

The ICC Pre-Trial Chamber's decision on Malawi regarding the failure to arrest and surrender President Al Bashir of Sudan: An opportunity missed

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Abstract

Article 27 of the Rome Statute makes it clear that immunities for any state official are not to bar prosecutions by the ICC. On the other hand, article 98(1) of the Rome Statute provides that the International Criminal Court (ICC) may not proceed with a request for surrender which would require the requested state to act inconsistently with its obligations under international law with respect to the state or the diplomatic immunity of a person from a third state, unless the ICC can first obtain the cooperation of that third state for the waiver of the immunity. There is therefore a clear tension between articles 27(2) and 98(1) of the Rome Statute when it comes to state parties' cooperation with the ICC in cases of arrest and surrender of accused persons who happen to be entitled to personal immunities. This raises questions such as: are states party to the Rome Statute under an obligation to arrest and surrender a head of state not party to the Rome Statute when such a head of state has immunities under international law? Does this mean that states party to the Rome Statute are to ignore their obligations under the Rome Statute vis-à-vis international law obligations on personal immunities of the incumbent heads of state, and vice versa? I argue that the Pre-Trial Chamber failed to consider these questions and as a result, it missed an opportunity.

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1 Introduction

In March 2004 the Pre-Trial Chamber of the International Criminal Court (ICC) issued an arrest warrant against Omar Al Bashir, an incumbent president of Sudan, for international crimes committed in the region of Darfur, Sudan.¹ Sudan is not a state party to the Rome Statute, and the situation in Darfur was referred to the ICC by the United Nations (UN) Security Council² acting in terms of article 13(b) of the Rome Statute, which serves as one of the trigger mechanisms for the jurisdiction of the ICC.³ The Pre-Trial Chamber also requested cooperation from states seeking the arrest and surrender of the president. As a result, the Office of the Registrar ('the Registry') of the ICC sent requests⁴ asking for cooperation from all states parties to the Rome Statute in the arrest and surrender of Omar Al Bashir pursuant to articles 89(1)⁵ and 91⁶ of the Rome Statute. Al Bashir is not the only sitting head of state that had been issued a warrant of arrest by the ICC – the late Colonel Muammar Gaddafi was likewise issued with a warrant of arrest for international crimes alleged to have been committed in Libya during the uprising of early 2011.⁷

In light of the arrest warrants issued by the ICC against the two incumbent heads of state who happen to be from Africa, the AU asked the Security Council to request the ICC to defer the arrest warrants for a year, as permitted in article 16 of the Rome Statute.⁸ However, the Security Council is yet to respond to such

¹*Prosecutor v Omar Ahmed Al Bashir*, ICC-02/05 -01/09, 4 March 2009. See also the 2010-07-12 decision, which adds genocide to the crimes of which Al Bashir is accused, as the first warrant of arrest does not include this charge, pursuant to the Appeals Chamber Decision of 2010-02-03, ICC-02-0501/09-73.

²See UN Security Council Resolution 1593, S/Res/1593 (2005) 2005-03-31.

³Article 13 of the Rome Statute, titled 'Exercise of jurisdiction', states as follows:

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

- (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
- (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

⁴ICC-02/05-01/09-7 of 2009-03-04 and ICC-02/05-01/09-96 of 2010-07-21.

⁵Article 89(1) of the Rome Statute states:

The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.

⁶Article 91 of the Rome Statute deals with the contents for arrest and surrender.

⁷See *Prosecutor v Muammar Mohammed Abu Minyar Gaddafi*, ICC-01/11, 2011-06-27. The situation in Libya was also referred to the ICC by the Security Council; see United Nations Security Council Resolution 1970, S/Res/1970 (2011) 2011-02-26.

⁸See the AU Decision on the Situation in Libya, Assembly/AU/Dec 385 (XVII), and the AU Assembly Decision on the Implementation of the Assembly Decisions on the ICC Doc EX CL/670(XIX), Assembly/AU/Dec 366 (XVII), Malabo, Equatorial Guinea, where the AU decided that member

requests. In light of the non-response by the Security Council, the AU Assembly passed decisions whereby it demanded its member states not to cooperate with the ICC on the request to arrest and to surrender the persons in question.⁹ One of the reasons advanced by the AU Assembly for non-cooperation with the ICC requests for the surrender of Al Bashir is article 98(1) of the Rome Statute, which relates to the cooperation by states party to the Rome Statute versus the immunities of the requested persons under international law.¹⁰ On the other hand, article 27 of the Rome Statute makes it clear that immunities for any state official are not to bar prosecutions by the ICC.¹¹ In this regard, article 27(2) states that:

Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Clearly, there is tension between articles 27(2) and 98(1) of the Rome Statute when it comes to states parties' cooperation with the ICC in cases of arrest and surrender. State parties are faced with the dilemma of having to abide by the Rome Statute and to also honour their other obligations under international law as contemplated by article 98(1) of the Rome Statute. This was the main issue faced by the Pre-Trial Chamber in this decision¹² – the apparent tension between articles 27(2) and 98(1) of the Rome Statute when it comes to arrests and surrenders.

