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Maria Sandén

# Immunity from arrest?

- *An analysis of obligations for State Parties to the Rome Statute to arrest and surrender a Head of State of a state not party to the Statute in a situation referred to the ICC pursuant to a UN Security Council resolution*

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# Summary

The International Criminal Court (ICC) was created as a compliment to domestic courts in the global fight against impunity. However, customary international law has afforded Heads of State with immunity from prosecution, even for serious international crimes. Some key challenges of international criminal law are to reconcile the competing objectives of maintaining stable international relations, and protecting the sovereignty of States, through immunity rules and ensuring that perpetrators of international crimes are held accountable.

These challenges are currently under intense scrutiny. Some State Parties to the Rome Statute of the International Criminal Court (Rome Statute) are refusing to comply with the ICC's request to arrest Omar Hassan Al Bashir, the incumbent President of Sudan. Bashir is facing charges before the ICC due to a referral by the United Nation Security Council (UNSC) to the ICC of the situation in Darfur, Sudan. Sudan is not a party to the Statute. Therefore, State Parties argues customary international law governs the relationship between them and Sudan. According to the states, this entails that Bashir is entitled to immunity from being arrested, even when the arrest is sought by ICC.

The purpose of this thesis was to discuss and analyse the concept of Head of State immunity and the obligation states have to respect such immunity. Immunity rules under customary international law has been analysed in relation to State Party obligations pursuant to the Rome Statute to disregard such immunity when the Court seeks to arrest an incumbent Head of State. The purpose included clarifying which legal regime applies with regards to the allegedly conflicting obligations for State Parties when a situation is before the ICC pursuant to a referral of a situation by the UNSC.

As there is no genuine solution of norm conflict in international law, the author has opted for a legal dogmatic method combined with international legal doctrine. As such, interpretation of the relevant sources of law according to established principles has been of focus. In order to provide the most appropriate interpretation of the relevant legal regimes, the thesis includes a historical and political perspective. There is also sufficient evidence African states are not willing to cooperate with the ICC due to political concerns.

The development of customary international law governing Head of State immunity entails that personal immunity before domestic courts is absolute. However, the International Court of Justice (ICJ) opened up for an exception which removes personal Head of State immunity before international courts. Incumbent Heads of State has since then been arrested and prosecuted before e.g. the International Criminal Tribunal for Former Yugoslavia, International Criminal Tribunal for Rwanda and the Special Court of Sierra Leone.

Scholars have argued that the ICJ suggested there is a new rule under customary international law which removes Head of State immunity before international jurisdiction. The author of this thesis argues that state practice has not yet constituted such exception. Instead, the author argues international courts have applied different legal regimes enabling them to prosecute and arrest incumbent Heads of States. These regimes provide for provisions which make that legal regime prevailing over customary international law.

In efforts to solve the issues of non-cooperation in the Bashir case, the ICC's three-panel Pre-trial Chamber (PTC) has issued decisions against several State Parties. In line with these decisions, the author argues that the legal effect of a UNSC resolution referring a situation to the ICC is that the Rome Statute in its entirety is applicable to that situation. By applying a teleological interpretation of the referral mechanism and Resolution 1593, Sudan should be treated analogously to a State Party under the Rome Statute. Under the Rome Statute, State Parties cannot impose personal immunity as a bar for prosecution. As such, the Rome Statute prevails over customary international law on immunities. It has been argued that removal of immunity before the ICC only applies to its jurisdiction. The author argues it applies also at the national level, when national authorities act in support of the ICC.

However, the PTC has been inconsistent in its decisions, applying different legal rationales. Therefore, the legal rationale, to some extent, lacks credibility. This fact opens up for critique and leaves the legal rationale ineffective. The author of this thesis argues against this critique. However, higher authority must address these matters to provide acceptance to the legal rationale in the international community. The ICC's Appeals Chamber has this opportunity since Jordan appealed the decision on non-cooperation against it.

The credibility of the legal rationale is to some extent also dependent on political actions. The Assembly of State Parties to the ICC has called upon State Parties to comply with ICC's arrest warrant. UNSC is the sole actor involved, which has not taken any measures to either endorse or decline the legal rationale issued by the PTC.

Leaving the legal issues to the politically oriented UNSC is neither desirable nor compatible with respect for the rule of law. Therefore, Jordan's appeal and the future judgment by the Appeals Chamber are crucial for the future practice by the ICC. Specifically, with regards to personal Head of State immunity in situations referred by the UNSC.

# Sammanfattning

Den internationella brottsmålsdomstolen skapades som ett komplement till nationella domstolar i den globala kampen mot straffrihet. Internationell sedvanerätt har dock medgett immunitet mot åtal för höga statschefer, även för allvarliga internationella brott. Att upprätthålla stabila internationella relationer och skydda staters suveränitet genom immunitetsregler konkurrerar gentemot att se till att gärningsmän av internationella brott hålls ansvariga. Detta är en stor utmaning inom det internationella samfundet.

Denna utmaning är för närvarande under intensiv debatt. Vissa av Romstadgans parter vägrar att samarbeta med domstolens framställning om samarbete för att gripa Omar Hassan Al Bashir, Sudans president. Sudan är inte part till Romstadgan för den internationella brottsmålsdomstolen (Romstadgan), men åtalet mot Bashir är möjligt efter att FN:s säkerhetsråd hänförde situationen i Darfur till domstolen. Parterna till Romstadgan hävdar att internationell sedvanerätt reglerar förhållandet mellan dem och Sudan, vilket enligt dem ger Bashir rätt till immunitet mot att gripas, även om arresteringsordern kommer från den internationella brottsmålsdomstolen.

Syftet med denna uppsats är att diskutera och analysera immunitet för höga statschefer och de skyldigheter som stater har att respektera sådan immunitet. Reglering av immunitet under internationell sedvanerätt analyseras i relation till de skyldigheter som stadgas i Romstadgan. Dessa skyldigheter inkluderar att parter ska bortse från immunitetsskyddet under sedvanerätten när domstolen beslutar om en arresteringsorder mot en statschef. Syftet är således att förtydliga vilken rättsordning som gäller rörande immunitet när FN:s säkerhetsråd hänfört en situation till den internationella brottsmålsdomstolen jurisdiktion.

Eftersom det inte finns någon genuin lösning av normkonflikter inom folkrätten har författaren besvarat frågeställningarna och uppfyllt syftet med en rättsdogmatisk metod i kombination med den folkrättsliga doktrinen. Således har fokus legat vid tolkning av rättskällorna enligt etablerade tolkningsprinciper. För att möjliggöra den mest korrekta tolkningen av rättskällorna är uppsatsen därför skriven med ett historiskt och politiskt perspektiv. Det finns också anledning att tro att vissa av stadgeparterna vägrar att samarbeta med domstolen på grund av politiska skäl.

Immunitet för statschefer under internationell sedvanerätt är absolut inför nationella domstolar. Den internationella domstolen (ICJ) har emellertid öppnat upp för ett undantag för personlig immunitet inför internationella domstolar. Sedan dess har flera sittande statschefer gripits och åtalats vid exempelvis den internationella krigsförbrytartribunalen för det forna Jugoslavien, Internationella krigsförbrytartribunalen för Rwanda och särskilda domstolen för Sierra Leone.

Akademiker har argumenterat att ICJ föreslog att det har utvecklats en ny regel under den internationella sedvanerätten som tar bort statschefers

immunitet under internationell jurisdiktion. Författaren av denna uppsats hävdar att statspraxis ännu inte bekräftat en sådan ny regel. I stället argumenterar författaren att internationella domstolar har tillämpat andra rättskällor som gör det möjligt för dem att åtala och gripa sittande statschefer. Dessa rättskällor föreskriver bestämmelser som innebär att den rättskällan tillämpas i stället för internationell sedvanerätt.

Under ansträngningar att försöka lösa problemen har den internationella brottsmålsdomstolen prövat flera fall där stadgeparter har vägrat tillmötesgå framställningen om samarbete i gripandet av Bashir. I samtliga beslut har domstolen fastställt att staternas agerande står i strid med Romstadgan. I linje med dessa beslut argumenterar författaren att den rättsliga effekten av en säkerhetsrådsresolution som hänför en situation till den internationella brottsmålsdomstolen är att Romstadgan i dess helhet är tillämplig i den situationen. Genom att tillämpa teologisk tolkning av mekanismen för FN att hänföra situationer till domstolen och av resolution 1593, bör Sudan behandlas analogt med en stadgepart under Romstadgan. Enligt stadgan kan parterna inte yrka personlig immunitet som skydd mot åtal. Romstadgan gäller före internationell sedvanerätt. Det har också argumenterats för att detta endast gäller för utövande av domstolens jurisdiktion. Författaren argumenterar för att immunitetsreglerna inte heller gäller på nationell nivå när nationella myndigheter agerar stöd för den internationella brottsmålsdomstolen med att arrestera en person.

Domstolen har emellertid varit inkonsekvent i sina beslut. Domskälen har varierat vilket resulterat i kritik och fortsatt vägran av stadgeparter att tillmötesgå domstolens framställning om gripande. Författaren argumenterar emot denna kritik. För att öka trovärdigheten för besluten i det internationella samfundet måste domstolens överklagandekammare pröva de juridiska frågorna. Kammaren har numera denna möjlighet efter att Jordanien överklagat det beslut som föreskrev att Jordanien agerat i strid med Romstadgan när staten inte grep Bashir under ett statsbesök på dess territorium.

Till viss del är acceptansen också beroende av politiska överväganden. Partsförsamlingen för internationella brottsmålsdomstolen har uppmanat stadgeparterna att verkställa domstolens arresteringsorder. FN:s säkerhetsråd är den enda inblandade aktören som inte vidtagit några åtgärder för att påverka situationen.

Att helt överlämna de rättsliga frågorna till det politiskt inriktade säkerhetsrådet är inte önskvärt och inte heller förenligt med rättsliga principer. Därför är Jordaniens överklagande och överklagandekammarens framtida dom avgörande för domstolens framtida arbete, speciellt vad gäller personlig immunitet för höga statschefer i situationer som hänskjuts till domstolen av FN:s säkerhetsråd.

# Preface

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# Abbreviations

| | |
|---|---|
| AIDP | International Association of Penal Law |
| ASP | Assembly of State Parties |
| AU | African Union |
| DRC | Democratic Republic of Congo |
| FRY | Former Republic of Yugoslavia |
| ICC/the Court | International Criminal Court |
| ICID | International Commission of Darfur |
| ICJ | International Court of Justice |
| ICJ Statute | Statute of the International Court of Justice |
| ICTR | International Criminal Tribunal for Rwanda |
| ICTR Statute | Statute of the International Tribunal of Rwanda |
| ICTY | International Criminal Tribunal for the Former Yugoslavia |
| ICTY Statute | Statute of the International Tribunal for the Former Yugoslavia |
| ILA | International Law Association |
| ILC | International Law Commission |
| JEM | Justice and Equality Movement |
| Nuremberg Charter | Charter of the International Military Tribunal |
| Rome Statute/the Statute | The Rome Statute of the International Criminal Court |
| SCSL | Special Court of Sierra Leone |
| SCSL Statute | Statute of the Special Court of Sierra Leone |
| SLM/A | Sudan Liberation Movement/Army |
| SPLA | Sudan's People Liberation |
| PTC | Three-panel Pre-trial Chamber |
| UN | United Nations |
| UNAMID | African Union-United Nations Mission in Darfur |
| UNGA | United Nation General Assembly |
| UNSC | United Nations Security Council |
| UN Charter | Charter of the United Nations |
| U.S. | United States of America |
| Vienna Convention | Vienna Convention on the Law of Treaties |

# 1 Introduction

## 1.1 Background

On 17 July 1998, 120 states made history by voting to adopt the Rome Statute of the International Criminal Court (Rome Statute/the Statute)[1], creating the world's first permanent international court. Four years later, the Statute obtained the requisite sixty ratifications for its entry into force and one year later the International Criminal Court (ICC/the Court) was fully operational. The Rome Statute provided for the creation of an international criminal court with authority to try cases and punish individuals for the most serious human rights violations. As a court of last resort, ICC seeks to complement national courts in the global fight against impunity, with the intention that no one, not even a Head of State, should go unpunished after committing grave international crimes.[2]

However, customary international law has afforded Heads of State with immunity from prosecution, even for serious international crimes, enabling them to evade justice. With the rise of the human rights movement and greater international support for ending impunity for perpetrators of international crimes, including the establishment of the ICC, immunity boundaries are being questioned.[3]

Some key challenges of international criminal law are to reconcile the competing objectives of maintaining stable international relations, and protecting the sovereignty of States, through immunity rules and ensuring that perpetrators of international crimes are held accountable. These challenges are currently under intense scrutiny as a result of the Rome Statute's State Parties refusal to comply with ICC's request for the arrest of Omar Hassan Al Bashir (Bashir), the incumbent President of Sudan. Specifically, the aforementioned case includes the question if Bashir as the serving Head of State of a non-party to the Rome Statute, subjected to prosecution before ICC due to the referral of the situation in Darfur, Sudan, by the United Nations Security Council (UNSC), enjoys immunity from being arrested and surrendered to the ICC by State Parties to the Rome Statute.[4] As the first situation referred to the ICC by the UNSC, questions are raised with regards to which international legal regime applies in such a situation.

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[1] *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998,

[2] William Schabas, *An introduction to the International Criminal Court*, (Fifth edition., Cambridge, 2017) viii.

[3] Xiaodong Yang, *State immunity in international law*, (Cambridge University Press, Cambridge, 2012) xvi.

[4] See United Nations *Security Council Resolution 1593*, 31 March 2005.

Bashir is currently facing charges of crimes against humanity, genocide, and war crimes against the civil population in Darfur.[5] The Rome Statute prohibits trials *in abstentia*.[6] Therefore, in order to continue proceedings, the ICC must obtain physical custody of Bashir. As the ICC has no enforcement powers, it must rely on either State Parties to cooperate with its request or on the voluntary surrender of Bashir by Sudan or Bashir himself.

In recent years, several State Parties to the Rome Statute have faced the conflict between obligations under the Rome Statute to cooperate with the ICC and obligations to respect immunities under customary international law, due to Bashir's travel into their territory. The three-panel Pre-trial Chamber (PTC) of the ICC, since August 2010, has issued decisions on non-cooperation, including referrals to the Assembly of States (ASP) and the UNSC, pursuant to the Rome Statute. Decisions have been issued against seven State Parties, a majority of them being African States.[7] One of its latest decisions, in July 2017, concerned South Africa's failure to arrest Bashir when he attended the African Union (AU) heads of summit meeting in Johannesburg in June 2015. This decision led protests by several African States, who have accused the ICC of bias against them. The PTC found that States Parties to the Rome Statute, such as South Africa, are required to arrest and surrender Bashir to the ICC when he is found in their territory. This holds even though Sudan is not a party to the ICC – thereby effectively overriding any immunity that Bashir may otherwise enjoy as Head of State under customary international law, and giving the Rome Statute and UNSC resolutions priority. In response, there have been threats by many African states to withdraw from the ICC, and some have taken steps to do so. These political issues may be part of the resistance to cooperate with the Court in arresting Bashir.

Providing justice for the horrendous crimes committed in Darfur is important but the rules of international law must be respected. It is uncertain how treaty rules contained in the Rome Statute and in the UN Charter interact with personal Head of State immunity provided under customary international law. Thus, how such interaction effects the obligations for State Parties stated in the Rome Statute. The inconsistency of legal regimes makes international law and the practice by the ICC, as well as international relations, unstable. Therefore, this thesis intends to contribute to the scholarly debate on the subject by clarifying the obligations for State Parties under the Rome Statute concerning request to arrest a Head of State of a non-party, who face

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[5] Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, 4 March 2009 (Bashir First Arrest Warrant); Second Warrant of Arrest for Omar Hassan Al Bashir, ICC-02/05-01/09, 12 July 2010, (Bashir Second Arrest Warrant).

[6] See Rome Statute art. 63.

[7] *Prosecutor v. Al Bashir*, Pre-Trial Chamber I, ICC-02/05-01/09-109, 13 December 2011 (Decision against Chad); *Prosecutor v. Al Bashir*, Pre-Trial Chamber I, ICC-02/05-01/09-139, 13 December 2011(Decision against Malawi); *Prosecutor v. Al Bashir*, Pre-Trial Chamber II, ICC-02/05-01/09-195, 9 April 2014 (Decision against DRC); *Prosecutor v. Al Bashir*, Pre-Trial Chamber II, ICC-02/05-01/09-266, 11 July 2016 (Decision against Djibouti); *Prosecutor v. Al Bashir*, Pre-Trial Chamber II, ICC-02/05-01/09-267, 11 July 2016 (Decision against Uganda); *Prosecutor v. Al Bashir*, Pre-Trial Chamber II, ICC-02/05-01/09-302, 6 July 2017 (Decision against South Africa); *Prosecutor v. Al Bashir*, Pre-Trial Chamber II, ICC-02/05-01/09-309, 11 December 2017 (Decision against Jordan).

prosecution pursuant to a UNSC referral, with regards to States obligations under customary international law to respect immunities of Heads of State.

## 1.2 Purpose of the thesis and research questions

The purpose of this thesis is to analyse the concept of Head of State immunity and the obligation States have to respect such immunity. Immunity rules under customary international law shall be discussed in relation to State Party obligations pursuant to the Rome Statute to disregard such immunity when the ICC seeks to arrest an incumbent Head of State. The purpose includes clarifying which legal regime applies with regards to the allegedly conflicting obligations when a situation is before the ICC pursuant to a UNSC referral. As such, the interactions between international legal regimes, namely the Rome Statute, the UN Charter and customary international law, will be of focus.

The purpose also includes providing for suggestions for a legal rationale solution to the inconsistent obligations for State Parties to the Rome Statute and its obligation under customary international law to respect immunities. In order to combat the persistence of the legal issues at hand, the thesis shall discuss how to give effect in the international community to the most appropriate legal rational.

In order to satisfy the stated purpose, this thesis will enlarge on the following research questions. The primary research question is formulated as follows:

- To what extent must State Parties to the Rome Statute uphold the personal immunity that Heads of State enjoy under customary international law, when faced with a request by the ICC for arrest and surrender of a Head of State of a non-party? Are State Parties required, on the basis of a UNSC referral of a situation to the ICC, to disregard its obligation under customary international law not to violate a Head of State's right to immunity?

To answer the primary research question, some secondary research questions are necessary. The secondary research questions are formulated as follows:

- What is the legal rationale and accompanying state obligations regarding personal Head of State immunity governed by international customary law?

- What is the legal rationale and accompanying state obligations regarding personal Head of State immunity before international criminal courts and tribunals?

- What is the legal effect of a UNSC resolution referring a situation to the ICC?

- What is the legal rationale and accompanying state obligations regarding personal Head of State immunity before the ICC? Specifically, what is the scope of application of, and relationship between art. 27(2) and 98(1) of the Rome Statute?

## 1.3 Methodology and perspective

### 1.3.1 Methodology

The main focus of the thesis is the legal rationale concerning obligations of State Parties to the Rome Statute under the Statute and customary international law, as well as the effect of a UNSC referral to the Court. As a starting point, the thesis assumes inconsistency between obligations for State Parties under the Rome Statute to comply with the ICC's requests for cooperation and its obligation under customary international law to respect immunities. To examine the international law, which generates this inconsistency, the author has opted for a legal dogmatic method combined with international legal doctrine.

The purpose of legal dogmatic method is often described as reconstructing the solution of a legal problem, often posed as a concrete research question, by applying a rule to it. The basis of doing so is the principles of the commonly accepted sources of law according to the hierarchy of norms.[8] Here is where the international legal doctrine applies. With regard to international law, according to art. 38(1) of the Statute of the International Court of Justice[9] (ICJ Statute), the recognised sources of law are treaties and conventions, international custom, general principles of law, and subsidiary sources such as judicial decisions and legal teachings.[10] The thesis is based on concrete research questions and guidance shall be searched for within the sources of international law.

Crucially, neither legal dogmatic method nor international legal doctrine provides for a genuine solution of norm conflict in international law. As such, no centralised system with a developed hierarchy based on sources of norms exists.[11] In domestic law, a constitutional norm will prevail over a statutory one, while legislation will ordinarily prevail over executive orders or decrees. In international law, all sources of law are generally considered to be equal.[12] There have been efforts to solve different conflicts of norms in international law. However, although a treaty usually prevails over custom, this is only so because the customary rule is *jus dispositivum*, meaning that it can be contracted out of, and applies only by default if the parties in question have

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[8] Fredric Korling, Mauro Zamboni (ed.), *Juridisk metodlära*, (1. edition, Studentlitteratur, Lund, 2013) 24.
[9] United Nations, *Statute of the International Court of Justice*, 18 April 1946 (ICJ Statute)
[10] See also Malcolm David Evans, (ed.), *International law*, (4. ed., 2014, Oxford University Press, Oxford, 2014) 91.
[11] Evans (n. 10) 145.
[12] Joost Pauwelyn, *Conflict of norms in public international law: how WTO law relates to other rules of international law*, (Cambridge University Press, Cambridge, 2003) 94-96.

not agreed differently.[13] However, a treaty is also *jus dispositivum* and can equally be amended or abrogated by subsequent treaty or custom. In international law, the only true instance of hierarchy is the very limited number of *jus cogens* norms, e.g. prohibition of genocide or prohibition of torture. Such norms invalidate any other conflicting norm. However, such invalidation can only be superseded by a subsequent norm of equal status.[14]

As such, as legal dogmatic method confirms, the examination and interpretation of the sources of law will be of focus. The Vienna Convention on the law of Treaties (Vienna Convention) is part of the international legal doctrine, and will be applied when interpretation is needed. As can be read in Art. 31(1) of the Vienna Convention, *'[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.* Thus, the purpose of the treaty needs to be derived from the treaty as a whole. Teleological interpretations have been recognised both in international rulings and in relation to the Rome Statute and the UN Charter.[15]

Legal dogmatic method was chosen due to the complicated nature of the legal questions presented in the research questions. A credible legal analysis requires the highest degree of devotion to the legal material. A legal dogmatic analysis intends to analyse the relevant sources of law so that the result can be assumed to reflect the established law, or how the relevant rule should be perceived in a given context. This thesis concentrates on the interpretation of *de lege lata*, including how the law has been interpreted and applied thus far. Different approaches and rationales to the legal questions at issue are put forward. As there are many interpretations, it is important to give effect of the most appropriate legal rationale. Therefore, this thesis will also discuss solutions to give this effect.

A flaw with the legal dogmatic method is that it prevents an examination of the relationship between the political and legal dimension of international law. Even if the thesis' main focus is the legal rationale of the issues arising under international law, these issues are part of international political issues. The author hopes to mitigate this flaw by including a historical and political perspective, describing how the law has developed through historical events and political decisions and relations, thereby placing the legal issues in a political context.

### 1.3.2 Perspective

Public international law is founded on historical events and political decisions made by states throughout history in the international society. Each legal regime is a historical phenomenon, developed through events in the

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[13] Alfred Verdross, 'Jus Dispositivum and Jus Cogens in International Law', (1966) 60(1) Am J Int'l L 55, 58.

[14] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, 331 (Vienna Convention) art. 53, 64. See also Pauwelyn (n. 12) 278-82.

[15] Bruno Simma and others (red.), *The Charter of the United Nations: a commentary* (Vol. 1, 3. ed., Oxford Univ. Press, Oxford, 2012) 31.

international society.[16] Though the issue of focus is the legal rationale of obligations related to immunities and the practice by the ICC, the historical and political context must be studied in order to completely understand such legal issues. The solutions to these issues may also have an effect on international relations as well as the practice of the ICC. Consequently, it appears natural for the thesis to include both a historical and political perspective, to explain the international legal development in order to analyse and constitute the appropriate interpretation of *de lege lata*.

However, as mentioned above, a historical and political approach can be said to conflict with the constitution of legal dogmatic method and the international legal doctrine. A strict legal analysis contradicts the rationale of the historical and political perspective, as it fails to present the factual circumstances behind the making and application of law. In the end however, these perspectives will benefit in providing the most appropriate interpretation of the international law of focus. This outweighed the created conflict between the historical and political description and the legal analysis. The historical and political perspective will permeate the thesis as a whole. In particular, the relationship between African states and the ICC, as well as the role of the UNSC and the ASP will be addressed continuously throughout the thesis.

# 1.4 Material

## 1.4.1 Sources

To fully comply with legal dogmatic method and the international legal doctrine, the primary material being researched for this thesis are sources of international law, as outlined above, and defined in art. 38(1) of the ICJ Statute. The primary sources constitute the applicable law of the complex problems presented and the main sources providing appropriate conclusions of the research questions.

The concept of Head of State immunity and the state obligations associated to it is, to a large extent, based on customary international law, as raised from state practice and *opinio juris*. Therefore, relevant case law will be a main focus and will examine the research questions related to immunities and states obligation under customary international law.

Concerning Head of State immunity before international courts and tribunals, the Charter of the United Nations[17] (UN Charter), the Charter of the International Military Tribunal[18] (Nuremberg Charter), the Statute of the International Tribunal of former Yugoslavia[19] (ICTY Statute), the Statute of

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[16] Robert Kolb, *Theory of International Law*, (Oxford: Hart Publishing 2016) 44.
[17] United Nations, *Charter of the United Nations*, 24 October 1945, (UN Charter).
[18] United Nations, *Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axix*, 8 August 1945 (Nuremberg Charter).
[19] UNSC, *Statute of the International Criminal Tribunal for the Former Yugoslavia* (as amended on 17 May 2002), 25 May 1993 (ICTY Statute).

the International Tribunal for Rwanda[20] (ICTR Statute), and the Statute of the Special Court for Sierra Leone[21] (SCSL Statute), as well as case law from these Tribunals and Courts will be examined and interpreted.

As outlined above, the Rome Statute governs the ICC, therefore, the interpretation of the Statute will be of main focus examining the research questions concerning the Court and State Party's obligations under the Rome Statute. Moreover, the decisions on non-cooperation issued by the PTC will be analysed. Since the ICC practice in the Bashir case is a result of a UNSC referral, UN law and practice are also primary sources. Specifically, interpretation of Resolution 1593, thus referring the situation in Darfur to the ICC, is crucial.

As all the aforementioned treaties must be interpreted, the Vienna Convention is part of the primary sources, as well as legal literature discussing the interpretation of these treaties.

