The Head of State Immunity Doctrine in the Al Bashir case:  

*Is the Arrest Warrant Lawful?*

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1 Introduction

On the 12th of July 2010 The Pre-Trial Camber of the International Criminal Court issued a second warrant of arrest for Omar Hassan Ahmad Al Bashir. But less than 3 weeks before the same person was sworn in for another five-year term as President of Sudan, Al Bashir is indicted by the ICC for ten counts of war crimes, crimes against humanity and genocide which he is suspected to have committed in Darfur (region of Sudan) during his presidency of Sudan since 1993. The judges of the ICC believe that there are reasonable grounds that Al Bashir has personal responsibility as an indirect (co-) perpetrator under article 25(3)(a) Rome Statute. The United Nations (UN) referred the case to the ICC to be reviewed by the prosecutor by means of a resolution. Sudan is not a State Party to the Rome Statute of the ICC but though a member of the UN, which forces them to comply with resolutions of the Security Council in which the UN urges Sudan to cooperate fully with the court. But can the Security Council impose the Rome Statute as a whole on a State that has not ratified it?

In international customary and treaty law something known as Head of State immunity exists. This concept is derived from respect for sovereign equality and State dignity. The UN is founded on the principle of sovereign equality of all member States, and States are prohibited to interfere in affairs that are within the domestic jurisdiction of another member State. The ICC holds a different view on Head of State immunity concerning the four different crimes it has jurisdiction over: war crimes, crimes against humanity, genocide and aggression. In article 27 Rome Statute the entire concept of Head of State immunity is waived. This attempt to abolish immunity for all officials is praiseworthy, but is it lawful? Customary law that evolved over decades stipulates that heads of state have immunity, including personal inviolability and exemption from criminal prosecution in a foreign State. Several cases before national courts, tribunals and the International Court of Justice give different opinions and thoughts about this issue. The central research question of this thesis is therefore: Is the warrant for arrest for Al Bashir lawful considering the Head of State immunity doctrine?

This thesis will give an overview of the development of the concept of immunity in international law and jurisprudence in general. The jurisprudence chosen in this thesis reflect the evolution of Head of State immunity in a concrete way before different courts and are landmark cases because other courts have relied on these judgments in subsequent verdicts. The ICC case of Al Bashir will be investigated and we will review to what extent and in which form immunity can be applied on this case and what other issues could make the Arrest Warrant unlawful. This thesis will highlight different theories about several aspects of the case with the objective of concluding if the issuance of the Arrest Warrant for Al Bashir was lawful.

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1 Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, in the case of The Prosecutor v. Omar Al Bashir, No.: ICC-02/05-01/09
2 Al Bashir was re-elected on 26 april 2010 as Sudan’s president and installed as such on 27 may 2010.
3 Article 25(3)(a) Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9*, 17 July 1998: “In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: a. Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;...”
5 Sudan signed the Rome Statute on 8 september 2000, but has never ratified it. In august 2008 the Secretary-General Ban-Ki Moon of the UN received a letter from Sudan’s Minister of Foreign Affairs Deng Alor Koul communicating the “unsigning” of the Rome Statute by Sudan (UN CN 612 Notification 27 August 2008).
6 See par. 4.3
7 See chapter 3
2 Head of State Immunity

The concept of Head of State immunity is derived from common law and the recognition of its existence goes centuries back. Throughout history the concept evolved but has never been explicitly codified as a single consistent rule of law. The tension between sovereign equality and exclusive territorial jurisdiction resulted in the doctrine of foreign State immunity and also Head of State immunity. The dimensions of Head of State immunity are always changing and many authors and courts debate whether or not it has become customary international law nowadays. In this chapter the past and current theories regarding immunity and the different forms in which it exists is described and discussed.

2.1 Functional and Personal Immunity

Immunity for State officials can be separated in two categories: *ratione materia* (functional immunity) and *ratione personae* (personal immunity). In international law this division emerged because of the protection of the two general values of Head of State immunity, namely the execution of official functions and the protection of each State’s dignity. These immunities mainly apply as a warranty against prosecution by foreign national courts.

All State officials have functional immunity, for actions executed as part of their responsibilities as State official. These actions can directly be attributed to the State and therefore cannot inflict individual responsibility on the State official. Nevertheless, a State official can be indicted when his acts seem to go beyond his mandate. It has become a generally accepted rule of international law that certain acts, such as core crimes, are always in excess of a mandate.

Only the officials higher up in rank, such as Head of State, ministers of foreign affairs and diplomats, have personal immunity. This personal immunity extends to all acts committed while being in office and ceases to exist when the official leaves his position. It is designed to protect the high State officials from criminal prosecutions during their time holding an official State position. The Head of State immunity is a personal immunity from jurisdiction, courts are obliged to refrain from jurisdiction over such cases. This provides many problems for prosecution of incumbent or former heads of state, which will be discussed later in this thesis.

2.2 Theories of Head of State Immunity

2.2.1 Absolute Theory

The Head of State immunity is found first in history as an absolute immunity which exists as a sign of respect and recognition for the sovereignty of the State. It meant that heads of state could not be held responsible for their actions in another State, because the courts did not have jurisdiction over a foreign Head of State. The absence of jurisdiction is based on two profound underlying principles. First, the Head of State is in theory identified as sovereign through the sovereignty of the State according to the concept of “an equal has no power over an equal”. Second, there was almost no movement across the borders needed for an

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9 Van Alebeek, *supra* note 8, p. 157
11 The origins of this concept are traced back to the fourteenth-century Italian jurist, Bartolus, who wrote “Non enim una civitas potest facere legem super alteram, quia par in parem non habet imperium”, Brian A. Garner, *Black’s Law Dictionary*, West Group, St. Paul 1999, p. 1673
effective maintenance of international relations back then\(^\text{12}\). International law was only applicable to States, and not to their government leaders, so they could behave in the name of their State in any way they wished. Because the Head of State identified with the State itself, which could not be prosecuted in a foreign court, this also protected them from individual responsibility. This theory is known as absolute immunity and it considered immunity as a fundamental State right due to the principle of sovereign equality.

2.2.2 Restricted Theory

The theory of restricted immunity arose when the fictional conformity between State and Head of State faded, especially when States became commercial entities.\(^\text{13}\) It is derived from an exception of the principle of State jurisdiction and in jurisprudence a distinction was made between *jure imperii* (State acts of a sovereign or governmental character subject to State immunity) and *jure gestionis* (State acts of a commercial or private character not subject to State immunity).\(^\text{14}\) This restricted immunity was accepted because judicial review of commercial or private actions of a foreign State was not deemed to be an infringement of a State’s sovereignty.\(^\text{15}\)

2.2.3 Normative Hierarchy Theory

Recently a new theory of Head of State immunity came forth known as normative hierarchy immunity. This theory has been developed by modern international human rights law and international criminal law to be able to hold heads of state personally responsible for serious violations of international law. This theory implies that jurisdictional immunity is no longer applicable if a State breaches fundamental norms of international law\(^\text{16}\) known as *jus cogens*.\(^\text{17}\) The underlying thought is that the international law norms rank higher in hierarchy than State immunity because they are *jus cogens* norms and they will always prevail over non-*jus cogens* norms. In the Arrest Warrant case, Judge Al-Khasawneh described in his dissenting opinion the normative hierarchy theory, stating:

> "The effective combating of grave crimes has arguably assumed a *jus cogens* character reflecting recognition by the international community of the vital community interests and values it seeks to protect and enhance. Therefore, when this hierarchically higher norm comes into conflict with the rules on immunity, it should prevail."\(^\text{18}\)

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\(^\text{15}\) Caplan, *supra* note 13, p. 758

\(^\text{16}\) Caplan, *supra* note 13, p. 741-742

\(^\text{17}\) "*Jus cogens is a norm thought to be so fundamental that it even invalidates rules drawn from treaty or custom. Usually, a *jus cogens* norm presupposes an international public order sufficiently potent to control States that might otherwise establish contrary rules on a consensual basis.*". Mark W. Janis, *An Introduction to International Law*, Aspen Publishers, New York 2003 p. 62-63

2.3 Applicability of Head of State Immunity

The three legal theories stated above are the result of decades of legal development that help in understanding the personal accountability of heads of state for crimes. The absolute immunity theory presents great difficulties for effectuating human rights law because absolute immunity applies endlessly, even after the Head of State is no longer in his official capacity. Supporters of the absolute theory contemplate that it is not right to allow prosecutions of heads of state for criminal acts supported by a government when the sovereign State itself has immunity. They also state that allowing prosecution will make the functioning of States and the heads of state very difficult because other States might bring vindictive suits to willfully damage a State. Both Statements are problematic. A Head of State should not be seen as an embodiment of the State itself and thus gaining rights that solely belong to the State, such as sovereignty. The second Statement is even a dangerous argument that international criminal law can be used as a weapon and therefore totally surpassing any benefits that can arise from it.

