

Sinethemba Memela

**The Authority of the United Nations Security Council to Waive
the Personal Immunity of Heads of States in the Context of
International Crimes**

**Submitted in partial fulfilment of the requirements for the degree of
Master of Laws by Coursework and Research Report
at the University of the Witwatersrand, Johannesburg**



Declaration

I, Sinethemba Memela, declare that this Research Report is my own unaided work. It is submitted in partial fulfilment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

Word count: 10 481

Signature:

Student Number: 686198

Date: 27 February 2019

Abstract

In 1998, the Rome Statute of the International Criminal Court (ICC) was adopted with the aim of ending impunity for perpetrators of international crimes. Under Article 13(b) of the Rome Statute, if the United Nations Security Council (UNSC) refers a situation to the ICC while acting under Chapter VII of the UN Charter, the ICC is entitled to exercise jurisdiction over the territory and nationals of the relevant State that. In some cases, the referred State is neither a party to the Rome Statute nor has consented to its jurisdiction, and implicated senior officials of the state enjoy immunity. In terms of Article 27 of the Rome Statute, immunity does not bar the ICC from exercising jurisdiction. However, customary international law has historically afforded immunity to senior State officials, such as Heads of State, from prosecution. This dichotomy has been a challenge in international criminal law; specifically, the question of balancing the competing objectives of ending impunity for international crimes while maintaining stable relations and respecting the sovereignty of States by respecting customary international law rules on immunity. This challenge has been compounded by the question of the implication of a UNSC referral, of a non-State party to the Rome Statute, to the ICC on the immunity of implicated senior state officials of that State.

Accordingly, this study is primarily concerned with whether, and the extent to which, the UNSC can waive the immunity enjoyed by senior state officials of UN Member States, particularly Head of State immunity, when it refers a situation to the ICC using its Chapter VII powers in the UN Charter. Before dealing with the above, the study analyses the concept of immunity, specifically personal immunity, in international law and the obligations of States to respect such immunity, taking into consideration their obligations under the Rome Statute as applicable.

List of Abbreviations

AU	African Union
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for former Yugoslavia
OTP	Office of the Prosecutor
PTC	Pre-Trial Chamber
UN	United Nations
UN Charter/ Charter	Charter of the United Nations
UNSC	United Nations Security Council
VCLT	Vienna Convention on the Law of Treaties

Table of Contents

<i>Abstract</i>	1
<i>List of Abbreviations</i>	3
1 Introduction	5
1.1 Background.....	5
1.2 Research questions	7
1.3 Research methodology	7
1.4 Overview of sections.....	7
2 Head of State immunity	8
2.1 The concept of immunities in international law	8
2.1.1 Immunity <i>ratione materiae</i>	9
2.1.2 Immunity <i>ratione personae</i>	11
2.2 Head of State immunity before foreign domestic courts	12
2.3 Head of State immunity before international courts and tribunals.....	13
3 Authority of the UNSC to waive the personal immunity of Heads of State	18
3.1 UNSC Powers under the UN Charter.....	18
3.2 UNSC powers under the Rome Statute	19
3.3 Implication of UNSC referral on immunity of non-state parties to the Rome Statute	19
3.4 Non-cooperation of with the ICC due to immunity considerations	22
3.5 Resolution 1593 and its legal effect on immunity	24
4 Conclusion	29
<i>Bibliography</i>	31

1 Introduction

1.1 Background

The international community is under increasing pressure to combat the impunity of perpetrators of international crimes, and this has brought into question the entitlement to immunities in cases where Heads of State are responsible, or complicit, in the commissioning of such crimes.¹ The existence of immunity in international law is important for delimiting the jurisdiction of states, and this is important for interstate relations.² The question of whether Heads of State enjoy immunity from prosecution for international crimes is one which brings about conflicting answers within the discipline of international law. International crimes are said to refer to offences which international courts or tribunals have jurisdiction³ and include genocide, crimes against humanity, war crimes and the crime of aggression.⁴

A number of *ad hoc* tribunals were created in order to investigate and prosecute individuals who committed these crimes, but the international community also recognised a need to create a permanent international criminal court.⁵ The creation of a permanent judicial body to deal with international crimes was based on the recognition that “such crimes threaten the peace, security and well-being of the world”.⁶ Prosecuting those that have committed such crimes, therefore, is a deterrent while also providing justice to victims, with the goal of restoring international peace and security.⁷ The International Criminal Court (ICC) was thus established through the adoption of the Rome Statute, which came into force in 2002. The establishment of the ICC as a permanent court for international crimes has become one of the seminal modern developments in international law. The purpose of the ICC is “to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes”.⁸ The

¹ R Cryer ‘International criminal justice in historical context: The post-Second World War trials and modern international criminal justice’ in W Gideon Boas & P Michael (eds) *International criminal justice: Legitimacy and coherence* (2012) 145–189.

² Advisory Committee on Issue of Public International Law (2011) *Advisory Report on the Immunity of Foreign States Officials* Advisory Report No. 20 at 13.

³ R Cryer et al *An Introduction to International Criminal Law and Procedure* (2007) at 2.

⁴ See Article 5-6 Rome Statute of the International Criminal Court A/CONF.183/9 of 17 July 1998.

⁵ Cryer op cit note 1.

⁶ See preamble, Rome Statute op cit note 4.

⁷ Ibid. The preamble to the Rome Statute states that putting an end to impunity for the perpetrators of international crime contributes to the prevention of these crimes.

⁸ See preamble, Rome Statute op cit note 4.

ICC acts complementary to domestic courts in the prosecution of international crimes and the ending of impunity.⁹

Many of the crimes that are of concern to the international community are at times committed or sanctioned by people in positions of power, including Heads of State, as these crimes may be politically motivated.¹⁰ However, customary international law affords Heads of State and other high-ranking state officials, immunity from criminal prosecution, even for the most serious of international crimes. In the context of prosecution for international crimes, this results in a conflict between the need to end impunity and the duty to respect the immunity of Heads of State. It has thus brought with it the challenge of ensuring accountability where Heads of State are perpetrators of international crimes. As will be illustrated below, States have made it difficult for the ICC to conduct its business by failing to arrest and surrender suspects who have warrants of arrests issued by the ICC. Even State Parties to the Rome Statute who have certain obligations under the Statute, including the duty to cooperate with the ICC have failed to enforce the ICC's warrants of arrests.¹¹

An example of such refusal to cooperate with the ICC would be the situation in Darfur, Sudan which was referred to the ICC through a UN Security Council (UNSC) Resolution in 2005¹² and two warrants of arrest were subsequently issued for the President of Sudan, Omar al Bashir¹³. Sudan is not party to the Rome Statute; therefore, a UNSC referral resolution, or the State's acceptance of the ICC's jurisdiction per article 12(3), are the only ways in which the ICC could investigate the situation in the country. The Rome Statute explicitly prohibits trials in absentia.¹⁴ Therefore, the ICC has to obtain the physical custody of an accused. The ICC has had difficulty obtaining custody of al Bashir because States which al Bashir has visited, have failed to arrest and surrender him to the ICC, often citing his immunity privileges as the

⁹ Ibid. Complementarity means that the ICC acts complementary to national courts and may be used as a Court of final resort only when a state is either unable or unwilling to prosecute.

¹⁰ For example, in the *Prosecutor v Uhuru Muigai Kenyatta* ICC-01/09-02/11 case Kenyatta was accused of international crimes committed during the 2007-2008 post-election violence in Kenya. Systematic attacks were carried out against population groups which supported the opposition party – this suggests that these international crimes were politically motivated.

¹¹ Article 86, Rome Statute op cit note 4.

¹² United Nations Security Council Resolution 1593 S/RES/1593 (2005).

¹³ *Prosecutor v Omar Hassan Ahmad Al Bashir* (Warrant of Arrest for Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-1 (4 March 2009) Pre-Trial Chamber I; (Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-94 (12 July 2010).

