

# The Survival of Head of State Immunity at the International Criminal Court

PHILLIP WARDLE\*

## Abstract

The recent cases that have been advanced by the Prosecutor of the International Criminal Court (ICC) against presidents Omar al-Bashir of Sudan, Muammar Gaddafi of Libya and Laurent Gbagbo of Côte d'Ivoire have attracted significant publicity. The first two have arrived at the Court as a result of Referrals from the United Nations Security Council and all represent novel incursions into the otherwise impenetrable immunity that incumbent heads of state have enjoyed under customary international law. This article will analyse the bases upon which a revocation of a head of state's immunity may be accomplished before the ICC, according to the prevailing rules of customary international law and the *Rome Statute of the International Criminal Court*. It will be argued that in the cases of al-Bashir and Gaddafi, neither the Court nor the Security Council has appropriately abrogated the absolute immunity from prosecution enjoyed by those defendants under customary international law.

## I Introduction

On 4 March 2009, the Pre-Trial Chamber of the International Criminal Court (ICC) issued a decision directing the Registrar of the Court to circulate a warrant for the arrest of Omar al-Bashir, the incumbent President of Sudan, for various war crimes and crimes against humanity.<sup>1</sup> On 27 June 2011, the Pre-Trial Chamber authorised a warrant for the arrest of Muammar Gaddafi, the then incumbent President of Libya, for similar charges.<sup>2</sup> As both Sudan and Libya are non-states parties to the *Rome Statute*,<sup>3</sup> these prosecutions could only be effected by the operation of United Nations (UN) Security Council *Resolutions 1593*<sup>4</sup> and

---

\* BA LLB (Hons) (*Macq*), Visiting Researcher at the Department of International Law and Economics, Faculty of Law, University of Barcelona. The author wishes to thank Natalie Klein for her valuable comments on an earlier draft of this article. Any errors and opinions expressed in this article are the author's alone.

<sup>1</sup> *Prosecutor v Omar Hassan Al Bashir (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir)* (ICC, Pre-Trial Chamber I, Case No ICC-02/05-01/09, 4 March 2009) (*'Prosecutor v Al-Bashir'*). Note that in the initial indictment, al-Bashir was also accused of genocide; however, this charge was not permitted in the arrest warrant as the high threshold of intent that is required for genocide was not established. One author has suggested that the application of this test was erroneous and that, furthermore, the obligations contained in the *Genocide Convention* might have served to remove al-Bashir's immunity vis-à-vis the ICC: Dapo Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities' (2009) 7 *Journal of International Criminal Justice* 333, 348–51.

<sup>2</sup> *Prosecutor v Gaddafi (Decision on the Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi)* (ICC, Pre-Trial Chamber I, Case No ICC-01/11-01/11, 27 June 2011) (*'Prosecutor v Gaddafi'*).

<sup>3</sup> *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) (*'Rome Statute'*).

<sup>4</sup> *Resolution on the Reports of the Secretary-General on the Sudan*, SC Res 1593, UN SCOR, sess 46<sup>th</sup>, 5158th mtg, UN Doc S/Res/1593 (31 March 2005) (*'Resolution 1593'*).

1970<sup>5</sup>, which respectively referred the situations in Sudan and Libya to the Court. More recently, on 23 November 2011, the Pre-Trial Chamber granted a warrant for the arrest of Laurent Gbagbo, the incumbent President of Côte d'Ivoire.<sup>6</sup> The manner in which Gbagbo was brought before the Court may be distinguished from that of the al-Bashir and Gaddafi cases. Although not a party to the *Rome Statute*, Côte d'Ivoire accepted the jurisdiction of the ICC on 18 April 2003,<sup>7</sup> which it reconfirmed on 14 December 2010.<sup>8</sup> Accordingly, the ICC Prosecutor exercised his *proprio motu* powers to initiate an investigation into the situation in Côte d'Ivoire under article 15 of the *Rome Statute*.<sup>9</sup> In both Gaddafi and al-Bashir's cases, the Pre-Trial Chamber of the ICC determined that the provisions of the *Rome Statute* would be applicable to the defendants, notwithstanding their nationality of non-states parties to the *Rome Statute*, by virtue of the respective Referrals from the Security Council.<sup>10</sup> One of the provisions of the *Rome Statute* — article 27 — purportedly removed the head of state immunity that al-Bashir and Gaddafi would receive under customary international law. The consequence of this analysis is enticing. It ascribes individual criminal responsibility to leaders such as al-Bashir and Gaddafi and provides a convenient legal vehicle to prosecute their crimes before a theatre of international criminal justice. This article will demonstrate, however, that the foundations of this analysis are unsound.

Part II of this article will offer a brief review of the basis for head of state immunity in customary international law and the exception that has been developed by the International Court of Justice (ICJ); that this immunity will not apply before international courts, where such courts have jurisdiction. Part III will scrutinise the various rationales for the removal of immunity before the ICC as a corollary of its status as an international court. It will be demonstrated that, according to the operation of this rule, head of state immunity has the potential to prevail in certain circumstances within the framework of the ICC. Part IV will observe the repercussions of *Resolutions 1593 and 1970* for head of state immunity before the Court. It will be concluded that these *Resolutions* do not satisfactorily remove the customary immunity attached to al-Bashir and Gaddafi in their prosecution at the ICC. Finally, Part V will look at the obligations that are created for other States by *Resolutions 1593 and 1970*, concluding that the existence of a legal obligation incumbent upon such States to arrest relevant state officials is unlikely. Although this article is not intended to excuse criminal acts of heads of state or champion their impunity before the ICC, it hopes to expose the ineffective exercise of the Security Council's referral power under the *Rome Statute* and offer future guidance for the referral of non-states parties to the Court.

---

<sup>5</sup> *Resolution on Peace and Security in Africa*, SC Res 1970, UN SCOR, sess 66<sup>th</sup>, 6491<sup>st</sup> mtg, UN Doc S/Res/1593 (26 February 2011) (*Resolution 1970*).

<sup>6</sup> *Prosecutor v Laurent Koudou Gbagbo (Warrant of Arrest for Laurent Koudou Gbagbo)* (ICC, Pre-Trial Chamber III, Case No ICC-02/11-01/11-1, 23 November 2011) (*Prosecutor v Gbagbo*).

<sup>7</sup> *Declaration Accepting the Jurisdiction of the International Criminal Court* (Republic of Côte d'Ivoire) Minister for Foreign Affairs, 18 April 2003 <<http://www.icc-cpi.int/NR/rdonlyres/9CFE32D1-2FCB-4EB4-ACA0-81C2343C5ECA/279844/ICDEENG7.pdf>>.

<sup>8</sup> *Confirmation de la Déclaration de Reconnaissance* [Confirmation of the Declaration of Recognition] (Republic of Côte d'Ivoire) President of the Republic of Côte d'Ivoire, 14 December 2010 <<http://icc-cpi.int/NR/rdonlyres/498E8FEB-7A72-4005-A209-C14BA374804F/0/ReconCPI.pdf>>.

<sup>9</sup> See *Situation in the Republic of Côte d'Ivoire (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the situation in the Republic of Côte d'Ivoire)* (ICC, Pre-Trial Chambers III, Case No ICC-02/11, 3 October 2011).

<sup>10</sup> *Prosecutor v Al-Bashir* (Case No ICC-02/05-01/09, 4 March 2009) 40; *Prosecutor v Gaddafi* (Case No ICC-01/11-01/11, 27 June 2011) 9.

## II The absolute personal immunity of incumbent heads of state

In international law, the doctrine of head of state immunity proposes that serving heads of state enjoy immunity *ratione personae* (otherwise known as absolute personal immunity) for each and every act undertaken while in office, regardless of whether they are done so in a private capacity. This immunity is not limited to heads of state, but attaches to all high-ranking state officials by virtue of the office they hold.<sup>11</sup> Former heads of state enjoy a reduced form of immunity *ratione materiae* (otherwise known as ‘functional immunity’), which only offers immunity for acts carried out in pursuance of some official function, and not for those which are undertaken in a private capacity.<sup>12</sup>

The rule according absolute immunity to incumbent heads of state is well established. In the jurisprudence of domestic courts, serving heads of state have continued to enjoy an almost unfettered absolute immunity from prosecution through the application of customary international law. State practice of recent years is indeed abundant with examples of incumbent heads of state receiving such protection within domestic jurisdictions according to the doctrine of absolute immunity.<sup>13</sup> This domestic practice came to the attention of the ICJ after, on 11 April 2000, a Belgian investigating judge issued an arrest warrant *in absentia* for the then incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo (DRC), accusing him of war crimes and crimes against

<sup>11</sup> On the exercise and availability of personal immunity generally, see James Miglin, ‘From Immunity to Impunity: Charles Taylor and the Special Court for Sierra Leone’ (2007) 16 *Dalhousie Journal of Legal Studies* 22.

<sup>12</sup> This is the nature of the immunity that is enjoyed by lower-ranking state representatives, whether they are in office or not. See, eg, *Vienna Convention on Diplomatic Relations*, opened for signature 23 May 1969, 500 UNTS 95 (entered into force 24 April 1964) art 31(1), where it stipulates that the private acts of such agents of the state are not covered by diplomatic immunity. However, because of the senior position that heads of state, ministers and the like occupy, they enjoy an absolute immunity from prosecution while in office. It is also important to clarify that the terminology employed in this article will often explain certain concepts in a number of ways. For example, state and sovereign immunity should be understood to be synonymous for the purposes explained in this article. Also, functional immunity/immunity *ratione materiae*, as well as personal immunity/immunity *ratione personae* will respectively be used interchangeably, as is customary in the rest of the literature on official immunities.

