

BRINGING POWER TO JUSTICE

ABSENCE OF IMMUNITY FOR
HEADS OF STATE BEFORE THE
INTERNATIONAL CRIMINAL
COURT

AMNESTY
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EXECUTIVE SUMMARY

“[T]he current position of Omar Al Bashir as Head of a state which is not a party to the Statute, has no effect on the Court’s jurisdiction over the present case.”

International Criminal Court, *The Prosecutor v. Omar Hassan Ahmad Al Bashir (“Omar Al Bashir”)*, Pre-Trial Chamber I, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, No. ICC-02/05-01/09-3, 4 March 2009, para41.

This paper analyses the absence of immunity for heads of state before the International Criminal Court (ICC or the Court) and discusses its consequences on the execution of the Court’s requests for surrender or assistance. In particular, it considers the legal framework of the recent refusal of states parties to the Rome Statute of the International Criminal Court (the Rome Statute) to arrest and surrender President Omar Al Bashir of Sudan.¹

KEY ELEMENTS OF ARTICLE 98(1)

Article 98(1) applies only to the Court’s requests for surrender or assistance, not to its requests for arrest. In no case can Article 98(1) be used by a state as a ground for not complying with a Court’s request for arrest.

Article 98(1), together with Rule 195 of the Rules of Procedure and Evidence, provide states with a procedure to raise with the Court concerns about potential conflicts between requests for surrender or assistance and other international law obligations.

It is for the Court alone in the framework of its judicial process, not for states, to determine whether immunities are applicable.

1. Article 98(1) of the Rome Statute and the rejection of immunity for heads of state

Chapter 1 of this paper discusses Article 98(1) of the Rome Statute and the long-

¹ This paper was researched and written by the International Justice Project team at the International Secretariat of Amnesty International. Amnesty International would like to thank the international experts who provided comments on earlier versions of this paper. The paper is updated as of 1 December 2010.

standing rejection of head of state immunity from prosecution for genocide, crimes against humanity and war crimes - both under the Statute and in general international law. It demonstrates that Article 98(1) of the Rome Statute affords no justification to any state to refuse to arrest and surrender a person sought in an ICC arrest warrant. In particular:

- When the state of nationality of the suspect is a party to the Rome Statute, a waiver under Article 98(1) is not necessary because it is already contained in Article 27 of the Rome Statute.
- When the state of nationality of the suspect is not a party to the Rome Statute, a waiver under Article 98(1) is not necessary because international law does not recognize any immunities for heads of state from prosecution for genocide, crimes against humanity and war crimes.

An ICC request for surrender or assistance related to proceedings against a head of state, therefore, would never require the requested state “to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person”. The conclusion is that Article 98(1) is never applicable to requests for surrender or assistance with respect to proceedings against a head of state. Article 98(1) refers exclusively to state or diplomatic immunity of property, which is not addressed in Article 27 of the Rome Statute. It cannot be interpreted as to allow states to easily eschew their responsibilities to execute requests for surrender or assistance.

2. The African Union Assembly Decisions of July 2009 and July 2010

Chapter 2 of this paper provides an analysis of the content, scope and consequences of the AU Assembly’s Decisions of July 2009 and July 2010. Such analysis shows that:

- While applying to all AU member states, irrespective of whether they are also parties to the Rome Statute, the AU Assembly’s Decisions accept and use the legal framework provided by the Rome Statute.
- The AU Decisions suggest a provisional interpretation of Article 98(1) of the Rome Statute, which is subject to revision, as the legal implications of the application of Articles 27 and 98 of the Rome Statute need to be further clarified. Additionally, they recognize, in accordance with the Rome Statute, that it is the sole responsibility of the Court, in the framework of its judicial process, to determine whether immunities are applicable.
- The AU Decisions are not intended to conflict with obligations to the ICC.

3. UN Security Council Resolution 1593(2005) and Sudan's obligation to cooperate with the ICC

Chapter 3 of this paper clarifies the legal basis of the Court's exercise of jurisdiction over the situation in Darfur, as well as the legal basis and extent of Sudan's obligation to cooperate fully with the Court. Both Sudan's obligation to cooperate fully with the Court and the Court's exercise of jurisdiction over the situation in Darfur do not derive from the Rome Statute, but from Resolution 1593(2005) and, ultimately, from the UN Charter.

The UN Security Council has the power to remove any possible immunity of serving heads of state, in the exercise of its powers under Chapter VII of the UN Charter. Therefore:

- Assuming, for the sake of argument, that Sudan was entitled under international law to claim immunity for President Omar al Bashir, Security Council Resolution 1593(2005) would have removed that ability. As a consequence, an explicit waiver of immunity by Sudan under Article 98(1) would not be required.
- Assuming, for the sake of argument, that Sudan's waiver of immunity was required under Article 98(1), Sudan would be under an obligation to provide it.

4. States' obligations to deny immunity and cooperate with the Court

The Rome Statute includes several provisions spelling out the obligations of states parties to cooperate with the Court. However, the cooperation regime of the Rome Statute may not be sufficient to ensure the arrest and surrender of suspects to the Court. Chapter 4 of this paper discusses the additional legal regimes that could be applicable to the prosecution of a case of crimes under international law.

A referral by the UN Security Council would link the legal regime of the Rome Statute to the legal regime of the UN Charter. When the Court's proceedings have been triggered by a UN Security Council referral:

- There is no requirement for the state of nationality of the suspect to waive immunity. As Security Council Resolution 1593(2005) includes an implicit waiver of any head of state immunity that might exist:
 - No state party to the Rome Statute can invoke Article 98(1) as a ground to delay the execution of a Court's request for surrender or assistance in relation to the situation in Darfur; and
 - States not parties to the Rome Statute can and should deny any claimed immunity from prosecution for crimes under international law to President Omar Al Bashir, if and when he enters their territory.

- All UN member states have cooperation obligations under the UN Charter. In particular:
 - The cooperation obligations of states parties to the Rome Statute derive not only from the Statute, but also from the UN Charter. Therefore, they prevail over obligations under any other international agreement, including the Constitutive Act of the African Union.
 - States not party to the Rome Statute have, *at a minimum*, the obligation to accept that (a) the Court has jurisdiction over the situation in Darfur; and (b) the Court can act in accordance with its Statute.

Similarly, charges of genocide would link the legal regime of the Rome Statute to the legal regime of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention). When charges of genocide are formulated:

- Article IV of the Genocide Convention imposes on all states which ratified the Convention an obligation to deny immunity from prosecution for genocide.
- The ICC falls within the scope of Article VI of the Genocide Convention. Therefore, all parties to the Genocide Convention, including those parties to the Genocide Convention that are not parties to the Rome Statute, have an obligation to cooperate with the Court.

5. The procedure under Article 98(1) of the Rome Statute

Chapter 5 of this paper clarifies the procedure under Article 98(1) of the Rome Statute and Rule 195 of the Rules of Procedure and Evidence.

CONCLUSION

There is no legal basis, either within the Rome Statute or in other international instruments, for states parties to the Statute to refuse to arrest immediately anyone named in an International Criminal Court arrest warrant, if they are found in territory subject to their jurisdiction. The official capacity of the suspect, either as head of state or as other government official, has no relevance on the obligation to execute without delay any request for surrender or assistance by the International Criminal Court.

States not party to the Rome Statute have, *at a minimum*, the obligation to accept that (a) the Court has jurisdiction over the situation in Darfur; and (b) the Court can act in accordance with its Statute. They can and should deny any claimed immunity from prosecution for crimes under international law to President Omar Al Bashir, if and when he enters their territory.

RECOMMENDATIONS

To states parties to the Rome Statute:

- If they have not yet done so, enact without further delay legislation implementing their cooperation obligations under the Rome Statute.

- Ensure that their law enforcement authorities arrest immediately anyone named in an International Criminal Court arrest warrant, if they are found in territory subject to their jurisdiction, irrespective of their official capacity.

- Ensure that they execute without delay any request for surrender or assistance by the International Criminal Court.

To states that have not yet ratified the Rome Statute:

- Publicly declare that individuals named in International Criminal Court arrest warrants will be immediately arrested and promptly surrendered to the Court if they enter the state's territory, irrespective of their official capacity.

INTRODUCTION

0.1. THE ARREST WARRANTS AGAINST OMAR AL BASHIR

The International Criminal Court (ICC or the Court) case against Sudanese President Omar Al Bashir arose out of the investigation into the situation in Darfur, which was referred to the ICC Prosecutor by the United Nations (UN) Security Council.²

Following an application by the Prosecutor in July 2008, the Court issued two warrants of arrest. The first, issued by Pre-Trial Chamber I on 4 March 2009, lists two counts of war crimes (“pillage” and “intentionally directing attacks against a civilian population as such or against individual civilians not taking direct part in hostilities”) and five counts of crimes against humanity (“murder”, extermination”, “forcible transfer”, “torture” and “rape”).³ The second, issued by the same chamber on 12 July 2010, adds three counts of genocide (“genocide by killing”; “genocide by causing serious bodily or mental harm”; and “genocide by deliberately inflicting conditions of life calculated to bring about physical destruction”).⁴

On the basis of the arrest warrants, the Court issued public requests for the arrest and surrender of President Omar Al Bashir to Sudan, all states parties to the Rome Statute of the International Criminal Court (the Rome Statute), as well as all UN Security Council members.⁵

² UN Security Council, Resolution 1593 (2005), UN Doc. S/RES/1593 (2005), 31 March 2005.

³ International Criminal Court, *The Prosecutor v. Omar Hassan Ahmad Al Bashir (“Omar Al Bashir”)*, Pre-Trial Chamber I, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, No. ICC-02/05-01/09-1, 4 March 2009.

⁴ International Criminal Court, *The Prosecutor v. Omar Hassan Ahmad Al Bashir (“Omar Al Bashir”)*, Pre-Trial Chamber I, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, No. ICC-2/05-01/09-95, 12 July 2010. The second arrest warrant followed the Judgment on the Appeal of the Prosecutor against the ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’, Appeals Chamber, No. ICC-2/05-01/09-73, 3 February 2010.

⁵ International Criminal Court, *The Prosecutor v. Omar Hassan Ahmad Al Bashir (“Omar Al Bashir”)*, Registrar, Request to the Republic of Sudan for the arrest and surrender of Omar Al Bashir, No. ICC-02/05-01/09-5, 5 March 2009; Request to all states parties to the Rome Statute for the arrest and surrender of Omar Al Bashir, No. ICC-02/05-01/09-7, 6 March 2009; Request to all United Nations Security Council members that are not states parties to the Rome Statute for the arrest and surrender of Omar Al Bashir, No. ICC-02/05-01/09-8, 6 March 2009. See also: No. ICC-02/05-01/09-96; No. ICC-02/05-01/09-97; No. ICC-02/05-01/09-98; No. ICC-02/05-01/09-99; No. ICC-02/05-01/09-100; No. ICC-02/05-01/09-101, 21 July 2010.

0.2. SUDAN'S DIPLOMATIC OFFENSIVE AND PRESIDENT OMAR AL BASHIR'S TRAVELS

The Sudanese government has so far refused to cooperate with the Court, despite the obligation to “cooperate fully” imposed by the UN Security Council.⁶ On the contrary, President Omar Al Bashir and the Sudanese government openly defied the ICC arrest warrant and the UN Security Council resolution on which the arrest warrant is founded.

In response to the Prosecutor’s application for an arrest warrant in July 2008, the Sudanese government started a massive diplomatic offensive calling on the UN Security Council to suspend the ICC proceedings using the power granted to the Council under Article 16 of the Rome Statute.

Rome Statute, Article 16

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

As a result of this offensive, in August 2008 an emergency Ministerial Meeting of the Executive Committee of the Organization of the Islamic Conference (OIC) urged the UN Security Council to “suspend indefinitely” the Prosecutor’s application for an arrest warrant.⁷ When the first arrest warrant was issued, the Council of the League of Arab States expressed deep concern at it and regret at the UN Security Council’s failure to suspend the Court’s proceedings.⁸ On the same day the Secretary General of the OIC expressed his “deep disappointment” over the arrest warrant and appealed to the UN Security Council to suspend the ICC proceedings.⁹

Rather than surrendering himself to the Court and defending himself against the charges, President Omar Al Bashir started a tour of friendly countries. In the six weeks immediately following his arrest warrant, he travelled to at least six countries in Africa and the Arab peninsula. President Omar Al Bashir visited Eritrea on 23

⁶ UNSC Resolution 1593 (2005), op2.

⁷ Organisation of the Islamic Conference, Final Communiqué of the Expanded Ministerial Meeting of the Executive Committee on the latest developments in Sudan, Jeddah, Saudi Arabia, 4 August 2008, Doc. OIC/POL-03/EXE-COM/2008/FC/FINAL, para4.

⁸ Council of the League of Arab States, Resolution on the Decision of Pre-Trial Chamber I of the International Criminal Court against His Excellency President Omar Hassan Ahmed Al Bashir of the Republic of Sudan, 4 March 2009, unofficial English translation on file with Amnesty International.

