Head of State Immunity at the International Criminal Court

Legal Consequences of UN Security Council Referrals for Personal Immunities

Candidate number: 686

Submission deadline: 25.4.2018 kl. 12.00.

Number of words: 17972
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<th>Abbreviation</th>
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<tr>
<td>AC</td>
<td>Appeals Chamber</td>
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<td>e.g.</td>
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<td>ed./eds.</td>
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<td><em>et al.</em></td>
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<td>GC</td>
<td>Convention on the Prevention and Punishment of the Crime of Genocide</td>
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<td>i.a.</td>
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<td><em>Ibid.</em></td>
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<td>ICC</td>
<td>International Criminal Court</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICL</td>
<td>International Criminal Law</td>
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<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
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<td>ICTY</td>
<td>International Criminal Tribunal for the former Yugoslavia</td>
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<td>IMT</td>
<td>International Military Tribunal (at Nuremberg)</td>
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<td>OTP</td>
<td>Office of the Prosecutor</td>
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<td><em>per se</em></td>
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<td>PTC</td>
<td>Pre-Trial Chamber</td>
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<td>Rome Statute/</td>
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<td>SCSL</td>
<td>Special Court for Sierra Leone</td>
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<td>States Parties</td>
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<td>UN</td>
<td>United Nations</td>
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<td>the Council</td>
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<td>UNSCR</td>
<td>United Nations Security Council Resolution</td>
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<td>VCDR</td>
<td>Vienna Convention on Diplomatic Relations</td>
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<td>VCLT</td>
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1 Introduction

1.1 Object of the thesis

*Par in parem non habet imperium* – an equal has no authority over an equal – is the maxim that expresses the historical foundation of State immunity.\(^1\) State immunity means that the State enjoys immunity from jurisdiction on foreign territory.\(^2\) International law prescribes the Sovereign State as its basic unit,\(^3\) and States’ sovereignty implies that they are equal.\(^4\) The concepts of sovereignty and equality of States denotes that States have exclusive jurisdiction over their territory and its populace. Moreover, these concepts entail the duty to not intervene in other States’ jurisdiction, and that consent is the basic form of committing to rules that govern relations between States – international law.\(^5\) Historically, in a world community of equal and sovereign States, absolute immunity was granted to a travelling sovereign on foreign territory at the behest of the host State’s sovereign.\(^6\) The Sovereign personified the State itself – and the equality of States implied that one sovereign had no authority over another sovereign.\(^7\) Thus, the sovereign was immune under the host State’s jurisdiction. The grant of immunity subsequently developed into an obligation under customary international law.\(^8\)

Today, State immunity facilitates the basic functioning of the State and its representatives on foreign territory by preventing the prosecution of State officials in foreign courts.\(^9\) Contemporary State immunity is split into two distinct categories – functional and personal immunity.\(^10\) Functional immunity protects the sovereignty of the State on State officials’ visits to foreign States. This immunity is limited to official acts, by which the State representative exercises governmental authority.\(^11\) Personal immunity, however, covers all acts of a person while in office, and is only granted to highest-ranking State officials.\(^12\)

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2 Malanczuk/Akehurst, Akehurst’s modern introduction to international law (Routledge, 1997) 118
3 Brownlie/Crawford (n1) 447
4 Ibid.
5 Malanczuk/Akehurst (n2) 1-2, 118
6 Brownlie/Crawford (n1) 487
7 Ibid. 489
9 Ibid. Brownlie/Crawford 488
10 Immunity ratione materiae and personae, see Part 3.3
11 Pinochet 3 (n1) 644
12 Arrest Warrant (n8) para. 53; Malanczuk/Akehurst (n2) 118
Personal immunity stands in the way of criminal justice when injustice is done by these highest-ranking State officials while incumbent. Therefore, the goal of the International Criminal Court (“ICC” or “the Court”) is to “end (...) impunity for the perpetrators of [the most serious crimes of concern to the international community as a whole],” including sitting Heads of State. The Rome Statute of the ICC (“Rome Statute” or “the Statute”) was adopted in 1998, and the Court was established in 2002. States Parties to the Statute (“States Parties”) have by consenting to Article 27(2) accepted the irrelevancy of immunities for their nationals under the Court’s jurisdiction. A Head of State of a State Party, e.g. King Harald V of Norway, could not claim immunity. Heads of State of non-State Parties, however, have no obligations to waive immunities in face of the Court.

There exist three ways for the ICC to initiate exercise of its jurisdiction over a State (“trigger” its jurisdiction), a UN Security Council referral (“UNSC referral”) being one of them. UNSC referrals can trigger the ICC’s jurisdiction over States that are not party to the Rome Statute. When that happens, the question becomes what to make of the personal immunity of the Head of State of the non-State party. This is because a non-State party has not consented to render its immunities irrelevant through Article 27(2). Furthermore, a complicating factor is that the Court relies on its States Parties to enforce its decisions. States Parties are obliged to cooperate with the Court’s requests. When the Court requests a State Party’s cooperation to arrest and surrender a Head of State of a non-State Party on the State Party’s territory, there is a conflict of fundamental norms – personal immunity in customary international law v. a treaty-based obligation to cooperate. The ICC holds that in the case of a UNSC referral, any claim to personal immunity before the Court (the Court’s adjudicatory jurisdiction) is eroded for the referred non-State party. Moreover, it holds that the same immunities also are rendered irrelevant in States Parties’ national jurisdictions (the ICC’s enforcement jurisdiction), obliging States Parties to cooperate with the Court’s request for arrest and surrender. In practice, though, many States Parties refuse to act on the Court’s requests for arrest and surrender of Heads of State. With scholarly support, they cite that personal immunities are left intact in their national jurisdictions, unless the UNSC referral expresses otherwise.

13 Pinochet 3 (n1) 644
15 Cassese, Cassese’s international criminal law (OUP, 2013) 324
16 Although there could be domestic constitutional issues, see Part 3.5.1
17 Article 13 Rome Statute (n14). The other two are State referrals and the Prosecutor proprio motu, see Part 2
18 Articles 86, 87(1)(a) Rome Statute (n14)
19 See Part 4
20 See Part 5
The topic of this thesis is the legal consequences of UNSC referrals for personal immunities for non-State parties. The conflict finds its roots in a disagreement on issues of contemporary international law, namely the hierarchy of international law and the role of UNSCRs, and the balance between international criminal law’s goal of ending impunity for the most serious crimes and State sovereignty. The object of the thesis is to determine whether the ICC’s interpretation of UNSC referrals’ implications for personal immunities is justifiable *de lege lata*, and examine the best interpretation *de lege ferenda*.

1.2 Research questions and aim

The research questions are:

1) What are the legal effects of a UNSC referral to the ICC of a situation in a State not party to the Rome Statute on the personal immunity of the Head of State of the referred situation’s State, and

2) What are the legal effects of such a UNSC referral on the obligations of States Parties to the Rome Statute to cooperate with the ICC in the arrest and surrender of the Head of State of the referred situation’s State?

The aim of this thesis is to distil the core legal issues that are central to the vastly different interpretations of UNSC referrals to the ICC. I aim to show the shortcomings in the ICC’s case law, and to inspire a more coherent and thorough legal approach in the ICC’s future jurisprudence on the matter.

1.3 Methodology

The primary sources of international law are treaties, customary international law and general principles of law.\(^{21}\) Legal theory and judicial decisions are secondary sources for interpretation of the law.\(^{22}\) In identifying the obligations that follow from the Rome Statute, the Statute itself is the primary source of law for the judges at the ICC.\(^{23}\) However, when analysing the relationship between UNSC Resolutions (“UNSCRs”) and the ICC, several legal sources have to be interpreted together. Judges at the ICC can secondarily, “where appropriate, [apply] ap-

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\(^{21}\) Article 38(1)(a-c) Statute of the International Court of Justice (“ICJ Statute”) (adopted 26.6.1945), annexed to the Charter of the United Nations

\(^{22}\) *Ibid.* Article 38(1)(d)

\(^{23}\) Article 21(1)(a) Rome Statute (n14)
plicable treaties and the principles and rules of international law”. They can resort to such other sources of law when “there is a lacuna in the written law contained in the Statute (…) and such lacuna cannot be filled by the application of the criteria provided for in Articles 31 and 32 of the Vienna Convention on the Law of Treaties [VCLT] and Article 21(3) of the Statute”. This thesis will analyse the ICC’s latest case law in the Al-Bashir case. Relevant legal literature will be examined in order to substantiate and expand on differing interpretations of UNSC referrals to the ICC.

1.4 Structure and demarcation

In Part 2 of the thesis I will review the historical and legal background of the ICC and the Al-Bashir case. In Part 3 I will analyse personal immunity as a rule of customary international law and the derogation from this rule in the Rome Statute. In Part 4 I will analyse and assess the latest case law of the ICC in the Al-Bashir case regarding the legal consequences of UNSC referrals for personal immunities of non-State parties. In Part 5 I will examine the research questions, by analysing whether the Court’s latest case law is justifiable de lege lata. I will analyse and assess alternative interpretations of UNSCRs in the context of UNSC referrals to the ICC. In Part 6 I will analyse and assess the research questions de lege ferenda. I will consider that there is a better interpretation than that of the Court’s latest case law. Since international law is – arguably – political, it is relevant to include political ramifications. In Part 7 I conclude by answering the research questions de lege lata and de lege ferenda.

Due to the limited scope of this thesis, I will not review all relevant approaches pertaining to personal immunities at the ICC de lege lata. For example, I will not discuss an exception to personal immunities in customary international law for international crimes. There is general agreement that there is no such exception. Nor will I discuss whether the Genocide Convention includes an obligation to cooperate with the ICC that prevails over personal immunities.

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24 Article 21(1)(b) Rome Statute (n14)
25 Meaning “gap” (in the law), see Garner, A dictionary of modern legal usage (OUP, 1995) 496
26 Article 34 Vienna Convention on the Law of Treaties (“VCLT”) (adopted 22.5.1969), 1155 UNTS 18232
27 The Prosecutor v. Omar Al-Bashir (“Al-Bashir”), Arrest Warrant I, 4.3.2009 (ICC-02/05-01/09-1) 44
28 Al-Bashir (ICC-02/05)
29 For a thorough analysis, see Kress, The International Criminal Court and Immunities, in State Sovereignty and International Criminal Law, eds. Bergsma/Ling (TOAEP, 2012) 243-262
Case law and legal literature are divided. However, I will examine both approaches de lege ferenda.

2 Background on the ICC, the Darfur situation and the Al-Bashir case

This Part briefly reviews the development and function of the ICC, in light of the historical and legal development of the situation in Darfur and the Al-Bashir case. Building on the momentum after the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) in the early 1990s, the ICC was established in cooperation with the UN. However, the ICC is a separate and treaty-based international organisation. In contrast, the ad hoc tribunals were created by UNSCRs and were, as such, subsidiary organs of the UN.

The ICC has jurisdiction over “the most serious crimes of concern to the international community as a whole”. These are the crime of genocide, crimes against humanity, war crimes and the crime of aggression. The Court has jurisdiction ratione temporis over crimes committed after the entry into force of the Statute for a State Party. It may exercise this jurisdiction on three different bases: A) a State Party refers to the Prosecutor a situation in which one or more crimes under the Statute appear to have been committed, B) the UNSC refers to the Prosecutor a situation in which one or more crimes under the Statute appear to have been committed, or C) the Prosecutor initiates an investigation of such a crime proprio motu. For situation A and C the exercise of jurisdiction also depends on whether the Court has jurisdic-

31 For a thorough discussion with different perspectives, see Steinberg, Contemporary issues facing the International Criminal Court (Brill Nijhoff, 2016); “What should the ICC do about the Darfur Situation?,” ICC Forum; Al-Bashir, PTC II, Minority Opinion in the South Africa Decision, 11.12.2017 (ICC-02/05-01/09-309-Anx-tENG) paras. 20-38; Al-Bashir, PTC II, South Africa Decision, 6.7.2017 (ICC-02/05-01/09-302) para. 109
32 UNSCR 827, 25.5.1993 (S/RES/827)
33 UNSCR 955, 8.11.1994 (S/RES/955)
34 Cassese (n15) 262-3
35 O’Keefe, International Criminal Law (OUP, 2015) 532
36 Ibid. 488
37 Article 5(1) Rome Statute (n14)
38 Ibid. Article 5(1)(a-d); The crime of aggression is “activated” on 17.7.2018, see Assembly of States Parties, Decision to activate the crime of aggression, 14.12.2017 (ICC-ASP/16/ Res.5)
39 Ibid. Article 11; Jurisdiction “by reason of time,” see Fellmeth/Horwitz, “Ratione temporis,” in Guide to Latin in international law (OUP, 2009)
40 Ibid. Article 13
41 “From [her] own motion”, see “Proprio (suo) motu” in Fellmeth/Horwitz (n39)
tion *ratione loci* and *personae*. The alleged criminal conduct must either have happened on the territory of a State Party or been exercised by a national of a State Party.