<sup>13</sup> See, eg, *Muammar al-Ghaddafi* (2004) 125 ILR 456 (French Cour de Cassation). For further commentary, see Salvatore Zappalà, ‘Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case Before the French Cour de Cassation’ (2001) 12 *European Journal of International Law* 595. See also *Fidel Castro* [Spain, *Audiencia Nacional*] No 1999/2723, 4 March 1999; *Tachiona v Mugabe and others* 169 F Supp 2d 259 (United States District Court, 2001). Another example is the suit filed in the Belgian courts against Israeli Minister of Defence (at that time) Ariel Sharon, in which it was determined that as an incumbent minister he was entitled to rely on absolute personal immunity. For commentary on this decision, see Antonio Cassese, ‘The Belgian Court of Cassation v. the International Court of Justice: the Sharon and others Case’ (2003) 1 *Journal of International Criminal Justice* 437. Curiously, on the issue of whether former heads of state are entitled to immunity *ratione materiae* for international crimes, the Belgian *Cour de Cassation* determined (in obiter) that there was no jurisdictional limitation to the prosecution of former officials for the commission of international crimes. This position seems at odds with the deliberations of the ICJ in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* [2002] ICJ Rep 3, 24 [58] (*‘Arrest Warrant case’*), which is examined below. For an analysis of the functional immunities accruing to former heads of state in light of these decisions, see Paola Gaeta, ‘Ratione Materiae Immunities of Former Heads of State and International Crimes: The Hissène Habré Case’ (2003) 1 *Journal of International Criminal Justice* 186. For an extensive commentary on the jurisprudence of international and domestic courts in relation to official immunities, see generally Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (Oxford University Press, 2009), ‘Part C: Cases’. It is also relevant to note that much of this domestic case law is concerned with the civil jurisdiction of domestic courts, in which some fora have developed an extraterritorial tort jurisdiction. Such is the case in the United States under the *Alien Tort Statute* 28 USC § 1350 (1789) under which universal civil jurisdiction has been established for human rights violations. See, eg, *Filartiga v Peña-Irala* 630 F 2d 876 (2<sup>nd</sup> Cir, 1980). The precedent of civil proceedings is still of certain value for criminal prosecutions, as the important distinction between functional and personal immunities will generally apply in a similar fashion.

humanity.<sup>14</sup> Upon application from the DRC, the ICJ was given the opportunity to examine the absolute immunities that serving officials benefit from under customary international law. In terms of the purported immunity that the Minister enjoyed, the Court considered the body of recent jurisprudence of domestic courts, but was:

unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.<sup>15</sup>

According to this analysis, such incumbent officials will be immune from foreign criminal jurisdiction even when they travel abroad for personal reasons or when they act in a private capacity while holding office, including situations where they are accused of having committed international crimes. Although the Court was only enjoined to consider the immunity of a serving Minister for Foreign Affairs, it has been recognised in subsequent scholarship and judicial practice that the substance of the ICJ's opinion will apply to other classes of senior state officials,<sup>16</sup> including heads of state.<sup>17</sup> Moreover, and notwithstanding the extensive commentary that has attended the Court's judgment, the *Arrest Warrant* case, in many respects, confirmed the pre-existing rule of customary international law that serving officials cannot be prosecuted in foreign jurisdictions. What importantly transpired in the analysis of the Court, and what reflects the novelty of the ruling, was its crystallisation of the various exceptions to this immunity *ratione personae* under customary international law. The Court observed that such immunity would be inapplicable in certain circumstances, namely when: (a) the accused is brought to trial before the domestic courts of their own State; (b) the official's State decides to waive the immunity; (c) once an official has left office and is brought before the courts of a foreign State for acts committed before or after the period of office or acts committed during office but in a private capacity;<sup>18</sup> and, finally (d) when the official is subject to proceedings before 'certain international criminal courts, where they have jurisdiction'.<sup>19</sup> As evidence of this last principle, the Court mentioned a number of examples of such international criminal courts, all of which possess the authority to prosecute heads of state and other state officials.<sup>20</sup>

<sup>14</sup> For further commentary on the arrest warrant and the Belgian legal framework under which it was issued, see Dapo Akande, 'Arrest Warrant Case' in Cassese, above n 13, 586–7.

<sup>15</sup> *Arrest Warrant* [2002] ICJ Rep 3, 24 [58].

<sup>16</sup> See, eg, Cassese, above n 13; Dapo Akande, 'The Application of International Law Immunities in Prosecutions for International Crimes' in Joanna Harrington et al (eds), *Bringing Power to Justice? The Prospects of the International Criminal Court* (McGill Queens University Press, 2006), 51.

<sup>17</sup> See, eg, *Prosecutor v Taylor (Decision on Immunity from Jurisdiction)* (SCSL, Appeals Chamber, Case No SCSL-2003-01-I, 31 May 2004) [50]–[52] ('*Prosecutor v Charles Taylor*'). See also Zsuzsanna Deen-Racsmany 'Prosecutor v. Charles Taylor: The Status of the Special Court for Sierra Leone and Its Implications for Immunity (2005) 18 *Leiden Journal of International Law* 299, 302–3. However, cf Rosanne van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (Oxford University Press, 2008), 194–5, where the author suggests that because heads of state are in essence a personification or personal embodiment of the state, they cannot be compared to the *agents* of the state, such as Ministers of Foreign Affairs.

<sup>18</sup> This reference to the acts of officials in a private capacity or for the period before and after their time in office confirms, albeit implicitly, the functional and thus lower species of immunity that such officials enjoy once leaving office.

<sup>19</sup> *Arrest Warrant* [2002] ICJ Rep 3 [61].

<sup>20</sup> These examples included the International Criminal Tribunal for the Former Yugoslavia ('ICTY'), the International Criminal Tribunal for Rwanda ('ICTR') and the ICC. The Court also referred to the explicit removal of official immunities in the *Rome Statute* art 27(2).

This final exception is informative of the immunity enjoyed by incumbent heads of state under customary international law, and, more importantly, of its apparent or potential removal in proceedings before the ICC. It also raises the question of when will a judicial forum belong to this category of ‘international criminal courts’. The past two decades have witnessed a noticeable proliferation of international penal courts and tribunals, each of which possess a distinct founding architecture and differing degrees of ‘international’ character in terms of their jurisdictional scope and indicia of supranational status. A marked element of uncertainty has prevailed in the application of the *Arrest Warrant* precedent to these bodies, which will be examined below.

### III The ‘international courts’ exception

In cases against heads of state before the ICC, it may be, and has been,<sup>21</sup> argued that the ICC possesses the capacity to abrogate such defendants’ immunity, because it presides over an international jurisdiction and that head of state immunity cannot apply before international courts, as per the above exception affirmed by the ICJ in the *Arrest Warrant* case. Curiously, in its determination and ultimate rejection of al-Bashir’s immunity, the Pre-Trial Chamber neglected to consider this issue.<sup>22</sup> Although not yet explored in the jurisprudence of the ICC, in response to the emerging principle in the jurisprudence of other international courts and tribunals, it is essential to consider whether the ICC’s status as an international court can operate to exclude the application of head of state immunity. This section will specifically examine the different rationales for the removal of official immunities before international courts, such as the ICC. It will be argued that official immunities will still be available at the international level in certain circumstances and that there is no clear principle that absolutely excludes their application from the framework of the ICC.

#### A Effects on the relationships between States

As the immunities accorded to state officials are informed by principles of state equality and the desire to preserve the horizontal architecture of the international system, it may at first seem that such immunities should never be pleaded before truly international courts and tribunals.<sup>23</sup> In effect, international courts, especially international criminal courts, derive their mandate from the international community as a whole and, accordingly, appear

<sup>21</sup> See, eg, Paola Gaeta, ‘Does President Al Bashir Enjoy Immunity from Arrest?’ (2009) 7 *Journal of International Criminal Justice* 315.

<sup>22</sup> In its deliberations, the Pre-Trial Chamber based its removal of customary immunities on four considerations: first, because one of the core goals of the Statute is to ‘end impunity for the perpetrators of the most serious crimes of concern to the international community’; second, that the Statute provides that it will be ‘applicable to all persons without distinction based on official capacity’ and that ‘capacity as Head of State or Government ... shall in no case exempt a person from criminal responsibility; third, that other sources of law (such as the customary law of head of state immunity) can only be resorted to when there is an irresolvable *lacuna* in the application of the rules of the statute; and finally, that when referring the situation to the Court, the Security Council accepted that investigations and prosecutions will take place in accordance with the Statute: *Prosecutor v Al-Bashir* (Case No ICC-02/05-01/09, 4 March 2009) [42]–[45].

<sup>23</sup> See, eg, Paola Gaeta, ‘Official Capacity and Immunities’ in Antonio Cassese et al (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, vol I, 2002) 991.

neither to depend nor intrude upon the relationships between sovereign States.<sup>24</sup> In a number of works,<sup>25</sup> Paola Gaeta has argued that the functions of inter-state relations have little bearing on international criminal courts:

[T]he very *rationale* of the rules on personal immunities is lacking when criminal jurisdiction is instead exercised by an international criminal court. While at the 'horizontal' level, there is a need to protect foreign state officials from the exercise or even abuse of jurisdiction by the receiving state, things are clearly different at a purely 'international' level. International criminal courts are not organs of a particular state; they act on behalf of the international community as a whole to protect collective or universal values, and thus to repress very serious international crimes. Therefore, their jurisdiction cannot be conceived as an expression of the sovereign authority of a state upon that of another state, nor can their judicial activity be considered as a form of 'unduly' interfering with the sovereign prerogatives of another state. [Immunities] aim at protecting the sovereign equality of states; therefore, they have no bearing on the functioning of international criminal courts.<sup>26</sup>

To assert that international law immunities are only conferred in respect of inter-state relations and, therefore, are of no import in international proceedings is misconceived. While it should certainly be accepted that international criminal courts are supposed to reflect a sense of fellowship among States in their efforts to ascribe individual responsibility to those who commit the most serious international crimes, it must also be understood that the exercise of jurisdiction of international criminal courts can have serious consequences for the sovereign equality of states and the intercourse of international relations.<sup>27</sup> In fact, the exercise of jurisdiction of the ICC and its concomitant realisation of prosecutions *depend upon* the actions of States as individual members of the international community. While, in many ways, the Court will itself determine the authority to hear a particular case, states parties and their relevant judicial structures are relied upon to execute the orders of the Court and to surrender accused parties to appear before it.<sup>28</sup> Moreover, as the Court's jurisdiction is founded on the principle of complementarity,<sup>29</sup> the ICC is intended to reside beside, not above, the jurisdictions of domestic courts.<sup>30</sup> According to this principle — that the jurisdiction of the ICC is not superior to that of States — it becomes clear that the same considerations of state equality must survive in the application of immunities before the Court.<sup>31</sup>

---

<sup>24</sup> See Sarah Nouwen, 'The Special Court for Sierra Leone and the Immunity of Taylor: The Arrest Warrant Case Continued' (2005) 18 *Leiden Journal of International Law* 645, 650, 652.

<sup>25</sup> See Gaeta, above n 23, 991–2; Gaeta, above n 21, 320–1.

<sup>26</sup> Gaeta, above n 21, 320–1 (emphasis in original).

<sup>27</sup> For further argument on the availability of international immunities before international courts, see Dapo Akande, 'International Law Immunities and the International Criminal Court' (2004) 98 *American Journal of International Law* 407, 417.

<sup>28</sup> See, eg, *Rome Statute* art 59 and pt IX.

<sup>29</sup> See *Rome Statute* art 17.

<sup>30</sup> On the principle of complementarity and the endowment of primary jurisdiction with national courts, see David Turns, 'Aspects of National Implementation of the *Rome Statute*: The United Kingdom and Selected Other States' in Dominic McGoldrick et al (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (2004), 338–9; Florian Jessberger, 'International v. National Prosecution of International Crimes' in Cassese, above n 13, 208–15.

