

Resolving the conflict between South Africa's international and domestic legal obligations concerning the arrest of heads of state: lessons from the Al Bashir visit to South Africa

by

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## Declaration

I declare that ‘Resolving the conflict between South Africa’s international and domestic legal obligations concerning the arrest of heads of state: Lessons from the Al Bashir visit to South Africa’ is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

I further declare that I submitted the dissertation to originality checking software. The result summary is attached. I further declare that I have not previously submitted this work, or part of it, for examination at Unisa for another qualification or at any other higher education institution.

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## **List of Abbreviations**

ASP	Assembly of States' Parties
AU:	African Union
CC:	Constitutional Court
CPA:	Criminal Procedure Act
DIPA:	Diplomatic Immunities and Privileges Act 37 of 2001
DRC:	Democratic Republic of the Congo
DIRCO:	Department of International Relations and Cooperation
EU:	European Union
GA:	General Assembly of the United Nations
HRC:	Human Rights Committee of the United Nations
ICC:	International Criminal Court
ICJ:	International Court of Justice
ILC:	International Law Commission
NPA:	National Prosecuting Authority of South Africa
NDPP:	National Director of Public Prosecutions
NGHC:	North Gauteng High Court
OAU:	Organisation of African Unity
SALC:	South African Litigation Centre
SC:	Security Council of the United Nations
SCA:	Supreme Court of Appeal

UN:	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
VCLT	Vienna Convention on the Law of Treaties

## **Summary**

This dissertation involved a discussion and analysis of the international and domestic legal framework, and case law governing the immunity, arrest and surrender of heads of State wherein international crimes are addressed. This is in light of the visit by Omar Al Bashir, as then President of Sudan (Al Bashir), to South Africa when he attended an AU summit in the country.

Before engaging discussions and analysis on the international and domestic legal framework, the dissertation starts by providing a background on immunity, arrest and surrender within the context of the Al Bashir matter. This was undertaken because the dissertation makes reference to the Al Bashir matter throughout, in order to demonstrate the conflicting obligations that arise for South Africa under the current legal framework, that is, the Rome Statute, Implementation Act and the DIPA.

On this note, the dissertation discusses the international position on immunity, arrest and surrender of heads of State, emphasizing the conflicting obligations that arise from the Rome Statute, being the international legal instrument governing it. This part of the discussion involves the clash between customary international law immunity and Rome Statute provisions, as well as international case law thereon. As a result, the basis to measure the extent of South Africa's compliance with the international law position on immunity, arrest and surrender, was provided.

The dissertation then proceeds with a discussion on whether South Africa's law complies with the international position on immunity, arrest and surrender of head of State to the ICC for trial. The discussion highlights the domestic laws of South Africa and case law on South Africa's failure to cooperate with ICC requests for the arrest and surrender of Al Bashir when he arrived in South Africa with two pending arrest warrants. Following this, the dissertation proceeds to discuss the effect of ICC cases on the international law position on immunity, arrest and surrender of heads of State such as Al Bashir.

Finally, the dissertation provides an overall analysis to establish whether South Africa's law complies with the international legal position and provides a recommendation based on the findings of the dissertation. Generally, South Africa has successfully incorporated the Rome Statute into its domestic laws under the Implementation Act. However, the pressing issue is the conflicting obligations that arise under the Rome Statute given that it recognises customary international law immunity, and in other provisions it denies immunity. This results in



conflicting obligations for South Africa, as such, South Africa failed to arrest and surrender Al Bashir on the basis of customary international law immunity, recognised in the Rome Statute. Moreover, South Africa has incorporated as part of their law, both the Implementation Act which precludes immunity, as well as the DIPA, which grants immunity to heads of State. As such, this dissertation recommends an amendment to the Implementation Act in order to ensure South Africa's compliance with provisions of the Rome Statute, to cooperate with ICC requests which is supported by international and domestic case law.

**Key terms:**

Arrest of heads of state; customary international law immunity; international warrant of arrest; International Criminal Court decisions; obligations to arrest heads of state; compliance with Rome Statute; international principle of cooperation; United Nations Charter; resolutions of UNSC; resolutions of AU.

# CHAPTER 1

## INTRODUCTION

### 1.1 INTRODUCTION

Kofi Annan, the former United Nations (UN) Secretary-General, in addressing the International Bar Association on 12 June 1997 said that:

‘[i]n the prospect of an international criminal court lies the promise of universal justice. That is the simple and soaring hope of this vision. We are close to its realization. We will do our part to see it through till the end. We ask you [...] to do yours in our struggle to ensure that no ruler, no State, no junta and no army anywhere can abuse human rights with impunity. Only then will the innocents of distant wars and conflicts know that they, too, may sleep under the cover of justice; that they, too, have rights, and that those who violate those rights will be punished’.<sup>1</sup>

At the 52<sup>nd</sup> session of the UN General Assembly (UNGA), it was decided to convene the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court from 15 June to 17 July 1998.<sup>2</sup> The purpose of the conference was to finalise and adopt a treaty on the establishment of the International Criminal Court (ICC). With 107 States’ Parties having ratified<sup>3</sup> the 1998 UN’s Rome Statute of the International Criminal Court (‘Rome Statute’),<sup>4</sup> its adoption in 1998 was in itself a historic event, marking a milestone in humankind’s efforts towards a more just world.<sup>5</sup> In light of this, the Rome Statute is a critical source of public international law as it relates to international crimes.

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<sup>1</sup> UN ‘Overview on the International Criminal Court’ <<http://legal.un.org/icc/general/overview.htm>> accessed 14 December 2017; and UN Press Release SG/SM/6257 <<https://www.un.org/press/en/1997/19970612.sgsm6257.html>> accessed 12 June 2019.

<sup>2</sup> UN ‘Official Records Volume I Final Documents Rome Statute of the International Criminal Court and Final Act of the United Nations [with an annex containing the resolutions adopted by the Conference] Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome’ 15 June–17 July 1998 <[http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings\\_v1\\_e.pdf](http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v1_e.pdf)> accessed 14 December 2017).

<sup>3</sup> Status of the Rome Statute <[https://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTSOnline&tabid=2&mtdsg\\_no=XVII-I-10&chapter=18&lang=en](https://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTSOnline&tabid=2&mtdsg_no=XVII-I-10&chapter=18&lang=en)> accessed 04 April 2020. Signatories are those states that have signed the treaty indicating their intention to comply with the treaty; and States’ Parties ratified the treaty in terms of arts 2(b) and 14 of the Vienna Convention on the Law of Treaties (VCLT).

<sup>4</sup> 2187 UNTS 3.

<sup>5</sup> ICC ‘Core Legal Texts’ <<https://www.icc-cpi.int/resource-library#coreICCTexts>> accessed 07 November 2018); see the list of 123 States’ Parties to the Rome Statute <[https://asp.iccpi.int/en\\_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://asp.iccpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx)> accessed 09 March 2020. and Jeron Maklanron, ‘South Africa’s Disappointment

The main sources of international law are conventions or treaties and customary international law as cited in article 38 of the 1946 UN's Statute of the International Court of Justice ('ICJ Statute').<sup>6</sup> International customs are codified in various international conventions or treaties and uniform laws.<sup>7</sup> Hence why the evolution of public international law has seen an emergence of sets of legal rules and norms<sup>8</sup> governing international relations amongst States regarding, *inter alia*, the immunity, arrest and surrender of heads of State. Once a State ratifies a convention or treaty in accordance with the 1969 UN's Vienna Convention on the Law of Treaties ('VCLT'),<sup>9</sup> the domestic law of the State accordingly changes or is amended.<sup>10</sup>

With regard to the Rome Statute, article 125 stipulates the requirements for States to become signatories to the statute and for its subsequent ratification.<sup>11</sup> At a domestic level, the procedure for approval of international legal instruments by South Africa, which includes the Rome Statute, is contained in section 231 of the Constitution of the Republic of South Africa, 1996 ('the Constitution').<sup>12</sup>

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with the International Criminal Court: The Unfair Treatment of African People Caused an End to Cooperation' 2016 *Africology: The Journal of Pan African Studies* 83.

<sup>6</sup> 33 *UNTS* 993.

<sup>7</sup> UN Statute art 38 1945 of the International Court of Justice identifies the sources of international law: '(a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognised by civilized nations; and (d) subject to the provisions of art 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.'

<sup>8</sup> *Inter alia* customary international law immunity, Rome Statute obligations to arrest and surrender heads of state that commit international crimes; and the doctrine of *jus cogens*.

<sup>9</sup> 1155 *UNTS* 331.

<sup>10</sup> The procedure incorporating treaties or conventions in South Africa is set out in s 231 of the Constitution. S 232 providing for incorporation of customary international law in South Africa: 'Customary International Law is Law in the Republic unless it is Inconsistent with the Constitution or an Act of Parliament.' S 233 provides for the application of international law in South Africa: 'When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.'

<sup>11</sup> Rome Statute art 125 provides that: '(1) This Statute [Rome Statute] shall be open for signature by all States in Rome, at the headquarters of the Food and Agriculture Organisation of the United Nations, on 17 July 1998. Thereafter, it shall remain open for signature in Rome at the Ministry of Foreign Affairs of Italy until 17 October 1998. After that date, the Statute shall remain open for signature in New York, at United Nations Headquarters, until 31 December 2000. (2) This Statute is subject to ratification, acceptance or approval by signatory States. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations. (3) This Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations.'

<sup>12</sup> Constitution of South Africa Act 108 of 1996 s 231 provides that: '(1) The negotiating and signing of all international agreements is the responsibility of the national executive. (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3). (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council

A treaty or convention is therefore a consensual agreement between sovereign independent States, as well as between States and international organisations.<sup>13</sup> In South Africa, an ‘international agreement’<sup>14</sup> refers to a treaty, meaning that it is a legally binding, enforceable agreement as defined in article 2 of the VCLT and accepted as such by the domestic courts of South Africa when applying international law in its jurisdiction.<sup>15</sup> Subsequent to South Africa ratifying a treaty, it becomes law in South Africa through an Act of Parliament, or if it is a self-executing treaty<sup>16</sup> that has been approved by Parliament.<sup>17</sup> The Act or the self-executing treaty approved by Parliament must not be inconsistent with the Constitution or national legislation.<sup>18</sup> This process was pointed out by the Constitutional Court in *Glenister v President of the Republic of South Africa and others* (‘*Glenister case*’).<sup>19</sup>

Similarly, South Africa must comply with customary international law that automatically becomes part of South African law, unless it is inconsistent with the Constitution or national legislation.<sup>20</sup> The ICJ Statute provides that when settling disputes, the Court shall ‘apply international custom, as evidence of a general practice accepted as law’.<sup>21</sup> Therefore, a custom is a settled practice followed by States because they feel legally obliged to behave in such a way.<sup>22</sup> Both *usus* (settled practice), and *opinio iuris* (a sense of obligation by States) must be present for the custom to have developed.<sup>23</sup> According to Dugard, evidence of settled practice by a State may be found in various materials that include treaties, decisions of national courts, national legislation, diplomatic correspondence, policy statements by government officers,

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within a reasonable time. (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. (5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.’

<sup>13</sup> VCLT art 2.

<sup>14</sup> The Constitution s 231.

<sup>15</sup> Treaties are defined in VCLT art 2.

<sup>16</sup> A self-executing treaty means the direct application of treaty obligations, whereby the transposing of a self-executing treaty into domestic legislation would be superfluous. This is so, because the treaty is directly applicable and therefore automatically part of domestic law.

<sup>17</sup> The Constitution s 231(4).

<sup>18</sup> *ibid.*

<sup>19</sup> *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347; 2011 (7) BCLR 651 (CC) para 89–90. The Constitutional Court highlighted that treaties that have been signed by the Executive, must be approved by Parliament unless it is of a technical, administrative or executive nature. It further highlighted that a treaty that has been approved by Parliament must be enacted into an Act of Parliament, unless it is self-executing, before it becomes part of South African law.

<sup>20</sup> The Constitution s 232.

<sup>21</sup> ICJ Statute art 38 (1)(b).

<sup>22</sup> John Dugard et al, *Dugard’s International Law: A South African Perspective* (5th ed<sup>n</sup>, Juta 2019) 31–37.

<sup>23</sup> *ibid* 31. See also, Dire Tladi, ‘Interpretation and International Law in South African Courts: The Supreme Court of Appeal and the Al Bashir Saga’ (2016) 16 AHRLJ 310, 315.

opinions of national law advisers, reports of the International Law Commission (ILC) together with comments thereon, and resolutions of international organisations particularly those of the political organs of the UN.<sup>24</sup> Often there is no clear evidence of consent to State practice, but it can be inferred from the inaction of some States.<sup>25</sup> In addition to State practice, there must be a feeling by States that they are bound by the particular rule.<sup>26</sup> These international law requirements for an international law custom to develop are linked to section 232 of the Constitution, which provides that customary international law automatically forms part of South African law, unless it is in conflict with the Constitution or legislation.<sup>27</sup>

Thus, customary international law that has developed through compliance with *usus* and *opinio iuris* automatically becomes part of South African law under section 232 of the Constitution. This is the case, unless the Constitutional Court finds that a particular custom is inconsistent with the Constitution or any other piece of legislation.

In so far as international crimes are concerned, South Africa signed and ratified the Rome Statute in terms of the procedure prescribed in section 231 of the Constitution. The Rome Statute became effective in South Africa through the promulgation of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 ('Implementation Act').<sup>28</sup> The Rome Statute, Implementation Act and its interplay with customary international law immunity gave rise to conflicting obligations for South Africa regarding the immunity, arrest and surrender of heads of State. This is particularly the case involving former President of Sudan, Omar Al Bashir ('Al Bashir') when he attended an African Union (AU) summit in South Africa from 13 to 15 June 2015. The conflicting obligations arose because customary international law immunity of heads of State such as Al Bashir are recognised in the Rome Statute, as well as the Diplomatic Immunities and Privileges Act of 2001 ('DIPA'),<sup>29</sup> which is

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<sup>24</sup> Dugard et al (n 22) 31–37. See also, ILC *Draft Conclusions on the Identification of Customary International Law*, *Draft Conclusion 4* (Seventieth Session (A/73/100) <[https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/1\\_13\\_2018.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_13_2018.pdf)> accessed 22 December 2020).

<sup>25</sup> ILC (n 24). ILC *Draft Conclusion on the Identification of Customary International Law*, *Draft Conclusion 6*, *para 1* (Seventieth Session (A/73/100) <[https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/1\\_13\\_2018.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_13_2018.pdf)> accessed 22 December 2020). See also *para 3* of the *Commentary to Draft Conclusion 6* <[https://legal.un.org/ilc/reports/2018/english/a\\_73\\_10\\_advance.pdf](https://legal.un.org/ilc/reports/2018/english/a_73_10_advance.pdf)> accessed 22 December 2020.

<sup>26</sup> Dugard et al (n 22) 36.

<sup>27</sup> The Constitution s 232: '[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.'

<sup>28</sup> Act 27 of 2002.

<sup>29</sup> Act 37 of 2001.

contrary to the Implementation Act prohibiting immunity. This was demonstrated when Al Bashir as head of State of Sudan was allowed into South Africa, notwithstanding that on 31 March 2005, the UN Security Council (UNSC) passed Resolution 1593 ('Resolution 1593'),<sup>30</sup> referring the prosecution of those who allegedly committed international crimes in Sudan to the ICC.<sup>31</sup> The UNSC acting under Chapter VII of the UN Charter referred the situation in Sudan to the ICC via Resolution 1593,<sup>32</sup> rendering the Court with jurisdiction to investigate and prosecute Al Bashir for allegedly committing international crimes in terms of article 13(b) of the Rome Statute.<sup>33</sup>

Subsequent to Resolution 1593, in terms of article 58 of the Rome Statute,<sup>34</sup> the ICC issued an arrest warrant against Al Bashir in 2009,<sup>35</sup> followed by another in 2010.<sup>36</sup> In terms of the warrants,<sup>37</sup> the charges levelled against Al Bashir include five counts of crimes against humanity,<sup>38</sup> two counts of war crimes<sup>39</sup> and three counts of genocide.<sup>40</sup> The warrants were endorsed by South Africa<sup>41</sup> in terms of section 8(1) of the Implementation Act<sup>42</sup> to be executed

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<sup>30</sup> UNSC Res 1593, 'Acting Under Chapter VII of the Charter of the United Nations' (31 March 2005 <<https://www.icc-cpi.int/NR/rdonlyres/85FEED1A-29F8-4EC4-9566-48EDF55CC587/283244/N0529273.pdf>> accessed 25 November 2016.

<sup>31</sup> Dugard et al (n 22) 276. UNSC referrals are issued in terms of art 13 of the Rome Statute as one of the ways in which the ICC acquires jurisdiction. The other two ways in which the ICC acquires jurisdiction in terms of art 13 are via a State Party or Prosecutor's referral.

<sup>32</sup> UNSC (n 30).

<sup>33</sup> The ICC can also exercise jurisdiction by referral of alleged international crimes by a State Party to the Rome Statute in terms of art 13(a); or if the Prosecutor initiated the investigation of alleged international crimes in terms of the Rome Statute art 13(c).

<sup>34</sup> Rome Statute art 58 regulates issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear.

<sup>35</sup> ICC-02/05-01/09-1 04-03-2009 <[https://www.icc-cpi.int/CourtRecords/CR2009\\_01514.PDF](https://www.icc-cpi.int/CourtRecords/CR2009_01514.PDF)> accessed 01 November 2020.

<sup>36</sup> ICC-02/05-01/09-95 12-07-2010 <[https://www.icc-cpi.int/CourtRecords/CR2010\\_04825.PDF](https://www.icc-cpi.int/CourtRecords/CR2010_04825.PDF)> accessed 01 November 2020.

<sup>37</sup> ICC-02/05-01/09-1 04-03-2009 <[https://www.icc-cpi.int/CourtRecords/CR2009\\_01514.PDF](https://www.icc-cpi.int/CourtRecords/CR2009_01514.PDF)> accessed 01 November 2020; and ICC-02/05-01/09-95 12-07-2010 <[https://www.icc-cpi.int/CourtRecords/CR2010\\_04825.PDF](https://www.icc-cpi.int/CourtRecords/CR2010_04825.PDF)> accessed 01 November 2020.

<sup>38</sup> Murder; extermination; forcible transfer; torture; and rape.

<sup>39</sup> Intentionally directing attacks against a civilian population as such or against individual civilians not taking part in hostilities; and pillaging.

<sup>40</sup> Killing; causing serious bodily and mental harm; and deliberately inflicting conditions of life on each target group to bring about the group's physical destruction.

<sup>41</sup> *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* (867/2015) [2016] ZASCA 17 para 96.

<sup>42</sup> Implementation Act s 8(1) provides that: 'Any request received from the Court for the arrest and surrender of a person for whom a warrant of arrest has been issued by the Court must be referred to the Central Authority and accompanied by such documents as may be necessary to satisfy a competent court in the Republic that there are sufficient grounds for the surrender of that person to the Court.'

in any part of South Africa in terms of section 8(2) of the Implementation Act.<sup>43</sup> This means that there is currently a South African arrest warrant for Al Bashir to be executed if he is found anywhere in South Africa. In light of the pending arrest warrant against Al Bashir for execution anywhere in South Africa,<sup>44</sup> South Africa indicated no reservations towards its obligations to cooperate with the ICC to arrest and surrender him for trial should he be found in South Africa.<sup>45</sup> However, this was not the case when Al Bashir arrived in South Africa in June 2015.

The South African government failed to arrest and surrender Al Bashir to the ICC when he landed in its jurisdiction. This was despite the pending ICC arrest warrants, its endorsement by the Pretoria Chief Magistrate, as well as consistent ICC rulings against States' Parties to the Rome Statute for failing to comply with their international obligations to arrest and surrender Al Bashir. These rulings were against, among others, the Republic of Chad ('Chad'),<sup>46</sup> the Democratic Republic of Congo (DRC),<sup>47</sup> the Republic of Malawi ('Malawi'),<sup>48</sup> and later South Africa.<sup>49</sup>

Al Bashir landed and departed from the above States without being arrested and surrendered to the ICC. In South Africa, the South African Litigation Centre ('SALC') brought an urgent court application against the South African Government in the North Gauteng High Court ('NGHC'),<sup>50</sup> followed by an appeal by the South African government in the Supreme Court of Appeal ('SCA').<sup>51</sup> Thereafter, the ICC brought a case against South Africa, on the basis of a

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<sup>43</sup> S 8(2) providing that: 'The Central Authority must immediately on receipt of that request, forward the request and accompanying documents to a magistrate, who must endorse the warrant of arrest for execution in any part of the Republic.'

<sup>44</sup> The ICC arrest warrants were endorsed in terms of s 8(1) of the Implementation Act by the Chief Magistrate, Pretoria for implementation anywhere in South Africa. See also *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* (867/2015) [2016] ZASCA 17 para 104.

<sup>45</sup> *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* (867/2015) [2016] ZASCA 17 para 104.

<sup>46</sup> ICC, 'Decision Pursuant to Article 87(7) of the Rome Statute on the Refusal of the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir' ICC-02/05-01/09 of 13 December 2011 <[https://www.icc-cpi.int/CourtRecords/CR2012\\_04203.pdf](https://www.icc-cpi.int/CourtRecords/CR2012_04203.pdf)> accessed 07 November 2020.

<sup>47</sup> ICC, 'Decision on the Cooperation of the Democratic Republic of Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court' ICC-02/05-01/09 of 9 April 2014 <[https://www.icc-cpi.int/CourtRecords/CR2014\\_03452.PDF](https://www.icc-cpi.int/CourtRecords/CR2014_03452.PDF)> accessed 07 November 2020.

<sup>48</sup> (n 46).

