

**Palacký University in Olomouc
Faculty of Law**



Fodé Traoré

**The International Criminal Court and the Head of
States Immunity**

Master's Thesis

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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. Also, 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.

So, 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 2022

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."

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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
- OAU- Organization of African Unity
- ILC- International Law Commission

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. Also, 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 law¹. 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

So, 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

¹ See Dapo Akande, International Law Immunities and the International Criminal Court, the American Journal of International Law, Vol.98, No. 3 (Jul. 2004), P.407.

² Ibid, P.407.

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 Tribunals?

1.3 Material

In compliance with the goal of this work, the various part of this document will comprise primary, secondary and internet sources.

The first source will comprise the judgments of the Pre-Trial Chamber of the International Criminal Court, Rome Statute of the International Criminal Court, Convention on the Privileges and Immunities of the United Nations, Vienna Convention on Diplomatic Relations, the Charter of the United Nations, Vienna Convention on the Law of Treaties and the General Convention

on the Privileges and Immunities of the Organization of African Unity. These first sources are essential to make an examination of the customary regulations of International Law regarding immunity. Concerning the subsidiary sources, they refer to books and scholar articles.

1.4 Delimitation

This paper is focused mainly to an examination of the dispute over the legitimacy of the ICC and the difficult partnership between the court and states from African regions.

Especially the request made by the tribunal to apprehend the Sudanese Al Bashir and the Libyan Muammar Gaddafi although they were in office and moreover the court accused Uhuru Kenyatta who later was elected Kenyan president. 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 prosecution of Al-Bashir the Sudanese head of State 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

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 *opinio juris*.⁶

³Al-Bashir is pretended to have facilitated plan, arrange, and perform horrible atrocities comprising: the compulsory relocation of numerous noncombatants; the rape of numerous women; ill treatment; massive murder of populations; and genocide. See Case: The Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-3, Pre-Trial Chamber I, Decision on the prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al-Bashir 4 March 2009 and Second Decision on the prosecution's Application for a Warrant of Arrest 12 July 2010, ICC-02/05-01/09-94.

⁴ See Asad G. Kiyani, *Al- Bashir & the ICC: The Problem of Head of State Immunity*, Oxford University Press, 2013, P.468.

⁵International Custom is accepted as one of the main sources of international law. Statute of the International Court of Justice, Oct. 24, 1945, art. 38, para. 1. The other accepted sources are treaties, general principles of law, judicial decisions, and writings of academics.

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 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 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

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 public agents, especially chief of the country, prime minister, and minister of foreign affairs.¹² They can be used also by ambassadors and other public representatives in particular task abroad.¹³

the *opinio juris* element establishes that "only that behavior which is considered legally relevant is regarded as capable of contributing to the process of customary international law").

⁷ See Michael A. Tunks, *DIPLOMATS OR DEFENDANTS? DEFINING THE FUTUR OF HEAD- OF STATE IMMUNITY*, 52 *DUKE LJ.* 2002. P.653.

⁸ *Ibid*, P.653.

⁹ *Ibid*, P.653.

¹⁰ See Dapo Akande and Sangeeta Shah, *Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, *The European Journal of International Law*, Vol.21, P.817.

¹¹ *Ibid*, P.818.

¹² Dapo Akande and Sangeeta Shah, above note 10.

¹³ See United Nations Convention on Special Missions, Dec. 8,1969, Vol.1400 P 231; Vienna Convention on Diplomatic Relations, 18 April 1961, Arts. 29,31.

Such immunities are accorded on public agents mostly with the aim to perform the country external relationship and rely on the acknowledgment that the productive evolution of global relationship and worldwide collaboration requires an effective procedure of discussion between different countries.¹⁴ The efficiency of this process of discussion and collaboration also requires that public agents in the fulfillment of their duties regarding external relationship should be capable to move effectively, to perform their tasks without any threat or chance of intimidation by different countries.¹⁵

Thus, such immunities are essential to keep a framework of friendly collaboration and a harmonious living together between different States.¹⁶ Like the International Court of Justice has well mentioned, there is "no more fundamental prerequisite for the conduct of relations between States . . . than the inviolability of diplomatic envoys and embassies."¹⁷

As chiefs 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 International Court of Justice declared that this kind of immunity can be used with regards to the acts achieved in public capacity 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 breach of international rule.²⁰

Nevertheless, as immunity *ratione personae* is accorded in a way that enables the effective practice of diplomatic and representative tasks, it can be used by public agents during all term

¹⁴ Dapo Akande and Sangeeta Shah, *supra* note 10, P.817.

