THE UNSETTLED QUESTION OF AL-BASHIR'S IMMUNITY: A CASE NOTE ON THE ICC MINORITY OPINION OF JUDGE PERRIN DE BRICHAMBAUT

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Abstract

In July 2017, Pre-Trial Chamber II of the International Criminal Court (ICC) delivered two opinions on the alleged non-compliance of South Africa in failing to arrest the Sudanese president, Omar Al-Bashir, while he was within its territory in 2015. The judgments concern the vexed question in international criminal law of whether there is a duty on ICC states parties to arrest a head of state for whom the ICC has issued an arrest warrant, despite the immunity from arrest which heads of state enjoy under customary international law. Both the Majority and the Minority Opinion found that there was a duty on South Africa to arrest Al-Bashir but each relied on different reasoning, or 'legal avenues' as they are referred to in this article. The subject of this case note is the Minority Opinion as it uniquely considers each of the most prominent legal avenues relied on by previous courts and in the literature. This note provides an analysis of the Minority Opinion's reasoning in respect of each avenue, namely the 'analogy avenue', 'Genocide Convention avenue', 'waiver avenue' and 'customary international law avenue'. It concludes that none of these avenues can be firmly relied upon yet, and that the question is therefore yet to be definitively resolved.

Keywords: immunity; Al-Bashir; International Criminal Court; ICC; Rome Statute; Sudan; South Africa; Judge Perrin de Brichambaut

1 Introduction

In April 2017, Pre-Trial Chamber II (PTC II) of the International Criminal Court (ICC) heard arguments on South Africa's alleged non-compliance with the ICC's request to arrest and surrender the president of Sudan, Omar Hassan Al-Bashir, while he was on South African territory. Al-Bashir, against whom arrest warrants have been issued for alleged crimes against humanity, war crimes and genocide, visited South Africa in July 2015, when no steps were taken to arrest him. South Africa, which as a state party to the ICC is obligated to co-operate with the ICC and adhere to its requests, claimed that it was prevented from executing the arrest

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warrant, as Al-Bashir as a head of state enjoys immunity from arrest in South Africa under customary international law.

The question before the chamber was whether South Africa was correct in holding that Al-Bashir was protected by immunity under customary international law, or whether that immunity had in fact been extinguished, meaning that South Africa should have arrested Al-Bashir. This question turns on whether circumstances exist that have the effect of lifting the immunity Al-Bashir enjoys as an incumbent head of state under customary international law. In the literature on this question, a number of legal arguments or 'avenues' have been advanced which claim to have such an effect. In this article, I refer to the most prominent of these avenues as the 'Genocide Convention avenue', the 'analogy avenue', the 'waiver avenue' and the 'customary international law avenue'.

PTC II delivered two opinions in July 2017. The Majority Opinion, which was delivered by judges Tarfusser and Chung, found that South Africa was under an obligation to arrest Al-Bashir by virtue of the 'analogy avenue'.[1] The Minority Opinion, which was delivered by Judge Perrin de Brichambaut, also found that South Africa had been under an obligation to arrest Al-Bashir but on the basis of the 'Genocide Convention avenue'.[2] In the preceding opinions of the ICC on Al-Bashir's immunity, two other avenues had been relied upon. In respect of Malawi and Chad's failure to arrest Al-Bashir, Pre-Trial Chamber I (PTC I) relied on the 'customary international law avenue',[3] whereas in respect of the Democratic Republic of the Congo (DRC), PTC II relied on the 'waiver avenue' in order to establish a duty to arrest Al-Bashir.[4] The ICC has therefore relied on a

1 'Majority Opinion of Pre-Trial Chamber II' in Decision under art 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the court for the arrest and surrender of Omar Al-Bashir, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-02/09, PTC 2, ICC, 6 July 2017 (Majority Opinion).

2 'Minority Opinion of Judge Marc Perrin de Brichambaut' in Decision under art 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the court for the arrest and surrender of Omar Al-Bashir, *Al Bashir, Situation in Darfur, Sudan*, ICC-02/05-02/09, PTC 2, ICC, 6 July 2017 (Minority Opinion).

3 *The Prosecutor v Omar Hassan Ahmad Al Bashir*, 13 December 2011, ICC, PTC I, Corrigendum to the Decision pursuant to art 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, 13 December 2011 (*Malawi*); *The Prosecutor v Omar Hassan Ahmad Al-Bashir,* ICC-02/05-01/09-140-tENG, Decision pursuant to art 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, 13 December 2011 (*Chad*).

4 *The Prosecutor v Omar Hassan Ahmad Al Bashir*, 9 April 2014, ICC, PTC II, Decision on the cooperation of the Democratic Republic of the Congo regarding Omar Al Bashir's arrest and surrender to the court, ICC-02/05-01/09 (*DRC*).

range of legal avenues, which Dire Tladi has criticised as an 'à la carte approach', in terms of which the court can choose from 'a wide selection of options … as long as the option leads to the conclusion that Al-Bashir must be arrested and surrendered'.[5]

Among these judgments, the Minority Opinion of Judge Perrin de Brichambaut in the South Africa case stands out in that it provides a thorough analysis of each of these legal avenues. While the opinions in respect of Malawi, Chad and the DRC, and the Majority Opinion in South Africa, each only considers the argument by which they are persuaded, often with little engagement with the critiques of that avenue, the Minority Opinion of Judge Perrin de Brichambaut considers in detail the arguments for and against each legal avenue. This thorough examination of all pertinent arguments fills a gap in the court's jurisprudence and provides a useful springboard from which to consider the vexed question of Al-Bashir's immunity.

In this article I set out and analyse the Minority Opinion's arguments in respect of each avenue. I reach a number of conclusions. First, that the reliance on the 'Genocide Convention' is unpersuasive and that this avenue is therefore at best, uncertain. Second, that the conclusion that the 'analogy avenue', 'waiver avenue' and 'customary international law avenue' achieve contradictory and unclear results, is correct. Third, accordingly, it is my view that the Minority Opinion reveals the uncertainty that still exists on the question of immunity, and that it therefore still requires final determination. Fourth, in assessing these avenues side by side, I also take the opportunity to consider which avenue might practically offer the means to achieve a long-term solution to this legal problem.

Section 2 of this article begins by outlining the facts pertinent to the case. Section 3 sets out the pertinent principles of international criminal law that provide the legal framework within which to consider the Minority Opinion. These principles reveal the legal problem intrinsic to Al-Bashir's immunity, which I set out in section 4. Section 5 describes and analyses each of the four legal avenues considered by Judge Perrin de Brichambaut in the Minority Opinion. Finally, section 6 concludes with my view that none of these avenues can currently be firmly relied upon, and discusses the ways in which this legal question could be settled in the future.

5 D Tladi 'Of heroes and villains, angels and demons: The ICC-AU tension revisited' 2017 (60) *German Yearbook of International Law* 43.

2 The Facts

2.1 Omar Al-Bashir and the Conflict in Darfur

Omar Hassan Al-Bashir has been the leader of Sudan since 1989 when he led a military coup against then Prime Minister Sadiq al-Mahdi.[6] Following the coup, Al-Bashir was appointed chairman of the Revolutionary Command Council for National Salvation and consequently suspended all political parties and trade unions. He also started implementing Shari'a law in Sudan, intensifying the then ongoing conflict between the northern region and the largely Christian southern region of Sudan. In 1993, Al-Bashir ended the military rule which had brought him to power and returned Sudan to civilian rule, appointing himself president of the new regime. In the ensuing elections, Al-Bashir has routinely been re-elected, most recently in 2015, albeit in an election boycotted by the major opposition parties which claimed that the election would not be free and fair.

