Critiquing Immunities of Serving Heads of State Under Articles 27 and 98 of The Rome Statute of The International Criminal Court: A Case Study of President Omar al-Bashir Warrant of Arrest

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Declaration and Approval

I declare that this work has not been previously submitted and approved for the award of a degree by this or any other University. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made in the Thesis itself.

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Dedication

I dedicate this work to my family, the staff at my office, my colleagues the International Criminal Justice LL.M pioneer class at Strathmore University Law School, my thesis supervisor Prof. Anne-Marie de Brouwer, and the course lecturers, specifically Dr. George Mukundi. Prof. Patricia-Kameri-Mbote was instrumental in persuading me to resume university studies after more than 30 years since I first graduated with an LL. B degree from the University of Nairobi. And I am most grateful to her. And to Emmah Wabuke and Patricia Ouma for reading my final thesis and making valuable suggestions for improvement. Thank you all for enriching my life.

Abstract

Whether there is an obligation on states to honour requests issued by the International Criminal Court (ICC) to arrest serving or sitting Head of States has been a controversial area of concern given the apparent contradiction between Articles 27 and 98 of the Rome Statute establishing the International Criminal Court (ICC). The problem with which this thesis is concerned with is the internal tensions created by what appears to be contradictory language of the Statute and the differing interpretations which have tended to reduce the effectiveness of the Rome Statute in ensuring accountability and ending impunity. In particular: Do Articles 27 and 98 of the Rome Statute give immunity from arrest of serving Head of States as argued by the African Union in opposition to the issuance of warrant of arrest against President Omar Al-Bashir? To answer the question whether these two provisions of the Rome can be reconciled, the decision of the Pre-Trial Chamber on the Omar Al-Bashir case is examined in the context of scholarly writings, contemporary debates and examination of international cases. The principal argument is that Article 27's removal of immunity must be interpreted in the context of the rationale forming the basis of the establishment of the International Criminal Court (ICC) by the Rome Statute. This way Article 98's true intent must be understood. If the International Criminal Court (ICC) is to attain the preambular purpose of ending impunity at the international field then national authorities must be obligated to serve the International Criminal Court (ICC) and this can only be achieved by purposive interpretation of the Rome Statute. In this regard, the thesis examines the application of Article 98 of the Rome Statute in the context of United Nations' Security Council referrals to the Court with the conclusion being made that the effect of the Security Council referral of the Sudan Case is to be regarded as binding by virtue of Article 27. The thesis concludes by making the case for the interpretation of the Statute in a way that ensures removal of immunities of persons before the International Criminal Court (ICC), notwithstanding status accorded to those individuals by any other statute or practice.

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List of Abbreviations

ACJHR	African Court of Justice and Human Rights
Art.	Article
AU	African Union
CAH	Cries Against Humanity
DC	Diplomatic Conferences
DRC	Democratic Republic of Congo
ECCC	Extraordinary Courts for Cambodia
GAIHLRLR	Geneva Academy of International Humanitarian Law and Human Rights
HOS	Head of State
ICC	International Criminal Court
ICC PTC	International Criminal Court Pre-Trial Chamber
ICCPR	International Covenant on Civil and Political Rights
ICI	International Commission of Inquiry
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	United Nations International Law Committee
RS	Rome Statute
RSA	Republic of South Africa
SCSL	Special Court for Sierra Leone, or the "Special Court"
STL	Special Tribunal for Lebanon
UN	United Nations
UNC	United Nations Charter
UNDHR	United Nations Declaration of Human Rights
UNSC	United Nations Security Council

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Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 227United NationsTS 78.

Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against humanity and all forms of Discrimination, 29 November 2006 (Great Lakes Protocol)

Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 27 June 2014, STC/Legal/Min7(1) Rev 1. (The Malabo Protocol)

Protocol Relating to the Establishment of the Peace and Security Council of the African Union, 9 June 2002.

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CHAPTER ONE: INTRODUCTION

1.1 Background to the Study

The effectiveness of the Rome Statute of the International Criminal Court was gravely tested by the issuance of warrants of arrest against a serving head of state who under international customary law enjoyed certain immunities and privileges. In addition, he was a head of state of the Republic of Sudan which was not a signatory to the Rome Statute. This was within the first decade of the Court's operation. The stiff opposition from the African Union was based on grounds of non-observance of immunities accorded to Heads of States under international law for its indictment of President Omar Hassan Ahmad Al-Bashir allegedly for a number of international crimes, and subsequently transmitting a request for his arrest.[1]

This opposition became even more visible with the indictment of soon to become President Uhuru Kenyatta of Kenya whose situation before the Court started before his ascension to the presidency as one of the original six suspects on trial for alleged crimes against humanity in the first *proprio motu* investigation.[2]

With both President Omar Al-Bashir (as he was then) and President Uhuru Kenyatta's situations remaining before International Criminal Court, while the two were sitting Heads of State, the African Union's protests became even louder, particularly with President Uhuru Kenyatta becoming the first sitting Head of State to appear before the International Criminal Court. This rise of opposition was not entirely surprising for the African Union had long been a critic of the International Criminal Court's "intervention" in Africa and had passed several resolutions on Head-of-State immunity since Omar Al-Bashir indictment in 2009-for allegedly directing a campaign of mass killing, rape, and pillage against civilians in Darfur– many of them to specifically protect him.

The position of the African Unions' anti-International Criminal Court member state, then and to date, has effectively been one countering any attempt to subject a sitting Head of State to any legal or judicial processes for the duration of their terms, whatever definition that tenure

[1] *The Prosecutor v Omar Hassan Ahmad Al-Bashir*, (2009), International Criminal Court. Decision on the Prosecutions Application for a Warrant of Arrest against Omar Hassan Ahmad. The Pre-Trial Chamber (PTC) of the International Criminal Court (ICC) directed the registry to transmit a request for arrest and surrender of Al-Bashir to (i) all states parties to the ICC Statute and (ii) all UN Security Council members that are not states parties to the Statute.

[2] *The Prosecutor v. Uhuru Muigai Kenyatta*, (2011). International Criminal Court. Formerly- *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein*, 2011.

may assume. It was a legal controversy that the African Union made clear in its response to the International Criminal Court's pre-trialling of the former Sudanese president in 2009.[3] The questions arising from the African Union's response to the International Criminal Court Pre-Trial Chamber Decision of 12 December 2011 raised four questions namely:

(a) Did the decision have the effect of unsettling customary international rules of practice asserting the absolute immunity of a sitting Head of State?

(b) Was the warrant tantamount to an abdication of the effect of the Rome Statute's Article 98?

(c) Did it sufficiently address and determine the critical issue of the operability of the United Nations Security Council's Resolution 1593(2005), which justified the Darfur' genocide trial at the International Criminal Court.

(d) What were the implications of the decision on the African Union's resolution to effectively denounce the International Criminal Court's legitimacy any claim to any nation within its membership founded on its adherence to its Constitutive Act obligating all its membership to comply with the International Criminal Court's operation earlier?[4] The constitutional aspect in question at this particular point was that the African Union's mandate would extend to further cooperation and respect for PIL as well as laws of custom in the global international community.

Any coherent answer to the above questions necessarily addresses the tensions and apparent contradictions in the wording of Article 27(2) of the Rome Statute. Here, the letter of the treaty provides that no individual sitting as a Head of State would be subject to the proceedings. However, the attendant situations warranted additional definition about the details of any special procedures that would seek to defeat the operation of the International Criminal Court's mandate. In other words, any interrogation of Article 27 (2) of the Rome Statute must establish how far the mandate of the court extend in the operation, especially when the text of the treaty overrides any immunity arising from the status of an individual being a sitting Head of State.

What then emerges is an interrogation of whether the wording of Article 27 was set out to have effect with nations or the persons that hold the title of sovereign in nations: be they member states or not. The question that then emerges is whether the jurisdiction of the Rome Statute is over the nations that form its primary audience, or the criminality of individuals that represent

[3] *The Prosecutor v. Omar Hassan Ahmad Al-Bashir (Decision of the ICC issuing warrant of arrest for President Al Bashir in the case)*, International Criminal Court, 2009.

[4] Article 23 (2), *Organization of African Unity (African Union)*, Constitutive Act of the African Union, 1 July 2000, available at: https://www.refworld.org/docid/4937e0142.html on 14 June 2019.

the unassailable legitimacy of sovereignty of nationhood, which is itself a founding principle of post-WWII international comity. From that perspective, in an instance where a sitting or serving Head of State is involved or a state representative, in his official capacity, then the legal relationship between the state and the International Criminal Court could ostensibly seem to fall under the ambit of Article 98 of the Rome Statute Charter.

These international regional and ultimately geo-political tensions on the applicability of the Rome Statute constitute the overall theme of this thesis.

The search for peace and security has been an integral aspiration to international comity from as early as the 15th Century during the era of Spanish expansionist policies that led to the Peace of Westphalia laying down a framework for the establishment system of international relations based on reciprocity. The basis of that reciprocity rests on the mutual desire of nations not to interfere with other's sovereign processes, functions or existence.[5] The Peace treaty of Westphalia did not last long as rivalry between the Netherlands, Great Britain and France and the American War of Independence forced a change of political events that led to the Berlin Conference of 1884 that carved out areas of influence for the major world powers resultantly leading to the partition of Africa.[6] The outbreak of almost global war twice in the 20th century subsequently led to the establishing of Nuremberg Military Trials and the Japanese Military Trials in the 1950s. This marked the first global attempt to address impunity at an international level.[7] Mass murder, pillage and destruction in Yugoslavia and then Rwanda saw the international community hasten to set up the International Criminal Tribunal for the former Yugoslavia (International Criminal Tribunal for Yugoslavia) and then set up the infrastructure to operationalize the forum.[8] The same holds true for the formation of the International Criminal Tribunal for Rwanda (International Criminal Tribunal for Rwanda) in the immediate aftermath of the genocide in Rwanda in 1994.[9] Overall, the guiding principle in setting up these

[5] Gross L, 'The Peace of Westphalia', 42 *American Journal of International Law* 20, 1948, 1648-1948.
[6] Between law and history: the Berlin Conference of 1884-1885 and the logic of free trade, 3 *London Review of International Law* 1, 2015, 31–59. https://doi.org/10.1093/lril/lrv002 on 7 July 2021.
[7] Nadia B, *Business and Human Rights. History, Law and Policy – Bridging the Accountability Gap*, Routledge, 2017, 313.
[8] International Criminal Tribunal for the former Yugoslavia (ICTY) was a United Nations court of law that dealt with war crimes that took place during the conflicts in the Balkans in the 1990s. Its mandate lasted from 1993 – 2017. http://www.icty.org/ on 7 July 2021.
[9] The International Criminal Tribunal for Rwanda closed on 31 December 2015. (Website of the International Criminal Tribunal for Rwanda as maintained by United Nations - International Residual Mechanism for Criminal Tribunals). http://unictr.irmct.org/ on 7 July 2021.

institutions to tackle criminality recognizable on an international level arises from the fact that seventh chapter of the founding United Nation Declaration of Human Rights.

The legitimacy of these forums for international justice directly under the United Nation's Charter set the pace for an establishment of a permanent international mechanism for addressing impunity and the resultant concerted efforts of state representatives, the civil society and several intergovernmental organisations culminated in the adoption of the Rome Statute on 17 July 1998.[10] Most notably, the Rome Statute came into force on the back of legitimization of the sixty-country threshold for validation of an international treaty by nations in the world. That is the premise of Article 126 of the United Nations's operationalizing charter. It validated the judicial forum's operation as an apex international mechanism with the jurisdiction of an unprecedented nature. The International Criminal Court has the mandate to try Crimes against humanity on both an international and municipal level. Furthermore, the fact that sixty state parties acceded to the treaty automatically extends the court's jurisdiction to the entire international community, worldwide.[11]

It is important to note that this scholarly position is one that enjoys the validation of both treaties and customs of international relations. That made the pre-trial arguments in the International Criminal Court matter on Al-Bashir's matter even more consequential in the development of a literature on the subject since the resolution of this position will outline the relation between Articles 98 and 27 (2) within the larger concept of defining this information, as the International Criminal Court is unbound even by its own decisions.

There is also the debate as to whether Article 27 extends its jurisdiction to non-signatory nations to the Rome Statute and to what extent would its application stretch under international law especially regarding immunity of serving Head of States before international mechanisms such as the International Criminal Court.[12]

That was the case of the situation involving Al-Bashir at the International Criminal Court. The conundrum was acutely visible due to the fact that the Sudanese Republic was not a signatory to the Rome Statute as at the time. Genocide had been committed at Darfur using what

[10] UN General Assembly, RS of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, https://www.refworld.org/docid/3ae6b3a84.html on 21 May 2019; The RS establishing the ICC entered in force on 1 July 2002 after the statute had attained the requisite signatories for it to enter force as provided for under Article 126.
[11] Article 13, *RS*.
[12] Akande D, The Legal Nature of Security Council Referrals to the ICC and its Impact on Al-Bashir's Immunities, 7 *Journal of International Criminal Justice* 2, 2009, 333–352.

investigators identified as state-sponsored actors such as the 'Janjaweed'. What made this situation all the more pressing for success by the Rome Statute, and in extension the International Criminal Court, was the fact that it occurred on the referral of the highest global institution on security-the United Nations Security Council. Committing the situation in Darfur to the International Criminal Court was the culmination of an intensive administrative process involving the singular attention of the International Commission of Inquiry (International Commission of Inquiry). The resultant inquiry then presented a report with empirical evidence to the United Nations Security Council on the violation of human rights *en masse* to the United Nations Security Council.

Despite President Al-Bashir (ousted out of power and forced to resign on April 11, 2019) having active warrants of arrest[13] issued against him, he nonetheless was able to travel in the continent making state visits to various countries around the continent of Africa.[14] In response, the International Criminal Court delivered decisions on all the countries save for South Africa and Kenya for the failure to co-operate with the court and effect the warrant while the suspect was publicly within their various jurisdictions.[15] This thesis focuses on an investigation of the application of Articles 27 and 98 to Sudan and considers the legal implications of the United Nations Security Council's referral.

1.2 Statement of the Research Problem

As the background above reveals, there exist internal tensions within the International Criminal Court Statute due to apparently contradictory provisions in Articles 27 and 98 of the Rome Statute. While Article 27(2) expressly and emphatically holds that there shall be no immunities in International Criminal Court; Article 98 recognizes that the state duty to substantively respond to the International Criminal Court, possibly to establish some form of reciprocity, when effecting an act such as arrest is dependent on the international obligations binding the said state. The debatable question in this context and which therefore forms the research focus for this writing revolves around the indictment; with the subsequent warrant of arrest for the Sudanese president for Crimes against humanity. Arising out of this, the study considers three secondary questions namely:

(i) How does the duty to cooperate arise;

[13] Between law and history: the Berlin Conference of 1884-1885 and the logic of free trade, 31-59.
[14] These nations included: the Federal Republic of Nigeria, Malawi, Chad, Democratic Republic of Congo, Kenya and RSA.
[15] Non-cooperation procedures and decisions of the ICC, https://asp.icc-cpi.int/en_menus/asp/non-cooperation/pages/default.aspx on 22 April 2019.

(ii) What is the import of the United Nations Security Council's referrals on the principles facilitating reciprocity among nation states;

(iii) What is the impact of the state parties' courts' decisions on the immunities and cooperation principles in the International Criminal Court?

1.3 Research Objectives

1.3(i) General Objective

To critique the Al-Bashir's case at the International Criminal Court, with a view to reconciling the apparent contradictory provisions in Article 27(2) which expressly vitiate any form of prosecutorial immunity against proceedings in the International Criminal Court: and Article 98 which recognizes state duty to cooperate with an International Criminal Court warrant of arrest dependent on the international obligations binding the said state.

1.3 (ii) Secondary Objective

a. An examination of the legal adjudications concerning the attendant arrest warrant and how they affect the duty to cooperate.
b. The examine the effects of Security Council Referral of non-member states, Sudan being a microcosmic example: as well as how it impacts on the principle of duty to cooperate imposed by the International Criminal Court Statute imposition of the duty of all nations to cooperate with it for the good of humanity: as enshrined in the United Nations Charter, as well as the Rome Statute in its third chapter.
c. To analyze the International Criminal Court's practice on this foundational duty to cooperate with the international tribunal in principle. And how that relates to the operation of the International Criminal Court Statute.

1.4 Hypothesis

This research assumes that there exist some internal tensions within the International Criminal Court Statute due to two apparently contradictory provisions enshrined under Articles 27 and 98 of the Statute. Whether or not the Al-Bashir Case gives direction to these legal controversies is the main hypothesis of this research study.

