

Exploring the Obligations for States to Act upon the ICC's Arrest Warrant for Omar Al-Bashir

A Legal Conflict between the Duty to Arrest and the Customary Status of Head of State Immunity

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"When Morgan Tsvangirai raised his hand to take the oath of office in the Zimbabwean government of national unity – with Robert Mugabe – all the international pressures and legal threats were forgotten. Maybe I should ask Tsvangirai to raise his hand here as well?"¹

Omar Al-Bashir

In its decision of 4 March 2009, the Pre-Trial Chamber (PTC) of the International Criminal Court (ICC) authorized the issuance of an arrest warrant for the Sudanese President, Omar Al-Bashir. This unprecedented judicial measure, through which an incumbent Head of State of a non-State Party was charged before the ICC, has prompted a series of legal questions on the principle of immunity that lie at the heart of the development of international criminal law. This article contends that, due to the ICC's standing as an independent international judicial body, Al-Bashir's entitlement to Head of State immunity does not shield him from being prosecuted before the Court. Nonetheless, it is argued that, as a result of Article 98(1), the Chamber's request for arrest and surrender is an ultra vires act, and national authorities of State Parties would be barred from acting upon the warrant under customary international law. Only were Al-Bashir's immunity to be waived, a subsequent Security Council resolution to be adopted, or were Al-Bashir to be removed from office, would States be allowed to arrest and surrender him to the International Criminal Court.

I. Introduction

On 4 March 2009, the Pre-Trial Chamber (PTC) of the International Criminal Court (ICC), in pursuance of the Prosecutor's application of July 2008, issued a warrant for the arrest of the President of Sudan, Omar Al-Bashir,² charging him with war crimes and crimes against humanity.³ Subsequently, the PTC directed the Registry to transfer a request for the arrest and surrender of Al-Bashir to the majority of the State community. In doing so, the PTC has paved the way towards an unprecedented scenario in which an incumbent Head of State of a non-State Party to the ICC Rome Statute (hereafter

'the Statute' or 'ICC-St.')⁴ is prosecuted before a treaty-based criminal court.

The juridical process underpinning the case of Al-Bashir was set in motion by the Security Council in September 2004, when it called for the establishment of an international commission to conduct an investigation into the crimes committed in the Sudanese region of Darfur.⁵ On the basis of the report that was subsequently published, which established that "the Government of the Sudan and the Janjaweed are responsible for serious violations of international human rights and humanitarian law amounting to crimes under international law"⁶, the Security Council, by means of Resolution 1593 (2005),⁷ referred the situation in Darfur, from 1 January 2002 onwards, to the ICC. This referral, which the Council issued while acting under Chapter VII of the Charter of the United Nations (UN), was the first time in the Court's history that the Council exercised its power to trigger the jurisdiction of the ICC.

This unparalleled course of action has given rise to a multitude of legal questions and ambiguities that cast great uncertainty over the continuation of the proceedings against Al-Bashir. In the first place, the issue of State cooperation with the Court arises, which rests to a large extent on the wording of the Security Council Resolution that called for the referral, instead of exclusively on the Rome Statute itself. Secondly and most significantly, Al-Bashir's official function as Head of State raise the issue as to the relevance of any immunity which he may be entitled to under international law. International immunities are ordinarily governed by customary international law, but they can be further shaped by the relevant statutory provisions of the ICC and the legal authority of the Security Council. It is the interplay and the tension between these three legal regimes, namely the ICC as a treaty-based Court, the Security Council as an authoritative political body, and customary international law as the underlying general legal framework, which makes the specific case of Al-Bashir one of such a compelling nature.

The present study will start out by addressing the question of Head of State immunity, and the extent to which it protects

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¹ *Moorcraft*, *The American Spectator* 29.5.2009, §. 2.

² Warrant of Arrest for Omar Hassan Ahmad Al Bashir, Omar Hassan Ahmad Al Bashir (ICC-02/05-01/09), Pre-Trial Chamber I, 4.3.2009 (hereafter "Arrest Warrant").

³ Summary of Prosecutor's Application under Art. 58, Omar Hassan Ahmad Al Bashir (ICC-02/05/152), 14.7.2008. For the redacted version, see Public Redacted Version of the Prosecutor's Application under Art. 58 (ICC-02/05-157-AnxA).

⁴ Rome Statute of the International Criminal Court adopted and opened for signature on 17.7.1998, by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, A/CONF.183/9, entered into force 1.7.2002.

⁵ The creation of the International Commission of Inquiry on Darfur was done in pursuance of UN SC Res. 1564, 18.9.2004.

⁶ International Commission of Inquiry on Darfur, Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General 3 (25.1.2005), available at the ICC homepage, <http://www.icc-cpi.int> (hereafter "Commission of Inquiry Report").

⁷ UN SC Res. 1593, 31.3.2005.

the chief representative of a non-State Party to the Rome Statute from prosecution before the ICC, and from apprehension and surrender to the Court by national authorities. After the contemporary status of Head of State immunity under customary international law has been considered, the legal issues surrounding the PTC's issuance of the arrest warrant will be scrutinized in two ways. In the first place, it is crucial to discern if, and on what basis, the ICC is qualified to prosecute the Head of State of a non-State Party. Secondly, even in those cases where Head of State immunity does not present a bar for prosecution, the question arises as to the extent to which States have to uphold the immunities that the officials enjoy within inter-State relations, when faced with a request by the Court. Would States be authorized, by virtue of the ICC's request for cooperation, or on the basis of the Council's referral, to disregard such customary duties for the purpose of arresting Al-Bashir and surrendering him to the Court? On the basis of this analysis, and by considering the ICC's cooperation regime and the implications of Resolution 1593, it should, subsequently, be possible to discern the exact legal obligations that are held by States in connection with the ICC's judicial proceedings and to act upon the ICC's arrest warrant in the specific case of Al-Bashir. The foregoing analysis should allow for a concluding assessment of the legal possibilities and prospects for the future arrest and criminal prosecution of Al-Bashir.

This in-depth analysis of the case of Al-Bashir may carry significant academic and practical weight. It aims to disentangle a number of complex legal issues, and in particular to shed light on the rights and duties that States have toward the ICC and other States. The critical legal questions that are elicited by the warrant for Al-Bashir's arrest are not just confined to the particular case of Al-Bashir. Indeed, they are relevant for a wider discussion of the interrelationship between different legal regimes: ICC law, UN law (Security Council resolutions), and customary international law.

II. The Question of Head of State Immunity in Relation to the International Criminal Court: A Dichotomy between Immunity from Prosecution and Immunity from Arrest

In its decision of 4 March 2009, the ICC's Pre-Trial Chamber, having issued the warrant for the arrest of President Omar Al-Bashir, i.e., the third arrest warrant in relation to the Darfur situation,⁸ called upon the Registrar to "prepare a request for cooperation seeking [his] arrest and surrender".⁹

⁸ The PTC had previously issued an arrest warrant for Ahmad Harun and Ali Kushayb in its Decision on the Prosecution Application Under Art. 58 (7) of the Statute, Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman (ICC-02/05-01/07-1), Pre-Trial Chamber I, 27.4.2007; Since then the PTC has issued a summons to appear for Abu Garda in its Decision on the Prosecutor's Application under Article 58, Bahr Idriss Abu Garda (ICC-02/05-02/09), Pre-Trial Chamber I, 7.5.2009.

⁹ Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Omar Hassan

The PTC urged such request to be transmitted to: (1) the competent Sudanese authorities, (2) all States Parties to the Statute, and (3) all United Nations Security Council members not parties to the Statute. On top of this, it directed the Registrar "to prepare and transmit to *any other State* any additional request for arrest and surrender which may be necessary for [his] arrest and surrender"¹⁰.

The circulation of this warrant of arrest for the sitting Head of the Sudanese Republic raises several vital questions concerning the status that Al-Bashir holds in relation to the Court. To what extent does the immunity that he enjoys as the Head of State of a country that has not ratified the Statute protect him from the jurisdiction of the ICC or from the obligations of arrest and surrender that States Parties hold? Moreover, considering the duties that States hold towards Al-Bashir under the customary international law rules on immunity, can the very issuance and circulation of the arrest warrant by the ICC be considered as "lawful"? These issues not only lie at the core of the specific case against Al-Bashir, but they have broader relevance for the field of international criminal justice, where distinct but associated legal regimes interact with one another. In order to answer the questions raised, it will be necessary to closely analyze the concept of immunity within international criminal law, and its specific relation to the ICC.

1. The Status of Functional and Personal Immunities in Customary International Law

It is a well-known rule within international law that, although not in an absolute sense, certain State officials are entitled to immunity from criminal prosecution in the court of another State.¹¹ This customary rule is based on the fundamental principles of State sovereignty and sovereign equality¹² and on extensive State practice. The concept of immunity for governmental representatives has its foundation in the doctrine that, by means of their domestic jurisdictions, foreign authorities should not be able to hinder the official performance of those acting for or on behalf of another State.¹³ Naturally, among those holding a status of immunity are Heads of State, whose position, as a constitutional figure, is central to "the structure and functioning of the [...] State"¹⁴. Under

Ahmad Al Bashir (ICC-02/05-01/09), Pre-Trial Chamber I, 4.3.2009 (hereafter "Al-Bashir Decision").

¹⁰ Al-Bashir Decision (supra note 9), p. 93 (emphasis added).

¹¹ See among others *Akande*, *American Journal of International Law* (hereafter *AJIL*) 98 (2004), 407 (409); *Simbeye*, *Immunity and International Criminal Law*, 2004, p. 2; *Wik-remasinghe*, in: Evans (ed.), *International Law*, 2003, S. 387.

¹² *Shaw*, *International Law*, 2nd edition 2008, p. 697.

¹³ *Broomhall*, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law*, 2nd edition 2003, p. 129.

