

SYMPOSIUM ON THE PRESENT AND FUTURE OF FOREIGN OFFICIAL IMMUNITY

REFERRALS TO THE INTERNATIONAL CRIMINAL COURT UNDER CHAPTER VII OF THE UNITED NATIONS CHARTER AND THE IMMUNITY OF FOREIGN STATE OFFICIALS

*Erika de Wet**

This contribution explores the implications of United Nations Security Council (UNSC) referrals under Chapter VII of the [Charter of the United Nations](#) to the International Criminal Court (ICC) for the immunity *ratione personae* of officials of states that are not party to [the ICC Statute](#).¹ While Article 13(b) of the ICC Statute allows the ICC to receive referrals of situations by the UNSC,² disagreement remains among authors as to when such a referral removes the customary immunity attached to a head of state of a nonstate party to the ICC Statute. In particular, it remains disputed whether the broad obligation placed on Sudan by UNSC [Resolution 1593 \(2005\)](#) had the implicit effect of doing so.³ In referring the situation in Darfur (Sudan) to the ICC under Chapter VII of the UN Charter, the UNSC determined that “the government of Sudan, and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the prosecutor pursuant to this resolution.”⁴

Subsequent to the adoption of this resolution, the ICC prosecutor issued an arrest warrant for President Bashir of Sudan. Yet several ICC member states failed to arrest and surrender Bashir during country visits.⁵ In order to determine whether this failure to act constituted a violation of the ICC Statute, the question whether the customary immunity of a head of state before foreign national courts constituted a bar against his arrest and surrender was of

* *SARChI Professor of International Constitutional Law, University of Pretoria (South Africa), and Honorary Professor, University of Bonn (Germany). This work is based on the research supported by the South African Research Chairs Initiative of the Department of Science and Technology and National Research Foundation of South Africa (Grant No. 98338).*

¹ [The Charter of the United Nations](#), June 26, 1945, 1 UNTS XVI; [Rome Statute of the International Criminal Court](#), July 17, 1998, 2187 UNTS 38553 [hereinafter Rome Statute].

² Rome Statute, [supra note 1](#), art. 13(b) determines that the ICC may exercise jurisdiction if “a situation in which one or more of [the crimes in Article 5] 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.” See also Dapo Akande, [The Legal Nature of Security Council Referrals to the ICC and Its Impact on Al-Bashir’s Immunities](#), 7 J. INT’L CRIM. JUST. 340 (2009).

³ The customary law immunity of heads of state includes immunity from arrest and is absolute in nature, i.e., applying also in situations where the head of state is accused of having committed an international crime. [Certain Questions of Mutual Assistance in Criminal Matters](#) (Djib. v. Fr.), 2008 ICJ REP. 177, para. 170 (June 4); [Arrest Warrant of 11 April 2000](#) (Dem. Rep. Congo v. Belg.), 2002 ICJ REP. 3, para. 54 (Feb. 14).

⁴ [SC Res. 1593](#), para. 2 (Mar 31, 2005).

⁵ See Erika de Wet, [The Implications of President Al-Bashir’s Visit to South Africa for International and Domestic Law](#), 13 J. INT’L CRIM. JUST. 1049 (2015).

central importance.⁶ The answer to this question turns on the relationship between Articles 27(2) and 98(1) of the Rome Statute, as well as their relationship with UNSC Resolution 1593 (2005). This essay will highlight key aspects of this relationship, taking account, among other things, of the [ICC's July 2017 decision by Pre-Trial Chamber II](#) against South Africa,⁷ as well as its earlier Pre-Trial Chamber II decisions against [South Africa](#) in 2015 and the [Democratic Republic of the Congo \(DRC\)](#) in 2014 respectively.⁸ All these decisions rebuked the failure of these countries to arrest and surrender President Bashir during country visits, although there were differences in their reasoning.