1.4.1 Secondary hypotheses

a. The meaning and scope of the legal mandate placed on the International Criminal Court by Articles 27 and 98 of the Rome Statute pertaining to International Customary law: the decision to issue a warrant to arrest a sitting president has had the impact of

unsettling hitherto settled perceptions on the immunity that Head of States would enjoy for the duration of their terms.

b. President Bashir's arrest warrant sufficiently addresses and determines the applicability of United Nations Resolution 1593(2005) as far as the question of presidentially-conferred immunities through the actions of the United Nations Security Council in this particular case is concerned.
c. The decision has had several implications on the African Union's declarations that effectively defeat International Criminal Court's operation on countries that are in its membership founded on its adherence to its Constitutive Act obligating all its membership to comply with its decisions and policies.

1.5 Research Questions

In analysing the Al-Bashir warrant issue, this study uses the following questions as parameters to interrogate the overall subject of the interplay between the Articles 27 and 98 of the Rome Statute. The questions form the basis of the theoretical postulations on the subject, as well as forming the background of study:

a) What is the meaning and scope of the legal mandate placed on the International Criminal Court by the scope of the attendant Articles of the Rome Statute with regards to International Customary law?
b) Did the decision of the International Criminal Court to issue a warrant ordering the immediate arrest and transportation of the former Sudanese president, Bashir, effectively unsettling customary international law regarding global Head of State immunity?
c) Putting the Rome Statute into consideration, did the said decision have neuter Article 98 of the Rome Statute, creating an operational redundancy effectively making it useless in its implementation provided that the International Criminal Court motions for a course of action?
d) Did the arrest sufficiently address and determine the legal conundrum that the motion to arrest the Sudanese Al-Bashir while still in office as against the United Nations Security Council's Resolution 1593 (2005), which resulted in the referral of the issue in Sudan under Al-Bashir to the International Criminal Court for the prosecution of a sitting president?
e) What were the implications of the decision on the African Union's declarations not to cooperate with the warrant by its membership founded on its adherence to its Constitutive Act obligating all its membership to comply with its decisions and policies?

1.6 Methodology

In its examination of the Rome Statute of the International Criminal Court, this study relies on the doctrinal methodology involving qualitative analysis of both primary and secondary data using the case study of the Omar Al-Bashir Warrant of Arrest. The primary data will include case law from applicable jurisdictions and statutes while secondary data includes literature from relevant authoritative materials such as books and journals.

1.7 Justification for the research

After the end of the Cold War in 1989, the UN General Assembly requested the International Law Commission (ILC) "to address the question of establishing an international criminal court[16] and in 1996 established a Preparatory Committee on the establishment an international criminal court[17]. This Committee its report to the Diplomatic Conference at Rome which eventually resulted in the Rome Statute for the International Criminal Court. Founded out of the concerted effort of states and non-state entities, the International Criminal Court has had its notable share of successes and critics.[18] In its first decade of operation, it had an involvement in over twenty situations with this list being inclusive of both contracting and non-contracting state parties.[19] It is also without a doubt its visibility has now increased for several reasons including the cases before it and the debates surrounding its legitimacy. Most notably, the very foundational arguments for its establishment as the world's first permanent international criminal court with the unfettered jurisdiction to investigate and, where warranted, to prosecute individuals charged with the gravest crimes of concern to the international community: genocide, war crimes, crimes against humanity and the crime of aggression has been the very notable reasons for its swelling opposition in Africa.[20] And even though, over time the court has made strides establishing liaison with the African Union to legitimize its operation and character from its previous investigations and active indictments, a need for the understanding of the changing legal terrain under which it operates invites research.[21] More particular, its

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[16] Cassese at page 261

[17] The 1994 ILC Report was referred to this Committee

[18] https://www.ejiltalk.org/the-african-unions-response-to-the-iccs-decisions-on-bashirs-immunity-will-the-icj-get-another-immunity-case/; https://theconversation.com/al-bashirs-escape-why-the-african-union-defies-the-icc-43226 on 20 May 2019.

[19] https://www.icc-cpi.int/pages/crm.aspx# on 20 May 2019 for the list of countries where the ICC has been involved: Preliminary Examinations: Afghanistan, Colombia, Guinea, Iraq/UK, Nigeria, Palestine, The Philippines, Bangladesh/Myanmar, Ukraine, Venezuela ; Situations under Investigation: Uganda, The Democratic Republic of the Congo, Darfur, Sudan, Central African Republic, The Republic of Kenya, Libya, Côte d'Ivoire, Mali, Central African Republic II, Georgia, Burundi.

[20] https://theconversation.com/al-bashirs-escape-why-the-african-union-defies-the-icc-43226 on 22 April 2019.

[21] The ICC has in the recent past progressed in its visibility through training of counsels, engaging with victims and presentation on its work and mandate to dispel political rumours as to its bias for instance on African states:

expansion of jurisprudential growth of international criminal law jurisprudence, including on victims' rights and the place of immunity of Heads of State (s) before it also justifies this research focus.

This research therefore seeks to add to the expanding scholarly interest on the various potential mechanisms and approaches within the framework of the Rome Statute on how best to deter and put an end to impunity.

1.8 Significance of the Study

This research has both scholarly and jurisprudential relevance. Scholarly, it seeks to contribute to an understanding of the effectiveness of the Rome Statute of the International Criminal Court was immensely tested by the issuance of warrants of arrest against a serving head of state who under international conventions on comity and interrogation enjoyed certain immunities and privileges. In the words of former Prosecutor Fatou Bensouda in the report to the United Nations Security Council "the creation of the International Criminal Court must surely be one of humanity's proudest moments. It is because it represents an awakening rooted in great human suffering throughout the ages, culminating in the recognition that lawless wars and conflict must no longer receive a pass to cause human carnage" This study aims to enhance the importance of the institution of International Criminal Court from an African perspective drawing from an African context.

From the jurisprudential perspective, the research seeks to positively contribute to the building of a *corpus juris* surrounding international customary law by the International Criminal Court. In so doing, this research seeks to show that there is a scholarly credible analysis of the interplay between the seemingly contradictory provisions in Articles 27 and 98. It seeks to fill the gap that was hitherto prevailed due to absence of a detailed study of the tensions between Articles 27 and 98 of the Rome Statute from an African perspective of the Omar Al-Bashir case.

1.9 Theoretical Framework

From the literature review undertaken for the purpose of this thesis it is apparent that there is no coherent theoretical stand in international customary law. Despite this, Sarah Neuwom's

ICC concludes four-day Training for Counsel (13 June 2019); ICC holds Retreat with African States Parties in Addis Ababa (12 June 2019); Leiden University (The Netherlands) wins ICC Moot Court Competition, English version Press Release (7 June 2019); Andrés Bello Catholic University of Venezuela wins 7th ICC Moot Court Competition, Spanish version (29 May 2019) amongst other measures it is doing in addition to prosecution of cases.

categorization serves as good guide,[22] and is used as the basis for the theoretical framework adopted in this thesis. From her categorizations, this research project will be guided by two of categorizations namely, foundational theory and secondly, operational theory. Under foundational theory, reference is made to normativity of international criminal law as explained by Christoph Burchard.[23] Specifically, at 1.1 in his paper he discusses the normativity of international criminal law.

The principal goal for the adoption of the Rome Statute was to codify existing practices and traditions from both treaty and customary international rules and general international law, human rights and criminal law to enable bring to account individuals accused of grave violations of grave international crimes notwithstanding their official positions[24]. A theoretical framework of how the International Criminal Court Statute is drawn to incorporate the principal goal clearly demonstrate reliance on the accountability mechanisms set out therein.

Riccado Pisillo Mazzschi[25] has pointed out that "doctrinal theories on the legal basis and the scope of application of functional immunity are numerous" but can be organised into three main general principles. The first is founded on the conceptual premise that every 'official' act of a foreign state's agent can be attributed only to the state. This derives from the principle of non-interference in the constitutional 'life' of the foreign state and includes the concept that the functional immunity of foreign officials ultimately coincides with the immunity of foreign states.

He further identifies another theory that has been adopted IL.C Special Rapporteurs under which the legal regime of functional immunity is categorised as relating only to certain categories of acts performed by foreign officials. He points out to recent developments arising out of international practice with regard to the 1997 International Criminal Tribunal for Yugoslavia decision, the judgment of the House of Lords in the *Pinochet case*, the trial by Dutch and Spanish courts against former heads of state and several similar cases and notes of the emergence of the tendency to deny immunity to heads of state accused of international

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[22] https://poseidon01.ssrn.com/delivery.php?ID=668089000120104016093003013080100106020020059065037078000112093006105104006097109071022118037001014005040069006076001116114075052021093009085104079090117110105067069026001016083101112111027065084016115083074071118068064006087010072075105000111003021118&EXT=pdf&INDEX=TRUE on 29 September 2021.

[23] https://www.toaep.org/ps-pdf/35-bergsmo-buis on 29 September 2021.

[24] Noor L, Public International Law "International Criminal Law and Continuing Impunity", *The American University of Beirut*, 2015, 5.

[25] Riccado P, 'The Functional Immunity of State Officials from Foreign jurisdiction: A Critique of the Traditional Theories', *Questions of International Law*, 2015.

crimes associated with the well-known *obiter dictum* by the International Court of Justice in the *Re Warrant Case* to the effect that immunity does not cover international crimes This also accords with the United Nations International Law Commissions(United Nations International Law Committee) Study culminating with the adoption of the Rome Statute of International Criminal Court codifying acts constituting criminal conduct amounting to the violation of gravest crimes against humanity. This now forms the theoretic grounding of all international human rights instruments starting with the Charter of the United Nations. Under this accountability theory heads of state and government responsible for the gravest crimes under international law must be held to account no matter their official standing in their countries.

The study draws from the benchmark of the normative principles of the United Nations Charter,[26] the United Nations Declaration of Human Rights[27] and international criminal law as formulated by Hans-Heirich Joscheck in *The Responsibility of the State under International Criminal Law.*[28]discussed also by Max Pensky[29]

Despite Hans-Heirich Joscheck's early definition of the conceptual framework of the jurisprudence of international criminal law, it was not until in the 1990's that there emerged a "renaissance of international criminal law"[30] following the setting up of the International Criminal Tribunal for Yugoslavia and the International Criminal Tribunal for Rwanda in the 1990s - and eventually the International Criminal Court in The Hague - that a visible development of this area of law begun being noticed thanks to the contribution of leading scholars and academics such as Antonio Cassese.[31]

International criminal law in a strict sense has sought to protect fundamental values of the international legal community and articulates the state's right to punish criminal offenses pursuant to its domestic laws. According to the *Max Planck Encyclopaedia of Public*

[26] *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, https://www.refworld.org/docid/3ae6b3930.html on 14 June 2019.
[27] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), https://www.refworld.org/docid/3ae6b3712c.html on accessed 14 June 2019.
Comments. Adopted by General Assembly Resolution 217 A(III) of 10 December 1948. The Universal Declaration is available in 369 language variations on the website of the Office of the United Nations High Commissioner for Human Rights.
[28] Bernhardt, R., & Max P, *Institute for Comparative Public Law and International Law*, 2002. Encyclopedia of public international law: Vol. IV. Amsterdam: North-Holland.
[29] In https://www.toaep.org/ps-pdf/35-bergsmo-buis Chapter 7

[30] Claus K, 'On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision', 23, *Leiden Journal of International Law*, 2010, 855-873.
[31] Cassese A, *Cassese's International Criminal Law*, Oxford University Press, United Kingdom, 3 ed, 2012.

International Law.[32] International Criminal Law in a strict interpretation largely presents and focuses on individual criminal responsibility directly under international law. It is therefore the body of law which seeks to protect fundamental values of the international legal community. Its original anchorage in international peace and security has overtime also changed and expanded. During more recent developments, changes have occurred and the protection of internationally recognised human rights has also gained significance and are now articulated in international treaties to correspond with the principle of accountability and legality.

It is this emergent international criminal law theoretical framework that forms the foundation of this study as evolved from Statutes of the Nuremberg and Tokyo Tribunals, the International Criminal for the Former Yugoslavia (International Criminal Tribunal for Yugoslavia),The International Criminal Tribunal for Rwanda (International Criminal Tribunal for Rwanda), the Rome Statute of the International Court (International Criminal Court), the Statute of the Special Court for Sierra Leone (Special Court for Sierra Leone, or the "Special Court"), the Rules of the Extraordinary Courts for Cambodia (ECCC) and the Statute of the Special Tribunal for Lebanon (Special Tribunal for Lebanon).

The foundational theory is utilized to determine the foundational philosophies of Articles 27 and 98 while operational theory, is used to find out the interpretation of immunity clauses in international criminal law.

1.10 Literature Review

To place this chapter in context it is important to appreciate the distinction between the different categories of immunity, i.e., sovereign, state and diplomatic as defined in international law whereby "sitting heads of state, accredited diplomats and other officials cannot be prosecuted while in office for acts committed in official capacities" i.e., immunity *ratione personae*[33] whereby jurisdictional immunities enjoyed by senior state officers are taken away by an international criminal court or tribunal enjoying jurisdiction over serious international crimes such as war crimes, crimes against humanity, genocide and aggression which are specifically covered by the International Criminal Court.

[32] Wolfrum, R, *The Max Planck encyclopedia of public international law*, Oxford University Press, New York, 2012.
[33] Anthony J. C, "Universal Jurisdiction as an International "False Conflict" of Laws" in Silverburg, S (ed) *International Law; Contemporary Issues and Future Problems,* West Press, 2011, 79.

Following the "renaissance of international criminal law'' there has been extensive writing[34] and a number of judicial decisions in both international and national jurisdictions that have enriched the understanding and scope of the subject of immunities concerning the situation of Heads of States and Governments before international mechanisms, including the ICC.

Cassese's International Criminal Law[35] is the main text relied upon. This is of particular significance because Professor Cassese was the Chairperson of Commission of Inquiry authorised by the Security Council to investigate reports of violations of international humanitarian law and human rights law in Darfur. Professor Cassese was the President of the International Criminal Tribunal for the Former Yugoslavia as well also the President of the Special Tribunal for Lebanon. The third edition of Cassese's scholarly work was edited by Professor Paola Gaeta, professor of International Criminal Law at the Law Faculty of the University of Geneva and also director of the Geneva Academy of International Humanitarian Law and Human Rights.

The key legal texts upon which this research study is founded are interpretative texts with a focus on the interplay of Articles 27(2) and 98(1) of the Rome Statute and Rule 195(1) of the Rules of Procedure and Evidence of the Court.

Several decisions rendered by the International Court of Justice and the International Criminal Court referring to or interpreting these provisions,[36] including Article 21 with regard to the

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[34] Abass, A. 2013. Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges, 24 *European Journal of International Law* 3, 933-946. https://doi.org/10.1093/ejil/cht042Africa Union, 2011. Sirte Resolution of the African Union. http://www.africa-union.org/summit/july%202005/Assembly%20Decisions%20-%20%2073-90%20Sirte%205th%20Session.pdf on 10 April 2019; Akande, D. and S., Sangeeta. 2010. Immunities of State Officials, International Crimes and Foreign Domestic Courts. *European Journal of International Law* 21(4): 815-852. https://doi.org/10.1093/ejil/chq080; on 10 April 2019.
Akhavan, P, 'The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court, 99 *The American Journal of International Law* 2, 2005, 403–421. https://doi.org/10.2307/1562505 on 11 April 2019.
Akhavan, P. 2009. Are International Criminal Tribunals a Disincentive to Peace? Reconciling Judicial Romanticism with Political Realism, 31 *Human Rights Quarterly* 3, 624-654. https://doi.org/10.1353/hrq.0.0096
Annan, K. 2013. Third Annual Desmond Tutu International Peace Lecture at the University of the Western Cape. https://www.uwc.ac.za/News/Pages/Third-Annual-Desmond-Tutu-International-Peace-Lecture.aspx on January 26, 2016). AU Assembly. 2009. 'Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court. Doc. Assembly/AU/13(XIII)' in Decisions and Declarations of the 13th ordinary session of the AU Assembly: Assembly/AU/Dec.245 (XIII) (Sirte, July 3, 2009) 7 8, para. 8. www.au.inUen/sites/default/files on 11th April 2019.
Bensouda, F. 2014. African Question: Is the International Criminal Court (ICC) Targeting Africa Inappropriately? http://iccforum.com/africa on 20 March 2019.

[35] See Footnote 25

[36] *Democratic Republic of Congo v Belgium (Arrest Warrant Case)* rendered by the International Court of Justice on 14 January 2002, *Prosecutor v Charles Ghankay* Taylor rendered by the Special Court for Sierra Leone on 31 May 2004, *Prosecutor v Al-Bashir* rendered by the ICC on 4 March 2009, *Prosecutor v Al-Bashir* rendered by the ICC on12th December 2011, and again on 9 April 2014, *Prosecutor v Al-Bashir* rendered on 13

applicable law for reference by the ICC have been considered. Domestic juridical mechanisms have also advanced an understanding of the mandate of the International Criminal Court with at least two domestic adjudications following the pronouncement of the decision of the High Court of South Africa.[37]

These cases are examined in the context of United Nations Security Council Resolution 1593 and within the literal interpretation of Article 103 of the United Nations Charter specially to understand the interaction of international law, customary international law and treaty law regarding immunities of Heads of States and official state representative within the context of the International Criminal Court Statute.

