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The Immunity for Omar Al-Bashir on the Proceedings at the International Criminal Court

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**THE IMMUNITY FOR OMAR AL-BASHIR ON THE PROCEEDINGS AT THE
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INTRODUCTION

On April 11, 2019, Mr. Omar Al-Bashir was ousted from power, ending his long-lasting term as president of Sudan – therefore a head of State –, for practically thirty years. During this period, he allegedly committed some of the most serious crimes under international law, according to the UN Security Council, which, by means of a binding resolution adopted under Chapter VII of the UN Charter, referred the case to the International Criminal Court. Since then, the Court has been trying to obtain his custody, but so far it has not been successful, also because, as a head of State, some States were reluctant to arrest and surrender him to the ICC, since he enjoyed immunity *ratione personae*, as will be seen. However, this immunity might not apply anymore, since he is now a *former* head of State. In light of this, this work intends to verify how this changes his situation in the proceedings before the International Criminal Court.

To this end, chapter 1 will analyze the issue of immunities before the ICC, namely the difference between national and international immunities, and their relevance in the case of Omar Al-Bashir; to then study the rules of the relevant articles of the Rome Statute, articles 27 and 98 (1). However, since the jurisdiction of the Court was triggered by a resolution of the Security Council, this chapter will also question the effects of this resolution in the aforementioned rules.

After this, chapter 2 will focus on the particularities of Omar Al-Bashir's immunities. First, since there is a difference between two types of immunities, it must be seen which of them is applicable to him, if any, and also their effects and if there are any exceptions to them under customary international law. After that, it will be seen that, while that immunity is applicable in the relation between States, Al-Bashir may also be entitled to immunity under international customary law. This last issue will be seen at the end of chapter 2.

Finally, chapter 3 analyzes the consequences of his immunities in the ICC proceedings in a broad sense. Therefore, it will firstly be seen if the effects of his immunities hampers the jurisdiction of the Court. Then, items 2 and 3 will address the obligations that a member State and a non-member State have before the Court, since the previous is usually bound to the Rome Statute, and the latter only to general international law and the Security Council resolution. It will be defended that only the previous have an indisputable duty to cooperate with the ICC. In the last item, it will be seen if, being a special addressee of Resolution 1593, there are any specificities in Sudan's obligations before the Court and the Security Council.

CHAPTER 1 – IMMUNITIES BEFORE THE INTERNATIONAL CRIMINAL COURT

An important rule of the Rome Statute¹, which instituted the International Criminal Court (ICC), is that of the disregard of immunities before proceedings under the jurisdiction of the International Criminal Court². As will be seen, although it raised some debate the question whether such rule extends to situations where the United Nations Security Council (UNSC) refers a case to the ICC, it seems that it is now settled that this is a possibility, as there were already two cases³ in which such a situation happened, and the Court had to decide on this question. However, while this does not seem to be very controversial, it is a well-known debate⁴, in current times, the question whether non-State parties must execute the arrest warrants issued by the International Criminal Court when there is a referral by the UN Security Council.

In light of this, it is important to study some aspects relating to the rules on immunity in the Rome Statute and in other relevant rules of International Law, aiming at understanding what the situation could be for a former head of State, as is the case of Omar Al-Bashir, focus of this work.

To this end, it will first be seen the difference between national and international immunities, since, as will be explained, the ICC is an international court, thus not affected by domestic immunities; then, the rules of articles 27 (2) and 98 (1) of the Rome Statute, and its relationship with UNSC referrals will be analyzed, a situation which was recently dealt with by the ICC's Appeals Chamber⁵, which arguably settled such debate.

1.1: National and International Immunities

The question presented here deals with a legal institute applicable to the International Criminal Court. Therefore, it is important to clarify some of the aspects that are intrinsic to this

1 Rome Statute of the International Criminal Court, Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Jul. 17, 1998, UN Doc. A/CONF.183/9 [hereinafter Rome Statute], available on <https://www.icc-cpi.int/nr/rdonlyres/add16852-ace9-4757-abe7-9cdc7cf02886/283503/romestatuteng1.pdf>.

2 Rome Statute, Art. 27 (2) – Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

3 See Security Council resolution 1593, S/RES/1593 (31 March, 2005), retrieved from [undocs.org/S/RES/1593\(2005\)](https://undocs.org/S/RES/1593(2005)); and Security Council resolution 1970, S/RES/1970 (26 February, 2011), retrieved from [undocs.org/S/RES/1970\(2011\)](https://undocs.org/S/RES/1970(2011)).

4 See below, item 1.3.

5 Prosecutor v. Omar Hassan Ahmad Al-Bashir, Judgment in the Jordan Referral re Al-Bashir Appeal, No. ICC-02/05-01/09 OA2 (May 6, 2019). Retrieved from https://www.icc-cpi.int/CourtRecords/CR2019_02856.PDF.

issue, namely the fact that only individuals can be prosecuted before the ICC⁶, and that such individuals may have immunities which may bar the exercise of jurisdiction or enforcement by foreign domestic courts (hereinafter national immunities) or by international courts (hereinafter international immunities). In light of this, it seems important to briefly differentiate the immunities belonging to individuals and to States, since the latter is of no concern here; then, an overview of the different sources that may provide for immunity to an individual will be regarded.

As it is well known, a State is not capable to act by itself, as it is an abstract entity; rather, it acts through its agents. However, since some acts can be attributed to the State⁷, and some to the individual (for example, by means of the Rome Statute)⁸, each of them may avail themselves from the exercise of foreign or international jurisdiction or enforcement by means of different types of immunity. They are also different in scope – as will be seen further⁹, the immunity for individuals envisage to ensure the proper functioning of an individual's functions (*ratione personae*)¹⁰, or to respect State sovereignty (*ratione materiae*)¹¹, while State immunity is derived only from the sovereign equality of States¹². Therefore, once they are different, only the immunity attached to individuals are relevant to assess the Al-Bashir's immunity, pursuant also to the provision of the Rome Statute, as mentioned above.

Before turning to the sources, however, it is important to note that international law may provide immunity from the exercise of jurisdiction or enforcement either from foreign domestic

6 Rome Statute, Art. 25 (1) – The Court shall have jurisdiction over natural persons pursuant to this Statute.

7 See International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, available at:

<https://www.refworld.org/docid/3ddb8f804.html>. The rules on attribution are particularly on articles arts. 4-11.

8 Notwithstanding the possibility of a dual attribution in some cases, in cases where a same act is both attributable to the State and to the individual. See Kolodkin, R. A. (2011) Third report on immunity of State officials from foreign criminal jurisdiction. Geneva: AG-ONU (Reports of the ILC, A.CN.4.646), p. 34 Retrieved from http://legal.un.org/ilc/guide/4_2.shtml; Hernández, C. E. (2015) Fourth report on immunity of State officials from foreign criminal jurisdiction. Geneva: AG-ONU (Reports of the ILC, A.CN.4.686), p. 43. Retrieved from http://legal.un.org/ilc/guide/4_2.shtml; and Shen, Q. (2017). Lingering issues of foreign official immunity in enforcing prohibition against torture in domestic courts: Pinochet's reasoning reassessed. Chinese Journal of International Law, v. 16 (n. 2), p. 341.

9 See *infra*, unit 2.1.

10 Hernández, C. E. (2014) Third report on immunity of State officials from foreign criminal jurisdiction. Geneva: AG-ONU. (Reports of the ILC, A.CN.4.661), p. 6. Retrieved from http://legal.un.org/ilc/guide/4_2.shtml.

11 International Law Institute. Les droits fondamentaux de la personne face aux immunités de juridiction du droit international. Naples Session. Naples: ILI, 2009, p. 85. Retrieved from http://www.idi-ii.org/en/sessions/naples-2009/?post_type=publication.

12 Jurisdictional Immunities of the State (Germany v. Italy, Greece intervening), Judgment, I.C.J. Reports 2012, p. 123-124, para. 57.

courts¹³, or from international courts¹⁴. However, it may be the case that the immunity from foreign domestic courts may also apply to international courts, and the doctrine share opposing views on this matter.

On one side, Akande and Schabas argue that, because “immunities are conferred to prevent foreign states (...) from exercising judicial jurisdiction over another state in circumstances where it has not consented”¹⁵, there is no practical difference whether such a State exercised its power through its own domestic courts or if it “joined forces with many other States”¹⁶ through a tribunal created by a multilateral treaty. As a result, Akande continues, the immunity from jurisdiction and execution of foreign *domestic* courts would also prevent individuals from non-member States from being prosecuted by the ICC, or to have its judgments enforced to them¹⁷.

An opposing view is laid down by Paola Gaeta, who argues that it is a rule of international customary law to dismiss immunity to certain officials before prosecutions in all international tribunals¹⁸. She defends this point of view by arguing that, because international courts are not organs of a State, and because “they act on behalf of the international community as a whole”¹⁹, the acts of an international court cannot be considered to be an interference in foreign domestic affairs. Consequently, the question is whether the ICC is an international court, and Gaeta answers positively, relying mainly on article 4 (1) of its statute²⁰, and on the fact that it acts with a high degree of autonomy and independence²¹.

13 A notable example of this is the 1961 Vienna Convention on Diplomatic Relations, which, in its article 31 (1), provides that “A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of (...)” – Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes, done at Vienna, April 18, 1961. [Washington], retrieved from https://treaties.un.org/doc/Treaties/1964/06/19640624%2002-10%20AM/Ch_III_3p.pdf.

14 An example of which is the case of Jurisdictional Immunities of the State (Germany v. Italy, Greece intervening).

15 Akande, D. (2004). International Law Immunities and the International Criminal Court. *The American Journal of International Law*, v. 98 (n. 3), p. 417.

16 Schabas, W. A. (2016). *The International Criminal Court – a Commentary on the Rome Statute* (2nd ed.). Oxford: Oxford University Press, p. 603.

17 Akande, D. (2004) International Law Immunities and the International Criminal Court.

18 Gaeta, P. (2009). Does President Al Bashir Enjoy Immunity from Arrest? *Journal of International Criminal Justice*, 7, p. 315-332. doi:10.1093/jicj/mqp030

19 *Ibidem*, p. 321.

20 Rome Statute, Art. 4 (1) – The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

21 Gaeta, P. (2009). Does President Al Bashir Enjoy Immunity from Arrest?

The difference in these views might be explained by the fact that the first explanation takes into account the relative effect of treaties²² to explain why a non-member State is not bound by a treaty rule removing immunity to which it has not consented, whereas the second point of view regards what the rules of customary international law are. It is true that generally a treaty cannot dismiss immunity of an individual of a non-member State, as explained; the question is simply to look at the exact wording used in an international tribunal's constituent instrument to see if *member* States cannot claim immunity before that tribunal. However, it is less clear if there is a custom in international law to the same effect.

Such rule dismissing domestic immunity of State officials may have been developed since the Charter of the Nuremberg Tribunal²³, especially in its article 7²⁴, which has been further replicated by the International Law Commission, in Principle III of the so-called "Nuremberg Principles"²⁵, with small differences²⁶. This principle, which does not necessarily reflect customary law²⁷, deals with the responsibility of State officials, and not explicitly with immunities, although it had the same effect. Indeed, this article removes the defense based on the official capacity of the agent, and thus relates to domestic immunities²⁸.