<sup>31</sup> On the relationship between immunities and complementarity, arguing for a survival of the former in proceedings at the ICC, see Jann Kleffner, 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law' (2003) 1 *Journal of International Criminal Justice* 86, 103–6.

To disconnect the jurisdiction of the ICC from the operation of domestic courts and the sovereignty of States posits an inherently artificial understanding of the international criminal jurisdiction. Just like the exercise of jurisdiction by domestic courts over foreign State officials, the ICC's exercise of jurisdiction in such cases can engender severe repercussions for the fabric of inter-state relations. The exercise of jurisdiction by the Court will affect, and be affected by, the same considerations of State sovereignty that inform the doctrine of head of state immunity and its application before domestic courts. This perspective does not suggest that head of state immunity should be retained before international criminal courts, but it serves to contradict the proposition that these considerations are absent in the international jurisdiction.

### **B The appearance of immunities in the Rome Statute**

In arriving at the conclusion that al-Bashir's head of state immunity could not apply before the Court, the Pre-Trial Chamber considered and applied the explicit prohibition of immunities that appears in article 27(2) of the *Rome Statute*.<sup>32</sup> This provision states that international or domestic immunities or special procedural rules will not prevent the Court from exercising jurisdiction over any person. In one respect, article 27(2) effectively operates as a waiver of an official's immunity by the state party to the *Rome Statute* and satisfies the second exception to the absolute immunity normally enjoyed by serving heads of state as articulated by the ICJ in the *Arrest Warrant* case. Such a waiver is precisely the manner in which Laurent Gbagbo's immunity has been effectively revoked before the ICC. Unlike the situations of Libya and Sudan, which will be examined in detail below, the ICC does not rely on the authority of the Security Council to exercise jurisdiction in relation to the conflict in Côte d'Ivoire. Although not a state party to the ICC, Côte d'Ivoire has explicitly accepted the jurisdiction of the ICC on two occasions,<sup>33</sup> a state of affairs that is contemplated by article 12(3) of the *Rome Statute*. The effect of this acceptance of the Court's jurisdiction is to render the provisions of article 27(2) applicable to Gbagbo and, therefore, waive the immunity he would normally enjoy under customary international law.<sup>34</sup> Accordingly, Gbagbo's head of state immunity has been abrogated by operation of articles 12(3) and 27(2) of the *Rome Statute*.

It has been argued that article 27(2) merely restates the already existing principle of customary international law, that no official immunities may be enforced before an international criminal court.<sup>35</sup> However, this provision must be read in accordance with article 98(1) of the *Rome Statute*. The appearance of this particular article sheds light on the apparently wholesale prohibition of official immunities before the ICC. It reads:

<sup>32</sup> See above n 22. *Rome Statute* art 27 is distinguished from its correspondents in the Statutes of the ICTR, ICTY and Special Court for Sierra Leone in that it resolves to render both official capacity (art 27(1)) and immunities (art 27(2)) irrelevant before the Court.

<sup>33</sup> See above nn 7–8.

<sup>34</sup> Note that according to the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 35, a treaty can create legal obligations for a state not party to a treaty if that state accepts that obligations in writing. For further commentary on the effect of the waiver of immunities embodied in *Rome Statute* art 27(2), see Sarah Williams et al, 'The Arrest Warrant for President al-Bashir: Immunities of Incumbent Heads of State and the International Criminal Court' (2009) 14 *Journal of Conflict & Security Law* 71, 77–8.

<sup>35</sup> Gaeta, above n 21, 322; Gaeta, above n 23.

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.<sup>36</sup>

There is a clear problem with the reconciliation of these two seemingly contradictory provisions.<sup>37</sup> If official immunities are intended to be inapplicable before the Court then why should such immunities be considered and respected in the course of requests for surrender of defendants? If all states parties to whom requests for surrender are directed were permitted to avoid compliance with such requests because of official immunities accruing to the accused individual, then any defendant who enjoys such immunity would never be able to appear before the Court. Such a bizarre result would render the inclusion of article 27(2) meaningless.<sup>38</sup>

It has been suggested by a number of commentators that to operate effectively in coordination with article 27(2), article 98(1) must only apply to requests for surrender of suspects from *non-states parties* to the *Rome Statute*.<sup>39</sup> This proposal is confirmed by the reference in article 98(1) to a ‘third state’. The use of this term suggests that the drafters must have contemplated a State outside the framework of the *Rome Statute*,<sup>40</sup> as the law of treaties dictates that the expression ‘third party’ is usually used to refer to States not party to the relevant treaty.<sup>41</sup> Such an interpretation would allow both articles 27 and 98 to operate by effectively disregarding immunities that accrue to officials from states parties, but allowing states to respect the immunities enjoyed by individuals from non-states parties.<sup>42</sup>

This formulation raises the question of official immunities and their potential application before the ICC. It may be argued that immunities in this case would not be applicable before the Court as they would only be relevant in relation to the *surrender* of individuals and not to their prosecution per se. However, in this instance the immunity

---

<sup>36</sup> *Rome Statute* art 98(1).

<sup>37</sup> It is important to note that some of the ambiguity in applying these provisions in tandem may have resulted from the drafting history of article 98, which was proposed and negotiated in the final stages of the Rome Conference by a completely different working group to article 27. See Per Saland, ‘International Criminal Law Principles’ in Roy Lee (ed), *The International Criminal Court: The Making of the Rome Statute* (Kluwer Law International, 1999) 202; Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observer’s Notes, Article by Article* (Beck/Hart, 1999) 501–14; William Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press, 3<sup>rd</sup> ed, 2007), 231.

<sup>38</sup> It is important to recall that the ICC does not have the power to try defendants *in absentia*, as per *Rome Statute* art 63, and as such the delivery of suspects to the Court is essential for the effective exercise of jurisdiction. Moreover, as the *Rome Statute* is a treaty, the rules of treaty interpretation and, in particular, the maxim of effectiveness (*ut res magis valeat quam pereat*) would apply to demand both articles are interpreted in such a way as to render them operative. See Akande, above n 1, 338.

<sup>39</sup> Gaeta, above n 23, 994; Akande, above n 27, 422; Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford University Press, 2003), 145; Steffen Wirth, ‘Immunities, Related Problems and Article 98 of the *Rome Statute*’ (2001) 12 *Criminal Law Forum* 429, 452–4.

<sup>40</sup> On the application of Article 98(1) to officials of non-states parties, see Broomhall, above n 39, 145; Akande, above n 16, 64, in which the author also refers to the domestic legislation of a variety of ICC states parties that confirms the immunity of officials from non-states parties unless that immunity is waived by the state concerned.

<sup>41</sup> See *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) arts 34–38.

<sup>42</sup> Considering the position of Sudan as a non-state party to the *Rome Statute*, the application of article 98(1) is central to the ability of states to legitimately avoid surrendering al-Bashir to the Court and will be analysed in greater detail in Part III C of this article.

under consideration would not be of the domestically applicable variety, such as that which would prevent a court from exercising domestic jurisdiction. In effect, when an ICC state party is requested to deliver a suspect from a non-state party to the Court, it would be required under customary international law and permitted under article 98(1) of the *Rome Statute* to give domestic effect to an official immunity that may be enjoyed before an international criminal court.<sup>43</sup>

It is, therefore, suggested that according to the dual operation of articles 27 and 98 of the *Rome Statute* in respect of requests for surrender of individuals from non-states parties, official (and, thus, head of state) immunities in relation to the international jurisdiction of the ICC will be the subject of consideration. Although it occurs in a somewhat disjointed manner, this argument proposes that official immunities *can* operate in relation to prosecutions before the ICC as they are implicitly preserved in relation to non-states parties such as Sudan and Libya by the appearance of article 98(1) in the *Rome Statute*.

### **C Examples of immunities before international courts and tribunals**

The argument that official immunities cannot be raised before any international court has also been discussed in the jurisprudence of various hybrid and other international tribunals.

This issue came before the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the case of *Prosecutor v Slobodan Milosevic*. In the course of proceedings, amici curiae argued that the Tribunal lacked the competence to try Milosevic by reason of his status as President and that that Court's Statute — article 7 of which prevents the defendant's official position from relieving such person of criminal responsibility<sup>44</sup> — could not overrule governing principles of customary international law according him head of state immunity.<sup>45</sup> The Trial Chamber dismissed this argument, suggesting that article 7 of the Statute reflected a rule of customary international law.<sup>46</sup> As evidence of this proposition, the Chamber cited the International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind and its corollary, the *Rome Statute* of the ICC, both of which preclude the application of official immunities.<sup>47</sup> The analysis of the ICTY Trial Chamber in this respect is not particularly convincing. The recent examples of the International Law Commission (ILC) Draft Code and the *Rome Statute* certainly constitute important advancements in international criminal law. However, it does not necessarily follow that these instruments offer evidence of state practice to the extent that a customary rule removing official immunities before international courts has been established.

In its analysis, the Chamber also referred to the Charters of the International Military Tribunal (IMT) for Nuremberg and the Far East (IMT Charters), which explicitly

<sup>43</sup> Dapo Akande has argued that the removal of immunity in the *Rome Statute* art 27 will also be applicable at the domestic level, with particular reference to the national implementing legislation of states parties to the *Rome Statute*, which in a number of cases removes official immunities in relation to a request for surrender issued by the ICC. See Akande, above n 1, 338–9.

<sup>44</sup> SC Res 827, UN SCOR, 48<sup>th</sup> sess, 3217<sup>th</sup> mtg, UN Doc S/RES/827 (25 May 1993), as amended by SC Res 1877, UN SCOR, 64<sup>th</sup> sess, 6155<sup>th</sup> mtg, UN Doc S/RES/1877 (7 July 2009) ('*ICTY Statute*') art 7(2); SC Res 955, UN SCOR, 49<sup>th</sup> sess, 3453<sup>rd</sup> mtg, UN Doc S/RES/955 (8 November 1994) annex ('*ICTR Statute*') art 6(2).

<sup>45</sup> *Prosecutor v Slobodan Milosevic (Decision on Preliminary Motions)* (ICTY, Trial Chamber, Case No ICTY-IT-02-54, 8 November 2001) [27].

<sup>46</sup> *Ibid* [28].