The separation between public and private State actions in the restrictive immunity theory is questionable. It can be very hard to draw the line between them when actions overlap the public and private fields. Commercial contracts such as the delivery of cigarettes to the Vietnamese army and the purchase of army boots have in the past been declared as sovereign acts and protected with immunity from prosecution. Those who are adepts of the restrictive theory argue that the international community is increasingly recognizing individual accountability, irrespective of their political status, for persons that commit such serious crimes violating international law, with a special position or human rights law. Since it was no problem to exclude commercial acts from immunity which even has become customary international law, excluding human rights violations from immunity should be equally acceptable. To be an exception to Head of State immunity these human rights violations thus have to be rising to the level of core crimes, which are: genocide, crimes against humanity and war crimes including torture.

The absolute and restrictive theory differ on the extent of the Head of State immunity, but both agree on the fact that a government leader should be protected by immunity in some cases, while acknowledging the value of prosecution for human rights violations. The normative hierarchy theory diminishes the scope of immunity the most. Where the other two theories might raise an obstacle when human rights victims seek prosecution of a Head of State, this theory guarantees that a Head of State cannot be protected by immunity when he breaks *jus cogens* norms. The only problem that arises accepting this theory is the use in practice. First must we assess if the elimination of Head of State immunity when violating *jus cogens* norms has become customary international law itself nowadays. Second, when this is established we must evaluate how proceedings work in court for an effective enforcement of this *jus cogens* norm.

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21 Caplan, *supra* note 13, p. 758
24 Stipulated especially in: *Article 4 Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, and *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984
2.4 Immunity for Incumbent and Former Heads of State under International Law

Incumbent heads of state are under international law protected from the jurisdiction of other states by means of immunity. Foreign national courts can consequently not prosecute heads of other states provided when the foreign court has universal jurisdiction, which arises when crimes are committed that pose a serious threat to the whole international community, such as international core crimes. After the Second World War the charters of the Nuremberg and Tokyo tribunals corroborated this development with the notion that official position does not acquit from criminal responsibility. Also the Genocide Convention dated from 1948 already established that the official capacity of a person will not shield them from prosecution.:

“Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”

This effectively means a removal of immunity for heads of state for the crime of genocide. Later on the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity elaborated the regime towards heads of state with regard to other international core crimes. The International Law Commission, a UN organ created for the promotion and codification of the progressive codification of international law, described it as following:

“The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as Head of State or Government, does not relieve him of criminal responsibility or mitigate punishment.”

The International Court of Justice, the ICJ, stated that official capacity was irrelevant for prosecution of persons by certain international tribunals and the ICC in cases they have received jurisdiction by means of their mandate, such as the ICTY and the SCSL, which also have this incorporated explicitly in their Statutes. All this amounts to the conclusion that it has become customary international law that immunities for heads of state for international core crimes do not exist.

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25 Werle, supra note 12, p. 64
28 Article 2 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, General Assembly Resolution 2391 (XXIII), UN Doc. A/7218, 26 November 1968
2.4.1. International Practice

So the doctrine of Head of State immunity is crumbling in international law in theory, but what about international practice? Although this is the first attempt of the ICC to prosecute a sitting Head of State, this case is preceded by several earlier examples of international criminal prosecution of other heads of state. The International Criminal Tribunal for the former Yugoslavia, the ICTY, issued the indictment for Milošević and Milutinović in 1999, when they were still presidents of respectively the Federal Republic of Yugoslavia and Serbia.32 The Special Court for Sierra Leone, the SCSL, did something similar when it indicted Charles Taylor when he was still the president of Liberia.33 Both tribunals referred in the indictments to previous cases of international criminal prosecution, namely the Pinochet case and Congo v. Belgium, also known as the Arrest Warrant case.34

These cases already raised the issue of Head of State immunity, stating the potential for international criminal courts to prosecute heads of state where these courts have jurisdiction.35 Where the Pinochet and Arrest Warrant case were tried before a national court and the ICJ, Milošević and Taylor were tried before international criminal tribunals especially established for that purpose. Therefore the jurisdiction of all of these courts was different.

The significant difference between the Al Bashir case on the one hand and the Taylor and Milošević case on the other hand is not necessarily the fact that prosecution is initiated by the ICC instead of an international criminal tribunal, but in particular the fact that both Milošević and Taylor were not arrested until they had stepped down or had been removed from power and Al Bashir is still an incumbent Head of State.

Milošević had unlawfully claimed the victory in the elections of 24 September 2000, which spurred demonstrations and nonviolent protest all over Yugoslavia. Federal authorities finally removed him from power and arrested him on 31 March 2001. Charles Taylor was convinced by African Heads of states that he needed to take action to bring peace to Liberia and stepped down on his own initiative on 11 August 2003 and went into exile in Nigeria. After an international arrest warrant from Interpol and a request from the new Liberian president Ellen Johnson-Sirleaf, Taylor was apprehended by Nigerian authorities and transferred to UN Peacekeeping Forces in Liberia by whom he was arrested.

In the Al Bashir case we can do nothing but wait and see if the arrest warrant will be executed while Al Bashir is still in office, or it will take an overthrow of the government or voluntary renouncement of the presidency to arrest him. However, Al Bashir can never claim immunity from prosecution in general for genocide, crimes against humanity and war crimes, although he might be able to claim inadmissibility of the ICC since Sudan is not a State Party to the Rome Statute.

33 Prosecutor v. Charles Taylor, SCSL, SCSL-03-01-7, 3 May 2003
35 See Chapter 3.
3 Evolution of Rejection of Immunity: Customary International Law

As stated above there have been several examples of codified rules of law and jurisprudence considering the fact that the official capacity of a person plays no role in prosecuting them for international core crimes. In this chapter we will describe chronologically the development of the rejection of immunity in landmark cases into customary international law.

3.1 Heads of state prosecuted by national courts

3.1.1 Pinochet case

Augusto Pinochet Agarte is a Chilean General who overthrew the democratically chosen government of Chile in 1973 with a military coup. Pinochet was the Head of State in an authoritarian regime for 19 years, until he resigned from presidency when did not get support from the Chilean people. During his presidency the government took part in torture, murder and abduction, also including foreign nationals. One of the affected countries was Spain, and when Pinochet travelled to the United Kingdom for medical treatment Spain requested the arrest of Pinochet.

On 16 October the first provisional international warrant for arrest was issued by the UK, on the request of Spanish authorities that was sent to British authorities. He was arrested the same day. On 22 October 1998 a second warrant for arrest was issued by a London magistrate in accordance with the Extradition Act 1989. Pinochet applied for judicial review to quash both warrants based on the fact that the arrest warrants are null because he had immunity under the State Immunity Act 1978 as a former Head of State and for habeas corpus. The High Court of Justice, Queen’s Bench Division reviewed the warrants, agreed with his plea and quashed the warrants. The Court found that the first warrant did not disclose an extradition crime, which was necessary according to the Act. The second arrest warrant did fulfil this demand, but it was still quashed because the Court ruled that Pinochet had immunity before the UK courts. But this decision was appealed to the House of Lords.

The appeal to the House of Lords concluded that the crimes of torture and abduction were not functions as a Head of State as seen in international law and therefore Pinochet had no immunity for these crimes. He had to remain in the UK, awaiting the decision of the Home Secretary whether or not to extradite him. Pinochet and his lawyers did not agree and lodged an application to the House of Lords with the demand that the decision must be set aside since one of the judges was supposedly biased, because he was a director of Amnesty International (which intervened in the case) at the time and did not disclose this prior to the appeal. The appeal committee of the House of Lords decided that this was a valid argument and the appeal to the quashing of the second warrant for arrest had to be reheard.

The rehearing of the case was done by seven Lords who all had not participated in the initial appeal. The House of Lords finally ruled that torture was an extraditable crime and Pinochet had

36 Extradition Act 1989, United Kingdom, of Great Britain and Northern Ireland, 1989 Chapter 33, 27 July 1989
37 State Immunity Act 1978, United Kingdom, of Great Britain and Northern Ireland, 1978 Chapter 33, 20 July 1978
38 Regina v. Bow Street Metropolitan Stipendiary Magistrate & Others, Ex parte Pinochet Ugarte, 1998 4 All ER 897 (Pinochet 1), 3 WLR 1456, 1998
39 Regina v. Bow Street Metropolitan Stipendiary Magistrate & Others, Ex parte Pinochet Ugarte (no.2), 1999 1 All ER 577 (Pinochet 2) 2 WLR 272, 15 January 1999
no right to claim immunity for these crimes.\textsuperscript{40} Three weeks later the UK Home Secretary proceeded with the procedure for extradition, but unfortunately this decision was reversed allegedly due to Pinochet’s mental health. The decision not to extradite Pinochet with the objective of prosecution was not based on any legal obligation. Pinochet had very good ties with prominent English people, in the political and aristocratic circuits. Thus, the decision to release Pinochet was mainly a political decision. He returned to Chile on 3 March 2000, were he eventually was indicted for several human rights violations. He died on 10 December 2006, without any convictions for these crimes.