International customary law principles have hitherto, or at least until the advent of the International Criminal Court era, recognised the immunity of sitting Heads of States from arrest and prosecution by domestic courts of third states even in situations where the crime is against international criminal law.[38] Academic scholars in the subject area have had supportive writing to this effect contributing towards the advancement of this scholarship.[39] A notable number of writers have equally in critical presentations argued for a situation of non-applicability of immunities accorded to Heads of States/ Governments in the instance that they are before international mechanisms, especially on the place of immunities before the International Criminal Court.

This research is thus informed by the supportive and critical commentaries on the work and exercise of the mandate of the International Criminal Court. Most notably, these pieces of

June 2015, *Prosecutor v Al-Bashir* rendered by the same court on 6 July 2017, *Prosecutor v Al Bashir* rendered on 11 December 2017.

[37] Article 13, *Rome Statute*.

[38] Claus K, Kimberly P, 'Article 98' in: Otto Trifterer/Kai Ambos (eds). *The Rome Statute of the International Criminal Court. A commentary.* 3rd ed. 2016, p.2117; Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes*, 2015, 488pp; Dire T, 'The ICC Decisions on Chad and Malawi. On Cooperation, Immunities, and Article 98', 11 *Journal of International Criminal Justice* (2013). 199; Akande D, 'The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC', 10 *Journal of International Law* (2012),731; Ingrid Wuerth, 'Pinochet's Legacy Reassessed'. 106, *The American Journal of International Law* (2012). 731; Claus Kress, 'The International Criminal Court and Immunities under International Law for States Not Party to the Court's Statute', in: Morten Bergsmo/Ling Yan(eds). State Sovereignty and International Criminal Law. 2012. P.223; Akande D, '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). 333; Paola Gaeta, 'Does President Al-Bashir Enjoy Immunity from Arrest?' 7 *Journal of International Criminal Justice*, 20090.315.

[39] Prof. Dire Tiladi for instance, has remained supportive of the African Union position that the Rome Statute does not oust international customary law immunities because such ouster would conflict with duties and obligations recognized under international customary law affording Heads of State complete immunity; also see: Tiladi also concludes that Article 93 of the Rome Statute does not oust the protections to Heads of States under international treaty and customary law nor is Article 27 of the Statute, properly read, applicable. He criticizes scholars who hold different perspectives based on Resolution 1593 of the Security Council.

scholarly writing will help in the advancement and in the understanding and in the presentation of the answers to the research questions underpinning the overall research topic: the interplay of Articles 27(2) and 98 and extent to which the place of Heads of State immunities apply or remain restricted within the situation of the International Criminal Court. The research itself as explained earlier, is substantially desktop based on literature review, case law analysis and where possible, classroom notes and unstructured interviews and engagements with experts and jurists on the subject. The resultant methodology is thus focused on qualitative examination.

1.11 Conclusion

The tensions arising out of the apparent contradictions between Articles 27 and 98 of the Rome Statute: particularly with regard to how they affect the achievement of the main goal of the Rome Statute to end impunity forms the primary scope of this thesis. The accountability mechanisms set out in the Statute have been challenged particularly by the African Union on behalf of President Al-Bashir and these will be examined in depth to establish whether serving Head of States are immune from the reach of the Court to answer for violations of the significant thresholds of the rule of law at an international level with regards to criminality as set out in the Statute. Judicial pronouncements of the International Criminal Court in so far as the question of Head of States immunities are concerned and the differing academic opinions on these pronouncements present needed room for debate and further understanding on this area. Informed by the specific case of former President Omar Al-Bashir's warrant of arrest, this writing will examine these writings and the judgment in particular, of the South African Court. The aim will thus be to explore the extent to which the Al-Bashir Case has contributed towards reconciling the tensions within the International Criminal Court Statute and thereby contributed to ending impunity by imposing accountability on sitting Head of States.

1.12 Chapter Breakdown

Overall, the substance of this study presents in five phases:

Chapter 1 introduces the subject matter in question, as well as scoping the theoretical foundations of the interrogation.

The chapter captures the general introduction and background of the research. It states the research problem, outlining the objectives of the analysis. Subsequently, there is specific justification for both the theoretical and pragmatic utility of the research matter. Scholarly growth in any subject moves from known to unknown, hence the value of having a brief

literature review to couch the information in the current *corpus juris*; the theoretical framework and the research methodology.

Chapter 2 explores by way of an analysis the interplay of Articles 27 (2) and 98 of the Rome Statute in the context of the Al-Bashir warrant of arrest scenario. This Chapter highlights the opposition of the African Union to the detainment of President Omar Al Bahir and tensions that emerge as a result of their interpretation of Article 98.

Chapter 3 This section of the inquiry encompasses an analysis of the legal nature of International Criminal Court request's decision to issue a warrant for the detaining or voluntary surrender of President Al-Bashir while still a sitting president of the Sudan Republic after examining the various assertions made pertaining to the exercise of the International Criminal Court's mandate. The chapter carries out an in-depth analysis of the Omar Al-Bashir Case including its factual background.

Chapter 4 sets out the origin of Resolution 1593 and the effect of the United Nations Security Council referrals in an effort to establish whether Sudan, not being a signatory to the Rome Statute was in an analogous relational position compared to that of a *bona fide* International Criminal Court party.

Chapter five provides a conclusion on the status of the interplay between Articles 27 and 98 of the Rome Statute based on the United Nations Security Council-sanctioned investigation through secondary research findings which sustain an assessment of the various writings and pronouncement of both national and international courts on the subject and makes certain recommendations.

CHAPTER 2: ANALYSING THE ROME STATUTE'S ARTICLES 27(2) AND 98(1)

2.1 Introduction

The introductory chapter presents a concise backdrop against which this research project is founded. The anticipated impact of stating the problem, objectifying the anticipated outcomes, hypothesizing, research questions and the significance of the study is to couch the impending analysis on an scholarly foundation that can withstand and relate with scholarly critique. The previous chapter goes so far as justifying the research subject.

What is seen as the apparent targeting of African leaders for investigation and prosecution met stringent criticism by the African Union and some scholars. The idea is that these quarters perceive the establishment of an International Criminal Court which almost exclusively targeted the global south as a manifestation of new-age imperialism and neo-colonialism. When the United Nations Security Council referred the then sitting Sudanese to the International Criminal Court, the Court went on to issue a warrant for Al-Bashir's arrest in light of the failure to honor the summon to appear in court, and in person, at the Hague-based judicial forum. The African Union immediately challenged the issuance of the warrant and called its member states to promptly ignore in sovereign and regional defiance of this directive to arrest a sitting president, President Omar Al-Bashir. The previous chapter went on to illustrate how the African Union made manifest declarations that were influential on it members not to cooperate with the Court. In doing so the African Union made a presentation preliminarily objecting to International Criminal Courts jurisdiction over a sitting Head of State. The justifications therein re-affirmed the African Union's position in its decision not to comply with the request for arrest. Indeed, the Resolutions of the African Assembly of Head of States and Government noted "the unfortunate consequences that the indictment [of President Omar Al-Bashir] resulted in a setback of the optimization of the national healing process in progress way in Sudan.[40] That exhortation from the attendant African Union commission also came with a statement urging the International Criminal Court to defer proceedings against sitting Libyan and Kenyan presidents, ostensibly for the duration of their terms.

The African Union, through the African Union Commission, argued that Article 27(2) of the Rome Statute provides that "immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person". They pointed out that this Article 27

[40] Assembly/African Union/December/366(XIII), 2009

appears under the part of the Statute setting out "general principles of criminal law" and was applicable only with regard to the relationship between the Court and the suspect. In the view of the African Union Commission, in its relationship with the Court, it is Article 98 of the Statute that should apply.

The import of Art 98 (1) of the Rome Statute formed the basis of the opposition of both the Sudanese government as well as the African Union to the sustained proceeding against a sitting president. To be more specific, the effect of the article effectively barred the International Criminal Court or any other judicial forum for that matter, from acting in a manner that sought to 'vitiate' the sovereignty of a nation. The article relies on customary law in the international sphere to posit that all state officials acting in response to any communication by the International Criminal Court ought to act only in a manner that allows them to exercise their sovereignty. Here too, the court is substantively barred from engaging in proceedings that would seek to defeat the purpose of settled principles of international comity such as non-interference. The article notes that it is the duty of the court not to act in a manner that will result in a demand for the arrest of an individual in a manner that goes against the municipal policy protection of that individual or property's immunities, *per* international law. The only exception to this caveat is the explicit allowance of the prospective detainee's state to the detainment, removal to Hague, and consequent prosecution of that person or property. That essentially amounts to a waiver of the said property or individual(s) immunity. The concerns underlying objections are summarized by Robert Cryer, Hokan Friman Darryl Robinson, Elizabeth Wilmshurt outline this phenomenon succinctly in their book by saying:

> "The concerns underlying the resolutions are reflected in allegations of the Court's double standards, with its focus on atrocities committed in Africa, the possible impact on peace and security in the region and a perhaps genuine difference of view on whether or not the Head of States which are not parties to the Statute enjoy immunity from Court proceedings." [41]

This chapter analyses the two Articles in light of the African Union's position and seeks to explore the extent to which the two provisions can be reconciled. The Omar Al-Bashir Warrant of Arrest Case arising out of South Africa's manifest decision not to arrest and forward the

[41] Page 176

then Sudanese president to the International Criminal Court while he was in South Africa is used as the case study.

2.2 Articles 27 and 98: A Brief Analysis

Article 27 provides for 'head of state immunity' thus:

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

Article 98 is worded as follows:

'Cooperation with respect to waiver of immunity and consent to surrender

1. The Court may not proceed with a request for surrender or assistance which would require the requested state to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.
2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.'

These provisions are part of the Articles of the Statute that were adopted during a five-week diplomatic conference convened to finalize and adopt convention on the establishment of an international criminal court. The two provisions were drafted by different committees in the

preparation of the Rome Statute – one of the widely consulted treaty in its drafting stages- and no thought appears to have been given to their consistency with one another.[42] The two Articles must be read in the context of the Rules and Procedure of Procedure and Evidence which under Rule 195(1) provide that:

> "When 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. Any concerned third State or sending State may provide additional information to assist the Court"

Dapo Akande[43] in considering whether Article 27(2) removes immunity at the vertical stage i.e. before the Court itself or whether it does so at the 'horizontal level' i.e. before the national authorities argues following the drafting history of this provision the intention of the framers was that it would have effect 'not just in proceedings before the ICC itself but also in national proceedings related to the ICC'S exercise of jurisdiction' and this is the position of the Court in both the Jordan and South African cases.

Cassese[44] summarizes the position thus:

> "it seems justified to hold that under international law personal immunities of state officials may not bar international criminal courts from prosecuting and trying persons suspected or accused of having committed international crimes, or at any rate the criminal offences over which the relevant international court or tribunal has jurisdiction"

Interpreting Article 27(1) the Trial Chamber in the Al-Bashir Case stated that it considered[45] "The current position of Omar Al-Bashir as Head of State which is not a party to the Statute, has no effect on the Court's jurisdiction over the present case. The Chamber reaches this conclusion on the basis of the four following considerations. First, the Chamber notes that,

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[42] Triffterer 0., Article 27, in 0. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes*, Baden Nomos Verlagsgesellschaft, 1999.

[43]Does the ICC Statute Remove Immunities of State Officials in National Proceedings? Some Observations from the Drafting History of Article 27(2) of the Rome Statute in EJIL:Talk! November12, 2018 Accessed on 23 July 2021

[44] At page 322

[45] See paragraphs 41 to45 of the Judgment of the Chamber.

according to the Preamble of the Statute is to put to an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole, which 'must not go unpunished' Second, the Chamber observes that, in order to achieve this goal, Article 27(1) and (2) of the Statute provide the following core principles:

> (i)'This Statute shall apply equally to all persons without any distinction based on official capacity;
>
> (ii)' […] official capacity as a Head of State or Government, or parliament, an elected representative or government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence' and
>
> (iii) Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.
>
> Third, the consistent case law of the Chamber on the applicable law before the Court has held that, according to Article 21 of the Statute, those other sources of law provided for in paragraphs(1)(b) and (1)(c) of Article 21 of the Statute, can only be resorted to when the following two conditions are met: (i) there is a lacuna in the written law contained in the Statute, the Elements of Crimes and the Rules; and (ii) such lacuna cannot be filled by the application of the criteria of interpretation provided in Articles 31 and 32 of the Vienna Convention on the Law of the Treaties and Article 21(3) of the Statute;
>
> Fourth, as the Chamber has recently highlighted in its 5 February 2009 'Decision on Application under Rule 103', the Security Council of the United Nations has also accepted that the investigation into the said situation, as well as any prosecution arising therefrom, will take place in accordance with the statutory framework provided for in the Statute, the Elements of Crime and the Rules as a whole"

The practice of state parties to the Rome Statute suggest that they interpret Article 27 as removing immunity not only at the stage where the defendant is before the Court, but also at the national level. As Cassese[46] emphasizes:

> "The current thrust of international law is to broaden as much as possible the protection of human rights and, by the same token, to make those who engage in heinous breaches of such rights criminally accountable. The very logic of the present trends of international law therefore fully warrants the subjection of state officials to the judicial scrutiny of international independent bodies, whenever such officials i) are accused of serious criminal offences against basic values of the world community; and ii) there is no risk that such judicial scrutiny surreptitiously used as a means of unduly restraining the official activity of the state agent concerned"

Some states parties have adopted domestic implementing legislation which implicitly or explicitly take the view that officials of other states may not be entitled to international law immunity from arrest when a request for arrest has been made by the ICC. This is the position adopted by South Africa and it became the subject of interpretation by the Pre-Trial Chamber. Although interpreting Article 27 as removing immunities vis-a-vis national authorities acting in response to an ICC provides meaningful effect to that provision, this interpretation does highlight the tension with Article 98 for such interpretation would deprive Article 98 all meaning.

Regarding the contention that since international courts like the ICC have no means of enforcing their decisions and therefore states are free to disregard immunities in order to comply with a request to arrest and surrender by those courts, Cassese[47] counters that by asserting that "at present the logic of international criminal justice does not work that way: the fat that an international criminal court is endowed with jurisdiction over a particular case but is deprived of enforcement powers does not imply that national judicial authorities are permitted to do whatever an international court asked them to do; and more so if that court has been established by virtue of a treaty, like the ICC, and therefore its authority derives from an instrument based upon consent". What the Rome Statute does Cassese goes on, is to derogate

[46] Page 322
[47] At page 323

from the rules of customary international law on immunities with respect to the exercise of jurisdiction by national authorities "including the execution of an arrest warrant but only with respect to the relationship among contracting parties… Indeed, Article 98(1) of the ICC Statute provides that the Court *may not proceed* with a request for surrender and assistance if compliance with it would require the requested state to act inconsistently with its obligations under international law with respect to immunities of a person or property of a *third* state" agreeing with C. Cress and K. Prost[48] that

> Articles 27(2) and 98(1) only deal with cases related to the exercise of jurisdiction *by the Court.* Therefore, the contention is warranted that the ICC Statute derogates from the customary international rules on personal immunities, among contracting parties, only on condition that the requested state needs to arrest a person for surrender to the ICC. The derogation from the regime on personal immunities set up by the ICC Statute does not encompass a request for arrest and extradition issued by domestic authorities, for proceedings *before national courts*. Therefore, the derogation applies only at the 'vertical' level i.e when compliance with a request by the ICC is at stake) and not at the 'horizontal' level (i.e. at the level of the relations between state parties to the ICC Statute"

According to Prof. Akande, this tension can be resolved and meaning given to both provisions by making a distinction between immunities accruing to non-parties to the Rome Statute and those accruing to the contracting parties to the Rome Statute. In this view immunities of officials are rights belonging to the state of the official and therefore not even the Rome Statute can remove the immunity belonging to non-parties to the Statute since that treaty cannot create obligations for third states.[49]

2.3 The Inter-Play between Articles 27 and 98

The interplay between Articles 27 and 98 differs in respect of whether or not the states involved are contracting parties or not. The operation of Article 27effectively extinguishes the immunities of any officials provided the nature of the crimes that they stand accused meets the threshold of Crimes against humanity. However, the liberal nature of Article 98 makes willful

[48] Article 98, in Trifferer, ICC Commentary, at Page1603
[49] Art. 34, *Vienna Convention on the Law of Treaties*, 1969.

surrender the only option in instances where the individual's country is both a non-party, and has policy backed by laws in place to delegitimize the operations of the International Criminal Court in its social contract.