⁹ OIC Secretary General strongly rejects the ICC indictment against President of the Sudan, press release, 4 March 2009, http://www.oicoci.org/topic_detail.asp?t_id=1970&x_key=sud, accessed 20 August 2009.

March 2009, meeting President Isaias Afwerki.¹⁰ He met Egyptian President Hosni Mubarak in Cairo on 25 March 2009¹¹ and Muammar Gaddafi in Libya the following day.¹² On 29 March the Emir of Qatar welcomed President Omar Al Bashir in the country, where he attended a summit of the Arab League.¹³ President Omar Al Bashir then visited Saudi Arabia on 1 April¹⁴ and Ethiopia on 21 April.¹⁵ None of these countries has yet become a party to the Rome Statute.

0.3. THE RESPONSE BY THE AFRICAN UNION

The African Union (AU) Peace and Security Council opposed the request by the ICC Prosecutor of an arrest warrant against President Omar Al Bashir, asserting that such an arrest warrant could undermine the efforts for a resolution of the conflict in Darfur.

Taking into account “the need to ensure that the ongoing peace efforts are not jeopardized, as well as the fact that, in the current circumstances, a prosecution may not be in the interest of the victims and justice”, in July 2008 the AU Peace and Security Council requested the UN Security Council to defer “the process initiated by the ICC” in accordance with Article 16 of the Rome Statute.¹⁶ The UN Security Council discussed the request during a public session on 31 July 2008 and “[took] note” of it. However, some members of the Security Council were strongly opposed to requesting the ICC to defer its proceedings. As a result, the

¹⁰ Andrew Heavens, “Sudan’s Bashir visits Eritrea despite ICC warrant”, Reuters, 23 March 2009, <http://www.reuters.com/article/idUSTRE52M4DM20090323>, accessed 12 November 2010.

¹¹ “Sudan’s leader ends Egyptian trip”, BBC News, 25 March 2009, <http://news.bbc.co.uk/1/hi/world/africa/7963092.stm>, accessed 12 November 2010.

¹² “Sudan’s al-Bashir visits Libya”, Al Jazeera, 26 March 2009, <http://english.aljazeera.net/news/africa/2009/03/200932692534202240.html>, accessed 12 November 2010.

¹³ Brian Murphy, “Sudan’s Leader Arrives in Qatar”, Associated Press / The Washington Post, 30 March 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/29/AR2009032902507.html>, accessed 12 November 2010.

¹⁴ Khaled Abdelaziz, “Sudan’s Bashir returns after defiant Saudi trip”, Reuters, 1 April 2009, <http://www.alertnet.org/thenews/newsdesk/L1334076.htm>, accessed 12 November 2010.

¹⁵ “Ethiopia gives Sudan’s Bashir warm welcome”, Voice of America, 21 April 2009, <http://www.voanews.com/english/news/a-13-2009-04-21-voa25-68641602.html>, accessed 12 November 2010.

¹⁶ African Union Peace and Security Council, Communiqué of the 142nd meeting, No. PSC/MIN/Comm(CXLII), 21 July 2008, para11(i). The request was then reiterated in September 2008 and March 2009: Communiqué of the 151st meeting, No. PSC/MIN/Comm.1(CLI), 22 September 2008, para7; Communiqué of the 175th meeting, No. PSC/MIN/Comm.1(CLXXV), 5 March 2009, para6.

Council did not decide to make such a request.¹⁷

In February 2009 the AU Assembly, reiterating the call by the Peace and Security Council, requested the UN Security Council to use its power under Article 16 of the Rome Statute and suspend “the process initiated by the ICC”.¹⁸ After the issuance of the first arrest warrant against President Omar Al Bashir in March 2009, the Chairperson of the Commission of the African Union, Mr Jean Ping, declared to be “deeply concerned at the far reaching consequences” of the Court’s decision.¹⁹

In July 2009, expressing regret at the perceived inaction of the UN Security Council and reiterating its request that the proceedings against President Omar Al Bashir be suspended, the AU Assembly decided that

*[I]n view of the fact that the request by the African Union has never been acted upon, the AU Member States shall not co-operate pursuant to the provision of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of The Sudan.*²⁰

This decision was reiterated in July 2010.²¹

0.4. PRESIDENT AL BASHIR’S TRIPS TO CHAD AND KENYA

On 21-23 July 2010 President Omar Al Bashir travelled to Chad, a state party to the Rome Statute, to attend a summit of the Sahel-Saharan States. Chad refused to

¹⁷ UN Security Council Resolution 1828 (2008), UN Doc. S/RES/1828 (2008), 31 July 2008, preamble. During the debate, no agreement was found on the AU request. See: Security Council, Record of the 5947th meeting, UN Doc. S/PV/5947, 31 July 2008.

¹⁸ Assembly of the African Union, Decision on the application by the International Criminal Court (ICC) Prosecutor for the indictment of the President of the Republic of Sudan, No. Assembly/AU/Dec.221(XII), 3 February 2009, para3.

¹⁹ The Chairperson of the Commission expresses deep concerns at the Decision of the Pre-Trial Chamber of the International Criminal Court on Darfur, press statement, Addis Abeba, 4 March 2009.

²⁰ Assembly of the African Union, Decision on the meeting of African states parties to the Rome Statute of the International Criminal Court (ICC), Doc. Assembly/AU/13(XIII), Assembly/AU/Dec.245(XIII), adopted by the Thirteenth Ordinary Session of the Assembly in Sirte, Great Socialist People’s Libyan Arab Jamahiriya, 3 July 2009 (hereinafter 2009 AU Decision), para10.

²¹ Assembly of the African Union, Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC), adopted by the Fifteenth Ordinary Session of the Assembly of the Union, Kampala, Uganda, 27 July 2010, Doc. Assembly/AU/Dec.296(XV) (hereinafter 2010 AU Decision), para5.

arrest him.²² The following 27 August he attended the celebrations for the promulgation of the new Constitution in Kenya, another state party to the Rome Statute. He was not arrested.²³

On 27 August 2010, the same day as President Omar Al Bashir's trip to Kenya, the ICC Pre-Trial Chamber I decided to inform the UN Security Council and the Assembly of States Parties about President Omar Al Bashir's visits to Chad and Kenya "in order for them to take any measure they may deem appropriate".²⁴

In October 2010, following a Prosecutor's notification that President Omar Al Bashir may travel to Kenya for a summit of the Inter-Governmental Authority for Development (IGAD), Pre-Trial Chamber I issued a decision requesting Kenya to take any necessary measure to ensure President Omar Al Bashir's arrest and surrender.²⁵ As a result of the decision and of pressure from local civil society, IGAD moved the summit to Ethiopia.²⁶

In December 2010, following press report that President Omar Al Bashir was about to travel to the Central African Republic, Pre-Trial Chamber I issued a request for cooperation and information to that country.²⁷

²² Xan Rice, "Chad refuses to arrest Omar al-Bashir on genocide charges", *The Guardian*, 22 July 2010, <http://www.guardian.co.uk/world/2010/jul/22/chad-refuses-arrest-omar-al-bashir>, accessed 1 December 2010.

²³ Xan Rice, "Omar al-Bashir tarnishes Kenya's landmark day", *The Guardian*, 27 August 2010, <http://www.guardian.co.uk/world/2010/aug/27/omar-al-bashir-war-crimes-kenya>, accessed 1 December 2010.

²⁴ ICC, *The Prosecutor v. Omar Hassan Ahmad Al Bashir ("Omar Al Bashir")*, Pre-Trial Chamber I, Decision informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir's presence in the territory of the Republic of Kenya, ICC-02/05-01/09-107, 27 August 2010; Decision informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad, ICC-02/05-01/09-109, 27 August 2010, p3.

²⁵ ICC, *The Prosecutor v. Omar Hassan Ahmad Al Bashir ("Omar Al Bashir")*, Pre-Trial Chamber I, Decision requesting observations from the Republic of Kenya, ICC-02/05-01/09-117, 25 October 2010.

²⁶ Michael Onyiego, "IGAD Summit Postponed Amid Controversy Surrounding Bashir Attendance", *Voice of America News*, 28 October 2010, <http://www.voanews.com/english/news/africa/-IGAD-Summit-Postponed-Amid-Controversy-Surrounding-Bashir-Attendance-106107494.html> accessed 1 December 2010.

²⁷ ICC, *The Prosecutor v. Omar Hassan Ahmad Al Bashir ("Omar Al Bashir")*, Pre-Trial Chamber I, Demande de coopération et d'informations adressée a la République Centrafricaine, ICC-02/05-01/09-121, 1 December 2010.

CHAPTER 1: ARTICLE 98(1) OF THE ROME STATUTE AND THE REJECTION OF IMMUNITY FOR HEADS OF STATE

Nor should such a defense be recognized as the obsolete doctrine that a head of state is immune from legal liability. There is more than a suspicion that this idea is a relic of the doctrine of the divine right of kings... We do not accept the paradox that legal responsibility should be the least where power is the greatest. We stand on the principle of responsible government... that even a King is still "under God and the law."

Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, to the United States President, 6 June 1945²⁸

Article 98(1) of the Rome Statute affords no justification to any state to refuse to arrest and surrender a person sought in an ICC arrest warrant for genocide, crimes against humanity and war crimes.

This conclusion, which will be explained in detail in this chapter, is fully consistent with the generally accepted rules of treaty interpretation, codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties and recognized in customary international law.²⁹

²⁸ Excerpted from *Department of State Bulletin*, 10 June 1945, p1071 *et seq.*, reproduced at <http://avalon.law.yale.edu/imt/jack08.asp>, accessed 3 December 2010.

²⁹ Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, *United Nations Treaty Series*, vol. 1155, p331. Paragraph 1 of Article 31 of the Vienna Convention adopts a textual approach to treaty interpretation: a treaty should be interpreted in accordance with the

Rome Statute, Article 98(1)

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.

1.1. THE SCOPE OF ARTICLE 98(1) OF THE ROME STATUTE

Article 98(1) cannot be read to refer to a supposed obligation to recognize immunity of heads of state for crimes under international law.

Article 98(1) seeks to avoid the Court requesting a state to comply with certain cooperation obligations, when acting on the request would conflict with the state's existing international obligations related to immunities. It thus imposes an obligation on the Court not to put a state which has received a request for surrender or assistance (the requested state) in the position of having to violate its international obligations with respect to immunities.³⁰

Article 98(1) refers to pre-existing obligations. However, it does not revive immunities that are no longer accepted under international law.³¹ The term "immunity", therefore, refers exclusively to those immunities (if any) that the third state might be able to assert under international law at the time of the request for surrender or assistance by the Court.³²

When the Court's request for surrender or assistance concerns the prosecution of a head of state, two cases can be distinguished:

- The head of state is a national of a state party to the Rome Statute, *i.e.*, the

ordinary meaning of its terms. In particular, the ordinary meaning of a term is not to be determined in the abstract but: (a) in the context of the treaty and (b) in the light of its object and purpose. International Law Commission, Draft Articles on the Law of Treaties with commentaries, *Yearbook of the International Law Commission*, 1966, vol. II, p221.

³⁰ Claus Kress and Kimberly Prost, "Article 98 (Cooperation with respect to waiver of immunity and consent to surrender)", in Otto Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Munich: C.H. Beck, Oxford: Hart and Baden-Baden: Nomos, 2nd ed., 2008) (hereinafter: Kress and Prost 2008), p. 1603.

³¹ *Ibid.*, p1606.

³² This consideration needs to be taken into account when interpreting Article 98(1) in the light of the positions of states participating in the Rome Conference. A claim that some delegations in Rome supported the existence of immunity of heads of state for crimes under international law is irrelevant for the interpretation of Article 98(1). This is because the exact scope of the immunity under international law referred to in Article 98(1) is bound to evolve and change overtime.

third state is a state party to the Rome Statute;

- The head of state is a national of a state not party to the Rome Statute, *i.e.*, the third state is not a party to the Rome Statute.

1.2. WHEN THE THIRD STATE IS A STATE PARTY TO THE ROME STATUTE

Article 98(1) is not applicable to the Court when the third state is a party to the Rome Statute. This is because an ICC request for surrender or assistance related to proceedings against the head of state of a state party would not require any requested state “to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person”.

Article 98(1) is not applicable to the Court when the third state is a party to the Rome Statute. In other words, Article 98(1) is not applicable to requests for surrender or assistance by the Court related to proceedings against nationals of states parties. This is because there would be no imaginable conflict between such a request and the requested state's obligations under international law with respect to immunity.

1.2.1. ARTICLE 98(1) IN THE CONTEXT OF THE ROME STATUTE

Consistently with the generally accepted rules of treaty interpretation, Article 98(1) needs to be read in conjunction with other provisions of the Rome Statute, in particular Article 27, and in a way that would give effect to them.