In situation B, where the UNSC (“the Council”) refers a situation to the Prosecutor, the Council acts under Chapter VII of the Charter of the United Nations (“UN Charter”). A UNSC referral determines that a situation is a “threat to international peace and security”. The Rome Statute does not impose any preconditions on the exercise of jurisdiction as the UNSCR itself defines the limitations of ICC’s jurisdiction *ratione temporis* and *loci*.

UNSC referrals can trigger the ICC’s exercise of jurisdiction over non-States parties to the Rome Statute. International law resides on the premise that “[a] treaty does not create either obligations or rights for a third State without its consent”. An analysis of the relation between UNSC referrals and the Rome Statute is thus required to explore whether referrals have implications for personal immunities in spite of this premise.

The question is of current interest. Since the entry into force of the Rome Statute, the Prosecutor of the ICC has received two referrals from the UNSC: the situation in Darfur, Sudan, since 1.7.2002, and in Libya since 15.2.2011. For Darfur UNSCR 1564 requested the establishment of a commission to investigate violations of international humanitarian and human rights law in the wake of reports on destruction of villages and over a million displaced persons in the region. On 31 March 2005, after receiving the report of the commission, UNSCR 1593 referred the situation to the ICC. The UNSC further decided that “Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance

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42 Jurisdiction “by reason of place,” and “by reason of person,” see “Ratione loci” and “Ratione personae” in *Ibid.;* based on the “active nationality principle”, see Malanzuk/Akehurst (n2) 111; Article 12(2)(a-b) Rome Statute (n14)
44 *Ibid. Article 39;* Preamble, UNSCR 1593, 31.3.2005 (S/RES/1593)
46 It is technically possible for the UNSC to refer situations in States Parties. It should be recalled that a referral is to the Prosecutor, who makes the decision on whether to pursue an investigation
47 Article 34 VCLT (n26), an expression of the customary international law rule that “treaties cannot infringe the rights of third states without their consent”, Brownlie/Crawford (n1) 384
48 UNSCR 1593 (n44) para. 1. There is no fixed endpoint.
49 UNSCR 1970 (n45) para. 4
50 UNSCR 1564, 18.9.2004 (S/RES/1564)
52 UNSCR 1593 (n44) para. 1
to the Court and the Prosecutor pursuant to this resolution”.\textsuperscript{53} It also “urge[d] all States (…) to cooperate fully”.\textsuperscript{54}

An arrest warrant was issued for Omar Hassan Ahmad Al-Bashir (Al-Bashir), the President of Sudan, in 2009.\textsuperscript{55} The ICC has no police force to effectuate its decisions. Therefore, States Parties are obliged to comply with the Court’s requests for arrest and surrender when a person is on their territory.\textsuperscript{56} However, since 2009, Al-Bashir has travelled to numerous States Parties.\textsuperscript{57} The ICC has issued requests for arrest and surrender to States Parties, but none have been acted upon. States Parties have cited Al-Bashir’s immunity as Head of State as grounds for not cooperating.\textsuperscript{58}

The inaction of States Parties stands in stark contrast to their obligation to cooperate under the Statute. The conviction that “Al-Bashir is not going to be able to leave Sudan without facing arrest” was misjudged.\textsuperscript{59} The ICC’s Pre-Trial Chambers (“PTCs”) preside over cases before the go to trial, and are i.a. competent to issue arrest warrants.\textsuperscript{60} On the basis of an arrest warrant, a PTC may request States Parties to cooperate with arrest and surrender of the individual.\textsuperscript{61} If States Parties fail to cooperate with the Court’s requests, the PTC is competent to make a finding to that effect and refer the non-compliance to the Assembly of State Parties (“ASP”) and the UNSC.\textsuperscript{62}

The PTCs have issued numerous decisions against States Parties because of their non-compliance with requests. In these decisions, the Court’s \textit{rationes decidendi} for the irrelevance of Al-Bashir’s personal immunity before the ICC and vis-à-vis States Parties has been inconsistent. Initially, the Court considered that personal immunities were irrelevant for the

\begin{itemize}
\item \textsuperscript{53} Ibid. para. 2
\item \textsuperscript{54} Ibid.
\item \textsuperscript{55} Al-Bashir, Arrest Warrant I (n27). The second arrest warrant included indictment for the crime of genocide, see Al-Bashir, PTC I, Arrest Warrant II, 12.7.2010 (ICC-02/05-01/09-95). An arrest warrant was also issued for Muammar Gaddafi, Libyan Head of State, before he was killed, see \textit{The Prosecutor v. Gaddafi et al.}, PTC I, Arrest Warrant for Gaddafi, 27.6.2011 (ICC-01/11-13); \textit{Gaddafi}, Transmission of death certificate, 9.11.2011 (ICC-01/11-01/11-22)
\item \textsuperscript{56} Article 89(1) Rome Statute (n14)
\item \textsuperscript{57} At least 14 States Parties, see OTP, “Twenty-Fourth Report” (2005)
\item \textsuperscript{58} Al-Bashir, PTC II, Democratic Republic of the Congo (DRC) Decision, 9.4.2014 (ICC-02/056-01/09-195) para. 19
\item \textsuperscript{59} “Sudanese president charged with genocide”, CBC News, 14.7.2008
\item \textsuperscript{60} Article 58 Rome Statute (n14)
\item \textsuperscript{61} Ibid. Articles 58(5), 87(1)(a) and 89(1)
\item \textsuperscript{62} Ibid. Article 87(7); The ASP is the Court’s management oversight and legislative body, see Article 112 Rome Statute (n14); Schabas, \textit{The International Criminal Court: A Commentary on the Rome Statute} (OUP, 2016) 1433
\end{itemize}
exercise of ICC’s adjudicatory jurisdiction by application of Article 27(2) on Sudan even though it is a non-State Party.\textsuperscript{63} The decision against Malawi in 2011 held that personal immunities were inapplicable for international crimes under customary international law.\textsuperscript{64} In a 2014 decision it held that UNSCR 1593 implicitly waived Al-Bashir’s personal immunities, while the decision against South Africa in 2017 held that Sudan should be treated as analogous to a State Party, which renders personal immunities inapplicable.\textsuperscript{65}

3 Personal immunity of Heads of State

3.1 Initial remarks

In this Part, I will analyse the grounds for recognising personal immunity as a rule in customary international law and contrast the application of personal to functional immunity de lege lata. I will analyse the historical development of derogations from personal immunity before international criminal tribunals. Then, I will analyse the derogation in the Rome Statute and its application by the ICC in cases involving States Parties to the Rome Statute.

3.2 Personal immunity as a rule of customary international law

The concept of immunity is closely related to the concept of jurisdiction. In Arrest Warrant the ICJ states that “it is only where a State has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to the exercise of that jurisdiction”.\textsuperscript{66} Immunity thus presupposes jurisdiction. Jurisdiction is the right of nations to regulate actions by law and prosecute breaches of the law through its court systems.\textsuperscript{67} Immunity can also be read as an abbreviation of “immunity from jurisdiction”.\textsuperscript{68}

Immunity is a procedural barrier to prosecution and does not affect an individual’s criminal responsibility.\textsuperscript{69} Traditionally a claim before national courts, it also applies before international criminal court/tribunals and other hybrid criminal courts.\textsuperscript{70} The scope of immunities is reg-

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\textsuperscript{63} Al-Bashir, PTC I, Arrest Warrant Decision I,” 4.3.2009 (ICC-02/05-01/09-3) paras. 41-5
\textsuperscript{64} Al-Bashir, PTC I, Malawi Decision, 12.12.2011 (ICC-02/05-01/09-139-Corr) para. 43
\textsuperscript{65} Al-Bashir, DRC Decision (n58) para. 29; Al-Bashir, South Africa Decision (n31) para. 107
\textsuperscript{66} Arrest Warrant (n8) para. 46
\textsuperscript{67} Brownlie/Crawford (n1) 456
\textsuperscript{69} Brownlie/Crawford (n1) 487
\textsuperscript{70} Hybrid or mixed courts are courts that apply a mixture of international and domestic law, see Cassese (n15) 265
ulated by customary international law. *Arrest Warrant* confirms this, stating that although treaties can provide useful guidance, in lack of specific definitions one must resort to customary law.\(^71\)

### 3.3 Functional v. personal immunity

Immunity is divided into functional and personal immunity (immunity *ratione materiae* and *personae*).\(^72\) I will exclusively focus on personal immunity, if not otherwise stated. Personal immunity is ascribed to a State official based on his or her position as such, while functional immunity is based on the acts of the official on behalf of the State.\(^73\) The queen of a State enjoys functional immunity when she is travelling to meet with officials of other States, because she functions as queen in these meetings. However, she also enjoys personal immunity by virtue of being queen, and thus cannot be held criminally responsible for acts outside the meeting room that are not acts in her capacity as queen, e.g. running over a pedestrian on her way to buying horses. Only the most high-ranking officials of States enjoy personal immunity, but other State officials enjoy functional immunity when discharging their official duties.\(^74\)

Functional immunity seeks to protect the integrity of the State’s actions. It does this by disallowing indirect prosecution of a State’s violation of international law in a foreign court through an individual that performed official acts on behalf of the State.\(^75\) As Antonio Cassese put it: “only the State may be held responsible at the international level”.\(^76\)

However, functional immunities do not apply to international crimes.\(^77\) During the Nuremberg trials a deviation was expressed, now famously, from the act of State-doctrine that provides functional immunity as a *substantive* defence for the individual at his invocation: \(^78\) “Crimes against international law are committed by men, not by abstract entities, and only by punish-

\(^{71}\) *Arrest Warrant* (n8) para. 52  
\(^{72}\) Brownlie/Crawford (n1) 488; Immunity “by reason of the matter,” see “Ratione materiae” in Fellmeth/Horwitz (n39); Immunity “by reason of person” (n42)  
\(^{73}\) Stigen (n68) 59  
\(^{74}\) Cassese (n15) 240  
\(^{75}\) Brownlie/Crawford (n1) 488  
\(^{76}\) Cassese (n15) 241  
\(^{77}\) According to Cassese (n15) 20, international crimes are 1) crimes that violate rules of customary international law or treaty provisions, 2) include rules that are intended to protect values of the whole international community and as such bind all states and individuals, 3) there exists a universal interest in repressing such crimes, and 4) crimes for which functional immunity cannot be invoked.  
\(^{78}\) *Pinochet* 3 (n1) 645
ing individuals who commit such crimes can the provisions of international law be enforced”.

Functional immunity for international crimes is now prescribed as a procedural defence that can be invoked and waived by the State, but it cannot be claimed as a substantive defence for international crimes. The possibility to claim functional immunity as a procedural defence should not be described as an exception or derogation applicable as part of customary international law. Rather, it should be seen as an expression of the legal irrelevance of having acted in an official capacity, and that it constitutes an international obligation. The difference between an international obligation and an exception or derogation from customary international law is that for international obligations, States do not retain the liberty to not exercise their jurisdiction, if they so wish. The obligation is of a jus cogens nature. Therefore, States that have jurisdiction over certain international crimes cannot refuse to exercise it on account of the official nature of the act.

Personal immunity can still apply even when functional immunity does not. Immunity ratione personae is accorded to enable reciprocal, peaceful travel and communication for a broader section of the State’s high-ranking officials. These are Heads of State and government, foreign ministers and diplomatic agents. The immunity is absolute for these officials, meaning that both official acts on behalf of the State as well as private acts are encompassed. It also includes inviolability for private and public actions prior to taking office. Anything else would counter the considerations for the basis of the immunity to allow safe travel and communication.