The charges against Al-Bashir concern the conflict in Darfur, a province in the west of Sudan inhabited by people of 'Arab' and 'African' descent.[7] In 2003, groups in Darfur such as the Sudan Liberation Army and the Justice and Equality movement, supported by 'African' Darfurians, rebelled against the Sudanese government, which it accused of oppressing Darfur's African population.[8] The government retaliated by recruiting militias known as the Janjaweed from local Arab groups, and directing that they attack the civilian population.[9] The Janjaweed, supported by the Sudanese army, made brutal attacks on civilians in Darfur, and are considered responsible for the mass killing, rape and forced removal of millions of black Africans in Darfur, particularly the Fur, Zaghawa and Masalit groups which supported the rebels. The United Nations (UN) has estimated that approximately 200 000 to 400 000 people have been killed in the conflict and a further 2,7 million people displaced.[10] The conflict is ongoing.

2.2 The United Nations Security Council Resolution and the ICC Arrest Warrant

In March 2005, the UN Security Council determined that the conflict in

6 J van der Vyver 'The Al Bashir debacle' 2015 (15) *African Human Rights Law Journal* 559, 561.

7 M Happold 'Darfur, the Security Council, and the International Criminal Court' 2006 (55) *International Comparative Law Quarterly* 226.

8 Ibid.

9 Ibid.

10 'Darfur – overview' *Unicef* https://www.unicef.org/infobycountry/sudan_darfuroverview.html (accessed 6 November 2017).

Darfur had become so critical as to constitute 'a threat to international peace and security'.[11] Acting under Chapter VII of the United Nations Charter,[12] the Security Council adopted Resolution 1593 (2005) (SC Resolution 1593 or the SC Resolution) in terms of which it referred the situation in Darfur from July 2002 to the Prosecutor of the ICC. Referral by the Security Council is one of the ways in which the ICC gains jurisdiction over a conflict where the state in question is not a party to the Rome Statute.[13] The resolution states that 'the Government of Sudan and all other parties to the conflict in Darfur, shall co-operate fully with and provide any necessary assistance to the Court and the Prosecutor'.[14]

In 2009, the Pre-Trial Chamber of the ICC issued an arrest warrant against Al-Bashir for crimes against humanity and war crimes allegedly committed in Darfur.[15] This was followed by a second arrest warrant in 2010, for the crime of genocide.[16] Upon the issuing of these arrest warrants, the ICC issued requests to its states parties, including South Africa, to arrest Al-Bashir.[17]

2.3 The South African Debacle

On 13 June 2015, Al-Bashir entered South Africa in order to attend the African Union (AU) Summit taking place in Johannesburg. Upon his arrival in South Africa, the government did not arrest him, adopting the view that it was not obliged to do so as Al-Bashir enjoyed immunity from arrest. The Southern Africa Litigation Centre (SALC) subsequently brought an urgent application to the High Court of South Africa seeking an order declaring that a failure to take steps to arrest Al-Bashir was in breach of the South African Constitution,[18] and directing the government to arrest and surrender him to the ICC to stand trial. The SALC's application was based primarily on a breach of the Implementation of the Rome Statute of the International Criminal Court Act (Implementation Act).[19] The High Court first issued an interim order prohibiting Al-Bashir from leaving the country. The following day, the court made an order for the arrest of Al-

11 UNSC Res 1593 (31 March 2005) UN Doc S/RES/1593 1.
12 1945 Charter of the United Nations, 1 UNTS.
13 Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 ('Rome Statute') art 13(b).
14 S/RES/1593 (2005) ('Resolution 1593').
15 'Warrant of Arrest for Omar Hassan Ahmad Al Bashir', 4 March 2009, ICC-02/05-01/09-1.
16 'Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir', 12 July 2010, ICC-02/05-01/09-95.
17 Majority Opinion (n 1 above) para 3.
18 Constitution of the Republic of South Africa, 1996.
19 Act 27 of 2002.

Bashir, only to be subsequently informed that Al-Bashir had been allowed to leave the country from a South African airbase that morning.

On appeal to the Supreme Court of Appeal, the court found that South Africa did indeed have an obligation to arrest Al-Bashir.[20] This obligation was based on South African domestic law, in particular the Implementation Act, which provides that the fact that a person to be surrendered to the ICC 'is or was a head of State', does not constitute a ground for refusing to arrest and surrender him or her to the ICC.[21] On behalf of the majority of the court, Wallis JA thus concluded that:

> [W]hen South Africa decided to implement its obligations under the Rome Statute by passing the Implementation Act it did so on the basis that all forms of immunity, including head of state immunity, would not constitute a bar to the prosecution of international crimes in this country or to South Africa cooperating with the ICC by way of arrest and surrender of persons charged with such crimes before the ICC, where an arrest warrant had been issued and a request for cooperation made.[22]

The issue was thus resolved under South African domestic law. The remaining question was whether South Africa had also been obliged to arrest and surrender Al-Bashir under international law. It is this question that was at issue before the ICC's PTC II.

3 The Legal Framework under International Law

Before dealing with the legal problem before the ICC, it is necessary to set out the legal framework in which the case of Al-Bashir must be considered. In this section the development of immunity under customary international law and the relevant provisions of the Rome Statute are considered.

3.1 Immunity before Foreign Domestic Courts under Customary International Law

It is a principle of customary international law that certain high-ranking state officials, such as heads of state, enjoy immunity from prosecution in foreign jurisdictions. This is called personal immunity or immunity *ratione personae*. It is attached to every act of the official but only lasts while he or she remains in office.[23] The rationale for this principle is to ensure that international relations can be conducted without impediment, and

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20 *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* [2016] ZASCA 17 (*Minister of Justice v SALC*) para 103.

21 Act 27 of 2002, s 10(9).

22 *Minister of Justice v SALC* [2016] ZASCA 17 para 103.

23 A Cassese (ed) *The Oxford Companion to International Criminal Justice* (2009) 368.

to prevent one state from intervening in the internal affairs of another.[24] The principle of personal immunity was confirmed in the *Arrest Warrant* case where the ICJ held that immunity continues to apply between states even where a high-ranking state official is charged with a crime under international criminal law.[25]

3.2 Immunity before International Courts under Customary International Law

The long-standing principle of immunity under customary international law underwent considerable upheaval during the 20th century with the introduction of international criminal courts into the international legal domain. The Nuremberg Trials in the 1940s, followed in the 1990s by the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL), aimed to prosecute those most responsible for international crimes.[26] These individuals naturally overlapped with the high-ranking officials who traditionally enjoyed immunity from prosecution in foreign domestic courts. The question was therefore whether such officials also enjoyed immunity before international courts.

While it has not been finally determined, the predominant view is that under customary international law, a person cannot rely on any immunity accruing to him or her to bar the jurisdiction of an international court.[27] In *Arrest Warrant* the ICJ determined *obiter* that while a state official continues to enjoy immunity in respect of the jurisdiction of other states, he or she does not enjoy immunity in respect of international courts.[28] This proposition finds support in certain examples of state practice. For example, in the *Charles Taylor* case, the SCSL rejected a plea of immunity, citing the 'international nature' of the court.[29] This view is also consistent with the rationale for immunity: as Paola Gaeta points out, whereas states must be protected from the 'exercise or even abuse of jurisdiction by the receiving state', international criminal courts 'act on behalf of the international community to protect collective or even universal values'.[30]

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24 Minority Opinion (n 2 above) para 84.