For the sake of arguments with regard to the legal rationale, and followed the historical and political perspective of this thesis, as well for the sake of discussion, both academic and political sources will be included. Such sources include legal literature, articles, historical documents, political statements, and discussions. Particularly these sources will be used when the legal doctrine fails to offer a conclusive answer to a question. Moreover, when available, multiple sources will be utilised.

### 1.4.2 Source criticism

The legal issues that will be discussed in this thesis include issues of political nature. Political opinions and personal interests can exist without influencing the professional works of academics. However, the author of the thesis has closely examined the authors of scholarly contributions on the subject and utilised multiple sources where available and appropriate. Above all, academia has played an important role on the subject.

Part of writing on a controversial subject is being aware of personal opinions that could risk negatively affecting the contents and the result of the thesis. It is difficult to have a lack of opinion on one of the most controversial legal issues of this time. The author has tried to mitigate these problems through constant awareness regarding the separation of personal opinion from legal analysis and close scrutiny of the material included in the thesis, in order to contribute to the thesis with an objective mind set.

## 1.5 Previous research

Countless of academic articles offer differing legal conclusions to the issues of international immunities and practice by the ICC, specifically regarding the case of Bashir.

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[20] UNSC, *Statute of the International Criminal Tribunal for Rwanda* (as last amended on 13 October 2006), 8 November 1994 (ICTR Statute).
[21] UNSC, *Statute of the Special Court of Sierra Leone*, 16 January 2002, (SCSL Statute).

An example of more recent articles includes *'Does President Al Bashir Enjoy Immunity from Arrest.'*[22], by Paola Gaeta, who argues that the UNSC referral only triggers the jurisdiction of the ICC and does not make the Rome Statute implicitly applicable to the situation in Darfur. She argues customary international law on personal immunities is not applicable when the ICC exercises its jurisdiction. However, she argues the Rome Statute continues to only bind State Parties to the treaty unless the UNSC expressly requires UN Member States to comply with requests issued by the ICC.[23] As such Gaeta distinguishes between exercise of jurisdiction and judicial orders. The State Parties cannot lawfully disregard personal immunities under customary international law, thus, are not obligated to comply with the request to arrest.[24]

Another example of a recent article is *'The Security Council Referral and Chapter VII of the Charter of the United Nations'*[25] by Dapo Akande, who argues that the UNSC Resolution 1593 implicitly adopts the provisions of the Rome Statute, rendering them binding on Sudan as obligations under UN law because the UNSC acts under Chapter VII of the UN Charter. Therefore, State Parties to the Rome Statute are obligated to arrest Bashir pursuant to the Rome Statute.[26]

In addition, some scholars argue a new rule of customary law, removing immunity before international courts, has developed. This would mean no Head of State is protected by immunity before international courts, including the ICC.[27]

In summary, although to some extent dependent on the circumstances in the Bashir case, the scholarly debate has resulted in at least three lines of arguments reflecting on differing legal rationales for State Parties obligations under the Rome Statute with regards to arrest a Head of State of a non-party subjected to jurisdiction pursuant to a UNSC referral: 1) the rules of customary international law on personal immunity applies with regards to State Parties' obligation, but not with regards to jurisdiction[28] 2) a UNSC referral implicitly adopts the provisions of the Rome Statue binding on a non-

[22] Paola Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest', (2009) 7 JICJ, 315.
[23] Gaeta 'Immunity from Arrest' (n. 22) 332.
[24] Gaeta 'Immunity from Arrest' (n. 22) 319, 332.
[25] Dapo Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities', (2009) 7 JICJ, 333–352.
[26] Akande 'Legal Nature of UNSC Referrals' (n. 25) 340-342.
[27] Sophie Papillon, 'Has the United Nations Security Council Implicitly Removed Al Bashir's Immunity', (2010) 10 Int'l Crim. L. Rev. 275; Antonio Cassese *International criminal law*, (2. ed., Oxford University Press, Oxford, 2008) 311-312; Claus Kreß, Kimberly Prost 'Article 98' in Otto Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article* (2nd ed, Verlag C. H. Beck oHG, Minchen, 2008) 1601.
[28] Gaeta 'Immunity from Arrest' (n. 22) 332.

party to the Rome Statute pursuant to UN law[29] 3) A new rule of customary law removes immunity of Heads of States before international courts.[30]

Considering the latest legal and political development there can be no serious debate that the question of personal immunity remains one of the most pressing issues before the ICC. While the PTC decisions may have the answer to the arising legal questions, it cannot pretend to be the last word on the matter. Certainly, it is not considered as such by several State Parties. Bashir will continue to travel inside and outside of State Parties and will avoid prosecution. Consequently, the issue of immunities and the ICC is highly relevant to further analyse. The aforementioned scholarly contributions are written prior to the latest PTC decision on non-cooperation in the Bashir case. Accordingly, new decisions have been issued, affecting the debate of the most appropriate legal rationale and its effect. Arguments made by the aforementioned scholars will be discussed in great detail throughout this thesis, as well as other contributions to the scholarly debate.

## 1.6 Delimitations and clarifications

As this thesis will analyse issues that are part of a larger and more complex issue, involving several legal and political concerns, delimitations have been made in order to provide the focus required.

International law includes several different rationales for immunity. This thesis will solely review the concept of Head of State immunity. In addition, personal immunity will be the primary focus here; hence, functional immunity will be briefly explained to give a better understanding of personal immunity. Personal immunity before national courts will be evaluated, but the focus here will be personal Head of State immunity before international courts, specifically, the ICC. Concerning other international courts and tribunals, the focus will be given to the practice by the ICJ, Nuremberg Tribunal, ICTY, ICTR and SCSL as personal Head of State immunity has been addressed by these bodies.

Moreover, it has been debated if international crimes should be considered as an official or private act. Since this thesis solely concentrates on personal immunity of an incumbent Head of State, which protect State Officials from prosecution of both official and private acts, this question will not be further addressed.

The Rome Statute consists of 128 complex provisions. This thesis will focus on the provisions governing Head of State immunity and obligations for State Parties to cooperate with the Court. However, to give a full understanding of the issues at stake, conditions for the Court's jurisdiction will be explained.

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[29] Akande 'Legal Nature of UNSC Referrals' (n. 25) 333; Dan Terzian, 'Personal Immunity and President Omar Al Bashir: An Analysis under Customary International Law and Security Council Resolution 1593', (2011) 16 UCLA J. Int'l L. Foreign Aff. 279, 309.

[30] Papillon (n. 27) 275; Cassese, *Int. Criminal Law* (n. 27) 311-312; Kreß & Prost (n. 27) 1601.

In total, the PTC has issued eight decisions against seven State Parties on non-cooperation; four of these decisions will be reviewed. Four of the decisions, namely the decisions against Djibouti, Uganda and two decisions against Chad lack of relevant arguments regarding Head of State immunity. Djibouti, Uganda and Chad mainly argued that Bashir is protected by immunity because of Sudan's membership in the AU. Regional and domestic law, including AU law, will not be reviewed. These decisions are not relevant with regard to the purpose and research questions of this thesis.

The decisions against Malawi, Democratic Republic of Congo (DRC), South Africa and the Jordan will be evaluated and analysed. Malawi and DRC also lack relevant argumentation of international law; however, these decisions are important to illustrate a change of legal rationale by the PTC. South Arica and Jordan also include irrelevant arguments for the scope of the thesis. However, with regard to obligations under the Rome Statute and Head of State immunity only relevant arguments and court analysis will be analysed.

For clarification, when referring to Head of State, the term includes Head of Government and Minister of Foreign Affairs. There is no definition of Head of State under customary international law, but its been clarified in practice and treaties the term includes the mentioned titles.[31]

## 1.7 Structure

In order to provide a logical line of arguments that answer the primary research question and provides for the thesis' conclusions, the author has chosen to structure the thesis according to the secondary research questions. All chapters will continuously provide interpretation and discussion of the legal regimes offered by judicial actors and legal commentators. The last section of each chapter will provide the author's analysis.

Chapter two will analyse the development of customary international law on immunities. This chapter aims to constitute *de lege lata* and its place in international law by reviewing the development of the legal regime.

Chapter three will analyse the development of personal immunity before international criminal tribunals and courts. This chapter aims to determine how personal immunity with regards to jurisdiction and judicial orders has been applied by international criminal tribunals and courts. This will provide analogous or *e contratio* interpretation with regards to personal immunity before the ICC.

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[31] See for example UN General Assembly, *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, 14 December 1973, art. 1(1)(a); Arthur Watts, 'The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers', (1994) 274 Recueil des Cours, 21; Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), International Court of Justice, 14 February 2002, para 51 (Arrest Warrant Case).

Chapter four will analyse personal Head of State immunity and State Parties' obligations under the Rome Statute. This chapter will mainly describe the legal framework of the Statute as it must be explained to understand the legal problems provided in the research questions. However, it will analyse, to some extent, the drafting procedure of the Rome Statute in order to provide for teleological interpretation of its provision.

Chapter five will analyse the Bashir case, specifically concentrating on the non-cooperation decisions issued by the PTC and State Parties' reaction to these decisions. Of focus for the analysis are the legal effect of Resolution 1593 and the scope of art. 27(2) and 98(1) of the Rome Statute, as well as the credibility of the PTC's legal rationale.

Chapter six will deliver the final analysis of the thesis. By drawing upon the analysis of each chapter, it will analyse the different parameters of the legal rationale and provide an answer to the primary research question. With this legal rationale, will come future reflections, and lastly the conclusions of this thesis.

# 2 Head of State immunity under customary international law

## 2.1 Introduction

Chapter two will explain and analyse the development of international customary law governing Head of State immunity. The purpose of this chapter is to determine the aims of Head of State immunity and its place in international law by discussing its development through state practice and doctrine.

Head of State immunity derives from State immunity; hence, the chapter will initially introduce the development of State immunity. The purpose here is to provide the reader with a background and deeper understanding of Head of State immunity. Additionally, recent developments and the current state of law concerning Head of State immunity will then be discussed. The development of both State immunity and Head of State immunity include many conflicting interpretations and opinions, both with regards to state practice and academia, which will be discussed in each section.

## 2.2 State immunity

### 2.2.1 Absolute immunity doctrine to restrictive immunity doctrine

Immunity rules are generally well established in international law as a possible hindrance to prosecuting international crimes.[32] State immunity was first created to ensure sovereign equality between states and non-interference.[33] During the 19th century, the theory of absolute immunity was sustainably accepted and upheld.[34] The concept of this theory derived from the Latin Maxim *par in parem non habet imperium* according to which all states are equally sovereign, thus, have no right to exercise jurisdiction against each other.[35] Accordingly, the sovereign state has jurisdiction over its territory and its citizens. Therefore, regardless of circumstances, no state may claim superiority or exercise jurisdiction over another state, and foreign states enjoy immunity from the jurisdiction of the domestic courts of other states. A consequence of the theory of absolute immunity is that all acts of a state are granted immunity by the domestic courts of other states. [36]

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[32] Arrest Warrant case (n. 31), para 51.

[33] Yang (n. 3) 7.

[34] Rosanna Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law,* (Oxford University Press. 2008) 13.

[35] Jurisdictional Immunities of State, Germany v. Italy, Judgment ICGJ 434 (ICJ 2012), 3 February 2012, International Court of Justice, (Germany v. Italy), para 57.

[36] Malcolm N. Shaw, *International law*, (Eighth edition., Cambridge, 2017) 494.

The principle *par in parem non habet imperium* was significantly present in one of the first judgments, from 1812, expressing the rule of State immunity; the *Schooner Exchange v. McFadden*[37]. The Schooner Exchange influenced the law of State immunity since it was one of the first cases confirming that states should be protected from foreign jurisdiction.[38] Chief Justice Marshall's explanation of the rationale of State immunity stated:

> *One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a sovereign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign status, though not expressly stipulated, are reserved by implication, and will be extended to him.*[39]

The *Schooner Exchange* became renowned because of this quote, in which Marshall does not address any exceptions to immunity, hence, representing absolute immunity. Comity and reciprocal treatment meant sovereigns were hesitant to assert jurisdiction over other sovereigns.[40] As monarchs gave way to the sovereign nation-state, sovereign immunity was transferred to politics. Considerations of foreign policy and domestic protection justified applying the rule of immunity to the state.[41]

However, scholarly writing and jurisprudence are divided in their understanding of the *Schooner Exchange*. The absolute doctrine was not universally accepted, even during Marshall's time.[42] Courts in Italy and Belgium rejected the absolute doctrine as early as the late nineteenth century, by adopting an exception for private acts. Several other states followed shortly thereafter.[43] As such, the transition from the absolute immunity theroy to the restrictive immunity theory began, and occurred gradually over a long period of time.

Modern critique against the absolute doctrine includes that it recognises the time when personal sovereigns were indeed above the law within their own states. The rationale is seen to have no deeper roots than the reciprocal interests of States in preventing interference with each other's basic governmental activities.[44] The *Schooner Exchange* has not only been referred

[37] *The Schooner Exchange v. McFaddon*, (1812) 11 U.S. (7 Cranch) 116.
[38] Rosanna Van Alebeek, 'National Courts, international Crimes, and the Functional immunity of state officials', (2012) Neth, Intl L Rev 59:5-41,12.
[39] Alebeek, *Immunity* (n. 34) 137.
[40] See Elihu Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States' (1951) 28 Brit YB Int'l L 220, 220-221.
[41] Lauterpacht (n. 40) 220-221.
[42] Jasper Finke, 'Sovereign Immunity: Rule, Comity, or Something Else?', (2010) 21 EJIL. 853, 858-60.
[43] Alebeek, 'National Courts' (n. 38) 14-15.
[44] Myres S. McDougal, 'Foreign Sovereign Immunities Act of 1976: Some Suggested Amendments', in Martha L. Landwehr, *Private Investors Abroad – Problems and Solutions in Internaitonal Business in 1981* 4, 4 (Martha L. Landwehr ed., 1981), 11.

to as a source of absolute immunity, but also under the assumption that immunity is granted as a matter of courtesy and not as a matter of law.[45]

In 1950, after a comprehensive survey of state practice in the case of *Dralle v. Republic of Czechoslovakia*[46], the Supreme Court of Austria found that a foreign state could only be protected from Austrian jurisdiction for the acts of a sovereign character.[47] A few years later, in the *1963 Claim Against the Empire of Iran Case*[48], the German Federal Constitutional Court held that absolute immunity was no longer a rule of customary international law. In the same case, the Court presented a distinction between sovereign acts (*acta jure imperii*) and non-sovereign acts (*acta jure gestionis*).[49]

The restrictive immunity doctrine was developed as a response to developments in the international community, specifically, the increase of state trading, and other activities in foreign countries.[50] Developments in immunity rules were argued as necessary because they would render states unjust business advantages if they were immune from the jurisdiction of foreign state's jurisdiction. The rationale entailed State immunity should only be granted in matters when necessary for the states to fulfil their functions. Eventually, an increasing number of states started to adopt the restrictive immunity approach.[51]

Today, the restrictive doctrine is accepted as the prevailing doctrine.[52] For example, this is indicated in the *UN Convention on Jurisdictional Immunities of States and their Property*[53], adopted by the United Nations General Assembly (UNGA) in 2004, which list exceptions to State immunity.[54]

However, even now that the restrictive doctrine enjoys widespread support, various national courts and legislation understands the doctrine differently. According to some scholars, the distinction between sovereign and non-sovereign acts is crucial to the present law of State immunity.[55] The distinction is only theoretical, and provides that sovereign acts are characterised by the fact that they are exercised by the sovereign powers of a state, and non-sovereign acts are performed by the state as a person.[56] Such

[45] Lee Caplan, 'State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory', (2003) 97 AM. J. INT'L. L. 741, 748; See also Svrine Knuchel, 'State Immunity and the Promise of Jus Cogens', (2011) 9 Nw. U. J. INT'L HUM. RTs. 149.
[46] OGH 1 Ob 171/50 (Dralle v. Republic of Czechoslovakia), 10 May 1950, SZ 1950 No. 23/143, 304-332; 17 ILR 155, Austria Supreme Court.
[47] August Reinisch, Peter Bachmayer, 'Identification of Customary International Law by Austrian Courts' (2012) 17 Austrian Rev Int'l & Eur L 1, 10.
[48] Empire of Iran, German Federal Constitutional Court, 45 ILR 57 (1963).
[49] Shaw (n. 36) 494; Anders Henriksen, *International law*, (Oxford University Press, Oxford, 2017) 105.
[50] Yang (n. 3) 19.
[51] Shaw (n. 36) 491.
[52] Shaw (n. 36) 499.
[53] UN General Assembly, *United Nations Convention on Jurisdictional immunities of States and their Property*, 2 December 2004, (Convention on Jurisdictional immunities).
[54] See Convention on Jurisdictional immunities art. 18 and 19.
[55] Hazel Fox, Philippa Webb, *The law of state immunity*, (Revised and updated Third edition., Oxford, United Kingdom, 2015) 22.
[56] Fox & Webb (n. 55) 22.

distinction has been criticised because it could be argued that any state act is carried out for public purposes.[57] In addition, different standards exist regarding how to determine the private or public nature of an act, and the context in which this distinction should be applied is also uncertain. So far, state practice so far has been varying.[58]

## 2.3 Recent developments of Head of State immunity

### 2.3.1 Individual criminal responsibility and irrelevence of capacity

The development of State immunity has reflected the development of Head of State immunity. Head of State originally benefited from immunity based on the absolute identification between the state and its leader. As such, the absolute State immunity was vested in the Head of State. Approaching the restrictive doctrine, the Head of State could be protected by immunity for sovereign acts. However, after World War II the Nuremberg trials made it clear that high-ranking State Officials could be held individually responsible for crimes committed while in office.[59] Nevertheless, rules governing immunity have continuously developed in customary international law to prevent abusive criminal proceedings against State Officials.[60]

In recent decades, the boundaries of immunity and accountability under international law have been under intense scrutiny. Broad legal fictions such as the representative theory, have been rationalised, thus, functional necessity is currently the most demonstrative explanation for immunity in international customary law.[61] Consequently, international law considers the rights given to a Head of State as accorded to him or her in the capacity as highest representatives of their State, rather than inherently in their own right.[62] Significant key developments in international criminal law have been the driving forces behind to the re-evaluation of immunity principles.[63]

International criminal law is a relatively new and unique international law regime.[64] It has developed by gradual accretion from international

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[57] Fox & Webb (n. 55) 399, 402.
[58] Finke (n. 42) 858-60.
[59] Lucas Buzzard, 'Holding an Arsonist's Feet to the Fire? - The Legality and Enforceability of the ICC's Arrest Warrant for Sudanese President Omar Al-Bashir', (2009) 24 Am U Int'l L Rev 879, 912-913.
[60] Steffen Wirth, 'Immunity for Core Crimes? The ICJ's Judgment in the Congo v. Belgium Case' (2002) 13 EJIL, 877, 882.
[61] Chanaka Wickremasinghe, 'Immunities Enjoyed by Officials of States and International Organisations' in Malcolm D Evans (ed) *International Law* (2nd ed, Oxford University Press, Oxford, 2006) 395, 396; Craig Barker, *International Law and International Relations*, (Continuum, London, 2000), 164.
[62] Watts (n. 31) 35-36.
[63] Cassese, *Int. Criminal Law* (n. 27) 307; Robert Cryer, 'The ICC and the Security Council: An Uncomfortable Relationship' in José Doria, and others (ed) *The Legal Regime of the International Criminal Court* (Martinus Nijhoff Publishers, Leiden, 2009) 422, 455.
[64] Cassese, *Int. Criminal Law* (n. 27) 4.

humanitarian law, human rights law and national criminal law.[65] International criminal law focus upon the individual criminal responsibility for international crimes. Thus, unlike international law in general, which typically governs the rights and obligations of states and relations between states.[66] International criminal law introduces a fundamental challenge to immunity for international crimes as the perpetrators of such crimes are often State Officials who have enjoyed immunity throughout history.[67] International criminal law encompasses substantive rules defining crimes and liability, and procedural rules, which regulate international criminal proceedings.[68]

The notion of individual criminal responsibility is central to international criminal law.[69] The concept that individuals are only subject to the criminal jurisdiction belonging to their States has been progressively rejected and states have slowly shifted towards claiming extraterritorial jurisdiction for international crimes.[70] The crucial turning point for this concept was the international Military Tribunals of Nuremberg. The tribunal were provided with jurisdiction to prosecute low-ranking servicemen, senior State Agents of military command as well as political leaders for crimes committed during the World War II.[71] As the infamous quote from the Nuremberg Tribunal states: '*Crimes against International Law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of International Law be enforced'*.[72]

The development of the principle of irrelevance of official capacity has been equally important to individual criminal responsibility. Historically, senior State Officials have been able to assert their official position as a defence to individual responsibility for international crimes.[73] Art. 7 of the Nuremberg Charter explicitly states that defendant's official position will not free them from responsibility; *'The official position of defendants, whether Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment'*.[74]

The provision, known as the Nuremberg formula, has served as a blueprint on the issue of individual criminal responsibility for all international tribunals and courts to be established. On 11 December 1946, the UNGA unanimously adopted Resolution 95, which affirmed the principles.[75] The principles have been endorsed in the Statutes of for example the ICTY, ICTR, SCSL and

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[65] Cassese, *Int. Criminal Law* (n. 27) 6-7.
[66] Cryer (n. 63) 1.
[67] Kreß and Prost (n. 27) 1608.
[68] Cassese, *Int. Criminal Law* (n. 27) 3.
[69] Ciara Damgaard, *Individual Criminal Responsibility for Core International Crimes* (Springer, Berlin, 2008) 15.
[70] Nuremberg judgment, *France v Göring*, Judgment and Sentence 22 IMT 203 (1946), 41 AJIL 172, (1946) 13 ILR 203, ICL 243 (IMTN 1946) 1 October 1946, International Military Tribunal, 466.
[71] Cassese, *Int. Criminal Law* (n. 27) 30.
[72] *France v. Göring* (n. 70) 466.
[73] Cassese, *Int. Criminal Law* (n. 27) 305.
[74] Nuremberg Charter, art. 7.
[75] UN General Assembly, *Resolution 96*, 11 December 1946.

ICC. In the *Eichmann case,*[76] the Supreme Court of Israel noted that the principles reflect customary international law.[77] The latter has also been stated by other domestic Courts, ICTY and addressed during the negotiations of art. 27 of the Rome Statute.[78]

### 2.3.2 Normative hierarchy doctrine

Influenced by international criminal law and international human rights law, a new theory for Head of State immunity has derived to solve the conflict between norms of Head of State immunity and norms constituting accountability for international crimes. The theory implies that jurisdictional immunity is no longer applicable if states breach fundamental norms of international law considered as *jus cogens* norms.[79] As such, Heads of States can be held responsible for such violations. The underlying rationale is that certain norms, such as international crimes, rank higher in hierarchy than immunity of Head of State because the latter is not considered a *jus cogens* norm.[80]

The idea that sovereign immunity must yield to fundamental human rights violations was first applied by the United States (U.S.) District Court in the *Princz case*[81]*,* however, the US Court of Appeals for the DC Circuit overruled the judgment.[82] It was not until the Corte di Cassazione of Italy delivered its judgment in *Ferrini v. Germany*[83], that a state's highest court had ever embraced the theory, explicitly stating:

> *Such rights are protected by norms, from which no derogation is permitted, which lie at the heart of the international order and prevail over all conventional and customary norms, including those, which relate to State immunity. […] The recognition of immunity from jurisdiction […] for such misdeeds stand in stark contrast to [this] […] analysis, in that such recognition does not assist, but rather impedes, the protection of those norms and principles […] There is no doubt that a contradiction between two equally binding legal norms ought to be resolved by giving precedence of the norm with the highest status*.[84]

In promoting the normative hierarchy theory, it has been argued that international law is gravitating from a system focused on states and

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[76] *Attorney-General of the Government of Israel v. Eichmann* (Israel Sup. Ct. 1962), Int'l L. Rep., vol. 36, p. 277, 1968 (Eichmann).
[77] Eichmann (n. 76) para 10; Cassese (n. 27) 871.
[78] Schabas William, *The International Criminal Court: a commentary on the Rome Statute*, (2. ed., Cambridge University Press, Cambridge, 2016), 595-597; *Prosecutor v Taylor,* Decision on Immunity from Jurisdiction, SCSL-2003-01-1-059, 31 May 2004, para 41.
[79] Janis, Mark, *An Introduction to International Law*, (Aspen Publishers, New York 2003), 62-63
[80] Caplan, (n. 45) 758.
[81] *Princz v. Federal Republic of Germany*, 813 F. Supp 22 (DDC 1992).
[82] *Princz v. Federal Republic of Germany* (n. 81).
[83] *Ferrini v. Germany*, Appeal decision, Cass no 5044/04, ILDC 19 (IT 2004), 11 March 2004, Italy Supreme Court of Cassation.
[84] F*errini v. Germany* (n. 83) 668–669.

sovereignty to a system focused on people and human rights.[85] Moreover, although in separate or dissenting opinions, Judges of international courts have argued for the normative hierarchy theory.[86] For example in Judge Awb Sgawkat Al-Khassawneh's dissenting opinion in the *Arrest Warrant case* he stressed that the move towards greater accountability for international crimes and increased recognition of the need to effectively combat such crimes are vital community values that require hierarchically higher norms to override any rules of immunity. This argument is consistent with art. 53 of the Vienna Convention which states that treaties may be void if they conflict with pre-emptory norms of international law. In addition, many academics support his argument.[87] However, Al-Khasawneh acknowledged that the idea of fundamental norms overriding immunity was at a *'very nebulous stage of development'*.[88]

The reasoning made by Corte di Cassazione has been criticised to simplify the concept of *jus cogens* and its consequences on non-*jus cogens* norms of international law.[89] A consensus in the debate is that *jus cogens* is a valid category of norms in international law, but much else is disputed. For example, how to determine which norms have acquired the status of *jus cogens* and which practical consequences the normative hierarchy theory generates.[90]

