

Protection or Prosecution for Omar Al Bashir? The Changing State of Immunity in International Criminal Law

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I INTRODUCTION

On 4 March 2009, the International Criminal Court (ICC) made its most far-reaching and controversial decision since its establishment in 2002, when it issued the first of two arrest warrants for the current President of the State of Sudan, Omar Hassan Ahmad Al Bashir (Al Bashir).¹ Al Bashir has allegedly committed war crimes, crimes against humanity and genocide during an internal conflict in the western region of Sudan, Darfur between March 2003 and July 2008.² The ICC has widely circulated the arrest warrants with requests for cooperation to authorities in Sudan, all states parties to the Rome Statute of the International Criminal Court (Rome Statute) and all member states of the United Nations Security Council (Security Council).³ Although Al Bashir remains at large, the requests are landmark events. This is the first time that an international criminal court has considered whether a serving Head of State has immunity under international law in international criminal proceedings.⁴ While both Slobodan Milosevic of the former Federal Republic of Yugoslavia and Charles Taylor of Liberia have been tried for war crimes and crimes against humanity before the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Special Court for Sierra Leone (SCSL) respectively, neither were serving Heads of State when they were brought into the custody of international tribunals.

The ICC's decision is also significant because it could be a recurring event. Acting under Chapter VII of the Charter of the United Nations (UN Charter), which empowers the Security Council to take measures to restore international peace and security, the Security Council has referred the

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1 *Prosecutor v Al Bashir (Warrant of Arrest for Omar Hassan Ahmad Al Bashir)* ICC-02/05-01/09, 4 March 2009 [First Arrest Warrant]; *Prosecutor v Al Bashir (Warrant of Arrest for Omar Hassan Ahmad Al Bashir)* ICC-02/05-01/09, 12 July 2010 [Second Arrest Warrant]. Together [Arrest Warrants]. *Prosecutor v Al Bashir (Decision on the Prosecution's Request for a Warrant of Arrest against Omar Al Bashir)* ICC-02/05-01/09, 4 March 2009 [Arrest Warrant Decision].

2 *Arrest Warrants*, ibid. The dates relate to the proceedings against Al Bashir only.

3 Ibid; Rome Statute of the International Criminal Court (opened for signature 17 July 1998, entered into force 1 July 2002) [Rome Statute].

4 Sarah Williams and Lena Sherif "The Arrest Warrant for President al-Bashir: Immunities of Incumbent Heads of State and the International Criminal Court" (2009) 14 JC & SL 71 at 73.

situation in the Libyan Arab Jamahiriya (Libya) since 15 February 2011 to the Prosecutor of the ICC.⁵ Following investigations, the Prosecutor is seeking an arrest warrant for Muammar Mohammed Abu Minyar Gaddafi (Gaddafi) for crimes against humanity allegedly committed in Libya.⁶

A deeper phenomenon in international law lies beneath these high-profile events: the changing state of immunity. Immunity exempts a person from the jurisdiction of foreign domestic courts and international criminal courts.⁷ It facilitates the effective functioning of global international relations and helps states maintain their domestic separation of powers. However, immunity may also shield senior state officials, including Heads of State, from standing trial for international crimes, which enables them to evade justice.⁸ With the rise of the human rights movement and greater international support for ending impunity for perpetrators of international crimes, the boundaries of immunity are being questioned. A key challenge for international criminal law is to reconcile the competing objectives of maintaining stable international relations through immunity rules and ensuring that perpetrators of international crimes are held accountable.

The proceedings against Al Bashir raise a number of international criminal law issues. Sudan is not a state party to the Rome Statute. However, the case arises from a Security Council referral of the situation in Darfur to the ICC.⁹ The Rome Statute establishes and governs the ICC, which is the world's first permanent international criminal court. Now with 118 states parties, the Rome Statute is one of the most important mechanisms for ensuring that those who commit international crimes are held accountable.¹⁰ Although the Pre-Trial Chamber of the ICC concluded that Al Bashir does not enjoy immunity before the ICC, this decision does not exhaust the immunity issue. The Rome Statute prohibits trials in abstentia, so in order to continue proceedings, the ICC must obtain physical custody of Al Bashir.¹¹ As the ICC has no enforcement powers, it must rely on other states to co-operate with its requests, or on the voluntary surrender of Al Bashir by Sudan or the man himself. But it is unclear whether Al Bashir has immunity before domestic courts of foreign states assisting the ICC. If he does, states cannot lawfully arrest and surrender him to the ICC, which means he may be able to avoid standing trial for international crimes.

5 *Security Council Resolution 1970 S/Res/1970 (2011)* at [4]. The referral was issued under art 13(b) of the Rome Statute. All United Nations member states must comply with Security Council resolutions issued under Chapter VII of the Charter: Charter of the United Nations, art 25 [UN Charter].

6 *Prosecutor v Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi (Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi)* ICC-01/11, 16 May 2011.

7 *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium) (Merits)* [2002] ICJ Rep 3 at [5] per Judge Koroma [*Yerodia Decision*].

8 Robert Cryer and others (eds) *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, Cambridge, 2008) at 422.

9 Referral under Rome Statute, above n 3, art 13(b); Arrest Warrant Decision, above n 1, at [240].

10 See International Criminal Court "The States Parties to the Rome Statute" (2011) International Criminal Court <www.icc-cpi.int>.

11 Rome Statute, above n 3, art 63.

The Pre-Trial Chamber's decision to remove Al Bashir's personal immunity before the ICC raises two key questions about immunity under international law. First, can a serving Head of State assert immunity under international law before international criminal courts? Second, what is the appropriate interpretation of immunity under the Rome Statute and how do these treaty rules interact with customary international law and the Security Council referral to the ICC?

After introducing the proceedings against Al Bashir in Part II of this article, Part III will describe the current state of immunity under customary international law. At present, the availability of personal immunity may differ between national and international courts, so Part IV will examine the underlying rationales for personal immunity in search of the most appropriate formulation of these principles before international courts. Part V will discuss immunity and cooperation obligations under the Rome Statute. Finally, Part VI will analyse how the three sources of law — the Rome Statute, customary international law and the Security Council referral — influence Al Bashir's immunity.

II SEEKING THE ARREST OF PRESIDENT AL BASHIR

The Referral of the Situation in Darfur, Sudan

On 31 March 2005, after much political debate, the Security Council issued Resolution 1593 under Chapter VII of the UN Charter.¹² The resolution determined that the situation in Sudan constituted a threat to international peace and security, and referred the situation in Darfur since 1 July 2002 to the Prosecutor of the ICC.¹³ The resolution further required the government of Sudan and all other parties to the conflict to co-operate fully with and provide any necessary assistance to the ICC and Prosecutor of the ICC.¹⁴ States not party to the Rome Statute are not obliged to assist the ICC, but are “urge[d]” to also cooperate with any proceedings. This is the first Security Council referral under art 13(b) of the Rome Statute of a “situation” to the

¹² Security Council Resolution 1593 S/Res/1593 (2005) [Resolution 1593]; Nigel White and Robert Cryer “The ICC and the Security Council: An Uncomfortable Relationship” in José Doria, Hans-Peter Gasser and M Cherif Bassiouni (eds) *The Legal Regime of the International Criminal Court* (Martinus Nijhoff Publishers, Leiden, 2009) 455 at 473.

¹³ For more background information on the situation in Darfur, see Benjamin N Schiff *Building the International Criminal Court* (Cambridge University Press, Cambridge, 2008) at 226–242; and Lucas Buzzard “Holding an Arsonist’s Feet to the Fire? — The Legality and Enforceability of the ICC’s Arrest Warrant for Sudanese President Omar Al-Bashir” [2009] 24 Am U Int’l L Rev 879.

¹⁴ Resolution 1593, above n 12, at [2].

ICC and it is significant given that at least three permanent members of the Security Council are not party to the ICC.¹⁵

Decision of the Pre-Trial Chamber

President Al Bashir is sought as an indirect perpetrator or indirect co-perpetrator of war crimes, crimes against humanity and genocide committed in Darfur between March 2003 and July 2008.¹⁶ He is alleged to have agreed upon a common plan with other high-ranking Sudanese political and military leaders to carry out a counter-insurgency campaign against opposition groups.¹⁷ While he may not have been physically involved in the forcible transfers of persons, acts of murder, extermination, rape, torture and pillage in Darfur, individual criminal responsibility can be imposed on the basis that he was in full or shared control of the “apparatus” of the State of Sudan and directed these unlawful attacks.¹⁸

In addressing the issue of jurisdiction, the Pre-Trial Chamber stated that Al Bashir’s position as Head of State does not prevent him from standing trial before the ICC.¹⁹ Although Sudan is not a state party to the Rome Statute, Al Bashir does not enjoy personal immunity.²⁰ There are four reasons for this decision. First, the Pre-Trial Chamber stated that one of the core goals of the Rome Statute is to end impunity for perpetrators of international crimes. Secondly, in order to achieve this goal, art 27 of the Rome Statute must apply. This provision removes immunity and imposes criminal responsibility on any person, regardless of their status.²¹ Thirdly, art 21 of the Rome Statute provides that sources of law other than the Rome Statute can only be utilised when there is a lacuna in the Rome Statute that cannot be filled by principles of interpretation in the Vienna Convention on the Law of Treaties and by reference to internationally recognised human rights.²² Finally, the case arises from a Security Council referral under art 13(b) of the Rome Statute. The Security Council has accepted that the investigation into the situation in Darfur and any resulting prosecutions will comply with the ICC’s statutory framework.²³

This decision of the Pre-Trial Chamber has been controversial. On the one hand, issuing arrest warrants illustrates the Prosecutor of the ICC’s commitment to hold all persons accountable for international crimes.