¹⁴ Article 63, Rome Statute op cit note 4.

reason.¹⁵ States Parties to the Rome Statute that have failed to do so claimed that they have competing international obligations: the first, an obligation to cooperate with the ICC in the arrest and surrender of al Bashir; and the second, an obligation to respect al Bashir's personal immunity as a Head of State.¹⁶ The ICC has issued a decision (discussed in section 3 below) that the UNSC resolution referring the situation in Darfur amounted to a waiver of immunity, which serves as the primary motivation for this study.

1.2 Research questions

The main research question to be answered in this study is whether the UNSC has the power to waive the personal immunity enjoyed by incumbent Heads of States acquired through customary international law. If so, whether UN Security Council Resolution 1593 waived the personal immunity of President al Bashir. The aim of this study, therefore, is to provide an analysis of the questions pertaining to the powers of the UNSC to waive the immunity of Heads of States of UN member states before international criminal bodies, with a particular emphasis on the personal immunities enjoyed by incumbent Heads of States.

1.3 Research methodology

This study mainly relies on primary sources of information such as case law emanating from national and international courts and tribunals, international conventions, statutes and treaties and UNSC Resolutions. The secondary sources of information used include journal articles, books and chapters in books.

1.4 Overview of sections

The first section highlights the basis and structure of this study. The second section evaluates the international customary law norm of Head of State immunity and differentiates between functional and personal immunity. It further analyses the status of Head of State immunity

¹⁵ E O Asaala 'Rule of law or realpolitik? The role of the United Nations Security Council in the International Criminal Court processes in Africa' (2017) 17 *African Human Rights Law Journal* 266-294.

¹⁶ *Prosecutor v Omar Hassan Ahmed Al Bashir* (Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-139-Corr (13 December 2011); (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) ICC-02/05-01/09-242 Pre-Trial Chamber II (13 June 2015) at paras 7-8.

before foreign domestic courts and before international courts and tribunals. The third section evaluates the possibility of a waiver of immunity by the UNSC, assessing the powers conferred on the UNSC by the UN Charter and the Rome Statute, and considers, generally, the legal implications of UNSC referral to the ICC. It considers the legal implications of such a waiver before foreign domestic courts and international courts and tribunals, and finally assesses whether UNSC Resolution 1593 which referred the situation in Darfur, Sudan, to the ICC waived al Bashir's immunity. Section four then concludes the study.

2 Head of State immunity

In international law, certain high ranking state officials enjoy immunity from arrest and prosecution. This immunity is usually attached to their office or the status of the official.¹⁷ The principle of immunity is recognised in both customary and conventional international law. Under customary international law, it is a well-established principle that Heads of State, diplomats and other high-ranking officials of a foreign state enjoy immunity from the jurisdiction of domestic courts of a foreign state.¹⁸ Additionally, there are a number of treaties that confer similar immunities upon representatives of States to international organisations and officials on official mission in other states.¹⁹

The subsequent sub-sections elaborate on the concept of immunity in international law, including Head of State immunity, and explain the different kinds of immunity that Heads of State enjoy as well as the distinction between them. It does so with reference to case law and academic articles on the subject matter. These subsections further consider the position of such immunity before international courts and foreign domestic courts.

2.1 The concept of immunities in international law

The principle of state immunity emerges from the theory of state sovereignty, independence, dignity and equality of States within the international community.²⁰ It protects states from the jurisdiction of foreign states. With regard to Heads of States, the immunity privileges they

¹⁷ R Pedretti *Immunity of Heads of State and State Officials for International Crimes* (2013) at 13.

¹⁸ Arrest Warrant of 11 April 2000 (*Democratic Republic of Congo v Belgium*) 2002 ICJ 3 (14 February 2002) at 54.

¹⁹ See for example, Article 39(2) of the Vienna Convention on Diplomatic Relations 1961.

²⁰ Pedretti op cit note 17 at 22.

enjoy are accorded to them in their capacity as the highest representatives of their State, not inherently in their own right. There are two forms of immunities enjoyed by Heads of State and other senior state officials, namely immunity *ratione personae* (personal immunity) and immunity *ratione materiae* (functional immunity).²¹

In international law, a Head of State is understood, by the international community, as a physical representation of such State. In *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Rwanda)* regarding whether incumbent Ministers of Foreign Affairs could be subjected to foreign domestic courts for international crimes, the ICJ held that:

it is a well-established rule of international law that the Head of State, the Head of Government and the Minister for Foreign Affairs are deemed to represent the State merely by virtue of exercising their functions, including for the performance, on behalf of the said State, of unilateral acts having the force of international commitments.²²

The highest representative of a state, the Head of State and other State officials, enjoy immunity from foreign criminal jurisdiction. The forms of immunity they enjoy are elaborated on in the subsections that follow.

2.1.1 Immunity *ratione materiae*

Functional immunity protects state officials during official state visits to foreign states and is limited to official acts of government.²³ This type of immunity provides state officials with a substantive defence for acts which may be crimes, committed in their official capacity and on behalf of their State.²⁴ Such acts are thus attributed to the State, and immunity is then enjoyed by the official because of the governmental nature of the act. *Ratione materiae*, is founded on the principle that States cannot be held liable for their actions by a foreign court because they are equal.²⁵

²¹ Ibid at 3.

²² *Armed Activities on the Territory of the Congo (New Application 2002) (Democratic Republic of the Congo v Rwanda)* Jurisdiction of the Court and Admissibility of the Application (2006) ICJ Reports 6 (3 February 2006) at 27.

²³ Ibid.

²⁴ Ibid.

²⁵ Predetti op cit note 17.

The *par in parem non habet imperium* rule provides that no state has authority over another because they are equal; states can therefore not claim jurisdiction over one another.²⁶ The principle of equality between states is an essential element of state sovereignty. The Head of State is considered the ultimate embodiment of a state, in the *Pinochet No. 3* case, Lord Millett remarked that

It would be an affront to the dignity and sovereignty of the state which he personifies and a denial of the equality of sovereign states to subject him to the jurisdiction of the municipal courts of another state, whether in respect of his public acts or private affairs. His person is inviolable; he is not liable to be arrested or detained on any ground whatever.²⁷

Functional immunity is a type of immunity which has as its purpose the protection of official acts carried out on behalf of States, and thus protects the sovereignty enjoyed by States.²⁸ There are two requirements for an act to qualify as an official act: the act must be conducted in accordance with a particular State policy (i.e. not for personal gain); and the act must be carried out using the systems and structures of the State.²⁹ This kind of immunity means that the act was carried out by the State, not the official, and it is for this reason that this immunity continues beyond the official's term in office.³⁰ The official thus avoids individual responsibility for the act and is protected by the veil of the State. In addition to current Heads of State, former Heads of State would thus still enjoy this immunity in respects of all official acts taken during their term of office.

The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) adopted the above reasoning in *Prosecutor v Blaškić* when it stated:

[s]uch officials [acting in their official capacity] are mere instruments of a State and their official action can only be attributed to the State. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of a State ... State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoy so-called "functional immunity".³¹

²⁶ Ibid at 226.

²⁷ *Pinochet (No. 3)* [2000] 1AC 147, 269 A – B.

²⁸ Ibid at 4.

²⁹ D Akande & S Shah 'Immunities of state officials, international crimes, and foreign domestic courts' (2011) 21 *European Journal of International Law* 815-852 at 832.

³⁰ Predetti op cit note 17 at 15.

³¹ *Prosecutor v Blaškić*, Case No IT-95-14-AR108 *bis*, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 at 38.

In the context of international crimes, Akande and Shah opine that international crimes cannot be subject to *ratione materiae*. They base this conclusion not on the *jus cogens* norms rendering the conduct criminal or on the believe that internationally wrongful criminal conduct cannot be seen to be governmental conduct, but rather on the jurisdiction of municipal courts to prosecute international crimes.³² Their argument is in line with the approach taken in the *Pinochet (No 3)* case where the House of Lords rejected the argument that functional immunity could be used as a substantive defence to torture.³³ The Lords could not accept that committing *jus cogens* crimes which are prohibited by an international convention can be considered as part of the official duties of a representative of State.³⁴ This argument is persuasive by virtue of the reasoning in *Pinochet*, as it is inconceivable that criminal activities can form part of the job of a Head of State.