Later on, the International Criminal Tribunal for the former Yugoslavia (ICTY) also dealt with this issue. In the case of Prosecutor v. Blaškić, the *ad-hoc* tribunal decided that immunity *ratione materiae* applies to both national and international courts, although it was accepted that an exception exists on international crimes²⁹. Such view is in contradiction with a previous case,

22 This expression indicates that treaties are only binding to States which have consented to that treaty, as indicated by article 34 of the Vienna Convention on the Law of Treaties. Done at Vienna, May 23, 1969. Retrieved from <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>.

23 Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement"). Done at London, August 8, 1945. Retrieved from <https://treaties.un.org/doc/Publication/UNTS/Volume%2082/v82.pdf>.

24 Article 7 – 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.

25 Principle III – The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law. International Law Commission (1950), Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, Yearbook of the International Law Commission, 1950, Vol. II, pp. 374-378, retrieved from http://legal.un.org/ilc/publications/yearbooks/english/ilc_1950_v2.pdf, Principle III.

26 The main difference is that the ILC, in formulating Principle III, thought that the question of mitigating punishment is for a court to decide, therefore it does not contain this last part of Nuremberg Charter's article 7 – see *ibidem*, p. 375.

27 *Ibidem*, p. 374.

28 Schabas, W. A. (2016). The International Criminal Court, p. 596.

29 Prosecutor v. Blaškić, Objection to Issue of Subpoenae duces tecum, No. IT-95-14-AR 108 bis (Oct. 29,1997), 110 ILR 609,707, para. 41.

judged by the ICJ in 2002, known as the “Arrest Warrant” case³⁰, which dealt with the legality of the issuance of an arrest warrant by Belgium against Mr. Abdoulaye Yerodia Ndombasi, to which it answered negatively³¹. In an *obiter dictum*, the World Court has mentioned instances in which Mr. Yerodia could be prosecuted, and one of them is when he would be trialed by an international court³², since he would only have immunity before domestic courts. A similar view is shared by the Special Court for Sierra Leone – a hybrid court, in the Taylor Case, which mentioned that such absence of immunity in international courts is a principle to be followed³³.

Therefore, if it is questioned whether there is a rule denying domestic immunity to certain officials or to acts committed in the regular exercise of their functions before international courts, the case-law appears to be somewhat indicating that such rule of a customary nature exists. Moreover, the constituent treaties of international courts denying such immunity is also an element to be taken into account, as it may be regarded as *opinio juris*. It is difficult to forget the fact that the Rome Statute was signed, to date, by 122 countries³⁴, and article 27 (1), contains such rule in question.

1.2: General rule of article 27 of the Rome Statute

Before analysing the provisions of the Rome Statute, a remark can be done about the Statute itself. It is a multi-lateral treaty, thus binding only on its parties, due to the aforementioned relative effect of the treaties. Therefore, the ICC has a different nature than the *ad-hoc* courts created by the United Nations Security Council³⁵. As a result, the rules of article 27, by itself, are relevant only to States-party.

Such article contains two paragraphs – one dealing with the official capacity of an agent as a matter of defence, and another dealing with immunity before the ICC. What is interesting to note is that all the previous statutes instituting criminal courts have only the first of them, namely

30 Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3.

31 *Ibidem*, p. 33.

32 It is worth saying that the ICJ made references to article 27 (2) of the Rome Statute. See *ibidem*, p. 25, para. 61.

33 “[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”. Prosecutor v. Charles Taylor, Immunity from Jurisdiction, No. SCSL-03-01-I (May 31, 2004), p. 24, para. 52.

34 Assembly of the States Parties (ICC). N.d. Retrieved August 9, 2019 from https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx.

35 See *infra*, unit 1.3.

the irrelevance of the official capacity; the second paragraph, then, is a novelty of the Rome Statute³⁶.

Indeed, looking at the texts of the Nuremberg Charter, mentioned above, it only deals with the irrelevance of the official position³⁷. The same is true with regard to the Statutes of the International Criminal Tribunal for the Former Yugoslavia³⁸, of the International Tribunal for Rwanda³⁹, and of the Special Court of Sierra Leone⁴⁰, they are all drafted to address the same issue as article 27 (1) of the Rome Statute.

In general lines, the content of the article, because it is similar to its previous provisions analysed, has already been explained. In other words, it excludes, from the possible defences, that which invokes the “official capacity” of an individual as a way to exempt themselves from individual criminal responsibility⁴¹. Therefore, it can be said that it deals incidentally with immunity, although only from the immunities under national law⁴². However, what it does, in fact, is to create a rule where individuals are responsible for the acts amounting to international crimes they commit, even if they claim to be acting in name of the State, and therefore only the latter would be engaged in international responsibility⁴³.

More interesting is the rule of article 27 (2), of the Rome Statute, which deals with immunities under international law. It has the effect of removing the immunity attached to an individual under international customary law⁴⁴, which, at the present state, is only conferred to those high-ranking officials entitled to immunity *ratione personae*⁴⁵. That is, in fact, what the ICJ has said, in the Arrest Warrant case, although it has also included immunity *ratione materiae* as customary international law⁴⁶.

36 Schabas, W. A. (2016). The International Criminal Court, p. 596.

37 See *supra*, note 25.

38 Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on July 7, 2009), adopted by the UN Security Council, May 25, 1993, Article 7 (2), retrieved from http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.

39 Statute of the International Tribunal for Rwanda (as last amended on 13 October 2006), November 8, 1994, article 6 (2), retrieved from <https://www.refworld.org/docid/3ae6b3952c.html>.

40 Statute of the Special Court for Sierra Leone, adopted by the UN Security Council, January 16, 2002, article 6 (2), retrieved from <http://www.rscsl.org/Documents/scsl-statute.pdf>.

41 Tladi, D. (2015). The duty on South Africa to Arrest and Surrender President Al-Bashir under South African and International Law. *Journal of International Criminal Justice*, v. 13, p. 1038. doi:10.1093/jicj/mqv057.

42 Schabas, W. A. (2016). The International Criminal Court, p. 596-7.

43 *Ibidem*.

44 Schabas, W. A. (2016). The International Criminal Court, p. 599.

45 For a further discussion on the customary nature of such immunities, as well as an analysis of who is entitled to them, see *infra*, unit 2.1.

46 “Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction”. Arrest Warrant of 11 April 2000, p. 25, para. 61.

Even if, at a first glance, there may be some confusion in the application of both paragraphs⁴⁷, they are different; in fact, the interplay between paragraphs (1) and (2) is that, whereas the previous relates to the irrelevance of any official position or rules of procedure that may attach to an official by reasons of national law⁴⁸, the latter removes immunities for any procedures related to the ICC, whether by national or international courts⁴⁹. Indeed, it is quite different to say that a person may not be criminally responsible because of their official positions, and to say that an individual may not be prosecuted for reasons of immunity⁵⁰.

The exact scope of application of Rome Statute's article 27 (2) has been discussed in the doctrine, and for several reasons it was argued that it does apply also to national courts. A first argument set out is that the reference to "national immunities" only makes sense if applied to domestic courts, since the ICC is "concerned only with international immunities applicable to international courts"⁵¹. Secondly, a contrary interpretation would make such article meaningless, since the ICC needs the cooperation of its member States to obtain custody of its suspects⁵². Thirdly, the provision analysed excludes also the immunity from arresting of an individual; therefore, since only national authorities can do so, immunities under national law – if effective – would "bar the Court from exercising its jurisdiction over such a person"⁵³, and would therefore withdraw almost all the situations whereby the ICC can gain custody over a person⁵⁴. Finally, several States have created implementing legislations whereby they accept that "international law immunity from arrest [does not apply] when a request for arrest has been made by the ICC"⁵⁵.

47 As noted by Schabas, W. A. (2016). *The International Criminal Court*, p. 596.

48 *Ibidem*.

49 Akande, D. (2009). The Legal Nature of Security Council Referrals to the ICC and Its Impact on Al Bashir's Immunities. *Journal of International Criminal Justice*, v. 7, pp. 337-338. Retrieved from <https://academic.oup.com/jicj/article/7/2/333/902217>.

50 Tladi, D. (2015). The duty on South Africa to Arrest and Surrender President Al-Bashir under South African and International Law.

51 De Wet, E. (2015). The Implications of President Al Bashir's Visit to South Africa for International and Domestic Law. *Journal of International Criminal Justice*, v. 13, pp. 1055. doi:10.1093/jicj/mqv058.

52 *Ibidem*.

53 Prosecutor v. Omar Hassan Ahmad Al-Bashir, Decision on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, No. ICC-02/05-01/09 (July 6, 2017), p. 27-28, para. 74. Retrieved from <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/05-01/09-302>.

54 Akande, D. (2018). Does the ICC Statute Remove Immunities of State Officials in National Proceedings? Some observations from the drafting history of Article 27 (2) of the Rome Statute. Retrieved from EJIL talk!, <https://www.ejiltalk.org/does-the-icc-statute-remove-immunities-of-state-officials-in-national-proceedings-some-observations-from-the-drafting-history-of-article-27-2-of-the-rome-statute/>.

55 Akande, D. (2009). The Legal Nature of Security Council Referrals to the ICC and Its Impact on Al Bashir's Immunities. *Journal of International Criminal Justice*, p. 338.

In light of this, it appears little disputed the fact that article 27 (1) of the Rome Statute, therefore, has the scope to engage individual criminal responsibility, irrespective of the position it has under domestic law; and that article 27 (2) removes immunities that may exist under national or international law of certain individuals, and that it applies both before proceedings in the ICC, and in any domestic procedures related to those, such as a request to arrest and surrender⁵⁶.

The last issue on the scope of application is with regard to non-member States to the Rome Statute. It can be argued that, due to the relative effect of the treaties, it is clear that immunity would still exist for non-member States in respect of the ICC; however, what if an individual, entitled to immunity, travels to the territory of a member State? As argued above, article 27 (2) would apply in *all* proceedings before their domestic courts in relation to the ICC, including to those who are nationals of non-member States. Due to the complexity of the issue, this will be the scope of the next unit.

1.3: The rule of article 98 (1) and UNSC referrals – the Jordan case of May 2019

At least until very recently, it was thought to exist a tension between article 27 (2) and article 98 (1)⁵⁷ of the Rome Statute, because they would, on the one hand, remove any immunities before national courts of member States while, at the same time, preserve the immunities of third States for purposes of making a request to arrest or surrender an indicted. However, this apparent conflict can be resolved by identifying the different scopes of application of both articles – it is a common view⁵⁸ that article 27 (2) of the Rome Statute is applicable *vis-à-vis* its member States, whereas article 98 (1) would only be applied by its member States in relation to non-member States.

Those who defend this view are interpreting article 98 (1), for different reasons, as being a *régime* applicable in relation to non-member States, even though the wording of the article is

56 For a different opinion on the scope of article 27 (2), see Gaeta, P. Does President Al-Bashir Enjoy Immunity from Arrest? p. 328-329; the author says that such article only applies at the vertical level (that is, to proceedings before the ICC itself), and not to at the horizontal level.

57 Article 98 (1) – The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

58 Among others, it is possible to mention Schabas, W. A. (2016). *The International Criminal Court*, p. 1345; Akande, D. (2009). *The Legal Nature of Security Council Referrals to the ICC and Its Impact on Al Bashir's Immunities*, p. 339; De Wet, E. (2015). *The Implications of President Al Bashir's Visit to South Africa for International and Domestic Law*, p. 1057; Gaeta, P. (2009). *Does President Al Bashir Enjoy Immunity from Arrest?* p. 328.