The interesting aspect of this whole case is the dissenting opinions of several judges. The discrepancy between the judgments and the dissenting opinions are a perfect example of one of the first and most definitely one of the most important discussions in international law between supporters of the absolute theory and supporters of the normative hierarchy theory concerning Head of State immunity.

Lord Slynn and Lord Lloyd dissented in Pinochet 1, and Lord Goff dissented in Pinochet 3. The most important grounds for dissenting were:

- Customary international law has not yet developed as far as constituting universal jurisdiction for national courts for all crimes against international law;
- These crimes were not covered by \textit{jus cogens} norms, which is necessary to override a claim to Head of State immunity;
- After leaving office a Head of State still has immunity \textit{ratione materiae} for acts performed by him while exercising his functions;
- The existing instruments for international criminal prosecution, such as Charters and Statutes, deal with the exclusion of state immunity in international criminal prosecution before international tribunals, and not before national courts.

The actual arguments in the judgments countered these statements as follows: The prohibition of torture is \textit{jus cogens};

- Customary international law gives universal jurisdiction to a national court if the crime meets two requirements: it must be an infringement of \textit{jus cogens} norms and it must be justly regarded as an attack to the international legal order.
- International crimes can never we regarded as performed in the exercise of functions as a Head of State
- Customary international law does not give immunity to former heads of state with respect to torture as an international crime.

This decision changed the perspective on Head of State immunity for the whole international community, and countless cases before national courts followed inspired by this judgment.\textsuperscript{41} It was a big step forward towards putting an end to impunity for (former) heads of state.

\textsuperscript{40} R. v. Bow Street Metropolitan Stipendiary Magistrate & Others, ex parte Pinochet Ugarte (No. 3), 1999 2 All ER 97 (Pinochet 3), 24 March 1999
\textsuperscript{41} Steiner, Henry J., \textit{Three Cheers for Universal Jurisdiction - or is It Only Two?}, Theoretical Inquiries in Law, 5 Theoretical Inq. L. 199, 2004
3.2 Heads of state prosecuted by international institutions

3.2.1 ICJ: Arrest warrant case (Congo v. Belgium)

In 1998 Abdulaye Yerodia Ndombasi was the Minister of Foreign Affairs of the Democratic Republic of Congo, the DRC. He allegedly incited the mass murder of Tutsi’s in 1998. On 11 April 2000 the Court of Brussels issued an international warrant for arrest for Yerodia, accusing him of crimes against humanity. In 1993 the Belgian Parliament had just passed the “law of universal jurisdiction” which enabled Belgium to prosecute foreign nationals who committed violations of the Geneva Conventions and international humanitarian law before their national courts. In article 5(3) of this law is stated: “Immunity attaching to the official capacity of a person shall not prevent the application of the present law.”

The DRC received the arrest warrant on 12 July 2000, but Yerodia was never arrested. His ministry of foreign affairs ended in April 2001. The DRC turned to the International Court of Justice for a nullification of the arrest warrant. They claimed diplomatic immunity before all foreign courts for Yerodia based of the fact that he was the incumbent minister of foreign affairs. The DRC also claimed that Belgium’s self-proclaimed universal jurisdiction over acts committed in the territory of a foreign state was a violation of customary law because it infringed in the sovereignty of the foreign state. When the case was heard by the ICJ in the end of 2001, the application of the DRC was reduced to only the immunity issue.

Contrary to the Pinochet case, the ICJ decided in the Arrest Warrant Case that the DRC was right, and Yerodia indeed enjoyed immunity from prosecution by Belgium. But similar to the Pinochet case there were several dissenting opinions displaying the ongoing discussion about immunity at the time. The ICJ explored customary international law relating to immunity for foreign ministers and concluded that the immunities for Ministers for Foreign Affairs are granted to ensure the effective performance of their functions on behalf of their respective States. The extent of this immunity is determined by the nature of his functions for which he has to be able to travel freely internationally. Therefore the Court concluded that:

“...the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.”

Immunity is supposedly necessary for a Minister for Foreign Affairs for a good execution of his tasks. This is indeed true, but it is not a rule of state practice or opinio juris to use this necessity as a legal guarantee for immunity. Judge Al-Khasawneh and Judge Van den Wyngaert dissented on this aspect with the notion that Ministers for Foreign Affairs are not comparable with diplomats or heads of state. Diplomats can be withdrawn of diplomatic recognition, which ends the diplomatic immunity, and heads of state personify the whole state. Judge Van den Wyngaert also pointed out the danger

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42 Geneva Conventions, 12 August 1949
43 Universal Jurisdiction Law (Genocide Law), Belgium, 38 ILM 918, 16 June 1993.
44 Article 5(3) Universal Jurisdiction Law
45 The compulsory jurisdiction of the ICJ was accepted by Belgium on 17 June 1958, and Congo, 8 February 1989.
46 Case concerning the arrest warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium; Arrest Warrant case), International Criminal Court, General List No. 121, 14 February 2002
47 Par. 53 Arrest Warrant case
48 Par. 54 Arrest Warrant case
states who perhaps appoint serious wanted criminals to high offices with the intent of providing them with immunity. She also said that there is no customary rule of international law granting immunity to foreign ministers and Head of State immunity can never be attributed to foreign ministers.  

From state practice, legal instruments creating international criminal tribunals and decisions of international criminal tribunals the Court also derived that under customary law no form of exception to the rule according immunity before national courts for incumbent Ministers of Foreign Affairs exists in the case of war crimes and crimes against humanity. Nevertheless, the ICJ also expressly mentioned that immunity from jurisdictions does not mean that they enjoy impunity for their crimes. Immunity enjoyed under international law by an incumbent or former Minister of Foreign Affairs will not be a bar to criminal prosecution in their own country, when their country waives immunity, after he ceases to hold office and when international criminal courts have jurisdictions over the crimes. There is no evidence to be found that immunity was rejected in similar cases before, but there is also no legal evidence to be found that immunity does exist for these crimes for Ministers of State. The ICJ actually attributed immunity for all acts committed in official capacity of the minister and rejected immunity for acts committed in private capacity. But when does a Minister for Foreign Affairs commit crimes against humanity in his leisure time? The ICJ ordered Belgium to nullify the warrant for arrest for Yerodia.

In the light of the development of international criminal prosecution by the ICC universal jurisdiction before national courts might not be necessary anymore. But we can still conclude that the ICJ was wrong in the Arrest Warrant case. International crimes are rarely committed in a private capacity, the nature of these crimes even requires using military or governmental authority to achieve its goals. But, derived from the Pinochet case, since it can never be the function of a state official to commit international core crimes, these crimes will always fall outside of the official capacity of a Minister of Foreign Affairs and therefore also outside the protection of immunity. Regrettably the outcome of the Arrest Warrant case was a setback for the development of international law in terms of the abolishment of impunity for heads of state.

49 Dissenting opinion of Judge ad hoc Van den Wyngaert, 14 February 2002
50 As examples mentioned: article 7 Charter Nuremberg Tribunal, article 6 Charter Tokyo Tribunal, Statute ICTY, Article 27 Rome Statute etc.
51 Arrest Warrant case, par. 58
52 Arrest Warrant case, par. 60 and 61
3.2.2 ICTY: Milošević case

Slobodan Milošević was the president of Serbia from 8 May 1989 till 23 July 1997 of the Federal Republic of Yugoslavia, the FRY, from 23 July 1997 till 6 October 2000. He was indicted for several counts of genocide, crimes against humanity, war crimes and much more by the ICTY allegedly committed during both presidencies in Kosovo, Croatia and Bosnia and Herzegovina. He was forced to resign after mass demonstrations of the Yugoslavian people when he did not accept the new democratically chosen president Kostunica. After a warrant for his arrest by the Yugoslav authorities for charges of corruption and abuse of power he was arrested, and eventually transferred to the ICTY.

Milošević defended himself and he and *amici curiae* contended several objections to his prosecution, one of which was the argument that the ICTY lacked competence to prosecute Milošević due to his status as the former president of Yugoslavia. The ICTY very easily rejected Milošević’s claim of immunity recalling article 7(2) of the Statute of the ICTY:

“The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.”

The ICTY also stated its qualification as a reflection of an accepted principle of customary international law by confirmations in case law, the incorporation of individual criminal responsibility in instruments such as tribunals and conventions, the 1996 International Law Commission’s Draft Code of Crimes against the Peace and Security of Mankind and the Rome Statute.

Contrary to the Arrest Warrant case, the ICTY Trial Chamber referred to the Pinochet case as affirmation of the rejection of immunity with the statement of Lord Millet:

“In future those who commit atrocities against civilian populations must expect to be called to account if fundamental human rights are to be properly protected. In this context, the exalted rank of the accused can afford no defence.”

After the setback from the Arrest Warrant case, the Milošević case is an important step forward in acknowledging the rejection of immunity for heads of state as put forward in the Pinochet case. Unfortunately Milošević was never convicted, he died on 11 march 2006, during the trial.

