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The International Criminal Court and the Head of States Immunity

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Abstract

During a long period of time, many states have failed to investigate and prosecute their own officials and agents accused to be the perpetrators of a serious international crimes.

The Rome Statute of the International Criminal Court came into force in July 2002, it was an important moment in international criminal justice and the African region was one of the main actors of the realization of this court. The Court's mandate is to try those responsible for war crimes, genocide, crimes against humanity and the crime of aggression.

With the establishment of a permanent international criminal court the possibility has given to hold perpetrators of serious violations of human rights rather crimes under international law. With the creation of the international criminal court, the protection of human rights and the demands of state sovereignty has been the subject of a very heated debate on whether states officials should be held responsible before an international court for international crimes committed while in office. This debate concerns the contradiction between two branches of international law. The first one is concerning the importance of immunity in international relations; it comes from notions of sovereign equality between states, and it is one of the main principles of the international law. On the second hand, we have those newer principles that focused on humanitarian values and consider certain kind of conduct as crimes under international law.

There is a real conflict between the different legal rules, which does not facilitate to understand the legal position, and this leads some authors to assert that the court while dealing with the issues of immunities ignores the fundamental rules of international law. Surprisingly all those accused by the ICC came from Africa, this fact has created a lot of speculation and particularly the court endeavors to prosecute African heads of states has created a real tension between the ICC and the African Union (AU)

The result of this paper shows that the ICC has dealt the issue of immunity in a manner that has strained its relationship with African states, and African Union. The argument provided by the court concerning immunity of heads of state who are not signatories of the Rome Statute was not convincing and as a result, the court has lost its authority in Africa. This fact continues to threaten states to ratify the Rome statute and it gives an opportunity to some member states to withdraw from the organization.

Key words: immunity, immunity of head of states, ICC, Africa

Declaration of Authenticity

I, Fodé Traoré declare that this Master's Thesis on the topic "The International Criminal Court and the Head of States Immunity" is my own work and I have acknowledged all sources used in bibliography.

Place: Olomouc Date: 01 September 2021 Signature: Fodé Traoré

Acknowledgement

As the former US President Bill Clinton once said, "We cannot build our own future without helping others to build theirs."
With this quote, I would like to thank all people who have accompanied me in the achievement of this work.
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List of Abbreviations

- AU- African Union
- ICC- International Criminal Court
- PTC- Pre-Trial Chamber
- SC- Security Council
- ICJ- International Court of Justice
- VCDR- Vienna Convention on Diplomatic Relations
- VCCR- Vienna Convention on Consular Relations
- VCLT- Vienna Convention on Law of Treaty
- UN- United Nations
- SOFA- Status of Forces Agreements
- ICTR- International Criminal Tribunal for Rwanda
- ICTY- International Criminal Tribunal for the former Yugoslavia
- SCSL-Special Court for Sierra Leone
- GA- General Assembly
- OAS- Organization of American States
- ISAF- International Security Assistance Force

1. Introduction to the topic

During a long period of time, many states have failed to investigate and prosecute their own officials and agents accused to be the perpetrators of a serious international crimes.

The Rome Statute of the International Criminal Court came into force in July 2002, it was an important moment in international criminal justice and the African region was one of the main actors of the realization of this court. The Court's mandate is to try those responsible for war crimes, genocide, crimes against humanity and the crime of aggression.

With the establishment of a permanent international criminal court the possibility has given to hold perpetrators of serious violations of human rights rather crimes under international law. With the creation of the international criminal court, the protection of human rights and the demands of state sovereignty has been the subject of a very heated debate on whether states officials should be held responsible before an international court for international crimes committed while in office. This debate concerns the contradiction between two branches of international law. The first one is concerning the importance of immunity in international relations; it comes from notions of sovereign equality between states and it is one of the main principles of the international law[1]. On the second hand, we have those newer principles that focused on humanitarian values and consider certain kind of conduct as crimes under international law.[2]

There is a real conflict between the different legal rules, which does not facilitate to understand the legal position, and this leads some authors to assert that the court while dealing with the issues of immunities ignores the fundamental rules of international law. Surprisingly all those accused by the ICC came from Africa, this fact has created a lot of speculation and particularly the court endeavors to prosecute African heads of states has created a real tension between the ICC and the African Union (AU)

[1] See EILEEN DENZA, DIPLOMATIC LAW (1998); HAZEL FOX, THE LAW OF STATE IMMUNITY (2002); James Crawford, International Law Foreign Sovereigns: Distinguishing Immune Transactions, 1983 BRIT. Y.B INT' LL 75

[2] See Antonio Cassese, INTERNATIONAL CRIMINAL LAW (2003); Antonio Cassese, International Criminal Law, in International Law 720 (Malcolm D.Evans ed., 2003)

The result of this paper shows that the ICC has dealt the issue of immunity in a manner that has strained its relationship with African states, and African Union. The argument provided by the court concerning immunity of heads of state who are not signatories of the Rome Statute was not convincing and as a result, the court has lost its authority in Africa. This fact continues to threaten states to ratify the Rome statute and it gives an opportunity to some member states to withdraw from the organization.

1.1 Aim

The main purpose of this thesis is to examine the application of international immunities in criminal proceedings, to provide a detailed explanation of the general rules of international law concerning immunity to clarify and simplify the controversies. From this perspective, it should be noted that only the parties to the ICC Statute have waived the immunities under international law (*ratione personae*) of their senior officials.

Although the Court can also exercise jurisdiction over nationals and officials of non-parties but in the current statute, there is no clear provision that can waive the immunities of those officials of non-parties. Particularly, article 98 of the Statute constitutes a clear message to the court and to parties to the ICC not to interfere with officials of non-parties who generally enjoy immunity under international law.

1.2 Research Questions

From the perspectives of this thesis, there are three main research questions:

1. What means immunity?
2. Which kind of immunity does exist?
3. Does the Customary Rule on Immunities Extend to International Courts?

1.3 Material

In line with the aim of this thesis, the different material of this paper will include primary, secondary and internet sources.

The primary source will include Rome Statute of the International Criminal Court, the judgments of the Pre-Trial Chamber of the International Criminal Court, Vienna Convention

on Diplomatic Relations, Convention on the Privileges and Immunities of the United Nations, General Convention on the Privileges and Immunities of the OAU, Vienna Convention on the Law of Treaties and the Charter of the United Nations. These primary sources are necessary to make an analysis of the general rules of International Law concerning immunity. With regards to secondary sources, they are about books and academic articles.

1.4 Delimitation

This thesis is limited exclusively to an analysis of the challenge to the legitimacy of the court and the problematic relationship between the International Criminal Court and Africans states.

Particularly the arrest warrants issued by the court against President Omar al Bashir of Sudan and Muammar Gaddafi of Libya while they were sitting heads of state, and it also charged Uhuru Kenyatta before he became Kenyan head of state._Through this project, we will also examine how the issue of immunity has been dealt by the ICC and the arguments invoked by different states.

2. The Ordinary Rules of Head of State Immunity:

In 2008 the tension between the AU and the ICC started with the indictment of the Sudanese president Omar Hassan Al-Bashir and this event was the main reason of the difficult relationship between the AU and the ICC.[3]

The fact that Al-Bashir was a Head of State was the crucial element. So, the main issue is Al-Bashir's immunity as a head of State, which Al-Bashir explains protects him from ICC jurisdiction. The International Criminal Court reply by saying that there is a rule of customary international law that prohibits the application of immunity, and moreover that the Security Council's Chapter VII actions have removed implicitly Al-Bashir's immunity in this case.[4]

Therefore, let us review the fundamental rules of head of State immunity by showing, firstly, that head of state immunity is a rule of customary international law and, secondly, by highlighting the different types of immunity.

It should be mentioned that no treaty has been signed to explain head of State immunity law, instead, the law has followed the development of international custom.[5]

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[3]Al-Bashir is alleged to have helped design, co-ordinate and implement crimes including: the forcible transfer of hundreds of thousands of civilians; the rape of thousands of women; torture; mass killings; and genocide. See prosecutor V. Omar Hassan Ahmad Al-Bashir, ICC-02/05-01/09, Pre-Trial Chamber I, Decision on the prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al-Bashir (4 March 2009) (First Bashir Warrant) and Second Decision on the prosecutor's Application for a Warrant of Arrest (12 July 2010) (Second Bashir Warrant).

[4]In its initial decision, the Pre-Trial Chamber (PTC) emphasized that the Chapter VII authority of the Security Council was its basis for jurisdiction. See First Bashir Warrant, above n°3 paras.40-45. Two years later, a differently constituted PTC (two of the three judges had not participated in the first decision) made only a single, one-line mention of the Security Council, but spent 22 paragraphs arguing that it had jurisdiction over Al-Bashir through an entirely separate rule of customary international law. See prosecutor v. Omar Hassan Ahmad Al-Bashir,

ICC-02/05-01/, Pre-Trial Chamber I, 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 (12 December 2011) (Malawi Decision) paras. 22-43 (Security Council reference para.36).

[5]International Custom is recognized as one of the four sources of international law. Statute of the International Court of Justice, Oct. 24, 1945, art. 38, para. 1, 59 Stat. 1031, 1060. The other recognized sources are treaties, general principles of law, and the writings of judges and scholars as a subsidiary source. Id

International customary law consists of two fundamental elements: objective State practice, and State's subjective belief that their behavior is obligatory under international law, an element known as opinion juris.[6]

The rules of sovereign immunity give a legal right to a state to be free from the jurisdiction of the courts of a foreign nation.[7] Historically, international law granted a theory of total immunity for sovereign states, under which no state could be tried without its consent.[8]This measure came from the basic principles that all states are independent and equal under international law, and the idea that is submitting a state to the jurisdiction of a foreign court would be incompatible with the idea of sovereign equality.[9]

Thus, it is generally allowed that state officials are immune in certain conditions from the jurisdiction of foreign states.[10] While some officials enjoy wide immunity by virtue of their status or function (immunity ratione personae), the immunity of others relates only to acts carried out in their official capacity (immunity ratione materiae). This section briefly examines the reasons for granting such immunities, as well as their scope.[11]

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[6]Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 97 (June 27); see also Asylum Case (Colom. v. Peru), 1950 I.C.J. 266, 276–77 (Nov. 20) (noting that a rule of customary international law must derive from constant and uniform usage); MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW 19 (1999) (explaining that the opinio juris element establishes that "only that behaviour which is considered legally relevant is regarded as capable of contributing to the process of customary international law").

[7]PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 118 (7th ed. 1997).

[8] Id.at 119.

[9]Id.at 118; see also U.N. CHARTER art. 2, para. 1 ("The Organization is based on the principle of the sovereign equality of all its Members.").

[10]See Mizushima Tomonori, The Individual as Beneficiary of State Immunity: Problems of the Attribution of Ultra Vires Conduct, 29 DENV.J. INT'L L. & POL'Y 261 (2001); Arthur Watts, The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers, 247 RECUEIL DES COURS 13 (1994 III); C. A. Whomersley, Some Reflections on the Immunity of Individuals for Official Acts, 41 INT'L & COMP. L.Q. 848 (1992).

[11]Vienna Convention on Diplomatic Relations, Apr. 18, 1961, Arts. 29, 31, 23 UST 3227,500 UNTS 95 [hereinafter VCDR].

2.1 Immunity Ratione Personae: (Immunity Attaching to an Office or Status)

The first kind of immunity applicable to some State officials is that of immunities which link to a special function and are only possessed while the official is in office ("personal immunity" or "immunity ratione personae"). These immunities are limited to a small group of senior State officials, in particular heads of state, heads of government and foreign ministers.[12] They apply as well to diplomats and other officials on special mission in foreign states.[13]

These immunities are granted on officials mainly for the conduct of State's international relations and come from the recognition that the successful development of international relations and international cooperation needs a real process of communication between States.[14] The effectiveness of this procedure of communication and cooperation, in turn, needs that state officials in charge of the conduct of international relations be able to travel freely, to carry out their duties without fear or possibility of harassment by other states.[15]

Therefore, these immunities are fundamental for the maintenance of a system of peaceful cooperation and coexistence among States.[16] As the International Court of Justice (ICJ) has

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[12] See Watts, supra note 10.

[13] VCDR, supra note 11, Arts. 29 & 31; United Nations Convention on Special Missions, Dec. 8,1969,1400 UNTS 231.

[14] Chanaka Wickremasinghe, Immunities Enjoyed by Officials of States and International Organizations, in INTERNATIONAL LAW, at 389.

[15]See Michael A. Tunks, Diplomats or Defendants? Defining the Future of Head-of-State Immunity, 52 DUKE LJ. 651, 656 (2002), who states: Head-of-state immunity allows a nation's leader to engage in his official duties, including travel to foreign countries, without fearing arrest, detention, or other treatment inconsistent with his role as the head of a sovereign state. Without the guarantee that they will not be subjected to trial in foreign courts, heads of state may simply choose to stay at home rather than assume the risks of engaging in international diplomacy abroad. The same may be said of others entitled to immunity ratione personae.