The Rome Statute relied on the doctrines of non-interference in allowing the then sitting president of Sudan free entry and exit from the country. However, that position is not unique to the nation alone. There is evidence of the same position being present in Samoa, the Republic of Ireland, Malta, and most notably the United Kingdom. [50] Other progressive nations like Canada explicitly strip immunity from all citizens on account of a course of action that the International Criminal Court prescribes, *vide* Section 6.1 of the country's federal Extradition Act of 1999.[51] This could be contemplated under two instances. First it could be involuntary where a Head of State waives through an involuntary act immunity accorded to him or her under international and national law to face criminal prosecution (a situation again which has not been recorded thus far as at writing this thesis). The second contemplated scenario where immunities can be deemed to be waived is where the United Nations Security Council for instance does so in its action – explicit or by implication.

This is debatable in law and scholars remain actively with divergent views. Thus, the United Nations Security Council Resolution 1593 did not only have an effect of making Sudan in a watershed moment in the jurisprudence of criminal justice on the international state level. The attendant cooperation that the United Nations Security Council drew out of Sudanese government, as well as the IC sanctioned relations with other contracting parties to the Rome

[50] Section 48, *Canada's CAH and War Crimes Act (2000)*, inserting a new Section 6.1 into the *Extradition Act (1999)*; Section 31(1), *New Zealand's International Crimes and International Criminal Court Act* (2000); Section 23, *United Kingdom's International Criminal Court Act* (2001); 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 of immunity relating to Article 98 in conjunction with Article 27 of the Statute which arise in the course of execution of the request' (emphasis added); *Malta's International Criminal Court Act* (2002) c. 453 (inserting a new Article 26S into the *Extradition Act*, c. 276); §10(9), RSA's Implementation of the RS of the *International Criminal Court Act* (2002); Article 6(3), Croatia's Law on the Application of the Statute of the International Criminal Court (2003); §32, Trinidad and Tobago's *International Criminal Court Act* (2006); §61, Republic of Ireland's International Criminal Court Act (2006); Article 32, *Samoan International Criminal Court Act* (2007). Article 489 of Estonia's Code of Criminal Procedure (2003) also appears to deny immunity regarding arrests in execution of ICCs request given that it does not provide for such immunity but 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. See also § 25 of the *Commonwealth's Model Law to Implement the RS of the International Criminal Court.*

[51] See the joint paper circulated by delegates from Canada and the United Kingdom at the July-August 1999 session of the ICC Preparatory Commission, quoted by B. Broomhall, International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law, Oxford university Press, 2003, 144.

Statute by requiring it to cooperate but also had the effect of placing an international obligation to signatory nation states to the Rome Statute to cause an arrest should the International Criminal Court suspect step within their organization.

2.4 Conclusion

The conundrum that the analysis in this chapter reveals is the seeming cross-purposes of Articles 27 and 98 have as far as the International Criminal Court exists as an enforcing agency. It is apparent that the imposition of a culture of legitimate expectation of trial and punishment of people accused of Crimes against humanity requires sanctions, or at least unequivocal position in of the letter of the Rome Statute. Article 27 reflects the need to immediately strip anyone accused of Crimes against humanity of the immunity that they would otherwise have within the ambit of ordinary diplomatic relations. However, Article 98 waters down the import of this position by creating leeway for international cooperation, and in extension geopolitics, into the enforcement of what should essentially be a single standard of morality in the international community. An in-depth analysis of the Omar Al-Bashir Warrant of Arrest Case, in the following chapter, demonstrates how this conclusion is arrived at.

CHAPTER 3: ANALYZING LEGALITIES IN THE AL-BASHIR WARRANT CASE

3.1 Introduction

The previous chapter concerned a descriptive analysis of Articles 27 and 98 with a view to revealing the apparent contradictions between them and concluded with the assertion that it is not in dispute that Article 98 somewhat seeks to restrict the application of Article 27 (2).

This chapter seeks to examine in greater detail the main research questions posed in Chapter one and in particular; the aim in this segment is on the analysis of the meaning and scope of the legal mandate placed on the International Criminal Court by Articles 27 and 98 of the Statute was they pertain to International Customary law. Furthermore, there is an interrogation of this concept in light on the effect of the warrant on settled doctrine of the immunity Head of States traditionally enjoy. The question here is whether the then Sudanese president's warrant by the International Criminal Court President Omar Al-Bashir unsettled any customs in international law regarding global Head of State immunity. In its focus on the Rome Statute , did the said decision neuter the import of Article 98 in determining the most appropriate means of ensuring that the enforcement of the Rome Statute as a viable method of punishing criminality in the international sphere? Did the arrest warrant sufficiently address and determine the import of U Resolution 1593 (225) referring the International Criminal Court Prosecutor to Darfur to begin the process of investigating atrocities with the aim of charging the then President Al-Bashir for Crimes against humanity? and finally, what were the implications of the decision on the African Union's declarations explicitly encouraging member states to ignore the International Criminal Court in its quest to arrest Al-Bashir in other nation states which were either signatories to the Rome Statute : what outcomes in reciprocity does this mean to its membership, as the African Union is founded on its strength of member state adherence to its Constitutive Act obligating all its membership to comply with its decisions and policies?

These questions are sought to be answered through the lens of the Omar Al-Bashir Warrant of Arrest Case which arose as a result of South Africa's failure to arrest and surrender the Sudanese president while on official visit to attend the Africa Union Summit held in Johannesburg.

3.2 The Factual Background to the Case

Pursuant to a report submitted to it, and acting pursuant to powers that it wields as a global overarching decider of security issues both within and across borders by the United Nations Charterin Chapter VII, the United Nations Security Council decisively adopted Resolution 1564. The import of that decision was to create the momentum to direct its Secretary General to "rapidly establish an international commission of inquiry in order to immediately to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that responsible persons are held accountable."

The Chair of the Committee was made to be Professor Antonio Cassese. Also on that Committee were other scholars on conflict on the international level such as Mohamed Fayek, Therese Strigger-Scott, Dumisa Ntsebeza and Hina Jilani as other members meriting to be present in the selection on account of their experience on the matter, as well as their eminence in the field of international criminal law.

The exertion of the Commission's mandate began in earnest in Sudan on October 2004 when it met in Geneva. The Commission engaged the Sudanese government in dialogue and paid an official visit to Sudan in November 2004 and January 2005.During the visit it travelled to the three Darfur States where it camped from November 2004 to January 2005. The final submissions arising from this investigation were then conveyed back to the Secretary General of the United Nations in January 2005.

The composition of this report encompassed four central elements. These parameters arose from the nature of the assignment that the investigators got in their brief and based on which the Commission and United Nations Security Council finally made their conclusions on the

state of Darfur in Sudan as well as the nature of response that the region would receive. These were in relation to the following points of interrogation:

(a) The determination of whether there were indeed violations of the human rights of the people of Darfur according to the standards set out in the international body of human rights laws

(b) Whether or not acts of genocide had indeed occurred in the said Darfur region as the initial reports suggested

(c) To conduct an explicit identifying activity of the alleged perpetrators of the Crimes against humanity, and

(d) To outline the accountability mechanisms that would make the legal resolution of the conflict as expedient, cost-efficient, and contribute to societal healing as much as possible.

Pertaining to the major issue of the violence in that specific event, it is important to show that the Commission was meticulous in identifying the scale and duration of the Diplomatic Conferences. The interrogation was very important in finding out the identities of the perpetrators of the mass murder and societal destabilization in places. In this respect, it was found that the Sudanese government was well as a militia called Janjaweed were the primary perpetrators of the Crimes against humanity that attracted the attention of the international community in the first place. Therefore, this was after the Commission had "carefully examined reports from different sources including governments, inter-governmental organisations, United Nations bodies and mechanisms as well as nongovernmental organisations"

The specific actors in this mass casualty event were government officials in the current employ of the Sudanese government. Therefore, the Commission recommended that its findings be handed over to the then official in the office of the Prosecutor on the behalf of the International Criminal Court. In making this recommendation the Commission was very explicit in stating that the Commission's research provided the originating evidence on which charges of Crimes against humanity could be proffered to the Janjaweed militia as well as the premier of the Sudanese government in its capacity as Head of State.[52]The nature of the report was descriptive, giving rise to the analysis of the International Criminal Court on the merits of the charges that the accused persons would face before the court. The starting premise in this instance was the definition of the phenomenology of the unravelling chaos in Darfur. At the time, the base facts pointed to a dire humanitarian situation in Darfur. The United Nations authoritatively held that

[52] From the Executive Summary of the Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General NN Document ICI-Darfur posted on 25 February 2005.

almost two million people were internally displaced due to the ravages of conflict. Additionally, there were two hundred thousand more refugees already in Chad, and accounted for as fleeing from the Darfur region. The second irrefutable truth of the severity of the conditions in the area was that there was carnage as a direct result of belligerent Diplomatic Conferences in the Darfur region. The report noted that the Darfur area consists of three provinces, all of which were badly hit by the violence that preceded the mass murder and other Crimes against humanity. Secondly, the report noted that there was widespread destruction of the basic infrastructure of supporting normal life in society. That manifested in the wholesale destruction of villages in the three states that make up the Darfur region.

The Commission made a point of conducting independent investigations into the statistical nature and scope of destruction so as to quantify whether indeed the criminality was deserving of a municipal and international forum for resolution. In so doing, the Commission conducted qualitative surveys of the settlements, towns, and even villages across the Darfur region. These were namely in the West, South and North of Darfur.

In light of the severity of the actions that both government and seemingly state-sponsored terrorists had on the people of Darfur, it was illogical not to forward the said report to wat United Nations Security Council in light of Resolution 1593. The emergent recommendation to refer the matter to the International Criminal Court for prosecutorial attention was therefore one that hinged on the morality of the Nuremberg and post-WWI adjudication systems. There was no express legal rationale for breaking normative international law customary values in allowing immunity to state officials. The United Nations Security Council in its Resolution specifically authorized the International Criminal Court to investigate the unfolding of Crimes against humanity in any United Nations member where it deemed it necessary and "acting under Chapter VII of the Charter of the United Nations." The next course of action for the United Nations Security Council was therefore to reach the decision of:

1. Referring the case of Sudan to the International Criminal Court on account of the atrocities that the Commission that were present and verifiable annotated from the 1st July to the expiry of the tenure of the Commission's investigation in Darfur.
2. Compelling the then government of the Sudanese Republic, as well as the African Union to provide all the necessary infrastructure, goodwill, as well as administrative assistance to ensure the optimization of the International Criminal Court's substantive and procedural outcomes. Therefore, while the originating resolution noted that the Sudan was a non-party state to the Rome Statute: that was not taken as a legitimate

reason not to ensure that Chapter VII of the United Nations Charter could not apply, particularly in the defence of millions of vulnerable human lives, and at the pain of death. Therefore, the motion was to urge all states to offer adequate support to the continued exercise of the International Criminal Court's prosecutorial obligations.

3. There was an immediate invitation by the United Nations Security Council to the African Union to define the modalities of handling what would ostensibly been a distinct novelty in the field of international law-the trial of a sitting president for Crimes against humanity. That was a departure from the custom of blanket immunity once diplomatic association was proven. However, the invitation by the United Nations Security Council to the African Union was to attempt to build a consensus around the prosecution of Al-Bashir within the region. The utility of prosecuting the siting head and his cohorts in the region was anticipated to be a positive contributor to the building of the perception of the rule of law in the region, especially since there was a manifest air of official infallibility and impunity in the leadership in the region.

The refusal to cooperate by the Sudanese government to these directives and the blatant disregard to the process of due legal interrogation eventually led to the indictment of President Al-Bashir in 2009 on count of committing Crimes against humanity and war crimes (even though this was later revised to genocide proper). The Prosecutor sought to have the court issue a warrant that would facilitate an arrest of the then President of Sudan. This marked the first time a serving president was under an indictment of the International Criminal Court for sponsoring, leading, and sanctioning mass murder, as well as violations of human rights such as rape and economic pillage. The facilitating report was explicit and succinct in its assertion of the facts leading up to the indictment. In her final Report as the Prosecutor of the International Criminal Court Fatou Bensouda it was apparent that the hallmark moment was not lost on her.[53] The eminent international criminal prosecutor noted that the indictment and even the issuance of a warrant of arrest was immense progress against the force of evil that reign with impunity and no regard for the sanctity and integral decency that with responsibility should handle human life. The indictment set a precedent and created the institutional memory that would continue a culture of proactive maintenance of the rule of law by not waiting for the cessation of atrocities for the international community to swoop in and punish the wrongdoers. In effect, the decision is an indication of the fact that international criminal law is actively

[53] Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593(2005). On 9 June 2021.

maintaining a system of morality that is not only constant, but is also appealing to spirit of the United Nations Charter as well as the letter of the United Nations Declaration of Human Rights. To Bensouda, it was "a clear demonstration of how the framers of the Rome Statute system envisaged the International Criminal Court and [The Security Council] to work together towards the twin goals of justice and peace. When [the Security Council] referred the Darfur Situation to the International Criminal Court in March 2005, it brought hope to victims of atrocity crimes in Darfur by sending a clear message that justice was not only important in its own right but also with a multiplier effect on achieving sustainable peace in Darfur…Sudan is under a legal obligation to surrender suspects pursuant to Resolution 1593…all suspects must appear before the International Criminal Court and that Sudan should fully cooperate with the Court in its investigation and prosecution of these suspects."

3.3 Legal Analysis of the Case

The charges against President Hassan were grievous in the sense that they pointed to the direct abdication of all the presidential responsibilities of good faith against the people that collectively comprise of the public. The warrant of arrest that the International Criminal Court issued came with a rationale justifying the arrest of a sitting Head of State. On 4th March 2009, as well as 12th July 2010, the court upheld the counts of five counts of crimes against humanity. These included the mass displacement of people through violence and the threat of death. Additionally, the warrant also detailed the facts justifying a charge of extermination were also laid out, for the role of government officials as well as infrastructure in the bid to exterminate entire populations in the North, West, and East Darfur regions. Murder, torture, and rape on an industrial scale rounded off the claims against the government of President Omar. On the issue of war crimes, the president stood accused of intentionally and consistently attacking soft target and as such engaging in the mass murder of civilians who are not active combatants in the conflict. Additionally, the president stood accused of committing war crimes such as pillaging the same civilian populations. Concerning genocide, the warrant issued three counts as justification for arrest. The first was on account of the mass murder that the Commission identified in the area. Secondly, there was significant evidence of the president's authority in the mutilation and psychological torture of target demographics. The nature of this physical and psychological harm was to decimate or cause the disintegration of targeted groups in the Darfur region.

Then, *per* the judgment of the Pre-Trial Chamber 2 issued on 6 July 2017,[54] Court learned in May of 2015 from media reports that he beleaguered president hade the express intention to travel to the South Africa for the purposes of attending and African Union summit which was due to occur in the city of Johannesburg between for a duration of eight days ending on the 15th of July 2015. The Court pursued appropriate administrative protocol by having its Registrar notify the government of South Africa of the International Criminal Court's request to cooperate for the purposes of facilitating an arrest or otherwise cause the surrender of President Al-Bashir and in the event of any inability of the South African government overtly facilitate the capture of the International Criminal Court fugitive while within its jurisdiction.

President Hassan entered Rome Statute on June 13, 2015, and departed two days later without incident. In this time, an order for his arrest had already been affirmed by the High Court, an appeal quashed, and the thus the elimination of all impediments to the arrest of the war crimes suspect removed. However, the legal process was not in time since the Sudanese Head of State had already departed for the safety of his country.[55]

On September 4, 2015, the reality of the South Africa's delay in facilitating the capture of the dissident president led to a motion to act against South Africa within the International Criminal Court's chambers. On December 8, 2016, the Chamber convened a hearing regarding two issues namely:

(i) whether South Africa was on the wrong for manifestly failing to conduct an expedient arrest of the Sudanese president, and also whether South Africa had any real culpability for letting the leader enter and leave the country unrestrained;

(ii) whether the unfolding series of events warranted a formal finding of South Africa's effective non-compliance. A public hearing was held on April 7, 2017 and submissions were made. 'In essence" said the Court, "the position expressed by Rome Statute… is that President Al-Bashir enjoys immunity from criminal proceedings, including from arrest, under customary international law, and that since that immunity had not been waived by Sudan or otherwise, the Court was precluded by Article 98(1) of the Statute from requesting Rome Statute to arrest and surrender President Al-Bashir and,

[54] *The Prosecutor v. Omar Hassan Ahmad Al- Bashir,* ICC-02/05-01/9, *Paras 5-8.*
[55] As Bashir leaves, RSA Court calls for his arrest, Reuters News Agency, 2015.

consequently, South Africa was not obliged to arrest President Al-Bashir and surrender him to Court."[56]

South Africa further posited that United Nations Security Council Resolution 1593 could not extend to the point of summarily waivering the immunity that Hassan enjoyed as Head of State of Sudan, an a sitting one no less. In so doing, South Africa noted that the assertion that Article 27 only applied to the question of jurisdiction in a matter of internationally criminal concern. Therefore, the entire situation in Darfur was a matter between the United Nations Security Council's Resolution 1593, and Sudan. The presence of the individual in South Africa had no impact on either the person of the Head of State, who according to South Africa's defence, still enjoyed the vestige of immunity due to the fact that he was head of government at the time.