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54 Par. 27 and 28 Decisions on Preliminary Motions, Prosecutor v. Milošević, ICTY, No. IT-99-37-PT, 8 November 2001
55 Prosecutor v. Milošević, supra note 53, par. 29-32
56 Prosecutor v. Milošević, supra note 53, par. 3. See also Pinochet (No.3), supra note 39
3.2.3 SCSL: Charles Taylor case

Charles Ghankay Taylor was President of Liberia till 11 August 2003, when he was forced to resign his presidency by other African heads of state and he relocated to Nigeria. Before this, he was already indicted by the SCSL on 7 March 2003, as a incumbent Head of State. The indictment included crimes against humanity, violations of the Geneva Conventions and other serious violations of international law for unlawfully killing a unknown number of civilians, rape, enlisting child soldiers etc.\(^57\) The indictment was amended a few times, but not significantly. On 31 May 2004 the Appeals Chamber dismisses a motion brought on behalf of Charles Taylor which challenged the indictment based on sovereign immunity and extraterritoriality.\(^58\) Charles Taylor was not apprehended until 29 March 2006 and surrendered to the UN and later to the SCSL.

Taylor applied to the SCSL Appeals Chamber to quash the indictment and to set aside the warrant for his arrest, because he is apparently of the opinion that he is immune from any exercise of the jurisdiction of this court by virtue of the fact that he was at the time of the issuance of the warrant for arrest based on the indictment the incumbent Head of State.\(^59\) The SCSL was hesitant to react on the application prior to a court appearance by Taylor. They decided to proceed with the determination of the merits in this immunity claim because of the particular nature of the claim of sovereign immunity and the coherence between immunity and jurisdiction issues.

The SCSL dismissed the motion of Taylor based on careful consideration of international jurisprudence, which concluded that the sovereign equality of states does not prevent heads of state to be prosecuted before an international criminal tribunal or court as a established principle.\(^60\) Article 6(2) of the Statute of the SCLS (exactly the same as article 7(2) of the Statute of the ICTY) is consequently not in conflict with a *jus cogens* norm, and the official capacity of Taylor did not bar his prosecution by the SCSL.

The SCSL follows a comparable reasoning for rejecting Head of State immunity as the ICTY, namely it has become customary international law. With these cases firmly anchored in international practice the days of impunity for heads of state are apparently over. We can only hope this is a prediction for the future of international criminal prosecution of government officials for international crimes.

From all the above we can conclude that Head of State immunity *ratione personae* seems to shield incumbent Heads of State from prosecution before foreign national courts, but not before international institutions, such as international tribunals and the ICC. Next to the ICTY and the SCSL also the International Criminal Tribunal for Rwanda (ICTR) took the same approach in head of state immunity\(^61\), which incorporates that no immunity exists for these crimes.

\(^{57}\) Indictment, Prosecutor v. Charles Taylor, SCSL, Case No. SCSL-03-01, 7 March 2003

\(^{58}\) Decision on Immunity from Jurisdiction, Prosecutor v. Charles Taylor, Special Court for Sierra Leone, Appeals Chamber, Case No. SCSL-2003, 128 ILR 239, 31 May 2004

\(^{59}\) Decision on Immunity from Jurisdiction, Prosecutor v. Charles Taylor, *supra* note 58, par. 1

\(^{60}\) Decision on Immunity from Jurisdiction, Prosecutor v. Charles Taylor, *supra* note 58, par. 52

4 ICC: Al Bashir Case

4.1 Facts

Omar Hassan Ahmad Al Bashir is the President of the Republic of Sudan, and has been since 16 October 1993. Sudan is the largest African country with 44 million inhabitants. In 2003 an internal conflict arose between the government of Sudan and armed groups in the region of Darfur. In particular the Sudanese Liberation Movement (SLM) and the Justice Equality Movement (JEM) stood up against the authorities to fight against the economic and political neglect of Darfur. The SLA attacked the El Fasher airport in March 2003 which sparked the rebellion. At the time the government was negotiating with the Sudan People’s Liberation Movement or Army to end the 30-year civil war between North and South Sudan, which was a different conflict.

Al Bashir and other political and military leaders drafted a plan to overthrow the SLA, JEM and other armed groups with a counter-insurgency campaign. An important element of the campaign was an unlawful attack on a part of the civilian population in Darfur, because the Fur, Masalit and Zaghawa groups living there were perceived to be supporting the organised armed groups that were opposing the government. The campaign was executed by different forces, namely the Sudanese armed forces, the allied Janjaweed militia, the Sudanese Police Forces, the National Intelligence and Security Service (NISS) and the Humanitarian Aid Commission (HAC)\(^62\). Estimates are that more than 300.000 people were killed, over 400 villages were completely destroyed and millions were internally displaced. Different reports from NGO’s at location state that the violence is still going on\(^63\).


4.2 The Warrant of Arrest for Al Bashir

The former UN Secretary General Kofi Annan established the International Commission of Inquiry on Darfur in accordance with Security Council Resolution 1564\textsuperscript{64}. This commission established that:

"The Government of Sudan and the Janjaweed are responsible for serious violations of international human rights and humanitarian law amounting to crimes under international law...".

They recommended strongly that the situation should be referred to the ICC\textsuperscript{65}. Two months later the Prosecutor of the ICC received the referral of the situation in Darfur from the Security Council\textsuperscript{66}, and the investigation was opened on 6 June 2005\textsuperscript{67}. The first warrant for arrest for Al Bashir was issued on 4 March 2009 with 5 counts of crimes against humanity and two counts of war crimes, but without the charges of genocide that were initially included by the Prosecutor. The Prosecutor appealed the warrant for arrest successfully and on 12 July 2010 the second warrant for arrest for Al Bashir including three genocide charges was issued.

The warrant of arrest for Al Bashir consists of the following charges on the basis of individual criminal responsibility under article 25(3)(a) of the Rome Statute as an indirect (co) perpetrator\textsuperscript{68}:

- **Crimes against humanity**
  - Art. 7(1)(a): Murder
  - Art. 7(1)(b): Extermination
  - Art. 7(1)(d): Forcible transfer
  - Art. 7(1)(f): Torture
  - Art. 7(1)(g): Rape

- **War Crimes**
  - Art. 8(2)(e)(i): Intentionally directing attacks against a civilian population as such or against individual civilians not taking part in hostilities
  - Art. 8(2)(e)(v): Pillaging

- **Genocide**
  - Art. 6(a): Killing members of the group
  - Art. 6(b): Causing serious bodily or mental harm to members of the group
  - Art. 6(c): Deliberately inflicting on the group conditions of life calculated to about its physical destruction in whole or in a part.

\textsuperscript{64} United Nations Security Council Resolution 1564, S/RES/1564 (2004), 18 September 2004, par. 12: "Requests that the Secretary-General rapidly establish an international commission of inquiry in order immediately to investigate reports of violations of international humanitarian law and human rights law in Darfur by all Parties..."


\textsuperscript{66} United Nations Security Council Resolution 1593.

\textsuperscript{67} ICC Case Information Sheet, supra note 62

\textsuperscript{68} Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, 12 July 2010, ICC-02/05-01/09-95
Since the issuance of the final Warrant for Arrest the ICC has made requests to all the States Parties to the Rome Statute, all UN Security Council members that are not States Parties to the Rome Statute and to Sudan itself for the arrest and surrender of Al Bashir. In 2009 Al Bashir started visiting countries that are not Parties of the Rome Statute and with a positive position towards him, such as Egypt, Libya, Qatar and Saudi Arabia as a sort of promotional tour. Although States Parties are obliged to arrest Al Bashir when entering their country and surrender him to the ICC, which urged them explicitly to do so, Al Bashir has recently made trips to countries which have ratified the Rome Statute, and was able to return to Sudan untroubled.

70 Omar Al-Bashir visited Kenya on 27 August 2010 for the celebration of the signing of the country’s new constitution and he visited Chad on 21 July of 2010 for a meeting of leaders and heads of state of the Community of Sahel-Saharan States.
4.3 Art. 98(1) Rome Statute

“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.”

The Vienna Convention on the Law of treaties established the general rules of treaty interpretation, most important the agreement that a treaty shall be interpreted textually with the ordinary meaning of its terms in the context of the treaty, but always in line with the intended object and purpose of the treaty. The object and purpose of the Rome Statute that can be derived from the preamble of the Statute is to end impunity for the perpetrators of international core crimes with the establishment of the ICC. Article 98(1) of the Rome Statute provides that the ICC can only make a request for surrender or assistance, that may cause a violation of international law regarding the immunity of a person, when the ICC has received the cooperation of the requested State to waive this immunity in advance. If you would accept that Al Bashir has some kind of Head of State immunity, you can reduce from the previous that the ICC is not allowed to request Kenya and Chad for his arrest when Al Bashir entered their territories. You can also derive from this hypothesis that Kenya and Chad would have had to give consent before the ICC requested the arrest to waive the immunity of Al Bashir.

But when you keep the Vienna Convention on the Law of Treaties in mind this interpretation of article 98(1) cannot be harmonised with the object and purpose of the Statute which is a necessary requirement. The question is whether or not the Rome Statute brought an unintended protection forward with this provision for heads of state invoking their so-called immunity to be surrendered to the ICC by acknowledging the existence of immunity in this article. Or does the Rome Statute not accept personal immunity in any case through article 27 and therefore rendering this provision null?

