

## **The Arrest Warrant for President al-Bashir: Immunities of Incumbent Heads of State and the International Criminal Court**

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### **Abstract**

In March 2009, the Pre-Trial Chamber (PTC) of the International Criminal Court (ICC) authorized the issue of an arrest warrant in respect of President al-Bashir of Sudan in relation to the alleged atrocities committed in Darfur. The request for the arrest warrant raised the issue of whether a serving head of state may rely upon immunity under international law to shield themselves from proceedings before international criminal tribunals. The decision was the first occasion on which the question of state immunity has been raised before the ICC and the first time an international criminal tribunal has considered the issue in respect of an incumbent head of state. This article will first consider the current status of head of state immunity in customary international law. It will then assess the applicability of the immunity of heads of state or government before international criminal tribunals, in particular the ICC, before examining the decision of the PTC as to whether the immunity enjoyed by President Bashir precluded proceedings before the ICC. Finally, the article will discuss the obligation of states, including Sudan, to comply with the Court's request for cooperation in the execution of the arrest warrant.

### **1. Introduction**

On 14 July 2008, the Prosecutor of the International Criminal Court (ICC) requested the Pre-Trial Chamber (PTC) to issue an arrest warrant in respect of the President of Sudan, Omar Hassan al-Bashir.<sup>1</sup> On 4 March 2009, on the basis of evidence provided to it by the Prosecutor, the PTC granted the application in part and authorized the issue of the arrest warrant.<sup>2</sup> In so doing, the PTC indicated that it was satisfied that there were reasonable grounds to believe that

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<sup>1</sup> Office of the Prosecutor, 'Prosecutor's Statement on the Prosecutor's Application for a Warrant of Arrest under Article 58 against Omar Hassan Ahmad Al Bashir' and 'Summary of the Prosecutor's Application for Warrant of Arrest under Article 58 against Omar Hassan Ahmad Al Bashir', 14 July 2008 (hereafter 'Prosecutor's Application').

<sup>2</sup> *Prosecutor v al-Bashir*, Decision on the Prosecutor's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Public Redacted Version, ICC Pre-Trial Chamber I, ICC-02/05-01/09, 4 March 2009 (hereafter 'Arrest Warrant Decision').

President Bashir has committed a crime within the jurisdiction of the Court and that his arrest was necessary in order to secure his presence for trial, to preserve the integrity of the trial or investigation process from their interference and to prevent the commission of further or related crimes.<sup>3</sup> At the request of the PTC, the Registry issued the arrest warrant the same day, transmitting the warrant, together with a request for cooperation, to authorities in Sudan, all states parties to the Rome Statute and all member states of the United Nations.<sup>4</sup>

The Prosecutor had presented evidence implicating President Bashir in three counts of genocide under Article 6 of the Rome Statute for encouraging action to kill members of the Fur, Masalit and Zaghawa ethnic groups; five counts of crimes against humanity under Article 7(1) of the Rome Statute for directing the murder, extermination, forcible transfer, torture and rapes of various ethnic groups; and two counts of war crimes under Article 8(2) of the Rome Statute for attacking civilians and pillaging towns.<sup>5</sup> A majority of the PTC found that the Prosecutor had failed to provide sufficient evidence to demonstrate reasonable grounds to believe that the Government of Sudan had acted with the requisite *dolus specialis* for genocide.<sup>6</sup> The majority did emphasize that if the ongoing investigation revealed additional evidence, the Prosecutor could request an amendment to the arrest warrant to include genocide charges.<sup>7</sup>

The PTC found that there were reasonable grounds to believe that (1) a protracted armed conflict not of an international character had existed in Sudan since early 2003 between the Government of Sudan and various armed groups,<sup>8</sup> in the context of which unlawful attacks against civilians and civilian objects had been carried out and towns and villages pillaged;<sup>9</sup> (2) a widespread and systematic attack had been knowingly carried out against the civilian population since early 2003,<sup>10</sup> comprising at least the crimes of murder, extermination, forcible transfer, torture and rape;<sup>11</sup> and (3) President Bashir was criminally responsible for these

<sup>3</sup> Art. 58(1), Statute of the International Criminal Court, Rome, 17 July 1998, in force 2 July 2002; (1999) 37 ILM 999 ('Rome Statute'). The PTC considered that the arrest of President Bashir was necessary under all three limbs of this test: see paras. 227–236, *Arrest Warrant Decision*.

<sup>4</sup> Warrant of Arrest for Omar Hassan Ahmad al-Bashir, issued on 4 March 2009.

<sup>5</sup> Prosecutor's Application.

<sup>6</sup> Para. 206, *Arrest Warrant Decision*. The PTC thus reached a similar conclusion to the United Nations Commission of Inquiry, which in 2005 had concluded that the Government of Sudan had not committed genocide in Darfur as the relevant special intent was missing, at least as far as central government authorities were concerned: Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 25 January 2005, paras. 508–512. For further discussion on the request for the inclusion of genocide charges, see Cayley, A., ‘The Prosecutor’s Strategy in Seeking the Arrest of Sudanese President Al Bashir on Charges of Genocide’, (2008) 6 *JICJ* 829.

