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## The International Criminal Court and Immunities under International Law for States Not Party to the Court's Statute

Claus Kreß\*

### 10.1. Introduction

The international law of immunities is *en vogue*. It has been at the heart of two recent judgments of the International Court of Justice ('ICJ')<sup>1</sup>, has been the subject of two recent resolutions adopted by the *Institut de Droit International* ('IDI')<sup>2</sup>, and is one of the topics to which the International

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<sup>1</sup> International Court of Justice, *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, 3 February 2012, available at <http://www.legal-tools.org/doc/674187/>; ICJ, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, 14 February 2002, ICJ Reports 2002, p. 3, available at <http://www.legal-tools.org/doc/c6bb20/>; the international law of immunities was also touched upon in International Court of Justice (*Djibouti v. France: Case Concerning Certain Questions of Mutual Assistance in Criminal Matters*), Judgment, 4 June 2008, ICJ Reports 2008, p. 177, available at <http://www.legal-tools.org/doc/7b6a80/>.

<sup>2</sup> Institut de droit international, *Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes*,

Law Commission ('ILC') is currently addressing its attention.<sup>3</sup> All of these developments have sparked, as one would suspect, a considerable amount of scholarly writing.<sup>4</sup>

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Napoli Session 2009, Third Commission, available at [http://www.idi-iil.org/idiE/resolutionsE/2009\\_naples\\_01\\_en.pdf](http://www.idi-iil.org/idiE/resolutionsE/2009_naples_01_en.pdf), last accessed on 17 July 2012; Institut de droit international, *Les immunités de juridiction et d'exécution du chef d'Etat et de gouvernement en droit international*, Vancouver Session 2001, Thirteenth Commission, available at [http://www.idi-iil.org/idiF/resolutionsF/2001\\_van\\_02\\_fr.PDF](http://www.idi-iil.org/idiF/resolutionsF/2001_van_02_fr.PDF), last accessed on 17 July 2012.

<sup>3</sup> For a summary of the work, see International Law Commission, *Report on the Work of its sixty-third session*, A/66/10, paras. 102–203 (Chapter VII – Immunity of State officials from foreign criminal jurisdiction); for the first three reports of Special Rapporteur Roman Anatolevich Kolodkin, see International Law Commission, *Third Report on immunity of State officials from foreign criminal jurisdiction*, 24 May 2011, A/CN.4/646; *Second report on immunity of State officials from foreign criminal jurisdiction*, 10 June 2010, A/CN.4/631; *Preliminary report on immunity of State officials from foreign criminal jurisdiction*, 29 May 2008, A/CN.4/601; for a voluminous memorandum prepared by the Secretariat at the request of the ILC, see International Law Commission, *Immunity of State officials from foreign criminal jurisdiction*, 31 March 2008, A/CN.4/596.

<sup>4</sup> The following is a selection of more recent publications; for a leading treatise of the subject as a whole, see Lady Hazel Fox, *The Law of State Immunity*, second ed., Oxford University Press, Oxford, 2009; for a most thorough monograph on international immunity rights and international criminal law, see Helmut Kreicker, *Völkerrechtliche Exemtionen. Grundlagen und Grenzen völkerrechtlicher Immunitäten und ihre Wirkungen im Strafrecht* (two volumes), Duncker and Humblot, Berlin, 2007; for two other recent monographs, see Rosanne van Alebeek, *The Immunity of States and their Officials in International Criminal Law and International Human Rights Law*, Oxford University Press, Oxford, 2008; Ellen L. Lutz and Caitlin Reiger (eds.), *Prosecuting Heads of State*, Cambridge University Press, Cambridge, 2009; for another detailed study, see Advisory Committee on Issues of Public International Law, *Advisory Report on the Immunity of Foreign State Officials*, Advisory Report No. 20, 2011, available at <http://www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2011/10/19/advies-inzake-de-immuniteit-van-buitenlandse-ambtsdragers.html>, last accessed on 17 July 2012; for some important shorter analyses, see Chimène I. Keitner, "Foreign Official Immunity and the 'Baseline' Problem", in *Fordham Law Review*, 2011–2012, vol. 80, p. 605; Joanne Foakes, "Immunity for International Crimes? Developments in the Law on Prosecuting Heads of States in Foreign Courts", in *Chatham House briefing paper*, IL BP 2011/02; Beth Stephens, "Abusing the Authority of the State: Denying Foreign Official Immunity for Egregious Human Rights Abuses", in *Vanderbilt Journal of Transnational Law*, 2011, vol. 44, p. 1163; Dapo Akande and Sangeeta Shah, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts", in *European Journal of International Law*, 2010, vol. 21, p. 815; Mary Margaret Penrose, "The Emperor's Clothes: Evaluating Head of State Immunity Under

It would be pretentious to confront the subject as a whole within the limited scope of a chapter as this. I shall therefore narrowly confine my considerations to one single facet of the broad theme, and shall discuss two closely interrelated questions pertaining to international law immunity rights in proceedings before the International Criminal Court ('ICC').<sup>5</sup> The first question is whether international law immunities of States not party to the Statute of the ICC ('Statute') prevent the latter from exercising its jurisdiction over an incumbent Head of State, Head of Government, Foreign Minister and certain other holders of high-ranking office of such a State. Only if this first question is answered in the negative does the second question arise, which is whether such international law of im-

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International Law", in *Santa Clara Journal of International Law*, 2009–2010, vol. 7, p. 85; Gionato Piero Buzzini, "Lights and Shadows of Immunities and Inviolability of State Officials in International Law: Some Comments on the *Djibouti v. France* Case", in *Leiden Journal of International Law*, 2009, vol. 22, p. 455; Mark A. Summers, "Diplomatic Immunity Ratione Personae: Did the International Court of Justice Create a New Customary Law Rule in *Congo v. Belgium*?", in *Michigan State Journal of International Law*, 2007–2008, vol. 16, p. 459; Natalino Ronzitti, "L'immunità funzionale degli organi stranieri dalla giurisdizione penale: Il caso Calipari", in *Rivista di diritto internazionale*, vol. XCI, 2008, p. 1033; Sarah M. H. Nouwen, "The Special Court for Sierra Leone and the Immunity of Taylor: The *Arrest Warrant* Case Continued", in *Leiden Journal of International Law*, 2005, vol. 18, p. 645; Philippe Sands, "International Law Transformed? From Pinochet to Congo?", in *Leiden Journal of International Law*, 2003, vol. 16, p. 37; Antonio Cassese, "When May Senior State Officials be Tried for International Crimes? Some Comments on the *Congo v. Belgium* Case", in *European Journal of International Law*, 2002, vol. 18, p. 853; Steffen Wirth, "Immunity for Core Crimes? The ICJ's Judgment in the *Congo v. Belgium* Case", in *European Journal of International Law*, 2002, vol. 13, p. 877; Andrea Bianchi, "Immunity versus Human Rights: The Pinochet Case", in *European Journal of International Law*, 1999, vol. 10, p. 237; Christian Dominicé, "Quelques observations sur l'immunité de juridiction pénale de l'ancien Chef d'Etat", in *Révue Générale de Droit International Public*, 1999, vol. 103, p. 297.

<sup>5</sup> Specifically on (aspects relating to) those questions, see Dapo Akande, "The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities", in *Journal of International Criminal Justice*, 2009, vol. 7, p. 333; Paola Gaeta, "Does President Al Bashir Enjoy Immunity from Arrest?", in *Journal of International Criminal Justice*, 2009, vol. 7, p. 315; Robert Uerpmann-Witzack, "Immunität vor Internationalen Strafgerichtshöfen", in *Archiv des Völkerrechts*, 2006, vol. 44, p. 33; Dapo Akande, "International Law Immunities and the International Criminal Court", in *The American Journal of International Law*, 2004, vol. 98, p. 407; Vanessa Klingberg, "(Former) Heads of State Before International(ized) Criminal Courts: the Case of *Charles Taylor* Before the Special Court for Sierra Leone", in *German Yearbook of International Law*, 2003, vol. 46, p. 537.

munities precludes the ICC from requesting a State Party to arrest and surrender a suspect who falls into one of the above-listed categories and who is sought by an arrest warrant issued by the Court.

Both questions have recently acquired, almost literally, burning practical relevance. On 4 March 2009, ICC Pre-Trial Chamber I decided that the Court is not prevented by Sudan's immunity under international law from exercising its jurisdiction over the incumbent President of this non-party State, Al Bashir.<sup>6</sup> More than two years later, on 12 and 13 December 2011, a differently composed Pre-Trial Chamber I specified (or, if this way to put it is preferred: added) in two decisions that the Court is also not precluded from requesting the States Parties of Chad and Malawi to arrest Al Bashir during his visit to their country and to surrender him to the Court.<sup>7</sup> Shortly thereafter, on 9 January 2012, the African Union Commission voiced its "deep regret" about, and its "total disagreement" with, the "ill-considered" and "self-serving" decisions of December 2011.<sup>8</sup>

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<sup>6</sup> International Criminal Court, *The Prosecutor v. Omar Hassan Ahmad Al Bashir* ("Omar Al Bashir"), Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09-3, paras. 41–45, available at <http://www.legal-tools.org/doc/e79f78/>.

<sup>7</sup> Cour Pénal Internationale ('CPI'), Le Procureur International Criminal Court, *Le Procureur c. Omar Hassan Ahmad Al Bashir*, Décision rendue en application de l'article 87–7 du Statut de Rome concernant le refus de la République du Tchad d'accéder aux demandes de coopération délivrées par la Cour concernant l'arrestation et la remise d'Omar Hassan Ahmad Al Bashir, 13 December 2011, ICC-02/05-01/09-140, available at <http://www.legal-tools.org/doc/c33d51/>; International Criminal Court, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, 12 December 2011, ICC-02/05-01/09-139, available at <http://www.legal-tools.org/doc/476812/>.

<sup>8</sup> Press Release of 9 January 2012 on the Decisions of Pre-Trial Chamber I of the International Criminal Court ('ICC') pursuant to Article 87(7) of the Rome Statute on the Alleged Failure by the Republic of Chad and the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with respect to the Arrest and Surrender of President Omar Hassan Al Bashir of the Republic of the Sudan; on file with the author.

## 10.2. The Decisions of 4 March 2009 and 12 December 2011 in the Case Against Al Bashir and the Dissent by the African Union Commission

In its decision of 4 March 2009, Pre-Trial Chamber I determined:

[...] the 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.<sup>9</sup>

The Chamber advanced four considerations in support of this determination.<sup>10</sup> It referred, firstly, to the goal to end impunity, as referred to in the Statute's Preamble. Secondly, it quoted Article 27 of the Statute. Thirdly, it seemed to indicate that the sources of applicable law listed in Article 21(1)(a) of the Statute, if relied upon within the spirit of Articles 31 and 32 of the Vienna Convention on the Law of Treaties and Article 21(3) of the Statute, left no *lacuna* to be filled by reference to the sources listed in Article 21(1)(b) and (c) of the Statute.<sup>11</sup> Fourthly, the Chamber stated that:

[...] by 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.