[16]See Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Joint Separate Opinion of Judges Higgins, Kooijmans & Buergenthal, para. 75 (stating that "immunities are granted to high State officials to guarantee the proper functioning of the network of mutual inter-State relations, which is of paramount importance for a well-ordered and harmonious international system".

pointed out, there is "no more fundamental prerequisite for the conduct of relations between States . .. than the inviolability of diplomatic envoys and embassies."[17]

Since Heads of States, diplomats and other officials are granted immunity ratione personae, they will be prevented in the fulfillment of their duties if arrested and detained in a foreign state, such officials are totally immune from criminal jurisdiction of the foreign state. In the Arrest Warrant case, the ICJ held that this type of immunity applies not only in relation to the official acts of this limited group of senior officials, but also in relation to private acts.[18] With the same purpose, immunity applies whether the act in question was carried out while the official was in office or before taking up his duties.[19] Therefore, the issuance of an arrest warrant and real prosecution of these senior officials, would be a violation of international law.[20]

However, since immunity ratione personae is granted in a manner to allow the free exercise of diplomatic and representative functions, it applies as long as the person is in office. The ICJ has confirmed that the absolute nature of the immunity from criminal process accorded to a serving foreign minister subsists even when it is alleged that he or she has committed an international crime and applies even when the foreign minister is abroad on a private visit.[21]

The Court stated that " it has been unable to deduce ... that there exists under customary international law any form of exception to the rule according to immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity."[22] This rule must be

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[17] United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Merits, 1980 ICJ REP. 3, para. 91 (May 24) (quoting United States Diplomatic and Consular Staff in Tehran, Provisional Measures, 1979 ICJ REP. 7, para. 38 (Dec. 15))

[18] See Arrest Warrant, supra note 16, para. 54; See also the treaty provisions cited supra note 13.

[19] See Arrest Warrant, supra note 16, paras. 54-55.

[20] Id., paras. 55, 70-71

[21] Id., para. 55.

[22] Id., para. 58.

considered as general and applying to all senior officials and serving diplomats enjoying immunity ratione personae.[23]

An absence of this kind of immunity concerning human rights violations perpetrated abroad is probably to hinder international cooperation and not to reinforce the protection of human rights.[24] According to this rationale, any measure that is waiving immunity will purely hinder foreign officials from traveling abroad.

This principle recognizing immunity ratione personae for senior official with regards to an international crime has been enforced recently by many national courts. In March 2001, France's highest Court, the Cour de Cassation, held that Libyan head of state Muammar El-Qaddafi was entitled to immunity in a suit alleging that Qaddafi was responsible for bombing a French DC-10 aircraft in an attack that killed 170 people.[25] In 1999, Spanish national court also recognized that it had no power to prosecute Fidel Castro a Cuban sitting head of State.[26]

Likewise, the United States have refused immunity to former heads of state but has never revoked the immunity of a sitting head of State or government.[27]Judicial opinion and State practice with regards to this aim, have all the same opinion and there is no example in which a state official enjoying immunity ratione personae is prosecuted by a court of a foreign state for an international crime.[28]

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[23] See ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW (2003); Antonio Cassese, International Criminal Law, in INTERNATIONAL LAW at 271-73; (Malcolm D. Evans ed., 2003); Hazel Fox, The Resolution of the Institute of lnternational Law on the Immunities of Heads of State and Government, 51 INT'L & COMP. L.Q. 119 (2002); Salvatore Zappala, Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case Before the French Cour de Cassation, 12 EUR.J. INT'L L. 595 (2001).

[24] See Tunks, supra note 15, at 678-79.

[25] See Ghaddafi case, supra note 23 No. 1414 (Cass. crim. 2001) (Fr.), 125 ILR 456 (criminal proceedings against Col. Muammar el-Qaddafi, the Libyan head of state, relating to bombing of French airliner dismissed on grounds of immunity).

[26] See Castro case, No. 1999/2723, Order (Audiencia nacional Mar. 4,1999) (Spain), (criminal proceedings against Fidel Castro, the Cuban head of state, dismissed on grounds of immunity).

[27] See Tachiona v. Mugabe, 169 F. Supp. 2d 259, 288, 296–97 (S.D.N.Y. 2001) (recognizing the immunity of Zimbabwe's sitting president, Robert Mugabe); Saltany v. Reagan, 702 F. Supp. 319, 320 (D.D.C. 1988) (finding sitting British Prime Minister Margaret Thatcher immune from suit in the United States).

[28] Tunks, supra note 15, at 663 (stating that "no nation has yet gone so far as to actually pass judgment against a sitting head of state"). United States v. Noriega, 117 F.3d 1206 (11 th Cir. 1997), is the only case that can be

Considering that the framework of immunity ratione personae seems to be reasonably established, then question rises which State officials are granted this full immunity from foreign criminal prosecution? In the Arrest Warrant case, the ICJ stated that these immunities are available to "diplomatic and consular agents, [and] certain holders of high-ranking office in a state, such as the Head of State, Head of Government and Minister for Foreign Affairs."[29] If it has been clear that sitting heads of state, heads of government and diplomats are granted full immunity ratione personae in criminal matters, the case of foreign ministers sometimes has been problematic.[30]

Nevertheless, in the Arrest Warrant case, the ICJ explained without any mention of state practice that "absolute immunity ratione personae also applies to foreign ministers because they are responsible for the international relations of the state and " [i] n the performance of these functions, he or she is frequently required to travel internationally, and thus must be in a position freely to do so whenever the need should arise."[31] This recognition by the ICJ will increase the number of senior officials entitled to such a privilege.

Nowadays, the development of international affairs requests that a very wide range of state agents (senior and junior) travel in the performance of their duties. Many Ministers other than foreign affairs sometimes act on behalf of their state at international level. They may oversee bilateral negotiations or be the representatives of their government at international summits. In fact, every minister may have at least a certain level of international implication.

Previously the mere fact that an official was acting in international relations, was not approved sufficient to grant immunity ratione personae. Indeed, in international organizations state representatives generally enjoy immunity through a treaty.[32]

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construed as denying immunity to a head of state. However, immunity was not accorded in this case on the ground that the U.S. government had never recognized General Noriega (the de facto ruler of Panama) as head of state.

[29] Arrest Warrant, supra note 16, para. 51 (emphasis added). The use of the words "such as" suggests that the list of senior officials entitled to this immunity is not closed.

[30] Watts, supra note 10, at 106-08.

[31] Arrest Warrant, supra note 16, para. 53

[32] See Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, Art. IV, ?11, 21 UST 1418, 1 UNTS 15,90 UNTS 327 (corrigendum to vol. 1) [hereinafter UN Immunities Convention]; General

Moreover, according to both customary international law and treaty law, the person of any official sent abroad on a special mission by a state may be inviolable, so that he cannot be arrested or detained.[33] Indeed, this principle is fully coherent with the theory underlying immunity ratione personae.

2.2 Immunity Ratione Materiae (Immunity Attaching to Official Acts)

Similarly state officials who are not accorded immunity ratione personae, cannot be prosecuted by the jurisdiction of other states with regards to any acts that they carried out in their official capacity ("functional immunity" or "immunity ratione materiae").[34] As this kind of immunity link to the official act, it can be invoked not only by serving officials, but also by former officials with regards to official acts achieved during their function.[35]

Likewise, it can be invoked by anyone who is not necessarily state officials or organs but who was performing some actions on behalf of the state.[36] The practice of immunity ratione materiae with regards to state officials has happened frequently in civil than criminal matter.[37]

Convention on the Privileges and Immunities of the Organization of African Unity, Oct. 25, 1965, Art. V, 1000 UNTS 393.

[33] See UN Convention on Special Missions, supra note 13, Arts. 29, 31. Whether these provisions represent customary international law has been doubted. See United States v. Sissoko, 121 ILR 599, 1997 U.S. Dist. LEXIS 22115 (S.D. Fla. 1997); Wickremasinghe, supra note 14, at 402.

[34] See, e.g., Propend Fin. Pty Ltd v. Sing (C.A. 1997) (Eng.), Ill ILR 611; Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095 (9th Cir. 1990). see Tomonori, supra note 10, at 269-73.

[35] Wickremasinghe, supra note 14, at 403; see also VCDR, supra note 11, Art. 39(2) (in relation to former diplomats); Vienna Convention on Consular Relations, Art. 24,1963, Art. 43 (1), 21 UST 77,596 UNTS 261 [hereinafter VCCR] (in relation to consular officials). Some have doubted whether the immunity ratione materiae applicable to former diplomats is of the same nature as the general immunity applicable to other official acts of other state officials. For example, Yoram Dinstein, Diplomatic Immunity from Jurisdiction Ratione Materiae, 15 INT'L & COMP. L.Q. 76,86-89 (1966), argues that diplomatic immunity ratione materiae is broader than that accorded to other state officials. Tomonori, supra note 10, at 281, questions whether other state officials possess immunity ratione materiae in criminal proceedings and in relation to ultra vires acts.

[36] See H. F. Van Panhuys, In the Borderland Between the Act of State Doctrine and Questions of Jurisdictional Immunities, 13 INT'L & COMP. L.Q. 1193, 1201 (1964); see also UK State Immunity Act, 1978, ch. 33, $14(2); Kuwait Airways Corp. v. Iraq Airways Co., [1995] 3 All E.R. 694 (H.L.); Walker v. Bank of New York, [1994] 16 O.R.3d 504 (Ct. App.) (Can.); Twycross v. Dreyfus, [1877] 5 Ch. D. 605 (C.A.) (Eng.).

[37] For the suggestion that the paucity of domestic criminal cases recognizing the immunity ratione materiae of state officials makes it difficult to prove that this type of immunity applies in criminal proceedings, see Tomonori, supra note 10, at 262.

Nevertheless, the purpose is easy to explain. State criminal jurisdiction is mainly territorial, and state agents very often do not act in their official capacity in the territory of other states. Consequently, the situations in which public agents will be a subject of legal proceeding in criminal matter in a foreign state with regards to an act achieved in their official capacity are reduced.

Even though immunity ratione materiae is well known criminally and the purposes under which it is granted apply a fortiori in criminal matter.[38] Two connected strategies subtend the granting of such immunity ratione materiae. First, this kind of immunity forms a substantive defense by showing that the person who is a state agent cannot be prosecuted for acts which are those of the state.[39] Second, such immunity prohibits foreign courts to proceed in any manner the indictment of public agent for acts that are attributable to the state.[40]

From this perspective, immunity works as a jurisdictional or procedural obstacle and prohibits the courts from proceeding control in any manner over the acts of the foreign state typically through prosecution against the public agent who performed the act. Although both serving and

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[38] The most well-known case in which this type of immunity was asserted with respect to criminal proceedings is McLeod's case. See R. Y. Jennings, The Caroline and McLeod Cases, 32 AJIL 82, 92 (1938). While both the British and U.S. governments accepted that there was immunity under international law from both civil and criminal processes, McLeod was subjected to trial owing to the inability of the U.S. federal government to interfere with the prosecution. However, in the Rainbow Warrior case, 74 ILR 241 (arb. 1987), the French government's assertion that military officer should not be tried in New Zealand once France had accepted international responsibility was rejected by New Zealand. See also the few cases cited by Tomonori, supra note 10, at 262.

[39] In Attorney General of Israel v. Eichmann, 36 ILR 277, 308-09 (Sup. Ct. 1962), the Israeli Supreme Court stated: The theory of "Act of State" means that the act performed by a person as an organ of the State-whether he was Head of the State or a responsible official acting on the Government's orders-must be regarded as an act of the State alone. It follows that only the latter bears responsibility therefor, and it also follows that another State has no right to punish the person who committed the act, save with the consent of the State whose mission he performed. Were it not so, the first State would be interfering in the internal affairs of the second, which is contrary to the conception of the equality of States based on their sovereignty. However, the Court was not prepared to accept that this theory applied in all cases. In Prosecutor v. Blaskid, Objection to Issue of Subpoenae duces tecum, No. IT-95-14-AR 108 bis (Oct. 29,1997), 110 ILR 609,707, para. 38, the appeals chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) stated that [state] officials are mere instruments of a state, and their official action can only be attributed to the State. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of the State. In other words, State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoy so-called "functional immunity". This is a well-established rule of customary international law going back to the eighteenth and nineteenth centuries, restated many times since. See also the correspondence in the McLeod case, supra note 38.

[40] Wickremasinghe, supra note 14, at 403; see also Propend Fin. Pty Ltd v. Sing, 111 ILR 611, 669 (C.A. 1997) (Eng.); Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1101 (9th Cir. 1990); Zoernsch v. Waldock, [1964] 1 W.L.R. 675, 692 (C.A., per Diplock, LJ.).

former state officials are usually accorded immunity ratione materiae regarding their official acts, nevertheless such immunity disappears in case of an international crime brought before foreign domestic criminal court.

Numerous cases of indictment against officials from foreign state happened before national criminal Courts for an international crime.[41] Each of these judgments occurs whether tacitly, and occasionally explicitly.[42] This absence of immunity ratione materiae concerning an international crime, is based on two main reasonings. First, although state agents enjoy immunity for official acts, therefore acts constituting an international crime should not be qualified as an official act.[43] Second, it should be mentioned that an international crime constitutes a violations of jus cogens norms. Consequently, no immunity is recognized in such case because peremptory norms have a higher status and should take precedence over, the rules granting immunity.[44] For this purpose, it is possible to examine in more detail elsewhere.[45]

These two reasonings are not convincing because they misconceive the reason for granting state immunity and propose a wrong conflict between the different rules of state immunity and the peremptory norms. In any case, the reasoning according to which immunity cannot be granted for acts contrary to peremptory norms has been dismissed by the International Court of Justice,[46]

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[41] See Antonio Cassese When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case, 13 EUR.J. INT'LL. 853,870-71 (2002) (referring to cases in which British, Dutch, French, Israeli, Italian, Mexican, Polish, Spanish, and U.S. courts have entertained proceedings against foreign state officials [particularly foreign military officers] with respect to war crimes, crimes against humanity, and genocide).

[42] See, e.g., Eichmann, 36 ILR 5, 44-48 (Dist. Ct. Jerusalem 1961), id. at 308-11 (Sup. Ct. 1962).

