**Immunity *v.* Impunity**

## Immunity Provisions of the Malabo Protocol

By far, the most controversial provision in the Malabo Protocol has been the immunities provision, which has been harshly criticized as contrary to international law and a blatant attempt to shield African leaders, thereby increasing impunity on the continent.[1] In fact, as the discussion below explains, article 46A bis reflects the current customary international law norm that sitting heads of state and senior officials are entitled to immunity *ratione personae* from any criminal prosecution, whether national or international. More importantly, by raising 10 additional crimes to the international level and extending criminal liability to corporations, the Malabo Protocol represents the most dramatic reduction of impunity since the creation of the tribunal at Nuremberg, a point that is too often lost in the unfortunate debate over whether a handful of senior state officials may be prosecuted.

### i. Description of the relevant provisions of the Malabo Protocol

For all of the controversy it has generated, the immunities provision of the Malabo Protocol is actually quite simple. Article 46A bis provides that the African Court may not prosecute any *sitting* AU Head of State or Government, anybody acting or entitled to act as an AU Head of State or Government, or any other senior state official.[2] This immunity extends only during an official's time in office, and therefore these same officials may be prosecuted before the Court after leaving office.

For ease of reference, the exact language of the relevant section, as amended by the Malabo Protocol, is provided below:

**Article 46A bis of the Statute (as amended)**
**Immunities**

No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.

### ii. Analysis

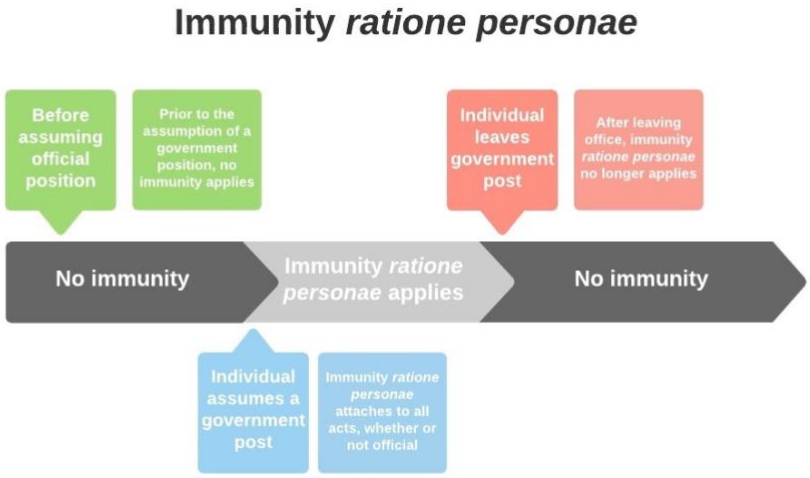
#### (a) Article 46A bis confers personal immunity, not functional immunity

As an initial matter, it is important to observe that the immunities recognized in Article 46A bis are a form of immunity *ratione personae*, meaning that the immunity attaches to the office and is

[1] *See, e.g.*, Human Rights Watch, *African States: Reject Immunity for Leaders* (Aug. 24, 2014) (describing declaration against immunities provision by 141 organizations, including many African groups), https://www.hrw.org/news/2014/08/24/african-states-reject-immunity-leaders.

[2] The Malabo Protocol does not define which persons are covered by the terms "AU Head of State or Government," "anybody acting or entitled to act in such capacity," or "other senior state officials." *See* AU, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (June 27, 2014), annex art. 22 (adding art. 46A bis) [hereinafter Malabo Protocol], https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights.

possessed by the officeholder only so long as he or she remains in office.[3] This form of immunity dates back hundreds of years, and was developed to ensure that certain high-ranking officials, including but not limited to heads of state, can discharge their functions unhindered by potentially politically motivated charges.[4] As will be discussed in more detail later, immunity *ratione personae* (also known as personal immunity) has traditionally been applied to those State agents with high-level responsibility for foreign affairs in order to ensure that these individuals can travel freely without harassment by other States, thereby promoting effective communications between States.[5] Because *any* arrest or detention would distract these officials from their duties, and, by extension, would have negative implications for the foreign policy, economy, and citizens of the State they represent, they are absolutely immune from prosecution by a foreign state, regardless of when the crime was committed or whether it constituted an international crime.[6] However, because immunity *ratione personae* is designed to ensure that high-level officials can carry out their functions, its protections are temporary and end when the individual leaves office,[7] as the following timeline shows.




[3] *See* Dapo Akande, *International Law Immunities and the International Criminal Court*, THE AMERICAN JOURNAL OF INTERNATIONAL LAW 407, 409 (2004); Max du Plessis, *Shambolic, shameful and symbolic: Implications of the African Union's immunity for African Leaders* 7 (Nov. 2014), https://issafrica.s3.amazonaws.com/site/uploads/Paper278.pdf.

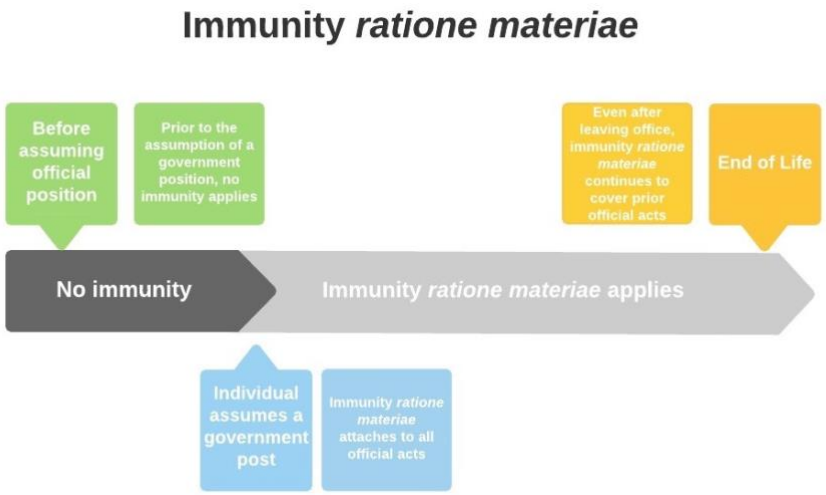
[4] Akande, *International Law Immunities and the International Criminal Court*, *supra* note 3, at 410; International Law Commission, *Report of the International Law Commission, 65th Session*, Doc. A/68/10, p. 58 (2013), http://legal.un.org/docs/?symbol=A/68/10; du Plessis, *Shambolic, shameful and symbolic*, *supra* note 3, at 5.

[5] *See* Akande, *International Law Immunities and the International Criminal Court*, *supra* note 3, at 410; *Report of the International Law Commission, 65th Session*, *supra* note 4, at p. 60; Mark Kielsgard & Ken Gee-kin, *Prioritizing Jurisdiction in the Competing Regimes of the International Criminal Court and the African Court of Justice and Human Rights: A Way Forward*, 38 BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL 285, 301 (2017).

[6] *See* Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, ¶¶ 10, 13, 71 (Feb. 14, 2002) (holding that official was immune from criminal process even though accused of international crimes), http://www.icj-cij.org/files/case-related/121/121-20020214-JUD-01-00-EN.pdf; *see also* Akande, *International Law Immunities and the International Criminal Court*, *supra* note 3, at 410-411; du Plessis, *Shambolic, shameful and symbolic*, *supra* note 3, at 6.

[7] du Plessis, *Shambolic, shameful and symbolic*, *supra* note 3, at 6; Asad G. Kiyani, *Al-Bashir & the ICC: The Problem of Head of State Immunity*, 12 CHINESE JOURNAL OF INTERNATIONAL LAW 467, 473 (2013), https://academic.oup.com/chinesejil/article/12/3/467/323940.

Immunity *ratione personae* is different from immunity *ratione materiae* (also known as functional immunity), which attaches to official acts and prevents the prosecution of a government official for those acts, regardless of whether the individual continues to serve in office.[8] This form of immunity recognizes that official acts are essentially acts of the State, rather than acts of the government official, and that a third State should not sit in judgment on those official acts through proceedings against the official who implemented the acts.[9] Nonetheless, it is now widely acknowledged that immunity *ratione materiae* does not protect officials from prosecution for international crimes.[10] Immunity *ratione materiae* begins when an individual enters office and covers official acts, except for international crimes, both while the official is in office and after he or she leaves office, as the following timeline shows.