On 6 March 2009 and 21 July 2010, respectively, the Registry adhered to the Chamber's instruction to request all States Parties to arrest and surrender Al Bashir.<sup>12</sup>

In its decision of 12 December 2011, the same (but differently composed) Chamber found that the Republic of Malawi had failed to co-

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<sup>9</sup> *Supra* note 6, para. 41.

<sup>10</sup> *Ibid.*, paras. 42–45.

<sup>11</sup> The formulation of the pertinent paragraph 44 of the decision is somewhat oracular so that its 'interpretation' involves a degree of speculation.

<sup>12</sup> International Criminal Court, *The Prosecutor v. Omar Hassan Ahmad Al Bashir* ("Omar Al Bashir"), ICC-02/05-01/09-7, Request to All States Parties to the Rome Statute for the Arrest and Surrender of Omar Al Bashir, 6 March 2009, available at <http://www.legal-tools.org/doc/24341e/>; Supplementary Request to All States Parties to the Rome Statute for the Arrest and Surrender of Omar Al Bashir, 21 July 2010, ICC-02/05-01/09-96, available at <http://www.legal-tools.org/doc/66e485/>.

operate with the Court by failing to arrest and surrender Al Bashir to the Court.<sup>13</sup> This finding is based on the convictions that: (1) there is no international law immunity of a State not party to the Statute in respect of proceedings before the ICC<sup>14</sup> and (2) the “unavailability of immunities with respect to prosecutions by international courts applies to any act of cooperation by States which forms an integral part of those prosecutions”.<sup>15</sup> In support of the first conviction, the Chamber takes the view that there is a customary international law exception (even) to Head of State immunity when international courts seek a Head of State’s arrest for the commission of crimes under international law and that therefore Article 98(1) of the Statute did not prevent the Court from proceeding with a request for surrender in the present case.<sup>16</sup> In support of the second conviction, the Chamber opines that:

[...] when cooperating with this Court and therefore acting on its behalf, States Parties are instruments for the enforcement of the *jus puniendi* of the international community whose exercise has been entrusted to this Court when States have failed to prosecute those responsible for the crimes within this jurisdiction.<sup>17</sup>

In its decision of 13 December 2011 pertaining to the Republic of Chad and presenting the same legal issues, the Chamber referred back to the decision it had rendered the day before<sup>18</sup> so that the legal analysis that follows in this chapter can focus on the latter decision.

The decisions of 12 and 13 December 2011 provoked a vigorous dissent by the African Union Commission. The press release dated 9 January 2012, by which this dissent was communicated to the world, contains the following passages:

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<sup>13</sup> ICC, 2011, *supra* note 7, *in fine*.

<sup>14</sup> *Ibid.*, para. 18.

<sup>15</sup> *Ibid.*, para. 44.

<sup>16</sup> *Ibid.*, para. 43.

<sup>17</sup> *Ibid.*, para. 46.

<sup>18</sup> Cour Pénal Internationale, Le Procureur International Criminal Court, *Le Procureur c. Omar Hassan Ahmad Al Bashir*, Décision rendue en application de l’article 87-7 du Statut de Rome concernant le refus de la République du Tchad d’accéder aux demandes de coopération délivrées par la Cour concernant l’arrestation et la remise d’Omar Hassan Ahmad Al Bashir, 13 December 2011, ICC-02/05-01/09-140, para. 13, available at <http://www.legal-tools.org/doc/c33d51/>.

Following these Decisions of ICC Pre-Trial Chamber I, the African Union Commission expresses its deep regret that the decision has the effect of:

- (i) Purporting to change customary international law in relation to immunity *ratione personae*;
- (ii) Rendering Article 98 of the Rome Statute redundant, non-operational and meaningless;
- (iii) Failing to address the critical issue of removal or non removal of immunities by the UN Security Council resolution 1593(2005), which referred the situation in Darfur to the ICC. [...]

As a general matter, the immunities provided for by international law apply not only to proceedings in foreign domestic courts but also to international tribunals: states cannot contract out of their international legal obligations vis-à-vis third states by establishing an international tribunal. Indeed, contrary to the assertion of the ICC Pre-Trial Chamber I, article 98(1) was included in the Rome Statute establishing the ICC out of recognition that the Statute is not capable of removing an immunity which international law grants to the officials of States that are not parties to the Rome Statute. This is because immunities of State officials are rights of the State concerned and a treaty only binds parties to the treaty. [...]

The Security Council has not lifted President Bashir's immunity either; any such lifting should have been explicit, mere referral of a "situation" by the UNSC to the ICC or requesting a state to cooperate with the ICC cannot be interpreted as lifting immunities granted under international law. The consequence of the referral is that the Rome Statute, including article 98, is applicable to the situation in Darfur.<sup>19</sup>

The preceding summary demonstrates a sharp disagreement between Pre-Trial Chamber I and the African Union Commission. The latter's dissent does not clearly distinguish between the two legal questions I have formulated in the introduction to my chapter and its precise legal position leaves room for interpretation. My reading is that the Commission gives a negative answer already to my first question, although with one qualification. The Commission appears to take the view that international law immunities of States not party to the Statute prevent the ICC

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<sup>19</sup> *Supra* note 8.

from exercising its jurisdiction over an incumbent Head of State, unless the Security Council has explicitly stipulated to the contrary in a resolution based on Chapter VII of the U.N. Charter. While Pre-Trial Chamber I has consistently given a negative answer to my first question, the above summary has revealed a remarkably different reasoning if the decision of 4 March 2009 is compared with the ones of 12 and 13 December 2011. While the latter postulate a special customary international law exception to international law immunities with respect to proceedings before international criminal courts, any reference to customary international law is conspicuously absent from the former decision. The former instead relies on the Statute itself and on the legal effect of a Security Council referral. The decisions of 4 March 2009 and of 12–13 December 2011 also differ in how they deal with my second introductory question. While this question has received an explicit treatment leading to a negative answer in the decisions of 12 and 13 December 2011, it was not specifically addressed in the decision of 4 March 2009. Yet, already in this decision the Chamber instructed the Registry to “proceed with a request for surrender” directed to all States Parties to borrow the words used in Article 98(1) of the Statute. In sum, the picture that results from the preceding summary is of considerable complexity.

### 10.3. Legal Analysis

In the following legal analysis, I shall make an attempt to disentangle the legal issues at stake.<sup>20</sup> In order to do so, I shall seek to clarify how Article 98(1) of the Statute relates to the international law of immunities outside the realm of the Statute, and how Article 98(1) of the Statute should be applied. I shall then separately explore the ‘Security Council avenue’ and the ‘customary law avenue’ to avoid the application of the prohibition contained in Article 98(1) of the Statute even in case of an incumbent Head of a State not party to the Statute. I shall begin, however, with a

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<sup>20</sup> It builds on and develops Claus Kreß and Kimberly Prost, “Article 98”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, C.H. Beck/Hart/Nomos, second ed., 2008, pp. 1601–1614; and on Claus Kreß, “Commentary on the Decision on Immunity from Jurisdiction (Prosecutor v. Taylor)”, in André Klip/Göran Sluiter (eds.), *Annotated Leading Cases of International Criminal Tribunals, Volume IX: The Special Court for Sierra Leone*, Intersentia, Antwerp-Oxford, 2006, p. 202.

brief comment on the first three considerations advanced in the Pre-Trial Chamber's decision of 4 March 2009.

### **10.3.1. An Initial Critique of the Decision of 4 March 2009**

It is not clear from the wording of the pertinent passages of this decision whether the four considerations advanced in support of its conclusion on the immunity issue are to form one composite legal argument or whether they should provide for different legal bases to independently reach the same conclusion. While the latter reading of the decision is possible, it would not make for a convincing legal argument, because neither Article 27(2) of the Statute nor the Statute's Preamble can *per se* affect the (immunity) rights of those States which are not party to the Statute.<sup>21</sup> For this reason, it is also unhelpful in the specific context at stake to say that a Chamber of the ICC cannot resort to international law outside the realm of the Statute where the latter does not leave a *lacuna*. The Statute as such simply cannot give a comprehensive legal answer to a question that implies the rights of States not party to it. It follows that the persuasiveness of the decision of 4 March 2009 depends on the strength of the reference to the Security Council referral. Unfortunately, the Pre-Trial Chamber did not develop what I shall call the 'Security Council avenue'.

### **10.3.2. Negotiating Article 98(1) of the ICC Statute**

As we have seen, the African Union Commission, in its protest against the decisions of 12 and 13 December 2011, relied heavily on Article 98(1) of the Statute and this provision is indeed relevant when it comes to the arrest of the Head of a State not party to the Statute for the purpose of the latter's surrender to the ICC. According to the African Union Commission,

[A]rticle 98(1) was included in the Rome Statute establishing the ICC out of recognition that the Statute is not capable of

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<sup>21</sup> The Pre-Trial Chamber's reference to the Preamble may have been influenced by a very similar reference made by Dapo Akande in his important and influential article Akande, 2004, *supra* note 5, pp. 423–424. Contrary to the Pre-Trial Chamber, however, Akande carefully confines the legal effect *per se* of both the Preamble and Article 27 of the ICC Statute to the legal relationship between the Court and States Parties and between States Parties.

removing an immunity which international law grants to the officials of States that are not parties to the Rome Statute.<sup>22</sup>

This statement requires some qualification.

While it is true that the drafters of Article 98(1) of the Statute<sup>23</sup> were certain that a provision of the Statute could not take away a right under international law of a State not party to it, the inclusion of Article 98(1) of the Statute does not express the drafter's recognition of a customary international law immunity for the Head of such States that would prevent the Court from exercising its jurisdiction or at least prevent it from requesting such a person's surrender to a State Party. Instead, Article 98(1) of the Statute has been carefully worded so as to avoid any view on this question of general international law.<sup>24</sup>

Perhaps it is useful to recall the drafting history of Article 98(1) of the Statute. The issue of conflicting immunities was a rather late arrival in the negotiations on Part 9 and even the 1998 Draft Statute did not explicitly refer to the matter.<sup>25</sup> One group of delegations took the view that developments in general international law had substantively reduced, if not eliminated, immunities with respect to crimes under international law with respect to proceedings before the ICC. However, on the insistence of some other delegations a provision on possibly conflicting immunities was included. Yet, this inclusion did not occur, as consensus could not be reached on the existence of certain immunities under general international law. In Rome, there was simply no time for such a debate and so the obvious way out was to not take a purely procedural decision on the matter and instead to include an open-ended reference to general international law as it exists at the given moment in time.

It is perhaps also worth stating that those delegations which were sceptical about the inclusion of Article 98(1) of the Statute eventually saw merit in having this provision. They felt that there is little evidence in State practice that immunity rights pertaining to State or diplomatic prem-

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<sup>22</sup> *Supra* note 8.

<sup>23</sup> Having been the member of the German delegation to the Rome Conference, who was in charge of the negotiations on Part 9 of the Statute, I was among those drafters.

<sup>24</sup> See Akande, 2004, *supra* note 5, p. 656.