<sup>47</sup> See 'Draft Code of Crimes against the Peace and Security of Mankind' (1996) 2 *Yearbook of the International Law Commission* Pt 2 (*ILC Draft Code 1996*); *Rome Statute* art 27.

disallowed the argument of official immunities, as evidence of this rule of customary international law. The value of the IMT Charters in this respect is limited. It has been argued that they do not constitute truly international tribunals as they were concluded by agreement between the victorious allied powers in Europe, and not by the international community as such. As the IMT trials acquired jurisdiction according to the occupied status of both Germany and Japan and by the allied assumption of sovereignty within those countries, it has also been suggested that they were exercising domestic jurisdiction.<sup>48</sup> Moreover, the omissions of the IMT Tokyo Charter are particularly relevant for prosecutions of heads of state. Although that Tribunal exempted accused individuals from arguing state immunity, it curiously preserved the head of state immunity enjoyed by the Emperor of Japan.<sup>49</sup>

Although, in this author's opinion, the status of the IMTs as 'international courts' seems doubtful, if their practice can be utilised as evidence of a removal of official immunities before *international* courts and tribunals, it is argued that such practice, coupled with the relatively modest and very recent State adherence to the *Rome Statute*, does not suffice to establish a rule of customary international law that precludes the application of head of state immunity in all international prosecutions. However important the *Rome Statute* has proven for the development of international criminal prosecutions and for the ascription of responsibility to high-ranking officials for international crimes, the ICTY Trial Chamber was misguided in trying to assert a customary rule to that effect.<sup>50</sup>

There are other examples in the jurisprudence of the ICTY that contradict the notion that international law immunities cannot survive before international courts. In *Prosecutor v Blaškić* the ICTY considered the application of official immunities *ratione materiae* in relation to the production of documents before the Tribunal. In this instance, the Chamber acknowledged that although the rule assigning immunity to state officials was intended to apply to relations between States inter se, 'it must also be taken into account, and indeed it has always been respected, by international organizations as well as international courts'.<sup>51</sup> According to this rule, the Appeals Chamber subsequently refused to address binding orders to state officials, confirming that their official status prohibited the Tribunal from doing so.<sup>52</sup> While the *Blaškić* decision considered a State representative's functional, rather than personal, immunity, it critically situated official immunities within the purview of an international tribunal, in obvious contrast to the *Milosević* decision. Accordingly, it is argued

<sup>48</sup> See generally Madeline Morris, 'High Crimes and Misconceptions: The ICC and Non-Party States' (2001) 64 *Law and Contemporary Problems* 13.

<sup>49</sup> On the absence of head of state immunity in the jurisprudence of the Tokyo Tribunal and its relevance for the ICC, see Kerry Cregoe O'Neill, 'A New Customary Law of Head of State Immunity?: Hirohito and Pinochet' (2002) 38 *Stanford Journal of International Law* 289; Michael Scharf, 'The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the US Position' (2001) 64 *Law and Contemporary Problems* 67, 103–6; Dapo Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits' (2003) 1 *Journal of International Criminal Justice* 618, 627–8; Akande, above n 27, 417.

<sup>50</sup> For further criticism of the ICTY's attempts to establish such a rule of customary international law, see Nouwen, above n 24, 645, 664–66.

<sup>51</sup> Ibid [41]. For a commentary on the *Blaškić* decision and on the issue of whether international tribunals are empowered to issue binding orders to state officials, see Micaela Friulli, 'Jurisdiction Ratione Personae' in Antonio Cassese et al (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, vol I, 2002), 537–8.

<sup>52</sup> *Prosecutor v Blaškić (Appeals Judgment)* (ICTY, Case No IT-95-14-A, 29 July 2004) [43] ('*Prosecutor v Blaškić*').

that the practice of ICTY does not serve to establish or support a customary rule that head of state immunity cannot survive before any international court.

The case of *Prosecutor v Charles Taylor* before the Special Court for Sierra Leone (SCSL or ‘Special Court’) provides some more guidance on the issue of personal immunities before international courts. Unlike the ad hoc tribunals, the Special Court’s founding statute does not reside in an explicit resolution of the Security Council. While there was certainly considerable Security Council activity surrounding the conflict in Sierra Leone,<sup>53</sup> which included the endorsement of some form of judicial body,<sup>54</sup> the Security Council did not establish the Court itself.<sup>55</sup> This came about through an agreement between the UN and the Government of Sierra Leone,<sup>56</sup> and is why the Special Court is often referred to as a ‘hybrid’ tribunal.<sup>57</sup> These peculiarities are most relevant when determining whether customary immunities can survive before the Special Court, considering that, like the ad hoc tribunals and the ICC, they are explicitly prevented from applying under its Statute.<sup>58</sup> This matter came before the Special Court when it was asked to consider Liberian President Charles Taylor’s head of state immunity for crimes allegedly committed during the conflict.<sup>59</sup>

First, the Court determined that because the Security Council authorised the conclusion of the agreement between the UN and the Government of Sierra Leone, the agreement (and, therefore, the Statute) was thus an agreement between *all* members of the UN and Sierra Leone. According to the Chamber, this inference of a multilateral consensus effectively elevated the Court to international status, therefore complying with the exception to personal immunities in the *Arrest Warrant* case.<sup>60</sup>

Second, in adopting a similar line of reasoning to the Trial Chamber of the ICTY, the Court recognised a customary principle that heads of state can never be immune from prosecution before international tribunals.<sup>61</sup> Clearly, the foundations of the Special Court for Sierra Leone question the definition of an ‘international court’ and are instructive of the legitimacy of judicial apparatus formulated by the Security Council. In many respects, the Special Court’s analysis oversimplified this process.

<sup>53</sup> See, eg, *Resolution on the Situation in Sierra Leone*, SC Res 1315, UN SCOR, 55<sup>th</sup> sess, 4186<sup>th</sup> Meeting, UN Doc S/Res/1315 (14 August 2000) (*Resolution 1315*), referring to Sierra Leone as a threat to international peace and security.

<sup>54</sup> *Resolution on the Situation in Sierra Leone*, SC Res 1400, UN SCOR, 57<sup>th</sup> sess, 4500<sup>th</sup> Meeting, UN Doc S/Res/1400 (28 March 2002), noting that the Council ‘welcomed the establishment’ of the SCSL.

<sup>55</sup> Note, however, that the Security Council did authorise the UN Secretary-General to negotiate the agreement that resulted in the establishment of the Special Court: *Resolution 1315*. See also Deen-Racsmany, above n 17, 307.

<sup>56</sup> See *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, signed 16 January 2002, 2178 UTS 137 (entered into force 12 April 2002) annex (*Statute of the Special Court for Sierra Leone*).

<sup>57</sup> Other prominent examples of such hybrid tribunals include the Extraordinary Chambers in the Courts of Cambodia, the Special Tribunal for Lebanon and East Timor Special Panels. On the development of these bodies generally, see Daphna Shrager, ‘Politics and Justice: The Role of the Security Council’ in Cassese, above n 13, 168–74.

<sup>58</sup> *Statute of the Special Court for Sierra Leone* art 6(2), which states: ‘The official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.’

<sup>59</sup> *Prosecutor v Charles Taylor* (Case No SCSL-2003-01-I, 31 May 2004).

<sup>60</sup> *Ibid* [38].

<sup>61</sup> *Ibid* [46]–[53].

As will be discussed in detail below, for tribunals that are explicitly created by resolutions of the Security Council (such as the ad hoc tribunals), the authoritative removal of official immunities is clearly made out due to the near universal membership of the UN and the binding nature of chapter VII resolutions of the Council. Also, for judicial bodies created by multilateral treaties, it is apparent that such courts will be accorded international status as between the parties to that treaty.<sup>62</sup> The situation of the Special Court does not fit neatly within either of these categories. In the situation where the Security Council *authorises* the creation of the court, rather than creates it itself, there is a disconnect between the judicial body and the binding authority of the Security Council. Furthermore, in this situation it is difficult to contemplate a solid connection between actions of the UN as a distinct entity and its constituent membership of States. It is important to recall that the UN is not always a sum of its parts and, at times, ‘occupies a position in certain respects in detachment from its Members’.<sup>63</sup> Thus, it seems that the connection between action of the UN and the will of the international community is not as apparent as the Special Court made out.

The foregoing examples suggest that international community involvement is an imprecise criterion for determining whether personal immunities should not apply.<sup>64</sup> Moreover, to entertain a division between international and domestic courts to decide the applicability of immunities can, in effect, provide a means of avoiding the jurisdictional restrictions that exist in domestic law. In his amicus curiae submissions to the Special Court in the *Charles Taylor* case, Philippe Sands was alert to this problem, suggesting that ‘two States may not establish an international criminal court for the purpose, or with the effect, of circumventing the jurisdictional limitations incumbent on national courts’.<sup>65</sup> Such a scenario is, indeed, conceivable. It almost seems that this is the *purpose* of international prosecutions of incumbent heads of state: to avoid the restrictions of immunity *ratione personae* that persist at the domestic level. If, for instance, Sierra Leone had attempted to arrest and try Taylor according to its own domestic process, then absolute personal immunity would operate to prevent the Sierra Leonean courts from exercising jurisdiction. If personal immunities are *never* available before *any* international tribunal — in other words, if immunity *ratione personae* is rendered inapplicable by virtue of the tribunal’s international character — then the effect of this internationality is that the jurisdictional limitations incumbent on domestic courts are essentially circumvented. The better statement of law is not that personal immunities will not apply before *certain international criminal courts*, but that personal immunities will generally prevail before such courts, unless immunity is explicitly removed by operation of the court or otherwise rendered irrelevant.<sup>66</sup> This position would maintain a consistent and discernible immunity doctrine that reconciles the current discrepancies between international and domestic practice.

---

<sup>62</sup> This is certainly the case with the ICC. As Paola Gaeta correctly points out: ‘the ICC statute contains a derogation from the international system of personal immunities for charges of international crimes, but only among state parties to the statute’: above n 21, 328.

<sup>63</sup> See *Reparations for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174.

<sup>64</sup> For an excellent criticism of the analysis and subsequent removal of head of state immunity by the Special Court in *Prosecutor v Charles Taylor* (Case No SCSL-2003-01-1, 31 May 2004), see generally Nouwen, above n 24.

<sup>65</sup> Philippe Sands et al, ‘Submissions of the Amicus Curiae on Head of State Immunity’, *Prosecutor v Charles Taylor* [43] cited in Deen-Racsmany, above n 17, 314.

