MINORITY OPINION OF JUDGE MARC PERRIN DE BRICHAMBAUT

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I. Introduction

1. I agree with the decision of the Chamber that: (1) South Africa has failed to comply with the cooperation request by the Court to arrest Mr Omar Hassan Ahmad Al-Bashir ("Omar Al-Bashir") and surrender him to the Court; and (2) a referral of South Africa's non-compliance to the Assembly of States Parties ("ASP") or the United Nations Security Council ("UN Security Council") is nonetheless unwarranted. However, I am not persuaded by the analysis underpinning the Majority's Decision with regard to the legal basis for the removal of Omar Al-Bashir's immunity. I am, in particular, unable to accept the Majority's conclusion that the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (the "Genocide Convention", or the "Convention")[1] does not render inapplicable Omar Al-Bashir's immunity as Head of State of a Contracting Party to the Convention.[2] On the contrary, for the reasons stated below, I find this legal basis to be more persuasive in the circumstances of the present case (Section II).[3]

2. The issue of Omar Al-Bashir's immunity has given rise to different legal positions in the jurisprudence of this Court and has also been the subject of debate in other fora and in the academic literature. This comes as no surprise considering that the question of Omar Al-Bashir's immunity is situated at the crossroads of different legal principles, regimes, and goals: from State sovereignty, to the role and powers of the

[1] 1948, Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277.
[2] Majority Decision, para. 109.
[3] It is acknowledged that my views have evolved since the previous two decisions issued by this Chamber regarding the non-compliance of the Republic of Djibouti and the Republic of Uganda with requests to arrest and surrender Omar Al-Bashir to the Court: Pre-Trial Chamber II, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute, 11 July 2016, ICC-02/05-01/09-266; Pre-Trial Chamber II, *Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute, 11 July 2016, ICC-02/05-01/09-267.

UN Security Council and the commitment to ending impunity for the most serious crimes, which is the primary purpose behind the establishment of this Court.

3. Accordingly, the legal basis for the Chamber's determination is of paramount significance in these circumstances. The parties themselves have litigated to a greater or lesser extent before this Chamber the different existing legal positions. It is for this reason that, in addition to setting out my interpretation of the Genocide Convention, I find it necessary to further engage with the following critical issues: (i) did the UN Security Council referral render Sudan analogous to a State Party, removing the immunity of Omar Al-Bashir by virtue of article 27 of the Rome Statute (the "Statute") (Section III); (ii) did UN Security Council Resolution 1593 (2005) ("Resolution 1593")[4] implicitly waive the immunity of Omar Al-Bashir (Section IV); and (iii) does the involvement of an international court affect the application of the rule of customary international law regarding the personal immunity of Heads of State in the relationship between States (Section V)?

II. What is the impact of the Genocide Convention on South Africa's obligations under international law with respect to the personal immunity of Omar Al-Bashir?

4. In the context of the current proceedings, South Africa invoked article 97 of the Statute – the first State Party to have done so.[5] In accordance with this provision, States Parties shall consult with the Court whenever they identify problems that may impede the execution of a request for cooperation or assistance. According to South Africa, it would have acted inconsistently with its obligations under international agreements and under customary international law to respect Omar Al-Bashir's

[4] UN Security Council Resolution 1593 (2005), 31 March 2005, S/RES/1593 (2005).
[5] Article 97 of the Statute provides that: "[w]here a State Party receives a request under this Part in relation to which it identifies problems which may impede or prevent the execution of the request, that State shall consult with the Court without delay in order to resolve the matter […]".

immunities as the incumbent Head of State of Sudan if it had complied with the request to arrest and surrender him.[6] South Africa, in effect, based its position on article 98 of the Statute and primarily on article 98(1) of the Statute,[7] as specified during the public hearing convened by the Chamber for the purposes of a determination under article 87(7) of the Statute (the "7 April 2017 hearing").[8] Rule 195 of the Rules of Procedure and Evidence contemplates the possibility that a requested State raises a problem of execution under article 98 of the Statute before the Court. It specifically indicates that "[w]hen a requested State notifies the Court that a request for surrender or assistance raises a problem of execution in respect of article 98, the requested State shall provide any information relevant to assist the Court in the application of article 98". Read together with article 119(1) of the Statute, this procedure vests the sole authority to decide whether South Africa is obliged to respect the immunities of Omar Al-Bashir in the Court.[9]

5. Accordingly, South Africa's request requires the Court to determine under article 98(1) of the Statute whether the arrest and surrender of Omar Al-Bashir to the Court would be inconsistent with South Africa's "obligations under international

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[6] Pre-Trial Chamber II, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Registry Report on the consultations undertaken under Article 97 of the Rome Statute by the Republic of South Africa and the departure of Omar Al Bashir from South Africa on 15 June 2015, 17 June 2015, Annexes 1 and 2, ICC-02/05-01/09-243-Anx1 and ICC-02/05-01/09-243-Anx2; Pre-Trial Chamber II, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Submission from the Government of the Republic of South Africa for the purposes of proceedings under Article 87(7) of the Rome Statute, ICC-02/05-01/09-290, para. 54 *et seq.* and Transcript of hearing, 7 April 2017, ICC-02/05-01/09-T-2-ENG, p. 18 *et seq*.

[7] Article 98(1) of the Statute provides that: "[t]he Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity".

[8] Transcript of hearing, 7 April 2017, ICC-02/05-01/09-T-2-ENG, p. 18 *et seq*.

[9] Pre-Trial Chamber I, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, 12 December 2011, ICC-02/05-01/09-139, para. 11; Pre-Trial Chamber II, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, 9 April 2014, ICC-02/05-01/09-195, para. 16.

law with respect to the […] immunity" enjoyed by Omar Al-Bashir as sitting Head of State of Sudan. The reference to "obligations under international law" indicates that, where relevant, a State Party's obligations under both conventional and customary international law must be assessed "with respect to the […] immunity of a person […] of a third State".

6. Both Sudan and South Africa are parties to the Genocide Convention since 11 January 2004 and 10 March 1999 respectively.[10] On 12 July 2010, Pre-Trial Chamber I issued a warrant of arrest against Omar Al-Bashir for his alleged criminal responsibility under article 25(3)(a) of the Statute for the crime of genocide within the meaning of article 6(a), (b) and (c) of the Statute.[11] Pre-Trial Chamber I found that there were reasonable grounds to believe that acts of genocide were committed between the month of April 2003 and 14 July 2008, throughout the Darfur region.[12] Against this background it is clear that the obligations that Sudan and South Africa have as Contracting Parties to the Genocide Convention need to be examined in order to determine whether they have an impact on the immunity of Omar Al-Bashir and whether South Africa's obligations towards Sudan and towards the Court are inconsistent, within the meaning of article 98(1) of the Statute.[13]

7. Before turning to this issue, one preliminary matter needs to be addressed. South Africa's submissions before this Chamber are centred upon the question of whether "the case of Mr Al Bashir is covered by Article 98".[14] Section III below will analyse the legal effects of the UN Security Council referral and, in particular, whether

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[10] See Status of the Convention on the Prevention and Punishment of the Crime of Genocide, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&lang=en (last visited 12 June 2017) and article XIII of the Genocide Convention.

[11] Pre-Trial Chamber I, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Second Decision on the Prosecution's Application for a Warrant of Arrest, 12 July 2010, ICC-02/05-01/09-94, p. 28.

[12] Pre-Trial Chamber I, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Second Decision on the Prosecution's Application for a Warrant of Arrest, 12 July 2010, ICC-02/05-01/09-94, paras 22-24, 29-31, and 36-40.

[13] On the applicability of the Genocide Convention in the present proceedings, see *infra* Section II.A.

[14] Transcript of hearing, 7 April 2017, ICC-02/05-01/09-T-2-ENG, p. 18, line 16.

Resolution 1593 has made Sudan analogous to a State Party to the Statute. In such a case, the horizontal relationship between Sudan and South Africa would be governed by article 27(2) of the Statute, rather than by article 98(1) of the Statute, which is applicable between non-States Parties and States Parties.[15] However, as it will be shown below, no firm conclusion can be reached as to whether UN Security Council Resolution 1593 has made Sudan analogous to a State Party. Assuming *arguendo* that Sudan remains a non-State Party to the Statute and that article 98(1) of the Statute is applicable, it will be shown that South Africa would not have acted inconsistently with its obligations under international law vis-à-vis the immunities enjoyed by Omar Al-Bashir if it had arrested and surrendered him to the Court.

8. The following analysis is presented in two parts. The first part will look into the applicability of the Genocide Convention to the present case. The second part will examine the extent to which the Convention removes the personal immunities enjoyed by "constitutionally responsible rulers" of the Contracting Parties.[16] It will

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[15] On the relationship between articles 27(2) and 98(1) of the Statute see *infra*, Section III.A.

[16] I note that this issue has been previously explored to some extent in academic writings. Notably, in January 2011, the *International Criminal Court Forum*, run by the UCLA School of Law's Human Rights Project, in partnership with the Office of the Prosecutor of the Court, opened up for discussion the following questions: what obligations did the Contracting Parties to the Genocide Convention have to implement arrest warrants on genocide counts issued by the Court and could they refuse to cooperate with arrest efforts on grounds of immunity? Five experts were invited to contribute to the discussion: see *ICC Forum*, Major Questions, Darfur Experts, available at: http://iccforum.com/darfur (last visited 12 June 2017). See also, D. Akande, "The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities", 7 Journal of International Criminal Justice (2009), pp. 350-351, arguing that article IV of the Genocide Convention "must be taken as removing any procedural immunities, as the availability of any such immunities would be mean *(sic)* that the persons mentioned in Article IV are not punished"; G. Sluiter, "Using the Genocide Convention to Strengthen Cooperation with the ICC in the *Al Bashir* Case", 8 Journal of International Criminal Justice (2010), p. 378 *et seq.*, arguing that the cooperation regime in the Genocide Convention contains no explicit ground for refusal, with no exception of immunity; M. Gillet, "The Call of Justice: Obligations under the Genocide Convention to Cooperate with the International Criminal Court", 23 Criminal Law Forum (2012), pp. 91-95; B. Schiffbauer, "Article IV", in C. Tams, L. Berster and B. Schiffbauer (eds), *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (2014), pp. 202-211, advancing that "Articles IV and VI allow for Convention-based arguments that preclude the invocation of immunity if otherwise the duty to ensure punishment of perpetrators cannot be achieved". For the opposite view, see contribution by P. Gaeta to the "Darfur Question", *ICC Forum*, available at: http://iccforum.com/darfur#Gaeta (last visited 12 June 2017), arguing that "the obligation

engage in an interpretation of article IV of the Genocide Convention by applying the rules and supplementary means of interpretation provided in articles 31 and 32 of the Vienna Convention on the Law of Treaties.[17]

9. In essence, the combined effect of a literal and contextual interpretation of article IV of the Genocide Convention, in conjunction with an assessment of the object and purpose of the treaty, will lead to the conclusion that personal immunities cannot attach to "constitutionally responsible rulers", within the meaning of article IV of the Convention, when charged with the crime of genocide. Pursuant to article VI of the Convention, such immunities are removed for the purposes of prosecution, *inter alia*, before an "international penal tribunal". This Court constitutes exactly such an international penal tribunal. It follows that South Africa would not have acted inconsistently with its obligations under international law with respect to the immunity of Omar Al-Bashir if it had arrested and surrendered him to the Court because his immunity had been removed by virtue of Sudan acceding to the Genocide Convention. No impediment existed at the horizontal level between South Africa and Sudan with regard to the execution of the request for arrest and surrender of Omar Al-Bashir issued by the Court.

A. The applicability of the Genocide Convention to the present case

10. Article VI of the Convention provides that

> Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction

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to cooperate with the ICC under Article VI of the Genocide Convention, does not allow a departure from the customary international law rules on personal immunities accruing to some foreign senior State officials, such as incumbent Heads of State"; see also P. Gaeta, "Immunities and Genocide" in P. Gaeta (ed.), *The UN Genocide Convention* (2009), pp. 317-320; W. Schabas, *Genocide in International Law* (2009), p. 370; D. Jacobs, "The Frog that Wanted to Be an Ox: The ICC's Approach to Immunities and Cooperation" in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (2015), pp. 296-299.

[17] 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331.

> with respect to those Contracting Parties which shall have accepted its jurisdiction.

11. In order to determine whether the Genocide Convention is applicable to this case and whether any waiver of immunity based on the Convention has effect vis-à-vis the Court, it has to be established that: (i) the Court constitutes an "international penal tribunal" within the meaning of article VI of the Convention; (ii) Sudan can be considered to have accepted the jurisdiction of the Court; and (iii) Omar Al-Bashir can be regarded as a "person[] charged with genocide" within the meaning of article VI of the Convention.

12. Regarding the first question, the International Court of Justice ("ICJ") has held that,

> the notion of an "international penal tribunal" within the meaning of Article VI must at least cover all international criminal courts created after the adoption of the Convention (at which date no such court existed) of potentially universal scope, and competent to try the perpetrators of genocide or any of the other acts enumerated in Article III.[18]

13. The Court is a treaty-based international court, as envisaged by the drafters of the Genocide Convention. It has a potentially universal scope and has jurisdiction over the crime of genocide, as per articles 5(a) and 6 of the Statute. It should be highlighted that not only does the Court have jurisdiction over the crime of genocide, but the definition incorporated in article 6 of the Statute is the same as the one in article II of the Genocide Convention. There can be no doubt that the Court qualifies as an "international penal tribunal" within the meaning of article VI of the Genocide Convention.