The main criticism of the Pre-Trial Chamber's decision is that it did not attempt to resolve or clarify the existing tension between articles 27(2) and 98(1) of the Rome Statute. Instead, the Pre-Trial Chamber dwelt on the fact that immunities do not bar the ICC from prosecuting any person brought before it irrespective of any status they might have. Article 27 of the Rome Statute is clear on that and Malawi did not dispute this fact. Malawi's defence for hosting Al Bashir on its territory and for refusing to cooperate with the ICC was based on the argument that article 27(2) – which cancels immunities – does not apply in this case because of other international obligations

states shall not cooperate with the execution of the arrest warrant of Gaddafi and reaffirmed that by receiving President Al Bashir, Kenya and Djibouti were discharging their obligations under Art 23 of the Constitutive Act (which deals with AU sanctions) and art 98 of the Rome Statute.

⁹*Ibid.*

¹⁰Article 98(1) of the Rome Statute states:

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.

¹¹Article 27 of the Rome Statute, titled 'Irrelevance of official capacity' and states that 'official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence'. Article 27(1).

¹²*Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-139, 2011-12-12.

contemplated in article 98(1) of the Rome Statute, which states that the ICC may not enforce cooperation if such international obligations in immunities exist.¹³ It is also a fact that Malawi and other states party to the Rome Statute have entrusted the ICC with a mandate to prosecute perpetrators of international crimes; however, state parties have also put in place a provision that recognises that there are other obligations under international law by which state parties to the Rome Statute ought to abide. In this particular instance article 98(1) of the Rome Statute is that provision. If article 98(1) does not apply at all – then what is the use of having the provision? Are states party to the Rome Statute under an obligation to arrest and surrender a head of state not party to the Rome Statute when such a head of state has immunities under international law as contemplated in article 98(1) of the Rome Statute? Does this mean that state parties to the Rome Statute, who are also AU member states, are to ignore their obligations under the Rome Statute vis-à-vis international law obligations on personal immunities of the incumbent heads of state, and vice versa? I argue that the Pre-Trial Chamber should have clarified this existing tension between articles 27(2) and 98(1). On that basis I am of the view that the Pre-Trial Chamber missed an opportunity to address this issue.

2 The facts and the decision of the Pre-Trial Chamber

The facts of this case are as follows: In October 2011, Malawi, a state party to the Rome Statute and an AU member hosted Heads of State and Government, which included Al Bashir, for a Summit of the Common Market for Eastern and Southern Africa (COMESA).¹⁴ Consequent to this, the Registry of the ICC filed a report which informed the Pre-Trial Chamber of Al Bashir's visit to Malawi.¹⁵ In this report the Registry informed the Pre-Trial Chamber that an *Article Verbale* had been sent to the Malawian Embassy in Brussels to remind Malawi of its obligations under the Rome Statute, to which Malawi did not respond.¹⁶ The Pre-Trial Chamber then issued a decision requesting observations about Al Bashir's recent visit to Malawi¹⁷ and ordered the Registry to transmit the copy of the report to the competent Malawian authorities in order to submit any observations on the report.¹⁸

Subsequent to the Pre-Trial Chamber's decision, Malawi submitted observations to the ICC with regard to its failure to comply with the cooperation

¹³See para 8.

¹⁴Paragraph 5.

¹⁵*Ibid.*

¹⁶*Ibid.*

¹⁷*Decision Requesting Observations about Omar Al Bashir's Recent Visit to Malawi*, ICC-02/05-01/09-136-Conf Anx 4.