2.1.2 Immunity *ratione personae*

Personal immunity protects the official, and sometimes private, acts of high ranking state officials such as Heads of State. This kind of immunity is attributed to the status of the person and ceases to exist when the term of office of such person ends.³⁵ In the *Arrest Warrant* case, it was held that, “[i]n customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States.”³⁶ The separate judgments also agreed with this majority and opined that “immunities are granted to high State officials to guarantee the proper functioning of the network of mutual inter-State relations, which is of paramount importance for a well-ordered and harmonious international system.”³⁷ This has practical advantages such as ensuring that high ranking state officials are able to conduct their business on behalf of their states without threat of politically motivated criminal allegations. The privilege of personal immunity is procedural in nature; it serves as bar to the exercise of jurisdiction and must be considered at the beginning of judicial proceedings.³⁸ Immunity *ratione personae* is accorded to facilitate reciprocal and peaceful travel, and communication

³² D Akande & S Shah op cit note 29 at 815.

³³ *Pinochet (No 3)* op cit note 27.

³⁴ *Ibid.*

³⁵ Pedretti op cit note 17 at 25.

³⁶ Arrest Warrant of 11 April 2000 (*Democratic Republic of Congo v Belgium*), 2002 ICJ 3 (14 February) at para 53.

³⁷ *Ibid.*, joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, at para 75.

³⁸ Pedretti op cit note 17 at 29.

for the State's high-ranking officials.³⁹ This type of immunity is essential for cooperation and mutual respect among states.⁴⁰

Regarding personal immunity in the context of international crimes, the ICJ in the *Arrest Warrant* case, had to consider whether incumbent Ministers of Foreign Affairs could be subjected to foreign domestic courts for international crimes and held that “[i]t has been unable to deduce from practice that there exists under customary international law any form of exception to the rule according immunity from jurisdiction.”⁴¹ The Court then states exceptions to this bar to prosecution, and one such exception is with regard to “criminal proceedings before certain international criminal courts”.⁴² The position before international criminal courts is discussed further in section 2.3 below. The position before foreign domestic court (discussed further in section 2.2. below) however differs as demonstrated in the *Pinochet (No 3)* case, where the Lords held that a Head of State can rely on his personal immunity as a bar to prosecution in a foreign domestic court against the crime of torture.⁴³

2.2 Head of State immunity before foreign domestic courts

As stated above, this subsection evaluates whether immunities apply to Heads of State when they are prosecuted in foreign domestic courts for international crimes. International law requires states to prosecute people who commit international crimes within their territory. When a state is for some reason unable or unwilling to prosecute those that have committed international crimes, such case may be brought before a foreign domestic court, subject to it having jurisdiction.

Akande and Shah state that the applicability of immunity at the domestic level depends on the domestic laws of a state.⁴⁴ While a Head of State might be granted immunity under customary international laws, such immunity may be limited or completely removed, depending on a nation's constitution and domestic legislation.

³⁹ Akande & Shah op cit note 29 at 818.

⁴⁰ Ibid.

⁴¹ *Arrest Warrant* case op cit note 36 at para 58.

⁴² Ibid at para 61.

⁴³ *Pinochet* op cit note 27.

⁴⁴ Akande & Shah op cit note 29 at 817.

In the *Pinochet* judgement, the Lords were in agreement that an incumbent Head of State or diplomat still enjoys personal immunity for international crimes such as torture. For such an official, “[t]he nature of the charge is irrelevant; his immunity is ... absolute” and “he [may not be] arrested or detained on any ground.”⁴⁵

Foreign domestic courts have consistently upheld personal immunity, regardless of the nature crimes allegedly committed.⁴⁶ Also, the Advisory Committee on Issues of Public International Law, in its advisory report on the immunities of foreign state officials, concluded that “in proceedings concerning international crimes claims for personal immunity by entitled persons should be honoured” in the case of national proceedings.⁴⁷ *Ratione materiae*, on the other hand is not available in proceedings before foreign domestic courts when the crimes charged are international crimes.⁴⁸

2.3 Head of State immunity before international courts and tribunals

The ICTY, the ICTR and the Special Court for Sierra Leone (SCSL) were created in terms of UNSC resolutions after the worst human rights violations and international crimes were committed in order to fill the vacuum of impunity whereas the ICC was created through an international agreement. This subsection considers the position on Head of State immunity before the above international courts and tribunals as well as the ICC.

The ICTY Statute⁴⁹ was established by the UNSC under its Chapter VII powers to prosecute individuals responsible for “serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991,” namely breaches of the Geneva Convention and its Additional Protocols, war crimes, genocide, and crimes against humanity.⁵⁰ Article 7(2) of the ICTY Statute explicitly authorised the Tribunal to prosecute Heads of State. The ICTY prosecuted Sloboden Milošević who was President of Serbia at that time using Article 7(2).⁵¹ Milošević appealed his indictment citing his immunity as a Head of State while also

⁴⁵ *Pinochet* 3 op cit 17 para 171 & 179 (Millett)

⁴⁶ Cryer op cit note 3 at 434.

⁴⁷ Advisory Committee on Issues of Public International Law *Advisory Report on the Immunity of foreign state officials* Advisory Report number 20 (2011) at 26.

⁴⁸ *Pinochet* op cit note 17 .

⁴⁹ Statute of the International Criminal Tribunal for the Former Yugoslavia (1993) (amended on 17 May 2002).

⁵⁰ *Ibid*, Articles 1-5.

⁵¹ *The Prosecutor of the Tribunal against Slobodan Milošević et al* Case No IT-99-37 (ICTY).

questioning the power of the UNSC to establish the ICTY.⁵² The Tribunal dismissed his appeal citing Article 41 of the UN Charter which empowers the UNSC to take certain measures in order to maintain or restore peace and security. In addressing his plea of immunity, the Tribunal held that a “Head of State cannot plead his official position as a bar to criminal liability in respect of crimes over which the International Tribunal has jurisdiction.”⁵³

Similar to the ICTY, the ICTR had jurisdiction over crimes of genocide, crimes against humanity and war crimes committed against the Tutsi tribe in Rwanda.⁵⁴ Article 6(2) of the ICTR Statute provides that “[t]he official position of any accused person, whether as Head of State or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment”. The ICTR charged the former Prime Minister of Rwanda, Jean Kambanda, with the crime of genocide; Kambanda plead guilty before the Tribunal and was consequently sentenced to life imprisonment.⁵⁵

The Appeals Chamber of the (SCSL) which was established by UNSC Resolution 1315 on request of the Sierra Leone Government dealt with the issue of jurisdictional immunities for Charles Taylor, who was the President of Liberia at the time. Charles Taylor was charged with war crimes and crimes against humanity.⁵⁶ One of the key issues before the Court was the scope of the immunities enjoyed by Charles Taylor during the period of his indictment as he was the Head of State of Liberia when he was indicted. His application was dismissed on the basis that the SCSL was an international criminal court and therefore Heads of State do not enjoy immunity before international criminal courts established using the Chapter VII powers of the UN Charter.⁵⁷ The Court further held that Article 6(2) of the Special Court’s Statute which provide that the official capacity of an accused is irrelevant is not in conflict with customary international law.⁵⁸ However, because the trial took place when Taylor was no longer in office and Liberia had consented to the proceeding against him, the precedent set in the case does not provide much analysis on immunity in the context of criminal proceedings against sitting Heads of State before international courts but does confirm, through the indictment of, and

⁵² *Prosecutor v Slobodan Milošević* Case No. IT-02-54-T, Decision on Preliminary Motions of the Trial Chamber (8 November 2001).

⁵³ *Ibid* at para 31.

