

ACCOUNTABILITY FOR WAR CRIMES AND THE QUESTION OF IMMUNITY UNDER INTERNATIONAL CRIMINAL LAW*

Abstract

Perpetrators of war crimes consist of officials of States and non-State actors. Legal instruments on international criminal law prohibit war crimes and place obligations on State Parties to ensure accountability of perpetrators. Notwithstanding these demands, immunity enjoyed by some State officials who perpetrate war crimes, remain the impediment to the enforcement of these laws on accountability of such perpetrators. This article examined war crimes and the extent at which immunity remains as impediments to accountability of perpetrators under International Criminal Law. Using the doctrinal methodology, the paper found that: acts that constitute war crimes cuts across all the four recognised international crimes; State Parties have the obligations of ensuring that perpetrators of war crimes are held accountable and; immunity operate as impediments for holding some perpetrators of war crimes accountable. The study recommends: encouragement of States to adopt implementing legislation in their national laws to give effect to Rome Statute and discard immunity from prosecution of officials of States for war crimes; increased cooperation of State Parties with the ICC and other States on accountability of perpetrators of war crimes with immunity; and encouragement of members of the International Community to strengthen the ICC and not to weaken it.

Keywords: Accountability, Immunities, International Criminal Law, Perpetrators of War Crimes, State Officials, and War Crimes

1. Introduction

The spate of persistent conflicts in the world today, makes accountability of perpetrators for war crimes a serious concern under International Criminal Law. Indeed, since disputes involving sovereign States are inescapable, armed conflicts resulting from such disputes are also inevitable. However, a resort to the use of force by a sovereign State against another as well as the conduct of such armed conflict is regulated by international law.¹ Accordingly, parties to armed conflict are limited by law to the means and methods employed in the prosecution of armed conflict.² These laws prohibit the performance of certain acts during armed conflicts, which constitute international crimes. One of such international crimes mostly committed during armed conflict is war crime.³ This crime has, in recent time, been shown to be committed by parties to armed conflicts in the world, including the conflicts in Sudan (between the Sudanese Armed Forces (SAF) and the paramilitary Rapid Support Forces (RSF)),⁴ Gaza (between Israel and Hamas)⁵ and Ukraine (between Russia and Ukraine).⁶

The world community recognises the existence of binding international legal instruments which accommodate and regulate conduct of armed conflicts by parties in armed conflict zones. Some of these instruments proscribe certain acts which constitute war crimes committed by parties to armed

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¹ PJ Rowe, 'Law of War', available at <<https://www.britannica.com>>, accessed 13 January, 2025.

² D Stephens and MW Lewis, 'The Law of Armed Conflict – A Contemporary Critique' [2005] 6 *Melbourne Journal of International Law*, 5.

³ D Luban, *et al.* 'Accountability for War Crimes: What Roles for National, International, and Hybrid Tribunals?' *American Society of International Law: Proceedings of the Annual Meeting*. (Washington: Cambridge University Press, 2004: 181).

⁴ A Lewis, 'Sudan's Conflict: Who is Backing the Rival Commanders', available at <<https://www.reuters.comafr>>, accessed 25 December, 2024.

⁵ More than 45,000 Palestines have been killed in Israel's War in Gaza Strip. *Aljazeera News*, 30 December, 2024.

⁶ M Ray, 'Russian – Ukraine War', available at <<https://www.britannica.com>>, accessed 13 January, 2025.

conflicts and also place obligations on State Parties to ensure that perpetrators are held accountable.⁷ The International Criminal Law, through the instrumentality of International Criminal Court (ICC) and other *ad hoc* tribunals, have been used to hold perpetrators of war crimes, accountable. But some of these perpetrators usually consist of officials of States, who are protected from prosecution for war crimes by immunity. Regrettably, some of these State officials from various parts of the world have been identified with the commission of war crimes and warrants of arrest have been issued against them.⁸ Nevertheless, they have remained without being arrested and prosecuted because they are protected by immunity. This therefore raises the question of immunity in enforcing accountability for perpetrators of war crimes.

This article is divided into five parts. Part one is the introduction and part two concerns itself with the consideration of those specific acts or omissions that constitute war crimes. Part three examines the law and accountability for war crimes. Part four concerns itself with immunity and the implications on accountability for war crimes while part five is the conclusion and recommendations.