One of the many particularities of the critique is a basic assumption which many scholars and judges consider has not been seriously questioned; fundamental human rights, like the prohibition of torture and crimes against humanity are part of *jus coges* whereas sovereign immunity, even though a legally binding rule, belongs to non-*jus cogens* norms.[91] This view reveals a substantive understanding focusing on the basic values of the international community. In contrast to a more formal perception, this view emphasises the protection of the most fundamental human rights, thereby strengthening the position of the individual *vis-à-vis* the Sate.[92] The more formal perception includes rules that are inherent to the function of the international legal system, e.g. *pacta sunt servanda* and the sovereign equality and independence of states.[93] It is argued that if one should accept a more state-centred concept of *jus cogens* and that sovereign immunity is directly based

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[85] Winston P. Nagan, Joshua L. Root, 'The Emerging Restrictions on Sovereign Immunity: Peremptory Norms of International Law, the U.N. Charter, and the Application of Modern Communications Theory', (2012) 38 N.C. J. Int'l L. & Com. Reg. 375, 468.
[86] *Germany v. Italy*, (n. 35) Judge Yusuf (separate opinion); Arrest Warrant case (n. 31) para 7-8 per Judge Al-Khasawneh (dissenting).
[87] For example, see Dinah Shelton, 'Normative Hierarchy in International Law', (2006) 100 Am. J.INT'L L. 291, 299-302.
[88] *Arrest Warrant case* (n. 31) para 8, per Judge Al-Khasawneh (dissenting).
[89] See in general L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law*(1988); A. Orakhelashvili, *Peremptory Norms in International Law* (2006); Finke (n. 42) 867.
[90] Finke (n. 42) 867.
[91] *AI-Adsani v. Kuwait*, 103 I.L.R. 420 (Q.B. 1995), affirmed by the English Court of Appeal, 107 I.L.R. 536 (C.A. 1996), Dissenting Opinion of Judges Rozakis and Caflisch, para 2; Finke (n. 42) 867; see also Caplan (n. 45) 745.
[92] Christian J. Tams, 'Enforcing Obligations Erga Omnes in International Law' (2005) CUP, 312, 142.
[93] Georges Abi-Saab, 'The Use of Article 19', (1999) 10 EJIL, 339, 349.

on such sovereignty, it is much more difficult to argue that sovereign immunity is not part of *jus cogens*.[94]

Moreover, another problem discussed is that even if most treaties consist of an existing peremptory norm of general international law[95], it is argued and far from settled that this specific consequence applies outside conflicting treaty obligations involving *jus cogens*.[96] Specifically, the clash between fundamental human rights and sovereign immunity is argued to be a clash of concepts and ideologies, not of norms. A conflict of norms would require that legal consequences of two norms are incompatible with each other. It is also argued that this requirement is not met as the truisms of international law are the existence of a rule and its enforcement are two different sets of problems.[97] Sovereign immunity is argued as an exception to adjudicatory jurisdiction, hence concerning enforcement matters, not the identification of an unlawful act as a human rights violation.[98] This would require the existence of a rule considering a *jus cogens* norm, because of its value, invaliding rules limiting its enforcement, which according to critics, does not and will not exist.[99]

## 2.4 Current state of Head of State immunity

### 2.4.1 The rationale for Head of State immunity

Customary international law governs Head of State immunity and no definition of this immunity exists thereunder. The notion of Head of State immunity emerged as a personal protection from the jurisdiction of foreign states. However, developments in international customary law provide that immunity is not vested in the Head of State personally, but belongs to the state. The independence of the state and the protection of the ability of its prime representatives to carry out international functions prevent one state from exercising jurisdiction over the Head of State of another state without the latter's consent.[100]

Justification for Head of State immunity can historically be divided into two main groups: the representative character theory and the functional necessity theory.[101]

The representative character theory originates from when the Head of State in person was very close to the state. According to the theory, the immunity is to be traced to the sovereignty of the state. In conjunction with the previously

[94] Finke (n. 42) 868.
[95] See for example Vienna Convention art. 53 and 64.
[96] Finke (n. 42) 868.
[97] Andreas Zimmermann, 'Sovereign Immunity and Violation of Ius Cogens – Some Critical Remarks', (1994–95) 16 Michigan J Int'l L 433, 438.
[98] Caplan (n. 45) 747, 780.
[99] Finke (n. 42) 869.
[100] Fox & Webb (n. 55) 427.
[101] Barker (n. 61) 164.

mentioned *par in parem non habet imperium*, this theory formed the foundation upon which the early rules of Head of State immunity rested.[102]

The functional necessity theory emerged during the 20th century as a development from the representative character theory. It is based on the rationale that Heads of States need immunity from jurisdiction of other states in order to conduct their work. The immunity itself is tied to the act performed, not to the individual performing it. The theory of functional necessity is currently considered to be the rationale for Head of State immunity.[103]

## 2.4.2 Concepts of Head of State immunity

### 2.4.2.1 Functional immunity

Functional immunity (*immunity rationae materiae*) attaches to official acts and provides former State Officials with a substantive defence for acts carried out in an official capacity on behalf of the state. As such, acts are attributed to the state, not the individual, and immunity is provided because of the official character of the act itself. Functional immunity derives from the principle of sovereign equality: one sovereign state cannot, in its own court of law, call into questions the acts of another.[104]

Even if the acts are attached to the state, it does not mean the functional immunity is part of the law of State immunity.[105] Similarities do however exist. Functional immunity also extends to governmental acts and commercial acts, unless they were performed in a private capacity. Acts are official in nature only when the act is exclusively attributable to the state. Since the act is regarded as performed by the state, functional immunity relates to substantive law and assures the State Official a substantive defence from criminal proceedings in another state. As a logical consequence, the immunity also applies when the term of the official functions of the representative is over.[106] Functional immunity applies *erga omnes*.[107]

### 2.4.2.2 Personal immunity

Under customary international law, Heads of States enjoy full immunity from coercive acts and criminal proceedings by foreign courts for official and private acts. Personal immunity (*immunity rationae personae*) attaches to the particular office, not the state, and provides the Head of State with absolute inviolability from foreign criminal jurisdictions for any act performed.[108] Such immunity applies regardless whether in an official or private capacity or whether the person is on an official or private visit abroad. The immunity

[102] Barker (n. 61); Watts (n. 31) 36.
[103] Barker (n. 61) 164.
[104] Alebeek, *Immunity* (n. 34) 266;
[105]Dapo Akande, Sangeeta Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts', (2010) 21 EJIL, 815, 827; Alebeek, *Immunity* (n. 34) 114.
[106] A similar provision can be found in art. 39 (2) of the Vienna Convention, which specifically provide that immunity for acts performed by a state official in the exercise of his functions shall continue to subsist.
[107] Alebeek, *Immunity* (n. 34) 114.
[108] Cassese (n. 27) 304; Alebeek *Immunity* (n. 34) 158.

applies to acts performed during or prior to the official's term of office, as long as the person holds the specific office.[109] Personal immunity is solely a procedural bar *while in office* and not a judgment of the lawfulness of the official's conduct. Hence, former Head of States may later be subject for prosecution for international crimes before national courts.[110] The ICJ in the *Arrest Warrant* case confirms the absolute personal immunity. National case law supports this rule as well.[111]

Three key justifications provide the basis for the wide scope of immunity against foreign domestic criminal proceedings for serving Heads of State. First, personal immunity preserves the dignity of the state.[112] Even though Heads of State may incur individual criminal liability, the Head of State position remains an important component of the modern international legal system.[113] Secondly, as a practical consideration, personal immunity prevents disruptions to the internal structure and function of a state, which may occur if its leader is subjected to the criminal jurisdiction of another state. However, most importantly, personal immunity is necessary to enable senior State Officials to carry out key sovereign functions. As such, personal immunity is linked with the functional necessity theory and the principle of sovereign equality.[114] These justifications facilitate peaceful cooperation and mutual respect between states.

## 2.5 Analysis

The development of both State immunity and Head of State immunity under customary international law renders uncertain and changing over time, which testifies to the unclear state of immunities in international law. Both state practice and academia provides for conflicting interpretations and opinions to what extent a Head of State should enjoy immunity before both national and international jurisdiction. The unclear conditions of Head of State immunity under customary international law should leave States uncertain of its obligation to respect such immunities.

Already during the 19th century conflicting opinions of State immunity was provided in case law. Absolute immunity was stated in the *Schooner Exchange*, but courts in Italy and Belgium rejected the doctrine soon thereafter. Developments in society and the evolution of democratic trends and the rule of law attested that the absolute doctrine was applied by personal

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[109] Cassese (n. 27) at 304.
[110] Alebeek, *Immunity* (n. 34) 266.
[111] See Gaddafi. 125 ILR 490 (2001) (Court of Cassation, France); Re Sharon and Yaron, HSA v SA (Ariel Sharon) and YA (Amos Yaron), Final appeal/Cassation (concerning questions of law) P.02.1139.F/2, JT 2003, 243, ILDC 5 (BE 2003), 12 February 2003, Belgium; Court of Cassation; See also International Law Commission, Immnity of State Officials from foreign criminal jurisdiction: Memorandum Prepared by the Secretariat, UN Doc. A/CN.4/596, 31 March 2008, 146.
[112] David, Koller, 'Immunities of Foreign Ministers: Paragraph 61 of the Yerodia Judgment as it Pertains to the Security Council and the International Criminal Court' (2004) 20 Am U Intl L Rev 7, 15.
[113] Arrest Warrant Case (n. 31) para 75 per Judges Higgins, Kooijimans and Buergenthal, Separate Opinion.
[114] Alebeek, *Immunity* (n. 34) 158; Arrest Warrant case (n. 31) para 54.

sovereigns and granted immunity as a matter of courtesy rather than a matter of law. Although the restrictive immunity doctrine made a distinction between sovereign and non-sovereign acts, it only considered trade related acts as non-sovereign acts. The Head of State was still protected by State immunity as vested in the Head of State.

It was not until the Nuremberg trials and the initiation of international criminal law Head of States were faced with individual criminal responsibility applied without relevance of capacity. As such, the relationship between the state and its Head of State drifted apart. Functional necessity became the prevailing rationale for Head of State and the immunity is now vested in the act performed, not in the individual preforming it.

With the rise of the human rights movement and greater international support for ending impunity for perpetrators of international crimes, Head of State immunity seems to diminish. Although the normative hierarchy theory might be questioned on its merits, its development shows a greater support in international society for a weakening state of Head of State immunity in international law. The continuing change of practice of Head of State immunity also testifies to this conclusion. The fact that Head of State immunity is still a matter of customary international law and not yet codified, similar to other immunity rules, also testifies to the uncertainty of its scope.

The principles of individual responsibility and irrelevance of official capacity are part of customary international law, proven by state practice in national jurisdiction and confirmed by international courts. However, the irrelevance of capacity seems to apply only to functional immunity before national courts. Personal Head of State immunity before national courts is undisputedly absolute. Moreover, although in a modified manner, the practice of personal immunity has the same aim as the absolute immunity doctrine had already had in the $19^{th}$ century; to protect sovereign functions of a State and its official. However, the development of international criminal law, and motivation within the international society to end impunity, opened up for prosecution of incumbent Heads of States before international courts and tribunals where personal immunity may not apply. This will be discussed in following chapters of this thesis.

# 3 Personal Head of State immunity before international tribunals and courts

## 3.1 Introduction

Chapter three will explain and analyse the development of the legal rationale for personal Head of State immunity before international courts and tribunals. The purpose of this chapter is to determine how personal immunity for Heads of States has been applied before other international courts and tribunals in order to later be analysed and compared with the ICC.

Initially, the chapter will discuss the *Arrest Warrant case* issued by the ICJ because this was the first case to open up for the possibility of prosecution of incumbent Heads of States before international courts. Since the Nuremberg trials, other international courts and tribunals have been established. For the purpose of this thesis, the ICTY, the ICTR and the SCSL are of particular interest. The ICC is a treaty-based international court with a close relationship to the UN. Therefore, both the practice by the ICTY and ICTR, which are established pursuant to a UNSC Resolution under Chapter VII of the UN Charter, and SCSL, which is a treaty-based body established through the UN, is of interest. There are important differences in the authority of these tribunals and court regarding removal of personal Head of State immunity.

The development of the legal rationale for personal Head of State immunity before international courts and tribunals includes conflicting interpretations and opinions, both with regards to court practice and academia, which will be discussed in each section.

## 3.2 The ICJ - Arrest Warrant Case

The ICJ is not an international criminal court, but the principal judicial organ of the UN.[115] It was established in June 1945 by the UN Charter and began its work in April 1946. The Court's role is to settle, in accordance with international law, legal disputes submitted to it by States and to give advisory opinions on legal questions referred to it by authorised UN organs and specialised agencies.[116]

In the *Arrest Warrant case*, issued by the ICJ in 2000, the ICJ had to decide whether Belgium had violated customary international law by issuing an arrest warrant for the incumbent Minister of Foreign Affairs of DRC, Abdulaye Yerodia Ndombasi. The warrant included war crimes and crimes

[115] ICJ Statute art. 1.
[116] See ICJ Statute art. 36.

against humanity. DRC filed an application with the ICJ complaining that Belgium, by issuing the arrest warrant, had violated the personal immunity of its Foreign Minister.[117] Belgium argued that immunity from prosecution did not apply to proceedings involving charges of war crimes and crimes against humanity.[118]

In its judgment, the ICJ held that the immunity from national criminal jurisdiction of incumbent ministers of foreign affairs is absolute for all acts, both private and official.[119] The ICJ could not deduce from state practice that an exception in the form of a customary rule had developed to remove personal immunity before national courts. As such, it concluded that a serving foreign minister should be granted immunity before national courts, even from accusations of serious international crimes.[120]

In the international context, the *Arrest Warrant* case created possible exceptions to personal immunity. In a broadly worded statement of *obiter dictum*, the ICJ stated that although Heads of State enjoy absolute personal immunity before foreign domestic courts, former and incumbent Heads of State may be subject to criminal proceedings under four different circumstances, on of them being: *'the accused may still be tried before an international criminal court'*.[121]

In this matter, the ICJ also cited the irrelevance of official capacity provisions contained in art. 7(2) of the Statute for the ICTY, art. 6(2) of the Statute of the ICTR and art. 27(2) of the Rome Statute, which hinder immunity as a procedural bar before the mentioned courts.[122]

Consequently, although only *obiter dictum*, the statement made by the ICJ remains an important declaration from the principal judicial organ of the UN; that incumbent Heads of State may not have immunity before international criminal bodies.[123]

The judgment, in combination with the development from the Nuremberg Trials with its formula, has opened up for scholars to argue a new rule has developed under customary international law. This rule removes personal immunity before international courts. Proponents for this new rule argue that with the increasing complexity of the international legal system and the greater variety of forms of state practice, the traditional two limb test creating a new customary rule, i.e. objective state practice and *opinio juris*, is insufficient.[124] Instead a modern positivist approach looks beyond the configuration of international practice and analyses whether a proposition can be safely derived from general principles governing the broad legal evolution

[117] Arrest Warrant case (n. 31) para 1, 11.
[118] Arrest Warrant case (n. 31) para 56.
[119] Arrest Warrant case (n. 31) para 54.
[120] Arrest Warrant case (n. 31) para 56.
[121] Arrest Warrant Case (n. 31) para 61.
[122] Arrest Warrant case (n. 31) para 61.
[123] Damgaard (n. 69) 56. There is no principle of judicial precedent in international criminal law. The ICJ's decision is not binding upon other international criminal courts and tribunals.
[124] Kreß & Prost (n. 27) 1611-1612.

or a set of related international norms.[125] This argument includes international judicial decisions, and official state pronouncements.[126]

However, the ICJ did not address what constitutes an international court or tribunal nor did it address on what basis personal immunities would not apply before competent international criminal courts and tribunals. Moreover, the ICJ did not specify the exact scope of the asserted non-application of personal immunities before international courts and tribunals. Neither did it distinguish between the power of an international court to issue an arrest warrant and the obligations of states to disregard the customary rules of international law on immunities in order to comply with a request for arrest and surrender issued by such court or tribunal.[127]

## 3.3 Chapter VII of the UN Charter and UN member states obligations

Chapter VII of the UN Charter sets out the UNSC's powers to maintain peace. Pursuant to art. 39, it allows the Council to *'determine the existence of any threat to peace, breach of the peace, or act of aggression'*[128], and to take military and non-military action to *'restore international peace and security'*.[129] The Chapter provides the framework within which the UNSC may take enforcement action. Art. 41 of the UN Charter includes the power for the UNSC to create international tribunals or courts.

Moreover, art. 25 of the UN Charter state: *'The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'*.[130] Further, art. 103 provides that the obligations under the UN Charter prevail over other international obligations:

> *In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.*[131]

Art. 103 is unique in international practice as it is the only true meaningful prospective conflict clause. Under its terms, a UN Charter obligation prevails over any conflicting obligation. That does not mean that the conflicting norm is invalidated, as with conflicts involving norms of *jus cogens*. The conflicting norm remains valid and continues to exist; the state is merely prohibited to apply it.[132] In addition, it is not a simple rule of priority; it also

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[125] Kreß & Prost (n. 27) 1611; Gaeta 'Immunity from Arrest' (n. 22) 321.
[126] Kreß & Prost (n. 27) 1611.
[127] Gaeta 'Immunity from Arrest' (n. 22) 319
[128] UN Charter art. 39.
[129] UN Charter art. 39.
[130] UN Charter art. 25
[131] UN Charter art. 103.
[132] International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc. A/CN.4/L.682, 13 April 2006, (ILC Study), para 333-34; Rain Liivoja, 'The Scope of the Supremacy Clause of the United Nations Charter', (2008) 57 Int'l & Comp. L.Q. 583, 597.

precludes or removes any wrongfulness due to the breach of the conflicting norm. In other words, a state cannot be held accountable for complying with its obligations under the Charter, even if in doing so it must violate another rule.[133]

In addition, art. 103 does not merely state that the Charter itself will prevail over conflicting obligations, but that member states' obligations under the Charter will also prevail. This formulation is broader, as it encompasses state obligations arising from binding decisions of UN organs, pursuant to art. 25 of the UN Charter.[134] The effect of art. 103 also extends to binding Security Council resolutions. This has been confirmed by both doctrine and practice,[135] as well as by the ICJ in the *Lockerbie case*.[136]

However, it has been debated whether or not art. 103 includes the Charter's prevailing over customary international law. By its own terms, the Charter only prevails over *'international agreement'*, such as a treaty. Scholars have argued for this textual interpretation, and that the Charter does not prevail over customary international law.[137] However, other scholars have argued that obligations under a customary rule frequently run in parallel with treaty obligations with the same substantive content. Therefore, it would run contrary to the object and purpose of art. 103 if it could only preclude a state's responsibility for failing to abide by the treaty, and not by the identical customary rule.[138] The latter has been confirmed by the practice of international courts and tribunals.

A decision issued pursuant to art. 41 of the UN Charter, to establish an international court or tribunal is binding upon member states of the UN. If such decision includes an obligation for member states to cooperate with those courts or tribunals, member states are obligated to comply with any request for judicial assistance made by that court or tribunal. Hence, when a request for arrest of a person enjoying immunity, conflicting law providing such immunity shall not be applicable pursuant to art. 103 of the UN Charter.[139] Moreover, in the *Namibia Advisory Opinion*[140] the ICJ confirmed that whether a binding decision is made under art. 25 of the UN Charter is to be determined by looking not only at the language of the resolution, but the totality of the circumstances surrounding it.[141]

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[133] ILC Study (n. 132) para 333-40.
[134] Liivoja (n. 132) 585-89.
[135] ILC Study (n. 132) para 331.
[136] Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. U.K.), ICJ, para. 37 (Req. for Provisional Measures) (Order of Apr.14, 1992).
[137] See for example Derek Bowett, 'The Impact of Security Council Decisions on Dispute Settlement Procedures', (1994) 5 EUR. J. INT'L L. 89, 92.
[138] See for example Alan Boyle, Christine Chinkin, *The making of international law*, (Oxford University Press, Oxford, 2007), 232-33.
[139] Gaeta 'Immunity from Arrest' (n. 22) 326.
[140] Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Nambia, Internaitonal Court of Justice, 21 June 1971 (Nambia Advisory Opinion)
[141] Nambia Adviosory Opinion (n. 140) 16, 116; Marko Öberg, 'The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ' (2005) 16 EJIL, 879, 891.

## 3.4 The ICTY and the ICTR

Almost half a century after the Nuremberg trials, the concept of international criminal tribunals was again established by the UNSC. Grave violations of human rights triggered the establishment of the ICTY in 1993, and the ICTR in 1994. Both were established by the UNSC, acting under Chapter VII of the UN Charter. The aim was to restore international peace and security in the concerned regions.[142]

The ICTY Statute and the ICTR Statute resemble each other. However, while the war crime provisions reflect that the Rwandan genocide took place within the context of a purely internal armed conflict, the ICTY provisions reflect an international conflict.[143] The ICTY has jurisdiction over crimes of genocide, crimes against humanity, grave breaches of international humanitarian law as well as war crimes committed in the territory of the Former Republic of Yugoslavia (FRY) since January 1991.[144] The ICTR has jurisdiction over the crimes of genocide, crimes against humanity or serious violations of the laws of war in the territory of Rwanda and over Rwandan citizens responsible for such violations committed in the territory of neighbouring states between 1 January and 31 December 1994.[145]

Art. 7(2) of the ICTY Statute and art. 6(2) of the ICTR Statute are identical to the Nuremberg formula stating the principles of individual criminal responsibility and irrelevance of capacity. The articles provide for criminal responsibility and the removal of immunities normally vested in Heads of State under customary international law.

In addition, UNSC Resolution 827 and 955, respectively established an obligation for member states of the UN to cooperate fully with the ICTY and ICTR. Both resolutions imply obligations of States to comply with requests for assistance or orders issued by the tribunals.[146]

As art. 25 and art.103 of the UN Charter provide that all member states to the UN Charter, must accept the UNSC resolutions and such resolutions prevail over other sources of international law, including the customary rules of Head of State immunity. Consequently, such immunity does not apply before the ICTY and the ICTR, including with concerns of judicial assistance, such as request for arrest.[147]

The provisions under the Statutes of the ICTY and the ICTR stating the individual criminal responsibility and irrelevance of capacity have not been applied in many cases. In addition, where it has been applied, functional, not

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[142] UN Security Council, *Security Council Resolution 827 (1993),* 25 May 1993; UN Security Council, *Security Council Resolution 955 (1994)*, 8 November 1994.
[143] Compare art. 8 ICTY Statute and art. 7 ICTR Statute.
[144] See art. 2, 3, 4, 5, 8 ICTY Statute.
[145] See art. 2, 3, 4, 7 ICTR Statute.
[146] UN res. 827 (n. 142) para 4; UN res. 955 (n. 142) para 2.
[147] U.N., Nwosu, 'Head of State Immunity in International Law' (2011), PhD thesis, Department of Law of the London School of Economics and Political Science, 272.

personal, immunity has been of focus. However, the importance of the provisions is significant for the development of Head of State immunity.

The case *Prosecutor v. Slobodan Milosevic*[148] before ICTY may, however, be addressed. It was the first case in which the question of Head of State immunity was addressed before an international tribunal. Milosevic had been arrested 1 April 2001 in Belgrade by local authorities and was transferred to the ICTY in The Hague on 29 June 2001. Originally, he was indicted for war crimes and crimes against humanity. Indictment of genocide was later added.[149]

The first indictment was made while Milosevic was still the incumbent Head of State of FRY.[150] However, when the trial began, he was no longer in office. Therefore, the issue of whether Milosevic as serving Head of State was entitled to personal immunity was never raised. Instead, Milosevic argued the ICTY lacked jurisdiction because he was the former Head of State and entitled to functional immunity. In response, the Trial Chamber of the ICTY stated:

> *There is absolutely no basis for challenging the validity of article 7, paragraph 2, which at this time reflects a rule of customary international law. The history of this rule can be traced to the development of the doctrine of individual criminal responsibility after the Second World War, when it was incorporated in article 7 of the Nuremberg Charter and article 6 of the Tokyo Tribunal Charter. The customary character of the rule is further supported by its incorporation in a wide number of other instruments, as well as case law.*[151]

Before the trial was completed, Milosevic passed away of a heart attack on 11 March 2006. However, the case is still regarded as decisive precedent on the irrelevance of official capacity and non-applicability of Head of State immunity before international tribunals as established by the UNSC under Chapter VII of the UN Charter.[152]

Even though Milosevic was the incumbent Head of State of former Yugoslavia at the time of his indictment and the issuance of arrest warrant, no one has questioned this in accordance with personal immunities of Head of States under customary international law.[153]

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[148] *Prosecutor v. Slobodan Milosevic*, (Decision on Preliminary Motions) IT-02-54. ICTY, 8 November 2001.
[149] *Prosecutor v. Slobodan Milosevic* Motions (n. 148) para 1-3.
[150] *Prosecutor v. Slobodan Milosevic*, (Indictment) IT-99-37, ICTY, 22 May 1999.
[151] *Prosecutor v. Slobodan Milosevic* Indictment (n. 150) para 28-29.
[152] Alebeek, *Immunity* (n. 34) 283.
[153] Gatea 'Immunity from arrest' (n. 22) 321.

## 3.5 The SCSL

In 2002, the SCSL was established.[154] The government of Sierra Leone had requested the UN to establish an international court to prosecute those responsible for the serious violations of international humanitarian law during the Sierra Leone civil war between 1991 and 2002.[155]

Similar to the ICTY and the ICTR Statutes, art. 6 of the SCSL Statute includes the Nuremberg formula.[156] In contrast to the ICTY and the ICTR, the authority of the SCSL is not enhanced through a resolution in accordance with the UN Charter Chapter VII.[157] The court is *'a treaty-based sui generis court of mixed jurisdictions and composition'*.[158] The court is established on the legal basis of the *Agreement on the Establishment of a Special Court for Sierra Leone*.[159] Therefore, there is no established obligation for UN member states to comply with any requests by the SCSL.[160] However, the court in the case *Prosecutor v. Taylor*[161] addressed the issue of arrest warrants and immunities.