¹⁵ *Ibid*, P.818.

¹⁶ Case Democratic Republic of Congo v Belgium: Arrest warrant of 11 April 2000, mixed different viewpoints of judges Buergenthal, Higgins, and Kooijmans, para 75.

¹⁷ Dapo Akande and Sangeeta Shah, *above* note 15, P.818.

¹⁸ See Arrest Warrant, *above* note 16, para. 54; See equally the treaty provisions mentioned *above* note 13.

¹⁹ See Arrest Warrant, *above* note 16, paras. 54-55.

²⁰ Dapo Akande and Sangeeta Shah, *supra* note 10, p.819.

of their functions. The International Court of Justice has recognized the total character of the immunity from arrest and surrender in criminal matter which is granted to a minister of foreign affairs and declared that such immunity exists even when it is pretended that the official in question has perpetrated some serious international crime and can be also used even when such public agent is in a foreign country for a personal reason.²¹

The ICJ declared 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 theory should be regarded as universal and granted to all high-ranking public agents and representatives benefiting immunity *ratione personae*.²³

The lack of this type of immunity regarding an international crime carried out everywhere is possibly to prevent international cooperation and not to reinforce the protection of human rights.²⁴ According to this rationale, any measure that is waiving immunity will purely prevent foreign agents from moving to other countries.

This theory authorizing immunity *ratione personae* for high-ranking public agents concerning serious human rights violations has been implemented lately by numerous domestic tribunals. 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

²¹ Ibid, P.819.

²² Ibid, P.819.

²³ Dapo Akande and Sangeeta Shah, *supra* note 10, P.819.

²⁴ Ibid, P.818.

²⁵ See Michael A. Tunks, *supra* note 7, P.663.

²⁶ Ibid, P.663.

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

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 proceedings, when it comes to ministers of foreign affairs, occasionally this question has been controversial.³⁰

Nonetheless, in the Arrest Warrant case, the International Court of Justice has demonstrated 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 from different ranking move in the fulfillment of their tasks. Numerous departments different from those in charge of external matters occasionally execute some actions on behalf of their country at global level. They can supervise discussions with their counterparts or to

²⁷ See Michael A. Tunks, *supra* note 7, P.663.

²⁸ Dapo Akande, *supra* note 1, P.411.

²⁹ Arrest Warrant, *supra* note 16, para. 51 (emphasis added). The use of the words "such as" suggests that the list of senior officials authorized to use such immunity is extensive.

³⁰ Dapo Akande and Sangeeta Shah, *supra* note 10, P.820.

³¹ Arrest Warrant, *supra* note 16, para. 53.

become the envoys of their State in worldwide meeting. 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 an agreement.³²

Furthermore, in accordance with international customary regulation and the pact rule, any public agent performing their duties on a special mission in another state can be untouchable, meaning is not possible to arrest or jailed him.³³ Thus, such theory is totally logical with the principle supporting 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

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.

³² Dapo Akande and Sangeeta Shah, *supra* note 10, P.821.

³³ *Ibid*, P. 821.

³⁴ See Dapo Akande, *International Law Immunities, and the International Criminal Court*, *supra* note 1, P. 412; Dapo Akande and Sangeeta Shah, *supra* note 10, P. 825.

³⁵ *Ibid*, P.825.

³⁶ Dapo Akande and Sangeeta Shah, *supra* note 10, P.825.

³⁷ *Ibid*, P.826.

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 if immunity *ratione materiae* is acknowledged in criminal matter and the aims according to which it is accorded can be used 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 former state officials are usually accorded immunity *ratione materiae* regarding their official acts, nonetheless this immunity doesn't work in circumstance where some serious human rights violations are perpetrated, and which matter is sent in front of the national criminal tribunal of another state.

Many events of prosecution against foreign public agents occurred in front of domestic criminal tribunals 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

³⁸ Dapo Akande and Sangeeta Shah, *supra* note 10, P.826.

³⁹ *Ibid*, P.826.

⁴⁰ *Ibid*, P.827.

⁴¹ *Ibid*, P. 839.