“1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government(...) shall in no case exempt a person from criminal responsibility under this Statute. 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.”

Article 27 seemingly takes personal immunities totally away from all persons before the ICC, leaving only State and diplomatic immunity as grounds for article 98(1).

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71 Article 31 and 32 of the Vienna Convention on the Law of Treaties, 23 May 1969. NB: this was signed, but not ratified by Kenya, and not signed nor ratified by Chad.
72 Par. 5 and 9 of the preamble of the Rome Statute.
73 Article 27(1) and (2) Rome Statute
The ICC is established with the Rome Statute, which is a treaty. Article 34 of the Vienna Convention States that treaties can only impose obligations on State Parties but without an explicit consent a third State can never be bound to a treaty. Many provisions of the Vienna Convention are seen nowadays as rules of international customary law. In this perspective Sudan and thus Al Bashir would still have immunity before the ICC which does not have jurisdiction over Al Bashir. The waiver of immunity from article 98(1) should still have to be obtained from Sudan in this case. As said in par. 2.2.1 the immunity belongs to the State and not directly to the individual. But you could also argue that the original signing of the Rome Statute by Sudan in 2000, ironically then already represented by Al Bashir, is the “consent” needed to impose the obligations of the Rome Statute on to a third State, unregarded the letter concerning the “unsigned” in 2008. The signing has irrefutably imposed an obligation on Sudan to act in line with the object and purpose of the treaty. But it remains questionable if you can derive only from this that the waiver of immunity does not have to be obtained anymore.

We can also use a textual approach in this matter. Article 98(1) literally applies to requests for surrender or assistance, not to a request for arrest. Since the Arrest Warrant is a explicit request for arrest, a State cannot use article 98(1) as an argument not to cooperate. A State would only have the right to invoke article 98(1) after the possible arrest, when the surrender issue would come up. The State then would have to notify the court of possible conflicts with its obligations under international law with respect to immunity, and then it is for the Court and only for the Court to decide whether or not the conflicts have enough merit to justify a refusal of cooperation. If the answer to this is yes, then the Court would need to obtain a waiver of immunity.

On the other hand, if we would accept that the normative hierarchy theory on Head of State immunity is the standard in international criminal law nowadays, this whole discussion on article 98(1) is totally irrelevant in this case. This theory does not accept any immunity for infringements of jus cogens norms, and since Al Bashir is prosecuted for genocide, war crimes and crimes against humanity, which amounts to violations of jus cogens norms, article 98(1) would be superfluous. Different NGO’s have also taken this view in their reports. The ambiguity in this statement is that the ICC can only prosecute for these crimes, thus every case would be about jus cogens norms and immunity would never be applicable. The question remains: why does article 98(1) even exist then? Article 98(1) refers to apparent pre-existing obligations under international law, and because of this, due to the continuing evolution of international law, immunity should be viewed in the light of prevalent international law at the time of the request for surrender and/or assistance from the ICC.

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74 Article 34 Vienna Convention: “A treaty does not create either obligations or rights for a third State without its consent.”
76 Article 18(a) Vienna Convention: “A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a Party to the treaty…”
78 Article 119 Rome Statute: “Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.”
4.3.1 The ICC on immunity in the Al Bashir case

The position of the ICC has always been very clear on this question in the Al Bashir case, they do not accept any form of immunity for him and State that article 98(1) will never apply in this case:

“This provision does not apply to the instant case. An ICC request for surrender and assistance with respect to the arrest warrant against Omar Al Bashir would not require any State “to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person.”. Article 27 applies. Therefore Omar Al Bashir has no immunity and the Sudan cannot claim immunity. Therefore there are no conflicting obligations for States Parties. As soon as States Parties receive the request for arrest and surrender from the Court, as per the Judge’s decision, they shall be obliged to enforce it. It is for the ICC, not for the requested State, to decide.”

The ICC derives this interpretation of article 98(1) from the travaux préparatoires, which includes documents concerning the dilemma of the correlation between article 27 and 98(1) that State: “...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.” The ICC supports this opinion by stating that there never is immunity before the ICC for a Head of State according to article 27 and with rules of customary law through international practice. Article 27(2) explicitly removes immunity with the Statement that the jurisdiction of the ICC extends to all situations and has authority even if a waiver of immunity has not been given beforehand.

This was confirmed by the Pre-Trial Chamber in the decision on the Arrest Warrant for Al Bashir and supplemented with the notion that consistent case law of the Court has held that other sources of law provided for in article 21(a)(b) and (c) may only be resorted to when there is a lacuna in the written law of the framework of the ICC that cannot be filled with the interpretation

80 Antônia Pereira de Sousa, Associate Cooperation Officer of the jurisdiction, complementarity and cooperation division of Office of the Prosecutor the ICC.
82 Antônia Pereira de Sousa: “The practice of international courts and tribunals addressing these sorts of crimes has been consistent, in that no serving Head of State has been recognized as being entitled to rely on jurisdictional immunities, whether in private or official capacity. Two sitting Heads of state, Slobodan Milošević and Charles Taylor, were indicted by the International Criminal Tribunal for the former-Yugoslavia and the Special Court for Sierra Leone, similarly on the basis of arrest warrants. The International Court of Justice has, moreover, recalled the non-applicability of immunities for certain State officials before international criminal courts.” NB: Ms. Pereira De Sousa is referring to ICJ, Congo v Belgium, Judgment 14 February 2002, par. 61
85 Article 21(a)(b)(c) Rome Statute: “The Court shall apply: (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence; (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict; (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.”
rules from articles 31 and 32 of the Vienna Convention and 21(3) Rome Statute. If you interpret this to the letter this means that the ICC is in this case not allowed to take customary international law (which is an “other source of law”), such as Head of State immunity, into account, while in article 98 the Rome Statute refers to immunity as a rule of international law. This argument of the pre-trial chamber is somewhat confusing on this point, but we can conclude safely that for heads of states Parties of the Rome Statute no personal immunities exist and States Parties are always obliged to execute a request for arrest of the ICC without any consent of waiver of immunity in advance. The crux of the problem lies in fact that Omar Al Bashir is the incumbent president of Sudan, which is not a Party to the Rome Statute.

86 Article 21(3) Rome Statute: “The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction...”
4.4 UN Security Council Resolution 1593 (2005)

On 31 March 2005 the UN Security Council referred the situation of Darfur to the Prosecutor of the ICC, acting under Chapter VII of the UN Charter. The ICC is able to receive such referrals by means of article 13(b) Rome Statute. In resolution 1593 the Security Council stipulates that the government of Sudan shall cooperate fully with and provide all necessary assistance to the ICC pursuant to the resolution. The Security Council also notes that this obligation for Sudan is not derived from the Rome Statute, but via the resolution itself, from the UN Charter. Since Sudan is a member of the United Nations and the UN Charter the country is apparently bound to this resolution, but Sudan is not a State Party to the Rome Statute and not bound to article 13(b) of the Rome Statute. Article 13(b) should be seen as a right for the Security Council, and thus it has nothing to do with an obligation for Sudan. The claim that the ICC does not have jurisdiction over the Darfur situation solely based on the Rome Statute and the Arrest Warrant is therefore unlawful is totally true, because the ICC would violate article 34 of the Vienna Convention. Nevertheless, in this case the jurisdiction of the court is not derived from the Rome Statute, but from resolution 1593 and the UN Charter.

As mentioned earlier, the ICJ confirmed in the decision on the Arrest Warrant case that a foreign State could not prosecute a Head of State while he still is in office. Following this reasoning, Al Bashir can also not be prosecuted by the ICC, because States can actually not do something together which they are not allowed to do alone. Nevertheless, you can argue that the ICC was wrong in this particular case. In the Arrest Warrant case the judges erroneously compared ad hoc tribunals established by the UN Security Council with the ICC. When it comes to ad hoc tribunals, an obligation on UN member States to arrest and surrender suspects in order to cooperate with these tribunals is apparently conflicting with customary international law concerning immunity issues.

But the UN Charter stated a new point of view on this issue. A new hierarchy was developed through article 25 and 103 of the UN Charter, placing the UN Security Council resolutions under Chapter VII above other international agreements and customary law, with the exception of jus cogens norms of course. Therefore, when the UN Security Council decides to establish an ad hoc tribunal or refer a case to the ICC with its powers rightly derived from Chapter VII of the Charter, it can actually surpass Head of State immunity for heads of states who are members of the UN.