<sup>49</sup> ICC, 'Decision under Article 87(7) of the Rome Statute on the Non-compliance by South Africa with the Request by the Court for the Arrest and Surrender of Omar Al Bashir' ICC-02/05-01/09-302 06 July 2017 <[https://www.icc-cpi.int/CourtRecords/CR2017\\_04402.PDF](https://www.icc-cpi.int/CourtRecords/CR2017_04402.PDF)> accessed 07 November 2020.

<sup>50</sup> *Southern African Litigation Centre v Minister of Justice and Constitutional Development and Others* (27740/2015) [2015] ZA GPPH 402.

<sup>51</sup> *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* (867/2015) [2016] ZASCA 17.

UNSC referral<sup>52</sup> for Al Bashir to stand trial for allegedly committing international crimes. The South African government argued that Al Bashir had immunity as a sitting head of State and consequently did not arrest him. However, the NGHC and SCA ruled that South Africa had violated its obligations under international and domestic law by not arresting and surrendering Al Bashir to the ICC as he did not have immunity. Similarly, the ICC ruled that the South African government failed to comply with its obligations to cooperate with the arrest and surrender of Al Bashir, which came subsequent to rulings against, amongst others Chad, DRC and Malawi.

In light of the above, this dissertation comprises of an investigation and analysis of the international and domestic legal obligations of South Africa on the immunity, arrest and surrender of heads of State. Ahead of undertaking the said investigation and analysis, this chapter provides a background, outlining South Africa's conflicting obligations, the research problem flowing therefrom, the objectives of the study, questions, methodology, limitations and the chapter outline.

## 1.2 BACKGROUND

As earlier indicated, the Constitution sets out the procedure for transposing international laws into domestic laws of South Africa.<sup>53</sup> This is guided by directives provided by the Department of International Relations and Cooperation ('DIRCO').<sup>54</sup> Due to the dissimilarity in different States' Constitutions, there is no absolute uniformity in concluding treaties, nor are there uniform rules and regulations thereon.<sup>55</sup> To this end, the process of negotiation and conclusion of treaties developed over time, and adapted by different States in accordance with their constitutional requirements.<sup>56</sup>

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<sup>52</sup> Rome Statute art 13(b) provides that the ICC will have jurisdiction over international crimes defined in art 5 of the Rome Statute if 'a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.'

<sup>53</sup> The Constitution s 231 contains the procedure for concluding treaties; s 232 provides that international custom automatically becomes part of South African domestic law; and s 233 provides that interpretation of legislation must be consistent with international law rather than an interpretation that is not consistent with international law. See also, Erika de Wet, 'The Implications of President Al-Bashir's Visit to South Africa for International and Domestic Law' (2015) 13 JICJ 1049, 1063.

<sup>54</sup> DIRCO, 'Directives for the Conclusion of International Agreements 2019' <[http://www.dirco.gov.za/chiefstatelawadvice/documents/directive\\_conclusion\\_international\\_agreements\\_2019.pdf](http://www.dirco.gov.za/chiefstatelawadvice/documents/directive_conclusion_international_agreements_2019.pdf)> accessed 12 September 2020.

<sup>55</sup> *ibid.*

<sup>56</sup> *ibid.*



At an international level, representatives of States negotiate and agree on terms that will bind them to a treaty in terms of the VCLT. The purpose of the signature is to establish the text of the treaty as authentic and definitive,<sup>57</sup> and to create an obligation not to defeat the object and purpose of the treaty.<sup>58</sup> This means that a signatory State to a particular treaty merely expresses the intention to comply with the treaty.<sup>59</sup> The consent to be bound by a treaty is usually established at a later stage by ratification<sup>60</sup> or similar means.<sup>61</sup> This is done by exchanging or notifying instruments of ratification for deposit<sup>62</sup> with the identified depository.<sup>63</sup> For South Africa, the approval of a treaty is usually required as a prerequisite for ratification.<sup>64</sup>

Once South Africa has ratified a treaty and passed an Act of Parliament in instances where a treaty is not self-executing, it becomes legally binding upon South Africa at a domestic and international level in terms of South Africa's Constitution.<sup>65</sup> On 27 November 2000, South Africa ratified the Rome Statute<sup>66</sup> and promulgated the Implementation Act in accordance with the procedure outlined in section 231 of the Constitution. Therefore, non-compliance with the Implementation Act which incorporates the Rome Statute, bears domestic and international law consequences for South Africa.<sup>67</sup> Despite ratifying the Rome Statute, South Africa has not cooperated with the ICC warrants and ICC requests for the arrest and surrender of Al Bashir when he attended an AU summit during 13 to 15 June 2015.

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<sup>57</sup> VCLT art 10.

<sup>58</sup> *ibid* art 18.

<sup>59</sup> In practice there is no obligation on a signatory state to ratify the signed statute.

<sup>60</sup> *ibid* art 14(1).

<sup>61</sup> *ibid* art 14(2).

<sup>62</sup> *ibid* art 16.

<sup>63</sup> *ibid* art 76 and 77.

<sup>64</sup> For South Africa, international agreements that fall within s 231(2) of the Constitution, that is not of a technical, administrative or executive nature, Parliamentary approval must first be obtained before it can be binding. This procedure entails tabling the international agreement before Parliament in order for the relevant Portfolio Committee in the National Assembly and Select Committee in the National Council of Provinces to process it for approval in both Houses of Parliament under Rule 342 of the National Assembly Rules (9<sup>th</sup> edn 2016). Only once the treaty has been approved by both Houses of Parliament can it enter into force through the depositing of an instrument of Ratification.

<sup>65</sup> The Constitution s 231 (1)–(5).

<sup>66</sup> UN Treaties

<[https://treaties.un.org/Pages/ShowMTDSDetails.aspx?src=UNTSO&tabid=2&mtdsg\\_no=XVII-I-10&chapter=18&lang=en](https://treaties.un.org/Pages/ShowMTDSDetails.aspx?src=UNTSO&tabid=2&mtdsg_no=XVII-I-10&chapter=18&lang=en)> accessed 04 April 2020.

<sup>67</sup> The South African government could be charged by the NPA in South Africa for contempt of court. At an international level, the ICC can refer the non-compliance by South Africa to cooperate with its requests for the arrest and surrender of those who allegedly committed international crimes to the ASP, or if the matter was referred to the ICC under a UNSC Resolution, then the ICC can refer the matter. See also, art 60 of the VCLT stipulating provisions for 'termination or suspension of the operation of a treaty as a consequence of its breach'.

As mentioned, the ICC, under a UNSC referral<sup>68</sup> in terms of article 13(b) of the Rome Statute, issued two ICC arrest warrants against Al Bashir for war crimes, crimes against humanity and genocide.<sup>69</sup> Article 13(b) of the Rome Statute initiates the jurisdiction of the ICC and States' Parties must comply with obligations imposed under it.<sup>70</sup> These obligations include ICC requests for the cooperation of States' Parties to arrest and surrender heads of State such as Al Bashir who stands accused of committing international crimes, failing which, will bear consequences.<sup>71</sup> These consequences include ICC cases being lodged against States' Parties which could result in a ruling by the ICC referring the matter to the UNSC and/or Assembly of States' Parties (ASP)<sup>72</sup> should the Court find that those States' Parties failed to comply with its obligations under the Rome Statute.<sup>73</sup> To date, no subsequent action has been taken by the UNSC and ASP, after the ICC referrals due to States non-compliance with the ICC's cooperation requests.

As indicated earlier, South Africa hosted the AU summit in Johannesburg, during which the South African government allowed Al Bashir entry into the country on the basis of his customary international law immunity provided under a host agreement which the South African government had entered into with the AU.<sup>74</sup> The host agreement was concluded in terms of section 5(3) and 7(2) of the DIPA.<sup>75</sup> Article VIII of the host agreement makes provision for privileges and immunities to 'members of the AU Commission and staff members, delegates

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<sup>68</sup> UNSC (n 30).

<sup>69</sup> Al Bashir arrest warrants (n 37).

<sup>70</sup> Rome Statute art 13 (b) provides that the ICC will have jurisdiction over international crimes defined in art 5 of the Rome Statute if 'a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations'.

<sup>71</sup> Rome Statute art 38 1945.

<sup>72</sup> In terms of art 112 of the Rome Statute: 'The Assembly of States' Parties (ASP) to the Statute [Rome Statute] was established with each State Party having one representative in the ASP who may be accompanied by alternates and advisers. Other States which have signed this Statute or the Final Act may be observers in the Assembly.'

<sup>73</sup> Rome Statute art 87(7).

<sup>74</sup> Agreement between the Republic of South Africa and the Commission of the African Union on the Material and Technical Organisation of the Meetings of the 30<sup>th</sup> Ordinary Session of the Permanent Representatives Committee (7–9 June 2015); the 27<sup>th</sup> Ordinary Session of the Executive Council (10–12 June 2015) and the 25<sup>th</sup> Ordinary Session of the Assembly (14–15 June 2015 in Pretoria (7 and 8 June 2015) and Johannesburg (10–15 June 2015), Republic of South Africa, *Government Gazette* (Pretoria, 05 June 2015) 600 38860).

<sup>75</sup> DIPA s 5(3) provides that: 'any organisation recognised by the Minister for the purposes of this section and any official of such organisation enjoy such privileges and immunities as may be provided for in any agreement entered into with such organisation or as may be conferred on them by virtue of section 7(2).' S 7(2) of the DIPA provides that: 'the Minister may in any particular case if it is not expedient to enter into an agreement as contemplated in subsection (1) and if the conferment of immunities and privileges is in the interest of the Republic, confer such immunities and privileges on a person or organisation as may be specified by notice in the Gazette'; s 7(1) provides that: 'any agreement whereby immunities and privileges are conferred to any person or organisation in terms of this Act must be published by notice in the Gazette'.

and other representatives of inter-governmental organisations attending meetings for the duration of the summit'.<sup>76</sup> The host agreement was confirmed by a ministerial notice published in a *Government Gazette*<sup>77</sup> and in terms of section 5(3) and section 7(2) of the DIPA. Thus, the South African government allowed Al Bashir into the country as the host agreement afforded him customary international law immunity as is recognised in the Rome Statute under article 98(1). However, contrary to the provisions of the Implementation Act under section 4 and 10 and the Rome Statute under article 27(2).

### **1.3 RESEARCH PROBLEM, OBJECTIVES AND QUESTIONS**

#### **1.3.1 Research Problem**

The problem identified in this dissertation is South Africa's conflict of obligations under international criminal law pertaining to immunity, arrest and surrender of heads of State. This conflict is reflected in international instruments and transposed into South Africa's domestic legal instruments. If faced with a similar situation, it remains unclear as to how South Africa ought to act regarding the immunity, arrest and surrender of heads of State accused of international crimes.

A review of judicial interpretations of the Rome Statute and Implementation Act shows, on the one hand, that both laws impose obligations on South Africa to arrest a head of State accused of committing international crimes, as such individual does not enjoy the immunity generally afforded to that office.<sup>78</sup> On the other hand, customary international law is recognised in the Rome Statute, as well as the DIPA, and imposes obligations on South Africa to not arrest heads of State by virtue of their immunity under customary international law.<sup>79</sup>

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<sup>76</sup> As contained in ss C and D, arts V and VI of the 'General Convention on the Privileges and Immunities of the Organisation of African Unity' (OAU Convention) <[http://www.au.int/en/sites/default/files/treaties/7760-file-general\\_convention\\_privileges\\_immunities\\_organisation\\_african\\_unity\\_0.pdf](http://www.au.int/en/sites/default/files/treaties/7760-file-general_convention_privileges_immunities_organisation_african_unity_0.pdf)> accessed 25 November 2016.

<sup>77</sup> *Government Gazette* (n 74).

<sup>78</sup> Rome Statute art 27(2); and ss 4 and 10 of the Implementation Act denies customary international law immunity of heads of State.

<sup>79</sup> Rome Statute art 98(1); and s 4 of DIPA recognises the customary international law immunity of Heads of State.

At an international level, conflicting obligations emanate from the relationship between article 27(2)<sup>80</sup> and 98(1) of the Rome Statute,<sup>81</sup> due to its recognition and denial of customary international law immunity. Domestically, this conflict is reflected under section 4,<sup>82</sup> read with section 10 of the Implementation Act which denies the customary international law immunity of heads of State, and section 4<sup>83</sup>, 5(3)<sup>84</sup> and 7(2)<sup>85</sup> of the DIPA giving effect to customary international law immunity of heads of State. This forms the basis of arguments proffered in the ICC, NGHC and SCA.

### 1.3.2 Research Objectives

This dissertation has two objectives. The first is to obtain clarity on South Africa's international and domestic obligations regarding the immunity, arrest and surrender of heads of State found in its jurisdiction. This is in light of the fact that South Africa's international obligations are conflicting and have been translated to South Africa's domestic law. The second objective is to recommend the appropriate legislative amendments to ensure compliance by South Africa.

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<sup>80</sup> Rome Statute art 27(2) provides that: 'Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.'

<sup>81</sup> Rome Statute art 98(1) provides that: '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.'

<sup>82</sup> Implementation Act s 4(2) provides that: 'Despite any other law to the contrary, including customary and conventional international law, the fact that a person (a) is or was a head of State or government, a member of a government or parliament, an elected representative or a government official: or (b) being a member of a security service or armed force, was under a legal obligation to obey a manifestly unlawful order of a government or superior, is neither: (i) defence to a crime; nor (ii) a ground for any possible reduction of sentence once a person has been convicted of a crime.'

<sup>83</sup> DIPA s 4(1) provides that: 'A head of state is immune from the criminal and civil jurisdiction of the courts of the Republic, and enjoys such privileges as: (a) heads of state enjoy in accordance with the rules of customary international law; (b) are provided for in any agreement entered into with a state or government whereby immunities and privileges are conferred upon such a head of state; (c) or may be conferred on such head of state by virtue of section 7(2).'

<sup>84</sup> DIPA s 5(3) provides that: 'Any organisation recognised by the Minister for the purposes of this section and any official of such organisation enjoy such privileges and immunities as may be provided for in any agreement entered into with such organisation or as may be conferred on them by virtue of section 7(2).'

<sup>85</sup> DIPA s 7(2) provides that: 'The Minister may in any particular case if it is not expedient to enter into an agreement as contemplated in subsection (1) and if the conferment of immunities and privileges is in the interest of the Republic, confer such immunities and privileges on a person or organisation as may be specified by notice in the Gazette'; See also, s 7(1) provides that: 'Any agreement whereby immunities and privileges are conferred to any person or organisation in terms of this Act must be published by notice in the Gazette.'

### **1.3.3 Research Questions**

Given the above objectives, the research questions are as follows. First, at an international level, in light of the legal framework on immunity, arrest and surrender of heads of State standing accused of international crimes, does article 27(2) trump article 98(1) of the Rome Statute in the context of the Al Bashir matter or is it the converse?

Secondly, resulting from the preceding question, does South Africa's law as it pertains to the immunity, arrest and surrender of heads of State in the context of the Al Bashir matter, comply with the existing international law position? The Al Bashir matter is used in this study in order to illustrate how the conflicting obligations emanate from article 27(2) and 98(1) for States' Parties to the Rome Statute, in instances where the ICC requests their cooperation for the arrest of a third State with customary international law immunity. Ultimately, it illustrates the conflicting obligations for South Africa.

## **1.4 METHODOLOGY**

The methodology entails a review and analysis of judicial interpretations of the differing international and domestic legal obligations of South Africa as it relates to the immunity, arrest and surrender of heads of State. The sources referred to include a combination of primary and secondary sources. The primary sources entail international treaties and customary international law, domestic legislation, international case law and domestic case law. The secondary sources entail books and academic journal articles.

## **1.5 LIMITATIONS**

Although the dissertation notes political arguments, policies and continental resolutions on the issue of customary international law immunity of heads of State, it is limited to focus on the legally binding international and domestic laws contained in the Rome Statute, the Implementation Act and the DIPA. This is supported by case law of the ICC, NGHC and SCA. The dissertation also notes that the respective obligations pertaining to the immunity, arrest and surrender of heads of State, internationally and domestically, remain subject to interpretation by the ICC and domestic courts given the conflicting obligations. The dissertation will not discuss diplomatic and consular immunity, arrest and surrender. Rather, its focus is on the Rome Statute provisions regarding the immunity, arrest and surrender of heads of State.

## 1.6 OUTLINE OF CHAPTERS

Chapter two answers the first question of the research problem which contains, at an international level, the legal framework governing the immunity, arrest and surrender of heads of State wherein international crimes are addressed. This includes an investigation and discussion on the conflicting obligations of States' Parties to the Rome Statute under article 27(2) and 98(1) of the Rome Statute. It also includes the jurisdiction of the ICC under the Rome Statute, and international Court cases including ICC cases against Chad, DRC and Malawi.

In light of the legal position emanating from the preceding chapter, chapter three answers the second question of the research problem, which is, whether South Africa's law as it pertains to the immunity, arrest and surrender of heads of State, complies with the existing international law position. This includes a review of South Africa's legislation on immunity, arrest and surrender of heads of State, as well as litigation against the South African government regarding Al Bashir's presence in the country while attending an AU summit on 13 to 15 June 2015. The judgments of the NGHC, SCA and the ICC on its cases levelled against the South African government inform this chapter on whether South Africa conforms with the existing international legal position on the immunity, arrest and surrender of heads of State. In light of sections 231, 232 and 233 of the Constitution,<sup>86</sup> international treaties and customs are transposed into South African law and South African Courts must interpret legislation in line with international law. Hence, these Court judgments provide the precedent for South Africa to address matters involving the immunity, arrest and surrender of heads of State accused of international crimes. Ultimately, it points out whether South Africa's law as it pertains to

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<sup>86</sup> Constitution s 231 provides that: '(1) The negotiating and signing of all international agreements is the responsibility of the national executive. (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3). (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time. (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. (5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect. Section 232 of the Constitution provides that: 'Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.' S 233 of the Constitution provides that: 'When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.'

immunity, arrest and surrender of heads of State, complies with the existing international law position.

Chapter four contains a consolidated analysis of the conflicting obligations of South Africa in light of the international law position and whether South Africa complies thereto. It includes a recommendation to amend section 4(2) of the Implementation Act in order to circumvent the conflicting obligations for South Africa as it relates to the immunity, arrest and surrender of heads of State standing accused of committing international crimes. The recommendation is limited to South African legislation, that is, the Implementation Act, in so far as it relates to the obligation on South Africa to comply with ICC requests for the cooperation with the arrest and surrender of heads of State accused of international crimes.

Chapter five contains the conclusion. The chapter indicates how the research questions have been addressed in order to achieve the objectives of the dissertation.

## **CHAPTER 2**

### **THE INTERNATIONAL LEGAL FRAMEWORK ON IMMUNITY, ARREST AND SURRENDER OF HEADS OF STATE**

#### **2.1 INTRODUCTION**

This chapter identifies, at an international level, the legal framework governing immunity, arrest and surrender of heads of State wherein international crimes are addressed, in the context of the Al Bashir matter. The context is necessary due to the number of ICC cases levelled against States' Parties who failed to arrest and surrender Al Bashir to the ICC, including South Africa. It includes a discussion on International Tribunal cases, and ICC cases against Chad, DRC and Malawi regarding the conflicting obligations of States' Parties emanating from article 27(2) and article 98(1) of the Rome Statute. The chapter seeks to determine whether article 27(2) trumps article 98(1) or whether it is the converse.

First, the chapter will discuss customary international law pertaining to immunity, arrest and surrender of heads of State. This includes, a discussion on its incorporation into the Rome Statute under article 98(1). Second, the chapter will discuss article 27(2) of the Rome Statute in the context of immunity, arrest and surrender of a head of State of a third State with customary international law immunity, as recognised in the Rome Statute. This includes the ICC's acquisition of jurisdiction and ICC cooperation requests to States' Parties for the arrest and surrender of heads of State of a third State. In doing so, the conflicting obligations between article 27(2) and article 98(1) are identified.

Finally, the chapter will expound on such conflicting obligations. This includes an illustration of the conflict in ICC cases against States' Parties Chad, DRC and Malawi, failing to arrest and surrender Al Bashir and academic discussions thereon. The discussion shows how the law has developed whilst trying to resolve the conflicting obligations that arise from article 27(2) and 98(1).

#### **2.2 CUSTOMARY INTERNATIONAL LAW IMMUNITY AND ARTICLE 98(1) OF THE ROME STATUTE**



The doctrine of immunity stems from customary international law incorporating the principle of *par in parem non habet imperium* meaning that ‘between equals no power’.<sup>87</sup> This means that a State and its officials are protected from the exercise of jurisdiction by other States.<sup>88</sup> Immunities applicable to various individuals including diplomats, consuls, and senior State officials are extensions of the immunity of the State itself.<sup>89</sup> These immunities can be either *immunity ratione personae* (personal immunity) or *immunity ratione materiae* (functional immunity).

The immunity applicable to heads of State includes personal immunity which refers to immunity on the basis of the office being held by an individual.<sup>90</sup> Personal immunity is conferred on heads of State due to their primary responsibility for the handling of the international relations of the State.<sup>91</sup> This is based on the need for effective communication between States pertaining to international relations and international cooperation.<sup>92</sup> Therefore, personal immunities do not remove criminal responsibility but merely provide a procedural bar that is removed once the head of State leaves office.<sup>93</sup>

Such customary international law immunity of heads of State is recognised under article 98(1) of the Rome Statute. The provision applies once the ICC requests States’ Parties to cooperate with the arrest and surrender of heads of State of a third State having customary international immunity.<sup>94</sup> Article 98(1) provides that:

‘[t]he Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can

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<sup>87</sup> Nadia Banteka, ‘No Longer Immune?: How Network Theory Decodes Normative Shifts in Personal Immunity for Heads of State’ (2019) 59 VJIL 389, 392; Thomas Weatherall, ‘Jus Cogens and Sovereign Immunity: Reconciling Divergence in Contemporary Jurisprudence’ (2015) 46 GJIL 1151,1156; Dapo Akande, ‘International Law Immunities and the International Criminal Court’ (2004) 98 AJIL 407, 433; and *Nicaragua v United States* Judgment ICJ 202 (27 June 1986).