“third States”. As noted by Schabas, this expression is often used to refer to States who are not party to an agreement, as was the case in the Vienna Convention on the Law of the Treaties [articles 34-37, and also the definition itself, in article 2 (1) (h)]⁵⁹; Akande, in turn, argues that this is the only interpretation possible, since article 27 already concerns immunities of member States; viewing it differently would turn this provision into dead letter⁶⁰. In this regard, the Pre-Trial Chamber II of the ICC said that article 98 recognizes the immunities of non-member States, thus, confirming the interpretations given by those writers⁶¹.

With regard to the content of article 98, two main issues arise – the difference between paragraphs 1 and 2, and to whom it obliges. By reading both paragraphs, it is noticeable that they are drafted in a similar way, therefore they endeavour to achieve the same goal – resolve inconsistencies between the obligation of a member State to cooperate under the Statute and its obligations towards third parties (non-member States, as explained above). The difference is that the first paragraph relates to obligations to respect “immunity of a person or property” of a non-member State under international customary law, while the second paragraph is applicable when the obligations arise out of an international agreement⁶².

As for the second issue, it seems clear that the intention was to impose a bigger obligation on the Court (not to issue a request on the cases where such conflict arises) and a smaller obligation on member States (to notify the Court of such conflict of obligations and provide all necessary information)⁶³, which is what the ICC Rules of Procedure and Evidence say, in Rule 195⁶⁴. Moreover, in the South Africa Case⁶⁵, the Pre-Trial Chamber II said that, since there was no immunity applicable to Omar Al-Bashir (for reasons explained elsewhere in the decision), there was no applicability of article 98 in this case. The Court also went on to say that, even if it was applied, this provision entails an obligation for the ICC not to “request

59 Schabas, W. A. (2016). *The International Criminal Court*, p. 1345.

60 Akande, D. (2009). *The Legal Nature of Security Council Referrals to the ICC and Its Impact on Al Bashir's Immunities*, p. 339

61 *Prosecutor v. Omar Hassan Ahmad Al-Bashir, Decision on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir*, p. 30, para. 82. As a consequence, the Court would not be entitled to impose on its member States an obligation which is inconsistent with the obligations that State would have towards *non-member States* with respect to immunity.

62 Schabas, W. A. (2016). *The International Criminal Court*, p. 1345.

63 *Ibidem*, p. 1344.

64 Rules of Procedure and Evidence of the International Criminal Court, adopted by the ICC Assembly of States Parties, September 3-10, 2013, ICC-ASP/1/3, retrieved from <https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf>.

65 *Prosecutor v. Omar Hassan Ahmad Al-Bashir, Decision on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir*.

cooperation until a waiver of the relevant immunity is obtained from the third State by the Court itself⁶⁶, and, therefore, South Africa could not disregard such request.

The *raison d'être* of this provision might be explained by the fact that the Rome Statute is an international agreement, which means it is only binding between its member States, as repeated above. Therefore, unlike other international courts, like the ICTY, the ICTR, and the Special Court for Sierra Leone⁶⁷, created by a Security Council Resolution⁶⁸, or in strict connection with it⁶⁹, it does not have the power to disregard rights of third States, such as the right to immunity. Although this is not so contested, as it was attempted to demonstrate, there is a situation in which there has been some dispute, namely the effect of triggering the jurisdiction of the ICC by means of article 13 (b) of its Statute, that is, by referral of the UN Security Council, when it acts under Chapter VII of the UN Charter.

The practice of the International Criminal Court, in such cases, has been to prosecute individuals within the jurisdictional limitations of the Rome Statute, specifically issues of admissibility, under article 17 of the Statute, and application of article 53 thereof (if there is a reasonable basis to proceed with an investigation)⁷⁰. However, the main discussion is whether article 27 (2) is also applicable in such situations, since article 98 (1) recognizes immunities for individuals of non-member States.

The Pre-Trial Chamber I has dealt with this situation in the 2009 decision on the issuance of an arrest warrant to Al-Bashir. It did not recognize his immunity for four different reasons: (1) it referred to the preamble of the Rome Statute, which sets its core goals, among which there is the fight against impunity; (2) it simply restated the goals set out in article 27; (3) there is no need to resort to other sources of law (such as customary international law), if there is no *lacuna* in the Statute; and (4) because “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

⁶⁶ *Ibidem*, p. 37, para. 105.

⁶⁷ Though it is often called as being a hybrid tribunal, it is international in nature, since – among other reasons – the agreement concluded between Sierra Leon and the UN can be considered an agreement with the whole international community, according to the 2004 decision on the Charles Taylor case; for further reading, see *Prosecutor v. Charles Taylor, Immunity from Jurisdiction*, paras. 37-42.

⁶⁸ ICTY: Security Council resolution 827, S/RES/827 (25 May, 1993), retrieved from [undocs.org/S/RES/827\(1993\)](http://undocs.org/S/RES/827(1993)); ICTR: Security Council resolution 955, S/RES/955 (8 November, 1994), retrieved from unscr.com/en/resolutions/doc/955.

⁶⁹ Special Court for Sierra Leone: Security Council resolution 1315, S/RES/1315 (14 August, 2000), retrieved from [undocs.org/S/RES/1355\(2000\)](http://undocs.org/S/RES/1355(2000)), item 1.

⁷⁰ Schabas, W. A. (2016). *The International Criminal Court*, p. 375.

place in accordance with the statutory framework provided for in the Statute”⁷¹. It could be understood, then, that the ICC considered, at this time, that the whole Statute is applicable in situations referred to it by the UNSC. It did not deal with article 98, although it decided to issue a request for cooperation to “[a]ll United Nations Security Council members that are not States Parties to the Statute”⁷². Therefore, it must be understood that the Pre-Trial Chamber I decided that no immunity would be attached to Omar Al-Bashir whatsoever, for purposes of the ICC trial⁷³.

This decision, was criticized by some authors⁷⁴ for being ill-founded. In subsequent decisions, the ICC has set out new arguments to support this view, such as in 2014, when the Pre-Trial Chamber II explained that Resolution 1593 of the Security Council⁷⁵ has implicitly waived Al-Bashir’s immunity and said that a third State should also lift his immunities for the purposes of article 98 (1)⁷⁶. This view was supported also by de Wet⁷⁷, who made an analogy to the Security Council resolutions which permitted the use of military force. According to her, the resolutions have a permissible wording, and when there is the need to exclude from a permission certain acts or measures, it must do so explicitly, as it did when, in resolution 1593, it authorized the use of force, while excluding the use of ground troops.

On a contrary view, Paola Gaeta supports the view that the mechanism envisaged in article 13 (b) of the Rome Statute merely triggers the jurisdiction of the ICC, it does not imply that the duty to cooperate extends to non-member States⁷⁸. In her view, the resolution should have expressly required the cooperation of the States, which it did not do (by using the term “urges” in relation to non-member States).

It must be noted that this discussion whether the Security Council resolution does or does not bind non-member States of the Rome Statute is only relevant because, if it did, these States would have an obligation towards the Security Council – and therefore to the UN Charter – to cooperate with the ICC, despite any infringement on the customary rule of immunities that it

71 Prosecutor v. Omar Hassan Ahmad Al-Bashir, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al-Bashir, pp. 15-16, paras. 42-45.

72 *Ibidem*, p. 93.

73 Schabas, W. A. (2016). *The International Criminal Court*, p. 1347.

74 *Ibidem*, p. 601; Gaeta, P. (2009). Does President Al Bashir Enjoy Immunity from Arrest? p. 323-324.

75 Security Council resolution 1593, S/RES/1593.

76 Prosecutor v. Omar Hassan Ahmad Al-Bashir, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court, No. ICC-02/05-01/09-195 (April 9, 2014), pp. 13-14, para. 29. Retrieved from https://www.icc-cpi.int/CourtRecords/CR2014_03452.PDF.

77 De Wet, E. (2015). *The Implications of President Al Bashir's Visit to South Africa for International and Domestic Law*, p. 1061.

78 Gaeta, P. (2009). Does President Al Bashir Enjoy Immunity from Arrest?

may entail. This is because article 103 of the UN Charter provides for a certain supremacy of the obligations under the UN Charter over other obligations. The ICC dealt with this issue in some occasions, when it had to rule on an alleged failure to comply with the obligation to cooperate with the Court, subsequently by Malawi⁷⁹, Chad⁸⁰, Congo⁸¹, Djibouti⁸², Uganda⁸³, South Africa⁸⁴ and Jordan⁸⁵ in relation to the Al-Bashir case.

In all cases, the outcome was to find the State concerned responsible for the non-compliance with the request to arrest or surrender Al-Bashir to the ICC, although with different reasonings, but all of them connected with article 98 (1) of the Rome Statute. The most recent case, the Jordan 2017 decision⁸⁶, there was an appeal which was recently judged by the Appeals Chamber. In this appeal, which had the scope of determining whether Jordan had failed to comply with a request by the ICC, the Court seemed to have given an importance to its decision, given that it invited numerous *amici curiae*, as seen in the judgment, and drafted a rather lengthy and comprehensive judgment of almost 100 pages. This is understandable, given the number of cases that have appeared before the Court in the Al-Bashir case only.

In a summary, the Appeals Chamber decided that the conclusion of the Pre-Trial Chamber was correct in finding Jordan's responsibility for the failure to comply with the request by the ICC, albeit with an erroneous reasoning. In the first argument made to reach this

79 Prosecutor v. Omar Hassan Ahmad Al-Bashir, Corrigendum to the 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, No. ICC-02/05-01/09-139-Corr (December 13, 2011), retrieved from https://www.icc-cpi.int/CourtRecords/CR2011_21750.PDF.

80 Prosecutor v. Omar Hassan Ahmad Al-Bashir, Decision pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir, No. ICC-02/05-01/09 (December 13, 2011). Retrieved from https://www.icc-cpi.int/CourtRecords/CR2012_04203.PDF.

81 Prosecutor v. Omar Hassan Ahmad Al-Bashir, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al-Bashir's Arrest and Surrender to the Court.

82 Prosecutor v. Omar Hassan Ahmad Al-Bashir, Decision on the non-compliance by the Republic of Djibouti with the request to Arrest and Surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute, No. ICC-02/05-01/09 (July 11, 2016). Retrieved from https://www.icc-cpi.int/CourtRecords/CR2016_04946.PDF.

83 Prosecutor v. Omar Hassan Ahmad Al-Bashir, Decision on the non-compliance by the Republic of Uganda with the request to Arrest and Surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute, No. ICC-02/05-01/09 (July 11, 2016). Retrieved from https://www.icc-cpi.int/CourtRecords/CR2016_04947.PDF.

84 Prosecutor v. Omar Hassan Ahmad Al-Bashir, Decision on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir.

85 Prosecutor v. Omar Hassan Ahmad Al-Bashir, Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir, No. ICC-02/05-01/09 (December 11, 2017). Retrieved from https://www.icc-cpi.int/CourtRecords/CR2017_07156.PDF.