2. Understanding War Crimes

War crimes consist of one of the categories of crimes that have been recognised under the Rome Statute of the ICC as international crime.⁹ Others are; the crime of genocide,¹⁰ crimes against humanity,¹¹ and the crime of aggression.¹² It has been shown that notwithstanding this identification, specific acts of each of these crimes dovetail, one into the other.¹³ Thus, some of the acts that constitute war crimes also constitute crimes against humanity as well as the crime of genocide.¹⁴ War crimes have been shown to denote not only the violations of the laws and customs of war, but also crimes against the peace, crimes against humanity, and genocide.¹⁵ The Rome Statute of ICC has stated in clear and comprehensive terms, what constitutes war crimes.¹⁶ According to this Statute, war crimes mean: grave breaches of the Geneva Conventions of 12 August 1949; other serious violations of the laws and customs applicable in international armed conflict within the established framework of international law and; in the case of an armed conflict not of an international character, serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949.¹⁷ The specific acts against person or property, considered as grave breaches of the Geneva Convention of 12 August 1949, which constitutes war crimes have been clearly stated to be: wilful killing; Torture or inhuman treatment, including biological experiments; Willfully causing great suffering, or serious injury to body or health; Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; Compelling a prisoner of war (POW) or other protected person to serve in the forces of a hostile power; Willfully depriving a POW or other protected person of the rights of fair and regular trial; Unlawful deportation or transfer or unlawful confinement; Taking of hostages.

Also, specific acts against person or property, considered as other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, which constitutes war crimes, have been clearly named to be: intentionally directing attacks

⁷See for instance, *Rome Statute of the International Criminal Court of 17 July, 1998 (last amended 2010)*, available at <<https://www.refworld.org/docid/3ae6b3a84.html>>, accessed 9 November 2024.

⁸Reuters, 'Which Leaders are on the ICC's Most Wanted List', available at <<https://www.reuters.com>>, accessed 15 January, 2025.

⁹Rome Statute, art 5 and 8.

¹⁰*Ibid*, art 6.

¹¹*Ibid*, art 7.

¹²Rome Statute, art 8b.

¹³MD Hanson, 'Obligations of States on Accountability for War Crimes under International Criminal Law' [2024], *African Journal of Law, Ethics and Education* (7)(6) 66.

¹⁴The Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), Article 3, available at < accessed 25 January.

¹⁵CC Joyner. 'Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability' [1997] *Law and Contemporary Problems* (59)(4) 153.

¹⁶Rome Statute, Article 8.

¹⁷*Ibid*.

against the civilian population as such or against individual civilians not taking direct part in hostilities; Intentionally directing attacks against civilian objects; Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict; Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated; Attacking or bombarding villages, dwellings or buildings which are undefended and which are not military objectives; Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion; Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury; The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory; Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives; Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons; Killing or wounding treacherously individuals belonging to the hostile nation or army; Declaring that no quarter will be given; Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war; Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party; Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war; Pillaging a town or place, even when taken by assault; Employing poison or poisoned weapons; Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices; Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions; Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, Committing outrages upon personal dignity, in particular humiliating and degrading treatment; Committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions; Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations; Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law; Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions; Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

In the case of an armed conflict not of an international character, serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949, specific acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause, which constitute war crimes are: Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; Committing outrages upon personal dignity, in particular humiliating and degrading treatment; Taking of hostages; Sentencing and executions without previous judgment pronounced by a regularly constituted Court. Also, specific acts considered within the classification

of other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, which constitute war crimes are: Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law; Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict; Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives; Pillaging a town or place, even when taken by assault; Committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence also constituting a serious violation of Article 3 common to the four Geneva Conventions; Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities; Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand; Killing or wounding treacherously a combatant adversary; Declaring that no quarter will be given; Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons; Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict; Employing poison or poisoned weapons; Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices; Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions. Undoubtedly, many of the above named acts have been committed by Israeli Government¹⁸ and Hamas¹⁹ in the Israeli/Hamas conflict in Gaza.

3. Law and Accountability for War Crimes

There are existing international laws which prescribe and proscribe war crimes. These laws limit parties to armed conflict to the means and methods employed in the prosecution of armed conflict.²⁰ They also place obligations on State Parties to ensure that perpetrators of war crimes are held accountable. Some of these laws include: the Hague Conventions of 1899 and 1907; Charter of International Military Tribunal at Nuremberg of 1945;²¹ Convention on the Prevention and Punishment of the Crime of Genocide 1948 (the Genocide Convention);²² 1949 Geneva Conventions and the Additional Protocols of 1977;²³ Convention on Prohibition or Restriction on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to Have Indiscriminate Effect 1980; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (Convention Against Torture); and Rome Statute of International

¹⁸ *Aljazeera*, 'Gaza Hospitals on the Brink of Total Collapse from Israel Attacks: UN', available at <<https://www.aljazeera.com>>, accessed 15 January, 2025.

¹⁹ JL MOUNIER, ' Hamas Terrorist Attack on October 7: The Deadliest Day in Israel's History', *France 24*, available at <<https://www.france24.com>> accessed 15 January, 2025.

²⁰ D Baisymakova, 'Defining the Regulations of War in the Hague Convention of 1907' in *The European Proceedings of Social & Behavioural Sciences* [2016], available at <<https://www.europeanproceedings.com/files/data/article/...>>, accessed 12 November 2024.