The following chart illustrates the differences between these two types of immunity.

| | **Immunity *ratione personae* (personal immunity)** | **Immunity *ratione materiae* (functional immunity)** |
|---|---|---|
| **When the protection begins** | When the official assumes his or her position | When the official assumes his or her position |
| **When the protection ends** | When the official leaves office | Not applicable - immunity continues even after the official leaves his or her position |
| **Who this immunity applies to** | State agents with high-level responsibility for foreign affairs (i.e. Head of State, Head of Government, Minister of | Every serving and former State official |

[8] For a discussion of the two types of immunities, *see* Akande, *International Law Immunities and the International Criminal Court*, *supra* note 3, at 409-15; *see also* Antonio Cassese, *When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case*, EUROPEAN JOURNAL OF INTERNATIONAL LAW 853, 862-64 (2002), http://ilmc.univie.ac.at/uploads/media/Cassese.pdf; UN General Assembly, International Law Commission, *Preliminary report on immunity of State officials from foreign criminal jurisdiction* ¶¶ 78-82 (May 29, 2008).
[9] Akande, *International Law Immunities and the International Criminal Court*, *supra* note 3, at 413.
[10] *Id.* at 413-14; du Plessis, *Shambolic, shameful and symbolic*, *supra* note 3, at 6.

| | | |
|---|---|---|
| | Foreign Affairs, other senior state officials) | |
| **Level of immunity** | Absolute immunity – while it attaches, one cannot be prosecuted for personal or official acts, regardless of when the crime was committed or whether it constituted an international crime | Qualified immunity – attaches to official acts and prevents the prosecution of a government official for those official acts (unless the acts constitute international crimes) |

There has been some debate as to whether Article 46A bis includes immunity *ratione materiae*, in addition to immunity *ratione personae*, because the provision extends immunity to "senior state officials *based on their functions*."[11] Although it is true that the question of function is typically relevant to immunity *ratione materiae*, it is plain that the inclusion of the phrase in Article 46A bis is meant to qualify "senior state officials" by specifying that such officials should be identified "based on their functions." That these senior state officials are covered by immunity *ratione personae* – and not immunity *ratione materiae* – is evident from the fact that the article goes on to indicate that these senior state officials shall receive immunity "during their tenure of office," which is the defining characteristic of immunity *ratione personae*. Moreover, as Dire Tladi has observed, the phrase "based on their functions" "appears to have been drawn from the ICJ's reasoning for extending immunity *ratione personae* to Ministers for Foreign Affairs in the *Arrest Warrant* case,"[12] and thus its inclusion seems meant to help indicate why immunity should be extended to such officials and which officials receive that immunity.

### (b) The immunities provision does not increase impunity

The most frequent criticism of the Malabo Protocol's immunities provision is that recognizing immunities before an international court promotes impunity.[13] According to this argument, because international crimes such as genocide and crimes against humanity are typically "massive, systemic crimes . . . perpetrated by those who wield [the] greatest power," recognizing the immunities of political leaders protects "those are most likely to commit these crimes."[14] The immunities provision also risks increasing the incidence of atrocity crimes by "giving leaders license to commit crimes" and "encouraging those accused of the crimes to cling to their positions

[11] *E.g.*, Dire Tladi, *The Immunity Provision in the AU Amendment Protocol and the Entrenchment of the Hero-Villain Trend*, 13 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 3, at 3-4 (2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2628137.
[12] *Id.* at 4.
[13] *See, e.g.*, Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court* 34 (2016), at 27.
[14] International Bar Association, *IBA and SALC express alarm at AU's endorsement of immunity for heads of state* (July 9, 2014), https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=f0c41e45-693d-4712-98c8-3da28c2b949d; Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court*, *supra* note 13, at 27 (2016) ("it is those in positions of power who typically abuse their authority and state resources to commit international crimes"); Dan Kuwali, Article 46A Bis: A Step Backward in Ending Impunity in Africa (Sept. 22, 2014), http://kujenga-amani.ssrc.org/2014/09/22/article-46a-bis-a-step-backward-in-ending-impunity-in-africa/.

to avoid facing the law."[15] For all of these reasons, it has been argued that the immunities provision is contrary to the Constitutive Act of the African Union,[16] which rejects impunity and grants the African Union the right to intervene in member states to combat war crimes, genocide, and crimes against humanity.[17]

In fact, the Malabo Protocol represents a dramatic expansion in the fight against impunity. By raising 10 additional crimes to the international level and extending criminal liability to corporations,[18] the Malabo Protocol ensures that many more perpetrators of serious crimes affecting the well-being of millions of Africans can be held accountable in a supra-national forum.[19] No other regional or international court has jurisdiction over these crimes or over corporate perpetrators. The AU's decision to create a regional criminal court with jurisdiction over substantially more crimes than the ICC demonstrates its commitment to ending impunity.[20]

Moreover, contrary to the concerns described above, the vast majority of these crimes are not perpetrated by senior state officials but rather by private citizens. For example, piracy, mercenarism, trafficking in persons, trafficking in drugs, and terrorisms are generally committed by organized criminal groups, not government officials. There can be no question that the Malabo Protocol reduces impunity for such crimes. Other crimes, such as trafficking in hazardous wastes, are frequently committed by corporate entities,[21] and the Malabo Protocol likewise reduces impunity with respect to these crimes because it is the first international court statute to include corporate criminal liability.[22]

Criticism of the immunities provision has therefore focused on just a few crimes, such as UCG and corruption, which can be perpetrated by senior state officials. Yet this criticism misses the forest for the trees. These crimes can be committed by a wide variety of persons, including

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[15] Human Rights Watch, *African States: Reject Immunity for Leaders*, *supra* note 1 (statement by the Executive Director of Malawi's Centre for Human Rights and Rehabilitation); *see also* International Bar Association, *supra* note 14 (arguing that the immunities "provision generates perverse incentives for abusive leaders to remain in power so that they are shielded from prosecution"); Daniel Abebe, *Does International Human Rights Law in African Courts Make a Difference?*, 56 VIRGINIA JOURNAL OF INTERNATIONAL LAW 527, 530 (2016).

[16] *See, e.g.*, Human Rights Watch, *African States: Reject Immunity for Leaders*, *supra* note 1 (describing statement by the Executive Director of the International Commission of Jurists-Kenya that the "immunity provision is a regrettable departure from the AU's Constitutive Act, which rejects impunity under article 4"); du Plessis, *Shambolic, shameful and symbolic*, *supra* note 3, at 1, 10; FIDH, *Immunity of Heads of State and Government for International Crimes? The African Union must act with coherence and political courage* (June 20, 2014), https://www.fidh.org/en/15601-immunity-of-heads-of-state-and-government-for-international-crimes-the; International Bar Association, *supra* note 14; Kuwali, *supra* note 14.

[17] AU, Constitutive Act of the African Union, 7, art. 4(h), (o) (July 11, 2000), https://au.int/en/constitutive-act.

[18] For a discussion of these additional crimes, *see* the discussion on Transnational Crimes here.

[19] *See* Pacifique Manirakiza, *The Case for an African Criminal Court to Prosecute International Crimes Committed in Africa*, *in* VINCENT O. NHEMIELLE, AFRICA AND THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE 375, 379 (2012), at 390.

[20] Vincent O. Nmehielle, *Taking Credible Ownership of Justice for Atrocity Crimes in Africa*, *in* VINCENT O. NHEMIELLE, AFRICA AND THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE 223, 239 (2012).

[21] *See, e.g.*, Amnesty International, *Trafigura: A Toxic Journey* (2016) (describing the dumping of toxic waste by Trafigura in and around Abidjan, causing at least 15 deaths and sickening over 100,000 people), https://www.amnesty.org/en/latest/news/2016/04/trafigura-a-toxic-journey/.

[22] Malabo Protocol, *supra* note 2, annex art. 22 (adding art. 46C).

mercenaries, armed dissidents and rebels, and low-level army officials.[23] Indeed, of the six acts constituting UCG, at least three – use of mercenaries; coup d'état; and use of armed dissidents, rebels, or political assassination[24] – are much more likely to be committed by these other actors than by senior state officials. At the moment, however, *none* of these perpetrators can be held responsible in a supra-national court because there is no court with jurisdiction over this crime. Ratification of the Malabo Protocol will, for the first time, provide a forum for the prosecution of such cases and therefore dramatically increase accountability for a wide array of perpetrators. Moreover, even if these perpetrators seize power, under customary international law, immunity would likely not attach so long as their "government" remained unrecognized.[25] As for the remaining acts constituting the crime of UCG, although the African Court would not be able to prosecute heads of state and other senior state officials during their tenure in office, they could be held accountable after leaving office. Recent events demonstrate a growing willingness – by the AU, regional communities, and civil society – to intervene to end such unconstitutional governments. For example, shortly after then-President Yahya Jammeh indicated that he intended to remain in office despite losing the recent elections,[26] both ECOWAS and the African Union moved to intervene, declaring the President's actions untenable and warning of "serious consequences" if he refused to leave office.[27] Shortly thereafter, Yahya Jammeh stepped down. If the criminal jurisdiction of the African Court had been in place, he could then have been held accountable before the Court. Even if the AU's intervention had been unsuccessful, however, the AU's decision to cease recognizing Yahya Jammeh as President would likely have stripped him of any immunity,[28] thereby enabling prosecution (though again, this would only have been relevant if the African Court's criminal jurisdiction already had been in place). And in Burkina Faso, then-President Blaise Compaoré's attempt to revise the constitution to enable him to stay in office led to a popular uprising that forced him to resign.[29] As these examples show, the environment in Africa is rapidly shifting and there is an opportunity for swift justice even for heads of state and senior state officials who are increasingly being forced from office when they attempt to unconstitutionally prolong their power.