¹⁵ White and Cryer, above n 12, at 466–467. The ICC’s jurisdiction may also be triggered by a state referring a situation in its own territory to the ICC or the Prosecutor may initiate an investigation proprio motu into the commission of crimes involving a state party: Rome Statute, above n 3, art 13.

¹⁶ *First Arrest Warrant*, above n 1, at 4; *Second Arrest Warrant*, above n 1, at 7.

¹⁷ *First Arrest Warrant*, above n 1, at 4–6; *Second Arrest Warrant*, above n 1, at 7.

¹⁸ *Arrest Warrant Decision*, above n 1, at [216].

¹⁹ *Ibid.*, at [41].

²⁰ *Ibid.*, at [40]–[41].

²¹ *Ibid.*, at [42]–[43].

²² *Ibid.*, at [44].

²³ *Ibid.*, at [45]. The statutory framework of the ICC includes the Rome Statute, Rules of Evidence and Procedure, and Elements of the Crimes.

However, Al Bashir is of the view that the arrest warrants are illegitimate, as he believes that the ICC is a tool of neo-colonialism used by Western countries to terrorise seemingly disobedient Third World nations.²⁴ In addition, the Arab League and the African Union have criticised the ICC's actions, fearing it will hamper peace efforts in the region.²⁵ Commentators have questioned the Pre-Trial Chamber's reasoning.²⁶

While it is clear and morally agreeable that Al Bashir's position should not enable him to avoid standing trial, the Pre-Trial Chamber's decision leaves many questions unanswered. Before the case can progress to trial, the ICC must obtain custody of Al Bashir, for the Rome Statute prohibits trials in abstentia.²⁷ However, the Sudanese government shows no signs of willingness to surrender Al Bashir, nor is it likely that Al Bashir will surrender himself to the ICC.²⁸ The ICC lacks independent enforcement powers, meaning it must rely on state cooperation to arrest and surrender Al Bashir to the ICC.²⁹ Moreover, it is unclear whether Al Bashir has immunity under international law before foreign domestic courts. Such immunity may make any cooperation illegal. Thus, before analysing Al Bashir's immunity under the Rome Statute, this article will examine his immunity under customary international law.

III IMMUNITY UNDER CUSTOMARY INTERNATIONAL LAW

Immunity is well-established in international law as a possible obstacle to prosecuting international crimes.³⁰ State immunity was first created to ensure sovereign equality between states.³¹ Heads of State originally benefited from immunity due to the absolute identification between the state and its leader. However, international military tribunal proceedings after World War Two made it clear that high-ranking state officials could be held individually responsible for crimes committed while in office.³² Nevertheless, derivative immunity rules have developed to prevent abusive criminal proceedings against state officials, which could call into question indirectly the sovereign acts of a state.³³

Immunity may operate as a procedural bar to foreign national or

24 Sam Dealey "Omar al-Bashir: Q&A: 'In Any War, Mistakes Happen on the Ground'" *Time Magazine* (14 August 2009).

25 Williams and Sherif, above n 5, at 83–84.

26 See Paola Gaeta "Does President Al Bashir Enjoy Immunity from Arrest?" (2009) 7 JICJ 315, at 324–325.

27 Rome Statute, above n 3, art 63.

28 Buzzard, above n 13, at 910.

29 Williams and Sherif, above n 4, at 83.

30 *Yerodia Decision*, above n 7, at [51]. This article does not discuss immunity in civil jurisdictions.

31 Buzzard, above n 13, at 912.

32 Ibid, at 912–913.

33 Steffen Wirth "Immunity for Core Crimes? The ICJ's Judgment in the *Congo v. Belgium Case*" (2002) 13 EJIL 877 at 882.

international criminal proceedings, or as a substantive defence to allegations of reprehensible actions.³⁴ It serves a key role in modern international law by enabling international relations to function properly and promoting a well-ordered legal system.³⁵ But immunity may also shield perpetrators of international crimes from being held accountable for their actions.³⁶ Immunity is provided for the benefit of, and therefore belongs to, the state. It applies unless it is waived by the particular state or removed by a rule of international law.³⁷

While diplomatic immunity is well-defined in the Vienna Convention on Diplomatic Relations 1961, the immunity of serving Heads of State and other senior state officials remains uncertain.³⁸ Without a comprehensive treaty, the area is largely left to the provisions of customary international law.³⁹ There are two main types of immunity granted to state officials under international law: immunity *rationae materiae* and immunity *rationae personae*.⁴⁰

Immunity *rationae materiae* or functional immunity attaches to official acts.⁴¹ It provides current and former state officials with a substantive defence for acts carried out in an official capacity on behalf of the state.⁴² Acts are attributed to the state, not the individual.⁴³ It is derived from the principle of sovereign equality: that one sovereign state cannot, in its own court of law, call into question the acts of another.⁴⁴ Functional immunity applies *erga omnes* between states.⁴⁵

Conversely, immunity *rationae personae* or personal immunity attaches to a particular office.⁴⁶ It provides Heads of State and other senior state officials with absolute inviolability from foreign criminal jurisdictions for any act performed, whether in an official or private capacity, regardless of whether the person is on an official or private trip abroad. The immunity applies to acts performed during or prior to the official's term of office, so long as the person holds the specific office.⁴⁷ Personal immunity enables Heads of State to communicate and travel freely, and conduct their role without fear of prosecution.⁴⁸ These justifications facilitate peaceful

34 Antonio Cassese *International Criminal Law* (2nd ed, Oxford University Press, Oxford, 2008) at 303–304.

35 *Yerodia Decision*, above n 7, at [75] per Judges Higgins, Kooijmans and Buergenthal Separate Opinion.

36 Cryer, above n 8, at 427.

37 Ibid, at 423–424.

38 Ibid, at 424–425.

39 Williams and Sherif, above n 4 at 74.

40 Ibid.

41 Dapo Akande “International Law Immunities and the International Criminal Court” (2004) 98 AJIL 407 at 412 (“International Law”).

42 Ibid, at 413; Cassese, above n 34, at 303–304.

43 Akande “International Law”, above n 41, at 413.

44 Cryer, above n 8, at 423; Cassese, above n 34, at 303.

45 Cassese, above n 34, at 304.

46 Ibid; Akande “International Law”, above n 41, at 409.

47 Cassese, above n 34, at 304.

48 Akande “International Law”, above n 41, at 410.

cooperation and mutual respect between states.⁴⁹ Personal immunity is only a procedural bar, so former Heads of State may later be tried for international crimes, subject to their entitlement to functional immunity.⁵⁰

Key Influences on Immunity Rules: the Rise of International Criminal Law

In recent decades, the boundaries of immunity and accountability under international law have come under intense scrutiny.⁵¹ Broad legal fictions, such as the representative theory, have been rationalised, so functional necessity is now the most convincing explanation for immunity in international law.⁵² Significant developments in international criminal law are central to this re-evaluation of immunity principles.

1 Introduction to International Criminal Law

International criminal law is a relatively new and unique branch of international law.⁵³ It has developed by gradual accretion from, and continues to be influenced by, international humanitarian law, human rights law and national criminal law.⁵⁴ Whereas international law typically governs the rights and responsibilities of states and regulates relations between states, international criminal law focuses upon the individual and imposes individual criminal responsibility for international crimes.⁵⁵ International criminal law poses a fundamental challenge to immunity for international crimes, especially those within the ICC's jurisdiction as international crimes are often committed by the purported recipients of immunity — state organs and officials.⁵⁶ The discipline encompasses substantive rules, which define crimes and modes of liability, and procedural rules, which regulate international criminal proceedings.⁵⁷ "International crimes" are crimes prohibited by international law because they threaten the international community as a whole.⁵⁸ The ICC has jurisdiction over three of these crimes: genocide, war crimes and crimes against humanity.⁵⁹

49 Buzzard, above n 13, at 914.

50 Cassese, above n 34, at 304.

51 Cryer, above n 8, at 422.

52 Chanaka Wickremasinghe "Immunities Enjoyed by Officials of States and International Organisations" in Malcolm D Evans (ed) *International Law* (2nd ed, Oxford University Press, Oxford, 2006) 395 at 396.

