

SOUTH AFRICA'S DILEMMA: IMMUNITY LAWS, INTERNATIONAL OBLIGATIONS, AND THE VISIT BY SUDAN'S PRESIDENT OMAR AL BASHIR

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Abstract: President Al Bashir has avoided the International Criminal Court ("ICC") for seven years and has been able to travel to both states that are party to the Rome Statute and states that are not without any consequences. The existence of customary international law immunities makes it difficult for the ICC to be able to discharge its duties without the cooperation of states parties. The silence of the Security Council and its failure to clarify Security Council Resolution 1593 (2005) on whether the resolution indeed removes Sudan's immunities in order for President Al Bashir to be arrested and surrendered to the ICC equally makes the ICC's job difficult. This article examines whether there is a justification for South Africa's failure to abide by its obligations under the Rome Statute when it did not secure and arrest President Al Bashir. This will be done against the backdrop of the ICC decisions on the obligations of states parties to the Rome Statute to cooperate. The article also analyzes the South African High Court and the Supreme Court of Appeal judgments with regard to South Africa's domestic and international obligations.

I. INTRODUCTION AND BACKGROUND

In January 2015, the South African government agreed to host the African Union Summit to be held in June of the same year.¹ This meant the Heads of State and other senior government officials would attend this Summit. Amongst those who would attend was Sudan's President Omar Hassan Ahmad Al Bashir, who is wanted by the International Criminal Court ("ICC").² He is alleged to have committed international crimes which include five counts of crimes against humanity (murder, extermination, forcible transfer, torture, and rape); two counts of war crimes (intentionally directing attacks against a civilian population or against individual civilians not taking part in the hostilities and pillaging);

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¹ *Southern Africa Litigation Centre v. Minister of Justice and Constitutional Development* 2015 (5) SA 1 (GP) (S. Afr.).

² *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09; *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-1, Warrant of Arrest, (Mar. 4, 2009); *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-95, Second Warrant of Arrest, (July 12, 2010). *See also* *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-73, Judgment on Appeal, (Feb. 3, 2010).

and three counts of genocide (genocide by killing, genocide by causing serious bodily or mental harm, and genocide by deliberately inflicting on each target group conditions calculated to bring about the group's physical destruction).³

Sudan is not a party to the Rome Statute, which established the ICC.⁴ Ordinarily, the ICC is expected to investigate and prosecute persons for matters that come from states that have ratified the Rome Statute ("states parties") as rules of international law so require.⁵ However, states parties to the Rome Statute included a provision which gives the United Nations ("UN") Security Council the power to refer a situation that threatens international peace and security to the ICC for investigation and possible prosecution.⁶ This provision serves as a jurisdictional trigger mechanism for the ICC to investigate and prosecute nationals of a non-party state to the Rome Statute.⁷ This means that situations originating from non-party states to the Rome Statute may be investigated and prosecuted by the ICC as evidenced by the situations in Darfur, Sudan,⁸ and Libya.⁹ In the case of Sudan, the Security Council referred the Darfur situation to the ICC Prosecutor¹⁰ based on the recommendation of the International Commission on Violations of International Humanitarian Law and Human Rights Law in Darfur.¹¹ The

³ *Id.*

⁴ The Rome Statute was adopted by delegates from around the world at UN conference of Plenipotentiaries on Establishment of the ICC, Rome, Italy, June 15-July 17, 1998. *See generally*, Phillippe Q.C. Kirsch & Darryl Robinson, *Reaching Agreement at the Rome Conference*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1 (Antonio Cassese, Paola Gaeta & John RWD Jones eds., 2002).

⁵ *See* Vienna Convention on the Law of Treaties (with annex) art. 34, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

⁶ Rome Statute of the International Criminal Court, (Rome, 17 July 1998) UN Doc. A/CONF.183/9 of 17 July 1998, entered into force 1 July 2002 [hereinafter Rome Statute]. Art. 13 of the Rome Statute reads as follows:

'The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

(a) A situation in which one or more crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;

(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council Acting under Chapter VII of the Charter of the United Nations; or

(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.'

⁷ On different trigger mechanisms for the exercise of ICC jurisdiction, see Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L L. 22, 26-29 (1999).

⁸ *Situation in Darfur, Sudan* ICC-02/05 (June 2005). *See also* The Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09.

⁹ *Situation in Libya*, ICC-01/11 (March 2011). *See also* The Prosecutor v. Saif Al-Islam Gaddafi, ICC-01/11-01/11.

¹⁰ *See* S.C. Res. 1593, para. 1 (March 31, 2005).

¹¹ This Commission was established by the UN Secretary-General on the request by the Security Council that the Secretary-General 'rapidly establish an international commission of inquiry in order

International Commission of Inquiry established that the government forces of Sudan and the militias committed widespread acts which could amount to crimes against humanity. These acts included rape and other forms of sexual violence, destruction of villages, torture, killings of civilians, and forced pillages.¹² Based on this report by the International Commission of Inquiry, the Security Council determined that there was a continuous threat to international peace and security in Darfur. These findings caused the Security Council to refer the situation to the ICC acting under Chapter VII of the UN Charter as evidenced by UN Security Council Resolution 1593.¹³

The ICC Prosecutor investigated the Darfur situation to determine whether there was a reasonable basis to proceed with the investigation.¹⁴ Once the Prosecutor was satisfied that there was a reasonable basis to proceed with the investigation, an application was made to the ICC Pre-Trial Chamber¹⁵ to issue a warrant for President Al Bashir's arrest.¹⁶ After examining the material brought by the Prosecutor, the Pre-Trial Chamber was satisfied that "there are reasonable grounds to believe that

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 those responsible are held accountable'. See S.C. Res. 1564, para. 12 (Sep. 18, 2004). See also Rep. of Int'l Comm'n of Inquiry on Darfur to the UN Secretary-General, at 5, U.N. Doc (Sep. 18, 2004) (recommending that the Security Council refers the Darfur situation to the ICC as per article 13(b) of the Rome Statute as 'the alleged crimes that have been documented in Darfur [met] the thresholds of the Rome Statute). The Report of the Commission is available at <www.un.org/news/dh/sudan/com_inq_darfur.pdf> [hereinafter *Rep. of Int'l Comm'n on Darfur*].

¹² See Rep. of Int'l Comm'n on Darfur at 3.

¹³ See S.C. Res. 1593, *supra* note 10 pmb1. The Security Council has the primary responsibility to deal with issues that threaten international peace and security. See U.N. Charter art. 39 (stating that "[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken ... to maintain or restore international peace and security").

¹⁴ See Rome Statute, *supra* note 6 at art. 53. See also *The Office of the Prosecutor, Policy Paper on Preliminary Examinations*, para. 5 (Nov. 2013) (describing the relevant Rome Statute principles, factors and procedures applied by the Office in the conduct of its preliminary examination activities') <https://www.iccpi.int/items/Documents/OTP%20Preliminary%20Examinations/OTP%20%20Policy%20Paper%20Preliminary%20Examinations%20%202013.pdf>.

¹⁵ Art. 34(b) of the Rome Statute, *supra* note 6 stipulates that the ICC consists of three judicial divisions: the Pre-Trial Division or Chambers; the Trial Division; and the Appeals Division. On the number of judges per chambers, see art. 39 of the Rome Statute. The role of the Pre-Trial Chamber is to deal with preliminary issues such as deciding whether or not there is sufficient evidence to go on trial and to confirm charges and to also issue summons or arrest warrants. See Rome Statute, arts. 56 - 61.

¹⁶ See *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest (Mar. 4, 2009), https://www.icc-cpi.int/CourtRecords/CR2009_01517.PDF [hereinafter *Decision on Prosecution's Application*]. See also Rome Statute, *supra* note 6 at art. 58(1) which, in part, states that "[a]t any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person, if having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that (a) [t]here are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court."

Omar Al Bashir is criminally responsible . . . as an indirect perpetrator or as an indirect co-perpetrator for those war crimes and crimes against humanity for which the Chamber has already found in the present decision that there are reasonable grounds to believe that they were directly committed.”¹⁷ The Pre-Trial Chamber subsequently issued the arrest warrant against President Al Bashir.¹⁸ The Pre-Trial Chamber also requested the states parties and non-party states cooperate with the ICC by arresting and surrendering President Al Bashir to the ICC if he was apprehended in their respective territories.¹⁹

Upon learning that President Al Bashir was in South Africa, the Southern African Litigation Centre²⁰ approached the High Court of South Africa²¹ to ensure that the South African government would abide by its

¹⁷ *Decision on Prosecution's Application*, at para. 223. *See also Id.* at para. 28, where the Pre-Trial Chamber outlines the questions to be satisfied by the Prosecutor before the application for the issue of an arrest warrant is granted.

¹⁸ The first arrest warrant against President Al Bashir was issued on March 4, 2009 (ICC, *Warrant of Arrest for Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-1, March 4, 2009) and the second arrest warrant (ICC, *Second Warrant of Arrest for Omar Hassan Al Bashir*, ICC-02/05-01/09-95, July 12, 2010) was issued on July 12, 2010 after the Prosecutor successfully appealed to the Appeals Chamber to include the charge of genocide when the initial arrest warrant did not include it. *See* Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-21, Decision on the Prosecutor's Application for Leave to Appeal the Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, (June 24, 2009). *See also* Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-94, Second Decision on the Prosecution's Application for a Warrant of Arrest (July 12, 2010) (where the Pre-Trial Chamber included the charge of genocide) [hereinafter *Second Decision*].

¹⁹ *See Second Decision*, where the Pre-Trial Chamber instructed the ICC Registry to ‘prepare a request for cooperation seeking the arrest and surrender of Omar Al Bashir for the counts contained in both the first and the second warrant of arrest’. *See generally* Rome Statute, *supra* note 6 at art. 87 on requests for cooperation.

²⁰ A National Governmental Organization “which promotes and advances human rights and the rule of law in southern Africa primarily through strategic litigation support and capacity building.” SOUTHERN AFRICA LITIGATION CENTRE, www.southernafricanlitigationcentre.org/about/ (last visited Aug. 2016).

²¹ S. AFR. CONST., 1996 § 166 provides for the hierarchy of the South African courts as follows:

The courts are—

- (a) the Constitutional Court;
- (b) the Supreme Court of Appeal;
- (c) the High Court of South Africa, and any high court of appeal that may be established by an Act of Parliament to hear appeals from any court of a status similar to the High Court of South Africa;
- (d) the Magistrates' Courts; and
- (e) any other court established or recognized in terms of an Act of Parliament, including any court of a status similar to either the High Court of South Africa or the Magistrates' Courts.

The Constitutional Court is the highest court in South Africa and may sit as a court of first instance or last instance on constitutional matters and any matter that is of public interest. The Constitutional Court also has exclusive jurisdiction in certain matters such as determining the constitutionality of the conduct of the president of South Africa. *See* § 167. The Supreme Court of Appeal decides on appeals from the high courts and may deal with issues connected with appeals as determined by legislation. *See* § 168. The high court may deal with constitutional issues except those that are within the exclusive jurisdiction of the Constitutional Court, or which the Constitutional Court has decided to hear as the court of first instance. *See* § 169.

international obligations, and arrest and surrender President Al Bashir to the ICC.²² Meanwhile on the request of the ICC Prosecutor, the Pre-Trial Chamber also clarified South Africa's position with regard to its obligations under the Rome Statute.²³ It is important to note that once the ICC issued the arrest warrant, the African Union ("AU") adopted a series of resolutions instructing member states not to comply with the ICC's request that the states parties cooperate by arresting and surrendering President Al Bashir to the ICC.²⁴ The Pre-Trial Chamber held that there was no dilemma for South Africa as it is a state party to the Rome Statute, and must therefore abide by the Statute's obligations. In addition, the Sudanese situation was referred to by the Security Council Resolution 1593, which is binding upon all states.²⁵ While the South African government tried to delay the proceedings by asking for more time, the High Court made an order that President Al Bashir not be allowed to leave South Africa.²⁶

It is well-known that President Al Bashir was able to leave South Africa's territory before the judgment was handed down by the High Court, which required South Africa to arrest and surrender President Al Bashir to the ICC.²⁷ The government of South Africa appealed the judgment of the High Court to the Supreme Court of Appeal ("SCA").²⁸ The SCA dismissed the appeal and held that South Africa failed to act consistently with its obligations to arrest and surrender President Al Bashir to the ICC at both the international and domestic levels.²⁹ The

²² *Southern Africa Litigation Centre v. Minister of Justice and Constitutional Development* 2015 (5) SA 1 (GP) para. 2.

²³ The Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-242, (June 13, 2015). Decision following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir.