<sup>7</sup> Para. 207, *Arrest Warrant Decision*. See also Art. 58(6), Rome Statute.

<sup>8</sup> *Ibid.*, para. 70.

<sup>9</sup> *Ibid.*, paras.76–77.

<sup>10</sup> *Ibid.*, para. 89.

<sup>11</sup> *Ibid.*, paras. 94, 97, 100, 104 and 108.

unlawful acts, either as an indirect perpetrator or indirect co-perpetrator,<sup>12</sup> by virtue of the control he exercised over the state apparatus of Sudan and the role he played in the intentional criminal policy.<sup>13</sup>

In addition to whether the test for the issue of an arrest warrant had been satisfied, the request for an arrest warrant in respect of President Bashir raised the issue of the immunity to be enjoyed by a head of state of a non-state party to the Rome Statute in proceedings before the ICC. As the President of Sudan, President Bashir may invoke immunity from criminal processes in third states and possibly before international criminal tribunals. Although the request for the arrest warrant does not represent the first time a head of state or government had been the subject of proceedings before an international criminal tribunal, both President Milosevic and President Taylor were no longer serving heads of state when they were brought within the custody of the relevant tribunal.<sup>14</sup> Thus, the request was the first occasion on which an international criminal tribunal has been required to consider the immunity of an incumbent head of state. This article considers whether immunities under international law may be pleaded before an international criminal tribunal, in particular the ICC, and the significance of the referral to the ICC by the Security Council to this question.

The issue of immunity is relevant in two respects. First, there is the matter of whether the ICC was competent to issue the arrest warrant and ultimately to proceed to a trial of President Bashir.<sup>15</sup> The PTC found that the official status of President Bashir did not preclude his trial before the ICC.<sup>16</sup> Second, what is the effect of the issue of the arrest warrant on the obligations of state parties—and non-states parties—to arrest and surrender President Bashir if he were to come within their territory?<sup>17</sup> As the ICC has no independent power of arrest, it is now dependent upon either President Bashir to voluntarily surrender himself to the ICC or for states to execute the arrest warrant. If President Bashir enjoys immunity under international law, third states may be entitled to refuse to arrest him and to surrender him to the ICC.

<sup>12</sup> Art. 25(3)(a), Rome Statute. For further discussion, see F. Jessberger and J. Geneuss, 'On the Application of a Theory of Indirect Perpetration in *Al Bashir*', (2008) 6 *JICJ* 853.

<sup>13</sup> Paras. 221–223, *Arrest Warrant Decision*.

<sup>14</sup> Slobodan Milosevic, President of the Federal Republic of Yugoslavia was first indicted by the ICTY whilst still in office on 24 May 1999: *Prosecutor v Milosevic et al.*, ICTY Case No IT-99-37, Indictment, 24 May 1999. Charles Taylor, President of Liberia, was first indicted by the SCSL whilst still in office on 3 March 2003: *Prosecutor v Charles Taylor* SCSL-03-01-PT-263, Indictment, 3 March 2003. See also the indictment issued in respect of Milan Milutinovic, President of Serbia, issued on 24 May 1999: *Prosecutor v Milosevic et al.*, *supra*.

<sup>15</sup> D. Akande, 'The Bashir Indictment: Are Serving Heads of State Immune from ICC Prosecution?', Oxford Transitional Justice Research Working Paper Series, 30 July 2008.

<sup>16</sup> Para. 41, *Arrest Warrant Decision*, discussed below.

<sup>17</sup> Akande, *loc. cit.*, fn. 15.

## 2. Immunity in International Criminal Law

The exact scope of protection offered by the laws of immunity, particularly in relation to international crimes, remains somewhat obscure. Unlike diplomatic immunity, there is no comprehensive treaty regulating state immunity and head of state immunity, so that the area is largely left to the provisions of customary international law.<sup>18</sup> In order to establish whether President Bashir enjoys immunity from proceedings before the ICC, it is necessary to examine briefly the rules concerning head of state immunity.

There are two types of immunity granted to state officials under international law: functional immunity (*ratione materiae*) and personal immunity (*ratione personae*). Functional immunity attaches to the acts of officials while they are in office. This type of immunity is limited, in that it only applies to those official acts carried out during the period of office. Officials may still be the subject of legal proceedings in respect of acts committed in a personal capacity, even where such acts were committed before or after their appointment. However, immunity *ratione materiae* will survive the cessation of office and, thus, may be claimed by former state officials. The second type of immunity enjoyed by state officials is known as immunity *ratione personae*. This immunity 'is conferred on officials with primary responsibility for the conduct of the international relations of the state'.<sup>19</sup> It protects the office holder in the exercise of their representative functions and is intended to facilitate the conduct of international relations. The rationale for immunity *ratione personae* is that the state requires certain state officials to be free to operate in the sphere of international relations, so as to allow the state to conduct effectively its international affairs and to maintain peaceful relations among states.<sup>20</sup> This freedom would be restricted if such officials were susceptible to legal proceedings before foreign courts, including arrest and detention. Therefore, the immunity enjoyed when in office is absolute, even in relation to international crimes,<sup>21</sup> and extends to all acts committed in a private

<sup>18</sup> European Convention on State Immunity, ETS No 74; United Nations Convention on the Jurisdictional Immunities of States and their Property, adopted by the General Assembly on 2 December 2004.