Conversely, the prosecution's contention was that the International Criminal Court Chamber had already pronounced its institutional position on the subject of non-compliance previously, and in favour of the prayers that the prosecution was placing before the court in this instance. In the matter involving the *Democratic Republic of Congo v Belgium*, the subject matter was also about a warrant. Here, the court was emphatic in settling the conundrum around compliance, especially with regard to the two controversial Articles in this research. The substance of the *dicta* is to the effect of the following pronouncement.[57] In its examination of the issue of non-compliance, the International Criminal Court mentioned that it was careful to base its institutional memory on the legal practice that was already in place at the time of the litigation in question. The informative juxtapositions were from the British House of Lords, as well as the French Cour de Cessation. From the interrogation of both issues, it was impossible to identify any instance where immunity to the process of criminal justice could subsist in any way shape, or form. Furthermore, the prosecution noted that the bench, in that matter, went on to extend the same search for immunity to the international spectrum, and still came up short of finding a single instance where immunity could be used to defeat the course of justice. On the contrary, even the Ministers of Foreign Affairs of nations that stood accused of committing war crimes and Crimes against humanity were vicariously liable for their governments' actions. That criminal culpability extended even to them. Therefore, the supposed immunities that such Ministers could enjoy, while sufficient in defeating personal

[56] Paras 53,71-74,101.
[57] Paras. 58,61.

tortions, were woefully inadequate in any attempt to stop the international criminal law justice system from operating in this instance. Therefore, the argument was that both present and past immunities as a result of official capacities had no impact on the justiciability of the prosecution of individuals in cases of certain extenuating circumstances, ostensibly such as this one where the charge is for crimes against humanity.

First of all, the argument was that criminal culpability was not a bar to the prosecution of even high-ranking representatives of the sovereign. Furthermore, even that immunity was subject to the mercy of the sovereign, and could be waivered or even fully withdrawn at any time. The court went on to note that the cessation of enjoyment of these privileges was absolute, and extended even to their immunities in foreign jurisdictions in that instance. The essence of the argument by the prosecution was that the loss of legitimacy by a sovereign would essentially make them 'fair game' for every criminal justice jurisdiction, be it in their home countries or externally. The only caveat to prosecution in a foreign jurisdiction was the demand of legitimacy in terms of the jurisdiction of that court. And even then, the prosecution noted that the bench in *The Democratic Republic of Congo v Belgium* was of the opinion that foreign ministers were still culpable for actions that they undertook in their personal capacities in the period directly preceding or subsequent to their occupation of their office. That was the trail of thought that the prosecution sought to establish in this case.

The fourth, and most direct, *dictum* of the International Criminal Court as set out in the Warrant Case noted that the notion of immunity was not infallible in the face of criminal culpability. Again, the court was also focusing on a high-ranking official as a microcosmic indicator of the court's attitude towards representative of a sovereign, or even the person of the sovereign him or herself. In making this point the prosecution pointed to the Chamber's then (and assertively still present) legitimacy in prosecuting individuals that overtly abused the power and responsibility of their stations in their nations to desecrate the effect of the United Nations Declaration of Human Rights. In so doing, the prosecution noted the International Criminal Tribunal for Yugoslavia and its Rwandan counterpart as both instance where justice demanded the 'drawing back' of the veil of incorporation in sovereignty to ensure that the culpable individuals met just dessert.

In its submission, the International Criminal Court prosecution argued that Chapter VII of the United Nations Charter was the operant framework inspiring the setting up and success of the Rome Convention of 1998. Therefore, the prosecution pointed out the impossibility of using customary law to defeat the purpose of codified international rules of engagement, in the form of a treaty. The objective here was to convince the court of the non-conformity of the Rome Statute inaction in attempting to pass off rules of international commity as being superior to the rules of set treaties, as it argued for Article 98-(1) defeating 27 (2). A comparative synthesis of this position can be summed up in how the basic hierarchy of laws in Kenya gives probative value to different sources of law.[58] The Constitution is the supreme law of the jurisdiction. There is a hierarchy of laws supporting the Constitution, but only valid to the extent that they give effect to the spirit and letter of the Constitution. Similarly, the fact that norms are the ones that crystallize to code is an illustration of the eminence of treaties to custom in this instance

The International Criminal Court Prosecutor identified the root of Sudan's obligation to comply with the United Nations Security Council and ultimately the criminal judicial process to Chapter VII of the United Nations Charter. Further, the Prosecutor argued that Resolution 1593 showed that "the Security Council was aware of the issue of immunities, addressed it in paragraph 6 in relation to one aspect… and by contrast not to address it in paragraphs 1 and 2, suggesting that it did not wish to disturb the ordinary application of the Rome Statute vis-à-vis the Court's jurisdiction in relation to Darfur."59 Regarding the theoretical correlation in interpretation diametrically positioning Articles 27(2) and 98(1) of the Rome Statute the Prosecutor's opinion was that there was no rule, explicit or implicit, for the court to seek the explicit consent of the state parties over which it exercised power to waiver immunity over its representative officials. State parties would thus have no prerogative to deny the effect of arrest or surrender of a waned individual to the court in the advent of a prosecution. The operation Art 27 (2) was already an acknowledgement of the disruption of immunity instances where there is a charge of grave proportions to the extent of a charge of war crimes and other Crimes against humanity.[60]In other words, the acceptance of the treaty without reservation effectively affirmed the legitimacy and precedence of Article 27 (2) in the face of the more vague requirement for international cooperation that 98 (1) identifies, as that cold essentially be a

[58] Section 3 of the Judicature Act, Cap 8, Laws of Kenya
[59] Para 46.
[60] Para 47.

means of defeating the straightforward purpose of the Rome Statute in prosecuting individuals that violate the spirit of the United Nations Charter and the letter of the United Nations Declaration of Human Rights.

Regarding the concerns of the African Union, the Prosecutor submitted that "the same logic applies, i.e., paragraph 2 of Resolution 1593 'waived any immunities granted by an international agreement pursuant to which the consent of a sending State is required to surrender a person of that State to Court"[61]

Overall, the International Criminal Court Chambers were not convinced with South Africa's argument, holding that the request to arrest or in the very least orchestrate a surrender of Hassan Omar was in open contravention to the settled law that was the Rome Statute. That argument did not hold in the face of the interests of justice, as well as the spirit of the rule of law. More specifically, the court cited South Africa for its non-compliance with the larger question of geopolitical prominence between the International Criminal Court and the African Union. That was in response to an argument that South Africa raised, quoting an alleged agreement to which the Rome Statute was a part of that extended the blanket immunity of customary law to all visiting heads of state in the African Union summit. The Court nevertheless differed on this premise, stating the contextual uniqueness of the current state of events involving the Sudanese HAS and his visit to the African Union summit. The aim of the distinction was to outline the limits of the appropriation of international customary law. The following pronouncement is therefore the import of this position *verbatim*[62]

> ".. the Chamber notes that customary international law prevents the exercise of criminal justice by States against Head of States. This immunity extends to any act of authority which would hinder the Head of State in the performance of his duties. The Chamber is unable to identify a rule in customary international law that would exclude immunity of Head of States when their arrest is sought on behalf of an international court, including, specifically, this Court."

On the interplay between Article 27(2) and 98(1) The Court framed the issue as follows:[63]

[61] Para 50.
[62] Para 68.
[63] Para 71-74.

> "As observed above, customary international law provides for the immunities of Head of States from arrest by other States. The Chamber must therefore determine whether and, if so, in what circumstances, there exists any derogation to the general regime of immunities under international law when the Court seeks the arrest and surrender of a person enjoying immunity as a Head of State. This determination concerns primarily the interpretation of Article 27(2) of the Statute and its relationship with Article 98(1) … South Africa made the argument that [Article 27(2)] provision that. 'Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person'] does not have any effect on the rights and obligations of States vis-a vis the Court (which it argues, are exclusively regulated in Part 9 of the Statute), but concerns only the Court's jurisdiction, ensuring that such jurisdiction is not excluded in cases of immunity or special procedural rules attaching to the official capacity of that person.
>
> *The Chamber does not subscribe to this view and finds that Article 27(2) of the Statute also excludes the immunity of Head of States from arrest*. [Emphasis added] First, the Chamber considers that since immunity from arrest would bar the Court from the exercise of its jurisdiction, the general exclusionary clause of Article 27(2) of the Statute, in its plain meaning, also encompasses that immunity. Had the drafters of the Statute intended exclusion only of a narrow category of immunities, they would have expressed it in plain language. The language used in that provision, however, conveys comprehensiveness and is not compatible with the provision that the immunity from arrest of Head of States is excluded from it."

The Court then went on state:[64]

> "As there exists no immunity from arrest and surrender based on official capacity with respect to proceedings before the Court where any such immunity would otherwise belong to a State Party to the Rome Statute, Article 98(1) of the Statute-in the part in which it addresses situations of possible State or diplomatic immunity preventing the arrest and surrender of an individual- is without object in the scope of application of Article 27(2) of the Statute. No waiver is required as there is no immunity to be waived"

[64] At para 81.

After discussing the import of United Nations Charter Resolution 1593, the International Criminal Court went on to hold that:[65]

> "It is evident that Article 98 of the Statute is construed in very different terms. It does not provide that the requested State may refuse cooperation with the Court or postpone execution of the request for arrest and surrender. Even less does this provision grant discretion to States Parties to choose whether to cooperate with the Court or refuse such cooperation on the ground of a disagreement with the Court's interpretation and application of the Statute. While in particular circumstances certain procedural remedies (such as appeal) may be available, disregarding the determination of a court of law is, manifestly, not one of these legitimate remedies.
>
> Rather, Article 98 of the Statute provides that it is the Court which shall not request cooperation until a waiver of the relevant immunity is obtained from the third State by the Court itself. Specifically in the case at hand, this means that it was not open to South Africa to delay cooperation and question the validity of the Court's request for cooperation once the Court elected to transmit one. The Court having proceeded with a request for the arrest and surrender of President Al-Bashir, and having confirmed such request following the information provided to it by South Africa as foreseen by Rule 195 of the Rules, South Africa had the obligation to execute it and could not claim vis-à-vis the Court with any consequence the existence of a conflict of obligations. Even assuming, for the sake of argument, its existence, such a conflict would not have relieved South Africa of its duties vis-à-vis the Court, or given it a discretion to dispense with such duties. Article 98 of the Statute simply does not have this effect."

In issuing the warrant of arrest for President Omar Al-Bashir of Sudan,[66] the Pre-Trial Chamber of the International Criminal Court ordered the transmission by the Registry of a request for arrest and surrender of President Al-Bashir to all states parties to the International Criminal

[65] Paras 104-106.
[66] *Decision on the Prosecutions Application for a Warrant of Arrest against Omar Hassan Ahmad Al-Bashir, Al-Bashir*, ICC-02/05-01/09, Pre-Trial Chamber 1 on 4 March 2009.

Court Statute67 and all United Nations Security Council members[68] that were not states parties to the International Criminal Court Statute. Under the Statute Article 98, the state parties to the Rome Statute are obliged to cooperate with the Court. This cooperation included the obligation to comply with the request for arrest and surrender of persons indicted by it.[69] Accordingly, and with regard to the warrants against President Al-Bashir issued on 4 March 2009 and12 July 2010, the question whether South Africa was under an obligation to arrest President Al-Bashir upon his travel to its territory arose. Put another way: was the Republic of South Africa even permitted by international law to arrest him?

In the context of President Al-Bashir's warrants of arrest therefore, it is important to note that the immunity accorded to a serving Head of State, *ratione personae*, from foreign domestic criminal jurisdiction (and from arrest) is absolute and applies even when he is accused of committing an international crime. This is certainly clear and remains visible under international law save for instances, unique and rare, where such immunities are waived.[70]

3.4 The Application of Article 98 and its Relationship with Article 27

The International Criminal Court Pre Trial Chamber's decision did not consider whether immunity is to be respected at the national level despite the fact that there is a provision in the Rome Statute that addresses this issue. Despite this proclamation of the irrelevance of immunity and official capacity in Article 27 of the Rome Statute, Article 98,[71] points the opposite way. If the immunity is provided by treaties such as the Special Missions

[67] For understanding of the list of countries who are signatories to the RS, now at 122 states, https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx on 11 April 2019.

[68]: https://www.un.org/securitycouncil/ on 11 April 2019 on the status of member states to the United Nations Security Council.

[69] Van Alebeek R., '*The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*, Oxford University Press, Oxford, 2008, 169; D. Akande, 'International Law Immunities and the International Criminal Court, 98 American Journal of International Law (2004) 407, 409; A. Watts, 'The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers, 247 Recuil des Cours (1994-Ill) 13; C. Wickremasinghe, 'Immunities Enjoyed By Officials of States and International Organizations', in Evans M (ed.), *International Law*, 2 ed., Oxford: Oxford University Press, 2006), 407.

[70] Akande D, Sangeeta S, Immunities of State Officials, International Crimes, and Foreign Domestic Courts 21 *European Journal of International Law* 4, November 2010, 815–852.

[71] Article 98(1), *RS*, states that the:
The Court may not proceed with a request for surrender or assistance which would require the requested state to act inconsistently with its obligations under international law with respect to the state or diplomatic immunity of a person or property of a third state, unless the Court can first obtain the cooperation of that third state for the waiver of the immunity

Convention or the United Nations Immunities Convention, Article 98(2) then becomes relevant.[72]

The International Criminal Court Pre Trial Chamber ought not to have ignored Article 98 in its analysis because it proceeded to make a request for arrest and surrender in a situation under which a bold and purposive interpretation would have gone a long way in settling the ensuing controversy. The Pre-Trial Chamber ought to have dealt with the applicability of Article 98 and how it relates to Article 27 before proceeding to issue the request for arrest and surrender to states parties and to the United Nations Security Council members. The Pre-Trial Chamber could have exercised its judicial discretion to satisfy itself that it would not be requiring states to act inconsistently with their international obligations relating to the concerns of immunity-the very issues raised by the African Union.

Does the demonstrated tension between Articles 27 and 98 of the Rome Statute diminish the effectiveness of Court with regard to warrants of arrest issued against serving Head of States. There are two clear ways of ensuring some form of synergy between the effect of Art's 27 and 98. A way of merging the impacts of the two with regard to identifying the most appropriate means of increasing these works is to institute specificity in the contextual applicability of the two Articles. For one, Article 27 could find proper applicability when its effect is deemed to strip individuals of protective immunity only when the court brings up the matter. That will be an adoption of the vertical approach earlier mentioned in the analysis. Additionally, in light of the distinct means of showing that there is a possibility of Article 98 (1) only having effect in as far as nations are pursuing criminal justice and cooperating on criminal matters on a national jurisdictional matter. This functional differentiation is necessary in defining rules of practice where the letter of the Rome Statute acts in its true stead as a facilitator of criminal justice in the identification of the most of the most expedient forum for achieving criminal justice. However, even then, both interpretations however, have been criticized.

[72] Akande D, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits', 1 *Journal of International Criminal Justice*, 2003, 618, 645. Article 98(2) provides that: 'The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.'

One deductible counter-argument against this position is that the application of Article 27 as an exclusive tool of the International Criminal Court would defeat the purpose of the court. The nature of international relations is such that all the nations in the world relate to each other on a level of existential equality. That means that a court seeking to exert control over Head of States and governments without the benefit of other states is essentially powerless in enforcing orders against national leaders without the support of other states. It is important to note that despite the fact that Article 27(2) is emphatic in determining the removal of immunity in state representatives, the International Criminal Court has had no independent powers of arrest since its inception. Therefore, holding that the immunities have no impact on the exercise of jurisdiction; while simultaneously leaving the power to arrest with nations will amount to creating a court that is functionally powerless to its exert physical will on the parties. Therefore, the courts in question will be hardly be able exercise their jurisdiction. That is where the impracticality of an isolated International Criminal Court making arrest manifests. The nature of arrests is that they typically occur in instances where the individual in question is not willing to commit to the process of the criminal proceedings. Having a court where the only compelling force is surrender by the nations will severely derogate the social capital of the court in the international community. Furthermore, it is important to point out that even in instances where that happens, the act of surrendering itself defeats the purpose of Article 27 (2).