<sup>25</sup> Article 87, Option 2(e) of the 1998 Draft Statute can be read as to contain an implicit reference to the matter; for the formulation, see Kreß and Prost, 2008, *supra* note 20, p. 1602, marginal note 1.

ises or property had suffered from an exception pertaining to investigative or other measures relating to proceedings for crimes under international law. They also recognised that Article 27(2) of the Statute does not cover those rights. This explains why, perhaps surprisingly for those not present in Rome, State or diplomatic immunities concerning property were the main driving force behind Article 98(1) of the Statute, and this explains why the term ‘third State’ in Article 98(1) of the Statute refers not just to States not party to the Statute, but to any State other than the requested State.<sup>26</sup>

One important first conclusion can be drawn from the drafting and negotiation history of Article 98(1) of the Statute. In and of itself, this provision provides no basis for a presumption that a certain international law immunity exists. This holds even truer with respect to an international law immunity covering a certain category of persons. In the same vein, it follows that the interpretative presumption that a treaty provision should retain an independent scope of application is inapplicable in the special case of Article 98(1) of the Statute because, at least with respect to the “State and diplomatic immunity of a person”, there was a widespread expectation and hope among the drafters that the open-ended reference to international law in Article 98(1) of the Statute would leave the prohibition formulated herein “redundant, non-operational and meaningless” to borrow the words used by the African Union Commission.

### **10.3.3. The Purpose and the Operation of Article 98(1) of the ICC Statute and a Further Critique of the Decision of 4 March 2009**

The purpose of Article 98(1) of the Statute is to prevent a State Party from being confronted by a conflict between the duties; on the one hand, to cooperate with the Court, and, on the other hand, to respect the international law immunities of other States. Yet, as the preceding summary of the drafting history was to demonstrate, there was uncertainty in Rome on the extent to which any such conflict could at all arise, and Article 98(1) of the Statute is no more than a procedural device to avoid a conflict of duties in case there should be one.

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<sup>26</sup> *Ibid.*, p. 1602, marginal note 9.

The way this procedural device has been construed is remarkable, because it is the Court that has been entrusted by the drafters with the competence to determine, as the cases arise, whether or not a request to co-operate could place the State Party concerned in a situation of conflicting duties. This decision is reflected in the wording of Article 98(1) of the Statute because the prohibition contained therein is directed to the Court. The latter may proceed with a request for surrender or assistance only after it has determined that the requested State could not run into a conflict of duties as a result of the request. Rule 195, sub-Rule 1, of the Rules of Procedure and Evidence confirms that this is the way Article 98(1) is meant to operate because this sub-rule requires the State Party concerned to provide the Court with “any information relevant to assist the Court in the application of Article 98”.<sup>27</sup>

It is noteworthy that the drafters of Article 98(1) of the Statute and of Rule 195, sub-Rule 1, of the Rules of Procedure and Evidence were fully aware that the Court would be able to make an authoritative determination only *vis-à-vis* States Parties, and that States not party would not be bound by any decision of the Court under Article 98(1) of the Statute. This provision therefore implies the remarkable decision by States Parties to entrust the Court with the power to make a decision about the existence or non-existence of “legal obligations [of those States] under international law with respect to the State or diplomatic immunity of a person or property”. Article 98(1) of the Statute therefore provides a powerful piece of evidence for the determination of States Parties to establish a system of collective justice with a strong vertical component. It would seem that a good number of States Parties have accurately translated the procedural scheme in Article 98(1) of the Statute into their respective piece of implementing legislation. The fact that some other States Parties may have acted differently is no sufficient reason to consider the emergence of a subsequent practice deviating from the texts of Article 98(1) of the Statute and Rule 195, sub-Rule 1, of the Rules of Procedure and Evidence.<sup>28</sup>

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<sup>27</sup> For the same view, see Akande, 2004, *supra* note 5, pp. 431–432, who, in addition, mentions Article 119(1) of the Statute in this context.

<sup>28</sup> For a collection of country reports on the implementation of the co-operation duties flowing from the Statute, see Claus Kreß, Bruce Broomhall, Flavia Lattanzi, and Valeria Santori (eds.), *The Rome Statute and Domestic Legal Orders. Volume II: Constitutional Issues, Cooperation and Enforcement*, Nomos/ilSirente, Baden-Baden/Ripa di Fagnano Alto, 2005; for States which have legislated in line with Arti-

In its decision of 12 December 2011, the Pre-Trial Chamber fully captures the way Article 98(1) of the Statute is meant to apply when it states that “[t]he Republic of Malawi did not respect the *sole* authority of this Court to decide whether immunities are applicable in a particular case [emphasis added]”.<sup>29</sup> It is impossible to give similar praise to the decision of 4 March 2009 issued by the same but differently composed Pre-Trial Chamber. In the five paragraphs of the latter decision dealing with the immunity issue, there is no mentioning of Article 98(1). In defence of this silence, it cannot be said that those paragraphs only deal with my first introductory question as to whether the Court may exercise its jurisdiction over the Head of a State not party to the Statute and that those paragraphs do not concern the triangular legal relationship between the Court, the State Party to whom a request is made, and the non-State party that is the sole subject matter of Article 98(1) of the Statute. To the contrary, the decision of 4 March 2009 goes well beyond my first introductory question and squarely addresses the above-mentioned triangular relationship by directing the Registrar to prepare co-operation requests for States Parties to arrest and surrender Al Bashir. The decision of 4 March 2009 should therefore have addressed my second introductory question, and to not have even begun to do so constitutes a significant omission.<sup>30</sup> The 12 December 2011 decision must therefore be read as the subsequent and laudable attempt to fill a regrettable gap in the earlier decision of the same Chamber.

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cle 98(1) of the Statute, see, by way of example, Canada (Kimberly Prost and Darryl Robinson, *ibid.*, pp. 61–62), Germany (Claus Kreß and Jan MacLean, *ibid.*, p. 140; New Zealand (Juliet Hay, *ibid.*, pp. 254–255); for States whose implementing legislation would seem to leave room for a national decision in conflict with that made by the Court, see again by way of example, Australia (Helen Brady, *ibid.*, pp. 18–19); Switzerland (Jürg Lindemann and Olivier Thormann, *ibid.*, p. 440); United Kingdom (Peter Lewis, *ibid.*, p. 463).

<sup>29</sup> ICC, 2011, *supra* note 7, para. 11.

<sup>30</sup> For the same critique, see Akande, 2009, *supra* note 5, p. 337; even irrespective of the missing analysis of Article 98(1) of the Statute, the five paragraphs of the 4 March 2009 decision dealing with the immunity issue are of a deplorably poor quality compared to the importance and sensitivity of the question.

#### 10.3.4. The Immunities Covered by Article 98(1) of the Statute

As was stated before, Article 98(1) of the Statute deals with international law<sup>31</sup> of immunities with respect to persons or properties, and the concern for the latter category of immunities was the driving force behind its inclusion in the Statute. The example that figured most prominently in the negotiations was the customary inviolability of diplomatic premises as codified in Article 22 of the Vienna Convention on Diplomatic Relations.

As far as persons are concerned, the term ‘State immunity’ in Article 98(1) of the Statute requires some explanation. In the more recent scholarly debate, an argument has been made that, contrary to what was stated by the ICJ in the *Djibouti v. France* case<sup>32</sup>, a clear conceptual distinction should be drawn between State immunity in civil proceedings and immunity of State officials *ratione materiae* in criminal proceedings.<sup>33</sup> The sophisticated considerations underlying this argument do certainly have merit and the ICJ has made it clear in its 3 February 2012 judgment on the *Jurisdictional Immunities of the State* case that the international law of immunities may recognise this distinction.<sup>34</sup> Yet, the postulated distinction cannot be made with respect to the term ‘State immunity’ in Article 98(1) of the Statute because this provision is part of the legal framework for criminal proceedings and because the latter term explicitly also refers to persons. The term ‘State immunity’ in Article 98(1) of the Statute therefore covers the international law immunity *ratione materiae* of a State official.

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<sup>31</sup> The reference to “obligations under *international* law [emphasis added]” makes it plain that Article 98(1) of the Statute does not address domestic legal order immunities.

<sup>32</sup> ICJ, 2008, *supra* note 1, p. 242, para. 188.

<sup>33</sup> Gionato Piero Buzzini, “Lights and Shadows of Immunities and Inviolability of State Officials in International Law: Some Comments on the *Djibouti v. France* Case”, in *Leiden Journal of International Law*, 2009, vol. 22, p. 463, drawing on Natalino Ronzitti, “L’immunità funzionale degli organi stranieri dalla giurisdizione penale: Il caso Calipari”, in *Rivista di diritto internazionale*, vol. XCI, 2008, p. 1039.

<sup>34</sup> International Court of Justice, *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, 3 February 2012, para. 91, available at <http://www.legal-tools.org/doc/674187/>; for an excellent analysis of the limited importance of this judgment for the international legal situation in criminal proceedings, see Helmut Kreicker, “Die Entscheidung des Internationalen Gerichtshofs zur Staatenimmunität - Auswirkungen auf das (Völker-) Strafrecht?”, in *Zeitschrift für Internationale Strafrechtsdogmatik*, 2012, vol. 7, p. 116.

It must further be asked whether the term 'State immunity' also covers the international law immunity *ratione personae* of Heads of State, Heads of Government, Foreign Ministers and certain other holders of high-ranking office of such a State. This was at the heart of the ICJ's judgment in the *Arrest Warrant* case.<sup>35</sup> While the ICJ did not elaborate in this case on the distinction between the international law immunities *ratione materiae et personae* of State officials in criminal proceedings, it emphasised this distinction in the subsequent *Djibouti v. France* case.<sup>36</sup> The distinction between international immunities *ratione materiae et personae* would also seem to be generally accepted in State practice and in international legal scholarship.<sup>37</sup> Important and generally recognised as it thus is, the distinction between the international immunity of persons in criminal proceedings *ratione materiae et personae* does not require the interpreter of Article 98(1) of the Statute to confine this provision's concept of 'State immunity of a person' to international law immunities *ratione materiae*. While both the scope and the rationale of the two types of immunities are different, the Special Rapporteur of the ILC on the subject of "immunity of State officials from foreign criminal jurisdiction" is right to say that "[t]he State stands behind both the immunity *ratione personae* of its officials from foreign jurisdiction and their immunity *ratione materiae*".<sup>38</sup> It is therefore warranted to construe the term of 'State immunity of a person' in Article 98(1) of the Statute so as to cover both international law immunities *ratione materiae et personae*. To do otherwise would have the odd consequence that the most powerful international law immunity, and so the one most likely to give rise to the conflict of duties that Article 98(1) of the Statute seeks to avoid, would, except for the diplomatic immunity *ratione personae*, remain uncovered. The resulting *lacuna* would then have to be filled by applying either the concept of 'State

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<sup>35</sup> I shall not in this essay explore the meaning to be given to the words "certain other holders of high-ranking office of such a State" which the ICJ used in ICJ, 2002, *supra* note 1, pp. 20–21, para. 51.

<sup>36</sup> ICJ, 2008, *supra* note 1, pp. 240–244, paras. 181–197.