¹⁸*Ibid.* See also para 7.

requests which include the confirmation of Al Bashir's recent visit.¹⁹ Malawi argued that Al Bashir was accorded all the immunities and privileges guaranteed to every visiting head of state and government including freedom from arrest and prosecution within the territories of Malawi.²⁰ For this Malawi cited public international law and the Immunities and Privileges Act of Malawi.²¹ Secondly, Malawi argued that Al Bashir is head of a state that is not party to the Rome Statute and therefore article 27(2) – which waives immunity for heads of state and government – is not applicable in this particular case.²² Thirdly, Malawi argued that as a member of the AU, it fully aligns itself with the position adopted by the AU with regard to the indictments of the sitting heads of states that are not parties to the Rome Statute.²³

The Pre-Trial Chamber found that customary international law creates an exception to head of state immunity when international courts seek the arrest of a head of state for the commission of international crimes.²⁴ Therefore, the Pre-Trial Chamber found no conflict between Malawi's obligations towards the ICC and its obligations under customary international law as it decided that article 98(1) of the Rome Statute does not apply in this matter.²⁵ Further, while acknowledging that there is an inherent conflict between articles 27(2) and 98(1) of the Rome Statute, the Pre-Trial Chamber nevertheless rejected Malawi's (and the AU's) claims that they could refuse cooperation to surrender Al Bashir based on article 98(1).²⁶ The Pre-Trial Chamber's rejection was based on the following reasons: First, it found that the immunity for heads of state before international courts has been rejected time and time again dating back to World War I.²⁷ Second, the Pre-Trial Chamber held that in the last decade there has been an increase in the number of prosecutions of heads of state by international courts, citing the cases of Charles Taylor, Muammar Gadhafi, Laurent Gbagbo and Al Bashir.²⁸ The Pre-Trial Chamber reasoned that these few cases show that initiating international prosecutions against heads of states has gained widespread recognition as accepted practice.²⁹ Third, the Pre-Trial Chamber held that the Rome Statute, in existence for over nine years, now has 120 states parties, all of whom accepted the possible loss of any immunity held under international law by their top officials and any claim to immunity by ratifying the language of article 27(2).³⁰ The Pre-Trial Chamber went further and

¹⁹Paragraph 8.

²⁰*Ibid.*

²¹*Ibid.*

²²*Ibid.*

²³*Ibid.*

²⁴Paragraph 43.

²⁵*Ibid.*

²⁶Paragraph 37.

²⁷Paragraph 38.

²⁸Paragraph 39.

²⁹*Ibid.*

³⁰Paragraph 40.

stated that even some states which have not joined the ICC have twice allowed for situations to be referred to the ICC by the UN Security Council Resolutions undoubtedly in the knowledge that these referrals might ordinarily have immunity from domestic prosecutions.³¹ Finally, the Pre-Trial Chamber held that all states referred to above have ratified the Rome Statute and/or entrusted the ICC with exercising 'its jurisdiction over persons for the most serious crimes of international concern'.³² It decided that it is therefore inconsistent for Malawi to entrust the ICC with this mandate and then refuse to surrender a head of state prosecuted for orchestrating genocide, war crimes and crimes against humanity.³³ The Pre-Trial Chamber held that to interpret article 98(1) of the Rome Statute in such a way as to justify harbouring Al Bashir on immunity grounds would disable the ICC and international criminal justice in ways completely contrary to the purposes of the Statute Malawi has ratified.³⁴ The Pre-Trial Chamber considered that the international community's commitment to rejecting immunity in circumstances where international courts seek arrest for international crimes has reached a critical mass.³⁵ It also opined that 'if it was appropriate to say so, it is certainly no longer appropriate to say that that customary international law immunity applies in the present context'.³⁶ Most importantly, the Trial Chamber stated that 'customary international law creates an exception to Head of State immunity when international courts seek Head of State's arrest for commission of international crimes'³⁷ and found 'no conflict between Malawi's obligations towards the Court and its obligations under customary international law'.³⁸ It is important to begin this discussion by giving the background to immunities in international law.

3 Background to immunities in international law

Immunity is broadly defined as '[a]ny exemption from a duty, liability, or service of process, [especially] such exemption granted to a public official'.³⁹ International law accords state officials, including heads of states, certain immunities from the jurisdiction of foreign states. The predominant justification for such immunities is that they ensure the smooth conduct of international relations and, as such, they are accorded to those states officials who represent the state at the international

³¹ *Ibid.*

³² Paragraph 41.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ Paragraph 42.

³⁶ *Ibid.*

³⁷ Paragraph 43.