[43] See Pinochet (No. 3), supra note 26, at 113, 166 (H.L., per Browne Wilkinson, Hutton, LJJ.); Regina v. Bow Street Stipendiary Magistrate, ex Parte Pinochet (No. 1), [1998] 4A11 E.R. 897,939-40,945-46 (H.L., per Nicholls, Steyn, L.JJ.). It is amazing that these judges could have reached this conclusion about torture, which under Article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Dec. 10, 1984, 1465 UNTS 85 [hereinafter Torture Convention], is limited to acts "of a public official or other person acting in an official capacity" (emphasis added); See, e.g., In re Estate of Ferdinand Marcos, 25 F.3d 1467, 1469-72 (9th Cir. 1994).

[44] See Andrea Bianchi, Immunity Versus Human Rights: The Pinochet Case, 10 EUR.J. INT'L L. 237, 265 (1999) ("As a matter of international law, there is no doubt that jus cogens norms, because of their higher status, must prevail over other international rules, including jurisdictional immunities."); see also Michael Byers, Comment on Al-Adsani v. Kuwait, 1996 BRIT. Y.B. INT'L L. 537, 539-40.

[45] See Dapo Akande, International Immunities in Respect of Human Rights Violations and International Crimes: Why the Difference Between Civil and Criminal Proceedings?

[46] Arrest Warrant, supra note 16, para. 58.

the European Court of Human Rights[47] and many domestic jurisdictions have considered the matter.[48]

In case an international crime is perpetrated by public agents and will occasionally be regarded as an official act, consequently a different measure applies and will exclude immunity ratione materiae with regards to such crimes. This absence of immunity is justified on the ground that in such procedure the purposes under which immunity is granted, disappear in case of an international crimes. First, the ordinary rule according to which only the state and not public officials can be held accountable for acts performed by public officials in their official capacity is not considered for acts that constitute international crimes.[49] On the opposite, it is well known that the official function of individuals does not exempt them from personal liability for actions that are qualified as crimes under international law and therefore cannot be a substantive defense.[50] Second, to enlarge international law has improved later, principles allowing national Courts to exercise universal jurisdiction over certain human rights violation that are qualified as an international crimes and such rules provide prosecution of crimes perpetrated in an official capacity. In such scenario the second purpose for granting immunity ratione materiae vanishes.

In this context, there is no way rationally for immunity ratione materiae to coexist with such an attribution of jurisdiction. In fact, to use in this scenario, the earlier rule granting immunity would have the effect of depriving the later jurisdictional rule of virtually all meaning. This is

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[47] Al-Adsani v. United Kingdom, 2001-XI Eur. Ct. H.R., 123 ILR 24, para. 61, in which the Court held, by 9 to 8: Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged.

[48] Distomo Massacre Case, No. BGH-112R 245/98 (Greek Citizens v. FRG) (Fed. Sup. Ct. June 26,2003) (FRG), translated in 42 ILM 1030,1033-34 (2003); Sampson v. Federal Republic of Germany, 975 F. Supp. 1108 (N.D. Ill. 1997).

[49] See ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW (2003) at 267, Steffen Wirth, Immunity for Core Crimes? The ICJ's Judgment in the Congo v. Belgium Case, 13 EUR. J. INT'L L. 877, 891 (2002).

[50] See In re Goering, 13 ILR 203, 221 (Int'l Mil. Trib. 1946). Provisions stating that official capacity does not amount to a substantive defense are included in the statutes of several international criminal tribunals. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, Art. 7,59 Stat. 1544, 82 UNTS 279; Charter of the International Military Tribunal for the Far East, Jan. 19 & Apr. 26, 1946, Art. 6, TIAS No. 1589,4 Bevans 20; Statute of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. S/25704, annex, Art. 7(2), reprinted in 32 ILM 1192 (1993); Statute of the International Criminal Tribunal for Rwanda, SC Res. 955, annex, UN SCOR, 49th Sess., Res. & Dec., at 15,Art. 6(2), UN Doc. S/INF/50 (1994), reprinted in 33 ILM 1602 (1994); Rome Statute of the International Criminal Court , July 17, 1998, Art. 27(1).

a better way to explain the opinion of the English House of Lords in the Pinochet case (No.3). Many of the judges in that case considered that, as the Convention against Torture reduced the crime of torture to acts perpetrated in the exercise of official capacity, consequently the conferral of immunity ratione materiae would certainly have been inconsistent with the clauses of the Convention which grant universal jurisdiction over the crime.[51]

Therefore, immunity ratione materiae should be considered as replaced by the rule of universal jurisdiction for acts of torture. Likewise, given that serious violations of the 1949 Geneva Conventions and other unhuman and degrading treatments perpetrated in an international armed conflict are frequently by definition acts carried out by public agents especially by soldiers, consequently the convention provisions granting universal jurisdiction over such offenses should not coexist with the conferral of immunity ratione materiae to public agents.[52]

Nevertheless, since genocide, crimes against humanity and war crimes perpetrated in an internal armed conflict can be carried out by military groups that are not state actors, the rules allowing universal jurisdiction over such crimes are hardly coextensive with immunity ratione materiae (this is the case with torture and war crimes perpetrated in an international armed conflict).

However, it can be asserted that these jurisdictional principles consider the domestic indictment of state officials, and this purpose predominates the previous rule granting immunity ratione materiae.[53] Consequently, immunity ratione materiae disappears with regards to domestic prosecution of any international crimes stated in the Rome Statute.

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[51] See Pinochet (No. 3), supra note 43, at 114,169-70,178-79,190 (per Browne Wilkinson, Saville, Millett, Phillips, LIJ.).

[52] See Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12,1949, Art. 49,6 UST 3114, 75 UNTS 31; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12,1949, Art. 50,6 UST 3217, 75 UNTS 85; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, Art. 129, 6 UST 3316, 75 UNTS 135; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, Art. 146, 6 UST 3516, 75 UNTS 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, Art. 85(1), 1125 UNTS 609.

[53] See Akande, supra note 45, for fuller development of the arguments contained in this paragraph.

3. The ICC Statute and Immunity:

This part examines the practice of immunities in proceedings launched by the ICC. The first section focuses on the tension between the two clauses of the ICC Statute dealing with immunities (Articles 27 and 98).

In the following section, particular attention is accorded to the question of whether states parties, non-parties and international organizations can profit from the clauses of paragraphs 1 and 2 of article 98. Those provisions require the Court not to ask the arrest or surrender of a person in case such a request would oblige the requested state to violate either the immunities granted to that person under international law or an international agreement prohibiting surrender to the ICC.

Lastly, the third section examines whether it is the ICC or the domestic authorities that are capable to determine whether a person incriminated by the Court is accorded immunity from arrest and surrender.

3.1The Tension between Articles 27 and 98 of the ICC Statute:

Determining the existence of state, diplomatic or other immunities from the ICC should start with a review of the text of the ICC Statute. Two provisions of the ICC Statute deal with questions of immunity: Articles 27 and 98. Article 27 deals mainly with the position of state officials with regards to the ICC itself. Article 27 (1) stipulates: This Statute shall apply equally to all persons without any distinction based on official capacity.

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. This provision is nowadays the norm in the creation of international criminal tribunals. Related provisions were introduced in the pertinent treaty for the Nuremberg and Tokyo tribunals following World War II, as well as in the statutes of the ICTY and the

ICTR.[54] Article 27 (1) deals mainly with the material liability of state officials for international crimes rather than questions of immunity. Its principal effect is to demonstrate that the official status of a person does not release him from his private criminal responsibility, and it removes a substantial defense which can be invoked by public agents.[55]It can be asserted that Article 27 (1) and identical provisions do not treat questions of immunity in any manner as the assertion that a person can be legally responsible does not specify whether that person is liable to jurisdiction of a particular forum, that means, if this body can establish this liability. These jurisdictional questions are dealt with, in part, by the law on international immunities, and the conferral of immunity does not mean that the person involved cannot be legally liable for the act in question.

Nevertheless, further investigation demonstrates that Article 27 (1) has the effect of eliminating at least some of the immunities that public officials may in other ways be granted.[56] Foremost, questions of legal liability are not totally disconnected from questions of immunity. Since it has previously been demonstrated, one of the reasons for granting immunity for official acts is that they are usually considered as acts of states for which the state and not the official should be held accountable.[57] From the perspective that an international rule determines that the agent himself must be held accountable for the act, this ground for immunity vanishes. Second, by stipulating that the ICC Statute applies to public officials, Article 27 (1) determines that such officials are liable to prosecution by the ICC even when they have acted in an official capacity.

Consequently, Article 27 (1) is equally jurisdictional in nature. Not just does the second phrase implicitly eliminate immunities founded on the official character of the act, the first phrase

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[54] See In re Goering, 13 ILR 203, 221 (Int'l Mil. Trib. 1946). Provisions stating that official capacity does not amount to a substantive defense are included in the statutes of several international criminal tribunals. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, Art. 7,59 Stat. 1544, 82 UNTS 279; Charter of the International Military Tribunal for the Far East, Jan. 19 & Apr. 26, 1946, Art. 6, TIAS No. 1589,4 Bevans 20; Statute of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. S/25704, annex, Art. 7(2), reprinted in 32 ILM 1192 (1993); Statute of the International Criminal Tribunal for Rwanda, SC Res. 955, annex, UN SCOR, 49th Sess., Res. & Dec., at 15,Art. 6(2), UN Doc. S/INF/50 (1994), reprinted in 33 ILM 1602 (1994); ICC Statute, supra note 50, Art. 27(1); Statute of the Special Court for Sierra Leone, as amended Jan. 16, 2002, Art. 6(2).

[55] See HAZEL FOX, THE LAW OF STATE IMMUNITY (2002) at 429-30.

[56] See Arrest Warrant, supra note 16, para. 58; ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW (2003) at 267; Paola Gaeta, Official Capacities, and Immunities, in THE ROME STATUTE at 981-82.

[57] See text supra at note 39.

likewise implicitly determines that the official position of the accused does not preclude them from the jurisdiction of the ICC. Maybe thanks to uncertainties as to whether Article 27 (1) totally suppresses the opportunity of relying on immunities in procedure before the ICC, Article 27 (2) includes an explicit rejection of legal immunities international and national. It provides: "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." That is a modern provision. It has no equivalent in the agreements of the Nuremberg or Tokyo tribunals or in the statutes of the ICTY and the ICTR. Article 27 (2) definitively determines that state officials are liable to prosecution by the ICC and this provision is a removal by states parties of any kind of immunity that their officials may in other ways have from the ICC.

Nevertheless, the lifting of immunity from the ICC by article 27 is not the termination of the issue. Since the ICC has no independent powers of arrest and should rely on states to arrest and surrender incriminated persons,[58] the immunities of public agents in domestic jurisdictions are getting significant.

Insofar as the Court may request the arrest and surrender of the official involved, Article 27 is a removal of immunities under national law by the parties to the Statute. Consequently, states parties are required to arrest and surrender their own agents even if such agents may in other ways be granted immunity under national law.[59]

Nonetheless, once a public agent is abroad and granted under international law to immunity from arrest and criminal proceedings in the other state, the issue become more complex. To address this issue, Article 98 (1) of the ICC Statute provides: The Court may not proceed with a request for surrender or assistance which would require the requested State to act

[58] States parties have an obligation to cooperate with the ICC regarding the arrest and surrender of wanted persons. ICC Statute, supra note 50, Arts. 86, 89.

[59] See BRUCE BROOMHALL, INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW 139-41 (2003); Gaeta, supra note 56, at 996-1000. As a result of the waiver of national law immunities in Article 27(2), some states parties (such as France) have been obliged to amend the provisions of their constitutions that grant immunity to heads of state or government. See Re Treaty Establishing the International Criminal Court, 125 ILR 442 (Cons. const. Jan. 22, 1999) (Fr.).

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.[60]

Therefore, whereas article 27 stipulates that the conferral of international immunity to State official does not prevent the ICC from exercising its jurisdiction, Article 98 directs the Court not to take measures the consequence of which would be the violation by states of their international obligations by granting immunity to foreign representatives.[61]

Quite possibly, the principal means for the Court to secure custody of accused public agents is by way of the cooperation with other States Parties in whose territory the representatives are located. However, state that are not parties to the ICC Statute have no duty to surrender their nationals or officials to the ICC, and state parties can breach their obligations by refusing to surrender their own officials.[62]

Nevertheless, the capacity of the Court to obtain custody of public agents and the refusal of Article 27 immunity can be compromised by the fact that representatives may be accorded to avail themselves of international immunities to preclude other states from arresting them. Whether or not this turns out to be an important obstacle to the exercise of the ICC's jurisdiction and will be subject to an interpretation of Article 98 (1).

3.2 Who May Benefit from Article 98?

The status of officials and diplomats of states that are not party to the ICC Statute. Even though the ICC is empowered to exercise jurisdiction over nationals of states not party to its Statute.[63]

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[60] In addition, Article 98(2) of the ICC Statute, supra note 50, provides: The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

[61] BROOMHALL, supra note 59, at 141.

[62] The risk of this happening is quite high, since the principle of complementarity adopted in the ICC Statute means that the ICC will exercise its jurisdiction only when the national state has genuinely failed to exercise its own jurisdiction in the case. See id. at 143-44.