²⁴ See AU Assembly, *Decision on the ICC*, para. 3 Assembly/AU/Dec. 590 (XXVI), (Jan. 30-31 2016), Addis Ababa, (commending South Africa 'for complying with the Decisions of the Assembly on non-cooperation with the arrest and surrender of President Omar Al Bashir of The Sudan and Decides that by receiving President Al Bashir, [South Africa] was implementing various AU Assembly Decisions on the warrants of arrest issued by the ICC against President Bashir and that South Africa was consistent with its obligations under international law.')

²⁵ *Id.* at para. 5.

²⁶ See also *SALC v Minister of Justice*, at para. 36.

²⁷ See Norimitsu Onishi, *Omar al-Bashir, Leaving South Africa, Eludes Arrest Again*, N.Y. TIMES, June 15, 2015, http://www.nytimes.com/2015/06/16/world/africa/omar-hassan-al-bashir-sudan-south-africa.html?_r=0; Tara Penny, Barry Bateman & Jean-Jacques Cornish, *Omar Al-Bashir Defies Court Order and Leaves South Africa*, EYE WITNESS NEWS, June 15, 2015, <http://ewn.co.za/2015/06/15/Omar-alBashir-to-land-in-Sudan-this-evening>; Don Melvin & Elliot C. McLaughlin, *Sudan's Leader Leaves South Africa Before Court Orders Arrest*, CNN, June 15, 2015, <http://www.cnn.com/2015/06/15/africa/south-africa-summit-icc-omar-al-bashir-arrest/>.

²⁸ *Minister of Justice and Constitutional Development v. Southern African Litigation Centre* 2016 (3) SA 317 (SCA) (S. Afr.).

²⁹ *Id.* at para. 107 and 113, where the SCA altered the High Court Order as follows: 'The Conduct of the Respondents in failing to take steps to arrest and surrender to the [ICC], the President of Sudan, Omar Hassan Ahmad Al Bashir, after his arrival in South Africa on 13 June 2015 to attend the 25th Assembly of the African Union, was inconsistent with South Africa's obligations in terms of

government of South Africa appealed the SCA judgment to the Constitutional Court,³⁰ but later withdrew the appeal after the government's decision to exit the Rome Statute.³¹ One reason advanced by the South African government for the exit is that "South Africa found itself in the unenviable position where it was faced with conflicting obligations: obligations contained in the Rome Statute which are in conflict with customary international law pertaining to immunity for sitting Heads of State."³² Therefore, being a state party to the Rome Statute compromised South Africa's "efforts to promote peace and security on the African Continent and to play an essential part in international peacekeeping missions in Africa and in related peace processes."³³ Subsequent to the decision to exit the Rome Statute, the Minister of Justice and Correctional Services introduced the Implementation of the Rome Statute of the International Criminal Court Act Repeal Bill to South Africa's Parliament in late 2016.³⁴ However, in March 2017, a notice to withdraw the repeal Bill was tendered before South Africa's Parliament by the Minister of Justice and Correctional Services without any explanation.³⁵ South Africa has been a state party to the Rome Statute since November 27, 2000.³⁶

the Rome Statute ... and section 10 of the Implementation of the Rome Statute of the [ICC] Act 27 of 2002, and unlawful'.

³⁰ *Minister of Justice and Constitutional Development v. Southern Litigation Centre* (3) S.A. 317 (SCA).

³¹ Michelle Nichols, *SA Begins Process to Withdraw From International Criminal Court*, MAIL & GUARDIAN, Oct. 21 2016, <http://mg.co.za/article/2016-10-21-south-africa-begins-process-to-withdraw-from-the-icc> (last visited Nov. 9, 2016). It is worth noting that the High Court of South Africa has recently found that the executive branch of government of South Africa acted unconstitutional in giving the notice of withdrawal from the Rome Statute without first getting approval from the legislative branch of government for such approval. The high court found that the executive breached the separation of powers for usurping the legislative powers in this regard. The executive branch was then ordered to rescind the notice of withdrawal until the legislative process has been completed on whether or not to withdraw from the Rome Statute. This judgment did not deal with the substantive nature of the withdrawal, but dealt with the procedural aspect that the executive did not have the power to withdraw from the Rome Statute without approval from the legislative branch. See *Democratic Alliance v. Minister of International Relations and Cooperation and others (Council for the Advancement of the South African Constitution Intervening)* 2017 (3) SA 212 (G.P). For analysis of this judgment, see Hannah Woolaver, *Unconstitutional and Invalid: South Africa's Withdrawal from the ICC Barred (For Now)*, EJIL Talk (Feb. 27, 2017), www.ejiltalk.org/unconstitutional-and-invalid-south-africas-withdrawal-from-the-icc-barred-for-now/ (last visited Mar. 2, 2017).

³² See Opening Statement from T. M. Masutha, Minister of Justice and Correctional Services, Fifteenth Meeting of the Assembly of States Parties of the International Criminal Court, The Hague, Nov. 16-24, 2016, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP15/GenDeba/ICC-ASP15-GenDeba-SouthAfrica-ENG.pdf (last visited on Apr. 2017) (unnumbered).

³³ Department of International Relations and Cooperation (S. Afr.), *South Africa's Withdrawal from the Rome Statute of the International Criminal Court*, http://www.dirco.gov.za/milan_italy/newsandevents/rome_statute.pdf (undated).

³⁴ See Implementation of the Rome Statute of the International Criminal Court Act Repeal Bill, B23 of 2016.

³⁵ See Parliament of the Republic of South Africa, *Announcements, Tablings and Committee Reports*, Fourth Session, Fifth Parliament, No. 33-2017, announcing that the Minister of Justice and

President Al Bashir's visit to South Africa to attend the African Union Summit necessitates an examination of South Africa's immunity laws and obligations both domestically and internationally. South Africa has enacted at least three statutes that address immunities of Heads of State and other senior state officials.³⁷ South Africa plays an important role in the African region and it is known as one of the most influential member states of the AU.³⁸ This is not surprising since the AU was a brainchild of Libya's Muammar Gaddafi, Nigeria's Olusegun Obasanjo, and South Africa's Thabo Mbeki.³⁹ It is therefore befitting to discuss the position of the AU with regard to the ICC's arrest warrant issued against President Al Bashir.

I have previously analyzed the strained relationship between the ICC and the African states.⁴⁰ In the first paper I discussed whether the ICC was targeting Africa in the aftermath of arrest warrants issued by the ICC against two sitting presidents at the time: Al Bashir and Libya's Gaddafi.⁴¹ I observed that one could conclude that the ICC cannot be viewed as targeting Africa because "African states [] voluntarily ratified the Rome Statute and therefore the consequences that flow from such ratification are that the ICC will prosecute Africans if African states are

Correctional Services withdrew the Bill in accordance with the Rules of the National Assembly, <https://www.parliament.gov.za/storage/app/media/Docs/atc/ed163e45-eccd-4b9e-8d11-817d5c9820e3.pdf> (last visited on Apr. 2017). See also, Siyabonga Mkhwanazi, *SA will not withdraw from ICC –Justice Minister*, IOL, March 15, 2017, <http://www.iol.co.za/news/politics/sa-will-not-withdraw-from-icc---justice-minister-8194669> (last visited on Apr. 2017).

³⁶ The States Parties to the Rome Statute, ICC, https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited on Sep. 26, 2016).

³⁷ Foreign Immunities Act 87 of 1981; Diplomatic Immunities and Privileges Act 37 of 2001; and Implementation of the Rome Statute of the ICC Act 27 of 2002. [hereinafter ICC Implementation Act].

³⁸ See Jackie Cilliers, Julia Schünemann & Jonathan Moyer, *Power and influence in Africa: Algeria, Egypt, Ethiopia, Nigeria and South Africa*, INSTITUTE FOR SECURITY STUDIES 14 (March 2015).

³⁹ See Tiyanjana Maluwa, *From the Organisation of African Unity to the African Union: Rethinking the Framework for Inter-State Cooperation in Africa in the Era of Globalisation*, 5 U. OF BOTS. L. J. 15, fn 44 (2007) (observing that "Both Presidents Olusegun Obasanjo of Nigeria and Thabo Mbeki of South Africa, as well as Foreign Minister Amr Mousa of Egypt, standing in for President Hosni Mubarak, played critical roles in the debates and consultations which produced the compromise that formed the basis for the Sirte Declaration. Their respective support for the proposed Constitutive Act of the African Union in the Lome summit was equally critical to securing its adoption after initial expressions of reservations by a number of delegations both at the ministerial and summit levels. However, Ghaddafi's self-image as "the leader of Africa" cannot be ignored. Any recent visitor to Tripoli will testify to the adornment of various major points and buildings in the city with murals and slogans displaying or proclaiming Ghaddafi's various poses and roles as the "leader," "guide" or "liberator" of the African continent and its people").

⁴⁰ See Ntombizozuko Dyani, *Is the International Criminal Court Targeting Africa? Reflections on the Enforcement of International Criminal Law in Africa in AFRICA AND THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE* 185-220 (Vincent Nmehielle ed., 2012); and Ntombizozuko Dyani-Mhango, *The ICC Pre-Trial Chamber's decision on Malawi regarding the failure to arrest and surrender President Al Bashir of Sudan: An opportunity missed*, 28 S. AFR. PUB. L. 106-120 (2013).

⁴¹ Dyani, *supra* note 40; see also S.C. Res. 1970, para. 4-8 (Feb. 26, 2011).

unwilling and unable to prosecute.”⁴² I will also remind readers that the conflict between the ICC and the AU (as the collective of the African states) only arose once the ICC issued arrest warrants against the sitting Heads of State. Situations such as those in Uganda,⁴³ in the Democratic Republic of Congo (“DRC”),⁴⁴ and in the Central African Republic⁴⁵ were self-referrals by the respective states.⁴⁶ However, I also argue that Africa being the only continent where heinous crimes are committed is a legitimate question, as at the time the Prosecutor was only investigating situations in Africa.⁴⁷ Since then, the Prosecutor has been investigating Georgia for crimes against humanity and war crimes,⁴⁸ additionally several other non-African countries are under preliminary examination.⁴⁹ I conclude in that paper that if African states wish to avoid being targeted by the ICC, they need to strengthen their judicial systems to align with international standards to try perpetrators domestically because the ICC operates only on a complementarity basis.⁵⁰ Put differently, the ICC may only claim jurisdiction if the state is unwilling or unable to prosecute an alleged perpetrator for international crimes found in the Rome Statute.⁵¹

In the second paper, I scrutinized the Pre-Trial Chamber’s decision on Malawi for failing to arrest and surrender President Al Bashir while he attended the Common Market for Eastern and Southern Africa (“COMESA”) Summit.⁵² I criticized the Pre-Trial Chamber for failing to

⁴² Dyani, *supra* note 40, at 218.

⁴³ Press Release, International Criminal Court, President of Uganda Refers Situation Concerning the Lord’s Resistance Army (LRA) to the ICC, (Jan. 29, 2004).

⁴⁴ Press Release, International Criminal Court, Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo, (Apr. 19, 2004).

⁴⁵ Press Release, International Criminal Court, Prosecutor Receives Referral Concerning Central African Republic, (Jan. 7, 2005).

⁴⁶ See Dyani, *supra* note 40, at 186 and the accompanying footnotes.

⁴⁷ *Id.* at 219.

⁴⁸ See Press Release, International Criminal Court, ICC Pre-Trial Chamber I Authorises the Prosecutor to Open an Investigation into the Situation in Georgia, (Jan. 27, 2016); Situation in Georgia, Case No. ICC-01/15/12, Decision on the Prosecutor’s request for authorization of an investigation, (Jan. 27, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_00608.PDF.

⁴⁹ These include Afghanistan, Colombia, Iraq/UK, Palestine, Registered Vessels of Comoros, Greece and Cambodia and Ukraine. This information can be easily accessed from the ICC website. *Academics, Students and the ICC*, <https://www.icc-cpi.int/get-involved/pages/academics-and-researchers.aspx>

⁵⁰ Dyani, *supra* note 40, at 220. For the discussion of the complementarity principle, see VINCENT O. NMEHELLE, *Taking Credible Ownership of Justice for Atrocity Crimes in Africa: The African Union and the Complementarity Principle of the Rome Statute*, in AFRICA AND THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE 223 (2012); and Carol Nalule & Rachel Odoi-Musoke, *The Complementarity Principle Put to the Test: Uganda’s Experience*, in AFRICA AND THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE 243 (Vincent O. Nmeielle ed., 2012).

⁵¹ See Rome Statute, *supra* note 6, art 1 (read together with the Preamble to the Rome Statute para. 10 and art 17 on the admissibility of the cases to the ICC) which provides that the ICC “shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, ...and shall be complementary to national criminal jurisdictions.”