14. Turning to the second question, it appears from a plain reading of article VI that the drafters envisaged that States would accept the jurisdiction of the "international penal tribunal" by virtue of acceding to its founding treaty. This is the case for States

[18] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Merits)*, Judgment of 26 February 2007, para. 445.

Parties to the Court like South Africa which have accepted its jurisdiction by ratifying the Statute. It is, however, not the case for Sudan which is not a State Party to the Statute. However, at the time of drafting of the Genocide Convention, the envisaged "international penal tribunal" was merely a concept and its establishment could only be achieved under a different treaty. It is necessary therefore to examine the requirement of having "accepted [the] jurisdiction" by taking into account all the mechanisms through which the Court can obtain such jurisdiction. The Statute provides in fact for another two, alternative preconditions for the exercise of the Court's jurisdiction, aside from becoming a State Party to the Statute: (i) a declaration under article 12(3) of the Statute; or (ii) a referral by the UN Security Council under article 13(b) of the Statute.

15. The exercise of jurisdiction by the Court in the case at hand is based on article 13(b) of the Statute, following the UN Security Council referral of the situation in Darfur to the Court in its Resolution 1593. The question of whether Sudan has "accepted [the] jurisdiction" of the Court becomes, in fact, a question of whether Sudan is obliged to accept the jurisdiction of the Court. In this regard it should be recalled that in referring the situation in Darfur to the Court, the UN Security Council acted under Chapter VII of the UN Charter. By virtue of article 25 of the Charter, UN Member States have agreed to accept and carry out the decisions of the UN Security Council.[19] Sudan, as a UN Member State, is thus obliged to accept the UN Security Council's decision to confer jurisdiction upon the Court over the situation in Darfur. In other words, Sudan can be regarded as having accepted the jurisdiction of the

[19] 1945 Charter of the United Nations, 1 UNTS XVI, article 25: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter".

Court as a result of having accepted the powers of the UN Security Council under Chapter VII of the UN Charter.[20]

16. It should be further noted that, as a consequence of having "accepted [the] jurisdiction" of the Court, both Sudan and South Africa have an obligation to cooperate with the Court on the basis of article VI of the Genocide Convention. This obligation runs parallel to South Africa's and Sudan's other obligations arising from the Statute and UN Security Council Resolution 1593 respectively. Here, it is worth quoting the ICJ once more:

> [I]t is certain that once such a court has been established, Article VI obliges the Contracting Parties "which shall have accepted its jurisdiction" to co-operate with it, which implies that they will arrest persons accused of genocide who are in their territory — even if the crime of which they are accused was committed outside it — and, failing prosecution of them in the parties' own courts, that they will hand them over for trial by the competent international tribunal.[21]

17. The third and final issue is whether Omar Al-Bashir can be regarded as a "person[] charged with genocide". Within the framework of the Statute, Omar Al-Bashir cannot be considered to be "charged" until the Prosecutor has presented her document containing the charges under article 61(3) of the Statute. It should however be specified that the confirmation of charges stage is a particularity of the proceedings before this Court. While it is true that Omar Al-Bashir has not been "charged" within the meaning of the Statute, the issue at hand is rather whether he has been "charged" within the meaning of the Genocide Convention.

18. A "charge" has been defined in the jurisprudence of the European Court of Human Rights ("ECtHR") as "the official notification given to an individual by the

[20] ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, para. 116.
[21] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Merits)*, Judgment of 26 February 2007, para. 443.

competent authority of an allegation that he has committed a criminal offence".[22] In the case of Omar Al-Bashir the question becomes whether he has been notified by the Court that he is alleged to have committed the crime of genocide. As recalled above, on 12 July 2010, Pre-Trial Chamber I found that there were reasonable grounds to believe that Omar Al-Bashir was criminally responsible under article 25(3)(a) of the Statute for the crime of genocide within the meaning of article 6(a), (b) and (c) of the Statute and accordingly issued a warrant of arrest against him.[23] The warrant of arrest thus qualifies as an official notification of charges as defined by the ECtHR. In light of this, Omar Al-Bashir can be considered a "person[] charged with genocide" for the purposes of article VI of the Genocide Convention.

19. Having analysed all the relevant requirements of article VI of the Genocide Convention, I will now turn to the second issue, i.e. whether personal immunities can attach to the official capacity of an incumbent Head of State when he has been "charged" with the crime of genocide before such "international penal tribunal" as envisaged by article VI of the Convention.

B. Do "constitutionally responsible rulers" of the Contracting Parties to the Genocide Convention enjoy immunity from prosecution for the crime of genocide?

20. The central provision of the Genocide Convention in the present discussion is article IV, which provides that:

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[22] ECtHR, *Deweer v. Belgium,* Application no. 4570/05, Judgment, 27 February 1980, para. 46; ECtHR, *Eckle v. Germany*, Application no. 8130/78, Judgment, 15 July 1982, para. 73; ECtHR, *Kravtas v. Lithuania*, Application No. 12717/06, Judgment, 18 January 2011, para. 36.

[23] Pre-Trial Chamber I, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Second Decision on the Prosecution's Application for a Warrant of Arrest, 12 July 2010, ICC-02/05-01/09-94, p. 28; Pre-Trial Chamber I, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, 12 July 2010, ICC-02/05-01/09-95.

> Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

a) Ordinary meaning

21. A plain reading of the text reveals that article IV is formulated in a mandatory manner, employing the phrase "*shall* be punished" (emphasis added). The provision imposes an obligation on States to punish perpetrators of genocide. In this regard, it makes no exception and clearly states that *all* persons committing genocide are liable for punishment, "whether they are constitutionally responsible rulers, public officials or private individuals". Grammatically, the phrase "whether they *are* constitutionally responsible rulers [or] public officials" (emphasis added) is written in the present tense. This suggests that the obligation to punish extends even to "constitutionally responsible rulers" while they are still in office. This is the first indication that personal immunities may not attach to the official capacity of a person committing genocide.

22. Article IV of the Genocide Convention has been previously read as a prohibition of defence of official capacity.[24] There is little disagreement that the provision is meant to preclude such defences, but a plain reading of the text suggests that this is not the limit of its scope. First, the text covers not only State officials, but also "private individuals", in relation to whom the defence of official capacity is irrelevant. Second, a comparison between article IV of the Genocide Convention and provisions in other instruments aimed at prohibiting the defence of official capacity reveals that article IV of the Convention is framed more broadly. Notably, article 7 of the Nuremberg Charter, which predates the Genocide Convention, reads: "The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from

[24] W. Schabas, *Genocide in International Law* (2009), p. 369 *et seq.*

responsibility or mitigating punishment".[25] Similarly, article 6 of the Tokyo Charter,[26] Principle III of the Nuremberg Principles,[27] article 7(2) of the Statute of the International Criminal Tribunal for the Former Yugoslavia ("ICTY"),[28] article 6(2) of the Statute of the International Criminal Tribunal for Rwanda ("ICTR"),[29] article 6(2) of the Statute of the Special Court for Sierra Leone ("SCSL"),[30] and article 27(1) of the Statute of this Court are all framed more restrictively than article IV of the Genocide Convention, focusing specifically on persons having an official position.

23. The scope of article IV of the Convention is broader. First and foremost, it establishes individual criminal responsibility for the crime of genocide. It essentially denies impunity to perpetrators of genocide, "whether there are constitutionally responsible rulers, public officials or private individuals", thus closing any possible impunity gap. Secondly, it imposes an obligation on States to punish all persons committing genocide, including "constitutionally responsible rulers". Thirdly, it precludes the defence of official capacity.

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[25] Charter of the International Military Tribunal, annexed to the 1945 Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, 82 UNTS 279.

[26] Charter of the International Military Tribunal for the Far East, Special proclamation by the Supreme Commander of the Allied Powers at Tokyo, 19 January 1946, Treaties and Other International Acts Series 1589.

[27] Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, 1950 Yearbook of the International Law Commission, vol. II, p. 192.

[28] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, adopted by UN Security Council Resolution 827 (1993) of 25 May 1993.

[29] Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda, between 1 January 1994 and 31 December 1994, adopted by UN Security Council Resolution 955 (1994) of 8 November 1994.

[30] Statute of the Special Court for Sierra Leone, annex to the 2002 Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 2178 UNTS 138.

24. In the context of the present discussion, the second of the above points is particularly important. As stated above, the use of the present tense in the phrase "are constitutionally responsible rulers [or] public officials" suggests that the obligation to punish covers incumbent State officials. The crucial question that follows is which States have such a duty to punish? If the obligation falls only on the State of which the official is a national, immunities under international law do not arise. A systematic interpretation of article IV reveals however that the duty to punish is broader than this and supports a literal reading of article IV according to which immunities are removed.

b) Systematic interpretation

25. Article IV of the Convention is closely linked to article VI which lays down the necessary, preceding step to ensure that perpetrators of genocide are punished. It establishes a duty to prosecute persons charged with genocide. Article VI envisages two types of jurisdiction, in the alternative: domestic and international.

26. The first limb of article VI concerns national prosecutions and it confers jurisdiction upon the courts of the State on the territory of which the crimes have been committed. Two scenarios can be envisaged: (i) first, where the territorial State is the same as the State of which the alleged perpetrator is a national; and (ii) second, where the territorial State is different from the State of which the alleged perpetrator is a national. In practice, most situations fall, and will probably continue to fall, under the first scenario, in which case immunities under international law will be irrelevant. Yet, it is clear that the Convention covers both. It establishes a duty for the Contracting Parties to prosecute persons committing genocide on their territory irrespective of such persons' nationality.

27. When articles IV and VI are read in conjunction, it appears that a Contracting Party to the Convention has a duty to prosecute all persons who commit genocide on its territory, including nationals of a foreign State. In other words, the Contracting

Parties have consented to the exercise of jurisdiction over any of their nationals committing genocide by the courts of a foreign State, when the crime is committed on the latter's territory. Such consent also extends to incumbent "constitutionally responsible rulers" by virtue of article IV of the Genocide Convention.

28. Turning to the second limb of article VI, the text signals the commitment of the Contracting Parties to submit perpetrators of genocide to the jurisdiction of an international penal tribunal. Such jurisdiction was not envisaged to be automatic, but subject to further agreement by States. For this reason, limited conclusions can be drawn from the second limb as far as immunities are concerned. The *travaux préparatoires*, however, are instructive. They reveal that the involvement of State officials in the commission of genocide permeated the negotiations and that States were committed to bringing even the highest officials to justice.

29. The first draft of the Genocide Convention was prepared by the UN Secretariat in 1947. In commenting on this draft, France expressed the view that genocide could only be committed with the complicity of the government.[31] It went further to state that, internationally, the crime of genocide should relate to rulers who would otherwise enjoy immunity within their own State.[32] Later on, the United States also advanced before the Ad Hoc Committee that the definition of genocide as an international crime should require the involvement or complicity of the government.[33] The idea of conferring jurisdiction to an international penal tribunal is intimately linked to this conception of genocide as a State crime. Article IX of the UN Secretariat draft provided that the Contracting Parties "pledge[d] themselves" to submit perpetrators of genocide for trial to an international court if "they [were] unwilling to try such offenders themselves […] or to grant their extradition", *or* if

[31] UN Doc. A/401/Add.3. The UN documents referred here and below can be accessed via the Official Document System of the UN at https://documents.un.org/prod/ods.nsf/home.xsp.
[32] UN Doc. A/401/Add.3.
[33] UN Doc. E/AC.25/SR.4, p. 3.

"the acts of genocide [had] been committed by individuals acting as organs of the State or with the support or toleration of the State".[34] In this regard, Norway urged for international criminal jurisdiction to be established in order to overcome impediments within domestic jurisdictions,[35] a position that the United States supported.[36] The proposal was included in the final text of the Convention, with a compromise, namely that jurisdiction was not to be automatic.

30. As an interim conclusion, it can be stated that article IV of the Genocide Convention imposes an obligation on the Contracting Parties to punish perpetrators of genocide, including incumbent "constitutionally responsible rulers". Such an obligation may be borne, *inter alia*, by a State that is not the State of nationality of the perpetrator, if the crimes are committed on its territory. It follows that, by consenting to such exercise of jurisdiction by a foreign State over their "constitutionally responsible rulers" committing genocide, the Contracting Parties have implicitly waived their personal immunities. This conclusion is further supported by the object and purpose of the Convention.

c) Teleological interpretation

31. In considering the object and purpose of the Genocide Convention, it is necessary to look at the text of article I, which encapsulates the two central obligations of the Contracting Parties – to prevent and to punish. Article I of the Convention reads as follows: "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish".

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[34] UN Doc. E/447, available at http://www.preventgenocide.org/law/convention/drafts/ (last visited 13 June 2017).
[35] UN Doc. E/623/Add.2, referred to in H. Abtahi and P. Webb, *The Genocide Convention: The Travaux Préparatoires* (2008), p. 633-634.
[36] UN Doc. A/401/Add.2, p. 9.

32. The question at hand is whether personal immunities are incompatible with any of these two obligations under the framework of the Convention. It appears that, at least in the abstract, the obligation to punish is not incompatible with personal immunities as far as persons enjoying such immunity can be brought to justice after their term of office. The next question is whether the duty to prevent is also compatible with immunities. In order to answer this it is necessary to enquire whether, in the framework of the Genocide Convention, the content of the duty to prevent is limited to the deterrence of future offences through punishment; in other words, whether the duty to prevent is absorbed by the duty to punish. In such a case there would be no incompatibility between prevention and immunities.