Rome Statute, Article 27

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, 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.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Article 27 of the Rome Statute reiterates the long-standing principle whereby no one, including heads of state and other officials, is above the law and immune from prosecution for genocide, crimes against humanity or war crimes (*see Section 1.3: When the third state is not a party to the Rome Statute*).

Read in conjunction with Article 27, Article 98(1) can only be interpreted as to refer exclusively to state or diplomatic immunity of property, which is not addressed in Article 27.

Within the legal regime of the Rome Statute, Article 27 deals with, and resolves, the issue of personal immunity with regard to prosecution for genocide, crimes against humanity and war crimes. When Article 27 is applicable, therefore, there is no need to resort to other sources of law, external to the Rome Statute (such as the requested state's obligations under international law, mentioned in Article 98(1)) to determine issues related to the immunity of individuals in proceedings before the Court. The Pre-Trial Chamber expressly stated that, with respect to the position of Omar Al Bashir as current head of state, sources of law other than the Statute, the

Elements of Crimes and the Rules of Procedures and Evidence of the Court can be resorted to only where there is a *lacuna* in the legal regime of the Statute.³³

As a consequence, Article 98(1) is applicable only to state or diplomatic immunity of property, which is not addressed in Article 27. This interpretation is confirmed by the preparatory works concerning Article 98(1) during the negotiations of the Rome Statute. As the issue of personal immunity was comprehensively dealt with in Article 27, during the Rome Conference “it was the inviolability of diplomatic premises that was at the heart of the debate on article 98 para.1”.³⁴

Any waiver by a state party to the Rome Statute, which may be necessary under Article 98(1), is already contained in Article 27. Therefore, a waiver under Article 98(1) is not necessary when the third state is a state party to the Rome Statute.

By agreeing to Article 27, states parties to the Rome Statute have expressly accepted that heads of state are not entitled to immunity for crimes under the jurisdiction of the Court. In other words, they renounced to any claim of immunity for their heads of state. Consequently, any waiver by a state party to the Rome Statute, which may be necessary under Article 98(1), is already contained in Article 27.³⁵

Any other interpretation would deprive Article 27(2) of its effect and would be contrary to the principle of effectiveness in treaty interpretation.³⁶ Of course, Articles 27 and 98 are different in nature, as Article 27 relates to the Court's jurisdiction, while Article 98 relates to surrender or assistance, which are technically an exercise of the requested state's jurisdiction. However, because the Court cannot execute arrest warrants by itself and cannot conduct trials *in absentia*, using Article 98(1) to justify a failure to comply with a request for surrender or assistance would in practice bar the Court from exercising its jurisdiction over heads of state.³⁷

States parties have recognized that Article 27 constitutes a waiver of any claims to immunity of government officials. A non-paper by Canada and the United Kingdom,

³³ ICC, *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (“Omar Al Bashir”), Pre-Trial Chamber I, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, No. ICC-02/05-01/09-3, 4 March 2009, para44, footnote omitted.

³⁴ Kress and Prost 2008, p1606. Claus Kress was a member of the German delegation at the Rome Diplomatic Conference on the International Criminal Court and Kimberly Prost was a member of the Canadian delegation at this conference.

³⁵ Paola Gaeta, ‘Official Capacity and Immunities’, in Antonio Cassese and others, eds., *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), Volume I, p994. See also: Kress and Prost 2008, p1607.

³⁶ Dapo Akande, “The Legal Nature of Security Council Referrals to the ICC and Its Impact On Al Bashir's Immunities”, *Journal of International Criminal Justice* 7 (2009) (hereinafter: Akande 2009), p338.

³⁷ Kress and Prost 2008, p1607 and 1613.

circulated informally during the negotiation of the Rules of Procedure and Evidence at the July-August 1999 session of the Preparatory Commission, stated:

*The interpretation which should be given to Article 98 is as follows. Having regard to the terms of the Statute, the Court shall not be required to obtain a waiver of immunity with respect to the surrender by one State Party of a head of State or government, or diplomat, of another State Party.*³⁸

This interpretation was adopted in the Commonwealth Model Law to Implement the Rome Statute of the International Criminal Court³⁹ and in the national legislation of **Ireland**,⁴⁰ **Malta**,⁴¹ **Samoa**⁴² and the **United Kingdom**.⁴³

In conclusion, when the third state is a party to the Rome Statute, Article 98(1) is applicable only to state or diplomatic immunity of property, neither of which are dealt with in Article 27.

³⁸ Non-paper by Canada and the United Kingdom, July-August 1999, quoted in Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (New York: Oxford University Press, 2003), p144, note 58.

³⁹ Commonwealth Model Law to Implement the Rome Statute of the International Criminal Court, s.25(1) ("Any state or diplomatic immunity attaching to a person or premises by reason of a connection with a State Party to the ICC Statute does not prevent proceedings under Parts III-VIII of this Act, in relation to that person")
http://www.iccnw.org/documents/ModelLawToImplementRomeStatute_31Aug06.pdf, accessed 3 December 2010.

⁴⁰ Ireland, International Criminal Court Act, No. 30 of 2006, 31 October 2006, s.61(1) ("In accordance with Article 27, any diplomatic immunity or state immunity attaching to a person by reason of a connection with a state party to the Statute is not a bar to proceedings under this Act in relation to the person.")

⁴¹ Malta, Extradition Act, No. XVIII of 1978, cap.276, s.26S(1) ("Any state or diplomatic immunity attaching to a person by reason of a connection with a state party to the ICC Treaty does not prevent proceedings under this Part in relation to that person"), as amended by the International Criminal Court Act, No XXIV of 2002, cap. 453, 13 December 2003, s.14.

⁴² Samoa, International Criminal Court Act, No. 26 of 2007, 9 November 2007, s.32(1) ("Any state or diplomatic immunity attaching to a person or premises by reason of a connection with a State Party to the ICC Statute does not prevent proceedings under this Act, in relation to that person").

⁴³ United Kingdom, International Criminal Court Act 2001, ch.17, 11 May 2001, s.23(1) ("Any state or diplomatic immunity attaching to a person by reason of a connection with a state party to the ICC Statute does not prevent proceedings under this Part in relation to that person").

1.2.2. ARTICLE 98(1) IN THE LIGHT OF THE OBJECT AND PURPOSE OF THE ROME STATUTE

Read in the light of the object and purpose of the Rome Statute, Article 98(1) cannot be interpreted as to allow states to easily eschew their responsibilities to execute requests for surrender or assistance.

Consistently with the generally accepted rules of treaty interpretation, Article 98(1) needs to be read in the light of the object and purpose of the Rome Statute. This mode of interpretation is particularly relevant, as the Rome Statute is not a common treaty, regulating reciprocal obligations: it reflects a common interest of the entire international community and includes obligations which go beyond the content of a mutual agreement among its parties.

Rome Statute, Preamble

The States Parties to this Statute...

[Affirm] that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

[Are] Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

[Recall] that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes, ...

[Emphasize] that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,

[Are] Resolved to guarantee lasting respect for and the enforcement of international justice...

The object and purpose of the Rome Statute is to end impunity for genocide, crimes against humanity and war crimes, *i.e.*, to hold accountable those responsible for such crimes and to ensure that they are brought to justice in all cases. As Pre-Trial Chamber I noted in the case of President Omar Al Bashir:

*[A]ccording to the Preamble of the Statute, one of the core goals of the Statute is to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole, which “must not go unpunished”.*⁴⁴

Read in the light of the object and purpose of the Rome Statute, Article 98(1) could only be interpreted in a way which strengthens the ability of the Court to prosecute individuals for genocide, crimes against humanity and war crimes. Such ability would be undermined if states could easily eschew their responsibilities to execute requests for surrender or assistance. Therefore, Article 98(1) cannot be interpreted in a manner than negates states' obligations to execute requests for surrender or assistance.

⁴⁴ ICC-02/05-01/09-3, cited, para42 (footnote omitted).

1.3. WHEN THE THIRD STATE IS NOT A STATE PARTY TO THE ROME STATUTE

Article 98(1) is not applicable to the Court when the third state is not a party to the Rome Statute. This is because an ICC request for surrender or assistance related to proceedings against the head of state of a non-state party would not require any requested state “to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person”.

For an ICC request for surrender or assistance related to proceedings against the head of state of a non-state party⁴⁵ to conflict with the requested state’s obligations under international law with respect to immunity, the non-state party would have to be able successfully to assert a claim of immunity from prosecution for genocide, crimes against humanity or war crimes for its head of state under international law. However, under international law, no state can successfully assert a claim of immunity for their heads of state from prosecution for genocide, crimes against humanity or war crimes. Therefore, there could be no imaginable conflict between the ICC request and the requested state’s obligations under international law with respect to immunity.

Under international law, states cannot successfully assert a claim of immunity for their heads of state from prosecution for genocide, crimes against humanity or war crimes.

This conclusion, which is explained in detail in this section, is confirmed by the evolution of international law since 1945. As states that are not parties to the Rome Statute are not bound by any of its provisions, including Article 27, the Rome Statute is not included among the instruments analysed below.⁴⁶ However, it must be noted at this point that the drafting of the Rome Statute reflected extended discussions on the status of international law at the time, and that its acceptance by 114 states of the international community is a clear indication of current international law trends.

1.3.1. IMMUNITY OF HEADS OF STATE FOR CRIMES UNDER INTERNATIONAL LAW BEFORE INTERNATIONAL TRIBUNALS

The Charters of the International Military Tribunals of Nuremberg⁴⁷ and Tokyo⁴⁸ both affirmed that official position does not exempt from criminal responsibility.

⁴⁵ Nationals of non-states parties to the Rome Statute may fall under the jurisdiction of the Court if they have committed genocide, crimes against humanity or war crimes on the territory of either a state party or a state that made a declaration recognizing the Court’s jurisdiction pursuant to Article 12(3). Additionally, they may fall under the jurisdiction of the Court if they committed genocide, crimes against humanity or war crimes in relation to a situation referred to the ICC Prosecutor by the UN Security Council.

⁴⁶ When the third state is not a party to the Rome Statute, a general waiver of claims of immunity cannot be constructed, because the state did not expressly accept Article 27.

⁴⁷ Charter of the International Military Tribunal, annexed to the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, London, 8 August 1945, 8 *United Nations Treaty Series* 279, 59 Stat. 1544 (Nuremberg Charter), Art.7.

Fifty years later, the Statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY)⁴⁹ and the International Criminal Tribunal for Rwanda (ICTR)⁵⁰ excluded immunity for heads of state and other government officials. In 1999, the ICTY issued an indictment for Slobodan Milosevic, then head of state of the Federal Republic of Yugoslavia.⁵¹

In 2002 the International Court of Justice found that immunity of governmental officials would not bar prosecution before an international tribunal:

*[A]n incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda... and the future International Criminal Court created by the 1998 Rome Convention.*⁵²

The 2000 Statute of the Special Court for Sierra Leone also excluded immunity for heads of state.⁵³ In 2004 the Special Court declared, in response to a claim to immunity from jurisdiction made by former Liberian President Charles Taylor regarding an arrest warrant issued when he was still in office:

*"[T]he principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court."*⁵⁴

⁴⁸ Charter of the International Military Tribunal for the Far East, Tokyo, 19 January 1946, TIAS 1589 (Tokyo Charter), Art.6.

⁴⁹ Statute of the International Criminal Tribunal for the Former Yugoslavia, Annex to the Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, 3 May 1993, Art.7(2).

⁵⁰ Statute of the International Criminal Tribunal for Rwanda, annexed to UN Security Council Resolution 955 (1994), UN Doc. S/RES/955 (1994), 8 November 1994, Art.6(2).

⁵¹ ICTY, *The Prosecutor v. Slobodan Milosevic and others*, Case No. IT-99-37, Trial Chamber, Indictment, 22 May 1999.

⁵² International Court of Justice, *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), Judgment, 14 February 2002 (hereinafter: ICJ Arrest Warrant Judgment), para61.

⁵³ Statute of the Special Court for Sierra Leone, annexed to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, signed on 16 January 2002 pursuant to Security Council resolution 1315 (2000) of 14 August 2000, Art.6(2).

⁵⁴ Special Court for Sierra Leone, *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-2003-01-I, Appeals Chamber, Decision on immunity from jurisdiction, 31 May 2004, para52.

The national legislation of **Canada**, for example, rejects immunity from arrest or extradition of anyone who is the subject of a request for surrender by the ICC.⁵⁵

1.3.2. IMMUNITY OF HEADS OF STATE FOR CRIMES UNDER INTERNATIONAL LAW BEFORE COURTS OTHER THAN INTERNATIONAL TRIBUNALS

While acknowledging that immunity of certain government officials from prosecution for ordinary crimes before national courts does not extend to prosecution for crimes under international law before international tribunals, the International Court of Justice was unable to conclude that such immunity has no application to prosecution for crimes under international law also before national courts.⁵⁶ In fact, the International Court of Justice maintained:

*It is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government, and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal.*⁵⁷

Amnesty International disagrees with these narrow findings.⁵⁸ In fact, a complete analysis of the evolution of international law since 1945 shows that:

The rejection of immunity from prosecution for crimes under international law is based on the nature of the crimes allegedly committed, rather than on the international character of the tribunal asserting jurisdiction over those crimes. Therefore, the rule granting immunity to heads of state and other government officials finds an exception not only when crimes under international law are prosecuted before international tribunals, but also when crimes under international law are prosecuted before national tribunals.