⁵² Dyani-Mhango, *supra* note 40, at 109. See also *The Prosecutor v. Al Bashir*, ICC-02/05-01/09-139-Corr, Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the

attend to the apparent conflict between articles 27(2)⁵³ and 98(1)⁵⁴ of the Rome Statute.⁵⁵ The conflict arises from article 27(2) prohibiting any form of immunity barring the ICC from exercising its jurisdiction over the individual claiming immunity, while article 98(1) prohibits the ICC from forcing a state party to the Rome Statute to cooperate by arresting and surrendering a person from a third state⁵⁶ if such cooperation will result in the state party acting against its customary international law obligations owed to the third state.⁵⁷ The Pre-Trial Chamber failed to deal with the conflict between these two articles as it held that article 98(1) of the Rome Statute did not apply to the matter.⁵⁸ I also argued that Malawi was justified in not arresting and surrendering President Al Bashir to the ICC because of its other obligations under customary international law owed to Sudan, a non-party state to the Rome Statute.⁵⁹ Since then, the Pre-Trial Chamber has dealt with the conflict between articles 27(2) and 98(1) of the Rome Statute.⁶⁰

In this paper I ask: Is there a justification for South Africa's failure to abide by its obligations under the Rome Statute when it did not secure and arrest President Al Bashir? In other words, does the same argument for Malawi apply to the South African situation? This paper will revisit these arguments and examine whether they apply to the South African situation. The paper will also analyze the High Court and the SCA judgments on South Africa's domestic and international obligations. This

Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, (Dec. 13, 2011), https://www.iccc-pi.int/CourtRecords/CR2011_21750.PDF [hereinafter *Malawi Decision*].

⁵³ Rome Statute, *supra* note 6 art. 27(2) states that "[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the [ICC] from exercising its jurisdiction over such a person."

⁵⁴ Rome Statute, *supra* note 6, art. 98(1) states, "[the ICC] 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 [ICC] can first obtain the cooperation of that third State for the waiver of the immunity."

⁵⁵ Dyani-Mhango, *supra* note 40, at 108.

⁵⁶ Vienna Convention, *supra* note 5, art. 2(1)(g) defines a third state as 'a state not party to the treaty.' I use non-party state and third state interchangeably.

⁵⁷ *Id.* at 116-119. For further reading on this issue, see also Paola Gaeta, *Does President Al Bashir Enjoy Immunity From Arrest?* 7 J. INT'L CRIM. JUST. 315 (2009); Dapo Akande, *The Legal Nature of the Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities*, 7 J. INT'L CRIM. JUST. 333 (2009).

⁵⁸ *Malawi Decision*, *supra* note 52, at para. 43.

⁵⁹ Dyani-Mhango, *supra* note 40, at 116-119.

⁶⁰ See Prosecutor v. Al Bashir, ICC-02/05-01/09-195, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, paras. 28-31 (Apr. 4, 2014), https://www.icc-cpi.int/CourtRecords/CR2014_03452.PDF [hereinafter *DRC Decision*] (holding that the Security Council Resolution to refer the matter to the ICC implicitly waived any form of immunities that President Al Bashir may have under customary international law).

will be done against the backdrop of the ICC decisions on the obligations of states parties to the Rome Statute to cooperate with the ICC.

Part I of the article presents a brief background to the events that led to South Africa's dilemma caused by its failure to abide by its obligations under the Rome Statute by virtue of being both a member of the AU and a state party to the Rome Statute. Part II briefly discusses the status of personal immunities entitled to Heads of State under customary international law, while Part III discusses the Rome Statute on immunities entitled to Heads of State from non-party states. Part III also discusses the criticism levelled against the ICC Pre-Trial Chambers I and II decisions on the conflict between articles 27(2) and 98(1) of the Rome Statute. Part IV then analyzes South Africa's legal framework on personal immunities and the South African courts' decisions on South Africa's failure to arrest and surrender President Al Bashir to the ICC. Part IV also examines the consequences of South Africa's attempt to withdraw from the Rome Statute and concludes that despite such an attempt to withdraw, South Africa would still face the consequences of failing to arrest and surrender President Al Bashir to the ICC under the Rome Statute.

II. INTERNATIONAL LAW ON HEADS OF STATE AND PERSONAL IMMUNITIES FOR INTERNATIONAL CRIMES

As explained above, the tension between the AU and the ICC stems from the barring of immunities for sitting Heads of State such as President Al Bashir, and is further exacerbated because Sudan is not party to the Rome Statute. This necessitates a brief discussion of immunities entitled to sitting Heads of State. Heads of State or government and foreign ministers (state officials) enjoy the broadest scope of immunity from criminal jurisdiction of foreign states in general. The rationale behind the exemption from criminal jurisdiction is two-fold: first, Head of State immunity is premised on the concept that a state and its rulers are one for the purposes of immunity; and second, all states are equal with the consequence that no state may exercise judicial authority over another.⁶¹ There is much literature about immunities in international law, specifically, the distinction between diplomatic and sovereign immunities, and between functional (*ratione materiae*)⁶² and personal (*ratione personae*) immunities.⁶³ Of concern in this discussion is the

⁶¹ ANTONIO CASSESE, INTERNATIONAL LAW 120 (2001).

⁶² Functional immunity is grounded on the notion that a state official is not accountable to other states for acts that he accomplished in his official capacity, so such acts must therefore be attributed to the state. *See id.*

⁶³ *See generally*, YITIHA SIMBEYE, IMMUNITY AND INTERNATIONAL CRIMINAL LAW (2004).

personal immunities accorded to Heads of State under sovereign immunities.

According to personal immunity, a senior state official is immune from foreign state jurisdiction in order to guard against the violation of state sovereignty or an interference with the official functions of a state agent under the pretext of dealing with an exclusively private act.⁶⁴ Indeed, the International Court of Justice ("ICJ") in *Arrest Warrant Case*,⁶⁵ confirmed this notion:

[T]he functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.⁶⁶

After carefully examining state practice, the ICJ further confirmed that it was "unable to deduce from this state practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity."⁶⁷ This illustrates how personal immunity is an absolute prohibition of the exercise of criminal jurisdiction by foreign states. "Judicial opinion and state practice on this point are unanimous and no case can be found in which it was held that a state official possessing personal immunity is subject to the criminal jurisdiction of a foreign state where it is alleged that he or she has committed an international crime."⁶⁸

The ICJ confirmed that this immunity extends even in cases involving allegations of international crimes.⁶⁹ However, the *Arrest Warrant Case* also made it clear that personal immunities may be lifted in international courts such as the ICC.⁷⁰ Indeed, article 27(2) of the Rome

⁶⁴ CASSESE, *supra* note 61, at 862.

⁶⁵ *Arrest Warrant of 11 April 2000* (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. Rep 3. (Feb. 14) [hereinafter *Arrest Warrant Case*].

⁶⁶ *Id.* at paras. 54-55.

⁶⁷ *Id.* at para. 58.

⁶⁸ Dapo Akande, *International Law Immunities and the International Criminal Court*, 98 AM. J. INT'L L. 407, 411 (2004).

⁶⁹ *Id.*

⁷⁰ *Arrest Warrant Case*, *supra* note 65, at para. 61 (where in its dictum, the ICJ stated that immunity might be lifted in four instances such as when the accused is tried in their home state; if the

Statute states that personal immunities do not bar the ICC from exercising its jurisdiction irrespective of the status of the person accused of committing an international crime.⁷¹ It is also worth noting that the International Law Commission (“ILC”) has embarked on a study of immunities for incumbent or foreign Heads of State and senior government officials which includes looking at personal immunities, amongst other related issues.⁷² The ILC Special Rapporteur has reported that personal immunities for sitting senior state officials in domestic courts are widely recognized and that no evidence exists that state practice leads to exceptions.⁷³ The ILC Special Rapporteur also stated that if there are exceptions to personal immunities they must satisfy the two requirements of international customary law: state practice and *opinio juris*.⁷⁴

As discussed above, the current international law position is that while President Al Bashir may be entitled to personal immunities before domestic courts, no such entitlement exists before international courts. The question that remains is whether he is entitled to immunities before the South African courts for the purposes of South Africa’s obligation to cooperate with the ICC by arresting and surrendering him to the ICC. This question becomes more important since Sudan is not party to the Rome Statute.

III. THE ROME STATUTE ON IMMUNITIES AND NON-PARTY STATES TO THE ROME STATUTE

As explained above, article 27(2) abrogates the immunities of persons accused of having perpetrated international crimes before the ICC irrespective of their status, while article 98(1) prohibits the ICC from requesting states parties to surrender or assist if such assistance would require the requested state to breach its customary international law

home state waives immunity; if the accused no longer holds office; and when the accused stands trial before certain international courts).

⁷¹ Rome Statute, *supra* note 6, art. 27(2) states 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 [ICC] from exercising its jurisdiction over such a person’.

⁷² See Concepción Escobar Hernández (Special Rapporteur), *Fifth Report. on Immunity of State Officials from Foreign Criminal Jurisdiction*, U.N. Doc. A/CN.4/701 (June 14, 2016) [hereinafter *ILC Fifth Report*].

⁷³ Roman Anatolevich Kolodkin (Special Rapporteur), *Second Report. on Immunity of State Officials from Foreign Criminal Jurisdiction*, para. 94, U.N. Doc. A/CN.4/631 (June 10, 2010) [hereinafter *ILC Second Report*.] (reissued for technical reasons on Feb. 22, 2011); *see also*, *ILC Fifth Report. supra* note 72, at para. 196.

⁷⁴ *Id.* para. 54.

obligations owed to a third state.⁷⁵ Cooperation by states parties to arrest and surrender persons from a third state⁷⁶ is allowed only when the ICC secures cooperation of the third state for the waiver of immunities.⁷⁷ Further, as with any other treaty, the Rome Statute binds those states who have subscribed to it.⁷⁸ Third states are therefore not bound by the Rome Statute when it comes to cooperation with the ICC. However, article 13(b) of the Rome Statute gives jurisdiction to the ICC to prosecute perpetrators from third states by virtue of a referral from the UN Security Council, as was the case for Sudan's President Al Bashir.⁷⁹ The question is whether states parties to the Rome Statute are obliged to arrest President Al Bashir who is a sitting head of a third state. This is where the apparent conflict between articles 27(2) and 98(1) of the Rome Statute becomes relevant.

A. *Two Schools of Thought Resolving the Conflict Between Articles 27(2) and 98(1)*

There are two schools of thought on the apparent conflict. One view, to which I subscribe, is that article 98(1) means that a state party to the Rome Statute may not be forced to cooperate with the ICC request to arrest and surrender an accused from a third state if such cooperation will breach the customary international law obligations the state party owes to the third state.⁸⁰ The argument is that once the Security Council refers the matter to the ICC for investigation, the Rome Statute applies. This means that the proceedings of the referral will be conducted in accordance with the Rome Statute, the ICC Rules of Procedure, and the Elements of Crime.⁸¹ However, this does not make Sudan a party to the Rome Statute. In fact, "a referral by the Security Council is simply a mechanism envisaged in the Statute to trigger the jurisdiction of the ICC: it does not and cannot turn a non-party to the Statute into a state party, and it has not turned Sudan into a state party to the Statute."⁸² In order for states parties to be able to arrest and surrender President Al Bashir, the ICC will still need to obtain a waiver of personal immunities entitled

⁷⁵ Paola Gaeta, *Official Capacity and Immunities*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 990 (Antonio Cassese, Paola Gaeta & John Jones eds., 2002).

⁷⁶ Vienna Convention, *supra* note 5, art. 2(1)(h) (defines a third state as "a state not party to the treaty").

⁷⁷ DRC Decision, *supra* note 60, para. 22.

⁷⁸ Vienna Convention, *supra* note 5, art. 34 (states that a "treaty does not create either obligations or rights for a third state without its consent").

⁷⁹ See S.C. Res. 1593, *supra* note 10.

⁸⁰ Gaeta, *supra* note 57.

⁸¹ *Id.* at 324.

⁸² *Id.*

to President Al Bashir from Sudan—a third state.⁸³ According to this view, the tension between articles 27 and 98 will only be resolved by the ICC securing the waiver from Sudan. There is no evidence which suggests that the ICC has secured a waiver of personal immunities entitled to President Al Bashir from Sudan.

The alternative view is that because the ICC is prosecuting an accused from a third state by virtue of a Security Council referral, this means that the referral by the Security Council is binding upon Sudan, which abrogates President Al Bashir's personal immunities.⁸⁴ According to this view, "[t]he fact Sudan is bound by article 25 of the UN Charter and implicitly by Security Council Resolution 1593 to accept the decisions of the ICC puts Sudan in an analogous position to a party to the [Rome] Statute."⁸⁵ This view goes further and argues that Sudan's obligations to abide by the Rome Statute are derived from the UN Charter and Security Council Resolution 1593. This is how the tension between articles 27 and 98 in the Al Bashir matter would be resolved under this view.⁸⁶

B. *The AU's Response: The Malawi and Chad Decisions*

The AU Assembly of Heads of State and Government ("AU Assembly") adopted numerous decisions based on the first school of thought, where it has argued that by not cooperating with the ICC to arrest and surrender President Al Bashir, the AU member states are abiding by their obligations under article 98(1) of the Rome Statute.⁸⁷ Put differently, the AU Assembly argues that article 98(1) requires the Rome Statute states parties not to abide by the ICC requests if those requests will make them breach their customary international law obligations owed to the third state.⁸⁸ The AU then instructed its member

⁸³ *Id.* at 329.