33. The meaning of "prevention" is "to hinder or preclude; to stop or intercept the approach, access, or performance of a thing".[37] Within the ordinary meaning of the term, prevention has two prongs: (i) the prevention of future acts; and (ii) putting a stop to ongoing acts. The text of the Convention reflects these two prongs. Article VIII, although not imposing any obligations on States, specifically speaks of "the *prevention* and *suppression* of acts of genocide" (emphasis added). More importantly, article III criminalises, *inter alia*, three inchoate crimes: conspiracy to commit genocide (article III(b)); incitement to commit genocide (article III(c)); and attempt to commit genocide (article III(d)).[38] These acts cover preliminary stages of genocide and reveal that prevention was not conceived by the drafters to be limited to deterrence through punishment. Rather, the drafters envisaged the possibility of intervening at initial stages before a full genocidal campaign unfolds. The *travaux préparatoires* further confirm that the duty to prevent and the duty to punish are

[37] Black's Law Dictionary Free Online Legal Dictionary 2nd ed., 'Prevent', available at: http://thelawdictionary.org/prevent/ (last visited 13 June 2017).
[38] W. Schabas, *Genocide in International Law* (2009), p. 520.

distinct obligations.[39] The findings of the ICJ in its 2007 judgment in the *Bosnia and Herzegovina v. Serbia and Montenegro* case are telling: "it is not the case that the obligation to prevent has no separate legal existence of its own; that is, as it were, absorbed by the obligation to punish".[40] Finally, the title of the Convention itself also shows that the obligation to prevent is not subsidiary to the obligation to punish.

34. Two important points can be derived from the above. First, the duty to prevent genocide is not merely a component of the duty to punish. It is a stand-alone obligation and an objective to be pursued in its own right, not only through punishment. In fact, as far as international crimes such as genocide are concerned, retribution may have only a limited deterrent effect. Since punishment occurs after the events have taken place it may achieve "too little, too late". In creating a specific obligation to prevent, the Genocide Convention addresses this unfortunate reality.[41]

35. Second, the duty to prevent encompasses a duty to supress ongoing acts of genocide. The measures that States can take to prevent and supress acts of genocide may be varied, but one of them is the arrest and prosecution of persons suspected of committing, conspiring, inciting or attempting to commit genocide. If one reads the provisions of the Convention having in mind this dimension of the obligation to prevent, the tension between prevention and personal immunities becomes apparent. In the framework of the Convention, courts play two roles towards prevention: (i) punishing perpetrators with a view to deterring future crimes; and (ii) prosecuting and trying persons charged with, *inter alia*, genocide or conspiring,

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[39] See the findings of the ICJ in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Merits)*, Judgment of 26 February 2007, paras 160-162.

[40] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Merits)*, Judgment of 26 February 2007, para. 427.

[41] In this context, it must be noted that the prevention of genocide is of such importance that the UN Office on Genocide Prevention and the Responsibility to Protect appointed a Special Adviser of the Secretary-General on the Prevention of Genocide to ensure an effective prevention of genocide through e.g. a Framework of Analysis for Atrocity Crimes to identify some of the main risk factors for genocide.

inciting or attempting to commit genocide with a view to preventing or supressing the ongoing commission of crimes. Viewed in this light, personal immunities appear to be incompatible with the scope of the Convention. How can the Contracting Parties have, on the one hand, committed themselves to preventing and supressing genocide and, on the other hand, upheld the personal immunities for their "constitutionally responsible rulers" as they are committing genocide?

36. To emphasize and strengthen further this crucial point it is worth quoting the UN General Assembly Resolution 96(I): "[genocide] shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to the moral law and to the spirit and aims of the United Nations".[42] Prevention is all the more important when the consequences of the crime are irreparable and the values that the law seeks to protect are considered fundamental by the international community. It is worth recalling that the prohibition of genocide is a *jus cogens* norm.[43] Upholding personal immunities in this context would seriously hinder efforts to prevent and suppress genocide and run counter to the object and purpose of the Genocide Convention.

37. To sum up all of the above, the Contracting Parties to the Genocide Convention have an obligation pursuant to article IV to punish all perpetrators of genocide, including incumbent "constitutionally responsible rulers". This obligation may extend to a foreign State, other than the State of nationality of the perpetrator, when the crimes have been committed on its territory. The territorial State has an obligation, *inter alia*, to arrest and prosecute the perpetrator in question with a view to supressing the commission of crimes and preventing their future commission. This leads to the conclusion that, in order for this framework of obligations to be effective, personal

[42] UN General Assembly Resolution 96 (I) on "The Crime of Genocide", 11 December 1946, A/RES/96(I).
[43] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Merits)*, Judgment of 26 February 2007, paras 161-162.

immunities cannot attach to "constitutionally responsible rulers" when charged with genocide or any of the related acts provided in article III of the Convention.

C. Conclusion

38. Having shown above that personal immunities are incompatible with the obligations that the Contracting Parties have undertaken under the Genocide Convention, Sudan must be regarded to have relinquished the immunities of its "constitutionally responsible rulers" when acceding to the Convention. As Omar Al-Bashir is alleged to have committed the crime of genocide, he no longer enjoys immunity from arrest and surrender. It follows that the requirements of article 98(1) of the Statute have been fulfilled due to the prior accession of Sudan to the Genocide Convention. As no impediment exists at the horizontal level between South Africa and Sudan regarding the execution of the request for arrest and surrender issued by the Court, South Africa would not have acted inconsistently with its "obligations under international law with respect to the […] immunity of a person […] of a third State" within the meaning of article 98(1) of the Statute, had it arrested and surrendered Omar Al-Bashir to the Court.[44]

[44] Furthermore, as highlighted above, both South Africa and Sudan have an additional obligation to cooperate with the Court arising from article VI of the Genocide Convention.

III. What is the status of Sudan following the referral of the situation in Darfur to the Court by the UN Security Council?

39. The status of Sudan vis-à-vis the Court pursuant to UN Security Council Resolution 1593 will be addressed next.[45] In more specific terms, in the context of these proceedings, it is necessary to determine whether Sudan is analogous to a State Party to the Statute or whether it should be considered a non-State Party to the Statute. This determination affects, in turn, which legal provision concerning immunities applies in the relationship between the Court, South Africa, and Sudan in the context of the request to arrest and surrender Omar Al-Bashir.

40. Before assessing the specific arguments put forward by South Africa and the Prosecutor in this respect, the general relationship between articles 27(2) and 98(1) of the Statute needs to be examined. This is because the interrelationship between these two provisions establishes the backdrop against which the submissions of the Prosecutor and South Africa must be considered.

A. What is the Relationship between articles 27(2) and 98(1) of the Statute?

41. Both South Africa and the Prosecutor agree, in principle, that a referral by the UN Security Council entails that the entire Statute applies.[46] This is indeed the correct

[45] It is to be noted that Resolution 1593 was adopted by the UN Security Council without mention of article 13(b) of the Statute. This provision provides that the "Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if […] a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations". On this basis, the Statute allows the Court to exercise its jurisdiction even if the preconditions defined in article 12(2) of the Statute are not fulfilled and no *ad hoc* consent has been given by a non-State Party under article 12(3) of the Statute. Despite the silence of Resolution 1593, article 13(b) of the Statute constitutes the only legal basis for the UN Security Council to refer a situation to the Court. This is confirmed by article 17(1) of the 2004 Negotiated Relationship Agreement between the International Criminal Court and the United Nations, ICC-ASP/3/Res.1. Therefore, by referring the situation in Darfur to the Court, the UN Security Council implicitly activated this provision. Accordingly, the essential prerequisite for the exercise of the Court's jurisdiction in relation to the situation in Darfur has been met.

[46] Transcript of hearing, 7 April 2017, ICC-02/05-01/09-T-2-ENG, p. 86 and pp. 65, 71 respectively.

reading of the Statute. Article 13(b) of the Statute explicitly allows the Court to "exercise its jurisdiction" upon the referral of a situation by the UN Security Council. Furthermore, article 1 of the Statute states that "[t]he *jurisdiction* and functioning of Court shall be governed *by the provisions of this Statute*" (emphasis added). A combined reading of these provisions leads to the conclusion that the referral of a situation to the Court by the UN Security Council triggers the applicability of the entire Statute. The exercise of the jurisdiction of the Court is namely regulated, without any limitation, by the Statute. This interpretation is in line with a similar conclusion reached by the Court on previous occasions.[47]

42. The applicability of the entire Statute logically entails, *inter alia,* that both articles 27(2) and 98(1) of the Statute are applicable. At first sight, these provisions appear to be at odds with each other. Article 27(2) of the Statute seems to categorically exclude any effect of immunities under national and international law on the proceedings before the Court. Conversely, article 98(1) of the Statute gives the impression that immunities may constitute a bar to the exercise of the Court's jurisdiction in certain circumstances. The preparatory work does not provide much guidance in this regard, since each article has been prepared in a different working group with a view to addressing distinct issues.[48] Even so, for the following reasons, these provisions must be considered to retain an independent scope of application within the Statute.

43. First, a contextual interpretation of the Statute indicates that these provisions embody a different purpose. Article 27(2) of the Statute is situated in Part 3 of the Statute on general principles of criminal law. Article 98(1) of the Statute is, on the

[47] Pre-Trial Chamber I, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to article 95 of the Rome Statute, 2 June 2012, ICC-01/11-01/11-163, paras 28-29 with further references.
[48] O. Triffterer and C. Burchard, "Article 27" in O. Triffterer and K. Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2016), marginal notes 5 and 15.

other hand, an element of Part 9 of the Statute, which is dedicated to international cooperation and judicial assistance concerning both States Parties and non-States Parties. These provisions therefore have separate roles in the logic of the Statute. The former declares the irrelevance of the immunities of a person in relation to the proceedings before the Court. The latter seeks to ensure that requests for cooperation and assistance by the Court do not entail a breach of immunities on the horizontal level. Therefore, "considering that criminal law and the law of international cooperation in criminal matters follow different rationales, articles 27 and 98 [of the Statute] should be interpreted independently from each other".[49]

44. Second, a contextual interpretation of these provisions further discloses that they apply in different circumstances. Article 27(2) of the Statute regulates the relationship between: (i) States Parties and the Court; or (ii) States Parties *inter se* in the context of a request for cooperation by the Court. Article 98(1) of the Statute regulates the relationship between: (i) non-States Parties and the Court; or (ii) non-States Parties and States Parties in the context of a request for cooperation by the Court addressed to States Parties. This conclusion arises out of the reference to "third State" in article 98(1) of the Statute, which must be interpreted to mean a non-State Party.[50] The reason is that, by adopting the Statute, States Parties have accepted to be bound by article 27(2) of the Statute and are under a general obligation to cooperate with the Court pursuant to article 86 of the Statute. It logically follows that immunities cannot be invoked in relation to the Court in the relationship between either the Court and States Parties or between States Parties *inter se* in the context of a request for cooperation by the Court. On this basis, only non-States Parties may rely on immunities in relation to the Court or a State Party that is obliged to cooperate with the Court.

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[49] O. Triffterer and C. Burchard, "Article 27" in O. Triffterer and K. Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2016), marginal note 5.

[50] Similar: P. Gaeta, "Does President Al Bashir Enjoy Immunity from Arrest?", 7 Journal of International Criminal Justice (2009), p. 328.

45. Third, the doctrine of "effet utile", according to which a provision must be interpreted in such a manner to ensure that it has practical effect,[51] supports the preceding reading of articles 27(2) and 98(1) of the Statute. In this regard, the mere fact that article 98(1) was included in the Statute signals that the drafters of the Statute intended this provision to exert a particular effect. However, if the reference to "third State" in article 98(1) of the Statute referred to another State Party, this provision would lose its meaning, in light of the aforementioned obligations of States Parties under articles 27(2) and 86 of the Statute. An interpretation of "third State" as referring to a non-State Party to the Statute is therefore the sole interpretation that ensures that effect is given to article 98(1) of the Statute.

46. In sum, taken together, the preceding considerations indicate that articles 27(2) and 98(1) are not in contradiction with each other – rather they fulfil separate functions in the Statute. Article 27(2) of the Statute determines that immunities are not a bar to the exercise of jurisdiction by the Court in the relationship between the Court and States Parties or in the relationship between States Parties *inter se* in relation to a request for cooperation emanating from the Court. However, in the specific circumstances specified in article 98(1) of the Statute, immunities may be invoked as a bar to the exercise of jurisdiction by the Court by a non-State Party in relation to the Court or in relation to a State Party that is under an obligation to cooperate with the Court.

47. Having found that articles 27(2) and 98(1) of the Statute retain an independent scope of application, it must be determined whether or not Sudan is analogous to a State Party to the Statute following the referral of the situation in Darfur to the Court by the UN Security Council. The status of Sudan would entail opposite outcomes to the question under consideration. If Sudan were analogous to a State Party, the result

[51] ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, para. 66.

would be that article 27(2) of the Statute applies and, therefore, "a requested State Party will not be under a conflicting international obligation towards another State if that third state has consented to the non-applicability of procedural immunity bars to the exercise of the Court's jurisdiction, either directly by becoming a State Party or indirectly by its duty to accept and carry out decisions of the Security Council".[52] If Sudan were not analogous to a State Party, the consequence would be that article 98(1) of the Statute may become applicable, which, provided that the relevant conditions are met, could entail that immunities may be opposed to the requested State in relation to a request to cooperate from the Court.