³⁸ *Ibid.*

³⁹ Garner, *Black's law dictionary*(2009) (9th ed) 817.

level.⁴⁰ It is important that states are able to negotiate with each other freely and that those agents charged with the conduct of such activities should be able to perform their functions without harassment by other states.⁴¹ International law distinguishes between sovereign immunity; heads of state, and government and foreign ministers' immunity; and diplomatic and consular immunity.⁴² However, immunity does not mean impunity.⁴³ This article will focus on sovereign immunity, in particular the immunity of incumbent state officials which includes heads of state and senior ministers as the Pre-Trial Chamber's decision deals with the immunities of state officials. Sovereign immunity has its origin in the immunity of the person of the foreign sovereign from the jurisdiction of municipal courts.⁴⁴ In this regard, heads of state, heads of government and foreign ministers (state officials) enjoy the broadest scope of immunity from criminal jurisdiction of foreign states in general. The rationale behind the exemption from the criminal jurisdiction is twofold: first, head-of-state immunity is premised on the concept that a state and its rulers are one for the purposes of immunity; and second, all states are equal with the consequence that no state may exercise judicial authority over another.⁴⁵

Two types of immunity can be accorded to state officials: immunity *ratione personae* (personal immunity) and immunity *ratione materiae* (functional immunity). Functional immunity is grounded on the notion that a state official is not accountable to other states for acts that he accomplished in his official capacity, so such acts must therefore be attributed to the state.⁴⁶ Functional immunity attaches to the official act, rather than the status of the official acts; it may be relied on by all who have acted on behalf of the state with regard to their

⁴⁰Akande and Shah 'Immunities of state officials, international crimes, and domestic courts' (2011) 21/4 *European Journal of International Law* 815, 818.

⁴¹The Joint and Separate Opinion of Judges Higgins, Kooijmans and Buergenthal in *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* (2002) ICJ Rep 3 para 75 (hereinafter the *Arrest Warrant Case*). See also Tunks 'Diplomats or defendants? Defining the Future of head-of-state immunity' (2002) 52 *Duke LJ* 651, 656, where he states, 'Head-of-State immunity allows a nation's leader to engage in his official duties, including travel to foreign countries, without fearing arrest, detention, or other treatment inconsistent with his role as head of a sovereign State. Without the guarantee that they will not be subjected to trial in foreign courts, heads of state may simply choose to stay at home rather than assume risks of engaging in international diplomacy.'

⁴²For a thorough discussion of this issue, see Simbeye *Immunity and international criminal law* (2004).

⁴³*Arrest Warrant Case* (n 41) at para 60. For criticism of this judgment, see Cassese 'When may senior state officials be tried for international crimes? Some comments on the *Congo v Belgium Case*' (2002) 13/4 *European Journal of International Law* 853, 862. See also Spinedi 'State responsibility v individual responsibility for international crimes: *Tertium Non Datur?*' (2002) 13/4 *European Journal of International Law* 895; and Akande and Shah (n 40).

⁴⁴Dugard *International law: A South African perspective* (2011) (4th ed) 240.

⁴⁵Cassese *International law* (2008) 120.

⁴⁶*Ibid.*

official acts.⁴⁷ This type of immunity is relied upon by former officials with respect to official acts performed while in office, as well as by serving officials.⁴⁸ It therefore constitutes a substantive defence for state officials to avoid being held responsible for state acts.⁴⁹ However, after World War II, international courts and tribunals have since held that the functional immunity of a state can be relaxed in order for senior state officials to be prosecuted. For example, articles 7(2) and 6(2) of the ICTY and ICTR provide, respectively, that '[t]he 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'.⁵⁰ In practice, these tribunals have prosecuted and convicted senior government officials involved in international crimes.⁵¹

More complex is the issue of personal immunities, that is whether customary or treaty law on personal immunities can be relaxed in the case of international crimes? Personal immunity is based on the notion that a state official is immune from foreign jurisdiction in order to avoid either an infringement by foreign states on the sovereign prerogatives of states or an interference with the official functions of a state agent under the pretext of dealing with an exclusively private act.⁵² Therefore, personal immunity is commonly regarded as an absolute prohibition of the exercise of criminal jurisdiction by states. In this regard, Dapo Akande argues that '[j]udicial opinion and state practice on this point are unanimous and no case can be found in which it was held that a state official possessing personal immunity is subject to the criminal jurisdiction of a foreign state where it is alleged that he or she has committed an international crime'.⁵³

⁴⁷Akande and Shah (n 40) 825.

⁴⁸*Ibid.*

⁴⁹Cassese 'Where may senior state officials be tried for international crimes?' (n 43) 863. See also, *Attorney-General of Israel v Eichmann* 36 ILR (1962) 5, 308-309, stating that 'The theory of "Act of State" means that the act performed by a person as an organ of the State – whether he was Head of State or a responsible official acting on Government's order – must be regarded as an act of the State alone'.

