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Master of Law (LLM) in Public International Law

IMMUNITY OF HEADS OF STATE AND GOVERNMENT: IMPLICATIONS AND CHALLENGES FOR THE PROPOSED HYBRID COURT FOR SOUTH SUDAN

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By

Behtelhem Alemtsehay Aberra

ID GSR/3649/08

Advisor

Getahun Kassa

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Declaration

I, Bethelhem Alemtsehay, do hereby declare that this thesis is my original work and it has not been submitted nor presented for degree or presentation in any university. All source of material used for this thesis has been duly acknowledged.

Signature: _____

Bethelhem Alemtsehay Aberra

Date: _____

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Examiner	Signature	Date
1) _____ Advisor	_____	_____
2) _____ Internal	_____	_____
3) _____ External	_____	_____

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ACRONYMS

ACHPR	African Court on Human and Peoples' Rights
ARCSS	Agreement on Resolution of the Conflict in the Republic of South Sudan
AU	African Union
AUC	African Union Commission
AUCISS	African Union Commission of Inquiry on South Sudan
CIL	Customary International Law
DRC	Democratic Republic of Congo
EU	European Union
GRSS	Government of Republic of South Sudan
ICC	International Criminal Court
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the Former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
IGAD	Inter-Governmental Authority on Development
IGO	Inter-governmental Organization
ILC	International Law Commission
IHRL	International Human Right Law
IHL	International Humanitarian Law
NGO	Non-governmental Organization
PHCSS	Proposed Hybrid Court for South Sudan
SPLM/A-IO	South Sudan People's Liberation Movement/ Army- in Opposition
SCSL	Special Court for Sierra Leone
TGoNU	Transitional Government of National Unity of the Republic of South Sudan
UNGA	United Nation General Assembly
UK	United Kingdom
UNMIK	United Nations Interim Administration Mission in Kosovo
UNMISS	United Nation Mission for South Sudan
UN	United Nations

UNOSAP	United Nations Operational Satellite Applications Program
US	United States
UNSC	United Nations Security Council
UNTAET	United Nations Temporary Authority in East Timor
WWI	World WarFirst
WWII	World War Second

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ABSTRACT

The paper discusses immunity of Head of States and Governments both under international law and in Africa particularly in the AU system. The aim of the paper is to demonstrate whether immunity of Head of States and Government, who violate International Human Rights and Humanitarian laws, are immune from criminal prosecution. Furthermore, the aim of this study is to show the legal framework of AU and the stands of African states mainly South Sudan on Immunity of Head of States and Governments and how it will pose a challenge to the proposed Hybrid Court for South Sudan. The paper illustrates how the proposed Hybrid Court for South Sudan will enforce its mandate on Heads of States and Governments and address accountability. The paper will unveil how individual criminal responsibility could be addressed if the proposed Hybrid Court remains in a paper. The research questions have been answered by using interviews, literature, conventions, cases, and various articles reviews and triangulations of those data collected. The result shows that the issue of immunity of Head of States and Governments under international law does not hold a settled ground, and a major debate subsists one which contends that there is sufficient state practice that removes immunity of Head of States and Governments under international law and one that contends otherwise. The paper recommends the establishment of an institution that conducts thorough study and analysis of the state practice and opinio juris to come up with a hard law which is codified that weighs all the evidence to settle the debate. The paper also addressed the question of accountability in South Sudan and whether the Hybrid Court for South Sudan enforces its mandate on Head of States and Governments who are allegedly responsible for International Human Right violations given the principle of immunity of Head of States and Governments from criminal jurisdiction. Agreement on the Resolution of the Conflict in South Sudan has been analyzed to assess the mandate of the Hybrid Court on addressing accountability which outlaw's immunity as a defense, however, the existence of immunity in South Sudan and the normative framework of AU will pose possible challenge on the functionality of the Hybrid Court. Finally, the paper also unveils there is no contingency plan to entertain transitional justice if the Hybrid Court remains on paper. Hence, the paper recommends the UNSC to enact the text of the peace agreement by way of Chapter VII resolution to enforce the provisions of the agreement as an alternative plan if the Hybrid Court remains in vain.

Key words: Immunity, Hybrid Court, Customary International Law

CHAPTER ONE

INTRODUCTION

1.1. Background of the Study

In the year 2013, violations of International Human Rights and Humanitarian Laws such as the killing of civilians often along ethnic lines, sexual violence, rape, use of children in hostilities and destruction of property were evident in South Sudan at the breakout of the civil war for which perpetrators bear individual criminal responsibility.¹ International criminal law prescribes a list of international crimes such as War Crimes, Genocide, Torture, Crimes against Humanity, and make the authors of such crimes bear individual criminal responsibility.² The principle of individual criminal responsibility entails holding individuals, be a state official notably in armed conflict or a private individual, accountable for his/her involvement in a culpable act that resulted in a breach of International Human Rights and Humanitarian Laws.³

International criminal justice aims to bring perpetrators accountable for their actions and carry justice for the victims.⁴ The phases of international criminal justice modalities can be traced back at the first attempt of signing the Treaty of Versailles which aimed at bringing accountability against individuals who are responsible for criminal acts against the nationals of one of the Allied and Associated Powers before military tribunals.⁵ Following the WWII, the Nuremberg and Tokyo Trials emerged to punish war criminals responsible for War Crimes, Crimes against Peace and Humanity before International Military Tribunal and International Military Tribunal for the Far East respectively.⁶ Ad-hoc tribunals then emerged namely ICTY and ICTR to prosecute most responsible individuals for violations of International Humanitarian Laws

¹ United Nations Mission in the Republic of South Sudan (UNMISS), "Conflict in South Sudan," Human Rights Report, (2014), p.51

² A. Cassese, International Criminal Law (2nd ed. 2007), p.4

³ *Id.*, pp.33-53

⁴ J. Galbraith, "The Pace of International Criminal Justice," Michigan Journal of International Law, Vol. 31(2009), p.85

⁵ Treaty of Versailles of June 1919, Art.229

⁶ Avalon Project, "Trial of the Major War Criminals Before the International Military Tribunal," Lillian Goldman Law Library, (1945), para.2; Milestones, "The Nuremberg Trial and the Tokyo War Crimes Tribunal," Office of the Historian, (1952), pp.2-4

in former Yugoslavia and Rwanda respectively.⁷In the early year of 2000,two unique courts emerged: a permanent international court called International Criminal Courtwith a power to exercise jurisdiction over individuals for most serious crimes of international concern⁸and a special court called Hybrid Courtwith a jurisdiction usually over individuals responsible for serious violation of International Human Right and Humanitarian Laws.⁹The paper mainly focuses onthe Hybrid Court model.HybridCourtis special because of its composition of both international and domestic legal professionals as well as the application of both domestic and international laws.¹⁰ The reason for the establishment of Hybrid Courtsdepends upon many factors such as the non-existence or the incapacity of domestic or international courts to entertain violations of International Human Right and Humanitarian Laws or to avoid the drawbacks of purely domestic and purely international justice mechanism.¹¹ This fused court is now proposed to be established in South Sudan according to ARCSS.¹²

The act of establishing Hybrid Court is not unprecedented- Hybrid model has been developed in a range of settings such as in post-conflict situations where no international tribunal exists in the case of East Timor; the inability of the domestic judicial system to prosecute international crime as in the case of Sierra Leonethat opposes purely international tribunals or where an international tribunal exists but cannot cope up with more cases as in the case of Kosovo.¹³

⁷ United Nations Security Council, 25 May 1993, 3217th meeting., U.N. Doc. S/RES/827, para.3-6; United Nations Security Council, 8 November 1994, 3453th meeting., U.N. Doc. S/RES/955, para.2-9

⁸ Rome Statute of the International Criminal Court of July 2002, Art.1

⁹H. Koh, "International Criminal Justice 5.0," Yale Law School Legal Scholarship Repository., Vol. 38 (2013), pp. 525-533

¹⁰ L. Dickinson, "The Promise of Hybrid Courts," The American Journal of International Law., Vol. 97, No. 2 (2003), p.295

¹¹Id., p.300

¹² Agreement on the Resolution of the Conflict in the Republic of South Sudan of August 2015, Chapter V, Art.3.1.1

¹³ L. Dickinson, cited above at note 10, Vol.97, p.295

In the case of South Sudan, the reason that necessitated to set up the Hybrid Court is due to many factors such as lack of strong domestic institutions capable of securing justice and managing conflict;¹⁴ weak rule of law in the judicial system and unsecured independence of the judiciary¹⁵ that can serve as a mechanism to bring accountability against individuals who bear responsibility for atrocities and violations of International Human Right and Humanitarian Laws.¹⁶ The civil war in South Sudan calls for the intervention of IGAD to mediate the conflict and to bring peace which resulted in the signing of the peace accord- an Agreement on the Resolution of the Conflict in the Republic of South Sudan (ARCSS) in August 2015, in Addis Ababa and later resulted in the formation of a TGoNU in April 2016.¹⁷ The peace accord intended to bring justice in South Sudan through the establishment of Commission for Truth; Reconciliation and Healing; Compensation and Reparation Authority and a Hybrid Court.¹⁸

UNMISS has often raised that Head of States, the highest level of governments, state officials and leaders of the opposition in South Sudan are alleged violators of international crimes namely War Crimes and Crimes against Humanity.¹⁹ The Hybrid Court for South Sudan is proposed to combat impunity and address gross human right violations by bringing cases against individuals including Head of States, Government, and elected officials who bear responsibility for violating international law and/or applicable South Sudanese law.²⁰

However, incumbent Head of States and Governments are immune from criminal and civil jurisdiction due to Customary International Law.²¹ There exist doctrinal debates whether or not there is an exception to immunity for incumbent Head of State or Governments who

¹⁴ AU Commission of Inquiry on South Sudan, Final Report of the African Union Commission of Inquiry on South Sudan (2014), p.39

¹⁵ Id., p.86

¹⁶ D. Deng, "Special Court for Serious Crimes (SCSC): A Proposal for Justice and Accountability in South Sudan," South Sudan Law Society., (2014), pp.4-5

¹⁷ C. Vhumunu, "Conflict Resurgence and the Agreement on the Resolution of the Conflict in the Republic of South Sudan," African Center for the Constructive Resolution of Dispute., (2016), p.5

¹⁸ Agreement on the Resolution of the Conflict in the Republic of South Sudan, 2015, cited above at note 12, Chapter V. Art.1

¹⁹ United Nations Mission in the Republic of South Sudan (UNMISS), cited above at note 1, pp.51-52

²⁰ Agreement on the Resolution of the Conflict in the Republic of South Sudan, 2015, cited above at note 12, Chapter V, Art. 3.1.1.

²¹ Advisory Committee on Issues of Public International Law, Advisory Report on the Immunity of Foreign State Officials (2011), No.20, p.8

violate International Human Right Laws and Humanitarian Laws.²² The paper will address whether immunity subsists for incumbent Head of States and Governments who violates International Human Right and Humanitarian Law.

The issue of immunity of incumbent Head of States and Government is not uniform within African states. On one hand, there are different normative and practical notions of immunity of incumbent Head of States and Governments of African countries. On the other hand, the African Union holds a consistent stand on immunity of incumbent Head of States and Governments through its various decisions and laws that objects indictment of incumbent Head of States and Governments in any foreign courts, the regional court (African Court of Justice and Human Rights) or before any international Court or tribunal.²³ This argument is similar with the AU Assembly decision, a decision swayed by the indictment of African state officials such as Rose Kabuye by European states primarily France and Germany, which advocates the abuse and misuse of indictments against African leaders that will hinder their ability to conduct their function and international relations.²⁴ Hence, this paper addresses the implication of immunity of incumbent Head of States and Government officials to the prospects of the proposed Hybrid Court for South Sudan, which aims to bring accountability in South Sudan.