B. Is Sudan analogous to a State Party for the purposes of the present proceedings?

a) The Prosecutor's submissions

48. The Prosecutor submits that "the legal consequence of triggering the ICC's jurisdiction by the Security Council is that the Court will exercise its jurisdiction 'in accordance with the provisions of this Statute;' one of those provisions being the non-applicability of procedural immunity bars to the exercise of the Court's jurisdiction".[53] According to the Prosecutor, "[t]he effect of Resolution 1593 is thus to place […] Sudan in a situation comparable to State Parties" and "[t]his outcome does not violate Article 34 of the Vienna Convention on the Law of Treaties since the relevant treaty under which Sudan has expressed its consent to be bound is the UN Charter".[54] The Prosecutor further asserts that immunities do not persist in the horizontal relationship between States in the execution of the Court's surrender requests, as such an interpretation "would render Article 27 of the Statute entirely

[52] Transcript of hearing, 7 April 2017, ICC-02/05-01/09-T-2-ENG, p. 71.
[53] Transcript of hearing, 7 April 2017, ICC-02/05-01/09-T-2-ENG, p. 71.
[54] Transcript of hearing, 7 April 2017, ICC-02/05-01/09-T-2-ENG, p. 71.

illusory since the Court's jurisdiction could never be given effect".[55] Finally, the Prosecutor is of the opinion that the *Arrest Warrant* case of the ICJ does not alter these conclusions, because the ICJ identified an exception to the rule of customary international law concerning immunities "in relation to criminal proceedings that have been instituted […] 'before certain international criminal courts where they have jurisdiction'", including this Court.[56]

49. The Prosecutor contends, in essence, that the referral of the situation in Darfur to the Court by the UN Security Council eliminated the distinction between States Parties and non-States Parties under the Statute. In more specific terms, in the view of the Prosecutor, the referral of the situation in Darfur to the Court by the UN Security Council has made Sudan analogous to a State Party to the Statute, which would render article 27(2) of the Statute applicable. This position finds some support in the Statute for the following reasons.

b) Analysis of the Prosecutor's submissions

50. On a general level, non-States Parties that have been referred to the Court by the UN Security Council are in a different legal position than other non-States Parties. Whereas the latter type of non-States Parties continue to fall under the general rule of international law that "[a] treaty does not create either obligations or rights for a third State without its consent",[57] the Statute specifically allows for the exercise of the jurisdiction of the Court over a situation in a non-State Party referred to the Court by the UN Security Council under article 13(b) of the Statute. The Statute therefore accepts the possibility that, in conjunction with the prerogatives of the UN Security Council under the UN Charter, the exercise of the jurisdiction of the Court may entail certain obligations for a non-State Party to the Statute. On this basis, it

[55] Transcript of hearing, 7 April 2017, ICC-02/05-01/09-T-2-ENG, p. 72.
[56] Transcript of hearing, 7 April 2017, ICC-02/05-01/09-T-2-ENG, p. 76.
[57] Article 34, 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331.

may be contended that the referral of the situation in Darfur to the Court by the UN Security Council rendered Sudan analogous to a State Party to the Statute, including the obligation to accept that immunities cannot bar the exercise of the Court's jurisdiction under article 27(2) of the Statute.

51. Moreover, the Statute draws a link between the Court's jurisdiction and the irrelevance of immunities. In this regard, article 27(2) of the Statute notes that immunities "shall not bar the Court from exercising its *jurisdiction* over a person" (emphasis added). This connection suggests that, when the Court may exercise jurisdiction, the immunities of the person concerned become irrelevant, as if he or she were a national of a State Party. This position has also been supported in the literature: "[t]he Security Council's decision to confer jurisdiction on the ICC, being (implicitly) a decision to confer jurisdiction in accordance with the Statute, must be taken to include every provision of the Statute that defines how the exercise of such jurisdiction is to take place. Article 27 is a provision that defines the exercise of such jurisdiction […]. The fact that Sudan is bound by Article 25 of the UN Charter and implicitly by SC Resolution 1593 to accept the decisions of the ICC puts Sudan in an analogous position to a party to the Statute".[58]

C. Is Sudan a non-State Party for the purposes of the present proceedings?

a) South Africa's submissions

52. According to South Africa, Sudan remains a non-State Party, considering that the exercise of the Court's jurisdiction does not equal the assertion that Sudan becomes

[58] D. Akande, "The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities", 7 Journal of International Criminal Justice (2009), p. 342; see also C. Kreβ, "The International Criminal Court and Immunities under International Law for States Not Party to the Court's Statute" in M. Bergsmo and Y. Lin (eds), *State Sovereignty and International Criminal Law* (2012), pp. 240-243.

analogous to a State Party, and, therefore, article 98(1) of the Statute would apply.[59] It advances, more specifically, that

> Sudan is not, as is suggested by the Office of the Prosecutor, comparable to a State Party. It does not have the right to decide or to vote in the ASP. It does not pay membership fees. The only thing that Article 13(b) of the Rome Statute does or, rather, a UN Security Council pursuant to Article 13(b) does, is to confer jurisdiction on the Court. […] And yes, it is also to ensure that the whole Statute applies. But the whole Statute […] includes also Article 98. But it does nothing more than this. […] UN Security Council resolution operative paragraph 2 places an obligation on Sudan. This would not be necessary if Sudan was in a position comparable to that of a State, because then Part 9 of the Statute would already apply, and there would already be a duty on Sudan […] to cooperate.[60]

53. The core of the argument of South Africa is that the referral of the situation in Darfur to the Court by the UN Security Council was made to the extent that it respects the distinction between States and non-States Parties in accordance with the cardinal rule of international law that "[a] treaty does not create either obligations or rights for a third State without its consent".[61] For the reasons set forth below, this position also finds some support in the Statute.

b) Analysis of South Africa's submissions

54. First, as noted by South Africa, and as discussed above, the conclusion that a referral of a situation to the Court by the UN Security Council triggers the applicability of the entire Statute necessarily entails not only the applicability of article 27(2) of the Statute but also, *inter alia,* article 98(1) of the Statute. It has also been developed above that the latter provision regulates the relationship between: (i) non-States Parties and the Court; or (ii) non-States Parties and States Parties in the context of a request for cooperation by the Court addressed to a State Party. It follows that the referral of a situation to the Court by the UN Security Council also activates

[59] Transcript of hearing, 7 April 2017, ICC-02/05-01/09-T-2-ENG, p. 86.
[60] Transcript of hearing, 7 April 2017, ICC-02/05-01/09-T-2-ENG, p. 86.
[61] Article 34, 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331.

provisions relevant to non-States Parties. This indicates, in turn, that such a referral need not necessarily render a non-State Party analogous to a State Party to the Statute. A respected Judge appears to implicitly agree with this position:

> [t]he Statute of the Court provides that if the Head of State of a country which has ratified the Statute (Italy, France, England, Japan and so on) commits a crime such as genocide or crimes against humanity, he can be brought for judgment to the Court, because he cannot invoke the personal immunities which pertain to him. If however, the accused is the head of a State that has not ratified the Statute (China, Russia, US, Sudan and so on), he can benefit from this immunity.[62]

55. Second, the proposition that the Court may exercise its jurisdiction does not, as such, equal the conclusion that immunities of officials are removed as if a non-State Party is analogous to a State Party to the Statute. In this regard, the ICJ has found that "the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction".[63] This conclusion is derived from the general distinction between these two concepts. As expressed by the International Law Commission, "[i]f there is no jurisdiction, there is no reason to raise or consider the question of immunity from jurisdiction".[64] It follows that the two concepts must be independently assessed. Therefore, the existence of jurisdiction does not amount to the absence of immunities or *vice versa*. This approach is followed in national jurisprudence too. A review of domestic jurisdictions by the International Law Commission reveals that "[t]he existence of jurisdiction is […] the point of departure on which immunity is founded; neither practice nor doctrine has refuted this observation. It suffices to recall that, as a rule,

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[62] A. Cassese, *Giustizia impossibile*, La Repubblica, 5 March 2009, available at http://www.repubblica.it/2009/03/sezioni/esteri/bashir-mandato-cattura/cassese-bashir/cassese-bashir.html (last visited 5 July 2017).

[63] ICJ, *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) (Merits)*, Judgment of 14 February 2002, paras 59, 61.

[64] International Law Commission, Preliminary Report on Immunity of State Officials from Foreign Criminal Jurisdiction, by Roman Anatolevich Kolodkin, Special Rapporteur, A/CN.4/601, 29 May 2008, para. 43.

when national courts have taken decisions on claims of immunity, they have not found that they lack jurisdiction in abstract terms, but rather that they are unable to exercise it in respect of an official of a third State who enjoys immunity".[65]

56. Turning to the circumstances of the case at hand, this logic applies, *mutatis mutandis*, to the Court as well. The jurisdiction of the Court is necessarily exercised on the basis of the Statute, which includes, as discussed, both articles 27(2) and 98(1) of the Statute. The referral of the situation in Darfur to the Court did not therefore exclusively activate article 27(2) of the Statute, but preserved the possibility to apply article 98(1) of the Statute, which allows a non-State Party to invoke the immunities of certain officials vis-à-vis the Court or a State Party in certain circumstances. In view of the fact that jurisdiction and immunities are distinct concepts, it follows that, once the Court's jurisdiction has been established, it must, subsequently, be established whether any immunities bar the exercise of the Court's jurisdiction. This means that it need not follow that the mere fact that the Court may exercise jurisdiction on the basis of a referral of the UN Security Council renders article 27 of the Statute applicable as if Sudan were analogous to a State Party. It has been similarly argued in the literature that "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".[66]

57. Furthermore, these arguments need not be interpreted as removing all meaning from article 27(2) of the Statute, insofar it is suggested that the possibility to try a person with personal immunities before the Court is removed across the board. The

[65] International Law Commission, Fifth Report on Immunity of State Officials from Foreign Criminal Jurisdiction, by Concepción Escobar Hernández, Special Rapporteur, A/CN.4/701, 14 June 2016, para. 145.

[66] P. Gaeta, "Does President Al Bashir Enjoy Immunity from Arrest?", 7 Journal of International Criminal Justice (2009), p. 324. It is noted that the Majority does not consider in its analysis any of the arguments presented above.

reason is that this reading must be interpreted in line with the general limitations attaching to personal immunities under international law. As noted in the literature, "the possibility remains that a state, on the basis of […] an arrest warrant [issued by the Court], can surrender a person to the ICC once this person is no longer entitled to immunities because he or she has relinquished his or her post, or because the requesting state has managed to obtain a waiver of immunities from the foreign state that the person represents".[67] On the basis of this approach, it cannot be said that "the Court's jurisdiction could never be given effect".[68] Its jurisdiction is, namely, not annulled in full, but must be exercised in conjunction with rules of general international law applicable in the specific context of the referral of a situation to the Court by the UN Security Council.

D. Conclusion

58. In conclusion, the arguments of both the Prosecutor and South Africa contain a degree of validity. Both sets of submissions find, to a certain extent, support in the Statute and the academic debate. However, contrary to the position of the Majority,[69] these submissions do not allow for a firm conclusion to be reached with regard to the question of whether or not Sudan is analogous to a State Party to the Statute pursuant to the referral of the situation in Darfur to the Court by the UN Security Council in view of the aforementioned divergences. Therefore, given the current state of the law, it cannot be determined, exclusively on the basis of the legal effects generated by UN Security Council Resolution 1593, whether, in general, either article 27(2) of the Statute or article 98(1) of the Statute applies between the Court, South

[67] P. Gaeta, "Does President Al Bashir Enjoy Immunity from Arrest?", 7 Journal of International Criminal Justice (2009), p. 326; see also D. Jacobs, "The Frog that Wanted to be an Ox: The ICC's Approach to Immunities and Cooperation" in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (2015), p. 295.
[68] Transcript of hearing, 7 April 2017, ICC-02/05-01/09-T-2-ENG, p. 72.
[69] Majority Decision, para. 88.

Africa, and Sudan in relation to the request to arrest and surrender Omar Al-Bashir to the Court.

IV. Did the UN Security Council Resolution 1593 remove the immunity of Omar Al-Bashir?

59. The next question that arises is whether UN Security Council Resolution 1593 removed the immunities of Omar Al-Bashir either directly or indirectly. Basing itself on the rules of treaty interpretation contained in the Vienna Convention on the Law of Treaties, South Africa submits that "each and every one of these elements […] supports the interpretation that the immunities of Mr Al Bashir have not been affected by UN Security Council Resolution 1593 […]".[70] The Prosecutor, in contrast, argues that the approach espoused in the decision in relation to the Democratic Republic of the Congo[71] was correct[72] and supports her assertion with a number of specific submissions.[73] Before addressing these arguments, two preliminary issues must be resolved.