25 Arrest Warrant of 11 April 2000 (*Democratic Republic of Congo v Belgium*), Judgment, 2002 ICJ Reports 3. (Feb 14) (Arrest Warrant).

26 And later, the Special Tribunal for Lebanon (2009), among others.

27 P Gaeta 'Does President Al Bashir enjoy immunity from arrest?' 2009 (7) *Journal of International Criminal Justice* 315, 320; D Tladi 'The duty on South Africa to arrest and surrender President Al-Bashir under South African and international law' 2015 (13) *Journal of International Criminal Justice* 1027, 1042.

28 Arrest Warrant (n 25 above) para 61.

29 Decision on Immunity from Jurisdiction, *Taylor* (SCSL-2003-01-I), Appeals Chamber, 31 May 2004.

30 Ibid.

In light of these considerations, it may tentatively be concluded that immunity, while continuing to apply (horizontally) between states, cannot be raised (vertically) in respect of international criminal courts such as the ICC.

3.3 Immunity under the Rome Statute: Articles 27(2) and 98(1)

Article 27(2) of the Rome Statute states that '[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the court from exercising its jurisdiction over such a person'. If it is accepted (as above) that customary international law does not allow for immunity to bar the jurisdiction of an international criminal court, article 27(2) can consequently be considered a restatement of that principle.[31] Gaeta convincingly argues that article 27(2) therefore applies to all persons who enjoy immunity under customary international law, irrespective of whether or not the person represents a state party to the Rome Statute.[32] Article 27 therefore regulates the vertical relationship between an accused and the ICC. However, article 27 also regulates the horizontal relationship between states parties, as they are understood to have waived their right to immunity in respect of each other when becoming a member of the Rome Statute.[33]

While article 27(2) thus removes the immunity between a state and the ICC as well as between states parties, it does not remove the immunity enjoyed by non-states parties in respect of other states under customary international law.[34] The situation may therefore exist where the ICC has jurisdiction to issue an arrest warrant, but its states parties are prevented from executing that warrant due to the obligation to respect the non-state party's immunity under customary international law.

This situation is provided for by article 98(1) of the Rome Statute, which states the following:

> 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

31 Id 322.
32 Id 322–323; Tladi (n 27 above) 1035.
33 D Jacobs 'The frog that wanted to be an ox: The ICC's approach to immunities and cooperation' in C Stahn (ed) *The Law and Practice of the International Criminal Court* (2015) 295, 296; D 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* 337–339.
34 Tladi (n 27 above) 1035.

> 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.

Article 98(1) therefore prevents the ICC from requesting a state party to arrest a member of a non-state party protected by immunity under customary international law. There thus exists a much mulled-over tension between article 27(2) and article 98(1): while article 27(2) purports to extinguish the immunity of an accused in the exercise of the court's jurisdiction, article 98(1) provides for the circumstances in which a court may be prevented from fully exercising its jurisdiction due to the customary international law obligations that continue to exist between a state party and a non-state party.

4 The Legal Problem: A Troublesome Triangle

The legal problem – as may be deduced above – arises out of a particular triangular relationship between the ICC, a state party and a non-state party. Where the ICC has gained jurisdiction over a non-state party, it is allowed to issue an arrest warrant against a person from that state. In terms of article 27(2) – and arguably also under customary international law – that person enjoys no immunity in respect of the court. In order to gain custody over the accused, the ICC must, however, rely on states parties to arrest the person for whom it has issued an arrest warrant. The problem arises that while the accused may not raise immunity as a bar for prosecution before the ICC, he or she may still, under customary international law, enjoy immunity in respect of the domestic courts of foreign states. Article 98(1) provides for this situation by precluding the ICC from requesting a state to arrest a person if this would require that state to contravene its obligations under customary international law. This leads to a serious problem of efficacy: while the ICC has jurisdiction over the person charged, it cannot fully exercise that jurisdiction if it cannot obtain custody over that person.

In order to resolve this problem, courts and commentators have proffered a number of legal avenues which rely on particular circumstances to argue that an official's immunity under customary international law has in fact been extinguished. From another angle, these avenues purport to render article 98(1) inapplicable, by finding that immunity under customary international law no longer exists, and that as a consequence, nothing prevents a state party from arresting and surrendering such an official. The circumstances on which these legal avenues have relied are, states' accession to the Genocide Convention; UN Security Council (UNSC) resolutions which refer a situation to the ICC; and the development of customary international law. The key legal question is therefore whether any of these circumstances provide a valid

argument for the lifting of immunity under customary international law, solving the above predicament.

In the present Al-Bashir case before PTC II, the triangle consists of the relationship between the ICC, South Africa (a state party) and Sudan (a non-state party referred to the court by the UN Security Council). The question before PTC II was whether South Africa's failure to comply with the ICC's request to arrest Al-Bashir had been justified. It follows from the above considerations that, if one of the above legal avenues applies to Al-Bashir and is valid, Al-Bashir's immunity would be considered vitiated and South Africa would not be justified in failing to comply with the ICC's request. The Minority Opinion of Judge Perrin de Brichambaut thus valuably traverses each of the possible legal avenues for lifting the immunity enjoyed by Al-Bashir under customary international law.

5 Judge Perrin de Brichambaut's Minority Opinion

In this section the four legal avenues explored in Judge Perrin de Brichambaut's Minority Opinion are considered: (a) the Genocide Convention avenue; (b) the analogy avenue; (c) the waiver avenue; and (d) the customary international law avenue. In respect of each, I introduce the legal avenue, set out the judge's reasoning on the validity of the route, and provide an analysis of this reasoning with reference to other judgments and commentaries. In my analyses I am concerned with the persuasiveness of the reasoning, the contribution of the Opinion to the ICC's jurisprudence on the subject and the practical consequences of each avenue.

5.1 The Genocide Convention Avenue

5.1.1 Background

The Genocide Convention of 1948 provides for the punishment of people who commit genocide, whether they be 'constitutionally responsible rulers' or 'public officials'.[35] By virtue of this provision, an argument has arisen that the Genocide Convention provides for the removal of immunity between states where both states are party to the Convention. South Africa and Sudan are both party to the Convention. Accordingly, if the 'Genocide Convention avenue' is valid, Al-Bashir would not enjoy immunity from arrest in South Africa.

[35] 1948, Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277, art IV.

5.1.2 The Judge's Reasoning

As a preliminary step before dealing with immunity under the Genocide Convention, Judge Perrin de Brichambaut considers whether the Genocide Convention is applicable with respect to the ICC, South Africa, Sudan and Al-Bashir. This enquiry concerns article VI of the Convention, which states the following:

> Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

The judge concludes that (i) the ICC may be considered an 'international penal tribunal';[36] (ii) Al-Bashir may be considered a 'perso[n] charged with genocide';[37] and (iii) since Sudan is obliged by SC Resolution 1593 to accept the conferral of the situation in Darfur to the ICC, it may be considered a state that has 'accepted its jurisdiction'.[38] It is further noted that, having accepted the jurisdiction of the ICC, Sudan and South Africa have an obligation to co-operate with the ICC on the basis of article VI.[39]

Having established these preliminary criteria, the judge then deals with the substantive question of whether the Convention removes the personal immunities of people who are members of states that are party to the Convention. This question is answered by approaching the Genocide Convention from three interpretive perspectives: its ordinary meaning, a systematic interpretation, and a teleological interpretation.