[63] ICC Statute, supra note 50, Art. 12(2) (a) (providing for ICC jurisdiction with respect to crimes committed on the territory of an ICC party). This writer and others have argued that states are legally entitled to create, by treaty,

No provision in the ICC Statute can work to eliminate the immunities that officials of non-parties may normally have under international law.[64] Section 9 of the Statute compel the parties with a duty to cooperate with ICC requests for the arrest and surrender of persons in their territory. Consequently, states parties may violate their international obligations to states that are non-parties if they arrested and surrendered to the Court public agents of a non-party who is granted immunity from arrest and prosecution.[65]In such context, Article 98 (1), by ordering the court not to act on a request for arrest, secure that state parties to the ICC will not be faced with competing legal obligations towards the ICC and 'other states. In fact, as the Court works by "delegation" from its States Parties[66],therefore the immunity of public agents of non-parties applies with regards to states Parties, but also towards the ICC itself. Therefore, the ICC itself is precluded under international law from making measures which can constitute a breach of these immunities.[67] Especially, the ICC can even be prohibited from delivering an arrest warrant under article 58 of the Statute.[68] This comes after the ICJ ruling in the arrest warrant case[69],

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an international tribunal with criminal jurisdiction over nationals of nonparties. See Dapo Akande, The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits, 1J. INT'L CRIM.JUST. 618, 628-31 (2003); Gennady M. Danilenko, ICC Statute and Third States, in 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1871, 1891-97 (Antonio Cassese, Paola Gaeta, &John R. W. D. Jones eds., 2002); Jordan J. Paust, The Reach of ICC Jurisdiction over Non-Signatory Nationals, 33VAND.J. TRANSNAT'LL. 1 (2000); Michael P. Scharf, The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position, 64 L. & CONTEMP. PROBS. 67 (2001). The United States and others have taken the contrary view and argued that the exercise of ICC jurisdiction over nationals of nonparties is illegitimate and even unlawful.

[64] See Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, Art. 34, 1155 UNTS 331 [hereinafter VCLT].

[65] Part I above contains a discussion of the circumstances in which international law immunities are available when a person is accused of committing an international crime.

[66] See Akande, supra note 63.

[67] See text at Article 6 of the Charter of the Tokyo Tribunal (unlike Article 7 of the Nuremberg Tribunal Agreement), both does not explicitly provide that a person's position as head of state may not be relied on as exempting individual responsibility. Also, while Article 27 of the ICC Statute, supra note 50, denies immunity, Article 98 of the Statute preserves it for certain persons.

[68] The arrest warrant issued under Article 58 (1) by the ICC's pretrial chamber after the conclusion of investigations by the prosecutor appears to be preliminary to, and different from, the request for arrest to which Article 98 (1) relates. The latter is provided for in Part 9 of the ICC Statute (specifically Articles 89-92). That there is a difference implicit in the requirement that a request for arrest under Article 91 must be supported by a copy of the arrest warrant.

[69] Arrest Warrant, supra note 16, paras. 70-71. Some of the dissenting judges in this case (Judge Oda and Judge ad hoc Van den Wyngaert, paras. 13 & 78-80, respectively, of their dissenting opinions) have argued that the mere issuance or international circulation of an arrest warrant is not a violation of applicable immunities because the receiving state is not obligated to carry it out.

which ruled that the issuance and dissemination of an arrest warrant for a person enjoying immunity infringes such immunity even though no further action is made.[70]

The situation of officials and diplomats of states parties to the ICC Statute according to article 98 (1). While it is lucid that Article 98 (1) applies to immunities accorded to public agents of third countries, it is less understandable whether this clause also is about immunities usually granted to representatives of state parties to the ICC. One may ask a question to know whether Article 98 (1) precludes the ICC from asking that a state Party surrender the representative of another state Party located in the territory of the former, where that representative may ordinarily have immunity according to international law. The response is dependent on the connection between Articles 27 and 98.

In particular, the response relies on whether the waiver of immunity included in the previous clause is a waiver not only vis-à-vis the ICC, but also with regards to other parties when those other parties are taking action to give an assistance for the exercise of the ICC jurisdiction. The opinion according to which section 98 (1) applies solely to public agents of non-parties was adopted by academics[71] and some state that are parties to the Court.[72]

This perspective is designed in the legislation of numerous State parties to fulfill their duties with regards to the ICC Statute. One example is section 23 (1) of the United Kingdom International Criminal Court Act of 2001 which stated: " [a] ny state or diplomatic immunity

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[70] Arguably, the position of diplomatic and consular officials is different since international law accords immunities to these officials only in the state to which they are accredited or through which they transit. VCDR, supra note 11, Arts. 39, 40; VCCR, supra note 35, Arts. 53, 54. Other states have no obligation to refrain from arresting such persons, and the issuance and circulation of an arrest warrant to other states will not violate immunities accorded by international law.

[71] See BROOMHALL, supra note 59, at 145; WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 92 (2001); Gaeta, supra note 56, at 993-96; Steffen Wirth, Immunities, Related Problems, and Article 98 of the Rome Statute, 12 CRIM. L.F. 429, 452-54 (2001).

[72] In the margins of the July-August 1999 session of the ICC Preparatory Commission, delegates from Canada and the United Kingdom circulated a paper, quoted in BROOMHALL, supra note 59, at 144, in which they stated: The interpretation which should be given to Article 98 is as follows. Having regard to the terms of the Statute, the Court shall not be required to obtain a waiver of immunity with respect to the surrender by one State Party of a head of State or government, or diplomat, of another State Party. This informal paper [hereinafter UK/Canada paper] was circulated after discussions among the "like-minded" group of countries on the relationship between Articles 27 and 98.

attaching to a person by reason of a connection with a state party to the ICC Statute" does not prevent his or her arrest in Britain or surrender to the Court.

Nevertheless, when state or diplomatic immunity link by purpose with a State not party, then section 23(2) stipulates: that proceedings for arrest or surrender may continue only where the non-state party has waived immunity. Almost similar provisions and wording are employed in the legislation of Malta and Ireland.[73] The legislation of Canada and New Zealand move further and stipulate: that no one can avail himself of the immunities of international law in proceedings initiated in accordance with a request for arrest and surrender from the ICC.[74]

Nonetheless, considering the debate in the precedent section, the Canadian and New Zealand provisions cannot be read as applying to public agents of states that are not party to the ICC Statute.[75] Consequently, as result of the provisions mentioned in the precedent section, a sitting head of state of an ICC party who is in official visit, or an incumbent diplomat from a state party to the ICC and accredited in such state, can be arrested and surrendered to the ICC if the Court ask to do so.[76]

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[73] International Criminal Court Act, 2001, c. 17, $23(1), (2) [hereinafter UK Act]; International Criminal Court Act, 2002, c. 453 (Malta) (inserting a new Art. 26S into the Extradition Act, c. 276, whose paras. (1) and (2) are identical to $23(1) and (2) of the UK Act); International Criminal Court Bill, 2003, No. 36, $60(1) (Ir.) (to the same effect).

[74] Crimes Against Humanity and War Crimes Act, 2000, Ch. 24. $48 (Can.) (inserting a new $6.1 into the Extradition Act, 1999, Ch. 18: "Despite any other Act or law, no person who is the subject of a request for surrender by the International Criminal Court ... may claim immunity under common law or by statute from arrest or extradition under this Act."); see also id. $70; International Crimes and International Criminal Court Act, 2000, No. 26, $31 (1) (N.Z.) ("The existence of any immunity or special procedural rule attaching to the official capacity of any person is not a ground for-(a) refusing or postponing the execution of a request for surrender or other assistance by the ICC; or (b) holding that a person is ineligible for surrender, transfer, or removal to the ICC or another State under this Act." Under $31 (2), subsection (1) is subject to $$66 and 120, which permit proceedings to be stayed while the ICC decides under Art. 98).

[75] The courts in these countries will probably apply the common law rule that ambiguous legislation ought to be construed in a manner consistent with the state's international obligations rather than in a manner contrary to them. See Salomon v. Customs & Excise Commissioners, [1967] 2 Q.B. 116 (C.A.); Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

[76] Under Article 26S (4) of the Maltese Act and $23(4) of the UK Act (but not under the Irish bill), supra note 73, the minister or secretary of state may, after consultations with the ICC and the other state, direct that proceedings which, but for subsections (1) & (2), would be prohibited by state or diplomatic immunity, shall not be taken.

The immunities ratione personae which normally are granted to such persons,[77]should not apply in such case. This is of considerable scope conclusion that makes an important change of the previous legal position, and it is compulsory that it should be sustained by persuasive reasoning. Situations in which the Court would like to make a request for surrender a public agent from one state party to a different state party are probable to be the circumstance under which the official's own State, may perhaps violate its duties and can declined to surrender the defendant.[78]

In case of voluntary nonappearance and surrender by a non-state organization, surrender of the public agent by a different state will provide the solely logical opportunity of obtaining detention. It was asserted that the efficiency of the Statute is helping better with a reading which allows the ICC to orient its requests for the surrender of agents of states parties to other states.[79]

Nevertheless, all intrusion with the immunity granted by international law to incumbent senior officials and diplomats establishes a highly grave intrusion with such state and its international relations, the reject of immunity can be beneficial to create the Court that is more effective, but this is not enough as purpose to justify such renunciation of immunity.

On the opposite, it should be exposed that such a withdrawal of relevant immunity is either expressed clearly in the Statute or understandable tacitly through its provisions. On one hand, the term of Article 98, paragraph 1, itself solves the question if it enlarges to agents of states parties as it makes mention of "immunity of a person ... of a third state." In accordance with this perspective, the term "third state", once used in the law of treaties, mainly make mention of states that are not party to the treaty concerned,[80] and thus Article 98 (1) makes mention of states that are not party to the ICC Statute.

Nevertheless, this reasoning is neither convincing nor conclusive. The provision of Article 98 (1) talks about “third states” and this does not stipulate that it keeps out states parties. Probably, the term “third state” in this provision does not comment on non-parties only but instead a state

[77] See Part 2 for a discussion of the immunities available to state officials in cases in which they are accused of committing international crimes.

[78] See supra note 50.

[79] BROOMHALL, supra note 59, at 145.

[80] See VCLT, supra note 64, Arts. 34-38

that is different from the one which has obtained the detention of the accused. Like Paola Gaeta has mentioned, in different sections of the Statute where mention is made of States not party to the Statute, no “third State” expression is employed but words like “non-contracting States”. And "States not parties."[81] Different uses of the expression “third State” in the ICC Statute likely do not make mention just of non-parties. As an example, it is improbable that the Article 108 ban on extradition to a third state by states with custody of persons convicted by the ICC was intended to cover only non-parties.

Moreover, when the Statute employs the word “third party” in link with the ICC requests to states parties asking documents or information revealed in secret by a third party, this expression clearly comprises both states parties and states non-parties.[82] A most convincing reasoning in support of the opinion that article 98 (1) only favor non-states parties is a reading that enables representatives of states parties to avail themselves of the immunities of international law once they are abroad, this fact would strip the Statute of its main aim of precluding impunity and assure that the gravest crimes of international nature should not stay unpunished.[83]

Additionally, the waiver of the immunity from the exercise of the jurisdiction of the ICC provided for in Article 27 would be cancelled in practice whether Article 98 (1) was read as permitting parties to avail themselves of the same immunities to hinder the surrender of their agents to the Court by other states."[84] This reasoning is sustained by the tenet that “[a] n

[81] Gaeta, supra note 56, at 993; see, e.g., ICC Statute, supra note 50, Art. 90(4).

[82] ICC Statute, supra note 50, Art. 73; see also id., Art. 93 (9) (b) (providing that where a request for assistance from the Court "concerns information, property or persons which are subject to the control of a third State or an international organization by virtue of an international agreement, the requested States shall so inform the Court and the Court shall direct its request to the third State or international organization").

[83] See id., 4th & 5th paras.: Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation, determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.

[84] BROOMHALL, supra note 59, at 145; Gaeta, supra note 56, at 993-94.

interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility." [85]

Consequently, the waiver of immunity in article 27 should be perceived as applying not merely to the Court itself, but likewise to states acting at the request of the ICC. This reasoning is sustained by the fact that, as noted above, revocation is included not only in Article 27 (2) - which states that immunities should not prevent the ICC from exercising its jurisdiction but additionally in section 27 (1).

Steffen Wirth has underlined that when the parties accepted in the first phrase of Article 27 (1) that the statute applied to their agents, they have thus approved that all sections of the statute comprising the cooperation system, that will be used with regards to those agents.[86]As the international law immunities of public agents from states parties are abolished by the Statute, other states where those agents are located, should not act in a way that will be incompatible with their duties with regards to international law [87] by arresting and surrendering such officials to the ICC.

In reaction to the above reasonings, it can be argued that a reading of article 98(1) which enlarges its application to agents of state parties to the court does not deny article 27 of all its meaning. Indeed, even with such a reading of article 98, article 27 can permit the ICC to make inquiries and moreover to issue an arrest warrant under article 58 against officials who may in other ways be granted immunity.[88]

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[85] United States-Standards for Reformulated and Conventional Gasoline, WTO Doc. WT/DS2/AB/R, at 23 (adopted May 20, 1996) (Appellate Body report).

[86] Steffen Wirth, Immunities, Related Problems, and Article 98 of the Rome Statute, 12 CRIM. L.F. 429, at 452 (2001).

[87] ICC Statute, supra note 50, Art. 98(1).

[88] The arrest warrant issued under Article 58 (1) by the ICC's pretrial chamber after the conclusion of investigations by the prosecutor appears to be preliminary to, and different from, the request for arrest to which Article 98 (1) relates. The latter is provided for in Part 9 of the ICC Statute (specifically Articles 89-92). That there is a difference is implicit in the requirement that a request for arrest under Article 91 must be supported by a copy of the arrest warrant.