When a nation surrenders its citizen to the process of the International Criminal Court, it is in essence stripping them of the immunities that would have ousted the jurisdiction of the International Criminal Court. In effect, that renders the article useless since the countries would have already stripped the said individuals of their immunity to the judicial process. Similarly, the only other situation where a court has the ability to gain access to a defendant is when they surrender themselves to the court. Here too, there is intrinsically no need for Article27 to exist. What that then leaves the operation of the article to is this rare instance. Overall, reducing the operation of Article 27 to a ceremonial function of the International Criminal Court would be in contravention of the Vienna Convention. The treaty prescribes the means by which international treaties operate, and the nature of their operation[73] The

[73] Vienna Convention on the law of treaties (with annex). Concluded at Vienna on 23 May 1969. [The Vienna Convention on the Law of Treaties (VCLT) is a treaty concerning the international law on treaties between states. It was adopted on 23 May 1969 and opened for signature on 23 May 1969. The VCLT has been ratified by 116 states as of January 2018.

Vienna Treaty has the effect of enjoining treaty laws for the identification of the most justiciable ways of implementing a treaty. In this case, the take-away from the treaty on interpretation is that the most appropriate way to construe the edicts of a treaty is to consider their functions *in toto.* The consideration of their impact in harmonious application enables treaties to properly address the mischief that the treaty intended to cure. Overall, the benefit of construing the treaties as a whole arises from the fact that such an approach avoids constructions of the law that would amount to redundancy in provisions due to the absurdity of their applications out of context.[74]

Another reason behind the validity Art 27 (2)'s legitimacy is that it exists at both national and international level. That gives it both vertical and horizontal utility in the escalation of its usage in international law as set out earlier in this analysis. The further evidence of this is that the provision itself identifies its roots as being in municipal law. The International Criminal Court exclusively deals with criminality on an international level. A keen reading of the provision notes that it states that the presence of municipally erected laws shall not be sufficient reason to defeat the exacting of the law in a forum where national legal forums do not have the right to primary jurisdiction. Therefore, the pronouncement in Article 27 (2) that vitiates nationally-placed immunities in the face of a charge that brings the different elements of culpability is that it develops the issue of international comity even further. In a sense, it is a continuation of the institutional memory that began with the institution of the International Criminal Tribunal for Yugoslavia and its Rwandan counterpart. In essence it is a demonstration of the evolution of human rights from the isolation of different social contracts into a globalized entity that is appreciative of the singularity of humankind.

These submissions were to the effect that that while 'Article 98(1) is directed generally to "third States"', it is 'inapplicable to requests for the surrender of persons who are officials of States subject to the operation of Article 27' and in the present case to a United Nations Security Council Situation-Referral State such as Sudan.[75] The Prosecutor added that Article 98(1) established a procedural obligation for the Court to consider before proceeding with any request for arrest and surrender when any relevant immunities are owed by the requested State to the third State. Turning to the principle of *Jus Cogens*, the Prosecutor argued that while such norms are superior to ordinary rules of customary law, it's a question of scope of the *jus cogens* norm

[74] United States - Standards for Reformulated and Conventional Gasoline, WTO Doc. WT/DS2/AB/R, at 23 (Appellate Body Report, May 1996). R. Gardner, Treaty Interpretation, Oxford University Press, 2008), 159-161.

[75] Para. 73.

as to whether it necessarily conflicts with […] a rule of immunity'. In summation, a customary rule restricting States from enforcing requests for arrest and surrender by a competent international court' does not serve the purpose underlying Head of State immunity.[76]

In its judgment in the *Arrest Warrant Case*, the International Court of Justice, as we have noted, had made the observation that[77] although it was speaking of the position of the Foreign Minister, the rule enunciated by the Court applied with greater force to the head of state. The International Court of Justice was emphatic that it was unable to find any form of exception to this principle under customary international law including the inviolability to incumbent Ministers for Foreign Affairs where they are suspected of having committed war crimes or Crimes against humanity. This principle applied in the horizontal application to this principle extending to Head of States(s) or Heads of Government(s) and state officials (in their official capacities).

In coming to this conclusion, the International Court of Justice, as we have seen, further explained that the question of whether states were entitled to act on the warrants of arrest issued by the International Criminal Court for the arrest President Al-Bashir (as he was then) and surrender him to the Court depended on whether the immunities that he enjoyed ordinarily as a serving Head of State had been removed. This in turn depended on the legal nature of Security Council referrals of situations to the International Criminal Court. The case of President Al-Bashir followed on the footsteps of the decisions of the International Criminal Tribunal for the former Yugoslavia (International Criminal Tribunal for Yugoslavia) which had issued a warrant for the arrest of Milosevic while he was Head of the State of the Federal Republic of Yugoslavia, and the Special Court for Sierra Leone (SCL) indicted former President Charles Taylor while he was the Liberian Head of State. The question on immunity of serving Head of States has raised controversy even in non-African countries.[78] In these circumstances therefore it was posited that Sudan was under a clear international law obligation to arrest President Al even though Sudan as a republic was and is still not a party to the Rome Statute.

[76] Para 75.
[77] *Arrest Warrant Case (Democratic Republic of Congo v. Belgium)*, 2002 ICJ Reports, at 22, § 54.
[78] Arab League Council, Resolution on the Decision of Pre-Trial Chamber 1 to the International Criminal Court against the President of the Republic of Sudan, Hassan Abmad Al Bashir, 4 March 2009. For an unofficial translation of the resolution, see http://www.iccnow.org/ documents/09.0304_ALResolutionn.OmarAl-Bashir. (EN). Unofficial Translation_ (2).pdf on 12 April 2019.

The Pre-Trial Chamber pointed out, in Paragraph 2 of that resolution, the United Nation's 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 and the Prosecutor pursuant to this resolution'. This is because under Article 25 of the United NationsC, Sudan is obliged to accept and carry out decisions of the Security Council. Resolution 1593 created an explicit international law obligation for Sudan to arrest President Al-Bashir.

3.5 The debate On the ICC Pre-Trial Chamber indictment of President Al Bashir

In its decision to issue the arrest warrant, the International Criminal Court Pre-Trial Chamber considered the question of President Al-Bashir's immunity implicitly. The Court considered that 'the current position of Omar Al-Bashir as Head of a State which is not a contracting party to the Rome Statute , did not have the effect of being a barrier to the exercise of the Court's jurisdiction over his case.'[79] In other words, there was no immediate barrier in the execution of the Court's jurisdiction over President Al-Bashir. It reached this decision upon consideration of four factors. The first the Chamber noted that according to the Preamble of the Rome Statute , one of the goals of the International Criminal Court is to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community which "must not go unpunished". Secondly, to achieve the goal, Article 27(1) and (2) of the Statute providing core principles regarding immunities of persons before the court shall be interpreted in a manner consistent with the intention and meaning for the establishment of the Court. Thirdly consistent case law of the chamber on the applicable law before the court had held that according to Article 21 of the Statute, other sources of law provided in the Statute can only be resorted to when two conditions were met. The court gave the two conditions as where there was a lacuna in the law as stated in the Statute, the Elements of Crimes and the Rules and such lacuna could not be filled by the application of the criteria of interpretation provided in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, and Article 21(3) of the Statute. Fourth, the Chamber had highlighted in its earlier decision on Application Under Rule 103, the Security Council had also accepted that the investigation into the Darfur Situation as well as any prosecution arising therefrom would take place in accordance with the statutory framework provided for in the Statute and the Rules as a whole.

[79] *Democratic Republic of Congo v. Belgium, Case Concerning the Arrest Warrant of 11 April 2000,* Judgement, ICJ Reports, 2002, 1.

This was clarified further when the Court stated that the International Court of Justice in the *Arrest Warrant Case* was concerned solely with immunity across national jurisdictions. The International Court of Justice majority referenced the international tribunal provisions addressing impunity, including Article 27 of the Statute and had concluded provisions did not enable it to conclude that any such exceptions exist under customary international law in regard to national courts. They proceeded to find that the majority discussion of customary international law immunity was distinct from the circumstances in the Bashir Case because in Bashir the court was an international court seeking arrest for international crimes.

The Special Court for Sierra Leone[80] understood this as follows

> "A reason for this distinction[between national and International Criminal Courts as drawn in paragraph 61 of the International Court of Justice Judgment in the Arrest Warrant Case] though not immediately evident, would appear due to the fact that the principle that one sovereign state does not adjudicate on the conduct of another state; the principle of state immunity derives from the equality of sovereign states and therefore has no relevance to international criminal tribunals which are not organs of a state but derive their mandate from the international community….[T]he principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court".

Explaining that the International Court of Justice Warrant Case was concerned solely with immunity across jurisdictions, the Pre-trial Chamber stated the International Court of Justice majority referenced the international tribunal provisions addressing immunity, including Article 27 of the Statute and concluded that "these provisions do not enable it to conclude any such an exception exists under *customary* international law *in regard to national courts"* The International Court of Justice majority discussion of customary international law immunity, the Chamber held, is therefore distinct from the Omar Al-Bashir circumstances, as in the latter, *an international court* was seeking arrest for international crimes. The Court went on explain that this distinction was meaningful because, as argued by Cassese, the rationale for foreign state officials being entitled to raise personal immunity before national courts is that otherwise national authorities might use prosecutions to unduly impede or limit foreign state's ability to

[80] Prosecutor v Chales Ghankay Taylor. 31 May 2004, Case No. SCSL-200301-1, Paras 51-52

engage in international action. This danger does not arise with international courts and tribunals which are totally independent of states and subject to strict rules of impartiality.

The Chamber continued:[81]

> "Therefore, the Chamber finds that the principle in international law is that immunity of either former or sitting Head of States cannot be invoked to oppose a prosecution by an international court. This is equally applicable to former or sitting Heads not parties to the Statute whenever the Court may exercise jurisdiction. In this particular case, the Chamber notes that it is exercising jurisdiction following a referral by the United Nations Security Council made under Chapter VII, in accordance with Article 13(b) of the Statute."

The rationale for foreign state officials being entitled to raise personal immunity before national courts, as explained by Antonio Cassese,[82] is that otherwise national authorities might use prosecutions to unduly impede or limit foreign states ability to engage in international action.

The Chamber also addressed the argument that arrest and surrender would put states in a situation of acting inconsistently with its international obligations[83]. In the case of *sub judice* the Democratic Republic of Congo claims that by issuing the 26 February Decision the Court placed the country in a situation where it was called upon to act inconsistently with its international obligations arising from the decision of the African Union 'to respect the immunities that come with [Omar Al-Bashir's] position as Head of State'

"This position stands to be corrected. The Chamber does not consider that such inconsistency arises in the present case. This is so because by issuing Resolution1593(2005) the Security Council *decided* that the 'Government of Sudan… *shall* cooperate fully with and provide any assistance to the Court and the Prosecutor pursuant to this Resolution" Since immunities attached to Omar Al-Bashir are a procedural bar from prosecution before the Court, the cooperation envisaged in said Resolution was meant to eliminate any impediment to the proceedings before the Court, including the lifting of immunities…Accordingly, the

[81] At paragraph 36
[82] Cassese A, Cassese's International Criminal Law, *Oxford University Press*, United Kingdom, 3 ed, 2012.
[83] At Paragraph 28

cooperation of that third State [Sudan] for the waiver of immunity as required under the last sentence of Article 98(10 of the Statute, was already ensured by the language used in Paragraph 2 of the Security Council Resolution 1593(2005). By virtue of the said paragraph, the Security Council implicitly waived the immunities granted to Omar Al-Bashir under international law and attached to his position as a Head of State.

Furthermore, the Chamber was of the view that the unavailability of immunities with respect to prosecutions by international courts applies to any act of cooperation by states which forms an integral part of prosecutions. Indeed, the court went on to hold, when cooperating with the Court and therefore acting in its behalf, contracting parties are instruments for the enforcement of the *jus puniendi* of the international community exercise has been entrusted to the International Criminal Court when states have failed to prosecute responsible for the crimes within its jurisdiction. In answer to the complaint that in calling for the arrest and surrender of Al-Bashir the Court was calling on states to act inconsistently with pre-existing international obligations, the Chamber did not consider such inconsistency because in issuing Resolution No.1593 the United Nations Security Council decided that the government of Sudan shall cooperate fully with the International Criminal Court and provide any necessary assistance to the Court and the Prosecutor pursuant to the Resolution.

The Pre-Trial Chamber also noted that since immunities attached to President Omar Al-Bashir were a procedural bar to his prosecution, the cooperation envisaged in the Resolution was meant to eliminate any impediment to the proceedings before it in the exercise of its jurisdiction, including the lifting of immunities. Any other interpretation would render the United Nations Security Council decision requiring that Sudan cooperate fully and provide any necessary assistance to the Court "senseless"

Accordingly, the "cooperation of third State, namely the Sudan, for the waiver of the immunity" as required under the last sentence of Article 98(1) of the Statute, was already ensured by the language used in paragraph 2 of the Security Council Resolution 1593 of 2005. By this paragraph the Security Council implicitly waived the immunities granted to President Al-Bashir under international law and attached to his position as Head of State.

Regarding similar objections raised by Rome Statute the Pre-Trial Chamber stated that in the present circumstances, any further reminder or clarification to the Republic of Rome Statute is unnecessary. Indeed, it is plain from the following that there exists no ambiguity or uncertainty with respect to the obligation of the Republic of South Africa to immediately arrest and surrender President Omar Al Bahir to the International Criminal Court, and that competent authorities of South Africa are already aware of state's obligation.

The Pre-Trial Chamber reached this decision based on several considerations. Uppermost was the core goal for the establishment of the International Criminal Court – to put an end to impunity. The court observed that Article 27, which in its view provides 'core principles', was included in the Rome Statute to achieve this very core goal.

Implied in the Court's statements is the view and as aforementioned - that the United Nations Security Council had implicitly adopted Article 27 and thus implicitly sanctioned the exercise of jurisdiction by the Court over a serving Head of State who would otherwise be immune from its jurisdiction.

However, stating that the Court may exercise jurisdiction over a serving Head of State and that serving Head of States(s) do not possess immunity vis-a-vis the Court does not exhaust the immunity question. For the International Criminal Court to exercise jurisdiction in practice, it would have to call for the practical execution of its warrants of arrest on President Al-Bashir. This would have been preferable option. Other options would have required Al-Bashir to voluntarily surrender himself which was most unlikely and which he did not do up to and until his ouster from Presidency in May 2019.

The Court needed a state to arrest him and turn him over to the Court. At that stage, the question which would have arisen would have been whether President Al-Bashir is immune from arrest by national authorities acting to support the Court. Where the request is to arrest a person who is, as is the case here, ordinarily entitled to immunity from the exercise of foreign criminal jurisdiction (including immunity from arrest), the question then becomes how to reconcile the tension between the obligation of states to accord immunity and the statement that immunity shall not bar the Court from exercising jurisdiction- such was the case in South Africa during President Al-Bashir's visit to Johannesburg, a scenario that faced many other countries he

visited. This remains the very core question that will face countries requested by the International Criminal Court to act on warrants of arrest.

In an Amicus Curiae filed in the Appeals Chamber[84] Professors Robinson, Cryer, deGuzman, LaFontaine, Oosterveld, and Stahn support the position of the Pre-Trial Chamber stating that that Chamber's approach was the most convincing reconciliation of the provisions of the Statute, the customary immunities of Head of States, and the powers of the United Nations Security Council. They add that "while all possible positions on this matter may be criticized, the Pre-Trial Chamber's approach has considerable, well-reasoned academic support" and is also "supported by national judicial decisions."

They point out that there is no exception to the Security Council's powers under the United Nations Charter stating that the Security Council cannot impose obligations if obligations are also stipulated in a treaty. On the meaning of "Fully Cooperate", the learned professors write that it must mean "to cooperate subject to the same limitations enjoyed by the states parties and they add that the this does not transform Sudan into a state party but merely imposes the 'cooperation' as opposed to 'governance' obligations. They support the Pre-Trial finding that Article 27(2) has vertical effect {removal of immunity before the International Criminal Court] and horizontal effect [removal of immunity for arrest and surrender to the International Criminal Court] and that Article 98(1) presents no barrier where the state is subject to the cooperation obligations because by virtue of Article 27(2) the state has no immunity against International Criminal Court requests for arrest and surrender. Immunity can be relinquished by becoming a party to the Statute, by undertaking to cooperate fully under Article 12(3), or by virtue of Chapter VII order to cooperate fully.