<sup>19</sup> D. Akande, 'International Law Immunities and the International Criminal Court', (2004) 98 *AJIL* 407, 409.

<sup>20</sup> *Case Concerning the Arrest Warrant of 11 April 2000* (Dem Rep Congo v Belg) (2002) 41 *ILM* 536 (*ICJ Arrest Warrant case*), Joint Separate Opinion Higgins, Koojimans and Buergenthal, para. 75. See Akande, *ibid.*, 409–10; H. Fox, 'The Resolution of the Institute of International Law on the Immunities of Heads of State and Government', (2002) 51 *ICLQ* 119.

<sup>21</sup> *Arrest Warrant case*, para. 58: the International Court of Justice held that it could not find 'under customary international law any form of exception to the rule according immunity from criminal responsibility and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity'. Akande notes that this principle has been applied by several national courts, and that '[J]udicial opinion and state practice on this point are unanimous': Akande, *loc. cit.*, fn. 19, p. 411, and the material cited in fns 26 and 27. See also

or personal capacity,<sup>22</sup> whether committed before or during the period of official service.<sup>23</sup> However, as the immunity is that of the state and not the individual, it does not survive the termination of office.<sup>24</sup> Although the category of officials entitled to personal immunity has not been defined, practice and academic opinion suggest that it would include heads of state and government, foreign ministers and possibly others.<sup>25</sup> Personal immunity is, thus, one of the key 'procedural bars to the exercise of jurisdiction'.<sup>26</sup>

The International Court of Justice (ICJ) has confirmed that the immunity of serving heads of state is absolute and that individuals cannot be the subject of legal proceedings in foreign courts or arrested while travelling abroad for as long as they remain in office.<sup>27</sup> However, the Court noted that 'immunity from jurisdiction ... does not mean that they enjoy impunity in respect of any crimes they might have committed'.<sup>28</sup> The Court accepted an exception to this general rule in four circumstances.<sup>29</sup> First, immunities accorded under international law do not bar criminal prosecution of such persons in their own state. Second, the state may always waive the immunity of an incumbent senior official. Third, a senior state official may be subject to criminal prosecution once they have left office, subject to any subsisting immunity *ratione materiae*. Finally, and most importantly for present purposes, the Court suggested that serving heads of state may be prosecuted before 'certain international courts, where they have jurisdiction'. Providing only limited material in support of this statement, the Court was satisfied merely to refer to the relevant provisions in the Statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) and Article 27(2) of the Rome Statute.

Although this statement is obiter dictum, as the ICJ was not required to determine the immunity applicable before an international criminal tribunal,<sup>30</sup> it has

M. Tunks, 'Diplomats or Defendants? Defining the Future of Head of State Immunity', (2003) 52 *Duke Law Journal* 651, 663.

<sup>22</sup> *ICJ Arrest Warrant* case, para. 54.

<sup>23</sup> *Ibid.*, paras. 54–55.

<sup>24</sup> Akande, *loc. cit.*, fn. 19, p. 410; Fox, fn. 20.

<sup>25</sup> It is accepted that heads of state and government possess functional immunity, as do diplomats, consular officials and officials on special missions: see A. Watts, 'The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers', (1994) 247 *RdC* 13; Vienna Convention on Diplomatic Relations 1961; Vienna Convention on Consular Relations 1963; United Nations Convention on Special Missions 1969. The International Court of Justice has held that foreign ministers also enjoy immunity, as may other senior state officials: *Arrest Warrant* case, paras. 51 and 53. A British court has recognized the immunity of a defence minister: Application for Arrest Warrant against General Shaul Mofaz, reprinted in (2004) 53 *ICLQ* 769.

<sup>26</sup> M. Frulli, 'The Question of Charles Taylor's Immunity: Still in Search of a Balanced Application of Personal Immunities', (2002) 2 *JICJ* 1118, 1126.

<sup>27</sup> *ICJ Arrest Warrant* case.

<sup>28</sup> *Ibid.*, para. 60.

<sup>29</sup> *Ibid.*, para. 61.

<sup>30</sup> The *ICJ Arrest Warrant* case concerned the immunity of the foreign minister of the Democratic Republic of the Congo before a national court.

been the subject of extensive debate.<sup>31</sup> The implication from the paragraph is that the absolute nature of immunity *ratione personae* exists only in relation to 'horizontal' criminal proceedings before foreign courts, and may not be pleaded in 'vertical' proceedings before international criminal courts. This ambiguous statement has been the basis for some very definite assertions that immunity cannot be pleaded as a bar to prosecution before *all* international courts.<sup>32</sup> The Special Court for Sierra Leone (SCSL) applied the dictum in a decision concerning the immunity *ratione personae* of Charles Taylor,<sup>33</sup> finding that, as the SCSL was an international criminal tribunal, the immunity normally accorded to an incumbent head of state was not a bar to the exercise of jurisdiction by the SCSL.<sup>34</sup>