In addition, article 27 would prohibit any use of immunity as soon as the ICC detains an accused linked to a state party.[89] From this perspective, Article 27 relates only to the position of state representatives vis-à-vis the ICC and does not influence the immunity of such representatives from the jurisdiction of other states. Instead of having been removed by Article 27, these immunities, from this perspective, are clearly maintained by Article 98, paragraph 1.

Consequently, Article 98 (1) would preclude the ICC from asking a host state to arrest and surrender agent of another state enjoying immunities under international law. Nonetheless, the Court would stay free to ask for the surrender of the agent from his state of origin, which is required under part 9 of the ICC Statute to cooperate with the Court in the implementation of the demand. If interpreting Article 98 (1) as also applicable to agents of the parties to the statute does not completely nullify the effect of Article 27, this reading gives just a very limited scope of application to Article 27 (2).

First, it is wrong to state that the removal of international law immunities in Article 27 (2) at least enables the ICC to make inquiries and deliver arrest warrants against public agents of state parties to the ICC in terms where it would have not been able to do so. If Article 98 (1) was read as precluding the ICC from asking host states to arrest agents of other state parties to the statute who enjoy immunity with regards to international law, then the warrants delivered under article 58 could cover merely the state of origin of the agent. Such a reading would make superfluous the part of Article 27 (2) which waives the immunity of civil servants under international law. As public agents do not enjoy immunities under international law with regards to their state of origin, the deletion provided for in Article 27 (2) of "immunities or special procedural rules which may attach ... under... international law " this cannot have been for the aim of permitting the court to deliver an arrest warrant that apply merely to the origin state of agent.

Second, the perspective that article 27 only applies to the Court and suppresses immunity only when the ICC has detained the suspected person (but not when they are in the territory of

[89] See Otto Triffterer, Article 27, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 513 margin n.24 (Otto Triffterer ed., 1999) [hereinafter ROME COMMENTARY].

another state different from their own) fact that shows in practice that this clause will apply only occasionally. In most cases, the ICC is expected to get detention of incriminated agents via surrender by their own state or another state. When an agent detained by the ICC has been surrendered by his or her state of origin, in such case, there is little need to rely on Article 27 to waive immunity from the exercise of the jurisdiction of the ICC, since surrender will -even establishes a removal. If Article 98 (1) is read as permitting states parties to avail themselves of immunities to hinder the surrender of their agents to the ICC by other states, this would signify that the waiver of immunity included in article 27 is genuinely relevant just in few of cases in which detention is provided by actions of non-state organization [90] or optional apparition.[91] Limiting what at first glance seems to be a significant clause to these restricted and unusual contexts would seem to run counter to the objects and aims of the Statute. To provide a significant impact to Article 27, Article 98 (1) should be read as applicable solely to agents of state nonparties.

Consequently, Article 98 (1) does not preclude the ICC from asking the surrender of agents of parties even in case those agents would in other ways be covered by immunities under international law against arrest by domestic authorities of other states. Accordingly, parties to the ICC Statute have a duty according to Part 9 to conform with demands for the arrest and transfer to the Court when a public agent of other state Party is in their territory. The ICC Statute thus provides State parties the authority not only but also an obligation to arrest and transfer public agents with higher-ranking, such as a sitting head of state or a sitting head of diplomatic mission once those agents have been accused by the Court and delivered an arrest warrant against them.

The practice of numerous state parties after their ratification of the ICC Statute sustains the perspective that Article 27 has the effect of waiving the immunity of representatives of states

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[90] It cannot be excluded that private parties, or peacekeeping or peace enforcement forces operating under a mandate from an international organization will be involved in surrendering persons to the ICC. Some persons have been transferred to the ICTY by NATO forces operating in Bosnia and Croatia. In one case there appeared to be collusion between private parties and the NATO force. See Prosecutor v. Nikolic, Interlocutory Appeals Decision, No. IT-94-2-AR73 (June 5, 2003). Since peacekeeping or peace enforcement forces are composed of state forces, any limitations that apply to states (e.g., the immunities retained in Article 98) would arguably apply to such forces as well.

[91] Gaeta, supra note 56, at 994; Triffterer, supra note 89.

parties in the territory of other states that act at the demand of the court. Mention has previously been made to the application laws of Canada, Ireland, Malta, New Zealand, and the United Kingdom, each of them include Article 27 of the Statute and clearly refuse immunity to representatives of states parties in national procedure with regards to a demand for arrest and transfer by the ICC.[92] In addition, the provisions of South Africa and Swiss law seem to take identical point of view on Article 27.[93]

Nonetheless this following practice in the implementation of the Statute concerns just a few state parties and does not "establish[] the agreement of the parties regarding its interpretation,"[94] it surely sustains the opinion that Article 98 (1) does not preclude the ICC from seeking the arrest of state representatives (including higher-ranking agents in office) of states parties. The attribution of the authority to arrest a visiting head of state or a sitting diplomat is virtually unusual (but not unheard of) [95] in international relations and can create an important tenseness

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[92] See notes 73 and 74 supra.

[93] Co-operation with the International Criminal Court, Arts. 6, 4,June 22,2001 (Switz.) (providing, respectively, that the Swiss Federal Council "shall decide on questions of immunity relating to article 98 in conjunction with article 27 of the Statute which arise in the course of the execution of requests, "and that consultations be held with the ICC where it appears that a request from the Court could violate state or diplomatic immunity); Implementation of the Rome Statute of the International Criminal Court Act, 2002, No. 27, §10(9) (S. Afr.) (providing that the fact that, under §4(2) (a), a person "is or was a head of State or government, a member of a government or parliament an elected representative or a government official" does not constitute a ground for refusing to issue an order for surrender to the ICC). The latter provision arguably refers only to domestic and not foreign officials, but since §4(2) states that the official position of these persons shall not constitute a defense despite any other law to the contrary, "including customary and conventional international law," it suggests that foreign officials are contemplated as well.

[94] VCLT, supra note 64, Art. 31(3) (b).

[95] See Prosecutor v. Charles Taylor, Immunity from Jurisdiction, No. SCSL-03-01-I (May 31, 2004). On March 7, 2003, the prosecutor issued an indictment charging Charles Taylor (then the head of state of Liberia) with responsibility for crimes against humanity and war crimes committed on the territory of neighboring Sierra Leone during the civil war in that state. In June 2003, the prosecutor sought the arrest of Taylor based on the indictment while Taylor was in Ghana for peace talks with Liberian rebels. The Ghanaian government declined to arrest him and Slobodan Milosevic case, it may be asked whether the Security Council can override the immunities normally accruing to representatives of states that are not members of the United Nations. This question may have been raised in 1999 when the ICTY indicted the then head of state of the Federal Republic of Yugoslavia (FRY)-Slobodan Milosevic and other senior members of the FRY government. At the time of the indictment, there was some doubt as to whether the FRY was a member of the United Nations. To the extent that the FRY was not a UN member, an attempt by other states to execute the indictment and arrest warrant would arguably have engaged the legal responsibility of the arresting state and/or even that of the United Nations. By the time Milosevic was handed over to the ICTY in June 2001, the FRY had been admitted to the United Nations (in 2000). In any event, surrender by the FRY would have constituted a waiver of any available immunities. For analysis of the status of the FRY in the United Nations prior to 2000, see Dapo Akande, The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits, 1J. INT'L CRIM.JUST. 618, 628-31 (2003); Yehuda Z. Blum, UN Membership of the "New" Yugoslavia: Continuity or Break? 86 AJIL 830 (1992); Matthew Craven, The

and disturbance in these relations if that authority is not used with good judgment or sense. It is not sure whether the authors of the pertinent sections of the ICC Statute deliberately considered (while writing) the probability of states being authorized to arrest a sitting head of state or diplomat.[96]

Nonetheless, as shown previously, this power flows from the text of the Statute. Furthermore, the goals and aims of the Statute as explained in the preamble and article 27 show clearly that the authors planned that even the high-ranking state representatives of parties to the ICC should not be excluded from the jurisdiction of the ICC. Also, the authors of the statute considered that international law immunities should not be an obstacle for the exercise of this jurisdiction by the ICC.

Certainly, tenseness and pressure will occur from the detention by any state of the higher-ranking agents from another state, the fact that similar detention cannot be launched solely by the host state but should come behind an inquiry and demand by the court, and the fact that the state of those higher-ranking agents should be a party to the ICC, should decrease this tenseness to some extent.

The status of state parties and non-parties under Article 98 (2). If Article 98 (1) is relevant solely to agents of third countries, the question thus appears if the same applies to Article 98 (2). By virtue of this provision, the ICC cannot act on a demand for surrender which would oblige the State in question to proceed in a manner that is incompatible with regards to its duties according to an international treaty under which the approval of a sending state is needed to transfer an agent from that state to the Court.

Like the first section of Article 98, the second section aims to dodge a circumstance under which a state that is addressed by the ICC with a demand for surrender or arrest is bring under a situation that is incompatible with its duties. Therefore, the provision of Article 98 (2)

Genocide Case, the Law of treaties and State Succession, 1997 BRIT. Y.B. INT'L L. 127, 131-35; Michael P. Scharf, Musical Chairs: The Dissolution of States and Membership in the United Nations, 28 CORNELL INT'L L.J. 29 (1995); Michael Wood, Participation of Former Yugoslav States in the United Nations and in Multilateral Treaties, 1997 Y.B. UN L. 231, 241-51.

[96] Articles 27 and 98 were drafted by different committees. See Triffterer, supra note 89. It is not clear whether any thought was given to the consistency of the two provisions with one another or to the question whether Article 98 applied to ICC parties.

authorizes states to comply with convention duties banning the transfer of agents located in their territory and that are representing other states.[97]

Specially, this section enables states to comply with the clause of Status of Forces Agreements (SOFA), that forbid States from apprehending the soldiers and other military staff of another state that are in their territory.[98] This clause can equally handle extradition treaties stipulating that an individual who has been extradited from a state to another cannot be re-extradited to a third state without the approval of the previous state.[99]

Nevertheless, is it possible for a state party to the statute to invoke Article 98 (2) to preclude other states from handing over agent from the state party to the court?

This issue is of great significance since many state parties to the court have entered treaties with other states (mostly the United States of America) expressly stipulating that no party can send individuals of a state party, located in the territory of the other, to the court without the approval of the other party.[100] As Article 98 (2) is talking solely about treaty that needs the approval of the “sending state” for surrender to the court, but the United States of America treaties (as long as they apply to individuals who have not been "sent") are not treated by this provision. "[101]

[97] For an analysis of Article 98(2), see Akande, supra note 63, at 642-46; Salvatore Zappala, The Reaction of the US to the Entry into Force of the ICC Statute: Comments on UNSC Resolution 1422 (2002) and Article 98 Agreements, 1 J. INT'L CRIM.JUST. 114 (2003).

[98] See, e.g., Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of their Forces, June 19,1951,4 UST 1792, 199 UNTS 67 [hereinafter NATO SOFA]. Some have doubted whether the NATO and similar SOFAs come within the scope of Article 98 (2). Akande, supra note 63, at 644, that Articles VII (3) (C) and VII (5) of the NATO SOFAS fall within the language of Article 98(2). Moreover, it is generally admitted that Article 98(2) was drafted with the intention of applying to SOFAs.

[99] See European Convention on Extradition, Dec. 13, 1957, Art. 15, 359 UNTS 273.

[100] Under these agreements, persons of one-party present in the territory of the other shall not, absent the expressed consent of the first Party:

(a) be surrendered or transferred by any means to the International Criminal Court for any purpose, or

(b) be surrendered or transferred by any means to any other entity or third country, or expelled to a third country, for the purpose of surrender to or transfer to the International Criminal Court. For the purposes of the agreement, "'persons' are current or former government officials, employees (including contractors), or military personnel or nationals of one Party." For the text of the agreement, see Sean D. Murphy, Contemporary Practice of the United States, 97 AJIL 200, 201-02 (2003).

[101] See Akande, supra note 63, at 643-44; JAMES CRAWFORD, PHILIPPE SANDS, & RALPH WILDE, IN THE MATTER OF THE INTERNATIONAL CRIMINAL COURT AND IN THE MATTER OF BILATERAL

Consequently, the ICC is allowed to demand the arrest of individuals who were not sent, nevertheless the state party to the statute is linked by the agreement with the United States of America not to send the individual.

Furthermore, this kind of treaty has been reached for the interest of several states that are parties to the Rome statute with other states different from the United States of America. According to the Military Technical Agreement among the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan, Afghanistan has approved not to hand over ISAF agent to any international court in the absence of the explicit approval of the participating state.[102]While signing this Military Technical Agreement, several of the ISAF member states were parties to the court, and that continue to exist the case later.[103]

The main concluding remark that can be established from such agreements is the fact that some state parties to the Rome statute believe that ICC parties can refer to agreements mentioned by Article 98 (2).[104] A few commentators have asserted that merely agreements in the profit of state parties to the court are covered by this provision.[105]

AGREEMENTS SOUGHT BYTHE UNITED STATES UNDER ARTICLE 98(2) OF THE STATUTE (June 5, 2003), available at

<http://www.lchr.org/international_justice/Art98_061403.pdf> (arguing that these agreements are inconsistent with Article 98(2) because (1) they deal with persons who cannot objectively be treated as having been "sent" by a state, and (2) the object and purpose of the ICC Statute precludes a state party from entering into an agreement whose purpose or effect may lead to impunity); Zappala, supra note 97, at 129. For similar views, see Council of the European Union, EU Guiding Principles Concerning Arrangements Between a State Party to the Rome Statute of the International Criminal Court and the United States Regarding the Conditions to Surrender of Persons to the Court, in Council Conclusions-International Criminal Court, annex (Sept. 30, 2002), 42 ILM 240, 241 (2003).