¹⁴ *Gaeta*, in Cassese et al. (eds.), *The Rome Statute for an International Criminal Court: A Commentary*, Vol. 1, 2002, p. 988. Cf. *Watts*, *Recueil des Cours* 9 (1994), 35 (52): "[Heads of State immunity] is in many respects still unsettled, and on which limited State practice casts an uneven light".

customary international law Heads of State are endowed with both functional and personal immunity, each holding a particular function and application. Functional immunity, or immunity *ratione materiae*, serves to shield State representatives from those acts that are performed while acting within an official function or on behalf of the State. This stems from the maxim that official acts by a representative of the State are fully attributable to the State itself, for which the representative cannot be called to account.¹⁵ Inherently, functional immunity spans solely over official acts that are taken on behalf the State, and therefore excludes any conduct performed prior to or after the holding of office, as well as any act taken in a private capacity. Secondly, personal immunity, or immunity *ratione personae*, is set in place to protect principal officials on account of their office, so as to guarantee their proper functioning within international affairs, without the danger of their being subject to (abuse at the hands of) a foreign jurisdiction. Because of its aim of preventing *any* undue impairment or interference by foreign authorities of the functioning of certain officials on behalf of the State, immunity *ratione personae* is *absolute* in nature, not restricted to specific conduct.¹⁶ This immunity is, however, restricted in a temporal sense, considering that it is lifted once the individual no longer holds his position in office.¹⁷

Despite the customary status of these two categories of immunity to which Heads of State are entitled, they have, throughout the last century, been placed in peril by the expansive movement of global criminal justice, which has brought about a clash between two branches of international law.¹⁸ The deeply rooted principles of immunity, which safeguard State officials from the reach of a foreign jurisdiction, have been called into question by the rapidly developing human rights and anti-impunity movement. The increasing push for the attribution of international criminal responsibility for gross violations of human rights and humanitarian law has led to a strong erosion of these traditional immunities.¹⁹

With regard to the former category of immunity – immunity *ratione materiae* – despite its deep-rooted foundations, throughout the 20th century, a trend has gradually developed towards limiting this traditional concept of *full* functional immunity. Following the heinous crimes committed during the Second World War, on a national level, the idea took root that this form of immunity should not hold for those cases in which a senior official is charged with having committed an international crime. There are two reasons for this restriction of functional immunity. Firstly, it ties in directly with the

well-founded principle of individual criminal responsibility, which, in the case of international crimes, rejects the defense that official capacity should exempt the perpetrator of accountability.²⁰ Secondly, it avoids an irreconcilable clash between, on the one hand, the granting of functional immunity for international crimes and, on the other hand, the “accordance of universal jurisdiction over such crimes”²¹. If it was accepted under international law that conduct performed within an official capacity could *never* amount to individual responsibility, then the concept of transnational prosecution for such crimes as genocide and torture would ring hollow, leaving universal jurisdiction as an empty shell. Instead, the development of this *lex specialis* to the rule of immunity *ratione materiae* into a rule of customary law is, at present, hard to dispute. It has received strong confirmation in the notorious English House of Lords case of *Ex Parte Pinochet*²² and numerous other examples of national case law.²³ It furthermore enjoys far-reaching academic support.²⁴

At a supranational level, this progression towards the removal of functional immunity for international crimes has been even more apparent. Following the 1945 London Agreement,²⁵ establishing the International Military Tribunal, the development of each of the international criminal tribu-

²⁰ In re Goering at Nuremberg Trials (1946), reprinted in 13 International Law Reports (hereafter ILR) 203, 221 (1951) (Int'l Mil. Trib.).

²¹ *Akande*, AJIL 98 (2004), 407 (415). See also *Bianchi*, EJIL 10 (1999), 237 (261): “International law cannot grant immunity from prosecution in relation to acts which the same international law condemns as criminal and as an attack on the interests of the international community as a whole”.

²² See among others the statement made by Lord Browne-Wilkinson in *R. v. Bow Street Stipendiary Magistrate and Others, ex parte Pinochet* (Amnesty International and Others intervening, No. 3 [1999]), 2 All E.R. 97 (House of Lords), (hereafter “*Ex Parte Pinochet*”), p. 111: “the first time [...] when a local domestic court has refused to afford immunity to a head of state or former head of state on the grounds that there can be no immunity against prosecution for certain international crimes”.

²³ See among others the judgment in the *Eichmann case* in Israel (1961), 36 ILR 5 (District Court Jerusalem), affirmed; (1961), 36 ILR 277 (Israel Supreme Court); *Fédération Nationale des Déportés et Internes Résistants et Patriotes v Barbie* in France (1985), 78 ILR 125 (1988); Order of the Spanish Audiencia Nacional in the *Scilingo case* (4.11.1998), no. 1998/22604.

²⁴ See among others *Shaw* (supra note 12), p. 738; *Akande*, AJIL 98 (2004), 407 (413); *Broomhall* (supra note 13), p. 148; *Gaeta* (supra note 14), pp. 981-983.

²⁵ Art. 7: “The official position of the defendants, whether as Heads of States or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment” in: Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis’, London, 8.8.1945, 8 UNTS 279.

¹⁵ *Akande*, AJIL 98 (2004), 407 (413); *Gaeta* (supra note 14), p. 976.

¹⁶ Because the rationale behind such immunity is independent of the nature of the conduct, it includes acts that are both private and public, performed while in office or prior to taking office, and irrespective of the nature of the crime.

¹⁷ *Cryer et al.*, An Introduction to International Criminal Law and Procedure, 2007, p. 423.

¹⁸ *Akande*, AJIL 98 (2004), 407.

¹⁹ *Cassese*, International Criminal Law, 2nd edition 2008, p. 309.

nals²⁶ leading up to the ICC has been characterized with a central statutory provision eliminating the possibility for Heads of State to hide behind the shield of functional immunity when charged with crimes against international law.

In contrast to the issue of functional immunity, the debate surrounding the question of whether, under customary international law, immunities *ratione personae* would also be nullified in cases where a senior official is charged with an international crime turned out more contentious. With regard to personal immunity, a distinction must be drawn between, on the one hand, proceedings carried out at the national level and, on the other, the jurisdictional reach of international criminal tribunals. With regard to the former, considering the importance of the proper functioning of a Head of State for both its own country's internal affairs, as well as an effective system of international cooperation and relations, it has been generally established that personal immunity subsists *even* in cases where the official is charged with an international crime. The customary standing of this notion can be traced back to a vast body of domestic case law,²⁷ as well as the momentous Arrest Warrant case before the ICJ. With regard to the latter case, which applied Head of State immunity per analogiam to the immunity of Ministers of Foreign Affairs, the Court ruled that "[i]t has been unable to deduce [...] that there exists under customary international law any form of exception to the rule according [full] immunity from criminal jurisdiction and inviolability [...], where they are suspected of having committed war crimes or crimes against humanity"²⁸. However, as immunity should not mean impunity, the judges proceeded by listing four exceptions to the rule of absolute personal immunity. Immunity *ratione personae* would not "represent a bar to criminal prosecution": (1) within the official's own State, (2) if the representing State were to waive the immunity, (3) if the official ceases to hold his office, and, most importantly for present purposes, (4) before certain international criminal courts.²⁹

²⁶ Art. 6 of the Charter for the International Military Tribunal for the Far East (although the Art. does not make a specific referral to the position of a Head of State); Art. 7 (2) ICTY-St.; Art. 6 (2) ICTR-St.; Art. 6 (2) SCSL-St., as amended 16.1.2002.

²⁷ See among others, the case against Libyan de facto leader Muammar al-Gaddafi, Cour de Cassation, Arrêt No. 1414 (13.3.2001), 125 ILR 456; the civil proceedings against Zimbabwean President Robert Mugabe in *Tachione v. Mugabe*, 169 F Supp 2d 259 (SDNY 2001); Judgment, *Furundzija* (IT-95-17/1-T), Trial Chamber II, 10.12.1998, at §§ 140 and 156; *Ex Parte Pinochet* (supra note 22), 126-7, p. 149, 179 and 189.

²⁸ Case Concerning the Arrest Warrant of 11.4.2000 (Democratic Republic of Congo v. Belgium), ICJ Reports 2002, p. 3, § 58 (hereafter "Arrest Warrant case"). This ruling by the Court, although concerning the immunity held by Ministers of Foreign Affairs, considering the process of analysis, applies in the same manner to Heads of State.

²⁹ Arrest Warrant case (supra note 28), § 61.

At this point, before considering the relevance of immunity within international tribunals, it would be useful to briefly address the case of Al-Bashir. Having examined the immunity granted under customary international law, more light can be shed on the status that Al-Bashir enjoys in relation to the international community and in particular the extent to which the immunities attached to his official capacity can shield himself from criminal prosecution before a domestic court. It can safely be assumed that at present, as the incumbent President of Sudan, Al-Bashir holds absolute personal immunity, which protects him from *any* possible domestic proceedings by foreign authorities, irrespective of his conduct or whereabouts. The availability of this immunity, however, would dissolve as soon as Al-Bashir's position in office were to discontinue (or in the case the Government of Sudan were to waive his immunity). From such a point onwards, he would remain protected only by functional immunity, which merely covers the acts taken within his official capacity, excluding his conduct prior to taking office and acts performed in a private capacity. Provided that domestic courts do not classify international crimes as acts performed in an official capacity, this would place Al-Bashir within the judicial reach of domestic courts for those international crimes he is accused of having committed in the Darfur region, from early 2003 onwards. Despite the unlikelihood of a near-future materialization of such a proceeding, having an understanding of the exact status that Al-Bashir holds in relation to foreign domestic authorities will be of great relevance for the further discussion on his case before the ICC, especially when dealing with the application of Art. 98 (1) Rome-Statute.

As is also denoted by the ICJ, although Heads of State, due to the absolute personal immunity accorded to them under customary international law, remain fully out of the reach of the executive and judicial authorities of foreign countries, within international criminal tribunals the applicability of international immunities is instead "regulated by each tribunal's constitutive instrument"³⁰. The statutes of the Tribunals preceding the ICC provide for an explicit dismissal of claims of functional immunity,³¹ but no concrete reference to the concept of *personal immunities* can be found. Nonetheless, when considering that, within their vertical cooperation regime, all UN members have an unqualified duty to cooperate with any request by the Court, it becomes apparent that the paramount nature of an obligation to arrest and surrender a suspect allows for the "derogation from the legal regulation of personal immunities contained in customary international law"³². However, unlike these international Tribunals, the

³⁰ *Bantekas*, JCSL 10 (2005) 21 (27).

³¹ Art. 7 of Nurember Charter; Art. 6 of Tokyo Charter; Art. 7 (2) ICTY-St.; Art. 6 (2) ICTR-St.; Art. 6 (2) SCSL-St.

³² *Gaeta* (supra note 14), p. 989; *Cryer et al.* (supra note 17), p. 439. In respect of the Special Court for Sierra Leone (SCSL), derogation may be justified on the grounds that the Court has been "established in the framework of Chapter VII of the UN Charter" (*Frulli*, JICJ 2 [2004], 1118). The irrelevance of official capacity or immunity is reflected in the trial

ICC has not been founded upon the binding and far-reaching mandate of the Security Council. Instead, as will be illustrated, the Court being a treaty-based Court, the ICC's provisions have limited implications, in particular with regard to States have chosen *not* to become Parties to the Rome Statute.