However, the ICJ's reference to 'certain international criminal tribunals' suggests that not all international criminal tribunals may exercise jurisdiction in respect of current heads of state. This statement is correct; it is not sufficient to remove the immunity of an incumbent head of state merely to assert that a tribunal is international in nature.<sup>35</sup> Yet, the ICJ provided no guidance as to the criteria to be applied, beyond referring to the three existing international criminal tribunals. The approach adopted also fails to take into account the different legal bases of the tribunals considered.<sup>36</sup> For instance, where a tribunal is established by a treaty, the international nature of a court does not, in itself, allow for the exercise of jurisdiction over nationals of a non-party state.<sup>37</sup> Rather, in order to ascertain whether a tribunal falls within the dictum of the ICJ in the

<sup>31</sup> For example, see Akande, *loc. cit.*, fn. 19; A. Orakhelashvili, 'Case Report: Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)', (2002) 96 *AJIL* 677; A. Cassese, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo v Belgium* Case', (2002) 13 *EJIL* 853; S. Wirth, 'Immunity for Core Crimes? The ICJ's Judgment in the *Congo v Belgium* Case', (2002) 13 *EJIL* 877; and J. Wouters, 'The Judgment of the International Court of Justice in the *Arrest Warrant* Case: Some Critical Remarks', (2003) 16 *LJIL* 253.

<sup>32</sup> R. Alebeek, *The Immunity of States and their Officials in International Criminal Law and International Human Rights Law* (2008) 279.

<sup>33</sup> *Prosecutor v Charles Taylor*, SCSL-03-01-I-059, Decision on Immunity from Jurisdiction, 31 May 2004.

<sup>34</sup> *Ibid.*, paras. 38, 41 and 53. This decision can be subject to criticism for failing to take into account the treaty-based nature of the SCSL. As the SCSL was established by a treaty between the United Nations and Sierra Leone, the Agreement on the Establishment of a Special Court for Sierra Leone, 16 January 2002, it may not affect the immunity accorded to the incumbent head of state of a third state, Liberia, without that state's waiver of immunity. See Akande, fn. 19, pp. 417–418; S. Nouwen, 'The Special Court for Sierra Leone and the Immunity of Taylor: The *Arrest Warrant* Case Continued', (2005) 18 *LJIL* 654 and Z. Deen-Racsmay, 'Prosecutor v Taylor: The Status of the Special Court for Sierra Leone and its Implications for Immunity', (2005) 18 *LJIL* 299.

<sup>35</sup> W. Schabas, 'Is an International Tribunal Equivalent to an International Criminal Court?', (2008) 21 *LJIL* 513, 523–534.

<sup>36</sup> This may be dealt with by the requirement that such courts must have jurisdiction: see W. Schabas, *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone* (2008) 329.

<sup>37</sup> Akande, *loc. cit.*, fn. 19, p. 418.

*Arrest Warrant* case, it is necessary to consider the nature of the court, its method of establishment and its constituent instrument. It must be determined whether the provisions of the instrument creating jurisdiction on the tribunal, expressly or implicitly, lift immunity and whether the state concerned is bound by that instrument.<sup>38</sup>

### 3. Immunity and the ICC

Thus, it is first necessary to examine the constituent instrument of the tribunal in question, in this case the Rome Statute, to determine whether that instrument has removed head of state immunity, either explicitly or implicitly. Article 27(2) of the Rome Statute provides: 'Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person'. This provision goes further than comparable provisions in the statutes of other international tribunals, declaring that procedural rules and immunities will not apply, irrespective of whether such conditions exist in national or international law.<sup>39</sup> Such procedural rules include all national regulations even if they rank as constitutional laws, and all provisions of general and international law. The article confirms the jurisdiction of the ICC in all situations, permitting it to exercise its authority without having to wait for a waiver of immunity.<sup>40</sup> Article 27(2) is, thus, an express removal of immunity.

However, it is also important to consider the method of establishment of the tribunal and whether a particular state is bound by the removal of immunity. The ICC was established by the Rome Statute, a treaty. Under Article 27(2), states parties have agreed, by ratifying the Rome Statute, to waive their right to procedural immunities under customary international law. As a general rule, treaties may only create obligations for states that are party to that treaty and a third state cannot be bound by the provisions of a treaty without its express consent.<sup>41</sup> This is reflected in the jurisdiction of the ICC, which is limited to nationals of state parties and/or acts conducted on the territory of a state party. Accordingly, the waiver of immunity contained in Article 27(2) has to be opted into and cannot

<sup>38</sup> This is similar to the approach adopted by Akande, *loc. cit.*, fn. 19, p. 418.

<sup>39</sup> Similar provisions may be found in the Charters of the International Military Tribunals for Nuremberg and Tokyo (Art. 7 and Art. 6, respectively), and the Statutes of the ICTY (Art. 7(2)), the ICTR (Art. 6(2)) and the SCSL (Art. 6(2)). However, these provisions provide that official capacity as a head of state or government shall not exempt an accused from criminal responsibility. Article 27(1) of the Rome Statute contains a similar provision. Commentators have suggested that this provision is not directed at the removal of immunity *per se*. Rather, the provision is intended to remove the substantive defence that an official acted in an official capacity when committing a crime and is not a rule as to the applicability of international law immunities.