<sup>88</sup> Banteka (n 87). Thomas Weatherall, ‘Jus Cogens and Sovereign Immunity: Reconciling Divergence in Contemporary Jurisprudence’ (2015) 46 GJIL 1151, 1156; and Akande (n 87).

<sup>89</sup> *Report of the International Law Commission on the Work of its Sixty-Fifth Session*, 6 May-7 June and 8 July-9 August 2013, Official Records of the General Assembly, Sixty-Eighty Session, Supplement No. 10, UN Doc A/68/10 (2013) para 49.

<sup>90</sup> Dire Tladi, ‘Immunity in the Era of “Criminalisation”’: The African Union, the ICC, and International Law’ (2015) JYIL 17, 26–28. See also, Akande (n 87) 407, 409.

<sup>91</sup> Akande (n 87) 407, 409.

<sup>92</sup> *ibid.*

<sup>93</sup> *ibid* 410.

<sup>94</sup> DRC (n 46) para 27.

first obtain the cooperation of that third State for the waiver of the immunity'.<sup>95</sup>

The provision therefore recognises the customary international law immunity of heads of State of a third State that has not ratified the Rome Statute. Accordingly, it directs the Court to:

‘secure the cooperation of the third State for the waiver or lifting the immunity of its Head of State. This course of action envisaged by article 98(1) of the Statute aims at preventing the requested State from acting inconsistently with its international obligations towards the non-State Party with respect to the immunities attached to the latter’s Head of State.’<sup>96</sup>

Ultimately, article 98(1) recognises the customary international law immunity of heads of State that are not parties to the Rome Statute. As a result, heads of States that have not ratified the Rome Statute are not bound by it and maintain their customary international law immunity. Hence, the ICC cannot request States’ Parties to arrest and surrender such head of State, unless such immunity is waived by the third State. In instances where no such waiver is obtained from the relevant third State, conflicting obligations emerge from article 27(2) and 98(1) of the Rome Statute. For an understanding on the nature of the said conflict, the following section discusses the immunity, arrest and surrender of heads of State under article 27(2) of the Rome Statute, including the ICC’s jurisdiction in immunity cases.

## **2.3 IMMUNITY UNDER ARTICLE 27(2) OF THE ROME STATUTE AND THE ICC’S JURISDICTION**

### **2.3.1 The ICC’s jurisdiction in immunity cases**

Article 13 of the Rome Statute establishes the jurisdiction of the ICC to investigate and prosecute individuals accused of committing international crimes as it relates to States that are parties to the Rome Statute, and may apply to States that are not parties to the Rome Statute in certain instances.<sup>97</sup> It is important to highlight that in the Al Bashir matter, the ICC obtained

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<sup>95</sup> Rome Statute art 98(1).

<sup>96</sup> DRC (n 46) para 27.

<sup>97</sup> Rome Statute art 13 allows the ICC Prosecutor, once an international crime is alleged, to conduct a ‘preliminary examination’ into situations referred to it either by a State Party, UNSC or the Prosecutor who initiated the investigation. This is undertaken under arts 53 and 54 of the Rome Statute in order to determine whether there is a reasonable basis to initiate an investigation into a crime of genocide, crimes against humanity, war crimes or the crime of aggression. Once this is confirmed, the Prosecutor will request issuance of an ICC arrest warrant from the Pre-Trial Chamber. This process is followed to confirm the gravity of the crime/s, and whether there are no genuine national proceedings or issuance of arrest warrants bringing individuals accused of international crimes before the ICC to confirm the charges and followed by trial and sentencing <<https://www.icc-cpi.int/about/how-the-court-works>> accessed 06 April 2020. Art 13(b) makes provision for the UNSC to refer a matter to the ICC even if it pertains to a third State such as in the case of Sudan, in terms Chapter VII of the UN Charter.

jurisdiction in terms of article 13(b) of the Rome Statute whereby the UNSC referred the matter to the ICC under Resolution 1593. Hence the ICC's jurisdiction applies to Sudan as a third State which includes Al Bashir as its head of State, albeit limited to interpretation of the wording of Resolution 1593. As a result, the ICC obtained jurisdiction, rendering article 27(2) of the Rome Statute applicable to Sudan and States having ratified the Rome Statute.

Once an ICC arrest warrant is issued pursuant to allegations of international crimes, the jurisdiction of the ICC is established in court proceedings. Thus, the Rome Statute becomes applicable to State Parties, including the obligations that arise from it under article 13 of the Rome Statute which provides that:

‘[t]he Court may exercise its jurisdiction with respect to a crime referred to in article 5 [war crimes, crimes against humanity, genocide and acts of aggression] in accordance with the provisions of this Statute if: (a) a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14; (b) a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; and (c) the Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15’.<sup>98</sup>

Article 13 therefore allows the ICC Prosecutor to initiate a preliminary examination to determine the seriousness of the alleged international crimes so that investigations can commence.<sup>99</sup> Once this is confirmed, the ICC Prosecutor may request issuance of an ICC arrest warrant by the Pre-Trial Chamber.<sup>100</sup> This happens if any of the international crimes of genocide, war crimes, crimes against humanity and acts of aggression occurred on or after the coming into effect of the ICC under the Rome Statute on 1 July 2002.<sup>101</sup> The ICC acquires jurisdiction only if international crimes were committed by a national of a State Party to the

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<sup>98</sup> Rome Statute art 13.

<sup>99</sup> Rome Statute art 53 provides for the initiation and investigation of alleged international crimes by the ICC Prosecutor subsequent to a referral alleging international crimes.

<sup>100</sup> According to art 58(1) of the Rome Statute the Pre-Trial Chamber may issue a warrant of arrest upon application by the Prosecutor if it is satisfied that: ‘(a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and (b) The arrest of the person appears necessary: (i) To ensure the person's appearance at trial; (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; or (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.’ This is in line with its powers and functions contained in art 57(3)(a) of the Rome Statute which provides that the Pre-Trial Chamber may ‘at the request of the Prosecutor, issue such orders and warrants as may be required for the purposes of an investigation.’

<sup>101</sup> Rome Statute art 11.

Rome Statute, or in the territory of a State Party, or in a State that has accepted the jurisdiction of the ICC.<sup>102</sup> The investigation and prosecution of alleged international crimes may thus occur, at the discretion and initiation of the ICC Prosecutor,<sup>103</sup> or referral by a State Party to the Rome Statute.<sup>104</sup> Alternatively, the ICC acquires jurisdiction via a referral by the UNSC under a Resolution adopted in terms of Chapter VII of the UN Charter, whether it pertains to a State Party or third State that is a member of the UN.<sup>105</sup>

With regard to instances whereby the ICC's jurisdiction is obtained under article 13(b), once the UNSC detects that a specific State is threatening international peace and security or has breached international peace and security, it can refer the case to the ICC in terms of Chapter VII of the UN Charter.<sup>106</sup> This means that the UNSC is empowered to stipulate circumstances in which the ICC has jurisdiction to prosecute international crimes, albeit a third State that has not ratified the Rome Statute, but is a member of the UN.<sup>107</sup> This was the case of Sudan under Resolution 1593, but remains limited to interpretation of its wording. Subsequent to the Court's jurisdiction in terms of Resolution 1593, the ICC Pre-Trial Chamber I, via two arrest warrants, found that there are reasonable grounds to believe that Al Bashir acted with specific intent to destroy in part the Fur, Masalit and Zaghawa ethnic groups.<sup>108</sup>

This resulted in obligations upon States' Parties to comply with ICC cooperation requests for the arrest and surrender of Al Bashir, as well as not to arrest and surrender him due to his immunity in terms of customary international law.<sup>109</sup> Having shed light on the immunity of heads of State in terms of Customary International Law, and having shown that the ICC had jurisdiction to the matter in question, the next section discusses article 27, moving towards a discussion on the conflicting obligations.

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<sup>102</sup> Rome Statute art 12, which sets out the preconditions to the exercise of jurisdiction by the ICC.

<sup>103</sup> Rome Statute art 13(c).

<sup>104</sup> Rome Statute art 13(a).

<sup>105</sup> Rome Statute art 13(b).

<sup>106</sup> UN Charter art 39–5.

<sup>107</sup> UN Charter Chapter VII provides that the UNSC to take action with respect to threats to the peace, breaches of the peace, and acts of aggression.

<sup>108</sup> ICC-02/05-01/09-1 04-03-2009 <[https://www.icc-cpi.int/CourtRecords/CR2009\\_01514.PDF](https://www.icc-cpi.int/CourtRecords/CR2009_01514.PDF)> accessed 01 November 2020; and ICC-02/05-01/09-95 12-07-2010 <[https://www.icc-cpi.int/CourtRecords/CR2010\\_04825.PDF](https://www.icc-cpi.int/CourtRecords/CR2010_04825.PDF)> accessed 01 November 2020.

<sup>109</sup> Dire Tladi, 'Duty on South Africa to Arrest and Surrender President Al Bashir under South African and International Law: A Perspective from International Law' (2015) 13 JICJ 1027, 1034; Dire Tladi, 'The ICC Decisions on Chad and Malawi: On Cooperation, Immunities, and Article 98' (2013) 11 JICJ 199; Paola Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?' (2009) 7 JICJ 315, 328; Akande (n 87) 407, 419–420 and 426.

### 2.3.2 Immunity of heads of State under Article 27(2) of the Rome Statute

Once the jurisdiction of the ICC has been established, article 27(2) of the Rome Statute becomes applicable providing that:

‘[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person’.<sup>110</sup>

This provision excludes immunity of heads of State as a result of the ICC’s jurisdiction obtained under article 13(a), (b) or (c). As indicated in the preceding section, the ICC’s jurisdiction is extended to third States such as Sudan in the Al Bashir matter, by virtue of a UNSC Resolution. In the Al Bashir matter, the ICC’s jurisdiction applied under Resolution 1593, albeit limited to interpretation of its wording. Therefore, the ICC’s jurisdiction is established under article 13 which gives rise to certain obligations for States’ Parties, which include the obligation to cooperate with the ICC’s requests to arrest and surrender heads of State accused of international crimes.

In exercising such jurisdiction, the principle of cooperation strongly underpins the effectiveness and operation of international criminal law given that the ICC does not have its own enforcement agencies.<sup>111</sup> The ICC requests for State Parties to cooperate with arrest and surrender of heads of State are made in terms of the international law principle of cooperation. The principle of cooperation refers to the interaction of persons or groups of persons representing various States in the pursuit of a common goal or interest, wherein States have the duty to cooperate with one another.<sup>112</sup> This is required irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security, as well as to promote international economic stability and progress, the general welfare of nations, and international cooperation free from discrimination based on such differences.<sup>113</sup>

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<sup>110</sup> Rome Statute art 27(2).

<sup>111</sup> Dire Tladi, ‘Duty on South Africa to Arrest and Surrender President Al Bashir under South African and International Law: A Perspective from International law’ (2015) 13 JICJ 1027, 1032–1033.

<sup>112</sup> UN ‘Declaration on Principles of International Law Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations’ <<https://www.un.org/ruleoflaw/files/3dda1f104.pdf>> accessed 15 April 2021.

<sup>113</sup> *ibid.*

Modern international law is founded on three different levels being the international law of coexistence, the international law of cooperation, and closely knit regional groupings.<sup>114</sup> International law of coexistence is described as the classical system of international law regulating diplomatic interstate relations, and orders the coexistence of States regardless of their social and economic structure.<sup>115</sup> Whereas international law of cooperation is described as the body of legal rules regulating universal human concerns, the range of which is constantly expanding, and extend from matters of international security to questions of international communication, health and welfare.<sup>116</sup> The principle is incorporated into the Rome Statute.<sup>117</sup>

With no police force or defence force, the ICC relies solely on such cooperation of States to support it in making arrests, transferral of arrested persons to the ICC, freezing the assets of suspects and for the enforcement of sentences.<sup>118</sup> This means that failure by States' Parties to cooperate with ICC investigations, arrests and surrendering of those allegedly having committed international crimes, have concomitant consequences emanating from the Rome Statute.<sup>119</sup> To this end, by virtue of article 27(2) denying immunity to heads of State, States' Parties are obligated to cooperate with ICC requests to arrest and surrender heads of State to the ICC.

This is so because, in the context of the Rome Statute, the international law principle of cooperation imposes a general obligation on States' Parties to cooperate with ICC requests under article 86 of the Rome Statute.<sup>120</sup> In accordance with this general obligation to cooperate with the ICC, article 89(1) provides that:

'[t]he Court may transmit a request for the arrest and surrender of a person [...] to any State on the territory of which that person may be found and shall request the cooperation of that State

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<sup>114</sup> Richard Jackson Barnet, 'Review: Coexistence and Cooperation in International Law' 1965 *World Politics* 18, 85–86.

<sup>115</sup> *ibid.*

<sup>116</sup> *ibid.*

<sup>117</sup> Rome Statute art 86, 87(7) and 89(1).

<sup>118</sup> ICC 'The Fight Against Impunity Continues' <<https://www.icc-cpi.int/>> accessed 7 November 2018.

<sup>119</sup> Hennie Strydom et al *International Law* (Oxford 2015) 420. See also, art 87(7) of the Rome Statute stating that 'failure by a member state to comply with ICC requests to cooperate, empowers the Court to make a finding to that effect and refer the matter to the Assembly of States' Parties (ASP) of the ICC or, where the UNSC referred the matter to the Court, to the UNSC.' No subsequent action has been taken by the UNSC and ASP, after the ICC referrals due to States non-compliance with the ICC's cooperation requests. The UNSC may impose sanctions on such States, yet none have been imposed.

<sup>120</sup> Rome Statute art 86 provides that: 'States' Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.'

in the arrest and surrender of such a person. States' Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender'.<sup>121</sup>

This means that once the ICC requests State Parties to cooperate with the arrest and surrender of a head of State, those States must comply with the request. If a State party fails to comply with the cooperation requests, they have to face the consequences set out in article 87(7) of the Rome Statute which provides that:

'[w]here a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States' Parties or, where the Security Council referred the matter to the Court, to the Security Council'.<sup>122</sup>

With regard to this principle, De Wet posits that:

'[a]t the heart of the international obligations contained in the Rome Statute is the duty of State Parties to cooperate with the ICC contained in article 86. In line with this general obligation, article 89(1) obliges State Parties to comply with requests for arrest and surrender. This obligation has also been implemented in South African domestic law by means of section 10 of the Implementation Act'.<sup>123</sup>

Thus, due to article 86, 87(7) and 89(1) of the Rome Statute, States' Parties are obligated to cooperate with ICC requests for the arrest and surrender of heads of State on the basis that article 27(2) denies immunity of heads of State. However, this obligation is in conflict with article 98(1) which recognises the customary international law immunity of third States by prescribing that a waiver of immunity is required by the third State before the ICC can request States' Parties to arrest and surrender a head of State.<sup>124</sup> This means that the Rome Statute under article 27(2) obligates States' Parties to arrest and surrender heads of States on the basis that they do not have immunity, which clash with their obligation not to arrest and surrender heads of State of third States in terms of their customary international law immunity.<sup>125</sup> This is

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<sup>121</sup> Rome Statute art 89(1).

<sup>122</sup> Rome Statute art 87(7).

<sup>123</sup> De Wet (n 53) 1049, 1050.

<sup>124</sup> Rome Statute art 98(1)

<sup>125</sup> Tladi (n 111) 1035.

because the Rome Statute, under article 98(1) provides that the ICC cannot request cooperation from States' Parties if it would require the requested State to act inconsistently with customary international law immunity.<sup>126</sup> States' Parties to the Rome Statute thus have an obligation not to arrest a head of State of third States in terms of their customary international law immunity, unless it is waived.

On the one hand, States' Parties are faced with an obligation not to cooperate with ICC requests to arrest and surrender heads of State on the basis of their customary international law immunity, as recognised in article 98(1). On the other hand, States' Parties are faced with an obligation to cooperate with the ICC to arrest and surrender heads of State on the basis of their immunity having been denied under article 27(2). Having identified that conflicting obligations arise for States' Parties, emanating from article 27(2) and 98(1) of the Rome Statute, the chapter moves on to expound on the conflicting obligations looking at case law on the subject.

## **2.4 CONFLICTING OBLIGATIONS BETWEEN ARTICLE 27(2) AND 98(1) OF THE ROME STATUTE**

### **2.4.1 Introduction**

When State Parties are requested by the ICC to cooperate with the arrest and surrender of a head of State of a third State that has not ratified the Rome Statute, conflicting obligations arise from article 27(2) and 98(1). Such conflicting obligations arise in instances that involve a third State which brings article 98(1) to the fore and in conflict with article 27(2). In light of the fact that the content of article 27(2) was left to the drafting committee of Part 9 of judicial cooperation with the ICC, it can be held that the conflict between article 27(2) and 98(1) was already identified in the *travaux préparatoires* (preparatory documents) of the Rome Statute in so far as it relates to the immunity, arrest and surrender of heads of State standing accused of committing international crimes.<sup>127</sup> This is also evident from a footnote in such preparatory documents containing the earlier formulation of article 27(2).<sup>128</sup> The footnote provided that:

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<sup>126</sup> *ibid.*

<sup>127</sup> Dapo Akande and Talita de Souza Dias 'Does the ICC Statute Remove Immunities of State Officials in National Proceedings? Some Observations from the Drafting History of Article 27(2) of the Rome Statute' (EJILtalk, 12 November 2018) <<https://www.ejiltalk.org/does-the-icc-statute-remove-immunities-of-state-officials-in-national-proceedings-some-observations-from-the-drafting-history-of-article-272-of-the-rome-statute/>> accessed 16 December 2020.

<sup>128</sup> *ibid.*



‘[f]urther discussion of paragraph 2 would be required in connection with [...] International judicial cooperation.’<sup>129</sup>

In terms of article 32 of the VCLT, these preparatory documents serve as evidence that the conflict between article 27(2) and 98(1) of the Rome Statute existed during its drafting stage already.<sup>130</sup> The drafting history shows that the drafters knew all along that what would become article 27 would have an effect in proceedings before the ICC itself, as well as national proceedings related to the ICC’s exercise of jurisdiction.<sup>131</sup>

In an attempt to address the long time coming conflicting obligations that arise from article 27(2) and 98(1), the ICC consistently ruled that a head of State such as Al Bashir does not have immunity and State Parties must arrest him.<sup>132</sup>

#### **2.4.2 Cases on the conflicting obligations**

##### **(a) Introduction**

To demonstrate the conflicting obligations that arise from article 27(2) and 98(1) a discussion on the immunity of heads of State before international tribunals and courts follows, focusing on the Al Bashir matter, given that it particularly concerns the arrest and surrender of a head of State of a third State.

In considering whether a head of State had customary international law immunity before international courts, the ICC goes back to trace the position since after the First World War and Second World War, respectively.<sup>133</sup> The rejection of immunity for heads of State has been detected since 1919 (First World War) and continued after 1946 (Second World War), and later the same argument was raised consistently in various cases and international treaties.<sup>134</sup>

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<sup>129</sup> UNGA ‘Decisions taken by the Preparatory Committee at its Session Held from 11 to 21 February 1997’ 22, footnote 14 <<https://www.legal-tools.org/doc/c0d16c/pdf/>> accessed 16 December 2020; and UNGA ‘Chairman’s Text Article B e.: Irrelevance of Official Position’ 1 <<https://www.legal-tools.org/doc/26efd7/pdf/>> accessed 16 December 2020.

<sup>130</sup> Art 32 of the VCLT provide that: ‘Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of art 31, or to determine the meaning when the interpretation according to art 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.’

<sup>131</sup> Akanda and De Souza Dias (n 127).

<sup>132</sup> Chad (n 46) para 14; DRC (n 47) para 33–34; and Malawi (n 48) para 47.

<sup>133</sup> Malawi (48) 12–18.

<sup>134</sup> Charter of the International Military Tribunal art 7; Charter of the International Military Tribunal for the Far East art 6; UNGA ‘Principles of International Law Recognised in the Charter of the Nuremberg

**(b) International Tribunals and Courts**

After the First World War, the ICC noted that the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, recommended the establishment of a High Tribunal rejecting the idea of immunities even for heads of States which provides that:

‘[i]n these circumstances, the Commission desires to state expressly that in the hierarchy of persons in authority, there is no reason why rank, however exalted, should in any circumstances protect the holder of it from responsibility when that responsibility has been established before a properly constituted tribunal. This extends even to the case of heads of States. An argument has been raised to the contrary based upon the alleged immunity, and in particular the alleged inviolability, of a sovereign of a State. But this privilege, where it is recognised, is one of practical expedience in municipal law, and is not fundamental. However, even if, in some countries, a sovereign is exempt from being prosecuted in a national court of his own country the position from an international point of view is quite different’.<sup>135</sup>

The same position was held after the Second World War, when two international tribunals were established in Nuremberg and Tokyo, wherein the 1945 UN’s Charter of the International Military Tribunal under article 7 provides that:

‘[t]he official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment’.<sup>136</sup>

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Tribunal and its Judgment’ 1950; International Tribunal for the Former Yugoslavia Statute art 7(2); art 6(2) International Tribunal for Rwanda art 6(2) and Several Judgments of the International Tribunal for the Former Yugoslavia (ICTY) stating that art 7(2) of the International Tribunal for the Former Yugoslavia and Statute of the International Tribunal for Rwanda art 6(2) are ‘indisputably declaratory of customary international law’; see also cases as discussed below: International Military Tribunal ‘The Trial of German Major War Criminals, Proceedings of the sitting at Nuremberg, Part 22’ (22 August 1946 to 1 October 1946) 447; ICTY, *The Prosecutor v Anton Furundzija*, IT-95-17/1-T 10 December 1998 para 140 <<https://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>> accessed 10 April 2020; ICTY, *The Prosecutor v Slobodan Milosevic*, IT-99-37-PT, Decision on Preliminary Motions, 8 November 2001, para 28 <[https://www.icty.org/x/cases/slobodan\\_milosevic/tdec/en/1110873516829.htm](https://www.icty.org/x/cases/slobodan_milosevic/tdec/en/1110873516829.htm)> accessed 10 April 2020; ICJ, Arrest Warrant of 11 April 2000 (*Democratic Republic of Congo v Belgium*) Judgment 14 February 2002 I.C.J. Reports 2002 para 58–61; Special Court for the Sierra Leone, Appeals Chamber, *The Prosecutor v Charles Ghankay Taylor* Case Number SCSL-2003-1-AR72(E) Decision on Immunity from Jurisdiction 31 May 2004, para 51–52; Chad (46); DRC (47); Malawi (48).