60. The first preliminary issue concerns the legal basis for the possibility of removing Omar Al-Bashir's immunities by means of UN Security Council Resolution 1593. This basis arises out of a combined reading of the following provisions of the UN Charter: (i) "[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter";[74] and (ii) "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other

[70] Transcript of hearing, 7 April 2017, ICC-02/05-01/09-T-2-ENG, p. 28.
[71] Pre-Trial Chamber II, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, 9 April 2014, ICC-02/05-01/09-195.
[72] Transcript of hearing, 7 April 2017, ICC-02/05-01/09-T-2-ENG, p. 64.
[73] Transcript of hearing, 7 April 2017, ICC-02/05-01/09-T-2-ENG, pp. 65-68.
[74] Article 25, 1945 Charter of the United Nations, 1 UNTS XVI.

international agreement, their obligations under the present Charter shall prevail".[75] Thus, if UN Security Council Resolution 1593 may be interpreted as removing the immunities of Omar Al Bashir, Sudan's obligation to "cooperate fully" pursuant to UN Security Council Resolution 1593 could be seen to prevail over the possibility to allow non-States Parties to uphold immunities vis-à-vis the Court and States Parties on the basis of article 98(1) of the Statute.

61. Such an approach presumes that the UN Security Council may deviate not only from conventional international law (as is suggested by the reference to "obligations under any other international agreement" in article 103 of the UN Charter), but also from international customary law, considering that the rules on immunities also belong to the latter category. In this regard, scholars disagree on the powers of the UN Security Council to set aside customary international law.[76] However, "the prevailing opinion [is] that Article 103 should be read extensively - so as to affirm that charter obligations prevail also over United Nations Member States' customary law obligations".[77] Accordingly, it is assumed *arguendo* that the UN Security Council may deviate from both conventional and customary international law.

62. The second preliminary issue concerns the powers of the Court to interpret UN Security Council resolutions.[78] In this regard, the Prosecutor has, on the basis of

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[75] Article 103, 1945 Charter of the United Nations, 1 UNTS XVI.

[76] International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi, A/CN.4/L.682, 13 April 2006, para. 344.

[77] International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi, A/CN.4/L.682, 13 April 2006, para. 345.

[78] It is imperative to emphasise that these proceedings are not concerned with the legality of UN Security Council Resolution 1593 in the context of the UN Charter. Certain other tribunals were established by the UN Security Council, which could raise issues as to the legality of the decision-making process under the UN Charter in relation to the proceedings conducted by these tribunals (see ICTY, *Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995; Special Tribunal for Lebanon, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01, Appeals Chamber, Decision on the Defence Appeals against the Trial Chamber's "Decision on the Defence Challenges to the Jurisdiction and

article 119 of the Statute, argued that "because the Court can only assert jurisdiction over the territory of a non-Party State by virtue of a Security Council resolution […], it will always be necessary in such situations for the Court to interpret the relevant resolution".[79] According to South Africa, "while the Court may interpret the UN Security Council resolution, it does not have the special powers of interpretation that it has with respect to the Rome Statute".[80] These submissions, therefore, raise the question whether the Court may autonomously interpret UN Security Council Resolution 1593 to determine its effects on the proceedings regarding Omar Al-Bashir in the context of the Statute. For the reasons that follow, the Court must be considered to have such a power.

63. Article 119(1) of the Statute stipulates that "[a]ny dispute concerning the judicial functions of the Court shall be settled by the decision of the Court". This provision expresses the doctrine of *compétence de la compétence*. As held by the ICTY, "this power […] is part, and indeed a major part, of the incidental or inherent jurisdiction of any judicial or arbitral tribunal, consisting of its 'jurisdiction to determine its own jurisdiction'".[81] On this basis, the Court is required to interpret UN Security Council Resolution 1593, considering that the question before it concerns the limits of its jurisdiction in the situation in Darfur. If it is accepted that UN Security Council Resolution 1593 does not remove the immunities of Omar Al-Bashir, it could be maintained that the Court is barred from exercising its jurisdiction over the crimes for which Omar Al-Bashir allegedly bears individual criminal responsibility. If it is accepted that UN Security Council Resolution 1593 does remove the immunity of

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Legality of the Tribunal", 24 October 2012, STL-11-01/AC/AR90.1). However, the Court was set up by means of a treaty, which has conferred a particular role on the UN Security Council in articles 13(b) and 16 of the Statute. Therefore, the Court is exclusively concerned with the legal effects of a UN Security Council resolution vis-a-vis the Statute.

[79] Transcript of hearing, 7 April 2017, ICC-02/05-01/09-T-2-ENG, p. 62.

[80] Transcript of hearing, 7 April 2017, ICC-02/05-01/09-T-2-ENG, p. 84.

[81] ICTY, *Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 18.

Omar Al-Bashir, it could be argued that then there is no such bar to the exercise of the jurisdiction of the Court. Accordingly, it is incumbent on the Court to consider this question and, in order to do so, the Court must interpret UN Security Council Resolution 1593.

A. How is UN Security Council Resolution 1593 to be interpreted vis-à-vis the immunities of Omar Al-Bashir?

64. Having found that the Court has the power to interpret UN Security Council Resolution 1593, the question arises as to the interpretative method to be applied. In this regard, the ICJ has provided the following statement:

> While the rules on treaty interpretation embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance, differences between Security Council resolutions and treaties mean that the interpretation of Security Council resolutions also require that other factors be taken into account. Security Council resolutions are issued by a single, collective body and are drafted through a very different process than that used for the conclusion of a treaty. Security Council resolutions are the product of a voting process as provided for in Article 27 of the [U.N.] Charter, and the final text of such resolutions represents the view of the Security Council as a body. Moreover, Security Council resolutions can be binding on all Member States (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 54, para. 116), irrespective of whether they played any part in their formulation. The interpretation of Security Council resolutions may require the Court to analyse statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue, as well as the subsequent practice of relevant United Nations organs and of States affected by those given resolutions.[82]

65. Accordingly, the following interpretation of UN Security Council Resolution 1593 is based on the aforementioned factors.

[82] ICJ, *Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Request for Advisory Opinion)*, Advisory Opinion of 22 July 2010, para. 94.

a) Ordinary meaning

66. An interpretation of the ordinary meaning of paragraph 2 of UN Security Council Resolution 1593, in which the UN Security Council decided "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", yields different outcomes.

67. Such an interpretation could, in principle, indicate that the UN Security Council did not remove the immunities of Omar Al-Bashir. As argued by South Africa, "[a] consideration of the ordinary meaning in paragraph 2 of UN Security Council Resolution 1593 suggests that it is not at all concerned with immunities".[83] Indeed, paragraph 2, the main operative paragraph in relation to the obligations of Sudan vis-à-vis the Court, establishes a duty to "cooperate fully", but omits an explicit reference to the removal of immunities. In view of the importance of the rules on immunities in international law, the absence of any such reference may be interpreted as a desire on the part of the UN Security Council not to address such matters. In light of the delicate nature of the question of immunities of a sitting Head of State, the UN Security Council may have been expected to express itself explicitly on this matter, had it intended to remove the immunities Omar Al-Bashir enjoys.[84] This is confirmed, *mutatis mutandis*, by a rapporteur of the International Law Commission, who states that "when applied to a serving Head of State […] a waiver of immunity should be explicitly stated".[85]

68. However, it may be questioned whether a textual interpretation applies to UN Security Council resolutions in the manner suggested in the preceding

[83] Transcript of hearing, 7 April 2017, ICC-02/05-01/09-T-2-ENG, p. 28.
[84] E.g. M. du Plessis, "Exploring Efforts to Resolve the Tension between the AU and the ICC over the Bashir Saga" in E. Ankumah (ed.), *The International Criminal Court and Africa* (2016), p. 258; D. Jacobs, "The Frog that Wanted to be an Ox: The ICC's Approach to Immunities and Cooperation" in C. Stahn, *The Law and Practice of the International Criminal Court* (2015), p. 295.
[85] International Law Commission, Third Report on immunity of State officials from foreign criminal jurisdiction, by Roman Anatolevich Kolodkin, Special Rapporteur, A/CN.4/646, para. 55.

paragraph. In this regard, it has been indicated that, "[i]nstead of explaining the extent to which states must deviate from international law under a Security Council resolution, resolutions under Chapter VII indicate what states may *not* do when deviating from international law in accordance with the resolution. It follows that all deviations that are *not allowed* are specified in the resolution".[86] Indeed, as indicated previously, the ICJ has considered that the principles of treaty interpretation set forth in the Vienna Convention on the Law of Treaties only serve as a guide in relation to UN Security Council resolutions and that the specific characteristics of such resolutions must be taken into account. Therefore, on the basis of this position, an explicit removal of the immunities of Omar Al-Bashir was not required, since "[t]he reference to 'full cooperation' in Resolution 1593 should be taken to denote all required measures under domestic and international law, including lifting immunities".[87]

b) Context

69. A contextual interpretation of paragraph 2 of UN Security Council Resolution 1593 similarly leads to diverging results.

70. Such an interpretation could support the conclusion that the reference to "cooperate fully" may be construed as a removal of Omar Al-Bashir's immunities. In this regard, the Prosecutor avers that "the Security Council in the first paragraph of the preamble of the resolution takes note of the report of the International Commission of Inquiry, and that report […] refers to the fact that the crimes which it had identified implicated the responsibilities of government officials".[88] In more specific terms, this report mentions *inter alia* that "individuals, including Government

[86] E. de Wet, "The Implications of President Al-Bashir's Visit to South Africa for International and Domestic Law", 13 Journal of International Criminal Justice (2015), p. 1061 (emphases in original).
[87] E. de Wet, "The Implications of President Al-Bashir's Visit to South Africa for International and Domestic Law", 13 Journal of International Criminal Justice (2015), p. 1061.
[88] Transcript of hearing, 7 April 2017, ICC-02/05-01/09-T-2-ENG, p. 68.

officials, may commit acts with genocidal intent" and that this "is a determination that only a competent court can make on a case-by-case basis".[89] In addition, it refers, more generally, to the possible involvement of senior governmental officials in the crimes in Darfur,[90] recommends that immunities granted to officials under Sudanese law be abolished,[91] and proposes that the Security Council refer the situation in Darfur to the Court[92]. In light of these findings, it may be argued that the Security Council was aware of the possibility that immunities could potentially constitute a bar to the exercise of the jurisdiction of the Court. Considering that the UN Security Council acted with such knowledge, the reference to "cooperate fully" could, as a consequence, be seen to remove immunities.

71. Similarly, as argued by the Prosecutor,[93] the Security Council took note of "the existence of agreements referred to in Article 98-2 of the Rome Statute"[94] and decided, on this basis, "that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State".[95] The reference to article 98(2) of the Statute indicates that, where the UN Security Council believed that article 98 of the Statute was at issue, it explicitly set

[89] Report of the International Commission of Inquiry on Darfur to the Secretary-General Pursuant to Security Council Resolution 1564 (2004) of 18 September 2004, 25 January 2005, S/2005/60, para. 641.
[90] Report of the International Commission of Inquiry on Darfur to the Secretary-General Pursuant to Security Council Resolution 1564 (2004) of 18 September 2004, 25 January 2005, S/2005/60, paras 644-645.
[91] Report of the International Commission of Inquiry on Darfur to the Secretary-General Pursuant to Security Council Resolution 1564 (2004) of 18 September 2004, 25 January 2005, S/2005/60, para. 650(a).
[92] Report of the International Commission of Inquiry on Darfur to the Secretary-General Pursuant to Security Council Resolution 1564 (2004) of 18 September 2004, 25 January 2005, S/2005/60, para. 647.
[93] Transcript of hearing, 7 April 2017, ICC-02/05-01/09-T-2-ENG, pp. 67-68.
[94] Resolution 1593, Preamble.
[95] Resolution 1593, para. 6.

out its ramifications. It follows that the fact that the Security Council did not refer to article 98(1) of the Statute in relation to Sudan's obligation to "cooperate fully" may indicate that it did not believe that this aspect of the provision had any effect on the obligation imposed on Sudan. If so, such an obligation could be seen to encompass the removal of Omar Al-Bashir's immunities.

72. However, a particular contextual element points towards the opposite conclusion. At the time of adoption of UN Security Council Resolution 1593 no warrants of arrest had been issued by the Court. Even though the International Commission of Inquiry referred to the possible involvement of high-ranking Sudanese officials in crimes, immunities under international law pertain only to a specific number of State officials in the highest echelons of government. This means that it was not certain that persons falling in this category would become the object of warrants of arrest issued by the Court. Indeed, the Prosecutor stated that his assessment would be independent of the findings of the International Commission of Inquiry.[96] Accordingly, in this context, it may be concluded that the reference to "cooperate fully" was not necessarily connected to the issue of immunities.

c) Object and purpose

73. Next, the object and purpose of UN Security Council Resolution 1593 will be considered. This factor also does not provide a clear indication as to the intention of the UN Security Council on the removal of immunities of Omar Al-Bashir.

74. UN Security Council Resolution 1593 does not exclusively concern a referral of the situation in Darfur to the Court, but envisages other measures to address the alleged crimes committed in Darfur as well. In this regard, UN Security Council Resolution 1593 "*[i]nvites* the Court and the African Union to discuss practical arrangements that will facilitate the work of the Prosecutor and of the Court, including the

[96] UN Security Council, 532st Meeting, 13 December 2005, S/PV.5321, p. 2.

possibility of conducting proceedings in the region",[97] "*[a]lso encourages* the Court, as appropriate and in accordance with the Rome Statute, to support international cooperation with domestic efforts to promote the rule of law, protect human rights and combat impunity in Darfur";[98] and "*[a]lso emphasizes* the need to promote healing and reconciliation and encourages in this respect the creation of institutions, involving all sectors of Sudanese society, such as truth and/or reconciliation commissions, in order to complement judicial processes and thereby reinforce the efforts to restore longlasting peace, with African Union and international support as necessary"[99]. This resolution, therefore, constitutes a loosely worded patchwork of measures seeking to establish a durable solution for the situation in Darfur. The referral of the situation to the Court is, thus, only one element of this approach. This could suggest that, in light of the multi-faceted object and purpose of UN Security Council Resolution 1593, the removal of immunities of Omar Al Bashir was not necessarily contemplated.