The Relationship Between Articles 27(2) and 98(1) of the Rome Statute

Article 27(2) establishes that “[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.”⁹ In its July 2017 decision, ICC Trial Chamber II underscored that as far as parties to the Rome Statute were concerned, no immunity would apply to any individual before the ICC itself (“vertically”), and neither would it apply to the national authorities of other state parties (“horizontal”).¹⁰ This conclusion indeed seems accurate. First, it is confirmed by the explicit references to national and international law immunities in Article 27(2).¹¹ Second, any other interpretation in a situation where the affected states are parties to the ICC Statute would render Article 27(2) meaningless and make it almost impossible for the ICC to obtain custody over indicted high-level perpetrators of international crimes. Given the absence of its own powers to arrest, the ICC is entirely reliant on national authorities to arrest suspects and to surrender them into the custody of the ICC.¹²

Article 98(1), on the other hand, confirms the customary international immunities pertaining to high officials of nonstate parties.¹³ Thus, where the ICC prosecutor wishes to arrest a high-level official of a nonstate party, he or she in principle can only proceed if the cooperation of the third state has been obtained. Put differently, the prosecutor would have to obtain a waiver of the customary immunity by the nonstate party in question, as the immunity referred to in Article 98(1) would otherwise bar arrest at the national level.¹⁴ While such an interpretation does

⁶ See also Nerina Boschiero, [The ICC Judicial Finding on Non-cooperation Against the DRC and No Immunity for Al-Bashir Based on UNSC Resolution 1593](#), 13 J. INT'L CRIM. JUST. 626 (2015).

⁷ Prosecutor v. Al-Bashir, Case No. ICC-02/05-01/09, [Decision Under Article 87\(7\) of the Rome Statute on the Non-Compliance by South Africa with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir](#) (July 6, 2017) [Bashir/South Africa 2017 decision].

⁸ See Prosecutor v. Al-Bashir, Case No. ICC-02/05-01/09, [Decision Following the Prosecutor's Request for an Order Further Clarifying that the Republic of South Africa is under the Obligation to Immediately Arrest and Surrender Omar Al Bashir](#) (June 13, 2015) [hereinafter Bashir/South Africa 2015 decision]. This decision mirrored that of Prosecutor v. Al-Bashir, Case No. ICC-02/05-01/09, [Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al-Bashir's Arrest and Surrender to the Court](#) (Apr. 9, 2014) [Bashir/DRC 2014 decision].

⁹ [Rome Statute](#), *supra* note 1, art. 27(1).

¹⁰ [Bashir/South Africa 2017 decision](#), *supra* note 7, at paras. 78–79.

¹¹ See Paula Gaeta, [Does President Al Bashir Enjoy Immunity from Arrest?](#), 7 J. INT'L CRIM. JUST. (2009) 315, 325; De Wet, *supra* note 5, at 1055.

¹² De Wet, *supra* note 5, at 1055.

¹³ [Rome Statute](#), *supra* note 1, art. 98(1) provides as follows: “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.”

¹⁴ Gaeta, *supra* note 11, at 328; De Wet (note 5), 1056.

limit the operational scope of Article 27(2), it takes proper account of the elementary principles of treaty law.¹⁵ Nothing in the Rome Statute can remove the customary immunity of an official from a nonstate party without the latter's consent, as that would create obligations for third states in violation of the *pacta tertiis* rule. It would also render Article 98 meaningless.¹⁶ The ICC essentially endorsed this logic in its July 2017 decision against South Africa,¹⁷ as well as in the earlier Pre-Trial Chamber II decisions against the Democratic Republic of the Congo and South Africa respectively.¹⁸ That being said, the question remains as to whether the referral and obligation to cooperate with the ICC in UNSC 1593 (2005) affects the customary immunities reaffirmed in Article 98(1) of the Rome Statute.

The Impact of UNSC Resolution 1593 (2005) on Articles 27(2) and 98 of the Rome Statute

In its most recent decision of July 6, 2017, ICC Pre-Trial Chamber II determined by majority that the consequence of the UNSC referral of the situation in Darfur to the Rome Statute was that the Rome Statute was made applicable in its entirety to the situation.¹⁹ Specifically, the obligation to cooperate and provide any assistance to the ICC, contained in UNSC Resolution 1593 (2005), implied obligations that Sudan, as a nonstate party to the Rome Statute, would otherwise not have had.²⁰ As far as the situation in Darfur was concerned, it placed Sudan in the same situation as a state party to the Rome Statute.²¹ As a result, Article 27(2) of the Statute applied to Sudan as if it were a state party and removed any immunity (both vis-à-vis the ICC and other ICC state parties) that would otherwise exist under international law.²² As a consequence, the immunities referred to in Article 98(1) of the Rome Statute did not apply in relation to President Bashir.²³

In 2017 Pre-Trial Chamber II thus deviated from its earlier reasoning in 2014 and 2015, in accordance with which UNSC Resolution 1593 (2005) implied a waiver of the immunities contained in Article 98(1) of the Rome Statute.²⁴ In line with this reasoning, the obligation on Sudan to cooperate fully with the ICC implicitly obliged it to revoke the immunity of its head of state referred to in this article.²⁵ Instead, Pre-Trial Chamber II in its July 2017 decision understood UNSC Resolution 1593 (2005) as implicitly extending the Rome Statute as a

¹⁵ Akande, *supra* note 2, at 338; De Wet, *supra* note 5, at 1056.