2. Immunity from Prosecution Before the ICC: An Interpretation of Art. 27 and the Court's Reach over Nationals of Non-States Parties

The Rome Statute's central provision in relation to immunity before the Court is Art. 27, the provisions of which were adopted relatively trouble-free, with little debate surrounding its formulation.³³ In Art. 27 (1), the drafters of the Statute address the issue pertaining to a suspect's official capacity, establishing that both "the international law doctrine of functional immunity and of national legislation sheltering State officials with immunity for official acts" cannot be used to

against the Liberian former-Head of State Charles Taylor, who held office at the time of the indictment, Decision on Immunity from Jurisdiction, Charles Ghankay Taylor (SCSL-2003-01-AR72(E)), Appeals Chamber, 31.5.2004, §§ 52-3 (hereafter "Taylor Immunity Decision"). The legal basis for this irrelevance is addressed in §§ 37-8: "Although the Special Court was established by treaty, unlike the ICTY and the ICTR which were each established by resolution of the Security Council in its exercise of powers by virtue of Chapter VII of the UN Charter, it was clear that the power of the Security Council to enter into an agreement for the establishment of the Court was derived from the Charter of the United Nations both in regard to the general purposes of the United Nations as expressed in Article 1 of the Charter and the specific powers of the Security Council in Arts 39 and 41. [...] the agreement of the United Nations is thus an agreement between all members of the United Nations and Sierra Leone. This fact makes the Agreement an expression of the will of the international community." See also *Sands*, Submissions of the Amicus Curiae on Head of State Immunity, Charles Chankay Taylor (SCSL-2003-02-I), 23.10.2003 (hereafter "Amicus Curiae on Taylor"), § 78: "If the Special Court had not been established pursuant to Security Council resolution the situation may be materially different: for example, two States may not [...] establish an international criminal court for the purpose, or with the effect, of circumventing the jurisdictional limitations incumbent on national courts [...]" It should be noted, however, that a submission by an amicus curiae is not binding in nature, but simply functions as an independent voicing by a non-party to the case on a particular issue that has been specified by the Chamber (pursuant to Rule 74 of the SCSL Rules of Procedure and Evidence).

³³ *Saland*, in: Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, 1999, pp. 189-217. See the Report of the Preparatory Committee on the Establishment of an International Criminal Court, A/Conf.183/2/Add.1, 14.4.1998, available at <http://daccessdds.un.org>.

avoid responsibility or mitigating punishment.³⁴ This provision is not unprecedented, echoing the earlier clauses on official capacity that can be found in the Nuremberg and Tokyo Charter, the Statutes of the *ad hoc* Tribunals and the SCSL Statute.³⁵ Art. 27 (2) goes on by addressing the concept of immunities explicitly:

"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."

In this paragraph, by dealing with immunities that "may attach to the official capacity", the Statute refers to the second category of immunities, namely immunities *ratione personae*.³⁶ In contrast to Art. 27 (1), this provision has no counterpart in other Statutes.³⁷ Read together with Art. 27 (1), its unprecedented wording makes it perfectly clear that the Statute operates to remove *all immunities* held by *any individual* before the ICC. Art. 27 thus allows the Court to exercise its jurisdiction *ratione personae* over individuals, irrespective of their political function, including Heads of State.

a) Grounding Art. 27 (2)'s Legal Force and its Application to Nationals of non-States Parties

This full preclusion of any claim of jurisdictional immunity by the ICC raises a significant question: how is it possible for a treaty-based court to surpass the well-grounded principle of international law that personal immunities are absolute, regardless of the seriousness of the crime? This compelling question can be answered on the basis of two antithetical theories, which can be dubbed the "treaty-based theory" and the "custom-based theory".

The treaty-based theory argues that Art. 27 (2), as an inherent provision to the Statute, establishes its powers by virtue of the direct consent of the States Parties. In this sense, by having ratified the Statute, States Parties voluntarily relinquish the entitlement of their nationals to immunity from prosecution by the ICC. This renouncement of a protection afforded to its nationals would be legitimate, considering that the personal immunity enjoyed by State officials "is the privilege of the State, not of the individual"³⁸. This theory can however impossibly explain the binding effect of Art. 27 (2) for States that have not ratified the Statute, in view of the rule of *pacta tertiis*, pursuant to which treaties cannot create obligations for third States. Accordingly, even in cases where a State official has committed a crime falling with the subject-

³⁴ *Gaeta* (supra note 14), p. 978. See also *Akande*, in: Milde et al. (eds.), *Bringing Power to Justice? The Prospects of the International Criminal Court*, 2006, pp. 47-98.

³⁵ See supra note 32.

³⁶ *Gaeta* (supra note 14), p. 978.

³⁷ *Akande*, *AJIL* 98 (2004), 407 (420).

³⁸ *Brunnée et al.*, *International Law, Chiefly as Interpreted and Applied in Canada*, 7th edition 2006, p. 347; *Akande*, *Oxford Transitional Justice Research Working Paper Series*, 30.7.2008, p. 1.

matter jurisdiction of the ICC on the territory of a State Party, the official would be able to invoke, if applicable, the claim of personal immunity as a bar to the exercise of the Court's jurisdiction.

The custom-based theory, in contrast, argues that Art. 27 is not simply an isolated treaty provision, but instead exemplifies a larger trend in international criminal law. The theory considers the rejection of personal immunity by the ICC as "a valid customary exception to the ordinary immunity rule established under customary law and applicable [...] with regard to international criminal tribunals"³⁹. Consequently, immunity continues to subsist with regard to inter-state relations, in proceedings before domestic courts, but it becomes extinguished before certain international tribunals.⁴⁰ If Art. 27 is simply a reflection of a broader rule of customary law, it is applicable to *all members* of the international community, whether they have ratified the Statute or not.⁴¹ Of course, it would remain the case, that, although this customary rule, in conjunction with Art. 27 (2), would strip *every State official* of his immunity in relation to ICC proceedings, the ICC could only prosecute those individuals that fall within its jurisdiction, since immunity only comes into play after jurisdiction has been established.⁴²

It is apparent that this discussion is of major importance for the future of the ICC – it is central to the question of whether the Court holds the inherent capacity to exercise its jurisdiction over State officials belonging to non-States Parties. Such a case, in which a national of a non-State Party falls within the jurisdiction of the Court can occur in three scenarios: (1) if a non-State Party were to accept the jurisdiction of the Court on an ad hoc basis regarding a specific crime, by means of an Art. 12 (3) agreement, (2) if a State Official of a non-State Party were to commit one of the Art. 5 crimes on the territory of a State Party,⁴³ or (3) in the case of a Security Council referral of a situation arising in a non-State Party, similar to the case of Al Bashir. Considering the

fact that State agents are probable candidates for the ICC's jurisdiction *ratione personae*, as State agents typically belong to the select group of individuals who are responsible "for the most serious crimes of international concern"⁴⁴, the admission of cases against State officials of non-States Parties seems to be a likely reoccurrence in the future.

b) The Application of Art. 27 to Sudan in the Case of Al-Bashir

At this juncture, before further analyzing the basis from which Art. 27 derives its legal force, it would be useful to turn to the specific case of Al-Bashir and determine how Art. 27 is applied in this particular scenario. The prosecutor's investigation into the Darfur situation, which has led to the warrant for the arrest of Al-Bashir, presents an unprecedented scenario, it being the first time that the Security Council has exercised its powers to refer a situation to the Court. The Council's authority to do so stems from Art. 13 (b), which sets out the possibility for the Prosecutor, following a Council referral, to exercise his jurisdiction over the situation in question. This particular triggering procedure is one of the three possible ways in which the Prosecutor can start an investigation,⁴⁵ and, aside from the possibility for an *ad hoc* agreement under Art. 12 (3), is the sole mechanism for bringing a situation within a non-State Party before the Court. However, unlike the two other trigger procedures, the legal implications that stem from this *modus operandi*, and in particular the Prosecutor's decision to investigate a situation in a non-State Party, are not elaborated upon in the Statute anywhere outside of Art. 13, nor do the *travaux préparatoires* shed much light on the issue. This leaves many important questions unanswered, which are especially pertinent in the case against Al-Bashir.

It remains contentious to what extent the referral of the situation in Darfur – which places Sudan within the jurisdictional ambit of the Court – alters the status that Sudan holds in relation to the ICC. Does the resolution, either by virtue of its text or as an inherent implication to a referral, completely strip Sudan of its impervious non-State Party standing, thereby rendering Sudan fully bound to the Rome Statute as a whole? Most notably, with regard to the *discussion on immunity*, to what extent does the referral by the Security Council render Art. 27's dismissal of immunity applicable to Sudan, Sudan being a State which has not ratified the Rome Statute? It is this latter question that not only lies at the heart of the analysis of the case against Al-Bashir, but that, more generally, will play a role in qualifying the reach that contemporary international criminal justice has *vis-à-vis* Heads of State. In order to analyze the possibility for the ICC to apply Art. 27 to the State of Sudan, and, subsequently, prosecute Al-Bashir before the Court, it would be useful to, first and

³⁹ *Bantekas*, Journal of Conflict and Security Law (hereafter JCSL) 10 (2005) 21 (31).

⁴⁰ The exact defining criteria of such an international court will be set out at a later stage.

⁴¹ Although practically equivalent, it should be kept in mind that it is this overshadowing customary rule, which calls for the inapplicability of personal immunity before international criminal courts, that falls upon all members of the international community and therefore allows the prosecution of Heads of State before the ICC, and not the specific provision of Art. 27 (2), which remains part of a treaty that is signed by a limited number of States.

⁴² It is important to note that immunity does not function to limit a Court's jurisdiction, but instead is a mere procedural bar to the exercise of the jurisdiction that is already held. In this sense, the fact that personal immunities cannot be used to prevent the ICC's exercise of its jurisdiction over a Head of State does not mean that the Court can automatically prosecute this State official.

⁴³ In this case the ICC can exercise its territorial jurisdiction in pursuance of Art. 12 (2) (a) ICC-St.

⁴⁴ Art. 1 ICC-St.

⁴⁵ The other two mechanisms for triggering the Courts jurisdiction being via a State Party referral to the Prosecutor (Art. 13 [a] ICC-St.) or by the Prosecutor's use of its powers to initiate an investigation *proprio motu* (Art. 13 [c] ICC-St.).

foremost, address the reasoning applied by the Pre-Trial Chamber in its decision to issue the arrest warrant.

aa) The reasoning of the PTC

When analyzing the PTC's rationale behind its issuance and circulation of an arrest warrant against a Head of State of a non-State Party, it becomes evident that the PTC considers Art. 27 fully applicable to Sudan. It explicitly affirms this in its decision of 4 March 2009, where it proclaimed that "the current position of Omar Al Bashir as Head of a State which is not a party to the Statute, has no effect on the Court's jurisdiction over the present case"⁴⁶. The PTC justifies this critical assertion on the basis of four grounds:

"First, [...] one of the core goals of the Statute is to put an end to impunity for the perpetrators of the most serious crimes [...].

Second, [...] in order to achieve this goal, article 27 (1) and (2) of the Statute provide for [...] core principles [...].

Third, [...] other sources of law provided for in paragraphs (1) (b) and (1) (c) or article 21 of the Statute, can only be resorted to when the following two conditions are met: (i) there is a *lacuna* in the written law contained in the Statute, the Elements of Crimes and the rules; and (ii) such *lacuna* cannot be filled by the application of the criteria of interpretation [...].

Fourth, [...] the Security Council of the United Nations has also accepted that the investigation into the said situation, as well as any prosecution arising therefrom, will take place in accordance with the statutory framework provided for in the Statute [...]"⁴⁷.

bb) Preliminary critical assessment of the PTC's reasoning

Despite the multitude of arguments put forward, the Chamber remains more or less silent on the overarching issue of whether Art. 27 should be considered as an isolated treaty provision or a comprehensive norm of customary law.

Ever since its issuance, the reasoning provided by the PTC has been scrutinized in detail by a number of legal scholars, who have generally considered none of the four arguments provided to be entirely convincing.⁴⁸ In the following paragraphs, in line with this scholarly commentary, the PTC's claims will be critically assessed and placed within the greater debate on Art. 27.