Lastly, the Malabo Protocol does not increase impunity for core international crimes because, as discussed in greater detail in the sections below, the Malabo Protocol does not alter the availability of immunities before domestic courts or the ICC.[30] Senior state officials, including heads of state, will continue to be just as accountable in these other courts after ratification of the Malabo Protocol as they are now. Indeed, as the situations in Libya and Sudan demonstrate, even officials of States

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[23] *See, e.g.*, Malabo Protocol, *supra* note 2, annex art. 14 (adding art. 28E(1)(b) & (c)).
[24] Malabo Protocol, *supra* note 2, annex art. 14 (adding art. 28E(1)(a)-(c)).
[25] UN, Yearbook of the International Law Commission, vol. II, ¶¶ 122-24 (2008), https://www.legal-tools.org/doc/34dfa0/pdf/.
[26] Dionne Searcy & Jaime Yaya Barry, *Yahya Jammeh, Gambian President, Now Refuses to Accept Election Defeat*, THE NEW YORK TIMES (Dec. 9, 2016), https://www.nytimes.com/2016/12/09/world/africa/yahya-jammeh-gambia-rejects-vote-defeat-adama-barrow.html.
[27] AU, Peace and Security Council, Communiqué, PSC/PR/COMM. (DCXLVII) (Jan. 13, 2017), http://www.peaceau.org/uploads/647.psc.comm.gambia.13.01.2017-1.pdf.
[28] UN, Yearbook of the International Law Commission, vol. II, at ¶¶ 122-24 (2008), https://www.legal-tools.org/doc/34dfa0/pdf/.
[29] David Smith, *Power struggle in Burkina Faso after Blaise Compaoré resigns as President*, THE GUARDIAN (Nov. 1, 2014), https://www.theguardian.com/world/2014/oct/31/burkina-faso-president-blaise-compaore-ousted-says-army.
[30] *See infra* notes 78-100 & accompanying text.

that are not parties to the Rome Statute potentially may be held accountable before the ICC through a Security Council referral.[31] Although the ICC has been unable to obtain the surrender of some of these officials, ratification of the Malabo Protocol will not affect that. Nor is there any reason to think that removal of the immunities provision in the Malabo Protocol will make the arrest of such officials – for prosecution before either the ICC or the African Court – more likely. The argument that senior leaders will be encouraged – any more than they currently are – to cling to their positions to avoid prosecutions is therefore incorrect.

### (c) The immunities provision is consistent with customary international law

Immunity is a procedural rule[32] that concerns *whether* and *when* a court has jurisdiction over a particular individual. For example, and as described earlier, a head of state with immunity *ratione personae* cannot be brought before a criminal court during his or her term in office, but that does not mean the head of state is exonerated from criminal responsibility – he or she may still be prosecuted, and thus held criminally responsible, after leaving office.[33] This is different from the issue of criminal responsibility, which is a substantive rule of law that concerns whether a government official can be held responsible – at all – for his or her acts.[34]

Consistent with these principles, the African Union has repeatedly stressed its commitment to combating impunity[35] – including with respect to abuses by leaders – but has objected to prosecutions of *sitting* heads of state and other senior state officials because under "international customary law … sitting Heads of State and other senior state officials are granted immunities during their tenure in office."[36] These immunities "apply not only to proceedings in foreign

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[31] Rome Statute of the International Criminal Court, art. 13(b) (July 17, 1998), https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

[32] Case Concerning the Arrest Warrant of 11 April 2000, *supra* note 6, at ¶ 60; *Report of the International Law Commission, 65th Session*, *supra* note 4, at p. 55 (confirming that immunity from criminal jurisdiction is "procedural in nature"); ROSANNE VAN ALEBEEK, THE IMMUNITY OF STATES AND THEIR OFFICIALS IN INTERNATIONAL CRIMINAL LAW AND INTERNATIONAL HUMAN RIGHTS LAW 298 (2008).

[33] Case Concerning the Arrest Warrant of 11 April 2000, *supra* note 6, at ¶ 60; *Report of the International Law Commission, 65th Session*, *supra* note 4, at p. 55.

[34] Case Concerning the Arrest Warrant of 11 April 2000, *supra* note 6, at ¶ 60; *Report of the International Law Commission, 65th Session*, *supra* note 4, at p. 55; VAN ALEBEEK, *supra* note 32, at 283.

[35] Assembly of the African Union, Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court, Doc. Assembly/AU/Dec.245(XIII) Rev.1 (July 3, 2009), at ¶ 4, https://au.int/sites/default/files/decisions/9560-assembly_en_1_3_july_2009_auc_thirteenth_ordinary_session_decisions_declarations_message_congratulations_motion_0.pdf; *see also* Assembly of the African Union, Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of The Sudan, Doc. Assembly/AU/Dec.221(XII) (Feb. 1-3, 2009), at ¶ 6, https://au.int/sites/default/files/decisions/9559-assembly_en_1_3_february_2009_auc_twelfth_ordinary_session_decisions_declarations_message_congratulations_motion.pdf; Assembly of the African Union, Decision on the Report of the Second Meeting of States Parties to the Rome Statute on the International Criminal Court (ICC), Assembly/AU/Dec.270(XIV) (Jan. 31-Feb. 2, 2010), at ¶ 3, https://au.int/sites/default/files/decisions/9561-assembly_en_31_january_2_feburuary_2010_bcp_assembly_of_the_african_union_fourteenth_ordinary_session.pd.

[36] AU, Decision on Africa's Relationship with the International Criminal Court (ICC), ¶ 9, Ext/Assembly/AU/Dec.1 (Oct. 2013), http://www.iccnow.org/documents/Ext_Assembly_AU_Dec_Decl_12Oct2013.pdf.

domestic courts but also to international tribunals."[37] Other States have expressed their agreement with the position of the African Union; for example, in 2009, the Arab League Council objected to attempts by the ICC to proceed against a head of state, invoking the principle of head of state immunity.[38] Together, the African Union and the Arab League represent 67 states,[39] or approximately one-third of all states.[40] Other states also have supported the AU position; for instance, Venezuela publicly stated that "[t]he issuance of the warrant of arrest by the International Criminal Court against President Omar Al-Bashir violates customary international law, which guarantees immunity to Heads of State."[41] The practice of these states, as well as of the AU itself, is representative of and contributes to the formation of customary international law.[42]

Although it is beyond dispute that sitting heads of state and at least some incumbent senior state officials are entitled to immunity *ratione personae* in the courts of foreign states,[43] some argue that these immunities are unavailable before international courts under customary international law.[44] These arguments typically rely on one or more of the following pieces of evidence: (1) the statutes of international criminal courts, which all incorporate the principle of official responsibility; (2)

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[37] AU, Press Release No. 002/2012 on the Decisions of Pre-Trial Chamber I of the International Criminal Court (ICC) Pursuant to Article 87(7) of the Rome Statute on the Alleged Failure by the Republic of Chad and the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of President Omar Hassan Al Bashir of the Republic of the Sudan (Jan. 9, 2012), http://www.iccnow.org/documents/PR-_002-_ICC_English_2012.pdf.

[38] Arab League Council, Resolution on the decision of Pre-Trial Chamber 1 to the International Court against the President of the Republic of Sudan, Hassan Ahmad Al-Bashir (Mar. 4, 2009), http://www.iccnow.org/documents/09_03_04_AL_Resolution_on_Omar_Al-Bashir_(EN)_Unofficial_Translation_(2).pdf.

[39] The African Union has 55 member states and the Arab League has 22 member states. However, because some states are members of both organizations, there are only 67 unique states between the two organizations. *See* African Union, Member State Profiles, https://au.int/en/memberstates; *Profile: Arab League*, BBC (Aug. 24, 2017), http://www.bbc.com/news/world-middle-east-15747941.