The judge first considers the ordinary meaning of article IV of the Genocide Convention which states that '[p]ersons committing genocide … shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals' and determines that the phrase '*shall* be punished', places an obligation on states to punish perpetrators of genocide.[40] Moreover, the phrase 'whether they are constitutionally responsible rulers [or] public officials' is written in the present tense, which suggests that such an obligation is applicable even where such rulers are still in office.[41] The question which follows is: *which states* have

36 Minority Opinion (n 2 above) para 13.
37 Id para 18.
38 Id para 15.
39 Id para 16.
40 Id para 21.
41 Ibid.

a duty to punish?[42] This, the judge argues, is answered by a systematic interpretation of article IV.[43]

In his systematic interpretation of the Convention, the judge refers to the fact that article VI confers jurisdiction on the state on whose territory the crimes have been committed. This could mean a territorial state of which the alleged perpetrator is a national, as well as a territorial state of which the alleged perpetrator is not a national.[44] Thus, when articles IV and VI are read together 'it appears that a Contracting Party to the Convention has a duty to prosecute all persons who commit genocide on its territory, including nationals of a foreign state'.[45] It may therefore be concluded, the judge argues, that the contracting parties have consented to the jurisdiction of the courts of another state over any of their nationals who have allegedly committed genocide on the other state's territory.[46] Implicit in this, the judge continues, is that 'by consenting to such exercise of jurisdiction by a foreign State over their "constitutionally responsible rulers" committing genocide, the Contracting Parties have implicitly waived their personal immunities'.[47] This conclusion, he says, is further supported by a teleological interpretation of the Convention.

In his teleological interpretation, the judge considers article I of the Convention which 'encapsulates the two central obligations of the Contracting Parties – to prevent and to punish'.[48] The question he poses is 'whether personal immunities are incompatible with any of these two obligations under the framework of the Convention'.[49] Having found that the obligation to punish is not incompatible with personal immunities, as a person who enjoys such immunity can be prosecuted once they are out of office, he turns to the question of whether the duty to prevent is also compatible with personal immunity.[50] The key argument here is that the duty to prevent 'encompasses a duty to suppress ongoing acts of genocide' and one of the ways in which states can suppress genocide is to arrest and prosecute a person suspected of committing genocide:

> In the framework of the Convention, courts play two roles towards prevention: (i) punishing perpetrators with a view to deterring future crimes; and (ii) prosecuting and trying persons charged with, inter alia, genocide or conspiring, inciting or attempting to commit genocide with

42 Id para 24.
43 Ibid.
44 Id para 26.
45 Id para 27.
46 Ibid.
47 Id para 30.
48 Id para 31.
49 Id para 32.
50 Ibid.

> a view to preventing or suppressing the ongoing commission of crimes. Viewed in this light, personal immunities appear to be incompatible with the scope of the Convention.[51]

The judge concludes that '[h]aving shown … that personal immunities are incompatible with the obligation that the Contracting Parties have undertaken under the Genocide Convention, Sudan must be regarded as having relinquished the immunities of its "constitutionally responsible rulers" when acceding to the Convention'.[52] As a consequence, no immunity exists horizontally between South Africa and Sudan,[53] and there was thus no obligation under customary international law preventing South Africa from adhering to the ICC's request for the arrest and surrender of Al-Bashir.

5.1.3 Analysis

Judge Perrin de Brichambaut's expansive interpretation of the Genocide Convention can in part be explained by the fact that the Genocide Convention and the Rome Statute were drafted 50 years apart. It naturally requires an extensive interpretative exercise to apply what was intended by the drafters of the Genocide Convention in 1948 to the international criminal law context today. That said, an interpretive analysis can stretch too far, creating obligations for which there is no real textual reference.

It is my view that this is the case in the judge's interpretation of the Genocide Convention, a treaty which at no point makes reference to immunity between states. As Gaeta says, 'nothing can be found in support of the argument that, under the Genocide Convention, contracting states are authorised to disregard the personal immunities of foreign state officials to execute the arrest warrants issued by an international criminal court'.[54] Similarly, the Majority of PTC II noted that, unlike article 27(2) of the Rome Statute, the Genocide Convention does not mention personal immunities based on official capacity, concluding that it '[did] not see a convincing interpretation of the provisions in the Convention such that would give rise to an implicit exclusion of immunities'.[55]

Writing prior to the judgment – but presciently – Dov Jacobs wrote the following:

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51 Id para 35.
52 Id para 38.
53 Ibid.
54 P Gaeta 'Darfur question' https://iccforum.com/darfur#Gaeta (accessed 23 September 2019).
55 Majority Opinion (n 1 above) para 109.

> Generally, I believe that one should be wary of reading into conventions what they do not actually say, through a form of teleological interpretation that is so disconnected from the actual text that it is in fact no longer an interpretative process but a rewriting of the treaty by the judges to fit what they think should have been included in the first place.[56]

An overall critique can thus be levelled on the basis that the judge's interpretation of the Genocide Convention is so far-reaching that it unearths what cannot reasonably be considered buried.

Apart from this overarching concern, the Minority Opinion can also be criticised on the basis of particular interpretations. First, for example, in considering the ordinary meaning of article IV, the judge interprets the statement that a person who commits genocide must be punished, as an obligation on states to punish that person. This confuses criminal responsibility and immunity from criminal jurisdiction.[57] As the Majority found, article IV 'can be effective even without reading into it an implicit exclusion of immunities based on official capacity'.[58] Second, the judge's systematic interpretation of the Convention makes a leap from finding that a territorial state is allowed to try a person for genocide, to a conclusion that a state party to the Convention has waived its immunity towards all other states. This is most unconvincing. To begin with, it must be considered that the purpose of article VI is the jurisdiction of a state or international court to try a person for genocide. This, as the Majority pointed out, 'does not bear upon immunities'.[59] Moreover, even if immunity is waived by this provision, it could equally (or more persuasively) be interpreted to mean that immunity is waived in respect of the territorial state only; it is a step too far to conclude that based on this provision, states parties to the Convention waive their immunity in respect of all other states.

In addition to the critiques of the validity of this avenue, it also gives rise to a practical concern. The avenue is only available where a person is charged with genocide, and not where he or she is charged with the other crimes prosecuted by the ICC. This is highly problematic as it means that where a person is, for example, only charged with crimes against humanity, this route would not allow for his or her arrest, even where the crime allegedly committed is as heinous a crime as genocide. In fact, the relationship between crimes against humanity and genocide is at times fraught; while the same set of facts may lead to conviction of both crimes, genocide is often harder to prove due to the difficulty of proving

56 Jacobs (n 33 above) 311–312.
57 Majority Opinion (n 1 above) para 109; Arrest Warrant (n 25 above) paras 60–61.
58 Majority Opinion (n 1 above) para 109.
59 Ibid.

genocidal intent. Indeed, in the case of Al-Bashir, the first arrest warrant issued against him only charged him with crimes against humanity and war crimes, as concerns were raised over the available evidence to charge him with genocide. The arrest warrant for genocide was thus only issued the following year once the Pre-Trial Chamber agreed that the prosecution had produced sufficient new material to decide that there were reasonable grounds for believing that Al-Bashir had been responsible for genocide.