⁵⁴ Statute of the International Criminal Tribunal for Rwanda (1994) (as amended on 13 October 2006).

⁵⁵ *Prosecutor v Kambanda* Case No ICTR-97-23-S ICTR Trial Chamber I (1998).

⁵⁶ *Prosecutor v Taylor* (Decision on Immunity from Jurisdiction) SCSL 2003-01-I Appeals Chamber (31 May 2004).

⁵⁷ *Ibid* at 34-42.

⁵⁸ *Ibid*.

issuance of arrest warrant, for Taylor while he was an incumbent Head of State, that prosecution of incumbent Heads of State is possible before international criminal courts.

With regard to the ICC, the Rome Statute empowers the ICC to exercise jurisdiction over individuals suspected of committing international crimes. Article 27(1) of the Rome Statute declares that the Statute applies

equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State ... shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

Article 27(2) of the Statute 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 Court from exercising its jurisdiction over such a person”. The Rome Statute thus removes the personal immunities enjoyed by high ranking State officials. State parties that ratify the Rome Statute accept this provision and renounce the privilege of personal immunities in respect of crimes within the jurisdiction of the ICC. This acceptance of the unavailability of immunity before an international court by such a large number of states (123 States parties) is evidence of the fact that immunity is becoming unacceptable in the case of international crimes.

A case in point is that of Uhuru Kenyatta, the first sitting Head of State to appear before the ICC. The ICC began investigating him for crimes committed in Kenya during and after the 2007 Presidential elections in 2010. Kenyatta was indicted by the ICC in 2012. Kenya, a state party to the Rome Statute, had accepted the entirety of the Statute – including its provisions excluding immunity. The AU objected to his indictment stating that it “could undermine the sovereignty, stability and peace in [Kenya] and other Member States”.⁵⁹ The AU resolved that no incumbent AU Head of State should be prosecuted by international courts in order to “safeguard the constitutional order, stability and, integrity of [its] Member States”.⁶⁰ The Kenyan government refused to cooperate with the ICC and as a result, the Prosecutor withdrew the charges against Kenyatta in 2014.⁶¹

⁵⁹ Extraordinary Session of the Assembly of the African Union *Decision on Africa’s Relationship with the International Criminal Court (ICC)* AU Doc. Ext/Assembly/AU/Dec.1 (Oct.2013) at para 5.

⁶⁰ *Ibid* at para 6.

⁶¹ *Prosecutor v Uhuru Muigai Kenyatta* (Notice of withdrawal of charges against Uhuru Muigai Kenyatta) ICC-01/09-02/11-983 (5 December 2014).

While Article 27(2) is applicable to States parties to the Rome Statute, its use in the case of Heads of States that have not ratified the Rome Statute but are referred to the ICC by the UNSC remains uncertain. Further, Article 27(2) can be contrasted with Article 98(1), which provides that “[t]he Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity”. This provision confirms the customary international law immunities enjoyed by Heads of State and other high-ranking officials of non-state parties. In such a case, the ICC would have to obtain a waiver of immunity from the non-state party in question before a state party can arrest and surrender the suspect, as Article 98(1) recognises immunity from arrest at the domestic level.⁶² For Gaeta, even in the context of a UNSC referral, such referral merely triggers the jurisdiction of the ICC and nothing more. He concludes that the arrest warrant issued for al Bashir was irregular because the ICC should have first sought the government of Sudan to waive the immunity of al Bashir.⁶³ Such interpretation is problematic because it takes a literal approach to the provisions of the Rome Statute and fails to consider the intention of the provision and thus fails to give effect to the purpose of Article 13(b) by preventing the arrest of a suspect.

At the African regional level, the African Union (AU) adopted the Malabo Protocol in 2014, which extends the jurisdiction of the African Court of Justice and Human Rights to adjudicate international crimes,⁶⁴ takes a different position from other international courts and tribunals. Article 46A *bis* of the Protocol and provides that

[n]o charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.

⁶² Paula Gaeta ‘Does President Al Bashir Enjoy Immunity from Arrest?’ (2009) 7 *Journal of International Criminal Justice* 328.

⁶³ *Ibid* at 329.

⁶⁴ Protocol on Amendments to the Protocol on the Statute of African Court of Justice and Human Rights, adopted 27 June 2014.

The contradiction between the Malabo Protocol and the ICC has drawn criticism for potentially undercutting the fight against impunity and providing incentive for African leaders to remain in power for extended periods of time.⁶⁵ This clause has the effect of delaying justice for victims of human rights violations for unreasonable periods of time, and as the commonly used legal maxim which is not attributable to any particular individual says, “justice delayed is justice denied”.

Against the backdrop of the recognition of non-applicability of immunity before international courts, Mettraux, Dugard and Du Plessis argue that there is one customary international law exception to immunities which is that immunities are inapplicable as a defence or jurisdictional bar to charges involving allegations of international crimes before international courts.⁶⁶ This exception, they argue, emerged with the understanding that “individuals, regardless of their rank or position, could be held criminally responsible for [international crimes]”.⁶⁷ They indicate with reference to the Nuremberg Trials, the ICTY and the ICTR, that international tribunals have consistently noted that the ranking of an individual is not a bar to their jurisdiction.⁶⁸ These tribunals were created through UNSC resolutions and in the case of the SCSL by agreement between the UN and Sierra Leone, which explicitly set aside the immunity of individuals suspected of committing crimes within their jurisdiction.⁶⁹ Gaeta made a similar argument that the ICC only had jurisdiction over the situation in Darfur because, of the existence of a customary international law rule which provides that Head of State immunity does not protect people who commit international crimes before international courts.⁷⁰ As noted previously, the ICJ, in the *DRC v Belgium* case has also confirmed that personal immunities exist in the context of international crimes with a caveat that such immunities may be waived by the home state and when the accused appears before international courts. This then leads to the conclusion that Heads of State enjoy immunity but such immunity is not applicable before international courts due to the provisions excluding immunities before such courts.

⁶⁵ Asaala op cit note 15.

⁶⁶ G Mettraux et al. “Heads of State Immunities, International Crimes and President Bashir’s Visit to South Africa” (2018) 18 *International Criminal Law Review* 577-622 at 583.

⁶⁷ Ibid.

⁶⁸ *Prosecutor v Slobodan Milošević* op cit note 50, *Prosecutor v Taylor* op cit note 55,

⁶⁹ Mettraux et al op cit note 66 above 600.

⁷⁰ P Gaeta “Does President Al Bashir Enjoy Immunity from Arrest?” 7 *Journal of International Criminal Justice* (2009) at 315.

3 Authority of the UNSC to waive the personal immunity of Heads of State

3.1 UNSC Powers under the UN Charter

The primary mandate of the UNSC is the maintenance of international peace and security.⁷¹ The UNSC is mandated with this responsibility while acting under, inter alia, Chapter VII of the Charter. The decisions the UNSC takes are binding on UN member states.⁷² Article 25 provides that “[t]he Members of the [UN] agree to accept and carry out the decisions of the Security Council in accordance with the present Charter”. This means that UN Member States must respect and carry out instructions of the UNSC – their status as UN Member is taken as consent to be bound by UNSC resolutions. This subsection analyses the powers of the UNSC as provided for in the Charter, as it is important in understanding whether the UNSC has powers to waive immunity and if Charter provides (implicitly or explicitly) for such powers.

The UNSC uses a number of methods to fulfil its mandate, including, imposing economic embargoes, authorising member states and regional organisations to use force, creating quasi-judicial mechanisms and authorising the civil administration of territories by the UN.⁷³ The UNSC is empowered to impose economic sanctions or military intervention under Articles 40, 41 and 42 of the Charter once it has determined the existence of “[a] threat to the peace, breach of the peace, or an act of aggression” in terms of Article 39.⁷⁴ In order to constitute a “threat to peace,” a situation must have the potential of causing armed conflict between states, a “breach of the peace” and an “act of aggression” constitute (different degrees of) an outbreak of hostilities.⁷⁵

The powers of the UNSC, which have been described as far-reaching,⁷⁶ have become a subject of concern to international lawyers and academics alike; and questions such as whether there are limits to the UNSC’s discretion in determining threats to and breaches of peace thus triggering Chapter VII enforcement mechanism and whether there are limits to the types of

⁷¹ Article 24(1), United Nations Charter 1 UNTS XVI (24 October 1945).