<sup>37</sup> By way of example, see, for the practice of the United States of America, Harold Hongju Koh, "Foreign Official Immunity After *Samantar*: A United States Government Perspective", in *Vanderbilt Journal of Transnational Law*, 2011, vol. 44, pp. 1153–1154; for a useful exposition of the distinction, which he states is "usually drawn", see Roman Anatolevich Kolodkin, *Preliminary report on immunity of State officials from foreign criminal jurisdiction*, 29 May 2008, A/CN.4/601, paras. 78–83.

<sup>38</sup> Kolodkin, *ibid.*, para. 94.

immunity of a person' or that of 'diplomatic immunity of a person' by way of analogy to, for example, Heads of State.<sup>39</sup> Instead of resorting to this complicated and artificial solution, it is suggested to interpret the term 'State immunity of a person' in Article 98(1) of the Statute so that it covers both international law immunities *ratione materiae et personae*.

### 10.3.5. A Short Digression: Article 98(1) and the Immunity Rights of States Parties

It is perhaps useful to restate that the scope of application of Article 98(1) of the Statute is not confined to the triangular legal relationship between the Court, a State Party to whom a request is made, and a State not party to the Statute.<sup>40</sup> Rather, the provision also covers the situation where the request for arrest and surrender concerns an official of a 'third' State Party present on the territory of another State Party (to whom a request from the Court is directed) or where the request for co-operation other than surrender is directed to the State or diplomatic property of a 'third' State Party which is located on the territory of another State Party (to whom the Court has directed its request).<sup>41</sup>

In the first situation, the prohibition contained in Article 98(1) of the Statute will remain redundant, non-operational and meaningless because the 'third' State Party concerned has already waived its immunity right by virtue of his acceptance of Article 27(2) of the Statute. It is not convincing to interpret this provision more narrowly to the effect that it applies only to the legal relationship between the Court and States Parties.<sup>42</sup> If such an interpretation were accepted, Article 27(2) of the Statute would enable the Court to issue an arrest warrant against a national of a

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<sup>39</sup> For an illuminating argument on the importance of the diplomatic immunity *ratione personae* for the international law immunity *ratione personae* in general, see Mark A. Summers, "Diplomatic Immunity Ratione Personae: Did the International Court of Justice Create a New Customary Rule in *Congo v. Belgium*?", in *Michigan State Journal of International Law*, 2007–2008, vol. 16, p. 459.

<sup>40</sup> For a different, albeit unconvincing view, see Paola Gaeta, "Official Capacity and Immunities", in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, Oxford, 2002, p. 991; Gaeta, 2009, *supra* note 5, p. 328.

<sup>41</sup> Akande, 2004, *supra* note 5, p. 423; Kreß and Prost, 2008, *supra* note 20, p. 1606, marginal note 9.

<sup>42</sup> For a different view, see Kreicker, 2007, *supra* note 4, p. 1391.

State Party otherwise protected by an international law immunity, but Article 98(1) of the Statute would still require the Court to obtain a waiver of immunity from this State Party before it could issue a request to arrest or surrender to another State Party on whose territory the person sought is present. In light of the fact that the Court has no enforcement powers and that the State Party whose official is sought by an ICC arrest warrant will typically be reluctant to co-operate with the Court when a higher ranking official is sought by it, the need to obtain a waiver of immunity from this State Party would often pose an insurmountable obstacle to the surrender of the person concerned to the Court. This means that the practical effect of Article 27(2) of the Statute would be largely nullified if this provision governed only the relationship between the Court and the national State Party of the suspect. To avoid such nullification in light with the Statute's overarching aim to end impunity, the waiver contained in Article 27(2) of Statute must extend to the triangular relationship between the Court, the requested State Party and the 'third' State Party.<sup>43</sup>

The situation is different with respect to, say, the diplomatic premises of a 'third' State Party because such property is not covered by the waiver contained in Article 27(2) of the Statute. Here, Article 98(1) of the Statute may require the Court, depending on its evaluation of the existing general international law, to first turn to the 'third' State Party in order to obtain its 'co-operation for the waiver of the immunity'.

#### **10.3.6. Article 98(1) of the Statute and International Law Immunities of Persons of States Not Party to the Statute**

Having clarified the legal ground so far, I shall now turn my attention to the burning question raised by the case against Al Bashir before the ICC. It concerns the international immunity right of a State not party to the Statute with respect to its incumbent Head of State. As the African Union Commission rightly states, the immunity at stake is that *ratione personae*.<sup>44</sup> In its judgment on the *Arrest Warrant* case, the ICJ recognised that

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<sup>43</sup> This argument has already been well made by Akande, 2004, *supra* note 5, pp. 423–425.

<sup>44</sup> The case would in addition concern the immunity *ratione materiae* of the State of Sudan with respect to acts of its Head of State if *Al Bashir's* conduct, which forms the subject matter of the proceedings before the Court, were to be qualified as official for the purposes of the international law on immunities. Despite its most significant practical importance, I shall not deal with this controversial question of qualification in

the international immunity protection *ratione personae* is subject to an exception for crimes under international law that are prosecuted in domestic criminal proceedings. On the basis of this decision, the non-application of the prohibition contained in Article 98(1) of the Statute requires an exception from the immunity right *ratione personae* of the State of Sudan, which is specifically designed to cover the proceedings before the ICC.

There are two conceptually distinct avenues to arrive at such an exception. The first one is to rely on the legal effect of the Security Council referral of the situation of Darfur (Sudan) to the Court. This avenue was alluded to, but not explained in any detail, by the Pre-Trial Chamber in its decision of 4 March 2009. The second one is to refer to a customary international law exception to otherwise existing international law immunities of persons for the specific purpose of criminal proceedings before an international criminal court. This avenue was chosen by the Pre-Trial Chamber in its decisions of 12 and 13 December 2011. The African Union Commission rejected both avenues.

In the analysis that follows, I shall explore both possible avenues. In doing so, I shall keep my two introductory questions in mind, and shall each time distinguish between the bipartite legal relationship between the Court and the State not party to the Statute, and the triangular legal relationship between the Court, the State Party to whom a request is made, and the third State not party to the Statute.

#### **10.3.6.1. The ‘Security Council Avenue’ for Arriving at an Exception to the International Law Immunity *Ratione Personae***

The African Union Commission rightly accepts that the Security Council, based on its powers under Chapter VII of the U.N. Charter, may decide that otherwise existing international law immunity rights do not apply

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this essay and I shall also not deal with the equally important related question, whether an international criminal law exception from the international immunity protection *ratione materiae* in cases of an alleged crime under international law exists under customary international law. Such an exception would cover both foreign domestic and international criminal proceedings and it could, within its reach, make the prohibition of Article 98(1) of the Statute “redundant, non-operational and meaningless”. Suffice it to say that such an exception would not solve the issue in the case of *Al Bashir* that goes beyond the reach of the customary international exception in question.

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with respect to certain proceedings before the ICC. The Commission, however, holds that such a decision must be taken explicitly. This view is unconvincing. Nothing in the U.N. Charter and more particularly in its Chapter VII makes the validity of such a decision by the Security Council dependent on the fact that it has been expressed explicitly. Nor is the ICC bound by its Statute and more particularly by Article 98(1) to accept a Security Council decision on the non-applicability of an immunity right only if this decision has been made explicitly. Whether or not the Security Council has decided that an otherwise existing international law immunity shall not apply with respect to certain proceedings before the ICC, is therefore a matter of construction of the relevant Security Council resolution.

Security Council Resolution 1593 of 31 March 2005<sup>45</sup>, by which the Council referred the situation in Darfur to the ICC, does not contain a provision that deals explicitly with the international immunity rights of the State of Sudan. The second operative paragraph of the resolution, which is based on Chapter VII of the U.N. Charter, reads as follows:

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

As we have seen, the Pre-Trial Chamber, in its decision of 4 March 2009, took this to mean that:

[...] 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.

This is a sensible inference in light of the fact that the Security Council not only referred the situation in Darfur to the Court, but that it also required the State of Sudan to “cooperate fully” with the Court. By borrowing the terms used in Article 86 of the Statute, the Security Council expresses its intention to place the State of Sudan in a legal situation

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<sup>45</sup> S/RES/1593 (2005), 31 March 2005.

analogous to that of a State Party for the purposes of the proceedings that result from the referral. It would go too far to demand that the Security Council goes one step further and specifies that the Court should proceed as if Article 27(2) of the Statute applied to the State of Sudan. Rather, this effect is implied in the resolution.<sup>46</sup> This holds all the more true as the Security Council could not be under any doubt that the Court would wish to focus its investigation on those allegedly most responsible for the crimes and that its investigation would thus likely concentrate on high ranking officials of the State of Sudan.<sup>47</sup>

The question remains whether the Security Council's implicit decision to render inapplicable any international law immunity of the State of Sudan for the proceedings resulting from the referral extends beyond the relationship between the Court and the State of Sudan to the triangular relationship between the Court, a State Party requested to co-operate with the Court, and the State of Sudan. According to one commentator, this is not the case.<sup>48</sup> Under this analysis, the Court was legally empowered to issue an arrest warrant against Al Bashir, but, in accordance with Article 98(1) of the Statute, it should have obtained a waiver of immunity from the State of Sudan before requesting a State Party to arrest and surrender this high level suspect. This position is unconvincing. The better view flows naturally from the above-explained interpretation of Article 27(2) of the Statute.<sup>49</sup> The same interpretation must hold true when the Security Council, acting under Chapter VII of the U.N. Charter, places a State not party to the Statute in a legal situation analogous to that of a State Party.<sup>50</sup>

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<sup>46</sup> This argument has already been well put by Akande, 2009, *supra* note 5, pp. 340–342.

<sup>47</sup> Helmut Kreicker, “Der Präsident des Sudan vor dem Internationalen Strafgerichtshof – ein Verstoß gegen das Völkerrecht? Überlegungen zur völkerrechtlichen Immunität von Staatsoberhäuptern anlässlich des Haftbefehlsantrages gegen Omar al-Bashir”, in *Humanitäres Völkerrecht – Informationsschriften*, 2008, vol. 21, pp. 161–162.

<sup>48</sup> Gaeta, 2009, *supra* note 5, p. 329.

<sup>49</sup> *Supra* Section 10.3.5.

<sup>50</sup> For the correct view, see again Akande, 2009, *supra* note 5, pp. 340–342; Kreicker, 2008, *supra* note 47, p. 163, argues that, whatever the correct interpretation of Article 27(2) of the Statute is, Resolution 1593 (2005) implies the decision to render any international law immunity of the State of Sudan inapplicable also for the purpose of an arrest executed by a requested State Party. For this reason alone, the prohibition contained in Article 98(1) of the Statute is irrelevant in the case of *Al Bashir*. It must be presumed, so the argument goes, that the Security Council wished to act consistently

To conclude, the Pre-Trial Chamber, in its 4 March 2009 decision, alluded to a possible avenue to overcome any immunity challenge by the State of Sudan both for the Court's arrest warrant against Al Bashir and any subsequent request by the Court to a State Party to arrest and surrender Al Bashir. It is thus particularly unfortunate that the Chamber presented its argument in such a superficial and incomplete fashion.