Firstly, with regard to the opening argument, it is hard to understand how a reference to the preambular provision of the Statute, which simply sets out its aim of removing criminal impunity, justifies the application of the Statute's articles to (individuals from) a non-State Party, which has not recog-

nized the instrument in the first place. It may well be the case that the removal of personal immunities by Art. 27 is indispensable for the fulfillment of the Statute's underlying objectives, but this does not provide a legal basis for the Court to strip States of these rights without their direct consent.

In its second and the third argument, the PTC addresses the relevant legal norms themselves, as they are set out in Art. 27, and stresses their primacy over other sources of international law. In so doing, the PTC seems to directly refer to the customary international customary rules on immunity, which are at loggerheads with Art. 27. It is hard to dispute the PTC's claim that the two paragraphs of Art. 27 constitute "core principles" of the Statute, and that they are important for the Court's achievement of its objectives, as discussed in the previous paragraph. However, here again, this cannot provide a legal basis for this treaty provision to prevail over customary international law and affect the rights and obligations of non-States Parties.⁴⁹ In particular, the PTC's argument as to the alleged primacy of the articles of the Statute over rules of customary international law – one of the other sources of law referred to in Art. 21 – is not very convincing, as the provisions of the Statute are not applicable to nationals of Sudan, as a non-State Party, in the first place. As is argued by Gaeta, "the only possibility to counter this observation is to contend that Art. 27 (2) enshrines a rule of customary international law"⁵⁰ and thus that the article applies to *every person*, irrespective of his or her State's stance towards the Rome Statute. The PTC, however, refrains from addressing this possible justification for the applicability of Art. 27 (2) to nationals of non-States Parties. Instead, it limits its argument to the status that the provision holds within the Statute, in spite of the fact that the Statute itself derives its legal validity from the consent of States Parties alone.

The fourth and final argument put forward by the PTC to justify its issuance of an arrest warrant for a sitting Head of State of a non-State Party is based on the referral of the situation by the Security Council. The PTC argues that the Security Council expected the ICC's use of the Statute *as a whole* for the investigation and prosecution of any case arising before it, and thus implicitly accepted the application of Art. 27 with regard to the situation in Sudan. This seems to be the most convincing argument of all four offered by the PTC. As such, it has also been supported by a number of scholars in the academic debate surrounding the issue. Even though the overall scholarly discourse pertaining to the specific issue of Al-Bashir and the role of Art. 27 has been limited, it would be useful at this point to address the arguments brought forward by the authorities on this issue. This may allow us to shed more light on those questions relating to immunity and the general application of Art. 27 that were not properly addressed by the PTC.

⁴⁶ Al-Bashir Decision (supra note 9), § 41.

⁴⁷ Al-Bashir Decision (supra note 9), §§ 42-45.

⁴⁸ See in particular the publication surrounding this debate by Gaeta, JICJ 7 (2009), 315; Mezyaev, International Legal Aspects of the ICC Pre-Trial Chamber Decision on the Arrest Warrant against the President of Sudan, Institute of Democracy and Cooperation, 4.6.2009, available at <http://www.idc-europe.org>.

⁴⁹ A similar point is raised by Mezyaev (supra note 48): "[t]he main defect of this argument is that the Court does not resolve the question of the applicability of this article to Sudan and its citizens."

⁵⁰ Gaeta, supra note 48, at 6.

cc) *Theories grounding the application of Art. 27 to Al-Bashir*

It is striking how much disagreement exists on the issue. In broad terms, there are four distinctive arguments that are put forward to address the question why, pursuant to Art. 27, Al-Bashir's immunity does not hold before the ICC. As will become apparent, elements of those theories may underlie the PTC's reasoning.

(1) *The text of Security Council Resolution 1593 provides for the application of Art. 27*

The first explanation for the possibility of the ICC to exercise its jurisdiction over a sitting Head of State of a non-State Party, despite his entitlement to personal immunity under customary law, refers to the *text* of Security Council Resolution 1593. On the basis of this Resolution, the Security Council obliges the Government of Sudan to "cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution"⁵¹. This sweeping obligation to cooperate has by some been interpreted to include a duty for Sudan to waive any immunity that could potentially obstruct the Court's possibility to investigate and prosecute.⁵² The fact that a non-State Party has the power to waive the immunity of one of its officials seems undisputed, and is even reflected in the Statute itself.⁵³ Whether an obligation to do so actually arises under the notion of "full cooperation" as set out in Resolution 1593 however, is debatable.

Before delving into the consequences of the duty of "full cooperation" for Al-Bashir's immunity, it should be noted that whichever interpretation of "full cooperation" is espoused, this argument would not help to resolve the debate on whether Art. 27 would *essentially* be applicable to Sudan in the first place. Although interpreting 'full cooperation' to include an obligation for Sudan to waive immunity would justify the proceedings taken by the PTC, it does not explain whether or not Art. 27 would *otherwise* have led to the same effect. Art. 27 functions as a procedural tool vitiating any immunity that is held by a suspect when he stands before the Court, but if Sudan is obligated, first and foremost, to waive this immunity, then Art. 27 would essentially not be applicable, because, retrospectively, there would be no immunity to dismiss. In this sense, a distinction must be drawn between, on the one hand, the inapplicability of immunity from prosecution that is set out by Art. 27 and, on the other hand, a possible obligation to waive immunity altogether. Although irrelevant at this point in the discussion, the question on the interpretation of "full cooperation" nevertheless remains

⁵¹ SC Res. 1593, operational § 2 (hereafter "Res. 1593"); for analysis of this obligation see *ibid*.

⁵² See the first response by *Akande to Heller*, *Opinio Juris International Law Blog*, 11.7.2008, response 6, available at <http://opiniojuris.org/2008/07/11/icc-prosecutor-to-charge-sudans-president-with-genocide>.

⁵³ As is stated in Art. 98 (1), the restriction it imposes on the Court's authority to issue an arrest warrant is not in force if it obtains "a waiver of the immunity" from "that third state."

central to the case of Al-Bashir and will be addressed at a later stage, when dealing with Art. 98, in relation to third States' obligations to surrender Al-Bashir to the Court.

(2) *The Security Council has the underlying power to provide for the application (or not) of Art. 27*

The second argument that can be put forward to elucidate the application of Art. 27, rather than relying on the textual wording of the Resolution and the explicit obligations that arguably stem from it, focuses on the underlying powers that the Security Council enjoys when making a referral to the Court. According to this argument, which strongly mirrors the aforementioned fourth argument presented by the PTC, the Security Council, when formulating Resolution 1593, expected the ICC to apply the Statute in its entirety in any case that would arise from the Darfur situation. Accordingly, by remaining silent on the application of Art. 27 and the issue of personal immunity, "the Security Council, acting under Chapter VII, referred the Darfur situation to the ICC, and by doing so implicitly overruled Al-Bashir's immunity"⁵⁴. According to this view of an *implied waiver*, the application of Art. 27 to Sudan thus finds its legitimacy in the general power of the Security Council under Chapter VII, rather than in the text of the specific Resolution 1593.

If the Security Council has the power to overrule a person's immunity, it could however also decide *not* to overrule his immunity, and to oppose the application of Art. 27 to a particular situation, by explicitly stating so within the Resolution, if it believes this to be in the best interest of international peace and security.⁵⁵ Proponents of this argument, which arguably includes the PTC (cf. its fourth claim quoted *supra*), would thus affirm that the Security Council, when making a referral, under its Chapter VII mandate, holds the authority to decide, in essence, whether or not the Statute or any of its specific articles would apply to a non-State Party when its nationals fall within the jurisdiction *ratione personae* of the Court.

This stance seems rather perilous, in the sense that it provides the Security Council with the power to control the scope of the mandate of the ICC, a fully independent institution. Arguably, in the same way that the Council cannot extend the jurisdiction of the Court beyond the scope of the Statute,⁵⁶ it cannot restrict the ICC's application of its juris-

⁵⁴ This argument is endorsed by *Milanovic* in his first response to *Heller* (*supra* note 52), response 5.

⁵⁵ This point has also recognized and confirmed by *Milanovic* in: ICC Issues Arrest Warrant for Bashir, but Rejects the Genocide Charge, *EJIL: Talk! Blog of the European Journal of International Law*, 4.3.2009, § 7, available at <http://www.ejiltalk.org>: "[h]ad, for instance, the Council said in its referral that it preserved the international law immunities of any persons connected to the referred situation, the Court could not in my opinion have exercised jurisdiction over Bashir [...]."

⁵⁶ It should be noted that an Art. 13 (b) ICC-St. referral by the Council should not be considered as extending the jurisdiction of the Court, in the same way that a State Party referral

diction under the Rome Statute. Any restrictions imposed by the Security Council would then be *ultra vires*. After all, the ICC, as Art. 1 and Art. 4 (1) of the Statute stipulate,⁵⁷ is an independent institution with its own international legal personality. The Court can neither be considered an organ of, nor a member of, the United Nations, and, in this respect, it is not bound by the Chapter VII resolutions that are issued by the Council, nor by Art. 103 of the UN Charter pursuant to which obligations under the UN Charter take precedence over any other international obligations (which *member states* may have). Thus, when the Council refers a situation, the Court is allowed to proceed by exercising its jurisdiction *only* as it is defined within the Statute.

It can be concluded that the Security Council's powers with respect to the legal regime of the ICC are strongly limited: they are strictly confined to the powers of referral and deferral as laid down in respectively Art. 13 (b) and Article 16 of the Statute. The Council does not have the mandate to restrict or extend the ICC's legal regime. This is not to say, however, that the Council does not have the Chapter VII power to place international obligations on any UN member. It clearly has this power, and, as the case may be, the exercise of this power could have beneficial or detrimental effects on the proceedings before the Court. For example, the Council could oblige a non-State Party to fully cooperate with the Court in a specific case, or, in the same way, to refrain from arresting and surrendering a suspect to the Court. In accordance with Art. 103 of the UN Charter, this would override the obligation that any State Party previously held in relation to the Statute.