If Al Bashir would hypothetically have immunity under international law, the resolution has an implicit waiver of immunity incorporated. Therefore, the waiver of article 98(1) would not be

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87 Chapter VII UN Charter (26 June 1945) gives the Security Council the power to take any measures to restore international peace and security. This includes the referral of a situation to the ICC.
88 Article 13(b) Rome Statute: “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.”
89 Article 34 Vienna Convention: “A treaty does not create either obligations or rights for a third State without its consent.”
91 Article 25 Charter of the United Nations, 26 June 1945: “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”
92 Article 103 Charter of the United Nations: “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.”
93 The tribunal has to be established as a reaction to a threat to international peace and security. This is a binding condition for the Security Council when acting under Chapter VII.
necessary anymore. Because the Security Council used article 13(b) Rome Statute\(^\text{93}\) for referring the case to the ICC, the UN Security Council accepted that investigation would take place into the case, as well as any prosecution resulting from the investigation, in accordance with the framework of the Rome Statute.\(^\text{94}\) The framework includes article 27(2) which removes personal immunity for all persons. The resolution also specifically mentions article 16 (deferral of investigation or prosecution) and 98(2), but does not mention article 98(1). This was done on purpose, because article 98(1) was irrelevant for the UN Security Council since the waiver was already implicitly obtained by the ICC.

But the ICC is not established by the UN Security Council using their Chapter VII powers, but with a treaty signed and (often) ratified by voluntary States Parties. The jurisdiction of the ICC is given to the ICC by the States Parties themselves, and therefore spreads only to the States Parties. However, Sudan has not consented to this authority and without a waiver of immunity from Sudan the ICC seemingly does not have jurisdiction over Sudan and its Head of State Al Bashir. But the UN Security Council did refer the case of Al Bashir to the ICC with resolution 1593 acting under Chapter VII. This referral effected the immunity of Al Bashir directly. Article 27(2) of the Rome Statute removes immunity for heads of state, but not for non-States Parties. But when a situation is referred by the UN Security Council the ICC will prosecute accordingly to the framework of the ICC, and thus also including article 27(2) within the boundaries of the referral, which will successfully remove Al Bashir’s immunity. This means that the Security Council will interfere with rules of treaty and general international law, but we have already established that the Security Council is allowed to do so.

However, this referral does not mean that the Security Council made Sudan a State Party to the Rome Statute. In a referral case the Rome Statute operates by virtue of Chapter VII powers of the Security Council and not by treaty law. Because Sudan then still is not a State Party to the Rome Statute, it will not have implemented the Statute into national law. The problem with this is that required mechanisms or instruments other States Parties have set up to be able to cooperate fully with the ICC will not exist in Sudan.\(^\text{95}\) In paragraph 2 of resolution 1593 the Security Council States explicitly that full cooperation is expected from Sudan. But what does this actually mean?

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\(^{93}\) Article 13(b) Rome Statute: “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…”

\(^{94}\) Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-3, 4 March 2009, par. 45

\(^{95}\) Göran Sluiter, *Obtaining Cooperation from Sudan – Where is the Law?*, Journal of International Criminal Justice, 2008
4.4.1. Full Cooperation

We can distinguish two different modes of cooperation in international criminal prosecution, namely the one used for example with the ICTY, and the one applied with the ICC arising from the Rome Statute. When the Security Council set up the ICTY with resolution 827\(^{96}\) they also explicitly demanded full cooperation in paragraph 4 but added an extra notion:

“Decides that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute”.

This resolution imposes the ICTY statute and corresponding obligations on the States. It also demands the State to take necessary measures under their national law for implementing this resolution, so full cooperation can be legally guaranteed. Resolution 1593 only commits States to the resolution itself, even recognizing the absence of obligations derived from the Rome Statute for non-State Parties:

“Decides that the Government of Sudan and all other Parties to the conflict in Darfur shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not Party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully”.

For States Parties article 88 of the Rome Statute\(^{97}\) ensures implementation, but in this phrase and also in the rest of Resolution 1593 you will not find an obligation for implementation of this resolution in Sudan’s national law. It is not clear whether or not this is a conscious choice of the Security Council or this is a flaw in the resolution. Does “full cooperation” in this case mean within the extend of Sudan’s national laws or does it include the obligation of article 88 Rome Statute. It is to be accepted that the Security Council meant “full cooperation” in the broadest sense of the words (including art. 88), but the question why they did not specifically State this in the resolution as they did before still remains.

The problem with regarding this as an unconditional obligation in which every request for assistance must be met without discussion by Sudan is the fact that article 90 and 93 Rome Statute actually contain different reasons for a justified refusal of cooperation, such as requests for assistance that somehow interfere with domestic laws\(^{98}\). If the Security Council was convinced that the Rome Statute was applicable to Sudan through the referral that these articles also apply to Sudan, and they may have justifiable grounds for refusing cooperation. So even if we would deem the Arrest Warrant to be lawful, it may not be executable. The lacuna in the resolution amounts to legal uncertainty which results in another problem. The unlawfulness of the Arrest Warrant may not only be based on the infringement of Head of State immunity, but also on the requirements of foreseeability and accessibility.\(^{99}\) Every person must have the guarantee that he will not be arbitrarily arrested and detained. Customary international law interprets this that

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\(^{96}\) UN Security Council Resolution 827, S/RES/827, 25 May 1993

\(^{97}\) Article 88 Rome Statute: “States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part.”

\(^{98}\) Article 93(1)(f) Rome Statute: “Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.”

detention should always be “in accordance with a procedure described by law”. Since any procedure for cooperating with the ICC, in this case Al Bashir’s actual arrest and surrender, has no legal basis in Sudan’s national law and is not concretized in the resolution these requirements are not met.

4.4.2 Discriminatory Prosecution

In paragraph 6 of the resolution you can read another peculiar Statement:

“Decides that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a Party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State”.

This was actually a demand from the United States because they wanted to keep all US nationals free from prosecution for acts committed when they supported operations in the Sudan. The US does want to respond to a call of the Security Council when necessary to help in this case, but since the US is not a State Party to the Rome Statute they needed this paragraph to go around any interference of the ICC with US nationals assisting in this case.

The Security Council has the power to make a referral to the ICC including a request for non-prosecution based upon article 16 Rome Statute:

“No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions”.

If you take the article literally, the Security Council would have had to renew this request every 12 months, which they did not do. In this case, the protection for nationals of non-States Parties would have seized to exist on 31st of March 2006. Nevertheless, a permanent protection may be found in article 98(2):

”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.”

A reference to this article is made in the preamble of the resolution, suggesting the need to get the consent of a State for surrendering a resident to the ICC. Notwithstanding that the ICC then still can exercise jurisdiction over this person.

If we assume that paragraph 6 of the resolution is still valid, this has an effect on the lawfulness of the resolution. The paragraph is the result of a political play, but the ICC is

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101 Report of 5158th Meeting proceeding resolution 1593, Doc. S/RES/1593 (2005); S/PV.5158, 31 March 2005, par. 4
supposed to be an independent judicial body. The independence is now challenged because this paragraph amounts to discrimination on the basis of nationality.

The jurisdiction of the ICC for non-States Parties is based on two principles: the territoriality and nationality principle. Either the accused should be a national of a State Party, or the crime has to be committed on the territory of a State Party for the ICC to be able to exercise jurisdiction. Now is neither Sudan nor the US Party to the Rome Statute, but the Security Council made Darfur explicitly subject of territorial jurisdiction. The Security Council also excluded nationals of Sudan from the protection arising from paragraph 6 ("..outside Sudan..."). This means in practice for example that Sudanese nationals, besides Al Bashir, but also British or Dutch nationals can be prosecuted for war crimes, while US or Chinese nationals can never be prosecuted for the same crimes on the same territory.

The Rome Statute also stipulates in article 21(3) that the law must be applied: “without any adverse distinction founded on grounds such as….. national, ethnic or social origin...”. The ICC is bound by the principle of equality and therefore subject to the requirement of non-discrimination. Excluding persons on the basis of nationality is not lawful in this case, and consequently the resolution referring the case to the ICC was not just in the first place. Sudan could perhaps conclude from this that they do not have a duty to cooperate, but this is now premature. Sudan could only do this when there is proof that individuals under in paragraph 6 have indeed committed grave core crimes covered by the jurisdiction of the ICC for which they have not been properly prosecuted in their State.

102 Article 12(2)(a) and (b) Rome Statute
103 The United Kingdom and the Netherlands are States Parties, the United States and China are non-States Parties.
4.5 The African Union

The African Union (AU) could be an important ally for the ICC in executing the Arrest Warrant. The AU is an organization consisting of all African States, except Morocco, established on the 9th of July 2002 as a replacement for the Organisation of Africa Union\textsuperscript{104}. One of the main objectives of the Union is: "to encourage international cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights."\textsuperscript{105} The Assembly of the AU consisting out of the Heads of state and governments of its members meets twice a year. The AU established various instruments, including the African Union Peace and Security Council\textsuperscript{106} after the example of the UN Security Council consisting of five countries for a three year term, and 10 countries for a two year term. Sudan is not and has never been a member of this Council.