⁷² Article 25, UN Charter.

⁷³ Chapter VII, UN Charter. E de Wet (2004) *The Chapter VII Powers of the United Nations Security Council*, 2.

⁷⁴ *Ibid* 133.

⁷⁵ *Ibid* at 138.

⁷⁶ See S Talmon ‘The Security Council as World Legislator’ *The American Journal of International Law* 99 (2005) at 186.

enforcement mechanisms available to the UNSC in the maintenance of international peace and security have become a subject of debate.⁷⁷ It should however be noted that the Charter does not have a provision on UNSC waiver of immunity of Heads of State.

3.2 UNSC powers under the Rome Statute

The Rome Statute provides three ways for the jurisdictions of the ICC to be triggered. Article 13 provides that the ICC may exercise its jurisdiction over a situation which is referred to the Prosecutor by a State Party,⁷⁸ a situation which is referred to the Prosecutor by the UNSC under Chapter VII of the UN Charter,⁷⁹ where the Prosecutor initiates investigation *proprio motu*⁸⁰ and through an ad hoc declaration by a non-member state to Rome Statute⁸¹. The most controversial of these jurisdictional triggers is UNSC referral because it enables the ICC to have jurisdiction over UN member States that are not party to the Rome Statute. Chenwi and Sucker argue that when a matter is referred to the ICC through a UNSC referral, State consent (to be bound by the Rome Statute) is not required and should be inferred from UN membership and state obligations under the Charter.⁸² It should be noted that the referral provision in the Rome Statute is silent on the implication of a referral on immunity of Heads of State or senior government officials of non-State parties to the Statute.

3.3 Implication of UNSC referral on immunity of non-state parties to the Rome Statute

As noted in section 3.1 above, under Article 39 of the Charter, the UNSC is authorised to deduce whether there is a threat to or breach of the peace or an act of aggression which has occurred that would necessitate its Chapter VII intervention. Once it has made such a determination, it may take a number of actions. Article 13(b) of the Rome Statute has empowered it to refer situations which fit the description in Article 39 to it, so it may investigate and prosecute under. But neither the Charter nor the Rome Statute contain explicit guidance on the implication of UNSC referral on immunity.

⁷⁷ D Whittle 'The Limits of Legality and the United Nations Security Council: Applying the Extra-legal Measure Model to Chapter VII Action' (2015) 26 *European Journal of International Law* 671-698.

⁷⁸ Article 13 (a) Rome Statute op cit note 4.

⁷⁹ Ibid Article 13(b) .

⁸⁰ Ibid Article 13(c).

⁸¹ Ibid Article 12(3).

⁸² L Chenwi and F Sucker 'South Africa's Competing Obligations in Relation to International Crimes' (2015) 7 *Constitutional Court Review* 207.

There is thus disagreement among legal scholars as to whether a UNSC referral of a case to the ICC can waive the personal immunity of Heads of State. There are scholars who are of the view that UNSC referrals only trigger the application of the Rome Statute in relation to the jurisdiction of the ICC and nothing further.⁸³ Schabas opines that there is an absolute prohibition on the removal of immunities of Heads of non-State party to the Rome Statute.⁸⁴ He supports his opinion by questioning how “a group of states, acting collectively ... withdraw an immunity that exists under international law”⁸⁵ by deciding, by treaty, to waive such immunities before *their* Court. He consequently concludes that there is no right to waive the immunity of a non-state party to the Rome Statute by application of Article 27 without their consent.⁸⁶ This view is primarily based on the principle enshrined in the Vienna Convention on the Law of Treaties (VCLT), namely that treaties only create obligations on State Parties that have consented to be bound by such treaties.⁸⁷ Scholars holding this view opine that the immunities enjoyed by States can only be removed, in the context of the Rome Statute, when State parties sign and ratify the Rome Statute.

The approach taken by Schabas ignores the fact that the ICC’s jurisdiction is triggered by Article 13(b) of the Rome Statute, and that non-member states are bound to the treaty only in relation to the matter that has been referred to the ICC by the UNSC. When ICC jurisdiction is triggered by a UNSC resolution, it is the UNSC that directs the concerned State(s) to cooperate with the ICC. Because there is no treaty which provides a framework of analysis for the interpretation of UNSC resolutions, like the VCLT plays in connection with interpreting treaties, there is disagreement among legal scholars on how to label such an act. The ICJ and other international courts and tribunals have considered UNSC resolutions, but none of them have fully engaged with, or contributed to the issue of interpreting the resolutions. This “gap”, leaves the interpretation of the legal effect, especially in relation to immunity, of UNSC referrals to the ICC a difficult exercise.

⁸³ A Kiyon ‘Al-Bashir and the ICC: The Problem of Head of State Immunity’ *Chinese Journal of International Law* (2013) at 481.

⁸⁴ W Schabas *An introduction to the International Criminal Court* 4th ed (2017) 62.

⁸⁵ *Ibid.*

⁸⁶ *Ibid* (emphasis added).

⁸⁷ Article 34 Vienna Convention on the Law of Treaties.

In the ICJ's Advisory Opinions on *Namibia*⁸⁸ and *Kosovo*⁸⁹, a method for interpreting UNSC resolutions was developed. The ICJ held in the *Namibia* case that when interpreting UNSC resolutions, two questions are relevant, the first being whether the resolution has a binding effect, and the second being what the content of that effect is.⁹⁰ In the *Advisory Opinion on Namibia*, the ICJ held that "[t]he language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect".⁹¹ An analysis of the binding effect must be done on a case by case basis taking into account "all circumstances that might assist in determining the legal consequence of the resolution".⁹² From this opinion, it can then be deduced that the UNSC must use unequivocal language when making resolutions. The *Kosovo* judgment confirms this approach.⁹³

Asaala proposes that UNSC resolutions may be interpreted as deferrals of prosecution in order to get around the challenge of immunity when referring non-Member States to the Rome Statute.⁹⁴ She argues that a deferral does not amount to a bar to future prosecution and merely defers prosecution until the individual vacates office.⁹⁵ This novel proposed approach is another interesting way of interpreting UNSC resolutions. This approach is problematic as it may provide incentive for Heads of State to remain in office post what may be legally permissible in their states in order to evade prosecution. One could also argue that such attempts to evade prosecution may lead to further human rights violations and violations of international law because dictators remain in power through violent means.

For the reasons outlined above, it is concluded that it is indeed theoretically possible for the UNSC to set aside the personal immunity enjoyed by Heads of State before international courts and tribunals. While the theoretical "setting aside" of immunities by the UNSC is possible, it cannot be assumed merely from the referral of a situation to the competence of the ICC and the duty to cooperate with the ICC.⁹⁶ The ICC, however, concluded that the UNSC's referral of

⁸⁸ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (1970) Advisory Opinion ICJ Reports 16 (21 June 1971).

⁸⁹ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion 2010 ICJ Reports 403 (22 July 2010).

⁹⁰ *Namibia* op cit note 88 at para 113-115.

⁹¹ *Ibid* at para 114.

⁹² *Ibid*.

⁹³ *Kosovo* op cit note 89 at para 117.

⁹⁴ Asaala op cit note 15.

⁹⁵ *Ibid*.

⁹⁶ Mettraux et al op cit note 66 at 607.

the matter to the ICC rendered any applicable immunities enjoyed by Sudanese officials inapplicable.⁹⁷

3.4 The question of UNSC's waiver of al Bashir's immunity

The President of Sudan, al Bashir, is alleged to have been involved in the commission of various war crimes, crimes against humanity and acts of genocide.⁹⁸ Two warrants of arrest were issued against him and state parties to the Rome Statute were directed to assist the ICC with instituting the arrest warrant.⁹⁹ The case has however been marked by non-cooperation of States in the arrest and surrender of al Bashir to the ICC on immunity grounds and debates on whether the applicable UNSC resolution in fact waived al Bashir's immunity. These issues are considered further below.