Taylor was the incumbent Head of State of Liberia when the SCSL issued his arrest warrant in March 2003. In August the same year, he resigned from his office and he was arrested and transferred to the SCSL in November 2006.[162]

In May 2003, arguing he was entitled to personal Head of State immunity from the jurisdiction of the SCSL, Taylor filed an application objecting to the indictment and the arrest warrant. He argued that the indictment was invalid since the ICJ in the *Arrest Warrant case* established that incumbent Heads of States enjoy absolute immunity and that the SCSL did not have such Chapter VII authority which could allow exceptions to such immunities.[163]

Taylor's application was referred to the Appeals Chamber of the SCSL, which concluded that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court. The Chamber stated: '*There is no reason to conclude that it should be treated as anything other than an international tribunal or court, with all that implies for the question of immunity for a serving Head of State'*.[164]

The SCSL denied Taylor immunity and stated there is no support in state practice that international law grants immunities in relation to international

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[154] UN Security Council, *Security Council Resolution 1315 (2000),*14 August 2000.
[155] SCSL Statute, art. 1(1).
[156] SCSL Statute, art. 6.
[157]Alebeek, *Immunity* (n. 34) 285.
[158] Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, 4 October 2000, UNDoc.S/2000/915.
[159] Agreement Between The United Nations and The Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 12 April 2002.
[160] See UN res. 1315 (n. 154); SCSL Statute.
[161] *Prosecutor v. Taylor*, SCSL-03-1-T, Special Court of Sierra Leone, 26 April 2012.
[162] Alebeek, *Immunity* (n. 34) 285.
[163] *Prosecutor v. Taylor* (n. 161) para 6, 51.
[164] *Prosecutor v. Taylor* (n. 161) para 41.

courts. It found that the jurisdiction of the SCSL is similar to that of the ICTY, the ICTR and the ICC, also with regards to personal immunity of a Head of State.[165] SCSL endorsed the view that the *'international nature'* of the SCSL denied immunity to an incumbent Head of State indicted for war crimes and crimes against humanity.[166]

The SCSL also stressed that underlying rationales for an international court entails that immunity does not apply before it. The Appeals Chamber of the SCSL declared, although not immediately evident, the ICJ distinguishes between the application of immunity between national and international courts because concerns of sovereign equality are irrelevant before international criminal tribunals.[167] International courts derive their mandate from the international community, which safeguards against unilateral judgment by one state.[168]

Some scholars have heavily criticised the decision of the SCSL. David Koller argued that a general exception based on the court's *'international nature'* breaches the fundamental *pacta tertiis* rule codified in art. 34 of the Vienna Convention.[169] He believes that the reasoning by the SCSL fails to explain how the fairness of the tribunal can disregard important immunity principles of international law.[170] Rosanna van Alebeek also doubts whether the *'international mandate'* can remove established immunity rules under international law.[171]

On the other hand, Claus Kreß and Kimberly Prost argue that international courts should be viewed more purposefully as having the *jus puniendi* of the international community.[172] As such, they argue any collective judgment rendered represents the will of the international community. This *'collective nature'* enables treaty-based courts to prosecute all persons, including a serving Head of State of a third state. Their argument is based on policy considerations. International courts have been established as additional mechanisms for combating impunity. Therefore, in their opinion, rules, which are obstacle to fulfilling this objective, should be excluded. [173]

## 3.6 Analysis

Many years past by before the next international criminal tribunal was established after the Nuremberg Tribunal. One can argue this is because it was not necessary. However, since grave human rights violations were committed in various regions during these fifty years, it rather confirms the sensitive issues arising in the establishment of such tribunals or courts. The recent development of personal Head of State immunity before international

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[165] *Prosecutor v. Taylor* (n. 161) para 41.
[166] *Prosecutor v. Taylor* (n. 161) para 151-531.
[167] *Prosecutor v. Taylor* (n. 161) para 51.
[168] *Prosecutor v. Taylor* (n. 161) para 51-52.
[169] Koller (n. 112) 32.
[170] Koller (n. 112) 32.
[171] Alebeek, *Immunity* (n. 34) 275.
[172] Kreß & Prost (n. 27) 1612.
[173] Kreß & Prost (n. 27) 1608.

criminal courts and tribunals indicates an open approach to prosecute incumbent Heads of States. The principles of individual criminal responsibility and irrelevance of official capacity are part of customary law, however, these principles do not seem to include personal Head of State immunity. Conflicting interpretation and opinions by both practice and academia render the scope of personal immunity before international courts uncertain and dependent on the legal regime applied.

The *Arrest Warrant* case confirms that incumbent Heads of States enjoys absolute personal immunity when facing domestic charges of international crimes. Head of State immunity from arrest and prosecution in the territory of foreign states appears undisputed. Nevertheless, the ICJ opened up for possible prosecution of incumbent Heads of States before international criminal courts. Although dissenting legal rationales was issued, it seems feasible that an international criminal court have jurisdiction to prosecute and request arrest of an incumbent Head of State. This is also confirmed by the practice of ICTY, ICTR and SCSL. However, the question is on what legal basis.

The arguments of a development of a new customary rule removing personal immunity before international courts, are persuasive, as they recognise different moral and policy considerations as well as key developments in international criminal law. Such argument may best express the evolving attitudes of states toward creating a *'culture of accountability'* in the international system. However, the formation of a customary rule that binds all states is complex. Elements of state practice and other evidence to support this argument are highly contested. It is difficult to pinpoint the exact creation of such rule, thus making this argument controversial.

In its judgment, the ICJ left a few important question marks to the matter. Specifically, it did not define an *'international court'*, nor did it take into account the differences between the establishment of each international criminal court or tribunal.

Rules of customary international law on personal immunities aim at preventing states from interfering with the fulfilment of foreign states' sovereign activities in their territories and from abusing their authority by unduly submitting foreign state's Head of States to their criminal and civil jurisdiction. Consequently, it can be argued the very rationale of the rules on personal immunities become inapplicable when criminal jurisdiction is exercised by an international criminal court established by the international society.

The ICTY and ICTR were created by virtue of a decision by the UNSC. As such, they are vested with the authority of a Chapter VII measure. The obligation for UN member states to cooperate with the tribunals is laid down in a binding resolution of the UNSC. Therefore, any order or request for judicial assistance emanating from the two tribunals has the authority of a decision of the UNSC. Thus, member states must comply, even if the decision is conflicting with other obligations under international law, pursuant to art. 25 and 103 of the UN Charter. In addition, the Statutes of the

tribunals establish the principles of individual criminal responsibility and irrelevance of capacity. As such, a UN member state would not violate customary international law by arresting an incumbent Head of State of another UN member state pursuant to an order issued by any of these tribunals. The *Milosevic* judgment, as well as the absence of following debate, confirms this conclusion. This judgment also confirms the principles of individual criminal responsibility and irrelevance of capacity as part of customary international law.

However, it is not clear if this would be the case for a request to arrest a Head of State of a non-member state of the UN. Gaeta is of the opinion this would entail a breach of that non-member states immunity rights under customary international law.[174] However, not much else is written about this, probably because most of the world's States are members of the UN.

The SCSL is a treaty-based court, therefore, the situation is more complex regarding its jurisdiction and authority to order States to comply with arrest warrants with respect to personal immunity of Heads of States. The court does not have the authority of a UNSC decisions pursuant to the UN Charter. The court denied *Taylor* personal immunity even though he was the incumbent Head of State during his indictment. It did this because of the *'international nature'* of the court. It is apparent that the SCSL is an international court since it was established through the UN and is not part of Sierra Leone's domestic judicial system. However, it may be held that SCSL does not have jurisdiction over Heads of States of a third state, and that States are not obligated to comply with any orders issued by the SCSL in this matter. The necessary connection between the UNSC and the SCSL is missing, thus, art. 25 and 103 of the UN Charter, which is required to remove customary rules of personal Head of State immunity, is not applicable. The conflicting interpretations and opinions following the *Taylor* judgment imply uncertainty of the authority of the SCSL. The court also failed to analyse whether a treaty-based body may remove the personal immunity of an incumbent Head of State of a third state.

The ICC is a treaty-based court, but has a close connection to the UN system. Therefore, there are similarities to ICTY, ICTR and SCSL. Personal Head of State immunity before the ICC will be reviewed and analysed in the following chapters.

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[174] Gaeta, 'Immunity from Arrest' (n. 22) 327.

# 4 Personal Head of State immunity and State Party obligations under the Rome Statute

## 4.1 Introduction

Chapter four will review and discuss State Party obligations under the Rome Statute, specifically its obligation to arrest and surrender persons sought by the ICC. This entails to discuss the scope of the articles addressing personal Head of State immunity, the effect of a UNSC referral of a situation to the jurisdiction of the Court, as well as the non-cooperation mechanism of the Court. The role of the UNSC and the ASP will also be discussed for the purpose to argue for solutions to give effect to an appropriate legal rationale.

In order to give a background and provide for teleological interpretation, the first section will address the complicated history of the establishment of the ICC. Moreover, understanding the functions of the Court is essential to understand the issues of state obligations and Head of State immunity. Therefore, other aspects of the ICC will be briefly explained. This includes reviewing the crimes within the jurisdiction of the Court, the scope of its jurisdiction and the principle of complementarity.

## 4.2 Drafting of the Rome Statute

Already during the 1920s several attempts were made to establish a permanent international criminal court. In 1926, The International Association of Penal Law (AIDP) and the International Law Association (ILA) jointly created a draft statute on the establishment on such court. It was presented to several European parliaments and the League of Nations. Because of the political differences and the following Second World War, there was no conclusive result.[175]

In the late 1940's, after the World War II and the establishment of the Nuremberg Tribunal, the project of establishing an international criminal court was introduced for the first time before the UNGA. In 1948, the UNGA assigned the project to the International Law Commission (ILC), which at its first session before the UNGA in 1949 concluded that the establishment of a permanent international criminal court was both desirable and possible.[176]

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[175] See International Law Association, *Report of the Permanent International Criminal Court*, 34th Conference, Vienna, Aug. 5- Aug. 11, 1926 (available in Report of the 34th Conference of the International Law Association (1927)); Schabas, *Introduction* (n. 2), 4-5; Schabas, *Commentary* (n. 78), 3-4.

[176] The Yearbook of the ILC, (1949) UN Publication, vol 1, 283, 290; The Year Book of the ILC (2012) eight edition, vol 1, UN publication No. E.12.V.2., 89-92.

However, the UNGA was not very impressed by the work of the ILC. Consequently, the UNGA decided to assign the preparation of the draft statute to another committee, established by the UNGA itself. The work was suspended in 1954 because difficulties on agreeing upon a definition of aggression. However, when the definition of aggression was adopted in 1974, the project of the court was again postponed.[177]

Not until 40 years later, in the 1990s, the UNGA once again invited the ILC to examine the matter. The establishment of ICTY and the ICTR reminded the international community of the need for a permanent international criminal court.[178] In 1993, the UNGA finally decided to give priority to the preparation of a draft statute for an international criminal court. The ILC completed its work and presented it to the UNGA in 1994 with the recommendation that a conference of plenipotentiaries be convened in order to conclude a statute on the establishment of an international criminal court.[179]

After receiving the ILC Draft Statute, member states of the UN wished to have an opportunity to examine the draft. An *ad hoc* Committee was established by the UNGA.[180] During 1995, the committee meet to review the issues arising from the draft statute prepared by the ILC. In December the same year, a Preparatory Committee was created to continue the preparation of a *'widely acceptable consolidated'* text of a statute.[181] With the ILC Draft Statute as a basis, it took the approximately 500 additional proposals and amendments submitted by States into account and completed a statute, which was eventually finalised and adopted during the Rome Conference in Rome, Italy, on 17 July 1998.[182] A vast majority of African States voted in favour.[183]

Like other regions, Africa showed a very positive support towards the creation of the ICC and contributed to the outcome of negotiations. During the negotiations, African states stressed a special interest in the establishment of the ICC. Its people had for centuries endured human rights atrocities such as slavery, colonial wars and other horrific acts of war and violence, which continue to exist despite the continent's post-colonial phase.[184]

The Rome Statute was, and still is, by no means considered to be perfect. It is a product of multilateral negotiations amongst 160 States with different

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[177] Schabas, *Commentary* (n. 78) 8-9.
[178] Schabas, *Introduction* (n. 2) 12.
[179] See The Yearbook of the ILC, (1994), vol 2, UN Publications A/49//10; Schabas, *Introduction* (n. 2) 16.
[180] Schabas, *Commentary* (n. 78) 19-20.
[181] Schabas, *Commentary* (n. 78) 20-21.
[182] United Nations Diplomatic Conference of Plenipotentiaries the Establishment of an International Criminal Court, (1998) UN Doc. A/CONF.183/SR.9 (UN Report Rome Conference) para 155; Kampala Declaration, RC/Decl.1, OP 12.
[183] See 'UN Diplomatic conference concludes in Rome with decision to establish permanent international criminal court, Press Release, 20 July 1998, L/2889 <https://www.un.org/press/en/1998/19980720.l2889.html> accessed 2018-05-20.
[184] UN Report Rome Conference (n. 182) para 116.

values, interests and concerns.[185] As a result of establishing a generally acceptable instrument, no state or group of state could claim victory or monopoly of the Statute. However, it was the best instrument possible with present circumstances, hence, it enjoyed wide support. Eighty States signed the Statute during the following six months of its adoption. Senegal became the first state in the world to ratify the Rome Statute on 2 February 1999.[186] In 2002, the Rome Statute obtained its requisite sixty ratifications for its entry into force. One year later, the world's first independent and permanent international criminal court was fully operational.[187]

Today, the Statute has 123 State Parties, 33 are African States, which comprises the largest regional bloc in the ASP. [188] However, because of both political and legal difficulties during the drafting of the Statute, some of the world's most vigorous states, also permanent members of the UNSC, such as the U.S.,[189] China and Russia,[190] have not ratified the Rome Statute.[191]

The U.S. position to the ICC has affected the relationship between African States and the ICC. In addition to not ratify the Rome Statute, it has concluded bilateral immunity agreements to avoid referrals to the ICC. In Africa alone, 42 States, 26 of them parties to the Rome Statute, has signed such agreements.[192] While precluding cooperation with the ICC, the U.S., together with other members of the UNSC, has referred situations involving African States to the ICC. Consequently, the AU claimed that former colonialists are using the ICC to discipline weaker and poor developing countries in impoverished continents as Africa.[193]

## 4.3 ICC and the UN

The ICC is an independent international organisation. Nevertheless, the UN played a crucial role in the creation of the Court and funded its establishment.[194] The Preamble of the Rome Statute refers to *'an independent permanent International Criminal Court in relationship with the United Nations System'*. The Negotiated Relationship Agreement[195], adopted in

[185] Lee Roy S. (ed.), *The International Criminal Court: the making of the Rome Statute: issues, negotiations, results*, Kluwer Law International, (The Hague, 1999) 5-6.
[186] UN, Senegal first state to ratify Rome Statute of International Court, Press Release, L/2905, available at <https://www.un.org/press/en/1999/19990203.l2905.html> accessed 2018-05-16.
[187] Schabas, *Commentary* (n. 78) 25, 27.
[188] See ASP, The State Parties to the Rome Statute, < https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx> accessed 2018-05-16.
[189] The U.S. is signatory, but has not ratified the Rome Statue.
[190] Russia is signatory, but has not ratified the Rome Statute.
[191] See Lee (n. 185) 582-586, 616-618, 632-634 for views and comments of the Rome Statute made by the mentioned states during the Rome Conference.
[192] Alexis Arieff and others 'International Criminal Court Cases in Africa: Status and Policy Issues', (2010) Congressional Research Service, 4-5.
[193] Chacha Murungu, Japhet Biegon, (red.), *Prosecuting international crimes in Africa*, (Pretoria University Law Press, Pretoria, 2011) 158.
[194] Schabas, *Commentary* (n. 78) 67.
[195] UN General Assembly, *Relationship Agreement Between the United Nations and the International Criminal Court*, 20 August 2004, (Negotiated Relationship Agreement).

accordance with art. 2 of the Rome Statute, defines the formal legal relationship between the ICC and the UN. Art. 2 states:

> *The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf.*[196]

The Rome Statute includes specific provisions providing the UNSC with the authority to refer situations to the Court, as well as blocking prosecutions under certain circumstances.[197]

The Negotiated Relationship Agreement address issues such as the exchange of information, judicial assistance, and cooperation. Provision of the Agreement provide for the exchange of representatives, including the participation of the Court as an observer at sessions of the UNGA, to which the Court submits an annual report.[198] The Agreement defines mechanisms of cooperation where the UNSC refers a situation to the Court in accordance with art. 13(b) of the Rome Statute.[199] Specifically, art. 17(3) of the Agreement states:

> *Where a matter has been referred to the Court by the Security Council and the Court makes a finding, pursuant to article 87, paragraph 5 (b) or paragraph 7, of the Statute, of a failure by a State to cooperate with the Court, the Court shall inform the Security Council or refer the matter to it [...]*[200]

However, there are no specified actions required by the UNSC when such referral of a non-cooperation decision is made. In addition, the agreement does not address the issue of immunities, other than for persons enjoying immunity due to her or his work in the UN.[201]

## 4.4 Jurisdiction

### 4.4.1 Crimes and preconditions

The articles in the Rome Statute governing the jurisdiction of the Court caused a great deal of debate during the entire preparatory process of the Rome Statute. The debate concerned that the articles address the fundamental issue of what restrictions should be imposed on the sovereignty of the State Parties, as well as the function of the UNSC.[202]

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[196] Rome Statute art. 2.
[197] Rome Statute art. 13(b), art. 16.
[198] Negotiated Relationship Agreement (n.202) art. 6.
[199] Negotiated Relationship Agreement (n. 202) art. 3.
[200] Negotiated Relationship Agreement (n. 202) art. 17(3).
[201] Negotiated Relationship Agreement (n. 202) art. 19.
[202] Andreas Zimmerman 'Article 5' in Otto, Triffterer, (ed) *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article* (2nd ed, Verlag C. H. Beck oHG, Minchen, 2008) 340.

Art. 5 of the Rome Statute is the general provision stating the subject-matter jurisdiction of the Court. The jurisdiction is limited to *'the most serious crimes of concern to the international community as a whole'*.[203] Specifically, art. 5 states: '*The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.'*[204]

Although art. 5 of the Rome Statute is considered as the core of the Court's jurisdiction, the jurisdiction over all crimes within the subject matter is compulsory. Besides falling within the subject-matter jurisdiction, any situation or case to be investigated and prosecuted must also meet temporal, territorial, and personal jurisdictional requirements.[205]

The ICC cannot exercise universal jurisdiction, which was the original purpose stated by a clear majority of States during the drafting of the Rome Statute.[206] Instead, the situations in which the Court has jurisdiction are limited. Art. 11 of the Rome Statute provides that the Court has jurisdiction with respect to crimes committed after the entry into force of the Statute, i.e. after 1 July 2002. If a state ratifies the Rome Statute after 1 July 2002, the Court has jurisdiction from the day of ratification, unless the state accepts jurisdiction for the period before it became a contracting party. Art. 12(1) provides that a State, which becomes a party to the Statute, thereby accepts the jurisdiction of the Court with respect to the crimes referred to in art. 5.

Two established principles determine when the ICC has jurisdiction. Firstly, Art. 12(2)(a) states that the Court may exercise jurisdiction if the crime took place in the territory of a State Party or in the territory of a non-party state accepting the jurisdiction of the Court. The principle of territorial jurisdiction is universally accepted in international criminal law and established in many treaties and conventions.[207] If a crime is committed in a member state by a national of a non-party state, the Court may exercise its jurisdiction, i.e. the nationality of the offender is irrelevant.[208]

Secondly, art. 12(2)(b) provides that the Court may exercise jurisdiction if the accused of the crime is a national of a State Party or a national of a state not party to the Rome Statute, accepting the jurisdiction of the Court. The principle of active personality jurisdiction is well established in domestic law among a majority of States. In the context of international criminal law, the principle is universally accepted by state practice, thus, *opinio juris*, a rule of customary international law.[209] In case a national of a member state commits a crime in a non-party state, the Court can exercise its jurisdiction, i.e. the Court has in this sense extra-territorial jurisdiction.[210]

[203] Rome Statute, preamble para 4; Rome Statute art. 5.
[204] Rome Statute, art. 5.
[205] See Rome Statute art. 11-12; Schabas, *Commentary* (n. 78) 112.
[206] Schabas, *Commentary* (n. 78) 344, 346, 348.
[207] See for example UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, UN Treaty Series, vol. 78, 277; Zimmerman 'Article 5' (n. 202) 340.
[208] Schabas, *Commentary* (n. 78) 351-352.
[209] Schabas, *Commentary* (n. 78) 350-351.
[210] Schabas, *Commentary* (n. 78) 352.

Art. 12(3) declares that a non-party may accept the jurisdiction of the Court on *ad hoc* basis without becoming a party to the Rome Statute. The prerequisite is that the crime was committed in that state's territory or by one of its nationals.[211] Several African states, including Côte d'Ivoire, Uganda, DRC, Central African Republic and Mali, have accepted the jurisdiction of the Court and referred their respective situations to the ICC.[212] This possibility was not very controversial during the drafting of the Rome Statute, but has since then been criticised, particularly by the U.S.[213] Concerns has been raised that a non-party could pick a particular incident over which it would grant the ICC jurisdiction, but that the actions of the non-party itself is outside the jurisdiction of the Court.[214] According to critical states, such rule could easily be abused. The interpretation of this rule is to some extent still debated. However, the prevailing opinion seems to be that acceptance of the Courts jurisdiction is made regarding a situation, not a particular crime.[215] Thus, all actors in such situation may be subject to prosecution before the ICC.

### 4.4.2 Exercise of jurisdiction

Once it is established that the ICC has jurisdiction over a situation as described in the previous chapter, the jurisdiction must be triggered by one of the three mechanisms stated in Art. 13 of the Rome Statute. The first mechanism is that a State Party refers the situation to the Prosecutor. Only State Parties can trigger the jurisdiction, hence, no *ad hoc* referrals by non-party states can be issued, unless the situation concerns citizens or the territory of that state. However, any State Party may trigger the jurisdiction, although it is not involved in the situation.[216]

The second mechanism provided for in art. 13(c) is the Prosecutor initiating an investigation *propio mutu*. This is essential for the sake of effectiveness and independence of the Court.[217]

The third mechanism provided for in art. 13(b) of the Rome Statute is the UNSC referral. By acting under Chapter VII of the UN Charter, the UNSC can trigger the jurisdiction by referring a situation to the Prosecutor. In contradiction to the previously explained triggering mechanisms, there are no further requirements. Once the UNSC has determined that a crime listed in

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[211] Cherif M. Bassiouni, *Introduction to international criminal law*, (2nd rev. ed., Martinus Nijhoff Publishers, Leiden, 2013) 658.
[212] ICC, *The Court Today*, ICC-PIDS-TCT-01-088/18, 23 April 2018.
[213] Schabas, *Commentary* (n. 78) 357.
[214] For example the U.S. has argued that someone like Saddam Hussein could grant the ICC jurisdiction over the U.S. actions in Iraq, but that the actions of Iraq against its own people were outside the reach of the Court.
[215] Schabas, *Commentary* (n. 78) 357; William A. Schabas, Giulia Pecorella 'Article 12' in Otto Triffterer, Kari Ambos (ed.), *Rome statute of the International Criminal Court: a commentary*, (3. ed., C.H. Beck, München, 2016) 688; Cherif M. Bassiouni, *The Legislative History of the International Criminal Court: Summary Records of the 1998 Diplomatic Conference*, (Transnational Publishers, Ardsley, NY, 2005), 84.
[216] Schabas, *Commentary* (n. 78) 367, 382.
[217] Schabas, *Commentary* (n. 78) 367, 394.

art. 5 has been allegedly committed, it may refer that situation to the Prosecutor. Art. 13(b) requires the UNSC to act under Chapter VII of the UN Charter.[218]

In addition, art. 12(2) of the Rome Statute does not address conferral of jurisdiction by the UNSC, hence, the conditions stated in the article must not be met. However, this is not stated explicitly in the Rome Statute. It does suggest that any situation including a crime listed in art. 5, in theory could be referred to the Court by the UNSC, irrespective of where or by whom it was committed. The crime must however have been committed after the Statue's entry into force. [219]

During negotiations of the Rome Statute, a minority of states strongly opposed including a provision that would allow the UNSC to refer situations or cases for the ICC to investigate. These states feared that a referral from the politically-oriented UNSC would undermine the legitimacy and independence of the ICC. However, the majority of states agreed that a provision was necessary and reached a compromise in art. 13(b).[220]

For these reasons, some commentators have referred to the ICC as an *'ad hoc permanent international criminal tribunal'*. With this view, the ICC draws upon the experiences of the ICTY and ICTR established by the UNSC under Chapter VII of the UN Charter, but negates the need to establish further tribunals, providing for a less costly and time-consuming option.[221] However, the ICC is treaty-based, limiting the UNSC ability to influence the practice of the ICC.[222]

If the UNSC triggers the Court's jurisdiction, the UNSC must live within the parameters of the Rome Statute with respect to such matters as jurisdiction.[223] However, other than with regards to jurisdiction, the legal effect of an UNSC resolution referring a situation in a non-party to the ICC is heavily discussed and is one of the main issues concerning immunities and the Court's request to arrest. As the Bashir case and the legal effect of Resolution 1593 are central to this discussion, this will be illustrated below under chapter five.