⁴² See Dapo Akande and Sangeeta Shah, *supra* note 10, P.839.

⁴³ *Ibid*, P.840.

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 the European Court of Human Rights⁴⁷ 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 conferring immunity *ratione materiae* disappears.

⁴⁴ Ibid, P.828.

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

⁴⁶ Dapo Akande, *supra* note 1, P.414.

⁴⁷ Ibid, P.414.

⁴⁸ Ibid, P.414.

⁴⁹ See Dapo Akande and Sangeeta Shah, *supra* note10, P.840.

⁵⁰ Dapo Akande, *supra* note 1, P.415.

In such circumstance, there is no reason logically for immunity *ratione materiae* to get along with such a granting of an authority. Indeed, to use in this context, the previous regulation conferring immunity can have the result of denying practically the last legal principle of all significance. This is 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, such 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.

⁵¹ See Dapo Akande and Sangeeta Shah, *supra* note 10, P.841.

⁵² Dapo Akande, *supra* note 1, P.415.

⁵³ *Ibid*, P. 415.

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.

3.1 The 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

⁵⁴ See Dapo Akande, *supra* note 1, P. 415.

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 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

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.

⁵⁷ Dapo Akande and Sangeeta Shah, *supra* note 10, P.826-827.

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 becomes 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 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

⁵⁸ See Rome Statute of the International Criminal Court, July 17, 1998. Arts. 86, 89.

⁵⁹ Dapo Akande, International Law Immunities, and the International Criminal Court, *supra* note 1, P.420.

⁶⁰ *Ibid*, P. 420.

⁶¹ *Ibid*, P.420.

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 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 Parties⁶⁶, 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

⁶² Dapo Akande, *supra* note 1, P.421.

⁶³ *Ibid*, P.421.

⁶⁴ *Ibid*, P.421.

⁶⁵ *Ibid*, P.421.

⁶⁶ *Ibid*, P.421.

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 case⁶⁹, 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 academics⁷¹ 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 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.

⁶⁷ See Dapo Akande, *supra* note 1, P.421.

⁶⁸ *Ibid*, P.421.

⁶⁹ *Ibid*, P.421.

⁷⁰ *Ibid*, P.422.

⁷¹ See Dapo Akande, *supra* note 1, P.422.

⁷² *Ibid*, P.422.

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

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

⁷³ Ibid, P.422.

⁷⁴ Ibid, P.422.

⁷⁵ See Dapo Akande, *supra* note 1, P. 422.

⁷⁶ Ibid, P. 423.

⁷⁷ Ibid, P.423.

⁷⁸ Ibid, P.423.

⁷⁹ Ibid, P.423.

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 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

⁸⁰ See Vienna Convention on the Law of Treaties, May 23, 1969.Arts. 34,38.

⁸¹ Dapo Akande, *supra* note 1, P.423; ICC Statute, *supra* note 58, Art. 90(4).

⁸² ICC Statute, *supra* note 58, Art. 73; Dapo Akande, *supra* note 1, P.423.

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 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.⁸⁶As 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 law⁸⁷ 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

⁸³ Ibid, P.424.

⁸⁴ Ibid, P.424.

⁸⁵ See Dapo Akande, *supra* note 1, P. 424.

⁸⁶ Ibid, P.424.

⁸⁷ ICC Statute, *supra* note 58, Art. 98(1).

inquiries and moreover to issue an arrest warrant under article 58 against officials who may in other ways be granted immunity.⁸⁸

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.

⁸⁸ See Dapo Akande, *supra* note 1, P.424.

⁸⁹ *Ibid*, P.424.

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 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 organization⁹⁰ 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 parties in the territory of other states that act at the demand of the court. Mention has previously

⁹⁰ Ibid, P.425.

⁹¹ Ibid, P.425.

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 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

⁹² See Dapo Akande, *supra* note 1, P.425.

⁹³ *Ibid*, P.425.

⁹⁴ *Ibid*, P.426.

⁹⁵ *Ibid*, 426.

⁹⁶ *Ibid*, P.426.

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) 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

⁹⁷ See Dapo Akande, *supra* note 1, P.426.

⁹⁸ *Ibid*, P.426.

⁹⁹ *Ibid*, P.427.

¹⁰⁰ Dapo Akande, *supra* note 1, P.427.