Similarly in an Amicus Brief also filed in the Appeals Chamber in support of the Pre-Trial Chamber Decision[85], Professor Claus Cress a leading expert stated:

> The legal issues before the Appeals Chamber go to the heart of the international criminal justice system *sticto sensu*, as established by the International Criminal Court Statute. At the material time, Jordan would not have acted inconsistently with any of its obligations under international law as referred to in Article 98(1) of the International Criminal Court Statute, (the Statute), had it complied with the International Criminal Court's ('the Court') request and surrender of President Al-Bashir to the Court while

[84] Doc. No.ICC-02/05-01/9 17 on June 2018.
[85] ICC-02/05-01/09 OA2 DATED 18 June 2018

> he was present on Jordanian territory. The same is true, *mutatis mutandis*, with respect to Article 98 of the Statute [T]wo main legal avenues have been identified in order to reach the conclusion that Article 98(1) of the Statute does not prevent the Court from proceeding with a requesting State Party to the Statute to arrest and surrender President Al-Bashir when he is present on the territory of that State. The first legal avenue, which, over time has been articulated in two main variants, is based on the legal effect of Security Council Resolution 1593 (the 'Security Council Avenue'. The second legal avenue is based on the view that, first, there exists a customary international law exception to the customary international law immunity right *ratione personae* of States for the purpose of proceedings before the Court and that, second, this exception extends to the triangular legal relationship of vertical cooperation between the Court, a requested State Party and the Non-State Party of which the person sought is the incumbent Head of State (the 'Customary Law Avenue').
>
> In accordance with the position taken by pre-Trial Chamber 1 in its Malawi and Chad decisions, the study views that the Customary Law Avenue is open and it should therefore be taken by the Appeals Chamber.
>
> In its Malawi and Chad decisions, the Pre-Trial Chamber 1 decided the question before the Appeals Chamber in accordance with the view [stated in the above paragraph] the pre- Trial Chamber provided fairly detailed reasons for this legal position. Pre-Trial Chamber 11… has changed direction and pursued a 'Security Council Avenue' *without explaining* this departure from the 'Customary Law Avenue' by Pre-Trial Chamber 1. Also in its subsequent decision, on the matter on 6th July 2017, which it affirmed in the appealed decision, Pre-Trial Chamber II only *stated*, but failed to explain its departure from the Customary Law Avenue.

Professor Cress argued for the adoption of the Customary Law Avenue because[86]

> the Customary Law Avenue enables the Court *equally* to exercise its jurisdiction under Article 12(2) of the International Criminal Court Statute, over Non- State Party officials who generally enjoy immunity *ratione personae*. Conversely, the Security Council Avenue will be open to the Court only if the Security Council makes the *political* decision to that effect. The need for the Court to apply

[86] At Paragraphs 4-7

> international criminal law as equally as possible is not only firmly enshrined in the fabric of the International Criminal Court Statute… but goes to the heart of the *legitimacy* of the exercise of international criminal jurisdiction.

3.6 Conclusion

This analysis of the Omar Al-Bahir Arrest Warrant Case in the light of the South Africa's failure to arrest and surrender him to Court – to deter and to end impunity – leads to the conclusion that the International Criminal Court is not restricted by immunities accorded to Head of States, from exercising its jurisdiction. A purposive interpretation of Article 27(2) of the Rome Statute binds non-contracting parties despite arguments to the contrary[87] in what would appear to be a hybrid argument regarding the manner in which the International Criminal Court has in particular handled specific instances with regard to, for instance making a clear understanding on the application of immunities 'vertically' and 'horizontally.' To this extent the question rests on whether for instance, President Al-Bashir's immunity should and ought to be respected at both the international level and at the national level.[88] Criticisms that the interpretation of the Rome Statute in its application and enforcement jurisdiction does not conform to the 'old tradition and well-grounded principles' treaty interpretations and applications[89] is not well founded.

In the case of Darfur Situation, for instance, the International Criminal Court was seized of the matter as a result of a request by the United Nations Security Council to investigate atrocities blamed on the Sudanese government under President Al-Bashir and militias drawing support from him and his government since the year 2003. The Security Council request was made in the knowledge that Sudan was not a signatory to the International Criminal Court Statute and

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[87]Everisto Benyera: Is the International Criminal Court Unfairly Targeting Africa? Lessons for Latin America and the Caribbean States. Africa, Latin America and Caribbean countries share many common features including a history of colonization, the ongoing fight against human rights abuses and the resultant pursuance of sustainable peace and justice. One of the tools at these countries' disposal is the International Criminal Court (ICC) where these two blocks are experiencing different fortunes. Except for the Georgia case, all the other cases dealt with by the ICC were from Africa and the court is yet to open an investigation in Latin America and the Caribbean, a situation which allows for lessons for the latter to be drawn from the former's relationship with the ICC. Using the decolonial perspective I argue that the targeting of Africa by the ICC is part of the colonial project which started with slavery and is now in the coloniality phase. The conclusion is that willingly or unwillingly, the way the ICC has treated Africa is tantamount to targeting. This perception can only be changed if the ICC successfully opened new cases elsewhere, especially in the west.

[88] Akande, D, 'The Immunity of Heads of States of Nonparties in the Early Years of the ICC', *American Journal of International Law*, 2018, 112.

[89] *Vienna Convention on the law of treaties* (with annex). Concluded at Vienna on 23 May 1969. (The Vienna Convention on the Law of Treaties (VCLT) is a treaty concerning the international law on treaties between states. It was adopted on 23 May 1969 and opened for signature on 23 May 1969. The VCLT has been ratified by 116 states as of January 2018.

the next Chapter will examine whether the Republic of Sudan was in an analogous situation to an International Criminal Court State party.

CHAPTER 4: THE EFFECT OF SECURITY COUNCIL REFERRALS: WAS SUDAN IN AN ANALOGOUS POSITION TO THAT OF AN ICC PARTY?

4.1 Introduction

The previous chapter analysed the Bashir Rome Statute Warrant of Case Decision and noted that the Security Council request was made in the knowledge that Sudan was not a signatory to the International Criminal Court Statute. This chapter examines whether in passing Resolution 1593 the Security Council was placing Sudan in an analogous position to that of an International Criminal Court member State.

In Resolution 1593 the Security Council decided that Sudan must cooperate fully with the Court but did not explicitly make the Statute binding on it, nor did it expressly address the question of immunity. It fell on the International Criminal Court Pre Trial Chamber to hold that the Security Council had accepted that investigations and prosecutions from the Darfur situation 'will take place in accordance with the statutory framework provided for in the Rome Statute, the Elements of Crimes and the Rules as a whole'[90]. It is in this context that we now discuss the effect of the Security Council's referral of the situation in Darfur to the International Criminal Court a non-contracting party to the Rome Statute.

4.2 UNSC Referral of Sudan to the ICC

In a Statement to the United Nations Security Council on the Situation in Darfur, pursuant to United Nations Security Council Resolution 1593(2005), issued on 9 June 20 20 2016 the International Criminal Court Prosecutor summarized the background under which the Sudan Situation reached the International Criminal Court:

The referral of the Darfur Situation [to the Office of the Prosecutor] in 2005, the first of its kind, was a landmark development in the fight to end impunity for perpetrators of atrocity crimes.[91]

> At the time of the referral [the Security Council] emphasized the need for the international community to promote healing and reconciliation by encouraging the creation of institutions and commissions, involving all sectors of the Sudanese society, to complement judicial processes.[92]

[90] https://www.un.org/press/en/2005/sc8351.doc.htm on 2 April 2019 for the notes and meeting of; United Nations Security Council referral of the situation in Darfur, Sudan, to prosecutor of international criminal court.
[91] Paragraph 4 of the Statement.
[92] Paragraph 5.

> …the creation of the International Criminal Court must surely be one of humanity's proudest moments…it represents an awakening rooted in great human suffering throughout the ages, culminating in the recognition that lawless wars and conflict must no longer receive a pass to cause human carnage.

The Resolution itself was adopted by the Security Council at its 5158th meeting, on 31 March 2005 after "taking note of the Report of the International Commission of Inquiry on violations of international humanitarian law and human rights in Darfur"[93] and "determining that the situation in Sudan continues to constitute a threat to international peace and security" and "acting under Chapter VII of the Charter of the United Nations,

4. Decides to refer to the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court;
5. Decides that the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this Resolution, and while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully;
6. Invites the Court and the African Union to discuss practical arrangements that will facilitate the work of the Prosecutor and of the Court, including the possibility of conducting proceedings in the region, which would contribute to regional efforts in the fight against impunity.

Vehemently opposed to the United Nations Security Council's position regarding lifting of President Al-Bashir's immunity, the African Union argued that the Security Council had not lifted President Bashir's immunity either, for any such lifting should have been explicit and mere referral of a "situation" by the Security Council to the International Criminal Court or requesting state(s) to cooperate with the International Criminal Court in the execution of the two warrants of arrest could not be interpreted as an indication to lifting immunities granted under international law which accords serving Head of States(s) immunity from the criminal jurisdiction of foreign states.[94] Emphasis was placed on customary international law which

[93] S/2005/60.

[94] Van Alebeek R, The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law. Oxford University Press, Oxford, 2008, 169; Akande D, 'International Law Immunities and the International Criminal Court, 98 *American Journal of International Law* (2004) 407, 409; A. Watts, 'The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers, 247 Recuil des Cours (1994-Ill) 13; C. Wickremasinghe, 'Immunities Enjoyed By Officials of States

regards the person of the Head of State as inviolable[95] when out of their countries and immunity from criminal jurisdiction includes immunity from arrest.[96]

In sum, the African Union's case was that treaties may also contain provisions conferring immunity on a serving head of state when out of his or her country as, for example when the serving head of state is leading that state's delegation to a meeting of an international organization where he or she will be covered by the immunity which attaches to representatives of a state to an international organization,[97] and a further example being where both states are parties to a treaty such as, the United Nations Convention on Special Missions (1969).[98]

In 2009, the African Union passed a resolution[99] supporting Al-Bashir's refusal to surrender to the Court, expressing its concern that his indictment could derail the Darfur peace process. This was followed in 2010 with a further declaration that the African Union would not co-operate with the International Criminal Court to arrest al-Bashir.[100] The African Union doubled down on its non-cooperation with a call to its membership in 2011 at the start of the International Criminal Court cases against President Uhuru Kenyatta, and his deputy, William Ruto in 2011, claiming immunity for sitting Head of States. This was compounded by the Kenyan government's claims that the International Criminal Court was being neo-colonial and "targeting Africans, an assertion which would invite a lot of differing statements today.[101]

The African Union continued fortifying its resolve of slow-cooperation with the International Criminal Court by approving the Malabo Protocol in 2014 which created an International Criminal Law Section in the African Court[102] to investigate and prosecute international and

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and International Organizations', in M. Evans (ed.), International Law, 2ed Oxford University Press, Oxford: 2006, 407.

[95]Fox H, *The Law of State Immunity*, 2ed., Oxford: Oxford University Press, 2008, 667.

[96] Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), 2008 ICJ Reports, § 170: 'A Head of State enjoys in particular "full immunity from criminal jurisdiction and inviolability" which protects him or her "against any act of authority of another State which would hinder him or her in the performance of his or her duties"', quoting from Arrest Warrant Case (Democratic Republic of Congo v. Belgium), 2002 ICJ Reports, at 22, § 54.

[97] Article IV, *Convention on the Privileges and Immunities of the United Nations*, 1946, 90 UNTS 327.

[98] Arts 21, 39 and 31, UN Convention on Special Missions.

[99] See: https://www.fidh.org/en/region/Africa/sudan/African Union-resolution-in-support-of-al on 10 May 2019.

[100]https://www.hrw.org/sites/default/files/related_material/Managing%20Setbacks%20for%20the%20ICC%20in%20Africa%20-%20Journal%20of%20African%20Law.pdf on 22 May 2019.

[101]https://www.hrw.org/sites/default/files/related_material/Managing%20Setbacks%20for%20the%20ICC%20in%20Africa%20-%20Journal%20of%20African%20Law.pdf on 22 May 2019.

[102] The African Court on Human and Peoples' Rights (the Court) is a continental court established by African countries to ensure the protection of human and peoples' rights in Africa. It complements and reinforces the functions of the African Commission on Human and Peoples' Rights. http://www.african-court.org/en/ on 22 May 2019.

The Court was established by virtue of Article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, (the Protocol) which was

other crimes, but still allowing immunity for Head of States and senior government ministers all in an effort to restate its opinion on Head of States immunities before the International Criminal Court.[103]

At the African Union Summit held in Johannesburg, South Africa, on the 15 June 2015, exactly twelve (12) months after the entry into force of Malabo Protocol (14 June 2014), South Africa failed to arrest President Al-Bashir in his visit despite an interim High Court order temporarily prohibiting his exit from the South African jurisdiction.[104] His escape from South Africa was not just an individual act of defiance but also a unilateral act of defiance by Sudan.

The African Union argued that the immunities provided and guaranteed under international law are not only limited in application to the proceedings in foreign domestic courts but also to international tribunals such as the International Criminal Court. Accordingly, states cannot contract out of their international legal obligations vis-à-vis third states by establishing an international tribunal. Indeed, the statement further emphasized that, contrary to the assertion of the International Criminal Court Pre-Trial Chamber 1, Article 98(1) as included in the Rome Statute remained incapable of removing any immunity which international law grants to the officials of states that are not parties to the Rome Statute for reasons that immunities of state officials are the rights of the state concerned and therefore a treaty is only binding upon its contractual parties.

In further and supplemental assertion, the African Union emphasized that its position was anchored on customary international law and hence a treaty ought not to be interpreted to deprive a non-contracting party states' rights which they ordinarily possess. In other words, immunity accorded to senior serving officials, *ratione personae*, from foreign domestic criminal jurisdiction (and from arrest) is absolute and applies even when the official is accused of committing an international crime. To support this contestation, the African Union relied

adopted by Member States of the then Organization of African Unity (OAfrican Union) in Ouagadougou, Burkina Faso, in June 1998. The Protocol came into force on 25 January 2004.

[103] See: Negotiated Engagement — The African Union, the International Criminal Court, and Head of State Immunity published March 5, 2018 available at https://justiceinconflict.org/2018/03/05/negotiated-engagement-the-african-union-the-international-criminal-court-and-head-of-state-immunity/on 22 May 2019.

[104] Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others (27740/2015) [2015] ZAGPPHC 402; 2016 (1) SACR 161 (GP); 2015 (5) SA 1 (GP); [2015] 3 All SA 505 (GP); 2015 (9) BCLR 1108 (GP) (24 June 2015). The Gauteng High Court made an interim order that al-Bashir could not leave RSA before it reached its decision on enforcing the ICC arrest warrant but leave he did like in his previous visit to Kenya and Nigeria in 2013.

upon the decision of the International Court of Justice[105] (hereinafter: International Court of Justice) decision in the *Arrest Warrant Case* (Democratic Republic of Congo v. Belgium).[106]

Applying the distinction between the immunities of parties and that of non-contracting parties with respect to the International Criminal Court to the case of President Bashir is complicated by the fact that although Sudan is not a party to the International Criminal Court Statute, the case arises out of a Security Council referral.[107] The key point arises as to whether Sudan is to be considered as being in the position of a party to the Rome Statute because of the Security Council's Resolution and referral.

In Resolution 1593 the Security Council decided that Sudan must cooperate fully with the Court but did not explicitly make the Statute binding on it, nor did it expressly address the question of immunity. It fell on the International Criminal Court Pre Trial Chamber to hold that the Security Council had accepted that investigations and prosecutions from the Darfur situation 'will take place in accordance with the statutory framework provided for in the Rome Statute, the Elements of Crimes and the Rules as a whole.'[108] The Court reasoned that the Security Council, in referring the situation regarding Darfur to the International Criminal Court, had mainly relied on Article 13(b) of the Rome Statute which permits such referrals and must therefore be deemed to have expected the Rome Statute to provide the governing framework and lay down any procedural questions as to such referrals. This indeed is provided in the Rome Statute [109] from which Resolution 1593 makes various references.[110]

[105] https://www.icj-cij.org/en on 22 May 2019.
[106] *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, International Court of Justice (ICJ), 14 February 2002, available at: https://www.refworld.org/cases,ICJ,3c6cd39b4.html on 22 May 2019.
[107] https://www.un.org/press/en/2005/sc8351.doc.htm on 2 April 2019 for the notes and meeting of; United Nations Security Council referral of the situation in Darfur, Sudan, to prosecutor of international criminal court.
[108] https://www.un.org/press/en/2005/sc8351.doc.htm on 2 April 2019 for the notes and meeting of; United Nations Security Council referral of the situation in Darfur, Sudan, to prosecutor of international criminal court.
[109] Although the resolution does not refer to Article 13(b), it is clear that the drafters of the resolution intended to use the procedure provided for in that provision as this is the only provision that would allow the ICC to exercise jurisdiction. Specific reference was made to Article 13 by the Argentinian ambassador explaining his country's decision to vote in favour of Res. 1593: See Report of the 5158th meeting of the Security Council, 31 March 2005, UN Doc. S/PV. 5158, at 7.
[110] The Security Council recalls provisions of the Statute in three preambular paragraphs of Res. 1593 and in § 4 'also encourages the Court, as appropriate and in accordance with the RS, to support international cooperation with domestic efforts to promote the rule of law, protect human rights and combat impunity in Darfur'. (Emphasis in original)

Professor Claus Cress[111] has strongly criticized the Referrals by the Security Council as being politically motivated. He asserted that "only the customary Law Avenue"[112] enables the Court equally to exercise its jurisdiction under Article 12(2) of the International Criminal Court Statute, over Non-State Party officials who generally enjoy immunity *ratione personae*. Conversely, the Security Council Avenue will be open to the Court only if the Security Council makes a political decision to that effect. The need for the Court to apply international criminal law as equally as possible is not only firmly enshrined in the fabric of the International Criminal Court Statute (for example, by requiring the Court to exercise its jurisdiction over 'situations' and not just 'cases'), but goes to the heart of the legitimacy of the exercise of international criminal jurisdiction".