[40] Due to disputes over the status of certain parts of the world – such as Western Sahara, Kosovo, and Taiwan – there is no agreed upon number of states in the world. However, the number of UN member and non-member states (195) is a good approximation of the total. *See* United Nations, Overview (there are 193 UN member states), http://www.un.org/en/sections/about-un/overview/index.html; United Nations, Non-member States (there are two additional non-member states), http://www.un.org/en/sections/member-states/non-member-states/index.html.

[41] United Nations Security Council, 7478th Meeting, U.N. Doc. S/PV/7478 (June 29, 2015), http://undocs.org/S/PV.7478.

[42] International Law Commission, *Identification of customary international law*, Draft conclusion 4(2) (May 30, 2016), http://legal.un.org/docs/?symbol=A/CN.4/L.872.

[43] *See, e.g.*, Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, ¶ 25 (Apr. 9, 2014) [hereinafter ICC Decision on the DRC's Cooperation], https://www.icc-cpi.int/CourtRecords/CR2014_03452.PDF; Dire Tladi, *The ICC Decisions on Chad and Malawi: On Cooperation, Immunities, and Article 98*, 11 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 199, 213 (2013); Paola Gaeta, *Does President Al Bashir Enjoy Immunity from Arrest*, 7 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 315, 317 (2009).

[44] Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court, Snapshots* 6 (2017), at 4, https://www.amnesty.org/en/documents/afr01/6137/2017/en/.; Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, International Criminal Court, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, ¶ 18 (Dec. 12, 2011) [hereinafter ICC Decision on Malawi's Cooperation], https://www.legal-tools.org/doc/476812/pdf/; Ntombizozuko Dyani-Mhango, *South Africa's Dilemma: Immunity Laws, Interntional Obligations, and the Visit by Sudan's President Omar Al Bashir*, 26 WASHINGTON INTERNATIONAL LAW JOURNAL 535, 546 (2017); Kuwali, *supra* note 14.

the practice of international criminal courts, which have indicated a handful of sitting leaders; (3) the ICJ's decision in the *Arrest Warrant* case, which purportedly confirmed that there is no immunity before international courts; (4) the rationale behind immunity, which is purportedly in recognition of the sovereign equality of states; and/or (5) the provisions of the Rome Statute of the ICC. As the following paragraphs demonstrate, none of these first four sources of evidence compellingly points to a customary law exception to head of state immunity before international courts. The fifth—the provisions of the Rome Statute of the ICC—is addressed later in this section, but likewise is insufficient.

First, the statutes of pre-ICC international and hybrid tribunals did ***not*** address the issue of immunity *ratione personae*. Instead, these provisions concerned the separate issue of criminal responsibility.[45] As the International Court of Justice has explained, "[i]mmunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts,"[46] and thus arguments that *criminal responsibility* provisions in the statutes of international courts reflect a customary international law rule against *immunity* mistakenly conflate these two legal principles.[47]

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[45] Statute of the International Criminal Tribunal for Rwanda, art. 6(2) ("The official position of any accused person, whether as Head of state or government or as a responsible government official, shall not relieve such person of ***criminal responsibility*** nor mitigate punishment") (emphasis added), (Nov. 8, 1994) [hereinafter Statute of the ICTR], http://unictr.unmict.org/sites/unictr.org/files/legal-library/100131_Statute_en_fr_0.pdf ; Statute of the Special Court for Sierra Leone, art. 6(2) ("The official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of ***criminal responsibility*** nor mitigate punishment.") (emphasis added) (Jan. 16, 2002) [hereinafter Statute of the SCSL], http://www.rscsl.org/Documents/scsl-statute.pdf; Statute of the Extraordinary African Chambers, art. 10 ("The official position of an accused, whether as Head of State or Government, or as a responsible government official, shall not relieve him or her of ***criminal responsibility*** under this Statute.") (emphasis added) (Aug. 22, 2012), https://www.hrw.org/news/2013/09/02/statute-extraordinary-african-chambers; Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7(2) (Sept. 2009) ("The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of ***criminal responsibility*** nor mitigate punishment.") (emphasis added) (Sept. 2009) [hereinafter Statute of the ICTY], http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf; Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, art. 29 ("The position or rank of any Suspect shall not relieve such person of ***criminal responsibility*** or mitigate punishment.") (emphasis added) (Oct. 27, 2004) [hereinafter Law on the Establishment of the ECCC], https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf; Charter of the International Military Tribunal, art. 7 (Aug. 8, 1945) ("The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from ***responsibility*** or mitigating punishment.") (emphasis added), http://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.2_Charter%20of%20IMT%201945.pdf; Charter of the International Military Tribunal for the Far East, art. 6 (Jan. 19, 1946) ("Neither the official position, at any time, of an accused … shall, of itself, be sufficient to free such accused from ***responsibility for any crime*** with which he is charged ….") (emphasis added), http://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.3_1946%20Tokyo%20Charter.pdf.; *see also* Kiyani, *supra* note 7, at 486, 490; Dov Jacobs, *The Frog That Wanted to Be an Ox: the ICC's Approach to Immunities and Cooperation* 7-8 (2015) (noting that most of the provisions in the statutes of earlier international criminal tribunals that are cited for the proposition that officials do not have immunity before international courts are "irrelevant" because they concern the separate issue of official responsibility), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2525547.

[46] Case Concerning the Arrest Warrant of 11 April 2000, *supra* note 6, at ¶ 60.

[47] Kiyani, *supra* note 7, at 491. For examples of such conflation, *see, e.g.*, Miriam Abaya, *No Place for Immunity: The Arguments Against the African Criminal Court's Article 46Bis*, 30 TEMPLE INTERNATIONAL & COMPARATIVE LAW JOURNAL 189, 204 (2016); Kuwali, *supra* note 14.

As explained above, immunity is a procedural rule[48] that concerns *whether* and *when* a court has jurisdiction over a particular individual. For example, a head of state with immunity *ratione personae* cannot be brought before a criminal court during his or her term in office, but that does not mean the head of state is exonerated from criminal responsibility – he or she may still be prosecuted, and thus held criminally responsible, after leaving office.[49] By contrast, provisions on criminal responsibility are substantive rules of criminal law[50] that determine whether a government official can be held responsible for his or her acts. Arguments resting on provisions in international statutes regarding the concept of criminal responsibility do not indicate anything about whether there is a customary law rule on the entirely separate issue of immunity; as Dapo Akande has stated, "[t]o say that official capacity does not exclude criminal responsibility is not necessarily to say that the person may not be immune from the jurisdiction of particular tribunals."[51]

Second, even if these provisions on criminal responsibility were somehow interpreted to affect the rule on immunity, none of them explicitly applied to *sitting* heads of state and senior state officials. While the language of these provisions does not specify whether they apply to both incumbent and former officials, the vast majority of the statutes were adopted *after* the relevant conflicts had ended and the relevant governments had changed, and thus there was almost no chance that incumbent (rather than former) officials would be brought before these courts.[52] As renowned

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[48] Case Concerning the Arrest Warrant of 11 April 2000, *supra* note 6, at ¶ 60; *Report of the International Law Commission, 65th Session*, *supra* note 4, at p. 55 (confirming that immunity from criminal jurisdiction is "procedural in nature").

[49] Case Concerning the Arrest Warrant of 11 April 2000, *supra* note 6, at ¶ 60; *Report of the International Law Commission, 65th Session*, *supra* note 4, at p. 55.

[50] Case Concerning the Arrest Warrant of 11 April 2000, *supra* note 6, at ¶ 60; *Report of the International Law Commission, 65th Session*, *supra* note 4, at p. 55.

[51] Dapo Akande, *ICC Issues Detailed Decision on Bashir's Immunity (… At long Last …) But Gets the Law Wrong*, EJIL: TALK! (Dec. 15, 2011), https://www.ejiltalk.org/icc-issues-detailed-decision-on-bashir%E2%80%99s-immunity-at-long-last-but-gets-the-law-wrong/; *see also* Jacobs, *supra* note 45, at 4 ("there is no conceptual obstacle to recognising that a person may have criminal responsibility in relation to conduct performed in an official capacity, but still say that some procedural bars, such as immunities, prevent certain courts from actually exercising jurisdiction to determine the scope of that criminal responsibility").