This goes to show that the limited applicability of the Genocide Convention does not provide for an effective solution to the problem of co-operation before the ICC, as it does not provide a solution for all possible persons against whom the ICC might issue an arrest warrant. Thus, both legally and practically, it is my view that the 'Genocide Convention avenue' should not be relied on in the future.

5.2 The Analogy Avenue

5.2.1 Background

While it agreed that Al-Bashir does not enjoy immunity in South Africa, the Majority of PTC II came to this conclusion on a different basis, the analogy avenue. The analogy avenue, which had previously been advanced by Dapo Akande,[60] relied on the existence of Security Council Resolution 1593, and argues that this resolution has the effect of making Sudan analogous to a state party to the Rome Statute. The relevance of this argument is that states parties are by virtue of article 27(2) considered to have waived their horizontal right to immunity in respect of other states parties. Therefore, if Sudan is considered analogous to a state party, article 27(2) would apply and Al-Bashir would not have immunity from arrest by states parties such as South Africa. Conversely, if Sudan is not considered analogous to a state party, article 98(1) will remain applicable, meaning that South Africa was prevented from arresting Al-Bashir under customary international law.

5.2.2 The Judge's Reasoning

Judge Perrin de Brichambaut approaches the 'analogy avenue' by pitting the arguments of the Prosecutor and South Africa against each other and providing his own appraisal of each.

The Prosecutor argued that the consequence of SC Resolution 1593 triggering the ICC's jurisdiction is that the court must exercise its

60 Akande (n 33 above).

jurisdiction 'in accordance with the provisions of [the Rome Statute]'.[61] Thus, as a provision of the Rome Statute, article 27(2) is applicable and Sudan no longer enjoys immunity in relation to states parties. The crux of the Prosecutor's argument is therefore that the effect of the SC Resolution is to render Sudan analogous to a state party.

The judge notes two aspects of the Rome Statute that support the Prosecutor's argument. First, the Statute in article 13(b) clearly foresees the possibility that, together with a Security Council referral, the exercise of the court's jurisdiction might involve obligations for a non-state party.[62] On this basis, the judge finds that, 'it may be contended that the referral of the situation in Darfur … rendered Sudan analogous to a State Party … including the obligation to accept that immunities cannot bar the exercise of the court's jurisdiction under article 27(2) of the Statute'.[63] Second, the Statute draws a link between the court's jurisdiction and the irrelevance of immunities.[64] Article 27(2) states that immunities 'shall not bar the Court from exercising its *jurisdiction* over a person'. This connection, the judge says, suggests that when the court exercises its jurisdiction, a person's immunities are irrelevant, 'as if he or she were a national of a State Party'.[65]

The judge then turns to South Africa's submissions, in which it was argued that the exercise of the court's jurisdiction is not tantamount to Sudan being analogous to a state party.[66] South Africa argued that Sudan could not be considered comparable to a state party as it does not have a right to vote at the Assembly of States Parties and also does not pay membership fees. Moreover, while it is true that the ICC's jurisdiction must be exercised in terms of the Statute, the Statute also includes article 98(1), which recognises the distinction between states and non-states and parties. Finally, the crux of South Africa's argument was that the Security Council referral had been made in a way which respected the distinction between states and non-states parties to the Rome Statute 'in accordance with the cardinal rule of international law that "[a] treaty does not create either obligations or rights for a third State without its consent"'.[67]

In support of South Africa's position, the judge agreed, first, that the resolution did not 'exclusively activate' article 27(2), but also 'preserved

61 Minority Opinion (n 2 above) para 48.
62 Id para 50.
63 Ibid.
64 Id para 51.
65 Ibid.
66 Id para 52.
67 Id para 53, quoting art 34 of 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331.

the possibility to apply' article 98(1).[68] The SC Resolution therefore 'also activates provisions relevant to non-States Parties'.[69] This, the judge says, indicates 'that such a referral need not necessarily render a non-State Party analogous to a State Party to the Statute'.[70] Second, the judge agreed that there is a 'general distinction' between the concepts of jurisdiction and immunities and that these concepts must be 'independently assessed':[71]

> In view of the fact that jurisdiction and immunities are distinct concepts, it follows that once the Court's jurisdiction has been established, it must, subsequently, be established whether any immunities bar the exercise of the court's jurisdiction. This means that it need not follow that the mere fact that the Court may exercise jurisdiction on the basis of a referral of the UN Security Council renders article 27 of the Statute applicable as if Sudan were analogous to a State Party.[72]

The judge concludes that the submissions of both the Prosecutor and South Africa 'contain a degree of validity'.[73] Due to these divergences, he found that, in contrast to the Majority decision, there could be no 'firm conclusion' on whether or not Sudan is analogous to a state party. He found that he was therefore unable to determine, based exclusively on the legal effects of the SC Resolution, whether article 27(2) or article 98(1) were applicable to the court, Sudan and South Africa in respect of the request to arrest Al-Bashir.[74]

5.2.3 Analysis

In his consideration of the Prosecutor's submissions, Judge Perrin de Brichambaut draws attention to the strong arguments in favour of the 'analogy avenue', which has found support in the Majority Opinion[75] and in the literature.[76] In his own analysis, the judge identifies arguments that support this view. The judge's view that the Statute itself draws a link between the court's jurisdiction and the irrelevance of immunity is particularly convincing. It is also supported by the view of Akande,

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68 Minority Opinion (n 2 above) para 56.
69 Id para 54.
70 Ibid.
71 Id para 55.
72 Id para 56.
73 Id para 58.
74 Ibid.
75 Majority Opinion (n 1 above) para 88.
76 C Kreß 'The international criminal court and immunities under international law for states not party to the court's statute' in M Bergsmo and L Yan (eds) *State Sovereignty and International Criminal Law* (2012) 241–242; Akande (n 33 above) 340–342.

who notes that article 27 in fact 'defines the exercise of [the court's] jurisdiction' as it provides that immunity shall not be a bar to that jurisdiction.[77]

However, the judge also highlights the valid grounds upon which this route can be challenged, and notes that these criticisms are not considered in the Majority Opinion.[78] A key concern voiced by commentators,[79] and identified by the judge, is the conflation of the two distinct concepts of jurisdiction and immunity. Gaeta is thus of the opinion that 'a referral by the Security Council is simply a mechanism envisaged in the Statute to trigger the jurisdiction of the ICC: it does not and cannot turn a state non-party to the Statute into a state party, and it has not turned Sudan into a state party to the Statute'.[80] The judge thus shows that, while convincing arguments can be made in support of the 'analogy avenue', arguments can also be made that suggest that it is not beyond doubt whether this avenue can safely be relied upon.

There is, moreover, a practical reason why the 'analogy avenue' should be approached cautiously. Security Council resolutions require a certain political will in order to be issued. They are therefore subject to the interests of states, in particular the permanent members of the Security Council, three of which are not party to the Rome Statute (the United States, Russia and China). This means that there are certain persons whom it would become impossible to arrest due to the political interests of the most powerful states. To put the problem more simply: what is to be done when there is no Security Council resolution? Jacobs refers to the conceivable example of Palestine and Israel where, due to the state of international politics, it is likely that the United States would veto a resolution:

> [S]hould Palestine join the ICC and refer the situation in Gaza to the Court, we might be faced with a concrete case of arrest warrants being issued against citizens from a non-State Party (Israel) and the question of whether states would have an obligation to cooperate in their arrest and surrender in the absence of a UNSC resolution.[81]

Claus Kreß also refers to this concern, noting that the 'analogy avenue' makes the ICC dependent on the Security Council in exercising jurisdiction

77 Akande (n 33 above) 342.
78 Minority Opinion, (n 2 above) n 66.
79 Gaeta (n 27 above) 324; N Dyani-Mhango 'South Africa's dilemma: Immunity laws, international obligations, and the visit by Sudan's President Omar Al Bashir' 2017 (26) *Washington International Law Journal* 547–548.
80 Gaeta (n 27 above) 324.
81 Jacobs (n 33 above) 310.

over persons who enjoy immunity under customary international law.[82] This limitation of the analogy avenue, and shared by the 'waiver avenue' below, makes it apposite to pay attention to another avenue, 'the customary international law avenue' (see 5.4 below), which does not suffer from this constraint.