1.2. Statement of the Problem

A number of instances show a positive move by some African states on the issue of accountability and accepting universal jurisdiction whether the perpetrator is incumbent/former Heads of State or Heads of Government. For instance, South Africa domesticated immunity clause of the Rome statute which out rules immunity of Head of States and Governments as a defense to a crime;²⁵ Senegal took the first step by ratifying the Rome Statute, an instrument that doesn't

²² P. d'Argent, "Immunity of State Officials and Obligation to Prosecute," *CeDIE Working Papers*, (2013), pp.9-10

²³ African Union Model National Law on Universal Jurisdiction over International Crimes of July 2012, Art.16; Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights of June 2014, Art.46A bis; Decision on Africa's Relationship with the International Criminal Court (ICC), 13 October 2013, AU Assembly, Extra Ord. Sess., Doc. Assembly/AU/1, Para.10(i)

²⁴ Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, 1 July 2008, A.U. Assembly, 11th Ord. Sess., Doc. Assembly/AU/14(XI), para.5(iii)

²⁵ Implementation of the Rome Statute of the International Criminal Court Act, No.27 of August 2002, Chapter.2, Sec. 4(2)

tolerate immunity of government officials from criminal responsibility;²⁶ and the indictment of former Head of State Hissène Habré through the establishment of Extraordinary Chambers (AU-mandated court)²⁷ and the Special Court in Sierra Leone indicted incumbent Head of State of Liberia, Charles Taylor.²⁸ This act by African countries to hold any individual, whether state official or not, responsible for acts of Genocide, Crimes against Humanity and War Crimes is crucial to maintaining individual criminal responsibility. However, a major change of track in accountability was envisaged when African state officials and leaders were subject to indictment and an arrest warrant by non-African states in foreign domestic courts and in international tribunals, for instance, AU shows its concern on the indictment against African leaders, particularly Rwandan highest officials by judges from German and France.²⁹ The issue has escalated when ICC issued arrest warrant and summon against Sudan President Omar Al-Bashir and Kenya President Uhuru Kenyatta respectively.³⁰ Despite the obligation to arrest those African leaders, some African states, for instance, South Africa, Djibouti and Uganda hosted indicted Head of States and Governments and took no measures against those individuals claiming incumbent Head of States and Governments have immunity in foreign countries.³¹

The indictments lead to hostilities towards foreign and international judiciary with a concern that overlooking the indictment of incumbent Head of State will further pave away for other Head of States to be exposed to foreign criminal prosecutions.³² As a result, in 2013, AU objected the indictment of any incumbent AU Head of State or Government in any international court or tribunal.³³ Furthermore the Malabo protocol “grants immunity from criminal

²⁶ Rome Statute of the International Criminal Court, 2002, cited above at note 8, Art.27

²⁷ Prosecutor v. Hissène Habré, (Extraordinary African Chambers., 2015), para.1

²⁸ Prosecutor v. Charles Ghankay Taylor (SCSL., 2003), para.12

²⁹ Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, 2008, cited above at note 24, Para.5(ii)

³⁰ Prosecutor v. Omar Hassan Ahmad Al Bashir, (ICC., 2009), Para.1; Prosecutor v. Uhuru Muigai Kenyatta, (ICC., 2011), Para.1

³¹ P. Apiko & F. Aggad, “The International Criminal Court, Africa and the African Union: What Way forward?” European Centre for Development Policy Management., (2016), p.10

³² K. Mills, ““Bashir is Dividing Us”: Africa and the International Criminal Court,” Human Rights Quarterly., Vol.34(2) (2012), P.4

³³ Decision on Africa’s Relationship with the International Criminal Court, 2013, cited above at note 23, Para. 10(i)

prosecution for incumbent AU Heads of State and Government, as well as other senior officials of unspecified rank.”³⁴

Then the problem remains on the AU’s normative structure that grants immunity for incumbent African Head of States and Governments from criminal prosecution even if they are responsible for breaches of International Human Right and Humanitarian laws. Furthermore, under international law, the uncertainty whether immunity also subsists to incumbent Head of States and governments who violates International Human Rights and Humanitarian laws is a problem for properly addressing accountability. There is also an issue of immunity in South Sudan which is a major problem to address the issue of accountability in South Sudan. Hence, it has become important to undertake this research to show the possible challenges the proposed Hybrid Court for South Sudan will face on its mandate to prosecute individuals bearing the responsibility for violations of International Human Right and Humanitarian Law in the presence of normative and practical notion of immunity of incumbent Head of State and Governments, and to a propose possible recommendation to address the issue.

1.3. Objective of the Study

1.3.1. General Objective

The general objective of this study is to examine implications and challenges on the implementation of the role of the proposed Hybrid Court for South Sudan and its intended purpose on bearing individual criminal responsibility of Head of States and Governments.

1.3.2. Specific Objectives

- ✓ To demonstrate the notion and scope of immunity of Head of States and Governments under international law and within Africa particularly in the AU;
- ✓ To discuss the recent development of international criminal justice mechanism- Hybrid Courts and mainly the advent and purpose of the proposed Hybrid Court for South Sudan;
- ✓ To assess the functionality of the proposed Hybrid Court for South Sudan on trying Heads of States and Governments of South Sudan;

³⁴Protocol on Amendments to the Protocol on the Statute of the African court of Justice and Human Right, 2014, cited above at note 23, Article 46A bis

- ✓ To assess the implication and effects of immunity of Head of States and Governments on the proposed Hybrid Court for South Sudan.

1.4. Research Questions

This study addresses the following questions:

- i. Does immunity of incumbent Head of States and Governments also subsist to violation of IHRL and IHL?
- ii. How will the question of accountability for human rights violations be addressed through Hybrid Court for South Sudan?
- iii. Will the proposed Hybrid Court for South Sudan be able to enforce its mandate on Heads of States and Governments and meet its intended purpose given the principle of immunity in South Sudan and in the AU system?
- iv. How will individual criminal responsibility in South Sudan be addressed if the proposed Hybrid Court remains in paper?

1.5. Significance of the Study

This research will contribute to the debate on the applicability of immunity of Heads of State and Government in the operation and practice of international criminal tribunals in general and in Hybrid Courts in particular. The research will also contribute to the discourse on legal matters in Africa with regard to immunity of incumbent Head of States and Governments and the competing good of international criminal justice on holding accountable those most responsible for violation of International Human Right and Humanitarian Laws in South Sudan. Finally, this paper will enable to show how accountability is addressed in South Sudan and to demonstrate how immunity is becoming a challenge for holding those responsible accountable and for the success of the proposed Hybrid Court for South Sudan.

1.6. Scope of the Study

This paper only discusses the Hybrid Court of South Sudan and it does not cover other transitional justice mechanisms such as truth and reconciliation. In doing so, to make a functional comparative analysis the researcher will delve into two special courts in the Africa continent- Special Court for Sierra Leone and the Extraordinary African chamber.

1.7. Research Methodology

The research will integrate qualitative legal research. The techniques that will be applied are interviews, informants are identified and selected purposively because they are professionals with adequate experience and special knowledge to the subject matter which would contribute relevant information to enrich the quality of the research output, literature reviews and examination of legal documents such as Geneva Conventions, Additional Protocols, Agreement on the Resolution of the Conflict in the Republic of South Sudan, various AU decisions on the issues of immunity of incumbent Head of States and Governments and a detailed description of journals and articles that focus on immunity. The information collected from the desk reviews, legal instruments, journals and key informants will be analyzed through data triangulation to come up with uncontested result.

1.8. Limitation of the study

The primary limitation of the study was getting access and information from the AU. Secondly, the time allotted for the research is so limited which hinders to cover in-depth analysis. Finally, interrupted and weak internet access limits this research to review as many literatures on a timely fashion. The effects of the limitations were minimized by extending the submission date of the paper and by using the internet in midnight where there is an uninterrupted connection.

1.9. Ethical Consideration

For the purpose of this research, key informants have been informed that their contribution was sought for exclusive academic purpose and the consent of key informants has been first obtained. For some key informants due to their request, the names are undisclosed as a result, they are referred by their professions throughout the paper.

1.10. Structure of the Study

The study is divided into five chapters. The first chapter is designed to draw a general framework of the study by highlighting the background of the study; the principal problem; the objective sought to be achieved; the significance of the study; limitation, scope, and methodologies used for conducting the research. Chapter two addresses the legal connotation of immunity and its

paramount importance. It also discusses various treaties that confer immunity; immunity of Head of States and Governments; ICJ jurisprudence on immunity and the legal context of immunity under the AU legal framework.

Chapter three discusses the origin of Hybrid Courts from the previous to the present experience and unfolds the peculiar natures of Hybrid Courts. It also addresses the rationale behind for the existence of Hybrid Courts. Furthermore, the chapter deals with the special court of Sierra Leone and discusses how and why the Hybrid Court for South Sudan was proposed to be established. Chapter four specifically unfolds responsibility bearers for atrocities and violations of IHRL and IHL in South Sudan. It also discusses on the mandate and role of the proposed Hybrid court for South Sudan on holding individuals responsible for atrocities, and the possible challenges the court will face as a result of immunity of Head of States and Governments enriched in the AU system in general and in South Sudan in particular. Chapter four will finally shade light on the impact of immunity of Head of States and Governments in the general criminal justice system; on the Hybrid Court for South Sudan; on the right of victims and on the future security and stability of the general public. Prospects and the current status of the proposed Hybrid court is also discussed in chapter four.

Finally, chapter five concludes the research by summarizing the main findings of the study and by recommending suggestions for future consideration.

CHAPTER TWO

THEORETICAL AND LEGAL NOTION OF IMMUNITY

2.1. Introduction

The legal notion of immunity entails two different connotations: to the immune whether an entity, individuals or a property it is a protection and a defense from the jurisdiction of court of a state whereas, to the judiciary/ an authority it is a limitation to exercise jurisdiction over the immune.³⁵ As per the definition given by the Special Rapporteur Roman Kolodkin of International Law Commission, immunity is both a right not to be subject under civil, criminal or administrative jurisdiction as well as an obstacle to the jurisdiction of local or international authorities.³⁶

The importance of immunity can be explained by referring to the ones who are subject to immunity for instance; diplomats are immune from the jurisdiction of a foreign state where they conduct diplomatic relations.³⁷ The reason for granting immunity for diplomats is so that they can perform their state functions effectively without being subject to law enforcement actions as well as to strengthen diplomatic relation between states.³⁸ Immunity is derived from sovereign equality of states, in which one state cannot interfere in the sovereignty of another state and exercise its jurisdiction.³⁹

Immunity is a legal impediment for a state or an authority to exercise civil, administrative and criminal jurisdiction.⁴⁰ Under international law, impediment to exercise jurisdiction against certain individuals may result from a treaty law⁴¹ or from CIL which gives immunity to Head of

³⁵R. Kolodkin, ILC Preliminary Report on Immunity of State Officials from Foreign Criminal Jurisdiction (2008), p.172

³⁶ Ibid

³⁷ Vienna Convention on Diplomatic Relations of April 1964, Art.31(1)

³⁸ United States Department of State Office of Foreign Missions, Diplomatic and Consular Immunity: Guidance for Law Enforcement and Judicial Authorities (2008), pp.4-8

³⁹ M.Shaw, International Law (5th ed. 2003), pp.697-701

⁴⁰ Immunity of State officials from Foreign Criminal Jurisdiction, 5 May-6 June and 7 July-8 August 2008, International Law Commission, Sixtieth sess. A/CN.4/596, para.15

⁴¹ Convention on Special Mission of June 1969, Art.31; Convention on the Privilege and Immunities of the United Nations of February 1946, section 11(a)

States and Governments.⁴²In a domestic level, immunities are granted through national legislations primarily to Head of States, Head of Governments, and members of the cabinet or legislative branch, mostly with respect to utterances made in the performance of their official functions.⁴³Such immunity is necessary for proper execution of state function without fear of prosecution.⁴⁴

A state may also diverge from the responsibility to investigate and prosecute individuals responsible for violations of International Human Rights and Humanitarian Laws and result to immunity due to unwillingness of a state to investigate and prosecute violations.⁴⁵ For instance, in Lomé Peace Agreement the government of Sierra Leone granted amnesties and pardon to individuals who ought to be subject to criminal jurisdiction.⁴⁶This act by Sierra Leone government resulted in rebel leader or member of rebels to be immune from criminal prosecution.⁴⁷According to UN Commission of Human Rights, immunity may arise from a failure by a state to investigate and prosecute violations of human rights and provide victims with effective remedies.⁴⁸Hence, such kind of immunity designed to benefit an individual and not his/her state function is different from the kind of immunity that serves as a necessary legal instrument that limits the jurisdiction of courts because the former will entail impunity while the latter might not so.

⁴²D. Akande and S. Shah, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts," The European Journal of International Law, Vol. 21 No.4 (2011), p.851

⁴³Immunity of State officials from Foreign Criminal Jurisdiction, 2008, cited above at note 40, para.24

⁴⁴ Ibid

⁴⁵N. Arriaza, "State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law" California Law Review, Vol.78 (1990), pp.453-458

⁴⁶Peace Agreement between the Government of Sierra Leone and Revolutionary United Front of Sierra Leone of May 1999, Art.IX(1)

⁴⁷ Ibid

⁴⁸Promotion and Protection of Human Rights: Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, 8 February 2005, UN Commission on Human Rights, 61st Session., E/CN.4/2005/102/Add.1, Principle.1, p.6

2.2. Notion and Scope of Immunity under International Law

International crimes, crimes that are defined in a range of international conventions and CIL constitute grave breaches of International Human Rights and Humanitarian laws.⁴⁹ Domestic courts of a state, where the violation occurred, have a duty to exercise criminal jurisdiction over those responsible for violation of Human and Humanitarian Rights.⁵⁰ There are other courts/ tribunals (domestic and/or international) that entertain and adjudicate violations of international crimes either to complement or supplement existing domestic courts.⁵¹ In order for such courts to prosecute state officials such as Head of states and Governments who are responsible for violations of IHRL and IHL, the courts should first establish jurisdiction and ensure the non-existence of immunity since state officials are immune from criminal jurisdiction.⁵² There are two circumstances where state officials are accorded immunity under international law that is *Ratione Personae*, personal immunities that are conferred on status of the official, be it for acts performed privately or officially, as long as the official remains in office, and *Ratione Materiae*, functional immunity which are conferred upon not on status of an official rather accorded to acts performed in official capacity.⁵³

Ratione Materiae encompasses the conduct of any state organ exercising legislative, executive, and judicial functions in accordance with the internal law of the state, within the meaning ILC on state responsibility, unlike the personal immunity which attach to certain high ranking officials because of their positions.⁵⁴ Functional immunity attributes responsibility, for acts of individuals who acted on behalf of a state, to the state since acts of state officials are done in the name of a

⁴⁹T. Einarsen, *The Concept of Universal Crimes in International Law* (2012), p.13

⁵⁰ International Covenant on Civil and Political Rights of March 1976, Art.2(3)(a) -(c); Universal Declaration of Human Rights of December 1948, Art.3 and 5; Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of June 1987, Art.5; Rome Statute of the International Criminal Court, 2002, cited above at note 8, para.5 and 7

⁵¹ D. Akande and S. Shah, cited above at note 42, Vol. 21, p.816

⁵² Ibid.