[52] The Charter of the International Military Tribunal, for example, was adopted in August 1945 to try war criminals of the European Axis, an alliance that ceased to exist upon the surrender of Italy in 1943 and Germany in the first half of 1945. Following Germany's unconditional surrender, the governments of the United States, the USSR, the United Kingdom, and France assumed supreme authority with respect to Germany Control Council to govern German territory. *See* Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority y Allied Powers (June 5, 1945), http://avalon.law.yale.edu/wwii/ger01.asp. By the time of the enactment of the law creating the International Military Tribunal, the Control Council governing Germany had already been established. *See* Statement by the Governments of the United Kingdom, the United States of America and the Union of Soviet Socialist Republics and the Provisional Government of the French Republic on Control Machinery in Germany (June 5, 1945), *in* ENACTMENTS AND APPROVED PAPERS OF THE CONTROL COUNCIL AND COORDINATING COMMITTee, Vol. I, page 14 (1945), https://www.loc.gov/rr/frd/Military_Law/Enactments/Volume-I.pdf. Similarly, the Charter of the International Military Tribunal for the Far East was adopted in January 1946, several months after the surrender of Japan and ensuing military occupation, during which time it was under the control of the Allied Powers. In November 1994, several months after a transitional government of national unity took power in Rwanda, the UN Security Council adopted a resolution establishing the ICTR. UN Security Council, *Report of the Secretary-General on the Situation in Rwanda*, U.N. Doc. S/1994/924 (Aug. 3, 1994), http://www.un.org/en/ga/search/view_doc.asp?symbol=S/1994/924;
UN, Security Council Resolution 955, ¶ 1 (Nov. 8, 1994) (establishing the International Tribunal for Rwanda), https://documents-dds-ny.un.org/doc/UNDOC/GEN/N95/140/97/PDF/N9514097.pdf?OpenElement. The Extraordinary Chambers in the Courts of Cambodia was established by a Cambodian law in 2001 to try senior

international law scholar Antonio Cassese has explained, "given the historical circumstances in which those provisions were adopted, it can be said that they were primarily intended to cover persons who were state officials when they committed the alleged crime, but *no longer* had such status when brought to trial."[53] In these circumstances, the question of immunity *ratione personae* was simply not relevant, because any entitlement to such immunity that an official may have had would have ended the moment he or she ceased to be a government official.[54]

Indeed, setting aside the ICC (which is addressed later), no international criminal tribunal has prosecuted a *sitting* head of state or head of government. Nonetheless, some have argued that the practice of international courts supports a rule against immunity because some international courts have indicted sitting leaders. In fact, this practice has been extremely rare. Only two international courts – the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Special Court for Sierra Leone (SCSL) – have indicted then-heads of state Slobodan Milošević and Charles Taylor, respectively.[55] Milošević never mounted a challenge, based on the fact that he was still President when it was issued, to the indictment's legitimacy, so the ICTY never ruled on whether it violated customary international law immunities.[56] However, when faced – in a different situation – with the question of whether other types of customary international law immunities applied before the ICTY, the Court unequivocally held that such immunities were available before international tribunals.[57] By contrast, Charles Taylor argued before the SCSL that the indictment

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leaders of the Khmer Rouge regime, which was overthrown in 1979. ECCC, Introduction to the ECCC, https://www.eccc.gov.kh/en/introduction-eccc. The Extraordinary African Chambers in the Courts of Senegal were established in 2012, more than twenty years after the fall of Hissène Habré's regime. Human Rights Watch, *Q&A: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal* (May 3, 2016), https://www.hrw.org/news/2016/05/03/qa-case-hissene-habre-extraordinary-african-chambers-senegal#1.

[53] Cassese, *When May Senior State Officials Be Tried for International Crimes?*, *supra* note 8, at 865.

[54] For the same reason, broad statements by these tribunals that senior government officials could not invoke immunity in prosecutions for international crimes must be read in context, as those statements were made in cases involving officials who had left office by the time the decisions were rendered and they were prosecuted. For example, the International Military Tribunal for the Far East rejected the assertion of the Japanese Ambassador in Berlin, Hiroshi Oshima, that he was protected by diplomatic immunity, concluding that "immunity has no relation to crimes against international law charged before a tribunal having jurisdiction." International Military Tribunal for the Far East, Judgment, p. 1189 (Nov. 1, 1948), https://www.ibiblio.org/hyperwar/PTO/IMTFE/index.html. Hiroshi Oshima, however, had ceased to be an ambassador by the time the tribunal was constituted, *id.* p. 1188, and thus any claim he might have had to immunity *ratione personae* would have ended by that time as well.

[55] Prosecutor v. Milošević, Case No. IT-99-37, International Criminal Tribunal for the Formery Yugoslavia, Indictment (May 22, 1999), http://www.icty.org/x/cases/slobodan_milosevic/ind/en/mil-ii990524e.htm. The indictment against Milošević also contained charges against other high-level state officials, including then-President of Serbia Milan Milutinović, Deputy Prime Minister of the FRY Nikola Šainović, and the Serbian Minister of Internal Affairs Vlajko Stojiljković. *Id.* ¶¶ 38, 43, 46, 50, 54. Milutinović and Sainović both surrendered to the ICTY after leaving office. *See* Prosecutor v. Milutinović, Case No. IT-05-87-T, International Criminal Tribunal for the Formery Yugoslavia, Decision on Milutinovic Motion for Provision Release, ¶ 10 (May 22, 2007), http://www.icty.org/x/cases/milutinovic/tdec/en/070522d.pdf; Prosecutor v. Šainović, Case No. IT-99-37-PT, International Criminal Tribunal for the Formery Yugoslavia Decision on Applications of Nikola Sainovic and Dragoljub Ojdanic for Provisional Release n.3 (June 26, 2002), http://www.icty.org/x/file/Legal%20Library/jud_supplement/supp34-e/sainovic.htm. Stojiljković committed suicide before he could be arrested. Lloyd Vries, *War Crimes Suspect Dies in Suicide*, CBS NEWS (Apr. 11, 2002), https://www.cbsnews.com/news/war-crimes-suspect-dies-in-suicide/.

[56] Gaeta, *supra* note 43, at 317; VAN ALEBEEK, *supra* note 32, at 283, 292.

[57] Prosecutor v. Blaškić, Case No. IT-95-14, International Criminal Tribunal for the former Yugoslavia, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, ¶¶ 38 (Oct. 29, 1997), http://www.icty.org/x/cases/blaskic/acdec/en/71029JT3.html.

and arrest warrant against him were invalid because he had been a sitting head of state at the time of their issuance[58]—an argument the SCSL rejected under the principle "that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court."[59] Yet the SCSL relied on little more for that conclusion than the criminal responsibility provisions in earlier statutes (discussed above), the ICJ Arrest Warrant case (discussed below), and the statement of a British Lord who noted a movement toward—not a settled principle that—the recognition of some crimes as those which should not be covered by immunity when charges are brought before international tribunals.[60] In addition, the SCSL held that because immunity is derived from the principle of the equality of sovereign states, it is not relevant before international criminal tribunals[61]—an argument rejected by the ICTY, which has recognized certain international immunities, as noted above. By the time Charles Taylor was brought before the SCSL, he was no longer a sitting head of state, and thus any concern about the validity of the original indictment was purely academic, since any defect could have been cured simply by reissuance, as the SCSL itself recognized.[62]

Third, the ICJ has ruled that, in some instances, sitting heads of states and other high-ranking officials may be prosecuted before *certain* international criminal courts *if* those courts have jurisdiction, and has not held, as some scholars argue, that these officials are always prosecutable before international courts.[63] The key ICJ decision on this issue was in *Arrest Warrant* case. The principal issue before the ICJ in that case was whether Belgium had violated international customary law by issuing and circulating an arrest warrant against the Minister for Foreign Affairs of the Democratic Republic of the Congo for alleged war crimes and crimes against humanity.[64] The ICJ unequivocally held that the issuance and circulation of the arrest warrant violated the immunity from criminal jurisdiction accorded to the Minister for Foreign Affairs under customary international law.[65] In so holding, the ICJ, in *dicta*, sought to clarify that such immunity is not the equivalent of impunity, since there may be other means of ensuring criminal responsibility, including prosecutions by the official's home country, waiver of immunity, or prosecutions in another state after the individual leaves office.[66] In addition, the ICJ noted that a sitting Minister for Foreign Affairs "may be subject to criminal proceedings before *certain* international criminal courts, *where they have jurisdiction*," and named the ICTY, the ICTR, and the ICC as examples.[67] This is not a sweeping conclusion in favor of international prosecutions; rather, the ICJ was simply "referring to *possible* avenues that may be followed for the prosecution of officials with immunity