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79 Trial of the Major War Criminals before the International Criminal Tribunal, Nuremberg, 14 November 1945-1 October 1946, Vol. I (1947), 223
80 Cassese (n15) 21, considers that international crimes are war crimes, crimes against humanity, genocide, torture, aggression and international terrorism.
81 See Article 27(2) Rome Statute (n14)
82 Cassese (n15) 248
83 Gaeta, “Immunity of States and State Officials” in Realizing Utopia, ed. Cassese (OUP, 2012) 237
84 Ibid.
86 Arrest Warrant (n8) para. 53
87 Pinochet 3 (n1) 644
88 Stigen (n68) 64-5
Along the same lines, immunity cannot be invoked for private acts performed while being a State official after the person has left office.\(^{90}\) Personal immunities are only accorded to sitting Heads of State.\(^{91}\) For former Heads of State, it is crucial to distinguish private and official acts while in office. Former Heads of State can still claim functional immunity for official acts during their time in office – but as mentioned above, not when prosecuted for international crimes.\(^{92}\) Lord Millett stated in *Pinochet 3* that an international crime is an “offence for which immunity *ratione materiae* could not possibly be available”.\(^{93}\) Numerous former Heads of State have been prosecuted since 1990.\(^{94}\) A recent example is former dictatorial ruler Hissène Habré, who was sentenced to life imprisonment for international crimes in Chad in the 1980s.\(^{95}\)

Personal immunity holds status as customary international law and finds support in domestic case law.\(^{96}\) Its customary status was authoritatively decided by the ICJ in *Arrest Warrant*.\(^{97}\) Personal immunities bar any possible interference, including when accused of international crimes.\(^{98}\) There is no derogation.\(^{99}\)

### 3.4 Historical exceptions to personal immunity in international law

Variations of the expression of the legal irrelevance of having acted in an official capacity has been stated in numerous documents of international law. Hereafter, I will discuss documents where variations of the expression have appeared, leading up to the derogation in the Rome Statute.

Before the adoption of the Treaty of Peace between the Allied and associated Powers and Germany (“Treaty of Versailles”) in 1919, an attempt was made to criminalise crimes against

\(^{90}\) Cassese (n15) 319

\(^{91}\) *Pinochet 3* (n1) 644

\(^{92}\) Ibid. 651

\(^{93}\) Ibid.

\(^{94}\) Lutz/Reiger, *Prosecuting heads of state*, (CUP, 2009)


\(^{96}\) Fidel Castro, Audiencia Nacional, Sala de lo Penal, 4.3.1999 (Auto no. 1999/2723); see Cassese et al., *International Criminal Law: Cases and Commentary* (OUP, 2011) 89-91

\(^{97}\) *Arrest Warrant* (n8) paras. 51-7

\(^{98}\) Cassese (n15) 320

the laws of humanity. The commission that prepared the treaty of Versailles recommended that:

[all] persons belonging to enemy countries, however high their position may have been, without distinction of rank, including chiefs of States, who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution.\(^{100}\)

The proposal was rejected, but the Treaty of Versailles included a provision on the responsibility of the former German Emperor Wilhelm II. He was to be prosecuted by a special tribunal in a trial of “all persons accused of having committed acts in violations of law and customs of war” without reference to the rank of the accused, ruling out the application of immunities.\(^{101}\) The Emperor was never extradited\(^{102}\) and thus never tried, but the idea of prosecution without adherence to immunities was born.

Both the Charter of the International Military Tribunal (“IMT Charter”) and the Charter of International Military Tribunal for the Far East (“Tokyo Charter”) disregarded immunities based on the official position of the defendants, including Heads of State.\(^{103}\) The IMT Charter directly addressed the “responsibility” of defendants, which refers to lack of immunity as a substantive defence. In addition, this wording implies that procedural immunity cannot be invoked, otherwise rendering the inclusion of the relevant provision meaningless.\(^{104}\)

The making of the Versailles Treaty, IMT Charter and Tokyo Charter were exercises of sovereign legislative power by victorious States over occupied territories.\(^{105}\) Thus, the Courts that were created were not international courts ‘proper’.\(^{106}\) Under sovereign jurisdiction they did not have to consider whether there were limitations to denial of personal immunities under international law at the time.\(^{107}\)

\(^{100}\) Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, “Report of the Commission”, presented at the Preliminary Peace Conference of Paris, 29.3.1919, _AJIL_ (1920) 95

\(^{101}\) Article 228 Treaty of Peace between the Allied and associated Powers and Germany (“Treaty of Versailles”) (adopted 28.6.1919), 1919 UKTS 4

\(^{102}\) The Netherlands refused as it was not party to the Treaty of Versailles, see Cassese (n15) 243

\(^{103}\) Article 7 Charter of the International Military Tribunal (“IMT Charter”) (entered into force 8.8.1945), 82 UNTS 279; Article 6 Charter of International Military Tribunal for the Far East (“Tokyo Charter”) (adopted 19.1.1946), 4 Bevans 20 – although the Charter did not specifically refer to Heads of State, perhaps as a consequence of the choice to not prosecute Emperor Hirohito.

\(^{104}\) Stigen (n68) 70

\(^{105}\) _Pinochet 3_ (n1) 646

\(^{106}\) _Ibid._

\(^{107}\) Stigen (n68) 71
The Statutes of the three tribunals that were created by the UN in the 1990s – the ICTY, the ICTR and the Special Court for Sierra Leone (“SCSL”) – all eliminate immunity as a procedural bar to exercise of jurisdiction or as a substantive defence. Both the ICTY and the ICTR indicted Heads of State, including President Milošević of Serbia and Prime Minister Kambanda of Rwanda. The President of Liberia, Charles Taylor, was indicted by the SCSL. His indictment only happened after a vigorous debate on the status of the SCSL as an international tribunal similar to the ad hoc tribunals and the ICC. The confirmation of the international legal status of the SCSL led to the derogation for personal immunities of Heads of State in the SCSL’s Statute also applying outside Sierra Leone’s national jurisdiction.

3.5 Exception to personal immunity in the Rome Statute

I will here present and analyse the rules with relevance to immunity in the Rome Statute and their applicability to States Parties. The exception to personal immunity of Heads of State in the Rome Statute is a derogation from customary international law by way of treaty. Nothing stands in the way of independent States agreeing to bind themselves to rules other than what customary law provides. This is the prerogative of sovereign States as independent subjects in international law.

3.5.1 Article 27(2) Rome Statute

Article 27 Rome Statute reads:

**Irrelevance of official capacity**

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under

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108 UNSCR 827 (n32)
109 UNSCR 955 (n33)
111 Schabas (n82) 159; Article 7(2) Statute of the ICTY (25.5.1993, as amended on 7.7.2009), appended to UNSCR 827 (n32); Article 6(2) Statute of the ICTR (adopted 8.11.1994), annexed to UNSCR 955 (n33); Article 6(2) Statute of the SCSL (adopted 16.1.2002), 2178 UNTS 138
112 Milosevic, Decision on Preliminary Motions, 8.11.2001 (IT-02-54-PT) paras. 26-34; Kambanda, Judgement and Sentence, 4.9.1998 (ICTR-97-23-S)
113 Schabas (n82) 159
114 Ibid.
115 Cassese (n15) 323
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.

Paragraph 1 follows the historical tradition of the 20th century, exempting official capacity as a substantive defence. Paragraph 2 points specifically to immunities as a procedural bar. According to the basic rule of treaty interpretation of Article 31(1) VCLT, the text of Article 27(2) should be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. Such an interpretation, as confirmed in the Al-Bashir case, leads to the conclusion that the immunities accorded to the persons mentioned in Article 27(1) Rome Statute, i.a. Heads of State, do not apply when the Court exercises its jurisdiction. Hence the Court shall disregard these immunities.

For example, in the unlikely situation that the ICC would indict the Norwegian monarch, King Harald V, he could not successfully claim immunity before the ICC’s adjudicatory jurisdiction. All States Parties to the Rome Statute must certainly be aware of this treaty provision. The legal relationship between a State Party to the Rome Statute and the ICC is called the vertical relationship.

According to the PTC II, “the same effect [of disregard of his/her immunity] exists horizontally between States”. The Court is of the view that the effect of Article 27(2) Rome Statute inter partes is that a State Party “cannot invoke… [personal] immunities when cooperation in

116 Stigen (n68) 72
117 Al-Bashir, South Africa Decision (n31) paras. 77-8
118 Before the ICC itself, see Part 1.1
119 Om samtykke til ratiﬁkasjon av vedtektene av 17. juli 1998 for Den internasjonale straffedomstol («Romavedtektene»), St. prp. nr. 24 (1999-2000) 63-6. A possible incompatibility with § 5 of The Constitution of the Kingdom of Norway (17.5.1814) was thoroughly discussed before ratification of the Rome Statute. § 5 protects the King from being indicted. The parliamentary proposition concluded that § 5 would hinder compliance with an ICC request for arrest and surrender. However, given the Monarch’s limited constitutional powers it was argued that the hypothetical possibility that he would commit an international crime and be indicted by the ICC was such an unlikely eventuality, insufficient to exclude Norwegian ratification without amending the Constitution. Furthermore, although § 5 was an absolute rule in 1814, it is not given that it is the case today. The proposition argues that freedom from responsibility for such crimes could contradict the general sense of justice, raising questions of whether the deviation from presumptions of worthiness of the Throne would be serious enough to disregard the textual interpretation of § 5.
121 Al-Bashir, South Africa Decision (n31) para. 79
the arrest and surrender of a person is provided by another State Party”. Therefore, the effect is also horizontal on the relationship between the States Parties themselves, in addition to the vertical effect on the relationship between the individual States Parties and the Court as an international organisation. The basic rule of international law in Article 34 VCLT states that “[a] treaty does not create (...) obligations (...) for a third State without its consent”. The derogation from the customary rule on personal immunities for Heads of State is, thus, limited to the States Parties to the Rome Statute.

3.5.2 Article 98(1) Rome Statute

The Rome Statute contains a second rule regarding immunities in its Article 98(1):

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

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

Cooperation with the States Parties is a fundamental basis to the Court’s functioning. The Court does not have a police force or other means to enforce its decisions, and is therefore dependent on the States Parties for enforcement of arrest warrants and surrender of the arrested person. States Parties have an obligation to cooperate with the Court according to the rules specified in Chapter IX of the Statute. As different committees prepared the articles of the Rome Statute, there could exist statute internal incoherence. Article 98(1), however, concerns the immunity of a person from a “third state”. A “third state” must be interpreted to mean any State not party to the Rome Statute, as the Statute otherwise uses the terms “State Party/-ies” to refer to States contracting to the

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123 Article 86 Rome Statute ff. (n14)
Statute. Article 2(1)(h) VCLT calls for the same results, describing that a “[t]hird State” means a State not a party to the treaty”.

The wording “State or diplomatic immunity” must be interpreted to include personal immunity. The reason for this is that personal immunity is a prolongation of State immunity. Personal immunity belongs to the State and not the individual, i.e. it must fall under “State immunity”. A narrow interpretation would eliminate any purpose for the rule as regards “State”, leaving only immunity for diplomats. It would be absurd that a vital rule of customary law, personal immunities, would not be applicable for the ICC’s request for arrest and surrender. Rather, for the interpretation of this provision, a teleological approach should be taken that would include all immunities, whose purpose it is to protect persons representing the State, including personal immunities.

The abovementioned interpretation leaves room for Article 98(1) alongside Article 27(2). This complies with the fundamental rule of treaty interpretation that an interpretation of a rule shall not render another rule without meaning. Article 98(1) addresses the power of the ICC and not the States Parties. Before the ICC requests a State Party to arrest and surrender a person who enjoys personal immunity as a Head of State, the Court must respect that immunity if the person is the Head of State of a State not Party to the Statute. In such a case, the ICC may not proceed with the request before it obtains a waiver of the immunity.

States Parties have bound themselves to disregard immunities through acceptance of the Rome Statute, including Article 27(2). Thus, the ICC does not have to obtain a waiver of immunity. As eloquently noted, Article 98(1) requires the Court “not to put a State in the position of having to violate its international obligations with respect to immunities”. In prolongation of the earlier example of a request for arrest of Norwegian King Harald V: in case

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127 Brownlie/Crawford (n1) 488
128 Akande, “Head of State Immunity is a Part of State Immunity,” *EJIL:Talk!* 27.2.2012
130 Kress (n29) 237
131 Dictated by the maxim *ut res magis valeat quam pereat*, see Cassese (n15) 57; *United States – Standards for Reformulated and Conventional Gasoline*, Appellate Body Report, May 1996 (WT/DS2/AB/R) 23
133 Cassese (n15) 324
134 *Ibid.*; any determination by the Court that no conflicting international obligation exists leaves the requested State Party with the risk that the determination is wrong, see Kress/Prost, “Article 98”, in Triffterer (n125) 1603 margin 3
Norway refused to comply with such a request from the ICC to arrest its own monarch (leaving Norway in violation of its duties towards the ICC) and King Harald later were to travel to another State Party, e.g. Denmark, the ICC could lawfully request Denmark to arrest and surrender him. There would be no requirement to obtain a waiver of immunity from Norway, as the King would not enjoy immunity in the first place.