⁵³ Id., pp.818- 825

⁵⁴ Responsibility of States for Internationally Wrongful Acts, 12 December 2001, General Assembly Resolution 56/83, Chapter II. Art.4(1) and (2)

state.⁵⁵ Functional immunity is limited, in a sense that officials may still be the subject of legal proceedings in respect of acts committed in a personal capacity.⁵⁶

Various treaties confer personal and functional immunities for instance, Vienna Convention on Diplomatic Relations confer personal immunity to diplomatic agents from criminal jurisdiction in receiving state⁵⁷ and gives personal immunity to representatives of the sending state in the special mission and to the members of its diplomatic staffs.⁵⁸ As to functional immunity, representatives of members to the principal and subsidiary organs of the UN⁵⁹ and consular officers and consular employees in respect of acts performed in the exercise of consular functions⁶⁰ have immunity as per international conventions. However, immunity is not absolute for instance, immunity does not apply in home state of a diplomat who is responsible for a criminal act which makes him/her subject to the jurisdiction of sending state⁶¹ and “immunities accorded to representatives of member of UN organ can be waived in any case if the immunity would impede the course of justice.”⁶² The reason and the purpose of immunities from the jurisdiction of foreign states is not to benefit individuals rather to “ensure proper state function; to avoid any hindrance of smooth conduct of international relations; to maintain peaceful cooperation and friendly coexistence among nations and to safeguard independent exercise of diplomatic function.”⁶³

Customary International Law established by state practice and *opinio juris* confers personal immunity to Head of States and Governments from civil, criminal and administrative jurisdiction.⁶⁴ Heads of States and Governments enjoy immunity because they are deemed to be an exemplification of state sovereignty in which they have the same immunity as the state, and the

⁵⁵ Advisory Committee on Issues of Public International Law, cited above at note 21, p.11

⁵⁶ S. Williams and L. Sherif, “The Arrest Warrant for President al-Bashir: Immunities of Incumbent Heads of State and the International Criminal Court,” *Journal of Conflict & Security Law*, (2009), p.74

⁵⁷ Vienna Convention on Diplomatic Relations, 1964, cited above at note 37, Art.31(1)

⁵⁸ Convention on Special Mission, 1969, cited above at note 41, Art.31

⁵⁹ Convention on the Privilege and Immunities of the United Nations, 1946 cited above at note 41, Section 11(a)

⁶⁰ Vienna Convention on Consular Relations of April 1963, Art.43(1)

⁶¹ Vienna Convention on Diplomatic Relations, 1964, cited above at note 37, Art.31(4)

⁶² Convention on the Privilege and Immunities, 1946, cited above at note 41, Section 14, Art.IV

⁶³ Vienna Convention on Diplomatic Relations, 1964, cited above at note 37, preamble, para.3 and 4

⁶⁴ Advisory Committee on Issues of Public International Law, cited above at note 21, p.8

immunity accorded is to respect the dignity of the office and of the state function.⁶⁵ Cases have also illustrated Head of States and Governments enjoy immunity from criminal prosecution (and from civil liability) in foreign state.⁶⁶

The pertinent question regarding both types of immunities is that, does immunity also subsist to incumbent Head of States and Governments who is responsible for violation of IHRL and IHL? There exists a debate regarding whether immunity of Head of States and Government is still the rule under CIL for example, Terzian argues that, there is no sufficient state practice that removes existing personal immunity for incumbent Head of States, and international tribunals such as ICTY and ICTR that removes immunity of state officials as a defense from criminal jurisdiction does not reflect a practice of states because they are not states rather a formation of temporary tribunals by the UNSC.⁶⁷ On the other hand, other scholars such as Mohanty and Tunks argues that the statutes and the cases deliberated in the ICTY, ICTR and ICC are sufficient evidence of state practice that immunity for incumbent state officials, Head of States and Governments is no longer a Customary International Law.⁶⁸

The essence of custom is an evidence of general practice accepted as law and the general practice by states is undertaken because of the belief that it is a legal obligation to act that way.⁶⁹ A state is not a living entity, rather a constitute of governmental departments, institutions, courts, diplomatic agents with officials who act on behalf of a state, and for an act to be a state practice/activity it has to be performed by those state officials and not by a state itself.⁷⁰ Accordingly, the overt act of Allied powers creating the Nuremberg Trial to address accountability regardless of official status can be considered as a state practice.⁷¹ In addition, the creation of ICC through states ratifying and accepting the jurisdiction of the court to hold

⁶⁵ E. Benneh, "Sovereign Immunity and International Crimes," 22 U. GHANA Law Journal., (2004), pp.112-115

⁶⁶ Djibouti v. France (ICJ., 2008), para.170; Democratic Republic of Congo v. Belgium (ICJ., 2002), para.51

⁶⁷ D. Terzian, "Personal Immunity and President Omar Al Bashir: An Analysis under Customary International Law and Security Council Resolution 1593," 16 UCLA Journal of International Law and Foreign Affairs., Vol. 279 (2011), p.10

⁶⁸ R. Mohanty, "Head of State Immunity in International Courts in Prosecution for International Crimes: Immunity or Impunity?" 38 Journal of International Law., Vol.3 (2015), p.4; M. Tunks, "Diplomats or Defendants? Defining the Future of Head-Of-State Immunity," Duke Law Journal., Vol.52 (2002), p.651-652

⁶⁹ M. Shaw, cited above at note 39, p.71

⁷⁰ Id., p.78

⁷¹ Charter of the International Military Tribunal of Nuremberg of August 1945, Art.7

individuals responsible whether government officials or not is also a state practice.⁷² The indictment of Slobodan Milosevic and Charles Taylor demonstrates that Heads of States who violate IHRL and IHL's are not immune from prosecution before an international criminal tribunal or Hybrid Courts.⁷³ Furthermore, states' response, UNGA expressing its support of the tribunals by passing resolutions to fund ICTY and ICTR,⁷⁴ also indicate their *opinio juris* to be bound by the law as well as by the courts that prosecute those responsible for violating IHRL and IHL's, regardless of official capacity as Head of States and Governments.⁷⁵

Instruments creating international criminal tribunals also expressly state that the official capacity of a person cannot be raised as a defense to bar the jurisdiction of such tribunals over international crimes.⁷⁶ Various decisions of international tribunals affirm that Heads of States, Governments or senior state officials who violate international crimes cannot bring their official status as a ground of exemption or mitigating circumstance from criminal responsibility before international court and tribunals.⁷⁷ Furthermore, the principle of criminal responsibility of Heads of States has been included in numerous treaties and other international instruments⁷⁸ and the principles of international law recognized by the Charter of the Nuremberg Tribunal which

⁷² Rome Statute of the International Criminal Court, 2002, cited above at note 8, Art.27

⁷³ Prosecutor v. Slobodan Milosevic (ICTY., 1999), Para. 90; Prosecutor v. Charles Ghankay Taylor, cited above at note 28, para.52

⁷⁴ Financing of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia since 1991, 14 September 1993, UNGA, 110th plenary meeting., A/RES/47/235, para.2-7; Financing of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States between 1 January and 31 December 1994, 20 July 1995, UNGA, 106th plenary meeting., A/RES/49/251, para.3-8

⁷⁵ M. Abaya, "No Place for Immunity: The Arguments Against the African Criminal Court's Article 46bis," Temple International and Comparative Law Journal., Vol. 30 (2016), p.207

⁷⁶ Charter of the International Military Tribunal of Nuremberg, 1945, cited above at note 71, Art.7; Charter of the International Military Tribunal for the Far East of January 1946, Art.6; Statute of the International Criminal Tribunal for the former Yugoslavia of May 1993, Art.7, para.2; Statute of the International Criminal Tribunal for Rwanda of Nov. 1994, Art.6, para.2; Rome Statute of the International Criminal Court, 2002, cited above at note 8, Art.27

⁷⁷ United States of America, The French Republic, The United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics v. Hermann Wilhelm Goring, (IMT., 1945), p.223; Prosecutor v. Araki, Sadao, Dohihara, Kenji, (IMTFE., 1948), pp.558-559

⁷⁸ Convention on the Prevention and Punishment of the Crime of Genocide of December 1948, Art.IV; Principles of Law Recognized in the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal of June 1950; Principle III; UN Draft Code of Offences against the Peace and Security of Mankind of July 1954, Article 3; Convention on the Suppression and Punishment of the Crime of Apartheid of November 1973, Article III

affirms a denial of immunity for individuals who acted “as Head of State or responsible Government official and the judgment of the Tribunal endorsed unanimously by the UNGA.”⁷⁹

It is an essential part of the international legal system that Heads of State, Governments and public officials should be held criminally responsible when they violate Humanitarian laws and large scale atrocities because such act often requires the involvement of governmental authorities either by formulating plans/policies; by instigating/authorizing use of means of destruction or by mobilizing the personnel required for carrying out these crimes.⁸⁰ Therefore, it is wrong to allow the masterminds that violate fundamental rules of international law to claim immunity but punish the subordinate who follows an order.⁸¹

Hence, the diverging arguments by the scholars whether immunity of incumbent Heads of States and Governments who violate International Human and Humanitarian Laws is still the rule under CIL should be settled for the necessity for maintaining individual criminal responsibility.

2.3. ICJ Jurisprudence on Immunity

There are two main cases ICJ deliberated on the issue of immunity of Head of States and Governments and senior official government upon its contentious jurisdiction. In the case between DRC and Belgium/Arrest Warrant case, when the court deliberated on the main issue that is whether Belgium violated diplomatic immunity by issuing international arrest warrant against Mr. Abdulaye Yerodia Ndombasi, incumbent Minister for Foreign Affairs of DRC who is alleged on breaching IHL and Crimes against Humanity, it also raised certain exceptions that

⁷⁹Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal, 11 December 1946, General Resolution 95 (I), para.3(3)

⁸⁰Report of International Law Commission, 6 May-26 July 1996, International Law Commission 48th sess. A/51/10, para.39

⁸¹ Ibid

certain high-ranking officials such as Head of States and Governments will be subject to the jurisdiction of international tribunals.⁸²

The court first ruled against Belgium by stating that Belgium failed to respect immunity from criminal jurisdiction by issuing arrest warrant against incumbent Minister for Foreign Affairs who is entitled personal and functional immunity against any act of authority of foreign states which would hinder the performance of their duties whether they are suspected of having committed IHRL or IHL's.⁸³ The reason given by the court is that there is no CIL that excludes immunity because decisions and rules of the Nuremberg tribunal, Tokyo trial, or of the ICTY do not deal with the question of immunity of incumbent Ministers for Foreign Affairs before national courts rather they deal with international courts and the court in Belgium that issued the arrest warrant is a national court.⁸⁴

However, the Court emphasized that immunity from jurisdiction does not mean that they enjoy impunity in respect of crimes they might have committed.⁸⁵ Accordingly, the court sets out circumstances where immunity for incumbent Minister of Foreign affairs cannot be raised as a defense from criminal prosecution in sending state; immunity will be no longer subsist if it's waived by sending state and for acts committed after tenure of office and immunity is not a defense before certain international tribunals where they have jurisdiction such as the ICTY, ICTR or the ICC.⁸⁶ The phrase "certain international tribunals that have jurisdiction" indicates that it is not only limited to ICTY or ICC to indict high ranking officials so there could be other international tribunals with jurisdiction irrespective of immunity. Hence, immunity in foreign domestic court does not necessarily mean impunity or immunity in certain international tribunals as per the Arrest Warrant case.

In another ICJ decision, a case filed by Djibouti against France for alleged breach of rules of diplomatic immunities and CIL by issuing witness summon to Djiboutian Head of State who was

⁸² Democratic Republic of Congo v. Belgium, cited above at note 66, Para. 44-54

⁸³ Id., Para. 54-70

⁸⁴ Id., Para. 58

⁸⁵ Id., Para. 60

⁸⁶ Id., Para. 61

on an official visit at the time of summon and to two other senior Djiboutian officials.⁸⁷ France, for its part, contends that the witness summons to senior Djiboutian officials was just an ordinary witness which cannot constitute an infringement of the absolute nature of immunity from jurisdiction and the witness summons addressed to the Djiboutian Head of State was not an obligation to come and testify rather a pure invitation which he can choose to refuse.⁸⁸

The court acknowledged the argument of France and rejected Djibouti's claim by deciding that a mere invitation to testify by issuing witness summons does not amount to violation of immunity of Head of States from criminal jurisdiction unless otherwise it is mandatory summons and would hinder any performance of the Head of State.⁸⁹ Regarding summons for two Djiboutian officials, Djibouti argued the two senior officials cannot be held individually responsible for acts performed in an official capacity.⁹⁰ France on its part contends that the two senior officials have never availed immunity that Djibouti claims on their behalf before the French criminal courts.⁹¹

The Court again affirmed the argument of France and decided that it's the duty of a state that claims immunity for its state organs to notify foreign courts that the acts done are in an official capacity and its officials are protected under functional immunity so that it will respect any entitlement to immunity.⁹² Since France was not informed by the Government of Djibouti the acts of the two senior officials were acts of the State of Djibouti, the court dismissed the allegation that functional immunity is breached.⁹³

According to both decisions, ICJ decided that Head of States, Governments and senior state officials enjoy immunity in foreign domestic courts however; in the Arrest Warrant case those individuals who violate IHRL and IHL are not absolutely immune from the jurisdiction of international criminal tribunals, a decision which sustains the argument that Head of States and Governments who violate IHRL and IHL can't claim immunity as a defense.