⁸⁴ Dapo, *supra* note 40, at 335.

⁸⁵ *Id.* at 342.

⁸⁶ *Id.*

⁸⁷ See, e.g., *Decision on the Implementation of the Assembly Decisions on the International Criminal Court*, Assembly of the Union, Seventeenth Ordinary Session, EX.CL/670(XIX), Assembly/AU/Dec.366(XVII) (July 1, 2011) (where the AU Assembly instructed the AU member states not to cooperate with the execution of the arrest warrant of Gaddafi and reaffirmed that by receiving President Al Bashir, Kenya and Djibouti were discharging their obligations under art 23(2) of the AU Constitutive Act and art 98 of the Rome Statute. The AU Assembly is the supreme organ of the AU which comprises of Heads of State and government of AU member states, which is the founding treaty of the AU); See Constitutive Act of the African Union art. 6(1) & (2), July 11, 2000, 2158 U.N.T.S. 3.

⁸⁸ See, e.g., *Decision on the Application by the International Criminal Court Prosecutor for the Indictment of the President of the Republic of the Sudan*, Assembly of the Union, Twelfth Ordinary Session, Assembly/AU/Dec.221(XII) para. 1, (where the AU Assembly expressed "its deep concern" of the ICC Prosecutor's indictment of President Al Bashir. Subsequently, the AU Assembly took a common position to instruct the AU member states not to abide by the ICC Requests to arrest and

states not to comply with the ICC request to arrest and surrender President Al Bashir and relied on the apparent conflict between articles 27(2) and 98(1) of the Rome Statute. Indeed, this is the argument that has been used by the AU member states to the ICC in their failure to comply with the obligations to arrest and surrender President Al Bashir.

For example, Malawi⁸⁹ and Chad⁹⁰ both relied on the “position adopted by the [AU] in respect to the international warrant of arrest issued by the Prosecutor against [President] Al Bashir,”⁹¹ and as members of the AU they refused to cooperate with the ICC request to arrest and surrender him to the ICC. Malawi explained that since Sudan was not party to the Rome Statute, and in accordance with the public international principles and its domestic laws, the bar to immunity in terms of article 27(2) did not apply to President Al Bashir.⁹²

The Pre-Trial Chamber noted the apparent conflict between article 27(2) and 98(1), but without any explanation, decided that Malawi and Chad (and the AU) were “not entitled to rely on article 98(1) to justify refusing to comply with Cooperation Requests.”⁹³ The Pre-Trial Chamber then gave four reasons why Malawi should have arrested and surrendered Al Bashir.⁹⁴ First, the Pre-Trial Chamber noted that immunities for Heads of States have been rejected by international courts since World War I.⁹⁵ Second, an increase in the prosecution of Heads of States by courts in the last decade include former presidents Milosevic, Charles Taylor, Maummar Gaddafi, and Laurent Bagbo.⁹⁶ Third, 120 states have ratified the Rome Statute since its inception, meaning these

surrender President Al Bashir; see *Decision of the Meeting of African States Parties to the Rome Statute of the International Criminal Court*, Assembly of the Union, Thirteenth Ordinary Session, Assembly/AU/13 (XIII), para. 10; see also *Decision On The International Criminal Court*, Assembly of the Union, Twenty-Sixth Ordinary Session, EX.CL/952(XXVIII), Assembly/AU/Dec.590(XXVI) paras. 3-4 (where it commended South Africa ‘for complying with the Decisions of the Assembly on non-cooperation with the arrest and surrender of President Omar Al Bashir of The Sudan and [decided] that by receiving President Bashir, [South Africa] was implementing various AU Assembly [d]ecisions on the warrants of arrest issued by the ICC against President Bashir and that South Africa was consistent with its obligations under international law [and reiterated] its decision on the need for all Member States to comply with the Assembly [d]ecisions on the warrants of arrest issued by the ICC against President Al Bashir of The Sudan pursuant to Article 23 (2) of the Constitutive Act of the African Union and Article 98 of the Rome Statute of the ICC’).

⁸⁹ Malawi Decision, *supra* note 52.

⁹⁰ Prosecutor v. Al Bashir, ICC-02/05-01/09-140, Decision Pursuant to Article 87(7) of the Rome Statute on the Refusal of the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Regard to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir (Dec. 13, 2011), https://www.icc-cpi.int/CourtRecords/CR2012_04203.PDF [hereinafter Chad Decision].

⁹¹ *Id.* para. 7; Malawi Decision, *supra* note 52 para. 13(ii).

⁹² Malawi Decision, *supra* note 52 para. 13(i).

⁹³ *Id.* para. 37.

⁹⁴ *Id.* paras. 38-42.

⁹⁵ *Id.*

⁹⁶ *Id.*

states have recognized the exceptions to immunities of the states' top officials.⁹⁷ They ratified the Rome Statute knowing full well the existence of article 27(2). The Pre-Trial Chamber also noted that "[e]ven some States which have not joined the [ICC] have twice allowed for situations to be referred to the [ICC] by United Nations Security Council Resolutions, undoubtedly in the knowledge that these referrals might involve prosecution of Heads of State who might ordinarily have immunity from domestic prosecution."⁹⁸ Finally, the Pre-Trial Chamber decided that it is inconceivable for Malawi to entrust the ICC with the mandate to prosecute perpetrators of international crimes and then interpret article 98(1) in a way that would render it impossible for the ICC to exercise such a mandate.⁹⁹ Based on these reasons, the Pre-Trial Chamber found that there exists an exception to Head of State immunity under customary international law, which made article 98(1) of the Rome Statute inapplicable.¹⁰⁰ In a subsequent case, the *Chad Decision*, President Al Bashir had attended an inauguration of the President of Chad. The Pre-Trial Chamber applied the same reasoning in the *Malawi Decision*. In fact, it referred to the *Malawi Decision* verbatim in deciding that Chad was under an obligation to abide by the ICC cooperation request and arrest President Al Bashir.¹⁰¹

The Pre-Trial Chamber decisions on Malawi and Chad were severely criticized by scholars for failure to deal with the apparent conflict between articles 27(2) and 98(1) of the Rome Statute.¹⁰² First, the Pre-Trial Chamber failed to make reference to the two schools of thought mentioned above and take a stand.¹⁰³ It was expected that the

⁹⁷ *Id.*

⁹⁸ *Id.* para. 41.

⁹⁹ *Id.*

¹⁰⁰ *Id.* para. 43.

¹⁰¹ See *Chad Decision*, *supra* note 90, paras. 12-14.

¹⁰² See, e.g., Dapo Akande, *ICC Issues Detailed Decision on Bashir's Immunity (... At Long Last ...) But Gets the Law Wrong*, BLOG OF THE EUROPEAN JOURNAL OF INTERNATIONAL LAW (Dec. 15, 2011), <http://www.ejiltalk.org/icc-issues-detailed-decision-on-bashir%E2%80%99s-immunity-at-long-last-but-gets-the-law-wrong/>; William Schabas, *Obama, Medvedev and Hu Jintao May be Prosecuted by International Criminal Court, Pre-Trial Chamber Concludes*, PHD STUDIES IN HUMAN RIGHTS, (Dec. 15, 2011, 12:21 PM), <http://humanrightsdoctorate.blogspot.co.za/2011/12/obama-medvedev-and-hu-jintao-may-be.html>; Dov Jacobs, *A Sad Hommage to Antonio Cassese: The ICC's Confused Pronouncements on State Compliance and Head of State Immunity*, SPREADING THE JAM, (Dec. 15, 2011), <https://dovjacobs.com/2011/12/15/a-sad-hommage-to-antonio-cassese-the-iccs-confused-pronouncements-on-state-compliance-and-head-of-state-immunity/>; Dyani-Mhango, *supra* note 40; Dire Tladi, *The ICC Decisions on Chad and Malawi: On Cooperation, Immunities, and Article 98*, 11 J. INT'L CRIM. JUST. 199 (2013).

¹⁰³ Alexander K.A. Greenwalt, *Introductory Note to the International Criminal Court: Decisions Pursuant to Articles 87(7) of the Rome Statute on the Failure by the Republic of Malawi and the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir & African Union Response*, 51 INT'L LEGAL

Pre-Trial Chamber would deal with the conflict to bring clarity. Secondly, the Pre-Trial Chamber's decision rendered article 98(1) redundant by deciding that article 27(2) cancelled any customary international law immunities that may be owed to a third state—Sudan in this case.¹⁰⁴ In other words, the Pre-Trial Chamber did not make a distinction between heads of third states and heads of states parties, which article 98 of the Rome Statute intends to do when it comes to immunities. Thirdly, the Pre-Trial Chamber's decision—that there existed a general exception to the Heads of State immunity in prosecutions before international courts—is flawed, as this is a misreading of the *Arrest Warrant Case*,¹⁰⁵ which stated that immunities may be lifted in circumstances which include “an incumbent or former Minister for Foreign Affairs . . . subject to criminal proceedings before *certain* international criminal courts, *where they have jurisdiction . . .*”¹⁰⁶ This can be interpreted to mean that international courts or tribunals do not have automatic jurisdiction to lift personal immunities to which senior state officials are entitled.¹⁰⁷ This also ties to the fact that there is a legal distinction between a Head of State that is party to a treaty and that which comes from a third state. The Pre-Trial Chamber fails to make that distinction.¹⁰⁸

C. *The DRC Decision Finally Resolved the Tension, But Many Issues Remain*

In subsequent decisions, the Pre-Trial Chamber addressed the tension between articles 27(2) and 98(1) and adopts the second school of thought advanced by Akande—that Sudan's obligations to abide by the Rome Statute are derived from the UN Charter and the Security Council Resolution 1593.¹⁰⁹ In fact, these decisions were made by the Pre-Trial

MAT. 393, 393-4 (2012) (criticising the Pre-Trial Chamber for failing to take into account the two approaches).

¹⁰⁴ Akande, *supra* note 102. For a contrary view see Tladi *supra* 102 arguing that since the Pre-Trial Chamber did not undertake any interpretation of article 98(1), there is no basis to argue that the PTC rendered it meaningless.

¹⁰⁵ See also, Akande, *supra* note 102.

¹⁰⁶ Arrest Warrant Case, *supra* note 65, para. 61.

¹⁰⁷ Akande, *supra* note 102.

¹⁰⁸ Gaeta, *supra* note 57 (correctly arguing that the ICC needs to obtain a waiver of immunity in this instance); see also, Vienna Convention, *supra* note 5, art. 35 (reiterates that a third state must consent to be bound by a treaty in writing).

¹⁰⁹ See DRC Decision, *supra* note 60; Prosecutor v. Al Bashir, ICC-02/05-01/09-242, Decision Following the Prosecutor's Request for an Order Clarifying that the Republic of South Africa is Under an Obligation to Immediately Arrest and Surrender Omar Al Bashir, (June 13, 2015), https://www.icc-cpi.int/CourtRecords/CR2015_06500.PDF; Prosecutor v. Al Bashir, ICC-02/05-01/09-267, Decision on the Non-Compliance by the Republic of Uganda with the Request to Arrest and Surrender Omar Al-Bashir to the Court and Referring the Matter to the United Nations Security Council and the Assembly of States Parties to the Rome Statute, (July 11, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_04947.PDF; Prosecutor v. Al Bashir, ICC-02/02-01/09-266, Decision

Chamber II without explaining its departure from the *Malawi* and *Chad* decisions.¹¹⁰ In the *DRC Decision*,¹¹¹ President Al Bashir visited the Democratic Republic of Congo (“DRC”) to attend the COMESA Summit, where the DRC claimed that the invitation came from the organisation and not from the DRC itself.¹¹² The DRC invoked the same defense as Malawi and Chad: that the AU had instructed its member states not to cooperate with the ICC,¹¹³ as this would be inconsistent with their obligations to respect the immunities attached to President Al Bashir as a sitting Head of State.¹¹⁴ The DRC also “wondered” about the other states parties to the ICC that had failed to comply with the ICC request to cooperate (or their obligations to arrest and surrender) and whether this was due to the immunities afforded to President Al Bashir as a sitting Head of State.¹¹⁵ The Pre-Trial Chamber II made it clear that the issue was not about other states parties’ motives for failing to comply with the ICC’s request to cooperate, as this did not relieve the DRC of its obligations under the Rome Statute. The issue was that the DRC, as a state party, “failed to execute the 2009 and 2010 Requests issued by the [ICC]”¹¹⁶ and “to discharge its obligation to consult or notify the [ICC] in due course.”¹¹⁷

The Pre-Trial Chamber II confirmed the existence of customary international law personal immunities for Heads of State—irrespective of whether such states are party to the Rome Statute or not. The Pre-Trial Chamber also confirmed that if Heads of State are prosecuted before the ICC, article 27(2) of the Rome Statute removes any reliance on

on the Non-Compliance by the Republic of Djibouti with the Request to Arrest and Surrender Omar Al-Bashir to the Court and Referring the Matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute, (July 11, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_04946.PDF.