[102] Military Technical Agreement Between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan, Jan. 4, 2002, Annex A, §1(4), 41 ILM 1032 (2002) ("The Interim Administration agree that ISAF and supporting personnel, including associated liaison personnel, may not be surrendered to, or otherwise transferred to the custody of, an international tribunal or any other entity or State without the express consent of the contributing nation.").

[103] For the composition of ISAF at its inception, see Fact Sheet: International Security Assistance Force (ISAF) in Afghanistan at <http://www.cdi.org/terrorism/isaf.cfm>

[104] This is evidently not the view of the members of the EU. Council of the European Union, supra note 101, annex, at 241 (stating: "Nationality of persons not to be surrendered: any solution should only cover persons who are not nationals of an ICC State Party."

[105] See EC Commission Legal Service, Effective Functioning of the International Criminal Court Undermined by Bilateral Agreements as Proposed by the U.S., 23 HUM. RTS. LJ. 158-59 (2002) (internal opinion); Human Rights Watch, United States Efforts to Undermine the International Criminal Court: Legal Analysis of Impunity Agreements (Sept. 4, 2002), available at<http://www.hrw.org/campaigns/icc/docs/art98analysis.htm>. Those taking this view argue that to interpret Article 98(2) as extending to agreements with nonparties would result in

As mentioned above[106], the opinion according to which the agreements in favor of third parties are not included in Article 98 (2) is not admitted.

The Rome Statute cannot go beyond the rights of state that are non-parties. Furthermore, three justifications show the relevance of interpreting Article 98 (2) also Article 98 (1) as in favor solely of states that are non-parties to the statute.

First, the purposes explained above for interpreting Article 98 (1) likewise apply to agreements mentioned by Article 98 (2) that grant immunity based on official standing (e.g., SOFAS).[107]

Second, the substantial grade of encroachment between both provisions imply that they should be taken in uniform reading. The encroachment occurs since treaties granting state or diplomatic immunities obviously drop into the wording of Article 98 (2). No matter the aim of the authors of the Rome statute, there is no doubt that the Vienna Convention on Diplomatic Relations of 1961 and the United Nations Convention on Special Missions of 1969 are "international treaties under which the consent of a sending state is needed to send a person of such state to the ICC.[108] Consequently, presuming that Article 98 (2) is not restricted to states that are non-parties, the restriction of Article 98 (1) to non-parties can be simply prevented by invoking Article 98 (2) rather.

Third, to read article 98 (2) as expanding to state parties to the Court when article 98 (1) does not conduct to the patently meaningless result that soldiers of parties and extradited individuals cannot be handed over to the Court (due to SOFA and extradition agreements included in article 98, paragraph 2). Therefore, a reading of Article 98 (2) in its real wording, illuminates the

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impunity in cases where the nonparty decides not to prosecute. They then argue that such an interpretation must be rejected since one of the purposes of the Statute is the prevention of impunity. According to this view, Article 98(2) is only a "routing device," allowing the ICC party on whose territory a national of another ICC party is found to comply with its treaty obligations to the latter ICC party but leaving the Court free to request surrender from the latter state.

[106] See Akande, supra note 63, at 643, for further reasons suggesting this argument is unacceptable

[107] While extradition agreements within the scope of Article 98(2), see supra note 99 and corresponding text, will not be covered by the waiver in Article 27, it has been argued that the right of ICC parties, under those extradition treaties, to demand that persons they extradite not be transferred to the Court has been waived by Article 89 of the ICC Statute.

[108] See Akande, supra note 63.

reading given to article 98 (1), and should conduct to the conclusion that solely agreements in favor of nonparties to the Rome statute fall under the framework of article 98, paragraph 2.

To conclude this analysis of Article 98, paragraph 2, It should be reported that agreements demanding the approval of a state for sending an individual to the Court do not fall under the framework of this provision (as an example, the United States of America agreements or other kind of treaties aimed at state parties to the statute) can nonetheless be juridically efficient in precluding any surrender to the Court.

3.3 Who Decides Whether a Person is Entitled to Immunity in Another State?

A last issue that should be resolved with regards to article 98 is: who determines if an individual wanted by the Court is granted state or diplomatic immunity or is protected by a treaty prohibiting surrender? Should this choice be determined by the Court or by the state in which the individual is located? Moreover, if the Court must determine this choice, by which process should it do so, and will such option be compulsory for the state that is addressed the demand for surrender?

According to article 97, a state party that has received a demand from the ICC "in relation to which it identifies problems which may impede or prevent the execution of the request ... shall consult with the Court without delay in order to resolve the matter." As the provision of article 98 stipulates "the Court may not proceed with a request for surrender" Except if the circumstance set out occurred, otherwise the ICC should firstly determine if such circumstance is considered or not.[109]

This interpretation is established by article 195 of the statute concerning Rules of Procedure and Evidence which stipulates that a requested state which considers that a demand for transfer creates an issue according to article 98, "shall provide any information relevant to assist the

[109] See CRAWFORD, SANDS, & WILDE, supra note 101, paras. 58--59 (arguing that where the ICC has requested or intends to request the surrender of a person, it is for the Court to decide whether a bilateral non surrender agreement covering the person is consistent with Art. 98(2)).

Court in the application of article 98." Furthermore "[a]ny concerned third state or sending state may provide additional information to assist the Court."[110]

Regrettably, none of the Rome statute or the Rules of Procedure and Evidence have clearly specified the process to be followed by the ICC while resolving such issues. Nevertheless, with an issue of this kind of significance, one can just presume that the state involved has a right to receive a decision from the pre-trial chamber. Whereas this question is not clearly mentioned in the register of tasks of the pre-trial chamber in the provision of article 57 of the Statute, article 195 possibly confers procedural rights to the nonparties states in question or to the transferring states at all audition in front of the pre-trial chamber.

Even though the Court should foremost take a decision according to Article 98, the question subsists if such decision is compulsory for the state involved. When a demand for transfer is issue, article 89 of the Statute compels the parties to conform with it. As a demand included in article 98 handles with a case concerning the duties of a state party to the statute towards non-parties, in such case giving the last decision to the Court goes too far,[111]and all mistakes by the ICC can make the relevant ICC party juridically liable to the non-party. It can be asserted that the provision of Article 59 (2) (c) of the Statute – which stipulates that an individual apprehended at the demand of the ICC must be sent in front of the specialized Courts of the state of detention for this aim," *inter alia*" to prove if the accused rights have been observed, this step enables such Courts to decide the immunity issue.

Nonetheless, disputes over whether a state involved should send an individual to the ICC or not are disputes "concerning the judicial function of the Court," which, according to Article 119 of the Statute "shall be settled by the decision of the Court."[112] Domestic laws that handle the immunity issue of agents from others states once a demand for arrest has been issued by the Court shows the different perspectives taken by states on the question: who is the body empowered to decide the matter? The Canadian Crimes Against Humanity and War Crimes Act

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[110] ICC Rules of Procedure and Evidence, Rule 195, Doc. ICC-ASP/1/3, available at<http://www.icc-cpi.int>

[111] See BROOMHALL, supra note 59, at 145, and Wirth, supra note 86, at 458, argue that the final decision should be left to the ICC.

[112] See CRAWFORD, SANDS, & WILDE, supra note 101, para. 58(6).

of 2000 and New Zealand International Crimes and International Criminal Court Act of 2000 give the last decision on immunity issue to the Court.

On the opposite side, Australian and Swiss legislations require consultation between their executive departments and the Court but give the last decision to the specialized domestic authorities, (the Australian Attorney General and the Swiss Federal Council), the decisions of these bodies seem to be compulsory for the ICC.[113]

[113] International Criminal Court Act, 2002, No. 41, §12 (Austl.); Co-operation with the International Criminal Court (Switz.), supra note 93, Arts. 4(d), 6.

4.The Security Council Referral

Current evolutions, as well as the requests addressed to the UN Security Council to refer the Syrian case to the ICC, the reference of the cases in Sudan and Libya to the Court, which includes different requests asking the Security Council to exercise its referral powers in accordance with the ICC statute,[114] underline the significance of the connection among the Security Council and the Court. The Security Council is a political organization that plays a dominant role with regards to the Court (a legal organization), especially the power to refer cases on which the ICC cannot in other ways have jurisdiction, and to make inquiries and indictments. The provision of the Rome Statute concerning referrals to the Security Council is rather short. Article 13 stipulates:" 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…."[115].

This part denies the context according to which the Chapter VII power of the Security Council has made the Sudanese president Al-Bashir immunity invalid for the goals of the ICC Statute. Al-Bashir has been indicted for crimes supposedly perpetrated in Darfur, which was referred to the Court by Security Council resolution 1593.[116]

The PTC did not explain clearly how the Security Council Resolution 1593 could tie Sudanese state to the ICC Statute and waive Al-Bashir immunity, nevertheless there are three options. One is by the means of transference of the Security Council Chapter VII powers to the Court, that also uses such powers to oblige Sudan to collaborate. Second is to tie Sudan to the ICC Statute and the provision of Article 27 (2) via Chapter VII resolution of the Security Council. Third is the removal of immunity by straight decision of the Security Council. The last reasonings rely on Article 103 of the United Nations Charter and are therefore regarded as in conjunction.

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[114] Rome Statute of the International Criminal Court, July 17, 1998, 2187 UNTS 90.

[115] Rome Statute, supra note 114, Art. 13(b).

[116] SC Res 1593 (31 March 2005).

The main issue with all these reasonings is the fact that none of the Chapter VII or Article 103 of the Charter enables the Security Council to enlarge the jurisdiction of the ICC.[117] The Court is unable to use Chapter VII powers since it is not a UN body, and the Security Council has no power to amend the regulations of public international law to deny the immunity of Al-Bashir. These rules, that comprise the United Nations Charter[118] as well, the customary law rules of immunities described previously and the law of treaties, seriously limit the powers of the Security Council in this matter.

4.1 The Inability to Delegate Chapter VII Powers to the ICC

The first point to be treated is that of transference. Nonetheless whether it is presumed that the Security Council can waive immunities, this does not signify such power may be transfer to the ICC. Granting this kind of power to the ICC needs that the Court is effectively specialized to be given such Chapter VII power.[119] Under the United Nations Charter, the specialized bodies are the Member States of the United Nations[120]; "regional arrangements" as envisaged in Article 51 of the Charter[121] and other bodies of the United Nations. The Court does not belong to none of these bodies. Although there is no explanation of the word "regional" in the Charter, nevertheless the kinds of organisms described as regional offices comprise the African Union (AU), the Arab League and the Organization of American States (OAS).[122]

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[117] Luigi Condorelli and Santiago Villalpando, Can the Security Council Extend the ICC's Jurisdiction? in: Antonio Cassese et al (eds.), The Rome Statute of the International Criminal Court: A Commentary (2002), 572.

[118] Charter of the United Nations, 26 June 1945, Can TS 1945 No 7.

[119] See Danesh Sarooshi, The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers (2000), 247 ("[T]he competence of the Council to delegate Chapter VII powers to an entity does not in itself mean that the entity has the institutional competence to be able to exercise those powers"), and 252–253 ("The delegation of Chapter VII powers to a regional arrangement gives the arrangement—and thus its organs—the right to exercise those powers but not in disregard of its constituent treaty").

[120] An example of such a delegation occurred in Operation Artemis, the French-led Interim Multinational Emergency Force to assist troops in the UN Mission in the Democratic Republic of Congo (MONUC), authorized by SC Res 1484 (30 May 2003).

[121] Such as NATO, whose operations in Kosovo were authorized by SC Res 1244 (10 June 1999).

[122] Along with the AU, OAS, and Arab League, Conforti includes the Commonwealth of Independent States (CIS), the Organization for Security and Cooperation in Europe (OSCE), the Western European Union (WEU), the Arab League, the Economic Community of West African States (ECOWAS), and the Organization of Eastern Caribbean States (OECS). See Benedetto Conforti, The Law and Practice of the United Nations (3rd ed., 2005), 235–238. Only the AU, OAS and Arab League are unambiguously considered regional agencies. See Waldemar Hummer

Allowing a decentralized office like the Rome status to have a regional status with regards to Chapter VII can jeopardize the role of the United Nations in saving international peace[123] by making senseless the closeness demand that is mentioned in Article 51.[124] However, whether the Court was ranked as a regional office, the issue appears because the sole Chapter VII powers that could be transferred to regional agencies are military implementation powers[125], in accordance with Article 53 (1) of the United Nations Charter.[126] The aim of Article 53 (1) is also proved by the United Nations Secretary-General program for Peace[127], that seek to place regional organisms at the service of the political and military functions of protective international relations and peacekeeping.[128] It does not envisage any legal functions.[129]

The ICC Statute is a treaty which was achieved without the United Nations, and the provisions of Articles 1 and 4 (1) of this treaty stipulate that the ICC is permanent and that it has "international legal personality". The preface and article 2 of the UN-ICC Agreement also admit the autonomy of the ICC from the United Nations structure.[130] Differently from the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for

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and Michael Schewitzer, Article 52 in: Bruno Simma (ed.), The Charter of the United Nations: A Commentary (2002), 807, 828. NATO may arguably be a Chapter VIII regional agency as well, notwithstanding its establishment as a collective security group.

[123] See Waldemar Hummer and Michael Schweitzer, above note 122, 822 ("Short of requiring 'regions' in the geographic sense, the requirement of some degree of spatial proximity among members of regional arrangements cannot be dropped, since this would cause the decentralized system of the UN for securing the peace, which is embodied in these regional arrangements, largely to lose its effectiveness").