¹⁶ See Luigi Condorelli & Annalisa Ciampi, *Comments on the Security Council Referral of the Situation in Darfur to the ICC*, 3 J. INT'L CRIM. JUST. 591 (2005); Akande, *supra* note 2, at 339; Dire Tladi, *The Duty on South Africa to Arrest and Surrender President Al-Bashir Under South African and International Law*, 13 J. INT'L CRIM. JUST. 1035 (2015); De Wet, *supra* note 5, at 1056.

¹⁷ *Bashir/South Africa 2017 decision*, *supra* note 7, at para. 82.

¹⁸ *Bashir/DRC 2014 decision*, *supra* note 8, at paras. 26, 29; *Bashir/South Africa 2015 decision*, *supra* note 8, at paras. 6, 7. These decisions all deviate from those of ICC Pre-Trial Chamber I against Malawi and Chad respectively on Dec. 12 and 13, 2011 (ICC-02/05-01/09-139; and ICC-02/05-01/09-1), which also related to a failure to comply with the ICC's request for arrest and surrender of President Bashir. In those decisions, ICC Pre-Trial Chamber I claimed the existence of a customary international law exception to immunities of heads of state, regardless of the existence of Art. 98(1) of the ICC Statute.

¹⁹ *Bashir/South Africa 2017 decision*, *supra* note 7, at para. 86.

²⁰ *Id.* at para. 87.

²¹ *Id.* at para. 88.

²² *Id.* at para. 91.

²³ *Id.* at para. 93.

²⁴ *Id.* at para. 96.

²⁵ This reasoning was supported by the *Bashir/DRC 2014 decision*, *supra* note 8, at para. 29; and the *Bashir/South Africa 2015 decision*, *supra* note 8, at paras. 6, 7.

whole to Sudan (in relation to Darfur).²⁶ That, in turn, made it possible to extend the implications of Article 27(2) of the Rome Statute to the situation in Darfur, while making Article 98(1) of the Statute irrelevant.

Purposive Interpretation of UNSC Resolutions

Both lines of reasoning discussed above have the same consequence in that customary immunity does not form a barrier at any level of the proceedings. In the view of this author, both lines of reasoning are equally plausible. They are underpinned by a purposive interpretation of UNSC Resolution 1593 (2005), resulting in a broad understanding of the obligation to “cooperate fully” with the ICC within the parameters of its Statute. In particular, both lines of reasoning depart from the assumption that the nonapplicability or waiving (whichever interpretation one prefers) of the customary immunity of President Bashir necessarily is implied by the obligation to “cooperate fully” in Resolution 1593 (2003). Therefore, it does not need to be addressed explicitly in the resolution.²⁷

In so doing, these interpretations gave due consideration to the need for the effective implementation of binding UNSC decisions in line with the 1970 *Namibia* advisory opinion of the ICJ.²⁸ That decision concerned the UNSC Resolution that declared South Africa’s presence in Namibia illegal,²⁹ without spelling out the implications for UN member states. The ICJ gave a purposive interpretation to the Resolution and determined that it required all states to recognize the illegality of South Africa’s presence and to refrain from any acts that would imply the recognition of the legality of South Africa’s presence.³⁰ All states thus had to accept the legal situation resulting from the UNSC binding decision and act in accordance with such acceptance. Anything less would undermine the efficacy of decisions of the UN organ entrusted with the primary responsibility for international peace and security.³¹ If this reasoning is applied by analogy to UNSC Resolution 1593 (2005), it implies that the Chapter VII character of the obligation on Sudan to cooperate fully with the ICC allows all UN member states to regard the customary immunity of President Bashir as either nonapplicable or waived, in relation to any arrest by national authorities for the purpose of surrendering him to the ICC.³²

The purposive interpretation of broadly-formulated UNSC resolutions is also supported by state practice in general. For example, when the UNSC authorizes the use of military force under Chapter VII of the UN Charter, it usually uses the phrase “all necessary means” or “all necessary measures.” It is generally accepted by states that this—by implication—would include all military measures, whether aerial or on the ground, unless any limitations are stipulated in the resolution.³³ If the UNSC can employ such general (i.e., vague) language when authorizing the most drastic of measures, namely, military force, it would only be consistent to accept that it

²⁶ [Bashir/South Africa 2017 decision](#), *supra* note 7, at para. 89.