⁸⁷ Djibouti v. France, cited above at note 68, Para 1

⁸⁸ Id., Para.168

⁸⁹ Id., Para.171

⁹⁰ Id., Para.181

⁹¹ Id., Para.189

⁹² Id., Para.196

⁹³ Id., Para.197

2.4. African States and AU Viewpoint on Immunity

A number of African states such as Uganda,⁹⁴ Mauritius,⁹⁵ Tunisia,⁹⁶ Zambia,⁹⁷ Malawi,⁹⁸ and Liberia⁹⁹ grant immunity from domestic courts to Head of States and Governments. Moreover, practice shows that some African countries uphold immunity of foreign Head of States for instance, Chad, Kenya, Uganda, South Africa, Djibouti and Nigeria hosted President Omar Al Bashir of Sudan despite his warrant for arrest issued by ICC.¹⁰⁰ Senegal granted asylum to Hissène Habré who was accused of Crimes against Humanity, War Crimes and Torture and recognized functional immunity of Head of States to say the least.¹⁰¹ International laws entitles states to claim universal jurisdiction over individuals responsible for international crimes and outlaws the defense of immunity of state officials.¹⁰²

However, not all African countries have the same perception towards immunity of Head of States and Governments alleged to have committed international crimes for instance, Nigeria surrendered Charles Taylor to the Special Court for Sierra Leone;¹⁰³ immunity of Heads of State and Governments are not embedded in the legal framework of some African countries for instance, Kenya constitution outlaws immunity of Head of States for international crimes¹⁰⁴ and Benin empowers the High Court of Justice to prosecute the President for any breaches committed in the exercise state function.¹⁰⁵ Moreover, South Africa, Kenya, Mauritius and Uganda

⁹⁴Constitution of Uganda of October 1995, Art.98(4)

⁹⁵Constitution of Mauritius of March 1968, Art.30(A)

⁹⁶Constitution of Tunisia of January 2014, Art.87

⁹⁷Amendment Constitution of Zambia of January 2016, Art.98(4)

⁹⁸Constitution of Malawi of May 1966, Art.91(1)

⁹⁹Constitution of Liberia of January 1986, Art.21(e)

¹⁰⁰Available at <www.coalitionfortheicc.org/cases/omar-albashir> last accessed on May 11, 2017

¹⁰¹Belgium v. Senegal (ICJ., 2012), Para.22

¹⁰²Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1987, cited above at note 50, Art. 5(2) and Art.7(1); Convention on the Prevention and Punishment of the Crime of Genocide, 1948, cited above at note 78, Art.IV; Geneva Convention I of August 1949, Art.49; Geneva Convention II of August 1949, Art.50; Geneva Convention III of August 1949, Art.129; Geneva Convention IV of August 1949, Art.146; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of December 1973, Art.7

¹⁰³International Federation for Human Rights, "The Decision to Transfer Former President Charles Taylor from the Premises of the Special Court for Sierra Leone to the Premises of the International Criminal Court in the Netherlands Should be as a Last Resort," *Worldwide Movement for Human Rights*, (2006), p.1

¹⁰⁴Constitution of Kenya of August 2010, Art 143(4)

¹⁰⁵Constitution of Benin of December 1990, Art.136

domesticated the obligation stipulated in Rome statute that ruled out the defense of state official capacity to bar criminal prosecution or to mitigate pronouncement of a sentence.¹⁰⁶

A prominent role of judiciary on ensuring state obligation is illustrated by the High Court of South Africa which denounced South Africa's failure, despite the obligation imposed by the Rome Statute and Implementation Act, to arrest President Al-Bashir who was accused of international crimes in ICC when he attended the AU summit in South Africa and subsequently gave judgment against the Government to arrest the President and to surrender him to ICC.¹⁰⁷ The Director General of Justice and Constitutional Development responded that South Africa agreed to host AU summit on the African Diaspora in Johannesburg and entered an agreement with the AUC, the Host Agreement, which provides inter alia; privileges and immunities to the delegates of member states¹⁰⁸ by which South Africa extended such immunity to its entire delegates including Al-Bashir resulting prevention of his arrest.¹⁰⁹ However, the High court contended that the Host Agreement did not confer immunity to member states of AU rather to member staff of the AUC itself and other IGO's which makes the President to only claim immunity based on CIL.¹¹⁰ Hence, the court dismissed the argument of the Director General by deciding immunity that might otherwise have attached to President Al-Bashir based on CIL is excluded by Implementation Act¹¹¹ which requires surrender of person to ICC without question of immunity.¹¹²

¹⁰⁶ Implementation of the Rome statute of the International Criminal Court Act, 2002, cited above at note 25, Ch.2, Sec. 4(2)(b)(i) and (ii); International Criminal Courts Act of July 2008, Art.27; International Criminal Court Act 27 of January 2011, Art.6; International Criminal Court Act 6 of May 2010, Art.25

¹⁰⁷ South African Litigation Center v. Ministry of Justice and Constitutional Development; Director-General of Justice and Constitutional Development; Minister of Police; Commissioner Of Police; Minister of International Relations and Cooperation; Director-General of International Relations and Cooperation; Minister of Home Affairs; Director-General Home Affairs; National Commissioner of the South African Police Service; National Director of Public Prosecutions; Head of the Directorate for Priority Crimes Investigation; Director of the Priority Crimes Litigation Unit (High Court of South Africa., 2015), para.1-3

¹⁰⁸ Host Agreement Between the Commission of the African Union (AUC) and the Government of the Republic of South Africa on the Material and Technical Organization of the Summit on the African Diaspora of May 2012, Art.13

¹⁰⁹ South African Litigation Center v. Ministry of Justice and Constitutional Development; Director-General of Justice and Constitutional Development; Minister of Police; Commissioner Of Police; Minister of International Relations and Cooperation; Director-General of International Relations and Cooperation; Minister of Home Affairs; Director-General Home Affairs; National Commissioner of the South African Police Service; National Director of Public Prosecutions; Head of the Directorate for Priority Crimes Investigation; Director of the Priority Crimes Litigation Unit, cited above at note 110, Para.13-20

¹¹⁰ Id., Para.28

¹¹¹ Ibid.

¹¹² Implementation of the Rome statute of the International Criminal Court Act, 2002, cited above at note 25, Ch.2, Sec. 4(2)(b)(i) -(ii) and Ch.4 Art, 8

The AU Assembly was also instrumental in commencing the trial of Hissène Habré, the former President of Chad, who was accused of Crimes against Humanity, War Crimes and Torture, through a decision mandating the Republic of Senegal to prosecute and ensure that Habré is tried, on behalf of Africa, by Extraordinary African Chambers.¹¹³ The indictment of the President shows AU's steps towards prosecuting Head of States. However, AU and Senegal took a measure against a former President who is no longer in power and who is deposed and lost political support from Chad—"Chad officially lifted all immunity from legal process from Mr. Hissène Habré."¹¹⁴ The indictment is as good as holding a civilian who is responsible for international crimes accountable because the personal immunity attached is stripped down once Hissène Habré is no longer Head of State.

The pressing issue is the issuance of arrest warrants and indictments against incumbent African leaders and senior officials in foreign domestic court or in international tribunals. The year 2008 was a stepping stone for the AU to raise its concern on indictments and arrests against African leaders by judges from some non-African States.¹¹⁵ For instance, a French judge indicted a number of Rwandan state and military officials for their alleged roles in the 1994 Genocide;¹¹⁶ Rose Kabuye, Kagame's Chief of protocol and a former officer in the Rwandan Patriotic Front (RPF), arrested in Germany;¹¹⁷ and Spanish judge issued international arrest warrants against 40 senior Rwandan state officials for their alleged involvement in the 1994 genocide.¹¹⁸ The problem was not on the principle of universal jurisdiction, a criminal jurisdiction exercised by any state regardless of place of the commission of the crime or nationality of the alleged violator of crimes that infringe universal value since such crimes harm the international community or international order itself,¹¹⁹ because AU recognized universal jurisdiction as a principle of international law that ensure individual criminal responsibility for violation of International Human and

¹¹³ Decision on the Hissène Habré Case and the African Union, 1-2 July 2006, AU Assembly, 6th ordinary sess., Doc Assembly/AU/127 (VII), para.5(2)

¹¹⁴ Letter from the Djimnain Koudj-Gaou to Belgian Judge, 5 October 2002, para.5

¹¹⁵ Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, 2008, cited above at note 24, para.5(ii)

¹¹⁶ The AU-EU Expert Report on the Principle of Universal Jurisdiction, Council of the European Union (2009), Para.26

¹¹⁷ C. McGreal, "Top Rwandan aide chooses French Terror Trial," The Guardian (U.S. ed.), Nov.10, 2008, p.1

¹¹⁸ J. Rever, "Kagame's Top General wanted by Spanish court reportedly in UK," Rising Continent, (2015), p.1

¹¹⁹ T. Einarsen, cited above at note 49, p.138

Humanitarian law since it is in line with the obligation of the AU to intervene when there is grave violation of Human Rights.¹²⁰

Africa Unions distress is on the misuse of universal jurisdiction against African leaders in which they believe it will lead to a state function hampered by foreign authority which will eventually affect international relations and disrupt overall state function.¹²¹ In the 10th and 11th meeting of the AU-EU Ministerial, AU addressed that “majority of people that are indicted by European states are sitting officials of African states which is contrary to sovereign equality and independence of states which evokes memories of colonialism.”¹²² However, of the twenty-eight cases pursued by EU states only ten was against Africans which makes it difficult to conclude EU is misusing universal jurisdiction by only targeting African countries.¹²³

Later in the year 2009 and 2010, the issue has been escalated at the indictment of incumbent Presidents-Omar Al-Bashir and Uhuru Kenyatta.¹²⁴ AU blamed ICC on the abuse of universal jurisdiction over Heads of State and senior officials claiming that such jurisdiction will negatively affect official functions of Head of States and foreign relations.¹²⁵ AU then decided that no international court or tribunal should indict or prosecute incumbent AU Head of States, Governments, or anyone entitled to act in such capacity during their term of office¹²⁶ because such officials and Head of States need to be protected from criminal proceedings so that sovereignty, stability, and peace in member state is safeguarded.¹²⁷ Furthermore, the Model National Law of AU, a non-binding legal document drafted with an intention that AU member states will strengthen their national legislations on the prosecution of individuals accused

¹²⁰ Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, 2008, cited above at note 24, Para.3

¹²¹ Id., para.5(iii)

¹²² The AU-EU Expert Report on the Principle of Universal Jurisdiction, cited above at note 116, para.34-37

¹²³ Id., para.40

¹²⁴ Prosecutor v. Omar Hassan Ahmad Al Bashir, cited above at note 30, Para.1; Prosecutor v. Uhuru Muigai Kenyatta, cited above at note 30, Para.1

¹²⁵ Decision on Africa’s Relationship with the International Criminal Court, 2013, cited above at note 23, para.5

¹²⁶ Id., Para.10(i)

¹²⁷ Id., Para.5

of international crimes based on such model law,¹²⁸ excludes criminal prosecution of incumbent Head of State and senior officials in foreign domestic court while they are in office.¹²⁹

The AU assembly decided to merge African Court of Justice and African Court on Human and Peoples' Rights, due to the realization that it would not have the required resources to operate two separate courts, which led to the adoption of Protocol on the Statute of the African Court of Justice and Human Rights.¹³⁰ The Protocol then was amended to extend the jurisdiction of ACJHR to crimes under international law and transnational crimes.¹³¹ The Amendment Protocol includes other international crimes such as piracy, terrorism, corruption, money laundering, trafficking in persons, trafficking in drugs¹³² but also grants functional immunity to Heads of State, Government and other senior state officials while they are in office.¹³³ The Amendment Protocol is not yet in force however; the fact that it is considered by AU's Legal Counsel and even drafted by the AU Assembly shows that a desire to grant immunity from criminal jurisdiction of not only for incumbent Head of States but also for senior state officials.¹³⁴

Ironically, AU constitutive act rejects impunity for serious crimes¹³⁵ and has the mandate to address justice and human rights by intervening in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely: War Crimes, Genocide and Crimes Against Humanity¹³⁶ which gives the AU its authority to engage in cases of accountability for international crimes.¹³⁷ However, granting immunity for Head of States and Governments is contrary to the objective of AU and creates two types of justice in which high ranking officials are

¹²⁸ Letter by African Union to Mr. Miguel de Serpa Soares, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, 10 February 2016

¹²⁹ African Union Model National Law on Universal Jurisdiction over International Crimes, 2012, cited above at note 23, Art.16

¹³⁰ Report on the Decision of the Assembly of the Union to Merge the African Court on Human and Peoples' Rights and the Court of Justice of the African Union, 24-28 January 2005, Executive Council, Sixth Ordinary Session, EX.CL/162, pp.1-2.

¹³¹ Decision on the Draft Legal Instruments, 15-16 May 2014, Specialized Technical Committee on Justice and Legal Affairs, 1st sessi., STC/Legal/Min/7(I) Rev. 1

¹³² Protocol on Amendment to the Protocol on the Statute of the African Court of Justice and Human Rights, 2014, cited above at note 24, Art.28A (1) (1-14)

¹³³ Id., 46A bis

¹³⁴ Amnesty International, Legal and Institutional Implications of the Merged and Expanded African Court (2016), pp.11-27

¹³⁵ Constitutive Act of the African Union of July 2000, Art.4(o)

¹³⁶ Id., Art.3(h) and 4(h)

¹³⁷ P. Apiko & F. Aggad, cited above at note 31, p.12

above the law.¹³⁸ Hence, ‘African solution to African problem’ seems to be a strategy in AU by supporting international justice in its own terms which excludes Head of States and Governments from criminal jurisdiction while they are in office.¹³⁹

¹³⁸ K. Mills, cited above at note 32, Vol.34(2), p.10

¹³⁹ Ibid.