¹¹⁰ The Darfur Sudan Situation was relocated from Pre-Trial Chamber I to Pre-Trial Chamber II. See Prosecutor v. Al Bashir, ICC-02/05-01/09-143, Decision on the Constitution of the Pre-Trial Chambers and on the Assignment of the Democratic Republic of Congo, Darfur, Sudan and Cote d’Ivoire Situations, (Mar. 3, 2012). Pre-Trial Chambers I and II exercise the same functions in terms of arts. 34 and 39 of the Rome Statute. That is why it is interesting to note that Pre-Trial Chamber II’s departure from Pre-Trial Chamber I’s Malawi and Chad decisions in the DRC decision is not explained.

¹¹¹ DRC Decision, *supra* note 60.

¹¹² *Id.* para. 12.

¹¹³ *Id.* para. 19 (where the DRC made references to the AU Assembly Decision of 2013-10-12 that “no serving AU Head of State or Government shall be required to appear before any international court or tribunal during their term of office”).

¹¹⁴ *Id.*

¹¹⁵ *Id.* para. 20.

¹¹⁶ These requests emanate from the arrest warrants issued against President Al Bashir requesting states party to the Rome Statute to cooperate by arresting and surrendering President Al Bashir to the ICC. See, e.g., Second Decision on the Prosecution’s Application for a Warrant of Arrest, *supra* note 19 (on the Pre-Trial Chamber’s requests to states to cooperate by arresting and surrendering President Al Bashir to the ICC).

¹¹⁷ *Id.*

customary international law immunities.¹¹⁸ The Pre-Trial Chamber II acknowledged that the Rome Statute can only bind those states that have ratified it and not the third states without their consent, as the rules of international law so provide.¹¹⁹ Therefore, in the event that the ICC were to be faced with the prosecution of a Head of State from a third state, the Pre-Trial Chamber II confirmed that the issue of immunities could be raised. Under these circumstances, article 98(1) of the Rome Statute directs the ICC “to secure the cooperation of the third State for the waiver or lifting the immunity of its Head of State” and thus “prevent [] the requested State from acting inconsistently with its international obligations towards the [third state] with respect to the immunities attached to the latter’s Head of State.”¹²⁰ This was also confirmed by the ICC Pre-Trial Chamber II in several decisions,¹²¹ where the Chamber “highlight[ed] that only States Parties to the [Rome] Statute are under the obligation to cooperate with the Court.”¹²² The ICC Pre-Trial Chamber II also confirmed that this position may be altered by the Security Council by passing a resolution under Chapter VII of the UN Charter that demands cooperation from non-party states.¹²³ Further, the Pre-Trial Chamber II acknowledged that except for Sudan,¹²⁴ Resolution 1593 did not demand such cooperation as it merely “urge[d] all states and concerned regional and other international obligations to cooperate fully’ with the [ICC].”¹²⁵

¹¹⁸ *Id.* para. 25.

¹¹⁹ *Id.* para. 26.

¹²⁰ *Id.* para. 27.

¹²¹ See, e.g., Prosecutor v. Gaddafi, ICC-01/11-01/11-420, Decision on the Request of the Defense of Abdullah Al-Senussi to Make a Finding of Non-Cooperation by the Islamic Republic of Mauritania and Refer the Matter to the Security Council, (Aug. 28, 2013), https://www.icc-cpi.int/CourtRecords/CR2013_05689.PDF; Prosecutor v. Al Bashir, ICC-02/05-01/09-162, Decision Regarding Omar Al Bashir’s Potential Travel to the United States of America, (Sep. 18, 2013), https://www.icc-cpi.int/CourtRecords/CR2013_06263.PDF [hereinafter USA Decision]; Prosecutor v. Al Bashir, ICC-02/05-01/09-164, Decision Regarding Omar Al Bashir’s Potential Travel to the Federal Republic of Ethiopia and the Kingdom of Saudi Arabia, (Oct. 10, 2013), https://www.icc-cpi.int/CourtRecords/CR2013_07402.PDF; Prosecutor v. Al Bashir, ICC-02/05-01/09-169, Decision Regarding Omar Al Bashir’s Potential Travel to the State of Kuwait, (Nov. 18, 2013), https://www.icc-cpi.int/CourtRecords/CR2013_08951.PDF; and Prosecutor v. Al Bashir, ICC-02/05-01/09-199, Decision Regarding the Visit of Omar Hassan Ahmad Al Bashir to the Federal Republic of Ethiopia, (Apr. 29, 2014), https://www.icc-cpi.int/CourtRecords/CR2014_03809.PDF.

¹²² USA Decision, *supra* note 121, para. 9.

¹²³ *Id.* para. 10.

¹²⁴ See also Prosecutor v. Al Bashir, ICC-02/05-01/09-227, Decision on the Prosecutor’s Request for a Finding of Non-Compliance against the Republic of Sudan paras. 11, 15 (Mar. 9, 2015), https://www.icc-cpi.int/CourtRecords/CR2015_02745.PDF (where the ICC Pre-Trial Chamber noted that Sudan has persistently refused to cooperate with the ICC as it does not recognize its jurisdiction. However, the Pre-Trial Chamber found that Resolution 1593(2005) binds the Sudanese government and that it had failed to abide by its obligations in terms of the UN Charter.).

¹²⁵ USA Decision, *supra* note 121, para. 11.

However, in the *DRC Decision*, the Pre-Trial Chamber II found that this case did not fall under those circumstances, where the DRC would act inconsistent with its international obligations if it arrested and surrendered President Al Bashir.¹²⁶ The Pre-Trial Chamber II's reasons were as follows: Firstly, the Security Council Resolution 1593's instruction to Sudan to "cooperate fully" and to "provide any necessary assistance to the Court" eliminated any impediment to arrest and surrender, and lifted any immunity Al Bashir might have had.¹²⁷ Accordingly, the decision by the Security Council in Resolution 1593¹²⁸ essentially satisfied article 98(1) of the Rome Statute's requirement for the ICC to "first obtain the cooperation of [the] third State for the waiver of the immunity."¹²⁹ The Pre-Trial Chamber stated that an alternative interpretation would render the Security Council's decision requiring Sudan to "cooperate fully" and to "provide any necessary assistance to the Court" "senseless."¹³⁰

Secondly, the Pre-Trial Chamber reasoned that the Security Council Resolution 1593 "implicitly waived the immunities granted to Al Bashir under international law and attached to his position as a head of State. Consequently, there also exists no impediment at the horizontal level between the DRC and Sudan as regards the execution of the 2009 and 2010 requests."¹³¹ Thirdly, the Pre-Trial Chamber II stated that the UN Charter, from whose provisions the Security Council operates, took precedence over the resolutions of the AU as envisaged in articles 25¹³² and 103¹³³ of the UN Charter. Consequently, the AU resolutions could not be invoked by the DRC to avoid complying with the ICC obligations, as the Security Council implicitly waived Sudan's immunities.¹³⁴ A series of decisions thereafter followed, where the Pre-Trial Chamber used the same reasoning to conclude that the Security Council Resolution 1593 implicitly waived President Al Bashir's customary international law

¹²⁶ DRC Decision, *supra* note 60, para. 29

¹²⁷ *Id.*

¹²⁸ S.C. Res. 1593, *supra* note 10, para. 1-2 ("2. *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.").

¹²⁹ DRC Decision, *supra* note 60, para. 24.

¹³⁰ *Id.* para. 29

¹³¹ *Id.*

¹³² U.N. Charter art. 25 ("[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.").

¹³³ *Id.* art. 103 ("[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.").

¹³⁴ DRC Decision, *supra* note 60, paras. 30, 31.

immunities, and consequently there exists no horizontal bar between the requested state party and Sudan.¹³⁵

The Pre-Trial Chamber should be commended for finally addressing the conflict between articles 27(2) and 98(1) of the Rome Statute and for confirming that article 98(1) precludes the ICC from requesting a state to cooperate by arresting and surrendering a Head of State of a third state if such cooperation will make the requested state act inconsistent with its international obligations towards a third state. However, the state party need not recognize a third state leader's immunity if the ICC has requested the third state to lift or waive the immunities and the third state agrees to the request.¹³⁶ However, despite having dealt with the conflict between articles 27(2) and 98(1) of the Rome Statute, the *DRC Decision* still received both criticism¹³⁷ and support from academics.¹³⁸ Further, I argue that the concerns I raised while criticizing the *Malawi Decision* have not been fully addressed by the Pre-Trial Chamber II for the following reasons.¹³⁹

The *DRC Decision* endorses the view by Akande that the UN Charter and the Security Council Resolution 1593, by implication, make Sudan bound by the Rome Statute.¹⁴⁰ According to this view, there is no impediment on state parties to the Rome Statute (such as the DRC) to arrest and surrender President Al Bashir to the ICC. Therefore, in refusing to arrest and surrender President Al Bashir, the DRC cannot invoke the customary international law obligations it owes to Sudan, a non-party state, as per article 98(1). This view is problematic as it goes against the rules of international law that require a state to consent to be

¹³⁵ See the decisions listed in footnotes 87 and 88.

¹³⁶ See also Paola Gaeta, *Guest Post: The ICC Changes its Mind on the Immunity from Arrest of President Al Bashir, But it is Wrong Again*, OPINIO JURIS (Apr. 23, 2014, 10:00 AM), <http://opiniojuris.org/2014/04/23/guest-post-icc-changes-mind-immunity-arrest-president-al-bashir-wrong/> (arguing that the Decision “correctly recognizes that Article 98 (1) of the Statute directs the Court to secure cooperation of a [third] State . . . for the waiver or lifting of the immunity of its Head of State.”).

¹³⁷ *Id.*; Dire Tladi, *The Duty on South Africa to Arrest and Surrender Al Bashir under South African and International Law: A Perspective from International Law*, 13 J. INT'L CRIM. JUST. 1027 (2015); Manuel J. Ventura, *Escape from Johannesburg? Sudanese President Al-Bashir Visits South Africa, and the Implicit Removal of Head of State Immunity by the UN Security Council in light of Al Jeddah*, 13 J. INT'L CRIM. JUST. 995 (2015); André de Hoogh & Abel Knottnerus, *ICC Issues New Decision on Al Bashir's Immunities – But Gets the Law Wrong ... Again*, EJIL: TALK! (Apr. 18, 2014), <https://www.ejiltalk.org/icc-issues-new-decision-on-al-bashirs-immunities-%E2%80%92-but-gets-the-law-wrong-again/>.

¹³⁸ See Nerina Boschiero, *The ICC Judicial Finding on Non-cooperation Against the DRC and No Immunity for Al-Bashir Based on UNSC Resolution 1593*, 13 J. INT'L CRIM. JUST. 625 (2015); Erika de Wet, *The Implications of President Al-Bashir's Visit to South Africa for International and Domestic Law*, 13 J. INT'L CRIM. JUST. 1049 (2015).

¹³⁹ Dyani-Mhango, *supra* note 40.

¹⁴⁰ Akande, *supra* note 57, at 335.

bound by a treaty.¹⁴¹ It is also important to note that while Sudan is bound by the UN Charter which gives certain powers to the Security Council, including the power to refer a situation to the ICC, such powers are limited.

To illustrate this point, the Security Council merely refers a situation to the ICC for further investigation and for the ICC to decide on its own whether or not to prosecute. Once the Security Council makes the referral to the ICC, only the provisions of the Rome Statute will apply and not those of the UN Charter.¹⁴² Article, 13(b) of the Rome Statute states that “[t]he [ICC] may exercise its jurisdiction . . . in accordance with the provisions of this Statute *if*: (b) A situation in which one or more of such crimes *appears to have been committed* is referred to the Prosecutor by the Security Council acting under Chapter VII of the [UN Charter].”¹⁴³ This provision does not require the ICC to prosecute without following its own process nor does it extend the powers of the Security Council to apply extraterritorially (to the ICC).¹⁴⁴ It is therefore expected that the ICC will first satisfy itself that there is a case to be heard even if it is a referral from the Security Council.¹⁴⁵ In support of this assertion, article 19 of the Rome Statute requires the ICC to “satisfy itself that it has jurisdiction in *any* case brought before it” and that it may on its *own* motion determine the admissibility of the case.¹⁴⁶

¹⁴¹ See Vienna Convention, *supra* note 5, art. 34-35. DRC Decision, *supra* note 60, para. 26 (Apr. 9, 2014) (also confirmed such – that “the [Rome] Statute cannot impose obligations on third States without their consent. Thus, the exception to the exercise of the [ICC]’s jurisdiction provided in article 27(2) of the Statute should, in principle, be confined to those States Parties who have accepted it.”).