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

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 continues to be the same situation 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

As mentioned above¹⁰⁶, 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.

¹⁰¹ Ibid, P. 427.

¹⁰² Ibid, P.427.

¹⁰³ Ibid, P.427, 428.

¹⁰⁴ See Dapo Akande, supra note 1, P.428.

¹⁰⁵ Ibid, P. 428.

¹⁰⁶ Ibid, P.428.

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 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

¹⁰⁷ See Dapo Akande, *supra* note 1, P.428.

¹⁰⁸ *Ibid*, P.428.

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 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 nonparty's 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 issued, 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

¹⁰⁹ Ibid, P. 431.

¹¹⁰ Ibid, P.431.

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 other 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 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

¹¹¹ See Dapo Akande, *supra* note 1, P.431.

¹¹² *Ibid*, P.431.

¹¹³ *Ibid*, P.431, 432.

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 between 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, 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. The second option is more understandable in our viewpoint.

¹¹⁴ Rome Statute of the International Criminal Court, July 17, 1998.

¹¹⁵ Ibid, Art. 13(b).

¹¹⁶ Security Council Resolution 1593, March 31, 2005.

The principal problem with all these lines of argumentation is that neither the Chapter VII nor Article 103 of the United Nations Charter allows the Security Council to extend the power of the Court.¹¹⁷ The ICC is incapable to exercise Chapter VII authorities 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 Charter¹¹⁸ 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 Nations¹²⁰; “regional arrangements” as envisaged in Article 51 of the Charter¹²¹ 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 include the Organization of American States, the Arab League, and the African Union.¹²²

Authorizing the ICC to get a regional statute regarding Chapter VII power, may endanger the task of the United Nations in keeping international peace¹²³ 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 authorities which can be delegated to

¹¹⁷ L, Condorelli. and S, Villalpando, *The Rome Statute of the International Criminal Court: A Commentary*, 2002. P.572.

¹¹⁸ See Asad G. Kiyani, *Al-Bashir & the ICC: The Problem of Head of State Immunity*, supra note 4, P.475.

¹¹⁹ D, Sarooshi. *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* 1999, P.247, 252 and 253.

¹²⁰ Asad G. Kiyani, supra note 4, P. 475.

¹²¹ *Ibid*, P.475.

¹²² *Ibid*, P. 475.

¹²³ *Ibid*. P. 475, 476.

¹²⁴ *Ibid*, P.476.

regional offices are military implementation powers¹²⁵, 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 Peace¹²⁷, 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 Special Court for Sierra Leone, the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, the ICC is entirely governed by the Assembly of its States parties.

Whereas juridically independent, the ICTR and ICTY 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 Special Court for Sierra Leone, the Secretary General of the UN supervises himself or with other members of the Court, the appointment of magistrates, prosecutors, and other officers of the tribunal.¹³²

In the light of our analysis, there is no juridical basis according to which the Court may exercise the Chapter VII authorities comprising the power to tie states that are nonparties to the statute.

¹²⁵ See D, Sarooshi. *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers*, P.248, 251.

¹²⁶ B, Conforti. *The Law and Practice of the United Nations*, 3 rd. ed, 2005. P. 231, 238; and D, Sarooshi. *Ibid*, P.247, 253.

¹²⁷ See Asad G. Kiyani, *supra* note 4, P.476.

¹²⁸ *Ibid*, P.476.

¹²⁹ *Ibid*, P.476.

¹³⁰ *Ibid*, P.476.

¹³¹ Asad G. Kiyani, *supra* note 4, P.476, 477.

¹³² *Ibid*, P. 477.

4.2 Article 103 and the primacy of the United Nations Security Council:

The next rationales in Omar Hassan Ahmad Al Bashir case according to which Sudanese State must comply with the Security Council referral because it is one member of the UN community, particularly its consent of the supremacy of the United Nations through Article 103¹³³ 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 treaties¹³⁴, not the rules of customary international law like high-ranking public officials' immunity or the rules regulating pacts. In such circumstance, those customary regulations are conflicting with the rationale according to which the Security Council referral can nullified the Sudanese president's immunity.