<sup>40</sup> See O. Triffterer, 'Article 27: Irrelevance of Official Capacity' in O. Triffterer (ed.), *Commentary of the Rome Statute: Observers' Notes, Article by Article* (1999) 501.

<sup>41</sup> Art. 34, Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331.



be assumed on behalf of a non-party state. Article 27(2) may only remove the immunity from officials of states parties to the Rome Statute. This suggests that the ICC cannot ignore the immunity which would otherwise exist under customary international law in respect of a state that is not a party to the Rome Statute. Immunity appertains to the state, not the individual, and it is for the state concerned to waive the immunity.<sup>42</sup> Sudan is not a party to the Rome Statute and, as such, may plausibly assert that it has not waived the immunity of its President.<sup>43</sup> However, as a signatory to the Rome Statute, Sudan is obliged to refrain from acts that would defeat the object and purpose of the treaty, although it is debatable as to whether this would extend to a requirement to waive immunity.<sup>44</sup> Furthermore, the decision of the ICJ in the *Arrest Warrant* case confirms that a foreign state could not initiate proceedings in respect of President Bashir while he remains in office. In creating the ICC, states cannot do together what they cannot do alone (i.e. issue legal proceedings in respect of an incumbent head of state) and, therefore, President Bashir cannot be tried by a tribunal established by third states.

The parallel made in the *Arrest Warrant* case between the ad hoc tribunals established by the Security Council and the ICC is inaccurate.<sup>45</sup> There is a necessary distinction to be made between tribunals created by the Security Council and those established by treaty. The obligations on member states to cooperate with the ad hoc tribunals,<sup>46</sup> including the arrest and surrender of suspects, would be inconsistent with the obligation under customary international law to not subject officials of third states to legal proceedings. However, in accordance with the hierarchy established by the Charter, the obligation under Article 25 of the Charter to comply with a binding Security Council resolution adopted under Chapter VII would prevail.<sup>47</sup> This is regardless of the importance of the rule affected,<sup>48</sup> if fundamental human rights under relevant treaties can be qualified or displaced due to the precedence of the Council's powers under the Charter, immunity under customary international law may also be overridden, particularly given the 'constitutional' character of the Charter.<sup>49</sup> Thus, it is presumed that the Security Council, acting under Chapter VII of the Charter, may effectively remove

<sup>42</sup> This is based on the maxim, *par in parem non habet imperium*, which underlies the rule on personal immunity: Alebeek, fn. 32, p. 181.

<sup>43</sup> Although Sudan signed the Rome Statute on 8 September 2000, it has not yet deposited an instrument of ratification, and displays no intention of doing so.

<sup>44</sup> Art. 18, VCLT.

<sup>45</sup> W. Schabas, *An Introduction to the International Criminal Court* (2007) 232.

<sup>46</sup> Para. 4 of Resolution 827 (1993) (ICTY) and para. 2 of Resolution 955 (ICTR). See also Art. 29, ICTY Statute; Art. 28, ICTR Statute.

<sup>47</sup> See R. Bernhardt, 'Article 103' in Simma (ed.), *The Charter of the United Nations* (2nd ed., 2002), asserting that the provisions of Article 103 of the Charter extend to inconsistent obligations under customary international law, at pp. 1298–1299.

<sup>48</sup> The exception to this would be where a Security Council resolution is inconsistent with a rule of customary international law of a *jus cogens* nature.

<sup>49</sup> *R (on application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, 12 December 2007, 132–136 as per Lord Carswell.



immunity with respect to officials of member states of the United Nations. This certainly appeared to be the presumption in the *Milosevic* case before the ICTY in 1999.<sup>50</sup> Member states can be said to have agreed to this removal of immunity and the possible surrender of their officials to the tribunals by virtue of accepting the legal framework for the protection of international peace and security under the Charter. However, the Security Council may only do so where the conditions for the exercise of its powers under Chapter VII of the Charter have been satisfied, that the tribunal has been established in response to a threat to international peace and security.<sup>51</sup> However, the same cannot be said for a court established by a treaty between two or more states. Since the jurisdiction of the ICC is based on the delegation by states of jurisdiction, the Court may not exercise its jurisdiction in respect of the head of state of a state which has not consented to its authority.<sup>52</sup> Absent an express waiver of immunity from Sudan, this raises the question of the impact of the Council referral on the immunity of President Bashir.

It is clear that the Security Council can confer on the ICC jurisdiction it would not otherwise have.<sup>53</sup> It has done this by referring the situation in Darfur to the ICC.<sup>54</sup> However, what is the effect, if any, of the referral on the immunity enjoyed by an incumbent head of state, President Bashir? Neither the Rome Statute nor

<sup>50</sup> *Prosecutor v Milosevic*, ICTY Case No. IT-02-54-T, Amici Curiae Motion for Judgement of Acquittal Pursuant to Rule 98bis, 3 March 2004; and *Prosecutor v Milosevic*, ICTY Case No. IT-02-54-T, Prosecution Response to Amici Curiae Motion for Judgement of Acquittal Pursuant to Rule 98bis, 23 March 2004. Milosevic asserted that the ICTY lacked competence 'by reason of his status as former President'. The Trial Chamber interpreted this as a challenge to Article 7(2) of the ICTY Statute and concluded that '[T]here is absolutely no basis for challenging the validity of Article 7, paragraph 2, which at this time reflects a rule of customary international law': *Prosecutor v Slobodan Milosevic*, Decision on Preliminary Motions, 8 November 2001, paras. 28–34.