<sup>135</sup> ‘Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties’ 1920 14 AJIL 116.

<sup>136</sup> UN ‘Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis’ (‘London Agreement’) 8 August 1945, <[https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.2\\_Charter%20of%20IMT%201945.pdf](https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.2_Charter%20of%20IMT%201945.pdf)> accessed 10 April 2020.

The International Military Tribunal sitting in Nuremberg reiterated that:

‘[t]he principle of International Law, which under certain circumstances protects the representatives of a State, cannot be applied to acts which are condemned as criminal by International Law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings’.<sup>137</sup>

In addition, the 1946 UN’s Charter of the International Military Tribunal for the Far East sitting in Tokyo under article 6, provides that:

‘[n]either the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to, free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires’.<sup>138</sup>

As indicated, both Charters under article 7 and article 6 respectively, share the same stance that those who stand accused of committing international crimes cannot escape responsibility. Although article 6 would allow mitigation of punishment on the basis of an individual’s official position, article 7 does not make the same provision. This position was implemented by the International Military Tribunal sitting in Tokyo, wherein convicted defendant Hiroshi Oshima, the Japanese Ambassador in Berlin, argued that he had diplomatic immunity. However, the judgment provided that:

‘Oshima’s special defence is that in connection with his activities in Germany he is protected by diplomatic immunity and is exempt from prosecution. Diplomatic privilege does not import immunity from legal liability, but only exemption from trial by the Courts of the State to which an Ambassador is accredited. In any event this immunity has no relation to crimes against

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<sup>137</sup> International Military Tribunal ‘The Trial of German Major War Criminals, Proceedings of the sitting at Nuremberg, Part 22’ (22 August 1946 to 1 October 1946) 447.

<sup>138</sup> UN ‘Charter of the International Military Tribunal – International Military Tribunal for the Far East Special proclamation by the Supreme Commander for the Allied Powers at Tokyo’ (19 January 1946) <[https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.3\\_1946%20Tokyo%20Charter.pdf](https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.3_1946%20Tokyo%20Charter.pdf)> accessed 10 April 2020.

international law charged before a tribunal having jurisdiction. The Tribunal rejects this special defence'.<sup>139</sup>

This was followed by the adoption of the 'Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal' by the UNGA, wherein Principle III provides that:

'[t]he fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law'.<sup>140</sup>

In addition, the International Tribunal for the Former Yugoslavia, held that article 7(2) was declaratory of customary international law providing that:

'[i]ndividuals are personally responsible, whatever their official position, even if they are heads of State or government ministers: Article 7(2) of the Statute and article 6(2) of the Statute of the International Criminal Tribunal for Rwanda [...] are indisputably declaratory of customary international law'.<sup>141</sup>

Furthermore, via the Draft Code of Crimes against the Peace and Security of Mankind, the International Law Commission adopted the same principle under article 7 which provides that:

'[t]he official position of an individual who commits a crime against the peace and security of mankind, even if he acted as Head of State or Government, does not relieve him of criminal responsibility or mitigate punishment'.<sup>142</sup>

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<sup>139</sup> Bernard Victor Aloysius Röling and Christiaan Frederik Rüter 'The Tokyo Judgment: The International Military Tribunal for the Far East (I.M.T.F.E.) 29 April 1946–12 November 1948' Volume I APA (University Press Amsterdam 1977) 456.

<sup>140</sup> UNGA 'Official Records, 5<sup>th</sup> session' Supp No 12, U.N. Doc.A/1316 (1950) <[https://legal.un.org/ilc/documentation/english/reports/a\\_cn4\\_34.pdf](https://legal.un.org/ilc/documentation/english/reports/a_cn4_34.pdf)> accessed 10 April 2020.

<sup>141</sup> ICTY, *The Prosecutor v Anton Furundzija*, IT-95-17/1-T 10 December 1998 para 140 <<https://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>> accessed 10 April 2020; see also ICTY, *The Prosecutor v Slobodan Milosevic*, IT-99-37-PT, Decision on Preliminary Motions, 8 November 2001, para 28 <[https://www.icty.org/x/cases/slobodan\\_milosevic/tdec/en/1110873516829.htm](https://www.icty.org/x/cases/slobodan_milosevic/tdec/en/1110873516829.htm)> accessed 10 April 2020.

<sup>142</sup> ILC 'Draft Code of Crimes Against the Peace and Security of Mankind', adopted by the Commission at its forty-eight session from 6 May to 26 July 1996, General Assembly, Official Records, 51<sup>st</sup> Session, Supplementary No.10; U.N. Doc. A/51/10 <[https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/7\\_4\\_1996.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_4_1996.pdf)> accessed 10 April 2020.

The same position was taken by the ICJ in the, *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium) Judgment* 14 February 2002 ('Arrest Warrant Case')<sup>143</sup> and the Appeals Chamber of the Special Court for Sierra Leone in *The Prosecutor v Charles Ghankay Taylor Case Number SCSL-2003-1-AR72(E) Decision on Immunity from Jurisdiction* 31 May 2004 ('Taylor case').<sup>144</sup> In the Taylor case, the Court applied article 6(2) of the Statute of the Special Court for Sierra Leone and found that the principle in international law is that immunity of former and sitting heads of State cannot be invoked to prevent prosecution by international courts.<sup>145</sup> The Court explained this as follows:

'[a] reason for the distinction, in this regard, between national courts and international courts, though not immediately evident, would appear due to the fact that the principle that one sovereign state does not adjudicate on the conduct of another state; the principle of state immunity derives from the equality of sovereign states and therefore has no relevance to international criminal tribunals which are not organs of state but derive their mandate from the international community'.<sup>146</sup>

The ICC therefore recognises that immunity of former and sitting heads of State cannot be invoked to prevent prosecution by international courts, albeit at the cost of inherent tension between article 27(2) and article 98(1) of the Rome Statute.<sup>147</sup>

(c) *Malawi and Chad ICC cases*

On 12 December 2011 the ICC ruled that Malawi had an obligation to arrest and surrender Al Bashir as head of State of Sudan on the basis of an exception to customary international law immunity. This was followed by the same ruling against Chad on 13 December 2011.

The Malawi decision, quoted in the Chad decision, recognised the tension between article 27(2) and article 98(1) of the Rome Statute affirming that:

'[t]he Chamber notes that there is an inherent tension between articles 27(2) and 98(1) of the Statute and the role immunity plays when the Court seeks cooperation regarding the arrest of a

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<sup>143</sup> ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium) Judgment* 14 February 2002 I.C.J. Reports 2002 para 58–61.

<sup>144</sup> Special Court for the Sierra Leone, Appeals Chamber, *The Prosecutor v Charles Ghankay Taylor Case Number SCSL-2003-1-AR72(E) Decision on Immunity from Jurisdiction* 31 May 2004, para 51–52.

<sup>145</sup> *ibid.*

<sup>146</sup> *ibid.*

<sup>147</sup> Chad (46) para 13; Malawi (48) para 36–37.

Head of State. The Chamber considers that Malawi, and by extension the African Union, are not entitled to rely on article 98(1) of the Statute to justify refusing to comply with the Cooperation Requests.<sup>148</sup>

In addition, the Court pointed out that:

‘the Statute now has reached 120 States’ Parties in its 9 plus years of existence, all of whom have accepted having any immunity they had under international law stripped from their top officials. All of these States have renounced any claim to immunity by ratifying the language of article 27(2): “[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising jurisdiction over such a person”. Even some States which have not joined the Court have twice allowed for situations to be referred to the Court by United Nations Security Council Resolutions, undoubtedly in the knowledge that these referrals might involve prosecution of Heads of State who might ordinarily have immunity from domestic prosecution.’<sup>149</sup>

In the case against Malawi followed by Chad, the Court therefore found that an exception to customary international law exists given that denial of immunity took place since after the First World War.<sup>150</sup> Accordingly, heads of State do not have immunity in terms of article 27(2), and customary international law immunity can no longer be raised to defend heads of State who committed international crimes.<sup>151</sup> The application of article 27(2) means that it trumps article 98(1) as the Court in the Malawi and Chad case found that there is an exception to immunity.<sup>152</sup> As a result, the Court found that these States’ Parties had an obligation to arrest and surrender Al Bashir.

In these two judgments the ICC ruled that a new customary international law had developed, but there appears to be no evidence that both requirements for the creation of a custom, *usus* and *opinio iuris*, had been met.<sup>153</sup> This means that according to the ICC, the custom developed as a result of States’ Parties to the Rome Statute feeling a sense of obligation to arrest heads of State such as Al Bashir, and that this had become settled practice. Instead, States’ Parties felt

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<sup>148</sup> Chad (46) para 13; Malawi (48) para 37.

<sup>149</sup> Chad (46) para 13; Malawi (48) para 40.

<sup>150</sup> Chad (46) para 13; Malawi (48) para 40–43.

<sup>151</sup> *ibid* para 40–43.

<sup>152</sup> Chad (46) para 13; Malawi (48) para 42–43.

<sup>153</sup> Art 38(1)(b) of the ICJ Statute. See also (n 22) 31–37.

the exact opposite as they argued that Al Bashir had customary international law immunity, hence they had no obligation to arrest and surrender him to the ICC to stand trial.

Customary international law can only be established, as earlier indicated, once the requirements of a settled practice and a sense of obligation by States have been met.<sup>154</sup> It cannot be inferred that an exception to international crimes developed under customary international law since States did not feel obligated to arrest and surrender Al Bashir. This is so despite the fact that since the First World War, it had become settled practice that immunity cannot be condoned for those committing international crimes. Thus, both requirements for a custom to develop have not been met and a new customary international law could not have developed in order to exclude immunity as found in the Malawi and Chad cases.

Furthermore, Tladi indicates that the tenet of States' Parties failing to cooperate pivots on the axial point relating to the interpretation of the relationship between article 27 and 98(1) of the Rome Statute,<sup>155</sup> and its interplay with customary international law immunity.<sup>156</sup> In its cases against Malawi and Chad, the ICC did not address this relationship.<sup>157</sup> According to Tladi, the Court was not tasked to determine Al Bashir's immunity before an international court, which was indeed disposed of by article 27(2).<sup>158</sup> Instead, it was tasked to determine whether there was a duty upon States' Parties to cooperate with the arrest and surrender of heads of State of third States.<sup>159</sup> The latter task of the Court was not resolved by the question of the immunity of heads of State before international courts, and instead remains a matter for interpretation.<sup>160</sup>

The Court however, made a determination on the immunity of heads of State which then led it to the ruling that Malawi and Chad had an obligation to arrest and surrender a head of State

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<sup>154</sup> *ibid* 31. See also, Tladi (n 23) 310, 315.

<sup>155</sup> Rome Statute art 27(1) provides that: '[The Rome 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 this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.' Art 27(2) provides that: 'Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.'

<sup>156</sup> Dire Tladi, 'The ICC Decisions on Chad and Malawi: On Cooperation, Immunities, and Article 98' (2013) 11 JICJ 199, 221.

<sup>157</sup> Tladi (90) 17, 32.

<sup>158</sup> *ibid*.

<sup>159</sup> *ibid*.

<sup>160</sup> *ibid*.

such as Al Bashir. This ruling was based on an exception to customary international law immunity.

*(d) DRC ICC case*

The Malawi and Chad cases were followed by a similar judgment in the DRC case on 09 April 2014. The Court found that the customary international law immunity as recognised in article 98(1) had been waived by Sudan in terms of Resolution 1593.<sup>161</sup> The DRC case differed, in that the Court found that article 98(1) is not applicable by virtue of Resolution 1593, which removed Al Bashir's immunity for the purposes of proceedings before the ICC.<sup>162</sup> Thus, the Court found that there are no impediments preventing State Parties from carrying out its obligations to cooperate with the Court under the Rome Statute.<sup>163</sup>

This is because paragraph two of Resolution 1593 provides that the 'Government of Sudan [...] shall cooperate fully with, and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution [...]'.<sup>164</sup> This means that the Court applied article 27(2) in the Malawi and Chad case on the basis of an exception to customary international law immunity, but in the DRC case, on the basis of Resolution 1593.<sup>165</sup>

The reason proffered in the DRC decision differed by the fact that Resolution 1593 served as a waiver of Al Bashir's immunity by Sudan, and not an exception to customary international law immunity.<sup>166</sup> The Court found that Resolution 1593 waives the immunity of Al Bashir as required under article 98(1), thus article 27(2) of the Rome Statute applied.<sup>167</sup> This was not explicitly provided in Resolution 1593, hence it remains subject to interpretation given that there is no express waiver of Al Bashir's immunity by Sudan, as required under article 98(1). It can therefore be said that implicit provisions contained in UNSC Resolutions presents as a controversial matter due to the potential differing interpretations. A UNSC Resolution can therefore serve as a waiver of immunity as is necessary under article 98(1) which can be either explicit or implicit. The ICC in its case against DRC relied on Resolution 1593 which authorised

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<sup>161</sup> DRC (n 46) para 30.

<sup>162</sup> *ibid* para 30.

<sup>163</sup> *ibid*.

<sup>164</sup> UNSC Res 1593 (31 March 2005), acting under Chapter VII of the Charter of the United Nations <<https://www.icc-cpi.int/NR/rdonlyres/85FEBD1A-29F8-4EC4-9566-48EDF55CC587/283244/N0529273.pdf>> accessed 25 November 2016.

<sup>165</sup> Chad (46) para 13; DRC (n 47) para 25–30; Malawi (48) para 42–43.

<sup>166</sup> DRC (n 46) para 25–30.

<sup>167</sup> *ibid*.



the Court's jurisdiction.<sup>168</sup> While the DRC decision acknowledged that article 27(2) of the Rome Statute explicitly denies personal immunities of heads of States before international criminal courts, it was not mentioned that an international custom developed providing an exception to immunity of heads of State.<sup>169</sup> Rather, Resolution 1593 served as a waiver of Al Bashir's immunity by the third State, Sudan.

In instances involving third States such as Sudan, article 98(1) recognises the customary international law immunity of heads of State of a third State, but may be eliminated by a UNSC Resolution either explicitly or implicitly, which would then be subject to interpretation of its wording. This was illustrated in the DRC case whereby the ICC interpreted Resolution 1593 as an implicit waiver of Al Bashir's immunity by Sudan being a third State. In instances involving no third States, article 27(2) will prevail and the immunity of heads of State of States' Parties will not apply.

The wording of article 98(1) of the Rome Statute indicates States' Parties can only cooperate with ICC requests for arrest and surrender of a head of State of a third State if the 'Court can first obtain the cooperation of that third State for the waiver of the immunity.'<sup>170</sup> The Al Bashir matter illustrates this, and due to its jurisdiction being acquired by article 13(b) of the Rome Statute, a UNSC Resolution would apply, and in this case Resolution 1593 applied. Due to its implicit wording, Resolution 1593 remains subject to interpretation by the ICC given that it acquired its jurisdiction under article 13(b) of the Rome Statute. In matters where the jurisdiction of the ICC is acquired under article 13(b) of the Rome Statute, whether the immunity of the head of State in question subsists shall remain subject to the provisions contained in the particular UNSC Resolution. Such provisions can be either explicit or implicit which then remains subject to interpretation. Here, the UNSC erred in the case of Resolution 1593, given that it does not specifically remove the customary international law immunity of Al Bashir as head of State of Sudan, and instead provides that 'the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with, and provide any necessary

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<sup>168</sup> Tladi (n 90) 32–33. See also, Nerina Boschiero 'The ICC Judicial Finding on Non-cooperation Against the DRC and No Immunity for Al-Bashir Based on UNSC Resolution 1593' (2015) 13 JICJ 625, 630.

<sup>169</sup> Paola Gaeta, 'Guest Post: The ICC Changes Its Mind on the Immunity from Arrest of President Al Bashir, But It Is Wrong Again' (*OpinioJuris*, 23 April 2014) <<http://opiniojuris.org/2014/04/23/guest-post-icc-changes-mind-immunity-arrest-president-al-bashir-wrong/>> accessed 09 April 2020.

<sup>170</sup> Rome Statute art 98(1).

assistance to the Court and the Prosecutor pursuant to this resolution'.<sup>171</sup> This means that the provision applied to Sudan, and thereby interpreted that Sudan fully cooperated by providing the waiver of Al Bashir's immunity to the ICC as required under article 98(1). Resolution 1593 further provided that it 'urges all States and concerned regional and other international organisations to cooperate fully' with the ICC.<sup>172</sup> This can also mean that the provision applied to States' Parties to 'cooperate fully' with the ICC's requests for the arrest and surrender of Al Bashir.

Furthermore, the DRC decision found that article 27(2) only applies to States' Parties to the Rome Statute since it is treaty based, and does not apply to third States that had not consented to it.<sup>173</sup> Heads of State of third States retain customary international law immunity, and the Court is directed to article 98(1) to obtain a waiver of immunity from those third States before it can request States' Parties to arrest and surrender Al Bashir.<sup>174</sup> The purpose is to prevent States' Parties from breaching its obligations under the Rome Statute once requested to cooperate with the arrest and surrender of a head of State of a third State.<sup>175</sup> Sudan as third State, had not itself waived Al Bashir's immunity, but the Court justified its cooperation request to States' Parties with Resolution 1593. Instead of assuming that Resolution 1593 places Sudan in an 'analogous' position to that of a State party to the Rome Statute,<sup>176</sup> the Court reasoned that the obligation upon Sudan to 'cooperate' as contained in Resolution 1593,<sup>177</sup> amounts to a waiver of Al Bashir's immunity by Sudan.<sup>178</sup> Tladi posits that the ICC cannot rely on an implicit assumption that Resolution 1593 waives immunities nor that it 'mandates conduct that is inconsistent with international law', instead the UNSC should have done so explicitly.<sup>179</sup> In addition, if that was the intention of the UNSC then it never confirmed such a

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<sup>171</sup> UNSC Res 1593 (31 March 2005), acting under Chapter VII of the Charter of the United Nations <<https://www.icc-cpi.int/NR/rdonlyres/85FEBD1A-29F8-4EC4-9566-48EDF55CC587/283244/N0529273.pdf>> accessed 25 November 2016.

<sup>172</sup> UNSC Res 1593 (31 March 2005), acting under Chapter VII of the Charter of the United Nations <<https://www.icc-cpi.int/NR/rdonlyres/85FEBD1A-29F8-4EC4-9566-48EDF55CC587/283244/N0529273.pdf>> accessed 25 November 2016.

<sup>173</sup> Boschiero (n 168) 625, 630.

<sup>174</sup> Gaeta (n 169).

<sup>175</sup> *ibid.*

<sup>176</sup> Dapo Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities' 2009 *Journal of International Criminal Justice* 342.

<sup>177</sup> UNSC Res 1593 (31 March 2005), acting under Chapter VII of the Charter of the United Nations <<https://www.icc-cpi.int/NR/rdonlyres/85FEBD1A-29F8-4EC4-9566-48EDF55CC587/283244/N0529273.pdf>> accessed 25 November 2016.

<sup>178</sup> Boschiero (n 168) 625, 630. See also, Tladi (n 90) 17, 33.

<sup>179</sup> Tladi (n 157) 34.

waiver.<sup>180</sup> Although this amounts to an expansion of the Rome Statute to include States that have not ratified it, it finds expression in article 25 and 103 of the UN Charter given that Sudan is a party to the UN Charter. Tladi argues that had the UNSC created a universal obligation to cooperate, then the article 98 limitation would be ‘trumped by the superior obligation of a Chapter VII UNSC Resolution on the basis of article 103’.<sup>181</sup>

It can be said that Resolution 1593 places Sudan in the position of State party to the Rome Statute without having ratified it.<sup>182</sup> Hence interpretations of Resolution 1593 can amount to an overreach epitomised in the ICC’s interpretation of article 98(1) of the Rome Statute for being poorly reasoned.<sup>183</sup> Notwithstanding that a UNSC Resolution has the effect of rendering a third State subject to the jurisdiction of the ICC, provided such third State is a member to the UN Charter, ‘little attention was paid to the question of whether [...] Resolution 1593, obliges States to arrest Al Bashir’.<sup>184</sup> This is because Resolution 1593 places an obligation on the ‘Government of Sudan and all other parties to the conflict in Darfur’ to ‘cooperate fully’ with the ICC,<sup>185</sup> while other ‘States and concerned regional and other international organisations’<sup>186</sup> are only ‘urged’ to cooperate fully.<sup>187</sup> This means that States other than Sudan, as well as international organisations were strongly persuaded to cooperate with the ICC. However, States’ Parties having ratified the Rome Statute must comply with article 27(2) denying immunity of heads of State, thus must cooperate with ICC cooperation requests in terms of article 86, 87 and 89 of the Rome Statute.

Therefore, conflicting obligations arising from article 27(2) and 98(1) will only arise in instances involving a third State, whereby the ICC’s jurisdiction is acquired via a UNSC Resolution in terms of article 13(b) of the Rome Statute. Such Resolution may contain explicit

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<sup>180</sup> *ibid* 33.