#### **10.3.6.2. The 'Customary Law Avenue' for Arriving at an Exception to the International Law Immunity *Ratione Personae***

As we have seen, in its decisions of 12 and 13 December 2011, the Pre-Trial Chamber did not remedy the shortcomings of the 4 March 2009 decision issued by the same (but differently composed) bench by setting out the 'Security Council avenue' in a comprehensive manner. Instead, it followed the 'customary law avenue' to explain that Al Bashir does not enjoy immunity before the Court and that the latter could request Malawi and Chad to arrest and surrender the suspect without the need to first obtain a waiver of immunity from Sudan pursuant to Article 98(1) of the Statute. There is much more than a technical difference between the two explanations offered by the same Chamber. While the 'Security Council avenue' is open only in case of a Security Council referral, the 'customary law avenue' does not require Security Council action. It could be availed whenever the Court may exercise its jurisdiction over an incumbent Head of State not party to the Statute in accordance with Article 12(2) of the Statute. For this practical reason alone, it is important to give close attention to the 'customary law avenue' for setting aside any international law immunities of incumbent Heads of State, Heads of Government, Foreign Ministers and certain other holders of high-ranking office of States not party to the Statute. Such an exception would apply to proceedings before the ICC and enable authorities of a State Party to arrest and surrender a suspect falling into one of the aforementioned categories when trying to adhere to such a request made by the Court.

##### **10.3.6.2.1. The Relationship between the ICC and the State of Sudan**

Importantly, the Pre-Trial Chamber, when setting out the 'customary law avenue' in its decision of 12 December 2011, did not challenge the ICJ's

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by not only activating the ICC's jurisdiction, but by also eliminating any potential key obstacle to an effective exercise of this jurisdiction over those most responsible.

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decision in the *Arrest Warrant* case that incumbent Heads of States, Heads of Governments, Foreign Ministers and certain other holders of high-ranking office enjoy immunity *ratione personae* in criminal proceedings in a foreign State even in cases of an alleged crime under international law. Instead, the Pre-Trial Chamber set out a customary law exception from the immunity right *ratione personae* for the specific and limited purpose of proceedings before an international criminal court. The Pre-Trial Chamber could feel encouraged by the ICJ's decision in the *Arrest Warrant* case to draw such a distinction between national and international criminal proceedings for crimes under international law. In that case, the ICJ held that:

[...] an incumbent or former Minister of 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, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 27, paragraph 2, that 'immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.'<sup>51</sup>

It is well known that this passage is an *obiter dictum* and that the Court included it in its judgment without adducing State practice based on *opinio juris* in support of it and without in any other way explaining and justifying its content. These facts, however, do not warrant the following suggestion:

[T]he statement by the ICJ that international immunities may not be pleaded before certain international tribunals must be read subject to the condition (1) that the instruments creating those tribunals expressly or implicitly remove the relevant immunity, and (2) that the state of the official concerned is bound by the instrument removing the immunity.<sup>52</sup>

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<sup>51</sup> ICJ, 2002, *supra* note 1, pp. 25–26 (Nr. 61).

<sup>52</sup> Akande, 2004, *supra* note 5, p. 418.

Whether or not correct as a description of the existing law, this is simply not what the ICJ has said. To the contrary, the ICJ's *dictum*, on the face of it, supports the distinction drawn by the Pre-Trial Chamber and only if one reads the ICJ's 'international criminal courts *dictum*' as it is worded, it substantially adds to the same Court's separate 'waiver *dictum*' that immunity *ratione personae* does not apply in a case of waiver of that immunity.<sup>53</sup>

The ICJ's 'international criminal courts *dictum*', in its literal form, had been followed and developed by the Special Court for Sierra Leone in its 2004 *Charles Taylor* jurisdiction decision. Therein, the Special Court held:

[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.<sup>54</sup>

Interestingly, even the Special Rapporteur of the ILC on the subject of "immunity of State officials from foreign criminal jurisdiction", who has otherwise formulated cautious views (to put it rather mildly), holds the opinion that:

[i]mmunity from international criminal jurisdiction appears to be fundamentally different from immunity from national criminal jurisdiction.<sup>55</sup>

China has made a similar statement in the Sixth Committee of the United Nations General Assembly in 2008. The relevant sentence reads as follows:

Immunity from criminal jurisdiction of a foreign State was not the same as immunity from international criminal jurisdiction such as that of the International Criminal Court, and the two should not be linked.<sup>56</sup>

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<sup>53</sup> "[T]hey [the high-ranking State officials qualifying for immunity *ratione personae*] will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity"; ICJ, 2002, *supra* note 1, p. 25.

<sup>54</sup> Special Court for Sierra Leone, *Prosecutor v. Charles Ghankay Taylor*, Decision on Immunity from Jurisdiction, 31 May 2004, SCSL-2003-01-I, para. 52, <http://www.legal-tools.org/doc/3128b2/>, last accessed on 3 October 2012.

<sup>55</sup> Kolodkin, 2008, *supra* note 37, para. 103.

<sup>56</sup> A/C.6/63/SR.23, 21 November 2008, para. 35.

### 10.3.6.2.1.1. Principles

This, of course, provokes the question why international criminal proceedings should be seen as being “fundamentally different” from their national counterparts. In fact, there would be no real difference at all if international proceedings were simply the collective exercise of State rights to conduct national proceedings.<sup>57</sup> Such a delegation model, however, is not the most convincing manner to conceptualise international criminal justice *stricto sensu*. Instead, international criminal law in the true (and narrow) sense of the word is ultimately based on the idea of a *jus puniendi* of the international community as a whole and, as a matter of principle, the exercise of this *jus puniendi* is therefore primarily entrusted not to States, but to organs of the international community.<sup>58</sup> Those organs constitute the direct embodiment of the ‘collective will’ and offer the best guarantee that the enforcement of international community values does not lead to notably hegemonic-abuses. This does not rule out the power of States to exercise the *jus puniendi* of the international community in the case of crimes under international law, but it explains the possibility that an international criminal court, which acts as an organ of the international community in conducting proceedings for crimes under international law, has wider powers than a national criminal court, which acts as a mere fiduciary of the common good.

Yet, not every international criminal court qualifies as an organ of the international community. It is fairly clear, for example, that France and Germany cannot create an organ of the international community by setting up a joint criminal court on the basis of a bilateral treaty.<sup>59</sup> The ICJ is likely to have alluded to this fact by confining its “international tribunals *dictum*” to “*certain* international criminal courts” [emphasis added] and it is a shortcoming of the 12 December 2011 decision of the Pre-Trial Chamber not to have accordingly confined its ‘customary law avenue’. This brings us to the question of which international criminal courts may

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<sup>57</sup> For such a view, see Akande, 2004, *supra* note 5, p. 417.

<sup>58</sup> International criminal law *stricto sensu* must ultimately be rooted in customary international law of a general nature; for the full exposition of this view, see Claus Kreß, “International Criminal Law”, in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, vol. V, Oxford University Press, Oxford, 2012, paras. 10–14.

<sup>59</sup> Up to this point, I agree with Nouwen, 2005, *supra* note 4, p. 656.

qualify as organs of the international community.<sup>60</sup> On an abstract level, it can be said that only those courts should count, which can make a convincing claim to directly embody the 'collective will'. This is certainly the case with international criminal tribunals set up by the Security Council and the same should hold true for international criminal tribunals which, as is the case with the Special Court for Sierra Leone, act with that Council's blessing. The case of the ICC is more difficult whenever this Court's exercise of jurisdiction has not been triggered by a Security Council referral. The obvious argument not to treat the ICC as an organ of the international community is the lack of (quasi-)universal adherence to the ICC Statute. On the other hand, it is impossible to deny that the ICC Statute constitutes a legitimate attempt to establish an organ that directly exercises the international community's *jus puniendi*; the treaty has been negotiated on a universal level, it contains a standing invitation for universal adherence, and it does not display elements lending themselves to a (hegemonic) manipulation of the collective will. The fact that the ICC Statute has attracted a very significant number of ratifications, that the Security Council has referred two situations threatening international peace and security to the ICC for investigation, and that the United Nations have endorsed the vision behind Article 2 of the Statute through the conclusion of the Relationship Agreement between the International Criminal Court and the United Nations all add further weight to the view that the ICC in substance, and despite its formal creation by treaty, derives its mandate from the international community.

As a matter of principle, it is therefore possible to draw a distinction between national criminal proceedings and proceedings before the ICC with respect to international law of immunities.<sup>61</sup> It is important to add that the principles outlined so far are not merely scholarly speculations about 'natural' international law. Instead, the 'international community' is a point of reference, not only in the fourth preambular paragraph of the Statute, but also in Article 53 of the Vienna Convention on the Law of

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<sup>60</sup> *Ibid.*, p. 657, does not believe a distinction between international criminal courts according to the criterion "international community involvement" possible. It is readily conceded that the elements listed in the following text do not amount to a watertight concept. Yet, they will yield sensible results in practice and, in addition, they may be refined in the future.

<sup>61</sup> For the contrary view, see Akande, 2004, *supra* note 5, p. 417; Nouwen, 2005, *supra* note 4, p. 657.

Treaties, in the famous ICJ's *dictum* on international obligations *erga omnes* in *Barcelona Traction* case<sup>62</sup>, and in Article 48(1)(b) of the ILC's Articles on State Responsibility.<sup>63</sup> Furthermore, there does not appear to be disagreement with the concept that international criminal law *stricto sensu* protects values belonging to the international community as a whole.

Up to this point, I have demonstrated no more than the possibility that the ICC possesses wider powers than a national criminal court. It is now necessary to have a closer look at the issue of international law immunities, and here again I shall do so on the level of principles first. Almost by definition, international criminal law *stricto sensu* poses a fundamental challenge to traditional international law immunities. To criminalise what is typically state-related conduct tends to run counter to the old idea of shielding acts of States from foreign judicial scrutiny by means of a procedural bar. The difficulty of reconciling traditional international law immunities with the very idea of international criminal law *stricto sensu* becomes even more apparent once it is recognised that the use of the international criminal law instrument is most important in cases involving those persons who bear the greatest responsibility for what is typically macro-criminality. For, those persons will often be precisely the ones in respect of whom traditional immunity protection is strongest. It is therefore no surprise at all that the International Military Tribunal at Nuremberg addressed the challenge upfront and clearly articulated the idea that the acceptance of an international criminal law *stricto sensu* implies the retreat of traditional international law immunities:

The principle of international law, which under certain circumstances, protects the representatives 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 positions in order to be freed from punishment in appropriate proceedings. Article 7 of the Charter expressly declares:

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<sup>62</sup> ICJ (*Belgium v. Spain: Barcelona Traction, Light and Power Company, Limited*), Judgment, 5 February 1970, ICJ Reports 1970, p. 32, paras. 32–33, available at <http://www.legal-tools.org/doc/75e8c5/>.