<sup>51</sup> This distinguishes the question of immunity before the Special Court for Sierra Leone, which was not established pursuant to a resolution of the Security Council utilising its powers under Chapter VII of the Charter.

<sup>52</sup> The Rome Statute delegates jurisdiction to the ICC on the basis of nationality and territoriality. For further discussion, see M. Morris, 'High Crimes and Misconceptions: The ICC and Non-Party States', (2001) 64 *Law & Contemp. Probs.* 13; D. Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits', (2003) 1 *JICJ* 618, 621; and M. Scharf, 'The ICC's Jurisdiction over Nationals of Non-Party States', (2001) 64 *Law & Contemp. Probs.* 67, 77.

<sup>53</sup> Art. 13(b), Rome Statute. Council referrals to the ICC need not be restricted to acts committed either by nationals of states parties or on the territory of a state party. For discussion as to whether referrals are subject to other jurisdictional restrictions in the Rome Statute, see L. Condorelli and S. Villalpando, 'Can the Security Council Extend the ICC's Jurisdiction?' in Cassese *et al.* (eds), *The Rome Statute of the International Criminal Court* (2002) 571.

<sup>54</sup> The situation in Darfur was referred to the ICC by the Council acting under Chapter VII of the Charter, and as provided for in Article 13(b) of the Rome Statute: UN Security Council Resolution 1593, UN doc S/RES/1593 (2005). For discussion of the referral, see: R. Cryer, 'Sudan, Resolution 1593 and International Criminal Justice', (2006) 19 *LJIL* 195; L. Condorelli and A. Ciampi, 'Comments on the Security Council Referral of the Situation in Darfur to the ICC', (2005) 3 *JICJ* 590; and M. Neuner,

Resolution 1593 expressly raised the immunity of the head of state of a non-party state where a situation concerning that state has been referred to the ICC by the Security Council. One argument is that while Article 27(2) does not remove the immunity of a non-state party, where a situation is referred to the ICC by the Security Council, proceedings before the ICC will be governed by the statutory framework of the ICC, including Article 27(2) of the Rome Statute. Thus, Article 27(2) would operate, in the limited circumstances of a Council referral, to expressly remove the immunity of officials of the affected state, here Sudan. However, this approach raises various issues. First, this approach requires the Council to override normally applicable rules of treaty and general international law, with the referral effectively imposing a treaty regime and apparatus on a state that has not given its consent to be bound to the instrument. The Council referral cannot make Sudan a party to the Rome Statute. In the case of a referral, the Rome Statute would not apply as a matter of treaty law—it applies solely by virtue of the Council's powers under Chapter VII of the Charter. Sudan remains a 'third state' and cannot be considered to be a party to the Rome Statute. The Security Council has arguably adopted a similar approach in relation to the establishment by Resolution 1757 of the Special Tribunal for Lebanon.<sup>55</sup> Second, as Sluiter notes, there may be significant practical and legal problems with adopting this approach. Resolution 1593 does not affect the position that Sudan is not actually a party to the Rome Statute and, thus, has not implemented the provisions of the Rome Statute into domestic law as would be required of a state party. This may mean that the requisite mechanisms or instruments to enable cooperation with the ICC do not exist, which may present potential legal loopholes.<sup>56</sup>

Another argument is that the Council has implicitly removed the immunity of President Bashir. The removal of immunity may be inferred from the act of the referral itself, the wording of Resolution 1593 and/or the wording of subsequent resolutions on the matter. By referring the situation in Darfur to the ICC, an institution that may exercise personal jurisdiction in relation to persons accused of committing the most serious of international crimes, the Council expected that senior officials, including those enjoying immunity under international law, may become the subject of an investigation.<sup>57</sup> Continued immunity for senior officials of the affected state would be inconsistent with the intended purpose of the referral. In these circumstances, the act of the referral itself would constitute an effective removal of immunity. Similarly, the obligation of Sudan to cooperate

'The Darfur Referral of the Security Council and the Scope of the Jurisdiction of the International Criminal Court', (2005) 8 *Ybk IHL* 320.

<sup>55</sup> B. Fassbender, 'Reflections on the International Legality of the Special Tribunal for Lebanon', (2007) 5 *JICJ* 1091.

<sup>56</sup> G. Sluiter, 'Obtaining Cooperation from Sudan—Where is the Law?', (2008) 6 *JICJ* 871.