<sup>181</sup> Dire Tladi, ‘When Elephants Collide it is the Grass that Suffers: Cooperation and the Security Council in the Context of the AU/ICC Dynamic’ (2014) 7 *AJLS* 381, 394.

<sup>182</sup> Akande (n 176). The same applied in the ICC case against South Africa discussed in the next chapter and Jordan which was confirmed in the Appeal Chamber.

<sup>183</sup> Kobina Egyir Daniel, ‘Head of State Immunity under the Malabo Protocol: Triumph of Impunity over Accountability?’ (LLD thesis, University of Pretoria) 46–50.

<sup>184</sup> *ibid* 49.

<sup>185</sup> UNSC Res 1593 para 2 (31 March 2005), acting under Chapter VII of the Charter of the United Nations <<https://www.icc-cpi.int/NR/rdonlyres/85FEBD1A-29F8-4EC4-9566-48EDF55CC587/283244/N0529273.pdf>> accessed 25 November 2016.

<sup>186</sup> UNSC Res 1593 Para graph 2 (31 March 2005), acting under Chapter VII of the Charter of the United Nations <<https://www.icc-cpi.int/NR/rdonlyres/85FEBD1A-29F8-4EC4-9566-48EDF55CC587/283244/N0529273.pdf>> accessed 25 November 2016.

<sup>187</sup> Daniel (n 183).

or implicit provisions serving as a waiver of immunity which will remain subject to interpretation in respect of implicit provisions. This was demonstrated in interpretation of the wording of Resolution 1593, given that it did not explicitly eliminate the immunity of Al Bashir. According to Tladi, the limited scope of application of Resolution 1593 was likely undertaken purposely by some UNSC member States to avoid creating obligations for themselves.<sup>188</sup> It can also be argued that the exception to the obligation to cooperate in article 98 of the Rome Statute is applicable, despite the fact that the UNSC referred the situations to the ICC.<sup>189</sup> However, this remains subject to interpretation of the wording of a particular UNSC Resolution, in the Al Bashir matter Resolution 1593 applied. Although this amounts to an expansion of the Rome Statute to include States that have not ratified it, it finds expression in article 25 and 103 of the UN Charter given that Sudan is a party to the UN Charter. Tladi postulates that had the UNSC created a universal obligation to cooperate, then the article 98 limitation would be ‘trumped by the superior obligation of a Chapter VII UNSC Resolution on the basis of article 103’.<sup>190</sup>

*(e) Effect of ICC cases on the international law position on immunity, arrest and surrender of heads of State*

In light of the varying reasons proffered by the ICC for the denial of Al Bashir’s immunity, it ordered that Chad, DRC and Malawi as State Parties, failed to comply with their obligations to consult with the Court in relation to the immunity of Al Bashir, and that they failed to cooperate with the arrest and surrender of Al Bashir.<sup>191</sup> Consequently, this prevented the Court from executing its functions and warranted a referral to the UNSC and to the ASP.<sup>192</sup> In addition, the ICC’s jurisdiction and mandate in the Al Bashir matter was highlighted as being obtained under Resolution 1593, and was entrusted to it by the UNSC.<sup>193</sup> The UNSC obtains its powers to refer a situation that presents a threat to international peace and security to the ICC under Chapter VII of the UN Charter, and failure by the UNSC to take follow up action would render the UNSC referral futile.<sup>194</sup> Consequently, the ultimate goal of the UNSC referrals to put an end to impunity would not materialise.<sup>195</sup>

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<sup>188</sup> Tladi (n 181) 381, 394.

<sup>189</sup> *ibid.*

<sup>190</sup> *ibid.*

<sup>191</sup> Chad (n 46) para 14; DRC (n 47) para 33-34; and Malawi (n 48) para 47.

<sup>192</sup> *ibid.*

<sup>193</sup> DRC (n 47) para 33–34.

<sup>194</sup> *ibid.*

<sup>195</sup> *ibid.*

International cases on immunity, particularly the Al Bashir matter, show that immunity of heads of State can no longer be used as a defence at an international level. Therefore, article 27(2) trumps the article 98(1) recognition of customary international law immunity. Consequently, States' Parties have an obligation to comply with ICC cooperation requests for the arrest and surrender of heads of State. With that in mind, Akande posits that immunities are primarily designed for horizontal interstate relationships, but may also be pleaded before international tribunals albeit reasons of principle and policy.<sup>196</sup> According to Akande, in practice, the availability of immunities depends on the text of the instrument creating the tribunal and on whether the State of the official is bound by that instrument.<sup>197</sup> Shelton surmises that the interpretations or determinations of applicable rules may vary considerably, making all international law somewhat relative, in the absence of institutions competent to render authoritative interpretations binding on all States.<sup>198</sup> In light of this, the interpretation by the ICC on the conflicting obligations that arise from the relationship between article 27(2) and 98(1) is important to determine what the obligations of State Parties to the Rome Statute are.

In order to determine whether States' Parties have an obligation to arrest and surrender heads of State committing international crimes, it requires revisiting the fact that the international law position on immunity was that heads of State do not have immunity since after the First World War. This position was held by the *International Military Tribunals sitting in Nuremberg and Tokyo*, as well as the *International Tribunal for the Former Yugoslavia and Rwanda*. This was followed by the *Arrest Warrant case* and the *Taylor case* also ruling that immunity can no longer be argued before international courts. Thus, later the ICC in its case against Malawi held that an exception to customary international law immunity developed. However, States' Parties that had been requested to cooperate with the ICC for the arrest and surrender of Al Bashir, did not feel obligated to do so. Although it is noted that immunity of heads of State has been denied since the First World War hence it can be considered as a settled practice, it cannot be inferred that States' Parties felt that they had an obligation to arrest and surrender heads of State. Consequently, it cannot be held that a new custom developed as both requirements for a custom were not met. The ICC case against Chad echoed the decision in the Malawi case, finding that an exception to customary international law immunity had developed.

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<sup>196</sup> Akande (n 91) 417.

<sup>197</sup> *ibid* 409.

<sup>198</sup> Dina Shelton, 'Normative Hierarchy in International Law' (2006) 100 AJIL 291, 322.

The ICC case against the DRC upheld the Malawi and Chad judgments, but for different reasons. Instead, the DRC relied on the fact that Al Bashir's immunity had been waived by Resolution 1593. The fact that Resolution 1593 contained implicit provisions, the ICC interpreted it as a waiver of the immunity requirement under article 98(1). Ultimately, whether the head of State in question has immunity or not can no longer prevail. Whether such immunity is removed by an exception to customary international law immunity or interpretation of a UNSC Resolution, article 27(2) trumps article 98(1). Consequently, the supposition that heads of State have customary international immunity cannot be argued to escape responsibility for committing international crimes, hence States' Parties have an obligation to cooperate with ICC requests for the arrest and surrender of heads of State albeit a third State. Such third States' immunity is recognised under article 98(1) and clash with article 27(2), but as illustrated in the International Tribunals and Courts, particularly the Al Bashir matter, such immunity is denied. To this end, the ICC found that the denial of such immunity is based on an exception to customary international law immunity, or interpretation of a UNSC Resolution.

Therefore, the effect of International Tribunals and Court cases is that immunity can no longer be argued before international courts. As a result, States' Parties to the Rome Statute have an obligation to cooperate with the ICC requests for the arrest and surrender of a head of State accused of committing international crimes, albeit for the differing reasons proffered by the ICC.

## **2.5 CONCLUSION**

In seeking to ascertain whether article 27(2) trumps article 98(1), this chapter undertook an investigation on customary international law as contained in article 98(1) of the Rome Statute relative to article 27(2) which denies immunity of a head of State. Its purpose was to determine whether article 27(2) trumps article 98(1) in so far as it relates to the immunity, arrest and surrender of heads of State of third States, in the context of the Al Bashir matter. The ICC's interpretations on the relationship between article 27(2) and 98(1) of the Rome Statute addresses whether the head of State of a third State has customary international law immunity before international courts. In turn, this determined whether States' Parties to the Rome Statute had an obligation to arrest and surrender such head of State of a third State's.

Despite the clash between holding heads of State accountable for committing international crimes and their immunity, International Tribunals and Courts denied immunity of those

committing international crimes since after the First World War, and the same position was undertaken by the ICC. The ICC was established in terms of the Rome Statute to put an end to impunity for those committing international crimes and to assist with the prevention of such crimes.<sup>199</sup> Once States' Parties ratify the Rome Statute, they are bound to comply with obligations under it, which includes the obligation to comply with requests to arrest and surrender heads of State to the ICC for trial.<sup>200</sup>

The question as to whether article 27(2) trumps article 98(1) was answered by rulings of International Tribunals and Courts denial of immunity before international courts, together with the ICC rulings that article 27(2) of the Rome Statute trump customary international law immunity as recognised in article 98(1). Thus, States' Parties to the Rome Statute had an obligation to cooperate with the ICC requests to arrest and surrender Al Bashir. This is so despite the varying reasons proffered by the ICC.

Having discussed the international law position and obligations on immunity, arrest and surrender of heads of State, the dissertation moves on to review and discuss the domestic obligations of South Africa which give effect to the Rome Statute that was ratified by South Africa.

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<sup>199</sup> Rome Statute Preamble.

<sup>200</sup> Rome Statute arts 86 and 89(1).

## **CHAPTER 3**

### **IMMUNITY OF HEADS OF STATE IN SOUTH AFRICA**

#### **3.1 INTRODUCTION**

In light of the international legal position, this chapter sheds light on South Africa's legal position on the immunity, arrest and surrender of heads of State that stand accused before the ICC, of committing international crimes. The review of cases against the South African government in the NGHC and SCA includes a discussion on the Courts' interpretation of section 4 and 10 of the Implementation Act, as well as section 4 of the DIPA. This is followed by a discussion on the ICC case levelled against South Africa. These discussions are undertaken to assess whether South Africa's legal framework complies with the international position explicated in the preceding chapter.

The chapter unfolds in 2 parts. First, the domestic laws on immunity, arrest and surrender of heads of State are discussed as interpreted and applied by the NGHC and SCA. This includes section 4 and 10 of the Implementation Act, and section 4 of the DIPA. Second, the ICC cases against the South African government are discussed to assess South Africa's compliance with the international law position on immunity, arrest and surrender of heads of State.

#### **3.2 CONFLICTING OBLIGATIONS ARISING FROM DOMESTIC LEGISLATION ON IMMUNITY, ARREST AND SURRENDER OF HEADS OF STATE**

##### **3.2.1 The DIPA**

In 2001, the DIPA was passed as an Act of Parliament and came into force on 28 February 2002. The legislator's intention was to provide immunities and privileges to diplomatic missions and consular posts and their members, heads of States, special envoys and certain representatives of the UN's and its specialised agencies, as well as other international organisations.<sup>201</sup> The DIPA also provides for the regulation of international conferences and meetings, and to enact into law

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<sup>201</sup> DIPA long title.



certain conventions, and matters related thereto.<sup>202</sup>

With regard to the immunity, arrest and surrender of heads of State section, 4(1) of the DIPA provides that:

‘[a] head of state is immune from the criminal and civil jurisdiction of the courts of the Republic, and enjoys such privileges as (a) heads of state enjoy in accordance with the rules of customary international law; (b) are provided for in any agreement entered into with a state or government whereby immunities and privileges are conferred upon such a head of state; or (c) may be conferred on such head of state by virtue of section 7(2)’.<sup>203</sup>

In addition, section 5(3) provides that:

‘[a]ny organisation recognised by the Minister for the purposes of this section and any official of such organisation enjoy such privileges and immunities as may be provided for in any agreement entered into with such organisation or as may be conferred on them by virtue of section 7(2)’.<sup>204</sup>

Section 7(2) makes the following provision as it relates to section 4(1) and 5(3):

‘[a]ny agreement whereby immunities and privileges are conferred to any person or organisation in terms of this Act must be published by notice in the *Gazette*; [t]he Minister may in any particular case if it is not expedient to enter into an agreement as contemplated in subsection (1) and if the conferment of immunities and privileges is in the interest of the Republic, confer such immunities and privileges on a person or organisation as may be specified by notice in the *Gazette*’.<sup>205</sup>

Thus section 4(1), 5(3), together with section 7(2) makes provision for the immunity of heads of State and that it can be conferred by the relevant Minister through publication in a Government Gazette, as well as the fact that an agreement can be entered into between organisations recognised by the Minister as it relates to immunity and privileges. Consequently, a Host Agreement between the AU and South Africa was concluded in terms of section 5(3) and 7(2) of the DIPA.<sup>206</sup> As such

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<sup>202</sup> *ibid.*

<sup>203</sup> DIPA s 4(1).

<sup>204</sup> *ibid* s 5(3).

<sup>205</sup> *ibid* s 7(2).

<sup>206</sup> Such Host Agreement that was entered into in terms of s 5(3) of the DIPA provides that: ‘any organisation recognised by the Minister for the purposes of this section and any official of such organisation enjoy such privileges and immunities as may be provided for in any agreement entered into with such organisation or as may be conferred on them by virtue of section 7(2)’. S 7(2) of the DIPA provides that: ‘the Minister may in any

the DIPA makes it possible for a head of State to acquire immunity. However, this clashes with the Implementation Act which denies immunity of heads of State.

### 3.2.2 The Implementation Act

The Implementation Act which was promulgated in 2002, makes provision for the implementation of the Rome Statute in South Africa in order to ensure that the country conforms with its Rome Statute obligations.<sup>207</sup> The Implementation Act also ensures that those who commit international crimes can be arrested and prosecuted in South African courts, as well as provides for the cooperation by South Africa with ICC requests.<sup>208</sup>

It is worth noting that according to the Implementation Act, given South Africa's own history of atrocities, the country is committed to bringing those who commit international crimes to justice in a South African Court under its applicable laws, and in accordance with its international obligations as State Party to the Rome Statute.<sup>209</sup> Accordingly, section 10(9) of the Implementation Act provides that:

‘[t]he fact that the person to be surrendered is a person contemplated in section 4 (2) (a) or (b) does not constitute a ground for refusing to issue an order contemplated in subsection (5)’.<sup>210</sup>

Customary international law immunity of heads of State are denied in terms of section 10 which must be read with section 4(2) of the Implementation Act providing that:

‘[d]espite any other law to the contrary including customary and conventional international law, the fact that a person (a) is or was a head of State or government, a member of a government or parliament, an elected representative or a government official; or (b) being a member of a security service or armed force, was under a legal obligation to obey a manifestly unlawful order of a

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particular case if it is not expedient to enter into an agreement as contemplated in subsection (1) and if the conferment of immunities and privileges is in the interest of the Republic, confer such immunities and privileges on a person or organisation as may be specified by notice in the Gazette’; See also, s 7(1) provides that: ‘any agreement whereby immunities and privileges are conferred to any person or organisation in terms of this Act must be published by notice in the Gazette’.

<sup>207</sup> Implementation Act long title.

<sup>208</sup> *ibid.*

<sup>209</sup> Implementation Act Preamble.

<sup>210</sup> *ibid* para 100.

government or superior is neither (i) a defence to a crime; nor (ii) a ground for any possible reduction of sentence once a person has been convicted of a crime.<sup>211</sup>

As contained in section 10 read with section 4(2) of the Implementation Act, customary international law immunity of heads of State cannot apply before South African domestic courts. This is contrary to section 4(1), 7(2) and 5(3) of the DIPA which affords customary international law immunity to heads of State. Therefore, the South African government was faced with conflicting obligations emanating from the Implementation Act allowing Al Bashir's immunity, whereas his immunity stands in terms of the DIPA, together with the Host Agreement entered into in terms of section 5(3) and 7(2) of the DIPA. These conflicting obligations were addressed by the NGHC and SCA cases in the Al Bashir matter.

### **3.3 AL BASHIR'S IMMUNITY, ARREST AND SURRENDER CASES AGAINST SOUTH AFRICA**

#### **3.3.1 Domestic court cases**

##### **(a) Introduction**

There are 2 legal processes that unfolded when Al Bashir arrived in South Africa. First, the ICC requested the South African government, having ratified the Rome Statute, to arrest and surrender Al Bashir on 13 June 2015.<sup>212</sup> Second, the NGHC order initiated by the SALC, ordered the South African government to keep Al Bashir in South Africa pending his arrest and surrender on 14 June 2015.<sup>213</sup> Despite the ICC request and NGHC order, Al Bashir left South Africa on the morning of 15 June 2015.<sup>214</sup> For South Africa, this was the start of conflicting obligations that arose for the country in so far as it relates to the immunity, arrest and surrender of Al Bashir. Different views and opinions were expressed in the domestic and international arenas as a result of Al Bashir's visit and departure from South Africa, given that he was not arrested and surrendered to the ICC for trial. Consequently, it gave rise to a legal battle in South Africa's domestic courts.<sup>215</sup>

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<sup>211</sup> Implementation Act s 4(2).

<sup>212</sup> ICC Decision following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir ICC-02/05-01/09 13 June 2015.

<sup>213</sup> NGHC (n 50).

<sup>214</sup> *ibid.*

<sup>215</sup> NGHC (n 50); and SCA (n 51).

(b) *The NGHC*

The NGHC found that the South African government failed to comply with its obligations under the Rome Statute as article 27 denies Al Bashir's immunity as head of State, as well as under the Implementation Act. Thus, failing to arrest and surrender Al Bashir amounted to conduct that is inconsistent with the Constitution and invalid.<sup>216</sup>

The SALC lodged an urgent application in the NGHC on 13 June 2015, seeking the immediate arrest and detention of Al Bashir.<sup>217</sup> Despite a court order for his arrest and transfer to the ICC, the government allowed him to depart South African territory contrary to an interim order forbidding his departure.<sup>218</sup> The SALC argued that the South African government had an obligation to arrest and surrender Al Bashir in terms of articles 86, 87(1) and 89 of the Rome Statute, and in terms of the Implementation Act.<sup>219</sup> On this basis, the SALC sought a ruling that the South African government arrest and detain Al Bashir in terms of section 40(1) and (k) of the Criminal Procedure Act 51, 1977 (CPA), or in terms of the Implementation Act.<sup>220</sup> They further sought a ruling that the South African government's conduct, in failing to arrest and surrender Al Bashir or making such arrangements, was unconstitutional and invalid.<sup>221</sup> In response, the South African government argued that Al Bashir, as head of State, had customary international law immunity from prosecution due to the DIPA and the Host Agreement, compounded by South Africa's AU membership.<sup>222</sup> This is so because South Africa's decision not to arrest Al Bashir was based on his customary international law immunity, a position endorsed by the AU.

The South African government was convinced that article VIII of the Host Agreement granted Al Bashir's immunity in accordance with section C and D, articles V and VI of the General Convention on the Privileges and Immunities of the Organisation of African Unity (OAU Convention).<sup>223</sup>

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<sup>216</sup> NGHC (n 50) para 2

<sup>217</sup> *South African Litigation Centre* 21 September 2015  
<<https://www.southernafricalitigationcentre.org/2015/09/21/salc-in-the-news-the-state-of-play-in-the-al-bashir-saga/>> accessed 30 September 2020.

<sup>218</sup> *ibid.*

<sup>219</sup> NGHC (n 50) para 23.

<sup>220</sup> *ibid* para 4

<sup>221</sup> *ibid.*

<sup>222</sup> *ibid* para 5, 15–17.

<sup>223</sup> *ibid* para 15.

According to the South African government, the host agreement formed part of domestic law of South Africa when it was published in the *Government Gazette* in terms of section 5(3) of the DIPA, read with section 231(4) of the Constitution.<sup>224</sup> The NGHC rejected the South African government's argument that the host agreement afforded immunity to Al Bashir as article VIII only refers to officials of the AU, delegates and representatives of International Government Organisations.<sup>225</sup> The NGHC held that it bore no reference to representatives of AU Member States.<sup>226</sup> Thus, Al Bashir did not have immunity under the host agreement published in the *Government Gazette* in terms of section 5(3) of the DIPA, nor did he have immunity under the OAU Convention as it was not ratified by South Africa.<sup>227</sup> It is the Rome Statute that has been ratified by South Africa, and the subsequent Implementation Act enjoys legislative authority since it has been passed as a law by Parliament and cannot be displaced by a Ministerial Notice published in a *Government Gazette* or a Cabinet decision.<sup>228</sup>

The judgment of the NGHC delivered on 15 June 2015, was a sequel to and a continuation of proceedings which had commenced the day before. On Sunday, 14 June 2015, the NGHC delivered an urgent court order that the South African government must keep Al Bashir on its territory pending its final order on the issue of Al Bashir's immunity.<sup>229</sup> The interim order delivered on 14 June 2015<sup>230</sup> was in response to the urgent application made by the SALC that the South African government arrest and detain Al Bashir in terms of section 40 of the CPA or Implementation Act which imposed obligations on the South African government at a domestic and international level.<sup>231</sup> Subsequent to the interim order of 14 June 2015,<sup>232</sup> the NGHC granted another order on 15 June 2015 which held that,

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<sup>224</sup> *ibid* para 17

<sup>225</sup> NGHC (n 50) para 30. See also, art VIII of the host agreement which makes provision for privileges and immunities to members of the AU Commission and staff members, delegates and other representatives of inter-governmental organisations attending meetings for the duration of the summit.

<sup>226</sup> NGHC (n 50) para 30.

<sup>227</sup> *ibid*.

<sup>228</sup> *ibid* para 31.

<sup>229</sup> *ibid* para 6.

<sup>230</sup> *ibid*.