There is general agreement on the coherent interpretation of Articles 27(2) and 98(1) outlined above. However, their agreement limits itself to situations where the ICC’s jurisdiction is triggered by a State Party referral or by the Prosecutor *proprio motu*. Furthermore, some scholars argue that Article 27(2) expresses a rule of customary international law, but only with regards to the Court’s adjudicatory jurisdiction. Cassese claims that under international law, “personal immunities of State officials may not bar *international criminal courts* from prosecuting and trying persons suspected or accused of having committed international crimes”. Given the existence of such a customary rule, the ICC can issue arrest warrants for Heads of State of any State. Cassese bases his claim on an *obiter dictum* in * Arrest Warrant*, and that the rationale for State officials enjoying personal immunities before foreign national courts do not apply to international criminal courts.

In * Arrest Warrant* the ICJ stated that “Minister for Foreign Affairs may be subject to criminal proceedings before *certain* international criminal courts, where they have jurisdiction”. Cassese argues that the *obiter* means that as long as international criminal tribunals have jurisdiction over the international crime, personal immunities do not apply. He ignores the word “certain”, by which the ICJ seems to open for the possibility that an international criminal tribunal may have jurisdiction, but personal immunities continue to apply. The fact that international criminal tribunals to date have disregarded personal immunities does not deny the possibility that a future tribunal recognises personal immunities. Cassese’s reliance on the *obiter dictum* seems unjustified. Nevertheless, the disagreement only relates to the basis of

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136 Article 13 Rome Statute (n14); see Part 2


138 *Ibid.* Cassese 322 (emphasis added)


140 *Ibid.* 320-1

141 *Arrest Warrant* (n8) para. 61 (emphasis added)

142 Cassese (n15) 321

143 Stigen (n68) 67; Schabas (n62) 1346-7
the ICC’s adjudicatory jurisdiction, and does not affect the general agreement of the coherent interpretation of Articles 27(2) and 98(1) above, which removes immunity under the ICC’s enforcement jurisdiction.144

4 Analysis of the latest ICC case law *de lege lata*

4.1 Initial remarks

This thesis centres on the relation between personal immunities for Heads of State and obligations of States Parties to cooperate in arrest and surrender of these Heads of State, when the Court’s jurisdiction is triggered by a UNSC referral. There are vastly different interpretations of the implications of such referrals. This results in a variety of legal arguments available for the (il-)legality of the ICC’s requests to enforce arrest warrants. The diverging interpretations stem from different understandings of the hierarchy of international law, interpretation of UNSCRs, and whether ending impunity for the most serious crimes should trump State sovereignty. In the following I will explore the research questions *de lege lata* by analysing the latest case law at the ICC.

4.2 The decisions on non-compliance against South Africa and Jordan

Al-Bashir visited South Africa 13-15.6.2015 to attend a summit of the African Union.145 The ICC sent a request for cooperation in his arrest and surrender to the Court.146 South Africa did not cooperate.147 On 29.3.2017 Al-Bashir attended an Arab League Summit in Jordan, but nor Jordan cooperated with the request issued by the Court.148 The PTC II issued decisions on 6.7.2017 and 11.12.2017, against respectively South Africa and Jordan, on the non-compliance with the requests by the Court.149 These decisions are the latest and the most relevant decisions to analyse the Court’s stance on the research questions.150 In the following, the South Africa Decision will be analysed. The Jordan Decision affirms its reasoning.151

144 The national jurisdictions of States Parties, who enforces the ICC’s requests.
145 *Al-Bashir*, South Africa Decision (n31) para. 5
146 *Ibid.* para. 6
147 *Ibid.* para. 16
148 *Al-Bashir*, PTC II, Jordan Decision, 11.12.2017 (ICC-02/05-01/09-309) paras. 5, 8
149 *Al-Bashir*, South Africa (n31) and Jordan Decisions (n148)
150 Two Heads of State have *appeared* before the ICC. Former President of Côte d’Ivoire Laurent Gbagbo is currently on trial for crimes against humanity during post-election violence in 2010-2011. Côte d’Ivoire *ad hoc* accepted the ICC’s jurisdiction in 2003 and waived Gbagbo’s functional immunity as former Head of State. President Uhuru Kenyatta of Kenya appeared while being Head of State in 2013 to refute allegations of crimes during post-election violence in 2007 (he was then Deputy Prime Minister). Charges against Kenyatta were dropped in 2015. Kenya was as State Party since 2005 obliged to disregard Kenyatta’s personal
In the South Africa Decision, the majority (2-1) concluded that the effect of UNSCR 1593 is that “for the limited purpose of the situation in Darfur, Sudan has rights and duties analogous to those of States Parties to the Statute”.\footnote{Al-Bashir, South Africa Decision (n31) para. 88} Hence Article 27(2) applies, which in turn excludes the invocation of personal immunity in Sudan’s cooperation with the ICC (the vertical effect). The horizontal effect of Article 27(2) is that Sudan is to be treated as a State Party also by ‘proper’ States Parties. This entails that Sudan is not a “third State” under Article 98(1) and that no waiver is necessary since there is no immunity to be waived.\footnote{Ibid. para. 93} Article 98(1) is “not applicable to the arrest of Omar Al-Bashir and his surrender to the Court”.\footnote{Al-Bashir, South Africa Decision (n31) para. 90}

The Chamber bases its conclusion on the wording of Article 13, according to which the Court “may exercise its jurisdiction (…) in accordance with the provisions of the Statute”. This wording is in the initial part of Article 13 and applies to all three bases of the Court’s jurisdiction.\footnote{See Part 2} The majority infers that the “Statute applies, in its entirety” for all three triggers of the Court’s exercise of jurisdiction.\footnote{Al-Bashir, South Africa Decision (n31) para. 86}

The majority further argues for its view on the basis of the ordinary meaning of ‘refer’, the context of its use and the object and purpose of a UNSC referral. It argues that the Statute \textit{in primis}\footnote{Meaning primarily, “\textit{In primis},” in Fellmeth/Horwitz (n39)} is the “only legal regime in which this Court may exercise the triggered jurisdiction” because it is “the one generally applicable to it”.\footnote{Ibid. para. 93} This argument is convincing, since the ICC has no other way to act than according to the rules in its system; the Statute and RPE.\footnote{RPE (n132)} However, putting Sudan in an analogous situation to that of States Parties to the Statute does not necessarily make sense for all aspects of the Rome Statute. The majority of the Chamber does not question this other than to point out that Sudan “does not have rights and obligations with respect to other Statute-based activities of the Court” and neither votes at the ASP nor pays contributions, which all are obvious conclusions.\footnote{Al-Bashir, South Africa Decision (n31) para. 90} The content of such other activities is not clear.

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\footnote{E.g. \textit{Al-Bashir}, Jordan Decision (n148) para. 37} \footnote{\textit{Al-Bashir}, South Africa Decision (n31) para. 88} \footnote{Cryer et al., \textit{An Introduction to ICL and Procedure} (CUP, 2010) 558} \footnote{\textit{Ibid.}, para. 93} \footnote{See Part 2} \footnote{\textit{Al-Bashir}, South Africa Decision (n31) para. 85} \footnote{Meaning primarily, “\textit{In primis},” in Fellmeth/Horwitz (n39)} \footnote{\textit{Al-Bashir}, South Africa Decision (n31) para. 86} \footnote{RPE (n132)} \footnote{\textit{Al-Bashir}, South Africa Decision (n31) para. 90}
The majority further finds that UNSCR 1593, by deciding that Sudan shall cooperate with the Court, has created an obligation for Sudan, in spite of not being a State Party to the Rome Statute. The majority knows that its conclusion involves the expansion of a treaty to a State that has not consented to it in line with the rule of customary international law expressed in Article 34 VCLT. The judges find, however, that this expansion is within the powers of the UNSC “to impose obligations on States”. The judgement gives no reasoning for this other than a footnote to an Advisory Opinion by the ICJ. The referenced paragraph in the Namibia Advisory Opinion states that when the UNSC “adopts a decision under Article 25 [UN Charter], it is for member states to comply with that decision, including (...) those Members of the United Nations who are not members of the Security Council. Hence Al-Bashir does not enjoy personal immunity, and South Africa is obliged to arrest him.

In neither the South Africa nor the Jordan Decision does the majority of the PTC II properly explain the legal sources and reasoning applied. It merely points to the Namibia ICJ Advisory Opinion without explaining its relevance or weight as an argument. Namibia simply recalls the binding nature of UNSCRs on UN Member States under Article 25 UN Charter. However, this is not the central issue; the question is what the legal consequences of referral resolutions are and not whether they are binding per se.

Conclusively, it is not possible to determine from the latest ICC case law itself whether its reasoning is justifiable de lege lata. In order to examine its justifiability, I will consider alternative interpretations of UNSCR 1593. This will be done in the Part 5.

The South Africa Decision is in principle limited to the question of States Parties’ compliance with the Court’s requests for arrest and surrender. However, as mentioned above, its reasoning i.a. has consequences also for Sudan’s vertical relationship with the Court. Article 27(2) applies to this relationship. One consequence is that any immunity under both national Su-

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161 Ibid. para. 92
162 Ibid. para. 89
163 Ibid. para. 89
164 Ibid. footnote 100
166 Jacobs, “The ICC and immunities, Round 326,” Spreading the Jam, 6.7.2017
167 The Decision also rejected immunity based on an agreement with the African Union, see Al-Bashir, South Africa Decision (n31) paras. 65-7. Due to the word limit I will not analyse this further.
168 Ibid. para. 91
Danese law and international law is rendered irrelevant for Sudan’s cooperation with the Court.\footnote{Ibid. para. 92}

A second consequence is for the validity of the proceedings against Al-Bashir \textit{per se}.\footnote{Ibid. para. 69} Applying Article 27(2) to the case means that the Court could exercise its adjudicatory jurisdiction over against Al-Bashir in spite of his immunities. Thus, it could validly initiate proceedings against him and issue warrants for his arrest. The Court does not state this conclusion, but states that its exercise of adjudicatory jurisdiction is not disputed by the parties.\footnote{Ibid.} The Court seems to have changed its reasoning on the basis for its exercise of adjudicatory jurisdiction over Sudan since issuing the warrant for Al-Bashir’s arrest. In Arrest Warrant Decision I it seemed to hold that Article 27(2) could be applied on non-State parties as long as the Court’s exercise of jurisdiction was triggered.\footnote{Al-Bashir, Arrest Warrant Decision I (n63) para. 41} The reason for this was that in lack of a finding a lacuna in the Statute, the Court had to apply it, including Article 27(2).\footnote{Ibid. para. 44} Alternative interpretations of UNSCR 1593 provide an argument that perhaps the Court was right to apply Article 27(2) on Sudan as a non-State Party in Arrest Warrant Decision I, limited to the exercise of adjudicatory jurisdiction. See Part 5.3.2.1 below.

\section{5 Alternative interpretations of UNSCR 1593 \textit{de lege lata}}

\subsection{5.1 Initial remarks}

In this section I will consider whether the interpretation in the ICC’s latest case law of UNSCR 1593’s consequences for personal immunities is justifiable \textit{de lege lata}. I will analyse and assess alternative interpretations of the relationship between the UNSC and the ICC, and of UNSCR 1593. Firstly, I will analyse whether the UNSC has the authority to decide on legal predominance over personal immunities. Secondly, I analyse whether the UNSCR 1593 did in fact decide on obligations with legal predominance over personal immunities.\footnote{Cassese (n15) 324-5; Gaeta/Labuda (n120) 157} In this analysis I will examine how UNSCRs should be interpreted, according to ICJ case law. Then, I will analyse and assess alternative interpretations of UNSCR 1593, with a view to determine the viability of the interpretation in the ICC’s latest case law. Lastly, I will analyse whether there is a requirement that UNSCR 1593 expressly state or indicate its intention to take legal predominance over personal immunities.
5.2 UNSC’s authority to decide on legal predominance over personal immunities

5.2.1 UNSC’s powers in the context of the ICC

Certain scholars argue that the authority of the UNSC vis-à-vis the ICC is exhaustively spelled out in Article 13(b) Rome Statute, i.e. triggering the ICC’s exercise of jurisdiction. They hold that UNSC referrals cannot create a different legal regime than the Rome Statute for the exercise of ICC’s jurisdiction. According to this view, a UNSC referral triggers the application of the Rome Statute to the exercise of ICC’s jurisdiction, in the same way if triggered by a State referral or proprio motu by the Prosecutor. In the two latter instances, Article 27(2) Rome Statute does not create obligations for non-State Parties. Thus, it should not be different in the case of a UNSC referral. Hence, these scholars argue that Article 27(2) cannot be applied to remove Al-Bashir’s immunity.