[58] Prosecutor v. Taylor, Case No. SCSL-2003-01-I, Special Court for Sierra Leone, Decision on Immunity from Jurisdiction, ¶¶ 6-7 (May 31, 2004), http://www.rscsl.org/Documents/Decisions/Taylor/Appeal/059/SCSL-03-01-I-059.pdf.
[59] *Id.* ¶ 52.
[60] *Id.* ¶¶ 43-52.
[61] *Id.* ¶ 51.
[62] *Id.* ¶ 59.
[63] For examples of arguments that the ICJ made such a holding, *see* Abaya, *supra* note 47, at 201; du Plessis, *Shambolic, shameful and symbolic*, *supra* note 3, at 6, 8; Lucas Buzzard, *Holding an Arsonist's Feet to the Fire? The Legality and Enforceability of the ICC's Arrest Warrant for Sudanese President Omar Al-Bashir*, 24 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 897, 928 (2009).
[64] Case Concerning the Arrest Warrant of 11 April 2000, *supra* note 6, at ¶¶ 1, 13.
[65] *Id.* ¶¶ 54-58, 62, 67-71.
[66] *Id.* ¶¶ 60-61; *see also* Jacobs, *supra* note 45, at 8. This issue was not before the Court, and its discussion on this topic was therefore entirely dicta.
[67] Case Concerning the Arrest Warrant of 11 April 2000, *supra* note 6, at ¶ 61 (emphasis added).

*if certain conditions were met*," not stating that such avenues were available in all cases.[68] As Dapo Akande has persuasively explained, whether an international criminal court may prosecute an official otherwise entitled to immunity depends first on the provisions of the statute regarding criminal responsibility and immunity and second whether the official's state is bound by that statute.[69] The ICTY and ICTR were both created by UN Security Council resolutions[70] and thus were binding on all UN member states, including the Federal Republic of Yugoslavia and Rwanda.[71] The Rome Statute of the ICC, as a treaty, is plainly binding on all states that ratify it. Even assuming that these three tribunals can prosecute sitting heads of state and other senior state officials—something neither the ICTY nor the ICTR did—they are not evidence that *any* international tribunal could do so.

Finally, some scholars have argued that immunity *ratione personae* applies only in foreign, not international, courts because the rationale for such immunity is based on the sovereign equality of states. Because international courts are not states, there can be no immunity in proceedings before them.[72] Taken to its logical conclusion, however, this argument would permit two states to enter into a treaty to create an international tribunal before which no state's officials would have immunity, thereby circumventing the customary law restrictions on their domestic courts.[73] Such a result is plainly impermissible under international law, and increasing the number of States Parties to the court does not change that analysis.[74] Moreover, this argument fails to account for the other long-standing rationales for immunity, including ensuring that those officials responsible for the conduct of foreign affairs are able to conduct their work unimpeded by distraction.[75] An international prosecution is no less disruptive to the work of a head of state or a minister for foreign affairs than a prosecution by a foreign state.

For all of these reasons, ***there is no evidence for the argument that customary international law immunities for sitting heads of state and other senior officials do not apply before international courts***. In order to establish a rule of customary international law, there must be a general practice that is accepted as law (*opinio juris*).[76] As the analysis above demonstrates, there is no general

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[68] Tladi, *The Immunity Provision in the AU Amendment Protocol and the Entrenchment of the Hero-Villain Trend*, *supra* note 11, at 10; *see also* Jacobs, *supra* note 45, at 9.
[69] Akande, *International Law Immunities and the International Criminal Court*, *supra* note 3, at 416-17; *see also* Dapo Akande, *The Bashir Indictment: Are Serving Heads of State Immune from ICC Prosecution?* 2 (July 30, 2008), https://www.law.ox.ac.uk/sites/files/oxlaw/akande1.pdf; Akande, *ICC Issues Detailed Decision on Bashir's Immunity*, *supra* note 51; Jacobs, *supra* note 45, at 9.
[70] UN Security Council Resolution 827, U.N. Doc. S/RES/827 (May 25, 1993) (establishing the ICTY), http://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf; UN Security Council Resolution 955, *supra* note 52.
[71] Jacobs, *supra* note 45, at 8. Although the Federal Republic of Yugoslavia (FRY) was not admitted to the UN until 2000, the FRY had argued throughout the conflict that it was the successor to the Socialist Federal Republic of Yugoslavia and thus a UN member. Akande, *ICC Issues Detailed Decision on Bashir's Immunity*, *supra* note 51.
[72] Tladi, *The Immunity Provision in the AU Amendment Protocol and the Entrenchment of the Hero-Villain Trend*, *supra* note 11, at 9.
[73] Akande, *The Bashir Indictment*, *supra* note 69; VAN ALEBEEK, *supra* note 32, at 277.
[74] Akande, *The Bashir Indictment*, *supra* note 69; *see also* Akande, *ICC Issues Detailed Decision on Bashir's Immunity*, *supra* note 51.
[75] *See supra* notes 4-6 & accompanying text.
[76] International Law Commission, *Identification of customary international law*, *supra* note 42, Draft Conclusion 2; Dire Tladi, *Interpretation and international law in South African courts: The Supreme Court of Appeal and the Al Bashir saga*, 16 AFRICAN HUMAN RIGHTS LAW JOURNAL 310, 315 (2016).

practice of prosecuting sitting heads of state or other incumbent high officials before international criminal courts, and certainly not a practice that is followed because it is believed to be a legal obligation. To the contrary, the foregoing evidence, including the lack of provisions addressing immunity in the statutes of international criminal tribunals and the lack of international prosecutions of incumbent officials, suggests the opposite—that the immunities of *sitting* heads of state and a limited group of other senior officials continues to apply before international criminal courts. The same conclusion has been reached by Dapo Akande (as well as other scholars both in and out of Africa), who persuasively concluded that "[t]here is no general principle that serving heads of States possess immunity only before national courts and that they do not have immunity before international tribunals."[77]

### (d) The Malabo Protocol does not conflict with the Rome Statute of the ICC

Unlike the statutes of earlier international criminal tribunals, the Rome Statute of the ICC includes both a provision on the irrelevance of official capacity and an explicit immunity provision in Article 27:

> (1) This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
>
> (2) Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

The addition of this explicit immunity provision in the Rome Statute of ICC does not, however, change the earlier analysis of whether there is a customary international law norm regarding the availability of immunities before international courts that would thereby affect the African Court. Unlike the ICTY and ICTR, the International Criminal Court was established by treaty and is subject to the same international law rules regarding treaties as any other treaty.[78] There is no impediment to States choosing to enter into a treaty that waives the immunity of their officials, as the Rome Statute has done.[79] But the presence of a rule in a treaty—or even a number of treaties—

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[77] Akande, *The Bashir Indictment*, *supra* note 69; *see also* Akande, *ICC Issues Detailed Decision on Bashir's Immunity*, *supra* note 51; Kiyani, *supra* note 7, at 487, 500; Tladi, *The Immunity Provision in the AU Amendment Protocol and the Entrenchment of the Hero-Villain Trend*, *supra* note 11, at 11 ("the AU is free to include or exclude immunities as a bar to prosecution as it deems fit"); VAN ALEBEEK, *supra* note 32, at 292 ("personal immunities . . . are *a priori* applicable to international courts").

[78] Prosecutor v. Bashir, Case No. ICC-02/05-01/09, International Criminal Court, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, ¶ 26 (Apr. 9, 2014), https://www.icc-cpi.int/CourtRecords/CR2014_03452.PDF.

[79] Alexander K.A. Greenwalt, *Introductory Note to the International Criminal Court: Decisions Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi and the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al*

does not necessarily indicate that the rule reflects customary international law.[80] And with so many states still to ratify the Rome Statute—including major powers such as the United States and China—any provisions in the Rome Statute that were not already customary law, such as article 27, remain far from attaining that status.

In addition to the customary law question, some scholars and commentators have raised concerns that Article 46A Bis of the Malabo Protocol violates, or conflicts with, the immunity provision in Article 27 of the Rome Statute.[81] This misconstrues the effect of both provisions, as well as the relationship between the African Court and the ICC.[82] Article 27 of the Rome Statute removes the immunity of government officials of states parties *in proceedings before the ICC*. By its own terms, it does not affect the availability of immunity before any other court, whether domestic, regional, or international. Meanwhile, Article 46A Bis of the Malabo Protocol provides that immunities for heads of state and certain other officials may be invoked *before the African Court*, but this provision does not—and cannot—affect the availability of immunity before any other court, whether the ICC or another. The fact that the African Court cannot try certain senior officials, including heads of state, does not prevent the ICC from prosecuting those same officials if it has jurisdiction.[83] Likewise, the fact that the ICC may have authority to prosecute heads of state and senior state officials does not affect whether the African Court has that same authority.