<sup>231</sup> *ibid* para 4

<sup>232</sup> *ibid* para 4

‘the conduct of the Respondents, to the extent that they have failed to take steps to arrest and/or detain the President of the Republic of Sudan Omar Hassan Ahmad Al Bashir, is inconsistent with the Constitution of the Republic of South African, 1996, and invalid. That the Respondents are forthwith compelled to take all reasonable steps to prepare to arrest President Bashir without a warrant in terms of Section 40(1)(k) of the Criminal Procedure Act, 51 of 1977 and detain him, pending a formal request for his surrender from the International Criminal Court [...]’.<sup>233</sup>

It also held that:

‘it is our view that the order we handed down, as well as this judgment remain relevant in view of the important constitutional and international law principles at stake’.<sup>234</sup>

Despite the urgent interim order handed down by the NGHC on Sunday 14 June 2015 prohibiting Al Bashir’s departure, he was allowed to leave South Africa on 15 June 2015.<sup>235</sup> South Africa did not comply with the NGHC urgent court order and the court found that:

‘[a] democratic State based on the rule of law cannot exist or function, if the government ignores its constitutional obligations and fails to abide by court orders. A court is the guardian of justice, the corner-stone of a democratic system based on the rule of law. If the State, an organ of State or State official does not abide by court orders, the democratic edifice will crumble stone-by-stone until it collapses and chaos ensues’.<sup>236</sup>

Given that the NGHC found the South African government did not comply with its order, it invited the National Director of Public Prosecution (NDPP) to consider criminal proceedings under its ruling that:

‘the departure of President Bashir from this country before the finalisations of this application and in the full awareness of the explicit order of Sunday 14 June 2015, objectively viewed, demonstrates

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<sup>233</sup> ibid para 2.

<sup>234</sup> ibid para 3.

<sup>235</sup> ibid para 36.

<sup>236</sup> ibid para 37.

non-compliance with that order. For this reason, we also find it prudent to invite the National Director of Public Prosecutions to consider whether criminal proceedings are appropriate'.<sup>237</sup>

On the basis of section 1 and 2, together with section 231 of the Constitution, the NGHC found that failure by the South African government to arrest and surrender Al Bashir was unconstitutional and invalid.<sup>238</sup> This is in light of the fact that South Africa is bound by obligations under the Rome Statute and Implementation Act.<sup>239</sup> Therefore, article 27 of the Rome Statute and Implementation Act trumps a cabinet resolution and ministerial notice actioned under section 5(3) of the DIPA.

This decision was also pointed out in the SCA discussed in the next subsection.

(c) *The SCA*

The SCA upheld the NGHC decision. The South African government argued before the SCA that customary international law immunity and section 4(1) of the DIPA afforded immunity to Al Bashir.<sup>240</sup> South Africa therefore indicated that it did not arrest Al Bashir because of Section 4(1) of the DIPA, which was in fact not argued in the NGHC case.<sup>241</sup>

The SALC conversely argued that Al Bashir did not have immunity because there is an exception to customary international law immunity for heads of State who committed international crimes.<sup>242</sup> Also, promulgation of the Implementation Act specifically removed immunity for those who committed international crimes.<sup>243</sup> In this regard, the SCA held that customary international law recognised immunity of heads of State, but that such immunity had been specifically removed by section 10(9) of the Implementation Act, which is read with section 4(2).<sup>244</sup> The South African government was convinced that they did not have an obligation to arrest Al Bashir as he had immunity under the host agreement, customary international law and the DIPA, which is also the AU's position. However, the NGHC and the SCA found that South Africa failed to comply with

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<sup>237</sup> *ibid* para 39.

<sup>238</sup> *ibid* para 37.

<sup>239</sup> *ibid*.

<sup>240</sup> SCA (n 51) paras 14–16.

<sup>241</sup> *ibid* para 49.

<sup>242</sup> *ibid* para 52.

<sup>243</sup> *ibid*.

<sup>244</sup> *ibid* para 100.

its obligations to arrest Al Bashir under article 27 of the Rome Statute and section 10(9) read with section 4(2) of the Implementation Act.<sup>245</sup>

Although the South African government lodged a successful SCA leave of appeal against the NGHC judgment, the SCA ruled against the South African government. The NGHC judgment was upheld with variations by the SCA, stating unequivocally that:

‘[t]he conduct of the Respondents in failing to take steps to arrest and detain, for surrender to the International Criminal Court, the President of Sudan, Omar Hassan Ahmad Al Bashir, after his arrival in South Africa on 13 June 2015 to attend the 25th Assembly of the African Union, was inconsistent with South Africa’s obligations in terms of the Rome Statute and section 10 of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, and unlawful [...]’.<sup>246</sup>

Thus, the South African government had an obligation to arrest and surrender Al Bashir to the ICC, and the pending arrest warrants were meant to be executed against Al Bashir if found on South African territory. The review of rulings from South African courts confirms that the host agreement, the DIPA and customary international law immunity did not apply to Al Bashir and that his immunity was removed by the Implementation Act that specifically gives effect to the Rome Statute. It also confirms that customary international law immunity is in conflict with section 4(2) and section 10(9) of the Implementation Act. Although the SCA recognised that customary international law immunity exists, it did not recognise the development of an exception on the basis of individuals committing international crimes.<sup>247</sup>

Therefore, at a domestic level, conflicting obligations which arose between the Implementation Act and the DIPA in so far as it relates to the immunity, arrest and surrender of heads of State, were addressed by the NGHC and SCA judgements. These Courts did not accept South Africa’s argument that Al Bashir had immunity. Instead, they ruled that his immunity was denied on the basis of article 27 of the Rome Statute and Implementation Act rather than the Host Agreement and the DIPA. As a result, the South African government had an obligation to arrest and detain Al

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<sup>245</sup> NGHC (n 50) para 28; SCA (n 51) para 119–123.

<sup>246</sup> SCA (n 51) para 113.

<sup>247</sup> *ibid* para 84.



Bashir.

### 3.3.2 The ICC Cases against South Africa

#### (a) *Introduction*

On 13 June 2015, the ICC ruled that there is no ‘ambiguity in the law’ pertaining to the arrest and surrender of Al Bashir.<sup>248</sup> This decision resulted from a request by the ICC Prosecutor for the Court to clarify the obligation that the South African government has an obligation to arrest and surrender Al Bashir to the ICC should he arrive in South Africa.<sup>249</sup> Despite this decision by the ICC, the South African government did not arrest Al Bashir when he arrived in South Africa. This resulted in a ruling by the ICC that South Africa failed to comply with its obligations under the Rome Statute as they failed to cooperate with the Courts requests to arrest and surrender Al Bashir when he arrived on its territory.<sup>250</sup> A discussion on both judgments follows.

#### (b) *The ICC Decision following the Prosecutor’s request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir*

The Court found that there is no need to clarify the law in so far as it relates to the arrest and surrender of Al Bashir, given that the Court had already settled this matter in its case against the DRC<sup>251</sup> in April 2014.<sup>252</sup> In particular, the Court pointed out that it had expressly ruled in the DRC case that,

‘[b]y issuing Resolution 1593 (2005) the [UN]SC decided that the “Government of Sudan [...] shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution”. Since immunities attached to Omar Al Bashir are a procedural bar from prosecution before the Court, the cooperation envisaged in said resolution was meant to eliminate any impediment to the proceedings before the Court, including the lifting of immunities. Any other

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<sup>248</sup> South Africa (n212).

<sup>249</sup> Prosecution’s Urgent Request for an Order clarifying whether art 97 Consultations with South Africa have Concluded and that South Africa is Under an Obligation to Immediately Arrest and Surrender Omar Al Bashir ICC-02/05-01/09-249 13 June 2015.

<sup>250</sup> South Africa (n 49).

<sup>251</sup> DRC (n 47).

<sup>252</sup> South Africa (n 248) para 5.

interpretation would render the SC decision requiring that Sudan “cooperate fully” and “provide any necessary assistance to the Court” senseless. Accordingly, the “cooperation of that third State [Sudan] for the waiver of the immunity”, as required under the last sentence of article 98(1) of the Statute, was already ensured by the language used in paragraph 2 of SC Resolution 1593(2005). By virtue of said paragraph, the [UN]SC implicitly waived the immunities granted to Omar Al Bashir under international law and attached to his position as a Head of State[...].<sup>253</sup>

Therefore, the Court concluded that there are no impediments on the vertical level, nor on the horizontal level, given that Resolution 1593 has lifted Al Bashir’s immunity.<sup>254</sup> As such, States’ Parties must cooperate with ICC requests for his arrest and surrender. The waiver of Al Bashir’s immunity can be based on an interpretation of the wording of Resolution 1593 that Sudan ‘shall cooperate fully’ with the ICC.<sup>255</sup> However, as indicated in the preceding chapter this may be perceived as an overreach given that Sudan had not ratified the Rome Statute hence its head of State maintains customary international law immunity as recognised under article 98(1) of the Rome Statute. The South African government was also repeatedly reminded during the meeting of 12 June 2015, of its obligation to immediately arrest and surrender Al Bashir, and that consultations under article 97 of the Rome Statute do not suspend this obligation.<sup>256</sup>

In light of this, the South African government was always fully aware of its obligation to immediately arrest and surrender Al Bashir should he be found in South Africa. Despite this, the South African government failed to do so when he attended the AU summit in South Africa. This resulted, apart from the NGHC and SCA cases, in the ICC case against the South African government wherein the Court had to decide whether South Africa had an obligation to arrest and surrender Al Bashir as requested by the ICC.<sup>257</sup>

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<sup>253</sup> DRC (n 47) para 29.

<sup>254</sup> South Africa (n 248) para 7.

<sup>255</sup> UNSC Res 1593 para 2 of the (31 March 2005), acting under Chapter VII of the Charter of the United Nations <<https://www.icc-cpi.int/NR/rdonlyres/85FEED1A-29F8-4EC4-9566-48EDF55CC587/283244/N0529273.pdf>> accessed 25 November 2016.

<sup>256</sup> South Africa (n 248) para 8.

<sup>257</sup> South Africa (n 49).

(c) *The ICC Decision under Article 87(7) of the Rome Statute on the non-compliance by South Africa with the Court's request for the Arrest and Surrender of Al Bashir*

During July 2017, the ICC case commenced against the South African government for failure to arrest and surrender Al Bashir when he attended the AU summit in South Africa in June 2015.<sup>258</sup> This was approximately two years after the NGHC and SCA ruled that failure by the South African government to arrest and surrender Al Bashir was unlawful under the Rome Statute and Implementation Act.

In this case, first the Court had to determine whether South Africa failed to comply with its requests to arrest and surrender Al Bashir contrary to the provisions of the Rome Statute. Second, pending the outcome of the first determination by the Court, it had to decide whether the referral of the matter to the ASP and/or the UNSC is warranted. In doing so, the ICC decided on the jurisdiction of the ICC in terms of article 13 on the basis of Resolution 1593, the removal of Al Bashir's immunity under article 27(2) of the Rome Statute relative to his immunity under article 98(1), rule 195, and its relationship with customary international law immunity. To this end, the Court comprehensively identified the applicable laws as article 27(2) of the Rome Statute<sup>259</sup> relative to article 98(1),<sup>260</sup> article 13,<sup>261</sup> Part 9 of the Rome Statute which includes article 86,<sup>262</sup> article 87,<sup>263</sup>

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<sup>258</sup> *ibid.*

<sup>259</sup> Art 27(2) states that: 'Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person'.

<sup>260</sup> Art 98(1) states that: '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'.

<sup>261</sup> Art 13 states: 'The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: [...] (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; [...]'.  
<sup>262</sup> Art 86 states that: 'General obligation to cooperate - States' Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.'

<sup>263</sup> Art 87 states that: 'Requests for cooperation: general provisions: [...] 5. (a) The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis. (b) Where a State not party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States' Parties or, where the Security

article 89,<sup>264</sup> article 97,<sup>265</sup> and Rule 195(1)<sup>266</sup> which complements article 98(1) of the Rome Statute.<sup>267</sup>

In deciding on these questions, the Court received submissions from the South African government, the ICC Prosecutor, Belgium and the SALC, to consider whether the South African government failed to comply with the Court's requests to arrest and surrender Al Bashir. Representatives of the UN were invited but did not make any written submissions to the Chamber.<sup>268</sup>

The South African government submitted that there were three fundamental errors of a procedural and substantive nature that took place during the article 97 consultations.<sup>269</sup> These entailed that consultations were wrongly dealt with, it took the form of a quasi-judicial rather than a diplomatic and political process, and no rules for the consultations were available under article 97.<sup>270</sup>

The submission by South Africa was based first, on the fact that the South African government was not afforded an opportunity to be adequately represented because the Ambassador was not

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Council referred the matter to the Court, the Security Council. [...] 7. Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States' Parties or, where the Security Council referred the matter to the Court, to the Security Council'.

<sup>264</sup> Art 89 states that: 'Surrender of persons to the Court: 1. The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States' Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender'.

<sup>265</sup> Art 97 states that: 'Consultations: Where a State Party receives a request under this Part in relation to which it identifies problems which may impede or prevent the execution of the request, that State shall consult with the Court without delay in order to resolve the matter. Such problems may include, inter alia: (a) Insufficient information to execute the request; (b) In the case of a request for surrender, the fact that despite best efforts, the person sought cannot be located or that the investigation conducted has determined that the person in the requested State is clearly not the person named in the warrant; or (c) The fact that execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State'.

<sup>266</sup> Rule 195(1)—which is placed under s V of Chapter 11 of the Rules entitled 'Cooperation under article 98' — complements art 98(1), stating that: 'When a requested State notifies the Court that a request for surrender or assistance raises a problem of execution in respect of article 98, the requested State shall provide any information relevant to assist the Court in the application of article 98. Any concerned third State or sending State may provide additional information to assist the Court.'

<sup>267</sup> South Africa (n 49) 21–23.

<sup>268</sup> Decision convening a public hearing for the purposes of a determination under art 87(7) of the Statute with respect to the Republic of South Africa <[https://www.icc-cpi.int/CourtRecords/CR2016\\_25714.PDF](https://www.icc-cpi.int/CourtRecords/CR2016_25714.PDF)> accessed 04 November 2020.

<sup>269</sup> South Africa (n 49).

<sup>270</sup> *ibid* 11–16.

mandated to represent South Africa under article 97 of the Rome Statute.<sup>271</sup> Second, whether South Africa violated its obligations under the Rome Statute.<sup>272</sup> Hence the issue before the Court was not whether South Africa had violated its legal obligation under South African domestic law.<sup>273</sup> Third, each party to a case must be allowed to make its own arguments because previous decisions of the Court on the obligations of States' Parties to arrest and surrender Al Bashir are not conclusive.<sup>274</sup>

In this regard, the South African government contended that conflicting reasons for ICC rulings in the cases of Chad, DRC and Malawi in fact gave rise to ambiguity regarding States' Parties obligations to arrest and surrender Al Bashir.<sup>275</sup> Lastly, Al Bashir as a sitting head of State enjoyed immunity under customary international law and Sudan did not waive Al Bashir's immunity as head of State.<sup>276</sup> Therefore the Chamber, because of article 98(1) of the Rome Statute, could not request South Africa to arrest and surrender Al Bashir.<sup>277</sup> The South African government argued that Resolution 1593 cannot waive the immunity of Al Bashir as head of State and that the waiver should be explicitly stated rather than tacit.<sup>278</sup>

According to Gaeta, the obligations imposed by Resolution 1593 on Sudan as a third State to cooperate with the Court, cannot affect the rights and powers of the Court as another international organisation.<sup>279</sup> The reason for this is because specific international organisations are regulated in terms of their respective constitutive instrument.<sup>280</sup> Thus, Resolution 1593 does not relieve the Court from implementing its power to request Sudan to cooperate under article 98 (1) of the Rome Statute.<sup>281</sup> In addition, there is no consensus on whether interpretation of Resolution 1593 places

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<sup>271</sup> ICC-02/05-01/09-290, para 40.

<sup>272</sup> South Africa (n 49) 11–16.

<sup>273</sup> *ibid.*

<sup>274</sup> *ibid* 11–16.

<sup>275</sup> *ibid.*

<sup>276</sup> *ibid.*

<sup>277</sup> *ibid.*

<sup>278</sup> In accordance with art 32(2) of the Vienna Convention on Diplomatic Relations; and the Resolutions on piracy and terrorism.

<sup>279</sup> ICC, 'Request by Professor Paola Gaeta for leave to submit observations on the merits of the legal questions presented in the Hashemite Kingdom of Jordan's appeal against the "Decision under Article 87 (7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir' of 12 March 2018"' ICC-02/05-01/09 OA2 (30 April 2018) 6 <[https://www.icc-cpi.int/CourtRecords/CR2018\\_02423.PDF](https://www.icc-cpi.int/CourtRecords/CR2018_02423.PDF)> accessed 03 November 2020.

<sup>280</sup> *ibid.*

<sup>281</sup> *ibid.*

Sudan in a position analogous to a State party. Whilst Resolution 1593 explicitly provides that Sudan must cooperate fully with the Court, it did not explicitly make the Statute binding on Sudan, nor did it address the question of immunity.<sup>282</sup> However, Sudan is a member State of the UN bound by article 25 of the UN Charter, and Resolution 1593 implicitly provides that Sudan accept the decisions of the ICC.<sup>283</sup> As a result, Sudan is placed in an analogous position to that of a State party.<sup>284</sup> In addition, the obligations of Sudan that emanate from the Rome Statute are derived from a UNSC Resolution and the UN Charter, and not directly from the Rome Statute.<sup>285</sup>

In contrast, the South African government also argued that the UNSC never issued a subsequent resolution to waive immunity of Al Bashir.<sup>286</sup> Therefore, they submitted that Resolution 1593 did not make the Rome Statute, particularly article 27(2) applicable to Sudan as a non-party State and thereby removing Al Bashir's immunity, and if it did apply to Sudan then article 98 of the Rome Statute would apply.<sup>287</sup>

The findings of the ICC are mainly based on the interpretation of Resolution 1593, the ICJ agrees that this, amongst others, is a means to determine the binding effect of such Resolutions. The ICJ highlighted that the language of a UNSC Resolution is not the sole reason used to determine whether the UNSC took a decision under article 25 of the UN Charter and held that:

[t]he language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.<sup>288</sup>

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<sup>282</sup> Akande (n 176) 342.

<sup>283</sup> *ibid.*

<sup>284</sup> *ibid.*

<sup>285</sup> *ibid.*

<sup>286</sup> South Africa (n 49) 11–16.

<sup>287</sup> *ibid.*

<sup>288</sup> ICJ 'Advisory Opinion, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution' 276 of 1970 para 114 <[https://www.icc-cpi.int/RelatedRecords/CR2018\\_04586.PDF](https://www.icc-cpi.int/RelatedRecords/CR2018_04586.PDF)> accessed 03 November 2020.

The ICJ applied the VCLT to the interpretation of UNSC Resolutions but cautioned that the peculiarities of UNSC Resolutions should be considered.<sup>289</sup> Such interpretations are explicated in ILC Draft Conclusions and Comments given that UNSC Resolutions are considered akin to treaties.<sup>290</sup> In light of this, the issues raised on Resolution 1593 remain a matter of interpretation since the denial or waiver of immunity, nor whether States' Parties to the Rome Statute had an obligation to arrest and surrender Al Bashir, was not explicitly contained therein. Akande posits that whether a binding decision is made in terms of article 25 of the UN Charter is determined by the language of the resolution, as well as all the surrounding circumstances.<sup>291</sup> According to Tladi, peculiarities may exist in so far as how texts of UNSC Resolutions come into being, but do not warrant a different approach to the interpretation of UNSC Resolutions from that of treaties.<sup>292</sup> Thus, the interpretation of the text of a resolution is not any different from the interpretation of the text of a treaty.<sup>293</sup>

The South African government further argued that a referral to the UNSC and ASP would not be warranted as it will not foster cooperation.<sup>294</sup> This is based on the fact that South Africa plays a leading role in AU peace efforts and cannot disengage from the AU or adopt a policy that fails to host AU heads of State.<sup>295</sup> This is because South Africa is a member State of the AU and must therefore comply with AU decisions and resolutions that apply to its member States. Thus, South Africa was also obligated to host the AU Summit with AU heads of State in attendance, including Al Bashir.

On the basis of the submission made to the Court by the South African government, it requested the Court to obtain an authoritative interpretation of Resolution 1593 from the UNSC, and an Advisory Opinion in terms of article 96(1) of the UN Charter.<sup>296</sup> The South African government

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<sup>289</sup> ICJ 'Advisory Opinion, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion' of 22 July 2010 para 98 and 100 <<https://icj-cij.org/public/files/case-related/141/141-20100722-ADV-01-00-EN.pdf>> 03 November 2020).

<sup>290</sup> Commentary on Draft Conclusion 2, of the Draft Conclusions on the Subsequent agreements and subsequent practice in relation to the interpretation of treaties, International Law Commission Seventieth Session (A/73/100) <[https://legal.un.org/ilc/reports/2018/english/a\\_73\\_10\\_advance.pdf](https://legal.un.org/ilc/reports/2018/english/a_73_10_advance.pdf)> accessed 22 December 2020.

<sup>291</sup> Akande (n 176) 347.

<sup>292</sup> Tladi (n 23) 310, 319.

<sup>293</sup> *ibid.*

<sup>294</sup> South Africa (n 49) 11-16.