CHAPTER THREE

HYBRID COURTS: MANDATE AND INSTITUTIONAL PRACTICE

3.1. Origin and Nature of Hybrid Courts

Hybrid Courts are the yields of the 20th century which followed the development of various international criminal justice mechanisms¹⁴⁰ starting from an attempt to establish military tribunal to hold individuals accountable for War Crimes as per the Treaty of Versailles¹⁴¹ and to the establishment of International Military Tribunals of the Nuremberg and Tokyo to punish war criminals;¹⁴² ICTY and ICTR for prosecution of persons responsible for violating IHL and Genocide;¹⁴³ and the ICC with jurisdiction to prosecute violation of most serious crimes.¹⁴⁴

Hybrid Courts are neither pure international nor domestic courts rather a blend of the two and a composition of both international and domestic apparatus and laws.¹⁴⁵ Hybrid Courts are proposed to be established for different reasons for instance, in Kosovo and East-Timor, the armed conflict which resulted in a breakdown of self-governing institutions necessitated United Nations administration both in Kosovo (UNMIK)¹⁴⁶ and in East Timor (UNTAET)¹⁴⁷ with a task of inter alia, promulgating regulations that enable composition of both foreign and domestic judges and lawyers to prosecute those suspected of violation of IHL and IHRL by applying both international and domestic law in force as in case of Kosovo.¹⁴⁸ Likewise, in East-Timor the UNTAET with a task of administration of justice established Special Panel for Serious Crimes in the District

¹⁴⁰ S. Gagno, "From the Versailles Treaty to the Hybrid Courts: The Development of International Criminal Responsibility," *Juridical Science Series*, Issue.4(2012), p.108

¹⁴¹ Treaty of Versailles, 1919, cited above at note 5, Art.229

¹⁴² Avalon Project, cited above at note 6, pp.2-4

¹⁴³ United Nations Security Council, 1993, cited above at note 7, para.6; United Nations Security Council, 1994, cited above at note 7, para.8

¹⁴⁴ Rome Statute of the International Criminal Court, 2002, cited above at note 8, Art.1

¹⁴⁵ L. Dickinson, cited above at note 10, Vol.97, p.295

¹⁴⁶ United Nations Security Council, 10 June 1999, 4011th meeting., U.N. Doc. S/RES/1244, para.10

¹⁴⁷ United Nations Security Council, 25 October 1999, 4057th meeting., U.N. Doc. S/RES/1272, para.6

¹⁴⁸ UNMIK Regulation on the Applicable Law in Kosovo of Dec. 1999, No. 1999/24, Sec.1, Art.1.1-1.3; UNMIK Regulation on Recommendations for the Structure and Administration of the Judiciary and Prosecution Service of Sep. 1999, No.1999/6, sec.2

Court of Dili that consist international judges applying both laws of East-Timor and international law.¹⁴⁹

Hybrid Courts were also established via bilateral agreements with international organizations such as the UN¹⁵⁰ as in the case of Sierra Leone where the government of Sierra Leone concluded an agreement with UN for the establishment of SCSL for reason of incapacity of domestic court and personnel to try violations of IHL and IHRL.¹⁵¹ Similarly, the Government of Cambodia and the United Nations entered an agreement to set up Extraordinary Chambers composed of international and domestic judges for reason of seeking international assistance to prosecute senior leaders of Kampuchea.¹⁵² Among the Hybrid Courts, Special Tribunal for Lebanon was created through a UNSC resolution with the aim of establishing international standard criminal justice to try persons alleged to have assassinated or attempted to assassinate the former Lebanon Prime Minister Hariri.¹⁵³

One of the most salient natures of Hybrid Courts is that they are mostly located in the country where the Human Right violation occurred¹⁵⁴ and they are funded on a cost-sharing basis.¹⁵⁵ Hybrid Courts operate by funds contributed both from the national government where the court is situated and the UN, unlike the ICTY and ICTR which are funded only by UN peacekeeping budget scale.¹⁵⁶ Another unique nature of Hybrid Courts is it composes a blend of local and international judges and prosecutors relying on both domestic and international laws.¹⁵⁷

¹⁴⁹ UNTAET Regulation on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences of June 2006, No.2000/15, sec.2-3; UNTAET Regulation on the Amendment of UNTAET Regulation No. 2000/11 on the Organization of the Courts in East Timor of July 200, No.2001/18, Sec.2A (1.4)

¹⁵⁰ Public International Law & Policy Group, Hybrid Tribunals: Core Elements (2013), p.9

¹⁵¹ Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone of January 2002, pp.15-29

¹⁵² Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea of May 2003, Art.2(2)

¹⁵³ United Nations Security Council, 30 May 2007, 5685th meeting., U.N. Doc. S/RES/1757, para.7; Statute of the Special Tribunal for Lebanon of Feb. 2007, Art.1

¹⁵⁴ P. Bennetch, M. Sellers, S. McGuire, Improving Hybrid Tribunal Design: Domestic Factors, International Support, and Court Characteristics (2015), p.4

¹⁵⁵ T. Ingadottir, "The Financing of Internationalized Courts and Tribunals," Internationalized Criminal Courts., (2004) pp. 271-273

¹⁵⁶ Ibid

¹⁵⁷ L. Dickinson, cited above at note 10, Vol.97, p.294

3.2. Purpose of Hybrid Courts

Countries that undergo large-scale conflict and atrocities will face a lot of challenges to deal with violations of IHRL and IHL in domestic courts because the judiciary or the law enforcement institutions will be physically damaged; the independence of the judiciary will be compromised and justice might be tainted.¹⁵⁸ For instance, in Sierra Leone, there was lack of resource and capacity to conduct trial;¹⁵⁹ in Kosovo the judiciary infrastructure was destroyed¹⁶⁰ and lack of experienced lawyers and judges in the Kosovo judiciary made some ruling by the Albanian judges against Serb defendants to be disregarded by mixed panels with international and local judges¹⁶¹ and in Kenya post-election violence, poor investigations, and indulgence let many perpetrators evade accountability.¹⁶² Therefore, for a state that lacks the capacity and neutrality to prosecute international crimes, Hybrid Courts fills an important gap by providing the necessary machinery; skilled personnel who are far detached from the conflict that depicts impartiality with a probability on building the capacity of domestic judiciary.¹⁶³

On the other hand, prosecutions in a pure international court is not without a drawback for instance, international courts/tribunals only entertain a small amount of cases when compared to the amount of atrocities occurred which will result in a failure to bring all perpetrators to justice.¹⁶⁴ For instance, ICC jurisdiction is limited to “most serious crimes and who bear the greatest criminal responsibility”¹⁶⁵ and the ICTR cannot cope up with large number of

¹⁵⁸ L. Dickinson, cited above at note 10, Vol. 97, p.301

¹⁵⁹ Letter from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council, 2000, cited above at note 155, para.7

¹⁶⁰ L. Dickinson, cited above at note 10, Vol. 97, p.301

¹⁶¹ E. Higonnet, “Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform,” Yale Law School Legal Scholarship Repository, Vol.3 (2006), p.29

¹⁶² Human Rights Watch, “Turning Pebbles: Evading Accountability for Post-Election Violence in Kenya,” Human Rights Watch Report, (2011), p.4

¹⁶³ D. Deng, cited above at note 16, p.4

¹⁶⁴ L. Dickinson, cited above at note 10, Vol. 97, p.302

¹⁶⁵ Rome Statute of the International Criminal Court, 2002, cited above at note 8, Art.5

cases because of large number of perpetrators.¹⁶⁶ Hence, Hybrid Courts will fill the loop-hole by entertaining cases that the international courts could not do so. Furthermore, international courts are located outside of the state where the atrocities took place which will avoid the chance of the local population to be part of a legal proceeding.¹⁶⁷ Hence, another reason for the establishment of Hybrid Court in a state where the atrocity took place is to grant local ownership and direct involvement to the victims, victim families and the populations in the justice system.¹⁶⁸ A participatory connection to trials will help promote reconciliation and ensure meaningful adjudication to the victims in a language they fully understand.¹⁶⁹ Moreover, it will be expensive to transfer witnesses and difficult to produce evidence if the trial is abroad.¹⁷⁰ Therefore, Hybrid Courts circumvent the cost of expensive trials and production of evidence.¹⁷¹

3.3. Hybrid Court for Sierra Leone

A letter from the government of Sierra Leone requested the UNSC President for an assistance to establish Special Court for Sierra Leone (SCSL), to bring individual accountability on leadership of Revolutionary United Front (RUF) who are responsible for atrocities against civilians, women and children, because the Sierra Leone criminal law does not encompass violation of IHRL and IHL's and the judiciary lacks the necessary resources and expertise to conduct trials of such crimes.¹⁷² The UNSC responded to the letter with a resolution requesting the Secretary-General to negotiate an agreement with the government of Sierra Leone to create a Special Court.¹⁷³ On the year 2000, the Sierra Leone government and the UN concluded an agreement on the establishment of the Special Court together with a Statute of the Special Court.¹⁷⁴

¹⁶⁶ L. Raub, "Positioning Hybrid Tribunals in International Criminal Justice," *International Law and Politics*, Vol. 41 (2009), p.1020

¹⁶⁷ Ibid

¹⁶⁸ R. Zacklin, "The Failings of Ad Hoc International Tribunals," *Journal of International Criminal Justice*, (2004), pp.541-544

¹⁶⁹ D. Cohen, "Hybrid" Justice in East Timor, Sierra Leone, and Cambodia: "Lessons Learned" and Prospects for the Future," *Stanford Journal of International Law*, Vol.43 (2007). p.5

¹⁷⁰ J. Alvarez, "Crimes of States/Crimes of Hate: Lessons from Rwanda," *Yale Journal of International Law*, Vol.24 (1999), p.403

¹⁷¹ T. Ingadottir, cited above at note 155, p.285

¹⁷² Letter from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council, 2000, Cited above at note 161, pp.2-4

¹⁷³ United Nations Security Council, 14 August 2000, 4186th meeting., U.N. Doc. S/RES/1315, para.14

¹⁷⁴ Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 2002, cited above at note 151, pp.15-29

The Special Court composed of international and domestic legal professionals¹⁷⁵ with the power to prosecute those individuals bearing the greatest responsibility for violation of IHL and Sierra Leone's law.¹⁷⁶ Among the individuals bearing the greatest responsibility, this paper discusses the indictment of Charles Taylor, the former President of Liberia. On March 2003, Charles Taylor was indicted by the SCSL and a warrant of arrest was issued while he was the sitting Head of State of Liberia on violations Crime against Humanity, Common Article 3 of the Geneva Convention and Additional Protocol II¹⁷⁷ for aiding and abetting the commission of crimes.¹⁷⁸ As a preliminary objection Charles Taylor applied to quash the indictment and to set aside the warrant of his arrest by stating Head of States enjoy absolute immunity from criminal jurisdiction from foreign state and since he was incumbent Head of States of Liberia at the time of the indictment he is immune from any exercise of the jurisdiction of the Special Court.¹⁷⁹

The prosecutor responded that CIL permits international criminal tribunals to indict incumbent Head of States and the Special Court is an international court established under international law.¹⁸⁰ The Amicus Curiae of the trial chamber affirmed the prosecutor stand by stating incumbent Head of State are subject to the jurisdiction of international courts in respect of violations of IHRL and IHL.¹⁸¹ Therefore, the "lawfulness of issuing an arrest warrant depends on the courts power and the legal basis upon which it is established"¹⁸² and since SCSL is established by an initiation of SC resolution through a treaty between UN and Sierra Leone government, unlike the ICTY and ICTR which were each established by resolution of UNSC in its exercise of power by virtue of Chapter VII of the UN charter,¹⁸³ which makes the Special

¹⁷⁵ Statute of the Special Court for Sierra Leone of October 2002, Art.12

¹⁷⁶ *Id.*, Art.1

¹⁷⁷ Prosecutor v. Charles Ghankay Taylor, cited above at note 28, pp.10-11

¹⁷⁸ *Id.*, pp.2-3

¹⁷⁹ *Id.*, pp.4-5

¹⁸⁰ *Id.*, p.6

¹⁸¹ *Id.*, p.8

¹⁸² *Id.*, p.11

¹⁸³ United Nations Security Council, 1993, cited above at note 7, para.12; United Nations Security Council, 1994, cited above at note 7, para.12

Court an expression of the will of the international community to establish an international court to fulfill an international mandate.¹⁸⁴

Hence, the trial chamber rejected the preliminary objection by stating the Special Court for Sierra Leone is a treaty-based international court with a jurisdiction to try Head of States since the Special Court is not part of Sierra Leone judiciary or a national court.¹⁸⁵ Charles Taylor appealed the decision of the trial chamber and the appeals chamber unanimously rejected Charles Taylor's preliminary motion that challenge the validity of his indictment on the ground that he was president of Liberia¹⁸⁶ by affirming the decision of trial chamber and by adding the statute of SCSL which dictates an exception to immunity in which the official position of the accused shall not release from criminal responsibility.¹⁸⁷

Hence, the SCSL held that, ICJ provides an exception with respect to international criminal courts such as ICTY, ICTR and ICC by stating that immunity of Head of States or Governments cannot bar criminal proceedings and since, SCSL is an international criminal court because of the role of UN and its composition of international components it can exercise jurisdiction over Head of States.¹⁸⁸