²¹ United Nations (8 August 1945) *Charter of the International Military Tribunal- Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (London Agreement)*, available at <<https://www.un.org/en/genocideprevention/documents/atrocity-crimes/...>>, accessed 10 September 2024.

²² Genocide Convention (n 14).

²³ Geneva Convention of 1949 and their Additional Protocols, available at <<https://www.icrc.org/en/doc/war-and-land/treaties-customary-law/geneva-convention.htm>>, accessed 27 June 2023.

Criminal Court.²⁴ Article 4 of the Hague Convention of 1907 prohibits POWs from being treated inhumanely in the form of torture, denial of food, clothing and medical treatments and personal belongings.²⁵ The Charter of International Military Tribunal at Nuremberg 1945, in its Article 6 provides for the jurisdictional powers of the tribunal over “crimes against peace,” “war crimes,” and “crimes against humanity” to prosecute and punish those who were judged to be guilty.²⁶ The Genocide Convention codifies the crime of genocide with succinct definition and punishes it.²⁷ In Article 1 of the Genocide Convention, Contracting Parties confirm that genocide, whether committed in peace or war time, is a crime under international law which they undertake to prevent and to punish. Also, the Convention places on State Parties the obligation to take measures to prevent and to punish the crime of genocide, including enacting relevant legislation and punishing perpetrators, whether they are constitutionally responsible rulers, public officials or private individuals.²⁸ Accordingly, any perpetrator of the crime of genocide is required to be held accountable by a competent tribunal of the State in the territory of which the act was committed, or by such international tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.²⁹ Genocide is not to be considered a political crime and perpetrators are to be extradited in accordance with laws and treaties of State Parties.³⁰

The four 1949 Geneva Conventions and the Additional Protocols of 1977, are aimed at reducing human suffering during armed conflict. Thus Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, of 12 August 1949 (Convention I) - provides that the wounded and sick soldiers and medical personnel who are not taking active part in hostility should not be targeted, tortured, inhumanly treated and executed without judgment.³¹ That the sick and wounded during armed conflict be properly treated and cared for. The Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, of 12 August 1949 - (Convention II), provides protection for shipwrecked soldiers, naval forces and hospital ships. The Geneva Convention relative to the Treatment of Prisoners of War, of 12 August 1949 – (Convention III), defined POW, prohibits inhumane treatment, use of torture to extract information from POWs and demand their release and returned to their home countries without delay after end of active hostilities. And, the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949 (Convention IV) prohibits inhumane treatment and attack of civilians, civilian hospitals, medical transports and others. There are three Additional Protocol to the four Geneva Conventions to wit: Additional Protocols of 8 June 1977 I, II and III, which expand the protection provided in the four Geneva Conventions.

Notably, Article 3 in all four Geneva Conventions prohibits the inhumane treatment of civilians and combatants who have surrendered or are wounded or sick. It prohibits violence to life and persons, in particular murder of all, kinds, mutilation, cruel treatment and torture; taking of hostages; outrages upon personal dignity, in particular humiliating and degrading treatment; sentencing and executions without previous judgment pronounced by a regularly constituted Court. It provides for universal jurisdiction for the trial of perpetrators of war crimes and other international crimes. Accordingly, under Articles 49 and 50 of Geneva Conventions I and II, Articles 129 and 146 of Geneva Conventions III and IV, and Additional Protocol I, Article 85, every state that is bound by the Conventions is legally obligated to enact laws, arrest, prosecute and punish those in its territory who

²⁴Rome Statute (n 7).

²⁵The Hague Convention (IV) - Chapter II: Prisoners of War- Regulations: Article 4. (1907), available at <<https://ihl-databases.icrc.org>>, accessed 10 November 2024.

²⁶JM Leffler, 'U.S. War Crimes and Accountability with the International Criminal Court: A Critique' [2006] *Senior Honors Projects Paper* 886, 7.

²⁷Genocide Convention, arts 2 and 3; Rome Statute art 6, where genocide is made a crime.

²⁸*Ibid*, Articles 3 and 4.

²⁹*Ibid*, Article 6.

³⁰*Ibid*, Article 7.

³¹Geneva Convention, Article 3.

are suspected of committing crimes accommodated in the Conventions, regardless of the nationality of the suspect or victim, or the place where the act was allegedly committed. Such State may also extradite the suspect to another State or surrender to an international tribunal for trial if it fails to prosecute. The Convention grants special role to the International Committee of the Red Cross to be granted access to handle the treatment of the wounded, sick, POWs and other humanitarian services.