3.4.1 Non-cooperation with the ICC due to immunity considerations

States have not been compliant with the ICC's instruction to arrest al Bashir; hence he remains at large. A number of States have been referred to the ICC for their failure to comply.¹⁰⁰ This has resulted in the ICC issuing a number of decisions pertaining to the duty of member states to arrest and surrender al Bashir.¹⁰¹ This subsection considers the decisions of the ICC's Pre-Trial Chamber regarding the failure of certain Rome Statute States parties to arrest and surrender al Bashir and therefore to comply with their obligations.

When al Bashir visited Malawi in 2011, an ICC Member State, Malawi failed to arrest and surrender him. Malawi cited the fact that Sudan is not party to the Rome Statute and has therefore not waived its immunity as the reason for its noncorporation.¹⁰² Malawi further stated that it "fully aligns itself with the position adopted by the AU with respect to the indictment of the sitting Heads of State and Government of countries that are not parties to the Rome Statute".¹⁰³ The ICC found that there is no customary international law obligation on Malawi

⁹⁷ *Prosecutor v Omar Hassan Ahmad Al Bashir* (Decision under Article 87(7) of the Rome Statute on the Non-Compliance by South Africa with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir) ICC-02/05-01/09-302 (6 July 2017) at para 91.

⁹⁸ *Prosecutor v Omar Hassan Ahmad Al Bashir* op cit 13 ICC-02/05-01/09-1 (4 March 2009).

⁹⁹ *Ibid.*

¹⁰⁰ See for example *Prosecutor v Omar Hassan Ahmed Al Bashir* op cit note 16.

¹⁰¹ *Ibid.*

¹⁰² *Ibid* ICC-02/05-01/09-139-Corr at para 8.

¹⁰³ *Ibid.*

to grant immunity to al Bashir and on that basis concluded that Malawi prevented it from exercising its powers and functions by failing to arrest and surrender al Bashir.¹⁰⁴

When South Africa also failed to arrest al Bashir, a High Court decision ordered South Africa to take all necessary steps to arrest and detain al Bashir pending a formal request for his arrest by the ICC.¹⁰⁵ During the proceedings, South Africa submitted that it had two conflicting international obligations: first, its customary international law obligation to respect al Bashir's Head of State immunity; and second, its ICC obligations to arrest and surrender al Bashir.¹⁰⁶ South Africa appealed the High Court decision to its Supreme Court of Appeal and its appeal failed. The SCA found South Africa's failure to arrest al-Bashir to be inconsistent with South Africa's international obligations in terms of the Rome Statute and section 10 of its domestic legislation, the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (ICC Act) and therefore unlawful.¹⁰⁷ The ICC also issued a decision on this matter and found that South Africa had failed to comply with its Rome Statute obligations.¹⁰⁸ The ICC held that no immunity would apply to any individual before the domestic authorities of Member States to the Rome Statute; and also reconfirmed that no individual is entitled to immunity before it.¹⁰⁹ It based this decisions on the fact that al Bashir was not entitled to immunity because the situation in Sudan was referred to it by the UNSC using its Chapter VII powers.¹¹⁰ The obligation to arrest and surrender suspects on instruction of the ICC (following its issuance of an arrest warrant) applies only to State parties to the Rome Statute. Given that the ICC relies on national authorities to arrest and surrender suspects to it, its decision above is persuasive. It would be impossible for the ICC to perform its functions without the assistance of national authorities.

The failure of Rome Statute member states to comply with the requests of the ICC is concerning, as it undermines the authority of the Court. It is clear that some African states no longer have faith in the Court and the AU supports and in fact encourages their non-compliance with ICC's instructions. This may place some states in a precarious position as they may want

¹⁰⁴ Ibid at 36-43.

¹⁰⁵ *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others* 2015 (5) SA 402 (GP).

¹⁰⁶ Ibid.

¹⁰⁷ *Minister of Justice and Constitutional Development and Others v The Southern Africa Litigation Centre and Others* 2016 (3) SA 317 (SCA) at para 17.

¹⁰⁸ *Prosecutor v Omar Hassan Ahmad Al Bashir* op cit note 97 at para 123.

¹⁰⁹ Ibid at paras 78-79.

¹¹⁰ Ibid.

to respect their regional body, for political, diplomatic and economic reasons while at the same time respecting their obligations under the Rome Statute.

3.4.2 Resolution 1593 and its legal effect on al Bashir's immunity

As noted in section 3.2 above, Article 13 of the Rome Statute authorises the Court to exercise its jurisdiction when the UNSC refers a matter to the Prosecutor using its Chapter VII powers. The purpose of this provision is to expand the jurisdiction of the ICC to crimes committed in States that are not Rome Statute signatories but have UN membership. Article 13 provides guidance as to when the UNSC may refer a situation to it – “[a] situation in which one or more of [Rome Statute] crimes appears to have been committed” and while the UNSC is “acting under Chapter VII of the Charter of the UN”.

The UNSC's Resolution 1593, referred the situation in Darfur to the ICC using Article 13(b) of the Rome Statute. The resolution determines that “the situation in Sudan continues to constitute a threat to international peace and security” and acting under Chapter VII of the Charter

[d]ecides 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.

This referral, however, made no reference to the question of immunity. The question of whether it does indeed waive the immunity of Sudan has been lengthily debated both in ICC judgments and within the academic community. Akande makes a general observation that

[g]iven that the Security Council, in referring a situation to the ICC, intends the Court to take action (to investigate and prosecute as appropriate), and given that the Security Council itself provides no procedure by which the investigation and prosecution is to take place the Security Council must be taken as expecting the Statute to be the governing law.¹¹¹

He interprets Article 13(b) of the Rome Statute and UNSC referrals to the ICC to make all provisions of the Rome Statute applicable to the referred situation by virtue of the referred

¹¹¹ D Akande ‘The Legal Nature of UNSC Referrals: Impact of the SC Referral on Al Bashir's Immunities’ (2009) 7 *Journal of International Criminal Justice* 333-352 at 340.

party's duty under the Charter.¹¹² This approach, he proposes, is based on a hierarchy of obligations within the UN system, namely Article 103 which provides that the provisions in the Charter prevail over other international agreements. He argues that "the nature of the Charter [is] a sort of 'constitutional' document, and ... that treaties will in general prevail over customary law obligations".¹¹³ This hierarchy of obligations gives UNSC Resolution 1593 the legal effect of making every provision in the Rome Statute applicable to the situation in Darfur. Akande's argument states that the fact that Sudan is bound by Article 25 of the Charter implies that UNSC Resolution 1593 puts Sudan in an analogous position to a party to the Statute.¹¹⁴ The only difference is that Sudan's obligations to cooperate with the ICC are not derived directly from the Statute but from a UNSC Resolution and the Charter.

Another answer to this conflict between respecting Head of State immunity and respecting the obligations under the Rome Statute may lie in Article 103 of the Charter which provides that "[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". This provision, together with Article 25 of the Charter, has been used by the ICC when assessing the obligations of Sudan and States parties to the Rome Statute to "fully cooperate" with it.¹¹⁵ This provision essentially means that in the event that States have competing international obligations, their obligations under the Charter prevails. The customary international law entitlement to immunity is not enjoyed as a result of an international agreement but rather as a result of international custom, defined as "evidence of a general practice accepted by law".¹¹⁶

Kiyani contends that the argument that Article 103 of the Charter places a duty on UN Member States to comply with a UNSC referral and thus overrides the immunity enjoyed by States is flawed because Article 103 makes no reference to customary international law rules.¹¹⁷ This

¹¹² Ibid.

¹¹³ Ibid at 348.