3.4. Advent of the Proposed Hybrid Court for South Sudan

On December 2013, the civil war that erupted in South Sudan mainly between soldiers loyal to President Salva Kiir and forces loyal to the former Vice-President Riek Machar, call for the attention of intervention to resolve the conflict and to come to cease fire agreements.¹⁸⁹ Weeks after the outbreak of the violence, the Government of Republic of South Sudan (GRSS) and the South Sudan People's Liberation Movement/ Army- in Opposition (SPLM/A-IO), under the auspices of IGAD mediated peace negotiations to end South Sudan's civil war and concluded

¹⁸⁴Prosecutor v. Charles Ghankay Taylor, cited above at note 28, pp.19-20

¹⁸⁵Id., p.20

¹⁸⁶ Prosecutor v. Charles Ghankay Taylor, cited above at note 28, affirmed, (Appel.chamb.,2004), p.52

¹⁸⁷ Statute of the Special Court for Sierra Leone, 2002, cited above at note 177, Art.6(2)

¹⁸⁸ Prosecutor v. Charles Ghankay Taylor, cited above at note 28, p.24

¹⁸⁹South Sudan Law Society, "Search for a New Beginning: Perceptions of Truth, Justice, Reconciliation, and Healing in South Sudan," UNDP South Sudan, (2015), p. 3

successive agreements.¹⁹⁰ However, both parties failed to implement the agreements due to different reasons such as both warring parties wanted an upper hand against the other despite the agreements hence, they both employed force as a political strategy to have security because of the mistrust among them.¹⁹¹ Moreover, the warring parties were not in full control of their troops and the command control was not strong which led to hysterical revenge killings and ambushes against another ethnic group.¹⁹² During IGAD's 28th Extraordinary Summit both sides failed to agree on the structure and composition of a transitional government with the SPLM/A-IO calling for the establishment of a Prime Minister and the establishment of a federal system of governance and the GRSS refusing such option to avoid the risks of the division of the society.¹⁹³

On October 2014, alongside IGAD mediation efforts, the Tanzanian Chama Cha Mapinduzi (CCM) party initiated a parallel intra-party dialogue in Arusha to resolve the conflict.¹⁹⁴ The intra-party dialogue was immediately followed by another agreement from the IGAD peace process that attempted to secure a peace agreement through an initiative called IGAD-plus, an expanded mediation with wider international engagement including the AU, UN, China, U.S., UK, EU, Norway and the IGAD Partners Forum (IPF).¹⁹⁵ The agreement was signed by opposition leader Rick Machar on 17 August 2015 in Addis Ababa, Ethiopia but refused by President Salva Kiir saying he needed more time to consult.¹⁹⁶ The UNSC enacted a resolution to impose sanctions, freezes assets and ban travels against any individual who acts or make policies to expand the conflict by violating IHRL and IHL or obstruct reconciliation, undermine

¹⁹⁰ Agreement on the Cessation of Hostilities Between the Government of the Republic of South Sudan (GRSS) and the Sudan People's Liberation Movement/Army (in Opposition) (SPLM/A in Opposition) on 23 January 2014; Recommitment on Humanitarian Matters in the Cessation of Hostilities Agreement Between the GRSS and the SPLM/A in Opposition on May 5 2014; Agreement to Resolve the Crisis in South Sudan on May 9 2014

¹⁹¹ Interview with Abebaw Bihonegn Belachew, Senior Political Advisor to Special Envoys in South Sudan, May. 2, 2017

¹⁹² Ibid.

¹⁹³ International Federation for Human Rights, "South Sudan: We fear the worst," International Federation for Human Rights Report, (2014), p.8

¹⁹⁴ South Sudan Law Society, cited above at 191, pp.6-7

¹⁹⁵ Interview with Abebaw Bihonegn Belachew, Senior Political Advisor to Special Envoys in South Sudan, May. 2, 2017

¹⁹⁶ Ibid.

peace processes and breach Hostilities Agreements.¹⁹⁷ As a result of the resolution and pressure from the international community on August 26, 2015 Salva Kiir signed the peace deal in Juba.¹⁹⁸

The idea of establishing Hybrid Court to adjudicate international crimes and address justice in South Sudan was also proposed by the members of the South Sudan Civil Society weeks after violence broke out.¹⁹⁹ The proposal was then taken up by NGO's in the US in their advocacy with the US government, more than 50 members of the US Congress including co-chairs of congressional caucus on Sudan and South Sudan, wrote a letter to the US Secretary of State John Kerry for the support of US government to establish the Hybrid Court for South Sudan.²⁰⁰ The trend shows that the need for the establishment of Hybrid Court for South Sudan is not a sudden move rather a carefully contemplated concept designed to prosecute individuals bearing the greatest responsibility. The question is why the court has to be hybrid? Why not a domestic court or international tribunal? The reason was because of the civil war, South Sudan judiciary system was undermined by various factors such as "weaknesses in the independence of the judiciary influenced and intimidated by militarized public life and the government; lack of human, financial and physical capacity (court buildings and research facilities) to deliver justice; decisions that does not always align with rule of law standards and human rights particularly in customary courts which discriminate women and the youth and a compensation decisions that require the offending party to give away a young woman to the successful litigant."²⁰¹

This finding by the AU commission of inquiry has been substantiated by the President of the State High Court and Legal Administrator of South Sudan highlighting lack of capacity both in terms of infrastructure and operation to prosecute violation of mass atrocities²⁰² Hence, where there is no independent judiciary and incapacity of domestic courts to try gross violation of

¹⁹⁷ United Nations Security Council, Resolution 2206, 3 Mar. 2015, 7396th meeting, U.N. Doc. S/RES/2206

¹⁹⁸ "South Sudan's Kiir Signs Final Peace Accords," Sudan Tribune: Plural News and Views on Sudan August 27, 2015, p.1

¹⁹⁹ South Sudan Law Society, "Special Court for Serious Crimes (SCSC): A Proposal for Justice and Accountability in South Sudan," Transitional Justice Working Group South Sudan, (2014), p.2

²⁰⁰ Letter from Co-Chairs of Congressional Caucus on Sudan and South Sudan to John Kerry, US Secretary of State 20 March 2014, para. 6

²⁰¹ AU Commission of Inquiry on South Sudan, cited above at note 14, pp. 289-291

²⁰² Id., p.207

IHRL and IHL, led for the need for establishment of Hybrid Court.²⁰³ To the question why not resort to international tribunals; since South Sudan is not a state party to the Rome Statute, ICC has no power to exercise jurisdiction.

The purpose of the Hybrid Court for South Sudan is intended to overcome capacity constraints of the justice and law enforcement system; to ensure trials are conducted in an impartial manner with the international support that meets international standard.²⁰⁴ There are various International standards that are set to ensure fair prosecutions, trials, and rights of the accused.²⁰⁵ For instance, United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems ensure the principle of presumption of innocence, the right to a fair and public hearing by an independent and impartial tribunal and the right to get legal aid.²⁰⁶ Furthermore, UN standard on Good governance, the Independence of the Judiciary and the Integrity of Criminal Justice Personnel safeguards impartiality of judiciary and state has a duty to ensure courts deliberate on cases without inducement or pressure.²⁰⁷ Hence, it is the purpose of Hybrid Courts particularly the Hybrid Court for South Sudan to ensure criminal justice system is in accordance with international standards by integrating international element in the system.

²⁰³ Interview with Abebaw Biohnegn Belachew, Senior Political Advisor to Special Envoys in South Sudan, 2017, cited above at note 191

²⁰⁴ D. Deng, cited above at note 16, p.5

²⁰⁵ The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies, 23 August 2004, Report of the Secretary General., UN. Doc. S/2004/616, para 7

²⁰⁶ United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems of December 2012, Principle B

²⁰⁷ Good governance, the independence of the judiciary and the integrity of criminal justice personnel of November 1985, principle 50

CHAPTER FOUR

4. ACCOUNTABILITY Vis-À-Vis IMMUNITY

4.1. Accountability Bearers in the South Sudan Conflict

Criminal accountability is a necessary condition to address violations of IHRL and IHL's²⁰⁸ and an instrument for victims to get remedy and justice.²⁰⁹ One instance where large-scale atrocities are committed is in the case of armed conflict and in such cases states have an obligation to provide effective accountability measures by investigating and prosecuting war crimes committed in their territory.²¹⁰ Thus, in order to attribute accountability and prosecute individuals responsible for violating IHL and IHRL the responsible party should be identified in the first place.

A number of reports pointed out that high government officials and country leaders of South Sudan bears the responsibility for atrocities and human right violations in South Sudan for instance, as per the report by the United Nations High Commissioner for Human Rights into allegations of abuses of Human Rights and violations of IHL in South Sudan since the outbreak of the violence, a team deployed to South Sudan mainly focusing on Unity and Upper Nile States because of severe access constraints and limited time, revealed that sexual and gender-based violence where committed by the Government forces and affiliated militia.²¹¹ The principal findings from the result of the evaluation by the assessment mission of the information it collected, including UNOSAP, satellite imagery which provides coordinated geo-spatial satellite imagery analysis, shows that the Government launched attacks deliberately targeting civilians and the SPLA, backed by armed militia and county commissioners, killed civilians and burnt civilian property.²¹²

²⁰⁸ United Nations Mission in the Republic of South Sudan (UNMISS), cited above at note 1, P.57

²⁰⁹ Universal Declaration of Human Right, 1948, cited above at note 50, Art. 8

²¹⁰ J. Marie Henckaerts and L.Doswald-Beck, "Customary International Humanitarian Law," International Committee of the Red Cross, Vol. I (2009), chap.44, Rule.158; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law of December 2005, Art.II

²¹¹ Report of the United Nations High Commissioner for Human Rights, Assessment Mission by the Office of the United Nations High Commissioner for Human Rights to Improve Human Rights, Accountability, Reconciliation and Capacity in South Sudan (2016), p.2

²¹² *Id.*, p.4

Furthermore, according to the Human Rights Watch Report, government forces, armed opposition forces, SPLA-IO and allied militia fighters killed hundreds of people; deliberate attacks on civilians and civilian property and both the government and opposition forces recruited and used child soldiers in the conflict.²¹³

The African Union Commission of Inquiry on South Sudan (AUCISS), mandated to investigate human rights violations and other abuses during the conflict, conducted field missions, interviewed witnesses and fact-finding inquiries on key areas for instance, Juba, Western Equatorial State, Bor and other places where violations could have occurred, in its final report stated that both the government and the opposition sides of the conflict had perpetrated human rights violations.²¹⁴ The same has been reiterated by UNMISS that there are reasonable grounds to believe that both parties to the conflict have perpetrated human right violations.²¹⁵

Acts perpetrated by both the government of South Sudan and the SPLA-IO violates IHRL and IHL such as the prohibition on the arbitrary deprivation of the right to life²¹⁶ and in case of an armed conflict not of an international character it violates the prohibition on the direct attack against civilians not directly participating in hostilities;²¹⁷ violates humane treatment of all persons who do not take direct part in the conflict or people who ceased to take part in hostilities;²¹⁸ and violates the prohibition of outrages upon personal dignity and rape²¹⁹ which amount to War Crimes and Crimes against Humanity.

There have been efforts from the government of South Sudan to bring accountability for instance; President Kiir established an investigation committee to investigate human right abuse since the outbreak of the civil war and to report to the UN²²⁰ but such report has not been released

²¹³ Human Rights Watch Report, "South Sudan: Events of 2015," *World Report 2016*, (2016), pp.520-524

²¹⁴ AU Commission of Inquiry on South Sudan, cited above at note 14, Pp. 111-215

²¹⁵ United Nations Mission in the Republic of South Sudan (UNMISS), cited above at note 1, p.51

²¹⁶ International Covenant on Civil and Political Rights, 1976, cited above at note 50, Art. 6

²¹⁷ Geneva Convention, 1949, cited above at note 102, Art.3; Protocol Additional to the Geneva Conventions of August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of June 1977, Art.13

²¹⁸ Protocol Additional to the Geneva Conventions of August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977, Art. 4

²¹⁹ *Id.*, Art. 4(2)(e)

²²⁰ Amnesty International, *The State of the World's Human Rights - South Sudan* (2014/15), p.3

and no investigation led to prosecution.²²¹With regard to the conflict in Juba in 2016,troops of SalvaKiirfaced charges in military court for looting property, raping and killing foreign aid workers²²²andtwo soldiers sentenced to 14 years, one soldier to death penalty and 77 others sentenced for various crimes.²²³However, one instance of accountability out of the overall atrocities does not qualify it to say human right violations are adequately addressed and fully implemented given the circumstance that prosecutions of crimes under international law in military courts is not generally considered as best mechanism to address gross violation of IHRL and IHL's.²²⁴

As a result, when there is no accountability and reconciliationfor past wrongdoings“it will exacerbate the pain of the current atrocities.”²²⁵ The proposed Hybrid Court for South Sudan as a viable choice to bring accountability over an individual who planned, instigated, ordered, conspired, committed, executed, aided or abetted²²⁶crimes of Genocide; Crimes against Humanity; War Crimes and other serious crimes under international law and relevant laws of the Republic of South Sudanis to be established by the African Union Commission²²⁷

²²¹ Report of the United Nations High Commissioner for Human Rights, 2016, cited above at note 211, p. 11

²²² “South Sudan Adjourns Trial of Soldiers Suspected of Committing Crimes,” Sudan Tribune; Plural News and Views on SudanMay 30, 2017, p.1

²²³ “Military Court Condemns Soldiers to Death,” Eye Radio September 23, 2016, p.1

²²⁴ Amnesty International and International Federation for Human Rights, Looking for Justice: Recommendations for the Establishment of the Hybrid Court for South Sudan (2016), p.8

²²⁵ AU Commission of Inquiry on South Sudan, cited above at note 14, pp.230-251

²²⁶ Agreement on the Resolution of the Conflict in the Republic of South Sudan, 2015, cited above at note 12, Art. 3.5.1

²²⁷ Id., Art.3.2.1 and Art.3.1.1

4.2. Accountability under the Hybrid Court for South Sudan

The proposed Hybrid Court for South Sudan is to be established by AUC authorized by Heads of State and Government of the AU Peace and Security Council (PSC).²²⁸ Former Hybrid Court experience namely the Extraordinary African Chambers and the SCSL set a precedent that Hybrid Courts can be formed by an agreement with international organizations. Likewise, the AUPSC meeting at the level of Head of States and Governments subsequently agreeing on the establishment of the Hybrid Court²²⁹ shows the expression of the will of the African community and the AU to establish an independent judiciary to try violations of international crimes. The application of international laws and personnel as well as the independent and distinct feature of the court from the national judiciary in its operations, and on its investigations²³⁰ further strengthen accountability and neutrality of the court.