In addition, the principle of complementarity governs the exercise of the Court's jurisdiction. This principle distinguishes the Court in several significant ways from other known institutions, including the ICTY and the ICTR. The Statute recognises that States have the first responsibility and right to prosecute international crimes. However, the ICC may only exercise jurisdiction where national legal systems fail to do so, including where they purport to act but in reality, are unwilling or unable to genuinely carry out proceedings. The principle is a result of a fundamental issue regarding the

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[218] Schabas, *Commentary* (n. 78) 375.
[219] Schabas, *Commentary* (n. 78) 375.
[220] Schabas, *Commentary* (n. 78) 368-369.
[221] Cassese, Antonio and others (ed.) *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, Oxford, 2002) 628.
[222] Cassese, *Rome Statute* (n. 221) 628.
[223] Schabas, *Commentary* (n. 78) 376

sovereignty of State Parties during the drafting of the Rome Statute: the relationship between the ICC and domestic courts.[224]

To the effect of the principle of complementarity, enabling States to abide to the obligation of accountability for the crimes under the Court's subject-matter jurisdiction, the existence of national legislation, incorporating the crimes and general principles in the Rome Statute is essential.[225] Regarding the enactment of national legislation, many State Parties have passed legislation implementing just some aspects of the Rome Statute, while several African states has enacted comprehensive implementing legislation.[226]

## 4.5 Personal Head of State immunity

Art. 27 of the Rome Statute provides the irrelevance of official capacity when being charged of a crime before the ICC:

> *1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.*
>
> *2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.*[227]

The wording of art. 27 is similar to the wordings of the Nuremberg Charter and the Statutes of the ICTY, ICTR and SCSL. The introduction to the second paragraph of art. 27 however carries out a different function compared to the first paragraph. The first paragraph, which removes functional immunity, is derived from the Nuremberg Charter and is similar to the articles stating irrelevance of official capacity in the Statutes of the ICTY and the ICTR. It was never an issue of much debate during the drafting of the Rome Statute as it was already well established in previous generations of international courts and tribunals, as well as under customary international law.[228]

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[224] Schabas, *Commentary* (n. 78) 448, 453, 469; Cryer, Robert (red.), *An introduction to international criminal law and procedure*, 3. ed., Cambridge University Press, Cambridge, 2014, 128.
[225] The Coalition for the ICC, *ICC Implementing Legislation,* <http://www.iccnow.org/documents/FS_CICC_Implementation_Legislation_en.pdf> accessed 2018-05-16.
[226] For example: Burkina Faso, Central African Republic, Kenya, Senegal, South Africa, and Uganda; Human Rights Watch, *Briefing Paper on Recent Setbacks in Africa Regarding the International Criminal Court* November (2010), 14.
[227] Rome Statute, art. 27.
[228] Schabas, *Commentary* (n. 78) 598.

Art. 27(2) had no precedent in international criminal law before it was included in the Rome Statute. It addresses the personal immunity of a serving State Official, who is protected by immunity under customary international law, and provides for a renunciation of Head of State immunity by the State Parties to the Rome Statute. [229] In the *Arrest Warrant* case, the ICJ specifically mentioned ICC as an example in stating possible prosecution of incumbent Heads of States.[230] State parties, by their ratification of the Rome Statute, have accepted the irrelevance of official capacity stated in art. 27 and renounced their right to plea personal immunity in respect of crimes within the subject-jurisdiction of the ICC stated in art. 5.[231] However, the scope of this article when Heads of States of non-party states are subjected to jurisdiction of the ICC pursuant to a UNSC referral is uncertain.

## 4.6 State Party obligations

### 4.6.1 General obligation to cooperate

State cooperation is where the ICC is at its most vulnerable. As it has no own enforcement measures, the Court must depend almost entirely on national authorities to provide it with both defendants and evidence.[232] The principle of complementarity is relevant in cooperation as well. The principle is based both on respect for the primary jurisdiction of States and on considerations of efficiency and effectiveness, since States will generally have the best access to evidence and witnesses and the resources to carry out proceedings.[233] In addition, a State Party may not invoke its domestic law as basis for refusing to cooperate with the ICC. This principle is stated in art. 27 of the Vienna Convention.[234]

Art. 86 of the Rome Statute provides: '*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'*.[235]

As such, State Parties to the Rome Statute are under a general obligation to fully cooperate with the ICC in its investigations of crimes. This article introduces Part IX of the Statute, containing complex provisions reflecting the sensitivity of States measures that might encroach upon their own sovereignty.[236] The obligations under Part IX solely apply to State Parties.

[229] Schabas, *Commentary* (n. 78) 595-596, 598.
[230] Arrest Warrant case (n. 31) para 61.
[231] Schabas, *Commentary* (n. 78) 600.
[232] Schabas, *Commentary* (n. 78) 1269.
[233] Expert Consultation, 'Informal expert paper: The principle of complementarity in practice', (2003) ICC-OTP, 3; Schabas, *Commentary* (n. 78) 448, 453, 469; Cryer *An introduction* (n. 224) 128.
[234] Schabas, *Commentary* (n. 78) 1269.
[235] Rome Statute, article 86.
[236] Schabas, *Commentary* (n. 78) 1265.

Obligations for non-state parties to the Rome Statute must be found elsewhere, e.g. in bilateral agreements or UNSC resolutions.[237]

Concerning sovereignty, obligations under Part IX were a fundamental issue under debate during the drafting of the Rome Statute. The now familiar debate about whether the cooperation would be horizontal, i.e. analogous to extradition and mutual legal assistance, or vertical, by which there is an essentially *sui generis* relationship between the State Party and the ICC was addressed.[238] As will be explained below under chapter five, the PTC has concluded cooperation is applicable on both a horizontal and vertical basis.

### 4.6.2 Arrest and surrender

Accused persons may appear before the ICC voluntarily or by law enforcement. Voluntary appearance is the consequence of a summons to appear, whereas appearance that is compelled is by an arrest warrant issued pursuant to art. 58. Arrest and surrender of persons wanted by the ICC remains a crucial issue. The Court cannot fulfil its mandate without it, as there can be no trials *in abstentia*.[239]

Art. 89(1) proclaims a general obligation for State Parties to comply with a request for arrest and surrender by the Court. When the ICC transmits a request for arrest and surrender, the requested State must comply. During the drafting of the Rome Statue, competing concerns were raised. Some States insisted on a procedure to be developed within the Statute applicable to all States, while others argued that their own domestic procedures should be respected.[240] Consequently, the result is a compromised formulation in art. 89(1), stating that the arrest and surrender must be made in accordance with the provisions of Part IX of the Statute and the procedure under States' national law, thus an expression of the principle of complementarity. Art. 89(2) provides that if a case is admissible, the requested State shall proceed with the execution of the request to arrest.

The ICC has issued thirty-three arrest warrants, twelve of which have been executed and the suspect taken into custody. Three persons have surrendered voluntarily to the Court after a warrant was issued. In four cases, the accused was deceased, including Gadhafi, the only other case, except the Bashir case, involving an arrest of a Head of State of a non-party State. In one case, the proceedings were halted following a successful challenge by the State to admissibility. Thirteen arrest warrants remain outstanding and the accused persons are at large, at least with respect to the Court. However, two of them are in the custody of national authorities.[241]

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[237] Schabas, *Commentary* (n. 78) 1268; Claus, Kreß, Kimberly, Prost 'Article 86' in Triffterer, Otto & Ambos, Kai (red.), *Rome statute of the International Criminal Court: a commentary*, (3. ed., C.H. Beck, München, 2016) 2016-2017.
[238] Schabas, *Commentary* (n. 78) 1266-1267.
[239] See Rome Statute art. 63; Schabas, *Commentary* (n. 78) 1289.
[240] Schabas, *Commentary* (n. 78) 1292-1293.
[241] Schabas, *Commentary* (n. 78) 1291-1292.

## 4.6.3 Cooperation with respect to immunity

Art. 98 provides for exceptions to the obligations under art. 86-102. Art. 98(1) covers international obligations in relations to immunities stating:

> *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.*[242]

As explained above, under customary international law, states have the obligation to respect immunities of Heads of States. Art. 98(1) declares that the ICC cannot request a State Party to cooperate if such cooperation would violate the obligation to respect personal immunity of a State Official of a state not party to the Statute.[243] If the ICC concludes that a request is in conflict with immunities belonging to an official of a non-party, it may inquire the concerned state of a waiver. Thus, art. 98(1) addresses the conflict of sources of law, i.e. immunity rules under customary international law and the Rome Statute.[244]

There is a clear tension between art. 27 and 98. The two provisions were drafted by different committees in the preparation of the Rome Statute and no thought appears to have been given to their consistency with one another.[245] One way of reconciling the tension between the two provisions is to take the position that art. 27 removes immunity with respect to the Court and applies only to actions by the Court, but that art. 98 preserves those same immunities with respect to action to be taken by national authorities, which Gaeta argued.[246] However, because the principle of complementarity is applicable with regards to cooperation, the better view should be that art. 27(2) removes personal immunity also with respect to action taken by national authorities.[247]

Akande argued that a proclamation that immunities shall not bar the exercise of jurisdiction by the Court while leaving such immunities intact with respect to arrests by national authorities would mean that the Court would hardly be in a position to apply art. 27 and exercise its jurisdiction. ICC would not gain custody of persons entitled to immunity except where such persons are surrendered by their state or voluntarily. This would confine art. 27 to the rare case where a person entitled to immunity surrendered voluntarily. The effect of the argument would be to make an important provision directed at combating impunity inoperable for most practical purposes. To read the treaty in this way would be contrary to the principle of effectiveness in treaty interpretation. According to this principle, a treaty interpreter must read all applicable provisions of a treaty in a way, which gives meaning to all of them

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[242] Rome Statute art. 98.
[243] Schabas, *Commentary* (n. 78) 1346-1347.
[244] Schabas, *Commentary* (n. 78) 1346-1347.
[245] Schabas, *Commentary* (n. 78) 594-595, 1343.
[246] Gaeta ‘Immunity from Arrest’ (n. 22) 328-329.
[247] Akande ‘Legal Nature of UNSC Referrals’ (n. 25) 337-338.

harmoniously and is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.[248]
In addition, neither art. 27 nor 98 address immunity in situations referred to the ICC by the UNSC. The relationship between art. 27(2) and 98(1) will be further discussed below under chapter five with regards to the Bashir case and decisions on non-cooperation.

### 4.6.4 Request for cooperation

Following the general obligation to cooperate, the very substantial text on *'request for cooperation: general provisions'* declares the core issues engaged in the state cooperation regime of the Rome Statute. Art. 87 affirms the authority of the Court to make requests of states, and proposes a mechanism for non-cooperation. The article deals with the modalities of such request of states, and contemplates application to non-party states as well as States Parties to the Rome Statute.[249]

Art. 87(1) states the Court's authority to make requests to States Parties for measures of cooperation. It establishes a general principle by which requests for cooperation from the ICC shall be transmitted through the *'diplomatic channel'*, i.e. the ASP.[250]

Concerning non-parties, art. 87(5) provides that such states may be required to cooperate with the Court by virtue of a UNSC resolution issued pursuant to art. 13(b). However, the article as such cannot impose obligations upon a non-party state, hence, the Court can merely *'invite'* such states to cooperate.[251]

Under art. 87(7), if a State Party fails to comply with a request for cooperation, and thereby preventing the ICC from exercising its functions and powers under the Rome Statute, the Court may make a finding to that effect. The article amounts to a judicial finding that a state has breached its international obligations under the Rome Statute. If there is a finding of non-cooperation, the Court may refer the matter to the ASP for its consideration.[252]

Concerning situations referred by the UNSC, the ICC is to refer the matter to the UNSC, according to art. 17(3) of the Negotiated Relationship Agreement. Hence, non-party states, which are subject to the ICC's jurisdiction pursuant to a UNSC resolution, can be subject for a decision of non-cooperation by the Court. Such decisions have been issued in both situations referred by the UNSC.[253]

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[248] Akande 'Legal Nature of UNSC Referrals' (n. 25) 328.
[249] Schabas, *Commentary* (n. 78) 1273.
[250] Schabas, *Commentary* (n. 78) 1274.
[251] Schabas, *Commentary* (n. 78) 1276.
[252] Schabas, *Commentary* (n. 78) 1278.
[253] See for example *Prosecutor v. Gaddafi*, Decision on non-compliance, Pre-Trial Chamber I, ICC-01/11-01/11-577, 10 December 2014.

Most decisions issued by the PTC regarding non-cooperation concern obligations to cooperate with regards to executing arrest warrants, e.g. raising challenges to the legal basis of a request for cooperation.

In the context of non-party states, a decision was issued by the PTC regarding non-cooperation in the case *Prosecutor v. Abdullah Al-Senussi*.[254] The Court had issued an arrest warrant against Al-Senussi for his alleged criminal responsibility for crimes against humanity committed in Benghazi, Libya, as Head of Military Intelligence of the Libyan Armed Forces.[255] The PTC issued a decision pursuant a request by the Defence of Al-Senussi, to make a finding of non-cooperation against Mauritania.[256]

In this case, the PTC concluded that obligations under the Rome Statute to cooperate fully with the Court are solely obligations of State Parties. Art. 87(5)(a) provides that the Court may *'invite'* any state not party to the Statute to provide assistance on the basis of an *ad hoc* agreement. Mauritania was not a State Party to the Statute and no *ad hoc* agreements had been arranged between the Court and Mauritania, thus, it had no obligations *vis-à-vis* the Court.[257] In addition, the PTC stressed that the UNSC in its Resolution 1970 clarified that *'States not party to the Rome Statute have no obligation under the Statute'*.[258]

Generally, State Parties are willing to cooperate regarding arrest warrants. For example, in the case *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (Al Hassan), the defendant, alleged chief of the Islamic Police, suspected of crimes against humanity and war crimes in Timbuktu, Mali, was handed over to the ICC by the authorities of Mali.[259]

Also in the case *Prosecutor v. Gbagbo*[260], in which the PTC issued an arrest warrant against the incumbent President of Côte d'Ivoire. Although Côte d'Ivoire is a party to the Rome Statute today, it was not at the time of the arrest warrant.[261] However, Côte d'Ivoire had accepted the jurisdiction of the ICC.[262] Such acceptance of the Court's jurisdiction made art. 27(2) applicable, thereby revoking the immunity of Gbagbo under customary international law.[263] Gbagbo was transferred to the custody of ICC by the authorities of Côte d'Ivoire.[264]

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[254] UN Security Council, *Security Council Resolution 1970 (2011)*, 26 February 2011.
[255] Warrants of Arrest for Abdullah Al Senussi, ICC-01/11, 27 June 2011.
[256] *The Prosecutor v. Gaddafi and Al Senussi*, Decision on non-cooperation, Pre-Trial Chamber I, ICC-01/11-01/11-420, 28 August 2013 (Decision against Mauritania).
[257] Decision against Mauritania (n. 256) para 12.
[258] UN Res 1970 (n. 254) para. 5; Decision against Mauritania, para14.
[259] ICC, *Situation au Mali*, Press release, 31 March 2018, <https://www.icc-cpi.int/Pages/item.aspx?name=pr1376&ln=fr> accessed 2018-05-16.
[260] *Prosecutor v. Gbagbo*, Pre-Trial Chamber I, ICC-02/11-01/15-1124.
[261] Côte d'Ivoire ratified the Rome Statute on 15 February 2013, see ICC, *Côte d'Ivoire ratifies Rome Statute*, Press Release, 18 February 2013.
[262] Phillip, Wardle., 'The Survival of Head of State Immunity at the International Criminal Court', (2011) 9 AILJ, 181, 187.
[263] Wardle (n. 262) 187.
[264] ICC, *ICC Prosecutor: The pursuit of justice continues in Côte d'Ivoire*, Press Release, 22 March 2014, <https://www.icc-cpi.int/pages/item.aspx?name=PR989> accessed 2018-05-16.

Both State Parties and non-parties to the Rome Statute, namely, Central African Republic, Uganda, the U.S., Belgium and the Netherlands also cooperated with the ICC in arresting and transferring Dominic Ongwen, charged with crimes against humanity and war crimes allegedly committed in Uganda, to the custody of ICC.[265]

Without doubt, the most pressing issue regarding non-cooperation due to request to arrest has been in the Bashir case because of the resistance of State Parties to comply with his arrest warrant due to immunity rules under customary international law. These decisions will be discussed below under chapter five.

The same issue was raised in the case *Prosecutor v. Gadhafi*. The UNSC, acting under Chapter VII of the UN Charter, had referred the situation in Libya to the ICC pursuant to Resolution 1970.[266] On 27 June 2011, the PTC authorised a warrant for the arrest of Muammar Gaddafi, the then serving President of Libya, which is not a party to the Rome Statute. By issuing the arrest warrant, the PTC determined that art. 27(2) would be applicable to Gaddafi and effectively remove his right to invoke personal immunity, notwithstanding Libya's status as a non-party to the Rome Statute.[267] In the decision, the PTC did not elaborate its reasoning on the issue of personal immunity, it merely made a reference to the decision in the Bashir case. In addition, the PTC did not issue any non-cooperation decisions against State Parties before Gaddafi's death in 2011. However, the case illustrates how the ICC looks upon its power to remove the personal immunity of Heads of State of non-party when authorised with jurisdiction by the UNSC.

## 4.7 The Assembly of State Parties

The ASP is the ICC's political organ composed of representatives of each State Party.[268] When it became clear the ICC was to be an international organisation independent from the UN, establishment of a political body to provide advice and policy directions became essential.[269]

The ASP plays a significant role in the operations of the Court. It has essentially administrative functions as well as a legislative role. The APS exercise an important influence upon the law applicable before the Court. It is also the forum for amendments to the Rome Statute.[270]

Art. 112(2)(f) states: *The Assembly shall [...] Consider pursuant to article 87, paragraphs 5 and 7, any question relating to non-cooperation*[271]

According to art. 112(2)(f) the ASP shall deal with matters of non-cooperation. The article referrers to Art. 87(5) and (7), in which the issue of

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[265] Warrants of Arrest for Dominic Ongwen, ICC-02/04, 8 July 2005.
[266] UN Res. 1593 (n. 4).
[267] Wardle (n. 262) 182.
[268] Schabas, *Commentary* (n. 78) 1433, 1434.
[269] Schabas, *Commentary* (n. 78) 1433.
[270] Schabas, *Commentary* (n. 78) 1433.
[271] Rome Statute, art. 112(2)(f).

non-cooperation is addressed. Particularly two issues were under discussion during the drafting of the Rome Statute: whether the ASP 1) had any role concerning non-cooperation by states not party to the Statute, 2) could engage in issues *sua motu*, or only upon referral from the relevant UN body. Some suggestions included that the ASP would act upon the recommendation of the Court, but was not incorporated in the provision. In the final text, the provision was extremely simplified.[272]

As previously stated, art. 87(5) specifically concerns requests for cooperation to non-party states. Accordingly, action by the ASP appears to be conditional on the existence of an *ad hoc* agreement or arrangement with the Court[273], and a referral by the Court to the UNSC, in the case of a UNSC referral. Cooperation by State Parties requires no special agreement, it is inherent in a state's the ratification of the Rome Statute.[274]

In 2012, recognising that the negative impact that non-execution of Court requests can have on the ability of the Court to accomplish its mandate, the ASP adopted procedures relating to non-cooperation[275]. The ASP stressed that the procedures aimed to improve implementation of the Court's decision, and that *'[a]ll actors involved must ensure that their participation in these procedures does not lead to discussion on the merits of the Court request or otherwise undermines the findings of the Court'*.[276] The procedures can only be triggered by a decision of the Court, which is addressed to the ASP.[277] The procedure consists of several stages, beginning with an emergency meeting, a communication to all State Parties, and eventually a discussion within the plenary of the ASP. A *'good offices'* role of the President of the ASP is also envisaged.[278]

The procedures also address the respective roles of the Court and the ASP. Any response by the ASP would be non-judicial in nature and would have to be based on the competencies under art. 112 of the Rome Statute. The ASP may support the effectiveness of the Rome Statute by deploying political and diplomatic efforts to promote cooperation and to respond to non-cooperation. However, these efforts may not replace judicial determinations to be taken by the Court in on-going proceedings.[279]

In addition to the Rules of Procedures, the ASP developed a Toolkit[280] as a resource for States Parties to improve the implementation of the informal measures of procedures on non-cooperation, and encouraging states to meet their obligations to cooperate with the ICC in relation to arrest and surrender

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[272] Schabas, *Commentary* (n. 78) 1439.
[273] Regulations of the Court, ICC-BD/01-03-11, reg. 107.
[274] Schabas, *Commentary* (n. 78) 1439.
[275] Assembly procedures relating to non-cooperation (ICC-ASP/10/Res.5, as amended by ICC-ASP/11/Res. 8, annex 1) (ASP Procedures on non-cooperation).
[276] ASP Procedures on non-cooperation (n. 275) para 12.
[277] ASP Procedures on non-cooperation (n. 275) para 13.
[278] ASP Procedures on non-cooperation (n. 275) para 14.
[279] ASP Procedures on non-cooperation (n. 275) para 5.
[280] Toolkit for the implementation of the informal dimension of the Assembly procedures relating to non-cooperation ICC-ASP/15/31/Add.1, 9 November 2016 (ASP Toolkit).

of persons subject to an arrest warrant.[281] The Toolkit mainly includes recommendations concerning monitoring of travels of persons subject to warrants of arrest and sharing information with the Court and States Parties as well as preventing instances of non-cooperation.[282]

Art. 112 as well as the Rules of Procedures and the Toolkit leave the scope of authority of the ASP, when an issue of non-cooperation is properly before it, uncertain. Art. 119(1) states that disputes concerning *'judicial functions',* should be resolved by the Court. However, Art. 119(2) of the Rome Statute resembles classic dispute resolution clauses in international treaties. The article provides for a mechanism for resolving disputes between State Parties that begins with bilateral negotiation and then proceeds to the ASP.[283] The ASP may attempt to promote its own settlement, or it may refer the involved State Parties elsewhere, including, when possible, the ICJ.[284] An issue on non-cooperation would seem to be appropriately examined from the perspective of art. 119(2), as a dispute between two or more State Parties. However, the scope application depends upon the interpretation given to *"judicial functions"* expressed in art. 119(1). The term appears elsewhere in the Rome Statute, where it seems to have the meaning of proceedings or trials. However, reducing the scope of art. 119(1) to debates about procedural matters seems too narrow. Rather, the purpose of the provision is to ensure that there is no second-guessing of rulings of the Court concerning the Rome Statute by other bodies. [285] Non-cooperation should be such judicial function according to this interpretation.

## 4.8 Analysis

The long and complex way to the establishment of the ICC testifies to aforementioned general sensitive issues evolving from the establishment of an international criminal court. Preparation of establishing the ICC included many stages and many conflicting opinions by States upon the provisions of the Rome Statute. However, in the end, the Statute had wide support, making it a treaty of universal scope, even though States as the U.S., China and Russia have not ratified the Statute.

Although the ICC is an independent body, it has a close relationship to the UN. Jurisdiction of the Court may be triggered by the UNSC, even with regards to States not party to the Rome Statute. However, the legal effect of such referral including a non-party state is discussed, questioning if such referral triggers the Rome Statute applicable as a whole to that situation, including obligations of State Parties to arrest and surrender a Head of State of a non-party.

It can be concluded that the Rome Statute can set aside Head of State immunity established in customary international law, which normally applies

[281] ASP Toolkit (n. 280) para 1, 10.
[282] See generally ASP Toolkit (n. 280).
[283] Schabas, *Commentary* (n. 78) 1485.
[284] Schabas, *Commentary* (n. 78) 1486.
[285] Schabas, *Commentary* (n. 78) 1485.

between states. By ratifying the Rome Statute, a state agrees to the removal of personal immunity of its Heads of States before the ICC pursuant to art. 27(2).

Part IX of the Rome Statute sets out treaty provisions, which confer given powers of the ICC and set forth the corresponding obligations of State Parties, including obligation to arrest and surrender persons sought by the Court. However, drawing upon the textual interpretation of these provisions and discussions during the drafting of the Statute, one can conclude State Parties tried to avoid the obligations of contracting States to cooperate with the Court from becoming incompatible with international obligations binding a State Party *vis-à-vis* a state not party to the ICC. Art. 98(1) of the Rome Statute should be an example of this. It provides for a conflict solution, giving customary law precedence with regards to non-party states.

The tension between art. 27(2) and 98(1) with regards to execution of arrest warrants by national authorities should be solved by the principle and complementarity and the principle of effectiveness in treaty interpretation. Both principles provide an interpretation of art. 27(2) that indicates the cooperation regime should be applicable both horizontal and vertical.

As such, if a Head of State of a State Party commits a crime under the jurisdiction of the Court, art. 27(2) will not prevent the ICC from seeking the arrest of that person. The same applies to non-party states, which have accepted the jurisdiction of the Court. This is confirmed in the case *Prosecutor v. Gbagbo*.

However, where situations have been referred to the jurisdiction of the Court by the UNSC acting under Chapter VII of the UN Charter, the legal principle is less clear. By the virtue of issuance of arrest warrants against Bashir and Gadhafi, the ICC stated its power to remove personal immunity of Head of States of a non-party pursuant to a UNSC referral. As such, the ICC does not consider art. 98(1) applicable in those situations, also with respect to arrest warrants. The PTC confirms this view in its decisions on non-cooperation in the Bashir case, which will be discussed in detail below under Chapter five.

In addition to the important role of the UNSC in matters of non-cooperation, the ASP, as the political organ of the ICC, plays a significant role. Lack of cooperation can be a result of political differences (which will be discussed in detail below under chapter five with regards to the Bashir case). Moreover, the ASP has the power to take both administrative and judicial measures with regards to State Parties lack of cooperation. However, the ASP shall not question the merits of a Court request or otherwise undermine the findings of the Court. Therefore, its actions may be somewhat limited, but it has the power to make amendments to the Rome Statute.

The legal effect of a UNSC referral and the relationship between art. 27(2) and 98(1) and its scope of application, as well as the role of the ASP, UNSC and other actors in non-cooperation matters will be further discussed in chapter five of this thesis with regards to the Bashir case.

# 5 The Bashir Case

## 5.1 Introduction

Chapter five will review and discuss State Party obligations under the Rome Statute with regards to the Bashir case and the situation in Darfur, as referred to the ICC by the UNSC. Specifically, this entails discussing the legal rationale about State Party obligation to arrest and surrender Bashir to the ICC in the PTC decisions on non-cooperation against Malawi, DRC, South Africa and Jordan. Of particular interest is the interpretation of Resolution 1593 as well as art. 27(2) and 98(1) of the Rome Statute. In addition, the aftermath of the decisions will be discussed, including scholarly critique and reactions by individual State Parties, in order to determine if the PTC resolve the legal issues convincingly.

The chapter will also include a discussion on the role of the UNSC in the referral of the Darfur situation, triggering the Court's jurisdiction, but also with regards to the PTC referral to the UNSC of non-cooperation decisions. In this regard, measures taken by the ASP will also be discussed. The role of both UNSC and ASP is specifically addressed for the discussion about giving effect of the legal solution, as well as the broader political perspective of the thesis. The analysis section will specifically focus on where the PTC has meet critique on its legal rationale.

In order to give a background, the chapter will initially introduce a time line of events in the conflict in Darfur. This section also has the purpose to explain the gravity of the alleged crimes in the conflict, providing for an explanation of ICC's reaction to the refusal of State Parties to cooperate the arrest warrants.