### *(e) Irrelevance of the Rome Statute 27/98 debate to ratification of the Malabo Protocol*

There is an ongoing, and highly contentious debate, over whether the immunity provisions of the Rome Statute can be applied to non-member States *in cases before the ICC*.[84] And though there are political reasons why States may be concerned about the ongoing issues related to the Rome Statute 27/98 debate, as a multilateral treaty, the Rome Statute, by definition, binds only those States that ratify it.[85] Accordingly, the Rome "Statute cannot impose obligations on third States without their consent," as the ICC recently admitted.[86] Officials of non-member States thus

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*Bashir & African Union Response*, 51 INTERNATIONAL LEGAL MATERIALS 393, 393 (2012); Gaeta, *supra* note 43, at 325.

[80] International Law Commission, *Identification of customary international law*, *supra* note 42, at Draft conclusion 11(2).

[81] Sètondji Roland Adjovi, International Commission of Jurists – Kenyan Section, *Immunities in International Criminal Law: The Challenges from Africa* 1, 5 (May 2015), http://www.icj-kenya.org/jdownloads/Papers/discussion%20paper%20on%20immunities.pdf; FIDH, *supra* note 16; International Bar Association, *supra* note 14.

[82] Tladi, *The Immunity Provision in the AU Amendment Protocol and the Entrenchment of the Hero-Villain Trend*, *supra* note 11, at 11.

[83] *Id.*

[84] For various perspectives on this debate, *see* Dapo Akande, *The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities*, 7 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 333 (2009); Dire Tladi, *The Duty on South Africa to Arrest and Surrender President Al-Bashir under South African and International Law*, 13 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 2017 (2015); Dyani-Mhango, *supra* note 44; Kiyani, *supra* note 7; Gaeta, *supra* note 43; Jacobs, *supra* note 45.

[85] Vienna Convention on the Law of Treaties, art. 34, 1155 U.N.T.S. 332 (May 23, 1969), https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf; *see also* ICC Decision on the DRC's Cooperation, *supra* note 43, at ¶ 26; AU Press Release No. 002/2012, *supra* note 37, at 2.

[86] ICC Decision on the DRC's Cooperation, *supra* note 43, at ¶ 26. Earlier decisions of the ICC invoked a very different argument, namely that even under customary international law heads of state could not invoke immunities

normally retain all of their immunities even in proceedings before the ICC.[87] In the *Al Bashir* case, however, the ICC has held that where the Security Council refers a situation in a non-member State to the Court, the entire Rome Statute – including its immunity provision – applies to the non-member State and that its officials therefore have no immunity before the ICC.[88] Even assuming that that interpretation is correct – and there is considerable debate to the contrary – many States, as well as the AU, have argued that article 27 only lifts immunities before the ICC itself, and does not affect the immunities that such officials enjoy in *domestic* courts.[89] Under this interpretation, the customary international law immunities that heads of state and senior officials enjoy before domestic courts—immunities recognized in the Rome Statute itself[90]—remain in place, preventing States from arresting Al-Bashir even if that arrest is on behalf of an international tribunal.[91] By contrast, the ICC has taken the position that article 27 lifts immunities not only before the ICC, but also in any domestic proceedings on behalf of the Court because otherwise article 27 would be rendered ineffective.[92] For that reason, article 98 is not implicated.[93] Moreover, even if article 98 applied, Sudan is required to waive any immunity it has under the terms of the Security Council's referral, which required the Government of Sudan to cooperate with the Court.[94] According to the ICC, there is thus no impediment to the arrest of a sitting head of state such as Al Bashir in a national court.[95]

It is critical here to observe that the foregoing debate – while of great legal and political interest – ultimately has no bearing on the debate over ratification of the Malabo Protocol. Regardless of

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to oppose a prosecution before an international court. *See, e.g.*, ICC Decision on Malawi's Cooperation, *supra* note 44, at ¶¶ 36, 43. The ICC appears to have now abandoned this argument.

[87] ICC Decision on the DRC's Cooperation, *supra* note 43, at ¶ 26; Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, International Criminal Court, Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, ¶ 82 (July 6, 2017) [ICC Decision on South Africa's non-compliance], https://www.icc-cpi.int/CourtRecords/CR2017_04402.PDF; Akande, *The Legal Nature of Security Council Referrals to the ICC*, *supra* note 84, at 339.

[88] Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir, ¶¶ 37-38 (Dec. 11, 2017) [hereinafter ICC Decision on Jordan's non-compliance], https://www.icc-cpi.int/CourtRecords/CR2017_07156.PDF; ICC Decision on South Africa's non-compliance, *supra* note 87, at ¶¶ 85-86; *see also* Akande, *The Legal Nature of Security Council Referrals to the ICC*, *supra* note 84, at 340.

[89] ICC Decision on Jordan's non-compliance, *supra* note 88, at ¶ 15 (describing Jordan's argument); Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Submission from the Government of the Republic of South Africa for the purposes of proceedings under Article 87(7) of the Rome Statute, ¶ 52.2 (Mar. 17, 2017) [hereinafter South Africa's Submission in the Al Bashir Case], https://www.icc-cpi.int/CourtRecords/CR2017_01350.PDF; AU Press Release No. 002/2012, *supra* note 37, at 2; *see also* Case Concerning the Arrest Warrant of 11 April 2000, *supra* note 6, at ¶ 47; Wambui Mwangi & Tiyanjana Mphepo, *Developments in international criminal justice in Africa during 2011*, AFRICAN HUMAN RIGHTS LAW JOURNAL 254, 277 (2012).

[90] Rome Statute of the ICC, *supra* note 31, art. 98(1).

[91] South Africa's Submission in the Al Bashir Case, *supra* note 89, at ¶¶ 52.2, 52.6, 61, 65; *see also* Akande, *ICC Issues Detailed Decision on Bashir's Immunity*, *supra* note 51; Tladi, *Interpretation and international law in South African courts*, *supra* note 76, at 331; Gaeta, *supra* note 43, at 329.

[92] ICC Decision on Jordan's non-compliance, *supra* note 88, at ¶ 33; ICC Decision on South Africa's non-compliance, *supra* note 87, at ¶¶ 74-76, 91, 93-94; *see also* Akande, *The Legal Nature of Security Council Referrals to the ICC*, *supra* note 84, at 338.

[93] ICC Decision on Jordan's non-compliance, *supra* note 88, at ¶¶ 33, 39.

[94] ICC Decision on the DRC's Cooperation, *supra* note 43, at ¶ 29; ICC Decision on South Africa's non-compliance, *supra* note 87, at ¶¶ 87-89.

[95] ICC Decision on the DRC's Cooperation, *supra* note 43, at ¶ 29.

the resolution of the foregoing dispute, it will not have any effect on the African Court. Whether or not a head of state or senior state official has immunity before the ICC does not determine whether that same individual has immunity before the ICC and vice versa. So even a determination that the ICC is correct – and that States Parties to the Rome Statute must arrest a head of state or senior state official of a non-member State *when requested to do so by the ICC* – would not impact the jurisdiction of the African Court because those individuals would continue to have immunity *before the African Court* pursuant to the terms of the Malabo Protocol.

Moreover, there is no risk that the debate currently raging over this issue could recur within the context of the African Court. The debate at the ICC has centered on whether States Parties are required to arrest heads of state or senior state officials of non-State parties for prosecution before the ICC. This question arises only because the ICC has authority, under its own statute, to prosecute heads of state and senior state officials. The African Court does not have that same authority under the Malabo Protocol. It could therefore never request the arrest of a head of state or senior state official because it lacks the authority to prosecute them.