According to the peace agreement, Head of States, Governments, or state official cannot escape criminal responsibility in the Hybrid Court;²³¹ the Hybrid Court while conducting investigation will use reports of AUCISS and other existing reports on South Sudan²³² which now and again pointed out that government leaders bear the responsibility for gross violation of IHRL and IHL.²³³ This implies that alleged accountability bearers mainly the government of South Sudan and SPLM/IO cannot be exempted from prosecution if found guilty. The peace agreement made explicit stipulation that a “person who planned, instigated, ordered, committed, aided and abetted, conspired or participated in a joint criminal enterprise in the planning, preparation or execution of a crime of Genocide; Crimes against Humanity; War Crimes and other serious crimes under international law and relevant laws of the Republic of South Sudan including gender based crimes and sexual violence shall be individually responsible for the crime.”²³⁴

²²⁸Peace and Security Council of the African Union, 26 September 2015, 547th meeting at the level of Head of States and Governments, para.22(ii)(A)

²²⁹Ibid.

²³⁰ Agreement on the Resolution of the Conflict in the Republic of South Sudan, 2015, cited above at note 12, Art.3.2.2

²³¹ Id., Art.3.5.5

²³² Id., 3.6.1

²³³ Report of the United Nations High Commissioner for Human Rights, cited above at note 211, p.2; Human Rights Watch Report, cited above at note 213, pp.520-524; AU Commission of Inquiry on South Sudan, cited above at note 14, Pp. 111-215

²³⁴ Agreement on the Resolution of the Conflict in the Republic of South Sudan, 2015, cited above at note 12, Art.3.5.1

The Hybrid Court is composed of personnel's: prosecutors and judges who are from African states other than South Sudan²³⁵ which is intended so that they will give impartial decisions since they are not directly affected by the atrocities and won't be swayed by the existing government. Accountability under the Hybrid Court is also designed as a way of reparation to the victims who have been deprived of their property and or any assets.²³⁶ It also provides remedies to victims through compensations.²³⁷ Hence, the court does not only bring punishment or sentence against perpetrators it also address the question of redress and restitution to the victims.

HCSS cannot by itself resolve conflict but it contributes on breaking the cycle of violence, immunity and revenge killings through a mechanism that deter more human rights violations and punish perpetrators that are responsible for past and current violations.²³⁸ Accountability is also a key for reconciliation; for strengthen rule of law and a platform for victims to raise their voice knowing that they will be heard and provided with an answer.²³⁹

4.3. Challenges for the Proposed Hybrid Court for South Sudan

A number of instances show that there is history of immunity in South Sudan which led to impunity of human right perpetrators for instance, past history shows that those responsible for the crimes perpetrated during the years of conflict between South and North Sudan have never faced prosecutions and peace agreements concluded between warring parties in particular the 2005 Comprehensive Peace Agreement, sealed under the auspices of IGAD – have remained silent on the need for justice for victims of serious crimes.²⁴⁰ Discard to accountability lead to revenge killings, retributions and people losing confidence on states ability to provide justice.²⁴¹ Human right activists raised that impunity for past crimes have fueled to the current civil war in South Sudan hence, accountability should be sought to tackle previous impunity,

²³⁵ Agreement on the Resolution of the Conflict in the Republic of South Sudan, 2015, cited above at note 12, Art.3.3

²³⁶ Id., Art.3.5.2

²³⁷ Id., Art.3.5.3

²³⁸ Letter from NGO to Permanent Representative of Member and Observer States of the UN Human Rights Council, 24 February 2017, p.2

²³⁹ T. Romano, "Hybrid court key for effective justice and accountability," UNMISS, January 27, 2017, p.1

²⁴⁰ International Federation for Human Rights, cited above at note 106, p.16

²⁴¹ D. Deng, cited above at note 16, p.3

current atrocities and future human right violations.²⁴² Hence, this heritage of immunity coupled with survival of South Sudan with a judiciary shattered and decayed by chaos and violence that stayed for more than 20 years, will cause a hurdle for the Hybrid Court that is designed to abolish immunity.

The peace agreement stipulates that the Hybrid Court shall not be “impeded or constrained by any statutes of limitations or the granting of pardons, immunities or amnesties”²⁴³ and government official shall not be excused from criminal responsibility on account of their official capacity.²⁴⁴ However, South Sudan’s President SalvaKiir has reportedly granted amnesty to 750 troops loyal to his main political rival and the country’s former first Vice-President Riek Machar.²⁴⁵ Another official statement by the South Sudan’s Defense Minister which states as, “the President of the Republic made an amnesty for those who will be ready to come back,” welcoming armed opposition forces residing in refugee camps in DRC despite past transgression.²⁴⁶ This is also a move towards forget and forgive approach which looks like an intention to avoid criminal responsibility. The plea for truth and not trial by both SalvaKiir and RiekMachar will exacerbate the challenges for the functionality of the Hybrid Court because if they believe that, those who tell the truth, even without remorse, about what they did will be exempted from prosecution,²⁴⁷ then the mandate of the Hybrid Court will be in vacuum since the Hybrid Court shall not be impeded by any amnesty or immunity.

In addition, South Sudanese Information Minister when invited by independent Commission on Human Rights in South Sudan to attend a meeting, he noted that the establishment of Hybrid Court will undermine peace because implementation of transitional justice at this time would never bring peace and stability in South Sudan unless peace comes first at the expense of

²⁴²D. Deng, cited above at note 16, p.3

²⁴³Agreement on the Resolution of the Conflict in the Republic of South Sudan, 2015, cited above at note 12, Art. 3.5.4

²⁴⁴Id., Art. 3.5.5

²⁴⁵ “South Sudanese President Grants Amnesty to Rebels,” Sudan Tribune; Plural News and Views on Sudan November 17, 2016, p.1

²⁴⁶KuolManyang, Address to Dawn newspaper, Sudan Tribune; Plural News and Views on Sudan, November 17, 2016. p.1

²⁴⁷SalvaKiir and Riek Machar, “South Sudan Needs Truth Not Trials,” New York Times, June 7, 2016, p.1, col. 1

justice.²⁴⁸ The paper is not arguing justice should preside over peace rather justice should not be disregarded under the expense of peace because both supplement each other and they are two sides of the same coin. It is also in the peace agreement that truth and reconciliation commission is to be established by the TGoNU as a critical peace building process²⁴⁹ but hasn't yet established. If the government of South Sudan is in fact determined on peace before justice, they would have been steps ahead on pushing the establishment of Commission for Truth, Reconciliation and Healing. Therefore, if the government of South Sudan is in fact advocating for peace to come first, they are disregarding an important point that there is no peace without justice.

South Sudan government has also continued to undermine the HCSS when it declared that the Hybrid Court should be seen as complementary to the national judiciary.²⁵⁰ This is contrary to the peace agreement which provides that the HCSS is independent from national courts and its priority over national judiciary.²⁵¹ It is the responsibility of the TGoNU to formulate/adopt legislation to establish an independent hybrid judicial body which has not yet enacted²⁵² and if the transitional government is against the court it is a complete violation of the peace agreement. In overall, the acts by the government of South Sudan imply a deliberate resistance from criminal prosecution and making themselves immune from the mandate of HCSS.

The ongoing violence and the replacement of Machar with Taban Deng Gai as Vice-President of TGoNU are now stalling the process because all the attention is focused on ending the current crisis.²⁵³ Moreover, instruments adopted at regional level that grants immunity for

²⁴⁸ Michael Makuei Lueth, 5 January 2014, meeting on Issues Regarding the Implementation of the Transitional Justice and Establishment of a Hybrid Court in the Young Nation, Ethiopia, Addis Ababa

²⁴⁹ Agreement on the Resolution of the Conflict in the Republic of South Sudan, 2015, cited above at note 12, Art. 2.1.1

²⁵⁰ Letter from Ambassador Joseph Moum Majak N. Malok to the President of UN Permanent Mission of the Republic of South Sudan 20 November 2016

²⁵¹ Agreement on the Resolution of the Conflict in the Republic of South Sudan, 2015, cited above at note 12, Art. 1.1.2 and 3.2.2

²⁵² Id., Art. 1.1

²⁵³ Institute for Security Studies, "Will the Hybrid Court for South Sudan Ever Try the Current Leadership?" Peace and Security Council Report, (2016), p.2

incumbent African Head of States and Governments²⁵⁴ can pose a challenge for the proper function of the Hybrid Court that aims to bring individuals accountable regardless of official capacity. IGAD mediation team member contend otherwise by saying that all the AU decisions that opposed indicting sitting Head of States and Governments is directed to only ICC and not to other courts.²⁵⁵ However, the wording and the exact context of one of the decision of the AU is directed against “*any international tribunals and courts*”²⁵⁶ and not only against the ICC. Hence, the legal framework that is passed as a response to foreign jurisdictions that indicted incumbent African Head of States and Governments can also be a challenge to the mandate of the Hybrid Court that aims to bring accountability regardless of official capacity as a criminal defense.

Legal expert in AU believes that due to the horrendous circumstance in South Sudan, the AU is looking forward and pushing for the establishment of the Hybrid Court.²⁵⁷ According to legal experts, AU is pushing for accountability in South Sudan which will eventually target sitting Head of State, however, AU is also against indicting incumbent Head of States and Governments. To the question wouldn't this lead to two conflicting interest, AU legal experts replied that the condition and circumstance in South Sudan is so dire that addressing the violence and bringing accountability outweighs every other things including the legal framework that grants immunity to sitting Head of States.²⁵⁸ Moreover, AU's commitment was envisaged when it established inquiry committee to investigate human right violations in South Sudan; AU support on mediation efforts and the condemnation of the extreme violence and atrocities necessitated the AU for the call of accountability in South Sudan.²⁵⁹

²⁵⁴ Decision on Africa's Relationship with the International Criminal Court, 2013, cited above at note 23, para. (i) African Union Model National Law on Universal Jurisdiction over International Crimes, 2012, cited above at note 23, Art.16; Protocol on Amendments to the Protocol on the Statute of the African court of Justice and Human Right, 2014, cited above at note 23, Art.46A bis;

²⁵⁵ Interview with Abebaw Biohnegn Belachew, Senior Political Advisor to Special Envoys in South Sudan, 2017, cited above at note 191

²⁵⁶ Decision on Africa's Relationship with the International Criminal Court, 2013, cited above at note 23, Para.10(i)

²⁵⁷ Interview with Legal Expert in AUC, May. 22, 2017

²⁵⁸ Ibid.

²⁵⁹ Peace and Security Council of the African Union, 2015, cited above at note 228, para.1-20

4.4. Implications of Immunity on the Proposed Hybrid Court for South Sudan

Immunities are a necessary feature of international law that limits the jurisdiction of states so that international relations will not be hampered²⁶⁰ however; individual criminal responsibility created a competing good that needs to be addressed to ensure accountability and to end impunity.²⁶¹ Criminal prosecutions have manifolds such as public condemnation of criminal acts; individual accountability of culprits; stand for victims to get justice and confirmation for a state ability and willingness to enforce its laws which gives great public confidence on state justice machinery.²⁶² However, there are constraints that limit the exercise of criminal justice especially in violation of IHRL and IHL and immunity of Head of States and Governments is among the impediments. Granting immunity to Head of States and Governments is a denial of justice for victims because if those responsible for violations of IHRL and IHL are not held responsible then those who are harmed and affected will be left out without any remedy and compensation.²⁶³

On the same note, if Head of States and Governments who violate IHL and IHRL are not held accountable for their actions as any individual would, then it is an implication that higher state officials are above the law which disregards the principle of “all persons are equal before courts and tribunals.”²⁶⁴ Furthermore, it creates a double standard in the judicial system by prosecuting individuals and exonerating higher officials.²⁶⁵

If immunity exempts Head of States and Governments from criminal responsibility and accountability then it becomes an incentive for leaders to remain in power in perpetuity so that they can be shielded from prosecution.²⁶⁶ Such endurance on power in office will negatively affect democratic change of government because Head of States will use any means necessary to stay

²⁶⁰ Advisory Committee on Issues of Public International Law, cited above at note 21, p.13

²⁶¹ M. Plessis, “Shambolic, Shameful and Symbolic Implications of the African Union’s Immunity for African Leaders” *Institute for Security Studies*, (2014), p.5

²⁶² The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies, cited above at note 205, para.39

²⁶³ International Council for Human Rights policy, Hard Cases: Bringing Human Rights Violators to Justice Abroad-A guide to Universal Jurisdiction (1999), pp.9-16

²⁶⁴ International Covenant on Civil and Political Rights, 1976, cited above at note 50, Art.14

²⁶⁵ D. Deng & R. Willems, Expanding the Reach of Justice and Accountability in South Sudan (2016), p.7

²⁶⁶ K. Asmal, “Truth Reconciliation and Justice: The South African Experience in Perspective,” The Modern Law Review, Vol. 63, No. 1 (2000), p.5

in power and to do ultra-virus acts without any call for accountability.²⁶⁷ Head of States and Governments who takes shield of immunity will never be afraid to commit the same violation knowing that there is no system that deter and held them accountable.²⁶⁸ Long attired immunity of Head of States and Governments will further lead to impunity because failing to prosecute for such crimes means no precedent is set against major crimes, nor is a deterrence presented to future perpetrators.²⁶⁹

Immunity of Head of States and Governments particularly in the AU's will create conflict for African states parties to Rome Statute and to Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of discrimination with regard to their obligation to prosecute or surrender individuals responsible for violation of international crimes and to deny immunity.²⁷⁰ Hence, it would be impossible for the member states namely Angola, Burundi, the Central African Republic, DRC, Kenya, the Republic of Congo, Rwanda, Sudan, Tanzania, Uganda and Zambia, to the protocol and to the Rome Statute to reconcile with the principle of immunity of Head of States and Governments with that of their obligation to punish perpetrators irrespective of official status of such individuals.²⁷¹ Hence, immunity of Head of States, Governments and higher officials who are responsible for violation of IHL and IHRL will adversely affect victims, the rule of law and the criminal justice mechanism process.