The Convention on Prohibition or Restriction on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to Have Indiscriminate Effect 1980, restricts or prohibits the use of certain conventional weapons that cause unnecessary suffering or indiscriminate harm and provides protection for civilians and civilian objects as well as places obligations on States to provide assistance and cooperation in that regard. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, prohibits torture and other acts of cruel, inhuman, or degrading treatment or punishment around the world³². In its Article 4, State Parties are required to ensure that all acts of torture are domesticated as offences under their national criminal law while Article 5 provides a universal jurisdiction for prosecution of offenders. Notably, Article 6 of the Convention places obligations on the State Parties to arrest, detain and investigate such perpetrators of torture for prosecutions, once found in their territories regardless of where the alleged act was committed or the nationality or residence of the alleged perpetrator. This is complimented by Article 7 which provides the obligations of State Parties to extradite or prosecute perpetrators of torture and to cooperate with other States in that regard in accordance with Article, 9 of the Convention.

Finally, the Rome Statute of the ICC (Rome Statute) establishes the ICC and makes it a Court to compliment national Courts of State Parties.³³ It prescribes and proscribes war crimes as well as places obligations on States to ensure that perpetrators of war crimes are arrested, investigated and prosecuted. From its preamble, it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes. As such, every State has the responsibility to prosecute perpetrators of suspected crime of genocide, crimes against humanity, war crimes and the crime of aggression.³⁴ However, the ICC may exercise its jurisdiction if the State on the territory of which the crime occurred is a party to the Rome Statute or have accepted the jurisdiction of the Court even though such State is not a party to the Rome Statute.³⁵ Notably, for perpetrators to be held accountable for commission of war crimes, the allegation of commission of such crime must be referred to the Prosecutor of the ICC by a State Party or by the Security Council acting under Chapter VII of the Charter of the United Nations or the Prosecutor of ICC, himself, has independently initiated an investigation in respect of such crimes.³⁶ This is aimed at accountability for both individual and the State who are perpetrators of war crimes.³⁷ The perpetrators, are subject to prosecution notwithstanding their official capacity or status.³⁸ Accordingly, under International Criminal Law, official capacity as Head of State or Government, member of Government executive or parliament, elected representative or a government official does not operate as immunity of such person from criminal responsibility or constitute a ground for reduction of sentence.³⁹ Similarly, immunity from criminal prosecution or special procedural rules which is attached to the official capacity of any perpetrator of war crimes, whether under national or international law, does not operate to bar the ICC from holding such a person accountable for commission of war crimes.⁴⁰ In the same vein, war crimes just like other international crimes, are not subject to the statute of limitation.⁴¹ Accordingly,

³² Convention Against Torture, Article 2.

³³ Rome Statute, Article 1.

³⁴ JM Leffler (n 26) 5.

³⁵ Rome Statute, Article 12 (1)(2)(a).

³⁶ *Ibid*, Article 13(a)(b)(c).

³⁷ *Ibid*, Article 25(4).

³⁸ *Ibid*, Article 27(1).

³⁹ Rome Statute, Article 27(1).

⁴⁰ *Ibid*, Article 27(2).

⁴¹ *Ibid*, Article 29.

perpetrators can be held accountable at any time after the commission of the offence. Notably, the United State of America (USA), China, Russia, Israel, North Korea, Turkey and Saudi Arabia are not State Parties to Rome Statute.⁴²

Existing legal frameworks on war crimes have placed obligations on States, in a bid to ensure that all perpetrators of war crimes are held accountable. The first of such obligations is the obligation to enact domestic laws to enable the prosecution of perpetrators of war crimes.⁴³ Here, States Parties are to make relevant provisions of international treaties relating to war crimes part of their national legislation by domestication.⁴⁴ This obligation has been performed by many State Parties.⁴⁵ The implication of this is that, States that are not parties to the Rome Statute are not under such obligation, hence do not accommodate the provisions of the Rome Statute in their national law. Some of them, such as Russia, goes further to prohibit the extradition of its own nationals for prosecution in other States in its Constitution.⁴⁶ This operates to frustrate accountability for war crimes in that regard. The second, is the obligation of State Parties to prevent war crimes and prosecute perpetrators. In 2012, the International Court of Justice (ICJ) in the case of *Belgium v. Senegal* established that it is the duty of States to investigate and prosecute crimes under international law.⁴⁷ In order to achieve this, war crimes has been made subject to universal jurisdiction. Thus a State Party that arrests a perpetrator of war crimes may either extradite such person to the State where the offense was committed, or surrender such person to an international tribunal established to try such offender, or prosecute him under its own national law.⁴⁸ This is accommodated in many legal frameworks on war crimes including the Rome Statute of the ICC, Genocide Convention and Geneva Conventions.⁴⁹ The third, is the obligation of State Parties to investigate, arrest, detain and extradite perpetrators of war crimes for prosecution. Such perpetrators are to be surrendered to the ICC for trial or extradited to requesting States when such request is made.⁵⁰ The 1949 Geneva Conventions, particularly, Articles 49, 50, 129 and 146 of the four Conventions respectively, accommodates this obligation as well as UN General Assembly resolutions.⁵¹ This obligation extends to the transportation of a person being surrendered to the ICC by another State in accordance with national laws of States of transit.⁵² Such person may also be detained during the period of transit by the requested State.⁵³ The fourth, is obligation of enhancement of international cooperation for the prosecution of perpetrators of war crimes.⁵⁴ This cooperation could be between two State Parties or between a State Party and the ICC.⁵⁵ It may also include non-State Parties where consent is obtained. Such cooperation is mainly required for arrest,

⁴²C Klobuscista and M. Ferragamo, 'The Role of the ICC-Council on Foreign Relations', available at <<https://www.cfr.org>> accessed 8 November, 2024.