On 21 July 2008 the African Union urged the Security Council to suspend the indictment process against Al Bashir based on article 16 Rome Statute. The AU Peace and Security Council decided to this in an emergency meeting after expressed concern by Tanzania. Since 2004 a peacekeeping force (AMIS) sent by the AU is present in Darfur\textsuperscript{107}, and the Union is afraid the indictment will jeopardize these peace efforts and that will not be in the best interest of victims and justice.\textsuperscript{108} The UN Security Council did not obey this request, and the AU Peace and Security Council continued with AMIS and reported repeatedly on the situation. During the thirteenth ordinary session of the AU themselves the indictment against Al Bashir was discussed again. They expressed great regret that their request was not heard nor acted upon and reiterated their request to the Security Council.\textsuperscript{109} On top of this they decided that the AU States Parties will not cooperate with the ICC pursuant to Article 98 of the Rome Statute, meaning they will not waive the immunity of Al Bashir as necessary for his arrest.\textsuperscript{110}

The AU enforced this decision again in the fourteenth meeting with recommendations for an amendment to article 16 of the Rome Statute entailing a right for the UN General Assembly to defer ICC cases for one year if the UN Security Council has failed to take a decision within a specified time frame. The AU also requests their members in this meeting to raise the issue of Head of State immunity at the Assembly of States Parties.\textsuperscript{111} At the fifteenth meeting on 25 till 27 July 2010 they restated again that AU Member States should not cooperate with the ICC in the arrest and surrender of Al Bashir.\textsuperscript{112} The AU rejects The ICC request for a Liaison officer to the AU and openly calls the ICC prosecutor rude and condescending in the Al Bashir case and other situations in Africa.

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\textsuperscript{104} The OAU was established 25 May 1963, all the African States were members.
\textsuperscript{105} Article 3(e) The Constitutive Act of the African Union, 7 November 2000.
\textsuperscript{107} The African Union Mission in Sudan (AMIS), August 2004
\textsuperscript{108} Paragraph 11(i) Communiqué of the 142\textsuperscript{nd} meeting of the Peace and Security Council, Consideration the Warrant of Arrest under Article 58 of the Rome Statute of the ICC against the President of the Republic of the Sudan, PSC/MIN/Comm(CXLII), 21 July 2008, par. 11(i)
\textsuperscript{111} Decision on the report of the second meeting of States Parties to the Rome Statute of the ICC, Assembly/AU/Dec270(XIV), 2 February 2010, par. 2, 5 and 8.
\textsuperscript{112} Decision on the progress report of the Commission on the Implementation of Decision Assembly/AU/Dec296 (XV), 29 July 2010 , par. 5, 8 and 9.
We can safely conclude that these politically motivated decisions of the AU are a very negative development in the Al Bashir case. Nevertheless, what you can derive from all the AU meetings is that they uphold the Rome Statute as a whole, also for AU members that are non-States Parties. They affirm in these decisions that the AU had obligations towards the ICC. They use the articles as they were intended and propose a valid amendment of the Statute which confirms the fact that they accept the Statute. Problem is that these obligations now conflict with obligations towards the AU.

The AU invoked article 98 as grounds for refusal of cooperation, on the assumption that Al Bashir is entitled to immunity from prosecution. Let us assume hypothetically that Al Bashir indeed enjoys immunity in this case, and then the AU is still not legally allowed to take this unilateral decision not to cooperate with the ICC. As stated in paragraph 4.3 the decision whether or not the States would be acting inconsistently with its obligations under international law with respect to immunity lies solely with the Court itself. The only option the AU has is making its concerns known to the ICC, so they could decide on it.

Al Bashir has been travelling since the first Arrest Warrant was issued to several countries. Chad and Kenya are the States Party to the Rome Statute that were among the visited countries. Under the pressure of the AU they decided not to arrest Al Bashir. On 27 August the Pre-Trial Chamber I decided to inform the UN Security Council and the Assembly of States Parties to the Rome Statute of these two trips. The AU responded to these decisions with a press release, stating:

“...the AU Member States shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of The Sudan [...] Additionally, the statements and the decisions did not take cognisance whatsoever of the obligations of AU Member states [...] which obligates all AU Member States “to comply with the decisions and policies of the Union”. Thus, the decisions adopted by the AU policy organs are binding on Chad and Kenya and it will be wrong to coerce them to violate or disregard their obligations to the African Union.”

113 Only 31 of the 53 AU member States are States Parties to the Rome Statute.
114 Art 119(1) Rome Statute: “Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.”
115 Par. 4.2: The Warrant of Arrest for Al Bashir.
117 African Union Commission / Press release on the decision of the pre-trial chamber of the ICC informing the UN Security Council and the Assembly of the State Parties to the Rome statute about the presence of president Omar Hassan Al-Bashir of the Sudan in the territories of the Republic of Chad and the Republic of Kenya, 29 August 2010
Further it states that the UN Security Council had no moral authority to sit in judgment over Chad and Kenya, because these countries have already committed themselves to “condemnation and rejection of impunity” by virtue of their AU membership. Ironically is Kenya one of the few countries that implemented article 27(2) Rome Statute in its domestic law. Article 27(1) of the Kenyan International Crimes acts states:

“The existence of any immunity or special procedural rule attaching to the official capacity of any person shall not constitute 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; or (c) holding that a person is not obliged to provide the assistance sought in a request by the ICC.”\(^{118}\)

By not arresting Al Bashir when he travelled to Kenya, the Kenyan government actually acted in violation of their national law.

The underlying reason that can be sought behind the refusal to cooperate based on immunity from the AU is also the complementarity principle. One can perceive a hint of this in the preceding paragraph where the AU states that Chad and Kenya have already committed to rejection of impunity. In the preamble of the Rome Statute, as well as in article 1, it is mentioned explicitly that the ICC shall be complementary to national criminal jurisdiction, not as an replacement for national criminal jurisdiction.\(^{119}\) When a case is currently being reviewed by a State with jurisdiction over it the case is inadmissible before the ICC.

The AU wants to take matters in the Darfur situation into their own hands since they deem themselves capable to handle it and may find the interference of the ICC needless. Among the objectives of the AU can be found: the promotion of peace, security and stability on the continent and protection of human and peoples’ rights.\(^{120}\) AMIS reports ongoing on the situation and also the Peace and Security Council of the AU is investigating the case. But the complementarity principle is meant for jurisdiction of the actual nation, and Sudan is making no attempt to investigate his own president. Even when you would consider that due to the nature of the crimes committed by Al Bashir universal jurisdiction would apply, no State within the AU is investigating this case. The AU is investigating the case, but not with the purpose to prosecute Al Bashir.

\(^{118}\) Article 27(1), International Crimes Act, Kenya, 2008
\(^{119}\) Preamble Rome Statute: “Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.” Article 1 Rome Statute: “An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.”
\(^{120}\) The African Union in a nutshell, the vision of the AU, http://www.africa-union.org/root/au/aboutau/au_in_a_nutshell_en.htm
Even if the AU would eventually decide to do so, they do not have any instruments available to prosecute Al Bashir. There has been an attempt to establish the African Court of Justice (ACJ)\textsuperscript{121}, but this has not been executed yet. The African Court on Human and Peoples Rights (ACHPR)\textsuperscript{122} has been established, and even delivered it first and only judgment in 2009. It has been decided that the ACJ and the ACHPR will merge into one instrument in the future. Unfortunately, both courts (and later on the one court) are not designed and meant to prosecute individuals. Only States can be prosecuted by these/this court, not persons, because the courts have jurisdiction over cases concerning interpretation disputes of the Charter, treaties and other agreements.\textsuperscript{123} Since there is no complementary investigation going on at the time, the ICC is not infringing the complementarity principle by issuing the arrest warrant for Al Bashir.

Taking into account that the African Union cannot decide on their own not to cooperate at all, that article 98 is only applicable to surrender and assistance and not to an arrest, article 27(1) Kenyan International Crimes Act and the fact that Al Bashir’s immunity is non-existent, Kenya and Chad should have arrested Al Bashir.

\textsuperscript{121} Article 18, Constitutive Act of the African Union, 11 July 2000.
\textsuperscript{122} Article 1, Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples Rights, 9 juni 1998
\textsuperscript{123} Article 3, Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples Rights
4.6 Accountability for Al Bashir

The crimes were Al Bashir is indicted for are not carried out by him personally, he has not physically committed them. He has criminal responsibility as an indirect (co-)perpetrator because he instructed the army and the militia who followed his commands.