The above view rests on the ground that UNSC referrals cannot set aside the relative effects of treaties. According to Article 34 VCLT, this relative effect is that treaties only create obligations for its parties. Even if a group of States wanted to, they could not create a treaty that outsources to the UNSC any powers which the States do not possess themselves. If a State does not have a given power individually, one cannot simply say that States have such a power collectively. Because States do not individually have the power to disregard personal immunities in international law, acting collectively through a treaty does give them any further powers. Thus, the ICC cannot import, through a UNSC referral, any power that the UNSC might have to disregard personal immunities, and apply that power to all States. Hence, only when Sudan consents to being bound by Article 27(2), i.e. becomes a State Party or accepts the ad hoc exercise of the ICC’s jurisdiction, the barrier of personal immunity is removed. Crucially, a consequence is that UNSC referrals cannot remove personal immunities at all in the context of the ICC, neither expressly nor implicitly.

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176 Ibid. Kiyani 481
177 Schabas (n62) 604
178 Ibid.
179 Kiyani (n174) 481
180 Article 34 VCLT (n26)
181 Schabas, An Introduction to the International Criminal Court (CUP, 2017) 62
182 Jacobs (n174) 10
183 Article 12(3) Rome Statute (n14)
184 Schabas (n62) 604; Kiyani (n174) 475; Jacobs (n174) 10 implies the same
It is correct that the decision to refer the Darfur situation to the ICC in UNSCR 1593 paragraph 1 triggered the ICC’s exercise of jurisdiction. It is also correct that States cannot outsource through a treaty any power that they do not possess as individual States. The UNSC, thus, cannot delegate or otherwise pass on its UN Charter-powers to the ICC. However, the above arguments fail to consider that the UN Charter provides UNSCRs powers independently of the delegated function to trigger the ICC’s exercise of jurisdiction. Hence, they fail to consider the effects of the decision in paragraph 2 of UNSCR 1593, which is distinct from the referral in paragraph 1. I shall argue that the UN Charter provides that UNSCRs have a sort of constitutional status in international law.

5.2.2 UNSCRs v. customary international law

UNSCRs may find that situations constitute a threat to international peace and security, and decide accordingly under Chapter VII of the UN Charter. Doing so, the UNSC e.g. has the power to decide on the use of force. Another power is to refer situations to the ICC, delegated to it by Article 13(b) Rome Statute. Furthermore, UNSCRs have the power to adopt binding decisions that UN Member States must “accept and carry out,” according to Article 25 UN Charter. Thus, UN Member States are legally bound to accept that a UNSCR has decided to define a legal situation.

However, Article 103 UN Charter states that the obligations of UN Member States under the Charter, in the event of a conflict, only prevail over “their obligations under any other international agreement”. An analysis of the ordinary meaning of the wording indicates that it does not refer to a conflict between the UN Charter and rules at the level of customary international law, including personal immunities. By looking only at the wording itself, one must infer that personal immunities cannot be removed by virtue of Article 103 UN Charter. However, other factors must be analysed to determine whether a strict textual interpretation is justified.

185 UNSCR 1593 (n44); Article 13(b) Rome Statute
187 UNSCR 1593 (n44)
188 Article 42 UN Charter (n43)
189 E.g. Preamble UNSCR 1593 (n44)
190 Namibia (n164) para. 116; Article 25 UN Charter (n43)
A system-oriented interpretation calls for a different result. Customary law normally yields to treaties as *lege specialis derogat legi generali*.\textsuperscript{191} Article 103 UN Charter stipulates that UN Charter obligations prevail over any treaty-based obligation. The internal logic of the UN Charter would then seem more coherent if customary law also yields to the UN Charter as *lege speciales*.\textsuperscript{192}

Conversely, the *travaux préparatoires* suggest that the drafters intentionally included “international agreements” instead of “all international obligations”.\textsuperscript{193} But *travaux préparatoires* are used less for interpreting treaties setting up international organisations than other treaties, and the intentions in the 1940s may provide little guidance for issues arising in the 2010s.\textsuperscript{194} Subsequent practice can establish a different interpretation than the textual.\textsuperscript{195} UN declarations have affirmed the textual interpretation,\textsuperscript{196} while it is debated whether this interpretation is supported by ICJ jurisprudence.\textsuperscript{197} An order in the *Lockerbie* case inferred that Article 103 UN Charter made obligations from a UNSCR prevail over the Montreal Convention, which both States in the dispute were parties to.\textsuperscript{198} Thus, the ICJ affirms the textual interpretation, but did not need to comment on the legality of a broader interpretation.

Later ICJ practice has been grounded on the constitutional document-interpretation. Judge Lauterpacht interpreted the *Lockerbie* order in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case.\textsuperscript{199} He held that in contradiction to the Montreal convention, “the prohibition of genocide […] has generally been accepted as having the status not of an ordinary rule of international law but of jus cogens”.\textsuperscript{200} He indicates that

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\textsuperscript{191} Meaning that obligations intended to apply in specific circumstances, in the event of a norm conflict, prevail over general principles of international law, including customary law. Some norms cannot be derogated from even as *lege speciales*, including *jus cogens* norms. See “Lex specialis derogat legi generali,” and “Jus cogens (superveniens),” in Fellmeth/Horwitz (n39)

\textsuperscript{192} International Law Commission (ILC), “Fragmentation of International Law,” 13.4.2006 (A/CN.4/L.682) para. 345; Akande (n124) 348


\textsuperscript{194} Malanczuk/Akehurst (n2) 366

\textsuperscript{195} *Ibid*. 367

\textsuperscript{196} UNGA Resolution 2625/25, 24.10.1970 (A/RES/25/2625); Preamble, UNGA Resolution 101/55, 2.3.2001 (A/RES/55/101)

\textsuperscript{197} Kiyani (n174) 479-80 argues for the textual interpretation; Brownlie/Crawford (n1) 758 takes no stance other than to exclude *jus cogens* norms


\textsuperscript{200} *Ibid*. para. 100 (my emphasis)
Article 103 prevails over not only treaty law, but any ordinary rule of international law, such as customary law.\textsuperscript{201}

It can be argued that States Parties have accepted that the UNSC can decide on legal predominance also over customary law. An example is the UNSCRs adopted under Chapter VII on piracy, which i.a. permit States to pursue suspected pirates in the territorial waters of Somalia.\textsuperscript{202} Although States legally can counter pirates as \textit{hostes humanes}, this is limited to the high seas.\textsuperscript{203} The resolutions allow States similar capabilities within the territorial waters of Somalia. This illustrates legal predominance over both treaty and customary law pertaining to the law of the sea.\textsuperscript{204}

Taking into account all the different factors, the best interpretation of Article 103 UN Charter is to accord it the power to take legal predominance over obligations from customary international law. This seems to be accepted by States, and is also the prevailing opinion among scholars.\textsuperscript{205} Thus, UN Member States are obliged to accept and carry out decisions taken by UNSCRs, even in conflict with personal immunities accorded under customary international law. The UN Charter thus has the status as a form of constitutional document in the hierarchy of international law. Whether a UNSCR has actually decided to bind a Member State to an obligation that prevails over personal immunities, is a question of interpretation of that resolution.

5.3 UNSCR 1593’s legal predominance over personal immunities

In this Part I will analyse whether UNSCR 1593 decided on obligations to take legal predominance over personal immunities. Alternative interpretations of the resolution indicate that the obligations do not prevail, for reasons that will be analysed below. First, the method of interpretation for UNSCRs shall be established.

\textsuperscript{201} The case was about a \textit{jus cogens} norm, rule of customary law from which there can be no derogation, see n190
\textsuperscript{202} UNSCR 1846, 2.12.2008 (S/RES/1846) para. 10, extended by UNSCR 2184, 12.11.2014 (S/RES/2184) para. 13
\textsuperscript{203} Articles 100-7, 110 UN Convention on the Law of the Sea (adopted 10.12.1982), 1833 UNTS 3
\textsuperscript{204} de Wet (n135) 1060 footnote 65
5.3.1 Interpretation of UNSCRs

There are two questions regarding interpretation of UNSCRs; whether there is binding effect, and what the content of that effect is. The ICJ Advisory Opinions on Namibia and Kosovo provide useful insight into the method of interpretation. On the question of binding effect, the majority in Namibia finds that the language “should be carefully analysed before a conclusion can be made”. Such analysis must be done on a case-to-case basis, taking in “all circumstances that might assist in determining the legal consequences” of the UNSCR. The majority in Kosovo confirms this approach. Legal literature points in the same direction. A legally binding obligation should only be transcribed to “clear, explicit, specific, and definitive expressions”.

The majority in Kosovo expands on how to interpret the content of the binding effects. It finds that Articles 31 and 32 VCLT, which contain the general rules of interpretation of treaties, may provide guidance for interpretation of UNSCRs. Thus, a natural starting point is the rule in Article 31 VCLT, according to which “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. Furthermore, differences between UNSCRs and treaties require that “other factors be taken into account”. According to Kosovo, other factors are statements by UNSC member’s representatives at the time of adoption, other UNSC resolutions on the same issue, and subsequent practice of relevant UN organs and States affected by the resolutions.

206 Namibia (n164) para. 114; Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion 22.7.2010, I.C.J. Reports 2010, p. 403
207 Ibid. Namibia
208 Ibid.
209 Kosovo (n205) para. 117
211 Joyner, Iran’s nuclear program and international law (OUP, 2016) 196-7
212 Kosovo (n205) para. 94; Murphy (n209) 34
213 Ibid. Kosovo para. 94
214 Article 31(1) VCLT (n26)
215 Kosovo (n205) para. 94
216 Ibid.
5.3.2 Interpretation of UNSCR 1593

Initially, I will examine whether obligations in UNSCR 1593 take legal predominance over personal immunities with respect to Sudan. Then, I will examine whether there is any obligation to give predominance with respect to others States, including State Parties to the Rome Statute. I will determine whether the South Africa Decision interpreted UNSCR 1593 justifiably de lege lata. Lastly, I will analyse whether there is a requirement that UNSCRs expressly state or indicate its intent to take legal predominance over personal immunities.

5.3.2.1 On consequences for Sudan

This Part examines the first research question with a specific view to UNSCR 1593 and the Al-Bashir case: the effect of UNSCR 1593 on the personal immunity of Al-Bashir. Thus, it is an examination of the effect on the vertical relationship between Sudan and the Court. The vertical relationship requires both an analysis of immunities when the ICC requests Sudan’s cooperation in its national jurisdiction (enforcement jurisdiction), and of immunities before the proceedings at the ICC itself (adjudicatory jurisdiction).

The wording “[d]ecides that (…) Sudan (…) shall (…) cooperate fully” in UNSCR 1593 indicates that Sudan is legally bound to remove any barrier to its cooperation with the Court, both in the adjudicatory jurisdiction of the Court and in the Sudanese jurisdiction.217 The ordinary meaning of “fully” requires that all barriers are removed. This conclusion was reached in the South Africa Decision.218 Based on the wording, the decision applied the Rome Statute on Sudan as if it was in an analogous legal situation to that of a State Party. Sudan was put in a vertical relationship with the Court, and Article 27(2) rendered any immunity inapplicable both in national (Sudanese) and international law. The ICC acknowledges that its reasoning constitutes “an expansion of the applicability of an international treaty to a State which has not voluntarily accepted it as such.”219 One can argue that the difference between applying a Statute to a State that has consented to the Statute, and applying it to a State as if that State is in an analogous legal situation to a State that has consented to the Statute, is only semantical. The effect on Sudan is the same either way. The analogous application of the Statute on Sudan can be criticized for violating Article 34 VCLT, according to which a treaty only creates obligations for States that consent to it.220 For this reason, I am sceptical to the application of the Rome Statute on Sudan as if it was in an analogous legal situation to that of a State Party.

217 UNSCR 1593 (n44) para. 2; Joyner (n210) 195, 200
218 Al-Bashir, South Africa Decision (n31) para. 91
219 Ibid. para. 89
220 Schabas (n180) 62
However, the analogous-interpretation must be found to be justifiable *de lege lata*. This is because of the sparse wording of the obligation on Sudan, saying only that it shall “cooperate fully”.

The short wording entails that the legal regime applicable to Sudan’s cooperation with the Court was *always* going to be difficult to determine. After all, the UNSC is a collective body. It cannot be presumed that it always has a complete understanding of the consequences of its decisions.