<sup>63</sup> James Crawford (ed.), *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries*, Cambridge University Press, Cambridge, 2002, p. 276.

“The official position of Defendants, whether as heads of State, or responsible officials in Government departments, shall not be considered as freeing them from responsibility, or mitigating punishment.”

On the other hand the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state authorizing action moves outside its competence under international law.<sup>64</sup>

The Nuremberg precedent, therefore, clearly sent out the message that international criminal law *stricto sensu* implies an important restriction on the traditional international law concept of State sovereignty. While it has been, and continues to be, the key function of this concept to allow scope for moral disagreement within a pluralist international legal order, and while the international law concept of State sovereignty includes the protection of States against intrusions into their territory even in cases of violations of international law<sup>65</sup>, the rules of international criminal law *stricto sensu* draw the red line beyond which State sovereignty no longer provides an impenetrable shield for those acting on behalf of the State.

The very idea of international criminal justice *stricto sensu*, which is not simply a scholarly speculation about ‘natural’ international law, but which has been accepted by States at Nuremberg, and which has been revitalised by States since the 1990s, therefore poses a formidable challenge to traditional international law immunities. Yet, the ICJ has authoritatively determined in the *Arrest Warrant* case that the traditional international law immunity *ratione personae* holds firm in national criminal proceedings for crimes under international law. It is oversimplified to explain the *Arrest Warrant* case’s qualification of the rigorously worded rejection of immunities by the Nuremberg Tribunal on immunities by saying that, in criminal proceedings in a foreign State, the right of the State of the of-

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<sup>64</sup> International Military Tribunal (Nuremberg), Judgment and Sentences, 1 October 1946, in *The American Journal of International Law*, 1947, vol. 41, pp. 172 and 221.

<sup>65</sup> For a thoughtful exposition of this key function, see Brad R. Roth, *Sovereign Equality and Moral Disagreement: Premises of a Pluralist International Legal Order*, Oxford University Press, Oxford, 2011, pp. 3–130.

fender to sovereign equality trumps the *jus puniendi* of the international community. A more convincing explanation would refer to the sovereign right of States to be protected against an abusive (hegemonic) use of the criminal law instrument by another State in the name of the international community in those cases where such an abuse would have a seriously destabilising effect on international relations. The message underlying the *ratio decidendi* of the *Arrest Warrant* decision would seem to be that, when it comes to persons enjoying international law immunity *ratione personae*, the State sovereignty interest to be protected against an abusive use of the criminal law instrument by a foreign State carries more weight than the international community's interest in the fiduciary exercise of this community's *jus puniendi* by such a State. At this point, the balance may be struck differently in criminal proceedings before a judicial organ of the international community. Such an organ may, of course, also fail in its attempt to serve the interests of justice, but the institutional safeguards against an abuse of the criminal law instrument are such that the international community's interest weighs heavier. In light of the preceding observations, the truth would appear to lie between the two extremes of saying that the principle of sovereign equality has "no relevance to international criminal proceedings which are not organs of a state but derive their mandate from the international community"<sup>66</sup> and that "[i]t makes little difference whether foreign states seek to exercise this judicial jurisdiction unilaterally or through some collective body that the state concerned has not consented to".<sup>67</sup> The truth is that there is no 'fundamental' difference between proceedings for crimes under international law conducted by a State as the fiduciary of the international *jus puniendi* and by an international criminal court that qualifies as an organ of the international community. There is, however, an appreciable difference regarding the institutional framework for such proceedings that justifies treating the question of international law immunities differently in both *fora*.

#### **10.3.6.2.1.2. Practice and *Opinio Juris* Up to the Pre-Trial Chamber's Decision**

The considerations so far were situated at the level of general principles. Although those principles are not the result of scholarly speculation, but

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<sup>66</sup> *Prosecutor v. Charles Ghankay Taylor*, 2004, *supra* note 54, para. 51.

<sup>67</sup> Akande, 2004, *supra* note 5, p. 417.

could be derived from international practice, they are not sufficient *per se* to demonstrate that the 'customary law avenue' is open under the *lex lata*. More specific practice based on *opinio juris* is needed to make the case. This does not mean, however, that the above highlighted principles are irrelevant to the question whether new customary international law has come into existence. The development of international criminal law since the 1990s provides clear evidence of the existence of what has been called 'modern custom'<sup>68</sup>, the ascertainment of which usually involves a degree of deduction from broader principles such as those established above<sup>69, 70</sup>. Where such principles clearly point in the direction of new customary law, the latter may crystallise without the need to identify a huge amount of more concrete State practice and verbal State practice (the latter being almost indistinguishable from *opinio juris*) and may largely take the place of hard State practice in the traditional sense. Modern custom may thus come into existence at a relatively high speed and without a voluminous body of hard practice confirming the respective rule. Importantly, such custom will, however, be relatively vulnerable to change if contrary hard practice occurs.<sup>71</sup>

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<sup>68</sup> The literature on the topic is vast and I do not wish to reproduce a complete list of it here; for a very useful study with many further helpful references, see Anthea Elizabeth Roberts, "Traditional and Modern Approaches to Customary International Law: A Reconciliation", in *The American Journal of International Law*, 2001, vol. 95, p. 757; see also Anja Seibert-Fohr, "Unity and Diversity in the Formation and Relevance of Customary International Law: Modern Concepts of Customary International Law as a Manifestation of a Value-Based International Order", in Andreas Zimmermann and Rainer Hofmann (eds.), *Unity and Diversity in International Law*, Duncker and Humblot, Berlin, 2006, p. 257, 264–270.

<sup>69</sup> For some insightful reflections on the matter, see Matthias Herdegen, "Das 'konstruktive Völkerrecht' und seine Grenzen: die Dynamik des Völkerrechts als Methodenfrage", in Pierre-Marie Dupuy, Bardo Fassbender, Malcolm N. Shaw and Karl-Peter Sommermann (eds.), *Völkerrecht als Wertordnung (Common Values in International Law); Festschrift für (Essays in Honour of Christian Tomuschat)*, N.P. Engel Verlag, Kehl, 2006, p. 899.

<sup>70</sup> On the crystallisation of war crimes committed in non-international armed conflicts, see Claus Kress, "War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice", in *Israel Yearbook on Human Rights*, 2001, vol. 30, pp. 104–109.

<sup>71</sup> On "relative resistance to change" and customary international law, see Michael Byers, *Custom, Power and the Power of Rules*, Cambridge University Press, Cambridge, 1999, pp. 157–160.

In its analysis of State practice on this point, the Pre-Trial Chamber, like the Special Court for Sierra Leone before it<sup>72</sup>, referred to Article 7 of the Charter for the Nuremberg Tribunal, Article 6 of the Charter for the Tokyo Tribunal, Principle III of the 1950 Nuremberg Principles, Article 7(2) of the ICTY Statute, Article 6(2) of the ICTR Statute and Article 7 of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind.<sup>73</sup> One may wonder whether the Chamber was justified in relying on those documents despite the fact that they are all framed in terms of substantive law and thus do not directly address the immunity issue like Article 27(2) of the ICC Statute. While it is true that “[i]mmunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts”<sup>74</sup> – so that the distinction drawn in the two paragraphs of Article 27 of the ICC Statute marks progress in the clarity of drafting, it is also true that the two concepts have not been neatly distinguished in the earlier practice of international criminal law.<sup>75</sup> Beginning with the Nuremberg judgment, as can be seen from the above citation<sup>76</sup>, the immunity issue has been addressed in conjunction with the statutory provision that confirms the applicability of the substantive law. It is therefore in line with the historic development that the ILC states in its commentary on Article 7 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind:

[...] 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.<sup>77</sup>

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<sup>72</sup> *Prosecutor v. Charles Ghankay Taylor*, 2004, *supra* note 54, paras. 45–47.

<sup>73</sup> ICC, 2011, *supra* note 7, paras. 24–32.

<sup>74</sup> Kolodkin, 2008, *supra* note 37, para. 66.

<sup>75</sup> This point has not received sufficient attention in Nouwen, 2005, *supra* note 4, pp. 660–668.

<sup>76</sup> *Cf.* the citation preceding fn. 64.

<sup>77</sup> Para. 6 of the Commentary on Article 7, in Gabrielle Kirk McDonald and Olivia Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law*, vol. II, part 1, Kluwer Law International, The Hague/London/Boston, 2000, p. 354; in fn. 3, the ILC further notes:

Judicial proceedings before an international criminal court would be the quintessential example of appropriate judicial proceedings in which an individual could not invoke any substantive or proce-

It is also true that the language of the texts cited by the Pre-Trial Chamber seems to extend to incumbent Heads of States *et cetera* without drawing a distinction as to whether the State concerned can be said to have waived its immunity rights in proceedings before the jurisdiction concerned. In light of this, the Pre-Trial Chamber was justified to refer to the aforementioned documents as relevant verbal State practice.

At the same time, it must be recognised that, until the *Charles Taylor* decision, this verbal State practice did not yield any hard practice as regards the international immunity *ratione personae* with the one single exception of the ICTY's arrest warrant against the then incumbent Head of State Slobodan Milošević and the ICTY Trial Chamber's decision confirming the jurisdiction of the Tribunal.<sup>78</sup> The precedential value of the latter decision is somewhat weakened, however, by the fact that the *Milošević* decision did not confront the legal issue of the immunity *ratione personae* of the Federal Republic of Yugoslavia<sup>79</sup> as a distinct legal problem. To the contrary, the ICTY Trial Chamber placed the pertinent paragraphs of their decision under the title "Lack of competence by reason of his status as *former* President" (emphasis added). As a result, the decision does not clearly recognise that the *Milošević* precedent exceeds the denial of immunity *ratione materiae* concerning the conduct of a former Head of State before a judicial organ of the international community.

The only judicial decision that explicitly acknowledges setting such a precedent before the 12 December 2011 decision of the Pre-Trial Chamber is the Special Court for Sierra Leone's Decision on Immunity from Jurisdiction in the *Charles Taylor* case.<sup>80</sup> Importantly, this precedent, to the best of this commentator's knowledge, has not provoked a protest from Member States of the African Union or from any other State.

It is, of course, possible to have different views on these materials depending on the approach to the ascertainment of customary interna-

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dural immunity based on his official position to avoid prosecution and punishment.

<sup>78</sup> ICTY, *Prosecutor v. Milošević*, Decision on Preliminary Motion, 8 November 2001, IT-99-37-PT, paras. 26–34, available at <http://www.legal-tools.org/doc/fl5771/>.

<sup>79</sup> Importantly, the Federal Republic of Yugoslavia was not a member State of the United Nations at the time of *Milošević*'s indictment. The case can thus not be explained on the basis of an (indirect) waiver of immunity of the State concerned.