As the foregoing analysis makes clear, the Security Council does not have the power to influence how the ICC applies its own Statute – and the provision which we are especially concerned with, Art. 27 relating to the irrelevance of the

official capacity of a person – to a particular situation. Because the ICC acts as an independent legal institution, the Council cannot extend nor limit the implementation of the Statute. In the same sense, as is argued for the situation of Darfur, the Council cannot “implicitly” allow the Court to act in accordance with its statutory provisions, because the Court is simply obliged to apply the Statute as a whole. In other words, it seems ill-founded to argue that the application of Art. 27 to Sudan and its nationals, as a treaty article, derives its legal force from Security Council 1593. Instead, when the ICC holds jurisdiction over a particular situation or individual, it is obliged, and authorized, to apply the Statute *as a whole*, including Art. 27, irrespective of the Council's wording or intentions.⁵⁸

(3) *The ICC is under the obligation to apply the provisions of the Statute whenever it has jurisdiction*

If one accepts the argument that the Court simply has to act in full accordance with the *entire* Statute *whenever* it has jurisdiction, this would mean that as a result of the referral of the situation in Darfur to the Court, the Court can, and has to, apply Art. 27 to Al-Bashir. With regard to Darfur and the case of Al-Bashir, the Court can exercise its jurisdiction *by virtue of the referral*, irrespective of the wording of the actual Resolution. In this sense, although it is the referral that triggered the Court's jurisdiction, the legal force of Art. 27 itself stems from the Statute and not from the Resolution or the UN Charter. This theory thus sets out the basic premise that *whenever* the Court has jurisdiction over an individual, Art. 27 applies. In light of the foregoing argumentation, this theory, which implies that as a result of an Art. 13 (b) referral of a situation in a non-State Party all its nationals would lose their immunity vis-à-vis the ICC, seems credible.⁵⁹

under Art. 13 (a) cannot be interpreted in this way. Both are simply trigger mechanisms to “waken” the Court's “dormant” jurisdiction; see *Condorelli/Villalpando*, in: Cassese et al. (supra note 14), p. 571 (p. 575): “When referring a situation to the Court, the Security Council is to be considered bound by those elements that constitute the intrinsic and essential features of the ICC as established in the Statute. [...] The Rome Statute does not explicitly confer on the Security Council *any powers to extend the Court's jurisdiction* beyond the provisions of Part 2” (emphasis added). Art. 17 on the “Cooperation between the Security Council of the United Nations and the Court” of the Relationship Agreement between the International Criminal Court and the United Nations limits the mandate of the Council to the powers of referral and deferral, ICC-ASP/3/Res.1, adopted 4.10.2004, available at ICC homepage, <http://www.icc-cpi.int> (hereafter “ICC-UN Relationship Agreement”).

⁵⁷ “The Court shall have international legal personality.” In addition, see Article 2 of the ICC-UN Relationship Agreement (supra note 56): “The United Nations recognizes the Court as an independent permanent judicial institution which, in accordance with Arts 1 and 4 of the Statute, has international legal personality”.

⁵⁸ In his recent publication, *Akande* has also put forward an elaborate and interesting stance on the question of why Art. 27 (2) leads to the relinquishment of Al-Bashir's immunity, applying an approach that combines elements of the first and second argument. According to *Akande*, the Council's decision to refer the situation of Darfur leads to the obligatory acceptance of the ICC's jurisdiction by all UN Members. Seeing how “a decision to confer jurisdiction is a decision to confer it in accordance with the Statute [...] all states (including non-parties) are bound to accept that the Court can act in accordance with its Statute”, which would include Art. 27 (2). This viewpoint is thus based on an, in our eyes somewhat parlous, premise that the Security Council could oblige non-States Parties to recognize the application of only *a part* of the Statute (that on jurisdiction) and be bound by only these articles, while staying free from the remainder of the Statute. For *Akande's* full analysis see *Akande*, JICJ 7 (2009), 333-352.

⁵⁹ See also *Condorelli/Villalpando* (supra note 56), p. 627 (p. 634): “[n]o specific exception is provided for in case of referral by the Security Council as regards jurisdiction *ratione materiae*. Nor is an exception recognized with respect to jurisdiction *ratione personae*”.

One should note, however, that this line of reasoning would not be confined to cases arising out of Security Council referrals alone, but would be applicable to all cases in which the ICC holds, or obtains, jurisdiction over a national of a non-State Party. As indicated earlier, such a scenario would also arise either if a non-State Party were to enter into an ad hoc agreement under Art. 12 (3) and recognize a specific crime under the Statute, or if a State agent were to commit an Article 5 crime in the territory of a State Party. The former scenario will not be further discussed, because, in such a case, the agreement itself could be argued to justify the application of Art. 27 (2) to all the nationals of the respective non-State Party. The latter scenario, however, provides for an interesting debate.

In the hypothetical case where the president of a non-State Party were to commit a crime against humanity on the territory of a State Party, and the territorial State would subsequently refer the situation to the ICC, would the Court be able to prosecute the incumbent Head of State on the basis that his personal immunity would be impertinent because of Art. 27 (2)? In accordance with the argument that Art. 27 (2) applies whenever the Court has jurisdiction, be on the basis of a Security Council Resolution (as in the case of Al-Bashir) or on the basis of another triggering mechanism, this would have to be answered in the affirmative. Still, such a scenario raises leeriness for the overall argument, because it would allow for a treaty, established by a group of States, to directly affect the rights and obligations of a State that has not actually agreed to, nor ratified, the document.⁶⁰ The only way to overcome this objection, informed by the principle of State consent to be bound, is to develop a fourth theory.

(4) Customary international law abrogates immunities before international criminal tribunals

The fourth and final argument grounds the applicability of Art. 27 to a national from a State that is not a party to the Rome Statute, such as Al-Bashir, on general rules of customary international law governing immunities, rather than on the text of a Security Council Resolution, the Security Council's referral powers, or the application of the Statute by the ICC, respectively. This approach derives from the "custom-based theory", pursuant to which Art. 27 has *intrinsic* legal force, i.e., force beyond the confines of the Statute itself.⁶¹ Proponents of this theory argue that in international criminal law, a customary exception (*lex specialis*) to the rule of absolute personal immunity has arisen. This exception would allow any State official to be prosecuted before (at least certain) international criminal tribunals, irrespective of any immunity that may be attached to his office or position. Accordingly, because Art. 27 (2) is simply a codification, for ICC purposes, of a customary rule of more general application, the article – and essentially the customary law underlying it – is

⁶⁰ This would be in violation of the international law tenet of *pacta tertiis nec nocent nec prosunt* and Art. 34 of the Vienna Convention on the Law of Treaties (1961).

⁶¹ As opposed to the "treaty-based theory", which considers Art. 27 (2) as an isolated treaty provision.

duly applicable to Sudan and to its nationals, including Al-Bashir. The extent to which such a customary exception has indeed been established will be examined in greater detail below.

c) A Customary Exception to the Rule on Absolute Personal Immunities before International Criminal Tribunals

In order to analyze the extent to which Art. 27 can be considered as extending beyond the status of an isolated treaty provision and, instead, embodies the development of a customary exception to the rule of absolute personal immunity, international practice should be studied. The most notable support for an exception to the customary rule of absolute personal immunities before international criminal tribunals can be found in the International Court of Justice's (ICJ) judgment in the Arrest Warrant case. In this judgment, the ICJ, having contended that immunities *ratione personae* are absolute before domestic courts, stresses that an exception to this rule of personal immunity can, however, arise "before certain international criminal courts, where they have jurisdiction"⁶². To clarify this point further, by way of example, it mentions the ICTY, the ICTR and the ICC, and refers explicitly to the text of Art. 27 (2).⁶³ In order to discern whether or not a customary law-based exception to the rule of immunity can be derived from this statement, it will be necessary to interpret what the ICJ meant with "certain international criminal courts". As will be illustrated further on in this section, there is a set of criteria that distinguish international tribunals from national tribunals, and justify the application of the said *lex specialis* to individuals appearing before international tribunals.

The distinction of the standing of personal immunity before national courts and certain international courts has also been recognized and applied before the Special Court of Sierra Leone, in the case of Charles Taylor. Here, the Appeals Chamber dismisses the Defense's claim for personal immunity on the basis that it considers that "the principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court"⁶⁴.

Further support for the existence of a customary exception to *full* personal immunity comes to light when considering the fundamental purpose that personal immunities hold in international law. As mentioned earlier, immunities *ratione personae* have developed in the international sphere to prevent the hindrance of the proper functioning of a State agent by subjecting him to the domestic jurisdiction of another State, or other pressures of the authorities of that State. Despite the limitation they place on the progression of international criminal justice, the persistence of such immunities may be considered as essential to prevent *national authorities* from using "this means as a way of interfering with the foreign state officials' activity, thereby unduly impeding or

⁶² Arrest Warrant case (supra note 28), § 61.

⁶³ Arrest Warrant case (supra note 28), § 61.

⁶⁴ Taylor Immunity Decision (supra note 32), § 52.

limiting their international action”⁶⁵. International criminal courts and tribunals, by contrast, are seen as acting independently from the national interest of its founding States.⁶⁶ On top of this, the independent and transnational nature of international courts deems the fundamental aim of immunity, i.e. the need for the protection of sovereign equality, fully irrelevant.⁶⁷ As a result of these two distinctions between the national and international judicial level, the rationale underlying personal immunities becomes absent before (certain) international courts, allowing such tribunals to prosecute all individuals, despite the immunities they may enjoy within the domestic order.

This dismissal of absolute immunity, however, gives rise to the unsettling hypothetical scenario in which two States were to establish a feigned ‘international court’ for the sole purpose of prosecuting a foreign Head of State, who would otherwise have enjoyed immunity from the jurisdictions of both of these States. In order to limit such an occurrence, in which the Head of State consequently cannot avail himself of any personal immunity, not *every* international criminal tribunal should be allowed to cast aside such immunities. As the ICJ also stated, “an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before *certain* international criminal courts, where they have jurisdiction”⁶⁸. Regrettably, although it mentioned the ad hoc tribunals and the ICC specifically, the ICJ did not (and did not have to, as this was obiter dictum) elaborate on the defining criteria by which such international criminal courts can be distinguished from others courts. It is, however, of great importance to identify these criteria, so as to clarify, if a case were to arise, the extent to which State officials are entitled to immunities before a particular tribunal.⁶⁹

In his extensive analysis of the issue, Damgaard concludes that the following criteria indicate that before the relevant international criminal court, personal immunities may not be called upon as a shield from prosecution:⁷⁰ (1) the court is established on the basis of an international treaty, a UN Security Council Chapter VII resolution, an agreement between the UN and a State, or a UN Charter amendment; (2) the court extends beyond the judiciary of a single State;

(3) it applies international criminal law, (4) it has an international jurisdiction *ratione materiae* and *ratione personae*; and (5) its decisions are binding.⁷¹ On the basis of these criteria, it is beyond doubt that, for the purpose of the removal of immunity from prosecution, the ICC can be categorized as a fully independent international judicial body before which the customary exception to the rule of absolute personal immunity applies.⁷²

When considering the foregoing argumentation, in conjunction with *Damgaard’s* five criteria and the ICJ’s explicit mentioning of the ICC in its Arrest Warrant case, it is submitted that the ICC, when it has jurisdiction, can prosecute *any* individual, including Al-Bashir, despite the immunity to which he is entitled under international law. No individual can invoke his personal immunity as a bar to prosecution by the Court, because such immunity is disabled before international criminal tribunals by virtue of a customary international law exception. This legitimizes the PTC’s issuance of an arrest warrant against a sitting Head of State of a non-State Party, such as Al-Bashir, and justifies the application of Art. 27 (2) of the Statute – which enshrines the non-applicability of any personal immunities – to him.

III. Immunity from Arrest: Interpreting Art. 98 (1)

At this point it can be stated that, as a result of the Security Council referral, Al-Bashir falls within the jurisdiction of the ICC and that the Court, under Art. 27 of the Statute in conjunction with relevant customary international law, has the authority to prosecute him as a sitting Head of State without immunity serving as an impediment. However, before the Court can do so, it must, naturally, first manage to obtain custody over Al-Bashir. As a judicial institution without a private police force or any inherent enforcement powers,⁷³ for this the ICC is fully dependent on the cooperation of national authorities.⁷⁴ At this point, when dealing with the process of

⁶⁵ *Cassese* (supra note 19), p. 312.