[124] Parties to the Rome Statute are as diverse and geographically scattered as the UN membership. At the time of writing, 121 States Parties had ratified the ICC Statute. There were 33 States Parties from Africa, 25 from Western Europe (including Canada, New Zealand, and Australia), 18 from the Asia-Pacific Region, and 27 from the Caribbean/ Latin America. A complete and current list of States Parties is available online at (www.icc-cpi.int).

[125] See Danesh Sarooshi, above note 119, 248–251.

[126] See generally, Jurgen Bröhmer and Georg Ress, Article 53, in: Bruno Simma (ed.), above note 122, 854, 859–866, esp. 860 ("[T]he majority of the member States assumed that the non-military sanctions were not enforcement actions which, from a systematic perspective (relation between Art. 53 and Art. 2(4)), is a conclusive interpretation"); Benedetto Conforti, above note 122, 231–238; and Danesh Sarooshi, above note 119, 247–253.

[127] Report of the Secretary-General, An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peacekeeping, UN Doc A/47/277—S/24111 (17 June 1992).

[128] See Christine Gray, International Law, and the Use of Force (2004), 282–294.

[129] The only judicial role mentioned is that for the ICJ, a UN organ. Agenda for Peace, above note 127, paras.38–39.

[130] Negotiated Relationship Between the International Criminal Court and the United Nations, ICC—UN, ICC-ASP/3/Res.1 (4 October 2004).

Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL), the court is fully administered by the Assembly of its member States.

Although legally autonomous, the ICTY and ICTR can use Chapter VII power since they are UN bodies which were created by the Security Council, and which were transferred such power.[131] The Security Council is not able to oversee any task of the Court, comprising the designation of its staff. On the other hand, with the SCSL, the United Nations Secretary General oversees, alone or together with other bodies of the SCSL, for the designation of judges, prosecutors, and the Court clerk.[132]

In view of all the above mentioned, there is no legal foundation under which the ICC can use the Chapter VII powers comprising the power to tie states that are nonparties to the statute.

4.2 Article 103 and the Supremacy of the Security Council:

The second reasonings in Al Bashir case under which Sudan should conform with the Security Council referral since its membership in the United Nations, especially its approval of the primacy of the United Nations through Article 103[133] of the charter, and the compulsory character of Chapter VII resolutions.

The Chapter VII powers do not go through the Court, the duty to apprehend Al-Bashir was Immediately enforced on Sudan and all United Nations member states by the Security Council. The fundamental defect concerning this perspective is the fact that the United Nations Charter prevail over other international treaties[134], not the rules of customary international law like head

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[131] See Danesh Sarooshi, above note 119, 107. The scope of this Chapter VII authority is limited in two ways. Firstly, by the restrictions on subject-matter, personal, temporal, and territorial jurisdiction contained within the ICTY and ICTR statutes. Secondly, by the purpose of Chapter VII delegation, as established by the tribunal statutes and the Security Council resolutions establishing the tribunals. See SC Res 827 (25 May 1993), para.4 and the ICTY Statute, art. 29; and of SC Res 955 (8 November 1994), para.2 and the ICTR Statute, art. 28.

[132] See the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (16 January 2002), arts. 2–4, 6, 7 and 10.

[133] "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." UN Charter, above note 118, art. 103.

[134] This primacy does not necessarily result in the voiding of those treaties, only the suspension of those provisions in so far as they conflict with obligations arising under the Charter. Any treaties that violate jus cogens norms

of state immunity or the laws governing treaties. In this context, these traditional rules run counter the reasoning under which the UN referral may void Al-Bashir immunity.

The story of Article 103 indicates that following a long discussion on whether the Charter must prevail over all international law, the authors have made an intentional option to define "international agreements" in place of "all international obligations", raising the Charter solely above treaties and other international agreements.[135] That was proclaimed by the General Assembly in the Declaration on Friendly Relations[136], that differentiated among "obligations under the generally recognized principles and rules of international law" and "obligations under international agreements valid under the generally recognized principles and rules of international law", and plainly indicated that solely the latter have been replaced by the Charter.[137] This comprehension has been visible in many statements of the General Assembly[138],without any denial, and equally established by the International Court of Justice

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would only be void under the Charter if one or more parties were also UN Member States. At the same time, such treaties would be void on the separate basis that they violate a non-derogable norm of customary international law.

[135] See Report of the Rapporteur of Committee IV/2, as approved by the Committee, "Privileges and Immunities" in: Documents of the United Nations Conference on International Organization (1945) Vol. XIII, 707. See also Rob McLaughlin, The Legal Regime Applicable to Use of Lethal Force When Operating under a United Nations Security Council Chapter VII Mandate Authorising "All Necessary Means", 12 J Conflict & Security L (2008), 389, 400–401; and Rain Liivoja, The Scope of the Supremacy Clause of the United Nations Charter, 57 ICLQ (2008), 583, 602–605.

[136] Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, GA Res 2625 (XXV), UN Doc. A/RES/25/2625, 121, 124 (24 October 1970).

[137] Ibid.

[138] See the Declaration on the Strengthening of International Security, GA Res 2734 (XXV), UN Doc A/RES/25/2734 (16 December 1970), para.3; the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, GA Res 42/22, UN Doc A/ RES/42/22 (18 November 1987) para.4; and the Preamble of Respect for the Purposes and Principles Contained in the Charter of the United Nations to Achieve International Cooperation in Promoting and Encouraging Respect for Human Rights and for Fundamental Freedoms and in Solving International Problems of a Humanitarian Character, GA Res 55/101, UN Doc A/RES/55/101 (2 March 2001).

(ICJ)[139], and many academics wrote about the United Nations[140] and the Lockerbie decisions of the ICJ.[141]

While the Charter solely takes precedence over international agreements and not over customary international law, therefore member states are not required to conform with all instructions coming from the United Nations. Any Security Council instruction that breaches a principle of customary international law is ultra vires, since any duty to conform "is conditional upon the Council compliance with the Charter principles: Article 103 cannot make a resolution which is unlawful under the Charter prevail over other legal norms"[142] This perspective, firstly

[139] Interpretation of the Agreement of 25 March 1951 Between the World Health Organization and Egypt, Advisory Opinion, ICJ Reports 1980, 73, 89–90, para.37 (all international organizations are bound by the rules of general international law). See also Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. UK), Provisional Measures, [1992] ICJ Reports 1992, 3, 15, para.39 ("in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention").

[140] Aleksander Orakhelashvili, The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions, 16 EJIL (2005), 59, 69 ("Article 103 makes the Charter prevail over international agreements … but this is not the case for the general international law, of which jus cogens is a part. The clear text does not support the opposite view, and those who wish to see Article 103 as making the Charter prevail over general international law cannot rely on evidence, but only on wishful thinking"); Derek Bowett, The Impact of Security Council Decisions on Dispute Settlement Procedures, 5 EJIL (1994), 89, 92 ("It is true that this reasoning confined to the supremacy of a Council decision over inconsistent treaty rights or obligations, because Article 103 is concerned solely with compatibility between Charter obligations and obligations 'under any other international agreement'. Accordingly the reasoning would not apply where a member relied on its rights under general international law"); Geoffrey R Watson, Constitutionalism, Judicial Review, and the World Court, 34 Harvard ILJ (1993), 1, 25 ("Article 103, relied on so heavily by the majority, provides that Charter obligations prevail over 'other international agreements'; it does not provide that Charter obligations prevail over jus cogens and other forms of customary international law"); and Judith Gardam, Legal Restraints on Security Council Military Enforcement Action, 17 Michigan JIL (1996), 285, 304 ("[T]he presence of Article 103 in the Charter has no impact on the need for the Security Council to comply with general international law. … It is not necessarily inconsistent for the Security Council to override other treaty obligations of States while remaining bound itself by customary rules. States have differing treaty obligations, but customary obligations bind all States equally.").

[141] See Rob McLaughlin, above note 135, 402 (the Lockerbie decisions "generally assert that the Article 103 trump is exercisable over treaty law"); Christian Tomuschat, The Lockerbie Case Before the International Court of Justice, 48 Rev Int'l Comm Jurists (1992), 38, 43–44; and Bernhard Graefrath, Leave to the Court What Belongs to the Court: The Libyan Case 4 EJIL (1993), 198–199 (criticizing the Court's initial Lockerbie decisions for their inadequate analysis of art. 103 as it relates to non-treaty matters).

[142] See Aleksander Orakhelashvili, above note 140, 69.

raised by Hans Kelsen in 1950[143], was taken up by the ICJ in the Lockerbie case[144] and strengthened by many scholars.

[143] Hans Kelsen, The Law of the United Nations: A Critical Analysis of Its Fundamental Problems (1950), 95 ("The meaning of Article 25 is that the Members are obliged to carry out these decisions which the Security Council has taken in accordance with the Charter.").

[144] Cited with approval in Lockerbie (Libya v UK), Provisional Measures, ICJ Reports 1992, 3, 101–102 (diss. op. El-Kosheri, para.23) (not dissenting on this point).

5.The Customary Exception from Personal Immunity in Proceedings Before International Criminal Tribunals

In accordance with the Vienna Convention on the Law of Treaties (VCLT), only those states which have given their consent to a treaty are bound by its terms and condition.[145] On the other hand, customary international law derives from "a general practice accepted as law", which in turn mean the fulfilment of two major conditions: state practice and *opinio juris*. The requirement that a given practice is treated by states as 'law' is often referred to as *opinio juris*.[146]

As a treaty-based organization, the UN is bound by the law of treaties as well as the codified rules of customary international law. That is to say that the UN, as an international organization, is bound to apply the provisions set out by the UN Charter as well as other codified documents deriving from customary international law. These rules means that the capacity of the Security Council, ICC and other international organization are limited from biding a non-state party to a treaty that is not ratified by it. One can apply this reading and understand the Rome Statute in a way that it either absolutely prevent the Security Council from referring a case to the ICC involving a non-state party or limit the jurisdiction of the ICC in dealing with such cases.[147]

5.1 The Treatment of Non-Parties and the Law of Treaties

A fundamental principle existing in international law, *pacta tertiis nec nocent nec prosunt*, holds that treaties do not create obligation or grant rights to a party which is not expressed its consent by it.[148] This principle is understood to be a rule of customary international law which is codified in article 34 of the VCLT.[149] Despite this, treaty creates obligations for a third party provided that the party in question expressly accepts the obligations.[150] Nevertheless, in

[145] Article 34, Vienna Convention on the Law of Treaties

[146] International Law Commission, Draft conclusions on identification of customary international law, with commentaries, Yearbook of the International Law Commission, vol. II, Part Two, 2018, conclusion 2.

[147] Asad G. Kiyani, Al-Bashir & the ICC: The Problem of Head of State Immunity, P. 480

[148] Certain German Interests in Polish Upper Silesia, Merits, (1926), PCIJ (Ser A) No 7, 29.

[149] Vienna Convention on the Law of Treaties (VCLT), article 34

[150] Ibid, article 35

accordance to the VCLT, only parties to a treaty are able to amend it following consultation with other parties.[151] Given the fact that the Security Council is not a party to the Rome Statute and that the Rome Statute does not allow the Security Council to amend its provisions, a non-state party to the Rome Statute appears to have no obligation to arrest the head of state and transfer it to the ICC.

5.2 Security Council Referrals with the Customary Laws of Treaties

While some scholars consider the characterization of the Darfur referral as *ultra vires*, other argues that the referral does not mean that Sudan is bound by the terms of the Rome Statute, but only imposed the terms of that treaty, and as such it should not be understood to be *ultra vires*.[152] Nevertheless, Michael Wood believes that the referral created, for example, an obligation for the Sudanese government to cooperate with the ICC like as it was bound by it.[153]

5.2.1 Customary International Law Exception for Immunities?

It has been argued that the immunity of a head of state is derived from rules of customary international law. The action of Security Council from removing this immunity as such should be understood as ultra vires and not thus not binding upon member states.[154] However, one may argue for making an exception to this rule by bringing another rule of customary international law holding that individuals charged with international crime cannot enjoy immunity before an international criminal court.[155] This, in turn, means that there will be no need to rely on the authority of Security Council in dealing with Al-Bashir case. In other words, this can explain how the ICC Pre-Trial Chamber (PTC) relied on this alleged exception to justify its jurisdiction

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[151] Ibid, Article 39, 40

[152]Asad G. Kiyani, Al-Bashir & the ICC: The Problem of Head of State Immunity, P. 481; M. Wood, The Law of Treaties and the UN Security Council: Some Reflections, in: Enzo Cannizzaro (ed.), The Law of Treaties Beyond the Vienna Convention (2011), p. 251.

[153] Michael Wood, The Law of Treaties and the UN Security Council, p. 251.

[154] Asad G. Kiyani, Al-Bashir & the ICC: The Problem of Head of State Immunity, P. 486

[155] See generally Paola Gaeta, Does President Al Bashir Enjoy Immunity From Arrest? 7 J. Int'l Criminal Justice (2009).

in al-Bashir case.[156] In support of its customary status, the 1919 Report of the Commission on the Responsibility of the Authors of the War and the founding treaties of previous international criminal tribunals are mentioned to confirm that there is an international consensus on the customary status of the mentioned exception.[157] In addition, it has been argued that the rationale for personal immunity does not hold true in the case of international tribunals considering that they are free from biases which may exist in national courts.[158] Last but not least, there is an increasing trend in the practice of international criminal tribunals removing the immunities of the head of states. One may read from this and argue that the ICC then has jurisdiction to try the sitting head of a state.[159]

However, looking at the previous cases where the heads of states were prosecuted demonstrate that those cases involved former heads of state or incumbents whose immunity was waived, and the founding treaties of previous tribunals confirms the existence of a separate rule that does not have impact on personal immunities, but on substantive defences. Additionally, the argument that the international tribunals are free from biases are largely questionable and this line of thinking depends on different views of governments in various locations of the world. These arguments demonstrate that it is difficult to come to a conclusion confirming the existence of an exception to the customary rule on the head of state immunity.