4.5. Prospects of the Proposed Hybrid Court for South Sudan

²⁶⁷ Ibid.

²⁶⁸ D. Deng & R. Willems, cited above at note 265, p.9

²⁶⁹ K. Asmal, cited above at note 266, p.4

²⁷⁰ Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination of November 2006, Art. 8, Art. 9, Art.12; Rome Statute of the International Criminal Court, 2002, cited above at note 8, Art.86

²⁷¹ Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination, 2006, Art.12

The ARCSS provided for the establishment of a Hybrid Court for South Sudan (HCSS) by the African Union Commission.²⁷² The Heads of State and Government of the AU Peace and Security Council (PSC) subsequently agreed to the establishment of the court.²⁷³ The PSC Council, with a function of promoting peace, security, stability and post conflict reconstruction in Africa which is also supported by the commission,²⁷⁴ requested the chairperson of the Commission to take all necessary steps towards the establishment of the HCSS, including providing broad guidelines on the location of the HCSS, its infrastructure, funding and enforcement mechanisms, the applicable jurisprudence, the number and composition of judges, privileges and immunities of court personnel and any other related matters.²⁷⁵ The PSC further called upon the international partners to support the peace process in South Sudan especially on the establishment of the Hybrid Court.²⁷⁶

According to the peace agreement, the mandate and the jurisdiction of the Hybrid Court should have been finalized within six months of the formation of TGoNU, which took place in April 2016.²⁷⁷ However, the deadline has expired and the planned Hybrid Court for South Sudan has still not seen the light of the day. In order to come across on finalizing the Hybrid Court, the AUC is facing many challenges and among the challenges political unwillingness from the government of South Sudan on the Hybrid Court and the court design on targeting individual criminal responsibility with the exclusion of official capacity as a defense are one of them.²⁷⁸ Despite the overdue deadline to operationalization the Hybrid Court, the AUC is working tenaciously to bring the Hybrid Court into life.²⁷⁹ South Sudan government signed Memorandum of Understanding (MoU) for the establishment of the Hybrid Court.²⁸⁰ However,

²⁷² Agreement on the Resolution of the Conflict in the Republic of South Sudan, 2015, cited above at note 12, Art.3.1.1

²⁷³ Peace and Security Council of the African Union, 2015, cited above at note 228, para.22(ii)(A)

²⁷⁴ Protocol Relating to the Establishment of the Peace and Security Council of the African Union of July 2002, Art.6(a) and Art. 2(2)

²⁷⁵ Peace and Security Council of the African Union, 2015, cited above at note 228, para.22(ii)(A)

²⁷⁶ Peace and Security Council of the African Union, 30 June 2016, 609th meeting at the level of Head of States and Governments, para.10

²⁷⁷ Agreement on the Resolution of the Conflict in the Republic of South Sudan, 2015, cited above at note 12, Appendix VI, p.70

²⁷⁸ Interview with, Legal Expert in AUC, May. 22, 2017

²⁷⁹ Ibid.

²⁸⁰ "South Sudan signed MoU with Africa Union to establish Hybrid Court," Radio Tamazuj September 11, 2017, p.1

the work is under progress and its current position on the Hybrid Court are not open for public endeavors due to confidentiality.²⁸¹

According to AU legal experts, the proposed Hybrid Court for South Sudan will enforce its mandate on Heads of States and Governments and meet its intended purpose despite the challenge it will probably face due to the presence of immunity in Africa and in the AU system because the peace agreement prevails since it specifically excludes any immunity and the warring parties signed it with no reservation which makes the agreement binding on them.²⁸² If and when the Hybrid Court remains in paper there are no contingency plans contemplated by the AU to address individual criminal responsibility because despite the challenges, the Hybrid Court will come into force no matter what.²⁸³ It is on the hands of highest decision-making body to draw up legislation for the Hybrid Court and on the political willingness of the government of South Sudan to establish the court which will be evident once the operationalization of the work by the AUC is finalized.²⁸⁴

²⁸¹ Interview with Legal Expert in AUC, May. 22, 2017

²⁸² Ibid.

²⁸³ Ibid.

²⁸⁴ Ibid.

CHAPTER FIVE

4. CONCLUSIONS AND SUGGESTIONS FOR FUTURE CONSIDERATION

5.1. Conclusion

Immunity is a legal protection for certain individuals as well as a legal impediment for a court of a state to exercise jurisdiction against certain protected individuals. Immunity could be personal, which is conferred on status of an official, and material, immunity given for acts performed in official capacity. Head of States and Governments are among those individuals endowed with Immunity from criminal, civil and administrative jurisdiction due to Customary International Law. The reason and purpose of such immunity is not to benefit individuals rather to ensure efficient performance of state function and since Head of States and Governments exemplify state sovereign independence, they should be able to execute their respective function without any fear of prosecution. However, there has been a debate whether Head of States and Governments who violate IHRL and IHL are still protected under the principle of immunity. There is no settled position under international law, however, the argument that says there is sufficient state practice that removes immunity for Head of States and Governments who violates International Human Right and Humanitarian Laws outweighs the other side of the debate.

The rise of international criminal law brings a competing good that individual criminal responsibility on violations of International Human Rights and Humanitarian law is essential part of international legal system. ICJ deliberated that immunity cannot be claimed in certain international tribunals where they have jurisdiction. AU was also instrumental on taking measure against former and incumbent Head of States and Governments which rule out immunity as a defense from criminal jurisdiction. The former President of Chad, Hissène Habré, was indicted in Extraordinary African Chamber for Crimes against Humanity, War Crimes and Torture. Charles Taylor, sitting Head of State of Liberia was also indicted in Special Court of Sierra Leone. Extraordinary African Chamber and Special Court of Sierra Leone are both Hybrid Courts where the former established by the AU and the later by an agreement between UN and government of Sierra Leone.

Hybrid Court for South Sudan is proposed to be established in South Sudan because the civil war in South Sudan mainly between the warring parties: President SalvaKirr and former Vice President RiekMachar resulted mass atrocities and human right violation calls for transitional justice mechanism and individual criminal responsibility which the local judiciary of South Sudan is incapable to provide. The proposed Hybrid Court for South Sudan is designed to bring accountability through prosecuting individuals bearing the responsibility for violations of international law and/or applicable South Sudanese law. Immunity, pardon or amnesty cannot be raised as a defense hence, no one who is found responsible for violation of IHRL and IHL will be exempted from criminal prosecution. The court is also designed to bring not only punishment against perpetrators but also designed to bring justice to victims through reparation, redress and compensation.

However, the court is facing multiple challenges from different arenas. The first one is AU legal framework is against an indictment of Head of States, Governments and senior state officials saying that it will undermine the sovereignty of a country. AU shows its stand through legal frameworks, swayed by indictment of African leaders by foreign states and international tribunals, which holds immunity of incumbent Head of States, Governments and state officials from criminal jurisdiction and through express refusal of their obligation to arrest indicted Head of States and Governments. However, AU's commitment to establish the Hybrid Court and past precedent that indicted sitting Head of State who violate IHRL and IHL in Africa court, gives anticipation that the Hybrid Court will force its mandate on Head of States but it would not be without resistance from South Sudan government. There is also political unwillingness from the government of South Sudan to establish transitional justice contending that justice will undermine peace. The other challenge is the long attired immunity is evident in South Sudan in which the government is accustomed to it that any accountability mechanism is ruled out.

There are no contingency plans if the Hybrid Court, due to the above mention challenges, fails to be operationalized. Hence, there are no individual criminal responsibility mechanisms contemplated by AU if the Hybrid court remains on paper.

5.2. Suggestions for Future Consideration

For the AU

- Cognizant of the fact that evidence and testimonies will be hampered or forgotten while waiting for the Hybrid Court to be established, AU should priorities establishing special prosecutor and investigation unit to preserve evidences. The same has been done by establishment of European Union's Special Investigative Task Force that conduct investigation and preserving evidence until the Kosovo Hybrid Court is operationalized.
- Recognizing the fact that the legal framework of the AU upholds immunity of Head of States and Governments from criminal prosecution is contrary to the AU constitutive act that out laws immunity for serious crimes, AU should repeal the existing law that grants immunity or makes an exception of immunity for violation of IHRL and IHL. The AU should also amend the Amendment Protocol that grants immunity to Head of States and Governments before it comes into effect.

For the UNSC

- There should be a contingency plan in case the Hybrid Court remains on paper and among the possible alternatives the UNSC may enact the text of the peace agreement by way of a Chapter VII resolution or decide what measure to take to enforce the provisions of the agreement and to maintain international peace and security.
- The UNSC may also resort to referring the case to ICC if the government still depicts its unwillingness to bring the Hybrid Court into force.

For the international community

- The issue whether Immunity of incumbent Head of States and Government is still a rule under CIL should be settled by establishing an institution that conduct thorough study and analysis of the state practice and opinio juris to come up with hard law which is codified as in the case of ICRC codifying the Geneva conventions as CIL.

For the South Sudan Government

- The contracting parties to the peace agreement should pledge to refrain from pursuing amnesties and immunities through national processes in South Sudan. The government should commit itself to ratify the Rome Statute to demonstrate its commitment to combating international crimes and establishing a culture of respect for human rights.
- Government officials and leaders of South Sudan should not run in the national election and occupy leadership. An alleged perpetrator of gross Human Rights Violations should not run for presidency and this requires a moral integrity on the side of South Sudan leadership to take accountability and by avoiding official capacity as a defense from criminal responsibility.

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Annex I

List of Key Informants

SN.	Name of Interviewee	Title and Position of Interviewee
1.	Ato. AbebawBihonegnBelachew	IGAD Mediation Team member and Senior Advisor to Special Envoys in South Sudan
2.	Anonymou26s	Expert from AUC Legal Affairs Department
3.	Anonymous	Expert from AU Legal Affairs Department

Annex II

Below are different questions designed to collect data from the key informants identified:

1) Question for Key Informant Number One

Q.1. The Government of Republic of South Sudan (GRSS) and the South Sudan People's Liberation Movement/ Army- in Opposition (SPLM/A-IO), under the auspices of IGAD, have concluded successive agreements for instance Agreement on the Cessation of Hostilities Between the Government of the Republic of South Sudan (GRSS) and the Sudan People's Liberation Movement/Army (in Opposition) (SPLM/A in Opposition) on 23 January 2014; Recommitment on Humanitarian Matters in the Cessation of Hostilities Agreement Between the GRSS and the SPLM/A in Opposition on May 5, 2014; Agreement to Resolve the Crisis in South Sudan on May 9, 2014. However, the agreements failed to be implemented. What is the reason behind such failure?

Q.2. what is the difference between IGAD and IGAD-plus on their role of mediating the South Sudan conflict?

Q.3. In the Agreement on Resolution of the Conflict in the Republic of South Sudan why is Hybrid Court chosen as one of transitional justice mechanism for South Sudan?

Q.4. what are possible challenges for the peace accord in general and for the hybrid Court in particular?

2) Question for Key Informant Number Two

Q.1. According to the peace agreement, the mandate and the jurisdiction of the Hybrid Court should have been finalized within six months of the formation of TGoNU, which took place in April 2016. However, the deadline has expired and the Planned Hybrid Court for South Sudan has still not seen the light of the day? Why is the reason behind such delay?

Q.2. what is the progress so far made on the Proposed Hybrid Court for South Sudan?

Q.3. what is the Plan-B if the Hybrid Court failed to meet its intended purpose?

Q.4. what are possible challenges for the peace accord in general and for the hybrid Court in particular?

3) Question for Key Informant Three

Q.1. Will the proposed Hybrid Court for South Sudan enforce its mandate on Heads of States and Governments and meet its intended purpose given the presence of immunity in Africa and in the AU system?

Q.2. Will the AU Assembly of Heads of State and Government, highest decision-making body, draw up legislation for the Hybrid Court that enables it to try leaders and senior government officials?

Q.3. what are possible challenges for the peace accord in general and for the hybrid Court in particular?