53 Cassese, above n 34, at 4.

54 Ibid, at 6–7.

55 Cryer, above n 8, at 1.

56 Claus Kreß and Kimberly Prost "Article 98: Cooperation with respect to waiver of immunity and consent to surrender" in Otto Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article* (2nd ed, Verlag C. H. Beck oHG, München, 2008) 1601 at 1608.

57 Cassese, above n 34, at 3.

58 Ibid.

59 Rome Statute, above n 3, art 5.

2 The Concept of Individual Criminal Responsibility

At the heart of international criminal law is the notion of individual criminal responsibility.⁶⁰ As the infamous quote from the Nuremberg Tribunal states: “Crimes against International Law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of International Law be enforced.”⁶¹ The concept that individuals are only subject to their state’s criminal jurisdiction has been progressively rejected and states have slowly shifted towards asserting more extraterritorial jurisdiction for international crimes.⁶² The crucial turning point for the concept was after World War Two. The International Military Tribunals of Nuremberg and Tokyo were provided with jurisdiction to try not only low-ranking servicemen, but senior state agents of military command and political leadership for crimes committed during the war.⁶³

3 Principle of the Irrelevance of Official Capacity

The development of the principle of the irrelevance of official capacity has been equally important. Historically, senior state officials have been able to assert their official position as a defence to individual responsibility for international crimes.⁶⁴ However, art 7 of the Charter of Nuremberg explicitly states for the first time that a defendant’s official position will not free them from responsibility nor mitigate any punishment.⁶⁵ This article was affirmed by the UN General Assembly and, together with the principle of individual criminal responsibility, has been endorsed in the founding documents of the ad hoc criminal tribunals, the ICC and certain conventions combating international crimes.⁶⁶

4 Creation of New International Criminal Bodies

Developments in international criminal law have also led to the creation of new mechanisms for adjudicating international crimes.⁶⁷ In the 1990s, the Security Council, acting under Chapter VII of the UN Charter, created

⁶⁰ Ciara Damgaard *Individual Criminal Responsibility for Core International Crimes* (Springer, Berlin, 2008) at 15.

⁶¹ *France v Göring* (1946) 22 IMT 203 at 466.

⁶² See Cassese, above n 34, at 28–31; *Yerodia Decision*, above n 7, at [73] per Judges Higgins, Kooijmans and Buergenthal Separate Opinion.

⁶³ Cassese, above n 34, at 30. See Damgaard, above n 60, for further discussion on developments of individual criminal responsibility.

⁶⁴ Cassese, above n 34, at 305. See Damgaard, above n 60, for further information on the evolution of the irrelevance of official capacity, including the Treaty of Versailles.

⁶⁵ Cassese, above n 34, at 305.

⁶⁶ David S Koller “Immunities of Foreign Ministers: Paragraph 61 of the *Yerodia Judgment* as it Pertains to the Security Council and the International Criminal Court” [2004] 20 Am U Intl L Rev 7 at 20–21.

⁶⁷ *Yerodia Decision*, above n 7, at [73] per Judges Higgins, Kooijmans and Buergenthal Separate Opinion.

the ICTY and the International Criminal Tribunal for Rwanda (ICTR), to improve stability and justice in the two regions. These ad hoc tribunals have catalysed the establishment of the ICC and a variety of other “hybrid” bodies.⁶⁸ Each international body may have a specific legal basis, as well as temporal, territorial and subject matter jurisdiction, but each aims to end impunity for international crimes.⁶⁹

Current State of Immunity under Customary International Law

The key developments in international criminal law outlined above have been driving forces behind critical evaluation of immunity granted by international law to serving Heads of State accused of committing international crimes.⁷⁰

1 Functional Immunity under Customary International Law

In 1998, the infamous *Pinochet* case before the House of Lords sparked debate over the functional immunity of former state officials charged with committing international crimes before foreign domestic courts.⁷¹ Chile’s former Head of State, Senator Augusto Pinochet, was arrested in London while seeking medical treatment. This arrest followed a request that he be extradited to Spain in order to stand trial for crimes, including the *jus cogens* crime of torture committed against Spanish nationals in the 1970s and 1980s. Pinochet asserted functional immunity before the English courts.⁷² Six of the seven judges in the House of Lords concluded that Pinochet did not have immunity, although the precise reasoning for this conclusion is difficult to determine, as each judge issued a separate opinion.⁷³ This position has been reaffirmed in a number of subsequent cases in other national jurisdictions.⁷⁴

Accordingly, commentators have widely stated that following this decision in the House of Lords and considering the international community’s desire to promote accountability for international crimes, international law does not grant these state officials immunity from foreign domestic criminal proceedings.⁷⁵ Remarkably, the International Court of Justice (ICJ) failed to confirm this development in the *Yerodia* decision, for which it has been strongly criticised.⁷⁶ Given the nature of functional

68 Cryer, above n 8, at 446–447. New international criminal bodies include the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia and the Special Tribunal for Lebanon.

69 Damgaard, above n 60, at 14–17.

70 Cassese, above n 34, at 307; Cryer, above n 8, at 422.

71 *R v Bow Street Metropolitan Stipendiary Magistrate and other ex parte Pinochet Ugarte (No. 3)* [2000] 1 AC 147 at 190 (HL) [*Pinochet*].

72 Cryer, above n 8, at 429–430.

73 Wickremasinghe, above n 52, at 415.

74 Cryer, above n 8, at 434–435.

75 Ibid, at 432.

76 Ibid, at 436–437.

immunity, these arguments against its application can be translated to the international context.⁷⁷

2 Personal Immunity under Customary International Law

Under customary international law, Heads of State and other high-ranking state officials enjoy full immunity from coercive acts and criminal proceedings by foreign domestic courts for official and private acts. This immunity ensures that they can carry out key state functions without undue interference by another state.⁷⁸ In the *Yerodia* decision, the ICJ had to decide whether Belgium had violated customary international law by issuing an arrest warrant for the Democratic Republic of Congo's then incumbent Minister of Foreign Affairs, Abdulate Yerodia Ndombasi, for war crimes and crimes against humanity. The ICJ could not deduce from state practice that an exception in the form of a customary rule had developed to remove personal immunity, even for accusations of committing international crimes.⁷⁹ The ICJ justified its conclusion on the basis that immunity, which is a procedural barrier to proceedings, does not equate to impunity, which entails a separate concept of individual criminal responsibility and substantive liability.⁸⁰ Although the ICJ has affirmed this position in a subsequent decision, it remains a sensitive issue.⁸¹

However, in the international context, the *Yerodia* decision created a possible exception to personal immunity. In a broadly worded statement of obiter dictum, the ICJ stated that although Heads of State enjoy complete personal immunity before foreign domestic courts, former and incumbent Heads of State may be subject to criminal proceedings before certain international courts "where they have jurisdiction".⁸² The ICJ cites the irrelevance of official capacity provisions contained in art 7(2) of the Statute for the ICTY, art 6(2) of the Statute for the ICTR and art 27(2) of the Rome Statute, which removes immunity before the ICC. Although only obiter, this statement remains an important declaration from the principal judicial organ of the United Nations — that incumbent Heads of State may not have immunity in criminal proceedings before international criminal bodies.⁸³

77 *Ibid.*, at 434.

78 *Yerodia Decision*, above n 7, at [53].

79 *Ibid.*, at [54]–[55].

80 *Ibid.*, at [60]. Judge Wyngaert disputes this distinction in a dissenting opinion at [34]–[38].

81 Gionata Piero Buzzini "Lights and Shadows of Immunities and Inviolability of State Officials in International Law: Some Comments on the *Djibouti v. France* Case" (2009) 22 LJIL 455 at 483.

82 *Yerodia Decision*, above n 7, at [61]. The ICJ draws an analogy between the official functions of incumbent Ministers of Foreign Affairs and Heads of State in international relations. Therefore, the ICJ's comments apply to personal immunity of incumbent Heads of State. See also Koller, above n 66, at 11.

83 Damgaard, above n 60, at 56. There is no principle of judicial precedent in international criminal law. The ICJ's decision is not binding upon other international criminal courts and tribunals.

IV QUESTIONING THE AVAILABILITY OF PERSONAL IMMUNITY BEFORE INTERNATIONAL COURTS

The *Yerodia* decision raises the possibility of distinguishing between the availability of personal immunity for current Heads of State before foreign domestic courts and international courts. In order to determine whether there should be differing immunity rules, this article will analyse the underlying rationales for personal immunity.