⁵⁰In *Prosecutor v Blaškić (Objection to the Issue of Subpoena duces Tecum)* IT-95-14-AR 108 (1997) 110 ILR (1997) 607, 707 para 41, the ICTY held that 'those responsible for such crimes cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity'. See also, *Prosecutor Charles Taylor Case, id* paras 45-53, holding that the official position of a person – whether a state official or not – does not bar prosecution before international courts.

⁵¹The ICTR has prosecuted and convicted senior government officials of Rwanda involved in the genocide, including former Prime Minister Jean Kambanda, who pleaded guilty. See *Prosecutor v Jean Kambanda*, Case no 97-23S, Judgment of 1998-09-04. For the ICTY, see *Prosecutor v Slobodan Milošević* (IT-02-54), who later died in custody before the completion of the proceedings.

⁵²Cassese (n 43) 862.

⁵³Akande *International Immunities and the International Criminal Court* (2004) 98 *American Journal of International Law* 407, 407 (2004). However, the International Law Commission has taken the view that 'the absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings is an essential corollary of the absence of any substantive

Indeed, in *Pinochet*, the House of Lords opined that if *Pinochet* had currently been a head of state, he would have enjoyed personal immunities and therefore could have been exempted from arrest and criminal jurisdiction in Great Britain.⁵⁴

The International Court of Justice (the ICJ), in *Arrest Warrant Case*,⁵⁵ went a step further and held that an incumbent Minister of Foreign Affairs enjoys full immunity from criminal jurisdiction when abroad and that ‘no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an “official” capacity, and those performed in a “private capacity”’.⁵⁶ The ICJ, after carefully examining state practice, also found no existence (under customary international law) of ‘any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity’.⁵⁷ This principle has since been widely applied by national courts.⁵⁸ However, in its dictum, the ICJ stated that immunity might be lifted in circumstances which include ‘an incumbent or former Minister for Foreign Affairs ... subject to criminal proceedings before certain international criminal courts, where they have jurisdiction ...’.⁵⁹ The rationale for the ICJ’s distinction for foreign courts and international courts should be construed as a belief that a foreign court cannot adjudicate upon the domestic affairs of another state for reasons of state sovereignty.⁶⁰ What does the *Arrest Warrant Case* mean for the ICC prosecutions in this regard?

immunity or defense. Its rationale is that it would be paradoxical to prevent an individual from invoking his official position to avoid responsibility for a crime only to permit him to invoke this same consideration to avoid the consequences of his responsibility.’ See *Comment on Article 7* of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, (1996) Vol. II, Part 2, *Yearbook of International Law Commission* 27. Art 7 of the ILC Draft Code provides that ‘[t]he official position of an individual who commits a crime against the peace and security of mankind, even if acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment.’

⁵⁴ Opinion of Lord Phillips of Worth Matravers, Judgment of the House of Lords of 1999-03-24 at 653.

⁵⁵ *Arrest Warrant Case* (n 41).

⁵⁶ *Id* paras 54-55.

⁵⁷ *Id* para 58.

⁵⁸ See, eg, *Tachiona v Mugabe* 169 F Supp 2d 259 (SDNY 2001), (where the district court accepted the Department of State’s suggestion of immunity and dismissed the action against the incumbent President Robert Mugabe of Zimbabwe and Foreign Minister Stan Muzenge). See also *The Schooner Exchange v M’Faddon* 11 US (7 Cranch) 116, 138 (1812) per CJ Marshall, recognising that, under customary international law, ‘the immunity which all civilized nations allow to foreign ministers’ is coextensive with the immunity of the sovereign.

⁵⁹ *Arrest Warrant Case* (n 41) para 61.

⁶⁰ See also Spinedi (n 43) 899 where she holds that ‘it must be concluded that according to the Court, a state is under the obligation not to subject to its jurisdiction the organs of another state having committed such crimes even after the officials in question leave office ... though the possibility remains to invoke state responsibility at the international level for the same conduct’.