86 Prosecutor v. Omar Hassan Ahmad Al-Bashir, Judgment in the Jordan Referral re Al-Bashir Appeal.

conclusion, it was found that, while article 27 (2) does not apply as a treaty rule towards non-member States, it has reached the threshold of customary international law, i.e., that head of State immunity is not applicable in proceedings before international courts, and that this is applicable also at the horizontal level (between States); consequently, article 98 (1) has no applicability, as there is no immunity to be disregarded in the arrest or surrender of Omar Al-Bashir⁸⁷. The second argument raised by the Appeals Chamber is that, since the UN Security Council has imposed on Sudan an obligation of cooperation equivalent to that of member States (to “fully cooperate with the Court”, in Resolution 1593), there could not subsist any immunity for Omar Al-Bashir; therefore, there was “no ‘irreconcilable legal obligations’ that Jordan was facing”⁸⁸.

At the end of the day, then, the Appeals Chamber seems to have settled a long-running debate in doctrine and within the jurisdiction of the ICC itself – although the precedents led to the same result. It is a fortunate decision of the ICC to make a comprehensive judgment on the issue, and recognizing customary international law *status* to the lack of immunity of heads of State before international tribunals, as it will be useful on future prosecutions⁸⁹.

87 *Ibidem*, paras. 100-119. Gaeta also defends this position, see *supra*, item 1.1.

88 *Ibidem*, para. 144.

89 Annegret L. H. 2019. The Climax of the Al-Bashir Saga: The ICC’s Jordan Judgment, *Völkerrechtsblog*, May 20, 2019, doi: 10.17176/20190520-172003-0.

CHAPTER 2 – ASSESSING OMAR AL-BASHIR’S IMMUNITY

After analyzing what the rules in the Rome Statute and in general international law say about immunity and its impact before the International Criminal Court proceedings, it could be seen that the type of immunity that a certain prosecuted enjoys or not leads to different implications. Therefore, it seems necessary now to assess the immunity that Omar Al-Bashir enjoys under foreign domestic jurisdictions (beginning with general remarks on the distinction of the types of immunity a person has in such situation), and under international law.

2.1: Immunity *Ratione Personae* and *Ratione Materiae*

There are two different types of immunity a person can enjoy, under both domestic and international law, to prevent themselves from foreign prosecution or enforcement – one which covers virtually all acts, but is attached to a very selected category of persons (*ratione personae*), and another which protects only from official acts, but applies to all State officials (*ratione materiae*). These immunities are different in many ways, and it might be useful to begin the analysis highlighting a possible difference in their rationale.

As noted by the International Court of Justice, the immunity *ratione personae* of the Minister of Foreign Affairs is granted not “for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States”⁹⁰. The same reasoning, i.e., the “functional necessity” foundation of this type of immunity, is found in the doctrine⁹¹. On the other hand, the immunity *ratione materiae*, also called “functional immunity” or “residual immunity”, has a more controversial rationale – it is disputed whether such immunity is founded in the sovereign equality of States⁹² – since a foreign State could interfere in a State’s sovereignty through the prosecution of its officials – or in the functional necessity⁹³.

90 Arrest Warrant of 11 April 2000, p. 22, para. 53.

91 Frulli, M. (2016). On the existence of a customary rule granting functional immunity to State officials and its exceptions: back to square one. *Duke Journal of Comparative & International Law*, v. 26 (n. 3), pp. 496-497; International Law Institute (2009). *Les droits fondamentaux de la personne face aux immunités de juridiction du droit international*, p. 49; Hernández, C. E. (2012) Preliminary report on immunity of State officials from foreign criminal jurisdiction. Geneva: AG-ONU, 18 p. (Reports of the ILC, A.CN.4.654). Retrieved from http://legal.un.org/ilc/guide/4_2.shtml.

92 *R. v. Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet*, Opinion of the Lords of Appeal for Judgment in the Cause, UKHL 17 (March 24, 1999), p. 17. Retrieved from <http://www.bailii.org/uk/cases/UKHL/1999/17.html>; Kolodkin, R. A. (2011) Third report on immunity of State officials from foreign criminal jurisdiction. Geneva: AG-ONU. 38 p. (Reports of the ILC, A.CN.4.646), p. 135, para. 135. Retrieved from http://legal.un.org/ilc/guide/4_2.shtml.

Nonetheless, Micaela Frulli insist that the rationale of both immunities is essentially the same⁹⁴. In her analysis, both State practice and case-law have shown a purely functional role of immunity *ratione materiae*, which can be partly seen by the fact that, in the cases she studied, individuals who committed acts outside the scope of their official functions (acts *ultra vires*) did not entitle them to claim functional immunity⁹⁵.

Regarding the persons concerned by each type of immunity, there is an indisputable difference between them.

For the immunity *ratione personae*, because it has a different, larger scope than the immunity *ratione materiae* (as will be seen below, in this item), protects a much smaller number of persons. In fact, the only undisputed persons are the so-called *troika* – the heads of State, heads of government and ministers of foreign affairs⁹⁶. However, because non of the mentions by the ICJ or the ILC to this list seemed to intend to create an exhaustive list, a debate has sparked as to which other persons may enjoy this type of immunity. Although it has been contested, it seems to be clear that those who enjoy personal immunities must embody or personify the State⁹⁷, which is perhaps why diplomats and members of special missions may enjoy this immunity, but only in the States where they are accredited⁹⁸. A thorough study on who might also enjoy this immunity was debated at the International Law Commission⁹⁹.

93 Hernández, C. E. (2013). Second report on immunity of State officials from foreign criminal jurisdiction. Geneva: AG-ONU, 29 p. (Reports of the ILC, A.CN.4.661), pp. 16-17. Retrieved from

http://legal.un.org/ilc/guide/4_2.shtml; Frulli, M. (2016). On the existence of a customary rule granting functional immunity to State officials and its exceptions: back to square one, pp. 496-497.

94 Frulli, M. (2016). On the existence of a customary rule granting functional immunity to State officials and its exceptions: back to square one.

95 *Ibidem*.

96 These three instances were said to enjoy personal immunities (which is a synonym to immunity *ratione personae*) by the International Court of Justice, in the already mentioned Arrest Warrant Case, in its paragraph 51; by a number of writers (which, due to space and scope restraints, only a few will be mentioned, such as D'Argent, P. (2013). Immunity of State Officials and Obligation to Prosecute. In A. Peters, E. Lagrange, S. Oeter & C. Tomuschat (Eds.), Immunities in the Age of Global Constitutionalism (p. 245). Leiden/Boston: Brill Nijhoff;

Hernández, C. E. (2013). Frulli, M. (2016). On the existence of a customary rule granting functional immunity to State officials and its exceptions: back to square one, p. 490-491); and by the International Law Commission, who adopted a draft article with this content (see General Assembly. (2013). Text of draft articles 1, 3 and 4 provisionally adopted by the Drafting Committee at the sixty-fifth session of the International Law Commission. Geneva: A/CN.4/L.814 (June 4, 2013), draft article 3. Retrieved from <https://undocs.org/A/CN.4/L.814>.

97 D'Argent, P. (2013). Immunity of State Officials and Obligation to Prosecute, p. 246.

98 See Vienna Convention on Diplomatic Relations, art. 31, para. 1; and Convention on Special Missions, adopted by the General Assembly of the United Nations, December 8, 1969. Retrieved from http://legal.un.org/ilc/texts/instruments/english/conventions/9_3_1969.pdf. art. 31, paras. 1 and 2.

99 As it runs out of the scope of this work, only a reference to the discussion will be made. For further reading, see Hernández, C. E. (2013). Second report on immunity of State officials from foreign criminal jurisdiction, paras. 56-68.

As for the subjective scope of immunity *ratione materiae*, draft article 6 of the International Law Commission simply puts “State officials”, which is in line with what some writers and case-law say, i.e., that all individuals who act in an official capacity (meaning “in the exercise of State authority”, as draft article 2 (f) defines) are entitled to this kind of immunity¹⁰⁰. It has also been mentioned that it embraces individuals “who are authorized to represent the State in all its manifestations”¹⁰¹, while the main criterion to identify such officials might still remain with the attributability of such act to a State¹⁰², within the rules of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, arts. 4-9.

Moving on to the temporal scope of both types of immunities, here there is probably little to none discussion – while the immunity *ratione personae* only applies for current and previous acts of high-ranking officers during the exercise of their functions, immunity *ratione materiae* applies only to official acts, both during and after the end of the official functions of a former State official¹⁰³. That means, also, that during a high-ranking official’s term of office, some acts are covered by both types of immunity, if all requirements are fulfilled.

Two last remarks about the difference between these types of immunities are which acts each of these encompass, and the customary nature or not of the immunities *ratione personae* and *ratione materiae*.

As for the previous, the issue is less complicated. Because of an authoritative ruling by the International Court of Justice¹⁰⁴, it becomes difficult to challenge the customary nature of the immunity accruing to high State officials, and that it applies both for civil and criminal jurisdictions. Moreover, these officials are protected from both official acts and private acts¹⁰⁵, which turns useless the discussion whether *ultra vires* acts are included or not, because they are.

For the immunity *ratione materiae*, however, there has been discussions and disagreements in doctrine and in case-law.

100 General Assembly. (2015). Text of the draft articles provisionally adopted by the Drafting Committee at the sixty-seventh session. Geneva: A/CN.4/L.865 (July 29, 2015). Retrieved from <https://undocs.org/A/CN.4/L.865>.

101 General Assembly. (1991). Draft articles on jurisdictional immunities of States and their property. Geneva: A/46/10 (September 10, 1991), p. 18. Retrieved from <https://undocs.org/A/46/10>.

102 D'Argent, P. (2013). Immunity of State Officials and Obligation to Prosecute, p. 248.

103 Franey. E. H. Immunity from the Criminal Jurisdiction of National Courts. In A. Orakhelashvili (Ed.), Research Handbook on jurisdiction and immunities in international law (pp. 214-229). Cheltenham: Edward Elgar Publishing Limited.

104 Arrest Warrant of 11 April 2000, pp. 21-22, para. 51.

105 *Ibidem*, p. 22, para. 55.

Regarding its customary nature, the ICTY has defended an affirmative answer¹⁰⁶, as well as the European Court of Human Rights¹⁰⁷. In doctrine, some writers concurred with the customary nature of the rule admitting immunity *ratione materiae*¹⁰⁸, others have remained silent on the issue¹⁰⁹, even though there has been a disagreement on part of Frulli. According to her, both State practice and case-law are not sufficiently consistent to affirm the existence of such customary rule¹¹⁰; on the contrary, she continues, she argues that functional immunity has been normally granted on the basis of conventional law, the lack of which usually resulted on domestic courts exercising their jurisdictional powers. For this reason, she concludes that it's not safe yet to affirm the existence of a customary rule granting immunity *ratione materiae*.

At last, but possibly the most controverted topic regarding such immunity, is the question of which acts are covered by it. It has already been mentioned, in this item, that functional immunity only covers official acts; therefore, disagreements have been found on the question whether acts *ultra vires* are included or not and if there is a difference in the *régime* of functional immunity which protects individuals from foreign civil or criminal jurisdictions. On the other hand, it doesn't seem to cause much problem the recognition that private acts are outside the scope of this immunity¹¹¹, as mentioned by the ICJ, in the Arrest Warrant Case (para. 61), and by the Supreme Court of the UK, in the Reyes v. Al-Malki case¹¹².