<sup>57</sup> See comments by Akande and Milanovic on K. Jon Heller, 'ICC Prosecutor to Charge Sudan's President with Genocide' on *Opinio Juris* blog, available at <<http://opiniojuris.org/2008/07/11/icc-prosecutor-to-charge-sudans-president-with-genocide/>>.

with the ICC<sup>58</sup> would be inconsistent with an assertion of head of state immunity or, alternatively, requires Sudan to waive any immunity that may exist.<sup>59</sup> It would also be open to the Security Council to adopt a further resolution(s) to more clearly deal with the issue of immunity. This could include imposing an obligation on Sudan to arrest and surrender President Bashir<sup>60</sup> or a reference to the applicability of Article 27(2) in relation to President Bashir.<sup>61</sup> Sudan has consented to this removal of its immunity by the Council by virtue of its membership of the United Nations and its obligation under the Charter to comply with binding Council resolutions. This is not, however, to suggest that the ICC is not required to consider issues affecting the exercise of its jurisdiction, such as immunity. It remains proper, regardless of the source of its authority, for the ICC to consider such jurisdictional challenges, as the ICC must in all circumstances act as an independent judicial body.<sup>62</sup>

There is another argument that has been used to justify the removal of immunity in respect of President Bashir. As Sudan is a party to the Genocide Convention,<sup>63</sup> arguably Articles IV and V of that convention have lifted head of state immunity where the accused is charged with genocide.<sup>64</sup> The ICJ has recently indicated that the ICTY falls within the scope of Article VI of the Genocide Convention, as states have accepted the obligation to cooperate with the ICTY under the Charter.<sup>65</sup> This same argument would also apply to Sudan, as

<sup>58</sup> Resolution 1593, para. 2.

<sup>59</sup> A. Ciampi, 'Obligation to Cooperate' in Cassese *et al.* (eds), *The Rome Statue of the International Criminal Court* (2002) 1631.

<sup>60</sup> The Security Council has imposed obligations to arrest and surrender named individuals in previous resolutions in other contexts. For example, in Resolution 1267 (1999), the Council demanded that 'the Taliban turn over Osama bin Laden without further delay to appropriate authorities in a country where he has been indicted ... or to appropriate authorities in a country where he will be arrested and effectively brought to justice'. Resolution 1638 (2005) imposed an obligation on the UN Mission in Liberia to apprehend and detain former President Charles Taylor and to transfer him to the SCSL. A general obligation on states to co-operate is too weak to infer a removal of immunity, as provided for in Resolution 1593 which 'urges all States and concerned regional and other international organizations to co-operate fully'. The wording is vague and most likely cannot be manipulated to include a removal of immunity.

<sup>61</sup> Alebeek, fn. 32, p. 280. See also Condorelli and Villalpando, fn. 53.

<sup>62</sup> Contrast the view of G. Fletcher and J. Ohlin, 'The ICC: Two Courts in One?', (2006) 4 *JICJ* 428, that where the ICC acts on the basis of a Council referral it assumes the role of a 'security court', and that to question the competence of the ICC to issue an arrest warrant in respect of President Bashir would 'mean to question the Charter itself and the authority of the Security Council to invoke its Chapter VII power to restore security', 431–432.

<sup>63</sup> Convention on the Prevention and Punishment of the Crime of Genocide (1951) 78 UNTS 277, adopted on 9 December 1948, entered into force on 12 January 1951. Sudan deposited an instrument of accession to this Convention on 13 October 2003.

<sup>64</sup> Akande, fn. 15.

<sup>65</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Serbia & Montenegro*), Judgment of 26 February 2007, General List No 91.

the Council's powers under Chapter VII of the Charter are also the source of the authority of the ICC in Sudan. However, as noted above, the PTC did not include genocide charges in the arrest warrant, although it has left open the possibility of including such charges in the future.

#### 4. The Decision of the PTC on the Issue of Immunity

The previous discussion demonstrates the complex issues raised by the question of whether the immunity of President Bashir as head of state under international law would preclude his arrest and surrender to the ICC. What then did the PTC decide? The PTC dealt with the status of President Bashir as head of state in five short paragraphs. It concluded that President Bashir's official position 'has no effect on the Court's jurisdiction over the present case'.<sup>66</sup> The PTC based this decision on four considerations. First, it referred to the object of the Rome Statute, as stated in the preamble, to put an end to impunity for the perpetrators of the most serious crimes. Second, the PTC referred to Article 27(1) and (2) of the Rome Statute. Third, the PTC noted that the jurisprudence of the court has held that other sources of law referred to in Article 21 of the Rome Statute may only be referred to where there is a lacuna in the framework of the ICC (the Rome Statute, the Elements of Crime and the Rules of Procedure and Evidence) and that lacuna cannot be filled by ordinary rules of treaty interpretation. Finally, the PTC stated that 'by referring the Darfur situation to the Court, pursuant to Article 13(b) of the Statute, the Security Council of the United Nations has also accepted that the investigation into the said situation, as well as any prosecution arising therefrom, will take place in accordance with the statutory framework provided for in the Statute, the Elements of Crimes and the Rules as a whole'.<sup>67</sup>

The brevity of the reasoning is somewhat regrettable, even though the PTC did not have the benefit of detailed submissions on this issue. Perhaps the PTC considered that the question of immunity will be revisited with the benefit of submissions from the accused should the proceedings progress. The relevance of the reference by the PTC to the preamble in this context is somewhat opaque. Indeed, one of the central aims of the Rome Statute is to end impunity for serious crimes. The preamble is not binding, even in respect of states parties. Perhaps the PTC is suggesting that any claim to immunity by officials of Sudan would be inconsistent with Sudan's obligation, as a signatory, to not act so as to undermine the object and purpose of the Rome Statute.<sup>68</sup> Or it could support the assertion that immunity for President Bashir would be inconsistent with the objective of the referral of the situation in Darfur to the ICC, to avoid impunity for those responsible for atrocities.