5.3 The Waiver Avenue

5.3.1 Background

As with the 'analogy avenue', the 'waiver avenue' relies on the existence of an SC Resolution. While the 'analogy avenue' relies on an interpretation of the Rome Statute, the 'waiver' avenue' relies on an interpretation of SC Resolution 1593 to argue that it has implicitly waived Al-Bashir's immunity. As previously quoted, the resolution states 'that the Government of Sudan and all other parties to the conflict in Darfur, shall co-operate fully with and provide any necessary assistance to the Court'. The 'waiver avenue' depends on whether the obligation placed on Sudan to 'co-operate fully' with the ICC can be interpreted as implicitly waiving the immunity Sudan enjoys in respect of other states.

This legal avenue sparked debate after it was relied upon in PTC II's 2014 decision on the DRC's failure to arrest Al-Bashir when he was on DRC territory.[83] The DRC opinion was the most recent judgment on immunity prior to South Africa's immunity question. The Majority Opinion in the present matter rejected this approach, yet did not provide reasons for its departure from the previous decision. The Minority Opinion does, however, consider this avenue in detail.

5.3.2 The Judge's Reasoning

Having accepted, for the sake of argument, the contested point that the Security Council has the power to deviate from customary international law,[84] and that the ICC may interpret the Security Council's resolutions,[85] the judge considers how the SC Resolution should be interpreted in respect of Al-Bashir's immunity. In his interpretation, the judge weighs a number of factors, considering the evidence for and against an implicit waiver in respect of each factor. The judge's interpretation of two pertinent factors are set out below: the resolution's ordinary meaning, and its context.

82 Kreß (n 76 above) 263.
83 *DRC* (n 4 above).
84 Minority Opinion (n 2 above) paras 60–61.
85 Id paras 62–63.

The judge finds that an interpretation of the ordinary meaning of the SC Resolution yields conflicting outcomes. On the one hand, the fact that there is no explicit reference to immunities suggests that the SC Resolution is not concerned with that subject at all. Due to the 'delicate nature' of the immunities question, the Security Council 'may have been expected to express itself explicitly on this matter' if it had intended to remove Al-Bashir's immunity.[86] This interpretation is moreover supported by a report of the International Law Commission, which states that when a waiver of immunity is applied to an incumbent head of state, that waiver should be stated explicitly.[87]

On the other hand, however, it may be questioned whether SC resolutions should be interpreted in this manner. The argument has been made that 'resolutions under Chapter VII indicate what states may *not* do when deviating from international law in accordance with the resolution' and that '[i]t follows that all deviations that are *not allowed* are specified in the resolution'.[88] Taking into account the ICJ's finding that Security Council resolutions cannot be interpreted in the same way as treaties but that the specific characteristics of such resolutions must be considered,[89] the judge states that it may be found that an explicit removal was consequently not required and that reference to 'full co-operation' includes the lifting of immunities.

Turning to a contextual interpretation, the judge once again finds 'diverging results'.[90] The first contextual fact is that, at the time of adoption of the SC Resolution, no warrants had been issued by the ICC, suggesting that the reference to 'co-operate fully' was not connected to the question of immunity.[91] Other contextual factors, however, point in the other direction. The preamble of the SC Resolution takes note of a report of the International Commission of Inquiry, which refers to the possible involvement of senior government officials in the crimes in Darfur and recommends that the immunities granted to officials under Sudanese

86 Id para 67.

87 Ibid, referring to International Law Commission *Third Report on Immunity on State Officials from Foreign Criminal Jurisdiction* by Roman Anatolevich Kolodkin, Special Rapporteur, A/CN.4/646, para 55.

88 Minority Opinion (n 2 above) para 68, quoting E de Wet 'The implications of president Al-Bashir's visit to South Africa for international and domestic law' 2015 (13) *Journal of International Criminal Justice* 1049, 1061.

89 International Court of Justice *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion),* Advisory Opinion of 22 July 2010, para 94.

90 Minority Opinion (n 2 above) para 69.

91 Id para 72.

law be abolished.[92] The judge finds that, in light of these findings, 'it may be argued that the Security Council was aware of the possibility that immunities could potentially constitute a bar to the exercise of the jurisdiction of the Court' and that '[c]onsidering that the UN Security Council acted with such knowledge, the reference to "co-operate fully" could, as a consequence, be seen to remove immunities'.[93]

Consideration of the ordinary meaning and context is followed by interpretation of the resolution in terms of its object and purpose;[94] statements by members of the UN Security Council (UNSC);[95] other UNSC resolutions;[96] and the subsequent practice of UN organs and affected states.[97] In respect of each factor, the judge concludes that the outcomes of the interpretations are all either contradictory or indistinct. He consequently finds that 'the current state of the law does not allow a definite answer to be reached in relation to the question of whether this resolution removes the immunities of Omar Al-Bashir'.[98]

5.3.3 Analysis

In his thorough analysis of the 'waiver avenue', Judge Perrin de Brichambaut fills a gap in the ICC's jurisprudence. While this was the avenue relied upon in the DRC decision, the Chamber in that case did not engage in a thorough analysis of the avenue, and as observed by Tladi, while the Chamber purported to interpret the resolution as including an implicit waiver, it '[did] not apply a single rule of interpretation to come to this conclusion'.[99] In contrast, the Minority Opinion makes use of a long list of interpretative lenses, fully considering all possible outcomes. This avenue is also not fully considered by the Majority Opinion which, despite the DRC decision being the previous avenue preferred by the court, departs from that avenue, stating that it does not see a waiver, but does so without explanation.

The judge's analysis of the waiver avenue draws on the many academic arguments that have been made in respect of this legal avenue, particularly in the aftermath of the DRC decision. It includes the key conflict in the literature between the view, advanced by Tladi, Dyani-

92 Id para 70; *Report of the International Commission of Inquiry on Darfur to the Secretary-General Pursuant to Security Council Resolution 1564* (2004) of 18 September 2004, 25 January 2005, s/2005/60, paras 644–645, 650.
93 Minority Opinion (n 2 above) para 70.
94 Id paras 73–75.
95 Id paras 76–78.
96 Id para 79.
97 Id paras 80–82.
98 Id para 83.
99 Tladi (n 5 above) 18.

Mhango, and De Hoogh and Knottnerus, that Security Council resolutions which waive immunities must be made explicitly (if an SC resolution may waive immunities at all)[100] and the view advanced by Erika de Wet that an explicit waiver would not be in accordance with the established and accepted practice of the Security Council.[101]

That there is evidence in support of both arguments appears correct, which means that it is unclear whether this avenue can be relied upon. While the Majority Opinion rejects this avenue (albeit *obiter* and noting that it is unnecessary to determine) a clear rejection in the Minority Opinion might have put this avenue to bed. Instead, it remains open to debate. If it were to be taken up again, it should, however, be kept in mind that it suffers from the same practical constraint as the 'analogy avenue' as it is also dependent on the political will of the Security Council.