75. Conversely, the referral of the situation in Darfur to the Court by the UN Security Council could be seen as the primary mechanism to address the alleged crimes committed in Darfur. This is because the UN Security Council used the introductory verb "*[d]ecides*" in relation to the referral, whereas the aforementioned mechanisms are introduced by "*[i]nvites*", "*[a]lso encourages*", and "*[a]lso emphasizes*". The difference in wording suggests that the remaining mechanisms are additional to the referral of the situation in Darfur to the Court. Such a construction of the object and purpose of UN Security Council Resolution 1593 would support the interpretation of "cooperate fully" as removing immunities, so as to enable the Court to try all individuals suspected of crimes within the jurisdiction of the Court.

[97] Resolution 1593, para. 3.
[98] Resolution 1593, para. 4.
[99] Resolution 1593, para. 5.

d) Statements by Members of the UN Security Council

76. The statements by representatives of Members of the UN Security Council made at the time of the adoption of UN Security Council Resolution 1593 also fail to provide a firm foundation to determine whether the UN Security Council sought to remove Omar Al-Bashir's immunities.

77. The record of the 5158th meeting of the UN Security Council, at which time the resolution in question was adopted, indicates that the issue of immunities of high-ranking Sudanese officials was not discussed directly.[100] This suggests that the removal of immunities was not considered when Sudan's obligation to "cooperate fully" was set out by the UN Security Council. In fact, in other meetings of the UN Security Council, certain States directly or indirectly expressed the view that Omar Al-Bashir continues to enjoy immunities under international law.[101]

78. However, in other meetings of the UN Security Council, certain States explicitly indicated that the aim of Resolution 1593 was to ensure that (all) perpetrators of serious crimes should be punished. Such statements may be seen as a possible endorsement of the position that immunities were removed by UN Security Council Resolution 1593.[102]

e) Other UN Security Council resolutions

79. Other resolutions of the UN Security Council on Sudan or similar issues lack any indication as to the question whether the reference to "cooperate fully" entails a

[100] UN Security Council, 5158th Meeting, 31 March 2005, S/PV.5158.
[101] E.g. UN Security Council, 7478th Meeting, 29 June 2015, S/PV.7478 (Bolivarian Republic of Venezuela: "The issuance of the warrant of arrest by the International Criminal Court against President Omar Al-Bashir violates customary international law, which guarantees jurisdictional immunity to [serving] Heads of State"; Russia: "we recall that, in addition to the obligation to cooperate with the ICC, the Statute states that parties to the Statute are bound by obligations arising from international legal norms governing the immunity of high-level officials, particularly Heads of States, of States that, like the Sudan, are not party to the Rome Statute").
[102] See *infra* Section V.A.

removal of immunities of those Sudanese officials that can claim such immunities under international law. In the context of the alleged crimes in Darfur, other resolutions of the UN Security Council on Sudan have not addressed the referral to the Court in more detail, besides reiterating, on certain occasions, the general obligations of Sudan to bring perpetrators of serious crimes to justice.[103] Furthermore, other resolutions of the UN Security Council concerning serious crimes in different contexts do not provide clear guidance as to a possible removal of immunities either. In referring the situation in Libya since 15 February 2011 to the Court, the UN Security Council stated in a nearly identical manner "that the Libyan authorities shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution".[104] However, it also omitted to specify whether such a duty encompassed a removal of immunities.

f) Subsequent practice of UN organs and affected States

80. The subsequent practice of relevant UN organs and of States affected by UN Security Council Resolution 1593 may be interpreted in conflicting manners as well.

81. Certain elements of the practice of the UN Security Council and affected States point towards an understanding that UN Security Council Resolution 1593 did not affect the immunities of Omar Al-Bashir. Sudan initially cooperated with the Court.[105] This situation changed once the Court issued the first warrants of arrest against persons suspected of crimes in the situation in Darfur[106] and deteriorated after the warrants

[103] E.g. UN Security Council Resolution 2035 (2012), 17 February 2012, S/RES/2035 (2012); UN Security Council Resolution 2063 (2012), 31 July 2012, S/RES/2063 (2012).
[104] UN Security Council Resolution 1970 (2011), 26 February 2011, S/RES/1970 (2011), para. 5.
[105] E.g. UN Security Council, 532st Meeting, 13 December 2005, S/PV.5321, p. 4; UN Security Council, 5459th Meeting, 14 June 2006, S/PV.5459, p. 2.
[106] E.g. UN Security Council, 5789th Meeting, 5 December 2007, S/PV.5789, p. 3.; UN Security Council, 5905th Meeting, 5 June 2008, S/PV.5905, p. 3.

of arrest against Omar Al-Bashir were issued[107]. However, despite the fact that the Court has referred Sudan to the UN Security Council for non-compliance with requests to arrest and surrender Omar Al-Bashir under article 87(7) of the Statute, the UN Security Council has not adopted any measures against Sudan that would suggest that it expected Sudan to lift the immunities against Omar Al-Bashir.[108] Similarly, the Court has informed the UN Security Council of visits by Omar Al-Bashir to certain States and it has referred several States Parties to the UN Security Council for failing to arrest and surrender Omar Al-Bashir.[109] Yet, the UN Security Council has not adopted any measures to ensure the execution of the warrants of arrest in such situations either.[110] Moreover, several States Parties have explicitly argued that the immunities Omar Al-Bashir enjoys under international law prevented them from executing the warrants of arrest issued by the Court.[111]

82. However, other elements of the subsequent practice of the UN Security Council and affected States call this understanding into doubt. The UN Security Council has not addressed requests by the African Union to adopt a resolution under Chapter VII of the UN Charter to defer investigations or prosecutions in the situation in Darfur in accordance with article 16 of the Statute.[112] These requests were, in part, based on its view that sitting Heads of State enjoy immunities under international law.[113] The fact that the UN Security Council did not adopt such a resolution could be evidence for the position that the immunities of Omar Al-Bashir did not form an obstacle for the exercise of the jurisdiction of the Court on the understanding that UN Security Council Resolution 1593 removed such immunities. Furthermore, certain States have

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[107] E.g. UN Security Council, 6688th Meeting, 15 December 2011, S/PV.6688, p. 3; UN Security Council, 6778th Meeting, 5 June 2012, S/PV.6778, p. 3.
[108] See further *infra* Section V.A.
[109] See further *infra* Section V.A.
[110] See further *infra* Section V.A.
[111] See further *infra* Section V.A.
[112] See further *infra* Section V.A.
[113] See further *infra* Section V.A.

expressly indicated that States are under an obligation to arrest and surrender Omar Al-Bashir on the basis of the Statute and/or UN Security Council Resolution 1593.[114]

B. Conclusion

83. In conclusion, an interpretation of UN Security Council Resolution 1593 on the basis of the factors put forward by the ICJ yields either contradictory outcomes or indistinct results. Therefore, similarly to the question regarding the status of Sudan pursuant to the adoption of UN Security Council Resolution 1593, the current state of the law does not allow a definite answer to be reached in relation to the question of whether this resolution removes the immunities of Omar Al Bashir, contrary to the Majority's position in relation to this matter.[115]

V. Does the involvement of an international court affect the application of the rule of customary international law regarding the personal immunity of Heads of State in the relationship between States?

84. There is a well-established rule of customary international law according to which incumbent Heads of State enjoy immunity from arrest and prosecution by domestic courts of third States, even in respect of international crimes. This rule has a clear rationale, namely to ensure the unimpeded conduct of international relations and to prevent interference in the internal affairs of a State by a third State.[116] However, the rule is limited to the horizontal relationship between States *inter se.* The question, accordingly, arises whether the involvement of an international court affects the application of the rule of customary international law regarding the personal immunity of Heads of State in the relationship between States. In more specific terms, is a State Party to the Statute obliged to respect the immunity of the Head of

[114] See further *infra* Section V.A.
[115] Majority Decision, para. 96.
[116] See further *infra* Concluding remarks.

State of a non-State Party to the Statute, on the basis of the existing rule of customary international law regulating the horizontal relationship between States?

85. This question will be addressed from two perspectives. First, the manner in which States have approached this question will be assessed. Second, it will be examined whether the involvement of an international court affects the application of the rule of customary international law regarding Head of State immunity between States.

A. States' responses

86. It is well known that, in the *Arrest Warrant* case, the ICJ held that there is no exception to immunity *ratione personae* in domestic courts of third States in relation to international crimes.[117] It affirmed this conclusion in a subsequent case.[118] Domestic courts have arrived at the same conclusion on multiple occasions as well,[119]

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[117] ICJ, *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium),*(*Merits*), Judgment of 14 February 2002, para. 58.

[118] ICJ, *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France*), Judgment of 4 June 2008 , para. 170. See also ICJ, *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening),* Judgment of 3 February 2012, paras 81-97 (regarding civil liability).

[119] E.g. *R v. Bow Street Magistrate and Others, Ex parte Pinochet Ugarte* (no. 3) [2000] 1 A.C. 147, Lord Hope of Craighead, p. 244; Lord Hutton, p. 261; Lord Saville of Newdigate, pp. 265-266; Lord Millett, p. 277; and Lord Phillips of Worth Matravers, p. 289 (U.K.); *Tatchell v. Mugabe*, Bow Street Magistrates' Court, 14 January 2004, 136 ILR 572, p. 573 (U.K.); *Re Bo Xilai*, Bow Street Magistrates' Court, 8 November 2005, 128 ILR 713, p. 714 (U.K.); *Re Mofaz*, Bow Street Magistrates' Court, 12 February 2004, 128 ILR 709, pp. 711-712 (U.K.); *Gaddafi*, Court of Cassation, Criminal Chamber, Judgment of 13 March 2001, n°de pourvoi: 00-87215, 125 ILR 508, p. 509 (France); *Re Sharon and Yaron, HSA v. SA (Ariel Sharon) and YA (Amos Yaron)*, (decision related to the indictment of Ariel Sharon, Amos Yaron and others) Court of Cassation, 12 February 2003, n°P.02.1139.F, 127 ILR 110, pp. 123-124 (Belgium); *Re Pinochet*, Investigating Judge to the Brussels' Court of First Instance, Court Order of 6 November 1998, 119 ILR 345, p. 349 (Belgium); National High Court, *Vallmajo I Sala and others v Kabareb and 68 others, Formal Indictment,* Order No. 3/2008 of 6 February 2008, case report available at http://opil.ouplaw.com/view/10.1093/law:ildc/1198es08.case.1/law-ildc-1198es08?rskey=D0OXM1&result=2&prd=OPIL (last visited 29 June 2017) (Spain); National High Court, *Teodoro Obiang Nguema and Hassan II*, Order of Central Investigation Court No. 5 of 23 December 1998 (Spain); National High Court, *Fidel Castro*, Criminal Chamber, Order 1999/2723 of 4 March 1999, 32 ILM 596 (Spain); National High Court, *Milošević*, Order of Central Investigating Court No. 1, of 25 October 1999 (Spain); National High Court, *Alan García Pérez and Alberto Fujimori*, Order of 15 June 2001 (Spain); National High Court, *Silvio Berlusconi*, Order No. 262/97, of 27 May 2002 (Spain); The Hague District Court, *The Hague City Party (De Haagse Stadspartij) and others v Netherlands and others,* Interlocutory Proceedings, Case No. KG 05/432, Decision No LJN: AT5152, case

notwithstanding certain limited exceptions adopted in specific circumstances.[120] However, States' approaches diverge in relation to the question of whether a State Party to the Statute, acting pursuant to its obligations towards the Court, may set aside the international customary law immunities of a Head of State of a non-State Party to the Statute.

87. On the one hand, a number of States are of the view that, in these circumstances, the immunities of incumbent Heads of State of non-States Parties to the Statute do not constitute an obstacle to their arrest and surrender to the Court. This approach suggests that the involvement of an international court alters the application of the horizontal rule of Head of State immunity under customary international law. First, States Parties implementing the Statute into national law have adopted provisions declaring that personal immunities of sitting Heads of State shall not be a bar to requests for arrest and surrender by the Court.[121] Second, in the context of UN

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report available at http://opil.ouplaw.com/view/10.1093/law:ildc/849nl05.case.1/law-ildc-849nl05 (last visited 28 June 2017) (The Netherlands); Supreme Court, *Sesay (Issa) and others v. President of the Special Court for Sierra Leone and others*, Original application, SC no 1/2003, 14 October 2005, case report available at http://opil.ouplaw.com/view/10.1093/law:ildc/199sl05.case.1/law-ildc-199sl05?rskey=Mk9I7l&result=2&prd=OPIL (last visited 28 June 2017) (Sierra Leone).

[120] Oberlandesgericht [Higher Regional Court] Cologne, *In re Hussein*, Case No. 2 Zs 1330/99, Judgment of 16 May 2000, case report available at http://opil.ouplaw.com/view/10.1093/law:ildc/2242de00.case.1/law-ildc-2242de00?rskey=zstzxN&result=12&prd=OPIL (last visited 30 June 2017) (Germany); Court of Appeal of Paris, *Teodoro Nguema Obiang Mangue*, *Pôle* 7, Second Investigating Chamber, Judgment of 13 June 2013; and application for annulment, Judgment of 16 April 2015 (France).