Already in 1946 the Nuremberg Tribunal stated:

The principle of international law, which under certain circumstances,

⁵⁵ Canada, Crimes against Humanity and War Crimes Act (2000, c.24), 24 June 2000, s.48, adding s.6.1 to the Extradition Act (1999, c.18) (“Despite any other Act or law, no person who is the subject of a request for surrender by the International Criminal Court or by any international criminal tribunal that is established by resolution of the Security Council of the United Nations and whose name appears in the schedule, may claim immunity under common law or by statute from arrest or extradition under this Act”).

⁵⁶ ICJ Arrest Warrant Judgment, para58.

⁵⁷ *Ibid.*, para51. This is a widely criticized aspect of the judgment. This conclusion was justified on the supposed ground that the international instruments concerning crimes under international law were intended to apply only in international, not national, courts. However, this is not the case. As demonstrated below in this section, each of these instruments was intended to reflect international law independently of the court enforcing them. Additionally, in some instances the instruments were expressly applicable to national courts.

⁵⁸ See also the Dissenting Opinion of Judge Van den Wyngaert, *ibid.*, in particular para31.

*protects the representative of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.*⁵⁹

Allied Control Council Law No. 10, governing trials in Allied military courts at the national level, reflected the Nuremberg Charter and provided that official position does not exempt from criminal responsibility.⁶⁰ Since 1946, every single instrument adopted by the international community expressly involving the prosecution of crimes under international law excluded immunity for government officials. These include:

- the 1946 General Assembly resolution on the affirmation of the principles of international law recognized by the Charter of the Nuremberg Tribunal;⁶¹
- the 1948 Convention on the Prevention and Punishment of the Crime of Genocide;⁶²
- the 1950 Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal;⁶³
- the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity;⁶⁴ and

⁵⁹ *Judgment of the International Military Tribunal for the Trial of German Major War Criminals (with the dissenting opinion of the Soviet Member) - Nuremberg 30th September and 1st October 1946*, Cmd. 6964, Misc. No. 12 (London: H.M.S.O. 1946), p41-42. Emphasis added.

⁶⁰ Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 3 *Official Gazette Control Council for Germany*, 20 December 1945 (1946), p50-55, Art.II(4)(a).

⁶¹ UN General Assembly Resolution 95 (I), 11 December 1946. Nothing in the drafting history of this resolution, its text or subsequent history suggested that the principles applied only in international courts.

⁶² Convention on the Prevention and Punishment of the Crime of Genocide, approved and proposed for signature and ratification or accession by General Assembly resolution 260 A(III) of 9 December 1948, *United Nations Treaty Series*, vol78, p277, Art.IV. Article VI makes clear that the Genocide Convention applies in both national and international criminal courts.

⁶³ Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, adopted by the International Law Commission at its second session and submitted to the General Assembly as a part of the Commission's report covering the work of that session. *Yearbook of the International Law Commission, 1950*, vol. II, para97, Principle III. The Nuremberg Principles are not limited to international courts.

⁶⁴ Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes

- the 1973 Convention for the Suppression and Punishment of the Crime of *Apartheid*.⁶⁵

These instruments were intended to reflect a general principle applicable in both national and international courts.

The 1996 Draft Code of Crimes against the Peace and Security of Mankind reiterated the principle that official position does not exempt from criminal responsibility.⁶⁶ The International Law Commission clarified that an official position cannot entitle to procedural immunity:

*"[T]he author of a crime under international law cannot invoke his official position to escape punishment in appropriate proceedings. 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 immunity or defence. 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 this responsibility."*⁶⁷

The Draft Code was intended to apply not only to international courts, but also to national courts.⁶⁸

The ICTY found in 2001 that Article 7(2) of its Statute, declaring the irrelevance of official capacity, reflected a rule of customary international law:

*The Chamber cites [the Rome Statute of the ICC and the International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind of 1996] as evidence of the customary character of the rule that a Head of State cannot plead his official position as a bar to criminal liability in respect of crimes over which the International Tribunal has jurisdiction.*⁶⁹

Against Humanity, General Assembly Resolution 2391 (XXIII), UN Doc. A/7218 (1968), Art.II. The Convention was intended to regulate proceedings before national jurisdictions.

⁶⁵ International Convention on the Suppression and Punishment of the Crime of *Apartheid*, General Assembly Resolution 3068 (XXVIII), UN Doc. A/9030 (1974), Art.III. Articles IV and V provide for prosecution in national and international courts.

⁶⁶ International Law Commission, *Report on the work of its forty-eighth session, 6 May to 26 July 1996*, Draft Code of Crimes against the Peace and Security of Mankind, Art.7.

⁶⁷ *Ibid.*, commentary on Article 7, p27 (footnote omitted). The Commission has consistently excluded immunity for heads of state for six decades in each of the instruments it has adopted regarding crimes under international law, beginning with the previously mentioned 1950 Nuremberg Principles, as in earlier drafts adopted in 1954 and 1991.

⁶⁸ *Ibid.*, Arts.8 and 9.

⁶⁹ ICTY, *The Prosecutor v. Slobodan Milosevic and others*, Case No. IT-99-37, Trial Chamber,

Rather than on the nature of the ICTY as an international tribunal, this finding was based on the nature of the “crimes over which the Tribunal has jurisdiction”: the Tribunal cited in support the *Pinochet* case before the national courts of the United Kingdom.⁷⁰

Recent practice shows a steady trend towards the exclusion of immunities for heads of state and other government officials, not only before international tribunals, but also before “hybrid” tribunals (national tribunals with international elements). This is the case of the Extraordinary Chambers in the Courts of Cambodia.⁷¹ The UNTAET Regulation establishing the Special Panel for Serious Crimes in Timor-Leste includes an explicit rejection of not only functional, but also personal immunities.⁷²

A significant number of states have modified their national legislation to exclude immunity for officials, including foreign heads of state, from prosecution for crimes under international law and/or from surrender to the Court. These provisions do not distinguish between nationals of states parties and nationals of non-states parties to the Rome Statute. The national legislation of **Burkina Faso** excludes immunity for heads of state from prosecution for genocide, crimes against humanity and war crimes.⁷³ Additionally, it imposes on the national authorities an obligation to execute ICC requests for arrest and surrender “without any distinction based on official capacity”.⁷⁴ The national legislation of **Kenya** provides that:

The existence of any immunity or special procedural rule attaching to the official capacity of any person shall not constitute a ground for— (a) refusing or postponing the execution of a request for surrender or other assistance by the ICC; or (b) holding that a person is ineligible for surrender, transfer, or removal to the ICC or another State under this Act; or (c) holding that a person is not obliged to provide the assistance sought in a request by the

Decision on Preliminary Motions, 8 November 2001, paras28 and 31.

⁷⁰ *Ibid.*, para33.

⁷¹ Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 27 October 2004 (NS/RKM/1004/006), Art.29(2).

⁷² UNTAET Regulation No. 2000/15 on the establishment of panels with exclusive jurisdiction over serious criminal offences, UNTAET/REG/2000/15, 6 June 2000. Article 15(2) of the Regulation provides: “Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the panels from exercising its jurisdiction over such a person.”

⁷³ Burkina Faso, Loi 052-2009/AN du 03 décembre 2009 portant détermination des compétences et de la procédure de mise en œuvre du Statut de Rome relatif à la Cour pénale internationale par les juridictions burkinabés, 3 December 2009, Art.7.

⁷⁴ *Ibid.*, Art.39: “Toute personne arrêtée et remise à la Cour au vu de ces dispositions le sera sans aucune distinction fondée sur la qualité officielle”.

ICC.⁷⁵

New Zealand⁷⁶ and **Trinidad and Tobago**⁷⁷ had adopted provisions virtually identical to the one adopted in Kenya. The national legislation of **South Africa** provides that “the fact that a person is or was a head of State or government, a member of a government or parliament, an elected representative or a government official” is neither a defence to a crime; nor a ground for any possible reduction of sentence.⁷⁸ This principle applies “despite any other law to the contrary”, either at the national or at the international level.⁷⁹ The Act further specifies that the official capacity of a person to be surrendered does not constitute a ground for refusing to detain the person pending his or her surrender to the Court.⁸⁰

The government of South Africa explained that, as a result of these provisions, the immunity from prosecution that President Omar Al Bashir would normally have enjoyed as a foreign head of state under South African legislation would not be applicable. As President Omar Al Bashir would not enjoy immunity on South African territory, the situation foreseen in Article 98(1) would not occur. South Africa also denied that the findings of the International Court of Justice in the Arrest Warrant case could be applicable to the arrest of President Omar Al Bashir in South Africa and his surrender to the ICC, on two concurrent grounds: (a) because of the exclusion of immunities under South African national law; and (b) because of the recognition in the Arrest Warrant case of the exclusion of immunities before international tribunals.⁸¹

⁷⁵ Kenya, International Crimes Act, No. 16 of 2008, Art.27(1) (Official capacity of person no bar to request).

⁷⁶ New Zealand, International Crimes and International Criminal Court Act, No. 26 of 2000, 6 September 2000, s.31 (Official capacity of person no bar to request). See also s.66 (Conflict with obligations to another State) and s.120 (Requests involving conflict with other international obligations).

⁷⁷ Trinidad and Tobago, The International Criminal Court Act 2006, s.31(1) .

⁷⁸ South Africa, Implementation of the Rome Statute of the International Criminal Court Act, No. 27 of 2002, 18 July 2002, *Government Gazette of the Republic of South Africa* No. 23642, Vol. 445, 18 July 2002; s.4(2).

⁷⁹ *Ibid.*, s.4 (1) and (2).

⁸⁰ *Ibid.*, s.10(9).

⁸¹ South Africa, Ministry of International Relations and Cooperation, *Notes following the Briefing of Department International Relations and Cooperation's Director-General, Ayanda Ntsaluba*, 30 July 2009, <http://www.dfa.gov.za/docs/speeches/2009/ntsa0731.html>, accessed 30 November 2010. The full text of the brief was quoted in “South Africa legally rebuts AU resolution on arresting Bashir”, *Sudan Tribune*, 3 August 2009, <http://www.sudantribune.com/test/spip.php?article31996> accessed 30 November 2010 (hereinafter: July 2009 Briefing).

1.3.3. CONCLUSION ON IMMUNITY OF HEADS OF STATE UNDER INTERNATIONAL LAW

In conclusion, all constitutive instruments and judgments of international criminal courts, as well as the practice of a significant number of states, have rejected immunity from prosecution of government officials for genocide, crimes against humanity and war crimes. Against this background, the inescapable conclusion is that customary international law does not recognize any immunities for heads of state and other government official for genocide, crimes against humanity and war crimes.

As international law rejects immunity from prosecutions for crimes under international law, there could be no conflict between a request for surrender or assistance by the Court and the requested state's obligations under international law with respect to immunity. Since there is no conflict, there is no need for the third state to waive immunity under Article 98(1). Therefore, Article 98(1) is not applicable to requests for surrender or assistance with respect to proceedings against an head of state (or other government official) when the third state is not a party to the Rome Statute.

CHAPTER 2: THE AFRICAN UNION ASSEMBLY DECISIONS OF JULY 2009 AND JULY 2010

On 3 July 2009 the AU Assembly, expressing regret at the perceived inaction of the UN Security Council on the Assembly's request to suspend the ICC proceedings against President Omar Al Bashir, decided that

[I]n view of the fact that the request by the African Union has never been acted upon, the AU Member States shall not co-operate pursuant to the provision of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of The Sudan.⁸²

On 27 July 2010 the AU Assembly

Reiterate[d] its Decision that AU Member States shall not cooperate with the ICC in the arrest and surrender of president El-Bashir of The Sudan.⁸³

The AU Assembly's Decisions are a response to the perceived inaction of the UN Security Council with respect to previous requests to use its powers under Article 16 of the Rome Statute to suspend the ICC proceedings against President Omar Al Bashir.⁸⁴ In other words, the Assembly's Decisions appear to be a politically-motivated response to a discretionary decision (or lack of) by a political body. However, the fact that the Decisions were politically-motivated does not affect their legality, nor their binding nature on AU member states.

An analysis of the content, scope and consequences of the AU Assembly's Decisions shows that they:

- While applying to all AU member states, irrespective of whether they are also parties to the Rome Statute, accept and use the legal framework provided by the

⁸² 2009 AU Decision. The decision was adopted by consensus, with one opinion to the contrary, recorded as a reservation. The entire text of the Decision is reproduced in Appendix I.