¹⁴² See Gaeta, *supra* note 136 (arguing that “the referral of a situation to the Court by the Security Council constitutes just one of the conditions for the *exercise* by the Court of its criminal jurisdiction, and does not constitute the *source* of the jurisdiction of the Court. This applies also when the Security Council refers to the Court a situation where the crimes are committed in the territory or by a national of a state not party to the Rome Statute.”).

¹⁴³ See Rome Statute, *supra* note 6, art. 13(b) (emphasis added).

¹⁴⁴ See Dyani-Mhango, *supra* note 40, 118 (arguing that the provision only avails a jurisdictional mechanism to the Security Council when dealing with its Chapter VII powers); See also Rome Statute, *supra* note 6, pmb. (stating that states parties are “[d]etermined to these ends and for the sake of present and future generations, to establish an independent permanent [ICC] in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole.”).

¹⁴⁵ See generally Markus Benzing, *The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity*, 7 MAX PLANCK Y.B. U.N. L. 591, 621 (2003) (discussing the admissibility of cases in the ICC where he argues that “it is the [ICC] as a judicial body itself that determines conclusively whether or not a case is admissible, including all the necessary criteria for determination.”).

¹⁴⁶ See Rome Statute, *supra* note 6, art. 19 (emphasis added); See also, Prosecutor v. Al Bashir, ICC-02/05-01/09-3, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, para. 35 (Mar. 4, 2009), https://www.icc-cpi.int/CourtRecords/CR2009_01517.PDF (where the Pre-Trial Chamber reiterates that “[a]rticle 19(1) of the [Rome] Statute requires the [Pre-Trial] Chamber to satisfy itself that any case brought before it falls within the jurisdiction of the [ICC].”).

Furthermore, the Rome Statute¹⁴⁷ does not make a distinction between the different mechanisms to trigger jurisdiction mentioned in article 13(b).¹⁴⁸ The ICC is not bound to investigate or even prosecute just because the Security Council referred a matter to it.¹⁴⁹ The Rome Statute is clear that the investigation lies only with the Prosecutor (and the ICC in general) and therefore it is expected of the Prosecutor to make an independent decision whether to investigate a situation or not, irrespective of who referred the matter to the ICC.¹⁵⁰ Therefore, while the Security Council will be acting under Chapter VII of the UN Charter when it refers a situation to the ICC, this does not translate into the application of the UN Charter provisions to the ICC.

Secondly, it is hard to fathom that the Security Council can *implicitly* waive sovereign immunities of a UN member state.¹⁵¹ One of the pillars of the UN is the sovereign equality of its member states¹⁵² and “the rationale underlying waiver of immunity—like the rationale for immunity itself—is based on the sovereign equality of states and the principle of *par in parem non habet imperium*.”¹⁵³ Only a state may

¹⁴⁷ See Rome Statute, *supra* note 6, art. 17 (which discusses issues of admissibility in the ICC).

¹⁴⁸ *Id.* art. 13 (which in its entirety reads as follows:

“Exercise of jurisdiction

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14; (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.”)

¹⁴⁹ See Press Release, Security Council, International Criminal Court Prosecutor Tells Security Council Investigation into Darfur Crimes Initiated 1 June, U.N. Press Release SC/8429 (Jun. 29, 2005) (commenting on the Al Bashir referral by the Security Council to the ICC, that the Office of the Prosecutor “will conduct its own independent investigation in order to determine those persons who must be prosecuted.”); See also Gaeta, *supra* note 136 (arguing that “[t]he obligations set forth by the Security Council upon a UN member State with a binding decision under Chapter VII of the UN Charter cannot affect the rights and powers of another international organization, in this case the ICC, as they are regulated in the respective constitutive instrument of such other international organization.”).

¹⁵⁰ Rome Statute, *supra* note 6, art. 15 (especially 15(2) and (3) which state:

“2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.

3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.”)

¹⁵¹ Emphasis added.

¹⁵² UN Charter art. 2, para.1 (stating that “[t]he [UN] is based on the principle of the sovereign equality of all its Members.”).

¹⁵³ Int’l Law Comm’n, Third Rep. on the Immunity of State Officials from Foreign Criminal Jurisdiction, U.N. Doc. A/CN.4/646, para. 32 (2011) [hereinafter ILC Third Report]. For further reading on the principle of *par in parem non habet imperium* see Yoram Dinstein, *Par in Parem non*

waive its own immunities, as the immunity belongs to a state and not the individual,¹⁵⁴ and such a waiver should be explicit.¹⁵⁵ This reasoning is also apparent in the correct interpretation of article 98(1) of the Rome Statute which requires the ICC to request the third state to waive its immunities.¹⁵⁶ This is in line with the rule that third states are required to expressly consent to be bound by a treaty.¹⁵⁷ The exception will be only when the Security Council passes a binding resolution that explicitly removes Sudan's immunities.¹⁵⁸ This depends on the context and the language used in such a resolution. In this regard, the ICJ has opined that

[t]he language of the Security Council resolution should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.¹⁵⁹

Looking at the language of paragraph 2 of Security Council Resolution 1593 on which the Pre-Trial Chamber II relies, it is evident that the resolution does not bind all UN member states, but only Sudan to fully cooperate with the ICC.¹⁶⁰ However, Security Council Resolution 1593 does not expressly remove the immunities of Sudan. As explained above, immunities relate to state sovereignty and equality of states and it is imperative that any waiver or removal of such immunities by the Security

Habet Imperium, 1 ISR. L. REV. 407 (1966) (arguing that this principle "is commonly regarded as the starting point for any venture into the field of State immunities."). This principle literally means that "one state has no power over another". See *id.* at 413-4.

¹⁵⁴ ILC Third Report, *supra* note 153 para. 33.

¹⁵⁵ *Id.* para. 55.

¹⁵⁶ See also de Hoogh & Knottnerus, *supra* note 137 (arguing that only the bearer of immunity can waive it as also stipulated in article 98(1) of the Rome Statute.); Gaeta, *supra* note 136 (correctly arguing that article 98(1) "is not concerned with whether a [third] State . . . is obliged to cooperate with the [ICC].") It requires the [ICC] to first obtain the cooperation of the third state for the waiver and that "[t]he decision of the Security Council on the obligation of Sudan to cooperate cannot relieve the Court from the necessity to implement a requirement for the correct exercise of a power as it is the case of Article 98 (1) of the Rome Statute.").

¹⁵⁷ Vienna Convention, *supra* note 5, art. 35.

¹⁵⁸ See de Hoogh & Knottnerus, *supra* note 137.

¹⁵⁹ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, para. 114 (June 21).

¹⁶⁰ S.C. Res. 1593, *supra* note 10, para. 2 (which states "*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*" (emphasis added)).

Council under Chapter VII of the UN Charter should be in express terms.¹⁶¹ Therefore, it is reasonable to conclude that Security Council Resolution 1593 does not remove Al Bashir's personal immunities.

Further, the constant non-cooperation by states parties to the Rome Statute subsequent to the *DRC Decision* shows that the issue of personal immunities is far from settled. Indeed, the ILC has recently made two important observations with regard to the customary international law of personal immunities in relation to the Al Bashir matter.¹⁶² First, the ILC reemphasized that "the inapplicability of immunity agreed upon states through treaties only applied to states parties."¹⁶³ It then observed that any exception that arose in a vertical relationship with an international criminal jurisdiction is not yet evidence of a customary rule in a horizontal relationship among states.¹⁶⁴ Secondly, the ILC observed that developments still need to be carefully considered before rejecting the impact the practice of international criminal tribunals may have over horizontal relationships, depending on the context of each case.¹⁶⁵

The Security Council has not yet condemned nor taken any action against the non-compliant member states despite numerous reports and statements by the ICC President and the Prosecutor.¹⁶⁶ Article 87(7) of the Rome Statute states that "where a party failed to comply with a request for cooperation by the [ICC] contrary to the provisions of the [Rome] Statute . . . The [ICC] may make a finding to that effect and refer the matter . . . to the Security Council."¹⁶⁷ The Pre-Trial Chamber has eloquently summarized the role of the Security Council on the failure by states to cooperate with the ICC as follows:

When the Security Council, acting under Chapter VII of the UN Charter, refers a situation to the Court as constituting a threat to international peace and security, it is expected that the Council would spend by way of taking such measures which are considered appropriate, if there is an apparent

¹⁶¹ Ventura, *supra* note 137, at 1018 (arguing that "if one accepts such a notion [that the Security Council can remove a well-established and well recognized norm of international law], and considering the wide-ranging powers of the UN Security Council under Chapter VII (including authorizing the use of force), then this could potentially open the door to the disturbance or displacement of other rules of international law as a result of vague or unclear UN Security Council resolutions. And the consequences may not be welcomed or desirable.").

¹⁶² *ILC Fifth Report, supra* note 72.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Rep. of the Bureau on Non-cooperation, paras. 34–39, ICC-ASP/14/38 (2015) (discussing the (in)action by the Security Council to non-cooperating states).

¹⁶⁷ Rome Statute, *supra* note 6, art. 87(7); *see also id.* para. 87(5) (covering requests for cooperation and non-compliance by third states).

failure on the part of the relevant State Party to the Statute to cooperate in fulfilling the Court's mandate entrusted to it by the Council. Otherwise, if there is no follow up action on the part of the Security Council, any referral by the Council to the ICC under Chapter VII would never achieve its ultimate goal, which is to put an end to impunity. Accordingly, any such referral would become futile.¹⁶⁸

It is important that the Security Council clarifies its position on the personal immunities of President Al Bashir, as its silence and failure to act perpetuates non-cooperation by the UN member states who are also states parties to the Rome Statute.

Despite the criticisms levelled against the *DRC Decision*, the current law is that states parties to the Rome Statute are obligated to arrest and surrender President Al Bashir to the ICC, as the conflict between article 27(2) and 98(1) has been resolved by the Pre-Trial Chamber II in the *DRC Decision* and subsequent decisions.¹⁶⁹ It must be recalled that this conflict between these articles arises because a non-party state will ordinarily not be bound by the Rome Statute. Article 27(2), which cancels customary international law immunities, will apply. However, because the Security Council referral of a situation occurring from a territory of a non-party state, the ICC is expected to request the third state to waive its immunities for the states parties to be able to arrest and surrender the accused sitting president to the ICC. The *DRC Decision*, for the reasons advanced above, made it clear that such conflict is resolved by the Security Council Resolution 1593.¹⁷⁰

IV. SOUTH AFRICA'S LEGAL FRAMEWORK ON IMMUNITIES, AL BASHIR, AND THE ICC

It must be recalled that President Al Bashir visited South Africa to attend the AU summit. It was expected that South Africa, a state party to the Rome Statute, would arrest and surrender President Al Bashir to the ICC. The Southern African Litigation Centre applied to the High Court of South Africa to compel South Africa to arrest and surrender President Al Bashir to the ICC. President Al Bashir left South Africa before the

¹⁶⁸ Prosecutor v. Al Bashir, ICC-02/05-01/09-151, Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir, para. 22 (Mar. 26, 2013), https://www.icc-cpi.int/CourtRecords/CR2013_02245.PDF.

¹⁶⁹ DRC Decision, *supra* note 60, para. 29, (where the Pre-Trial Chamber Security Council Resolution 1593 (2005), which required Sudan "to cooperate fully with" the ICC, has waived the immunities of Sudan and therefore there is no need for the ICC to request for the waiver.). Essentially, the conflict between articles 27(2) and 98(1) has been resolved.

¹⁷⁰ *Id.*

High Court rendered a judgment. As stated earlier, South Africa has enacted three pieces of legislation that address immunities, including the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (“ICC Act”), which has domesticated the Rome Statute.¹⁷¹ This section discusses the proceedings before the South African courts on South Africa’s failure to arrest and surrender President Al Bashir to the ICC, and it also examines South Africa’s legislative framework on immunities.