In their Amicus Brief Professors Robinson, Cryer, deGuzman, LaFontaine, Oosterveld, and Stahn[113] counter Prof Cress by pointing out that:

> The United Nations Charter expressly conveys broad powers on the United Nations Security Council once it identifies a threat to international peace and security. Jointly, Articles 31 and 42 convey exhaustive powers to require measures, whether involving the use of force or not. The International Court of Justice has confirmed that this express grant of powers is not confined to the illustrative list of examples. The United Nations Security Council 'enjoys a wide margin of discretion' in choosing measures. The recognised limitations on these powers are *jus cogens* norms and the Powers and Principles of the United Nations, none of which preclude removal of immunities for international crimes.
>
> […] Under its mandate to protect international peace and security, the United Nations Security Council can order a United Nations member state to cooperate with other bodies. The United Nations Security Council Has done so numerous times. In requiring cooperation, the United Nations Security Council does not violate the law of treaties nor does it make it 'make a state a party' to the relevant treaty. The United Nations Security Council is directly ordering a United Nations member state to cooperate, under its Chapter VII authority. The United Nations Member state has accepted to carry out United Nations Security Council decisions pursuant to Article 35 of the United Nations

[111] In an Amicus Brrief filed with the Appeals Chamber in the Jordinian Case ICC002/05-01/09 OA2 DATED 18 June 2018
[112] Supra page 54
[113] See Footnote 89

> Charter. When the United Nations Security Council orders a state to 'fully cooperate' with the International Criminal Court, the content of the obligation is delineated by the Rome Statute , but the source of the obligation is the resolution and the United Nations Charter. The Rome Statute is not being applied qua treaty. The United Nations Security Council incorporates, pursuant to its own authority, the relevant provisions of the Rome Statute to delineate the obligation imposed by the resolution.

Hence it can also be argued that in making the referral the Security Council intended the International Criminal Court to investigate and prosecute as appropriate. This view is strengthened by the fact that the United Nations Security Council itself provided no procedure by which the investigation and prosecution was to take place and must therefore have been taken to mean that the Statute was to be the governing law and more so in this case because of the reliance on Article 13(b) of the Rome Statute . Indeed, the International Criminal Court can only act in accordance with its Statute since Article 1 thereof provides that 'the jurisdiction and functioning of the Court shall be governed by the provisions of this Statute'.

What is not clear is whether the International Criminal Court would have been competent to act otherwise notwithstanding United Nations Security Council decision.[114] The very decision to refer a situation to the International Criminal Court is a decision to bring whatever individuals may be covered by the referral within the jurisdiction of the International Criminal Court and therefore within the operation of the Rome Statute . The decision of the United Nations Security Council Resolution to refer also affects the position of contracting parties to the Rome Statute indirectly. This arises because the resolution raises the possibility that obligation to cooperate will be invoked by the court.

The International Criminal Court Pre Trial Chamber II's Decision in the Jordanian Case, on the question, was that the literal interpretation of the statement in the Resolution had the explicit if not implicit effect of establishing Sudan's international obligations to the Rome Statute as if it was a contracting party. 115 Most recently, on 6 May 2019, in an appeal brought by the Hashemite Kingdom of Jordan, the Appeals Chamber of the International Criminal Court decided unanimously to confirm the decision of International Criminal Court Pre-Trial

[114] Recall that the Court, as an institution, is not a member of the United Nations and is therefore not bound by Security Council resolutions and moreover, the Court is bound by the Statute. Article 103 of the UNC would be inapplicable as the Court is not a member of the United Nations. See generally, D. Sarooshi, 'The Peace and Justice Paradox: The International Criminal Court and the UN Security Council, in D. McGoldrick, P Rowe and E. Donnelly (eds), The Permanent International Criminal Court, Oxford: Hart Publishing, 2004.
[115] https://www.icc-cpi.int/Pages/item.aspx?name=pr1349 on 12 April 2019.

Chamber II , to the extent that it found that Jordan, a State Party to the Rome Statute since 2002, had failed to comply with its obligations by not arresting President Omar Al-Bashir (at all material times the President of the Republic of the Sudan and surrendering him to the International Criminal Court while he was on Jordanian territory attending the League of Arab States' Summit on 29 March 2017.

The principle has thus been buttressed by this decision of the Appeals Chamber of 6 May 2019. Jordan acted inconsistently to its international obligations as a contracting state party to the Rome Statute since 2002 by failing to arrest Mr. Omar Al-Bashir and surrendering him to the International Criminal Court while he was on Jordanian territory attending the League of Arab States' Summit on 29 March 2017116. Non-contracting parties are equally to be subjected to Article 27 (2) in particular depending on how such non-contracting state party finds itself within the jurisdiction of the International Criminal Court.

In his Amicus Brief Professor Roger O'Keeffe[117] takes a position akin to the African Union:

> At the time of the Court's request to Jordan, President Al-Bashir was the Head of State of Sudan, a state not a party to the Statute. Jordan was consequently obliged under customary international law to accord absolute inviolability and immunity. The Court had not obtained Sudan's waiver of the inviolability and immunity from which Sudan was entitled under international law to see President Al-Bashir benefit in other States. In proceeding with a request to Jordan to arrest and surrender President Al-Bashir, the Court acted contrary to Article 98(1) and thereby exceeded its powers under the Statute.

On the effect of the United Nations Resolution, Professor O'Keefe says Security Council Resolution 1593(2005) does nothing to alter the ordinary application of Article 98(1) of the Statute.

It will be recalled that in responding to the South Afica Omar Al-Bashir decision,[118] South Africa's position was similar to this but the Pre-Trial Chamber responding to South Africa's argument that "fundamental errors occurred in the conduct of consultations under Article 97 of the Statute…aimed at discussing the application of Article 98(1) of the statute "the Court had emphasized that "the application of Article 98(1) of the Statute is incumbent upon the Court. This provision, on its plain terms, does not give procedural rights, including any right to

[116] https://www.icc-cpi.int/Pages/item.aspx?name=pr1452 on 10 May 2019.
[117] ICC-02/05-01/9 OA2
[118] Paragraphs 110-115.

suspend or deny cooperation, to the requested State." "Crucial in this context", the Court explained" is also the provision of Rule 195 of the Rules, which addresses, in substance, the interaction between a Court and the requested State when a situation under Article 98 of the Statute arises."[119] In such a situation, the Court expounded thus:

> "Rule 195 stipulates that, when a requested State considers that a request for surrender or assistance raises a problem of execution in respect of Article 98, it 'notifies' the Court and provides any information relevant 'to assist the Court in the application of Article 98'.This provision therefore places a duty on the State to share all relevant information with the Court and confirms that the responsibility for 'the application of Article 98" rests with the Court itself… the mechanism foreseen in situations under Article 98 is not one of a bilateral exchange aimed at resolving the matter, but one in which the Court is provided with all relevant information by the requested State."

4.3 Conclusion

From the above discussion it follows that and in line with earlier analysis, the most persuasive way to give meaningful effect to the statement in Article 27(2) that international law immunities shall not bar International Criminal Court's exercise of jurisdiction is to hold that that provision not only removes immunity with respect to the International Criminal Court, but also with respect to national authorities, acting to support the exercise of the Court's jurisdiction.

Thus, the international law immunities of Sudanese officials, including the immunity of the head of state, are removed because of the Rome Statute and the referral by the United Nations Security Council. Accordingly, every provision of the Rome Statute that defines how the exercise of its jurisdiction is to be carried out is binding on the Sudan as if it were a party to it. In this way then the tension between Articles 27 and 98 becomes reconcilable.

[119] Para 115.

CHAPTER 5: SUMMARY OF FINDINGS, CONCLUSION AND RECOMMENDATIONS

5.0 Introduction

This research study attempted to critique the immunities of serving Head of States with a view to establishing whether the traditional customary international law immunities enjoyed by them have been ousted by the Rome Statute of International Criminal Court.

Chapter one outlined the scope of the study by giving the background, statement of the problem, hypothesis, research objectives, the research questions, justification for the research, theoretical framework and literature review.

Chapter two analysed Articles 27 and 98 of the Rome Statute with a view to highlighting the tensions within the Statute and found out that what has emerged from practice so far is that on the interpretation of the application of Articles 27(2) and Article 98 of the Rome Statute, it is clear that the latter somewhat seeks to restrict the application of Article 27 (2), which purports to nullify all immunities of persons before the International Criminal Court.

After exploring several questions in Chapter three including the meaning and scope of the legal mandate placed on the International Criminal Court by Articles 27 and 98 of the Statute, with regards to International Customary law; whether the decision of warrant of arrest against President Omar Al-Bashir had the effect of unsettling customary international law regarding global Head of State immunity; whether the said decision rendered Article 98 of the Rome Statute redundant, non-operational and meaningless within the context of international customary law; whether the arrest sufficiently addressed and determined the critical issue of removal or non-removal of immunities by the United Nations Security Council vide Resolution 1593(2005), which referred the situation in Darfur to the International Criminal Court?, and finally, what were the implications of the decision on the African Union's declarations of 'non-cooperation' with the International Criminal Court to its membership founded on its adherence to its Constitutive Act.

The conclusion was reached that a purposive interpretation of Article 27(2) of the Rome Statute binds non-contracting parties despite arguments to the contrary in what would appear to be a hybrid argument regarding the manner in which the International Criminal Court had handled the Omar Al-Bashir Case, for instance by making a clear understanding on the application of immunities 'vertically' and 'horizontally.'

Chapter four examined the effect of the United Nations Security Council Resolution1593 and whether in passing Resolution 1593 the Security Council was placing Sudan in an analogous position to that of an International Criminal Court member State. Conclusion after conducting an in-depth analysis of the Omar Al-Bashir Decision was reached that every provision of the Rome Statute that defines how the exercise of its jurisdiction is to be carried out is binding on Sudan as if it were a party to the Rome Statute.

The overall conclusion of the study is that there are internal tensions within the Rome Statute which require to be reconciled to effectively achieve the core purpose of the Statute which is to end impunity. These internal tensions can be removed by interpreting the Statute as not restricted by immunities accorded to Head of States, from exercising its jurisdiction. This can be achieved by interpreting Article 98 as applying only vertically. Indeed, the Court was emphatic that in line with the Pre-Trial Chamber decisions in *The Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al—Senussi*,[120]

> 'the effect of a Security Council Resolution triggering the Court's jurisdiction under Article 13(b) of the Statute is that the legal framework of the Statute applies, in its entirety…The ordinary meaning of the term 'refer'. The context of a referral…and its object and purpose all confirm that the effect of a referral is to enable the Court to act in the referred situation, and to do so under the rules according to which it has been designed to act. In other words, the only legal regime in which [the] Court may exercise the triggered jurisdiction is the one which is generally applicable to it, its Statute *in primis*"

In the introduction to this writing, the study set out the four key questions raised by the African Union's response to the International Criminal Court Pre-Trial Chamber Decision of 12 December 2011 namely:

(e) Did the decision have the effect of unsettling customary international law regarding Head of States immunity?
(f) Did it have the effect of rendering Article 98 of The Rome Statute redundant, non-operational and meaningless;

[120] *Decision on the Postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to Article 95 of the RS*, ICC-01/11—01/11-163, (1 June 2012).

(g) Did it sufficiently address and determine the critical issue of removal or non-removal of immunities by the United Nations Security Council vide Resolution 1593(2005), which referred the situation in Darfur to the International Criminal Court, and

(h) What were the implications of the decision on the African Union's declarations of 'non-cooperation' with the International Criminal Court to its membership founded on its adherence to its Constitutive Act obligating all its membership to comply with its decisions and policies?[121]

Focusing on the Sudan situation for the purposes of assessing whether the argument by the African Union in the above four questions, the Omar Al-Bashir Warrant of Arrest demonstrate that a proper reading of Articles 27(2) and 98 in the context of the core purpose of the International Criminal Court does not support the African Union position if Article 98 is applied vertically. Indeed, the decision that the International Criminal Court Appeals Chamber in the *Jordan Case*[122] has now buttressed the contestation that in accordance with this purposive interpretation of the Rome Statute and the reading of its Article 27 – on immunity of persons before it *vis-a vis* customary law application, no key principle exists as to bar an international tribunal, such as the International Criminal Court in the exercise of its jurisdiction to end impunity.

In conclusion, what has emerged from this research project is that "a more universal support and ratification of the Rome Statute and potentially more involvement and coordination with national or other competent courts could contribute to a more sustainable, inclusive development of criminal international law."[123] What follows is the recommendations in the next section suggesting how this can be achieved. In the context of removing the ambiguities and tensions that are addressed in this thesis.

5.2 Recommendations

In the context of the overall objective of the United Nations Security Council Resolution that triggered the assumption of jurisdiction by the International Criminal Court, namely that the Court and the African Union do discuss practical arrangements that will facilitate the work of the Prosecutor and of the Court, including the possibility of conducting proceedings in the region, which would contribute to regional efforts in the fight against impunity. Three types of recommendations can be made under three themes namely legal, policy and advocacy, and

[121] Article 23 (2), *Organization of African Unity (African Union),* Constitutive Act of the African Union, 1 July 2000, available at: https://www.refworld.org/docid/4937e0142.html on 14 June 2019.
[122] https://www.icc-cpi.int/Pages/item.aspx?name=pr1349 on 12 April 2019.
[123] Noor L, *International Criminal Law and Continuing Impunity,* Public International Law, The American University of Beirut (African UnionB), 19 December 2015.

institutional. These recommendations will enhance progress and the incorporation of the values of criminal international law into the minds of the ordinary masses and therefore help in sustaining the International Criminal Court justice as part of the milieu of shared and universal societal values.

5.2.1. Legal Recommendations

As pointed out earlier this study Articles 27 and 98 were drafted by two separate working groups and this may have contributed to the apparent contradictions in the Statute. The tensions between Articles 27 and 98 that arise in their practical application would be significantly reduced, if not totally eliminated, by redrafting Article 98 of the Rome Statute. The redrafting would make it clear that the intention of the framers of the Statute meant that derogation from the regime on personal immunities set up by the International Criminal Court Statute did not encompass a request for arrest and extradition issued by domestic authorities, for proceedings *before national courts*. The derogation applies only at the 'vertical' level i.e., when compliance with a request by the International Criminal Court is at stake, and not at the 'horizontal' level i.e., at the level of the relations between state parties to the International Criminal Court Statute.

5.2.2 Policy and Advocacy Recommendations

The United Nations Security Council Resolution in its third paragraph, as we have noted, had invited the Court and the African Union to discuss practical arrangements that will facilitate the work of the Prosecutor and the Court, including the possibility of conducting proceedings in the region aimed at contributing to regional efforts in the fight against impunity. What has emerged during the period of its existence, however is that there has been open from most African countries. The International Criminal Court has an optics problem. To address this, it is recommended that the Court takes inspiration from the resolution and introduce regional cooperation mechanisms like scheduling its sittings with the various regional courts away from *The Hague*. This will address the perception problem that it is a Court to punish poor and weak nations.

For, as Cassese points out[124] holding trials *in the territory where the crimes have been perpetrated,* the local population is exposed to past atrocities, with the two-fold advantage of making everybody cognizant of atrocities, including who sided with the perpetrators, and bringing about a cathartic process in the victims or their relatives, through public stigmatization

[124] Cassese A, *Cassese's International Criminal Law*, 266.

of the culprits and just retribution; thus the exposure of past misdeeds to the local population contributes to the process of gradual reconciliation".

5.2.3 Institutional Recommendations

Flowing from the Policy and Advocacy recommendation it is also recommended that the Court enhances its outreach division by posting its representatives to all the capitals of its member states to serve in the same way as United Nations bodies such as the United Nations Development Programme, who have country representatives permanently based in various countries. This is important because the Court is almost entirely dependent on diplomacy and international goodwill. Locally based representatives of the International Criminal Court in member states capital cities would facilitate the enhancement of the Court and provide authorities with regular briefs of the activities of the Court including holding press briefings.

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