Personal Immunity before National Courts

There are three key justifications for the wide scope of immunity against foreign domestic criminal proceedings for serving Heads of State. First, personal immunity preserves the dignity of the state.⁸⁴ Although Heads of State may now incur individual criminal liability, the “Head of State” position remains an important component of the modern international legal system.⁸⁵ Secondly, as a practical consideration, personal immunity prevents disruptions to the internal structure and functioning of a state, which may occur if its leader is subjected to the criminal jurisdiction of another state. But most importantly, personal immunity is necessary to enable senior state officials to carry out key sovereign functions.⁸⁶ Interlinked with the functional necessity rationale is the principle of sovereign equality: that one sovereign state cannot use its own courts of law to pass judgment on acts of another state.⁸⁷

Personal Immunity before International Criminal Courts and Tribunals

In the international context, there is ongoing debate about the appropriate balance between upholding sovereign equality, which presupposes a system of immunity, and the need for accountability and protection of human rights.⁸⁸ Unfortunately, the ICJ did not qualify its proposition of an exception to personal immunity before international criminal courts and tribunals. It is unclear whether the ICJ posited the far-reaching consequence of eliminating all personal immunity before any international court, or whether it intended a more reserved shift in principle so that immunity may be overridden in accordance with known principles of law.⁸⁹ Is it the “international nature” of the court itself that is central to this exception or

84 Koller, above n 66, at 15.

85 *Yerodia Decision*, above n 7, at [75] per Judges Higgins, Kooijmans and Buergenthal Separate Opinion.

86 Ibid, at [54].

87 Akande “International Law”, above n 41, at 409.

88 Ibid, at 407.

89 Kreß and Prost, above n 56, at 1610.

the particular provisions of the statute creating the court?⁹⁰ The ambiguous nature of the ICJ's statement has given rise to a range of viewpoints, each reflecting differing priorities in international criminal law and international law.

1 Personal Immunity does not apply before International Courts

(a) *Jus Cogens* Argument

There are two key arguments for the irrelevance of personal immunity before international courts. The first argument draws on developments in international human rights law and states that immunity does not apply to international criminal proceedings involving crimes of *jus cogens* nature. *Jus cogens* norms are pre-emptory norms recognised by states as being superior to other norms of international law.⁹¹ The higher status of these norms necessitates that they should prevail over any lesser and conflicting rules, such as immunity when prosecuting international crimes before international courts.⁹² The argument appeals to moral values and the international community's commitment to upholding fundamental norms.

Judge Al-Khasawneh affirmed this view in his dissenting opinion in the *Yerodia* decision. The move towards greater accountability for international crimes and increased recognition of the need to combat these grave crimes effectively are vital community values that require hierarchically higher norms to override any rules of immunity.⁹³ Academics widely support this argument.⁹⁴ It is also consistent with art 53 of the Vienna Convention on the Law of Treaties, which states that treaties may be void if they conflict with pre-emptory norms of international law.⁹⁵ However, there are still few instances of "hard" state practice upholding these principles.⁹⁶ As Judge Al-Khasawneh acknowledges, the idea of fundamental norms overriding immunity is at a "very nebulous stage of development".⁹⁷ While morally attractive, national courts have rejected the argument and commentators have severely criticised it for lacking a principled legal basis.⁹⁸ Critics fail to see how the *jus cogens* nature of the crime, which prohibits substantive acts, accounts for the removal of immunity, which is a procedural matter.⁹⁹

90 Cryer, above n 8, at 443.

91 Dinah Shelton "International Law and 'Relative Normativity'" in Malcolm D Evans (ed) *International Law* (2nd ed, Oxford University Press, Oxford, 2006) 159 at 164.

92 *Ibid.*

93 *Yerodia Decision*, above n 7, at [7]–[8] per Judge Al-Khasawneh (dissenting).

94 For example, see Shelton, above n 91, at 159, 163–173; but see Akande "International Law", above n 41, at 414.

95 Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) [Vienna Convention].

96 Cryer, above n 8, at 427–428.

97 *Yerodia Decision*, above n 7, at [8] per Judge Al-Khasawneh (dissenting).

98 Cryer, above n 8, at 427–428.

99 *Ibid.*

(b) Underlying Rationales for Personal Immunity do not apply before International Courts

Other commentators argue that the “international nature” of international courts precludes the need for immunity. The Appeals Chamber of the SCSL endorsed the view that the “international nature” of the SCSL denied immunity to Charles Taylor (the former President of Liberia, who was indicted while still serving as President) for war crimes and crimes against humanity committed during the internal conflict in Liberia in 2004.¹⁰⁰ The Appeals Chamber declared that, although not immediately evident, the ICJ distinguishes between the application of immunity between national and international courts because concerns of sovereign equality are irrelevant before international criminal tribunals.¹⁰¹ International courts derive their mandate from the international community which safeguards against unilateral judgment by one state.¹⁰²

Some commentators have heavily criticised the decision. Deen-Racsmany calls the conclusion an “obvious — but ever so dangerous precedent” for immunity in international criminal proceedings.¹⁰³ Frulli is disappointed by the Appeals Chamber’s reliance on the SCSL’s “international nature” and sovereign equality. These arguments divert attention from what should have been the core analysis: whether a treaty-based court may remove the immunity of a serving leader of a third party state.¹⁰⁴

On the other hand, Kreß and Prost believe that the decision has a sound legal basis.¹⁰⁵ They argue that international courts should be viewed more purposefully as having the *jus puniendi* of the international community.¹⁰⁶ Any collective judgment rendered represents the will of the international community and this “collective nature” enables treaty-based courts to prosecute all persons, including the serving leader of a third party state.¹⁰⁷ This argument for the irrelevance of personal immunity before international courts is based on policy considerations. International courts have been established as additional mechanisms for combating impunity. Therefore, rules that are an obstacle to fulfilling this objective should be excluded. Accordingly, immunity granted under international law is unavailable in criminal proceedings before international courts.

However, a number of commentators disagree with this approach. Koller argues that a general exception based on the court’s “international

¹⁰⁰ *Prosecutor v Charles Gankay Taylor (Decision on Immunity from Jurisdiction)* SCSL-2003-01-I-059, 31 May 2004, at [51]–[53].

¹⁰¹ *Ibid.*, at [51].

¹⁰² *Ibid.*, at [51]–[52].

¹⁰³ Zsuzsanna Deen-Racsmany “*Prosecutor v. Taylor: The Status of the Special Court for Sierra Leone and Its Implications for Immunity*” (2005) 18 LJIL 299 at 320.

¹⁰⁴ Micaela Frulli “The Question of Charles Taylor’s Immunity: Still in Search of a Balance Application of Personal Immunities?” (2004) 2 JICJ 1118 at 1124.

¹⁰⁵ Kreß and Prost, above n 56, at 1612.

¹⁰⁶ *Ibid.*, at 1608.

¹⁰⁷ *Ibid.*, at 1612.

nature” breaches the fundamental *pacta tertiiis* rule codified in art 34 of the Vienna Convention on the Law of Treaties, which provides that states are only bound by treaty provisions to which they expressly agree.¹⁰⁸ Koller understands that international courts may offer additional safeguards against abusive proceedings. However, he believes that this reasoning fails to explain how the fairness of the tribunal, which has nothing to do with its legal creation, can disregard important immunity principles of international law.¹⁰⁹ Indeed, even art 27(2) of the Rome Statute, which explicitly removes all forms of immunity for ICC proceedings, acknowledges the existence of immunity before international courts. Van Alebeek also doubts whether the “international mandate” can remove established immunity rules under international law.¹¹⁰ After all, what constitutes an “international” court? How can a group of states create an international court with the ability to remove immunity under international law when they do not have this power individually?¹¹¹

Koller and Van Alebeek have a more positivist view of immunity before international courts. They acknowledge recent developments in international criminal law, but are not convinced that existing explanations for the removal of personal immunity have a sound legal basis. Personal immunity is a well-established rule of international law, which has developed over time to fulfil a particular purpose. Therefore, these commentators believe that incumbent Heads of State are entitled to immunity before international courts until it is removed by another rule of international law or voluntarily waived by that state.

2 Personal Immunity is Applicable until Waived by the Particular State

Akande agrees that personal immunity applies before international courts and tribunals. To suggest that immunity is non-existent before an international tribunal to which the state has not consented subverts the policy underpinning immunity in international law.¹¹² Any blanket removal of personal immunity before all international courts also oversimplifies the matter. There are important distinctions between the different types of immunity under international law.¹¹³ Instead, Akande focuses on whether a state has waived the immunity of its officials. This waiver depends on the nature of the tribunal and the provisions establishing the court. In order for immunity of a state official to be removed, the person must be bound by the statutory provision removing immunity.¹¹⁴ Therefore, whether a court is

¹⁰⁸ Koller, above n 66, at 32.

¹⁰⁹ Ibid.

¹¹⁰ Rosanna Van Alebeek *The Immunity of States and their Officials in International Criminal Law and International Human Rights Law* (Oxford University Press, Oxford, 2008) at 275.

¹¹¹ Cryer, above n 8, at 443.

¹¹² Akande “International Law”, above n 41, at 417–418.

¹¹³ Ibid, at 417.