⁸³ 2010 AU Decision, para5. The entire text of the Decision is reproduced in Appendix II.

⁸⁴ See also: Commission of the African Union, Decision on the meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), press release, 14 July 2009.

Rome Statute;

- Suggest a provisional interpretation of Article 98 of the Rome Statute, which is subject to revision; and
- Were not intended to conflict with obligations to the ICC.

2.1. THE DECISIONS ACCEPT AND USE THE ROME STATUTE FRAMEWORK

While applying to all AU member states, irrespective of whether they are also parties to the Rome Statute, the AU Assembly's Decisions accept and use the legal framework provided by the Rome Statute.

The 2009 decision that AU member states should not cooperate with the ICC for the arrest and surrender of President Omar Al Bashir is expressly founded on “the provisions of Article 98 of the Rome Statute of the ICC”.⁸⁵ Additionally, several paragraphs of the 2009 Decision refer to the legal regime and to specific provisions of the Rome Statute. Article 16, for example, is expressly mentioned as the legal background of the recommendation targeting the UN Security Council. The Assembly also takes note “that any party affected by the indictment has the right to legal recourses to the processes provided for in the Rome Statute regarding the appeal process and the issue of immunity”.⁸⁶ The 2010 Decision also refers to Article 16 of the Rome Statute.⁸⁷

In other words, the AU Assembly's Decisions accept and use the Rome Statute as the legal framework applicable to the issues related to the arrest and surrender of President Omar Al Bashir. This is particularly relevant in view of the consideration that, as their text makes clear, the Decisions apply to all AU member states, not only to those member states which are also parties to the Rome Statute.⁸⁸ This implies that all AU member states, both those that ratified the Rome Statute and those that did not, have obligations towards the ICC and assumes that these obligations may, at times, conflict with obligations towards the AU. As states not parties to the Rome Statute do not have obligations under the Statute itself, the Decision cannot but refer to obligations towards the ICC arising from UN Security Council Resolution 1593(2005). The 2010 Decision therefore accepts that both states parties and states not parties to the Rome Statute have obligations towards the ICC, arising from UN Security Resolution 1593(2005) (see *Section 4.1.2: Cooperation by states not parties to the Rome Statute*).

⁸⁵ 2009 AU Decision, para10.

⁸⁶ *Ibid.*, para7.

⁸⁷ 2010 AU Decision, para4.

⁸⁸ The 2010 Decision, in particular, requests “Member States to balance, where applicable, their obligations to the AU with their obligations to the ICC”; *ibid.*, para6.

2.2. THE AU DECISIONS SUGGEST A PROVISIONAL INTERPRETATION OF ARTICLE 98 OF THE ROME STATUTE WHICH IS SUBJECT TO REVISION

The AU Assembly's Decisions suggest a provisional interpretation of Article 98(1) of the Rome Statute, which is subject to revision.

The AU Assembly's Decisions suggest an interpretation of Article 98(1) of the Rome Statute, whereby: (a) Sudan would be entitled to claim immunity from prosecution for genocide, crimes against humanity and war crimes for President Omar Al Bashir; and (b) states would be entitled to take a decision not to cooperate with the Court, based on such claim.

Both components of the Assembly's interpretation are incorrect. In particular: (a) Sudan cannot successfully assert a claim of immunity from prosecution for genocide, crimes against humanity and war crimes for President Omar Al Bashir (*see Section 1.3.: When the third state is not a state party to the Rome Statute*); and (b) assuming, for the sake of argument, that Sudan could successfully assert a claim of immunity for President Omar Al Bashir, states would not be entitled to take a unilateral decision not to cooperate with the Court, based on such claim (*see Chapter 5: The procedure under Article 98(1) of the Rome Statute*).

However, the Decisions, in particular the 2009 one, also make clear that the interpretation provided by the Assembly is only provisional, as the legal implications of the application of Articles 27 and 98 of the Rome Statute need to be further clarified; and that ultimately, it is solely for the Court to determine whether immunities are applicable, in the framework of its judicial process.

2.2.1. THE ASSEMBLY'S INTERPRETATION IS ONLY PROVISIONAL

The AU Assembly Decisions make clear that the interpretation provided by the Assembly is only provisional, as the legal implications of the application of Articles 27 and 98 of the Rome Statute need to be further clarified.

In its 2009 Decision, the AU Assembly requested the AU Commission to convene a preparatory meeting of African states parties to the Rome Statute at expert and ministerial levels. In preparation for the Review Conference of the Rome Statute of the International Criminal Court held in Kampala, Uganda, in May-June 2010, the meeting was requested, among other issues, to provide clarification on the immunities of officials whose states of nationality are not party to the Statute and to elaborate a comparative analysis of the implications of the practical application of Articles 27 and 98 of the Rome Statute.⁸⁹ In other words, the Assembly recognised that its interpretation of Article 98(1) needed further discussions and might need to be clarified and revised.

The second Ministerial Meeting on the Rome Statute of the ICC, held in November 2009, did not take a definitive position on the issue of the relationship between

⁸⁹ 2009 AU Decision, para8 (iv) and (v).

Articles 27 and 98 of the Rome Statute. Instead, it recognised the role of the Assembly of States Parties to the Rome Statute in the settlement of disputes about the interpretation of the Statute and recommended:

“Articles 27 and 98 of the Rome Statute should be discussed by the Assembly of States Parties under the agenda item ‘stock taking’ in order to obtain clarification on the scope and application of these Articles particularly with regard to non States Parties. In this regard, there is need to clarify whether immunities enjoyed by officials of non states parties under international law have been removed by the Rome Statute or not.”⁹⁰

In February 2010 the AU Assembly requested the African states parties to raise the issue of the immunities of officials whose states of nationality are not parties to the Rome Statute (*i.e.*, the relationship between Articles 27 and 98) within the Assembly of States Parties as well as during the Review Conference.⁹¹

The discussion on cooperation at the Review Conference of the Rome Statute of the International Criminal Court

Far from supporting any claim to immunity from prosecution for genocide, crimes against humanity and war crimes, the Review Conference declared in two separate documents that states were obliged to cooperate with the Court, without suggesting that there could be any exceptions under the Rome Statute. In the final Declaration, the Conference:

Stressing the importance of full cooperation with the International Criminal Court, United by the common bonds of our peoples, our cultures pieced together in a shared heritage,

7. Further resolve to continue and strengthen our efforts to ensure full cooperation with the Court in accordance with the Statute, in particular in the areas of implementing legislation, enforcement of Court decisions, execution of arrest warrants, conclusion of agreements and witness protection, and to express our political and diplomatic support for the Court.”⁹²

Moreover, in a specific Declaration on cooperation, the Review Conference:

⁹⁰ Report of the 2nd Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC), Addis Ababa, Ethiopia, 6 November 2009, Doc. Min/ICC/Legal/Rpt.(II) (hereinafter: Report of the 2nd Ministerial Meeting), recommendation R.4.

⁹¹ Assembly of the African Union, Decision on the Report of the Second Meeting of States Parties to the Rome Statute of the International Criminal Court (ICC), adopted by the Fourteenth Ordinary Session of the Assembly in Addis Abeba, Ethiopia, Doc. Assembly/AU/8(XIV), 2 February 2010, para8.

⁹² Review Conference of the Rome Statute of the International Criminal Court, Kampala Declaration, adopted at the 4th plenary meeting, on 1 June 2010, by consensus, Declaration RC/Decl.1.

5. *Emphasizes the crucial role that the execution of arrest warrants plays in ensuring the effectiveness of the Court's jurisdiction and further emphasizes the primary obligation of States Parties, and other States under an obligation to cooperate with the Court, to assist the Court in the swift enforcement of its pending arrest warrants.*⁹³

2.2.2. IT IS THE SOLE RESPONSIBILITY OF THE COURT TO DETERMINE WHETHER IMMUNITIES ARE APPLICABLE

The AU Assembly Decisions recognize, in accordance with the Rome Statute, that it is the sole responsibility of the Court to determine whether immunities are applicable, in the framework of its judicial process.

The 2009 Decision correctly notes that:

*any party affected by the indictment has the right to legal recourses to the processes provided for in the Rome Statute regarding the appeal process and the issue of immunity.*⁹⁴

In the same vein, the November 2009 Ministerial Meeting recommended:

*"States Parties should consider having recourse to the provisions of Article 119 of the Statute and Rule 195 of the Rules of Procedure and Evidence of the ICC to settle disputes regarding the implementation of Articles 27 and 98 of the Rome Statute."*⁹⁵

Under Article 119 of the Rome Statute, the Court has exclusive competence to settle any dispute concerning its judicial functions, while the Assembly of States Parties has a role in the settlement of any other dispute between states parties relating to the interpretation or application of the Statute.

Rome Statute, Article 119

1. Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.
2. Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court.

⁹³ Review Conference of the Rome Statute of the International Criminal Court, Declaration on cooperation, adopted at the 9th plenary meeting, on 8 June 2010, by consensus, Declaration RC/Decl.2.

⁹⁴ 2009 AU Decision, para7.

⁹⁵ Report of the 2nd Ministerial Meeting, recommendation R.5.

2.3. THE AU DECISIONS ARE NOT INTENDED TO CONFLICT WITH OBLIGATIONS TO THE ICC

The AU Decisions are not intended to conflict with obligations to the ICC.

In a press release dated 29 August 2010, the AU Commission commented on the Pre-Trial Chamber Decision of 27 August that “[t]he decisions adopted by the AU policy organs are binding on Chad and Kenya and it will be wrong to coerce them to violate or disregard their obligations to the African Union”.⁹⁶ Such a statement seems to imply that the obligations arising from the AU decisions would conflict with the obligations that states parties have towards the ICC. This is not the case.

As shown above, the AU Assembly Decisions posit an interpretation of Article 98(1), whereby AU members would be allowed not to cooperate with the ICC claiming that cooperation would conflict with their obligation to respect President Omar Al Bashir’s asserted immunity. The flaws of this interpretation are discussed elsewhere in this paper. However, it would be unreasonable to read in the Decisions an intention to create a conflict with obligations towards the ICC. On the contrary, the Decisions offer an interpretation that is expressly framed within the legal regime of the Rome Statute and that can, as any other interpretation, be overturned.

The 2010 Decision expressly

*[r]equests Member States to balance, where applicable, their obligations to the AU with their obligations to the ICC.*⁹⁷

This language recognizes that, at times, the obligations towards the AU can conflict with obligations towards the ICC (both obligations arising under the Rome Statute and obligations arising from UN Security Council Resolution 1593(2005)). In this case, that AU Assembly requests AU member states to “balance” the two sets of obligations – an exercise which can result in the obligations towards the ICC prevailing over the obligations towards the AU.⁹⁸ In other words, the 2010 Decision provides AU member states with a tool to solve any possible conflict between the obligations arising from the 2009 and 2010 Decisions and the obligations towards the ICC.

This reading of the 2009 and 2010 AU Decisions is consistent with Article 4 of the Constitutive Act of the African Union.⁹⁹

⁹⁶ African Union Commission, Press release No. 119/2010 on the Decision of the Pre-Trial Chamber of the ICC informing the UN Security Council and the Assembly of the States Parties to the Rome Statute about the presence of President Omar Hassan al-Bashir of the Sudan in the territories of the Republic of Chad and the Republic of Kenya, 29 August 2010.

⁹⁷ 2010 AU Decision, para6.

⁹⁸ Human Rights Watch and others, *Briefing Paper on Recent Setbacks in Africa Regarding the International Criminal Court*, October 2010, p4.

⁹⁹ The Constitutive Act of the African Union, adopted by the thirty-sixth ordinary session of

Constitutive Act of the African Union, Article 4 (Principles)

The Union shall function in accordance with the following principles: ...

(m) respect for ... human rights [and] the rule of law ...

(o) ... condemnation and rejection of impunity...

the Assembly of Heads of State and Government, Lomé, Togo, 11 July 2000,
http://www.africa-union.org/root/au/Aboutau/Constitutive_Act_en.htm, accessed 1 December 2010.

CHAPTER 3: UN SECURITY COUNCIL RESOLUTION 1593(2005) AND SUDAN'S OBLIGATION TO COOPERATE WITH THE ICC

The case against President Omar Al Bashir arose out of the investigation into the situation in Darfur, which was referred to the ICC Prosecutor by the UN Security Council, acting under Chapter VII of the UN Charter.

UN Security Council Resolution 1593 (2005), 31 March 2005

The Security Council, ...

Determining that the situation in Sudan continues to constitute a threat to international peace and security...

1. Decides to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court,
2. Decides that the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide all necessary assistance to the Court and the Prosecutor pursuant to this resolution.

Sudan's obligation to cooperate fully with the Court does not derive from the Rome Statute, but from Resolution 1593 and, ultimately, from the UN Charter. This is clear from the formulation of Resolution 1593, which imposes on Sudan an obligation to cooperate with the ICC "pursuant to this resolution". Sudan's obligation, then, ultimately stems from the UN Charter.