5.4 The Customary International Law Avenue

5.4.1 Background

As discussed under section 2.2, it is widely accepted that the principle of immunity under customary international law has developed in such a way as to extinguish the immunity of an incumbent head of state in respect of international courts. International criminal courts may consequently issue arrest warrants for incumbent heads of state. However, a further, and distinct, question is whether states under customary international law are allowed to arrest a person for whom an international criminal court has issued an arrest warrant. In other words, has customary international law developed to the point that when an international criminal court issues an arrest warrant, a head of state cannot rely on their immunity in respect of that court, *and in addition*, in respect of other states?

5.4.2 The Judge's Reasoning

Judge Perrin de Brichambaut poses the question as follows: is a state party to the Statute 'obliged to respect the immunity of the Head of State of a non-State Party to the State, on the basis of the existing rule of customary international law regulating the horizontal relationship

[100] Tladi (n 27 above) 1043; Dyani-Mhango (n 79 above) 557; A de Hoogh & A Knottnerus 'ICC issues new decision on Al-Bashir's immunities – But gets the law wrong … again' *EJIL Talk!* 18 April 2014 https://www.ejiltalk.org/icc-issues-new-decision-on-al-bashirs-immunities-%E2%80%92-but-gets-the-law-wrong-again/#more-10712 (accessed 17 November 2017).

[101] De Wet (n 88 above) 1061.

between States?'[102] In the Minority Opinion the question is approached from two perspectives: first, 'the manner in which States have approached this question', and second, 'whether the involvement of an international court affects the application of the rule of customary international law regarding Head of State immunity between States'.[103]

Considering the first perspective, the judge notes that the approaches adopted by states diverge on this issue.[104] A first group of states take the view that the personal immunity of an incumbent head of state of a non-state party is not an obstacle to their arrest and surrender to the court.[105] This approach, the judge says, suggests 'that the involvement of an international court alters the application of the horizontal rule of Head of State immunity under customary international law'.[106] The judge cites the following evidence:

> First, States Parties implementing the Statute into national law have adopted provisions declaring that personal immunities of sitting Heads of State shall not be a bar to requests for arrest and surrender by the Court. Second, in the context of UN Security Council meetings, certain States have emphasized the need to execute warrants of arrest issued by the Court, which could indicate that these States do not consider that the existing rule of customary international law relating to Head of State immunity constitutes an obstacle vis-à-vis the Court.[107]

The approach of a second group of states, however, indicates that 'the involvement of the Court does not alter or displace the application of the existing rule of customary international law regarding immunities of Head of State'.[108] The judge refers to a number of indicators of this approach, including, first, the AU and the Arab Leagues where 'States have taken a firm stand that no exception exists in customary international law for personal immunities of Heads of State'.[109] Second, 'during meetings of the UN Security Council, certain States have, directly or indirectly, defended the proposition that Omar Al-Bashir is still entitled to his personal immunity'.[110] Third, states parties and non-states parties have continued to host Al-Bashir in their countries, despite the arrest warrant issued by the court.[111] Moreover, where the ICC has referred

[102] Minority Opinion (n 2 above) para 84.
[103] Id para 85.
[104] Id para 86.
[105] Id para 87.
[106] Ibid.
[107] Ibid.
[108] Id para 88.
[109] Id para 89.
[110] Ibid.
[111] Id para 90.

such countries to the Security Council and the Assembly of States Parties for non-compliance, the countries usually argue in their defence that they consider Al-Bashir to enjoy immunity from arrest.[112] The UN Security Council has never taken action against these states, and the judge considers that this inaction could also be 'seen as support for the States' position that Omar Al-Bashir continues to enjoy immunity'.[113]

In considering the 'conflicting positions' of these two groups of states, the judge finds that it remains undecided whether customary international law has developed in such a way as to recognise an exception to immunity between states where a state acts in compliance with an ICC arrest warrant.[114] The judge thus moves on to consider a second perspective on this question, namely whether the international nature of a court has an impact on the horizontal obligation between states to respect immunity.

The judge sets out this second perspective as 'whether, by virtue of the international nature of this court, the horizontal rule of customary international law regarding immunities of Heads of State continues to function in the same manner'.[115] In answering this question, the judge considers the following commentary from courts and academics. He first refers to the dictum of courts, noting that in *Arrest Warrant* the ICJ commented that personal immunities 'do not apply before certain international criminal courts, where they have jurisdiction'.[116] Furthermore, '[o]n certain occasions, international courts appear to have indicated that they are not bound by the horizontal rule of customary international law regarding immunities of Heads of States':

> The SCSL relied upon its own international nature to reject the claim that the issuance of a warrant of arrest for Charles Taylor while he was serving as Head of State of Liberia was in violation of his immunity under customary international law. Furthermore, no objection was raised on the basis of immunity to the warrant of the arrest issued against Slobodan Milošević by the ICTY. This is notwithstanding the fact that he was serving as the President of the then Federal Republic of Yugoslavia and that neither the UN SC Resolution … nor the tribunal's constitutive document expressly removed personal immunities of Heads of State.[117]

112 Ibid.
113 Ibid.
114 Id para 91.
115 Id para 92.
116 Ibid.
117 Id para 93.

The judge notes, however, that these examples remain isolated and that no clear practice can be identified which indicates that the 'international nature' of a tribunal has the effect of lifting personal immunities.[118]

The judge then turns to the arguments made by academic commentators, among whom there are conflicting views. The first school of thought is that the rationale for personal immunities logically suggests that the rule which applies between states does not apply to international courts.[119] The argument goes as follows:

> [T]he purpose of such immunities is to ensure the smooth running of the functions of high-ranking State officials in third States and to prevent such States from interfering with the exercise of these functions in order to facilitate effective and peaceful international relations. It has, thus, been contended that, on the horizontal level, the protections are necessary to avoid abuse of jurisdiction by the receiving State, whereas this is not so at the international level. International courts do not promote any particular State's interests and act on behalf of the international community to protect collective values and repress serious crimes. The exercise of jurisdiction by such courts cannot be seen as undue interference and personal immunities are, therefore, not considered necessary at the international level.[120]

The second school of thought, however, points out that 'if there is no immunity before international courts and tribunals, states would be able to prosecute heads of state and other state officials when acting in concert, when they would not be able to do so alone'.[121] It is contended that this is 'unacceptably arbitrary' with the consequence that 'the very concerns applicable to domestic prosecutions also apply to international courts and tribunals'.[122]

The judge concludes his discussion on the academic commentary by finding that the matter is thus 'not entirely clear'.[123] On the one hand, the o*biter dictum* of the ICJ suggests that personal immunities cannot be raised in respect of international courts. On the other hand, there are reasons indicating that this *obiter dictum* merely means that 'specific rules applying to particular institutions remove immunity with regard only

118 Ibid.
119 Id para 94.
120 Ibid.
121 Ibid.
122 Ibid.
123 Id para 95.

to the institution in question'.[124] He therefore concludes that it is not possible to make a conclusive finding on this question.[125]