⁶⁶ See also the reason put forward by *Orentlicher*, Submissions of the Amicus Curiae on Head of State Immunity, Charles Chankay Taylor (SCSL-2003-02-I), 23.10.2003, para 25: “states have considered the collective judgment of the international community to provide a vital safeguard against the potential destabilizing effect of unilateral judgment in this area”.

⁶⁷ Taylor Immunity Decision (supra note 32), § 51.

⁶⁸ Arrest Warrant case (supra note 28), § 61 (emphasis added).

⁶⁹ See also *Damgaard*, Individual Criminal Responsibility for Core International Crimes: Selected Pertinent Issues, 2008, p. 264: “[it] is [...] important [...] to enable an accused to determine if his entitlement to immunity from prosecution applies before the judicial body before which he appears.”

⁷⁰ *Damgaard* (supra note 69), p. 270.

⁷¹ *Damgaard* (supra note 69), p. 270.

⁷² Naturally, the same can be said for the ICTY and the ICTR, which meet all five criteria and can thus be categorized as international criminal courts for present purposes. It can furthermore be stated that the SCSL, in the same sense, qualifies as an international criminal tribunal. The remainder of the hybrid criminal courts, however, cannot be considered as international criminal judicial bodies, with regard to the lifting of immunity, according to the criteria presented. This is due to the fact that these hybrid courts do not extend beyond the judiciary of a single State. The Special Tribunal for Lebanon *does* meet this criterion, but does not conform to the principle of applying international criminal law, nor that of holding an international jurisdiction *ratione materiae* and *personae*. This inference is also made by *Damgaard* (supra note 69), p. 354.

⁷³ *Kreß et. al.*, in: Triffterer (ed.), The Rome Statute of the International Criminal Court, Observers’ Notes, Article by Article, 1999, p. 1503 (p. 1504).

⁷⁴ *Cassese*, EJIL 9 (1998) 2 (13): “[...] [T]he ICTY remains very much like a giant without arms and legs – it needs artificial limbs to walk and work. And those artificial limbs are

suspect apprehension, a distinction must be drawn between, on the one hand, *immunity from prosecution* and, on the other, *immunity from arrest*. Because the arrest and surrender of Al-Bashir lie with national authorities and thus possibly impinge on inter-state relations, it will be necessary to readdress the standing of personal immunities within customary international law, this time in relation to the question of *arrest*.

The issue of immunity from arrest is addressed in Art. 98 (1) of the Statute, which states the following:

“The Court 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” (emphasis added).

This provision responds to the clash of obligations that may arise between the legal regime of the ICC and that of traditional international law. It places a restriction on requests for State cooperation emanating from the Court in those cases where a request “would result in the violation by *States* of their international obligations to accord immunity to foreign officials”⁷⁵. This provision, which makes up part of the section on State cooperation, was tactfully inserted into the Statute to prevent the Court from placing the States Parties to the Rome Statute in a compromising position which would require them to choose between their obligation to cooperate with the Court or their legal duty to adhere to the international law of immunities.

Prima facie, Art. 27 and Art. 98 (1), the two statutory articles dealing with immunity seem to fully contradict one another.⁷⁶ While Art. 27 rules out the pertinence of any kind of immunity before the Court, Art. 98 (1) seems to require the Court to *respect* immunity when requesting State cooperation. In order to fully understand the interplay between these two articles, it will be necessary to closely analyze the exact wording and purpose of Art. 98 (1).

1. The Interpretation of the Term “Third State” and its Application to the Case of Sudan

Although both Art. 27 (2) and Art. 98 (1) deal explicitly with the concept of immunity, it is important to recognize that the two articles, being part of different sections in the Statute, address two completely separate stages of the ICC's proceed-

state authorities. If the cooperation of states is not forthcoming, the ICTY cannot fulfill its function.” Considering the fundamental similarities between the ICTY and the ICC, the same can be said about the ICC; Statement by Justice Louise Arbour to the Preparatory Committee on Establishment of an International Criminal Court, 8.12.1997 (unpublished), § 3; *Broomhall* (supra note 13), pp.155 and 157.

⁷⁵ *Akande* (supra note 34), p. 61.

⁷⁶ *Gaeta* (supra note 14), p. 992: “[t]here clearly arises a problem of coordination of Article 98 (1) with Article 27 (2).”

ings.⁷⁷ Art. 27 (2) precludes personal immunities from being invoked by a person appearing before the Court as a supranational institution. Art. 98 (1), in contrast, addresses the situation of a national of one State finding himself in the power of another sovereignty. The latter scenario raises specific inter-state concerns which are not present in the former. In order to analyze the extent to which Art. 98 (1) applies, and thus limits the practical scope of Art. 27 (2), it is first necessary to determine what is meant by a “third State”.

When considering both the word choice,⁷⁸ as well as the international law principle of *effet utile*, it seems most reasonable to conclude that although “third party” is a reference to *any* State other than the requested State, whether it is a State Party or a non-State Party, a waiver of immunity need in practice not be obtained from a State Party.⁷⁹ This is because, when reading Art. 98 (1) in conjunction with Art. 27, it can be argued that States Parties have fully relinquished the immunities of their nationals vis-à-vis the Court by virtue of their ratification of the Statute. This reasoning, which would allow the Court to request the arrest and surrender of any State official belonging to a State Party, irrespective of an explicit waiver, has received abundant academic support.⁸⁰

However, as far as nationals of non-States Parties are concerned, Art. 98 (1) arguably places a restriction on the Court's authority to issue a request for arrest and surrender of a suspect who is entitled to immunity under international law. In so doing, the article prevents a conflict between a State Party's obligations under the Statute and other international duties it might have. This article may apply in the scenario of an official of a non-State Party being charged with having committed a crime on the territory of a State Party; in this scenario, the Court should refrain from requesting his arrest and surrender from the State Party, in line with the foregoing argumentation. However, in the exemplary case of Al-Bashir, in which the ICC is able to exercise its jurisdiction by virtue

⁷⁷ This is also why, during the travaux préparatoires, the two articles were negotiated and drafted by separate working groups, which also prompted the obscurity surrounding their correspondence.

⁷⁸ In relation to the remainder of the Statute's text, Art. 98 is the *only* provision in which this particular expression is used. When examining the sentence structure in which it is applied, it seems sensible to conclude that it is used in contradistinction to ‘the requested State’, thus indicating *all* States other than the one requested.

⁷⁹ As far as States Parties are concerned, it would be futile to draft an (already contentious) provision such as Art. 27 (2) that nullifies international immunities before the Court, if, as a result of Art. 98 (1), immunity would prevent a suspect from being ever surrendered to the Court.

⁸⁰ *Wirth*, CLF 12 (2001), 429 (456 et seq.); *Swart/Sluiter*, in: von Hebel/Lammers/Schukking (eds.), *Reflections on the International Criminal Court, Essays in honour of Adriaan Bos*, 1999, p. 91 (p. 120 et seq.); *Dworkin/Iliopoulos*, *Crimes of War Project*, 19.3.2009, available at <http://www.crimesof-war.org/onnews/news-darfur-9.html>; *Broomhall* (supra note 13), p. 144, n. 58.

of a Security Council referral, the application of Art. 98 (1) is less straightforward.

Undoubtedly, Sudan remains a non-State Party as such. It cannot be argued that by virtue of the Council's referral or the text of Resolution 1593, Sudan has become a State Party to the Statute and thus falls outside the classification of "third state". Neither does the argument hold that Sudan, as a result of the Council referral, has been placed *mutatis mutandis* in the position of a State Party with regard to the Court's proceedings in the situation of Darfur and thus, as is the case for States Parties, cannot rely on Art. 98 (1). This theory is founded on the previously rejected, fallacious premise that the Council can implicitly decide what provisions of the Rome Statute apply to non-State Parties as a result of its Chapter VII powers.

If Sudan has indeed remained a non-State Party to the Court, Art. 98 (1) should have remained applicable, and the ICC would not be allowed to request the arrest and surrender of Al-Bashir from a State where he could be found (except Sudan itself of course). Still, an argument could be made that the explicit wording of Resolution 1593 and the obligations it imposes on Sudan renders Art. 98 (1) inapplicable to the case of Al-Bashir. It could be argued that by requiring Sudan to "cooperate fully with and provide any necessary assistance to the Court"⁸¹, the Council has implicitly obliged Sudan to waive the immunity that is held by all its nationals under international and national law *vis-à-vis* the Court (a waiver is indeed duly contemplated by Art. 98 [1]). The Resolution may thus have made the restriction under Art. 98 (1) inapplicable for any case that might arise out of the Darfur situation, by requiring the removal of immunity on the part of Sudan. Of course, the force of this argument hinges on the exact interpretation of the term "full cooperation".

Considering the text of the Rome Statute alone, the term "full cooperation" could be argued to encompass a duty to waive the international immunities in relation to the Court by a State Party, or by any other State that is or becomes subject to a full cooperation regime. As argued *supra*, relinquishing all immunities *vis-à-vis* the Court's proceedings is a central part of what is expected of a State when it becomes a party to the cooperation regime of the ICC. Further support for this argument can be found in the text of Art. 98 (1), which provides that "[t]he Court may not proceed with a request [...], unless the Court can first obtain the *cooperation* of that third State *for the waiver of the immunity*" (emphasis added). As is explicitly affirmed by this provision, a third party's waiver of its nationals' immunities can be considered as a form of third party cooperation. It is this cooperation that is arguably contemplated by the "full cooperation", which Sudan is expected to provide to the Court pursuant to clause two of Resolution 1593. Accordingly, pursuant to the Resolution, Sudan is under an international obligation to waive the immunity of all its State officials in relation to the ICC. As a result of this waiver, it would be possible for any State Party to lawfully arrest Al-Bashir should he enter or travel through the territory of that State, and surrender him to the Court.

⁸¹ Res. 1593 (*supra* note 51), operative § 2.

It is, however, one thing to state that Sudan is required to waive all immunities, but it is another to state that Sudan has *already waived* those immunities. In fact, *until* the Government of Sudan has actually officially waived the immunity of Al-Bashir, this restriction on the Court *remains fully in place*. As long as Sudan refuses to act on its obligation to waive Al-Bashir's immunity, the Court is not given the authority to simply ignore the immunity from prosecution that Al-Bashir continues to hold. Instead, the Court will have to call upon the enforcement measure that is laid down in Art. 87 (7) of the Statute, which allows it, after having made a finding of non-cooperation, to refer the matter to the Security Council. In turn, the Council can bring additional pressure to bear on Sudan, pushing for a waiver of immunity. Until now such an application has not been made, arguably leaving Al-Bashir's immunity in full force.