4 The Rome Statute on immunities for incumbent heads of state and senior state officials

The *Arrest Warrant Case* has made it clear that personal immunities may be lifted in international courts such as the ICC. Indeed, article 27(2) of the Rome Statute simply restates this view as personal immunities cannot preclude the ICC from the exercise of its jurisdiction. However, article 27(2) must be read in conjunction with article 98(1) of the Rome Statute, which explicitly covers personal immunities in international law. In this regard, article 98(1) states that:

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

This provision deals with the cooperation of state parties with the ICC. It actually bars the ICC from proceeding with requests for the surrender or assistance if such assistance would require the requested state to breach the international obligations it owed to a third state in the area of immunities.⁶¹ While *ad hoc* international criminal tribunals such as the ICTY and the ICTR are constructions of the Security Council⁶² and therefore may bind all UN member states, the ICC on the other hand was created by a multilateral treaty, and as a result, it can only bind state parties to the Rome Statute as international law rules so require.⁶³ Non-state parties are therefore not bound by the Rome Statute especially when it comes to cooperation with the ICC. The decision by the Pre-Trial Chamber that there was no conflict between articles 27(2) and 98(1) was therefore mistaken.⁶⁴ The starting point for the Trial Chamber should have been to deal with this apparent conflict considering that the Malawi government relied on it in its arguments. Hence, it is argued that the Pre-Trial Chamber in this decision should have considered the application of article 98(1). In other words, what does this provision mean for state

⁶¹Gaeta 'Official capacity and immunities', in Cassese, Gaeta and Jones (eds) *The Rome Statute of the International Court: A commentary* (2002) 990.

⁶²The International Criminal Tribunal for the Former Yugoslavia (ICTY) was established to prosecute 'Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991' SC Res 827 (1993-05-25). The Statute of the ICTY is contained in UN Doc S/25704 Annex (1993-05-03). Whereas, the International Criminal Tribunal for Rwanda (ICTR) was established for the 'Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Violations in the Territory of Neighboring States, between 1 January 1994 and 31 December 1994' SC Res 955 (1994-11-08). The Statute of the ICTR is attached to SC Res 955 as an Annex.

⁶³Article 34 of the Vienna Convention on the Law of Treaties with Annex 1969-05-23, UN Doc A/CONF 39/27 (Vienna Convention).

⁶⁴See para 40.

parties who have obligations under the Rome Statute to cooperate with the ICC as well as other obligations under international law, ie, to honour their obligation owed to the third state in issues of immunities?

5 Was Malawi under an obligation to arrest and to surrender President Al Bashir?

Very few legal scholars have actually discussed the tension between articles 27(2) and 98(1) of the Rome Statute and there are at least three views to this question.⁶⁵ One view is that a state can surrender a person to the ICC once the person is no longer entitled to immunities because he or she has relinquished his or her office, or because the requesting state has managed to obtain a waiver of immunities from the foreign state that the person represents.⁶⁶ This is unlikely to happen as states jealously guard their sovereignty against interference (in internal matters) by other states. The second view is that if a state decides to disregard the personal immunities of the foreign state official and to render him or her to the ICC, that state commits an international wrongful act.⁶⁷ This view maintains that these two provisions can be reconciled by scrutinizing article 98(1) of the Rome Statute closely. According to Professor Gaeta, two interpretations can be made from this provision.⁶⁸ First, article 98(1) uses the term 'Third State' (which only appears in this provision), to be distinguished from the term 'Requested State'.⁶⁹ Consequently Professor Gaeta argues that this reference could imply that the drafters of article 98(1) used the expression precisely to indicate third states, ie, states other than the requested state, regardless of whether or not such a third state is party to the Rome Statute. Therefore, it can be construed to refer to a state other than the state that is requested by the ICC to cooperate. If this is the correct interpretation, then article 27(2) (which disregards immunities) would prove to be meaningless were one to hold the view that a waiver of immunity by the competent states, including state parties to the Rome Statute, would always be a necessary condition to the obligation of the requested state to execute arrest warrants or requests for transfer. By virtue of article 98(1) of the Rome Statute, the ICC would be permitted to exercise its jurisdiction only after obtaining a waiver of immunity from the competent states.⁷⁰

⁶⁵Gaeta 'Does President Al Bashir enjoy immunity from arrest?' (2009) 7 *Journal of International Criminal Justice* 315; and Akande 'The legal nature of Security Council referrals to the ICC and its impact on Al Bashir's immunities' (2009) 7 *Journal of International Criminal Justice* 333. See also, in general, Jurid *The International Criminal Court and national courts: A contentious relationship* (2011) 199, discussing the complementarity principle and the Security Council deferral in Darfur.

⁶⁶*Arrest Warrant Case* (n 41) para 61.

⁶⁷Gaeta 'Does President Al Bashir enjoy immunity from arrest?' (n 65) 326.

⁶⁸Gaeta (n 61) 992.