⁴³RS Lee, 'States' Responses to Issues Arising from the ICC Statute: Constitutional, Sovereignty, Judicial Cooperation and Criminal Law' [2005] xxi; Preamble of the Rome Statute; Geneva Conventions I of 1949, Article 49, Geneva Conventions II of 1949, Article 50.

⁴⁴J Joyce, 'Legal Obligations of States and Organizations under the Rome Statute, Specifically addressing the legal obligations of States Parties, Non-States Parties, and the Security Council, and analyzing what options exist to aid the ICC in its enforcement of these obligations' [2015] 13, *War Crimes Memoranda*, 286, available at <https://scholarlycommons.law.case.edu/war_crimes_memos/286>, accessed 9 November 2024.

⁴⁵MD Hanson (n 13) 75.

⁴⁶T Law, 'The ICC Has Issued a Warrant for Warrant for Vladimir Putin. Will He Actually Be Arrested?', available at <*Time Magazine*...[time.com](https://www.time.com)>, accessed 9 November, 2024.

⁴⁷D Kansra, 'State Obligations under International Criminal Law: Progress, Challenges and Prospects' [2014] *Rostrum's Law Review* (1)(4) 4.

⁴⁸CC Joyner (n 15) 170.

⁴⁹*Ibid*; Rome Statute art 4; Genocide Convention, art 3 and 4; Geneva Conventions III of 1949, art 129; Geneva Conventions IV of 1949, Article 146.

⁵⁰Rome Statute, Article 89(1) and art 90; Genocide Convention, Article 7; Convention Against Torture, Article 5, 6 and 7, which oblige States to prosecute or extradite.

⁵¹See for instance, General Assembly Resolution 3074 (1973) and General Assembly Resolution 41/160 (1986).

⁵²Rome Statute, Article 89(3)(a).

⁵³*Ibid*, Article 89(d).

⁵⁴*Ibid*, 86, 87 and 89; Additional Protocol I to the Geneva Conventions 1977, Article 88.

⁵⁵Rome Statute, Article 87.

extradition or surrender of perpetrators of war crimes for prosecution and punishment.⁵⁶ The fifth, is the obligation of enforcement of sentence of ICC.⁵⁷ Accordingly, since the ICC does not have its own police force to execute its orders, it relies on the Police of State Parties to arrest people it indicts.⁵⁸ However, where the Police of involved States fail to cooperate with the ICC, accountability remains frustrated.

It is therefore clear that holding perpetrators of war crimes accountable depends significantly on whether States parties perform their obligations or not. Although some State Parties have made recorded gains as shown in cases where perpetrators of war crimes have been held accountable, others have failed to hold perpetrators of war crimes accountable, even when warrants of arrest have been issued by the ICC in that regard.⁵⁹ This failure is usually caused by many impediments which render such States incapable or unwilling to perform their obligations. These impediments operate to bar such perpetrators from arrest, detention, extradition, surrender prosecution and sentence. One of such impediments is immunity of Head of State or Government and other State Officials.⁶⁰

4. Immunity and its Implications on Accountability for War Crimes

Immunity has been shown as an exemption from a legal requirement, prosecution, or penalty granted by Statute or government authorities.⁶¹ It is the legal protection that prevents or shields a person from prosecution. Thus any individual Head of State or diplomat or official of State that is accommodated by immunity, generally enjoys the privilege, in law, of not being arrested, extradited or surrendered, prosecuted or sentenced for any crime committed by such person. The effect of such immunity is that the courts of one State are unable to exercise jurisdiction over a Head of State or official of another State who is otherwise within their jurisdiction.⁶² Although there are different types of immunity, it has been shown that under customary international law, there are two classifications of international immunity which render officials of one State immune from arrest and prosecution in another State.⁶³ These are immunity *ratione personae* (personal immunity or absolute immunity) and immunity *ratione materiae*, (functional immunity).⁶⁴

Personal immunity is that immunity that protects certain State officials from prosecutions by virtue of the offices occupied by them. Such officials include the Heads of State or Government and Ministers for Foreign Affairs.⁶⁵ Such immunity is absolute in that it applies to all acts of the State official, whether done in a public or private capacity, whether done while on an official or private visit, and whether done while in office or prior to taking office.⁶⁶ It has been shown that this immunity applies to the State officials during their terms in office.⁶⁷ Thus, once such State official leaves office, this immunity ceases to be operational.⁶⁸ Nevertheless, such official cannot still be arrested or prosecuted

⁵⁶Rome Statute, Article 102(a) and (b) for distinction between the term 'surrender' and 'extradition'.