## 5.2 The conflict in Darfur

Following the separation of Sudan and South Sudan in July 2011, Sudan became the third largest state in Africa. Darfur is a region in Western Sudan with a population estimated to seven million people. Bashir has been the president of Sudan since 16 October 1993. Since 2003, there has been an on-going non-international armed conflict[286] between the Government of Sudan and at least two rebel groups, namely the Sudan Liberation Movement/Army (SLM/A) and Justice and Equality Movement (JEM), in Darfur.[287]

The causes of the conflict are complex. In the 1970s, the Government appointed new officials with both executive and judicial powers at state level. Leaders were appointed at the local level based upon loyalty to the central Government, without regard to the traditional leadership recognised by local

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[286] See the Geneva Conventions I-IV, common art. 3.

[287] *Report of the International Comission of Inquiry on Darfur to the UN Secretary General*, 25 January 2005 (ICID Report), 26.

communities. The people of Darfur were generally excluded from social services normally provided by the state, such as education and medical care.[288]

Increased desertification and drought during the 1980s resulted in significant movements of people. *'Newcomers'* arrived to Darfur from Chad, Libya, and Mauritania. Darfur's own issues of scarce water and other resources, resulted in these groups to have contentious relationship. Villages formed defence groups. Small arms and light weapons were imported into the region.[289] As fighting intensified between 1995-1998, the Government began recruiting of militias, further aggravating divisions.[290]

Against this backdrop, the two aforementioned rebel groups organised, drawing their members primarily from village defence groups. Most rebels were from the ethnic groups Fur, Massalit and Zaghawa. Already in 2002, the SLM/A and JEM took up arms against central authorities. However, the scale of rebel attacks increased noticeably in February 2003.[291] Bashir and other high-ranking Sudanese political and military leaders allegedly agreed upon a common plan to carry out a counter-insurgency campaign against the SLM/A, JEM and other armed groups opposing the Government of Sudan in Darfur. The Government significantly increased its recruitment of proxy militias from Arab tribes also known as *'Janjaweed'*.[292] Janjaweed attacks, and other attacks by Sudanese Government forces, including air force, continued to primarily be directed against the civilian population of Darfur, especially against tribal groups from which most of the rebels belonged to.[293]

The UN estimates that over 300.000 people have been killed by violence or conflict-induced disease, starvation, or dehydration.[294] The exact number of women and girls who been raped or subjected to sexual violence by Sudanese military personnel is unknown, but estimates suggest it is high. Survivors of rape and sexual violence have little or no access to health services. Thousands of villages and countless livelihoods have been destroyed.[295] According to UN estimates, 4,4 million people in Darfur are in need of humanitarian assistance.[296] About 2,9 million people are displaced by the conflict, facing enduring hardships inside Darfur or in refugee camps in eastern Chad. Approximately 600.000 people were displaced during 2014 and beginning of 2015.[297]

The UN and the AU have responded to the conflict with various interventions designed to resolve the conflict or to diminish the suffering experienced by

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[288] ICID Report (n. 287) 21-22.
[289] ICID Report (n. 287) 21.
[290] ICID Report (n. 287) 21-22.
[291] ICID Report (n. 287) 26.
[292] ICID Report (n. 287) 24.
[293] ICID Report (n. 287) 24-25.
[294] Human Rights Watch (HRW), *Mass Rape in North Darfur* (2015).
[295] HRW, *Mass Rape in North Darfur* (n. 294).
[296] OCHA map of North Darfur showing New Displacements in 2014 as of December 31, 2014, <http://reliefweb.int/sites/reliefweb.int> accessed 2018-05-20.
[297] HRW, *Mass Rape in North Darfur* (n. 294); Human Rights Watch, *Men With No Mercy – Rapid Support Forces Attacks against Civilians in Darfur, Sudan* (2015).

the civilian population of Darfur. In 2006, and in 2011, the Sudanese Government and rebel groups signed peace agreements, respectively endorsed by the UN and the AU. Neither of the agreements has improved the situation in Darfur.[298]

The International Commission on Inquiry on Darfur (ICID) was established by former UN Secretary-General Kofi Annan pursuant UNSC Resolution 1564.[299] In January 2005, the Commission reported to the UN that there was reason to believe that crimes against humanity and war crimes had been committed in Darfur and recommended that the situation be referred to the ICC.[300] On March 31, 2005, the UNSC, acting under Chapter VII of the UN Charter, adopted by a vote of eleven in favour with four abstentions[301], Resolution 1593, whereby it referred the situation in Darfur, since July 1, 2002 to the Prosecutor of the ICC.[302]

In 2007, the UNSC authorised the hybrid AU-UN Mission in Darfur (UNAMID), mandated to protect the civilian populations under imminent threat of physical violence and to prevent attacks on civilians. However, since 2014 the Government subsequently renewed calls for UNAMID and humanitarian organisations to withdraw. Since 2007, 216 UNAMID peacekeepers and other staff have been killed during the mission.[303]

Violence and grave violations of human rights continues in Darfur. The alleged perpetrators of these crimes are at large and cannot be brought to justice until they are arrested and surrendered to the ICC. Apart from Bashir, the Court has issued arrest warrants for four other defendants, including leaders of the Militia/Janjaweed and other Ministers of the Sudanese Government.[304] One case has been dismissed due to lack of evidence and proceedings against one defendant were terminated following his passing.[305]

## 5.3 Resolution 1593

Art. 13(b) of the Rome Statute enables the UNSC to extend the ICC's jurisdiction over a state not party to the Rome Statute. Resolution 1593

[298] Peace Agreements and Related, *2006 Darfur Peace Agreement*, 5 May 2006; Peace Agreements and Related, *2011 Darfur Peace Agreement*, 6 July 2011.
[299] UN Security Council, *Security Council Resolution 1564 (2004),* 18 September 2004.
[300] ICID Report (n. 287) 5.
[301] Algeria, Brazil, China and the U.S. abstained.
[302] UN Res. 1593 (n. 4).
[303] HRW, Men with no mercy (n. 297)
[304] Warrants of Arrest for Ali Kushayb, ICC-02/05-01/07, 27 April 2007; Warrants of Arrest for Ahmad Harun, ICC-02/05-01/07, 27 April 2007; Warrant of Arrest for Abdel Raheem Muhammad Hussein, ICC-02/05-01/12, 1 March 2012; Warrants of Arrest for Abdallah Banda Bakaer Nourain, ICC-02/05-03/09, 11 September 2014.
[305] See *Prosecutor v. Bahar Idriss Abu Garda,* Decision on the Prosecution's Application for Leave to Appeal the 'Decision on the Confirmation of Charges', Pre-Trial Chamber I, ICC-02/05-02/09-267, 23 April 2010; ICC, *Darfur Situation: Trial Chamber IV terminates proceedings against Saleh Jerbo*, Press Release, ICC-CPI-20131004-PR950, 4 October 2013.

specifically declares, as art. 13(b) requires, that the UNSC was acting under Chapter VII of the UN Charter issuing the resolution.[306]

The UNSC, in Resolution 1593, established that *'the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor'*.[307] It did not explicitly make the Rome Statute binding upon Sudan and it recognises that states not party to the Rome Statute have no obligations under it, but urges all states to cooperate fully.[308]

The UNSC also encourages the ICC to support international cooperation with domestic efforts to promote the rule of law, protect human rights and combat impunity in Darfur. [309]

The situation in Darfur is the first UNSC referral to the ICC.[310] Therefore, it is unknown precisely how the provisions of the Rome Statute apply to a situation in a non-party state pursuant to a UNSC resolution, other than with regards to triggering jurisdiction.[311] Moreover, the Rome Statute does not include any additional specific provisions explaining the legal consequences for the practice by the ICC. Resolution 1593 does not address immunity of State Officials. As stated in the introduction of this thesis, it is therefore uncertain how treaty rules contained in the Rome Statute, international customary law and obligations arising from the UN Charter, particularly the UNSC Chapter VII powers, interact with personal Head of State immunity provided under customary international law and how it effects the obligations for State Parties provided for in the Rome Statute. The conflict of sources of law must be sought for with the interpretation of Resolution 1593.

Gaeta and Akande offer well-reasoned, yet unique, interpretations of the legal effect of Resolution 1593. Gatea is offering the most limited interpretation as she argues that a referral by the UNSC can only require member states of the UN to cooperate with the ICC if this intention is clearly expressed. With this strict legal approach, she argues a UNSC referral only triggers the ICC's jurisdiction and the Rome Statute in its entirety only apply to State Parties to the Statute. Although Gaeta is clear that justice must be served for the horrendous crimes committed in Darfur, she argues justice must be achieved within distinct rules that regulate interactions between sources of international law. She argues if the UNSC does not issue expressly binding orders on states, the boundaries of treaty law, particularly *pacta tertiis* principle, must be respected.[312]

Akande interpret art. 13(b) of the Rome Statute and UNSC referrals to the ICC to endow all provisions of the Rome Statute to the situation with the force of UN law. This approach is based upon the hierarchy of obligations

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[306] UN Res. 1593 (n. 4).
[307] UN Res. 1593 (n. 4) para 2.
[308] UN Res. 1593 (n. 4) para 2.
[309] UN Res. 1593 (n. 4) para 4.
[310] The situation in Libya is the only other situation referred, see UN Res. 1970 (n. 254).
[311] Schabas, *Commentary* (n. 78) 376.
[312] Gaeta 'Immunity from Arrest' (n. 22) 330, 332.

within the UN, particularly the UNSC overriding powers for dealing with threats to international peace and security. Akande argues that the UN Charter has a *'constitutional'* nature and that treaties generally prevail over customary international law. This hierarchy of norms give Resolution 1593 the legal effect of making the Rome Statute applicable in its entirety to the situation in Darfur. As such, Akande argues the fact that Sudan is bound by art. 25 of the UN Charter and implicitly by Resolution 1593 to accept the decisions of the ICC puts Sudan in an analogous position to a party to the Statute. The only difference is that Sudan's obligations to accept the provisions of the Statute are derived not from the Statute directly, but from a UNSC resolution and the UN Charter.[313]

## 5.4 Non-cooperation of the request to arrest Bashir

### 5.4.1 Investigation, arrest warrants and request for cooperation

Following the referral from the UNSC, the prosecutor received the conclusion of the ICID. In addition, the Office of the Prosecutor requested information from a variety of sources, leading to the collection of thousands of documents. The prosecutor concluded that the statutory requirements for initiating an investigation were satisfied and decided to open the investigation on June 6, 2005.[314]

After submission by the Prosecutor, the PTC issued an arrest warrant against Bashir on March 4, 2009, including charges of war crimes and crimes against humanity.[315] It concluded that Bashir as *de jure* and *de facto* President of Sudan and commander in chief of the Sudanese armed forces played an essential role in coordinating and implementing the campaign against the civilian population of Darfur. In July 2009, the Prosecutor appealed the decision to the extent that the PTC decided not to issue a warrant of arrest in respect of the charge of genocide. The PTC concluded, on February 3, 2010, that there are reasonable grounds to believe Bashir responsible for three counts of genocide against the Fur, Massalit and Zaghawa tribes, and therefore issued the second arrest warrant.[316]

The warrants of arrests list ten counts of crimes on the basis of Bashir's individual responsibility under art. 25(3)(a) of the Rome Statute as a (co)perpetrator including five counts of crimes against humanity, two counts of war crimes, and three counts of genocide committed in Darfur during March 2003 until, at least, July 14, 2008.[317]

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[313] Akande 'Legal Nature of UNSC Referrals' (n. 25) 341-342.
[314] ICC*, The Prosecutor of the ICC opens investigation in Darfur*, Press Release, ICC-OPT-0606-104, 6 June 2005.
[315] Bashir First Arrest Warrant (n. 5).
[316] Bashir Second Arrest Warrant (n. 5).
[317] See Bashir First Arrest Warrant (n.5); Bashir Second Arrest Warrant (n. 5).

Following the issuance of the two arrests warrants, the ICC, pursuant to Part IX of the Rome Statute, transmitted to the State Parties to requests for the arrest of Bashir and his surrender to the court.[318] Despite the issuance of the warrants and request for cooperation by the State Parties, Bashir is still at large and the arrest warrants are still to be executed.

Early positive attitudes and constructive support of the ICC by African States changed following the indictment of Bashir. Mainly, the confrontation revolves around the ICC's perceived prioritisation of Africa over other regions in its selection of cases and the potential effect of prosecutions on peace processes. Many African leaders are questioning the functioning of the Court as it heavily focused on Africa.[319]

Some Arab and African leaders, Russia, and China also expressed their opposition to the arrest warrants.[320] Several regional organisations, including the AU, have criticised the ICC and called on the UNSC for deferral of prosecution.[321] In 2009, the AU construed the arrest warrants as serious threats to the on-going peace efforts in Sudan, and directed all African ICC member States to withhold cooperation from the Court in respect of the arrest and surrender of Bashir.[322] On the other hand, supporters of the ICC argue that the ICC will contribute to Africa's long-term peace and stability.[323]

The current chief prosecutor of the ICC, Fatou Bensouda, has contended that seeking justice for victims on the African continent is hardly evidence of discrimination.[324] According to Bensouda, the Court has not targeted African nationals, rather simply sought justice for victims of grave international crimes, including victims in Africa. She specifically stated: *'all of the victims in our cases in Africa are African victims, and they are the ones who are suffering these crimes'*.[325]

Until Bashir is arrested and transferred to the seat of the ICC in The Hague, the case will remain in the Pre-Trial stage since ICC does not try individuals

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[318] See *Prosecutor v. Al Bashir,* Request to all State Parties to the Rome Statute for the Arrest and Surrender of Omar Al Bashir, Pre-Trial Chamber I, ICC-02/05-01/09, 6 March 2011.

[319] See for example BBC, 'World Reaction: Bashir Warrant', 4 March 2009,<http://news.bbc.co.uk/2/hi/africa/7923797.stm> accessed 2018-05-18; Aljazeera, 'Rwanda's Paul Kagami says ICC targeting poor African countries', 29 April,2018.,<https://www.aljazeera.com/news/2018/04/rwanda-kagame-accuses-icc-bias-africa-180429050656022.html> accessed 2018-05-18; Voanews, 'Analyst Questions ICC's Intense Focus on Africa', April 3, 20013,<http://www.voanews.com/content/icc-focus-on-africa-questioned/1633694.html> accessed 2018-05-18.

[320] Arieff (n. 192) 14.

[321] Arieff (n. 192) 16.

[322] Assembly of the African Union, 'Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC*)*', Assembly/AU/Dec.245 (XIII), 3 July 2009, para 10.

[323] UNSC, 'Chief Prosecutor, Briefing Security Council, Blames Non-cooperation by States for Non-Appearance of International Criminal Court's Sudan Indictees', UNSC 8132nd Meeting, SC/13116, 12 December 2017 (UNSC 8132nd Meeting).

[324] David Bosco, 'Why is the International Criminal Court picking only on Africa?', *29* March 29 2013, <https://www.washingtonpost.com/opinions/why-is-the-international-criminal-court-picking-only-on-africa/2013/03/29/cb9bf5da-96f7-11e2-97cd-3d8c1afe4f0f_story.html?noredirect=on&utm_term=.a40a38a2d1cd> accessed 2018-05-18.

[325] Bosco (n. 324).

unless they are present in the courtroom.[326] Since the issuance of arrest warrants, eight decisions on non-cooperation has been issued stating State Parties failed to cooperate with the Court. In 2011, the PTC issued a decision against Malawi and a decision against DRC in 2014. During 2017, two decisions were issued, one against South Africa and one against Jordan. All the aforementioned decisions, except the decision against South Africa, were referred to the ASP and the UNSC for a formal finding on non-cooperation.

### 5.4.2 The PTC analysis and conclusions

All the aforementioned State Parties have been subjected to decisions on non-cooperation due to the fact Bashir visited their territory and no attempt to arrest him was made by authorities. Malawi, DRC, South Africa and Jordan all requested the PTC to find that they did not act inconsistently with its obligations under the Rome Statute. They requested this outcome claiming the relationship between Sudan and State Parties is governed by customary international law. They argued Bashir enjoys immunity as a sitting Head of State under the rules of customary international law and that immunity has not been waived by Sudan or the UNSC in its Resolution 1593.[327]

The PTC found that, pursuant to art. 87(7), all the subjected State Parties had failed to comply with the request to arrest and surrender Bashir and thereby preventing the Court from exercising its functions and powers under the Rome Statute.[328]

In its decision against Malawi, the PTC admitted that there is an *'inherent tension between art.s 27(2) and 98(1) of the Rome Statute and the role of immunity plays when the Court seeks cooperation regarding the arrest of a Head of State'*. It went on to discuss the historic treatment of Head of State immunity by international law, arguing that there had been a gradual evolution towards its rejection before international courts.[329]

The Chamber explained that art. 98(1) was not applicable because *'customary international law creates an exception to Head of State immunity when international courts seek a Head of State's arrest for the commission of international crimes'*.[330]

In its decision against DRC, the PTC's position changed regarding the interpretation of art. 27(2) and 98(1), leaving aside the argument of an exception under customary international law removing personal Head of State immunity before international criminal courts. Instead, it concluded that Bashir enjoys immunity under customary international law, but the UNSC implicitly waived this immunity in Resolution 1593.[331]

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[326] See Rome Statute art. 63.
[327] Decision against Malawi (n. 7) para 8; Decision against DRC (n. 7) para 18-19; Decision against South Africa (n. 7) para 32; Decision against Jordan (n. 7) para 14-15.
[328] Decision against Malawi (n. 7) para 47; Decision against DRC (n. 7) para 34; Decision against South Africa (n. 7) para 139; Decision against Jordan (n. 7) para 50.
[329] Decision against Malawi (n. 7) para 41.
[330] Decision against Malawi (n. 7) para 25.
[331] Decision against DRC (n. 7) para 29.

In its decision against South Africa, the PTC revised its position again, leaving aside the conclusion of a waiver. It noted that customary international law prevents the exercise of criminal jurisdiction by states against Head of States of non-party states. The Chamber further noted that this immunity extends to any act of authority which would hinder the Head of State in the performance of his or her duties and the PTC is unable to identify a rule in customary international law that would exclude immunity for Head of States when their arrest is sought for international crimes by another state, even when the arrest is sought on behalf of the ICC.[332] This position followed in the decision against Jordan.[333]

However, the PTC emphasised that the issue before the Chamber *'[d]oes not revolve around the effect of any possible immunity of Head of States on the exercise per se by the Court of its jurisdiction'*.[334] It further stressed no dispute has arisen with respect to the general validity of the proceedings against Bashir before ICC or of the arrest warrants issued. Instead, the matter concerned whether there existed a duty in the part of the State Party to execute the request for arrest of Bashir.[335] The PTC concluded it is a question relating to the law applicable between states, i.e. between Malawi/DRC/South Africa/Jordan and Sudan.[336] Therefore, the Chamber concluded it must determine whether and, if so, under what circumstances, there exists any derogation to the general regime of immunities under international law when the ICC seeks to arrest and surrender a person protected by immunity as Head of State. The Chamber stressed this determination primarily concerns interpretation of art. 27(2) of the Rome Statute and its relationship with art. 98(1).[337]

South Africa argued art. 27(2) does not have any effect on the rights and obligations of states *vis-á-vis* the Court, but concerns only the Court's jurisdiction, ensuring that such jurisdiction is not excluded in cases of immunity or special procedural rules attached to the official capacity of a person.[338] The Chamber did not consent to this view and found that art. 27(2) of the Rome Statute also excludes the immunity of Heads of State from arrest. In its decision against Jordan, the PTC referred to its decision against South Africa regarding the interpretation of art. 27(2).[339]

The PTC considered that since immunity from arrest would bar the ICC from the exercise of its jurisdiction, the general exclusionary clause of art. 27(2) in its plain meaning also encompasses that immunity. The Chamber stressed that if the drafters of the Statute intended exclusion only of a narrow category of immunities, they would have expressively done so in plain language.[340]

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[332] Decision against South Africa (n. 7) para 68.
[333] Decision against Jordan (n. 7) para 27.
[334] Decision against South Africa (n. 7) para 69.
[335] Decision against South Africa (n. 7) para 70.
[336] Decision against South Africa (n. 7) para 70.
[337] Decision against South Africa (n. 7) para 71. Decision against Jordan (n. 7) para 33.
[338] Decision against South Africa (n. 7) para 38.
[339] Decision against South Africa (n. 7) para 74.
[340] Decision against South Africa (n. 7) para 74.

Moreover, the PTC stressed that such reliance on immunities or special procedural rules to deny cooperation with the court by State Parties to the Rome Statute would create an insuperable obstacle to the Court's ability to exercise its jurisdiction. Such a result would according to PTC clearly be incompatible with the object and purpose of art. 27(2).[341] Furthermore, the Chamber emphasised that the exercise of the Court's jurisdiction which fully depends on State Parties' execution of the arrest warrants would be reduced to a purely theoretical concept if State Parties could refuse cooperation by invoking immunities based on official capacity.[342]

According to the PTC, art. 27(2) prevents State Parties from raising any immunity belonging to it under international law as a reason for refusing arrest and surrender of a person sought by the court and from invoking any immunity belonging to them when cooperation in the arrest of a person is provided by another State Party.[343] As there is no immunity from arrest and surrender based on official capacity with respect to proceedings before the Court where immunity would otherwise belong to a State Party, art. 98(1) of the Rome Statute is without object in the scope of application of art. 27(2). Therefore, no waiver is required as there is no immunity to be waived.[344]

With these considerations, the Chamber stressed that the effect of art. 27(2) concerns both vertically, the relationship between a State Party and the Court and, horizontally, the inter-state relationship between State Parties to the Rome Statute.[345] However, the Chamber emphasised this only applies to States that have consented to such a regime. States not party to the Statute in principle have no obligation to cooperate with the Court and the irrelevance of immunities based on official capacity as stated in art. 27(2) has no effect on their rights under international law. Conversely, with respect to States not parties to the Statute, the applicable regime is that of art. 98(1). Therefore, the court may not, in principle, without first obtaining a waiver of immunity, request State Parties to arrest and surrender the Head of State of a non-party to the Rome Statute.[346]

As such, the Chamber stressed the fundamental distinction when considering issues of cooperation with the Court is thus between State Parties and states not parties to the Statute. Nevertheless, the PTC underlined that the Statue provides for a particular situation where obligations defined in the Statute may become incumbent upon a state not as a result of its acceptance of the Statute, but as a result of, and under, the UN Charter, as *sui generis*, i.e. in the Bashir case by Resolution 1593.[347]

Concerning interpretation of Resolution 1593, South Africa and Jordan argued that while they would accept the UNSC to exercise its Chapter VII powers to suspend the customary obligations of states to respect the

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[341] Decision against South Africa (n. 7) para 75.
[342] Decision against South Africa (n. 7) para 75.
[343] Decision against South Africa (n. 7) para 77-78.
[344] Decision against South Africa (n. 7) para 81-81; Decision against Jordan (n. 7) para 39.
[345] Decision against South Africa (n. 7) para 76; Decision against Jordan (n. 7) para 33.
[346] Decision against South Africa (n. 7) para 77; Decision against Jordan (n. 7) para 35.
[347] Decision against South Africa (n. 7) para 83; Decision against Jordan (n. 7) para 35-36.

immunity of a foreign Head of State, UNSC has not done so in the case of Bashir.[348] Jordan argued that if the UNSC intended to impose an obligation on states, including State Parties to the Rome Statute, to lift the immunity of Sudan's officials, including the absolute immunity of an incumbent Head of State, then the UNSC could have expressly stated so in Resolution 1593, or in subsequent resolutions.[349] In addition, Jordan asserted that the object and purpose of Resolution 1593 are not defeated by interpreting it as silent with respect to the denial of immunity of Bashir from national criminal jurisdiction.[350]

The PTC did not consent to the interpretation argued by South Africa and Jordan. It stated that in its resolution, the UNSC decided that Sudan should cooperate fully with and provide any necessary assistance to the Court and the Prosecutor. Since immunities attached to Bashir are a procedural bar from prosecution before the ICC, the cooperation envisaged in Resolution 1593 was meant to eliminate any impediment to the proceedings before the Court, including lifting immunities.[351] In its decision against South Africa and Jordan, the Chamber concluded that the effect of a UNSC resolution triggering the ICC's jurisdiction under art. 13(b) of the Rome Statute is that *'the legal framework of the statute applies, in its entirety, with respect to the situation referred'*.[352] As such the PTC revised its conclusion in the decision against DRC, that the Resolution included a waiver.

Consequently, the PTC declined the argument of South Africa and Jordan that the legal relationship between Sudan and a State Party is governed by customary international law and not by the Rome Statute. The PTC empathised that in relation to the imposition on Sudan by the UNSC to cooperate fully with the Court and provide any necessary assistance, the terms of such cooperation are set by the Rome Statute, not by international customary law.[353] It acknowledged that this is an expansion of the applicability of an international treaty to a state, which has not voluntarily accepted it as such.[354] Nonetheless, the UNSC is permitted to impose obligations on states according to the UN Charter. Accordingly, the Statute regulates the interactions between Sudan and the ICC and art. 27(2) applies equally to Sudan, rendering any immunity on the basis of official capacity belonging to Sudan that would otherwise exist under international law.[355]

Consequently, the PTC considered the immunities of Bashir, as Head of State, do not apply *vis-à-vis* State Parties when they execute a request for arrest and surrender issued by the ICC in the exercise of its jurisdiction in the situation in Darfur.[356] Accordingly, art. 98(1) of the Rome Statute is not applicable to the arrest of Bashir. No immunity needs to be waived and State

[348] Decision against South Africa (n. 7) para 34; Decision against Jordan (n. 7) para 16.
[349] Decision against Jordan (n. 7) para 16.
[350] Decision against Jordan (n. 7) para 16.
[351] Decision against South Africa (n. 7) para 88; Decision against Jordan (n. 7) para 37.
[352] Decision against South Africa (n. 7) para 85; Decision against Jordan (n. 7) para 37.
[353] Decision against South Africa (n. 7) para 85; Decision against Jordan (n. 7) para 37.
[354] Decision against South Africa (n. 7) para 89; Decision against Jordan (n. 7) para 37.
[355] Decision against South Africa (n. 7) para 91; Decision against Jordan (n. 7) para 38.
[356] Decision against South Africa (n. 7) para 92-93; Decision against Jordan (n. 7) para 39.