Another view supports the conclusion that the interpretation of the latest ICC case law is justifiable. The wording “cooperate fully (...) [with] the Court” should *de lege lata* not be interpreted textually to directly remove personal immunities by reason of the decision itself. Rather, the wording should be interpreted in a teleological manner. Such an interpretation puts weight to the broader purpose of the decision, outside of what the text itself implies. The purpose of the obligation can justifiably be interpreted to be that Sudan must cooperate according to rules that govern the ICC, which is its Statute. Hence, Sudan’s obligation is to cooperate fully with the Court within the parameters of its Statute. Application of the Rome Statute on Sudan is a necessary consequence to fulfil the purpose of full cooperation. The wording cooperate fully thus has the consequence that Article 27(2) is applied as if Sudan was analogous to a State Party, and immunity is not a barrier to the ICC’s exercise of jurisdiction.

Provided that UNSCRs can give legal predominance over customary international law, legal literature supports an interpretation of UNSCR 1593 that Sudan is obliged to arrest and surrender Al-Bashir to the Court, albeit on different basis than the ICC. Arrest and surrender are questions of immunity under enforcement jurisdiction, i.e. Sudanese jurisdiction. However, justification for the Court’s exercise of adjudicatory jurisdiction differs. As discussed above, Cassese argues that the Court can apply Article 27(2) on a non-State party, such as Sudan, because of a rule in customary international law. The basis for such a rule is an unconvincing interpretation of *Arrest Warrant*.

A different interpretation is that UNSCR 1593’s obligation on Sudan to cooperate fully does not address immunity under the ICC’s exercise of adjudicatory jurisdiction. The resolution only mentions cooperation, not immunity. Rather, one can argue that the Court can apply Article 27(2) also vis-à-vis a non-State party, as long as its exercise of jurisdiction over that non-

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221 UNSCR 1593 (n44) para. 2
222 Sluiter, “Obtaining cooperation from Sudan – where is the law?,” *JICJ* (2008) 877
223 de Wet, “Referrals to the International Criminal Court,” *AJIL Unbound* (2018) 36
224 Cassese, “Giustizia impossibile,” *LaRepubblica.it*, 5.3.2009; Gaeta/Labuda (n120) 156
225 See Part 3.5.2, n137-43
State party has been triggered. This was arguably how the ICC itself reasoned in Arrest Warrant Decision I. Application of Article 27(2) on a non-State party such as Sudan raises the question of whether the ICC is acting illegally under international law. Sudan has not consented to the application of a rule that derogates from customary law, a violation of Article 34 VCLT. However, one can argue that the ICC judges should not take this into account, because they are simply obligated to apply the Statute. A textual interpretation of Article 27 indicates that it does not technically provide obligations on Sudan, rather, it addresses the Court and possible obstacles to its exercise of jurisdiction. It can be inferred that the possibility that the ICC as an international organisation is committing an internationally illegal act in prosecuting Al-Bashir, is a separate question, and not one the judges need to address.

However, in case law since Arrest Warrant Decision I the Court has rejected applying Article 27(2) on non-States Parties. De lege lata it does not seem justified to interpret that Article 27(2) only addresses the Court. In any case, no matter on what basis the Court applies Article 27(2) on Sudan, the result is that Al-Bashir’s personal immunity is not a barrier to the exercise of the ICC’s adjudicatory jurisdiction.

In conclusion, the effect of UNSCR 1593 on the vertical relationship between the Court and Sudan is that Sudan’s obligation to cooperate takes legal predominance over personal immunities under the Court’s exercise of jurisdiction over Sudan. The latest ICC case law is justified de lege lata.

5.3.2.2 On consequences for States Parties to the Rome Statute

This Part examines the second research question with a specific view to UNSCR 1593 and the Al-Bashir case: the effect of UNSCR 1593 on the obligation of States Parties to the Rome Statute to cooperate with the ICC in the arrest and surrender of Al-Bashir. This is an examination of effects on immunities under the jurisdictions of States Parties (the ICC’s enforcement jurisdictions).

The second part of paragraph 2 of UNSCR 1593 states that the UNSC, “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”. A textual interpretation of the ordinary meaning of the word “urges” indicates that there are no legally binding effects for all States to cooperate fully. This meaning is confirmed by the resolution

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226 Al-Bashir, Arrest Warrant Decision I (n63) paras. 41-5; see Part 4.2
227 Jacobs (n174) 13-4
228 Al-Bashir, DRC Decision (n58) para. 26
recognising, inversely, that only States Parties to the Rome Statute are bound by the Statute to cooperate with the ICC. On this basis one can conclude that UNSC 1593 has not decided with legally binding effect that other States than Sudan must cooperate with the Court in spite of immunities. Consequently, the obligation to cooperate for States Parties is still vested in the Rome Statute. According to this view, since Sudan is a non-State party, it is a third state for the purposes of Article 98(1), meaning that Al-Bashir can still benefit from his personal immunity vis-à-vis other States Parties. Cassese supports this interpretation and holds that the ICC was acting ultra vires when requesting that South Africa arrest Al-Bashir.\(^{229}\) He has stated that although UNSCR 1593 could have removed Al-Bashir’s personal immunity, the resolution did not do it, “merely imposing only on Sudan the obligation to ‘cooperate with the Court’.”\(^{230}\)

A comparison to the UNSCRs that established the ICTY and ICTR supports the interpretation that UNSCR 1593 does not require other States than Sudan to cooperate in spite of immunities. These resolutions decided to oblige all States to cooperate fully with the ad hoc tribunals.\(^{231}\) Furthermore, the resolutions incorporated the respective Statutes into the resolutions themselves (attached or annexed).\(^{232}\) UNSCR 1593 does not mention immunities, only cooperation. Thus, there is only a textual link to Chapter IX of the Rome Statute, indicating that although Sudan shall cooperate, it is still a non-State party and should be treated as such. On this basis, Sudan is still a third State according to Article 98(1), and can uphold its immunities vis-à-vis other States Parties.\(^{233}\)

Other elements in line with Kosovo must be considered.\(^{234}\) One element is a more teleological interpretation of Sudan’s legally binding obligation to cooperate fully. A teleological interpretation takes into account the wider purpose of the decision. One must have in mind that Article 25 UN Charter requires that all UN Member States must accept the decisions of the UNSC. In this sense, all States must accept that UNSCR 1593 defines the legal status of Sudan in international law with regards to its cooperation with the ICC. An element in a purposeful interpretation of Sudan’s obligation is that because the decision is taken with legally binding effects for all States,\(^{235}\) it must be effectively implemented.\(^{236}\)

\(^{229}\) Cassese (n15) 325; Gaeta/Labuda (n120) 157
\(^{230}\) Cassese (n224)
\(^{231}\) UNSCR 827 (n32) para. 4; UNSCR 955 (n33) para. 2
\(^{232}\) Ibid.
\(^{233}\) Wardle, The Survival of Head of State Immunity, AILJ (2011) 196
\(^{234}\) Kosovo (n205) para. 94
\(^{235}\) Article 25 UN Charter (n43)
\(^{236}\) de Wet (n222) 36
In the *Namibia* Advisory Opinion, the ICJ considered the consequences of such an effective implementation of a decision towards one State, on all UN Member States, in line with Article 25 UN Charter.\(^{237}\) The Opinion concerned South Africa’s presence in Namibia, which a UNSC resolution had declared illegal.\(^{238}\) Through a teleological interpretation the ICJ determined that the resolution required all States to recognise the UNSC’s decision that South Africa’s presence was illegal, by refraining from acting in any way that would imply recognising that South Africa’s presence was legal.\(^{239}\) Anything less than all States accepting that the UNSC had defined the legal situation in Namibia, and act in accordance with that decision, would undermine the effectiveness of the decision to put an end to the illegal situation in Namibia.\(^{240}\)

Applying the logic above to UNSCR 1593, an effective implementation requires all UN Member States to accept that Sudan has been bound to remove any barrier to its cooperation with the ICC. Sudan’s obligation must apply to all forms of cooperation with the ICC, including an ICC request to a State Party to enforce an arrest warrant. Sudan cannot uphold any barrier to its cooperation with the ICC, including Al-Bashir’s personal immunity. Anything less would undermine the effective implementation of the UNSC decision to oblige Sudan to cooperate with the Court. On this basis, UNSC’s decision must be seen to have *allowed* all States to disregard Al-Bashir’s personal immunity when it comes to cooperation with the ICC.\(^{241}\) All States are, however, not under obligations to arrest and surrender him.\(^{242}\) States Parties to the Rome Statute have such obligations through the Rome Statute.

A further consideration supports such an interpretation. As noted above, UNSCR 1593 clearly only “urges” all other States to cooperate fully with the Court. This sentence must, however, be interpreted together with the preceding words: “recognizing that States not party to the Rome Statute have no obligation under the Statute”.\(^{243}\) An inverse interpretation of this sentence arguably shows that the UNSC recognises that ICC States Parties have pre-existing, independent obligations to cooperate in the Rome Statute. A justifiable inference is that the UNSC itself has recognised that it does not need to oblige States Parties to the Rome Statute to cooperate, because they already have such obligations in the Statute. Thus, the UNSCR

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\(^{237}\) *Namibia* (n164)

\(^{238}\) UNSCR 276, 30.1.1970 (S/RES/276) para. 2

\(^{239}\) *Namibia* (n164) para. 119

\(^{240}\) *Ibid.* para. 117

\(^{241}\) Akande (n124) 347

\(^{242}\) *Ibid.*

\(^{243}\) UNSCR 1593 (n44) para. 2
itself only needs to directly obligate Sudan to cooperate with the ICC and remove any barrier to the ICC’s exercise of jurisdiction for all States. Of course, the UNSC could have obliged all States to cooperate with the Court. But before it does so, only States Parties are under obligations from the Rome Statute to disregard Al-Bashir’s immunity when the Court requests his arrest.

A teleological approach is arguably also supported by a comparison with the resolutions creating the ad hoc tribunals, in contrast to a strictly textual comparison outlined above. In the 1990s is was necessary for the UNSC to spell out all the consequences when establishing a criminal tribunal, as the UNSC had never created such organs before. However, with a permanent ICC, UNSCRs no longer need to express all consequences. These are already set out in the Rome Statute. A comparison to the ad hoc tribunals thus warrants an interpretation where Sudan’s obligation to cooperate fully must be purposefully interpreted to mean that Sudan shall cooperate fully in accordance with the Rome Statute. Because the only legal regime applicable to the ICC is its Statute, a full cooperation must entail that Sudan is submitted to that legal regime. This argument supports the reasoning of the South Africa Decision.244

It can be argued that effective implementation does not necessitate legal predominance over personal immunities, as they are only accorded to a select few of the highest-ranking State officials, likely only the trio Head of State, Government and Foreign Minister.245 Respecting Al-Bashir’s personal immunity can thus be argued to be in line with the obligation to cooperate fully, because it does not negate the effective implementation of UNSCR 1593 to a significant degree. The ICC still can pursue other individuals.246 However, international criminal law is founded on the concept of ending impunity by providing individual criminal responsibility for the most serious crimes.247 It is a matter of fact that these crimes often are committed by precisely these highest-ranking State officials. Thus, depending on the specific situation, one could legitimately claim that an investigation and prosecution would be ineffective for the purpose of fully sanctioning the crime, if the highest-ranking officials were exempted. On this basis a broader teleological interpretation in line with Namibia is warranted.248

In line with the Kosovo Advisory Opinion, other relevant factors for the interpretation of UNSCR 1593 are statements prior to the adoption of the resolution and any subsequent prac-

244 Kress (n29) 240-3
245 Cassese et al., The Rome Statute of the International Criminal Court: a commentary (OUP, 2002) 989
246 Gaeta/Labuda (n120) 149; Jacobs (n174) 14
247 E.g. Preamble Rome Statute (n14)
248 Al-Bashir, DRC Decision (n58) para. 29, seems to imply this
No statements before the resolution’s adoption brought up the question of personal immunities in general or specifically for Al-Bashir. This points in the direction that UNSCR 1593 has not obligated other States than Sudan to disregard personal immunities. However, the value of this argument depends on whether UNSCRs are required to expressly state that they take legal predominance over customary law. I will analyse this in Part 5.3.2.3

A number of points can be made about subsequent practice. In 2008, the UNSC was asked by the African Union to defer the indictment in the Al-Bashir case before the ICC. The UNSC rejected the request and only took note of the AU concerns. Subsequent UNSCRs on the Darfur situation have reaffirmed that the situation represents a threat to international peace and security. However, the Council has neither responded to the ICC referring States Parties’ non-compliance to the Council, nor to repeated calls from the Prosecutor to take action. Statements in UNSC meetings point to Sudan’s obligations to surrender indicted persons. Russia is the only Member having mentioned immunities. It pointed to the importance of States’ cooperation with the Court, “while complying with norms of international law in the matter of immunity of senior State officials”. It seems justified to hold that little can be inferred from subsequent practice. The Russian comments came years after adoption of the UNSCR, and the statements of a single Member contribute little to establish any collective intent of the Council. The passiveness of the UNSC can be argued to fit both perspectives – that Sudan’s obligation takes legal predominance over personal immunities and that it does not.