<sup>80</sup> *Prosecutor v. Charles Ghankay Taylor*, 2004, *supra* note 54.

tional law one believes to be the preferable one.<sup>81</sup> Under the modern positivist approach to customary international law, which I have set out above for reasons of methodological transparency, a weighty case can be made for the crystallisation of a customary international criminal law exception from the international law immunity *ratione personae* in proceedings before a judicial organ of the international community. The case builds, as has been developed in the course of the preceding observations, on the combined effect of a set of guiding principles pertaining to the concepts of ‘international community’ and ‘international criminal law *stricto sensu*’ as accepted by States over the last decades, on a consistent line of verbal State practice beginning with the Charter for the Nuremberg Tribunal, on the *Milošević* precedent before the ICTY (though with a somewhat limited effect), on the literal formulation of the ‘international criminal courts *dictum*’ of the ICJ in the *Arrest Warrant* case and on the culmination of all this in the *Charles Taylor* decision by the Special Court for Sierra Leone and the absence of State protest against this decision in any significant manner. However, it must be added that, according to my approach to the ascertainment of customary international law, this new customary norm has come into existence with a relatively high vulnerability to change because the hard practice that contributed to its crystallisation is fairly scarce.

It is therefore necessary to inquire whether subsequent State practice challenged the new customary law exception to State immunity before the 12 and 13 December 2011 decisions of Pre-Trial Chamber I. Clearly, Malawi and Chad have, through their conduct and their legal ob-

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<sup>81</sup> For a different approach on the subject, see Penrose, 2009–2010, *supra* note 4, pp. 85–144, who makes the general critique that “modern courts dogmatically overemphasize the hollow written words relating to head of state immunity and ignore the empty actions or actual practice”. There is no explaining away of the methodological difference between (for example) Penrose’s approach and the one preferred in this chapter. Two specific comments, however, would seem in place. First, however one evaluates the international practice in point, since the issuance of the indictment in the *Milošević* case it is no longer possible to speak on ‘empty actions’. Second, Penrose much overemphasises the fact that the Tokyo precedent on immunity, other than that of Nuremberg, does not include the Head of State. While the latter is true, there is nothing in the subsequent practice to suggest that Tokyo instead of Nuremberg should be followed upon as far as Head of State immunity is concerned. After all, the General Assembly solemnly endorsed the Nuremberg principles soon after the judgment and did not add any Head of State *caveat* pertaining to Tokyo.

servations before the Pre-Trial Chamber<sup>82</sup>, posed such a challenge and the same is probably true for the State of Sudan given the latter's rigorous opposition to the proceedings before the Court. The opposing practice of three States cannot, however, on its own, turn back the development of customary international law as analysed before. It would be different, though, if all Member States of the African Union and, in particular, those Member States which are not party to the ICC Statute, had endorsed this challenge. At its thirteenth Ordinary Session (1–3 July 2009), the Assembly of the African Union, in its Decision 245(XIII) formulated one request and issued one decision on the subject-matter in question. The Assembly requested:

[T]he Commission to convene a preparatory meeting of African States Parties at expert and ministerial levels but open to other Member States at the end of 2009 to prepare fully for the Review Conference of States Parties scheduled for Kampala, Uganda in May 2010, to address among others, the following issues, [...].

v.) Comparative analysis of the implications of the practical application of Articles 27 and 98 of the Rome Statute; [...].

The Assembly decided:

[...] that in view of the fact that the request by the African Union [to defer the proceedings initiated against President Bashir] 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; [...].<sup>83</sup>

It is submitted that these formulations do not amount to the rejection of the 'customary law avenue' by all Member States of the African Union in a manner that should have prevented Pre-Trial Chamber I to declare this avenue open on 12 and 13 December 2011. The Assembly's request to the Commission to prepare a legal analysis does not express a legal position on the issue, but the wish to form such a position at a later stage. It is not easy to harmonise this wish with the decision that Member States of African Union shall not co-operate with the Court. On close in-

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<sup>82</sup> For these observations, see CPI, 2011, *supra* note 7, para. 7; ICC, 2011, *supra* note 7, para. 8.

<sup>83</sup> Assembly/AU/Dec.245(XIII) Rev.1, paras. 8 and 10, 3 July 2009.

spection, however, this decision cannot be read as the articulation of precisely that legal position which the request to the Commission was meant to prepare. Instead, the decision is explicitly made “in view of the fact that the request by the African Union [to defer the proceedings initiated against President Bashir] has never been acted upon”. It is thus (and somewhat curiously so) drafted as a political reaction to a prior (political) decision by the Security Council. It is therefore not possible to read a sufficiently clear, let alone unambiguous position of the Member States of the African Union into Decision 245 (XIII). This assessment is confirmed by the Report of the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (‘ICC’) held on 6 November 2009 the pertinent passage of which states that,

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.<sup>84</sup>

While perhaps not drafted with the utmost legal precision, this passage clearly does not contain a legal position on our subject matter. Instead, the Ministers once more emphasised the “need to clarify” the law. This may reflect the fact that there appeared to be a lively discussion among Member States of the A.U. about the right course of action on the matter.<sup>85</sup> In sum, the practice of the Member States of the African Union before 12 December 2011 has not been strong enough to change the new customary law exception to the international law immunity *ratione materiae* despite the latter’s vulnerability to change.

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<sup>84</sup> African Union, Min/ICC/Legal/Rpt. (II), p. 4 (R. 4), as annexed to EX.CL/568 (XVI).

<sup>85</sup> For an illuminating overview, see Elise Keppler, “Managing Setbacks for the International Criminal Court in Africa”, in *Journal of African Law*, 2012, vol. 56, pp. 4–6.

**10.3.6.2.2. The Triangular Relationship Between the ICC,  
the Requested State and the State not Party  
to the Statute**

At this stage of the analysis again, there is a need to distinguish between my two introductory questions. Therefore the question remains whether the 'customary law avenue' was also open within the above triangular relationship between the ICC, the requested States of Malawi and Chad, and the State of Sudan with respect to the arrest and surrender of Al Bashir. Pre-Trial Chamber I held that this was the case and it argued that,

[...] when cooperating with this Court and therefore acting on its behalf, States Parties are instruments for the enforcement of the *jus puniendi* of the international community whose exercise has been entrusted to this Court when States have failed to prosecute those responsible for the crimes within this jurisdiction.<sup>86</sup>

This argument is situated at the level of principles and at this level it is convincing. While the State of arrest and surrender is formally exercising its national authority, it is on substance acting for the Court to assist the latter in the direct enforcement of the *jus puniendi* of the international community. For this reason, there is an important difference between the *Arrest Warrant* case, where a State conducts national criminal proceedings against a person suspected of having committed a crime under international law, and the Al Bashir case, where a State party to the Statute has been requested by the ICC to arrest and surrender a person suspected of having committed a crime under international law for proceedings before the Court. Pre-Trial Chamber I was therefore justified to believe that the principles underlying the customary law exception to the international law immunity *ratione personae* cover the triangular relationship in question.

There is, however, no precedent in hard practice covering this extension of the 'customary law avenue'. This raises the methodological question whether such a precedent is needed to defend the approach chosen by the Pre-Trial Chamber. At this juncture once more, there is certainly room for disagreement between reasonable international lawyers depending on how they draw the line between the necessary judicial refinement of rules of customary international law and inappropriate 'judi-

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<sup>86</sup> ICC, 2011, *supra* note 7, para. 46.

cial legislation'. In my view, the extension of the 'customary law avenue' from the bilateral relationship between the Court and a State not party to the Statute to the triangular relationship in question does not constitute the recognition of a different rule of customary international law, but the delimitation of the scope of application of the same customary law exception to the international law immunity *ratione personae*. It is therefore submitted that, in extending the 'customary law avenue' to the triangular relationship in question, Pre-Trial Chamber I did not overstep the confines of what constitutes legitimate international judicial activity.

**10.3.6.2.3. The Practice within the African Union Subsequent to the 12 and 13 December 2011 Decisions of Pre-Trial Chamber I**

Up to this point of the legal analysis, I have sought to demonstrate that, on 12 December 2011, Pre-Trial Chamber I had a good, although not compelling, case to open the 'customary law avenue'. At the same time, I have recognised that the customary law exception underlying this avenue is not yet firmly grounded in the international legal order, but retains a relatively high vulnerability to change and has been challenged by at least three States. In light of this latter fact, I shall now turn to the practice within the African Union after 13 December 2011 to see whether this practice has 'closed the customary law avenue' shortly after it had been declared open.

On 9 January 2012, the African Union Commission published its Press Release criticising the decisions of Pre-Trial Chamber I of 12 and 13 December 2011, the reference of which has repeatedly been made in the course of this chapter.<sup>87</sup> This Press Release contains a protest against the 'customary law avenue' because the Commission expresses its "deep regret that the decisions rendered by Pre-Trial Chamber I on 12 and 13 December 2011 have the effect of [...] [p]urporting to change *customary* international law in relation to immunity *ratione personae*" [first emphasis added]. The African Union has, therefore, through one of its organs, rejected the opening of the 'customary law avenue'. This legal position cannot, however, be attributed to the Member States of the African Union, because the African Union possesses an international legal personality which is distinct from that of its Member States, and because nothing in

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<sup>87</sup> *Supra* note 18.

the African Union's Constitutive Act suggests that the Commission is empowered to formulate and express its legal position on the international law of immunities on behalf of the Union's Member States.<sup>88</sup> It is also not possible to attribute the conduct of the individual members of the Commission to their national States because the Commission constitutes an integrated (and not an intergovernmental organ) of the African Union.

Finally, there is no evidence that the African Union's Assembly has subsequently endorsed the Commission's legal view. Quite the contrary, there is evidence of some instances of an African State practice to the contrary. On 23 January 2012, the High Court of Kenya issued a provisional warrant of arrest against Al Bashir and the Court based its decision of the request to arrest and surrender by the ICC.<sup>89</sup> In June 2012, the new President of Malawi, Joyce Banda, announced that the State would not host Al Bashir during the summit of the African Union. The Republic of Botswana supported Malawi's change of position and stated:

The Government of Botswana is deeply concerned about the pressure exerted by the African Union Commission on the Government of Malawi to commit to hosting President Al Bashir at the forthcoming AU summit in July this year. Unfortunately, this pressure has consequently led to the Summit being moved to Addis Ababa, thus depriving Malawi to host the meeting. Botswana therefore condemns this action as it is inconsistent with the very fundamental principles of democracy, human rights and good governance espoused by the AU, and which Malawi upholds. It is our considered view that Malawi as a sovereign state has the right to make decisions it may deem necessary in fulfilment of her obligations under both the Rome Statute and the AU. In this regard, Botswana will take the opportunity at the forthcoming AU Summit to put its case across on this important matter of principle.<sup>90</sup>

In its most recent Decision on the Implementation of the Decisions on the International Criminal Court, the Assembly:

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<sup>88</sup> In fact, as Keppler, 2012, *supra* note 85, vol. 56, p. 4, has shown, the stand taken by the African Union Commission was not shared by all Member States of the Union.

<sup>89</sup> A copy of the arrest is on file with the author.

<sup>90</sup> A copy of the Press Release of Botswana's Ministry of Foreign Affairs and International Cooperation of 12 June 2012 is on file with the author.