5.4.3 Analysis

The judge's consideration of the approaches of states provides a clear and correct assessment of the current status of customary international law. That the approaches of states are contradictory is recognised by those commentators who have dealt with this question. In the South African Supreme Court of Appeal's decision in *Minister of Justice v SALC*, Wallis JA, after considering evidence of state practice, concluded that he could not at that time identify a rule of customary international law extinguishing immunity between states.[126] Kreß also concludes, upon consideration of the contradictory practices of the AU and some African states, that '[f]or the time being, the "customary law avenue" remains open without providing for an altogether safe walking ground'.[127]

South Africa's approach to the status of Al-Bashir's immunity illustrates the contradictory behaviour that prevents a firm finding on the 'customary international law avenue'. On the one hand, the South African executive refrained from arresting Al-Bashir and claimed that it considered Al-Bashir protected by immunity under customary international law. On the other hand, the Implementation Act, passed by the South African legislature, does not recognise immunity as a bar to the arrest and surrender of an individual for whom the ICC has issued an arrest warrant. The SCA, moreover, confirmed this position, with Wallis JA stating that with the Implementation Act 'South Africa was taking a step that many other nations have not yet taken' which may be considered as 'put[ting] [South Africa] in the vanguard of attempts to prevent international crimes'.[128] South Africa's approach to this question can thus be cited both for and against a finding that customary international law has developed to remove horizontal immunity, depending on which branch of its government one relies.

While there is agreement that customary international law cannot currently be relied upon to extinguish the immunity between states, the judge nevertheless provides a useful review of it. Whereas the ICC, in an opinion on Malawi's non-compliance with an arrest warrant, found that customary international law did not recognise immunity before an international court, the court in that decision conflated the question of

124 Ibid.
125 Ibid.
126 *Minister of Justice v SALC* (n 22 above) para 84.
127 Kreß (n 76 above) 261.
128 *Minister of Justice v SALC* (n 22 above) para 103.

immunity of an accused before an international court, and immunity between states when an international court is involved.[129] There was thus previously a lacuna in the ICC case law on the development of the customary international law on immunities as between states. While the Majority Opinion sidesteps the avenue of customary international law,[130] the Minority Opinion usefully sets out the current status of this avenue, potentially providing guidance to future litigants and courts on how to rely on this legal avenue.

The discussion of this avenue is also timely as it could become valid in the near future. As Kreß says, while this avenue 'does not yet offer a solid walking ground due to the relative scarcity of hard practice in support of it and because of the African Union Commission's protest against its opening', the avenue can now be considered 'open'.[131] While it cannot be relied upon yet, it should be noted that a rule of customary international law can change rather quickly. Kreß notes that where legal principles 'clearly point in the direction of new customary law, the latter may crystallise without the need to identify a huge amount of more concrete State practice and verbal State practice'.[132] As such, '[m]odern custom may … come into existence at a relatively high speed and without a voluminous body of hard practice confirming the respective rule'.[133] Thus, there need not necessarily be a long period of development before customary international law is seen to have developed an exception with regard to immunity between states when an international court is involved.

The opening of this avenue is also significant as it is arguably the avenue most befitting the ICC's aim of putting an end to impunity.[134] While the 'Genocide Convention avenue' is limited to the crime of genocide and the 'analogy' and 'waiver' avenues are reliant on the political will of the Security Council, the 'customary law avenue' would extinguish immunity between a non-state party and a state party whenever the ICC gained jurisdiction over – and issued an arrest warrant for – a particular individual. The 'customary international law avenue' thus has the widest application and would ensure a greater level of efficacy than the other avenues. Kreß also adds that, compared to the 'analogy avenue', the 'customary international law avenue' therefore 'enables the Court to exercise its jurisdiction less asymmetrically and such an advance in the equal application of international criminal law is not "self-serving", but

129 Jacobs (n 33 above) 307.
130 Majority Opinion (n 1 above) para 68.
131 Kreß (n 76 above) 362.
132 Id 251.
133 Ibid.
134 Rome Statute (n 13 above) Preamble.

serves the legitimacy of the emerging system of international criminal justice'.[135] The benefits being such, a close eye should be kept on this emerging avenue, as it provides the most desirable solution to the current predicament.

6 Conclusion

An analysis of the Minority Opinion of Judge Perrin de Brichambaut reveals that the question of personal immunities between states is bedevilled by a great deal of uncertainty. The 'Genocide Convention avenue', while relied on by the judge, is in my opinion undermined by the fact that the Convention makes no reference to immunity, a fact which by the judge's own admission means that the 'interpretation [is not] entirely free of doubt'.[136] In respect of the 'analogy avenue', the judge identifies the critiques of this avenue, eschewed by the Majority Opinion, which can raise doubt over its validity. The 'waiver avenue' is similarly revealed to be plagued by uncertainty. Finally, in respect of the 'customary international law avenue', the judge notes the number of conflicting approaches to this question, with the result that it is not currently possible to make a firm conclusion on the status of customary international law on this question.

While there is a degree of uncertainty attached to each avenue, certain approaches are, however, more persuasive than others. Whereas the judge finds that 'the Genocide Convention points more conclusively towards a removal of immunity', I am of the opinion that the 'analogy avenue' is more persuasive as it is best supported by the Rome Statute and the relevant commentary. Moreover, while the 'customary international law avenue' does not currently engender confidence, it may do so in the future, especially as the reasoning behind its development is persuasive. It is imperative that the courts continue to consider this route, particularly because it may be the only available avenue in a future scenario where there is no Security Council resolution.

Whichever approach is preferred, it is clear that this matter requires final determination. This is, first, because the ICC may in the future issue an arrest warrant for a person who is not a member of a state party, and second – and of more imminent concern – because Al-Bashir is still at large and has given no indication that he intends to stop travelling to the territories of ICC states parties. This means that the territories he visits will continue to deal with opposing obligations under the Rome Statute, and under customary international law, the tension between which has not yet been resolved. In fact, in November 2017 (at the time

[135] Kreß (n 76 above) 263.
[136] Minority Opinion (n 2 above) para 101.

of writing) Al-Bashir had travelled to Uganda, a state party of the ICC, and was allowed to leave after a two-day visit, as the Ugandan government, like South Africa, claimed that he was protected by immunity under customary international law.[137]

A final determination on the question of personal immunities could potentially be settled in two different ways. First, a (preferably unanimous) decision of the ICC Appeal Chamber could be authoritative. A decisive opinion would also have the benefit of 'enhanc[ing] the integrity and legitimacy of the court'.[138] It is thus unfortunate that South Africa chose not to appeal the decision made against it. The possibility of the Appeals Chamber resolving the issue is, however, not shut, as there remains the possibility that the Assembly of States Parties could refer the matter to the Appeals Chamber for resolution.[139] Furthermore, an opportunity to clarify the issue might also arise if another state party which fails to arrest Al-Bashir while he is on its territory, is referred to the ICC for non-compliance.

The second way in which the matter could be settled is by the ICJ, which could be approached by the United Nations General Assembly or the Security Council for an advisory opinion. While the findings of the ICJ are not legally binding on the ICC, the 'authority of the ICJ ... is such that it would be difficult to criticise the ICC if it followed the advice rendered by the ICJ whatever its content'.[140]

In order to create certainty in an increasingly fraught area of legal and political concern, it must be hoped that one of these courts will decisively resolve the issue in the near future.

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137 R Muhumuza, 'Sudan's president, wanted by the ICC, visits Uganda' *abcNews* 13 November 2017 http://abcnews.go.com/International/wireStory/sudans-president-wanted-icc-visits-uganda-51112428 (accessed 25 November 2017).

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