<sup>66</sup> By, for example, a chapter VII Security Council resolution that explicitly removes personal immunity. This position has received the support of Judge Shahabuddeen, in a powerful dissenting opinion he issued in relation to the applicability of official immunities before the ICTY:

### D Irrelevance of official capacity

An important distinction in the jurisprudence and architecture of international criminal law that is often overlooked is that between official immunities and the concept of irrelevance of official capacity. In the *Arrest Warrant* case, the ICJ intended to reinforce the principle that immunities cannot be pleaded before ‘international’ courts by reference to their irrelevance before the ICTY, ICTR and ICC.<sup>67</sup> In fact, no international criminal courts, apart from the ICC, *explicitly* prevent the application of customary immunities. Rather, their statutes assert that the *official capacity* of an individual will neither free them from responsibility nor mitigate punishment,<sup>68</sup> a provision borrowed directly from the IMT Charters.<sup>69</sup> It was not until the adoption of the *Rome Statute* that both irrelevance of official capacity *and* removal of immunities were accorded parallel operation under the framework of an international criminal court.<sup>70</sup> Although the effect of this provision is to render officials (including heads of state) responsible for crimes that they may otherwise not have been, many commentators have argued that it is a concept distinct from immunity for the reason that it is concerned with substantive law.<sup>71</sup> Roseanne van Alebeek has suggested that:

[t]he principle of individual responsibility for crimes against international law and the principle of irrelevance of official capacity accordingly do not affect the personal immunity enjoyed by foreign diplomatic agents and foreign heads of state during their term in office.<sup>72</sup>

According to this reasoning, while under the ad hoc statutes and IMT Charters senior officials may have been held accountable for crimes, their immunity would have technically been maintained. Antonio Cassese has argued on somewhat different footing, advocating that the distinction between substantive and procedural law actually correlates with the two

---

In my view ... there is no substance in the suggested automaticity of disappearance of the immunity just because of the establishment of international criminal courts. [...] International criminal courts are established by States acting together, whether directly or indirectly, as in the case of the Tribunal, which was established by the Security Council on behalf of States members of the United Nations. There is no basis for suggesting that by merely acting together to establish such a court States signify an intention to waive their individual functional immunities. A presumption of continuance of their immunities as these exist under international law is only offset where some element in the decision to establish such a court shows that they agreed otherwise.

See *Prosecutor v Krstić (Decision on Application for Subpoenas)* (ICTY, Appeals Chamber, Case No IT-98-33-A, 1 July 2003) [11] (*Prosecutor v Krstić*). On the relevance of official immunities before international criminal courts generally, see Deen-Racsmany, above n 17, 314; Akande, above n 27, 416–19. These considerations — of whether a court’s international status can of itself operate to remove immunity — will be informative of the status of defendants from non-states parties before the ICC, and will be examined in greater detail below.

<sup>67</sup> *Arrest Warrant* [2002] ICJ Rep 3 [61].

<sup>68</sup> *ICTY Statute* art 7; *ICTR Statute* art 6.

<sup>69</sup> See *Charter of the International Military Tribunal in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 82 UNTS 280, entered into force 8 August 1945, arts 6–7. For further commentary, see Alebeek, above n 17, 208.

<sup>70</sup> The *Rome Statute* renders both concepts irrelevant, under articles 27(1) and 27(2).

<sup>71</sup> On the substantive or procedural nature of international law immunities, see Hazel Fox, *The Law of State Immunity* (Oxford University Press, 2<sup>nd</sup> ed, 2008), 675–82; Akande, above n 16, 59–60; Alebeek, above n 17, 240–6; Schabas, above n 37, 231.

<sup>72</sup> Alebeek, above n 17, 266. The author also refers to certain aspects of the *Arrest Warrant* principal judgment to support her contention. As the Court affirmed: ‘Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law’. See *Arrest Warrant* case, [60]; Alebeek, above n 17, 243.

species of immunities: *ratione materiae* and *ratione personae*. He suggests that functional immunities are such that they are effectively a substantive defence, whereas the latter class of immunity relates to procedural law.<sup>73</sup> Indeed, much of the confusion surrounding these concepts is largely related to the conceptual differences of the immunity/defence and procedural/substantive dichotomies in domestic criminal justice systems.<sup>74</sup> These lines become blurred across the boundaries of different systemic approaches to criminal law.

It seems as though in the *Arrest Warrant* case the ICJ understood the appearance of the official capacity defence in international criminal tribunals to be evidence of the removal of immunities *ratione personae* in such courts.<sup>75</sup> It may be argued that these concepts are so similar that they effectively become conjoined for the purpose of establishing a customary rule that removes immunities before international courts.<sup>76</sup> Nonetheless, it appears that there remains a conceptual difference between these two principles and an element of uncertainty as to their preliminary or substantive presence in international criminal law. This uncertainty lends support to the argument that the practice of international courts and tribunals has not unequivocally removed immunities at the international level, and, moreover, that there is no prevailing customary rule to this effect that is applicable to the practice of the ICC.

### **E Other issues concerning internationality**

The foregoing analysis demonstrates that the international character of a court is an ambiguous mechanism to determine whether official immunities can apply within its framework. In light of the confusing jurisprudence of the last decade, many authors have suggested that the factor that should operate to remove an official's immunity is the internationality of the crime itself, rather than the forum in which it is adjudged.<sup>77</sup> In this manner, the ICJ's exception to absolute immunity in the *Arrest Warrant* decision has been widely criticised for contradicting the *opinio juris* of other States and international courts in respect of the development of such a rule.<sup>78</sup>

<sup>73</sup> Antonio Cassese, 'When May Senior Officials Be Tried for International Crimes? Some Comments on the *Congo v. Belgium* Case' (2002) 13 *European Journal of International Law* 853, 862–4.

<sup>74</sup> William Schabas has remarked that it was for this reason that the *Rome Statute* attempted to rectify the issue with the inclusion of articles 27(1) and (2). See Schabas, above n 37, 226.

<sup>75</sup> Sarah Nouwen has also drawn this connection between irrelevance official capacity and the removal of immunity *ratione personae*. See Nouwen, above n 24, 660–1.

<sup>76</sup> In relation to the jurisprudence of the Nuremberg IMT, the ILC (*ILC Draft Code 1996*, above 46, 26–7) has rendered commentary to this effect:

As further recognised by the Nürnberg Tribunal in its judgment, the author of a crime under international law cannot invoke his official position to escape punishment in appropriate proceedings. The absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings is an essential corollary of the absence of any substantive immunity or defence. It would be paradoxical to prevent an individual from invoking his official position to avoid responsibility for a crime only to permit him to invoke the same consideration to avoid the consequences of this responsibility.

<sup>77</sup> On the development of a rule refusing to grant immunity to international atrocity crimes, see Steffen Wirth, 'Immunity for Core Crimes? The ICJ's Judgment in the *Congo v. Belgium* Case' (2002) 13 *European Journal of International Law* 877; Dapo Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits' (2003) 1 *Journal of International Criminal Justice* 618, 638–40; Akande, above n 16, 56–8; Nouwen, above n 24, 658–68.

<sup>78</sup> See Wirth, above n 77, 889–91.

The principle developed by the House of Lords in the *Pinochet* case<sup>79</sup> offers the most persuasive rationale for this argument. The material facts and deliberations of that case are well known and it is therefore not necessary to repeat them here in great detail; however, it is important to recognise the influence that this decision has had on the nature of head of state immunity under customary international law. The House of Lords recognised the limitations of a former head of state's functional immunity, asserting that the commission of crimes to which international criminal accountability must attach (specifically torture in Pinochet's case) cannot be recognised as being protected by such functional immunity, notwithstanding that the commission of these crimes may have been undertaken under the guise of official or government authority.<sup>80</sup> Because of the *jus cogens* character of certain international crimes such as torture, they occupy a position at the top of the hierarchy of legal norms. It has been suggested, therefore, that as a rule of international law, official immunity cannot operate to exempt individuals from the jurisdiction of courts in respect of the commission of crimes of such a character.<sup>81</sup> To do so would be contrary to the peremptory status of torture and other international crimes.

The logic this argument is certainly appealing. It positions the immunity issue outside the realm of severe international crimes and, therefore, would not require a detailed and cumbersome inspection of the apparent 'international' character of a judicial forum to determine its application. However, it appears that this approach will only be of value to the resolution of immunity *ratione materiae* in respect of international crimes. While the *Pinochet* judgment has been heralded as a benchmark for the attribution of guilt to former tyrants who had managed to shield themselves behind the veil of head of state immunity,<sup>82</sup> its dicta recognises that incumbent heads of state continue to enjoy the benefit of immunity *ratione personae* under customary international law.<sup>83</sup> The case remains that, according to the enduring rule of personal immunity, high-ranking state officials continue

<sup>79</sup> *R v Bow Street Metropolitan Stipendiary Magistrate; ex parte Pinochet Ugarte (No 3)* [1999] 2 All ER 97 ('*Pinochet*').

<sup>80</sup> *Pinochet* [1999] 2 All ER 97, 113 (Lord Browne-Wilkinson); 124–9 (Lord Goff). Substantial debate ensued in the *Pinochet* case about whether the commission of widespread international crimes could have been seen as an official act and, therefore, subject to head of state immunity: *Pinochet* [1999] 2 All ER 97, 113 (Lord Browne-Wilkinson), 164 (Lord Hutton). Note, however, that while this line of reasoning was upheld in *Pinochet*, similar state immunity proceedings in the civil jurisdiction of the same forum asserted that functional immunity should not be denied for the commission of international crimes. See generally *Jones v Saudi Arabia* [2007] 1 AC 270. The issue of whether the severity of an international crime committed should be the threshold at which immunity ceases to apply will be examined further below.

<sup>81</sup> See *Pinochet* [1999] 2 All ER 97, 113 (Lord Browne-Wilkinson), 163 (Lord Hutton).

<sup>82</sup> See, eg, Jonathan Black-Branch, 'Sovereign Immunity Under International Law: The Case of Pinochet' in Diana Woodhouse (ed), *The Pinochet Case: A Legal and Constitutional Analysis* (Hart, 2000) 111; Charles Pierson, 'Pinochet and the End of Immunity: England's House of Lords Holds that a Former Head of State is not Immune for Torture' (2000) 14 *Temple International and Comparative Law Journal* 263.

<sup>83</sup> *Pinochet* [1999] 2 All ER 97, 170 (Lord Millet), in which the absolute nature of immunity *ratione personae* was confirmed:

The immunity of a serving head of state is enjoyed by reason of his special status as the holder of his state's highest office. He is regarded as the personal embodiment of the state itself. It would be an affront to the dignity and sovereignty of the state which he personifies and a denial of the equality of sovereign states to subject him to the jurisdiction of the municipal courts of another state, whether in respect of his public acts or private affairs. His person is inviolable; he is not liable to be arrested or detained on any ground whatsoever.

to enjoy immunity *ratione personae* even within the context of *jus cogens* violations of international law.<sup>84</sup>

As has been demonstrated above, the international status of the ICC, of itself, cannot operate to absolutely exclude the issue of personal immunities from proceedings. Moreover, as the relevant authority suggests that immunity *ratione personae* will continue to be enjoyed by heads of state in respect of the commission of international crimes, the issue is certainly alive before the ICC.