⁵⁷*Ibid*, art 103.

⁵⁸A Fichtelberg, 'Putin may not outrun the warrant for his arrest-history shows that several leaders on the run eventually face charges in court' available at <<https://theconversation.com>>, accessed 9 November, 2024.

⁵⁹International Criminal Court. 'Situation in Ukraine: ICC Judges Issue Arrest Warrants Against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova', available at <> accessed 17 March 2023.

⁶⁰B Nijhoff, 'Immunities Barring the Prosecution of the Crime of Aggression Against Ukraine: The Contribution of the ECtHR Case Law' [2023] *European Convention on Human Rights Law Review* (4) 105-114.

⁶¹W Kenton, 'Immunity: Meaning, Types, and Special Considerations', <<https://www.investopedia.com>>, accessed 5 January 2025.

⁶²A Balajee, 'The Changing Paradigm of State Immunity: Impunity or Accountability for International Crimes?' [2003], *National Law School of India Review* (15)(1)(5) 62.

⁶³H King, 'Immunities and Bilateral Immunity Agreements: Issues Arising from Articles 27 and 98 of the Rome Statute' [2006], *NZJPIL* (4) 271.

⁶⁴*Ibid*.

⁶⁵AS Galand, 'Victims' Right to Justice, Immunities and New Avenues for International Criminal Justice' [2023], *International Community Law Review* (25)(2)192.

⁶⁶*Ibid*, 272; See also *Regina v Bow Street Magistrate, Ex Parte Pinochet (No 3)* [2001] 1 AC 147, 202 (HL) Lord Browne Wilkinson, 210 Lord Goff [*Pinochet No 3*].

⁶⁷MA Summers, 'Immunity or Impunity? The Potential Effect of Prosecutions of State Officials for Core International Crimes in States like the United States that are not Parties to the Statute of the International Criminal Court' [2006], *Brooklyn Journal of International Law*(31) 464.

⁶⁸AS Galand (n 65) 192.

for crimes committed in performing the functions of that office as at the time he occupied the office because of Immunity *ratione materiae* (functional immunity or subject matter immunity). This is the class of immunity that provides all State officials with protection from prosecution but only in respect of their official acts - that is acts committed in the course of performing the function of their office for and on behalf of the State. This immunity shields the state officials from the jurisdiction of another state's courts for acts committed in their "official capacities."⁶⁹ Consequently, unlike immunity *personale*, this immunity continues after the official has left office.

There are various national laws of all States as well as treaties, which provide for immunities of State officials. Some of these treaties include: Vienna Convention on Diplomatic Relations 1961; Vienna Convention on Consular Relations 1963; Convention on the Privileges and Immunity of the United Nations 1946; United Nations Convention on Special Missions 1969 European Convention on State Immunity 1972; and Rome Statute of the ICC 1998. Despite these treaties, under International Criminal Law, no person is protected by immunity from prosecution for war crimes before the ICC.⁷⁰ Also, Article 27(2) of the Rome Statute states that all immunity, including personal immunity, which would otherwise be enjoyed at international or national law, are ineffective to bar the ICC from exercising its jurisdiction. In view of this provision and amidst existing arguments on immunity of State officials from prosecution, it has been shown that while non-States Parties may waive their officials' immunity, in the absence of such a waiver, their officials are immune from being arrested and surrender for prosecution before the ICC.⁷¹ This situation has been shown to be different for States Parties.⁷² Thus by Article 27 of the Rome Statute, the immunity of State Party officials under national and international law will not bar the ICC or any special international tribunal from prosecuting such officials.

It is therefore crystal clear that holding Head of States or officials of States accountable for war crimes cannot occur unless State Parties perform their obligations under the ICC or other relevant laws in that regard. This constitute a serious impediment because the ICC has no police of its own to enforce international law and trial before the ICC cannot also be undertaken in absentia.⁷³ As such, reliance for arrest and trial of perpetrators of war crimes is placed on State Parties who employ their national laws alongside international laws to enforce accountability.⁷⁴ It has been shown that in the prosecution by State Parties, a high government official who holds personal immunity will be immune from prosecution even in foreign national courts for commission of an international crime while in office.⁷⁵ This position has been shown to be affirmed by the International Court of Justice (ICJ),⁷⁶ the House of Lords⁷⁷ and the Belgian Court of Cassation.⁷⁸ Also, the principle of *pacta tertiis nec nocent nec prosunt* which is enshrined in Article 34 of the Vienna Convention on the Law of Treaties⁷⁹ as a fundamental international treaty law principle, shows that a treaty does not create either obligations or rights for a third State without its consent.⁸⁰ This is important because some non-State Parties may have existing bilateral treaties between them and other States on immunity of State officials who may be involved in

⁶⁹MA Summers (n 67).