¹¹⁴ Ibid.

established by a treaty or pursuant to a Security Council resolution issued under Chapter VII of the UN Charter significantly affects its ability to remove personal immunity of state officials.¹¹⁵

Akande's suggestion offers a clear method of statutory interpretation to determine whether a state official has immunity before an international court. No inquiries into a court's "international nature" are required. Any removal of immunity of Heads of State is justified by the text of the founding statute and the obligations assumed by the state of the official in question. While providing certainty, a key problem with this approach is the limited extent to which it can recognise important developments in international criminal law. The international court is bound by its own legal creation and the obligations assumed by states in its constitutive document.

3 Removal of Immunity by a New Rule of Customary International Law

Finally, other commentators argue that a new rule of customary international law has developed. This rule removes personal immunity before international courts. It engages the positivist framework of international law, but also includes a broader range of sources of state practice, policy considerations and developments in international criminal law.

Customary international law rules develop gradually over time and are binding on all states.¹¹⁶ In order to create a new customary rule, objective state practice and an accompanying *opinio juris* or belief in the rule is required.¹¹⁷ Proponents for the new customary rule argue that with the increasing complexity of the international legal system and the greater variety of forms of state practice, the traditional two limb test of creating a new customary rule is insufficient.¹¹⁸ Instead, a modern positivist approach looks beyond the configuration of international practice and analyses whether a proposition can be safely derived from general principles governing the broad legal evolution or a set of related international law norms.¹¹⁹ This analysis includes "hard" state practice, such as international judicial decisions, and "softer" state practice, such as official state pronouncements.¹²⁰ Gaeta cites two examples of state practice supporting this new customary rule: the SCSL's decision to deny immunity on the basis of sovereign equality to Charles Taylor and the lack of protest when the ICTY issued an arrest warrant against the serving Head of State, Slobodan Milosevic.¹²¹ Advocates of this new rule also argue that underlying rationales for personal immunity are irrelevant in international criminal proceedings, for international courts are composed of impartial

¹¹⁵ Ibid.

¹¹⁶ Damgaard, above n 60, at 32–33.

¹¹⁷ Ibid. at 32.

¹¹⁸ Kreß and Prost, above n 56, at 1611–1612.

¹¹⁹ Ibid. at 1611.

¹²⁰ Ibid.

¹²¹ Gaeta, above n 26, at 321.

judges with specialised knowledge of international criminal law, judges who act on behalf of the international community.¹²²

Arguments for the development of a new customary rule are persuasive, as they recognise different moral and policy considerations as well as key developments in international criminal law. These factors mount a persuasive argument for a new rule within the international system's existing legal framework rather than not recognising immunity at all in international criminal proceedings. They also best express the evolving attitudes of states toward creating a "culture of accountability" in the international system. However, the formation of a customary rule that binds all states is complex. Elements of state practice and other evidence to support this argument are highly contested. It is difficult to pinpoint the exact creation of a rule, thus making this argument controversial.

Immunity under the Rome Statute

The current state of immunity under customary international law cannot be understood without recognising significant developments in immunity rules under the Rome Statute. The Rome Statute is a treaty-based framework for prosecuting perpetrators of the worst international crimes in which there are two key provisions relating to immunity: arts 27 and 98.¹²³

Article 27 is the core treaty provision relating to immunity. It asserts that official capacity is irrelevant before the ICC. All persons, including government or military leaders, can be held directly responsible for international crimes. Article 27(2) expressly removes immunity granted under national or international law in ICC proceedings. However, art 27 must be interpreted in conjunction with art 98. Article 98 preserves international law immunity of third states by prohibiting the ICC from requesting surrender or assistance where the requested state would have to act inconsistently with obligations under international law. While art 98 is a reminder of the treaty-based limits of the Rome Statute, art 27 is nevertheless a key development in international criminal law.

A Turning Point for Immunity under International Law

Although the debate has tended to focus on the legal basis of any exception, it appears that underlying rationales for personal immunity in domestic criminal proceedings in foreign states still apply to a certain extent before international courts. Despite arguments otherwise, Al Bashir may still have immunity under international law. This uncertainty in immunity rules complicates the application of the Rome Statute, which must be interpreted against the backdrop of existing customary international law. It may also create conflicting customary and treaty obligations for states who wish to

¹²² Cassese, above n 34, at 311–312.

¹²³ These articles will be discussed in Part V.

execute the ICC's requests relating to Al Bashir.¹²⁴ Without further decisions of international courts regarding immunity, no definitive conclusions of an exception to personal immunity can be drawn.

Each argument shows the international community's desire to remove immunity as an obstacle to prosecuting international crimes. But states and commentators have differing levels of tolerance for moving away from the positivist, consent-based framework of international law to create new exceptions, especially ones based on broader considerations of international criminal justice. One solution is to encourage universal ratification of the Rome Statute so that all states will be bound by the same legal framework for prosecuting three core international crimes.

However, even without universal ratification, over half of the world's states have agreed to be bound by art 27 of the Rome Statute. The proceedings against Al Bashir challenge immunity principles and present a unique opportunity for the ICC to express changes to immunity rules. The possible proceedings against the current leader of Libya, Gaddafi, may also raise immunity issues. Immunity under customary international law has reached a turning point and any future decisions of an international court relating to immunity will be significant. Having concluded that Al Bashir may still be entitled to immunity under customary international law, this article will now examine his immunity in the context of the Rome Statute.

V IMMUNITY AND COOPERATION UNDER THE ROME STATUTE

In order to impose individual criminal responsibility on Al Bashir, any immunity granted under international law must be lifted. Therefore, the immunity provisions under the Rome Statute play a key role in transforming criminal investigations into trial proceedings. Unfortunately, the Pre-Trial Chamber's decision does not specifically address immunity. There are two important immunity provisions under the Rome Statute: arts 27 and 98.

Removal of Immunity under the Rome Statute: Arts 27 and 98

Article 27 is the main immunity provision under the Rome Statute. It asserts that all persons, regardless of their official capacity, can be held responsible for committing international crimes. Article 27 states:¹²⁵

- (1) This statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or

¹²⁴ These complications will be discussed in Parts V and VI.

¹²⁵ Rome Statute, above n 3, art 27.

parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

(2) Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the court from exercising its jurisdiction over such a person.

This provision expressly removes procedural and substantive immunity before the ICC.¹²⁶ Article 27(1) primarily addresses the substantive responsibility of state officials by declaring that a state official may not use his or her official status to evade individual criminal responsibility for international crimes, nor use it as a defence.¹²⁷ The Rome Statute applies to every person, irrespective of their official position. This reflects the reality that international crimes are often planned and instigated by senior state officials, who are no less responsible than the persons committing these crimes on the ground.

Article 27(2) is an unprecedented express waiver of personal and functional immunity, whether granted under national or international law before the ICC.¹²⁸ This provision enables the ICC to issue arrest warrants and requests for surrender, and to commence criminal proceedings. However, it is not a general waiver of immunity.¹²⁹ As a treaty provision, art 27 cannot impose obligations on third states that have not consented to the ICC's jurisdiction. Regrettably, the Pre-Trial Chamber does not mention that the true scope of art 27's removal powers for the provision cannot be properly understood without considering art 98(1). Article 98(1) states:¹³⁰

The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

Article 98(1) seems to work against art 27, as it preserves immunity of third states under international law. It addresses the situation where one state party is asked to surrender the national of a third state, who enjoys immunity under international law.¹³¹ Under art 98(1), the ICC must not request the assistance or surrender of a person from a state that would be

¹²⁶ Akande "International Law", above 41, at 419–421.

¹²⁷ *Ibid.*, at 419.

¹²⁸ *Ibid.*, at 420.

¹²⁹ Kreß and Prost, above n 56, at 1608.

¹³⁰ Rome Statute, above n 3, art 98.

¹³¹ Kreß and Prost, above n 56, at 1603.

required to act inconsistently with obligations owed to third states under international law. The meaning of “third state” in art 98(1) has been hotly debated, for different interpretations significantly affect the ICC’s ability to arrest and prosecute suspects.

One interpretation is that “third state” means any party other than the state that has custody of the suspect.¹³² Thus, art 27 only removes immunity in “vertical proceedings” between a state and the ICC, while state officials retain immunity in foreign national jurisdictions.¹³³ As a practical consequence, immunity under international law acts as a procedural bar in foreign domestic courts when a suspect, whether a national of a state party or non-party state, is found in the territory of a third state. This immunity prevents the third state from lawfully arresting and surrendering the suspect to the ICC. Article 98(1) requires the ICC to obtain a waiver of immunity from the suspect’s state in order for the ICC’s request to be lawfully executed.¹³⁴ This interpretation is justified on the basis that drafters of the Rome Statute used terms such as “non contracting state” and “states not party to the statute” to refer specifically to non-party states.¹³⁵

However, the Rome Statute is a diplomatically negotiated treaty. Articles 27 and 98 were drafted independently of each other in separate committees without consideration for consistent wording throughout the Rome Statute.¹³⁶ Therefore, it would be wrong to place too much emphasis on the differences in exact wording between provisions.¹³⁷ Instead, the main problem with this interpretation is that it operates contrary to the principle of effectiveness for interpreting treaties.¹³⁸ Interpreting “third state” as requiring a waiver of immunity whenever a state official is found outside of their own state’s territory effectively nullifies art 27’s removal of immunity. A waiver would always be required to execute the ICC’s requests, save for a few instances and the voluntary surrender of a suspect.¹³⁹ Apart from causing significant delays and impairing the ICC’s ability to obtain suspects and undertake criminal proceedings, it would be contradictory if, having agreed to waive immunity for state officials in ICC proceedings, a state party could then rely on immunity to prevent its officials from being surrendered to the ICC when found in another state’s territory.¹⁴⁰ This clearly defeats the purpose of the Rome Statute.