### *(f) The immunities provision of the Malabo Protocol is not contrary to the domestic laws of African States*

Several African countries have domestic laws providing that all individuals, including government officials, shall be held criminally responsible for international crimes. For example, South Africa's law domesticating the Rome Statute of the International Criminal Court provides that "[d]espite any other law to the contrary, including customary . . . law, the fact that a person . . . is or was a head of State or government, a member of a government or parliament, an elected representative or a government official . . . is neither (i) a defence to a crime; nor (ii) a ground for any possible reduction of sentence."[96] In addition, some regional protocols address the issue of official status. For example, the Protocol for the Prevention and Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination, which was adopted by the International Conference on the Great Lakes Region, provides that "the official status of a Head of State or Government, or an official member of a Government or Parliament . . . shall in no way shield or bar their criminal liability."[97]

For the same reasons as above, these provisions do not affect the availability of customary law immunities because they concern an entirely different matter—criminal responsibility.[98] These

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[96] South Africa, Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, sec. 4(2), http://www.justice.gov.za/legislation/acts/2002-027.pdf. Other domestic African laws are similar. For example, Burkina Faso's 2009 law on the ICC provides that "La présente loi s'applique à tous de manière égale, sans aucune distinction fondée sur la qualité officiele. En particulier, la qualité officielle de chef d'Etat ou de gouvernement, de member d'un gouvernement ou d'un parlement, de représentant élu ou d'agent d'un Etat, n'exonère en aucun cas de la responsabilité pénale au regard de la présente loi, pas plus qu'elle ne constitute en tant que telle un motif de reduction de la peine." Burkina Faso, Loi No 052-2009/An Portant Determination des Competences et de la Procedure de mise en Oeuvre du Statut de Rome Relatif a la Cour Penale Internationale par les Jurisdictions Burkinabe, art. 7, http://iccdb.webfactional.com/documents/implementations/pdf/Burkina_Faso_Implementing_Legislation.pdf.

[97] UN Convention on the Prevention and Punishment of the Crime of Genocide, art. V, 78 U.N.T.S. 278, art. 12 (Dec. 9, 1948) [hereinafter "Genocide Convention"], https://treaties.un.org/doc/publication/unts/volume%2078/volume-78-i-1021-english.pdf.

[98] *See supra* notes 45-51 & accompanying text.

provisions are therefore not evidence of a customary law norm regarding immunities. Nor do they conflict with article 46A bis of the Malabo Protocol, which addresses immunity rather than criminal responsibility.

There are some African States which also have domestic provisions regarding the availability of immunity for heads of state or other senior state officials. For example, Niger's Penal Code abrogates immunity for state officials with respect to certain international crimes, namely genocide, war crimes, and crimes against humanity.[99] There is, however, no conflict between provisions like Niger's and the Malabo Protocol because such provisions apply to prosecutions only in *domestic* courts. The Malabo Protocol does not alter the availability or unavailability of immunities at the domestic level, and thus even if countries like Niger ratify the Malabo Protocol they remain free to prosecute their senior state officials, including heads of state, before their domestic courts. For all of these reasons, criticisms that the immunities provision of the Malabo Protocol is contrary to national laws are without merit.[100]

### *(g) The scope of the immunities provision is not unclear*

The Malabo Protocol does not define several of the terms used in the immunities provision, namely "AU Head of State or Government," "anybody acting or entitled to act in such capacity," or "other senior state officials."[101] Some scholars have criticized this lack of definitions, arguing that it renders the scope of the immunities provision unclear and that there is therefore a risk that the provision could be extended to protect a wide set of government officials.[102] In fact, the immunities provision is likely to generate significantly less confusion than these critiques anticipate – and cover a relatively limited set of officials – because these terms are likely to be interpreted consistently with customary international law.

Most of the critique regarding the lack of definitions has rested on the terms "anybody acting or entitled to act in such capacity" and "other senior state officials," since the terms "Head of State" and "Head of Government" generate little confusion. For example, some have argued that the phrase "anybody . . . entitled to act in such capacity" could be broadly interpreted to refer to all ministers and perhaps even to all members of parliament because many countries specify that a wide array of officials may act as the head of state when the head of state is absent or otherwise unavailable.[103] This argument, however, is without merit. The *possibility* that a person might one day become the acting head of state does not make that person *entitled* to act as the head of state. Only upon designation as the acting head of state does that individual become so entitled.

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[99] *See, e.g.*, Niger, Loi N° 2003-025 du 13 juin 2003 modifiant la loi N° 61-27 du 15 juillet 1971, portant institution du Code Pénal, Journal Officiel special N° 4 du 7 avril 2004, art. 208.7 ("L'immunité attachée à la qualité officielle d'une personne n'empêche pas l'application des dispositions du présent chapitre" sur les crimes internationaux), http://www.droit-afrique.com/upload/doc/niger/Niger-Code-2003-penal.pdf.

[100] For examples of such criticisms, *see, e.g.*, Jemima Kariri Njeri, *Can the new African Court truly deliver justice for serious crimes?*, INSTITUTE FOR SECURITY STUDIES (July 8, 2014), https://issafrica.org/iss-today/can-the-new-african-court-truly-deliver-justice-for-serious-crimes.

[101] *See* Malabo Protocol, *supra* note 2, annex art. 22 (adding art. 46A bis).

[102] For criticisms of the provision, *see, e.g.*, du Plessis, *Shambolic, shameful and symbolic*, *supra* note 3, at 8; Dire Tladi, *The Immunity Provision in the AU Amendment Protocol and the Entrenchment of the Hero-Villain Trend*, *supra* note 11, at 3-5.

[103] *Id.* at 3 (citing section 90 of the South African constitution).

Although states may have different systems for designating which person will become the acting head of state, as well as long lists of who may be so designated, they are consistent in specifying that only one individual shall become acting head of state at any one time.[104] Accordingly, only one individual is *entitled* to act in the capacity of head of state, and only during periods when the actual head of state is unavailable. This provision of the Malabo Protocol would therefore apply, at most, to only one person at any particular time.

As for the term "senior state official," it similarly has been criticized as potentially granting immunity to a wide array of government officials, and perhaps even every senior member of government.[105] Under well-recognized international law principles, however, immunity *ratione personae* (which is the form of immunity recognized by the Malabo Protocol[106]) is limited to a small group of senior state officials, namely those responsible for the conduct of the State's foreign affairs and international relations.[107] As the ICJ has explained, these officials frequently travel in the performance of their functions and therefore must be in a position to freely undertake such travel to represent their States in foreign affairs whenever the need should arise.[108] The threat of arrest and/or prosecution while traveling in a foreign state would impede the effective performance of these functions.[109] To date, the ICJ has recognized three officials which fall within this category – Heads of State, Heads of Government, and Ministers for Foreign Affairs – but has acknowledged that this list is only illustrative and that other "holders of high-ranking office in a State" also may be covered by immunity.[110] National decisions regarding immunity of senior state officials likewise suggest that the set of senior state officials entitled to personal immunity is small – perhaps extending, for example, to Vice Presidents, Ministers of Defense, and Ministers of Commerce.[111]

There is a strong rationale for not providing a more specific definition, or list of officials covered by immunity, in the Malabo Protocol. First, states use different titles to describe similar positions and a specific definition might inadvertently omit officials from some States who have the same responsibilities as covered officials from other States based solely on their titles. Second, the functions of many government officials have been changing due to globalization, and a position that many years ago might not have had a strong international component (such as the Minister of Commerce) may now have significant responsibility for foreign affairs (such as negotiation of trade agreements) or may gain such responsibility in the future. By leaving the term senior state

[104] *See, e.g.*, Constitution of the Republic of South Africa, sec. 90 (1996) (providing a list, *in order*, of the individuals who may be designated as the Acting President in the event the President is absent or otherwise unavailable), http://www.wipo.int/edocs/lexdocs/laws/en/za/za107en.pdf.
[105] Kuwali, *supra* note 14; Betty Waitherero, *Immunities clause at the African Court of Justice and Human Rights is outrageous*, DAILY NATION (July 2, 2014), https://mobile.nation.co.ke/blogs/-Heads-of-state-Immunities-clause/-/1949942/2369696/-/format/xhtml/-/7lahgiz/-/index.html.
[106] *See supra* notes 3, 11-12 & accompanying text.
[107] Akande, *International Law Immunities and the International Criminal Court*, *supra* note 3, at 409-10; Kielsgard & Gee-kin, *supra* note 5, at 301.
[108] Case Concerning the Arrest Warrant of 11 April 2000, *supra* note 6, at ¶ 53.
[109] *Id.*
[110] *Id.* ¶ 51.
[111] Council of the European Union, The AU-EU Expert Report on the Principle of Universal Jurisdiction, at ¶ 24 n.120 & n. 121 (2009), http://www.africa-eu-partnership.org/sites/default/files/documents/rapport_expert_ua_ue_competence_universelle_en_0.pdf; Kielsgard and Gee-kin, *supra* note 5, at 302.

official undefined, the expanded African Court will be able to undertake a functional analysis of a position's responsibilities at the time a case is brought rather than simply determine whether the official is on a pre-determined list. This flexibility could allow the jurisprudence of the expanded African Court to evolve as official functions change over time.

Nonetheless, due to the confusion generated by these terms, the AU may prefer to create more specific definitions of their intended scope. A variety of options is included in the Options for Ratification section immediately below.