This is the first time a prosecutor of an international tribunal indicts a person on this concept.\textsuperscript{124} Grounds for such a prosecution can be found in article 25(3)(a) Rome Statute. In the ICC’s Katanga and Ngudjolo case was a rule established: The leader must use his control over the apparatus to execute crimes. In other words, he mobilises his power and authority within the organisation to secure compliance with his orders, the compliance including the commission of any of the crimes under ICC jurisdiction.\textsuperscript{125} The Pre-Trial Chamber of the Al Bashir case also reiterated that indirect co-perpetration is only applicable when some or all co-perpetrators carried out their own essential contributions to the common plan using another person.\textsuperscript{126}

The majority of the Pre-Trial Chamber concluded that there were reasonable grounds to believe that after the El Fasher Airpot attack in April 2003 a common plan was devised by high Sudanese government officials including Al Bashir to precipitate anti-government groups. This plan included a unlawful attack on Darfurian civilians which is covered by the jurisdiction of the ICC and the use of the apparatus of Sudan, in particular implemented through state and security committees of the government.\textsuperscript{127}

This resulted in the conclusion that Al Bashir is criminally responsible as an indirect perpetrator, or as an indirect perpetrator for all crimes he is indicted for.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{125} The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui , ICC-01/04-01/07-717, 30 September 2008, par. 514.
\item \textsuperscript{126} Decision on the Warrant of Arrest against Omar Hassan Ahmad Al Bashir, \textit{supra} note 94, par. 213
\item \textsuperscript{127} Decision on the Warrant of Arrest against Omar Hassan Ahmad Al Bashir, \textit{supra} note 94, par. 215-221
\end{itemize}
\end{footnotesize}
4.7 The execution of the Arrest Warrant

The ICC does not accept trials in absentia, thus the prosecution of the Al Bashir case can only proceed if Al Bashir is arrested and surrendered to the ICC.\textsuperscript{128} There is no police or military power available to the ICC to ensure Al Bashir’s arrest, nor will it be likely that the UN Security Council will decide to send an arrest team to Sudan. However the UN Security Council has the power to do so based on articles 41 and 42 UN Charter, the stability in Africa is on the verge of cracking totally down with the newest conflicts in Tunisia, Libya and Egypt and therefore the UN will not decide to intervene any time soon. The UN actually still has a peacekeeping force present in Sudan (UNMIS)\textsuperscript{129} since 2005 with more than 20.000 persons personnel. If they had any intention to arrest Al Bashir, they would have done so already. The threat of violent repercussions and evicition from Sudan is present and would not be in the interest of establishing peace in Darfur, which is the ultimate goal of UNMIS.

The ICC is dependent on the cooperation of the States Parties to the Rome Statute and also non-States Parties to execute their Arrest Warrants. In paragraph 4.5 of this thesis we made clear that for the time being the ICC does not need to expect that neighbouring countries of Sudan, to which Al Bashir has constricted his travels lately, will arrest Al Bashir when he travels into their territory. Not only the African Union, but also the League of Arab States openly opposed the warrant and supported the request of the AU for deferral of the arrest warrant and they will not arrest Al Bashir when he might enter their states.\textsuperscript{130} It is obvious that as long as Al Bashir is the incumbent Head of State and chief of the military. He will not demand his own arrest. In the Milosevic as well as in the Arrest Warrant case

Although an arrest in the present future would be unimaginable, the arrest warrant for Al Bashir does put a lot of pressure on Sudan and also other African states to solve the conflict in Darfur.

When we do a careful forecast of the development of the situation based on the current African instability, were revolution is everywhere, mainly in countries with authoritarian regimes and repressed populations such as in Sudan, and learning in hindsight from history we come to the conclusion that the arrest of Al Bashir will not happen anytime soon, but it will happen.

In the Milosevic case as well as the Taylor case both government officials were removed from office or forced to resign. The chance of this happening anytime soon is slim, but Al Bashir cannot be Sudan’s president forever. Eventually he will pass his power over to a successor or that power will be taken from him against his will. In both cases the new Head of State will probably want to banish all influences that can undermine his authority and he will probably want to make a positive start in the international community, because Sudan needs the humanitarian aid provided by it. And when that time comes, the ICC has the case prepared for trial.

\textsuperscript{128} Article 63(1) Rome Statute:” The accused shall be present during the trial.”
\textsuperscript{130} League of Arab States, Doha Summit, 30 March 2009
5 Conclusion

Based on all asserted in this thesis we can safely conclude that immunity for incumbent heads of state does not exist for international crimes, such as genocide, crimes against humanity and war crimes, over which the ICC has jurisdiction. Therefore Omar Hassan Ahmed Al Bashir cannot invoke protection from prosecution by the ICC on grounds of immunity. Although it took some time, the normative hierarchy theory on Head of State immunity has developed into a principle in customary international law through international practice and opinio iuris.

The rationale behind this is that for crimes as grave as these no shield of any kind should exist. Committing these crimes are considered to be a violation of *jus cogens* norms, and as the highest fundamental rules in international law this justifies prosecution for every person, irrelevant of his or her official capacity. Article 98(1) of the Rome Statute is irrelevant for the Al Bashir case. The mentioned “waiver of immunity” is not necessary since Sudan and third states are bound to the Rome Statute by UN Security Council Resolution 1593. Through this binding obligation to comply with the Rome Statute, article 27 also applies to Sudan and consequently also to Al Bashir, removing all eventual immunities for persons. Resolution 1593 is only relevant for the scope of the jurisdiction it has given the ICC with respect to Sudan. It does not implicitly make Sudan State Party to the Rome Statute, but only applies to the case mentioned in the resolution.

In the resolution “full cooperation” is asked from all states, including Sudan. But a definition of the range of this cooperation is not explicitly given, creating a legal lacuna in the resolution. Nevertheless, even if this would make the arrest warrant unlawful, this would not be based on infringement of the supposed immunity of Al Bashir.

Another peculiar aspect of the arrest warrant can be found in paragraph 6 of resolution 1593, which amounts to unlawful discriminatory prosecution. But this will not be relevant until there is evidence of persons committing such crimes that are not prosecuted in their own state, so it does not influence the lawfulness of the arrest warrant at this time.

The African Union decided wrongfully after an ignored request for deferral of the Al Bashir case not to cooperate with the court at all. First, they argue falsely that Al Bashir is protected from prosecution by Head of State immunity. Second, they argue that their requests are not heard by the UN Security Council, which is impermissible. And third, the AU seems to be of the opinion that the complementarity principle bars the ICC from prosecution because the case would be inadmissible. It is for the ICC only to decide whether or not immunity applies, in this case the ICC decided that it does not, the UN Security Council has the discretion to decide if they will honor a request and the complementarity principle is no problem in this case. All of these arguments constitute no legal reason for collective non-cooperation.

All states and non-states parties to the Rome Statute are obliged to arrest and surrender Al Bashir to the ICC as soon as he enters their territories. Al Bashir has no immunities before the ICC and the ICC has jurisdiction over the case.

The research question of this thesis: “Is the warrant for arrest for Al Bashir lawful considering the Head of State immunity doctrine?” can be, taking all above into account, answered with a concise: “Yes”.

6 Recommendations

The Al Bashir case started out with the referral by the UN Security Council in Resolution 1593, which was at least problematic. The UN Security Council should be more explicit and specific in future referrals to the ICC with respect to necessary legal cooperation tools. They should also make an explicit choice in which cooperation regime is applicable to what extent. If the entire Rome Statute is applicable to non-states parties the resolution should state this expressly. If the Security Council deems that another cooperation regime is appropriate, it should develop and state the rules for this regime in the resolution.

The political negotiations with the US resulted in a discriminatory prosecution possibility based on distinction of nationality. The UN Security Council should not let politics get in the way of international law. Negotiations about resolutions should never result in favoring any country with respect to international criminal prosecution. It is not good for the credibility of the Council and consequently also not good for the credibility of resolutions produced by the Council. This could lead to inequality before international law and enforceability issues when States invoke this inequality or apply rights granted to certain States on themselves, which has to be prevented.

The UN Security Council should at least react to requests made relating to article 16 Rome Statute and communicate if it honors or reject the request, and elaborate on the grounds. The proposal done by the AU is worth considering. Article 16 Rome Statute could be amended to the effect that it gives power to the UN General Assembly to decide on a request of deferral of an ICC case that was referred by the UN Security Council. The Security Council should still have the primary right to do this and have appropriate time to decide on the request, for example one year.

The United Nations should address the collective non-cooperation of the African Union. They should engage in a discussion with the AU to convince them to execute the arrest warrant. This can be done in a structure of consultation and deliberation, but could also entail punitive sanctions if the AU continues to refuse cooperation with the ICC, such as economic sanctions or sanctions relating to official development aid from western countries.

A refusal of cooperation should never be tolerated by the ICC. There have to be consequences for not cooperation as enforcement of either the Rome Statute itself, or Security Council Resolutions leading to applicability of the Rome Statute. The enforcement of the Rome Statute is stated in article 87(7), if the situation is referred by the Assembly of States the ICC can send a finding of non-cooperation of a State to the Assembly. If the situation is referred by the Security Council the ICC can send a finding of non-cooperation to the Security Council. Since the ICC has not taken any of these actions in the Al Bashir case it seems too easy for states not to cooperate and it may even seem condoned. It is recommended for the ICC to send findings of non-cooperation to the Security Council, so the Council can take appropriate action with punitive measures for refusing States. Since the ICC is totally reliant on the cooperation of other states this needs to be a strong obligation for states.

The ICC should come to a conclusion in the relationship between article 27 and 98 Rome Statute. In this light article 98(1) should be clarified and/or revised by the Assembly of States Parties so that no uncertainty about the waiver of immunity exists anymore, or the waiver of immunity should be scratched from the Rome Statute as a whole. Since the ICC can only prosecute for international core crimes for which no immunity exists before the ICC this is a valid suggestion.
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