3.1. THE SOURCE OF THE COURT'S EXERCISE OF JURISDICTION OVER THE SITUATION IN DARFUR

The Court's exercise of jurisdiction over the situation in Darfur does not derive from the Rome Statute, but from Resolution 1593 and, ultimately, from the UN Charter.

Sudan is not a party to the Rome Statute and has not made any declaration under Article 12(3) of the Statute accepting the exercise of jurisdiction by the Court. Equally, Sudan is not bound by Article 13 of the Statute, whereby the UN Security Council can refer a situation to the ICC Prosecutor. On this basis, the contention has been made that the ICC does not have jurisdiction over crimes committed in Darfur and that, by exercising its jurisdiction over those crimes, it would violate the principle whereby a treaty does not create either obligations or rights for a third

State without its consent (Article 34 of the Vienna Convention on the Law of Treaties).¹⁰⁰ In fact, the jurisdiction of the Court over the situation in Darfur is not founded only on the Rome Statute; it stems from Resolution 1593 and, ultimately, from the UN Charter.

By Resolution 827 of 1993, acting under Chapter VII of the UN Charter, the Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY) and adopted its Statute.¹⁰¹ In 1995, called to review the validity of its establishment, the ICTY clarified that “the establishment of the International Tribunal falls squarely within the powers of the Security Council under Article 41” of the UN Charter.¹⁰² In particular, although the Security Council is not a judicial organ and is not provided with judicial powers, it “resorted to the establishment of a judicial organ in the form of an international criminal tribunal as an instrument for the exercise of its own principal function of maintenance of peace and security”.¹⁰³ As the Security Council has authority to create international criminal tribunals, it must necessarily have the power of referring a situation to a treaty-based permanent international criminal court.

Article 13 of the Rome Statute recognizes such power of the Security Council and allows the Court to exercise its jurisdiction over situations referred by the Security Council.

Rome Statute, Article 13

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: ... (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.

As the Court itself explained:

[T]he Court may, where a situation is referred to it by the Security Council, exercise jurisdiction over crimes committed in the territory of States which are not Party to the Statute and by nationals of States not Party to the

¹⁰⁰ Abdallah El-Ashaal, “For the defence”, *Al-QAhrqam Weekly*, 2 September 2008, <http://weekly.ahram.org.eg/print/2008/912/op2.htm>.

¹⁰¹ UN Security Council Resolution 827, 25 May 1993, UN Doc. S/RES/827 (1993).

¹⁰² ICTY, *Prosecutor v. Dusko Tadic a/k/a “Dule”*, Appeals Chamber, Decision on the defence motion for interlocutory appeal on jurisdiction, 2 October 1995 (hereinafter: ICTY Tadic Decision), para36. Article 41 of the UN Charter provides: “The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”

¹⁰³ *Ibid.*, para38.

*Statute.*¹⁰⁴

In particular with respect to the case of Omar Al Bashir, the Court clarified:

*[I]nsofar as the Darfur situation has been referred to the Court by the Security Council, acting pursuant to article 13(b) of the Statute, the [case of Omar Al Bashir] falls within the jurisdiction of the Court despite the fact that it refers to the alleged criminal liability of a national of a State that is not party to the Statute, for crimes which have been allegedly committed in the territory of a State not party to the Statute.*¹⁰⁵

3.2. THE SECURITY COUNCIL'S POWER TO REMOVE ANY IMMUNITY OF SERVING HEADS OF STATE, IN THE EXERCISE OF ITS POWERS UNDER CHAPTER VII OF THE UN CHARTER

The UN Security Council has the power to remove any immunity of serving heads of state, in the exercise of its powers under Chapter VII of the UN Charter.

Assuming, for the sake of argument, that immunity of heads of state from prosecution for ordinary crimes under national law extended to protect them from prosecution for genocide, crimes against humanity and war crimes, the UN Security Council would be competent to remove it under Chapter VII of the UN Charter.

The referral of the situation in Darfur was not the first time that the UN Security Council established a tribunal's jurisdiction over crimes under international law, independently of the rank or position of power of the perpetrator. Article 7(2) of the ICTY Statute provided:

*The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.*¹⁰⁶

This provision was uncontroversial among states during the discussions about ICTY Statute.¹⁰⁷ States and one intergovernmental organization urged that the Statute include a provision stating that officials regardless of rank could not benefit from

¹⁰⁴ ICC, *The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Al Abd-Al-Rahman ("Ali Kyshayb")*, Pre-Trial Chamber I, Decision on the Prosecution Application under Article 58(7) of the Statute, No. ICC-02/05-01/07-1-Corr, 27 April 2007, para16.

¹⁰⁵ ICC-02/05-01/09-3, cited, para40.

¹⁰⁶ Statute of the International Criminal Tribunal for the former Yugoslavia, cited.

¹⁰⁷ UN Doc. S/25704, cited, para55.

immunity from prosecution for genocide, crimes against humanity or war crimes.¹⁰⁸

Implicitly, the rejection of immunity based on official capacity was extended to the cooperation of states for the surrender or transfer of suspects to the Tribunal, as “an order by a Trial Chamber for the surrender or transfer of persons to the custody of the International Tribunal shall be considered to be the application of an enforcement measure under Chapter VII of the Charter of the United Nations”.¹⁰⁹

In conclusion, the Security Council has the power to “decide explicitly or by implication that even immunities *ratione personae* do not constitute a bar to the cooperation of States in the execution of requests made by the Court for arrest and surrender”.¹¹⁰

¹⁰⁸ Recommendations of the Organization of the Islamic Conference on the establishment of an ad hoc International War Crimes Tribunal for the territory of the former Yugoslavia, annex to the Letter dated 31 March 1993 from the representatives of Egypt, the Islamic Republic of Iran, Malaysia, Pakistan, Saudi Arabia, Senegal and Turkey to the United Nations addressed to the Secretary-General, UN Doc. A/47/920, 5 April 1993, section II(2); Report of the Committee of French Jurists set up by Mr. Roland Dumas, Minister of State and Minister for Foreign Affairs, to study the establishment of an International Criminal Tribunal to judge the crimes committed in the former Yugoslavia, attached to the Letter dated 10 February 1993 from the Permanent Representative of France to the United Nations addressed to the Secretary-General, UN Doc. S/25266, 10 February 1993, para96; Draft Statute of a Tribunal for War Crimes and Crimes against Humanity Committed in the Territory of the Former Yugoslavia, attached to the Letter dated 16 February 1993 from the Permanent Representative of Italy to the United Nations addressed to the Secretary-General, UN Doc. S/25300, 17 February 1993, Art. 5; Draft Statute of the International Tribunal to hear cases relating to crimes committed in the territory of the former Yugoslavia, Annex I to the Letter dated 5 April 1993 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General, UN Doc. S/25537, 6 April 1993, Art. 14; Draft Charter of the international tribunal for violations of international humanitarian law in the former Yugoslavia, Annex II to the Letter dated 5 April 1993 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, UN Doc. S/25575, 12 April 1993, Art.11(c).

¹⁰⁹ UN Doc. S/25704, cited, para126.

¹¹⁰ Kress and Prost 2008, p1613.

3.3. THE SECURITY COUNCIL'S REMOVAL OF SUDAN'S ABILITY TO CLAIM IMMUNITY

Assuming, for the sake of argument, that Sudan was entitled under international law to claim immunity for President Omar al Bashir, Security Council Resolution 1593(2005) would have removed that ability. In other words, Security Council Resolution 1593(2005) includes an implicit waiver of head of state immunity. As a consequence, an explicit waiver of immunity by Sudan under Article 98(1) would not be required.

If one were to assume, for the sake of argument, that Sudan were entitled under international law to claim immunity for President Omar al Bashir, that immunity would be removed by Security Council Resolution 1593(2005). As a consequence, a waiver of immunity by Sudan under Article 98(1) would no longer be necessary.

As the Court itself explained, by using its power of referral under Article 13(b) of the Rome Statute, the Security Council automatically accepted that investigations and prosecutions into the situation in Sudan would be regulated by the Statute:

[B]y referring the Darfur situation to the Court, pursuant to article 13(b) of the Statute, the Security Council of the United Nations has also accepted that the investigation into the said situation, as well as any prosecution arising therefrom, will take place in accordance with the statutory framework provided for in the Statute, the Elements of Crimes and the Rules as a whole.¹¹¹

Additionally, Resolution 1593(2005) mentions Article 16 and Article 98(2) of the Rome Statute, but it makes no mention of Article 98(1). If the Security Council intended to limit the jurisdiction of the Court to individuals other than the head of state, it would have mentioned Article 98(1). This is particularly true as the Security Council was “conscious of the possible levels of responsibility” involved in the Court’s investigation and prosecution of the situation in Darfur, having examined the report of the International Commission of Inquiry on Darfur.¹¹² In fact, the Security Council accepted that the Court would apply its legal regime in its entirety.

As a result of Resolution 1593(2005), therefore, Sudan is bound by all the provisions of the Rome Statute – *i.e.*, it is *de facto* in an analogous position to a state party.¹¹³ A waiver of immunity by Sudan under Article 98(1) would not be necessary.

¹¹¹ ICC-02/05-01/09-3, cited, para45 (footnote omitted).

¹¹² Rod Rastan, “The emerging jurisprudence of the International Criminal Court – Legal issues arising from the first case-law”, in *Making Peace Through Justice: New development in International Criminal Law*, Ling Yan (ed.) (Beijing: World Affairs Press, 2009), p16.

¹¹³ Akande 2009, p340-342.

3.4. SUDAN'S OBLIGATION TO COOPERATE AND A WAIVER OF IMMUNITY UNDER ARTICLE 98(1)

It might be contended that immunity could not be removed implicitly and that, if the Security Council wanted to remove Sudan's ability to claim immunity for any of its nationals, it should have specified in Resolution 1593(2005) that all provisions of the Rome Statute, including Article 27, would be applicable to the Court's exercise of jurisdiction over the situation in Sudan. According to this line of thought, despite Resolution 1593(2005), Sudan's waiver of immunity would still be required under Article 98(1).

Assuming, for the sake of argument, that Sudan's waiver of immunity was required under Article 98(1), Sudan would be under an obligation to provide it.

Any claim of immunity for President Al Bashir would jeopardize cooperation. Sudan's obligation to fully cooperate under Resolution 1593(2005), therefore, would imply, at the very minimum, an obligation to waive President Al Bashir's immunity – *i.e.*, an obligation to recognize that heads of state are not entitled to immunity for crimes under the jurisdiction of the Court.

By virtue of Article 103 of the UN Charter, Sudan's obligation to cooperate prevails over any other treaty obligation to which Sudan is bound. The ICC maintained on this point:

"[T]he [Government of Sudan's] obligations, pursuant to United Nations Security Council Resolution 1593, to cooperate fully with and provide any necessary assistance to the Court shall prevail over any other obligation that the State of Sudan may have undertaken pursuant to 'any other international agreement'".¹¹⁴

Sudan's obligation to fully cooperate under Resolution 1593(2005) has consequences also with respect to states receiving ICC requests for surrender or assistance. Of course, if Sudan cannot successfully assert a claim of immunity for President Al Bashir as head of state, then other states cannot invoke Article 98(1) as a ground to delay the execution of the Court's request (*see Section 4.1.: The case of a referral by the UN Security Council*).

¹¹⁴ ICC-02/05-01/09-3, cited, para247 (emphasis in the original).

CHAPTER 4: STATES' OBLIGATIONS TO DENY IMMUNITY AND COOPERATE WITH THE COURT

The ICC has no independent powers of arrest; it relies on states to arrest and surrender suspects. The Rome Statute includes several provisions spelling out the obligations of states parties to cooperate with the Court.¹¹⁵

However, the cooperation regime of the Rome Statute may not be sufficient to ensure the arrest and surrender of suspect to the Court. First, because the cooperation obligations in the Rome Statute are binding only on states parties to the Statute – currently 114 out of 192 UN member states. States that are not parties to the Rome Statute are not bound by it. Second, because such obligations may be perceived as being conflicting with other obligations that states, including states parties, have under other international treaties.

Under specific circumstances, additional legal regimes could be applicable to the prosecution of a case of crimes under international law. For example, a referral by the UN Security Council would link the legal regime of the Rome Statute to the legal regime of the UN Charter. Similarly, charges of genocide would link the legal regime of the Rome Statute to the legal regime of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention). Both the legal regime of the UN Charter and the legal regime of the Genocide Convention provide additional grounds to the rejection of immunity from prosecution for crimes under international law and to the obligation of states to cooperate with the ICC.

4.1. THE CASE OF A REFERRAL BY THE UN SECURITY COUNCIL

All UN member states are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter. In accordance with Article 103 of the Charter, the obligations of UN member states in that respect prevail over their obligations under any other international agreement.¹¹⁶

¹¹⁵ Rome Statute, Art. 59; Part 9: International Cooperation and Judicial Assistance, Arts. 86-102.