⁷⁰Rome Statute, Article 27(1).

⁷¹*H King* (n 63) 284.

⁷²*Ibid.*

⁷³Rome Statute, Article 63.

⁷⁴D Akande 'International Law Immunities and the International Criminal Court' [2004], *Am J Int'l L* (98)(407) 420.

⁷⁵*H King* (n 63) 272-273.

⁷⁶A Watts 'The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers' [1994], *Recueil des Cours* (247)13; *Case Concerning the Arrest Warrant of 11 April 2000 (Congo v Belgium)* (Judgment) [2002] ICJ Rep 1, para 51 Judgment of the Court [*Arrest Warrant Case*].

⁷⁷*Regina v Bow Street Magistrate, Ex Parte Pinochet (No 3)* [2001] 1 AC 147, 202 (HL) Lord Browne Wilkinson, 210 Lord Goff [*Pinochet No 3*].

⁷⁸A Cassese 'The Belgian Court of Cassation v the International Court of Justice: The Sharon and Others Case' [2003], *J. Int'l Crim Just* (1) 437 [Cassese 'The Sharon and Others Case'].

⁷⁹Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331, Article 34.

⁸⁰*H King* (n 63) 277.

international crimes. Such bilateral agreement operate to frustrate accountability of perpetrators of war crimes that are clothed with immunity arising from such treaty. And Article 27 has not removed such international law immunities between States Parties themselves when the ICC is asserting jurisdiction and requesting cooperation from such States. This also constitutes an impediment, which leaves accountability of such officials of non-State Parties at the convenience of such State to waive such immunity and grant consent for arrest and prosecution in that regard. Also, by Article 98(1) of the Rome Statute provides the ICC may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity. This provision is yet another potential impediment to State Parties arrest and surrender of State officials on immunity who are perpetrators of war crimes to ICC as well as impediment to the ICC obtaining custody of such individuals for prosecution. It has been shown that this article purports to limit the court's power to request the surrender of individuals from States when to do so would subject the requested State to conflicting international obligations regarding the immunity of the State or the individual involved.⁸¹ Similarly, Article 98(2) of the Rome Statute places a duty on the ICC to refrain from requesting the surrender of an individual when the State Party has entered into a bilateral agreement with another State, particularly where such other State is a non-State Party, protecting the surrender of such individual for prosecution by the ICC unless consent of the sending State is obtained in that regard.

Anti-accountability national laws of non-State Parties is yet another impediment to accountability of perpetrators of war crimes who are accommodated by immunity. State Parties are under obligation to cooperate with the ICC in the investigation and prosecution of perpetrators of war crimes.⁸² This obligation does not apply to non-State Parties like the US, Russia, Israel and others some of whom have national laws prohibiting the arrest and extradition and prosecution of their nationals in ICC or foreign Courts.⁸³ For instance, in the US, the American Service Members' Protection Act provides that no US Court, agency or entity of any State or local government may cooperate with the ICC in response to a request for cooperation submitted by the ICC pursuant to the Rome Statute.⁸⁴ This anti-accountability law makes US citizen immune from arrest, surrender and prosecution before the ICC. This frustrates accountability of perpetrators of war crimes in States where such laws exist.

5. Conclusion and Recommendation

The increasing incidents of armed conflicts across the world with concomitant war crimes, perpetrated by actors during armed conflict present serious concerns to the international community in the field of International Criminal Law. Existing legal frameworks on war crimes have prohibited it and placed obligations on State Parties to ensure that perpetrators are held accountable. Accordingly, States are obliged to cooperate with each other and the ICC in ensuring that such perpetrators are investigated, arrested, detained, extradited or surrendered, prosecuted and sentence for commission of war crimes. Notably, many perpetrators of these crimes have been shown to be Head of States or State officials, who are protected by immunity. Although under international law, immunity does not operate to prevent the prosecution of an individual before the ICC, State Parties are under obligations to ensure that such prosecution is undertaken. In performing these obligations, the immunity remains as impediment to accountability of such officials thereby frustrating such States in view of its recognition by such State Party.

⁸¹*H King (n 63) 289.*

⁸²Rome Statute, Article 86.

⁸³*T Law (n 47).*

⁸⁴American Servicemembers' Protection Act 22 USC SS 7421-7433.