#### IV Security Council abrogation of immunity

Notwithstanding the internationality of the ICC, certain problems arise from the understanding that the referral of the situations in Darfur and Libya by the Security Council operates to remove al-Bashir and Gaddafi's head of state immunity. The removal of official immunities that appears in article 27 of the *Rome Statute* is, in certain respects, frustrated by the fact that the Statute has not yet received universal acceptance among States.

In relation to other international tribunals such as the ICTY, whose governing Statute is found in a resolution of the Security Council, the absence of a customary rule precluding the application of official immunities in international proceedings does not defeat the Tribunal's ability to establish jurisdiction over senior officials and heads of state. As the *ICTY Statute* forms part of a Security Council Resolution, it creates obligations for all members of the UN. Moreover, because in their creation of the ICTY the Security Council was acting under chapter VII of the *UN Charter* — responding to a 'threat to international peace and security'<sup>85</sup> — the effect of this Resolution (and of the *ICTY Statute*) is such that it becomes binding on all members of the UN and will therefore prevail over States' obligations under customary international law.<sup>86</sup> Thus, as the *ICTY Statute* stipulates that official capacity cannot apply to excuse criminal conduct; this, of itself, would appear to override customary head of state immunity before the Tribunal.<sup>87</sup> This is not the case, however, with the ICC, which is created by treaty.

According to the *Vienna Convention on the Law of Treaties*, treaty provisions cannot create obligations for third States without their consent.<sup>88</sup> Therefore, as Sudan and Libya are not parties to the *Rome Statute* and have not, thus far, consented to the jurisdiction of the ICC, the Court would rely on the Security Council Referrals to exercise jurisdiction over Syrian or Libyan defendants. Accordingly, the decision of the Pre-Trial Chamber in *Prosecutor v*

<sup>84</sup> Note that even commentators who advocate that immunity *ratione materiae* cannot apply to the commission of *jus cogens* violations all agree that personal immunities of high-ranking state officials will continue to shield them from foreign prosecution in such cases. See Cassese, above n 73, 864: '[n]evertheless ... the foreign minister is inviolable and immune from prosecution on the strength of international rules on personal immunities. This proposition is supported by some case law, and is authoritatively borne out by the Court's judgment under discussion'. See also Wirth, above n 77, 889.

<sup>85</sup> See SC Res 827, UN SCOR, sess 48<sup>th</sup>, 3217<sup>th</sup> mtg, UN Doc S/RES/827 (25 May 1993) preambular paragraphs.

<sup>86</sup> *Charter of the United Nations* art 25 ('UN Charter'). For commentary on the binding character of chapter VII Resolutions, see Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (Oxford University Press, 1994) 605–36. See also Akande, above n 27, 417.

<sup>87</sup> For further analysis on the Security Council's withdrawal of immunity in the case of the ICTY, see Schabas, above n 37, 232.

<sup>88</sup> *Vienna Convention on the Law of Treaties* art 34. On the application of this provision relative to international organisations, see Dan Sarooshi, *International Organizations and their Exercise of Sovereign Powers* (Oxford University Press, 2005), 20–1. On the application of this provision to non-states parties to the *Rome Statute*, see Schabas, above n 37, 200–202.

*al-Bashir* made the necessary connection between the Referral and the establishment of jurisdiction, inferring that the Security Council intended to enforce the terms of the *Rome Statute* against Sudan.<sup>89</sup> The Chamber did not, however, offer a detailed inspection of the wording of the Security Council Resolution and the nature and extent of the obligations it creates for both Sudan and Sudanese nationals. It is argued that, upon proper inspection, *Resolutions 1593 and 1970* do not properly establish personal jurisdiction over al-Bashir and Gaddafi, as to do so they would need to *explicitly* remove their head of state immunity.

### **A Distinction between situations and cases**

The disconnect between *Resolutions 1593 and 1970* and the removal of customary immunities in respect of non-states parties to the *Rome Statute* is largely due to the division of power between the Security Council and the organs of the ICC. According to the referral power under article 13(b) of the *Rome Statute*, the Security Council is permitted to assign authority to the Court to investigate a ‘situation in which one or more such crimes [referred to in the Statute] appears to have been committed’.<sup>90</sup> On one hand, this provision empowers the Security Council to influence the proceedings of the Court, but on the other it inhibits the scope of control that the Council may exercise. This restriction results from the distinction between situations and cases under the *Rome Statute*. As the Security Council’s referral power is limited to ‘situations’, article 13(b) in effect restricts the ambit of influence that the Security Council can exercise over the Court by excluding the referral of single cases.<sup>91</sup> This view received the support of the ICC Preparatory Committee,<sup>92</sup> as well as the International Law Commission, which, in the commentary to its *Draft Code* of 1994, noted that:

the Security Council would not normally refer to the court a “case” in the sense of an allegation against named individuals. [The provision] envisages that the Council would refer to the Court a “matter”, that is to say a situation to which Chapter VII of the Charter applies.<sup>93</sup>

Moreover, the language of the *Resolutions* themselves refer specifically to the ‘*situation*’ in Darfur or the Libyan Arab Jamahiriya respectively,<sup>94</sup> thus, according to their own intention, restricting the Security Council’s ambit of influence to those situations before the ICC,

<sup>89</sup> *Prosecutor v Al-Bashir* (Case No ICC-02/05-01/09, 4 March 2009) [40], [45].

<sup>90</sup> *Rome Statute* art 13(b).

<sup>91</sup> In strong support of this argument, William Schabas has suggested that such language was adopted to specifically exclude extrinsic influence in the conduct of individual cases and therefore avoid the danger of one-sided referrals: Schabas, above n 37, 157. On the exclusion of Security Council referral of single cases and the deliberations at the Rome Conference, see also Philippe Kirsch et al, ‘Referral by States Parties’ in Antonio Cassese et al (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, vol I, 2002), 619, fn 1: ‘within the context of a State Party referral or Security referral, it became clear in the negotiations that general ‘situations’ would be referred to the Prosecutor and that the Prosecutor would have the authority to decide to pursue specific indictments within the scope of those situations.’

<sup>92</sup> Some delegations in the Preparatory Committee ‘held the view that the Council, while having the power to refer a situation to the Court, should not be able to refer an individual to the Court’: *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, GA Res 51/207, UN GAOR, 51<sup>st</sup> sess, Supp No 22, UN Doc A/51/22 (1996).

<sup>93</sup> ‘Draft Code of Crimes against the Peace and Security of Mankind’ (1994) 2 *Yearbook of the International Law Commission* Pt 2, 44 (‘ILC Draft Code 1994’).

<sup>94</sup> *Resolution 1593*, para 1; *Resolution 1970*, para 4 (emphasis added).

rather than the cases that will transpire at a later stage. This function becomes apparent when one considers that international organisation activity is normally concerned with States, the traditional subjects of international law.<sup>95</sup> It follows that such a definition would encompass territorial, temporal and even material considerations, but appears not to include individual persons. It has, accordingly, been argued that as the guardian of international peace and the relationship between States, the Security Council should 'not be concerned with the destiny of individuals'.<sup>96</sup>

It is conceivable that the conduct or enduring impunity of a particular individual may be so severe as to constitute a threat to international peace and security of itself, warranting referral by the Security Council of a particular case to the Court.<sup>97</sup> Such an individual may in fact be so directly and significantly connected with a situation in which international peace is threatened that that individual therefore becomes an indispensable feature of the situation.<sup>98</sup> Nonetheless, the Security Council did not act in such a way by issuing the Darfur or Libya Referrals. The Referrals in those cases were both couched in rather general language and provided neither an individual referral of the heads of state nor an explicit abrogation of their immunity. Although not necessarily decisive of immunities of itself, the generality of these *Resolutions* provides the context for any interpretation of obligations that may arise thereunder.

## **B Interpretation of Security Council obligations**

Although it is clear that in referring the Darfur and Libya situations to the Court, the Security Council intended to create binding obligations by acting under Chapter VII of the *UN Charter*, the nature and extent of those obligations are not made apparent. As mentioned above, it was asserted by the Pre-Trial Chamber that Security Council Referral accepted that any investigations and prosecutions would take place in accordance with the framework of the *Rome Statute*.<sup>99</sup> However, whether the Security Council made such an undertaking is not clear from the general language of the Resolution. In this regard, the Pre-Trial Chamber was, through implication, asserting that the general referral of Darfur to the Court would have the effect of applying the entirety of the *Rome Statute* to each individual case before the Court. With respect, this assertion is unconvincing. Although some commentators have contended otherwise,<sup>100</sup> it is certainly possible to accept that the

---

<sup>95</sup> In contemporary international practice, the individual has, however, become a subject of the law in a variety of fields, as may be illustrated by the individual criminal responsibility provisions of the statutes of international courts and tribunals (such as the *Rome Statute* art 25), which provide for international criminal responsibility for the commission of international crimes, or, in another respect, in relation to the right of individual petition to the Human Rights Council under the *First Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). On individuals as subjects of international law generally, see John O'Brien, *International Law* (Cavendish Publishing, 2001) 153–55. On the limitations of this species of international legal personality, see Gillian Triggs, *International Law: Contemporary Principles and Practices* (LexisNexis Butterworths, 2006) 187.

<sup>96</sup> See Luigi Condorelli et al, 'Referral and Deferral by the Security Council' in Cassese, Antonio Cassese et al (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, vol I, 2002), 632; Flavia Lattanzi, 'The *Rome Statute* and State Sovereignty: ICC Competence, Jurisdictional Links, Trigger Mechanism' in Flavia Lattanzi (eds), *Essays on the Rome Statute of the International Criminal Court* (il Sirenete, vol I, 1999) 60–1.

<sup>97</sup> This potential has been contended by some commentators: Condorelli et al, above n 96, 633.

<sup>98</sup> Although this is yet to be seen in relation to the ICC, the Security Council has nominated individual perpetrators on previous occasions. For further commentary, see Williams et al, above n 34.

<sup>99</sup> *Prosecutor v Al-Bashir* (Case No ICC-02/05-01/09, 4 March 2009) [45].

<sup>100</sup> See Gaeta, above n 21, 324.

framework of the Statute applies to Sudan and Libya without the application of article 27. By acknowledging the relevance of official immunities, article 98(1) indeed conceives such a state of affairs.

What is essential in such a situation is a proper interpretation of the legal consequences of *Resolutions 1593 and 1970*. In the case of ambiguity, such interpretation may require reference to extrinsic or contextual considerations, as the *UN Charter* does not identify an authoritative means of interpretation of its terms or of the terms of resolutions of UN organs such as the Security Council.<sup>101</sup> However, such an interpretation should necessarily be undertaken with caution.