Parties can execute the request to arrest and surrender without violating Sudan's rights under customary international law.[357]

For clarification, the PTC stated that for its conclusion it is unessential whether the UNSC intended, or even anticipated, that by virtue of art. 27(2) of the Rome Statute Bashir's immunity as Head of State would not operate to prevent his arrest sought by the court in relation to the proceedings in the situation in Darfur referred by the UNSC.[358] The PTC stressed *'[...]this is a necessary, un-severable, effect of the informed choice by the Security Council to trigger the jurisdiction of this Court and impose Sudan the obligation to cooperate with it'*.[359]

Moreover, the PTC emphasised that art. 98(1) provides no rights for a State Party to refuse compliance with the ICC's requests for cooperation. The article is addressed to the Court, and is not a source of substantive rights to the State Parties. While the provision does not indicate that a tension may exist between the duty of a State Party to cooperate with the ICC and that state's obligation to respect immunities under international law, it leaves to the Court to address such matter.[360] Consequently, the PTC considered that the State Parties were not entitled to rely on its own understanding of art. 98(1) of the Rome Statute (whether on its own or in relationship with art. 27) to decide not to cooperate with the request to arrest Bashir.[361]

All the reviewed cases above, except the decision against South Africa, were referred to the ASP and the UNSC respectively pursuant to art. 87(7) of the Rome Statute and Resolution 1593.[362]

## 5.5 Aftermath of the PTC decisions

### 5.5.1 Jordan's appeal

In March 2018, Jordan appealed the PTC decision to the Appeals Chamber of ICC.[363] Jordan requested leave to appeal the decision with respect to four issues, two of interest for the scope of this thesis. Firstly, it argued the PTC erred with respect to a matter of law in its conclusion regarding the effects of the Rome Statute upon the immunity of Bashir, including conclusions that art. 27(2) excludes the application of art. 98 and that art. 98 establishes no rights for State Parties.[364]

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[357] Decision against South Africa (n. 7) para 93; Decision against Jordan (n. 7) para 39.
[358] Decision against Jordan (n. 7) para 40.
[359] Decision against Jordan (n. 7) para 40.
[360] Decision against Jordan (n. 7) para 43.
[361] Decision against Jordan (n. 7) para 43.
[362] Decision against Malawi (n. 7) para 47; Decision against DRC (n. 7) para 34; Decision against South Africa (n. 7) para 135-138; Decision against Jordan (n. 7) para 46-49.
[363] *Prosecutor v. Al Bashir*, Decision on Jordan's request for leave to appeal, Pre-trial Chamber II, ICC-02/05-01/09, 21 February 2018 (Decision on Jordan's Appeal).
[364] Decision on Jordan's Appeal (n. 363) para 2.

Secondly, Jordan argued the PTC erred with respect to matters of law in concluding that Resolution 1593 affected Jordan's obligations under customary international law accorded immunity to Bashir.[365]

Concluding that the issues raised by Jordan arise out of the decision and that these issues *'would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial'* and that *'an immediate resolution by the Appeals Chamber may materially advance the proceedings'*, as necessary pursuant to art. 82 of the Rome Statute, the Appeals Chamber granted the appeal.[366] In addition, the Appeals Chamber has invited observations from international organisations, State Parties and Professors of international law on legal matters raised by Jordan.[367]

This will be the first time the Appeals Chamber will examine the legal issues of State Parties' obligations to arrest and surrender a Head of State of a non-party state subjected to the ICC's jurisdiction pursuant to a UNSC referral.

### 5.5.2 Scholarly critique

The PTC decisions have meet critique. After the issuance of the decision against Malawi, Akande first criticised the PTC for issuing decisions on non-cooperation very late after the issuance of arrest warrants. He also argues that the PTC ignored these sensitive issues has contributed to the tension with African states and to the feeling that the position of those states is just being ignored.[368]

Akande continued to criticise the PTC's rationale on a developed rule under customary international law removing immunities. He argued neither the practice of the international tribunals and courts, nor national state practice consent to this view.[369] Even if the PTC were right that there is no immunity from prosecution before international courts, it fails to explain how this means that as a matter of customary international law national authorities are entitled to arrest in support of request from an international court.[370]

According to Akande, the biggest weakness in the PTC decisions is that it fails to explain why art. 98 is there at all. If under international law, there can be no immunities when an international court seeks someone for prosecution, why did the parties to the Rome Statute insert art. 98? In short, national authorities may never raise the immunity of a Head of State as an obstacle to cooperation with the ICC. Akande argued art. 98 has been made redundant by

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[365] Decision on Jordan's Appeal (n. 363) para 2.
[366] Decision on Jordan's Appeal (n. 363) para 13-15.
[367] *Prosecutor v. Al Bashir*, Order inviting expressions of interest as *amici curiae* in judicial proceedings (pursuant to rule 2013 of the Rules of Procedure and Evidence), The Appeals Chamber, ICC-02/05-01/09 OA2, 29 March 2018.
[368] Akande Dapo, 'ICC Issues Detailed Decision on Bashir's Immunity (…At long Last…) But gets the law wrong', (2011) EJILT.
[369] Akande, 'ICC Issues Detailed' (n. 368).
[370] Akande ICC Issues Detailed' (n. 368).

the PTC decision and that this is contrary to a basic principle of treaty interpretation.[371]

However, instead, Akande has argued there was another route that could have been taken by the PTC. It could simply have said that the effect of the referral of the situation by the UNSC has the consequence that Sudan is bound by the Statute. The effect of this would therefore mean that those states are to be regarded as in the same position as a State Party to the Rome Statute. As explained above, this legal rationale is were the PTC ended up in its decisions later issued.

Gatea agreed with Akande's critique regarding the PTC's interpretation of a new rule under customary international law removing immunities.[372] However, Gaeta was not convinced by the legal rationale in the PTC's following decisions in which it changed its legal rationale, making the Rome Statute applicable in its entirety. Instead, she argues that art. 98(1) is still applicable to the case and that the ICC must obtain a waiver by Sudan in order to require State Parties to comply with its request to arrest. Such waiver is according to Gaeta not included in Resolution 1593.[373]

With regards to later decisions, Abel Knottnerus has criticised the decision against South Africa. He questions if the ICC is allowed to treat Sudan as a State Party as both the Rome Statute and Resolution 1593 indicate that Sudan remains a non-party. He criticised the PTC for not addressing this matter and argued its assumption that Sudan should be treated as a State Party turns a blind eye to the numerous provisions in the Statute that explicitly distinguish the legal position of a State Party to that of a non-party. Knottnerus argued there is no textual argument in the Statute for treating Sudan as a State Party and that a referral does not transform a non-party into a Sate Party, it only triggers the Court's jurisdiction. As such, Knotterus argued the Rome Statute may be applicable in its entirety, but Sudan should still be treated as a non-party. Consequently, provisions addressing the relationship to non-parties are applicable, including art. 98(1).[374]

Different possibilities giving legal effect to a solution have also been discussed. For instance, Akande has argued ICJ be asked to render an advisory opinion on the immunity of Heads of States not party to the ICC. He argues this because the PTC has changed it legal rationale over time. Although Akande argues it is possible for the ICC Appeals Chamber to sort this issue out but since there is such distrust between the AU and the ICC it seems unlikely that African states will accept any ICC decision on the matter. In addition, Akande argues the ICJ would potentially address the whole range

[371] Akande, 'ICC Issues Detailed' (n. 368).
[372] Paola Gaeta, 'The ICC changes its mind on the immunity from arrest of President Al Bashir, but it is wrong again', (2014) Opinio Juris.
[373] Gaeta 'The ICC Changes its mind' (n. 372); See also André de Hoogh, Abel Knottnerus, 'ICC issues decision on Al-Bashir's immunities – but gets the law wrong…again', (2014) EJILT.
[374] Abel Knottnerus, 'The immunity of al-Bashir: The latest turn in the jurisprudence of the ICC', (2017) EJILT.

of international law arguments made by the AU rather than just the position under the ICC Statute.[375]

### 5.5.3 Reactions by indivudal State Parties

Before the PTC issuance of the decision against South Africa, South Africa's obligation to cooperate with the ICC was tried in the High Court of South Africa. The Government argued that it had higher obligation not to arrest Bashir than cooperating with the ICC request. In September 2015, the High Court of South Africa denied the Governments argument, concluding the implementation of the Rome Statute in South African domestic law clearly constituted a higher obligation.[376] The Government appealed the judgment, but the South African Supreme Court of Appeal's dismissed the appeal. The Appeal Court found that by passing the implementation of the Rome Statute Act in 2002, South Africa had effectively annulled all forms of immunity, including Head of State immunity, and that it was bound by its obligations under the Rome Statute and therefore had to arrest Bashir.[377]

In 2016, after stating it would withdraw from the Rome Statute, the Government withdrew its application on the matter to the South African Constitutional Court. However, in early 2017, South Africa revoked its withdrawal from the Rome Statute after a decision by the Gauteng High Court ruled that the initial process to withdraw from the ICC was unconstitutional.[378] However, after the PTC decision against it, South Africa again has again threatened to leave the ICC.[379]

In addition to the judgments by domestic courts in South Africa, a Kenyan Court of Appeal, in early 2018, reaffirmed an earlier decision stating the Kenyan Government's international obligation to arrest Bashir should he ever return to Kenya. Taking the historical foundations of international criminal law into account, the Court acknowledges that despite potential conflicts that there is no real legal conflict between provisions of the Rome Statute with respect to immunity.[380] However, on the political level, Kenya during a meeting with the ASP, proposed an amendment to Article 27 of the Rome Statute, which would provide for immunity of Heads of States.[381]

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[375] Dapo Akande, 'An international Court of Justice Advisory Opinion on the ICC Head of State Immunity Issue', (2016) EJILT.
[376] *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development & others* 2015 (5) SA 1 (GP), para 39.
[377] *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17, 15 March 2016, para 113.
[378] *Democratic Alliance v Minister of International Relations and Cooperation and Others* (Council for the Advancement of the South African Constitution Intervening) (83145/2016) (2017) ZAGPPHC 53, 22 February 2017, para 47, 50, 51, 56, 77, 79.
[379] Peter Fabricius , *South Africa confirms withdrawl from ICC*, Daily Maverick, 7 December 2017, <https://www.dailymaverick.co.za/article/2017-12-07-south-africa-confirms-withdrawal-from-icc/#.WvWspFOFPBI> accessed 2018-05-19.
[380] Tim Fish Hodgson, 'Kenyan Appeals Court strongly affirms that al-bashir cannot claim immunity as a defense against the ICC's Arrest Warrants', (2018) Opinio Juris.
[381] ASP, 'Report of the Working Group on Amendments', ICC-ASP/13/31, (2014) Thirteenth session, 15-16.

At first glance, the ICC's lack of legitimacy ranks as a prime justification for opposition to the ICC in parts of Africa.[382] However, as mentioned above, African states were deeply involved in creating the ICC and all the provisions in the Rome Statute, including the lack of immunity for Head of States. Moreover, several African states have invited ICC action in their countries, thus refuting the argument of a blanket lack of legitimacy. Questioning the Court's legitimacy has only become common since the ICC started charging sitting Heads of State. Hence, while the focus of the Court's prosecution on Africa has certainly damaged the perception that it is truly impartial, arguing that the Court lacks legitimacy is often used as a strategic argument to depict the Court as anti-African.[383]

International-level explanations shed light on African states non-cooperation. The AU has put non-cooperation pressure on its member states. This pressure, institutionalised through the AU Assembly's 2009 decision calling on member states not to cooperate in the arrest of Bashir, subjected State Parties to the Rome Statute a loyalty conflict between its AU and ICC commitments.[384] In existing scholarship, international pressure often leads to compliance with human rights treaties. However, the Bashir case shows that international pressure, here through the AU, may also lead to non-cooperation with an international treaty as the AU's policy directly counteracts the ICC's arrest warrant.[385] In a statement made by John Jeffery, Deputy Minister of Justice and constitutional development in South Africa, he stressed that had Bashir been arrested, there would have been *'extreme consequences in the region'*.[386] This testifies to a deep concern about the repercussions for South Africa's relations with the AU if it would execute the ICC arrest warrant.

## 5.5.4 Measures taken by the ASP and the UNSC

As explained above, Art. 87(7) provide for the possibility for the ICC to refer a decision of non-cooperation to the ASP and the UNSC. The ASP has taken measures with regards to the decisions on non-cooperation regarding the situation in Darfur and the arrest of Bashir. As stated above, because of the lack of cooperation it adopted official procedures regarding non-cooperation as well as a toolkit on non-cooperation.[387]

In the toolkit, the ASP specifically addresses the arguments about the Rome Statute's inapplicability to non-party States, which continues to be ventilated.

[382] For a detailed discussion on legitimacy and the ICC, see, Michael J. Struett, 'The Politics of Discursive Legitimacy: Understanding the Dynamics and Implications of Prosecutorial Discretion at the International Criminal Court', in Steven C. Roach, *Governance, Order, and the International Criminal Court: Between Realpolitik and a Cosmopolitan Court*, (ed., Oxford: Oxford University Press, 2009) 114.
[383] Franziska Boehme, '"We Chose Africa": South Africa and the Regional Politics of Cooperation with the International Criminal Court', (2017) 11IJTJ, 56.
[384] Assembly of the African Union, 'Decision on the meeting of African States Parties to the Rome Statute of the International Criminal Court', Thirteenth Ordinary Session, (2009), Doc. Assembly/AU/13(XIII), para 9-10.
[385] Boehme (n. 383) 6-7.
[386] Boehme (n. 383) 68.
[387] ASP Procedures on non-cooperation (n 275); ASP Toolkit (n. 280).

In order to avoid such future debates, the ASP suggest the UNSC use a clearer language in its future resolutions referring situations to the ICC. The ASP argues its suggested language more closely reflects the cooperation language found in Resolution 827 and 955, which respectively established the ICTY and the ICTR and as such clarifying the legal effect of such resolution making the Rome Statute applicable as a whole to the situation referred. The suggested language states an implicit reference that the state of the situation referred should cooperate fully pursuant to both the resolution and the Rome Statute.[388]

The President of the ASP has recalled multiple times the importance for states to spare no effort in executing the arrest warrants issued by the ICC and forwarded to State Parties the decisions of the PTC related to non-cooperation.[389]

The UNSC, however, has not taken any actions to ensure that State Parties are held accountable for their failure to arrest and surrender suspects sought by the ICC. The PTC referred to this problem in its latest decisions on non-cooperation regarding the situation in Darfur. In its decisions, the PTC stated that the UNSC refers a situation to the ICC, it is expected that the UNSC would respond by way of taking such measures which are considered appropriate, if there would be an apparent failure on the part of a State Party to the Statute to cooperate in fulfilling the Court's mandate entrusted to it by the Council. The PTC stressed that if there is no follow up action, any referral by the UNSC to the ICC would never achieve its ultimate goal to end impunity. Such referral would become futile.[390]

Since 2015, the Prosecutor has respectively addressed the issues of non-cooperation and lack of actions by the UNSC in its biannual reports to the Council pursuant to Resolution 1593.[391] Recalling the non-cooperation findings referred to the UNSC, the Prosecutor stated that the Council's inaction invariably undermined the credibility of it and that of the referral mechanism, and in addition had a great adverse impact on victims.[392] The Prosecutor stated it was past due for the UNSC to address instances of non-cooperation and urged it to fully assume its responsibilities by taking strong and concrete measures to ensure compliance with the Rome Statute and Resolution 1593.[393] Moreover, the Prosecutor expressed that unless the Council acts decisively and forcefully there was little prospect for the arrest of Bashir, meaning that justice would continue to elude the victims of Darfur.[394]

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[388] ASP Toolkit (280) para 51-52.
[389] See for example Resolution ICC-ASP/13/Res.3, adopted at the 12th plenary meeting, 17 December 2014, para 7.
[390] See for example Decision against DRC (n. 7) para 33.
[391] See for example ICC, 'Statement of ICC Prosecutor, Fatou Bensouda, before the United Nations Security Council on the situation in Darfur', pursuant to UNSCR 1593 (2003*)*, 13 December 2016 (Prosecutor Statement before UNSC).
[392] Prosecutor Statement before UNSC (n. 391) para 3-4.
[393] Prosecutor Statement before UNSC (n. 391) para 38.
[394] Prosecutor Statement before UNSC (n. 391) para 38, 40.

Considering many of the UNSC permanent members are not part of the Rome Statute, there may exist a risk of a deferral if the UNSC takes action. AU representatives in the UNSC constantly remind it of their opposition to the arrest and surrender of Bashir and reiterate their call for the use of a deferral.[395] In response to Bensouda's statement before the UNSC in 2016, the Russian representative stated:

> *[...] the obligation to cooperate, as set forth in resolution 1593 (2005), does not mean that the norms of international law governing the immunity of the Government officials of those States not party the Rome Statute can be repealed, and presuming the contrary is unacceptable.*[396]

However, member states of the UNSC have also shown support to the ICC. During the briefing by Bensouda in December 2017, representatives for France, Sweden, Italy, Ukraine, Uruguay and Japan all stressed the importance of cooperation with the court to arrest and surrender Bashir, as well as stressing the importance of UNSC to act upon the referrals of non-cooperation.[397]

## 5.6 Analysis

The Darfur conflict has a long and complex history, which has resulted in grave international human rights violations by the Sudanese Government with Bashir as its leader. The gravity of the crimes committed against the civil population of Darfur as well as UNAMID personnel, and the conflict's sequel of humanitarian crisis as well as the Government's resistance to improve the situation in combination with the ICC's mandate to end impunity, are all factors explaining why the ICC consider it urgent to prosecute the alleged perpetrators. In addition, the Prosecutor has been provided with a great amount of evidence, which probably leave the Prosecutor to believe a conviction is fairly possible.

The situation in Darfur is the first situation being referred to the ICC by the UNSC. As shown in this thesis, customary international law governing Head of State immunity as well as the practice of other international courts and tribunals leaves the scope of personal Head of State immunity before international courts uncertain. Therefore, it is not very surprising issues arise when personal Head of State immunity is a question before the first permanent international criminal court for the first time. The future practice of the ICC, its relationship to the UN, and the state of Head of State immunity under customary international law, is dependent on the outcome in the Darfur situation before the ICC.

The author of this thesis believes the PTC in its two latest decisions offers a well-reasoned legal rationale considering State Parties obligation to arrest a Head of State of a non-party to the Rome Statute when subjected to the

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[395] UNSC, Reports of the Secretary-General on the Sudan and South Sudan, 7963rd meeting, New York 8 June 2017 (UNSC 7963rd Meeting), 6.
[396] UNSC 7963rd Meeting (n. 395) 12.
[397] UNSC 8132nd Meeting (n. 323) see statements by mentioned States.

Court's jurisdiction pursuant to a UNSC resolution. However, the PTC has meet opponents and critique, questioning the credibility of the legal rationale.

Akande criticise the PTC for its delay in addressing the matter, which is fair critique, but without meaning for the legal rationale. He also argues the PTC failed to address that the issues contribute to the tension with African states and that the position of those states is being ignored.[398] The author of this thesis believes this critique does not address the legal rationale of the issues, rather the political aspect. Even though the PTC could have addressed the political considerations arising, its mandate is to concentrate on the legal questioned addressed before it.

Both Gaeta and Akande questioned the legal rationale in the PTC's earlier decision in which it concluded a new rule under customary international law removing immunity before international courts.[399] Akande argues neither the practice of the international tribunals and courts, nor national state practice consent to this view.[400] The author of this thesis agrees, and so does the PTC in its later decisions. Akande argued that instead the PTC could have concluded the legal effect of a UNSC resolution is that the Rome Statute in its entirety is applicable to that situation, which the PTC does in its latest decisions.[401]

According to the author of this thesis, there is not sufficient evidence showing such exception has developed. The pure formation of a customary rule that binds all states is complex and state practice is not in conformity with such conclusion. Neither State Parties nor the PTC argues for such conclusion. State Parties argues customary law prevails over the Rome Statute, and the PTC concludes that as a result of that the Rome Statute is applicable in its entirety, customary law on immunities does not apply. As such, the solution of the legal problem is determining which legal regime applies in what situations, which the PTC has concluded is the Rome Statute.

However, the PTC's change of position, not once but twice. This testifies to the complex legal question at hand. It may be argued this degrade the PTC's credibility. The author of this thesis does consent to this view. However, in its two latest decisions, the PTC offers well-reasoned legal rationales.

Jordan decided to appeal the decision against it, arguing the PTC erred in two matters of interest within the scope if this thesis. Firstly, it argued PTC's interpretation that art. 27(2) exclude the application or art. 98 was not correct. Similarly, Akande argues that the PTC failed to explain why art. 98 is included in the Rome Statute at all. He questioned whether State Parties ever may raise personal immunity as an obstacle for compliance. [402] He has a valid argument in this matter, though it was argued for the decision against Malawi, in which the PTC had a different legal rationale from its later decisions. However, in its later decisions the PTC also failed to explain in

[398] Akande, 'ICC Issues Detailed' (n. 368).
[399] Akande, 'ICC Issues Detailed' (n. 368); Gaeta 'The ICC Changes its mind' (n. 372).
[400] Akande, 'ICC Issues Detailed' (n. 368).
[401] Akande, 'ICC Issues Detailed' (n. 368).
[402] Akande, 'ICC Issues Detailed' (n. 368).

what situations art. 98(1) can be applicable. If the Rome Statute is applicable in its entirety in situations referred by the UNSC, the Rome Statute is applicable in its entirety in all triggering-mechanisms available in the Rome Statute. However, the ICC can prosecute nationals of a non-party state pursuant to territorial jurisdiction. Thus, if a national of a non-party commits a crime in the territory of a State Party, this person can be subject for prosecution before the ICC. In such situation art. 27(2) would not apply to that national, thus, customary international law on immunities will be applicable and art. 98(1) will serve its purpose. As such, even though the PTC did not address this, art. 98(1) is not redundant.

Secondly, Jordan argued that the PTC erred in concluding Resolution 1593 affected Jordan's obligations under customary international law. In other words, Jordan questioned the whole legal rationale by the PTC with regards to its interpretation of the legal effect of Resolution 1593.

Scholars have argued that the plain language of Resolution 1593 is not clear enough to conclude its legal effect.[403] The author of this thesis agrees. Gatea is offering a very limited interpretation as she argues that a referral by the UNSC can only require member states of the UN to cooperate with the ICC if this intention is clearly expressed, thus, a strict textual interpretation.[404] In this author's opinion, Gaeta's approach undermines the notion that any respectable system of international criminal justice must be effective. The establishment of the ICC was aimed to fill gaps in criminal accountability before domestic courts. The very definition of crimes within the ICC's jurisdiction illustrate that perpetrators of these crimes often are senior State Officials abusing their power in order to commit international crimes. According to Gaeta's interpretation, such senior officials will enjoy immunity for such crimes. Given the conflicting objectives of customary international law on personal immunities and international criminal law, the interactions of these sources of law should be interpreted bearing these objectives in mind. As such, the purpose of art. 13(b) of the Rome Statute must be considered to interpret the appropriate legal effect of a UNSC resolution referring a situation to the ICC.

Although not addressed by the PTC, but above by this author; during the negotiations of the Rome Statute, a small group of states opposed including a provision allowing the UNSC to refer situations to the ICC. The states rationale was that they feared that a referral from the politically oriented UNSC would undermine the legitimacy and independence of the ICC. However, the majority of states agreed that such provision was necessary for ending impunity. In addition, the ability of the UNSC to influence the mandate and procedures of the ICC is limited to art. 13(b).

As such, Gaeta's interpretation of the UNSC referral as a mere triggering mechanism is not the most appropriate. Such interpretation prevents the purpose of art. 13(b). It seems incongruous that the drafters of the Rome

[403] Akande 'Legal Nature of UNSC Referrals' (n. 25) 340; de Hoogh, Knottnerus (n. 373); Knottnerus (n. 374).
[404] Gaeta 'Immunity from Arrest' (n. 22) 330.

Statute would enable the UNSC to refer situations to the ICC, extending the ICC's jurisdiction over non-parties, yet preventing the Court from exercise this jurisdiction not making the Rome Statute applicable to the situation, which was also addressed in other words by the PTC.

However, Bashir is presumed to be innocent until proven guilty. It may be argued at this stage of the case, it is not a matter of justice, but a matter of legality and procedural law. Therefore, the issues of immunity would be more appropriate to address regarding Bashir's arrest to execute his punishment. However, considering art. 27(2) prohibits states to imply immunity as a procedural bar, it must also apply when the ICC seeks arrest for trial, specifically considering trials *in absentia* are prohibited pursuant to the Rome Statute.

Akande's interpretation seeks to ensure that all states are able to assist the ICC in arresting Bashir, enabling justice to be served through international criminal proceedings. In addition, this interpretation shows a strong desire to follow the purpose of art. 13(b) and the UN Charter in general. Akande's interpretation is in line with the PTC latest decisions against South Africa and Jordan. The legal rationale offers not just textual interpretation, but also teleological. Considering the purpose of individual provisions, the ICC as a whole as well as its relationship with the UN and the purpose of UNSC referrals, it concludes that the legal effect of such referral is that the Rome Statute is applicable in its entirety.

Knottnerus criticised this conclusion as well, arguing Sudan should be treated as a non-party with regards to provision explicitly distinguish between State Parties and non-parties. The author of this thesis agrees that the PTC should have addressed this issue. However, although Knottnerus is right there is no textual argument in the Statute for treating Sudan as a State Party, there is teleological interpretation giving that effect. Specifically, considering the principle of effectiveness in treaty interpretation. Knottnerus interpretation has the same effect as Gaeta's interpretation. The ICC cannot effectively fulfill its mandate given to it pursuant to Resolution 1593, if Sudan would not be treated analogously as a State Party. The provisions of the Rome Statute, Resolution 1593 and the UN Charter must be interpreted to give meaning to all of them harmoniously. As there is more than one legal regime applicable, a strict textual interpretation and applying strictly *pacta tertiis*, is not in line with principles of interpretation provided for under international law.

The PTC has gained wide support. Most importantly, domestic Courts in both South Africa and Kenya have concluded that they as State Parties to the Rome Statute are obligated to cooperate with the court, even if such cooperation would conflict with immunity rules under customary international law. Although the ICC should have the last word in the matter, the support of domestic courts, specifically in African states is significant.