¹¹⁴ Ibid at 340-342.

¹¹⁵ For example, *Prosecutor v Omar Hassan Ahmad Al Bashir* op cit note 54, paras 245–247; *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi* ICC-01/11-01/11-72 (Decision on Libya's Submissions Regarding the Arrest of Saif Al-Islam Gaddafi) Pre-Trial Chamber I (7 March 2012) para 12; *Prosecutor v Omar Hassan Ahmad Al Bashir* I (Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court) CC-02/05-01/09-195 Pre-Trial Chamber II (9 April 2014) at paras 30–31.

¹¹⁶ United Nations Statute of the International Court of Justice 33 UNTS 993 (18 April 1946) article 38(1)..

¹¹⁷ A Kiyani 'Al-Bashir & the ICC: The Problem of Head of State Immunity' (2013) *Chinese Journal of International Law* 467-508 at 478.

argument is supported by the drafting history which shows that the drafters of the Charter made a deliberate decision to ensure that the Charter does not override all international obligations, but rather overrides only international agreements.¹¹⁸ If it is accepted that the Charter only overrides international agreements, and does not extend to customary international law, then it would have to be accepted that UN Member States are not obliged to comply with all directives emanating from the UN.¹¹⁹ This argument is suspect because rules of international customary law often exist parallel with international treaty obligations of the same substantive content. In the al Bashir judgment, the ICC held that UNSC enforcement measures have an impact on customary law rights enjoyed by States, and that the UNSC at times overrides customary international law when it carries out its mandate; and it is widely accepted that it has the authority to do so.¹²⁰

The ICC has held that customary international law makes jurisdictional immunities inapplicable in cases which concern crimes within its jurisdiction.¹²¹ However, there appears to be limited support in state practice or *opinio juris* for this proposition. In the 2009 decision of the Pre-Trial Chamber I, the ICC on the applicability of Article 13(b) emphasised that “the current position of al Bashir as a Head of State which is not party to the Statute, has no effect on the Court’s jurisdiction over the present case”; and found Article 27 directly applicable because of the purpose of the Statute – the ending impunity for international crimes.¹²²

In 2011, the Pre-Trial Chamber issued two rulings concerning Malawi’s and Chad’s obligation to cooperate with the ICC in the arrest and surrender of al Bashir to the ICC. In these decisions, the Pre-Trial Chamber ruled that “customary international law creates an exception to Head of State immunity when international courts seek a Head of State’s arrest for the commission of international crimes”¹²³ The Chamber cited the ICJ *Arrest Warrant* case and determined that “the principle in international law is that immunity of either former or sitting Head of State

¹¹⁸ Ibid.

¹¹⁹ Ibid at 480.

¹²⁰ *Prosecutor v Omar Hassan Ahmad Al Bashir* Appeals Chamber ICC-02/05-01/09 OA2 (17 June 2018).

¹²¹ *Prosecutor v Omar Hassan Ahmad Al Bashir* (Corrigendum to Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir) ICC-02/05–01/09 Pre-Trial Chamber I (13 December 2011) at paras 34 &36.

¹²² *The Prosecutor v Omar Hassan Ahmed Al Bashir* ICC-02/05-01/09, Pre-Trial (Chamber I 4 March 2009) at para 41.

¹²³ (Decision on the Failure by the Republic of Malawi to Comply with the Cooperation Requests) ICC-02/05–01/09 Pre-Trial Chamber I (12 December 2011), 43; (Decision on the Refusal by the Republic of Chad to Comply with the Cooperation Requests) ICC-02/05–01/09 Pre-Trial Chamber I (13 December 2011) at 13.

cannot be invoked to oppose a prosecution by an international court. This is equally applicable to former or sitting Heads of States, not Parties the Statute whenever the Court may exercise jurisdiction”.¹²⁴

In 2014, the Pre-Trial Chamber issued a decision on the DRC’s failure to arrest and surrender al Bashir and concluded that al Bashir was not entitled to personal immunity as this entitlement was implicitly waived by the UNSC’s referral of the Darfur matter to the ICC for investigation. The Pre-Trial Chamber held that “the cooperation envisaged in the said resolution was meant to eliminate any impediment to the proceedings before the Court, including lifting of immunities”.¹²⁵

In issuing its arrest warrant against al Bashir, the Pre-Trial Chamber was of the view that al Bashir’s personal immunities as an incumbent Head of State had effectively been set aside by the UNSC resolution which referred the situation in Darfur to the ICC.¹²⁶ This, the ICC believed, is implied from Sudan’s duty to cooperate with the ICC as directed by the UNSC.

The *Blaškić* case, however, indicates that the State’s duty to cooperate with an international criminal tribunal does not nullify immunities applicable to its officials.¹²⁷ This principle from the ICTY case makes it clear that a duty to cooperate cannot automatically lead to a waiver of immunity. In a dissenting opinion on the *Blaškić* case, Judge Shahabudden opined:

[i]nternational criminal courts are established by States acting together, whether directly or indirectly as in the case of the Tribunal, which was established by the Security Council on behalf of States members of the United Nations. There is no basis for suggesting that by merely acting together to establish such a court States signify an intention to waive their individual functional immunities.¹²⁸

¹²⁴ *The Prosecutor v Omar Hassan Ahmad Al Bashir* (Decision Pursuant to Article 87 (7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hasan Ahmed Al Bashir) ICC-02/05/01/09 (12 December 2011), para 36.

¹²⁵ Decision on the Cooperation of the Democratic Republic of Congo Regarding Omar al Bashir’s Arrest and Surrender to the Court, Case No. ICC-02/05–01/09, Decision of the Pre-Trial Chamber II (9 April 2014) at 29.

¹²⁶ *Prosecutor v Omar Hassan Ahmad Al Bashir* (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) ICC-02/05–01/09–242 Pre-Trial Chamber II (13 June 2015) at paras 7-8.

¹²⁷ Mettraux op cit note 66, 607, see *Prosecutor v Tihomir Blaškić*, it-05–14, ICTY, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997.

¹²⁸ *Prosecutor v Radislav Krstić*, it-98–33-A, ICTY, Dissenting Opinion of Judge Shahabuddeen on Decision on Application for Subpoenas (1 July 2003) at para 11.

The dissent put forward by Judge Shahabudden is also persuasive because unequivocal language is of paramount importance in international law, particularly concerning decisions which have far-reaching implications. Actions such as a waiver of immunity cannot be assumed or implied; they ought to be expressly given.

Dyani-Mhango argues that the view that Resolution 1593 implicitly made Sudan bound to the Rome Statute is problematic because it is contrary to the principle of international law which requires states to consent to be bound by a treaty.¹²⁹ She further argues that only states can waive their immunity and that such waiver should be explicit and therefore concludes that the resolution of the UNSC does not remove al Bashir's personal immunities.¹³⁰ She further indicates that

[r]esolution 1593 only affects the relationship between Sudan and the Court. It does not create obligations *erga omnes* nor *inter partes* between State Parties and the referred State which remains a third State for the purpose of the Statute. In other words, Resolution 1593 did not modify or qualify South Africa's legal obligations towards the Court or towards Sudan.¹³¹

The obligations of other States, such as South Africa, Malawi and Jordan to arrest and surrender al Bashir are then determined by their domestic laws and international obligations. Section 232 of South Africa's Constitution, for example, provides that "customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament". Section 4(2) of the ICC Act, provides that a person's status is neither a defence to a crime nor a ground for the reduction of a sentence and therefore prohibits the recognition of personal immunity. Customary international law on immunity thus conflicts with the ICC Act's position, implying the ICC Act's position on the question of immunity takes priority over customary international law's position by virtue of section 232 of the Constitution.

Kiyani argues that al Bashir still enjoys personal immunity without being affected by the adaptation of UNSC resolution 1593. The author bases this argument on the belief that ICC jurisdiction can only be valid when the UNSC has the authority to override customary international law rules or when there already exists an exception to al Bashir's immunity in

¹²⁹ N Dyani-Mhango 'South Africa's Dilemma: Immunity Laws, International Obligations, and the Visit by Sudan's President Omar al Bashir' 26 (2017) *Washington International Law Journal* 535-571 a 555-556.