⁶⁹*Ibid.*

⁷⁰*Ibid.*

The second interpretation of article 98(1) of the Rome Statute is that this provision could mean that a waiver of immunity is a necessary condition to the execution of arrest warrants or transfers only in those cases where the requested state is internationally obligated, as far as immunities are concerned toward a state not party to the Rome Statute.⁷¹ Therefore, according to Professor Gaeta the expression 'Third State' in article 98(1) must be taken to mean 'third state regards to the [Rome] Statute' – that is equivalent to 'State not Party'.⁷² Under this interpretation, the ICC's request for arrest or transfer would be preceded by a waiver of immunity only when the requested state is legally bound *vis-à-vis* a state not party to the Rome Statute.⁷³ From this interpretation the conclusion is that the ICC's request to state parties to surrender President Al Bashir is contrary to article 98(1) of the Rome Statute and is an act *ultra vires*.⁷⁴ State parties are therefore not bound to comply with the request to cooperate in this regard.⁷⁵ This interpretation is legally sound and therefore it should be followed.⁷⁶

Recall that the arrest warrant issued for President Al Bashir was a result of the Security Council referral to the ICC in terms of article 13(b) of the Rome Statute. Further, recall that Sudan is not party to the Rome Statute. The third view contends that the removal of immunity by article 27 of the Rome Statute is also applicable when state party cooperation in support of the ICC is required.⁷⁷ Therefore and according to this view, by virtue of the referral done in terms of Chapter VII of the UN Charter, Sudan is to be treated as bound by the Rome Statute, as if it were a party to the Statute. This will then resolve the tension between articles 27(2) and 98(1) of the Rome Statute when it comes to states' cooperation with the ICC. The rationale for this view is found in article 25 of the UN Charter, which says: 'Members of the United Nations agree to accept and carry out the decisions of the Security Council ...'. The argument is that the Rome Statute operates in this case not as a treaty, but by virtue of being a Security Council resolution; thus, the removal of immunity operates even with regard to non-state parties.⁷⁸ This is the view that seems to be advanced by the Pre-Trial Chamber in this decision.⁷⁹

⁷¹*Id* at 994.

⁷²*Ibid.*

⁷³*Ibid.*

⁷⁴*Ibid.*

⁷⁵Gaeta 'Does President Al Bashir enjoy immunity from arrest?' (n 65) 326. She also contends (rightly so) that the fact that the ICC is endowed with jurisdiction over a particular case, but is deprived of enforcement powers, does not imply that national judicial authorities are permitted to do whatever an international court asks them to do; and more so if that court has been established by virtue of a treaty, like the ICC, where its authority derives from an instrument based upon consent, *ibid.*

⁷⁶See art 38 of the ICJ Statute, which provides that the writings of legal scholars can be used as an interpretative tool.

⁷⁷Akande (n 65) 333.

⁷⁸*Id* at 339.

⁷⁹See para 40.

There are three counterarguments that can be advanced against the latter view. First, if we agree with this view, then that would mean that the ICC operates on two heads: as an independent court created by a multilateral treaty, and as an instrument of the Security Council. However, the history of this provision shows that it was designed to make available to the Security Council the jurisdictional mechanism created by the Rome Statute, but that it would not add to (nor restrict) the powers of the Security Council, as defined in the UN Charter.⁸⁰ Accordingly, article 13(b) of the Rome Statute provides that the Security Council could only refer a 'situation in which one or more of such crimes (referring to article 5) appears to have been committed'. In other words, this provision provides for a possible referral of a situation to the ICC for further investigation and pronouncements by the ICC. In this regard, the exercise by the Security Council of its powers under Chapter VII is submitted to the control of legality of the jurisdictional organs of the ICC.⁸¹ Therefore, the second counterargument is that the ICC may decide on its own motion whether to investigate and prosecute according to its own procedures and regulations.⁸² For example, in defining the general principles of admissibility, article 17 of the Rome Statute does not distinguish between the different trigger mechanisms mentioned in article 13.⁸³ Consequently, the ICC is an independent court that operates according to the Rome Statute, and it is responsible for determining its own jurisdiction.⁸⁴

Third, while article 25 of the UN Charter provides that UN member states agree to accept and to carry out the decisions of the Security Council in accordance with the UN Charter, not all Security Council resolutions are binding to all UN member states. The ICJ has explained that:

The language of the Security Council resolution should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.⁸⁵

In other words, while resolutions that merely 'recommend', 'call upon', or 'urge' states to do or to refrain from doing something are not binding on UN member states,⁸⁶ 'decisions' taken under Chapter VII of the UN Charter to maintain or to

⁸⁰Condorelli and Villalpando *Referral and deferral by the Security Council* in Cassese *et al* (n 61) 645.

⁸¹*Id* at 633.