The history of Article 103 shows that subsequent to an extended debate in order to know if the UN Charter should predominate upon every international law, the writers have deliberately chosen to specify international pacts instead of every international duties, lifting up the United Nations Charter only above treaties and other international agreements.¹³⁵ That was proclaimed by the General Assembly in the Declaration on Friendly Relations¹³⁶, 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 Assembly¹³⁸, without any denial, and equally established by the International Court of Justice

¹³³ See Charter of the United Nations, 26 June 1945, art. 103.

¹³⁴ Asad G. Kiyani, *supra* note 4, P.478.

¹³⁵ *Ibid*, P.478.

¹³⁶ *Ibid*, P.478.

¹³⁷ *Ibid*, P.478.

¹³⁸ *Ibid*, P.479.

(ICJ)¹³⁹, and numerous scholars have drafted regarding the UN¹⁴⁰ and the Lockerbie case of the International Court of Justice.¹⁴¹

So, the Charter takes precedence only 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 and that predominate above other juridical rules”¹⁴² That viewpoint, early raised by the Austrian jurist and legal philosopher Hans Kelsen, in 1950¹⁴³, has been taking into account by the International Court Of Justice in the Lockerbie decision¹⁴⁴ and reinforced by numerous academics.

¹³⁹ Asad G. Kiyani, supra note 4, P.479.

¹⁴⁰ Ibid, P.479.

¹⁴¹ Ibid, P.479.

¹⁴² Ibid, P.480.

¹⁴³ Asad G. Kiyani, supra note 4, P.480.

¹⁴⁴ Ibid, P.480.

5.Exceptions and Limitations to Immunity Rule for State Officials, Current Work of the International Law Commission

In 2017, following a very controversial vote on exceptions and limitations to immunity of public officials, which is well known as draft article 7 of the ILC, the International Law Commission has temporarily added recent draft articles during its last seance in 2021. The new draft article added enumerates six serious international crimes like war crimes, the crime of genocide, crimes against humanity, enforced disappearances, torture and crime of apartheid for which immunity *ratione materiae* cannot be granted. Such exceptions cannot be enforced when it comes to immunity *ratione personae*.

The principal denunciation formulated in opposition to the draft article is the fact that it does not constitute current rule and in states behaviours, it has no foundation. In the following part, this paper will underline the context of adoption of the draft article by the committee, as well as a short view of the report that is the foundation of the draft article 7 and numerous reasonings provided hostile to the acceptance of the draft article. In the second part, it will be demonstrated that exceptions and limitations to immunity *ratione materiae* still cannot establish international customary law.

5.1 The Clauses of Draft Article 7 and the Justifications for its Acceptance

Early it is fundamental to indicate the structure of this text before starting any analysis. As this paper explains the actual work of the committee based on immunity of public agents from external criminal judicature, its framework is going to be like the one of the draft articles of the commission.¹⁴⁵ Therefore, this text is going to be restricted mainly on immunities of public agents according to international customary rule and will not cover State immunity or other immunities contained in different pacts like diplomatic immunities according to the Vienna Convention on Diplomatic Relations. Likewise, as the structure of the Committee's work

¹⁴⁵ Draft art 7 para 1 on the Immunity of State Officials from Foreign Criminal Jurisdiction adopted provisionally by the Commission, ILC report during its Sixty-Ninth Session, GA Official Records, Seventy-Second Session, Supplement No 10.

examine immunity with regards to external criminal judicature, therefore the question of immunity before the ICC is precluded.

The International Law Commission has double task, that is to codify and develop international law continuously.¹⁴⁶ Under the Commission Statute, codification happens when the Commission organizes the different provisions of international law on topics where there is enough practice of States.¹⁴⁷ With regards to continual development, it is about events which still have not been discussed by international law or that have not been used enough by numerous States.¹⁴⁸

For opponents to the draft articles 7, this is something new that cannot be qualified as codification or constant development. According to their opinion, draft article 7 is a new rule which has no foundation in States behaviours. Finally, the draft articles 7 was approved by the Committee after a very controversial vote on July 20, 2017.

It is fundamental at this level to recap the context under which the Draft Article 7 was approved by the Commission. The fifth report was transmitted to the committee by the special rapporteur about immunities, which includes limitations and exceptions to immunity over the sixty-eighth session in 2016.¹⁴⁹ The report offers an important review of practice application, domestic regulation, and domestic court judgments like examples of practice by States. Equally it offers a review of international tribunal judgments and the work of the commission, that are the secondary methods for the establishment of international law regulations. It deduces that according to international law no exception is possible to immunity *ratione personae*.