When it comes to acts *ultra vires*, it has been defended that they are also covered by immunity *ratione materiae*¹¹³, however, the *special rapporteur* of the International Law Commission on the immunity from foreign criminal jurisdiction studied the case-law and, while finding there an inconsistency¹¹⁴, she concludes that such acts are equivalent to private acts,

106 Prosecutor v. Blaškić, Objection to Issue of Subpoenae duces tecum, para. 38.

107 Jones and others v. the United Kingdom, European Court of Human Rights (Fourth Section), Applications n. 34356/06 and 40528/06 (January 14, 2014), para. 202-204.

108 Webb, P. (2018). How far does the systemic approach to immunities take us? AJIL Unbound, v. 112, p. 16. doi:10.1017/aju.2018.10.

109 D'Argent, P. (2013). Immunity of State Officials and Obligation to Prosecute.

110 Frulli, M. (2016). On the existence of a customary rule granting functional immunity to State officials and its exceptions: back to square one.

111 D'Argent, P. (2013). Immunity of State Officials and Obligation to Prosecute, p. 249; O'Keefe, R. (2015). An "international crime" exception to the immunity of State officials from foreign criminal jurisdiction: not currently, not likely. AJIL Unbound, v. 109, p. 170. doi:10.1017/S2398772300001379.

112 Reyes v. Al-Malki and another, Judgment on appeals procedure, UKSC 61 (October 18, 2017), pp. 29-30, para. 48 Retrieved from <https://www.supremecourt.uk/cases/uksc-2016-0023.html>.

113 D'Argent, P. (2013). Immunity of State Officials and Obligation to Prosecute, p. 248.

114 Hernández, C. E. (2015). Fourth report on immunity of State officials from foreign criminal jurisdiction, p. 50, para. 113.

therefore not covered by this type of immunity¹¹⁵. In line with this thought, it has been said that the tendency nowadays is not to uphold functional immunity when the acts were committed “outside the scope of functions covered by specific rules”¹¹⁶ (*ultra vires*).

Finally, regarding the differences between the effects of this immunity on civil or criminal jurisdiction, it is undisputed that civil suits can generally be barred by a claim of official acts immunity¹¹⁷, although there might be a growing tendency to conceive some exceptions to it¹¹⁸, although its customary character was not affirmed by the International Court of Justice¹¹⁹.

Regarding criminal jurisdiction, since it is related to a possible immunity Al-Bashir may have, it will be seen in the next item.

2.2: Al-Bashir’s domestic immunities in the aftermath of the *coup d’État*

As a preliminary remark, it is worth noting that not all possible crimes Omar Al-Bashir could have committed are relevant to assess his immunities, but only those to which he is being prosecuted of, as laid down in the arrest warrants to be seen shortly. Therefore, to assess the immunity for Al-Bashir, reference will be made solely to those crimes, but not because they might be the only ones, but rather because the scope of this work is to assess the impact of his immunities *in the ICC proceedings*.

Omar Hassan Ahmad Al-Bashir, born in 1944, was the 7th president of Sudan, for practically 30 years, from June 30, 1989, to April 11, 2019. He was called by the presses as being a dictator, responsible for a genocide in Darfur and other crimes, and also for an economic crisis that further revolted the population¹²⁰. For these and other reasons, he had been facing protests against him and his government, which started escalating since December, 2018, when

115 Hernández, C. E. (2016). Fifth report on immunity of State officials from foreign criminal jurisdiction. Geneva: AG-ONU. 99 p. (Reports of the ILC, A.CN.4.701), p. 91, para. 232. Retrieved from http://legal.un.org/ilc/guide/4_2.shtml.

116 Frulli, M. (2016). On the existence of a customary rule granting functional immunity to State officials and its exceptions: back to square one, p. 497.

117 See General Assembly. (2015). Text of the draft articles provisionally adopted by the Drafting Committee at the sixty-seventh session, article 6, and the discussion which led to the provisional adoption, in General Assembly. (2015). Immunity of State officials from foreign criminal jurisdiction. New York: A/70/10 (August 14, 2015). Report of the International Law Commission, Chapter X, pp. 115-129 Retrieved from <http://legal.un.org/docs/?symbol=A/70/10>, especially para. 201.

118 See General Assembly. (1991). Draft articles on jurisdictional immunities of States and their property, articles 10 to 17.

119 Jurisdictional Immunities of the State (Germany v. Italy, Greece intervening).

120 Addario, L. April 11, 2019. The fall of Omar Hassan al-Bashir, the ‘spider’ at the heart of Sudan’s web. The New York Times. Retrieved from <https://www.nytimes.com/2019/04/11/world/africa/omar-bashir-sudan.html>.

some mischievous killings took place¹²¹. The protests kept gaining force, until, in April 6, 2019, the largest protest against to date took place, occasion in which even Al-Bashir's internal advisers "told him it was time to leave"¹²². Finally, he was ousted from power, in 11 April, 2019.

Due to the occurrences in Darfur, the situation was referred to the ICC, by means of Resolution 1593, and finally an arrest warrant against the then president of Sudan was issued, for having allegedly committed crimes against humanity, war crimes and crimes of genocide¹²³.

Having set the facts, it is now possible to analyze what they mean.

During the time Al-Bashir was in power, i.e., president of Sudan, he was the head of that State. That entails an immunity *ratione personae*, which protects him from foreign domestic prosecution. Moreover, his immunity was not affected by the fact that he is being accused of grave crimes under international law. At least, that seems to be the current state of customary international law, following the case law of international and domestic jurisdictions¹²⁴. Thus, before foreign domestic courts, he enjoyed an absolute immunity, which has subsisted until he was ousted, in April, 2019.

After this military *coup d'État*, no longer being in power, Al-Bashir has lost its personal immunity, but he has nonetheless a residual immunity, that subsists in time – immunity *ratione materiae*. That is the immunity he has now, at the time of conclusion of this work. The basic elements of this immunity were already seen above, in item 2.1; however, the main question is if there are any exceptions to this functional immunity. As seen above, it does not cover private acts, nor, arguably, *ultra vires* acts or some exceptions provided for in a treaty, which might not reflect customary law, but relates to civil proceedings.

Things get more complicated when it comes to exceptions for criminal proceedings, which seems to be the case, pursuant to the arrest warrant issued by the ICC.

Omar Al-Bashir is being searched for trial before the ICC for having allegedly committed some of the most serious crimes of international law, the prohibition of some, maybe all, of which have even reached the *status* of *jus cogens*¹²⁵ norm¹²⁶.

121 *Ibidem*.

122 *Ibidem*.

123 International Criminal Court. (2010). Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, No. ICC-02/05-01/09 (July 10, 2010). Retrieved from https://www.icc-cpi.int/CourtRecords/CR2010_04825.PDF.

124 Arrest Warrant of 11 April 2000, pp. 20-21, para. 47; Reyes v. Al-Malki and another, Judgment on appeals procedure, UKSC 61 (October 18, 2017), p. 12.

125 Those peremptory norms of international law of which no derogation is accepted, according to article 64 of the Vienna Convention on the Law of Treaties.

126 According to Escobar Hernández, all international crimes are in violation of peremptory norms of international law. See her Fifth report on immunity of State officials from foreign criminal jurisdiction, pp. 78-79, para. 193.

It is worth noting, though, that the seriousness of a breach does not have, as a consequence, the effect of removing a former agent's immunities. Those who advocate for this possibility have concerns for "impunity for international crimes, to serious human rights violations and to protection of the fundamental values of contemporary international law"¹²⁷. But it is not true to say that immunity entails impunity, as famously stated by the ICJ¹²⁸. Another common basis for recognizing an exception to immunity is to deny that the commitment of international crimes is an act that could possibly be regarded as an official function. This argument has been advanced by the Amsterdam Court of Appeals, though it has had critics from the doctrine¹²⁹ and from the United States¹³⁰.

There are other arguments set out to defend both positions, but, according to Escobar Hernández¹³¹, the current debate was sparked by a case judged in 1999, by the UK's House of Lords, in the Pinochet case, in which it was ruled that Pinochet, a former head of State, cannot enjoy immunity *ratione materiae* for the acts of torture, when the States concerned have signed the Torture Convention¹³², which contains, in article 7 (1), a clause which obligates the States party to prosecute the perpetrators of such act¹³³. This view has been criticized by Hernández, since it would only apply to crimes which are foreseen in treaties; and, most importantly, because such treaty rule which requires a State to prosecute those crimes have the effect of establishing a jurisdiction, and not removing the immunity for such crime¹³⁴.

This topic has been studied by the International Law Commission, with Ms. Escobar Hernández being appointed as *Special Rapporteur* (substituting the previous one, Roman Kolodkin). It has been discussed in the annual sessions of 2016 and of 2017, and it resulted in the previous adoption of Draft Article 7¹³⁵, which contains a list with 6 crimes that could serve as

127 *Ibidem*, pp. 10-11, para. 19.

128 "It concludes that immunity does not mean impunity", as there would be alternative means of prosecution. See Arrest Warrant of 11 April 2000, p. 21, para. 48.

129 D'Argent, P. (2013). Immunity of State Officials and Obligation to Prosecute, p. 252.

130 General Doland B. Verrilli Jr. (2015). Brief for the United States as Amicus Curiae, In Mohamed Ali Samantar, Petitioner v. Bashe Abdi Yousuf et al. No. 13-1361, Supreme Court of the United States (January, 2015). Retrieved from <http://sblog.s3.amazonaws.com/wp-content/uploads/2015/01/13-1361-Samantar.pdf>.

131 Hernández, C. E. (2016). Fifth report on immunity of State officials from foreign criminal jurisdiction.

132 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly of the United Nations, December 10, 1984. Retrieved from https://treaties.un.org/doc/Treaties/1987/06/19870626%2002-38%20AM/Ch_IV_9p.pdf.

133 R v. Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet. See also, with a similar position, D'Argent, P. (2013). Immunity of State Officials and Obligation to Prosecute.

134 Hernández, C. E. (2016). Fifth report on immunity of State officials from foreign criminal jurisdiction, pp. 83-87.

a basis for dismissing functional immunity¹³⁶. By reading her arguments in the defense of such exceptions (which were slightly different in her Fifth Report), most of the attention was focused on national and international practice (no less than 45 out of 99 pages of the Report were dedicated on this issue). However, this study was said to be flawed; in fact, on the subsequent “Symposium on the Present and Future of Foreign Official Immunity”¹³⁷, the common trace found in the contributors was that the practice she found was either insufficient, or not relevant, or both.

In light of this, the question remains if the aforementioned Draft Article 7 constitutes *Lex Lata* or *Lex Ferenda* since the International Law Commission has a mandate both for codifying international law and to foster its development¹³⁸. The Fifth Report intentionally does not make it clear, but three external aspects can indicate what this draft article stands for.

First of all, it was provisionally adopted by voting, an uncommon practice of the International Law Commission, which usually ends discussions with a consensus¹³⁹. Additionally, the States’ reaction in the Sixth Commission of the General Assembly (responsible for legal matters) have criticized the provision adoption of this draft article; while 12 States supported its adoption, 22 States have disagreed or expressed concerns, and other 10 States said that a consensus should have been reached before provisionally adopting it¹⁴⁰. At last, it has been said that the language of Draft Article 7 is very close to that normally used in treaties, and it was,

135 General Assembly. (2017). Titles of Parts Two and Three, and texts and titles of draft article 7 and annex provisionally adopted by the Drafting Committee at the sixty-ninth session. Geneva: A/CN.4/L.893 (July 10, 2017). Retrieved from <https://undocs.org/A/CN.4/L.893>.