The better interpretation of art 98(1) is that “third state” refers to a

¹³² Paola Gaeta “Official Capacity and Immunities” in Antonio Cassese, Paola Gaeta and John RWD Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, Oxford, 2002) 975 at 993.

¹³³ Ibid, at 996–999.

¹³⁴ Ibid, at 993.

¹³⁵ Ibid.

¹³⁶ Dapo Akande “The Legal Nature of Security Council Referrals to the ICC and its impact on Al Bashir’s Immunities” (2009) 7 JICJ 333 at 337 [“Legal Nature”].

¹³⁷ Ibid.

¹³⁸ Ibid, at 338.

¹³⁹ Akande “International Law”, above n 41, at 424.

¹⁴⁰ Ibid, at 423–424; Akande “Legal Nature”, above n 136, at 338.

non-party state of the ICC.¹⁴¹ Pursuant to art 27, states parties are deemed to have waived immunity of their officials in vertical proceedings before the ICC and horizontal proceedings between national jurisdictions of states parties. Under this interpretation, art 27 is a general relinquishment of immunity between states parties. Hence, art 98(1) only requires the ICC to obtain a waiver of immunity where the third state has not ratified the Rome Statute and therefore has immunity under customary international law.

In practice, this interpretation of art 98(1) properly expresses art 27. It reduces the need for the ICC to obtain waivers of immunity and enables the ICC to carry out international criminal proceedings in a more effective and principled manner. This interpretation is consistent with the Rome Statute's objects and purposes. Akande notes that several states parties have enacted domestic legislation as further supporting this interpretation of arts 27 and 98(1).¹⁴² It also matches the ICC's cooperation obligations, which enable the ICC to investigate and prosecute perpetrators of international crimes.

Cooperation Obligations under the Rome Statute

State cooperation is crucial to the effective functioning and success of the ICC. Unlike domestic courts, which can rely on national authorities to gather evidence and apprehend suspects, the ICC does not have police forces to execute its requests.¹⁴³ As a treaty-based institution, it is built upon state consent. The ICC relies on states to provide assistance and carry out its requests in order to gather necessary information, obtain custody of suspects and undertake criminal proceedings. The ICC's cooperation regime is noticeably weaker than those of the ICTY and the ICTR. Being established by the Security Council acting under Chapter VII of the UN Charter, the ICTY and ICTR can issue orders which are binding on states.¹⁴⁴ By contrast, only states parties to the Rome Statute are required to cooperate with the ICC in its investigation and prosecution of crimes.¹⁴⁵

Sudan has not ratified the Rome Statute and so *prima facie* is entitled to immunity under international law. However, this case arises from a Security Council referral of the situation in Darfur to the ICC. Resolution 1593 requires Sudan to co-operate with the ICC. This raises two key questions about Al Bashir's immunity as a serving Head of State. First, how can art 27, a treaty provision that is only binding on states parties to the Rome Statute, remove Al Bashir's immunity before the ICC? Second, as a serving Head of State, Al Bashir has absolute immunity before domestic courts in foreign states. Therefore, can other states execute the

141 Ibid, at 425–426.

142 Ibid, at 422.

143 Cassese, above n 34, at 346.

144 Ibid, at 347–348.

145 Rome Statute, above n 3, art 86.

ICC's requests for assistance, and arrest and surrender Al Bashir to the ICC? In order to resolve these questions, it is necessary to first determine the legal nature of the Security Council referral.

VI THE LEGAL EFFECT OF THE SECURITY COUNCIL REFERRAL

As Resolution 1593 illustrates, art 13(b) of the Rome Statute enables the Security Council to extend the ICC's jurisdiction over a state not party to the Rome Statute. Resolution 1593 states that all investigations into the situation in Darfur and any resulting proceedings must be undertaken in accordance with the Rome Statute.¹⁴⁶ However, this is the first Security Council referral to the ICC. Therefore, it is unknown precisely how the provisions of the Rome Statute apply to a non-party state. To further complicate matters, the Rome Statute does not have any additional specific provisions to explain the legal consequences of a Security Council referral on the operation of the ICC.¹⁴⁷

The resolution also does not address immunity of state officials. This omission adds another layer of complexity to any legal analysis of Al Bashir's immunity. The ICC must determine how treaty rules contained in the Rome Statute, customary rules of international law and obligations deriving from the UN Charter, particularly the Security Council's Chapter VII powers, interact with and affect Al Bashir's immunity under international law. Any conclusion reached should guarantee lasting respect for international justice and its enforcement.¹⁴⁸

Three commentators have sought to explain how the Security Council referral affects Al Bashir's immunity before foreign national and international courts.

Gaeta: The Security Council Referral as a Trigger Mechanism Only

Gaeta argues that a referral under art 13(b) of the Rome Statute only triggers the ICC's jurisdiction. The Rome Statute continues to only bind states parties to the treaty unless the Security Council expressly requires United Nations member states to comply with ICC requests.¹⁴⁹ In the latter case, art 103 of the UN Charter requires states to uphold obligations arising under the UN Charter over other conflicting international agreements.¹⁵⁰

¹⁴⁶ Resolution 1593, above n 12, at [2].

¹⁴⁷ Luigi Condorelli and Santiago Villalpando "Referral and Deferral by the Security Council" in Antonio Cassese, Paola Gaeta and John RWD Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, Oxford, 2002) 627 at 629.

¹⁴⁸ Rome Statute, above n 3, Preamble [11].

¹⁴⁹ Gaeta, above n 26, at 324.

¹⁵⁰ UN Charter, art 103.

Resolution 1593 falls short of this express requirement, as it only “urges” United Nations member states (other than Sudan) to co-operate with the ICC. The Security Council has granted the ICC jurisdiction to investigate the situation in Darfur, but the ICC continues to operate within the treaty-based framework of the Rome Statute. Gaeta argues that the Security Council referral does not turn Sudan into a state party to the Rome Statute.¹⁵¹ Undertaking investigations and proceedings in accordance with the Rome Statute means that provisions of the Rome Statute only apply to Al Bashir to the extent that they bind nationals of a non-party state.¹⁵² Therefore, art 27 cannot remove Al Bashir’s immunity under international law.

Nevertheless, issuing and circulating the arrest warrants against Al Bashir is still legal. Gaeta believes that a new customary international law rule has developed, a rule that removes the immunity of serving Heads of States before international courts.¹⁵³ International courts act on behalf of the international community, which renders concerns about interfering with sovereign equality or official functions irrelevant.¹⁵⁴ Thus, serving Heads of State do not enjoy personal immunity before any international court.

However, Gaeta distinguishes between issuing arrest warrants for Al Bashir, which is legal, and circulating requests for his surrender, which is illegal.¹⁵⁵ Although Al Bashir does not enjoy immunity before international courts, he retains absolute immunity before national courts of foreign states. Gaeta believes that states violate international law if they disregard his personal immunity under international law and execute the ICC’s requests.¹⁵⁶ In fact, the ICC has breached art 98(1) of the Rome Statute by issuing such requests, as states must choose between upholding immunity obligations under international law and fulfilling the ICC’s requests.¹⁵⁷ Instead, the ICC must wait for Al Bashir to surrender himself voluntarily, or for Sudan to surrender him to the ICC. Alternatively, if Al Bashir leaves his position of power, he will lose personal immunity before foreign domestic courts, in which case the requests for cooperation can be lawfully circulated and fulfilled.¹⁵⁸

Akande: The Security Council Referral and Chapter VII of the Charter of the United Nations

In contrast, Akande argues that the Security Council referral introduces the overriding powers of Chapter VII of the UN Charter, which significantly

¹⁵¹ Gaeta, above n 26, at 324.

¹⁵² Ibid. at 323–324.

¹⁵³ Ibid. at 324–325.

¹⁵⁴ Ibid. at 321–323.

¹⁵⁵ Ibid. at 315.

¹⁵⁶ Ibid. at 331.

¹⁵⁷ Ibid. at 329–331.