²⁷ However, see the minority opinion of Judge De Brichambaut; *id.* at para. 83. He submits that international law is unclear on this point. See also Göran Sluiter, *Obtaining Cooperation from Sudan – Where is the Law?*, 6 J. INT’L CRIM. JUST. 877–78 (2008); Gaeta, *supra* note 11, at 330; Tladi, *supra* note 16, at 1042.

²⁸ [Legal Consequences for States of the Continental Presence of South Africa in Namibia \(South West Africa\) Notwithstanding Security Council Resolution 276 \(1970\)](#), Advisory Opinion, 1971 ICJ REP. 16 (June 21); Akande, *supra* note 2, at 347.

²⁹ [SC Res. 276](#), para. 2 (Jan 30, 1970).

³⁰ [Namibia Advisory Opinion](#), *supra* note 28, at paras. 114–16; Akande, *supra* note 2, at 347; De Wet, *supra* note 5, at 1062.

³¹ Akande, *supra* note 2, at 347; Boschiero, *supra* note 6, at 646–47; De Wet, *supra* note 5, at 1062.

³² See Akande, *supra* note 2, at 342; De Wet, *supra* note 5, at 1062. However, see Tladi, *supra* note 16, at 1043, who does not consider the implications of the [Namibia Advisory Opinion](#), *supra* note 28.

³³ E.g., when authorizing the use of all necessary measures against the Libyan government in [SC Res. 1973](#) para. 4 (Mar. 11, 2011), the UNSC explicitly excluded ground troops (“foreign occupation force”). See De Wet, *supra* note 5, at 1061.

can also do so when obliging a nonmember state of the Rome Statute to cooperate with the ICC in a manner that is not hindered by any customary immunity of its state officials.

At this juncture it is also worth recalling that Sudan, while not a party to the Rome Statute, is a party to the UN Charter. In accordance with Article 25 of the UN Charter, member states have to accept and carry binding UNSC decisions under Chapter VII of the UN Charter.³⁴ In addition, Article 103 of the UN Charter determines that “[i]n 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.”³⁵ Sudan would thus have to accept a UNSC decision that had the effect of waiving the immunity of the head of state or made it nonapplicable, despite any other treaty obligation to the contrary. Moreover, Sudan would have to do the same despite any customary immunities that might apply. Even though the wording of Article 103 of the UN Charter only refers to treaty obligations, states over time have accepted in practice that the UNSC can also oblige states to deviate from customary international law.³⁶ In essence, therefore, subsequent to the adoption of UNSC Resolution 1593 (2005), ICC member states no longer could rely on the customary immunities attached to President Bashir as a procedural bar to his arrest and surrender to the ICC.

Conclusion

It is fair to conclude that a purposive interpretation of UNSC [Resolution 1593 \(2005\)](#), combined with Articles 25 and 103 of the UN Charter, has removed the procedural bar that the customary immunities attached to President Bashir would otherwise have constituted in relation to his arrest by ICC member states and surrender to the ICC. However, the fact that the ICC is yet to develop a consistent line of reasoning pertaining to the relationship between UNSC Resolution 1593 (2005), Article 27(2) of the Rome Statute, and Article 98(1) of the Statute, is likely to form a point of contention in the scholarly debate in and of itself. For the ICC’s position to gain credibility amongst scholars and states alike, it needs to develop and maintain a clear and consistent reasoning regarding this complex, triangular relationship.

³⁴ [UN Charter](#) art. 25 provides: “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.” See also Akande, [supra note 2](#), at 341; Condorelli & Ciampi, [supra note 16](#), at 593; De Wet, [supra note 5](#), at 1059.

³⁵ See Akande, [supra note 2](#), at 335; Boschiero, [supra note 6](#), at 631; De Wet, [supra note 5](#), at 1059–60.

³⁶ A concrete example includes the UNSC resolutions addressing piracy before the coast of Somalia and which were adopted under Chapter VII of the Charter. These resolutions inter alia permit states to pursue suspected pirates in the territorial waters of Somalia, a deviation from both treaty and customary norms pertaining to the law of the sea. See, e.g., [SC Res. 1846](#) para. 10 (Dec. 2, 2008). See De Wet, [supra note 5](#), at 1060.