Generally, resolutions or decisions of international bodies are interpreted according to the same considerations as are treaties.<sup>102</sup> In this regard, the ICJ has previously determined that an important principle of customary international law cannot be tacitly dispensed with, 'in the absence of any words making clear an intention to do so'.<sup>103</sup> If the Security Council had intended to create obligations irrespective of those already in force under customary international law, it is argued that they would (and would need to) have made this intention clear. This was not the case.

It may be argued that a contextual or purposive interpretation of *Resolutions 1593 and 1970* might take into account the preambular paragraphs of those *Resolutions*, which include various comments in relation to the protection of civilians and the systematic violation of human rights taking place in Sudan and Libya. It is in this context that the intention to remove a head of state's customary immunity may be inferred, the consequence of which would be a conflict between the *Resolutions* of the Security Council and the customary international law protections of head of state immunity. In this case, article 103 of the *UN Charter* suggests that Charter obligations arising from Security Council resolutions will prevail.<sup>104</sup> However, as the revocation of immunity that is purportedly accomplished by the Security Council Referrals is not clearly identifiable, it is argued that no such conflict arises. If there were any uncertainty as to the intended reach of *Resolution 1593*, the Pre-Trial Chamber should have accounted for the contextual background of the Referral in its decision. Certain elements of the *al-Bashir* decision attempted such an exercise. In particular, the Chamber highlighted, inter alia, the intention of the *Rome Statute* to end impunity for the most serious crimes of concern to the international community and the

<sup>101</sup> On the interpretation of Charter and Security Council obligations generally, see José Alvarez, *International Organizations as Law-makers* (Oxford University Press, 2005), 74–83. See also James Fry 'Remaining Valid: Security Council Resolutions, Textualism, and the Invasion of Iraq' (2007) 15 *Tulane Journal of International and Comparative Law* 609, 616: 'Evidence of Security Council intent that is outside the four corners of the relevant resolution should be relied on only when the resolution's key language is prima facie ambiguous or leads to an absurd result'; Francis Jacobs, 'Varieties of Approaches to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties Before the Vienna Diplomatic Conference' (1969) 18 *International and Comparative Law Quarterly* 318, 319.

<sup>102</sup> See Michael Wood, 'The Interpretation of Security Council Resolutions' (1999) 2 *Max Planck Yearbook of United Nations Law* 73, 85. International judicial fora have generally utilised rules of treaty interpretation when interpreting such resolutions. Examples include the UN Administrative Tribunal in *Howrani and 4 others v Secretary of the United Nations* (Judgment of the UN Administrative Tribunal, JUNAT Nos 1-70, UNAT judgment No 4, 14 September 1951). Note, however, that most analyses of the effects of Security Council resolutions tend to concentrate on their substantive repercussions (ie whether they are binding or mere authorisations). See, eg, Marko Öberg, 'The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ' (2005) 16 *European Journal of International Law* 879.

<sup>103</sup> *Elektronica Sicula (United States of America v Italy)* [1989] ICJ Rep 15 [50].

<sup>104</sup> *UN Charter* art 103.

clear provision of the Statute (in article 27) that the official position of an individual will be irrelevant before the Court.<sup>105</sup> The fundamental problem with this interpretation is that it disregards the initial irrelevance of these provisions to Sudan, a non-state party to the ICC.

In al-Bashir's case, the Court attempted to apply an international treaty to a non-party (Sudan) by virtue of a Resolution of the Security Council. In determining the context of such a course of action, it is not appropriate to refer to the very treaty that the Court wishes to ascribe to a non-party and its nationals. This is not the context of the interpretation, but its subject. In this author's opinion, two important contextual considerations must be the prevailing customary doctrine of absolute head of state immunity *ratione personae*, and the distinction between situations and cases within the architecture of the ICC, which place certain restrictions on the referral power of the Security Council. Accordingly, the customary and absolute head of state immunity of al-Bashir would survive in proceedings before the ICC, unless *explicitly* removed by the Security Council.<sup>106</sup> Without specifying any abrogation of Gaddafi's personal immunity in *Resolution 1970*, the same consequences present themselves in relation to the Libya situation. Acting under chapter VII of the *UN Charter*, the Security Council has the power to revoke customary international law immunities should it wish to do so;<sup>107</sup> however, this power must be exercised in a clear and unequivocal fashion to ensure that such a revocation will be effective.

### C Obligations of Sudan and Libya

It has been largely understood that *Resolutions 1593 and 1970* create clear obligations incumbent on Sudan and Libya to cooperate with the ICC. *Resolution 1593* states 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'.<sup>108</sup> This is mirrored in *Resolution 1970*, which states that 'the Libyan authorities shall cooperate fully with and provide and necessary assistance to the Court'.<sup>109</sup> There is no doubt that, in their adoption of those *Resolutions*, the Council was clearly and indeed explicitly acting under chapter VII of the Charter,<sup>110</sup> which confirms that the effect of the *Resolutions* is binding on Sudan and Libya

<sup>105</sup> *Prosecutor v Al-Bashir* (Case No ICC-02/05-01/09, 4 March 2009) [42]–[43]. Note, that in the Gaddafi decision the Pre-Trial Chamber's analysis on this point was far more cursory, with only one paragraph being concerned with the jurisdiction *ratione personae*, in which the Chamber merely referenced its deliberations in the al-Bashir decision: *Prosecutor v Gaddafi* (Case No ICC-01/11-01/11, 27 June 2011) [9].

<sup>106</sup> For further discussion on contextual interpretation of Security Council Resolutions, see Ben Saul, 'The Legality of the Use of Force Against Iraq in 2003: Did the Coalition Defend or Defy the United Nations?' (2003) 8 *UCLA Journal of International Law and Foreign Affairs* 267.

<sup>107</sup> It has been argued by William Schabas that this is precisely what the Security Council did in establishing the ad hoc tribunals, which sets a precedent for them to do the same in respect of prosecutions of individuals from non-states parties. See Schabas, above n 37, 232. See also Dapo Akande, 'The Bashir Indictment: Are Serving Heads of State Immune from ICC Prosecution?' Oxford Transitional Justice Research Working Paper Series 6, University of Oxford Centre for Socio-Legal Studies, (2008) 2.

<sup>108</sup> *Resolution 1593* para 2.

<sup>109</sup> *Resolution 1970* para 5.

<sup>110</sup> The preamble to *Resolution 1593* remarks that '[d]etermining that the situation in Sudan continues to constitute a threat to international peace and security, Acting under Chapter VII of the Charter of the United Nations'. The preamble to *Resolution 1970* also notes that the Security Council is '[a]cting under Chapter VII of the Charter of the United Nations, and taking measures under its Article 41' (emphases in originals).

respectively<sup>111</sup> and that Sudan and Libya are bound to carry out the demands of the Security Council.<sup>112</sup>

It appears at first that because the Security Council Referrals direct Sudan and Libya to comply with the Court's requests, they would be under an obligation to surrender their presidents to the Court. This position has commanded support in recent commentary;<sup>113</sup> however, it conflates two important and distinct issues: the obligations incumbent on the States of Sudan and Libya to comply with the ICC, and the personal immunities enjoyed by Sudanese and Libyan officials under customary international law (and the removal thereof under the *Rome Statute*). The above analysis suggests that such officials would be able to argue that their personal head of state immunity acts as a bar to the jurisdiction of the ICC. As this is the case, the existence of immunity before the ICC (having the effect of barring the jurisdiction of the Court) would also affect Sudan and Libya's obligations to surrender their presidents. In the *Arrest Warrant* case, the ICJ determined that not only the exercise of jurisdiction over an incumbent official was in breach of customary international law, but that the mere issuance of the arrest warrant itself contravened the rules on official immunities.<sup>114</sup>

Accordingly, the availability of head of state immunity for al-Bashir before the ICC would have the same consequence for the obligations of Sudan to surrender him to the Court. If it were successfully argued that al-Bashir enjoyed head of state immunity before the ICC, then Sudan would no longer be compelled to surrender him to the Court and, subsequently, not be in breach of its international obligations under *Resolution 1593* for not doing so.

## V Attendant obligations of third party States

The reality of the political situation before the ICC is that States whose leaders have been indicted for serious international crimes are unlikely to be forthcoming in delivering their serving heads of state to the Court. Accordingly, the appearance at trial of incumbent heads of state is likely to depend upon the cooperation of other States. It is argued that regardless of whether a State is party to the *Rome Statute* or not, their obligations under customary international law to respect the absolute head of state immunity of al-Bashir and Gaddafi will prevail and, therefore, no State would be permitted or obliged to surrender them to the ICC.

## A Article 98(1) and the position of states parties to the Rome Statute

As mentioned above, the reconciliation of articles 27(2) and 98(1) of the *Rome Statute* is problematic. This is also the case in respect of obligations of States to surrender al-Bashir to the ICC. According to article 98(1), the Court is not to proceed with requests for surrender that would require states parties to act inconsistently with their obligations under

<sup>111</sup> *UN Charter* art 103. On the application of *UN Charter* art 103 and the primacy of Charter obligations, see Robert Kolb, 'Does Article 103 of the Charter of the United Nations Apply only to Decisions or also to Authorizations Adopted by the UN Security Council' (2004) 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 21.

<sup>112</sup> As a member of the UN, Sudan is obliged under *UN Charter* art 25 to carry out the mandatory decisions of the Security Council.

<sup>113</sup> See Akande, above n 1, 335.

<sup>114</sup> *Arrest Warrant* [2002] ICJ Rep 3, [70]. See also Gaeta, above n 21, 318.

customary international law in respect of the official immunities enjoyed by the individual who is the subject of the request for surrender. It would therefore appear that states parties have no obligation to comply with the requests of the Court under the *Rome Statute*.

In some recent commentaries, Dapo Akande has argued that *Resolutions 1593 and 1970* place Sudan and Libya in a position analogous to a states parties, as the Security Council intended for the whole framework of the *Rome Statute* to apply to the prosecution of any potential defendants.<sup>115</sup> Therefore, according to this rationale and because it is widely accepted that article 98(1) will only apply to requests for surrender in relation to non-states parties,<sup>116</sup> there is no longer a need for States to respect the head of state immunity of al-Bashir. With respect, this argument is untenable. Because article 98(1) will only apply in the case of requests in relation to non-states parties, its application can only arise in the case of a Security Council referral under article 13(b) of the *Rome Statute*. The only other possible way in which a situation involving a non-state party could potentially come before the Court would be in the case of a referral by a state party,<sup>117</sup> or if the Prosecutor exercises his *proprio motu* powers and initiates an investigation.<sup>118</sup> In both of these scenarios, it clearly follows from the *Vienna Convention on the Law of Treaties* that the *Rome Statute* cannot be applied to the non-state party because it has not consented to the provisions of the treaty.<sup>119</sup>

The only way in which the provisions of the *Rome Statute* can be applied to a non-state party without its consent is through the mechanism of a Security Council referral, as, by acting under chapter VII of the *UN Charter*, the Security Council can effectively assign such treaty responsibilities to a non-party.<sup>120</sup> Therefore, the only instance when article 98(1) could be relevant would be in the case of a Security Council referral to the ICC. If, as Akande suggests, a Security Council referral places the non-state party in a position analogous to a state party, thus making article 98(1) inapplicable, article 98(1) is rendered useless in all cases. The maxim of effectiveness in treaty interpretation (*ut res magis valeat quam pereat*) demands that provisions of a treaty are interpreted in such a way as to render them operative.<sup>121</sup>

<sup>115</sup> See Akande, above n 1, 342. However, cf Gaeta, above n 21, 324 (emphasis in original):

A Security Council referral serves to trigger the jurisdiction of the Court, in accordance with the Statute, also with respect to crimes committed in the territory or by nationals of non-state parties. Nonetheless a referral by the Security Council is *simply* a mechanism envisaged in the Statute to trigger the jurisdiction of the ICC: it does not and cannot turn a state non-party to the Statute into a state party, and it has not turned Sudan into a state party to the statute.