136 These are the crimes of genocide, crimes against humanity, war crimes, crime of apartheid, torture and enforced disappearance. Therefore, all the crimes listed in the Rome Statute are mentioned here, except the recently added crime of aggression, because it was argued that judicializing such acts in non-international tribunals runs against the sovereignty of States. See, in this respect, General Assembly. (2017). Immunity of State officials from foreign criminal jurisdiction. New York: A/72/10 (August, 2015). Report of the International Law Commission, Chapter VII, pp. 163-191. Retrieved from <http://legal.un.org/docs/?symbol=A/72/10>.

137 Contributions of Murphy, S.; Shen, Q; Webb, P; Forteau, M.; and Alebeek, R. (2018). Symposium on the Present and Future of Foreign Official Immunity. *AJIL Unbound*, v. 112, pp. 1-37, 2018.

138 General Assembly. (2011). Immunity of State officials from foreign criminal jurisdiction. New York: A/66/10 (August, 2011). Report of the International Law Commission, Chapter VII, p. 222, para. 119. Retrieved from <http://undocs.org/A/66/10>.

139 This has been noted by 4 of the 5 authors of the already mentioned Symposium on the Present and Future of Foreign Official Immunity, namely Murphy, Alebeek, Forteau and Shen.

140 Forteau, M. (2018). Immunities and International Crimes before the ILC: Looking for Innovative Solutions. Symposium on the Present and Future of Foreign Official Immunity. *AJIL Unbound*, v. 112, pp. 1-37, 2018. doi:10.1017/aju.2018.11.

thus, even suggested that the final version of this project of the ILC should take form of a treaty, so that this draft article can have legal effects¹⁴¹.

With the above considerations in mind, it is possible to read Draft Article 7 as not reflecting customary international law. Moreover, there might be some negative impacts of a provisional adoption of this draft article without expressing its nature as *lex lata* or *lex ferenda*¹⁴². It could even be argued that it should not even be part of a progressive development of international law, since it could trouble the peaceful relations between States¹⁴³.

Finally, it can be concluded that, at least at the current state of customary international law, there are no exceptions to the exercise of foreign criminal jurisdiction, when the accused is entitled to immunity *ratione materiae*. The possible cases in which a former official could have its immunity disregarded is when the States concerned are parties to a treaty establishing an obligation to prosecute. However, since Sudan is not a signatory of treaties containing this obligation for all the crimes of which Al-Bashir is being accused, it is not possible to affirm that he will not be entitled to functional immunity before foreign domestic courts in relation to the crimes allegedly committed. On the other hand, as already explained, he is not entitled anymore to immunity *ratione personae*, since the day he was ousted from power, in April 11, 2019.

2.3: The former president's international immunities

The immunity for Omar Al-Bashir, as already mentioned, can potentially protect him from the exercise of foreign domestic jurisdiction and from international jurisdiction. While the previous item focused on foreign domestic jurisdiction, it is now time to analyze if his position as a former president can protect him from international jurisdiction. Such immunity exists as a result of international customary law. In item 1.1, some general remarks were made about the irrelevance of official capacity and, to a lesser extent, to international immunities; therefore, reference will be made to the findings on that previous item to assess Al-Bashir's immunities.

141 Murphy, S. (2018). Immunity Ratione Materiae of State Officials from Foreign Criminal Jurisdiction: Where is the State Practice in Support of Exceptions?

142 There would be mainly 2 consequences for that. Firstly, the judges of national courts, who are not experts of international law, might get confused on the applicability of Draft Article 7, since the text adopted, and the discussions which led to it, were not clear on the matter. Secondly, if they apply this draft article, either thinking it has an enforceable nature – which is not the case if it is considered that this provision constitutes, at most, *lex ferenda* – or with bad faith (being politically motivated, as alerted by Sean Murphy on the symposium), extending a State's jurisdiction where there is none, this would possibly engage the international responsibility of the forum State.

143 General Assembly (2006). Immunity of State officials from foreign criminal jurisdiction. New York: A/61/10 (August, 2006). Report of the International Law Commission. Annex A, pp. 436-454. Retrieved from <http://legal.un.org/docs/?symbol=A/61/10>.

A first important remark to make is that, as explained, there are two different rules that were discussed. To the present discussion, it is not relevant to question if his position as a former head of State would “relieve him from responsibility under international law”¹⁴⁴, because it was concluded that such rule is part of international customary law, therefore, even if the acts he is being accused of were committed while he was still in office, they simply do not apply before international courts.

The relevant discussion here is whether there really is a customary law disregarding immunities before international courts. As briefly mentioned, there were some instances in which such customary rule was said to exist¹⁴⁵, and they are not without relevance – it was no less than the International Court of Justice, in the Arrest Warrant case, which expressly stated that no immunity applies before “international criminal courts, where they have jurisdiction”¹⁴⁶. This sentence underlines a condition for immunity to be disregarded, i.e., it is only applicable in cases where the criminal court is exercising its regular jurisdiction. Ultimately, it is equivalent to saying that Al-Bashir would only lose his immunity, if any, before an international court which has jurisdiction over the crimes to which he is being accused of.

This issue has also been dealt with by the International Criminal Court, in a recent landmark decision¹⁴⁷, in which the Appeals Chamber exposed the view agreeing with the International Criminal Court. In their judgment, they “confirmed the absence of a rule of customary international law recognizing Head of State immunity before international courts in the exercise of jurisdiction”¹⁴⁸. Moreover, a joint concurrent opinion of 4 judges¹⁴⁹ (of a total of 5, therefore with a good degree of authority) supports the view that the discussion on immunity is only applicable where an international court has jurisdiction. In an institutional interview, the ICC prosecutor endorsed the same idea¹⁵⁰.

144 International Law Commission (1950), Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal

145 See *supra*, notes 30 and 33.

146 Arrest Warrant of 11 April 2000, p. 25, para. 61.

147 Prosecutor v. Omar Hassan Ahmad Al-Bashir, Judgment in the Jordan Referral re Al-Bashir Appeal.

148 *Ibidem*, pp. 57-58, para. 113.

149 Prosecutor v. Omar Hassan Ahmad Al-Bashir, Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, Judgment in the Jordan Referral re Al-Bashir Appeal, No. ICC-02/05-01/09-397-Anx1-Corr (May 6, 2019), p. 6, para. 8, and p. 77, para. 188. Retrieved from https://www.icc-cpi.int/RelatedRecords/CR2019_02857.PDF.

150 International Criminal Court. (2019). Questions and Answers regarding Appeals Chamber’s 6 May 2019 judgment in the Jordan referral Re Al-Bashir appeal, No. ICC-PIOS-Q&A-SUD-02-01/19_ENG (May, 2019). Retrieved from <https://www.icc-cpi.int/itemsDocuments/190515-al-bashir-qa-eng.pdf>.

Furthermore, these judges have expressed the view that such immunity is not confined to heads of State¹⁵¹; indeed, they argue that “the evolution of customary law, to the effect that not even heads of State may enjoy immunity before international criminal courts, did not limit the anti-immunity norm to former heads of State”¹⁵². It would be somewhat difficult, in fact, to accept a view whereby the most protective type of immunity, *ratione personae*, does not apply before international criminal courts, whereas the lesser protective, *ratione materiae*, would subsist. Such affirmative seems to be logically ill-founded.

In conclusion, Omar Al-Bashir, entitled to immunity *ratione materiae* under some circumstances, cannot rely on it when it comes to international criminal jurisdictions, based a relatively settled case-law. If the authority of the International Court of Justice, affirming the customary nature of such a rule, and the Appeals Chamber of the ICC, in the specific context of international criminal jurisdictions, further developed this reasoning, then it leaves little space for those who might disagree with this view.

However, this is a general view on his immunities based on customary law. It may be the case that a treaty can provide for such immunity, in derogation of customary international law. This being the scope of item 3.1, no more should be mentioned here.

151 *Ibidem*.

152 *Ibidem*, p. 72, para. 175.

CHAPTER 3 – THE EFFECTS OF OMAR AL-BASHIR’S IMMUNITY ON THE ICC PROCEEDINGS

The general state of the law and the specificities of the Omar Al-Bashir’s immunities are set – as a former head of State, he enjoys immunity *ratione materiae*, which is applicable before foreign domestic courts, with no exceptions for international crimes, but which does not apply in international criminal jurisdictions according to customary international law.

It is now advisable to proceed with the analysis of his immunities before the International Criminal Court, this time based mostly on the Rome Statute and treaty law, to then verify which obligations may fall on States, be they members of the Statute or not. Reference will also be made to Resolution 1593, which referred the case to the ICC, and might have imposed a different treatment for Sudan, requiring it to cooperate in a special way. This possible difference will also be object of this chapter, in item 3.3.2.

3.1: Consequences of Al-Bashir’s immunity on the ICC’s jurisdiction

Since Omar Al-Bashir does not enjoy immunity before the ICC on the basis of customary international law, the alternative would be to verify if there is anything in the Rome Statute which might offer him such immunity; if there is, then the arrest warrants issued against him were unlawful. To assess this, two issues will be addressed.

Firstly, it is necessary to assess the Court’s jurisdictional basis on Sudan, since, as explained in item 2.3, it is only then that a discussion on immunities is relevant. The discussion on his immunity, in its turn, has to analyze the applicability of article 27 (2) of the Rome Statute. Then, it must be seen if article 98 (1) Statute was respected, i.e., if the Court urged the addressees of the arrest warrant to act inconsistently with their obligations concerning immunities, as seen above (item 1.3). Thus, to begin setting the relevant legal framework within the Rome Statute, a brief summary of the proceedings could be made.

Because of his actions which might amount to international crimes, Omar Al-Bashir gained attention of the international community, with concerns of impunity. As a consequence, for some of the crimes he allegedly committed, he was object of an investigation by the International Criminal Court. After the investigations commenced in 2005, the prosecutor has “submitted an application for the issuance of a warrant of arrest for the Sudanese president”¹⁵³, in

153 Case Information Sheet (The Prosecutor v. Omar Hassan Ahmad Al-Bashir). ICC-PIDS-CIS-SUD-02-006/18_Eng. April, 2018. International Criminal Court. <https://www.icc->

2009, partially upheld by the Pre-Trial Chamber I¹⁵⁴. However, since the arrest warrant did not contain the crime of genocide, the prosecutor appealed, and the Appeals Chamber ordered the Pre-Trial Chamber to rule again on the issue¹⁵⁵, and this time it issued a second warrant of arrest, for the commitment of crimes against humanity, war crimes and crimes of genocide¹⁵⁶.

Starting with the analysis of the Court's jurisdiction, the relevant provision is Article 13, since it sets the three instances that can legally trigger the jurisdiction of the ICC. They are, first, a referral of a situation by a State party; second, a referral by the Security Council; and third, when the prosecutor acts *proprio motu* (on its own initiative). However, Sudan is not a party to the Statute¹⁵⁷, therefore, the only possible way of activating the Court in this case is through a Security Council referral, under Article 13 (b).

This was, indeed, the legal basis presented before the ICC, which had its jurisdiction triggered by the Resolution 1593 of the Security Council, as explained by the concurring judges in the recent Jordan appeal¹⁵⁸. As a result, the Court established its jurisdiction in conformity with its Statute, and with the authority of the Security Council resolution, therefore a coherent legal basis, the outcome of which is to remove any immunities attached to Al-Bashir from jurisdiction of the International Criminal Court on the basis of customary international law, as clarified in item 2.3.