A. *The Foreign States Immunities Act*

The first piece of legislation, the Foreign States Immunities Act (“FSIA”), predates the South African Constitution and the Rome Statute, but it is still applicable.¹⁷² The South African Law Reform Commission “consider[ed] that the Foreign States Immunities Act . . . continues to serve a purpose to ensure legal certainty on matters related to the extent of immunity of foreign states from the jurisdiction of the South African courts and propose[d] that the Act be retained on the statute book.”¹⁷³ The purpose of the FSIA is “to determine the extent of the immunity of foreign states from the jurisdiction of the courts of the Republic; and to provide for matters connected therewith.”¹⁷⁴ The FSIA defines the term “foreign state” to include “the Head of State of that foreign state, in his capacity as such Head of State.”¹⁷⁵ This piece of legislation confers immunities to a foreign state from the jurisdiction of the South African courts, including criminal jurisdictions.¹⁷⁶ The FSIA does not require the presence of the Head of State before courts when giving effect to the immunity conferred by the Act.¹⁷⁷

The FSIA places restrictions on the conferral of immunities on several grounds, including when it transpires that the foreign state accords less (or more) immunities to South Africa, and if the immunities and privileges accorded by the Act “are less than those required by any treaty . . . to which that foreign state and the Republic are parties.”¹⁷⁸ In this regard, the President is required to make a proclamation in the Government Gazette, which may restrict or extend such immunities

¹⁷¹ S. AFR. CONST. 1996 § 231(4) (which requires domestication of an international agreement before it becomes binding domestically).

¹⁷² Foreign States Immunities Act 87 of 1981 § 18 (S. Afr.).

¹⁷³ S. AFR. L. REFORM COMM’N, PROJECT 25: REPORT ON STATUTORY LAW REVISION: LEGISLATION ADMINISTERED BY THE DEPARTMENT OF INTERNATIONAL RELATIONS AND COOPERATION, para. 2.47 (2014).

¹⁷⁴ Foreign States Immunities Act 87 of 1981 pmbl.

¹⁷⁵ *Id.* §1

¹⁷⁶ *Id.* §§2(1) and (3).

¹⁷⁷ *Id.* §2(2).

¹⁷⁸ *Id.* §16.

depending on the case in question.¹⁷⁹ The FSIA also recognizes the waiver of immunity by a foreign state and confirms that should a foreign state expressly waive its immunities, it will then be subjected to the jurisdiction of South African courts.¹⁸⁰ The South African government did not rely on any of the provisions of the FSIA in the *Southern African Litigation Centre* case (“SALC”) and the reason is unclear.¹⁸¹

B. *The Diplomatic Immunities Act*

The second piece of relevant legislation is the Diplomatic Immunities Act (“DIA”), whose purpose is “[t]o make provision regarding the immunities and privileges of diplomatic missions and consular posts and their members, of Heads of State, special envoys and certain representatives of the United Nations, and its specialised agencies”¹⁸² The long title also specifies that these immunities will be granted with regard to the international conferences and meetings, among other things. The DIA confers customary international law “immunities and privileges [to] Heads of State, special envoys and certain representatives” from both criminal and civil jurisdiction of the South African Courts.¹⁸³ It also requires that the conferment of immunities and privileges to the Heads of State be published in the Government Gazette by way of a notice.¹⁸⁴

The question before the High Court in the *SALC* case was whether the Cabinet Resolution, read together with a Ministerial Notice, was capable of suspending South Africa’s obligation to arrest and surrender President Al Bashir.¹⁸⁵ *SALC* argued that South Africa is bound by its obligations under the Rome Statue as a state party to it. This meant that South Africa had to comply with the ICC’s request to arrest and surrender President Al Bashir. The applicant acknowledged that South Africa could only avoid its obligations if President Al Bashir was entitled to immunities from the South African courts.¹⁸⁶

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* §3.

¹⁸¹ *Southern Africa Litigation Centre v. Minister of Justice and Constitutional Development* 2015 (5) SA 1 (GP) at 3 para. 1.

¹⁸² The Diplomatic Immunities and Privileges Act 37 of 2001 §4(1)(a) which states that the categories of people ‘enjoy [the immunities] in accordance with the rules of customary international law’.

¹⁸³ *Id.*

¹⁸⁴ *Id.* § 4(1)(c) read together with §7(2).

¹⁸⁵ *Southern Africa Litigation Centre v. Minister of Justice and Constitutional Development* 2015 (5) SA 1 (GP) at 3 para. 1.

¹⁸⁶ *Id.* para. 23.

On the other hand, the South African government argued that it was merely hosting the event, while the AU Commission was “charged with the exclusive responsibility of organizing, conducting and managing the meetings and of inviting all the delegates and attendees.”¹⁸⁷ However, as part of the hosting agreement between the South African government and the AU Commission, South Africa was expected to grant immunities to certain people who would attend the Summit, including members of the AU Commission, staff members, delegates and other representatives of Inter-Governmental Organizations in terms of the General Convention on the Privileges and Immunities of the Organization of African Unity (“OAU Convention”).¹⁸⁸ This host agreement was concluded in terms of section 5(3) of the DIA, which provides that “[a]ny organization recognised by the Minister for the purposes of this section and any official of such organisation enjoy such privileges and immunities as may be provided for in any agreement entered into with such organisation or as may be conferred on them by virtue of section 7(2).”¹⁸⁹ Section 7(2) enjoins the Minister to specify the conferment of immunities by notice in the Government Gazette.

The High Court rejected the government’s argument that the host agreement covered President Al Bashir’s immunity, as its provisions only conferred immunities to the AU members of staff and to the delegates or representatives of intergovernmental organizations.¹⁹⁰ Further, the Court correctly pointed out that the host agreement was included under the terms of the DIA, which deals with immunities of members of intergovernmental organizations instead of Heads of State.¹⁹¹ The Court found reliance on such provisions to be “ill-advised and ill-founded.”¹⁹² In fact, the Court correctly pointed out that the provision of the DIA that deals with immunities of Heads of State was not relied upon by the government.¹⁹³

¹⁸⁷ *Id.* para. 14.

¹⁸⁸ *Id.* para. 15. The General Convention on the Privileges and Immunities of the Organization of African Unity, Oct. 25, 1965, CAB/LEG/24.2/13 [hereinafter The OAU Convention] does not refer to Heads of State immunity but refers to the immunities granted to the officials, delegates and representatives of the OAU. Article V(6) of the OAU Convention defines representatives to ‘include all delegates, deputy delegates, advisers, technical experts and secretaries of delegation’.

¹⁸⁹ Section 5 of The Diplomatic Immunities and Privileges Act 37 of 2001 is titled ‘Immunities and privileges of United Nations, specialised agencies and other international organisations’.

¹⁹⁰ *Southern Africa Litigation Centre v. Minister of Justice and Constitutional Development 2015* (5) SA 1 (GP) at 3 para. 1.28.10.1.

¹⁹¹ *Id.* (The court referred to The Diplomatic Immunities and Privileges Act 37 of 2001 § 5(3) , which provides that ‘[a]ny organization recognised by the Minister for the purposes of this section and any official of such organisation enjoy such privileges and immunities as may be provided for in any agreement entered into with such organisation or as may be conferred on them by virtue of §7(2)’).

¹⁹² *Id.* para. 31.

¹⁹³ *Id.* para. 28.6.

The Court also held that the discretion of the Minister of International Relations and Cooperation could only be exercised within the boundaries of South African law and its obligations that arise from both national and international law.¹⁹⁴ The Court further held that the AU's decisions and Convention on Immunities could not trump South Africa's obligations under the ICC Act and the Rome Statute, as their provisions "enjoy pre-eminence in our constitutional regime."¹⁹⁵ In fact, the AU Convention has a persuasive status under South African law as South Africa is not a party to it.¹⁹⁶ The Court held that this fact "represent[ed] a clear choice by the legislature not to confer blanket immunity on AU bodies, meetings and officials that attend them."¹⁹⁷ In this regard, the SCA did not find it necessary to alter the High Court's reasoning. It endorsed the High Court's view that section 5(3) of the Diplomatic Immunities Act relied upon by the Minister "did not cover Heads of State or representatives of states attending meetings of the AU."¹⁹⁸

C. *The ICC Act*

The most important piece of legislation relevant to this discussion is the ICC Act, which was enacted in order

[t]o provide for a framework to ensure the effective implementation of the Rome Statute of the [ICC] in South Africa; to ensure that South Africa conforms with its obligations set out in the Statute; to provide for the crime of genocide, crimes against humanity and war crimes; to provide for the prosecution in South Africa and beyond the borders of South Africa in certain circumstances; to provide for the arrest of persons accused of having committed the said crimes and their surrender to the said Court in certain circumstances; to provide for co-operation by South Africa with the said Court; and to provide for matters connected therewith.¹⁹⁹

South Africa was the first African state to domesticate the Rome Statute.²⁰⁰ The Constitutional Court has dealt with the importance of the

¹⁹⁴ *Id.* para. 28.12.

¹⁹⁵ *Id.* para. 28.13.1–3.

¹⁹⁶ *Id.* para. 28.13.2–3.

¹⁹⁷ *Id.* para. 28.13.2.

¹⁹⁸ *Minister of Justice and Constitutional Development v. Southern African Litigation Centre* 2016 (3) SA 317 (SCA) at para. 41.

¹⁹⁹ ICC Implementation Act *supra* note 37.

²⁰⁰ *Nat'l Commissioner of the South African Police Service v. Southern African Human Rights Litigation Centre and Another* 2014 (1) SA 30 (CC), at para. 33.

ICC Act in South Africa in the *National Commissioner of the South African Police Service* case where it had to determine the extent of South Africa's duty to investigate crimes against humanity that were committed outside its borders.²⁰¹

On immunities, the ICC Act provides that “[d]espite any other law to the contrary, including customary international law and conventional international law, the fact that a person . . . is or was a Head of State or government . . . is neither . . . a defence to a crime, nor . . . a ground for a possible reduction of sentence once a person has been convicted of a crime.”²⁰² Some academics have argued that this provision means that South African courts should have no impediment in prosecuting and convicting accused persons of international crimes irrespective of their status.²⁰³ As to the apparent conflict between the DIA and the ICC Act, Professor John Dugard argues that the ICC Act trumps the DIA when it comes to international crimes.²⁰⁴ Professor Max du Plessis endorses this view and argues that by including this provision, “South Africa has attempted to cut its way past [the controversy of immunities accorded to sitting Heads of State as per the *Arrest Warrant Case*].” Moreover, du Plessis contends that the South African courts “are accorded the same power to “‘trump’ the immunities which usually attach to officials of government as the ICC by virtue of article 27 of the Rome Statute.”²⁰⁵

The immunities provision is found in the chapter of the ICC Act that deals with the domestic prosecution of the perpetrators of international crimes that are found in the Rome Statute.²⁰⁶ It misses the second part found in article 27 of the Rome Statute which provides “[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the [ICC] from exercising its jurisdiction over such a person.”²⁰⁷ It is unclear why the drafters of the ICC Act decided to leave out this part. A view led by Professor Dire Tladi is that the provision does not remove immunities, but “it addresses the criminal accountability of an individual, that is, the substantive accountability or responsibility, whereas immunity is a procedural notion applying to the ‘right of a court to entertain a

²⁰¹ *Id.* paras. 3–4.

²⁰² See ICC Implementation Act *supra* note 37, §4(2).

²⁰³ See John Dugard & Garth Abraham, *Foreign Policy and International Relations*, 2002 ANN. SURV. S. AFRICAN L. 140, 165-166 (2002) (arguing that this provision was a choice by the drafters of the ICC Act to move away from the *Arrest Warrant Case*, *supra* note 65).

²⁰⁴ JOHN DUGARD, INTERNATIONAL LAW: A SOUTH AFRICAN PERSPECTIVE 257 (2011).

²⁰⁵ Max du Plessis, *South Africa's Implementation of the ICC Statute*, 5 J. INT'L CRIM. JUST. 460, 474 (2007).

²⁰⁶ See Chapter 2 of the ICC Act titled ‘Jurisdiction of South African Courts and Institution of Prosecutions in South African Courts in respect of Crimes’.