See also Dapo Akande, 'The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC' (2012) 10(2) *Journal of International Criminal Justice* [forthcoming].

<sup>116</sup> See above n 40 and accompanying text.

<sup>117</sup> *Rome Statute* art 14.

<sup>118</sup> *Rome Statute* art 15.

<sup>119</sup> *Vienna Convention on the Law of Treaties* art 34. The only other exception to this is when a non-state party otherwise accepts the jurisdiction of the Court pursuant to the *Rome Statute* art 12(3).

<sup>120</sup> As under *UN Charter* art 25, UN Members are obliged to carry out the decisions of the Security Council. Note, however, that it is arguable that a national of a non-state party may be prosecuted before the ICC outside the framework of a Security Council referral if either: (a) that non-state party explicitly recognises the jurisdiction of the ICC in respect of that particular prosecution, making a declaration pursuant to the *Rome Statute* art 12(3); or (b) the individual concerned engages in the alleged criminal conduct on the territory of a state party to the statute: Stephane Bourgon, 'Jurisdiction *Ratione Temporis*' in Antonio Cassese et al (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, vol I, 2002), 552. On this latter possibility, see also David Scheffer, 'The United States and the International Criminal Court' (1999) 93 *American Journal of International Law* 12. It is essential to realise, however, that neither of these situations have eventuated in the Gaddafi or al-Bashir cases.

<sup>121</sup> See above n 38 and accompanying text.

According to this principle, it is argued that Sudan and Libya cannot be placed in the position of states parties by operation of *Resolutions 1593 and 1970*, as to do so would cause article 98(1) to be meaningless. The only appropriate interpretation is that the Security Council Referrals must intend for article 98(1) to apply to officials from Sudan and Libya.

States parties to the *Rome Statute* are generally obliged to comply with requests for surrender transmitted by the Court.<sup>122</sup> However, article 98(1) would operate in this instance to prevent the Court from making such a request, or at least to render the operative request legally invalid. Thus, if al-Bashir were to travel to an ICC state party on an official or private visit, that State would not be obliged to arrest them under the *Rome Statute*. The operation of article 98(1) effectively places states parties in the position of non-states parties in relation to whether they are permitted or obliged to surrender al-Bashir to the Court. The question, therefore, becomes whether *Resolution 1593* compels or permits States to arrest al-Bashir. This will be examined below.

### **B Obligations of third States under SC Resolutions 1593 and 1970**

The nature and determination of any international obligations that arise from the Darfur and Libya Referrals will hinge upon the language that was employed by the Security Council. As mentioned above, the use of mandatory language in the Referrals clearly evinces an intention to create binding obligations for Sudan and Libya.<sup>123</sup> However, this mandatory language appears exclusively directed towards Sudan and Libya, and other parties to those conflicts. In its *Namibia* Advisory Opinion, the ICJ remarked that: '[t]he language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect'.<sup>124</sup> It is against this background of interpretative principle that the obligations of other States under the Darfur Referral must be determined. *Resolutions 1593 and 1970* both continue, stating that:

while recognizing that States not party to the Rome Statute have no obligation under the Statute, [the Security Council] *urges* all States and concerned regional and other international organizations to cooperate fully.<sup>125</sup>

Although the Security Council decided that Sudan and Libya *shall* cooperate with the Court, it merely *urges* other States to cooperate. In other words, while the Security Council intended to create binding obligations vis-à-vis Sudan and Libya, its use of discretionary language in respect of other States suggests that no such obligations were ever intended to extend to these parties. Therefore, it is argued that while *Resolutions 1593 and 1970* have been enacted under chapter VII,<sup>126</sup> their concomitant binding effect under the *UN Charter*

<sup>122</sup> *Rome Statute* arts 86–89.

<sup>123</sup> *Resolution 1593* para 2: 'the Government of Sudan and all other parties to the conflict in Darfur, *shall* cooperate fully with the Court and the Prosecutor pursuant to this resolution' (emphasis added).

<sup>124</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep 16, [114] ('*Namibia*').

<sup>125</sup> *Resolution 1593*, para 2 and *Resolution 1970*, para 5 (emphasis added).

<sup>126</sup> It is essential to recall that in the *Namibia* opinion, the ICJ determined that the use of mandatory language could result in a binding Resolution of the Security Council that resided outside the chapter VII framework: *Namibia* [1971] ICJ Rep 16, [111]–[114]. On the nature and scope of such implied powers, see Tadashi Mori, 'Namibia Opinion Revisited: A Gap in the Current Arguments on the Power of the Security Council' (1997) 4 *ILSA Journal of International and Comparative Law* 121.

will only extend to the States of Sudan and Libya (and potentially other States involved directly with those conflicts).<sup>127</sup> Due to the non-mandatory language used in relation to other States, those States will not be bound by the *Resolutions*.

Perhaps a more curious question in this context is, considering the lack of an international *obligation* to arrest and surrender al-Bashir, whether States would be *permitted* under international law to arrest him. While it is apparent that the Resolution does not create obligations for those States, further examination is required to determine whether it authorises States to arrest al-Bashir and thus circumvent their obligations under the customary law of head of state immunity.

The regime of the *UN Charter* provides that when there is a conflict between a State's obligations under the Charter (such as those which emanate from a Security Council Resolution) and other obligations under international law, those under the Charter will prevail.<sup>128</sup> The most obvious situation in which such a conflict will arise is in the case of a binding obligation created by the Security Council acting under chapter VII of the Charter. However, in the present discussion, although *Resolutions 1593 and 1970* are indeed consummated under chapter VII, their position in relation to most States is recommendatory. There is some literature to suggest that certain recommendations of the Security Council effectively authorise a State to undertake a course of action which, in the context, will involve the exercise of a power of the Security Council by the State specified in the Resolution. This has been understood to entail a delegation of the Security Council's authority to the State concerned, the exercise of which would, therefore, trump other international obligations under article 103.<sup>129</sup> However, caution should certainly be exercised when implicitly suggesting that the Security Council intends to displace prevailing obligations under treaty or customary international law.<sup>130</sup>

In the situations of Darfur and Libya it appears that there has been no such delegation of Security Council authority to suggest an application of article 103. While *Resolutions 1593 and 1970* urge other States to cooperate with the ICC, they do not urge those States to disregard their obligations in respect of immunities enjoyed by officials of other States. Although it is conceivable that the abrogation of immunities is within the scope of the Security Council's power, there is no relationship between the delegation of such power to

---

<sup>127</sup> Note, however, that due to the involvement of the NATO (North Atlantic Treaty Organization) force and, therefore, a number of external states in the conflict in Libya, it is arguable that the binding effect of *Resolution 1970* will extend to those states.

<sup>128</sup> *UN Charter* art 103.

<sup>129</sup> This has been suggested by a number of commentators in the course of determining the legal consequences of non-binding Security Council Resolutions. See Kolb, above n 111, 31; Danesh Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (Oxford University Press, 1999). On the precedence of chapter VII Resolutions of the Security Council over the rules on immunity, see Alebeek, above n 17, 221.

<sup>130</sup> On the danger of the delegation of Security Council authority model, see Rudolf Bernhardt, 'Article 103' in Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (Oxford University Press, 2<sup>nd</sup> ed, vol II, 2002) 1296:

When UN organs, including the Security Council, adopt non-binding resolutions, Art. 103 is not applicable. This follows from the text of the Article, which speaks only of obligations (meaning legal obligations). However, there are additional reasons for excluding recommendations and other non-binding pronouncements from the scope of Art. 103. This Article represents a partial suspension of the basic international law maxim *pacta sunt servanda*. Such a suspension is only acceptable in the case of a conflict between obligations, the superior or stronger of which should prevail. If a certain measure or form of behaviour is merely recommended without being legally obligatory, existing treaty obligations must be respected and the recommendation cannot be followed.

States and the substance of *Resolutions 1593 and 1970*. It is therefore argued that there is no basis within the suggestive language of the Darfur of Libya Referrals to deny States' obligations to respect the doctrine of head of state immunity under customary international law. Accordingly, States not party to *Rome Statute*, or the conflicts in Sudan or Libya, would neither be obliged nor permitted to arrest and surrender state officials to the ICC, notwithstanding the circulation of arrest warrants by the Court.

## **VI Concluding remarks**

The absolute personal immunity of incumbent heads of state remains alive in international law and before international courts and tribunals. More importantly, the foregoing analysis has demonstrated that *Resolutions 1593 and 1970* have not adequately removed this immunity from Omar al-Bashir and Muammar Gaddafi in respect of their prosecution before the ICC. This unfortunate conclusion can be attributed to the drafting of those *Resolutions* and their failure to explicitly remove the head of state immunity enjoyed by al-Bashir and Gaddafi under customary international law. The recent death of Gaddafi and the attendant post-conflict reconciliation process in Libya obviously closes the door on his prosecution at the ICC. Although the consequences for Gaddafi's potential immunity before the ICC will never be fully appreciated, the cases against al-Bashir and Gbagbo continue to represent challenges to the impunity of powerful leaders in respect of their commission of international crimes. The ICC is certainly an appropriate venue for the prosecution of such crimes and the attendant revocation of head of state immunity. However, the attribution of individual criminal responsibility to heads of state must be coherently realised in accordance with the whole architecture of international law to command the respect it deserves from the international community. To avoid such issues in future prosecutions of heads of state from non-states parties to the *Rome Statute*, the Security Council should specifically nominate any heads of state from whom it intends to revoke immunity and the extent to which any such rule of customary international law is to be displaced. This will ensure that such prosecutions at the ICC take place in accordance with the established principle of head of state immunity under customary international law.