The second level of analysis is related to the applicability of article 27 (2) of the Rome Statute. The main concern here is if the Rome Statute is applicable to Sudan or not, and this would only be possible through the effects of Resolution 1593 on Sudan.

In the majority's position, Sudan is in an analogous position of a Member State, for purposes of the situation in Darfur, for a number of reasons. First, the Pre-Trial Chamber I has decided that the investigations and procedures arising out of the Security Council's resolution

[cpi.int/CaseInformationSheets/albashirEng.pdf](https://www.icc-cpi.int/CaseInformationSheets/albashirEng.pdf).

154 International Criminal Court. (2009). Warrant of Arrest for Omar Hassan Ahmad Al Bashir, No. ICC-02/05-01/09 (March 4, 2009). Retrieved from https://www.icc-cpi.int/CourtRecords/CR2009_01514.PDF.

155 Case Information Sheet (The Prosecutor v. Omar Hassan Ahmad Al-Bashir).

156 International Criminal Court. (2010). Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir.

157 Assembly of the States Parties (ICC). N.d. Retrieved August 9, 2019 from https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx.

158 In particular, paragraph 401 of the opinion is express in this sense: 401. No doubt, when article 27(2) speaks of the Court exercising 'its jurisdiction'—. See Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, Judgment in the Jordan Referral re Al-Bashir Appeal

which shall not be barred—what is contemplated is the jurisdiction which the Court was entitled to 'exercise' by virtue of any of the means indicated in article 13. That surely includes the jurisdiction which it is entitled to 'exercise' when the Security Council, in the exercise of its Chapter VII powers, refers a situation to the Court, pursuant to article 13(b) of the Rome Statute.

“will take place in accordance with the statutory framework provided for in the Statute”¹⁵⁹; secondly, the Resolution did not set any procedure to be followed, therefore the Statute is expected to be the legal framework¹⁶⁰; furthermore, because the Court is only entitled to act following the provisions of its statute, according to its article 1¹⁶¹; and finally, because States are bound, by article 25 of the UN Charter, to “accept and carry out the decisions of the Security Council”¹⁶², and any conflicts that may arise between the Charter and other obligations, the previous shall prevail, according to article 103 of the same Charter¹⁶³.

These reasons set out above are indeed convincing, although it has encountered some disagreements¹⁶⁴. Be it as it may, if it is true, then, that the Rome Statute is the applicable law in the prosecutions arising out of the investigation in Darfur, then the matter of immunity for Omar Al-Bashir has to be solved according to it. In this case, the applicable law is article 27 (2), which dismisses immunities attached to “the official capacity of a person”, as the article says. Therefore, it is possible to conclude that, neither in international customary law, nor in treaty law, does Al-Bashir has any immunities before the ICC and, consequently, in foreign domestic jurisdictions in relation to proceedings related to the International Criminal Court, as clarified in item 1.2 above.

As for the issue whether the addressees of the arrest warrant were asked to act inconsistently with their obligations, a separate analysis on ICC’s member States (item 3.2) and on its non-member States (item 3.3) will be made.

159 Prosecutor v. Omar Hassan Ahmad Al-Bashir, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al-Bashir, p. 16, para. 45.

160 Akande, D. (2009). The Legal Nature of Security Council Referrals to the ICC and Its Impact on Al Bashir's Immunities. *Journal of International Criminal Justice*, p. 340.

161 De Wet, E. (2015). The Implications of President Al Bashir's Visit to South Africa for International and Domestic Law, p. 1058.

162 Charter of the United Nations and Statute of the International Court of Justice.

163 De Wet, E. (2018). Referrals to the International Criminal Court Under Chapter VII of the United Nations Charter and the Immunity of Foreign State Officials’. *Symposium on the Present and Future of Foreign Official Immunity*. *AJIL Unbound*, v. 112, pp. 33-37, 2018. doi:10.1017/aju.2018.13.

164 For a contrary view, see Tladi, D. (2015). The duty on South Africa to Arrest and Surrender President Al-Bashir under South African and International Law, pp. 1041-1043; he does not accept that Sudan is a member-State-like of the Rome Statute, recognizing his minority view, but arguing nonetheless that Resolution 1593 should have been express when dismissing rules of international law, therefore it only had the power of triggering the ICC’s jurisdiction, not waiving the immunity of Omar Al-Bashir. This argument was already seen above, in note 78, by Gaeta, P. (2009). Does President Al Bashir Enjoy Immunity from Arrest?.

3.2: The obligations falling on member States

The States party to the Rome Statute have agreed, by virtue of its Part IX, on a general obligation to fully cooperate with the International Criminal Court. Its basic rule is in article 86, which, although is very general, serves to block member States from non-complying with this obligation claiming that a certain situation is not explicit in the Statute¹⁶⁵. However, this is the area where the Court is most vulnerable, because it depends on the will of States to comply with this obligation¹⁶⁶.

In fact, it seems that this concern is well-founded. The reason for this is because the ICC, in its cases where it had to decide on the issue of cooperation, ruled in all its 7 Pre-Trial Decisions and in the recent Jordan appeal before the Appeals Chamber that the States concerned have failed to comply with their obligations to arrest or surrender Al-Bashir under the Rome Statute¹⁶⁷. Al-Bashir's defiance of the Court's powers has gained notoriety¹⁶⁸, with scholars arguing that this failure to obtain custody of Al-Bashir might give credit to who sees the ICC as a weak institution¹⁶⁹. It cannot be forgotten, however, that due to its 2011 decision, Malawi has refused to hold an AU Heads of State Summit because they could not receive then president Al-Bashir without arresting him¹⁷⁰. This remains, though, a rather political discussion.

Whereas article 86 of the Statute provides for a general rule, the specific obligation that falls on member States is in its article 89¹⁷¹, which compels those States to arrest and surrender a person. With regard to the rationale of this rule, the Appeals chamber, making an interpretation of this provision in light of the object and purpose of the Statute, stated that parties of the Statute could not refuse to comply with a request to arrest or surrender by the Court because it has

165 Prosecutor v. William Samorei Ruto and Joshua Arap Sang, Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, No. ICC-01/09-01/11 (April 17, 2014). Retrieved from https://www.icc-cpi.int/CourtRecords/CR2014_03826.PDF.

166 Schabas, W. A. (2016). The International Criminal Court, p. 1269.

167 See notes 5 and 79 to 85, *supra*.

168 Addario, L. April 11, 2019. The fall of Omar Hassan al-Bashir, the 'spider' at the heart of Sudan's web.

169 Cacciatori, M. April 12, 2019. Al-Bashir: Why the ICC is between a rock and a hard place, The Conversation. Retrieved from <https://theconversation.com/al-bashir-why-the-icc-is-between-a-rock-and-a-hard-place-115388>;

Scharf, M. N.d. Introduction to International Criminal Law: Week 5: Specialized defences [online course]. Case Western Reserve University. Retrieved from <https://www.coursera.org/learn/international-criminal-law/lecture/HnJaQ/specialized-defenses>.

170 Joselow, G. June 8, 2012. Malawi Cancels AU Summit over Bashir Controversy. VoaNews. Retrieved from <https://www.voanews.com/africa/malawi-cancels-au-summit-over-bashir-controversy>.

171 Schabas, W. A. (2016). The International Criminal Court, p. 1292.

jurisdiction over “the most serious crimes of international concern” and because they agreed to “put an end to impunity for the perpetrators of these crimes”¹⁷².

In the case of Omar Al-Bashir, there is also a Security Council resolution, which decided to impose an obligation to the parties to the conflict in Darfur to fully cooperate with the ICC, while urging non-members States to do the same¹⁷³. Therefore, there doesn’t seem to be an obligation of member States to cooperate with the Court by virtue of the resolution. This is the reason why, according to Tladi, member States are obliged to cooperate with the ICC only by virtue of the Statute, and not by Resolution 1593 since, according to him, it only placed a duty to cooperate “on the situation State, Sudan”¹⁷⁴.

Some States have not complied with this obligation, as already shown, making the ICC Chambers decide on the issue, with regard also to the effect of Al-Bashir’s immunity, which, as shown above, does not prevent member States from complying with their obligations under the Rome Statute.

When these States fail to comply with a request to cooperate, the consequences are set out in article 87 (7) of the Rome Statute. It states that such a failure empowers the competent Chamber to determine the existence of such failure and to “refer the matter to the Assembly of States Parties”¹⁷⁵ or to the Security Council when the case arose out of its referral. This referral is discretionary at its essence¹⁷⁶. However, the Appeals Chamber decided that it could only refer a non-compliance if it “is grave enough to prevent the Court from exercising its functions and powers under the Statute”¹⁷⁷.

In the case of Jordan’s failure to arrest and surrender Al-Bashir to the International Criminal Court, the Appeals Chamber decided that the Pre-Trial Chamber “failed to exercise its discretion judiciously when it decided to refer the matter of Jordan’s non-compliance to the Assembly of States Parties and the UN Security Council”¹⁷⁸ while, at the same time, recognizing Jordan’s failure to comply with the Court. The reasons for this is that such failure was not “grave enough”. In fact, the Pre-Trial Chamber had decided to exercise its discretion because it found

172 Prosecutor v. Omar Hassan Ahmad Al-Bashir, Judgment in the Jordan Referral re Al-Bashir Appeal, pp. 60-61, para. 121.

173 See below, item 3.3.

174 Tladi, D. (2015). The duty on South Africa to Arrest and Surrender President Al-Bashir under South African and International Law, p. 1034.

175 Schabas, W. A. (2016). The International Criminal Court, p. 1278.

176 Prosecutor v. Omar Hassan Ahmad Al-Bashir, Judgment in the Jordan Referral re Al-Bashir Appeal, p. 89, para. 192.

177 *Ibidem*, p. 87, para. 184.

178 *Ibidem*, p. 97, paras. 212-213.

that Jordan's *Note Verbale* did not amount to a consultation with the Court asking for directions, pursuant to article 97 of the Rome Statute¹⁷⁹. The Appeals Chamber, on the other hand, interpreted the document's nature differently, which resulted in an overturn of the Pre-Trial Chamber's ruling¹⁸⁰.

What is interesting to note is that the disagreement between the chambers was in a point of fact, not of law – had the Pre-Trial Chamber found that the *Note Verbale* was in accordance with article 97 of the Statute, it would probably not have referred the case to the Assembly of States parties and the UN Security Council.

3.3: The obligations falling on non-member States

The International Criminal Court is subject to the constraint under article 98 (1) of the Rome Statute, according to which the Court may not request the cooperation of third States if, by so doing, such State would have to disregard the immunity of the person sought (see item 1.3). Therefore, following the discussions in items 2.1 and 2.2, Al-Bashir is still entitled to immunity *ratione materiae*. Therefore, the issue here is to question if an obligation of arrest or surrender can exist for non-member States.

3.3.1. General obligations

Due to the relative effect of treaties, non-member States do not have obligations before the International Criminal Court. This also includes an absence of a duty of cooperation, although they are encouraged to participate; such determination is in article 87 (5) of the Rome Statute. Under this article, a State is only obliged to cooperate with the Court by means of a special agreement [article 12 (3)] or by a resolution of the Security Council¹⁸¹.