¹¹⁶ International Court of Justice, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Provisional Measures, Order of 14 April 1992, *I.C.J. Reports* 1992, p114 and *ff.*, para42.

UN Charter, Article 25

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

UN Charter, Article 103

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

In particular, UN Security Council Resolution 1593(2005) has two important consequences with respect to the obligations of states to cooperate fully with the ICC:

- It provides additional grounds for the absence of any requirement for the third state to waive immunity in respect to proceedings against heads of state before the Court;
- It imposes obligations on all UN member states, both states parties and states not parties to the Rome Statute.

4.1.1. RESOLUTION 1593(2005) AND STATES' OBLIGATION TO DENY IMMUNITY

When the Court's proceedings have been triggered by a referral by the UN Security Council under Chapter VII of the Charter, there is no requirement for the third state to waive any immunity that might exist in respect to proceedings against heads of state before the Court.

UN Security Council Resolution 1593(2005) definitely solved any question related to Sudan's ability to claim immunity from prosecution for genocide, crimes against humanity and war crimes for its head of state: even assuming, for the sake of argument, that Sudan was entitled under international law to claim such an immunity for President Omar Al Bashir, Security Council Resolution 1593(2005) would have removed that ability (see Section 3.3.: *The Security Council's removal of Sudan's ability to claim immunity*). On this basis:

- No state party to the Rome Statute can invoke Article 98(1) as a ground to delay the execution of a Court's request for surrender or assistance in relation to the situation in Darfur; and
- States not parties to the Rome Statute can and should deny any claimed immunity from prosecution for crimes under international law to President Omar Al Bashir, if and when he enters their territory.¹¹⁷

¹¹⁷ Akande 2009, p345-348.

4.1.2. RESOLUTION 1593(2005) AND STATES' OBLIGATION TO COOPERATE FULLY WITH THE COURT

4.1.2.1. The obligation of states parties to the Rome Statute to cooperate fully and their obligations to the African Union

When the Court's proceedings have been triggered by a referral by the UN Security Council under Chapter VII of the Charter, the cooperation obligations of states parties derive not only from the Rome Statute, but also from the UN Charter. Therefore, they prevail over obligations under any other international agreement.

The ICC Pre-Trial Chamber I based Kenya and Chad's obligation to cooperate with the Court in the enforcement of the arrest warrant against President Omar Al Bashir on two concurrent grounds: not only Article 87 of the Rome Statute, to which Kenya and Chad are parties, but also UN Security Council Resolution 1593(2005).¹¹⁸

The ability to invoke the regime of the UN Charter, in addition to the Rome Statute, as the legal ground of the cooperation obligations of states parties towards the Court has important consequences. By virtue of Article 103 of the Charter, such obligations prevail over obligations under any other international agreement. This consideration is particularly relevant when analysing the relationship between cooperation obligations under the Rome Statute and any other obligation that states may have under regional instruments, such as the Constitutive Act of the African Union.

Assuming, for the sake of argument, that the 2009 and 2010 AU Decisions created a conflict between the obligations of AU member states under the Decisions and their obligations to the ICC, the obligations of states parties to the Rome Statute under the Statute and, ultimately, the UN Charter, would prevail over the obligations under the AU Decisions.

The discussion above shows that there is no conflict between the obligations of AU member states under the 2009 and 2010 AU Decisions and the obligations of states parties to the ICC (see *Chapter 2: The African Union Assembly Decisions of July 2009 and July 2010*). Assuming, for the sake of argument, that the 2009 and 2010 AU Decisions created such a conflict, the obligations of states parties to the Rome Statute under the Statute and, ultimately, the UN Charter, would prevail over the obligations under the AU Decisions.

Article 23(2) of the Constitutive Act of the African Union obligates all member states to "comply with the decisions and policies of the Union".¹¹⁹ However, the Constitutive Act does not include any provision comparable to Article 103 of the UN Charter. Additionally, the African Union being a regional organization, its authority on peace and security ultimately stems for Chapter VIII of the UN Charter, which regulates "regional arrangements".

¹¹⁸ ICC-02/05-01/09-107, cited; ICC-02/05-01/09-109, cited.

¹¹⁹ Article 23(2) of the Constitutive Act of the African Union provides: "Furthermore, any Member State that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly."

Several AU member states that are also parties to the Rome Statute recognised that their obligations under the Statute and, ultimately, the UN Charter, prevail over their obligations under the AU Decisions. Kenya originally responded to the Pre-Trial Chamber Decision about President Al Bashir's visit citing its binding obligations to the AU arising from the 2009 and 2010 AU Decisions.¹²⁰ However, after the IGAD summit scheduled to take place in Kenya in October 2010 was moved to Ethiopia, Kenyan Assistant Minister for Foreign Affairs, Richard Onyonka, reportedly stated that Kenya would honour "whatever the ICC requires".¹²¹ The government of South Africa declared that, despite the 2009 AU Decision, it would fulfil its cooperation obligations under the Rome Statute.¹²² The government of Uganda reiterated its commitment to the Rome Statute and support for the ICC.¹²³ The government of Botswana also reaffirmed, both in 2009 and in 2010, its commitment to its cooperation obligations under the Rome Statute.¹²⁴

4.1.2.2. Cooperation by states not parties to the Rome Statute

Although states not party to the Rome Statute have no obligations under the Statute, under the UN Charter they have, at a minimum, the obligation to accept that (a) the Court has jurisdiction over the situation in Darfur; and (b) the Court can act in accordance with its Statute.

In Resolution 1593(2005), the UN Security Council stated "that States not party to the Rome Statute have no obligation under the Statute". In effect, the Resolution imposes an express obligation to cooperate with the Court only on one non-party, Sudan. The language of the Resolution ("the Security Council... *urges* all States...") does not seem to indicate an intention to create obligations to cooperate with the Court for other states not parties to the Rome Statute.¹²⁵

¹²⁰ Kenya, Ministry of Foreign Affairs, *Press release on Kenya's response to the Decision of the Pre-Trial Chamber of the ICC to refer the matter of President Omar Al Bashir's presence in Kenya to the UN Security Council*, press release, 29 August 2010, http://www.mfa.go.ke/mfacms/index.php?option=com_content&task=view&id=413 accessed 30 November 2010.

¹²¹ Michael Onyiego, "IGAD Summit Postponed Amid Controversy Surrounding Bashir Attendance", cited.

¹²² South Africa, July 2009 Briefing, cited.

¹²³ Uganda, Ministry of Foreign Affairs, *Uganda committed to ICC*, press release, 10 July 2009, <http://www.mediacentre.go.ug/details.php?catId=3&item=477> visited 1 December 2010.

¹²⁴ Botswana, Ministry of Foreign Affairs and International Cooperation, Press release, 4 July 2009, <http://appablog.wordpress.com/2009/07/07/government-of-botswana-position-on-au-summit-regarding-icc/>, accessed 30 November 2010; *Botswana Stands by the International Criminal Court*, press release, 28 July 2010, <http://www.gov.bw/en/News/Botswana-stands-by-the-International-Criminal-Court-/>, accessed 30 November 2010.

¹²⁵ Akande 2009, p344.

Although states not party to the Rome Statute have no obligations under the Statute, they have obligations under the UN Charter. By virtue of Article 25 of the UN Charter, read together with Article 2(5), UN member states that are not parties to the Rome Statute have, *at a minimum*:

- The obligation to accept that the Court has jurisdiction over the situation in Darfur;
- The obligation to accept that the Court can act in accordance with its Statute.¹²⁶

UN Charter, Article 2(5)

All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

Additionally, the obligations to cooperate with the UN in the implementation of the actions and measures decided by the Security Council would, of course, operate in respect to Resolution 1593(2005) in the same way as they would operate in respect to any resolution adopted under Chapter VII of the UN Charter. The ICTY found on this point:

*[The powers of the Security Council under Chapter VII through Articles 41 and 42 of the UN Charter] are coercive vis-à-vis the culprit State or entity. But they are also mandatory vis-à-vis the other Member States, who are under an obligation to cooperate with the Organization (Article 2, paragraph 5, Articles 25, 48) and with one another (Article 49), in the implementation of the action or measures decided by the Security Council.*¹²⁷

4.2. THE CASE OF GENOCIDE CHARGES

When charges of genocide are formulated,¹²⁸ the legal regime of the Genocide Convention provides an additional basis to impose on all states which have ratified the Convention:

- An obligation not to assert any claim of immunity from prosecution for genocide;

¹²⁶ *Ibid.*, p341.

¹²⁷ ICTY Tadic Decision, para31, emphasis in the original.

¹²⁸ Of course, the inclusion in an ICC arrest warrant of genocide charges does not detract from the seriousness of charges of crimes against humanity or war crimes. Additionally, international law rejects immunity from prosecution for all crimes under international law, without distinction.

- An obligation to deny any claim of immunity from prosecution for genocide; and
- An obligation to cooperate with the Court in the prosecution of genocide.

4.2.1. THE GENOCIDE CONVENTION AND STATES' OBLIGATIONS TO DENY ANY CLAIM OF IMMUNITY

When charges of genocide are formulated, Article IV of the Genocide Convention imposes on all states which ratified the Convention an obligation to deny immunity from prosecution for genocide.

Article IV of the Genocide Convention provides an additional basis to the rejection of immunities of heads of state and other officials from prosecution for genocide.

Genocide Convention, Article IV

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

Article IV of the Genocide Convention creates two sets of obligations, which are independent from similar obligations arising from other international instruments, such as the Rome Statute or the UN Charter:

- Sudan, which is a party to the Genocide Convention, is under an obligation not to claim immunity for its head of state or other government officials;
- Other states parties to the Genocide Convention are under an obligation to deny international law immunities to President Omar Al Bashir, if and when he enters their territory.

4.2.2. THE GENOCIDE CONVENTION AND STATES' OBLIGATION TO COOPERATE WITH THE COURT

When charges of genocide are formulated, the ICC falls within the scope of Article VI of the Genocide Convention. Therefore, all parties to the Genocide Convention, including those parties to the Genocide Convention that are not parties to the Rome Statute, have an obligation to cooperate with the Court.

When charges of genocide are formulated, the legal regime of the Genocide Convention provides an additional basis to impose on all states which ratified the Convention an obligation to cooperate with the Court. Article VI of the Genocide Convention requires suspects to be tried either in national or in international courts:

Genocide Convention, Article VI

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.

Interpreting Article VI, the International Court of Justice found that:

once [an "international penal tribunal"] has been established, Article VI obliges the Contracting Parties "which shall have accepted its jurisdiction" to

*cooperate with it, which implies that they will arrest persons accused of genocide who are in their territory – even if the crime of which they are accused was committed outside it – and, failing prosecution of them in the parties’ own courts, that they will hand them over for trial by the competent international tribunal.*¹²⁹

The ICC is an “international penal tribunal” within the meaning of Article VI.¹³⁰ Therefore, Article VI creates two sets of obligations, which are independent from similar obligations arising from other international instruments, such as the Rome Statute:

- With respect to Sudan, Article VI creates an obligation either to prosecute individuals suspected of having committed genocide within Sudanese territory before Sudanese national courts, or to arrest and surrender them to the Court for trial.
- With respect to all other states parties to the Genocide Convention, including those parties to the Genocide Convention that are not parties to the Rome Statute, Article VI creates an obligation to cooperate with the Court in arresting genocide suspects and surrendering them to the Court for trial. This obligation arises because all UN member states have accepted the jurisdiction of the Court in relation to the situation in Darfur by virtue of Resolution 1593(2005).¹³¹ It was recognised by the European Parliament, which stated in September 2010 that “countries which have ratified the UN Genocide Convention of 1948 have an obligation to cooperate with the ICC, even if they are not signatories to the Rome Statute”.¹³²

Of course, the obligations deriving from the Genocide Convention are binding on all states which ratified it. As of 1 December 2010, 141 states were parties to the Genocide Convention, including Sudan and 51 other states that are not parties to the Rome Statute.¹³³ Reference to the Genocide Convention, therefore, widens the

¹²⁹ International Court of Justice, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgement, 26 February 2007 (hereinafter: ICJ Genocide Convention Judgment), para443.

¹³⁰ Goran Sluiter, “Using the Genocide Convention to Strengthen Cooperation with the ICC in the *Al Bashir* Case”, *Journal of International Criminal Justice* (2010) 8 (2): 365-382 (hereinafter: Sluiter 2010), p369, referring to: ICJ Genocide Convention Judgment, para445.

¹³¹ Sluiter 2010, p370-372.

¹³² European Parliament, Resolution on Kenya: failure to arrest President Omar al-Bashir, 9 September 2010.