In light of these arguments, it is extremely surprising that the Pre-Trial Chamber, in its decision to issue the warrant for Al-Bashir's arrest, remains completely silent on the pertinence of Art. 98 (1) and the likely procedural limitation that it brings about. Instead, based on the simple argument that "the current position of Omar Al Bashir as Head of State which is not a party to the Statute, has no effect on the Court's jurisdiction over the present case"⁸², the PTC decided to order the Registry to "prepare a *request for cooperation* seeking [Al-Bashir's] arrest and surrender", and to transmit it to all States Parties, Sudan, the members of the Security Council and any other States if necessary.⁸³ When considering that, firstly, Al-Bashir appears to enjoy full immunity from arrest under international law and that, secondly, the PTC refrains from making any clarification on this issue, it seems reasonable to conclude that the PTC, when making its request for State cooperation, acted in violation of Art. 98 (1) and thus acted *ultra vires*.⁸⁴

2. *The Duty to Arrest and Surrender: The Legal Implications of Resolution 1593 upon the ICC's Cooperation Regime*

As has been argued in the previous part, despite the procedural limitation that Art. 98 (1) imposes on the ICC's power to request a State to arrest a Head of State of a non-State Party and surrender him to the Court, the Pre-Trial Chamber has circulated such a request in the case of Al-Bashir, thereby acting *ultra vires* to its mandate under the Statute. The fact that the PTC has acted *ultra vires* does not mean, however, that, pursuant to the PTC's order, States are not under an obligation to apprehend Al-Bashir should he enter their national territory. The question arises indeed whether States can simply cast aside the order and apply the relevant customary international laws on immunity when it comes to the apprehension and surrender of Al-Bashir.

⁸² Al-Bashir Decision (*supra* note 9), § 41.

⁸³ Al-Bashir Decision (*supra* note 9), p. 9.

⁸⁴ For a strong denunciation of the measures taken by the PTC's and a further analysis into whether Art. 98 (1) ICC-St. has been violated see *Nouwen/Albanese*, Making Sense of Darfur, 10.3.2009, available at <http://blogs.ssrc.org/darfur>.

In order to address this practical issue, it is important at this point to determine the extent to which specific States bear a legal obligation, or have the right, to arrest Al-Bashir and surrender him to the Court. To do so, it will be necessary to review the cooperation regime under the Statute of the ICC and consider the implications that stem from a Security Council referral.

For the purpose of delineating States' rights and duties to act upon the arrest warrant for Al-Bashir, the international community can be divided into three separate categories. In the first place, there is the individual Republic of Sudan, as the territorial State in relation to the conflict in Darfur and the national State of Al-Bashir. Secondly, there are the States Parties to the ICC, which have consented to the obligations laid down in the Statute, along with those States that have entered into a relevant Art. 12 (3) ad hoc agreement. Lastly, there are the non-States Parties, i.e., the remainder of the State community.

a) Sudan

It should be noted that with regard to Sudan specifically the PTC, when considering whether or not to issue a request for Al-Bashir's arrest and surrender, did not have to give consideration to Art. 98 (1) and the possible procedural impediment it would create. In the sense of Art. 98 (1), Sudan would have to be regarded as both the "requested State", as well as the "third State". Seeing how a State cannot be considered as holding international obligations of immunity towards itself, Art. 98 (1) is not applicable for the PTC's request to Sudan and does not have a bearing on its obligations of cooperation vis-à-vis the Court.

It is recalled that the Government of Sudan signed the Rome Statute on 8 September 2000, but since then has made it explicitly clear to the UN that it is unwilling to become a State Party in the future.⁸⁵ It is for this reason that, up until the issuance of Resolution 1593 by the Security Council, the Sudanese region of Darfur, with a population that has been downtrodden and has fallen victim to heinous international crimes,⁸⁶ had been beyond the juridical reach of the ICC Prosecutor. However, Sudan's status of juridical dissociation was brought to an abrupt end when the Security Council issued the said resolution, and thereby placed the situation of Darfur within the direct jurisdiction of the Court.

Sudan, not having ratified the Rome Statute, remains a non-State Party to the Court and is thus not conventionally bound to the Statute's cooperation regime in the way that States Parties are. However, a Security Council referral under Art. 13 (b) of the Statute may oblige UN Member States to cooperate with the Court, as the relevant Security Council resolution is to be adopted under Chapter VII of the UN Charter. As has been argued above, neither the provisions of

the Statute, nor its negotiation history, shed much light on the exact obligations of cooperation to be derived from the referral.⁸⁷ Nevertheless, it is beyond doubt that in Resolution 1593, the Security Council, when addressing the obligation that States hold in relation to the Court's proceedings in Darfur, gives specific consideration to the Republic of Sudan, it being the territorial State in which the conflict has taken place. Unlike the other members of the UN, in clause two, the Council subjects Sudan to a strict legal obligation to "cooperate fully with and provide any necessary assistance to the Court and the Prosecutor"⁸⁸, thereby expanding the international duty to cooperate beyond the States Parties alone.

As Sluiter noted in this context, the concept of "[f]ull cooperation" is a complex legal notion, and may be subject to various interpretations.⁸⁹ In particular, the question may be asked whether the resolution places Sudan *fully* within the cooperation regime of the Court, set out under Part 9 of the Statute,⁹⁰ or whether it imposes a disparate and stricter regime, analogous to the model used under the ad hoc Tribunals? Neither the Resolution's text, nor the record of Security Council meeting 5158 that led up to the adoption of Resolution 1593,⁹¹ provide a concrete answer. Nonetheless, as far as arrest and surrender is concerned, it is fairly uncontroversial to claim that once a request to this effect has been issued by the Court, Sudan has the strict obligation to arrest any person, including Al-Bashir, and surrender him to the Court.⁹² Also, as has been noted above, Sudan has an ancillary duty to explicitly waive any immunity held by its nationals, including Al-Bashir, vis-à-vis the Court as well as with regard to those acts by States Parties that can be carried out to facilitate the proceedings of the Court.

b) States Parties

States Parties to the ICC, by virtue of their ratification of the Statute, have a legal obligation to fully adhere to the regime of international cooperation and judicial assistance, as is set

⁸⁷ Only Art. 87 (7) ICC-St. addresses those implications that a Security Council referral has with regard to purposes of enforcement in the case of non-cooperation by the State.

⁸⁸ Res. 1593 (supra note 51), at operative § 2.

⁸⁹ Sluiter, JICJ 6 (2008) 871 (877).

⁹⁰ In this case, the term "cooperate fully" would be comparable to its use in Art. 86 ICC-St., which holds that "States Parties shall, in accordance with the provisions of this Statute, *cooperate fully* with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court" (emphasis added). If the Council intended to indicate the cooperation regime of the ICC, it could have easily elucidated this by adopting the reference used in Art. 86, by stating that "Sudan shall, *in accordance with the provisions of the Rome Statute*, cooperate fully with the Court".

⁹¹ S/PV.5158, 5158th meeting, 31.3.2005.

⁹² This conclusion is also drawn by Williams/Sherif, JCSL 14 (2009), 71 (84); Akande, Journal of International Criminal Justice 7 (2009), 333 (335); Gaeta (supra note 48), at p. 6.

⁸⁵ Coalition for the International Criminal Court, Rome Statute Signatory Chart (alphabetical), p. 2, available at <http://www.iccnw.org/?mod=documents>.

⁸⁶ For details on the situation and the violations of international human rights and international humanitarian law in Darfur, see Commission of Inquiry Report (supra note 6).

out under Part 9 of the Statute.⁹³ This includes Art. 86, which, as an “overarching *interpretative guideline*”⁹⁴, imposes the pivotal duty to, “in accordance with the provisions of this Statute,” *fully cooperate* with the ICC “in its investigation and prosecution of crimes within the jurisdiction of the Court.” In Art. 89 (1), this sweeping obligation is furthermore reaffirmed with regard to a request for arrest and surrender of a suspect to the Court. As a result of the circulation by the Chamber of a request for the arrest and surrender, States Parties have arguably incurred an unmitigated treaty obligation to apprehend and transfer Al-Bashir to the ICC.

Despite their duties under the Statute, States Parties – as affirmed by Art. 98 (1) and as indicated above – remain fully bound by the rules of customary international law, which require them to respect international immunities of foreign officials. If Al-Bashir were to make a visit to or travel through the territory of a State Party, this State would thus be inconveniently faced with two conflicting legal obligations. Subsequently, a State could decide to nevertheless act upon the arrest warrant and justify this action on the same reasoning that was applied by the PTC. As has been argued, however, this would amount to a direct violation of the customary international law rules on immunity and, consequently, to a breach of international law. A State Party can not rely on its duty of arrest to legitimately override the personal immunity that Al-Bashir is entitled to. If a State were to do so, the Republic of Sudan could, as a result, start proceedings against the arresting State before an international judicial body such as the ICJ.⁹⁵ On top of this, Al-Bashir would be able to make a claim of *unlawful arrest* before the Court.⁹⁶

Alternatively, States Parties could decide to err on the side of caution, and instead of acting on the Court’s request for arrest and surrender challenge their alleged obligation to arrest on the basis that the request of the PTC was *ultra vires* (see previous part). It is submitted that a State Party could do this by consulting ‘with the Court without delay in order to resolve the matter’ in accordance with Art. 97 of the Statute. The ICC’s legal texts provide little clarification as to whether it is one of the ICC Chambers or the national authorities that eventually hold the authority to make the final decision on whether or not immunity from arrest is applicable and thus whether or not the requested State has an obligation to arrest. As Akande has shown, there is much obscurity surrounding this issue, both in the ICC’s legal provisions and in the views adopted by States Parties in domestic legislation.⁹⁷ In order to

solve the conundrum as to who can take the decision, it could be argued that Art. 119 of the Statute should be controlling here; this article states that “[a]ny dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.” Thus, it might be the Court *itself* that would have the final say in deciding whether or not its initial request for cooperation can be considered legitimate in light of the Statute.⁹⁸

c) *Non-States Parties*

The third category of States consists of all non-States Parties, excluding Sudan and any country that has entered into an ad hoc agreement with the Court. Because such States have not given their consent to the enforcement of the Statute, they hold no legal obligations to cooperate with the Court on account of the Statute.

Nonetheless, despite their legal dissociation from the Court, in the case of a Security Council referral to the ICC, as was the case for the situation of Sudan, it is possible for non-States parties to incur obligations vis-à-vis the Court by virtue of the Council’s resolution. In clause two of the operative part of Resolution 1593, the Council indeed addresses the obligations that are incumbent on those States that are not parties to the conflict. Considering that the situation in Darfur represents an internal State conflict,⁹⁹ this section pertains to *all* UN members outside of Sudan, including both States Parties and non-States Parties to the ICC. Regarding these countries, the Council makes the key assertion that it “*urges*” them to cooperate fully with the Court.

For States Parties, this ‘urging’ on the part of the Security Council is not dispositive as they may be bound to cooperate with the Court on the basis of the Rome Statute itself, subject to the proviso of Art. 98 (see previous section). Non-States Parties remain outside the framework of the Statute, however. This requires us to ascertain the exact meaning of the Security Council’s “urging to cooperate fully” by virtue of Resolution 1593.