[121] Article 39, Burkina Faso's law *portant determination des compétences et de la procedure de mise en oeuvre du Statut de Rome relatif à la Cour Pénale Internationale par les juridictions Burkinabe* (2009); § 48, Canada's Crimes Against Humanity and War Crimes Act (2000), inserting a new § 6.1 into the Extradition Act (1999); Articles 6(3) and (4), Croatia's Law on the Implementation of the Statute of the International Criminal Court and the Prosecution of Crimes Against International Law of War and Humanitarian Law; Article 489 of Estonia's Code of Criminal Procedure (2003) also appears to deny immunity with regard to arrests in execution of ICC's request given that it does not provide for such immunity, while article 492(6) dealing with European arrest warrants explicitly bars execution of such warrants with respect to persons entitled to immunity under international law unless a waiver is obtained; §21, Germany's Courts Constitution Act; §27, Kenya's International Crimes Act (2008); §31(1), New Zealand's International Crimes and International Criminal Court Act (2000); §10(9), South Africa's Implementation of the Rome Statute of the International Criminal Court Act (2002); Article 6, Swiss Federal Law on Cooperation with the International Criminal Court (2001), which permits arrest despite any question of immunity but provides the Swiss Federal Council shall decide on "questions

Security Council meetings, certain States have emphasised the need to execute warrants of arrest issued by the Court, which could indicate that these States do not consider that the existing rule of customary international law relating to Head of State immunity constitutes an obstacle vis-à-vis the Court.[122]

88. On the other hand, the approach of other States indicates that the involvement of the Court does not alter or displace the application of the existing rule of customary international law regarding immunities of Heads of State, as shown below.

89. In the context of both the African Union and the Arab League, States have taken a firm stance that no exception exists in customary international law for personal immunities of Heads of State.[123] Furthermore, during meetings of the UN Security

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of immunity relating to article 98 in conjunction with article 27 of the Statute which arise in the course of execution of the request"; §31, Trinidad and Tobago's International Criminal Court Act (2006); §25, Uganda's International Criminal Court Act (2010); see also §25 of the Commonwealth's Model Law to Implement the Rome Statute of the International Criminal Court. See D. Akande, "The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities", 7 Journal of International Criminal Justice (2009), p. 338, footnote 19 and R. Pedretti, *Immunity of Heads of State and State Officials for International Crimes* (2015), pp. 118-122.

[122] E.g.: **Australia**, during the UN Security Council 7337th Meeting, 12 December 2014, S/PV.7337, p. 4: "The Pre-Trial Chamber clearly concluded that Head of State immunity does not apply in the current circumstances". **Columbia**, during the UN Security Council 6887th Meeting, 13 December 2012, S/PV.6887, p. 13: "The primary focus of the Council's attention and that of the international community should be on carrying out the arrest orders issued by the Court". **France**, during the UN Security Council 6778th Meeting, 5 June 2012, S/PV.6778, p. 12: "States Parties cannot host on their territory an individual under an ICC arrest warrant without moving towards his arrest". **Germany**, during the UN Security Council 6778th Meeting, 5 June 2012, S/PV.6778, p. 18: "Germany reiterates its call upon all States Parties to the Rome Statute to fully honour their obligation to cooperate with the Court and execute any arrest warrant issued by it". **Guatemala**, during the UN Security Council 7080th Meeting, 11 December 2013, S/PV.7080, p. 10: "Concerned that some States Parties to the Court are not complying with the cooperation required of them to execute those arrest warrants". **Ukraine**, during the UN Security Council 7710th Meeting, 9 June 2016, S/PV.7710, p. 9: Ukraine refers to article 27 of the Statute and "believes that the arrest warrants against suspects in the ICC's investigation into the situation in Darfur should be carried out".

[123] African Union, Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court, 3 July 2009, Assembly/AU/13 (XIII), para. 10; African Union Assembly, Decision on the Implementation of the Assembly Decisions on the International Criminal Court Doc.EX.CL/670 (XIX), 17th Ordinary Session, 30 June – 1 July 2011, Assembly/AU/Dec.366 (XVII), para. 5; African Union Assembly, Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court (ICC) Doc.EX.CL/710 (XX), 18th Ordinary Session, 29 – 30 January 2012, Assembly/AU/Dec.397 (XVIII),

Council, certain States have, directly or indirectly, defended the proposition that Omar Al-Bashir is still entitled to his personal immunity.[124] In addition, it is of particular interest that, in the context of these proceedings, the South African Supreme Court of Appeal concluded that it is "unable to hold that at this stage of the development of customary international law there is an international crimes exception to the immunity and inviolability that heads of state enjoy when visiting foreign countries and before foreign national Courts", despite there being a warrant of arrest from an international court or tribunal.[125]

90. Furthermore, both States Parties and non-States Parties to the Statute have repeatedly hosted Omar Al-Bashir on their territories, despite the warrants of arrest issued by the Court. Initially, the Court simply informed the UN Security Council and the ASP of States' failures to arrest Omar Al-Bashir.[126] Subsequently, the Court

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para. 6; Council of the Arab League (Ministerial Level), Resolution on the decision of Pre-Trial Chamber 1 to the International Criminal Court against the President of the Republic of Sudan, Omar Hassan Ahmad Al-Bashir, 4 March 2009, para. 4, unofficial translation prepared by the Coalition for the International Criminal Court, available at: http://www.iccnow.org/documents/09_03_04_AL_Resolution_on_Omar_Al-Bashir_(EN)_Unofficial_Translation_(2).pdf (last visited 19 June 2017).

[124] **Egypt**, during the UN Security Council 7710th Meeting, 9 June 2016, S/PV.7710, p. 11: "We reject any measure against States that have not arrested or delivered President Al Bashir to the ICC, especially since African countries must respect their obligations stemming from resolutions and decisions of the African Union summit as well as the Constitutive Act of the African Union". **Morocco**, during the UN Security Council 6887th Meeting, 13 December 2012, S/PV.6887, p. 17: Morocco recalls the League of Arab States' position with regard to the ICC indictment of Omar Al-Bashir. **Russia**, during the UN Security Council 6887th Meeting, 13 December 2012, S/PV.6887, p. 16: "Importance of the implementation by States of their relevant obligations regarding cooperation with the Court, while complying with the norms of international law in the matter of the immunity of senior State officials". **Rwanda**, during the UN Security Council 6974th Meeting, 5 June 2013, S/PV.6974, p. 6: "Believes that all African countries that received President Al Bashir since his indictment were in conformity with the decisions of the AU Summits". **Venezuela**, during the UN Security Council 7478th Meeting, 29 June 2015, S/PV.7478, p. 14; "The issuance of the warrant of arrest by the International Criminal Court against President Omar Al-Bashir violates customary international law, which guarantees jurisdictional immunity to [serving] Heads of State".

[125] *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* (867/15) [2016] ZASCA 17 (15 March 2016), para. 84.

[126] E.g. Pre-Trial Chamber I, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Kenya, 27 August 2010, ICC-02/05-01/09-107. Pre-Trial

referred both Sudan[127] and six States Parties to the UN Security Council and the ASP after making formal findings of non-compliance pursuant to article 87(7) of the Statute with regard to obligations to arrest and surrender Omar Al-Bashir.[128] In this regard, in stating their reasons for their failures to arrest Omar Al-Bashir, States Parties have generally contended that they consider Omar Al-Bashir to enjoy immunity from arrest by foreign States.[129] The President of the ASP has reminded States Parties of their obligations under the Statute, but these reminders have not

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Chamber I, *Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad, 27 August 2010, ICC-02/05-01/09-109. Pre-Trial Chamber I, *Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to Djibouti, 12 May 2011, ICC-02/05-01/09-129.

[127] Pre-Trial Chamber II, *Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision on the Prosecutor's Request for a Finding of Non-Compliance Against the Republic of the Sudan, 9 March 2015, ICC-02/05-01/09-227, p. 10.

[128] Pre-Trial Chamber I, *Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, 12 December 2011, ICC-02/05-01/09-139. Pre-Trial Chamber I, *Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, 13 December 2011, ICC-02/05-01/09-140. Pre-Trial Chamber II, *Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir, 26 March 2013, ICC-02/05-01/09-151. Pre-Trial Chamber II, *Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, 9 April 2014, ICC-02/05-01/09-195. Pre-Trial Chamber II, *Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute, 11 July 2016, ICC-02/05-01/09-266. Pre-Trial Chamber II, *Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute, 11 July 2016, ICC-02/05-01/09-267.

[129] Pre-Trial Chamber II, *Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute, 11 July 2016, ICC-02/05-01/09-266, pp. 4-5; Annex 1 to Rapport du Greffe relatif aux observations de la Republique du Tchad, 30 September 2011, ICC-02/05-01/09-135-Anx1, and Annex 1 to the Report of the Registry on the observations submitted by the Republic of Chad on Omar Al-Bashir's visit to the Republic of Chad, 21 March 2013, ICC-02/05-01/09-150-Anx1.

altered the views of the States Parties in question.[130] It is moreover noteworthy that the UN Security Council omitted to take any action against Sudan and other non-compliant States,[131] even following 25 bi-annual reports by the Prosecutor on actions taken pursuant to Resolution 1593.[132] As discussed, such inaction could be seen as support for the States' position that Omar Al-Bashir continues to enjoy immunity. This interpretation is bolstered by the fact that, despite numerous proposals made by some UN Security Council Member States to ensure an effective follow-up of the referral from the Court, none was forthcoming.[133]

91. In conclusion, the conflicting positions adopted by States reveal that it remains undecided whether the existing rule of customary international law regarding immunities enjoyed by incumbent Heads of State functions in the same manner if one of the States involved is acting pursuant to its obligations towards the Court. This conclusion is strengthened by the fact that many States have eschewed the matter of immunity in different forums, including following an express invitation by

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[130] Report of the Bureau on non-cooperation of the ASP 2012, 1 November 2012, ICC-ASP/11/29, para. 4.

[131] It is worth noting that the composition of the UN Security Council changes every year and includes both States Parties and non-States Parties to the Statute.

[132] Resolution 1593, para. 8. In her most recent statement before the UN Security Council on 8 June 2017, Prosecutor Bensouda expressed her hope that Pre-Trial Chamber II's decision regarding South Africa "will provide the basis for an improved coordination between [her] Office, the Court, States Parties and this Council in future efforts to arrest and surrender the Darfur suspects", UN Security Council 7963th Meeting, 8 June 2017, S/PV.7963, p. 3.

[133] E.g. **Argentina** during the UN Security Council 6974th Meeting, 5 June 2013, S/PV.6974, p. 12: "Argentina is in favour of the Council addressing the consideration of these letters in the appropriate forum, which in the view of my country should be the Informal Working Group on International Tribunals"; **Australia** during the UN Security Council 6974th Meeting, 5 June 2013, S/PV.6974, p. 16: "The Council's Sanctions Committees should give consideration to ICC arrest warrants and summonses to appear, with a view to ensuring greater consistency between sanctions lists and ICC indictments"; **Chad** during the UN Security Council 7199th Meeting, 17 June 2014, S/PV.7199, p. 14: "The issue of a solution to the follow-up of cases referred to the ICC could be usefully and judiciously discussed within the Conference of States Parties"; **Guatemala** during the UN Security Council 6887th Meeting, 13 December 2012, S/PV.6887, p. 17: Guatemala organized an open debate on strengthening cooperation between the UN Security Council and the ICC (17 October 2012, S/PV.6849); **New Zealand** during the UN Security Council 7582th Meeting, 15 December 2015, S/PV.7582, p. 7: New Zealand made two proposals: "That the Council be more structured in its consideration of these findings of non-cooperation" and that it rebuild its relation with Sudan.

the Chamber to submit written submissions in the context of non-compliance proceedings relating to South Africa,[134] with the welcome exception of the Kingdom of Belgium.[135] While silence or inaction may amount to acquiescence with the existing rule of customary international law regarding immunities in certain circumstances,[136] such silence may also simply reflect the sensitive nature of immunity and the unwillingness of State officials to commit themselves to a definite position on the matter.

B. The nature of international courts

92. The ICJ commented in the aforementioned *Arrest Warrant* case that the personal immunities of high-ranking officials "do not apply before certain international criminal courts, where they have jurisdiction".[137] The ICJ listed as examples the ICTY and the ICTR, making reference to their establishment in terms of resolutions under Chapter VII of the UN Charter, as well as to this Court, referring to article 27 of the Statute. The *obiter dictum* of the ICJ raises the question whether, by virtue of the international nature of this Court, the horizontal rule of customary international law regarding immunities of Heads of State continues to function in the same manner.

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[134] Pre-Trial Chamber II, *Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision convening a public hearing for the purposes of a determination under article 87(7) of the Statute with respect to the Republic of South Africa, 8 December 2016, ICC-02/05-01/09-274, pp. 6-7, in which the Chamber sought submissions with respect to:

> "(i) whether South Africa failed to comply with its obligations under the Statute by not arresting and surrendering Omar Al Bashir to the Court while he was on South Africa's territory despite having received a request by the Court under articles 87 and 89 of the Statute for the arrest and surrender of Omar Al Bashir; and, if so,
> (ii) whether circumstances are such that a formal finding of non-compliance by South Africa in this respect and referral of the matter to the Assembly of States Parties to the Rome Statute and/or the Security Council of the United Nations within the meaning of article 87(7) of the Statute are warranted".