¹³³ These states are: Algeria, Armenia, Azerbaijan, Bahamas, Bahrain, Belarus, China, Cote d’Ivoire, Cuba, Democratic People’s Republic of Korea, Egypt, El Salvador, Ethiopia, Guatemala, Haiti, India, Iran, Iraq, Israel, Jamaica, Kazakhstan, Kuwait, Kyrgyzstan, Lao People’s Democratic Republic, Lebanon, Libyan Arab Jamahiriya, Malaysia, Maldives,

scope of the cooperation regime applicable to the ICC, increasing the number of states obliged under international law to cooperate with the Court.

Monaco, Morocco, Mozambique, Myanmar, Nepal, Nicaragua, Pakistan, Papua New Guinea, Philippines, Russian Federation, Rwanda, Saudi Arabia, Singapore, Sri Lanka, Syrian Arab Republic, Togo, Tonga, Tunisia, Turkey, Ukraine, United Arab Emirates, United States of America, Uzbekistan, Viet Nam.

CHAPTER 5: THE PROCEDURE UNDER ARTICLE 98(1) OF THE ROME STATUTE

Despite the discussion in the previous chapters, a state (whether a state party to the Rome Statute or not) might still contend that it cannot comply with a Court's request for surrender or assistance because the suspect benefits from an asserted immunity as head of state, which would have to be either waived by the state of nationality or removed in some other way. The issue of the procedure under Article 98(1) would then arise.

Article 98(1) applies only to the Court's requests for surrender or assistance, not to its requests for arrest. Article 98 (1) does not prevent the Court from proceeding with a request for arrest. In no case can Article 98(1) be used by a state not to comply with a Court's request for arrest.

The term "arrest" does not figure anywhere in the wording of Article 98. Article 98, therefore, does not impose any limitation or condition on the Court's requests for arrest. The Court would have to apply Article 98(1), if at all, only in respect to a request to surrender the arrested individual or to a request for international assistance.

Article 98(1) applies to the Court only, not to states.

It is for the Court alone, not for states, to decide whether to proceed with a request for surrender or assistance, when the circumstances described in Article 98(1) occur.

5.1. HOW WOULD THE ARTICLE 98(1) PROCEDURE OPERATE?

Rules of Procedure and Evidence, Rule 195(1)

When a requested State notifies the Court that a request for surrender or assistance raises a problem of execution in respect of article 98, the requested State shall provide any information relevant to assist the Court in the application of article 98. Any concerned third State or sending State may provide additional information to assist the Court.

Rule 195 of the Rules of Procedure and Evidence of the International Criminal Court (Rules) describes the procedure that requested states must follow, when they believe that executing a Court's request for surrender or assistance would conflict with their international law obligations with respect to immunity.

If the arrest can be executed, the requested state must execute the arrest of the suspect first.

As explained above, Article 98(1) has no application to an arrest. Therefore, the requested state cannot invoke Article 98(1) to refuse to execute, or delay the execution of, a request of arrest by the Court. If any litigation regarding the scope of Article 98(1) and its application to the state's circumstances is to take place, the state needs to initiate it once the suspect is already under arrest.

If the requested state, after having arrested the person named in the arrest warrant, believes that the request for surrender or assistance "raises a problem of execution in respect of article 98", it must notify the Court.

Once the requested state has arrested the suspect, it might decide that, in its view, the Court's request for surrender would require it "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". In that case, it must notify the Court.

The requested state must provide any information relevant to assist the Court in the application of article 98.

It is the Court, not the requested state, which decides the existence and scope of any claimed immunity.

After the Court has received the notification and the relevant information, then it should decide under Article 98(1) whether the request for surrender or assistance would require the requested State to act inconsistently with its obligations under international law with respect to immunity. It is for the Court, not the requested state, to make the determination whether there is a problem.

If the Court determines that there is no problem in execution, then the requested state must comply with the request for surrender or assistance.

If the requested state is a state party, its obligation to comply with the request for surrender and assistance derives from Articles 59 (Arrest proceedings in the custodial state) and 86 (General obligation to cooperate) of the Rome Statute.

Only if the Court determines that there is a problem in execution, then it would need to obtain a waiver of immunity from the third state.

5.2. A CASE STUDY: THE PROCEDURE UNDER KENYA'S LAW

The legislation adopted in Kenya in 2008 to implement the Rome Statute includes specific provisions detailing the procedure to follow if Kenya were to decide that Article 98(1) may be applicable.

Following an ICC request for surrender, Kenya could ask the ICC to determine whether Article 98 of the Rome Statute applies to the Court's request and postpone its execution, until the Court makes a final determination. However, Kenya can refuse to surrender a suspect only if the Court advises that it does not intend to

proceed with the request. If the Court decides to proceed with the request, the legislation requires Kenyan authorities to comply with it.¹³⁴

Similarly, following an ICC request for assistance concerning “persons who, or information or property that, are subject to the control of another State or an international organisation under an international agreement”, Kenya can ask the ICC to determine whether Article 98 of the Rome Statute applies to the Court’s request and postpone its execution until the Court makes a final determination. However, Kenya can refuse the request for assistance only if the Court advises that it does not intend to proceed with it. If the Court decides to proceed with the request, the legislation requires Kenyan authorities to comply with it.¹³⁵

¹³⁴ Kenya, International Crimes Act, Art.62 (Conflict with obligations to another State) provides: “(1) Where – (a) the ICC makes a request for surrender; (b) the ICC has not previously made a final determination on whether or not article 98 of the Rome Statute applies to that request; and (c) a request is made to the ICC to determine whether or not article 98 of the Rome Statute applies to the request for surrender, the Minister may postpone the request for surrender until the ICC advises whether or not it intends to proceed with the request for surrender. (2) If the ICC advises that it does not intend to proceed with the request, surrender shall be refused. (3) If the ICC advises that it intends to proceed with the request for surrender, and there is no other ground for refusing or postponing the request, the request shall continue to be dealt with under this Part.”

¹³⁵ Article 115.(Requests involving conflict with other international obligations) provides: “(1) If a request by the ICC for assistance to which this Part applies concerns persons who, or information or property that, are subject to the control of another State or an international organisation under an international agreement, the Attorney-General shall inform the ICC to enable it to direct its request to the other State or international organisation. (2) Where - (a) the ICC makes a request for assistance; (b) the ICC has not previously made a final determination on whether or not paragraph 1 of article 98 of the Rome Statute applies to that request; and (c) a request is made to the ICC to determine whether or not paragraph 1 of article 98 applies to the request for surrender, the Minister may postpone the request for assistance until the ICC advises whether or not it wishes to proceed with the request for assistance. (3) If the ICC advises that it does not intend to proceed with the request, the request for assistance shall be refused. (4) If the ICC advises that it intends to proceed with the request for assistance, and there is no other ground for refusing or postponing the request, the request shall continue to be dealt with under this Part.”

APPENDIX I

ASSEMBLY OF THE AFRICAN UNION DECISION ON THE REPORT OF THE COMMISSION ON THE MEETING OF AFRICAN STATES PARTIES TO THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (ICC)

Adopted by the Thirteenth Ordinary Session of the Assembly in Sirte, Great Socialist People's Libyan Arab Jamahiriya, Doc. Assembly/AU/Dec.245(XIII), 3 July 2009

The Assembly,

1. TAKES NOTE of the recommendations of the Executive Council on the Meeting of the African States Parties to the Rome Statute of the International Criminal Court (ICC);
2. EXPRESSES ITS DEEP CONCERN at the indictment issued by the Pre-Trial Chamber of the ICC against the President Omar Hassan Ahmed El Bashir of the Republic of The Sudan;
3. NOTES WITH GRAVE CONCERN the unfortunate consequences that the indictment has had on the delicate peace processes underway in The Sudan and the fact that it continues to undermine the ongoing efforts aimed at facilitating the early resolution of the conflict in Darfur;
4. REITERATES the unflinching commitment of AU Member States to combating impunity and promoting democracy, the rule of law and good governance throughout the entire continent, in conformity with the Constitutive Act of the African Union;
5. REQUESTS the AU Commission to ensure the early implementation of Assembly Decision, Assembly/Dec.213(XII), adopted in February 2009 mandating the AU Commission, in consultation with the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights to examine the implications of the Court being empowered to try serious crimes of international concern such as genocide, crimes against humanity and war crimes, which would be complementary to national jurisdiction and processes for fighting impunity;
6. ENCOURAGES Member States to initiate programmes of cooperation and capacity building to enhance the capacity of legal personnel in their respective countries regarding the drafting and security of model legislation dealing with serious crimes of international concern, training of members of the police and the judiciary, and the strengthening of cooperation amongst judicial and investigative agencies;

7. FURTHER TAKES NOTE that any party affected by the indictment has the right to legal recourses to the processes provided for in the Rome Statute regarding the appeal process and the issue of immunity;
8. REQUESTS the AU Commission to convene a preparatory meeting of African States Parties at expert and ministerial levels (Foreign Affairs and Justice) but open to other Member States at the end of 2009 to prepare fully for the Review Conference of States Parties scheduled to take place in Kampala, Uganda in May 2010, to address among others, the following issues:
 - i) Article 13 of the Rome Statute granting power to the UN Security Council to refer cases to the ICC;
 - ii) Article 16 of the Rome Statute granting power to the UN Security Council to defer cases for one (1) year;
 - iii) Procedures of the ICC;
 - iv) Clarification on the Immunities of officials whose States are not party to the Statute;
 - v) Comparative analysis of the implications of the practical application of Articles 27 and 98 of the Rome Statute;
 - vi) The possibility of obtaining regional inputs in the process of assessing the evidence collected and in determining whether or not to proceed with prosecution, particularly against senior state officials; and
 - vii) Any other areas of concern to African States Parties.
9. DEEPLY REGRETS that the request by the African Union to the UN Security Council to defer the proceedings initiated against President Bashir of the Sudan in accordance with Article 16 of the Rome Statute of the ICC, has neither been heard nor acted upon, and in this regard, REITERATES ITS REQUEST to the UN Security Council;
10. DECIDES that in view of the fact that the request by the African Union has never been acted upon, the AU Member States shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of The Sudan;
11. EXPRESSES CONCERN on the conduct of the ICC Prosecutor and FURTHER DECIDES that the preparatory meeting of African States Parties to the Rome Statute of the ICC scheduled for the late 2009 should prepare, *inter alia*, guidelines and a code of conduct for the exercise of discretionary powers by the ICC Prosecutor relating particularly to the powers of the Prosecutor to initiate cases at his own discretion under Article 15 of the Rome Statute;

12. UNDERSCORES that the African Union and its Member States reserve the right to take any further decisions or measures that may be deemed necessary in order to preserve and safeguard the dignity, sovereignty and integrity of the continent;
13. FINALLY REQUESTS the AU Commission to follow-up on the implementation of this Decision and submit a report thereon to the next Ordinary Session of the Assembly through the Executive Council in January/February 2010 and in this regard AUTHORIZES expenditure from arrears.

APPENDIX II

DECISION ON THE PROGRESS REPORT OF THE COMMISSION ON THE IMPLEMENTATION OF DECISION ASSEMBLY/AU/DEC.270(XIV) ON THE SECOND MINISTERIAL MEETING ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (ICC)

Adopted by the Fifteenth Ordinary Session of the Assembly of the Union on 27 July 2010 in Kampala, Uganda, Doc. Assembly/AU/Dec.296(XV), 27 July 2010

The Assembly,

1. TAKES NOTE of the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270 (XIV) adopted by the Fourteenth Ordinary Session of the Assembly held in Addis Ababa, Ethiopia, on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC) and all comments and observations made by Member States and ENDORSES the recommendations contained therein;
2. REITERATES its commitment to fight impunity in conformity with the provisions of Article 4(h) of the Constitutive Act of the African Union;
3. RECALLS the African Union (AU) position expressed through the Decision Assembly/AU/Dec.270(XIV);
4. EXPRESSES its disappointment that the United Nations Security Council (UNSC) has not acted upon the request by the African Union to defer the proceedings initiated against President Omar Hassan El-Bashir of the Republic of The Sudan in accordance with Article 16 of the Rome Statute of ICC which allows the UNSC to defer cases for one (1) year and REITERATES its request in this regard;
5. REITERATES its Decision that AU Member States shall not cooperate with the ICC in the arrest and surrender of President El-Bashir of The Sudan;
6. REQUESTS Member States to balance, where applicable, their obligations to the AU with their obligations to the ICC;
7. URGES all Member States to speak with one voice to ensure that the proposed amendment to Article 16 of the Rome Statute which would allow the UN General Assembly to take over the power of the UNSC to defer cases for one (1) year in cases where the UNSC has failed to take a decision within a specified timeframe;
8. DECIDES to reject for now, the request by ICC to open a Liaison Officer to the

AU in Addis Ababa, Ethiopia and REQUESTS the Commission to inform the ICC accordingly;

9. EXPRESSES CONCERN over the conduct of the ICC prosecutor, Mr. Moreno Ocampo who has been making egregiously unacceptable, rude and condescending statements on the case of President Omar Hassan El-Bashir of The Sudan and other situations in Africa;
10. REQUESTS the Commission to report regularly on the implementation of this decision.

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