[e]ndorses the recommendation of the Meeting of Ministers of Justice/Attorneys General to approach the International Court of Justice (ICJ), through the United Nations General Assembly (UNAG), for seeking an advisory opinion on the question of immunities, under international law, of Heads of State and senior state officials from States that are not Parties to the Rome Statute of ICC [sic] and this regard [sic], [r]equests the Commission to undertake further study on the advisability and implications of seeking such advisory opinion from ICJ [sic] and to report thereon to the Executive Council.<sup>91</sup>

This decision does no more than to restate the view of the Member States of the African Union that the immunity issue is in need of clarification and to point to a possible way to achieve it. There is thus clearly no unanimity within the African Union on the matter and it is likely that the debate in Africa will continue. Members of the civil societies are taking an active part in this debate and it remains to be seen whether their arguments may influence their governments. In Malawi, representatives of national civil society organisations issued a noteworthy statement on 9 June 2012 that contains the following passages:

Informed that the Malawi government decided to not to host the African Union summit this July following AU's insistence that our government must accept the attendance of the Sudanese President, Omar Al Bashir in the face of a warrant of arrest from the International Criminal Court for war crimes charges in Darfur where thousands of people have been killed and displaced;

Noting that earlier Sudan had already requested the AU to shift the summit to Ethiopia after President Joyce Banda indicated that Malawi would arrest al-Bashir if he came for the summit. This also followed equal sentiments by other Principled African countries such as South Africa, Botswana, Zambia and Tanzania against Omar Al Bashir's attendance of the Summit.

Observing that while we have obligations to abide by decisions of the AU, we are also under obligation to other international agreements including the Rome Statutes;

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<sup>91</sup> Assembly/AU/Dec.419(XIX), p. 1 (para. 3), 15/16.7.2012.

Recognizing that the government arrived at the decision with the primary consideration of what is in the best interests of Malawians as part of its effort to reposition the country's image to the international community and in fulfilment of the international obligations placed on itself under the various international instruments our government has accented to or ratified.

[...]

Although it may be understood that the invested resources into the hosting of the 19<sup>th</sup> Summit of the AU has gone down the drain, we are still of the view that the decision is timely and beyond our government's control. More so, we believe that this painful decision demonstrates our government's commitment to defending its human rights record and the interests of Malawi against the potential economic gains associated with hosting the Summit.<sup>92</sup>

To summarise, the decisions of 12 and 13 December 2011 issued by Pre-Trial Chamber I on the 'customary law avenue' have met with the opposition of the African Union. In view of this practice, it cannot be said that the two decisions have, as of yet, decisively contributed to consolidate the 'customary law avenue'. Quite to the contrary, the 'customary law avenue' has come under quite severe stress soon after its opening. Yet, this avenue has not been closed as a result of the African Union Commission's protest because the latter has not been endorsed by the Member States of the African Union. Instead, a number of those Member States have recently made it clear that they are willing to execute the international arrest warrant against Al Bashir. For the time being, the 'customary law avenue' remains open without providing for an altogether safe walking ground.

#### **10.3.6.2.4. Another Short Digression: Some Remarks on the Practice of States Parties on the 'Customary Law Avenue'**

In the foregoing sections, no distinction has been made between the practice of States Parties to the Statute and other States. There is an important

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<sup>92</sup> The *Civil Society Statement on Malawi's Decision's to Withdraw from Hosting the 19th Summit of the African Union* of 9 June 2012 is on file with the author. The above citation does not correct a couple of typos in the text.

qualification to be added to this analysis. As explained above<sup>93</sup>, Article 98(1) of the Statute operates in a remarkably vertical manner and Pre-Trial Chamber I rightly referred to the Court's "sole authority to decide whether immunities are applicable in a particular case".<sup>94</sup> In light of this verticality of the Statute's scheme, it may well be asked whether States Parties have agreed that the Court acts on their behalf when it comes to the formation or identification of a customary law exception to the international law immunity *ratione personae* for proceedings before the Court. Irrespective of the answer to this question, the Statute's vertical scheme at least implies a duty of States Parties to be loyal to the Court when the latter has made an attempt to clarify the relevant customary international law in a way that is not manifestly mistaken. Indeed, it would amount to a self-contradictory behaviour by States Parties to entrust the Court, by virtue of Article 98(1) of the Statute, with the duty to clarify the relevant customary international law and to then let the Court down once it has fulfilled this duty in a manner that is not manifestly erroneous. In light of the fact that the decisions of 12 and 13 December 2011 constitute an attempt to clarify the law which is not manifestly mistaken, the duty of loyalty which States Parties owe to the Court with respect to its application of Article 98(1) of the Statute includes the reasoning underpinning these decisions.

#### 10.4. Concluding Remarks

This chapter has set out and analysed two avenues to explain why the international law immunity *ratione personae* of States not party to the Statute is inapplicable before the ICC, and why this immunity does also not prevent the Court from requesting a State party to arrest and surrender a suspect, who is otherwise enjoying such an immunity. While the 'Security Council avenue' constitutes solid legal ground, the same cannot, as of yet, be said of the 'customary law avenue'. According to the view set out in this chapter, this avenue is now open, but it does not yet offer a solid walking ground due to the relative scarcity of hard practice in support of it and because of the African Union Commission's protest against its opening.

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<sup>93</sup> *Supra* Section 10.3.3.

<sup>94</sup> ICC, 2011, *supra* note 7, para. 11.

I will not pretend that my defence of Pre-Trial Chamber I's opening of the 'customary law avenue' is a compelling one, and I seriously doubt that a compelling defence is possible at this stage of the development of the law. To the contrary, I believe that the current state of customary international law leaves room for disagreement between reasonable international lawyers. My modest ambition has been to show that the African Commission went much too far when it criticised the opening of the 'customary law avenue' by Pre-Trial Chamber I as "ill-considered".

At this final juncture, I wish to also add that the African Union Commission's portrayal of the decisions of 12 and 13 December 2011 as "self-serving" constitutes an unhappy formulation at best. In fact, it would have been the easier way out for Pre-Trial Chamber I to confine its reasoning to the 'Security Council avenue' in order to minimise the risk of any serious controversy with States not party of the Statute. For this reason alone it is hard to see why Pre-Trial Chamber I should have been misguided by institutional interests when it entered into the thorny terrain of customary international law. Very much to the contrary, the 'customary law avenue' is in full harmony with principles which have been solemnly referred to by States time and again since Nuremberg and which have been directing the development of international criminal law since then. Furthermore, the 'customary law avenue' makes the ICC less dependent on the Security Council in order to effectively exercise its jurisdiction over incumbent Heads of State not party to the Statute. Compared to the 'Security Council avenue', the 'customary law avenue' thus enables the Court to exercise its jurisdiction less asymmetrically and such an advance in the equal application of international criminal law is not "self-serving", but serves the legitimacy of the emerging system of international criminal justice. While this is, of course, a matter of speculation, the said advance in the equal application of international criminal law may well have been the most important motivation for Pre-Trial Chamber I on 12 December 2011 not to confine its reasoning to the confirmation of the 'Security Council avenue', but to also open the 'customary law avenue' and to even place it in the foreground.

Whether or not one agrees with the position taken by Pre-Trial Chamber I on the 'customary law avenue', this Chamber's decisions of 12 and 13 December 2011 have certainly moved the development to a law-crystallising point. At this important moment in time, the suggestion submitted by the Member States of the African Union to request the ICJ to

render an advisory decision on the matter deserves the closest attention. This suggestion does not imply any disloyalty towards the ICC, but duly recognises the fact that the Court's "sole authority" under Article 98(1) of the Statute does not extend to States not party to the Statute. Of course, an advisory opinion of the ICJ would, by definition, not carry any binding legal force. The authority of the ICJ, however, is such that it would be difficult to criticise the ICC if it followed the advice rendered by the ICJ whatever its content. At the same time, the proceedings before the ICJ would provide all States with the opportunity to set out their *opinio juris* on the matter and the ICJ would be given the chance to clarify its somewhat oracular 'international criminal courts *dictum*' in the *Arrest Warrant* judgment.<sup>95</sup> This is not the place to enter into a debate about the technical details and the best timing for a request for an advisory opinion. It suffices to conclude that the Member States of the African Union are to be commended for having submitted a most constructive proposal to clarify the difficult legal question under scrutiny in this chapter.

In November 2008, China stated in the Sixth Committee of the United Nations General Assembly that the ILC's topic "Immunity of State officials from foreign criminal jurisdiction" is "an important one, in view of the need to maintain the international legal order and the stability of inter-State relations".<sup>96</sup> I believe that this statement holds true also with respect to the topic under consideration in this chapter. To conclude this chapter, I wish to add that the particular difficulty of the topic of immunities and international criminal law resides in the fact that, at times, the maintenance of the international legal order, on the one hand, and the stability of inter-State relations, on the other hand, may prove to be conflicting goals. Clearly, the international criminal proceedings against Al Bashir adversely affect the stability of the relations of all those States which support those proceedings, with the State of Sudan, as long as Al Bashir stays in power. At the same time, however, those criminal proceedings aim at the maintenance and at the strengthening of the *noyau dur* of the international legal order. The difficult policy question is therefore where to strike the balance. In its *Arrest Warrant* case, the ICJ gave preference to the stability of inter-State relations as far as national criminal proceedings and the international law immunity *ratione personae* are con-

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<sup>95</sup> For this *dictum*, see ICJ, 2002, *supra* note 1.

<sup>96</sup> A/C.6/63/SR.23, 21 November 2008, para. 32.

cerned. I accept the wisdom of this judgment, not only on legal, but also on legal policy grounds. In its decisions of 12 and 13 December 2011, the Pre-Trial Chamber I of the ICC has followed the precedent set by the Special Court for Sierra Leone and has struck the balance differently as far as criminal proceedings before a direct judicial embodiment of the international community are concerned. I have attempted to show that this way of 'striking the balance' is defensible on legal grounds. I now wish to add that it seems convincing to so strike the balance on legal policy grounds. This legal policy view is, however, premised on the expectation that the scope of substantive international criminal law *stricto sensu* will remain strictly and narrowly confined, and that the ICC will refrain from 'progressively' developing this body of law without giving due consideration to the consequences in sensitive adjacent fields such as the law of immunities. The need for such caution is imperative, in particular, with respect to the interpretation of crimes against humanity.

Taken seriously, international criminal law *stricto sensu* comes at a price with respect to the stability of inter-State relations. I believe this price is worth paying, provided that the scope of application of substantive international criminal law *stricto sensu* will not be diluted, but remains confined to the conduct that constitutes a fundamental assault to the *noyau dur* of the international legal order.

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## **State Sovereignty and International Criminal Law**

Morten Bergsmo and LING Yan (editors)

‘State sovereignty’ is often referred to as an obstacle to criminal justice for core international crimes by members of the international criminal justice movement. The exercise of State sovereignty is seen as a shield against effective implementation of such crimes. But it is sovereign States that create and become parties to international criminal law treaties and jurisdictions. They are the principal enforcers of criminal responsibility for international crimes, as reaffirmed by the complementarity principle on which the International Criminal Court (ICC) is based. Criminal justice for atrocities depends entirely on the ability of States to act.

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