There are many relevant objections to the argumentation of the latest ICC case law. This is only natural, given the sparsely worded obligations in UNSCR 1593. Based on my analysis, however, the ICC’s case law is justified de lege lata by applying a teleological interpretation that encapsulates the legal consequences that are required for an effective implementation of the resolution’s goal to protect international peace and security. Although this conclusion is

249 Kosovo (n205) para. 94
250 Record of 5158th meeting, 31.3.2005 (S/PV.5158)
251 Article 16 Rome Statute (n14)
252 Preamble, UN SCR 1828, 31.7.2008 (S/RES/1828)
253 E.g. Ibid.
254 E.g. Al-Bashir, DRC Decision (n58) para. 34
255 OTP, Statement to the UNSC on the Situation in Darfur, 12.12.2017
256 Boschiero, “The ICC Judicial Finding on Non-Cooperation Against the DRC,” JICJ (2015) 646; Record of 5905th meeting, 5.6.2008 (S/PV.5905); Record of 7080th meeting, 11.12.2013 (S/PV.7080)
257 Record of 6887th meeting, 13.12.2012 (S/PV.6887) 16; Ibid. 7080th meeting 8
258 See further Tladi, “The Duty on South Africa to Arrest and Surrender of President Al-Bashir,” JICJ (2015) 1043
warranted *de lege lata*, several commentators claim the existence of a requirement *de lege lata* that UNSCR 1593 had to be expressly state or indicate its intent to take legal predominance over customary international law. Whether such a requirement exists must be considered.

### 5.3.2.3 Should UNSCR 1593 have expressed its legal predominance over personal immunities?

Different types of arguments have been proposed in legal literature for requiring that UNSCR 1593 *de lege lata* should have expressed that it took legal predominance over customary international law, including personal immunities. It can be argued that the UNSC should have made its intention to override personal immunities clear, that a comparison to a waiver of immunities calls for an express reference, or that because UNSCR 1593 involves a delegation of jurisdiction to the ICC, it should have expressly mentioned the Rome Statute if it was meant to apply to Sudan.

In the *Elettronica Sicula* judgement, the ICJ discussed whether a rule of customary international law was non-applicable to the dispute between the parties. The Article in the treaty that conferred jurisdiction upon the ICJ in this specific case, did not state that the rule of the exhaustion of local remedies applied to a case brought before the ICJ. The ICJ found that it was “unable to accept” that an “important principle of customary international law” could have been “tacitly dispensed with, in the absence of any words making clear an intention to do so”.

The ICJ seems to indicate that if the customary rule of exhaustion of local remedies was intended not to apply to the dispute before the ICJ, it had to be expressed in the treaty. Applying similar logic to the interpretation of UNSCR 1593, it can be argued that the resolution should have made its intention clear to take legal predominance over personal immunities. Arguably, this intention is not clear from the wording “cooperate fully”. However, this argument fails to take into account that interpretation of UNSCRs may be different from treaty interpretation. It may also rely on other factors, such as the resolutions object and purpose, statements at the time of adoption and subsequent practice. The analysis in the previous Part concludes that a teleological interpretation justifiably warrants that the UNSC did not need to make its intention to take legal predominance over personal immunities clear. That

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260 Ibid.

261 Wardle (n232) 199-200; Jacobs (n174) 14 seems to imply the same

262 *Kosovo* (n205) para. 117

263 de Wet (n222) 36

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legal predominance is a legal consequence which is required for an effective implementation of the resolution’s goal to protect international peace and security is justified de lege lata.

Similarly, it can be argued that it is unrealistic to expect UNSCRs to spell out in advance all legal issues that could potentially arise out of a referral. No such requirement can be found in the UN Charter. The drafters of the Rome Statute considered that the UNSC should not have the power to refer specific cases, potentially undermining the political legitimacy and independence of the ICC. From this it can be inferred that referrals should neither be required to expressly state legal predominance over personal immunities. An express reference could be interpreted as a wish to see the certain few people enjoying personal immunities prosecuted. One can argue that personal immunities can only be removed in abstracto with regard to an entire situation. In any case, the UNSC could not be of any doubt that the ICC would be willing to investigate the “senior government officials” in the list of names provided to the Council by the International Commission of Inquiry on Sudan.

An objection to allowing non-express legal predominance over immunity draws on the regulation for waiver of diplomatic immunity. Article 32 Vienna Convention on Diplomatic Relations (“VCDR”) states that “waiver [of immunity] must always be express”. Although the reasoning on personal immunities in the ICC’s latest case law do not concern waiver of immunity, the non-applicability that follows from application of Article 27(2) Rome Statute has the same effect. Furthermore, diplomatic immunity relies on similar considerations as personal immunity. It is also personal, i.e. cover all aspects of a person acts, not limited to acts on behalf of the State (as functional immunity). Personal immunity has developed from State immunity to serve the effective functioning of a State’s highest-ranking officials while abroad. Diplomatic immunity similarly provides for the effective functioning of the State on foreign territory, namely its permanent foreign representatives. There might be good grounds to demand a waiver of immunity where the immunity covers all acts of the person, and protects the integrity of the State’s functioning abroad. Conversely, in my opinion, a UN-

265 Kress (n29) 241; Boschiroy (n255) 648
266 Article 13(1)(b) Rome Statute (n14) refers to “situations”; Williams/Schabas, “Article 13”, in Triffterer (n125) 568 margin 13
267 Boschiroy (n255) 848
268 Ibid.; Cassese et al. (n51) para. 644
269 Vienna Convention on Diplomatic Relations (“VCDR”) (adopted 18.4.1961), 500 UNTS 95; Tladi (n257) 1043
270 Akande/Shah (n86) 818
271 Cassese et al. (n244) 976
272 See Parts 1.1 and 3.3
SCR is necessarily a much broader decision than a single waiver by a country such as Côte D’Ivoire.\textsuperscript{273} In lack of obligations in the UN Charter to do so, requiring that a resolution expressly state legal predominance over personal immunities would unjustifiably limit the UNSC’s discretion of power.

Lentner argues that if Article 27(2) was meant to apply to Sudan the resolution should have mentioned the Rome Statute explicitly. He grounds this on the view that UNSCRs are the source of the ICC’s jurisdiction in cases of referral.\textsuperscript{274} He envisions that the ICC’s power to exercise jurisdiction over a State Party is conferred to it by its States Parties, and similarly by UN Member States to the ICC through a UNSC referral. As such, the UNSC can only confer the jurisdictional powers that has been conferred upon it by its UN Member States according to Article 24 UN Charter. Because of this, he finds that “the scope of these powers must be expressly stated and circumscribed in the respective resolution”.\textsuperscript{275} UNSCR 1593 does not mention that the Rome Statute applies to the Darfur situation, instead that Sudan shall cooperate fully “pursuant to this resolution”.\textsuperscript{276} Lentner infers that if the UNSC wished to deviate from personal immunities, it would have specified that the Rome Statute, including Article 27(2), applies. Lentner incorrectly claims that the UNSCR is the source of jurisdiction. Rather, the Rome Statute is the source. In its provisions on triggering of jurisdiction, the wording of the Statute is that UNSC referrals, as well as State referrals and \textit{proprio motu} by the OTP, trigger the “exercise of jurisdiction”.\textsuperscript{277} This indicates that the ICC already possesses jurisdiction. As such, there is no conferral of jurisdictional powers from the UNSC to the ICC. Thus, there is no basis for Lentner’s excessively formalistic argument that UNSCR 1593 had to explicitly state that the Rome Statute applies. This view is in line with the history of the drafting and negotiations of the ICC, which gave the Rome Statute a form of “universal jurisdiction”.\textsuperscript{278}

To the contrary of the question posed in this Part, it may be argued that UNSCR 1593 would have expressly stated if it intended to exempt taking legal predominance over the personal immunity of certain individuals.\textsuperscript{279} The resolution exempted nationals from contributing States outside Sudan that are non-States parties to the Rome Statute from the Court’s jurisdic-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{273} Who waived former President Gbagbo’s immunity, see n150
\item \textsuperscript{274} Lentner, “Why the ICC Won’t Get It Right”, \textit{EJIL: Talk!}, 24.7.2017; similarly Akande (n124) 341, however, he does not argue that express reference to the Statute is necessary
\item \textsuperscript{275} \textit{Ibid.} Lentner
\item \textsuperscript{276} UNSCR 1593 (n44) para. 2
\item \textsuperscript{277} Article 13 Rome Statute
\item \textsuperscript{278} Williams/Schabas, “Article 12”, in Triffterer (n125) 547-55; Gaeta/Labuda (n120) 153-4, footnote 66
\item \textsuperscript{279} Kreicker (n137) 161-2
\end{itemize}
\end{footnotesize}
tion.\textsuperscript{280} Although this exemption might have been an unlawful limitation of the ICC’s jurisdiction,\textsuperscript{281} it shows that the Council did consider the possible consequences of the resolution. It apparently did not consider that Al-Bashir should be exempted in any way.

5.4 Conclusive remarks on viability of the ICC’s case law \textit{de lege lata}

After an analysis \textit{de lege lata}, there is no requirement that UNSCR 1593 expressly state or indicate its intention to take legal predominance over personal immunities. Consequently, I find that the ICC can justifiably argue \textit{de lege lata} that UNSCR 1593 made Al-Bashir’s personal immunity non-applicable by application of Article 27(2) on Sudan as if it was analogous to a State Party. \textit{De lege ferenda}, however, I will argue that a better interpretation of UNSCR 1593 is that it implicitly waived Al-Bashir’s personal immunity for the national jurisdictions of States Parties (enforcement jurisdiction of the ICC). For its adjudicatory jurisdiction, the ICC should apply Article 27(2) on non-State parties as long as it can exercise jurisdiction over a non-State Party.

6 \textit{De lege ferenda} considerations and outlook

6.1 Initial remarks

I will now turn to the future and consider personal immunities for international crimes \textit{de lege ferenda}. I firstly consider how the ICC should interpret UNSCR 1593 in the upcoming Appeals Chamber (AC) decision on Jordan’s non-compliance. Secondly, I discuss other possible legal avenues to remove the barrier of personal immunity for international crimes. This includes a possible exception to personal immunities in customary international law when charged with international crimes, an obligation to cooperate in the Genocide Convention (GC) that prevails over personal immunities, and consequences of a possible ICJ Advisory Opinion.

6.2 On ICC decisions on States Parties’ non-compliance \textit{de lege ferenda}

The ICC should generally interpret UNSC referrals according to the method established in Part 5.3.1. The ICC should consider the ordinary meaning of a UNSCR’s text, together with its object and purpose. Preceding statements and subsequent practice can be taken into account. Attention should be paid to the effective implementation of a UNSCR decision. Any

\footnotesize{\textsuperscript{280} UNSCR 1593 (n44) para. 6
\textsuperscript{281} Cryer, “Sudan, Resolution 1593, and International Criminal Justice,” \textit{LJIL} (2006) 208-14}
consequence for customary international law need not be stated expressly, hence legal predominance over a rule of customary law need not be directly implied by the wording itself.

The AC should in its decision against Jordan interpret Sudan’s obligations in UNSCR 1593 to cooperate fully to mean that it has waived personal immunities regarding its cooperation with the ICC. Consequently, in the horizontal view, immunity is to be seen as waived under Article 98(1). Hence, the ICC could legally request that Jordan arrest and surrender Al-Bashir when he was on Jordanian territory. This argument was previously applied by the PTC II itself in the DRC Decision in 2014. The interpretation that Al-Bashir’s immunity is implicitly waived is a legally clearer and more convincing interpretation than the ICC’s interpretation in the South Africa Decision.