⁸²In this regard, see art 19 of the Rome Statute, which provides that the ICC 'shall satisfy itself that it has jurisdiction in *any* case brought before it' and that it 'may on its *own* motion determine the admissibility of a case' (emphasis added).

⁸³See art 17 of the Rome Statute.

⁸⁴See *id* art 19.

⁸⁵ICJ *Namibia Advisory Opinion* ICJ Reports, 1971 para 53.

⁸⁶Boyle and Chinkin *The making of international law* (2007) 229.

restore international peace and security may be binding.⁸⁷ Therefore, the Security Council's resolutions may be binding on member states when adopted on matters concerning the maintenance of peace and security, which is the primary responsibility of the Security Council.⁸⁸

Thus, if we scrutinize the Security Council resolution on the referral of the situation in Sudan, we would find that it does not use a binding language on all UN member states; instead it employs such a binding language only to Sudan.⁸⁹ Based on this and the interpretation of article 98(1) of the Rome Statute above, it is reasonable to argue that Rome Statute state parties (who are also UN Member States) and, in particular, AU member states are not bound by the Rome Statute to cooperate with the ICC (ie, to arrest and to surrender President Al Bashir, an incumbent head of a non-state party to the Rome Statute); and that if they (state parties) do arrest him, such states will be going against their obligations to Sudan under customary international law on personal immunities. In other words, while the arrest warrant issued against Al Bashir is not unlawful based on article 27(2) of the Rome Statute; it would be unlawful to force the states to act against their obligations as envisaged in article 98(1). Instead, state parties who are also AU members are obliged to abide by the decisions of the AU Assembly not to cooperate with the ICC by virtue of article 98(1) of the Rome Statute. If they do not comply with the AU Assembly's decision they may face sanctions as envisaged in the Constitutive Act.⁹⁰ It is in this regard that I argue that the decision of the Pre-Trial Chamber on Malawi's cooperation with the ICC is wrong as it failed to take into account the views advanced in this article.

6 Conclusion

Two arguments are advanced by my discussion on immunities and the Pre-Trial

⁸⁷ *Ibid.* See also Wood 'Interpretation of Security Council Resolutions' (1998) 2 *Max Planck Yearbook of United Nations Law* 73 at 82, arguing that when the Security Council intends a provision to be binding, the resolution contains or refers to an art 39 determination and includes the words 'acting under Chapter VII' or reference to an appropriate article thereof, as well as the word 'decides.'

⁸⁸ Article 24(1) of the UN Charter.

⁸⁹ In Resolution 1593 pertaining to Darfur, Sudan, paras 2 and 3, the Security Council *decided* that the *government of Sudan and all other parties to the conflict* in Darfur *shall* cooperate and provide any assistance to the ICC and the prosecutor, *urged* all states and regional and other organisations to cooperate fully, and also *invited* the ICC and the AU to discuss practical arrangements to facilitate the work of the prosecutor and of the ICC. In contrast, Resolution 1970 pertaining to the Libyan situation, paras 4 and 5 also used the same binding phrases '*decides*' and '*shall*' with regard to the Libyan authorities and *urged* all (other) states to cooperate fully. This is in comparison to para 17 of Resolution 1970, where the Security Council decided that '*all Member States shall* freeze without delay all funds, other financial assets and economic resources which are on their territories, which are owned or controlled, directly or indirectly by individuals or entities listed ...' (emphasis added).

⁹⁰ See art 23 of the AU's Constitutive Act, which provides that 'any member state that fails to comply with the decisions and policies of the [AU] may be subjected to sanctions'.

Chamber's decision with regard to Malawi's (and the AU's) refusal to cooperate with the ICC on arresting and surrendering Al Bashir: (1) while article 27 of the Rome Statute lifts the immunity of incumbent heads of states, state parties to the Rome Statute are not under any legal obligation to arrest and to surrender Al Bashir by virtue of article 98 of the Rome Statute and not unless the immunity is waived by the state in question or if the Security Council insists (through a binding resolution) that states should cooperate with the ICC by arresting and surrendering Al Bashir, as analysed above; and (2) AU member states are under a legal obligation to abide by the decisions of the AU Assembly. However, this does not in any case absolve Al Bashir from facing the charges at a later stage, once he leaves office as immunity does not mean impunity.⁹¹ Furthermore, while states are not to be forced to cooperate with the ICC in this regard, they are also not prohibited from doing so as long as they are prepared to face the consequences of committing an internationally wrongful act.⁹²

⁹¹As per the ICJ judgment in *Arrest Warrant Case* (n 41).

⁹²Gaeta 'Does President Al Bashir enjoy immunity from arrest?' (n 65) 332.