¹⁵⁸ Ibid. at 331–332.

affects legal obligations under the Rome Statute. By acting under art 13(b) of the Rome Statute, the Security Council accepts that all investigations into the situation in Darfur and any subsequent criminal proceedings will be undertaken in accordance with the Rome Statute. In doing so, the Security Council's decision adopts implicitly the provisions of the Rome Statute, rendering them binding on Sudan not as treaty obligations, but as obligations under United Nations law.¹⁵⁹ The combined effect of Resolution 1593 and art 25 of the UN Charter, which requires member states to accept and carry out Security Council decisions, is that Sudan is in an analogous position as a state party to the ICC.¹⁶⁰ Therefore, art 27 of the Rome Statute, operating as a provision of the Security Council decision, removes Al Bashir's personal immunity before the ICC and national courts of all United Nations member states acting in support of the ICC.¹⁶¹

This removal of Al Bashir's immunity means that conflicting obligations do not arise under art 98(1) of the Rome Statute. States parties to the ICC can arrest and surrender officials of other states parties to the ICC.¹⁶² However, determining whether non-party states may arrest Al Bashir is more complex. These states have no legal obligation to arrest Al Bashir. Resolution 1593 only "urges" them to provide assistance.¹⁶³ Akande argues that the Security Council's implicit adoption of art 27 effectively creates a "right" for non-party states to arrest Al Bashir.¹⁶⁴ But states need a reason to prefer this "right" over immunity obligations in customary international law. States cannot rely upon art 103 of the UN Charter, which provides that obligations under the Charter prevail over any "other international agreement", as this case involves conflicting UN Charter obligations and immunity rules under customary international law.

However, Akande provides two justifications for non-party states to prefer the ICC's requests to arrest and surrender Al Bashir to the ICC over immunity obligations under international law. First, the UN Charter obligations may be seen as having a higher "constitutional" status, which should take priority over customary international law. Second, treaties generally prevail over customary law obligations.¹⁶⁵ Accordingly, Akande believes that the arrest warrants and requests for assistance for Al Bashir from the ICC are legal. States parties and non-states parties to the ICC can therefore execute lawfully the ICC's requests.

¹⁵⁹ Akande "Legal Nature", above n 136, at 333–334, 336.

¹⁶⁰ Ibid, at 342.

¹⁶¹ Ibid, at 340–342.

¹⁶² Ibid, at 342.

¹⁶³ Ibid, at 344.

¹⁶⁴ Ibid, at 342–348.

¹⁶⁵ Ibid, at 348.

Papillon: The Security Council Referral and the Implied Waiver Theory

Like Akande, Papillon also argues that the referral introduces the Security Council's decision-making powers under Chapter VII of the UN Charter. However, the combination of the implied waiver theory and the development of a new customary rule explain the removal of Al Bashir's immunity before the ICC and foreign domestic courts.¹⁶⁶ Resolution 1593 triggers the ICC's jurisdiction over the situation in Darfur, but the provisions of the Rome Statute, including art 27, remain binding only on states parties to the treaty.¹⁶⁷ Papillon argues that a new customary rule has developed, which removes Al Bashir's immunity before international courts.¹⁶⁸ Papillon further believes that the mandate of international courts is superior to those of states, rendering fears of interference with state sovereignty and official functions by other states irrelevant.¹⁶⁹

But this new customary rule only removes immunity before international courts.¹⁷⁰ The Security Council's referral now becomes central to explaining Al Bashir's lack of immunity before foreign national courts. Otherwise, without a waiver of Al Bashir's immunity before foreign national courts, the ICC will have breached art 98(1) of the Rome Statute by requesting the cooperation of states, which brings into conflict customary and treaty law obligations.

Papillon argues that the immunity of state officials may be waived implicitly or explicitly in ad hoc circumstances or through more abstract means, such as treaties.¹⁷¹ The Security Council has broad powers under Chapter VII of the UN Charter to take measures to maintain or restore international peace and security. As illustrated by creating the ICTY and ICTR, these powers include the ability to remove implicitly the immunity of state officials in criminal proceedings before the ad hoc tribunals.¹⁷² When joining the UN, states give an implicit waiver, which enables the Security Council to remove immunity of state officials when acting under Chapter VII of the UN Charter. States must accept these decisions under art 25 of the UN Charter.¹⁷³

Papillon applies this reasoning to explain the removal of Al Bashir's immunity before national jurisdictions.¹⁷⁴ By joining the UN, Sudan waived impliedly the immunity of its state officials. Resolution 1593 removes

¹⁶⁶ Sophie Papillon "Has the United Nations Security Council Implicitly Removed Al Bashir's Immunity?" (2010) 10 Int CLR 275.

¹⁶⁷ Ibid, at 282–284.

¹⁶⁸ Ibid, at 279–282, 284–285.

¹⁶⁹ Ibid, at 281.

¹⁷⁰ Ibid, at 284–285.

¹⁷¹ Ibid, at 279–280. Papillon notes that Lord Goff is in the contrary position to the implied waiver theory in the *Pinocchet* decision: *Pinocchet*, above n 71.

¹⁷² Ibid, at 285–286.

¹⁷³ Ibid, at 288.

¹⁷⁴ Ibid, at 279–280.

implicitly Al Bashir's immunity in foreign domestic courts of other states, enabling states to carry out the ICC's requests. Papillon further justifies this conclusion on the basis that the Security Council was exercising its principal function of maintaining international peace and security when it referred the situation in Darfur to the ICC. Also, the implied waiver mirrors the abstract nature of referrals, as the Security Council can only refer "situations" to the ICC for investigation.¹⁷⁵ Papillon also believes that the implicit removal of immunity is consistent with the Security Council's goal when acting under Chapter VII of the UN Charter and art 13(b) of the Rome Statute, which is to end impunity for perpetrators of international crimes that threaten international peace.¹⁷⁶

Analysis of the Different Approaches

Each commentator offers well-reasoned, yet unique interpretations of how the Security Council's referral of the situation in Darfur to the ICC influences Al Bashir's personal immunity before the ICC and foreign domestic courts. Of the three, Gaeta grants the most limited role to the Security Council referral. Gaeta is unwilling to infer that the referral requires all member states to co-operate with the ICC unless this intention is clearly expressed. Therefore, the referral of the Darfur situation triggers the ICC's jurisdiction and the Rome Statute only applies to states parties to the treaty.

Akande and Papillon believe that the Security Council referral significantly affects Al Bashir's immunity under international law. Both commentators agree that the Security Council referral removes implicitly Al Bashir's personal immunity. However, each interprets art 13(b) in a slightly different way. Akande argues that the Security Council endows the provisions of the Rome Statute with the force of United Nations law, enabling art 27 to operate beyond the treaty framework and remove Al Bashir's immunity. This approach is based upon the hierarchy of obligations within the UN, particularly the Security Council's overriding powers for dealing with threats to international peace and security. In contrast, Papillon keeps the analysis of the Security Council referral distinct from the ICC's legal framework. Papillon believes that a newly developed rule of customary international law and the implied waiver theory explains the Security Council's implicit removal of Al Bashir's immunity. Although both commentators reach some common conclusions, each argument reflects different priorities and favours different sources of international law. Any legal effect attributed to the referral must be carefully analysed, for any conclusions of Al Bashir's immunity will influence the future development of immunity under international law.

Gaeta is clear that justice must be done for the horrendous crimes

¹⁷⁵ Ibid, at 285–286.

¹⁷⁶ Ibid, at 283, 286.

committed in Sudan. But Gaeta believes that justice must be achieved within distinct rules that regulate interactions between sources of international law.¹⁷⁷ If the Security Council does not issue express binding orders on states, the boundaries of treaty law, particularly the fundamental *pacta tertii* principle, must be respected. Gaeta is aware that this strict legalistic approach may lead to unpleasant results. If Sudan does not waive Al Bashir's immunity, it is the only state that can lawfully arrest Al Bashir while he remains in a position of power. However, Gaeta fears any other interpretation of the referral will undermine the ICC's credibility as an impartial and independent system, and generate the perception that the ICC is open to being manipulated in order to achieve certain political goals.¹⁷⁸ Gaeta believes that respect for the ICC and international criminal justice is best preserved through obeying inherent limits of treaty law, even if the ICC and the international community must wait for other solutions to arise in order to arrest Al Bashir.

But by remaining loyal to a key principle of treaty interpretation, Gaeta's approach undermines another important notion: that any respectable system of international criminal justice must be effective. The ICC is one of the newly established international criminal bodies designed to fill gaps in criminal accountability left open by national jurisdictions.¹⁷⁹ The very definition of crimes within its jurisdiction illustrate that perpetrators of these crimes are often senior state officials, who abuse their position of power in order to commit widespread international crimes.¹⁸⁰ In these situations, state officials will assert personal immunity to bar the ICC's jurisdiction. Given the conflicting objectives of international law and international criminal law, it is arguable that the rules governing the interactions of sources of law should be interpreted less rigidly. To determine the most appropriate legal effect of a Security Council referral, one must consider art 13(b)'s purpose.