<sup>295</sup> *ibid.*

<sup>296</sup> *ibid* para 41.

also requested that in the event that the Chamber finds that South Africa failed to comply with its obligations under the Rome Statute, that the Chamber grant it leave to the Appeal Chamber.<sup>297</sup>

The Court also considered the submission from the ICC Prosecutor. This submission entailed that the South African government was aware of its obligations to arrest and surrender Al Bashir because it acknowledged the arrest warrants until June 2015, but despite having an opportunity to arrest and surrender him, the South African government failed to do so.<sup>298</sup> With regard to the consultations under article 97, the Prosecutor submitted that it did not alter or suspend the existing obligations of South Africa to arrest and surrender Al Bashir.<sup>299</sup>

With regard to whether South Africa failed to comply with its obligation to arrest and surrender Al Bashir, the Prosecutor submitted that the ICC's decision on DRC's non-compliance<sup>300</sup> was authoritative on the issue of immunity. The Court found that DRC had not complied with its obligation to arrest and surrender given that Al Bashir's immunity was removed by Resolution 1593 which created certain obligations for Sudan under the Rome Statute.<sup>301</sup> Accordingly, article 27 of the Rome Statute applied. The Prosecutor also submitted that Sudan's obligations to cooperate with the ICC emanate from Chapter VII of the UN Charter, and that the jurisdiction of the ICC is found in article 13 of the Rome Statute and article 17 of the Negotiated Relationship Agreement between the ICC and the UN.<sup>302</sup> Thus the Court can only exercise its jurisdiction in terms of the Rome Statute. The UNSC, upon request to defer and suspend the case against Al Bashir due to his status as head of State, declined to do so pursuant to article 16 of the Rome Statute.<sup>303</sup> The UNSC gets reminded of the arrest warrants issued by the ICC against Al Bashir every six months yet did not discharge the ICC from its mandate.<sup>304</sup> Furthermore, the immunities

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297 *ibid.*

298 *ibid* 16.

299 *ibid.*

300 DRC (n 47).

301 *ibid.*

302 South Africa (n 49) 17–20.

303 *ibid.*

304 *ibid.*



of Al Bashir is addressed in paragraph 6 of Resolution 1593<sup>305</sup> and not in paragraph 2.<sup>306</sup> Moreover, the preamble of Resolution 1593 noted the International Commission of Inquiry report<sup>307</sup> and that the crimes it identified implicated government officials.<sup>308</sup>

In addition, acceptance of article 27(2) by a State party of the Rome Statute means that there was no need for the ICC to obtain consent to waiver immunity from such a State party.<sup>309</sup> Sudan had a duty to cooperate with the ICC by virtue of the Rome Statute and that Resolution 1593 placed Sudan in the position of State party to the Rome Statute that created certain obligations for Sudan.<sup>310</sup> This is in conflict with State sovereignty given that Sudan did not ratify the Rome Statute. However, as earlier indicated Sudan is a member State of the UN and therefore article 25 of the UN Charter applies.<sup>311</sup>

Hence, there were no conflicting obligations between South Africa and Sudan and the immunities argued by South Africa under the host agreement are not applicable given that paragraph 2 of Resolution 1593 waives immunity that is found in article 98 of the Rome Statute.<sup>312</sup> South Africa's argument under article 98(1) of the Rome Statute was intended to keep Al Bashir in South Africa whilst consultations and determination on the issue of immunity by the ICC were pending, and rule

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<sup>305</sup> UNSC Res 1593 (31 March 2005), acting under Chapter VII of the Charter of the United Nations para 6 states that: '[...] nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State.'

<sup>306</sup> UNSC Res 1593 (31 March 2005), acting under Chapter VII of the Charter of the United Nations para 2 states that: '[...] that the government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organisations to cooperate fully.'

<sup>307</sup> Report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur (S/2005/60) <<https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/WPS%20S%202005%2060.pdf>> accessed 08 June 2020.

<sup>308</sup> UNSC Res 1593 (31 March 2005), acting under Chapter VII of the Charter of the United Nations preamble states that: '[...] Taking note of the report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur (S/2005/60).'

<sup>309</sup> South Africa (n 49) 17–20.

<sup>310</sup> *ibid.*

<sup>311</sup> UN Charter art 25 provides that: '[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'.

<sup>312</sup> South Africa (n 49) 17–20.

195 confirm that only the ICC can make a determination on article 98(1) and article 98(2) of the Rome Statute.<sup>313</sup>

On the basis of this submission, the Prosecutor requested the Chamber to make a finding of non-compliance with article 87(7) of the Rome Statute and to refer the matter to the UNSC and ASP because the referral would reaffirm and promote the demand for cooperation.

In light of the submissions and opposing requests by the South African government and the ICC Prosecutor respectively, the Court relied on the applicable law relative to the submissions in order to decide on the question of South Africa's failure to comply with the ICC arrest and surrender requests.

In doing so, a number of reasons were presented by the Court for its finding that the South African government failed to comply with the request to arrest and surrender Al Bashir contrary to the provisions of the Rome Statute. The Court pointed out that the issue in dispute was not in relation to immunity of heads of State but rather whether South Africa was obligated to execute the request for arrest and surrender of Al Bashir to the ICC while he was on South African territory.<sup>314</sup> This is governed by the law applicable between States, *in casu* South Africa and Sudan.<sup>315</sup>

The Court reasoned that by ratifying the Rome Statute, South Africa accepted the irrelevance of immunity, thereby having an obligation to arrest and surrender Al Bashir under article 27(2), whereas article 98(1) applies to third States.<sup>316</sup> Resolution 1593 affords jurisdiction to the ICC and places an obligation on Sudan as a third State to cooperate with the ICC.<sup>317</sup> This position is supported by an ICC Appeal case rendering the issue conclusive.<sup>318</sup> The UN Charter authorises and empowers the UNSC to impose obligations on States.<sup>319</sup> This is supported by an ICJ Advisory

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<sup>313</sup> *ibid.*

<sup>314</sup> *ibid* 44–52.

<sup>315</sup> *ibid.*

<sup>316</sup> *ibid.*

<sup>317</sup> *ibid.*

<sup>318</sup> *The Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi* ICC-01/11-480 on 29 November 2013 para 18.

<sup>319</sup> *South Africa* (n 49) 44–52.

Opinion of 1971 regarding South Africa's continued presence in Namibia ('*Namibia Opinion* ')<sup>320</sup> despite the UNSC Resolution 276<sup>321</sup> to withdraw from the territory.<sup>322</sup> To this end, Resolution 1593 gave rise to lawful obligations contained in article 27(2) of the Rome Statute which deny immunity, as well as rendering the Rome Statute applicable to Sudan.<sup>323</sup> This means that both South Africa as a State party to the Rome Statute and Sudan as third State had an obligation to arrest and surrender Al Bashir.

Consequently, Sudan cannot claim immunity for Al Bashir and article 98(1) of the Rome Statute is not applicable to Sudan.<sup>324</sup> Therefore, there was no immunity to waive under article 98(1), and immunity cannot be a defense not to cooperate with the ICC under article 27(2).<sup>325</sup> In any event, the Court pointed out that it is the ICC that must make a determination on the waiver of immunity required under article 98(1) and not a State Party.<sup>326</sup> This is also in accordance with rule 195 of the Rules of Procedure and Evidence.<sup>327</sup>

The Court concluded that by virtue of Resolution 1593 acting under Chapter VII of the UN Charter, obligations under the Rome Statute including article 27(2) applies to Sudan, albeit that Sudan is a third State.<sup>328</sup> Hence, the immunity of Al Bashir as head of State does not preclude a State Party from executing its obligation to arrest and surrender Al Bashir for having committed international crimes.<sup>329</sup> Therefore, article 98(1) is not applicable in the case of Al Bashir and States' Parties are obligated to arrest and surrender him.<sup>330</sup> According to Akande, the Rome Statute operates in the Al Bashir matter by virtue of a UNSC Resolution and not as a treaty, and therefore it can apply to third States.<sup>331</sup>

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<sup>320</sup> IDJ Advisory Opinion Legal consequences for States of the continued presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970) of 21 June 1971.

<sup>321</sup> UNSC Res 276 (1970) of 30 January 1970 <<http://unscr.com/en/resolutions/doc/276>> accessed 08 June 2020.

<sup>322</sup> South Africa (n 49) 44–52.

<sup>323</sup> *ibid.*

<sup>324</sup> *ibid.*

<sup>325</sup> *ibid.*

<sup>326</sup> *ibid.*

<sup>327</sup> *ibid.*

<sup>328</sup> *ibid* 38–39; 44.

<sup>329</sup> *ibid.*

<sup>330</sup> *ibid.*

<sup>331</sup> Akande (n 176) 347.

In addition, South Africa and Sudan are parties to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide ('Genocide Convention'),<sup>332</sup> and one of the warrants for the arrest of Al Bashir have been issued for the crime of genocide, which does not 'bear upon immunities'.<sup>333</sup>

In light of the above findings, the Court ruled that South Africa failed to comply with its obligations under the Rome Statute when it failed to arrest and surrender Al Bashir to the ICC while he was on South African territory from 13-15 June 2015. The Court did not refer South Africa's non-compliance with its obligations under the Rome Statute to the ASP and the UNSC as it was not appropriate according to the Court.

This decision also gave rise to a minority opinion which gives rise to a plausible alternative on the reasons for immunity of Al Bashir. Judge Marc Perrin De Brichambaut agreed with the majority judgment that Al Bashir's immunity had been removed. However, the Judge disagreed on the reasons proffered by the majority ruling, instead opined that his immunity is removed by the Genocide Convention.<sup>334</sup>

De Brichambaut argues that the immunity of Al Bashir initiated critical and different legal positions in the jurisprudence of the ICC, as well as the subject for debate in other fora and academic literature.<sup>335</sup> The Judge added that:

'[t]his comes as no surprise considering that the question of Al Bashir's immunity is situated at the crossroads of different legal principles, regimes, and goals: from State sovereignty, to the role and powers of the United Nations Security Council and the commitment to ending impunity for the most serious crimes, which is the primary purpose behind the establishment of this Court'.<sup>336</sup>

This opinion considered the interpretation and importance of the Genocide Convention, as well as UNSC referral to the ICC rendering Sudan akin to a State Party to the Rome Statute. In the latter

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<sup>332</sup> 78 *UNTS* 277.

<sup>333</sup> South Africa (n 49) 38–39; 44.

<sup>334</sup> ICC Minority Opinion of Judge Marc Perrin De Brichambaut ICC-02/05-01/09-302-Anx 06-07-2017 <[https://www.icc-cpi.int/RelatedRecords/CR2017\\_04403.PDF](https://www.icc-cpi.int/RelatedRecords/CR2017_04403.PDF)> accessed 07 November 2020.

<sup>335</sup> *ibid* para 2.

<sup>336</sup> *ibid* para 2.

instance, the immunity of Al Bashir had been denied because of article 27 of the Rome Statute.<sup>337</sup> Moreover, Resolution 1593 implicitly removed the immunity of Al Bashir but is not conclusive in light of the current state of the law.<sup>338</sup>

Whilst the majority decision by the ICC takes precedence, it should be noted that the minority opinion found that Resolution 1593 does not conclusively remove the immunity of Al Bashir nor is it conclusive that it places Sudan in the position of a State party to the Rome Statute. The reason provided by the minority opinion is because paragraph two of Resolution 1593 explicitly recognises that states that are not parties to the Rome Statute are not obligated to cooperate with the ICC except Sudan.<sup>339</sup> Given that the ICC was tasked to determine whether South Africa was obligated to cooperate with the ICC, Resolution 1593 does not explicitly provide for the obligation of States' Parties to cooperate with the ICC, nor the elimination of immunity. Hence the question is left open to interpretation of the wording of Resolution 1593.

This indicates that Sudan is obligated to cooperate with obligations under the Rome Statute by virtue of Resolution 1593. However, Resolution 1593 does not waive Sudan's immunity, despite the ICC ruling in the DRC case that it was indeed a waiver of immunity by Sudan.<sup>340</sup> The preferred position relied on by the minority opinion is that Sudan was placed under an obligation to cooperate with the ICC and its jurisdiction under Resolution 1593, and not that Sudan's immunity was waived.<sup>341</sup>

The minority opinion does amount to acceptance that the immunity of Al Bashir was denied. However, it was based on the Genocide Convention rather than Resolution 1593.

***(d) Notice of Withdrawal from the Rome Statute by South Africa***

Failure by the South African government to arrest and surrender Al Bashir led to a plethora of

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<sup>337</sup> *ibid* para 7.

<sup>338</sup> *ibid* para 7.

<sup>339</sup> *ibid*.

<sup>340</sup> *ibid*.

<sup>341</sup> *ibid*.

litigation matters, as well as its delivery of a notice of withdrawal from the Rome Statute on 19 October 2016, to the UN Secretary General.<sup>342</sup> In this instance the Minister of International Relations acted in accordance with a cabinet decision to withdraw as State party to the Rome Statute without prior approval to do so from the Parliament of South Africa.<sup>343</sup> However, on 22 February 2017, the NGHC found that the issuance and delivery of such notice of withdrawal is unconstitutional, hence ordered that it be rescinded.<sup>344</sup> This led to the revocation of the notice of withdrawal by the South African government on 7 March 2017.<sup>345</sup>

To date, South Africa remains a State Party to the Rome Statute, given its revocation of its notice of withdrawal from the Rome Statute.

### 3.4 CONCLUSION

In seeking to ascertain whether South Africa's law regarding the immunity arrest and surrender of heads of State conforms with the international law position, interpretations by the NGHC, SCA and ICC were undertaken. The international obligations of States' Parties having ratified the Rome Statute, have been transferred to South African law via the Implementation Act. The above Courts' interpretation of sections 10 and 4 of the Implementation Act, relative to section 4 of the DIPA and article VIII of the Host Agreement provide direction on South Africa's legal position on the immunity, arrest and surrender of heads of State committing international crimes. This brings South Africa's domestic obligations to the fore, in light of the duty of South African Courts to interpret legislation that is consistent with international law in terms of section 233 of the Constitution.

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<sup>342</sup> Article 127 (1) of the Rome Statute states that: "A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date."

<sup>343</sup> *Democratic Alliance v Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening)* (83145/2016) [2017] ZAGPPHC 53 (22 February 2017).

<sup>344</sup> *Democratic Alliance v Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening)* (83145/2016) [2017] ZAGPPHC 53 (22 February 2017).

<sup>345</sup> United Nations Reference C.N. 121.2017. Treaties – XVIII.10 (Depositary Notification), South Africa: Withdrawal of Notification of Withdrawal available at <<https://treaties.un.org/doc/Publication/CN/2017/CN.121.2017-Eng.pdf>> accessed 25 July 2022.

The question was addressed by the findings of the NGHC and SCA respectively. In this regard, section 10(9) of the Implementation Act read with section 4(2) which give effect to the Rome Statute, trump section 4 of the DIPA and the host agreement. This is because the Implementation Act as a law that has been passed by Parliament cannot be displaced by a Ministerial Notice or Cabinet decision, and constitutes special legislation specifically implementing the Rome Statute. These findings are supported by the fact that the Implementation Act gives effect to the Rome Statute's provisions, which trump customary international law immunity recognised under article 98(1) according to the ICC findings. This applies in instances where the jurisdiction of the ICC is initiated by a UNSC Resolution in which case it remains subject to interpretation if its provisions are implicit. Therefore, article 27(2) of the Rome Statute and the Implementation Act trump customary international law immunity of heads of State that commit international crimes as recognised in article 98(1) of the Rome Statute. As a result, South Africa has an obligation under these instruments to arrest and surrender Al Bashir to the ICC to stand trial. This pertains to instances where the ICC obtained its jurisdiction via a UNSC Resolution on basis of interpretation of its wording.<sup>346</sup> In addition, a UNSC Resolution has the effect of rendering a third State as if it had ratified the Rome Statute. This means that article 98(1) will be trumped by article 27(2) by virtue of interpretation of the wording of a specific UNSC Resolution in cases where the wording is not express.

On the basis of the ICC cases, it can be concluded that the customary international law immunity of heads of State is recognised in article 98(1) of the Rome Statute. Such immunity remains intact unless the relevant third State waives the immunity of its head of State. This applies in instances where the ICC acquires jurisdiction in terms of article 13(b) of the Rome Statute under a UNSC Resolution. Once a waiver is received by the ICC, it can then request its States' Parties to arrest and surrender the third State's head of State. As a result, States' Parties have an obligation to arrest and surrender the head of State in question. Once the wording of a UNSC Resolution is interpreted as the removal of immunity of a third State's head of State, and placing obligations upon a third State akin to those of a State Party, then other States' Parties (including South Africa) have an

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<sup>346</sup> UNSC Res 1593 para 2 (31 March 2005), acting under Chapter VII of the Charter of the United Nations <<https://www.icc-cpi.int/NR/rdonlyres/85FEBD1A-29F8-4EC4-9566-48EDF55CC587/283244/N0529273.pdf>> accessed 25 November 2016.

obligation to arrest and surrender such head of State. This means that article 27(2) of the Rome Statute trump article 98(1), and section 10(9) read with section 4(2) of the Implementation Act, applies to South Africa.

Having discussed the international law, as well as South Africa's position on the immunity, arrest and surrender of heads of State, the dissertation proceeds to an overall analysis and recommendation.



## **CHAPTER 4**

### **ANALYSIS AND RECOMMENDATION**

#### **4.1 INTRODUCTION**

This dissertation focused on the conflicting obligations that emanated from article 27(2) and article 98(1) in so far as it relates to the immunity, arrest and surrender of heads of State, and how it translates into South African law. Various Courts were tasked with interpreting the relationship between article 27(2) and 98(1) of the Rome Statute, including South Africa's position thereon. The aim was to determine the international law position on the immunity, arrest and surrender of heads of State wherein international crimes are addressed, and whether South Africa complied with it. In this regard, an overall analysis and recommendation on the conflicting obligations are undertaken in this chapter.

The conflicting obligations for States' Parties to the Rome Statute emanate from the immunity, arrest and surrender of heads of State of a third State, within the context of the Rome Statute. This was demonstrated in the Al Bashir matter and entails:

- (a) The recognition of customary international law immunity under article 98(1) of the Rome Statute which requires the waiver of immunity by third States.
- (b) The jurisdiction of the ICC by a UNSC Resolution, which guarantees no immunity in terms of article 27(2) of the Rome Statute, on the basis of interpretation of the wording of such UNSC Resolutions.
- (c) These conflicting obligations for States' Parties translated into domestic legal instruments of South Africa which include section 10(9) read with section 4(2) of the Implementation Act, relative to section 4(1) of the DIPA and the Host Agreement concluded in terms of section 5(3) and 7(2) of the DIPA.

Given the fact that South Africa ratified the Rome Statute and incorporated it into domestic law of South Africa through the Implementation Act, the South African government had an obligation to arrest and surrender Al Bashir. This is as a result of the jurisdiction of the ICC being initiated by Resolution 1593, wherein its wording obligated Sudan to 'cooperate fully' with the ICC, amounting

to removal of Al Bashir's immunity and placing obligations on Sudan akin to those of a State Party. As a result, article 27(2) became applicable albeit that Sudan had not ratified the Rome Statute. Ultimately, article 27(2) trumps article 98(1) in instances where a third State is involved as a result of the Court's jurisdiction being acquired in terms of a UNSC Resolution. This depends on the provisions of the UNSC Resolution which will have to amount to a waiver of immunity by the relevant third State and places obligations on the third State akin to a State Party. This can be explicitly or implicitly provided in a particular UNSC Resolution.

#### **4.2 RECOMMENDATION**

To determine whether article 27 (2) trumps article 98 (1), the starting point is article 98 (1) with the associated variables highlighted in the following litmus test:

- (a) Ascertain whether a particular matter concerns a third State.
- (b) Was the customary international law immunity as recognised in article 98(1) waived by the third State.
- (c) If not, then the ICC cannot request States' Parties to cooperate with the arrest and surrender of the head of State of the third State.
- (d) Ascertain whether there is a UNSC Resolution establishing the jurisdiction of the ICC, hence rendering the Rome Statute applicable to the third State on the basis of interpretation of the wording of such Resolution.
- (e) Depending on the wording of the respective UNSC Resolution, this can be interpreted either as a waiver of customary international law immunity, and that the third State acquires obligations akin to those of a State Party to the Rome Statute. Both interpretations discharge the customary international law immunity recognised in article 98(1), but remain subject to interpretation if the provisions are not explicit.
- (f) Thereby, article 27(2) becomes applicable and the immunity of heads of State recognised in article 98(1) is denied, hence trumping article 98(1).
- (g) This position translated into domestic law of South Africa contained in section 10(9) read with section 4(2), as well as section 4(1) of the DIPA. This took place in terms of section 231, 232 and 233 of the Constitution.

On the basis of what the litmus test revealed, the following recommendation is made and is limited to South Africa:

South Africa should amend the Implementation Act to reflect that section 10(9) read with section 4(2) trumps section 4(1) of the DIPA. This could be drafted under section 4(2) of the Implementation Act as follows:

‘Despite any other law to the contrary, including customary and conventional international law, the fact that a person— (a) is or was a head of State or government, a member of a government or parliament, an elected representative or a government official; or (b) being a member of a security service or armed force, was under a legal obligation to obey a manifestly unlawful order of a government or superior, is neither—

(i) a defence to a crime; nor (ii) a ground for any possible reduction of sentence once a person has been convicted of a crime; **nor (iii) shall customary international law immunity bar the State’s cooperation with the International Criminal Court for the arrest and surrender of heads of State of third States with pending International Criminal Court arrest warrants, found on South African territory.**<sup>347</sup>

In order to realise the above recommendation, a draft amendment to the Implementation Act must be tabled at Parliament so that it can be passed into law as prescribed by the Constitution.<sup>348</sup> Such draft amendment must indicate the above recommended addition to section 4(2) of the Implementation Act. Once the Act is signed into law by the President, South Africa must comply with ICC requests to arrest and surrender heads of State of third States such as Al Bashir when he arrived in South Africa in 2015. As a result of this recommendation, subject to becoming law in South Africa, the conflicting obligations of South Africa will be settled on the basis that South African legislation would be aligned to article 27(2) of the Rome Statute. The recommended addition to section 4(2) of the Implementation Act would only apply to South Africa once the ICC requests the cooperation of South Africa with arrest and surrender of a head of State of a third State accused of international crimes. In any event, the ICC would only be in a position to make such a

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<sup>347</sup> Bold and underlined text should be added to the provision as an amendment to the Implementation Act.

<sup>348</sup> The procedure to pass a particular Bill into law is contained in ss 75, 76, 77 or 78 of the Constitution.

request subject to interpretation of a UNSC Resolution which either explicitly or implicitly removes the immunity of such head of State.