²⁰⁷ Rome Statute, *supra* note 6, Art 27(2).

matter.”²⁰⁸ In other words, the provision “removes official capacity on a substantive defense to the commission of crimes but does not address the matter of immunity.”²⁰⁹ Tladi’s argument is that a Head of State entitled to immunities would not be arrested in the first place since the domestic courts would not have had jurisdiction to do so. This argument was raised by the South African government in the *SALC* case in the SCA, where it contended that section 4(2) “has nothing to do with immunity from arrest in terms of the ICC arrest warrants, but precludes immunity being advanced as a defense or in mitigation of sentences. It does not remove the immunity that a Head of State enjoys from arrest in South Africa.”²¹⁰

The SALC on the other hand, argued that the ICC Act’s purpose is “to give effect to South Africa’s accession to the Rome Statute and South Africa’s obligations [that derive from that].”²¹¹ The SCA agreed with the SALC and reasoned as follows:

A construction of section 4(2) that would exclude claims of immunity if a person was being tried before a South African Court, but would not exclude immunity in seeking to bring that person to trial before that Court would ... be a serious anomaly. The ordinary principle of interpretation is that the conferral of a power conveys with it all ancillary powers necessary to achieve the purpose of that power. The purpose of the power to prosecute international crimes in South Africa is to ensure that the perpetrators of such crimes do not go unpunished. In order to achieve that purpose it is necessary for the National Director of Public Prosecutions to have the power not only to prosecute perpetrators before our Courts, but to bring them before our Courts. This is also consistent with the constitutional requirement that the [ICC Act] be construed in a way that gives effect to South Africa’s international law obligations and the spirit, purport and objects of the Bill of Rights.²¹²

The SCA should be criticized for not making a distinction between an arrest to surrender the head of a third state and an arrest to prosecute a

²⁰⁸ *Tladi*, *supra* note 137, at 1038. *But see Ventura*, *supra* note 137, at 1012 fn 65, (arguing that “[i]t makes little sense for the ICC Act to include a defence that no person could ever realistically rely upon unless South African courts have jurisdiction over Heads of State in the first place.”)

²⁰⁹ *Id.*

²¹⁰ *Minister of Justice and Constitutional Development v. Southern African Litigation Centre* 2016 (3) SA 317 (SCA) at para. 50. This argument was not canvassed before the high court.

²¹¹ *Id.* para. 51.

²¹² *Id.* para. 95 (footnotes omitted).

Head of State before domestic courts. The ICC Pre-Trial Chamber II has confirmed the existence of personal immunities for sitting Heads of State and the role article 98(1) of the Rome Statute plays for the purposes of arresting and surrendering President Al Bashir to the ICC, and yet it failed to make the above distinction.²¹³ The SCA itself discussed the customary international law immunities in great detail, including the *DRC Decision*, and confirmed that ordinarily President Al Bashir would be immune from being arrested and surrendered to the ICC.²¹⁴ Further, the SCA has been rightly criticized for concluding that immunities do not bar prosecution of Heads of States by South African courts—a position that was held by Belgium before the *Arrest Warrant Case*.²¹⁵ The SCA missed the point of immunities in international law—“that the immunity from jurisdiction enjoyed by incumbent [Heads of States] does not mean that they enjoy impunity in respect of any crimes they might have committed, irrespective of their gravity.”²¹⁶ Personal immunities are temporal in nature and once they cease to exist—when the person ceases to hold office or when their state waives the immunities—the person may be brought to court to be prosecuted for the heinous international crimes they have committed.

On the issue of cooperating with the ICC request to arrest and surrender (to execute the ICC arrest warrant) the accused to the ICC, the ICC Act states that “[t]he fact that the person to be surrendered is a person contemplated in section 4(2)(a) or (b) [that is, a sitting or former Head of State] does not constitute a ground for refusing to issue an order [to surrender].”²¹⁷ Again, the ICC Act does not have a provision similar to article 98(1) of the Rome Statute, which precludes the ICC from forcing states parties to cooperate if that means such states will breach the international obligations owed to a third state.²¹⁸ A possible construction of this provision of the ICC Act is that there is no bar to President Al

²¹³ *DRC Decision*, *supra* note 60, at para. 25.

²¹⁴ *Minister of Justice and Constitutional Development v. Southern African Litigation Centre* 2016 (3) SA 317 (SCA) at para. 85.

²¹⁵ See *Akande*, *supra* note 102 (arguing that this *dictum* has far reaching effects domestically and possibly internationally).

²¹⁶ *Arrest Warrant Case*, *supra* note 65, at para 60.

²¹⁷ See ICC Implementation Act *supra* note 37 ch. 4, *Cooperation with and Assistance to Court In or Outside South Africa*. This chapter includes a part on the procedure for cooperation and surrender of the accused to the ICC (§§8-13). The term ‘Court’ is defined in this chapter as the ICC.

²¹⁸ *du Plessis*, *supra* note 205, at 476-477, however has argued that ‘if one accepts that under international law personal immunity attaches to incumbent senior cabinet officials such as Heads of State, then not only would any prosecution by South Africa under the ICC Act of a current leader of a country that is not party to the ICC Statute be possibly inconsistent with its (South Africa’s) obligations under customary international law, but the ICC would also be prevented from requesting the surrender of that person. This may in fact mean that proceedings against such a person are effectively precluded. The only exception to this situation would be a waiver of the immunity by the third state.’ (Footnotes omitted).

Bashir's surrender to the ICC.²¹⁹ The SCA rejected the government's argument that this provision is catered for a person who was already arrested in terms of section 8 of the ICC Act (dealing with the procedure for the arrest) on the grounds that such construction will render section 10(9) of the ICC Act (dealing with no ground for refusal)²²⁰ useless as this means that no Head of State will ever come before courts for the purposes of section 10(9).²²¹ The problem with this interpretation is that the SCA, like the *DRC Decision*, does not make a legal distinction between a Head of State that is a party to the Rome Statute and a head of a third state. While I agree that the section will be made redundant by claiming that all Heads of State may not be arrested and surrendered, it is reasonable to argue that the Head of State from a third state is precluded from being arrested and surrendered without a waiver as the Rome Statute so requires. In fact, the SCA has also conceded that there are customary international law immunities afforded to sitting Heads of State not party to the Rome Statute.²²²

D. *South Africa's Withdrawal from the Rome Statute*

From the discussion, and despite the criticism of the SCA judgment above, the ICC Act takes precedence when it comes to arresting and surrendering accused persons to the ICC. There was no legal impediment on the part of South Africa to arrest and surrender President Al Bashir since section 232 of the Constitution also states that customary international law is applicable in so far as it does not conflict with the Constitution or an Act of Parliament.²²³ This means that the current law expected the South African government to adhere to the High Court Order and arrest President Al Bashir to surrender him to the ICC. This has also been confirmed by the sudden attempt to withdraw from the Rome Statute by the South African government²²⁴ in terms of article 127

²¹⁹ See also, *du Plessis*, *supra* note 205, at 476 arguing that 'where South Africa chooses to surrender a high standing official to the ICC, the ICC Act makes clear that whatever immunity might have otherwise attached to the official does not constitute a bar to the surrender of the person to the ICC'; and *Ventura*, *supra* note 137, at 1010, also arguing that 'there is no reasonable way to read the ICC Act's provisions on surrender and participation with the ICC even when a Head of State is involved in a way ... that [says] that South Africa should not surrender President Al-Bashir or cooperate with the ICC with respect to his case'.

²²⁰ ICC Implementation Act *supra* note 37 §10(9) stipulates that '[t]he fact that the person to be surrendered is a person contemplated in §4(2)(a) or (b) does not constitute a ground for refusing to issue an order contemplated in subsection (5)'.

²²¹ *Minister of Justice and Constitutional Development v. Southern African Litigation Centre* 2016 (3) SA 317 (SCA) at para. 101.

²²² *Id.* para. 85.

²²³ See also, *Id.* para. 62.

²²⁴ The Notice of Withdrawal was deposited with the UN Secretary-General on 2016-10-19. See *South Africa formally withdrawing from ICC*, SOUTH AFRICAN GOVERNMENT NEWS AGENCY, (Oct. 21, 2016), <http://www.sanews.gov.za/south-africa/sa-formally-withdrawing-icc>; see also *UN confirms*

of the Rome Statute.²²⁵ To support its position to withdraw from the Rome Statute, the South African government has argued that the Rome Statute conflicts with the Immunities Act with regard to the personal immunities of the sitting Heads of State, which are recognized under customary international law.²²⁶ This argument has been expanded in the Repeal Bill (the Bill repealing the ICC Act) as follows:

[T]he Republic of South Africa, in exercising its international relations with Heads of State of foreign countries, particularly Heads of State of foreign countries in which serious conflicts occur or have occurred, is hindered by the Implementation of the Rome Statute of the International Criminal Court Act, 2002, which together with the Rome Statute of the International Criminal Court compel South Africa to arrest Heads of State of foreign countries wanted by the International Criminal Court for the crime of genocide, crimes against humanity and war crimes and to surrender such persons to the International Criminal Court, even under circumstances where the Republic of South Africa is actively involved in promoting peace, stability and dialogue in those countries.²²⁷

The South African government has since decided to halt its intention to exit the ICC by withdrawing the Repeal Bill from Parliament. Thus, South Africa remains a state party to the Rome Statute and therefore South Africa is still obligated to arrest and surrender President Al Bashir should he return to the territory.²²⁸ Further, South Africa still has to face the consequences of failure to cooperate with the ICC when it did not arrest and surrender President Al Bashir.²²⁹ It is likely that the Pre-Trial Chamber II will apply the *DRC Decision* to the South African situation once it deals with the matter, including reporting South Africa to the

SA *ICC withdrawal*, MSN NEWS (Oct. 22, 2016), <http://www.msn.com/en-za/news/featured/unconfirms-sa-icc-withdrawal/ar-AAjfDDh?li=AA520r>.

²²⁵ Rome Statute, *supra* note 6, Article 127(1) states that 'A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute'.

²²⁶ Press Conference Statement from Michael Masutha, Minister of Justice and Correctional Services, ENCA NEWS (Oct. 20, 2016).

²²⁷ See Implementation of the Rome Statute of the International Criminal Court Act Repeal Bill, B23 of 2016, pmbi.

²²⁸ Rome Statute, *supra* note 6, 127(2).

²²⁹ South Africa has asked the ICC to delay its findings until South Africa exhausts its internal appeals of the Al Bashir matter. However, Minister Masutha, on his press statement announced that the Constitutional Court appeal, *supra* note 226, will be withdrawn. On April 7, 2017, the ICC Pre-Trial Chamber II heard the arguments from the ICC Prosecutor and the South African government legal representatives, see *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-T-2-ENG, Transcript (Apr. 7, 2017), https://www.icc-cpi.int/Transcripts/CR2017_02211.PDF. The decision has not yet been handed down.

Security Council as it has done in relation to other states parties.²³⁰ Therefore, South Africa still has to face the consequences resulting from its failure to cooperate with the ICC.

V. CONCLUSION

President Al Bashir has avoided the ICC for seven years and has been able to travel to both states parties to the Rome Statute and non-states parties' territories without any consequences. The existence of customary international law immunities makes it difficult for the ICC to discharge its duties without the cooperation by states parties. The silence by the Security Council and its failure to clarify Security Council Resolution 1593 on whether it removes Sudan's immunities equally makes the ICC's job difficult.

There is still a need to clarify the role of personal immunities derived from customary international law, especially considering the vertical relationships between international criminal jurisdictions and the potential impact on horizontal relations among states. The ILC is dealing with this issue and it is hoped that this will settle the matter. The current position of the ILC is that there exists no customary rule that is an exception to the existence of customary international law recognizing personal immunities of sitting Heads of States, although a treaty may alter this position.

I argued previously, that the Pre-Trial Chamber in the *Malawi Decision* failed to attend to the apparent conflict between articles 27(2) and 98(1) of the Rome Statute.²³¹ I also argued that Malawi was justified in not arresting and surrendering President Al Bashir to the ICC because of the customary international law obligations it owed to Sudan, a non-party state to the Rome Statute. However, the above arguments I used against the *Malawi Decision* are not applicable to the South African situation based on the following reasons. First, the South African Constitution limited the application of customary international law by making it subordinate to the Constitution and legislation should there be a conflict. Secondly, South Africa domesticated the Rome Statute and made it superior to any other law to the contrary. The ICC Act not only disregarded personal immunities of sitting Heads of State as per article

²³⁰ See, e.g., Prosecutor v. Al Bashir, ICC-02/02-01/09-266, Decision on the Non-Compliance by the Republic of Djibouti with the Request to Arrest and Surrender Omar Al-Bashir to the Court and Referring the Matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute (July 11, 2016).

²³¹ Dyani-Mhango, *supra* note 40.

27(2) of the Rome Statute, but it ensured that customary international law is not applicable.

The commentators are still not convinced that the Pre-Trial Chamber is correct in deciding that the conflict between articles 27(2) and 98(1) of the Rome Statute is resolved by the Security Council Resolution 1593 waiving Sudanese immunities. The continuous non-cooperation by states parties to the Rome Statute by failing to arrest and surrender President Al Bashir also shows that this issue is far from over. However, no state party has yet appealed the Pre-Trial Chamber to the Appeals Chamber. We will wait to see if the South African hearing before the ICC on failure to arrest and surrender President Al Bashir to the ICC will produce different results.²³²

²³² The Pre-Trial Chamber heard the arguments by the government of South Africa and the ICC Prosecutor on April 7, 2017. *See* Prosecutor v. Al Bashir, ICC-02/05-01/09-274, Decision Convening a Public Hearing for the Purposes of a Determination under Article 87(7) of the Statute with regard to the Republic of South Africa (Dec. 8, 2016).