¹³⁰ *Ibid* at 557-559.

¹³¹ *Ibid*.

international law, which she finds unconvincing.¹³² The author argues that UNSC resolution 1593 could not have given the ICC the authority to prosecute al Bashir without regard for his personal immunity because this would amount to a delegation of its Chapter VII powers,¹³³ which is implausible because the ICC is not a UN organ and therefore not competent to receive such delegated authority.¹³⁴

When faced with the question of whether the UNSC can indeed waive immunity of states, Mettraux, Dugard and Du Plessis, opined that it would be reasonable to believe so as the UNSC removed immunities when adopting the Statutes of the *ad hoc* Tribunals,¹³⁵ this would thus not be an unprecedented act.

4 Conclusion

It is generally accepted that Heads of States do not enjoy immunity before international criminal courts and tribunals. The ICC has ruled that the officials of a State that is not a party to the Rome Statute lose their immunity in the context of a referral of a situation by the UNSC to the ICC, as the entirety of the Rome Statute, including the exclusion of immunities provisions becomes applicable to them. This is the result of the State's obligation to comply with decisions of the UNSC. This position has been supported by some scholars as illustrated in this study.

The intention behind UNSC resolution 1593 is to protect the rule of law and combat impunity. Read together with Articles 25 and 103 of the Charter indicate that such resolutions have the effect of setting aside the immunity enjoyed by Heads of State and other high-ranking officials of UN member states referred by the UNSC to the ICC. This has been confirmed by the ICC. However, the UNSC has been silent on the issue. To avoid any uncertainties as to the legal effect of referral resolutions on immunity, in future, it would be more useful for the UNSC to issue explicit and unambiguous resolutions clearly setting aside the immunities enjoyed by

¹³² A Kiyani op cit note 117 at 467.

¹³³ Ibid at 475.

¹³⁴ Ibid.

¹³⁵ Mettraux et al op cit note 66 at 604.

States, if it wishes to do so, when it uses its Chapter VII authority to refer a matter to the ICC using Article 13(b) of the Rome Statute.

Bibliography

Books

Cryer R et al *An Introduction to International Criminal Law and Procedure* (2007) Cambridge.

De Wet E *The Chapter VII Powers of the United Nations Security Council* (2004) Hart.

Pedretti R *Immunity of Heads of State and State Officials for International Crimes* (2013) Brill Nijhoff.

Chapters in books

Cryer R 'International Criminal Justice in Historical Context: The Post-Second World War Trials and Modern International Criminal Justice' in W Gideon Boas & P Michael (eds) *International criminal justice: Legitimacy and coherence* (2012) 145–189.

Articles

Akande D 'The Legal Nature of UNSC Referrals: Impact of the SC Referral on Al Bashir's Immunities' (2009) 7 *Journal of International Criminal Justice* 333-352.

Akande D & Shah S 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2011) 21 *European Journal of International Law* 815-852.

Asaala E 'Rule of Law or Realpolitik? The Role of the United Nations Security Council in the International Criminal Court Processes in Africa' (2017) 17 *African Human Rights Law Journal* 266-294.

Chenwi L & Sucker F 'South Africa's Competing Obligations in Relation to International crimes' (2015) 7 *Constitutional Court Review* 199-245.

Divac Öberg M 'The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ' (2005) 16 *European Journal of International Law* 879-906.

Dyani-Mhango N ‘South Africa’s Dilemma: Immunity Laws, International Obligations, and the Visit by Sudan’s President Omar al Bashir’ 26 (2017) *Washington International Law Journal* 535-571.

Elberling B ‘The Ultra Vires Character of Legislative Action by the Security Council’ (2005) 2 *International Organizations Law Review* 337-360

Kiyani A ‘Al-Bashir & the ICC: The Problem of Head of State Immunity’ (2013) *Chinese Journal of International Law* 467-508.

Mettraux G et al. ‘Heads of State Immunities, International Crimes and President Bashir’s Visit to South Africa’ (2018) 18 *International Criminal Law Review* 577-622.

Talmon S ‘The Security Council as World Legislator’ (2005) 99 *The American Journal of International Law* 175-193.

Whittle D ‘The Limits of Legality and the United Nations Security Council: Applying the Extra-legal Measure Model to Chapter VII Action’ (2015) 26 *European Journal of International Law* 671-698.

Cases

Armed Activities on the Territory of the Congo (New Application 2002) (Democratic Republic of the Congo v Rwanda) Jurisdiction and Admissibility, Judgment, (2001) ICJ Reports 6 (3 February 2006).

Decision on the Cooperation of the Democratic Republic of Congo Regarding Omar al Bashir’s Arrest and Surrender to the Court, Case No. ICC-02/05–01/09 Decision of the Pre-Trial Chamber II (9 April 2014).

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1971) ICJ Reports 16.

Minister of Justice and Constitutional Development and Others v The Southern Africa Litigation Centre and Others 2016 (3) SA 317 (SCA).

Prosecutor v Charles Taylor (Decision on Immunity from Jurisdiction) SCSL 2003–01-I Appeals Chamber (31 May 2004).

Prosecutor v Omar Hassan Ahmad Al Bashir (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) ICC-02/05–01/09–242 Pre-Trial Chamber II (13 June 2015).

Prosecutor v Omar Hassan Ahmed Al Bashir (Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-139-Corr Pre-Trial Chamber I (13 December 2011).

Prosecutor v Omar Hassan Ahmad Al Bashir (Warrant of Arrest for Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-1 Pre-Trial Chamber I (4 March 2009).

Prosecutor v Omar Hassan Ahmad Al Bashir (Decision under Article 87(7) of the Rome Statute on the Non-Compliance by South Africa with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir) ICC-02/05-01/09-302 Pre-Trial Chamber II (6 July 2017).

The Prosecutor v Omar Hassan Ahmed Al Bashir (Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09 Pre-Trial Chamber I (4 March 2009).

Prosecutor v Omar Hassan Ahmad Al Bashir (Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-94 Pre-Trial Chamber I (12 July 2010).

Prosecutor v Omar Hassan Ahmad Al Bashir (Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute) ICC-02/05-01/09-267 Pre-Trial Chamber II (11 July 2016).

Prosecutor v Radislav Krstić ICTY Dissenting Opinion of Judge Shahabuddeen on Decision on Application for Subpoenas IT-98–33-A (1 July 2003).

Prosecutor v Tihomir Blaškić ICTY Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 IT-05–14 (29 October 1997).

Prosecutor v Uhuru Muigai Kenyatta (Notice of withdrawal of charges against Uhuru Muigai Kenyatta) ICC-01/09-02/11-983 Trial Chamber V (5 December 2014).

Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others 2015 (5) SA 402 (GP).

International Treaties

Charter of the United Nations 1 UNTS XVI (24 October 1945).

Rome Statute of the International Criminal Court A/CONF.183/9.

Statute of the International Criminal Tribunal for the Former Yugoslavia (1993) (amended on 17 May 2002).

Statute of the International Criminal Tribunal for Rwanda (1994) (as amended on 13 October 2006).

Vienna Convention on the Law of Treaties Vol 1155,1-18232.

Reports and decisions of international bodies

Extraordinary Session of the Assembly of the African Union *Decision on Africa's Relationship with the International Criminal Court (ICC)* AU Doc. Ext/Assembly/AU/Dec.1 (Oct.2013) at para 5.

Declaratory Statement by the Republic of South Africa on the Decision to Withdraw from the Rome Statute of the International Criminal Court C.N.786.2016.TREATIES-XVIII.10 (19 October 2016).

International Law Commission, Third Report on the Immunity of State Officials from Foreign Criminal Jurisdiction, by the Special Rapporteur, Mr. Roman Kolodkin, 24 May 2001 (A/cn.4/646).