[135] Registry, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Transmission of written observations from the Kingdom of Belgium, dated 20 February 2017, submitted pursuant to Pre-Trial Chamber II's Decision ICC-02/05-01/09-274, 23 February 2017, ICC-02/05-01/09-277-Anx-tENG.

[136] PCIJ, *The Case of the S.S. "LOTUS"*, Judgment of 7 September 1927, Series A, No. 10, p. 28; M. Shaw, *International Law* (2008), p. 81.

[137] ICJ, *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) (Merits)*, Judgment of 14 February 2002, para. 61.

93. On certain occasions, international courts appear to have indicated that they are not bound by the horizontal rule of customary international law regarding immunities of Heads of State. The SCSL relied upon its own international nature to reject the claim that the issuance of a warrant of arrest for Charles Taylor while he was serving as Head of State of Liberia was in violation of his immunity under customary international law.[138] Furthermore, no objection was raised on the basis of immunity to the warrant of arrest issued against Slobodan Milošević by the ICTY.[139] This is notwithstanding the fact that he was serving as the President of the then Federal Republic of Yugoslavia and that neither the UN Security Council Resolution 827 (1993) nor the tribunal's constitutive document expressly removed personal immunities of Heads of State. However, these precedents remain isolated, and no clear practice can be identified establishing that the international nature of a tribunal is sufficient to lift the personal immunities of State officials.

94. On a more general level, conflicting interpretations concerning the purpose of personal immunities vis-à-vis international courts have been provided in the scholarship. Some commentators have contended that the purpose of personal immunities logically suggests that international courts and tribunals are not bound by a rule applicable in the relationship between States.[140] As indicated above, the purpose of such immunities is to ensure the smooth running of the functions of high-ranking State officials in third States and to prevent such States from interfering with the exercise of these functions in order to facilitate effective and peaceful

[138] SCSL, *Prosecutor v Charles Ghankay Taylo*r, Case No. SCSL-2003-01-I, Appeals Chamber, Decision on Immunity from Jurisdiction, 31 May 2004, para. 34 *et seq*.
[139] See P. Gaeta, "Does President Al Bashir Enjoy Immunity from Arrest?", 7 Journal of International Criminal Justice (2009), p. 321.
[140] A. Cassese, *International Criminal Law* (2008), p. 312; P. Gaeta, "Does President Al Bashir Enjoy Immunity from Arrest?", 7 Journal of International Criminal Justice (2009); M. Blommestijn and C. Ryngaert, "Exploring the obligations for States to act upon the ICC's arrest warrant for Omar al-Bashir", Working Paper no.48 for Leuven Centre for Global Governance Studies (2010).

international relations.[141] It has, thus, been contended that, on the horizontal level, the protections are necessary to avoid abuse of jurisdiction by the receiving State, whereas this is not so at the international level. International courts do not promote any particular State's interests and act on behalf of the international community to protect collective values and repress serious crimes.[142] The exercise of jurisdiction by such courts cannot be seen as undue interference and personal immunities are, therefore, not considered necessary at the international level. Certain commentators disagree however with the position that the purpose of immunities differs in situations in which international courts are involved. International courts and tribunals are often created by agreements between States. Thus, it has been pointed out that, if there is no immunity before international courts and tribunals, States would be able to prosecute Heads of State and other State officials when acting in concert, when they would not be able to do so alone.[143] This may appear unacceptably arbitrary and it has been argued that, on this basis, the very concerns applicable to domestic prosecutions also apply to international courts and tribunals.[144]

95. Thus, the matter is not entirely clear. On the one hand, the *obiter dictum* of the ICJ suggests that, for one reason or another, personal immunities cannot be opposed before international courts and tribunals as before foreign domestic courts. On the other hand, there is also some reason to conclude that this *obiter dictum* simply

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[141] D. Akande, "International Law Immunities and the International Criminal Court", 98 American Journal of International Law (2004), pp. 409-410.

[142] See, for example, the Preamble of the Statute of this Court; the Preamble of UN Security Council Resolution 827 (1993), 25 May 1993, S/RES/827 (1993) establishing the ICTY; or the Preamble of UN Security Council Resolution 955 (1994), 8 November 1994, S/RES/955 (1994), establishing the ICTR.

[143] D. Akande, "ICC Issues Detailed Decision on Bashir's immunity (…At long Last…) But Gets the Law Wrong", *EJIL:Talk!* (15 December 2011), available at: https://www.ejiltalk.org/icc-issues-detailed-decision-on-bashir%E2%80%99s-immunity-at-long-last-but-gets-the-law-wrong/ (last visited 16 June 2017).

[144] D. Akande, "ICC Issues Detailed Decision on Bashir's immunity (…At long Last…) But Gets the Law Wrong", *EJIL:Talk!* (15 December 2011), available at: https://www.ejiltalk.org/icc-issues-detailed-decision-on-bashir%E2%80%99s-immunity-at-long-last-but-gets-the-law-wrong/ (last visited 16 June 2017).

means that specific rules applying to particular institutions remove immunity with regard only to the institution in question. It is, therefore, not possible to make a firm finding on the matter.[145]

C. Conclusion

96. The approaches of States differ in relation to the question of whether the existing rule of customary international law regarding immunities, which regulates the horizontal relationship between States, functions in the same manner in the relationship between a State Party to the Statute and a non-State Party to the Statute. This may be the result of the varying approaches adopted by the international courts in respect of this issue and the possibly diverging application of the rationales of the rule of customary international law on immunities in the two contexts. Accordingly, it is not possible to determine, at this point in time, whether the scope of senior officials' immunity from arrest is restricted when the arresting State is acting in compliance with its obligations towards the Court or whether the rule of customary international law applies in the same manner in these circumstances as it would in the horizontal relationship between States.

VI. Concluding remarks

97. The call for contributions from States Parties and the UN issued by this Chamber and the 7 April 2017 hearing were the first opportunities for an open debate on the issue of immunity of a Head of State of a non-State Party to the Statute, following a referral by the UN Security Council. The arguments raised by South Africa and by the Prosecutor, as well as the different approaches that States have taken in relation to the existing horizontal rule of customary international law regarding personal

[145] Similarly, see D. Liu, "Has Non-Immunity for Heads of State Become a Rule of Customary International Law?" in M. Bergsmo and Y. Lin, *State Sovereignty and International Criminal Law* (2012), p. 73.

immunities, indicate that the legal issues involved are particularly complex, and are situated at the intersection between public international law and international criminal law. Some issues mentioned in the debate might have warranted a request for an advisory opinion by the ICJ, but the Chamber does not have the possibility to request such advice. This opinion has therefore endeavoured to capture the current state of international law with a view to reaching a conclusion on the issue of South Africa's non-compliance with the Statute on the occasion of Omar Al-Bashir's visit to the country.

98. The question of whether or not South Africa failed to comply with its obligations under the Statute by not arresting and surrendering Omar Al-Bashir has been addressed through four successive lines of questioning, reflecting the main points that have been raised in this case and the wider debate.

99. In view of the different plausible and legitimate interpretations that can be made, as shown above, I do not believe that the current state of international law allows for firm conclusions to be drawn on any of the following three questions:

- Has the referral of the Darfur situation to the Court by the UN Security Council rendered Sudan analogous to a State Party, with the consequence that article 98(1) of the Statute is not applicable to the case at hand;

- Can UN Security Council Resolution 1593 be interpreted as removing the immunities enjoyed by Omar Al-Bashir as a sitting Head of State;

- Does the involvement of an international court affect the application of the rule of customary international law regarding the personal immunity of Heads of State in the relationship between States?

100. However, I find firmer ground when it comes to the Genocide Convention. The combined effect of a literal and contextual interpretation of article IV of the Genocide Convention, in conjunction with an assessment of the object and purpose of this

treaty, lead to the conclusion that Omar Al-Bashir does not enjoy personal immunity, having been "charged" with genocide within the meaning of article VI of the Genocide Convention.

101. Admittedly, certain aspects of the present conclusions may appear, at first sight, to stand in tension with each other. It appears that, on the one hand, the Genocide Convention implicitly removes the immunities of incumbent "constitutionally responsible rulers", while, on the other hand, there is doubt regarding an implied removal of immunities by way of UN Security Council Resolution 1593. This impression stems, however, from the different degrees to which the issue of immunities is addressed in these two instruments. In this regard, it is clear that neither the Genocide Convention nor UN Security Council Resolution 1593 make any explicit reference to the removal of immunities and, because of that, neither interpretation is entirely free from doubt. However, the language of article IV of the Genocide Convention points more conclusively towards a removal of immunities. As highlighted above, it specifically states that "constitutionally responsible rulers" shall be punished, and this applies even throughout their period in office. Conversely, UN Security Council Resolution 1593 imposes on Sudan a rather broad obligation to cooperate with the Court without any reference to the issue of immunities. Further, the Genocide Convention creates specific obligations to prevent, prosecute, and punish persons committing genocide for its Contracting Parties. Within the framework of the Genocide Convention, these obligations are more clearly conflicting and incompatible with immunities than is Sudan's obligation to cooperate with the Court under UN Security Council Resolution 1593. In sum, there is comparatively less ambiguity in the text of the Genocide Convention than there is in the language of UN Security Council Resolution 1593 in respect of the removal of immunities.

102. Furthermore, it should be emphasized that the conclusion that the Genocide Convention implicitly removes the personal immunities of "constitutionally

responsible rulers" is independent of, and does not affect, any findings related to the actual state of customary international law regarding immunities. This is based on the notion "that customary international law continues to exist and to apply separately from international treaty law".[146] It is, therefore, possible to conclude that certain State officials are entitled to immunities under customary international law, but that such immunities are removed pursuant to States' treaty obligations on a specific matter.

103. In addition, on a general level, the aforementioned tensions reflect the challenges concerning the practical implementation of the Statute against a wider system of international law that is characterised by opposing tendencies.

104. State sovereignty remains at the heart of public international law and protects the jurisdiction of the courts of each State vis-à-vis its nationals. However, following the Second World War, States have increasingly joined international and regional human rights instruments with a view to ensuring the protection of fundamental rights owed to the individual.[147] Progress made in the adoption of these international instruments means that issues related to human rights no longer pertain exclusively to the domestic jurisdiction of States.[148] The fact that States have pledged to protect human rights entails an obligation on their part not to commit violations of human rights themselves, and even less on a massive scale. When such crimes are, nevertheless, committed, both national and international tribunals are expected to prosecute and provide judgment.

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[146] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits)*, Judgment of 27 June 1986, para. 179.

[147] Most notably, the 1948 Universal Declaration of Human Rights, adopted and proclaimed by UN General Assembly Resolution 217 A (III), 10 December 1948, A/RES/3/217 A; the 1966 International Covenant on Civil and Political Rights, 999 UNTS 171; the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 221; the 1969 American Convention on Human Rights, 1144 UNTS 123; and the 1981 African Charter on Human and Peoples' Rights, 1520 UNTS 217.

[148] M. Shaw, *International Law* (2008), p. 213, also p. 267.

105. These developments necessarily have some bearing on how the concept of immunities is approached. The immunity of State officials from prosecution in other States is a key manifestation of sovereignty, as expressed by the Latin maxim of *par in parem non habet imperium*. However, if matters of human rights no longer fall exclusively within the sovereign domain of States, the concept of immunities must be interpreted accordingly. As three ICJ Judges illustratively stated, "a trend is discernible that in a world which increasingly rejects impunity for the most repugnant offenses the attribution of responsibility and accountability is becoming firmer […] *and the availability of immunity as a shield more limited*".[149] In view of this state of flux, it is not surprising that, over time, different approaches have been adopted in determining whether South Africa has complied with its obligations, either by the Chambers or the Prosecutor of this Court, or by States Parties and non-States Parties to the Statute, including South Africa itself. It suffices to note that this Opinion is not immune from these developments.

106. For all of the above reasons, I come to the conclusion that the full participation of Sudan and South Africa in the Genocide Convention has the effect of lifting the immunity of Omar Al-Bashir, allowing and in fact compelling Contracting Parties to the Convention to arrest him when he is present on their territory. It follows that South Africa would not have acted inconsistently with its "obligations under international law with respect to the […] immunity of a person […] of a third State" within the meaning of article 98(1) of the Statute, had it arrested and surrendered Omar Al Bashir to the Court. However, it failed to do so and it is, therefore, in non-compliance with its obligations under the Statute to execute the Court's request to arrest and surrender Omar Al-Bashir.

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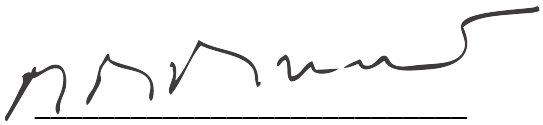
[149] ICJ, *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) (Merits)*, Judgment of 14 February 2002, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para. 75 (emphasis added). For a different view, see B. Jia, "Immunity for State Officials from Foreign Jurisdiction for International Crimes" in M. Bergsmo and Y. Lin, *State Sovereignty and International Criminal Law* (2012), pp. 93-96.

Done simultaneously in English and French, with both the English and French versions being authoritative.



Judge Marc Perrin de Brichambaut

Dated this Thursday, 6 July 2017

At The Hague, The Netherlands