In view of the identified problems in this article, the study recommends firstly, encouragement of States to adopt implementing legislation in their national laws to give effect to the ICC and discard immunity from prosecution of Head of States or officials of governments for war crimes. It has been shown that the failure of national legislation to give effect to the Rome Statute, particularly on issues of universal jurisdiction and immunity in view of State obligations, constitutes one of the impediments to accountability of perpetrators of war crimes.⁸⁵ It is the absence of such implementing national legislation that made the Supreme Court of Senegal, in 2000-2001, to confirm the decision of the lower Court that dismissed the charges against the then President of the Republic of Chad, Hissene Habre, when it ruled that Senegal had not enacted legislation to implement the Convention Against Torture and therefore had no jurisdiction to pursue the charges because the crimes were not committed in Senegal.⁸⁶ State laws granting immunity should be reviewed by inclusion of clearly defined exceptions to ensure that they are not too broad as to leave beneficiaries completely clothe with protection from prosecution for war crimes. Accordingly, States should adopt new laws or amend existing ones that gives them universal jurisdiction to prosecute war crimes committed outside of their jurisdictions once the perpetrator is found within the jurisdictions. This is what happened in the case of Hissene Debre in Senegal.⁸⁷ Similarly States should increase entering into treaty agreements that demand for accountability of State officials who are perpetrators of war crimes and to ratify and implement such treaties. Also, it is clear that perpetrators of war crimes who pleads immunity would enjoy no criminal immunity under international law in their own countries, and could be tried in hybrid or special courts of those countries in accordance with the relevant laws.

Secondly, this article recommends increased States cooperation with the ICC and other States. It has been shown that under the Rome Statute, persons alleged to have perpetrated war crimes cannot be tried in absentia.⁸⁸ This underscores the importance of State cooperation with the Court on matters of arrest and surrender of such person, particularly where such person is protected by immunity. Thus, the Security Council of the UN should require both State Parties and non-State Party to cooperate with the ICC so as to avoid the potential of undermining the Security Council's referrals, which usually hinders the Court's ability to secure custody of suspects and prosecution. This would help in a situation where a perpetrator of war crimes in one State Party flees to a neighbouring State that is not a party to the Rome Statute. Since the non-State Party is neither bound by the Rome Statute nor Security Council Resolution to perform the obligations of ensuring accountability of such perpetrator, cooperation of such country with the ICC in the form of consent and waiver of immunity where applicable is the remedy. This is so because, notwithstanding existing arguments on immunity of State officials from prosecution for war crimes, it has been shown that while non-States Parties may waive their officials' immunity, in the absence of such a waiver, these non-State Party officials are immune from any criminal proceedings before the ICC.⁸⁹ This situation has equally been shown to be different for States Parties.⁹⁰ Thus, by virtue of Article 27, the immunity of State Party officials under national and international law will not bar the ICC or any special international tribunal from exercising its jurisdiction to prosecute such officials. So to remedy this situation, non-States Parties should be encouraged to cooperate with the ICC and to waive such immunity or create *ad hoc* tribunal where both national and international law could be used to arrest and prosecute perpetrators of war crimes.

Thirdly, members of the International community should be encouraged to strengthen the ICC and

⁸⁵ J Pejic, 'Accountability for International Crimes: From Conjecture to Reality', [2002] *RICR Mars IRRC* 84 (845) 25.

⁸⁶ EWC/CCJ/JUD/06/10; *Hissene Habre v. Republic of Senegal*, available at <<https://www.internationalcrim...com>>, accessed 15 January 2025.

⁸⁷ *New York City Bar Association*, 'The Trial of Hissene Habre', available at <<https://www.nycbar.org>h...>>, accessed 15 January 2025.

⁸⁸ Rome Statute, Article 63(1).

⁸⁹ *H King (n 63)* 284.

not to weaken it. Accordingly, States, particularly those with veto powers, should be encouraged not to oppose the majority decisions of the UN Security Council or a well-considered decision of the ICC. This is necessary because doing so would prevent the jurisdiction of the ICC from being undermined and eroded, which frustrates accountability for perpetrators of war crimes. Where this is done, State officials with immunity could be prosecuted for war crimes through an international tribunal that would exercise its powers on the basis of a United Nations Security Council Resolutions. This may be impossible where such State official is a national of a permanent member of UN Security Council who uses its veto power against such Resolution. Thus for this to be practicable, it is time for the end to the use of veto powers in the UN Security Council. Veto power has been shown as a major force resisting full actualisation of global peace and security and renders the global system chaotic and anarchic.⁹¹ It is undemocratic and lacks transparency.⁹² The use of veto powers has frustrated the efforts of the UN Security Council in ensuring peace, accountability and provision of humanitarian services to civilians. And since justice upholds equity, then it is time that equality of all states in the exercise of their powers in the world community be recognized. Also, since the world encourages democratic governance, then the decision of the UN Security Council should be democratically taken by majority decision of the members of the UN Security Council, without exercise of veto power to frustrate such majority decision. Where this is done, established international tribunals would exercise their jurisdictions on the basis of a United Nations Security Council Resolution to hold perpetrators of war crimes accountable in spite of existing immunity.

⁹¹ B NnekaIyase and SF Folarin, 'A Critique of Veto Power System in the United Nations Security Council' [2018], *Acta Universitatis Danubius. Relationes Internationales* (11)(2) 104.

⁹² *Ibid*, 109.