On the political level this support is lacking, specifically by African states and member states of the UNSC, which are not parties to the Rome Statute. However, although states to some extent argue on a legal level against the PTC decision, political statements by for example representatives of South

Africa, testifies to that its non-cooperation with ICC is of political nature, protecting its relationship with the AU. The fact the both South Africa's and Kenya's domestic legal system confirm its obligations under the Rome Statute, but the Government does not, testifies to this conclusion. In addition, none of the African states subjected to non-cooperation decisions has appealed that decision, but political statements critiquing the PTC proceed. This protection of the relationship between individual African states and the AU has escalated to threats of withdrawal from the Rome Statute. Lack of legitimacy of the ICC is proven not to be the justification for opposition by African states since these states been deeply involved in creating the ICC and all the provisions in the Rome Statute. Also after its entry into force, African states have cooperated with the Court's mandate.

Moreover, there are logical reasons why ICC focuses on African states. As the principle of complementarity explains, the ICC was created to fill a gap in national jurisdiction. Many African states are unwilling or unable to prosecute perpetrators of international crimes. The ICC was created for exactly these cases as its whole *raison d'etre* is to end impunity and deliver justice to the victims of international crimes, no matter the political power of perpetrators. As Bensouda stated, the victims are also in African states. Regards must be given to the ones justice will be delivered to.

Akande's suggestion to ask the ICJ for an advisory opinion may be effective. Moving the matter to the ICJ would possibly allow for the obligations under separate sources of law to be considered separately and then allow the ICJ to consider what the overall position is under general international law. This possibility is however not explicitly addressed in the Rome Statute. On the contrary, art. 119(1) of the Rome Statute states that any dispute concerning judicial functions should be settled by the Court. As stated above, the purpose of the provision is to ensure that there is no second-guessing of rulings of the Court concerning the Rome Statute by other bodies. Asking the ICJ for an advisory opinion would not be in line with that purpose. This is a matter for the ICC, and a decision from the Appeals Chamber is expected. In addition, Akande gave political reasons for this suggestion. Political reasons should not afford for second opinions by other bodies, even though Akande's argument that it might be effective is legitimate.

Under the Rome Statute, it is unclear what measures to be expected by the ASP and the UNSC when a referral of a decision of non-cooperation is referred to it. However, the referral mechanism of non-cooperation decisions must exist for a reason, although not stated in any negotiations while drafting the Rome Statute, certain measures can be expected. The ASP cannot question the Court's decisions or judgment on its merits. Consequently, it has acted consistently with the decisions on non-cooperation, calling upon State Parties to cooperate and established procedures and a toolkit for non-cooperation as a result of the referrals. The ASP does however also holds the power to amend the Rome Statute, providing it an opportunity to clarify relevant provisions. Seven-eights of the State Parties to the Rome Statute must ratify such amendment pursuant to art. 121(4) of the Statute. Considering the political aspect, such result is unrealistic.

The UNSC has done nothing as a whole to improve the matter. Statements by individual member states of the UNSC prove the intense political aspect as such statements considering the dissenting opinions. With non-parties to the Rome Statute, e.g. the U.S., China and Russia, as permanent members of the UNSC, as well as African states' critique against the Court in the Council, the matter includes difficult political considerations.

The UNSC is the sole actor in the situation, which has not expressed its considerations on the issue. The UNSC inaction is making the whole referral mechanism, as well as the effectiveness of the ICC, doubtful. However, as the UNSC is politically oriented, it can be questioned if it is the right actor to decide on the effect of such complex legal problem. Instead, this author leaves it hope to the ICC's Appeals Chamber's future decision on the non-cooperation by Jordan. As a Chamber of higher authority, and with a different composition than the PTC, it can give a solution to the legal issues considered credible in the international society, for State Parties and in particular, for African states.

# 6 Final analysis, reflections for the future and conclusions

## 6.1 Introduction

Drawing upon the analysis of each previous chapter of this thesis, chapter six will answer the primary research question, by analysing the obligations of State Parties to the Rome Statute to uphold the immunity Heads of States enjoy under customary international law when faced with a request to arrest a Head of State of a non-party to the Statute, in a situation referred to the ICC by the UNSC.

The chapter be divided in sections focusing on each secondary research question which then be individually discussed in relation to the primary research question. Each section will include argument for *de lege lata,* and the sixth section will focus on reflections for the future, specifically on how to give effect to the solution to the legal questions. Lastly, the conclusions of the thesis will be presented.

## 6.2 Personal Head of State immunity under customary international law

The rules of customary international law on personal immunity, comprising immunity from the exercise of jurisdiction and arrest, have developed to ensure reciprocal respect among states for their sovereignty and to protect officials representing foreign states from possible abuses by other states of its powers and authority. The absolute immunity of an incumbent Head of State was illustrated in the *Arrest Warrant case*, which have been the prevailing case law providing legal rationale for personal Head of State immunity before domestic courts. In its decision the ICJ concluded immunities could be violated by a state regardless of the presence of the foreign Head of State concerned on the territory of that state, i.e. as in the case of the issuance of an arrest warrant. This is because a coercive act like an arrest warrant put the inviolability of those Head of States at risk, hampering their freedom to travel abroad to discharge their official functions. Consequently, incumbent Heads of States cannot be prosecuted before foreign national jurisdiction, nor be subject for an arrest warrant issued by such jurisdiction. Old traditions deriving from State immunity is applied although somewhat modified with regards to the legal rationale being functional necessity. However, personal immunity still applies to both official and private acts, including international crimes.

The legal rationale for Head of State immunity under customary international law is under constant scrutiny, specifically concerning developments under international criminal law including the principles of individual criminal responsibility and irrelevance of official capacity, as well as the normative

hierarchy theory. The latter have less support in the international society, even though Judges of international courts has argued for this rationale in dissenting or separate opinions. The principles of individual criminal responsibility and irrelevance of capacity is well established and part of customary international law. This confirms to the strong will of the international society to end impunity for grave international crimes. However, the latter principle as confirmed under customary international law is applied with respect to functional immunity, not personal, as it is affirmed to be absolute under the same regime.

The illustrated *de lege lata* legal rationale, i.e. absolute personal immunity, is argued by the State Parties to the Rome Statute as a hindrance to execute the arrest warrant of Bashir. It is argued, customary international law governs the relationship between State Parties to the Rome Statute and non-parties to the Rome Statute. Pursuant to this argument, State Parties have an obligation to respect the personal immunity of Bashir stated under customary international law.

At first, in its decision on non-cooperation against Malawi, the PTC answered to this argument concluding an exception under customary international law had developed, removing personal immunity before international courts. However, in later decisions, it declined such exception concluding personal immunity is absolute under customary international law, also before international criminal courts. PTC's latest decisions declare that personal immunity under customary international law, even though it is under intense scrutiny, is absolute for the time being, but there are still ways to prosecute incumbent Heads of States before international courts.

## 6.3 Personal Head of State immunity before international courts and tribunals

### 6.3.1 The relevance of the Arrest Warrant Case

In the *Arrest Warrant case* the ICJ found that the mere issuance of the arrest warrant by the Belgian judicial authorities against the incumbent Minister of Foreign affairs of DRC breached customary international law on personal immunities. These rules were violated by Belgium by simply circulating internationally the arrest warrant, regardless of whether Belgium had taken necessary steps to request other states to execute it. Accordingly, the ICJ stated that personal immunity is absolute before domestic courts.

In this regard, the relevance for personal immunity before international courts was stated in the *obiter dictum* of the judgment in which the ICJ stated that Heads of States may be prosecuted for international crimes before international criminal courts. Specifically, it referred to the ICTY, ICTR and ICC. As such, the ICJ opened up for a legal rationale including an exception under customary international law to remove immunity of incumbent Heads

of States before international criminal courts. However, this implied exception has rather been an incitement for international criminal courts to find other legal rationales for personal Head of State immunity to be inapplicable before its jurisdiction. This may be a result of that the ICJ did not address the matter in detail, leaving important questions without answers, including what constitute an international criminal court or tribunal. In addition, there is not sufficient state practice creating *opinio juris* for such exception under customary international law.

Crucially, the *Arrest warrant case* has played an important role in the development of personal immunities before international criminal courts and tribunals as it opened up for international courts to apply legal rationales to prosecute incumbent Heads of States and impose obligations on states to arrest such individuals. However, the international criminal courts have applied different regimes of international law than an exception under customary international law.

### 6.3.2 The legal effect of requests for cooperation by International tribunals and courts

International criminal tribunals and courts are not judicial organs of a particular state. They act on behalf of the international society as a whole to protect collective or even universal values. As such, their jurisdiction or judicial activity is not an expression of the sovereign authority of a state over another. Thus, proceedings before international courts cannot be considered as a form of unduly interference with the sovereign prerogatives of another state, which is the rules of personal immunity aims to avoid.

This argument is supported by the *Taylor* case before the SCSL, in which the court relied upon its *'international nature'* to reject the claim of defence that the issuance of the arrest warrant against the then incumbent Head of State of Liberia violated the rules on personal immunity under customary international law. The fact that no one questioned if the ICTY violated the personal immunity of the then incumbent President of FRY in the *Milosevic* case, in which the court issued and circulated an arrest warrant against him, also testifies to this conclusion.

However, the international criminal courts where established upon different grounds, affording different legal regimes applicable, binding upon UN member states or contracting parties to a Statute. The ICTY and the ICTR were created by virtue of a decision of the UNSC and were vested with the authority of Chapter VII of the UN Charter. The SCSL is a treaty-based court, as well is the ICC. The latter courts rests upon the direct consent of contracting states. This distinction imply a few differences in the courts' authority to require states to comply with judicial requests such as arresting a person entitled to personal immunity under customary international law. However, the tribunals and courts have respectively indicted and sought the arrest of incumbent Heads of States.

Regarding the ICC, similarities to the ICTY and ICTR as well as SCSL can be argued. The ICC is a treaty-based body and as such dependent on State Parties consent by their ratification of the Rome Statute, similar to the SCSL. When the jurisdiction is triggered under art. 13(a) or (c) of the Rome Statute the situation should be the same as before the SCSL: treaty provisions removing personal immunity can solely be applied to State Parties to the Rome Statute. However, the ICC has a close connection to the UN and art. 13(b) provides the UN to act under Chapter VII of the UN Charter to refer a situation to the ICC.

One can argue this conclusion entails that the ICC, with an analogue interpretation, should have the same authority as the ICTY and the ICTR. As illustrated above, the ICTY and the ICTR, respectively in Resolutions 827 and 955, was given the authority of the Chapter VII of the UN Charter in its judicial activities. As the UNSC distinctly is acting under Chapter VII when imposing obligations on Sudan in Resolution 1593, the ICC may also been given this power.

However, the nature of the relationship between ICC and the UN is not as close as between the UN and the *ad hoc* tribunals. The UN Charter is not applicable as such before the ICC, and the ICC does not have the authority to issue judicial orders binding upon all UN member states as the ICTY and ICTR, entailing that the Rome Statute cannot prevail over customary international law pursuant to art. 103 of the UN Charter. Instead, the UN has applied its power to make the Rome Statute in its entirety applicable to the situation in Darfur. The Rome Statute is binding upon Sudan, but not other UN member states not parties to the Rome Statute.

## 6.4 Personal Head of State immunity before the ICC

### 6.4.1 The legal effect of a UNSC resolution referring a situation to the ICC

The PTC, in its decisions on non-cooperation, concluded, in general terms, that the legal effect of a UNSC resolution referring a situation to the ICC is that the Rome Statute in its entirety is applicable to the situation referred. As such, the PTC concluded a UNSC referral is an expansion on the applicability of an international treaty and that the UN, under Chapter VII of the UN Charter is permitted to impose obligations on its member states, in this situation, Sudan.

Even though the PTC in its first two decisions argued for a new rule under customary international law removing personal immunity before international courts and that this rationale meet intense critique, the author does not see it necessary to continue this discussion. In its six latest decisions the PTC argues on the contrary for a different legal rationale (although not consistent to one), which imply personal immunity absolute under customary international law. As there is not enough sufficient state practice constituting

*opinio juris* for such rule, this argument can be left aside for the discussion on interpretation of the legal effect of Resolution 1593.

The plain language of Resolution 1593 is not clear enough to interpret its legal effect. However, PTC's legal rationale is credible, considering principles of interpretation under international law. The ICC and the Prosecutor are acting under the Rome Statute. By deciding Sudan should cooperate fully and provide any necessary assistance to the Court and the Prosecutor, requires Sudan to also be bound by the Rome Statute as the Court and the Prosecutor are acting there under. Though the ICC is treaty-based, and solely can impose obligations on its State Parties, its close relationship with the UN, and the allowance under the Rome Statute for the UNSC to refer situations to the Court acting under Chapter VII, supports this conclusion. In addition, the UN, thus, the international society as a whole, has endorsed the referral mechanism trough the Negotiated Relationship Agreement.

This conclusion is supported by the fact that authority of the UNSC to influence the ICC is through art. 13(b) of the Rome Statute in combination with the UN Charter Chapter VII, separating the legal regimes. The ICC is in all other ways independent from the UNSC. On the contrary, the ICTY and ICTR were established by the UNSC and their pure existing was dependent on the UNSC. The Rome Statute is applicable to the situation referred by the UNSC, and the UN Charter is applied in its referral, not in the situation when it is before the Court. Thus, the ICC should not have the authority to make customary international law inapplicable before it pursuant to the UN Charter. However, for Sudan, Resolution 1593 is a biding decision pursuant art. 25 of the UN Charter, therefore, it is bound by the Rome Statute. With a teleological and analogue interpretation, Sudan is to be treated as a State Party.

The PTC decisions have also meet critique regarding the interpretation of the legal effect of Resolution 1593. The alternative legal rationales offered by Geata and Knottnerus, discussed above, provide for very strict arguments. Gaeta does not consider teleological interpretation, stressing *pacta treetis* should be implicitly applied.[405] Knottnerus argument is broader, but still prevent the ICC to effectively fulfil its mandate given by the UNSC. Akande argues for similar legal rationale as the PTC in its two latest decisions.[406] This rationale offers a textual and teleological interpretation considering the Rome Statute, the relationship between ICC and the UN and the UNSC's authority to impose obligations on its member states, but still respect the decision by other member states of the UN to not become a party to the Rome Statute.

Critique by State Parties, specifically African states, as well as non-party states, for example Russia, should be seen as mere political concerns without any legal relevance. The contradiction between legal decisions and political

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[405] Gaeta 'Immunity from Arrest' (n. 22) 332.
[406] See Akande 'Legal Nature of UNSC Referrals' (n. 25); Akande, 'ICC Issues Detailed' (n. 368).

statements at domestic level is also indicative of political motives for non-cooperation. Even though political concerns are important for the effectiveness of the mechanism, they do not contribute in resolving legal discrepancies. In addition, one cannot avoid the fact the ICC and the judges of the PTC are given the authority to interpret the Rome Statute. ICC should be seen as an independent and credible international criminal court, delivering legal decisions and judgment, without any political considerations.

### 6.4.2 The relationship between article 27(2) and 98(1) of the Rome Statue and its scope of applicaiton

As the legal effect of a UNSC resolution referring a situation to the ICC is that the Rome Statute in its entirety is applicable to the situation referred, the provisions of the Rome Statute govern obligations for State Parties to the Statute in that situation. The Rome Statute also governs the relationship between the Court and Sudan. Therefore, in order to determine the obligation for State Parties to arrest and surrender a Head of State of a non-party, subjected to the Courts jurisdiction through a UNSC referral, the scope of art. 27(2) and 98(1) must be discussed.

The Rome Statute is binding upon Sudan and therefore, art. 27(2) is applicable to the situation in Darfur, analogously as to a situation referred by a State Party. In its plain meaning, art. 27(2) encompasses personal immunity. This does not mean personal immunity does not exist under customary international law, rather that the regime is not applicable in that situation. Sudan has no right to impose personal immunity as a procedural bar since the UNSC imposed the obligations under the Rome Statute on Sudan. Just as for a contracting State Party, the Rome Statute prevail customary international law pursuant to art. 27(2), solving the conflict of applicable norms.

South Africa, as well as Gaeta, argued there is a difference between immunity from jurisdiction and immunity from arrest.[407] The former seems according to South Africa, to be the sole meaning of art. 27(2), hence, Head of States enjoy immunity from arrest of other states.[408] The PTC concluded that immunity from arrest would bar the ICC from exercising its jurisdiction. The author of this thesis agrees with this conclusion. The textual meaning of the article does not provide for such distinction. Moreover, there was no such distinction during the drafting of the Rome Statute. The ICC does not have its own enforcement power and is dependent on State Parties to cooperate and execute arrest warrants. If such immunity would apply with regards to arrest warrants, the sole purpose of the ICC to end impunity and prosecute perpetrators of international crimes would be lost.

As such, both the textual and the teleological interpretation of art. 27(2) provide that State Parties, and the relevant non-party in the situation referred

[407] See Gaeta 'Immunity from Arrest' (n. 22) 332.
[408] See Decision against South Africa (n. 7) para 38.

by the UNSC, are prevented from raising any immunity belonging to it under international law as a bar from arrest or a reason for not executing an arrest warrant.

On the contrary, art. 98(2) provides for customary international law to prevail the Rome Statute. Personal Head of State immunity is solely governed by customary international law. As there is no immunity applicable under international customary law pursuant to art. 27(2), the request by the Court to arrest and surrender a Head of State subjected to prosecution through a UNSC referral, cannot be considered to require a State Party to act inconsistently with its obligations under international law with respect to immunities. The scope of art. 98(1) is without object in the scope of application of art. 27(2). Hence, art. 98(1) is only applicable when art. 27(2) is not. As been argued above, this apply both vertical and horizontal due to the effect of the principle of complementarity and the principle of effectiveness in treaty interpretation.

Akande questioned if art. 98(1) is ever applicable.[409] Even though it would have been evident for the PTC to address this question, it was not the legal question before it. However, the author of this thesis concludes that art. 98(1) would be applicable when the Court has jurisdiction over a national of a non-party state who committed crimes in the territory of a State Party.

## 6.5 Reflections for the future

It has been argued that international tribunals and courts in their practice contribute to the development of customary international law, limiting the possibility of serving or former Heads of State to invoke personal immunity. The 123 State Parties to the Rome Statute have agreed upon the mandate of the ICC to end impunity, and the Rome Statute being applicable to the practice before it. Customary international law on personal immunities is not applicable other than to states not parties to the Statute and not subjected to the jurisdiction of the ICC pursuant to an acceptance of the jurisdiction or a UNSC referral. Extensive state practice is necessary to constitute *opinio juris*. Therefore, the practice by the ICC cannot contribute to its development.

The author of this thesis argues that personal Head of State immunity under customary international law will continue to be subjected to intense scrutiny, and perhaps there will be sufficient evidence of state practice for an exception under customary international law removing personal immunity before international courts in the future. However, the ICC has provided for a conclusion not affecting customary international law as such. Instead, it concluded that the Rome Statute is applicable in a situation referred to the Court by the UNSC. When the Rome Statute is applicable, customary international law on personal immunity pursuant to art. 27(2) of the Rome Statute is not applicable, leaving the latter legal regime unchanged in substance. Instead, the scope of the application of customary international law before the ICC is clarified.

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[409] See Akande, 'ICC Issues Detailed' (n. 368).

As such, the rationale of personal Head of State immunity under customary international law renders unchanged, applicable absolute before both domestic and international courts. However, it is not applicable before an international criminal court established by a Statute where State Parties to the Statute has agreed upon this fact, or in the case of a UNSC referral, agreed upon the international community as a whole to make the Rome Statute the legal regime applicable to a situation referred.

In this authors opinion, it is quite clear that non-cooperation by African states are not just a result of dissenting with the legal rationale – it has a clear political aspect. The fact that none of the African states subjected to decisions on non-cooperation has appealed those decisions also testifies to this conclusion. Even though the legal issues, raised by State Parties in the decisions on non-cooperation, are important to address to come to a conclusion, they are motivated by political pressure. Such political considerations should not affect the legal rationale as such. Nevertheless, as the fractious relationship between African states and the ICC indicates, as well as the political orientation of the UNSC, the very effect of credibility of the legal rationale given by the PTC is affected by political considerations.

Important steps are taken by the ASP to improve the cooperation of State Parties, including a statement that State Parties should not question the merits of the Court's decisions or otherwise undermine the findings of the Court. However, since Bashir is still at large, even after eight non-cooperation decisions issued by the PTC, these measures render ineffective.

The ASP has the power to amend the provisions of the Rome Statute. Considering the submissions by the State Parties subjected to non-cooperation decisions before the PTC and other State Parties opposing these arguments supporting the PTC, it is not realistic the ASP would agree upon an amendment. This is regardless if it would clarify the provisions of the Rome Statute in line with the legal rationale of the PTC, or on the contrary, that personal immunity under customary international law is applicable in situations referred by the UNSC, as Kenya suggested.

Consequently, although not optimally, to make the legal rational credible, it is important for the UNSC to take measures endorsing it. As it has done nothing to call upon states to cooperate with the Court and accept the legal rationale by the PTC, no one can know what the effect of such measure would entail. Both the PTC and the Prosecutor have urged the UNSC to take responsibility. Therefore, it seems like they consider the Council's action important. The inaction by the UNSC is making the referral mechanism doubtful. It does also prevent the ICC to effectively end impunity in the situation in Darfur, which the UNSC specifically encourages in Resolution 1593. Bashir will continue governing Sudan, the situation in Darfur will not be improved and victims will continue suffering.

In addition, even though the PTC expressed its legal rationale in general terms, the future language of a UNSC resolution referring a situation to the ICC is left to the UNSC. However, since the PTC used both textual and teleological interpretation, the UNSC would be required to state an opposing

legal rationale in plain language in such resolution to change that resolutions legal effect from Resolution 1593.

There are also legal options of making the legal rationale credible. For instance, the ICC Appeals Chamber, through Jordan's appeal will soon have the legal issues before it to determine. Although it is not certain the Appeals Chamber will come to the same conclusion through the same legal rationale as the PTC did in its latest decisions, the author of this thesis finds it is likely it will. The PTC offers a legal rationale considering aspects of the law not addressed by either individual State Parties, AU nor UNSC. The Appeals Chamber's decision will be important for the credibility of the legal rationale, specifically since the PTC has been inconsistent in its decisions.

Akande also argued for the option to ask the ICJ for an advisory opinion on the matter.[410] As argued above, this author believes this would not be in line with the purpose of article 119(1) of the Rome Statute. Questions concerning the judicial functions of the ICC should be a matter for the ICC to decide. Even though this author believes a judgment by the ICJ would be effective with regards to African states, it would undermine the credibility of the ICC and its authority to interpret the Rome Statue. Instead, this author stresses the importance of the Appeals Chamber's future judgment on the appeal by Jordan. Regardless if it will come to the same conclusion as the PTC, its judgment will have higher authority, which hopefully will provide effect to its legal rationale, also with regards to African states.

## 6.6 Conclusions

In conclusion, the solution to the legal questions of this thesis revolves around determining which international legal regime is applicable when a situation is referred by the UNSC to the ICC. As there is no hierarchy of sources of law in international law, textual and teleological interpretation, pursuant to the Vienna Convention, of customary international law, UN law and the Rome Statute have been of significant importance for the conclusion.

There is not sufficient state practice constituting *opinio juris* for a new rule under customary international law which remove personal immunity before international courts. Instead, international criminal justice before the ICC is governed by a different international legal regime, including a mechanism to refer situations in non-party states to the jurisdiction of the Court, agreed upon by the international community as a whole through the Negotiated Relationship Agreement.

According to the author of this thesis, the PTC provides a credible legal rationale of the legal question in its two latest decision, through both textual and teleological interpretation, including considerations of customary international law, UN law and the Rome Statute. With this legal rationale, the legal effect of a UNSC resolution referring a situation to the ICC is that the Rome Statute is applicable in its entirety to that situation, and is also binding

[410] Akande, ' ICJ Advisory Opinion' (n. 375).

upon the relevant non-party. Thus, art. 27(2) is applicable (both with regards to jurisdiction and arrest warrants) when a Head of State is subjected to prosecution pursuant to such referral, prohibiting that state to invoke immunity as a procedural bar. Thus, leaving art. 98(1) inapplicable, as well as customary international law on personal immunities.

Therefore, State Parties to the Rome Statute are not obligated to uphold the personal immunity Heads of States enjoy under customary international law when faced with a request for arrest and surrender of a Head of State of a non-party to the Statute subject to ICC's jurisdiction pursuant to a UNSC referral of a situation authorised by art. 13(b) of the Rome Statute. State Parties are not required to disregard their obligations under customary international law to not violate a Head of State's right to immunity, because there are no such immunity rules applicable.

However, the PTC has been inconsistent in its decisions. In addition it did not address all legal questions of concern. Therefore, the legal rationale lacks credibility to some extent. This opens up for critique and leaves the legal rationale ineffective. Even though the author of this thesis may argue against this critique, higher authority, such as the Appeals Chamber of the ICC, must address these matters to provide credibility to the legal rationale.

The very credibility of the legal rationale is to some extent dependent on political considerations. African states are not willing to accept the legal rationale, in this author's conclusion, because of political concerns. UNSC is the sole actor, which has not taken any measures to either endorse or decline the legal rationale issued by the PTC. The PTC concluded the legal effect of a UNSC resolution in general terms. Consequently, its interpretation should be applicable in future situations referred to the Court by the UNSC. However, the interpretation is still dependent on the wording provided for by UNSC in its resolutions, leaving the future of this matter to the UNSC. The ASP has, however, tried to influence the UNSC through suggested language in future resolutions. Still, ending impunity of the crimes committed in Darfur, and in future situations possibly referred to the ICC by the UNSC, is dependent on the latter's actions.

The gravity of the crimes allegedly committed and the on-going conflict in Darfur as well as the Sudanese President's refusal to cooperate with humanitarian help, implies the importance of the arrest and surrender of Bashir to the ICC. Leaving the legal issues to the politically oriented UNSC is neither desirable nor compatible with respect for the rule of law. Therefore, the future judgment by the Appeals Chamber on Jordan's appeal, is crucial for the future practice by the ICC, particularly, with regards to personal Head of State immunity in situations referred by the UNSC. The author stresses the significance of this judgment in order to provide a credible legal rationale, after considering all aspects of the legal issues before the Chamber, avoiding influence of politics on the legal judgment.

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