Ultimately, then, the question is whether Resolution 1593 has the effect of compelling non-member States to the Rome Statute to arrest and surrender Al-Bashir to the ICC. It has been argued that, while the Resolution has the power to remove immunities for the former president, it does not create an obligation on member States to arrest and surrender him (or, more generally,

179 Prosecutor v. Omar Hassan Ahmad Al-Bashir, Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir, pp. 18-19, para. 47. Prosecutor v. Omar Hassan Ahmad Al-Bashir, Judgment in the Jordan Referral re Al-Bashir Appeal, p. 95, para. 207.

180 Schabas, W. A. (2016). *The International Criminal Court*, p. 1278.

181 *Ibidem*, p. 1276.

to cooperate with the Court), it merely gives them a permission¹⁸². If one looks at the Resolution, however, it is easy to perceive that the Security Council has simply urged “all States (...) to cooperate fully”¹⁸³. This has led Paola Gaeta to argue that non-member States were not entitled to arrest and surrender Al-Bashir, since the cooperation to which the Resolution refers is limited by the statutory framework applicable to ICC proceedings¹⁸⁴. Worth noting, though, is the fact that she considers the request for arrest and surrender by the Court unlawful¹⁸⁵; perhaps she might have reached a different conclusion, had she analysed another request which she deems lawful.

Following the same reasoning, the Appeals Chamber has ruled, on the Jordan Appeal case, that the International Criminal Court can only act through its Statute, meaning that also the cooperation regimes have to be those foreseen in the Rome Statute¹⁸⁶. Therefore, so the Chamber goes, either States cooperate by virtue of articles 86 and following (for member States), or the “more limited regime for States not parties to the Statute”¹⁸⁷ in article 87 (5), and this notwithstanding a referral of the Security Council Resolution.

In any case, regarding the *régime* applicable for non-compliances, whereas for member States, as seen, the breach of the duty to cooperate triggers article 87 (7) of the Rome Statute, for non-member States, the breach of the obligation to cooperate with the request for surrender or assistance is in breach only of article 25 of the UN Charter, according to Liechtenstein’s ambassador¹⁸⁸. If they don’t cooperate, then the competent chamber may decide to refer the matter to the Security Council according to 87 (5) (b) of the Rome Statute¹⁸⁹. The Security Council, in turn, could take appropriate actions, pursuant to article 17 of the Assembly of States Parties’s Resolution ICC-ASP/3/Res.1¹⁹⁰. It does not, however, specify which actions to be taken, it only uses generic terms¹⁹¹.

182 Akande, D. (2009). The Legal Nature of Security Council Referrals to the ICC and Its Impact on Al Bashir's Immunities. *Journal of International Criminal Justice*, pp. 347-348; De Wet, E. (2015). The Implications of President Al Bashir's Visit to South Africa for International and Domestic Law, pp. 1062-1063.

183 Security Council resolution 1593, S/RES/1593, item 2.

184 Gaeta, P. (2009). Does President Al Bashir Enjoy Immunity from Arrest? pp. 331-332.

185 For the reasons state *supra*, note 56.

186 Prosecutor v. Omar Hassan Ahmad Al-Bashir, Judgment in the Jordan Referral re Al-Bashir Appeal, p. 68, para. 137.

187 *Ibidem*.

188 Security Council. (2012). 6849th meeting (transcripts). S/PV.6849 (Resumption 1) (October 17, 2012), p. 2. Retrieved from https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_pv_6849_resumption_1.pdf.

189 Schabas, W. A. (2016). *The International Criminal Court*, p. 379.

190 Negotiated Draft Relationship Agreement between the International Criminal Court and the United Nations, adopted by the ICC Assembly of States Parties, September 7, 2004, ICC-ASP/3/Res.1. Retrieved from https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-ASP3-Res-01-ENG.pdf.

191 *Ibidem*, article 17 – “(...) The Security Council, through the Secretary General, shall inform

3.3.2. *Specific obligations on Sudan?*

As seen in the previous item, some authors have disagreed on the obligation of non-member States to the Rome Statute to cooperate with the International Criminal Court, mostly based on the language used in the resolution of the Security Council. On the other hand, and for the same reason, there seems to be, in UNSC Resolution 1593, an indisputable obligation of Sudan to cooperate with the Court¹⁹². A very similar, almost identical wording is used in the UNSC Resolution 1970, which referred the situation in Libya to the ICC¹⁹³, thus imposing *ex aequo* obligations on both addressees. Therefore, it doesn't seem fruitful to discuss if the general obligation that possibly applies to non-member State applies, in turn, to Sudan, because such obligation exists.

However, the fact that Sudan is undoubtedly bound to do so, by virtue of article 25 of the UN Charter, as explained, can already be seen as a specific obligation, even more if it is considered the fact that Omar Al-Bashir is, at the present date, in the territory of Sudan. It could be thought, then, that since he was ousted from power, it was likely that he would be surrendered to the ICC; however, the military council in power has repeatedly said that they would not do so¹⁹⁴. Instead, it has been reported that they may trial Al-Bashir themselves¹⁹⁵. Therefore, if Sudan, indeed, trial its former president according to respected standards of criminal justice, would there still be an obligation to surrender him to the Court?

In this context, the president of the Security Council has made a statement that Sudan should “cooperate fully with and provide any necessary assistance to the International Criminal Court (...), while stressing the principle of complementarity of the International Criminal

the Court through the Registrar of action, if any, taken by it under the circumstances”.

192 Security Council resolution 1593, S/RES/1593, item 2: “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 and other international organizations to cooperate fully”.

193 Security Council resolution 1970, S/RES/1970, item 5: “Decides that the Libyan authorities 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 and other international organizations to cooperate fully with the Court and the Prosecutor”.

194 Declan, W. May 13, 2019. Sudan's Omar Al-Bashir Charged in Connection with Killing of Protesters. The New York Times. Retrieved from <https://www.nytimes.com/2019/05/13/world/africa/al-bashir-charged-sudan.html>.

195 Euronews. April 12, 2019. Sudan's overthrown president Omar Al-Bashir 'will not be extradited'. Reuters. Retrieved from <https://www.euronews.com/2019/04/12/sudan-s-overthrown-president-omar-al-bashir-will-not-be-extradited>.

Court”¹⁹⁶, therefore urging Sudan to “cooperate fully with the Court, consistent with Resolution 1593 (2005), **in order to put an end to impunity for the crimes committed in Darfur**”¹⁹⁷.

The preamble of the Rome Statute gives some indicatives on what should happen in such a case. According to it, the objective and purpose of the Rome Statute includes the punishment of the most serious crimes, the need to end impunity, the complementarity of the ICC in relation to national jurisdictions and, also, “the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”¹⁹⁸. As stated by the Appeals Chamber judge Pikis, “States Parties are enjoined to exercise the jurisdiction trusted to them. If they do not, a corresponding duty is cast upon the Court to investigate, prosecute and try the persons liable for the commission of one or more crimes punishable under the Statute”¹⁹⁹.

This statement gives some high authority to the possibility of States to prosecute individuals of the crimes which fall under the jurisdiction of the ICC, only upon the fail of which that a subsidiary obligation would rise to extradite the suspect for trial before the ICC²⁰⁰. On top of that, both the preamble and articles 1 and 17 of the Statute, which deals with admissibility of cases, reaffirm the principle of complementarity. In this sense, the ICC prosecutor has already stated that any case should be admissible under the conditions of article 17 before it proceeds, even if the Court’s jurisdiction was triggered out of a resolution of the Security Council (article 13 (b) of the Statute), which is the case at hand²⁰¹. As mentioned above, article 17 sets out issues of admissibility, one of which is the analysis whether a State is unwilling or unable to investigate or prosecute. Therefore, if Sudan decides to trial Al-Bashir, then the case could have its admissibility weakened.

To solve this issue, the text of article 89 (2) of the Statute indicates that the prosecution of Al-Bashir would still continue under the ICC jurisdiction. In theory, it deals with claims of *ne bis in idem* before national courts²⁰², therefore it would not be relevant. However, the ultimate effect of this provision is to allow a State to postpone the execution of an arrest warrant until the

196 Security Council. (2008). Statement by the President of the Security Council. S/PRST/2008/21 (June 16, 2008). Retrieved from <https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Sudan%20SPRST200821.pdf>.

197 *Ibidem*, emphasis added.

198 Rome Statute of the International Criminal Court, preamble.

199 Ex parte, Prosecutor only, Separate and partly dissenting opinion of Judge Georghios M. Pikis, in the judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", No. ICC-01/04-169-US-Exp (July 13, 2006). Retrieved from https://www.icc-cpi.int/CourtRecords/CR2006_01807.PDF.

200 Schabas, W. A. (2016). *The International Criminal Court*, p. 49.

201 Schabas, W. A. (2016). *The International Criminal Court*, p. 375.

202 *Ibidem*, pp. 1293-1294.

issue of admissibility before the ICC has been established²⁰³. Under this line of thought, it can be concluded that, once the case has been admitted before the International Criminal Court – and there is the moment when the issue of complementarity seems to be relevant – it can exercise its jurisdiction until the end.

On the other hand, the question still remains: if the purpose of Rome Statute is to establish a jurisdiction on the basis of complementarity, would it not be against it to obtain custody of suspects who are already being trialed at the national level with high standards of justice and human rights?

203 *Ibidem*.

CONCLUSION

By analysing the International Criminal Court's case-law and the concepts of general international law, it can be concluded that Omar Al-Bashir being ousted from power had practical implications in the proceedings before the Court.

Regarding immunities in general international law, it could be seen that a person may enjoy protection from the jurisdiction or enforcement both from foreign domestic courts and from international criminal courts, although the latter can only exist by means of a treaty derogating from the international customary law, which denies it.

Therefore, since the case studied is happening within the jurisdictional framework of the Rome Statute, it was questioned if articles 27 and 98 provide any specificity in this regard, to which it was contended that article 27 (2) reflects customary law, and that it applies both before the ICC and other States – but only member States, otherwise the applicable rule is article 98 (1) of the Statute. Such rule prevents the Court from requesting cooperation of member States if, by so doing, they would have to disregard their obligations towards non-member States concerning immunity. However, the Appeals Chamber has possibly settled a debate concerning the effects of a Security Council resolution in this issue, arguing that, since Sudan is bound, by Resolution 1593, to “cooperate fully with the Court”, there can be no immunity for Al-Bashir.

However, if he travels to a third State (non-member State), there is still the question whether this State could arrest and surrender him to the Court. To this end, it was seen that the difference between two types of immunities is that he is only entitled to a residual immunity, commonly called *ratione materiae*, which affords no exceptions under customary international law, including for the crimes to which he is being charged with, notwithstanding their character of peremptory norms of international law (*jus cogens*). On the other hand, it was argued that Al-Bashir is not entitled to international immunities, since there are two high authorities denying such immunities under customary international law.

At last, it was seen that, not only does Al-Bashir is not entitled to immunity before the International Criminal Court under customary law, but also the Rome Statute expressly denies immunities under national or international law in article 27 (2). This discussion was relevant because, although not party to the Statute, the Security Council resolution had the effects of putting Sudan in a likewise position. In the last item, it was argued that Sudan, addressee of Resolution 1593, has the obligation to cooperate, and also to trial him, possibly relieving it of the obligation to cooperate with the Court, following the object and purpose of the Rome Statute.

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