Regarding immunity *ratione materiae*, the report deduces dubiously that there are limitations and exceptions to immunity *ratione materiae*. Such concluding remark was a subject of a lot of disagreement and dissension within the commission and that is examined in this paper.

¹⁴⁶ Article 1 of the International Law Commission Statute.

¹⁴⁷ *Ibid.* Para 15.

¹⁴⁸ *Ibid.*

¹⁴⁹ Fifth report, Concepcion Escobar Hernandez, Special Rapporteur on the Immunity of State Officials from Foreign Criminal Jurisdiction, 2016.

It is fundamental to start with the Special Rapporteur behavior toward pact application. To demonstrate limitations and exceptions to immunity *ratione materiae*, he was relying on different agreements like Enforced Disappearance Convention, Genocide Convention, and the Convention against Torture.¹⁵⁰ For instance the Apartheid Convention and the Genocide Convention comprise clauses precluding the legal status when it comes to the question of liability for serious international crime.¹⁵¹

Concerning the practice in domestic regulation, the report started by mentioning different rules about immunity. However, it comments that the question of immunity of public agents at domestic level is not clearly mentioned in many States.¹⁵² At the same time, it acknowledges some domestic rules dealing with question relating to some public agents' immunities.¹⁵³ The following countries: Spain, United States of America and Argentina are mentioned to be especially pertinent.¹⁵⁴ The report also relates many national laws achieving the goals of the ICC Statute, fact from which two main perspectives can be found. The first perspective is about the pertinent national laws that rejects immunity in cases relating to crimes within the scope of the ICC.¹⁵⁵ The next perspective restricts the non-use of immunity to circumstances under which collaboration is required with the International Criminal Court.¹⁵⁶

With regards to international crimes, the report makes mention of the case against Ex Parte Pinochet in UK as example of practice by States.¹⁵⁷ Moreover, the report pointed out the decisions of international tribunals comprising the ICJ. It offers a very long examination about the Arrest Warrant case.¹⁵⁸ It is understandable according to the examination of the different decisions mentioned in the report that jurisprudence offers only a small assistance to immunity

¹⁵⁰ Fifth Report on Immunity, above note 149, Para 32.

¹⁵¹ *Ibid.* Para 33.

¹⁵² *Ibid.* Para 44.

¹⁵³ *Ibid.*

¹⁵⁴ Fifth Report on Immunities, above note 149, Paras 47-53.

¹⁵⁵ *Ibid.* Para 58.

¹⁵⁶ *Ibid.* Para 59. Under the report, States following that perspective are Kenya, Switzerland, Canada, Uganda, France, New Zealand, Germany, and Norway.

¹⁵⁷ Ex Parte Pinochet, United Kingdom House of Lords Decisions, 24 March 1999.

¹⁵⁸ See Arrest Warrant of 11 April 2000, Democratic Republic of Congo, Judgment Of 14 February 2002, 3 P, Paras 60-61.

exceptions trend. Identical deduction appears from the report about judgments of the European Court of Human Rights.

5.2 Exceptions and Limitations to Immunity Ratione Materiae still cannot establish International Customary Law

The International Court of Justice in the Republic of Nicaragua v. the United States of America case declared that two fundamental elements: objective State practice, and State's subjective belief that their behaviour is obligatory under international law, an element known as *opinio juris*, are needed to create international customary law.¹⁵⁹ The reality of State practices with regards to immunity exceptions needs to fulfill the conditions of continuance, accuracy, and generalization. While looking at different practices from national and international side, it is possible to clearly see that immunity of public agents from external criminal judicature, is a rule of international customary law. Nevertheless, concerning the exceptions and limitations to immunity of public agents from external criminal judicature, the practice is different from one State to another one and that fact is inadequate to establish a rule of international customary law.

¹⁵⁹ See *Military and Paramilitary Activities, the Republic of Nicaragua v. the United States of America* in 1986.

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."¹⁶⁰ 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. Likely, the Court will rely on the cooperation of states to ensure the detention of those accused of serious crimes, so 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, between 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.

¹⁶⁰ ICC Statute, *supra* note 114, pmb1.

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 States¹⁶¹, 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.

¹⁶¹ See HAZEL FOX, THE LAW OF STATE IMMUNITY (2002) at P. 30.

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