5.2.2 A Lack of Supporting Case Law

In order to establish whether a certain practice has the status of customary law, two major conditions of state practice and *opinio juris* should be fulfilled. In this respect, there is not enough evidence pertaining to the fact that the head of states can be arrested and prosecuted for international crimes. The example of cases which are believed to support the customary status of this rule are not entirely relevant. This is because the individuals involved in those cases were the ones who are no longer sitting heads of state at the relevant time, and therefore do not have personal immunity. Furthermore, most of those cases concerned individuals who had been

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[156] Asad G. Kiyani, Al-Bashir & the ICC: The Problem of Head of State Immunity, P. 486

[157] Commission on the Responsibility of the Authors of the War and On Enforcement of Penalties—Report Presented to the Preliminary Peace Conference.

[158] Asad G. Kiyani, Al-Bashir & the ICC: The Problem of Head of State Immunity, P. 486

[159] Ibid

arrested and transferred with the consent and help of the concerned states; something can be understood as a waiver of their immunities by the concerned states. As such, these arguments cannot provide sufficient evidence that there exists an exception to the customary rule on the immunity of head of states.

In fact, the cases which the PTC relied to exercise its jurisdiction on al-Bashir case are example of four heads of states including Laurent Gbagbo, Muammar Gaddafi, Charles Taylor, and Slobodan Milošević. In this respect, the Gbagbo and Gaddafi cases are very problematic to see them as comparable with a case involving a sitting head of a state. Indeed, Mr. Gbagbo was not a sitting head of a state at the time of his arrest, and additionally his immunity was waived by his own government. Additionally, Mr. Gbagbo was in power as president from 2000 until 2010 when the contested election took place. Three years later, his government decided to declare its ad hoc acceptance of the jurisdiction of the ICC jurisdiction, which in turn means that accepting the statutory waiver of immunity under Article 27(2) of the Rome Statute. Besides, even before the arrest of Mr. Gbagbo, the government unconditionally accepted the jurisdiction of the ICC. These facts illustrate that arresting individual, who were a former head of a state and whose immunity had been waived, is compatible with the ordinary rules of customary international law. This, as such, confirm that such cases cannot be considered as relevant to establish a new exception to the customary law of the immunities of the heads of a state. Likewise, the case of Mr. Gaddafi is also irrelevant assuming that if he could live longer, his immunity could be waived by the new Libyan government and could be arrested and transferred to the ICC. The case of Charles Taylor does not also provide evidence for establishing a new customary law on the exception of the immunity for a head of a state considering that at the time of his arrest and transfer to the Special Court for Sierra Leone (SCSL) he was no longer in power already for three years.

Nevertheless, the case of Slobodan Milošević can be considered as to be more complex. However, in this case also by the time that Mr. Milošević was appeared before the ICTY, he had lost his re-election contest and thus he was considered to be a former head of the state. All these cases discussed in this section illustrate that there is no sufficient evidence to establish a new exception to the traditional customary law of head of State immunity.

5.2.3 Article 27(2) of the Rome Statute has no Statutory Predecessor

Apart from the discussed cases above, the PTC also used the historical statutory precedents to establish its jurisdiction, for example, in al-Bashir case. Nevertheless, it has been argued that the PTC has ignored using other explanations of this evidence that may result in different conclusion.[160] An example is the 1919 report of the Commission presented during the Preliminary Peace Conference which took place in the aftermath of the First World War. The content of the report meant that immunities should not apply in a situation of committing international crime.[161] This report finally led to the conclusion of one provision of the Versailles treaty, which in its article 227 states that "[t]he Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties."[162] Looking at this Article, again we can see that this deals with the immunity of the former head of a state. In addition, the content of this Article meant that the jurisdiction of Allies over the former Kaiser was not absolute, and instead of making an absolute obligation on the Netherlands to transfer the former Emperor, they could only request for his transfer – a request which was immediately rejected by the Netherlands.[163]

This once again illustrates that there is not sufficient evidence for making an exception to the customary rule on the immunity of the head of state.

Moreover, the PTC also brings other reasoning to justify its jurisdiction on al-Bashir case, for example by arguing that the statutes of previous international criminal tribunals make further evidence for believing that there is an exception to the customary law on immunity of head of state. However, this assumption fails to take into account the important difference existing in criminal law between substantive defense and procedural constraints like immunities.[164]

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[160] Ibid, P. 489

[161] Commission on the Responsibility of the Authors of the War and On Enforcement of Penalties—Report Presented to the Preliminary Peace Conference, reprinted in 14 AJIL (1920), 116–117

[162] Treaty of Versailles, 225 CTS 188

[163] Asad G. Kiyani, Al-Bashir & the ICC: The Problem of Head of State Immunity, P.490

[164] See generally, R. Cryer, Prosecuting International Crimes: Selectivity and the International Criminal Law Regime (2005).

The provision of Article 27(1) of the Rome Statute reflects a similar statement which exist in the Nuremberg and Tokyo Charters, as well as the ICTR and ICTY Statutes. The substantive defense of official capacity – the defense that an individual cannot be held responsible for the actions of the state – are all removed from the provision of these documents. But what makes the Rome Statute different is the provision of Article 27(2), which removes the procedural barriers that limit the jurisdiction of a court to deal with a case involving particular individuals. This as such confirm that the provision of Article 27 (2) has no statutory predecessor, and in fact none of the other documents even mentions immunities.

To conclude, assuming that the substantive defenses and procedural bars are identical, then the immunity of the head of a state could never be waived against the will of the accused person. This is in direct contrast with the nature of immunity and, as such, undermines the argument put forward by the PTC which claims that the statutory precedent supports its position.

6. Conclusion

The fundamental goals of those parties that redacted the Rome Statute were "that the most serious crimes of concern to the international community as a whole must not go unpunished" and "to put an end to impunity for the perpetrators of these crimes."[165] These aims can be achieved merely insofar as there is an endeavor to conduct to justice those individuals who intended and perpetrated such crimes. As story shows that international crimes are frequently done by public officials, therefore a plan of indictment until the summit can lead to prosecute high-ranking state officials. In all likelihood, the Court will rely on the cooperation of states to ensure the detention of those accused of serious crimes, so that the issue of the immunity of public agents from arrest and surrender is probably to be central in the tasks of the Court.

While applying to criminal matter pretending the perpetration of international crimes, the international law provisions regarding immunity should make a just balance, among the necessity to make sure that there is no excessive intrusion in the running of any states and the necessity to make sure that perpetrators of international crimes are penalized. Therefore, high -ranking public agents, like serving diplomats and other representative agents on special mission, have the right to immunity and cannot be apprehended or prosecuted while in function or when they work within the scope of the mission.

Nevertheless, the situation is dissimilar for other public agents like former civil servants (regardless of the grade they occupied). The evolution of the provision of universal jurisdiction shows that all states have the right to prosecute individuals in their territory that are charged of having perpetrated some international crimes, regardless of their nationality or the location where such crime was perpetrated. When this rule thinks over prosecution of public agents, those who are not granted immunity by reason of their actual position (immunity ratione personae) cannot invoke immunity ratione materiae in circumstances where universal jurisdiction is used. State parties to the Rome Statute went further on the evolution of customary international law. By opening the way for prospective indictment of all public agents by the court and by clearly suppressing the international law immunities of high-ranking agents, as well as heads of state (article 27), Rome Statute parties have accepted not just indictments by the Court, but equally the probability for high-ranking agents to be apprehended and handed over to the ICC by all states.

[165] ICC Statute, supra note 114, pmbl.

Such conclusion appears inevitable even with the provision of article 98 of the Statute. While it is difficult to reject the reasoning under which Article 98 conserves the international law immunities of agents from state parties to the statute while they are in nonparties states, such reading should be dismissed finally as it can make some section of article 27 inefficient. The granting of an authority to states to apprehend a head of state who is a guest or serving diplomats, goes further, but this is a unique chance to bring such individuals to the ICC. Considering the parties resolution in accordance with the Rome Statute to conduct all authors of international crimes to the Court, the Statute should be interpreted in a manner that allows this possibility.

As state immunity comes from the independence and sovereign equality of States[166], this concept should be put to the side when a State is acting in favor of an international court. In this context, the proverb *par in parem non habet imperium* ("An equal has no power over an equal") is difficult to apply since it is the Court and not a state that is apprehending and which eventually tries to use power.

Nonetheless, it should be noted that this removal of immunity vis-à-vis different states is considering once the Court demands for an apprehension and transfer, and this has no link with any internal prosecutions. It should also be noted that solely state parties to the Rome Statute have removed the immunities in accordance with international law (*ratione personae*) of their high-ranking public agents. While the ICC can use authority over citizens and agents of states that are non-parties, nevertheless there is no provision in the Statute that should influence the immunities of agents of those non-parties.

Consequently, the provision of article 98 of the Statute constitutes a message for the Court and the Rome Statute parties not to interfere with those agents of non-parties who normally enjoy immunity under international law.

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[166] See HAZEL FOX, THE LAW OF STATE IMMUNITY (2002) at 30.

Bibliography

Legal Sources

Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of their Forces, June 19,1951, [hereinafter NATO SOFA].

Charter of the International Military Tribunal for the Far East, Jan. 19 & Apr. 26, 1946.

Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946.

European Convention on Extradition, Dec. 13, 1957.

International Criminal Court Act, 2002.

Military Technical Agreement Between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan, Jan. 4, 2002.

Rome Statute of the International Criminal Court, July 17, 1998.

Statute of the International Court of Justice, Oct. 24, 1945.

Statute of the International Criminal Tribunal for Rwanda, SC Res. 955, (1994).

Statute of the International Criminal Tribunal for the Former Yugoslavia, (1993).

United Nations Convention on Special Missions, Dec. 8,1969.

United Nations, Charter of the United Nations (UN Charter), 24 October 1945.

Vienna Convention on Consular Relations, 1963, [hereinafter VCCR].

Vienna Convention on Diplomatic Relations, Apr. 18, 1961, [hereinafter VCDR].

Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, [hereinafter VCLT].

Books

BROOMHALL , BRUCE, INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW (2003).

BYERS ,MICHAEL, CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW 19 (1999).

Cassese ,Antonio , International Criminal Law, in International Law 720 (Malcolm D.Evans ed., 2003).

Crawford , James, International Law Foreign Sovereigns: Distinguishing Immune Transactions, 1983 BRIT. Y.B INT' LL 75.

CRAWFORD ,JAMES, SANDS, PHILIPPE, & WILDE, RALPH, IN THE MATTER OF THE INTERNATIONAL CRIMINAL COURT AND IN THE MATTER OF BILATERAL AGREEMENTS SOUGHT BY THE UNITED STATES UNDER ARTICLE 98(2) OF THE STATUTE (June 5, 2003).

DENZA, EILEEN , DIPLOMATIC LAW (1998).

FOX, HAZEL, THE LAW OF STATE IMMUNITY (2002).

MALANCZUK AKEHURST'S ,PETER, MODERN INTRODUCTION TO INTERNATIONAL LAW 118 (7th ed. 1997).

Salvatore Zappala, The Reaction of the US to the Entry into Force of the ICC Statute: Comments on UNSC Resolution 1422 (2002) and Article 98 Agreements, 1 J. INT'L CRIM.JUST. 114 (2003).

Sarooshi, Danesh, The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers (2000).

SCHABAS, A.WILLIAM, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 92 (2001).

Tomonori , Mizushima, The Individual as Beneficiary of State Immunity: Problems of the Attribution of Ultra Vires Conduct, 29 DENV.J. INT'L L. & POL'Y 261 (2001).

Watts, Arthur, The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers, 247 RECUEIL DES COURS 13 (1994 III); C. A.

Wirth ,Steffen, Immunities, Related Problems, and Article 98 of the Rome Statute, 12 CRIM. L.F. 429, 452-54 (2001).

Journal Articles

Akande, Dapo ,The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits, 1J. INT'L CRIM.JUST. 618, 628-31 (2003).

Akande, Dapo, International Law Immunities and the International Criminal Court ,The American Journal of International Law, Vol. 98, No. 3 (Jul., 2004).

Asad G. Kiyani, Al-Bashir & the ICC: The Problem of Head of State Immunity, 2013 Published by Oxford University.

Tunks, A.Michael ,Diplomats or Defendants? Defining the Future of Head-of-State Immunity, 52 DUKE LJ. 651, 656 (2002).

CASES

Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.).

Asylum Case (Colom. v. Peru), 1950 I.C.J. 266, 276–77 (Nov. 20).

Case Concerning Armed Activities on The Territory of The Congo (Democratic Republic of the Congo v. Uganda), ICJ Decision of 19 December 2005.

Ghaddafi Case Before the French Cour de Cassation, 12 EUR.J. INT'L L. 595 (2001).

Lockerbie case (Libya v UK), Provisional Measures, ICJ Reports 1992.

Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 97 (June 27).

Prosecutor v. Charles Taylor, Immunity from Jurisdiction, No. SCSL-03-01-I (May 31, 2004).

Prosecutor V. Omar Hassan Ahmad Al-Bashir, ICC-02/05-01/09, Pre-Trial Chamber I, Decision on the prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al-Bashir (4 March 2009) (First Bashir Warrant) and Second Decision on the prosecutor's Application for a Warrant of Arrest (12 July 2010) (Second Bashir Warrant).

United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Merits, 1980 ICJ REP. 3, para. 91 (May 24).