### **4.3 CONCLUSION**

In order to address the conflicting obligations for South Africa arising from article 27(2) and 98(1), this chapter recommends that section 4(2) of the Implementation Act be amended. The potential amendment is made with the view that heads of State of third States must be arrested by South Africa, should they be requested to do so by the ICC in terms of its jurisdiction acquired under a UNSC Resolution. The amendment will only become law in South Africa through tabling it at Parliament to be passed into law, whereafter the President will sign it. Therefore, the conflicting obligations that arise from article 27(2) and 98(1) of the Rome Statute, and section 10(9) read with section 4(2) of the Implementation Act and section 4(1) of the DIPA will be curtailed by virtue of the proposed amendment to section 4(2) of the Implementation Act.

## **CHAPTER 5**

### **CONCLUSION**

#### **5.1 INTRODUCTION**

This dissertation addressed two research questions on the immunity, arrest and surrender of heads of State wherein international crimes are alleged. The extent to which these questions have been addressed is exhibited in this chapter.

#### **5.2 DOES ARTICLE 27(2) TRUMP ARTICLE 98(1) OF THE ROME STATUTE?**

The first research question was whether article 27(2) trumps article 98(1) of the Rome Statute or whether it is the converse. This was addressed by undertaking an investigation of the Rome Statute provisions applicable to the immunity, arrest and surrender of heads of State. In particular, the relationship between customary international law immunity and article 98(1), article 27(2) and the ICC's jurisdiction, the conflicting obligations between article 27(2) and 98(1), as well as the effect of ICC cases on the international law position on immunity, arrest and surrender of heads of State.

In doing so, it emerged that the conflicting obligations of State Parties emanate from the relationship between article 27(2) and 98(1) of the Rome Statute. This is so because article 98(1) recognises the customary international law immunity of heads of State and requires the waiver of such immunity by the relevant third State. The decisions of International Tribunals and Courts, together with the ICC shows that immunity was rejected since the First World War. Consequently, the ICC's interpretation on the conflicting obligations that emanate from article 27(2) and 98(1), is that heads of State are denied immunity before the Court under article 27(2) of the Rome Statute, and article 98(1) is then inapplicable. In this instance, the ICC's jurisdiction was acquired by Resolution 1593, whereby the UNSC referred the matter to the ICC under its Chapter VII of the UN Charter powers. Consequently, States' Parties must comply with cooperation requests for the arrest and surrender of Al Bashir on the basis of interpretation of the wording of Resolution 1593, which removes his immunity.

The ICC did not address the immunity of heads of State under customary international law wherein the ICC does not have jurisdiction, and is in conflict with article 27(2). However, the Malawi and Chad finding advanced that a customary international law exception developed in instances where international crimes are committed by heads of State. This remains subject to interpretation until an ICJ advisory opinion is delivered thereon given that a custom can only be created if the two requirements of *usus* and *opinio iuris* are met.

Furthermore, where the ICC's jurisdiction is initiated via a State Party or the Prosecutor of the ICC, and it concerns a third State, the customary international law immunity of such head of State will prevail, unless the waiver of immunity is provided to the ICC by the relevant third State as required under article 98(1). Only then can the ICC request States' Parties to arrest and surrender the head of State of third States. In instances where there is no third State involved, article 98(1) will not apply and no waiver will be needed as article 27(2) applies to all State Parties. On the question of whether article 27(2) trumps article 98(1), it can therefore be concluded in the assertive in instances not concerning a third State, as well as those concerning a third State on the basis of the interpretation of a UNSC Resolution.

### **5.3 DOES SOUTH AFRICA'S LAW COMPLY WITH THE EXISTING INTERNATIONAL LAW POSITION ON IMMUNITY, ARREST AND SURRENDER OF HEADS OF STATE?**

The second research question, resulting from the preceding question, was whether South Africa's law complies with the existing international law position on immunity, arrest and surrender of heads of State. This was addressed by examining the conflicting obligations arising from domestic legislation on immunity, arrest and surrender of heads of State, as well as domestic and international case law thereon. Upon review of the NGHC, SCA and ICC cases against the South African government, it confirmed that the conflicting obligations of States' Parties under the Rome Statute on immunity, arrest and surrender of heads of State, had been transposed into domestic legal instruments of South Africa. This includes the conflicting obligations contained under section 10(9) read with section 4(2) of the Implementation Act, and section 4(1) of the DIPA. The transferral of the international law obligations into South African law took place in terms of section 231, 232 and 233 of the Constitution.

The review of Courts' interpretations on the conflicting domestic obligations, revealed that South Africa has an obligation to arrest and surrender heads of State such as Al Bashir in terms of the article 27(2) of the Rome Statute and Implementation Act. This will apply in instances where the ICC's jurisdiction was acquired via a UNSC Resolution, depending on whether its wording is express or implies the waiver required under article 98(1), and it can be interpreted as placing the third State in the position akin to that of a State Party. In light of this, should the South African Government be faced with a similar situation, they must cooperate with ICC requests for the arrest and surrender of the head of State who remains at large.

It can therefore be concluded that the international law position brings conflicting obligations to the fore for State Parties under article 27(2) and 98(1) of the Rome Statute, and was transposed into domestic laws of South Africa as contained in the DIPA and the Implementation Act. This position was adopted by South Africa under section 231, 232 and 233 of the Constitution. As a result, South Africa's law complies with the existing international law position on immunity, arrest and surrender of heads of State.

#### **5.4 CONCLUSION**

The above research questions were addressed in order to meet the objectives of the dissertation, being, first to obtain clarity on South Africa's international and domestic obligations regarding the immunity, arrest and surrender of heads of State found in its jurisdiction. Second, to recommend appropriate legislative amendments to ensure compliance by South Africa. The dissertation set out an overall analysis which confirms that the conflicting obligations that arise from the relationship between article 27(2) and 98(1) have indeed been transposed into South Africa's domestic laws. Notwithstanding the arguments of States' Parties including South Africa and the AU, article 27(2) and section 4(2) read with section 10(9) of the Implementation Act trump article 98(1) and section 4(1) of the DIPA. This inference is drawn from the rulings of the NGHC, SCA, as well as the ICC cases against South Africa. In this instance, the ICC ruled that South Africa has indeed failed to comply with its obligations under the Rome Statute to cooperate with the ICC.

Accordingly, the objectives of the dissertation have been met though an analysis and recommendation which confirmed that South Africa's international and domestic obligations are to arrest and surrender heads of State of a third State standing accused of international crimes in

terms of article 27(2) of the Rome Statute and Implementation Act. This remains subject to interpretation of the UNSC Resolution in question in cases where the ICC acquired jurisdiction in terms of such Resolution. For South Africa, this dissertation recommends an amendment to section 4(2) of the Implementation Act to ensure South Africa's compliance with ICC requests for the arrest and surrender of heads of State of third States given that South Africa argued that such head of State had immunity under customary international law. Alternatively, further research can be undertaken to determine the practicality and extent to which provisions of a UNSC Resolution can resort to.



## Bibliography

### 1. Books

Dugard J et al *Dugard's International Law: A South African Perspective* (5<sup>th</sup> edn Juta 2019).

Röling BVA and Rüter CF *The Tokyo Judgment: The International Military Tribunal for the Far East (IMTFE) 29 April 1946-12 November 1948* Volume I (APA University Press Amsterdam 1977).

### 2. Cases

#### 2.1 International Tribunal and Courts Cases

ICC Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir ICC-02/05-01/09 of 12 December 2011

ICC Decision Pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to Comply with the Cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir ICC-02/05-01/09 of 13 December 2011.

ICC Decision on the Cooperation of the Democratic Republic of Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court ICC-02/05-01/09 of 9 April 2014; with Observations of the DRC, ICC-02/05-01/09-190-AnxI; ICC-02/05-01/09-190-AnxII-tEng 27-03-2014.

ICC Decision under Article 87(7) of the Rome Statute on the non-compliance by South Africa with the Request by the Court for the Arrest and Surrender of Omar Al Bashir ICC-02/05-01/09-302 06 July 2017; with Observations of South Africa, ICC-02/05-01/09-290; and ICC Minority Opinion of Judge Marc Perrin De Brichambaut ICC-02/05-01/09-302-Anx 06-07-2017.

ICC Decision under Article 87 (7) of the Rome Statute on the Non-compliance by Jordan with the request by the Court for the Arrest and Surrender of Omar Al Bashir ICC-02/05-01/09-309 11 December 2017.

ICC The Hashemite Kingdom of Jordan's Notice of Appeal of the Decision under Article 87(7) of the Rome Statute on the Non-Compliance by Jordan with the Request by the Court for the Arrest

and Surrender of Omar Al Bashir; or, in the Alternative, Leave to Seek Such an Appeal ICC-02/05-01/09-312 18 December 2017; and submissions.

ICC Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar A-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute ICC-02/05-266 of 11 July 2016.

ICC Request by Professor Paola Gaeta for leave to submit observations on the merits of the legal questions presented in the Hashemite Kingdom of Jordan's appeal against the "Decision under Article 87 (7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir of 12 March 2018' ICC-02/05-01/09 OA2 (30 April 2018) 6 <[https://www.icc-cpi.int/CourtRecords/CR2018\\_02423.PDF](https://www.icc-cpi.int/CourtRecords/CR2018_02423.PDF)> accessed 03 November 2020.

ICJ Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium) Judgment 14 February 2002.

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

ICTY *The Prosecutor v Anton Furundzija*, IT-95-17/1-T 10 December 1998.

ICTY *The Prosecutor v Slobodan Milosevic*, IT-99-37-PT, Decision on Preliminary Motions, 8 November 2001.

International Military Tribunal for the Far East (IMTFE), The Tokyo Judgment 29 April 1946 to 12 November 1948.

International Military Tribunal sitting at Nuremberg, Proceedings of the Trial of German Major War Criminals, Part 22 (22 August 1946 to 1 October 1946).

## **2.2 South African case law**

*Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347; 2011 (7) BCLR 651 (CC).

*Minister of Justice and Constitutional Development and Others v Southern African Litigation*

*Centre and Others* (867/2015) [2016] ZASCA 17.

*Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others* (27740/2015) [2015] ZAGPPHC 402.

### **3. Journal articles**

Akande D, 'The immunity of heads of States of nonparties in the early years of the ICC' (2018) 112 *AJIL*.

Akande D, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities' (2009) 7 *JICJ*.

Akande D, 'International Law Immunities and the International Criminal Court' (2004) 98 *AJIL*

Barnet RJ, 'Review: Coexistence and Cooperation in International Law' (1965) 18 *World Politics*.

Banteka N, 'No Longer Immune?: How Network Theory Decodes Normative Shifts in Personal Immunity for Heads of State' (2019) 59 *VJIL*.

Boschiero N 'The ICC Judicial Finding on Non-cooperation Against the DRC and No Immunity for Al Bashir Based on UNSC Resolution 1593' (2015) *Journal of International Criminal Justice*.

De Wet E 'The implications of President Al Bashir's visit to South Africa for International and Domestic Law' *Journal of International Criminal Justice* (2015) 13(5).

Gaeta P, 'Does President Al Bashir Enjoy Immunity from Arrest?' (2009) 7 *JICJ*

Maklanron J 'South Africa's Disappointment with the International Criminal Court: The Unfair Treatment of African People Caused an End to Cooperation' (2016) *Africology: The Journal of Pan African Studies* 83.

Shelton D 'Normative Hierarchy in International Law' (2006) *AJIL*.

Tladi D, 'The ICC Decisions on Chad and Malawi: On Cooperation, Immunities, and Article 98' (2013) 11 *Journal of International Criminal Justice*.

Tladi D, 'When Elephants Collide it is the Grass that Suffers: Cooperation and the Security Council in the Context of the AU/ICC Dynamic' (2014) 7 *African Journal of Legal Studies*.

Tladi D 'The duty on South Africa to Arrest and Surrender President Al Bashir under South African and International Law: A Perspective from International Law' 13(5) (2015) *Journal of International Criminal Justice*.

Tladi D, 'Immunity in the Era of "Criminalisation': The African Union, the ICC, and International Law' (2015) *Japanese Yearbook of International Law*.

Tladi D 'Interpretation and international law in South African Courts: The Supreme Court of Appeal and the Al Bashir saga' 2016 (16) *African Human Rights Law Journal*.

Weatherall T 'Jus Cogens and Sovereign Immunity: Reconciling Divergence in Contemporary Jurisprudence' 2015 *Georgia International Law*.

#### **4. Legislation**

##### **4.1 Republic of South Africa**

Constitution of South Africa 1996.

Diplomatic Immunities and Privileges Act 37 2001.

*Government Gazette* No 38850 5 June 2015.

Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.

##### **4.2 Treaties**

Constitutive Act of the African Union (11 July 2000) (AU) <[http://www.au.int/en/sites/default/files/ConstitutiveAct\\_EN.pdf](http://www.au.int/en/sites/default/files/ConstitutiveAct_EN.pdf)> 25 November 2016.

Charter of the United Nations (24 October 1945) (UNC) <<http://www.un.org/en/charter-united-nations/>> 25 November 2016.

Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948) (UNGA) <<https://treaties.un.org/doc/publication/unts/volume%2078/volume-78-i-1021-english.pdf>> 23 March 2019).

Rome Statute of the International Criminal Court (1998) (ICC Statute) <<https://www.icc->

[cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](http://cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf)> 25 November 2016.

Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006), entered into force 8 November 1994) (ICTR) <<https://www.refworld.org/docid/3ae6b3952c.html>> 3 February 2019).

Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002 and entered into on 25 May 1993 (ICTFY) <<https://www.refworld.org/docid/3dda28414.html>> 19 June 2021.

Statute of the Special Court for Sierra Leone (16 January 2002) (SCSL) <<https://www.refworld.org/docid/3dda29f94.html>> 3 February 2019).

Statute of the International Court of Justice, 1945 (ICJ Statute) <<http://www.icj-cij.org/documents/?p1=4&p2=2>> 19 June 2021.

United Nations, Vienna Convention on Diplomatic Relations (1961) (UN Vienna Convention on Diplomatic Relations) <[http://legal.un.org/ilc/texts/instruments/english/conventions/9\\_1\\_1961.pdf](http://legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf)> 19 June 2021.

Vienna Convention on the Law of Treaties (with annex) (concluded at Vienna, 23 May 1969) ( UN Vienna Convention on the Law of Treaties)) <<https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>> 19 June 2021.

## **5. Internet**

About the ICC <<https://www.icc-cpi.int/about>> 3 February 2019.

Dapo Akande, ‘ICC Issues Detailed Decision on Bashir’s Immunity (...At long Last...) But Gets the Law Wrong’ (EJILtalk, 15 December 2011) <<https://www.ejiltalk.org/does-the-icc-statute-remove-immunities-of-state-officials-in-national-proceedings-some-observations-from-the-drafting-history-of-article-272-of-the-rome-statute/>> 16 December 2020.

Dapo Akande and Talita de Souza Dias ‘Does the ICC Statute Remove Immunities of State Officials in National Proceedings? Some Observations from the Drafting History of Article 27(2)

of the Rome Statute' (EJILtalk, 12 November 2018) <<https://www.ejiltalk.org/does-the-icc-statute-remove-immunities-of-state-officials-in-national-proceedings-some-observations-from-the-drafting-history-of-article-272-of-the-rome-statute/>> 16 December 2020.

Assembly of States' Parties <[https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/african%20states/Pages/malawi.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/malawi.aspx)> 03 March 2019.

International Criminal Court Core legal texts <<https://www.icc-cpi.int/resource-library#coreICCTexts>> 07 November 2018.

International Criminal Court Elements of Crimes <<https://www.icc-cpi.int/>> 7 November 2018.

International Criminal Court The fight against impunity continues <<https://www.icc-cpi.int/>> 7 November 2018.

International Law Commission Seventieth Session

<<http://legal.un.org/docs/?path=../ilc/reports/2018/english/chp11.pdf&lang=EFSRAC>> 25 May 2011).

International Law Commission (ILC) Sixth report of the Special Rapporteur (A/CN.4/722)

<<http://legal.un.org/docs/?symbol=A/CN.4/722>> 25 May 2018).

International Law Commission Draft Conclusion 4 of the Draft Conclusions on the Identification of Customary International Law, International Law Commission Seventieth Session (A/73/100) <[https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/1\\_13\\_2018.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_13_2018.pdf)> 22 December 2020.

International Law Commission Draft Conclusion 6, para1 of the Draft Conclusions on the Identification of Customary International Law, International Law Commission Seventieth Session (A/73/100)

<[https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/1\\_13\\_2018.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_13_2018.pdf)> 22 December 2020.

Paola Gaeta, 'Guest Post: The ICC Changes Its Mind on the Immunity from Arrest of President Al Bashir, But It Is Wrong Again' (*OpinioJuris*, 23 April 2014)

<http://opiniojuris.org/2014/04/23/guest-post-icc-changes-mind-immunity-arrest-president-al->

bashir-wrong/> 09 April 2020.

Reinold T “African Union v International Criminal Court: episode MLXIII” 2018-03-23 *EJILtalk* <<https://www.ejiltalk.org/african-union-v-international-criminal-court-episode-mlxiii/>> 07 December 2018).

## 6. Other

African Union Assembly, ‘Thirteenth Ordinary Session: Decision on the meeting of African States’ Parties to the Rome Statute of the International Criminal Court’ Doc Assembly/AU/13(XIII) adopted in Sirte, Great Socialist People’s Libyan Arab Jamahiriya on 3 July 2009, Assembly/AU/Dec.245(XIII) Rev.1 <<http://www.au.int/en/decisions/assembly-african-union-thirteenth-ordinary-session>> 25 November 2016).

African Union Assembly, Rules of Procedure (July 2002) <[https://oldsite.issafrica.org/uploads/rules\\_AssemblyJuly2002.pdf](https://oldsite.issafrica.org/uploads/rules_AssemblyJuly2002.pdf)> 20 June 2019).

African Union ‘Assembly, Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec 270((XIV) on the Second Ministerial meeting on the Rome Statute of the International Criminal Court’ Doc Assembly/AU/10(XV), 27 July 2010, Assembly/AU/Dec 296(XV) <[http://www.au.int/en/sites/default/files/decisions/9630-assembly\\_en\\_25\\_27\\_july\\_2010\\_bcp\\_assembly\\_of\\_the\\_african\\_union\\_fifteenth\\_ordinary\\_session.pdf](http://www.au.int/en/sites/default/files/decisions/9630-assembly_en_25_27_july_2010_bcp_assembly_of_the_african_union_fifteenth_ordinary_session.pdf)> 25 November 2016).

African Union, ‘Assembly, Decision on the Implementation of the Decisions on the International Criminal Court’ Doc EX CL/639(XVIII), 30–31 January 2011, Assembly/AU/Dec.334(XVI) <[http://www.au.int/en/sites/default/files/decisions/9645-assembly\\_en\\_30\\_31\\_january\\_2011\\_auc\\_assembly\\_africa.pdf](http://www.au.int/en/sites/default/files/decisions/9645-assembly_en_30_31_january_2011_auc_assembly_africa.pdf)> 25 November 2016).

African Union, Assembly, ‘Decision on the Implementation of the Assembly Decisions on the International Criminal Court’ Doc EX.CL/670(XIX)’, 30 June–1 July 2011, Assembly/AU/Dec366(XVII) <[http://www.au.int/en/sites/default/files/decisions/9647-assembly\\_au\\_dec\\_363-390\\_xvii\\_e.pdf](http://www.au.int/en/sites/default/files/decisions/9647-assembly_au_dec_363-390_xvii_e.pdf)> 25 November 2016.

AU Decision at the Assembly of the Union Thirtieth Ordinary Session 28-29 January 2018 Addis Ababa, Ethiopia Assembly' 665-689 Assembly/AU <<http://www.peaceau.org/uploads/decision-678-eng.pdf>> 10 December 2018.

African Union 'Decision at the Assembly of the Union Thirtieth Ordinary Session 28-29 January 2018 Addis Ababa, Ethiopia Assembly/AU/Dec. 665–689 Assembly/AU <<<http://www.peaceau.org/uploads/decision-678-eng.pdf>> 10 December 2018.

African Union, Assembly "Decision on the Meeting of African States' Parties to the Rome Statute of the International Criminal Tribunal' Doc. Assembly/AU/13(XIII), 3 July 2009, Assembly/AU/Dec.245(XIII) Rev.1 ('3 July 2009 AU Decision').

African Union, Assembly 'Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court Doc. Assembly/AU/10(XV)', 27 July 2010, Assembly/AU/Dec 296(XV).

African Union, Assembly "Decision on the Implementation of the Decisions on the International Criminal Court (ICC) Doc. Ex.CL/639(XVIII)", 30 to 31 January 2011, Assembly/AU/Dec.334 (XVI).

African Union, Assembly 'Decision on the Implementation of the Assembly Decisions on the International Criminal Court – Doc. EX.CL/670(XIX), 30 June-1 July 2011, Assembly/AU/Dec 366(XVII) (30 June to 1 July 2011 AU Decision').

International Criminal Court Rules of Procedure and Evidence of the International Criminal Court <<<https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf>> 03 March 2019.

Mikulaschek 'Understanding Compliance With UN Security Council Resolutions in Civil Wars— Guidelines for Assessing Compliance with Security Council Resolutions' (2009) International Peace Institute.

United Nations Security Council (UNSC) Resolution 1593 (31 March 2005), acting under Chapter VII of the Charter of the United Nations <<https://www.icc-cpi.int/NR/rdonlyres/85FEBD1A-29F8-4EC4-9566-48EDF55CC587/283244/N0529273.pdf>> 25 November 2016).



5158<sup>th</sup> Meeting of the UNSC <<<https://www.un.org/press/en/2005/sc8351.doc.htm>> 26 February 2019.