When comparing the Council’s choice of language in the relevant section of the clause in the Resolution to the language addressing Sudan, it is easy to note that “the word ‘urges’ stands in marked contrast to ‘decides’.”¹⁰⁰ Consider-

request for arrest has been made by the ICC reveal that states have taken differing views on the identity of the body entitled to decide the issue.”

⁹⁸ *Crawford et al.*, In the Matter of the Statute of the International Criminal Court and in the Matter of Bilateral Agreements sought by the United States under Article 98(2) of the Statute, 5.6.2003, § 58, available at <http://www.iccnw.org/documents/SandsCrawfordBIA14June03.pdf>: “The Court will then form a view as to whether or not it agrees with the view of the requested State Party; [...] if it does not so agree, it will proceed with the Article 89 (1) request.”

⁹⁹ Commission of Inquiry Report (supra note 6), p. 26-27: “The requirements [...] in order for this situation to be considered an internal armed conflict under Article 3 of the Geneva Conventions are met.”

¹⁰⁰ *Nouwen/Albanese* (supra note 84).

⁹³ This also includes those States that have entered into an ad hoc agreement with the Court, pursuant to Art. 12 (3) ICC-St.

⁹⁴ *Kreß et al.* (supra note 73), p. 1515.

⁹⁵ See also *Cronin-Furman/Taub*, *Opinio Juris*, 18.3.2009, available at <http://opiniojuris.org>.

⁹⁶ For an analysis of the possibility to argue unlawful arrest under the Statute see *Radosavljevic*, LLR 29 (2008), 269-285.

⁹⁷ *Akande*, AJIL 98 (2004), 407 (431 et seq.): “Despite the fact that the Court must, in the first place, make a decision under Article 98, there remains the issue whether that decision is binding on the requested state. [...] The national statutes that deal with the immunity of foreign officials when a

ing that the Security Council's accustomed word choice for legal obligation is along the lines of "requires" or "decides that", it seems evident that the use of the word "urges" falls short of imposing any legal obligation on non-States Parties.¹⁰¹ It seems likely that this weak expression should be considered as a form of political exhortation towards non-States Parties. The Council's intention of absolving non-States Parties from any direct legal obligations under the Resolution is moreover confirmed when reading the relevant section in conjunction with the part preceding it, in which the Council states its recognition of the fact "that States not party to the Rome Statute have no obligation under the Statute."

It can thus be concluded that, despite the PTC's request to the Registrar to "prepare and transmit to any State any request for transit which may be necessary for the surrender of Omar Al Bashir"¹⁰², non-States Parties are under no international obligation to act upon any Court request for Al-Bashir's arrest. The question whether these States are nonetheless *permitted* under international law to arrest Al-Bashir on their own accord and surrender him to the ICC for prosecution is easily resolved. Non-States Parties, as is the case for States Parties, have strict obligations under customary international law to abide by the rules of immunity. This would protect Al-Bashir from any enforcement measures by national authorities when traveling to, or through, the territory of non-States Parties.¹⁰³

d) Possibilities for the Arrest and Surrender of Al-Bashir

It can at this point be concluded that the prospect of Al-Bashir's arrest by third States is severely restricted as a result of his entitlement, as a Head of State of a non-State Party to the Statute, to immunity within inter-state relations. Sudan is the only State that can, and is even required to, legally enforce the arrest warrant, or allow others to do so by means of an immunity waiver. It is well known, and hardly surprising of course, that Sudan is reluctant to fulfill these international obligations. But it remains no less true that those States that may be willing to arrest Al-Bashir are legally prohibited from doing so; they are not allowed to "help themselves" and remedy Sudan's failure to waive Al-Bashir's immunity.

¹⁰¹ By comparing the language of Res. 1593 (supra note 51) to that of para. 5 of SC Res. 827, 25.5.1993, the same conclusion is drawn in *Neuner*, in: McCormack et. al. (eds.), *Yearbook of International Humanitarian Law* 2005, 2007, p. 320 (325), n. 30: "The use of the term 'urge' was hardly meant in a mandatory sense, because the Council cannot obligate states to increase their financial contributions to the UN."

¹⁰² Al-Bashir Decision (supra note 9), 93.

¹⁰³ Since the issuance of the arrest warrant, Al-Bashir has traveled to seven countries (Egypt, Eritrea, Ethiopia, Libya, Qatar, Saudi Arabia and Zimbabwe), all of which have not ratified the Statute (See "Turkey: No to Safe Haven for Fugitive from International Justice", 6.11.2009, Amnesty International, available at <http://www.amnesty.org/en/for-media/press-releases/turkey-no-safe-haven-fugitiv-international-justice-20091106> [visited 6.11.2009]).

Clearly, these States are faced with a legal dichotomy between their duties of cooperation with the ICC and their obligation to respect international immunities. More generally, this conflict epitomizes the head-on clash of the legal regime under the ICC Statute with the traditional regime of international law. However, apart from an issuance of a waiver by Sudan, there are two ways in which this procedural deadlock can be lifted, as a result of which foreign States would be able to lawfully arrest Al-Bashir.

The first avenue would be for the Security Council to issue another resolution providing for the obligation for some or all UN Member States to either, in a general sense, provide cooperation to the Court or, more specifically, act upon the arrest warrant issued for Al-Bashir. Consequentially, a situation would arise, equivalent to the cooperation regimes of the ad hoc Tribunals, in which the imposed obligation to surrender Al-Bashir surpasses *any* other obligation held under international law, including the duty to adhere to international immunities, in accordance with Art. 103 of the UN Charter. Any States, referred to in the Council's resolution, would thus be obligated to arrest Al-Bashir, having been relieved of any duty under customary international law to respect Head of State immunity.

It is noted that such a resolution would not change the ICC's legal regime, as it would only be addressed at States, and their duties of arrest. As far as the removal of Al-Bashir's jurisdictional immunity before the ICC itself is concerned, it has been noted in the first part that such a removal is not, and cannot be, based on a Security Council Resolution (as this would indeed unlawfully change the legal regime of the ICC), but instead derives its legal force from customary international law.

A second, longer-term option that would open up perspectives for the lawful arrest of Al-Bashir by third States relates to the temporary character of immunities *ratione personae*. Al-Bashir only enjoys his personal immunity as long as he remains in office, and would thus no longer be able to rely on his immunity to protect him from arrest by a third State, once he loses power. Neither would functional immunity provide a bar from criminal prosecution, considering that immunities *ratione materiae*, as is widely recognized, can no longer be invoked for international crimes. The likelihood of the removal of Al-Bashir's official function in the near future, which would most likely occur as a result of internal revolt, would depend on a multitude of political factors, which fall outside of the scope of this discussion.¹⁰⁴ Nonetheless, it is of great significance to discern these possible political alterations and how they would cause this complex legal scenario surrounding the case of Al-Bashir to play out differently.

3. Concluding Observations: The Procedural Impact of Personal Immunities on the Proceedings before the ICC

The Security Council's referral of the Darfur situation to the ICC has triggered the jurisdiction of the Court. At the same

¹⁰⁴ For a discussion on this possibility see *Pham*, *Foundation for Defense of Democracies*, 6.3.2009, available at <http://www.defenddemocracy.org>.

time, the development of a customary exception to the rule of absolute personal immunities of Heads of State before international criminal tribunals ensures that Al-Bashir, as President of Sudan, can be prosecuted by the ICC for atrocities committed since 2003 in the territory of Sudan. Nonetheless, the ICC, not having any enforcement powers of its own, depends on State cooperation for Al-Bashir's arrest and surrender to the Court. As such an arrest procedure is an exercise of *domestic* jurisdiction, immunities – from arrest – may again rear their head, and serve, in keeping with Art. 98 of the Statute, as strong impediments to the possibility of bringing Al-Bashir to justice. Certain States may want to arrest Al-Bashir, but have their hands, legally speaking, tied behind their back.

The sole avenue for the lawful arrest of Al-Bashir by a third State is the removal of his Head of State immunity. This can be realized in three ways. Firstly, the Sudanese Government could waive Al-Bashir's immunity, as it is arguably required to do under Security Council Resolution 1593. Secondly, a new Security Council Resolution could impose obligations on all or some UN Member States to act upon the arrest warrant. And thirdly, Al-Bashir could be removed from office, stripping him from his personal immunity.

As far as the first two scenarios are concerned, the Court itself can play its own part, by making a finding of non-cooperation and referring the matter to the Security Council by virtue of Art. 87 (7) of the Rome Statute. The Security Council could then either apply greater political pressure on Sudan, in the hope of obtaining its cooperation, or impose a paramount obligation on the remainder of the State community, thereby indirectly setting aside Al-Bashir's immunity.

In the third scenario, the Court can only play a minor role, as in the end Al-Bashir's removal from office will normally be the result of a transition of power, whether democratically or by means of a forceful overthrow by the Sudanese people. Nonetheless, it could be argued that, as a result of the public issuance of the arrest warrant, the Court has made a regime change considerably more likely.¹⁰⁵ This argument is based on the reasoning that the public issuance of the arrest warrant could spur the political isolation and international marginalization of Al-Bashir and his public policies. It is not unlikely then that his domestic constituency will turn against him and forcefully demand an end to his despotic regime. However, the opposite outcome of a prolongation of the incumbent regime seems just as likely, with Al-Bashir condemning the arrest warrant as a façade of post-colonial and jingoistic efforts by the West, and, instead, decidedly clinging on to the immunity he is granted under international law.

The case of Al-Bashir intriguingly exemplifies the legal characteristics and implications that arise from the unprecedented scenario of a Security Council referral to the ICC. The authors hope to have elucidated the legal ambiguity surrounding the referral, and at the same time to have mapped future strategies to have Al-Bashir arrested by third States. The case of Al-Bashir furthermore sheds greater light on the general interaction and points of overlap between the three separate legal regimes that influence the development of the cases before the ICC. These are the regimes of (1) the ICC, which, as a treaty-based Court, functions on the basis of the Rome Statute; (2) the Security Council, which, as an authoritative political organ, enjoys powers of referral and deferral under the Statute and a powerful mandate under the UN Charter; and (3) the traditional rules of customary international law, which remain binding as the underlying framework to both States Parties and non-States Parties to the Statute.

On the basis of the research done on the interaction between these three spheres of international law, it is apparent that, despite the general trend towards the diminution of the application of immunities in international criminal law, Heads of State's entitlement to personal immunity continues to play a pivotal role in the ICC's proceedings. The case of Al-Bashir should be considered as a single snapshot of the ongoing evolution of international criminal law. It has become apparent that at this stage, despite the ongoing worldwide efforts to end impunity for tyrants, international immunity, a fundamental principle of international law and interstate relations, persists as a significant procedural hurdle limiting progress in international criminal justice.

¹⁰⁵ It could even be argued that the *public* issuance of an arrest warrant for Al-Bashir is an act of *realjuridik* by the Prosecutor, with the underlying aim of evoking internal pressures towards a regime change in Sudan. For a detailed analysis of this possibility see *Gosnell*, JICJ 6 (2008) 841 (842): "Eventually, in conjunction with the right political circumstances, the warrant against Al Bashir might emerge as a tolerably acceptable mechanism inside Sudan for disposing of an unpopular or embarrassing leader."