During negotiations for the Rome Statute, a small minority of states strongly opposed including a provision that would allow the Security Council to recommend situations or cases for the ICC to investigate. These states feared that a referral from the politically-oriented Security Council would taint the legitimacy and independence of the ICC.¹⁸¹ However, the majority of states agreed that a provision was necessary and reached a compromise in the form of art 13(b) of the Rome Statute. Some commentators consider the ICC to be an "ad hoc permanent international criminal tribunal". On this view, the ICC draws upon the experiences of the ad hoc criminal tribunals established by the Security Council under Chapter VII of the UN Charter, but negates the need to establish further

¹⁷⁷ Gaeta, above n 26, at 315.

¹⁷⁸ Ibid, at 315, 330.

¹⁷⁹ Rome Statute, above n 3, 4th Preamble.

¹⁸⁰ See generally Rome Statute, above n 3, arts 6–8.

¹⁸¹ Sharon A Williams and William A Schabas "Article 13: Exercise of Jurisdiction" in Otto Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article* (2nd ed, Beck, München, 2008) 563 at 568.

tribunals, which are costly to create and time-consuming to organise.¹⁸² However, there are significant differences between the Security Council's ability to influence the mandate and procedures of the ad hoc criminal tribunals and the ICC's mandates and procedures. The ICC is governed by the Rome Statute and the Office of the Prosecutor determines against whom to initiate criminal proceedings following a referral from the ICC.¹⁸³

Therefore, it seems that Gaeta's approach of interpreting the Security Council referral as a mere trigger mechanism is not the most appropriate formulation of art 13(b). This interpretation prevents the provision's purpose from being fulfilled. It seems incongruous that the creators of the Rome Statute would enable the Security Council to refer situations to the ICC, which may extend the ICC's jurisdiction over non-party states, yet immunity rules under international law may impair the success of such investigations and proceedings. As Papillon correctly observes, it is also significant that referrals to the ICC are made in abstract terms. Issues of immunity of state officials may not arise in the Security Council's discussion of the situation, so an abstract implicit removal of immunity by the Security Council would be acceptable.¹⁸⁴ After all, any resolution referring a situation to the ICC must be passed by a sufficient consensus in the Security Council, which excludes a veto vote of a permanent Security Council member.

Thus, this author would prefer Akande and Papillon's analyses. Akande presents a coherent argument for removing Al Bashir's immunity before the ICC. However, the explanation relating to non-party states of the Rome Statute is more problematic. The idea that the Security Council has created a "right" to arrest Al Bashir that can be preferred over customary rules is based on broad principles. Akande refers to the apparent "majority view" among writers — given that the UN Charter has a sort of "constitutional" nature and that treaties generally prevail over customary law obligations, this higher legal status should explain why states may execute the ICC's requests for Al Bashir. Article 103 of the UN Charter does not apply, as it only relates to conflicting UN Charter obligations with other international agreements. However, it could lend indirect support to Akande's argument, as art 103 shows that UN Charter obligations can prevail over another source of law: international agreements. Given the general nature of this reasoning, one may question whether this argument is convincing enough to allow states to disregard immunity. On the other hand, this interpretation seeks to ensure that all states are able to assist the ICC in capturing Al Bashir, enabling justice to be served through criminal proceedings. Akande's arguments also show a strong desire to fulfil the purposes of art 13(b) and the UN Charter in general.

Finally, Papillon's approach is intriguing. It also draws on the Security

¹⁸² Condorelli and Villalpando, above n 147, at 628.

¹⁸³ Ibid.

¹⁸⁴ Papillon, above n 166, at 285.

Council's mandatory decision-making powers, but includes an element of state consent through the implied waiver theory. For Papillon, the starting point for interpreting an implicit removal of Al Bashir's immunity by the Security Council begins at an earlier point in time: when states join the UN. By committing to the UN Charter — of which justice, international peace and security, and friendship among nations are among its key purposes and principles — states give an implied waiver of immunity. This implied waiver acknowledges that, in certain circumstances, the Security Council may implicitly remove immunity in order to achieve more fundamental goals.

Lord Goff disputes this notion of implied waiver. He believes that waivers in international agreements must be express, otherwise parties will disagree about whether immunity applies to a particular situation or agreement and there will be international chaos.¹⁸⁵ However, the implied waiver theory is less concerned with textual certainty of treaties. Instead, it focuses on achieving wider and, from this perspective, more important goals of the international community. The theory can be justified on the basis that when persons breach certain international standards of behaviour, especially *jus cogens* norms (for example, by committing genocide), these persons should not have immunity. The implied waiver theory favours upholding fundamental norms and facilitating international proceedings to try perpetrators of international crimes over allowing such persons to enjoy immunity.

Until Al Bashir is arrested and surrendered to the ICC so that trial proceedings can begin, it is unknown if these approaches to immunity, if any, will be adopted by the ICC. The ICC has a difficult task. It must make innovative decisions regarding immunity that develop international criminal law while also keeping states parties and other observers convinced of its awareness of the international legal system in which it operates.¹⁸⁶ Despite the legal basis of any decision regarding immunity, the ICC's decision will be interpreted politically.

Perhaps the ICC will prefer a more technical approach that allows the Rome Statute's operation to be enhanced by the UN legal framework. This enables the ICC to conduct effective investigations and proceedings, and also emphasises the Security Council's support for ICC investigations and proceedings relating to the Darfur situation. But any approach that relies heavily on the Security Council's Chapter VII powers is open to criticism about the Security Council's nature. Criticisms may include negative opinions on unequal voting rights, potential bias within the Security Council and the inherently political decision-making process.

Therefore, Papillon's approach should be considered seriously as

¹⁸⁵ *Pinochet*, above n 71, at 215–217 per Lord Goff.

¹⁸⁶ Robert Cryer "The International Criminal Court and its relationship to Non-State Parties" in Carsten Stahn and Göran Sluiter (eds) *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers, Leiden, 2009) 115 at 121.

a viable explanation for the removal of Al Bashir's immunity. Papillon's reasoning process combines the development of a new customary rule, a technical removal of immunity by the Security Council acting under Chapter VII of the UN Charter and the implied waiver theory. This theory draws on the underlying values of international criminal law and supports the international community's increasing desire to end impunity for international crimes. It highlights that, by virtue of their membership to the United Nations, all member states consent to immunity of their state officials being removed where it is necessary to uphold *jus cogens* norms and fundamental human rights, and to achieve justice for international crimes. This approach reflects the evolving attitudes of the international community. This evolution may change how established legal principles, such as immunity, operate in order to prosecute those who continue to commit abhorrent international crimes. Judicial endorsement of this reasoning process by the ICC would be invaluable to the continued development of, and support for, key principles of international criminal law.

VII CONCLUSION

On 4 March 2009, the ICC issued the first of two arrest warrants for the serving President of Sudan, Omar Al Bashir. Al Bashir has allegedly committed war crimes, crimes against humanity and genocide in an internal conflict in the western region of Sudan, Darfur between March 2003 and July 2008. Sudan is not a state party to the Rome Statute, but the Security Council has referred the situation in Darfur to the ICC under art 13(b) of the Rome Statute. The Security Council has ordered Sudan to co-operate with the ICC. The Pre-Trial Chamber has stated that Al Bashir is not entitled to immunity as a serving Head of State before the ICC. However, a number of issues regarding his immunity before the ICC and domestic courts of foreign states are left unresolved.

The Pre-Trial Chamber's decision is significant, as it sparks further debate about whether Heads of State have personal immunity under international law before international courts. Although different arguments for an exception to personal immunity are raised, it cannot be decided conclusively that underlying rationales for personal immunity are irrelevant before international courts. Thus, Al Bashir may have personal immunity under international law. Despite this uncertainty, the creation of art 27 of the Rome Statute is a key development in the fight to end impunity for those who commit international crimes.

This article also discusses three competing arguments regarding the legal effect of the Security Council referral on Al Bashir's immunity. Each approach reflects different priorities in international law. The author prefers approaches that provide the Security Council referral with a greater

role in removing Al Bashir's immunity; in particular, Papillon's argument. Papillon explains Al Bashir's lack of immunity before the ICC and domestic courts of foreign states by using the Security Council's decision-making powers under Chapter VII of the UN Charter and the implied waiver theory. The implied waiver theory best reflects significant developments in international criminal law and is consistent with achieving the key purposes and principles of the Charter. Under this approach, President Al Bashir does not have immunity before the ICC or in foreign national jurisdictions of states seeking to execute the ICC's arrest warrants and requests for surrender.

Schiff describes the ICC as a "work in progress".¹⁸⁷ As this article illustrates, immunity too is a work in progress in international law. Immunity under international law is currently undergoing significant change. Further judicial analysis and decisions of international courts are needed to clarify this contested area of law. Consequently, any decisions made regarding Al Bashir's immunity and possibly Gaddafi's will affect not only the immunity of the state leader in question, but also the development of immunity rules in the wider context of international criminal justice.

¹⁸⁷ Schiff, above n 13, at 3.