I find both legal and political reasons to support my view. In contrast to the South Africa Decision, the implicit-waiver argument continues to treat Sudan as a non-State party. Thus, the ICC can continue to respect the rule that a treaty may only bind those who consent to it. Admittedly, the ICC must still exercise its jurisdiction over Sudan on the basis of the Rome Statute. However, it will continue to treat Sudan as a non-State party where the Statute recognises limits in its exercise over non-States parties. An example is that Sudan will continue to be treated as a “third State” according to Article 98(1). Sudan’s obligation to cooperate with the Court in waiver of personal immunities stems from UNSCR 1593’s obligation to cooperate fully. A textual link to Article 98(1) supports this. The Article states that the Court must “obtain the cooperation of that third State for the waiver of the immunity”. Interpreting the obligation to mean that the Court must first ask Sudan for a waiver would undermine the effective implementation of the decision to obligate Sudan to cooperate fully. Thus, Sudan must be seen as effectively having cooperated in waiving immunities.

A consideration of the legitimacy of the ICC supports my view. In my opinion, arguing that the ICC continues to respect that Sudan is a non-State party is beneficial for the Court’s relations with its States Parties. It is understandable that States Parties react to the application of a treaty as if a State, for all intents and purposes, was a State Party, based on a UNSCRs obligation to fully cooperate. Although such an application is a justifiable interpretation of Sudan’s obligations in UNSCR 1593 de lege lata, it can at the same time be politically difficult to accept for States Parties. States Parties will be more lenient towards a legal argument that takes into account that a State is not fully contracting to a treaty that it has not consented to.

282 UNSCR 1593 (n44) para. 2
283 Al-Bashir, DRC Decision (n58) para. 29
284 Article 34 VCLT (n26)
Conversely, there are some shortcomings to the implicit-waiver argument. It must be analysed how Sudan is to be treated according to other rules on cooperation, should they arise. That the implicit-waiver argument does not solve all remaining questions, should not be held against it. This is a consequence of the fact that the complex relationship between UNSC referrals and the ICC is not thoroughly developed. In my opinion, the lack of a fully developed legal relationship does not, as such, trump the implicit-waiver argument.285

The AC decision on Jordan’s non-compliance will likely not address whether Al-Bashir’s personal immunity is a hinder to the Court’s exercise of adjudicatory jurisdiction over a non-State party such as Sudan, because the decision only concerns cooperation. However, should the AC or any other ICC Chamber rule on exercise of adjudicatory jurisdiction over a non-State party, they should simply apply Article 27(2). In line with the Arrest Warrant Decision I, the best stance de lege ferenda is that the Court must apply its own framework when there is no lacuna in the Statute.286 As Article 27(2) addresses the irrelevancy of immunities before the Court, the ICC should find that there is no lacuna and that it is bound to apply the Article. This argument is supported by the fact that Article 27(2) addresses limitations to the Court’s exercise of jurisdiction, and not obligations put on States Parties. Consequently, as long as the Court’s jurisdiction over a non-State party is triggered by a UNSC referral, the Court should issue arrest warrants in spite of personal immunities.287 The application of Article 27(2) should be limited to the adjudicatory jurisdiction, as Sudan’s status as a non-State party hinders the Court’s ability to demand cooperation solely by virtue of the decision in para. 1 of UNSC 1593 to refer the Darfur situation to the Court. As explained above, the decision in para. 2 to obligate Sudan to cooperate fully has implicitly waived immunities horizontally in face of States Parties’ cooperation with the Court for arrest and surrender.

The sparse wording of UNSCR 1593 has created seemingly endless possibilities for complex interpretations of the legal consequences for Sudan and States Parties. Irrespective of the legal reasoning that the AC applies, it should present its argument more clearly than previous ICC decisions. The ICC does not operate in a legal vacuum. So far, the PTCs have not sufficiently taken into account conflicting interpretations. It must not be underscored that these interpretations are legitimate and draw on valid legal sources and reasoning. The AC should aspire to

286 Article 21 Rome Statute (n14)
287 Jacobs (n174) 11-2
take into account and thoroughly examine all reasonable interpretations of UNSCR 1593. The development of the case in its Pre-Trial phase is promising.288

Cassese once stated that “international justice should not hinder political solutions of complex international crises in which very serious crimes are perpetrated” and that “the justice-spectacle must be avoided at all costs”.289 I respectfully disagree with Cassese, and believe that a judicial process against Al-Bashir in principle does not hinder a political solution to the Darfur conflict. The ICC should continue to apply justifiable interpretations of UNSCR 1593, and find that States Parties must arrest and surrender Al-Bashir when he visits their territory. African and other States Parties will likely continue to oppose such requests. In the long-term I believe an offensive approach by the ICC with continued international pressure better serves the goals of peace and justice.290

6.3 Alternative legal avenues to remove the barrier of personal immunity to cooperation with the ICC in situations referred by the UNSC

I will examine two possible legal avenues to establish an obligation on States to cooperate in the arrest and surrender of Heads of State accused of international crimes. Firstly, a possible exception to personal immunities in customary international law when indicted for international crimes, secondly, an obligation to cooperate with the ICC in the GC that prevails over personal immunities.291

The best option to end impunity for incumbent Heads of State and others enjoying personal immunities, is to establish an exception to such immunities for international crimes in customary international law, but only for prosecution by an international court. This would circumvent the complex legal question of UNSC referrals’ consequences for immunities. There are two requirements to establish a rule of customary international law: opinio juris and state practice.292 There is agreement that no such exception exists de lege lata, as there is insufficient state practice.293 There are good reasons for such a rule de lege ferenda. It would remove

288 Both parties have filed comprehensive submissions. The AC has invited submissions of amici curiae, see Al-Bashir, AC, Jordan’s appeal, 12.3.2018 (ICC-02/05-01/09-326); Prosecution Response, 3.4.2018 (ICC-02/05-01/09-331); Amici curiae invitation, 29.3.2018 (ICC-02/05-01/09-330)
289 Cassese (n224)
290 The former Prosecutor Moreno-Ocampo holds that “his destiny is to face justice,” see Papenfuss, IPI Global Observatory, 25.1.2012
291 Articles VI, VI GC (n30)
292 Military and Paramilitary Activities in and against Nicaragua, Merits, Judgment 27.6.1986, I.C.J. Reports 1986, p. 14, paras. 183-4; Malanczuk/Akehurst (n2) 39
293 See Kress (n29) 243-262
the last prosecutorial barrier to ending impunity for the most serious crimes. However, the requirement of state practice denotes that such practice must be both sufficient and consistent. In my opinion, it is unlikely that these conditions will be fulfilled in the short term. The African Union’s hostility towards and undermining of personal immunities will likely continue for the foreseeable future.294

An alternative option is to find obligations on States to cooperate in the GC. Clearly, potential obligations on this basis only apply for genocide indictments. In his Minority Opinion in the South Africa Decision, Judge de Brichambaut argued that the GC establishes a duty on States to cooperate in spite of personal immunities. In order for the Convention States’ duty to cooperate in the GC to be effective in preventing genocide, he argues that Article IV of the GC places a duty to arrest and surrender also sitting Heads of State.295 De lege lata it is unclear if obligations in the GC supersede personal immunities. The ICC has held that the individual criminal responsibility for “persons committing genocide” must not be confused with immunity from criminal jurisdiction.296 It is also questionable whether the ICC’s arrest warrant for Al-Bashir is sufficient to fulfill the condition to be “charged” in the GC.297 Under the Rome Statute, an individual can only be formally charged by appearing before the ICC.298 Legal literature seems to be divided on the issue.299

Although there is uncertainty de lege lata, it can be argued that the GC should apply de lege ferenda. Applying it, however, would only provide basis for the ICC to request States Parties to cooperate for persons indicted for genocide. This creates an unfortunate division between the possibility to sanction genocide and the other core crimes.300 On the other side, genocide is prima facie the most serious of the core crimes, which could justify such a division.

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295 Al-Bashir, Minority Opinion in the South Africa Decision (n31) paras. 20-38
296 Al-Bashir, South Africa Decision (n31) para. 109
297 Article VI GC (n30)
298 Article 61 Rome Statute (n14)
299 For a thorough discussion of numerous elements, see Steinberg (n31)
300 Article 5(1) Rome Statute (n14)
6.4 An ICJ Advisory Opinion

In February 2018, the African Union adopted a decision to seek an Advisory Opinion from the ICJ on the question of Head of State immunity.\textsuperscript{301} Such a request can be made by the UN General Assembly.\textsuperscript{302} An Advisory Opinion is not legally binding on anyone, but is a relevant legal source when the ICC interprets rules of international law.\textsuperscript{303} The Court has previously referred to ICJ Advisory Opinions.\textsuperscript{304}

The relevance of an Advisory Opinion for the ICC would be determined by the framing of the question to the ICJ. To potentially assist in legal clarity, the question should be framed on the relationship between UNSC referrals and the ICC. It should include the consequences of UNSCR 1593 on personal immunities. Furthermore, it should address whether UNSCRs must expressly state or indicate its intent to take legal predominance over a rule of customary international law. Limiting the question to a possible exception to personal immunity for international crimes in customary international law would, if negatively answered, not resolve any disagreement on the consequences of UNSC referrals to date.

7 Conclusion

This thesis has answered two research questions \textit{de lege lata}:

1) What are the legal effects of a UNSC referral to the ICC of a situation in a State not party to the Rome Statute on the personal immunity of the Head of State of the referred situation’s State, and

2) What are the legal effects of such a UNSC referral on the obligations of States Parties to the Rome Statute to cooperate with the ICC in the arrest and surrender of the Head of State of the referred situation’s State?

0. I have shown that the answer to both questions is that a UNSC referral of a situation in a State not party to the ICC, \textit{per se} neither has legal effects on the personal immunity of the Head of State of that State, nor on the obligations of States Parties to the ICC to cooperate in the arrest and surrender of the Head of State.

\textsuperscript{301} Assembly of the Union, Decision on the International Criminal Court, 29.1.2018 (Assembly/AU/Dec.672) para. 5(ii)

\textsuperscript{302} Article 96(a) UN Charter (n43); Chapter IV ICJ Statute (n21)

\textsuperscript{303} Article 21(1)(b) Rome Statute (n14)

\textsuperscript{304} \textit{Al Bashir}, South Africa Decision (n31) para. 89
1. However, UNSCR 1593’s obligation on Sudan to cooperate fully takes legal predominance over personal immunities both in the Court’s exercise of adjudicatory jurisdiction vis-à-vis Sudan, and when requesting Sudan to cooperate with arrest and surrender of an individual under its national jurisdiction. The ICC’s interpretation in the South Africa Decision, namely that the Rome Statute applies as if Sudan was in a legal situation analogous to a State Party, is justified de lege lata. Article 27(2) renders Al-Bashir’s immunity inapplicable for the Court’s exercise of jurisdiction over Sudan.

2. This thesis has also shown that UNSCR 1593’s obligation on Sudan to cooperate fully has consequences for States Parties’ obligations to cooperate with the ICC when requesting arrest and surrender of an individual. Personal immunities remain an important rule of customary international law, and will continue to provide for the peaceful communications between States. Despite this, the UN Charter provides that UNSCRs can take legal predominance over rules of customary international law. An interpretation according to the established method of interpretation of UNSCRs reveals that UNSCR 1593’s obligation on Sudan to cooperate fully also takes legal predominance over personal immunities when the Court requests States Parties to arrest and surrender an individual under its national jurisdiction. The ICC’s latest interpretation, that it may consider Sudan as analogous to a State Party for the purposes of Article 98(1) Rome Statute, is justified de lege lata. The ICC may legally request States Parties to arrest and surrender Al-Bashir when he is on their territory.

*De lege ferenda* I have shown that there is a better interpretation of UNSCR 1593. The resolution should be interpreted to have implicitly waived Al-Bashir’s immunity vis-à-vis Sudan’s and States Parties’ cooperation in his arrest and surrender. Respecting that Sudan has not consented to the Statute, the ICC should treat Sudan as a non-State party according to Article 98(1). However, by UNSCR 1593 obligating Sudan to cooperate fully, Sudan should be seen as having cooperated in waiving Al-Bashir’s personal immunity per Article 98(1).

The ICC should apply Article 27(2) when exercising its adjudicatory jurisdiction, also when exercising such jurisdiction over non-States parties. As there is no *lacuna* in the Statute concerning the status of immunities before the Court, the ICC should, for the limited purpose of its adjudicatory jurisdiction, such as issuing arrest warrants, apply Article 27(2) for situations in non-States parties. For the reasons above, there is neither any impediment on the ICC to prosecute Al-Bashir, nor on requesting Sudan or States Parties to arrest and surrender Al-Bashir to the Court.
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