<sup>66</sup> Para. 41, *Arrest Warrant Decision*.

<sup>67</sup> *Ibid.*, para. 45.

<sup>68</sup> Art. 18, VCLT.

The PTC refers to Article 27(1) and (2) of the Rome Statute as incorporating three core principles: (i) that the Rome Statute ‘shall apply equally to all persons without any distinction based on official capacity’; (ii) official capacity shall not exempt a person from responsibility; and (iii) immunities or procedural rules shall not bar the ICC from exercising jurisdiction. As noted above, it is Article 27(2) that is relevant to the question of immunity, as Article 27(1) is directed to responsibility and not rules of immunity. The PTC purports to rely on this provision to demonstrate the absence of immunity for a head of state. However, it does not take into account that this is treaty-based deviation from customary international law principles and so fails to discuss the effect of the Rome Statute on officials of states that are not party to it. The reference to Article 21 of the Rome Statute is also somewhat confusing. Is the PTC asserting here that the ICC is precluded by the Rome Statute from considering principles of international law such as immunity? This would appear to be a peculiar interpretation, particularly given that the same principles of immunity are also referred to in Article 98 of the Rome Statute.

The final reason advanced by the PTC is the most convincing and is one of the approaches examined above. This approach suggests that where the Security Council refers a situation to the ICC, the state concerned is effectively subjected to the treaty-based regime of the Rome Statute, including the waiver of immunity set out in Article 27(2).<sup>69</sup> Sudan is treated as if it were a state party. As noted above, this does, however, raise interesting legal and practical questions. It also suggests that other provisions of the Rome Statute, such as the principle of complementarity, are also applicable.

## 5. Obligations of States to Arrest and Surrender President Bashir to the ICC

As the arrest warrant has now been issued and circulated, the second aspect of the immunity issue is now significant—the obligation of states to arrest and to surrender President Bashir to the ICC. Although it was established as an independent court, the ICC has no independent powers of enforcement and must rely on states to arrest and surrender suspects.<sup>70</sup> It is not likely that President Bashir will voluntarily surrender himself to the ICC. As the Rome Statute does not permit trials *in absentia*,<sup>71</sup> a failure to gain custody will result in the trial not proceeding. Thus, the cooperation of states is vital. At present, the African Union and moderate African states such as South Africa and the Arab League are opposed to

<sup>69</sup> Akande, *loc. cit.*, fn. 15.

<sup>70</sup> For example, the ICC has been unable to secure the arrest and surrender of Joseph Kony. See: K. Apuuli, ‘The ICC Arrest Warrants for the Lord’s Resistance Army Leaders and Peace Prospects for Northern Uganda’, (2006) 4 *JICJ* 179, 186 and M. Ssenyonjo, ‘The International Criminal Court and the Lord’s Resistance Army Leaders: Prosecution or Amnesty?’, (2007) 54 *NILR* 51.

<sup>71</sup> Art. 63, Rome Statute.

the indictment against President Bashir.<sup>72</sup> Many of these states are party to the Rome Statute.<sup>73</sup>

There are three categories of states to consider. First, there is Sudan as the territorial state and the state of nationality. As already noted, the Government of Sudan is under an express obligation to cooperate with the ICC pursuant to Resolution 1593, which would include the arrest and surrender of President Bashir. Furthermore, Article 87(5) of the Rome Statute provides that a state not party to the Rome Statute may be subject to an obligation to cooperate with the ICC on an 'appropriate basis', which must include a resolution adopted by the Security Council. Thus, unlike states parties, the Government of Sudan is bound by the terms of Resolution 1593 to cooperate with the ICC's request for the execution of the arrest warrant. However, it is highly unlikely that Sudan will take any steps towards complying with the request, given Sudan's previous failure to cooperate. The ICC has limited access to individuals in Darfur and interviews with witnesses and victims must be conducted in neighbouring Chad. Sudan has failed to execute the arrest warrants outstanding in respect of Ahmed Harun and Ali Kushayb.<sup>74</sup> Sudan has indicated that Sudanese courts have jurisdiction in relation to its own nationals and that it will not extradite or surrender any national for trial.<sup>75</sup> Sudan has previously announced that it will not cooperate with the ICC.<sup>76</sup> It is therefore improbable that Sudan will arrest and surrender President Bashir to the ICC, particularly as Sudan claims that immunity subsists.<sup>77</sup>

<sup>72</sup> 'AU rejects Bashir Darfur charges', *BBC*, 21 July 2008, available at <<http://news.bbc.co.uk/1/hi/world/africa/7517393.stm>>; M. Faul, 'ICC warrant raises questions on leaders targeted', *The Associated Press*, 5 March 2009: 'African and Arab nations say they will support Sudanese President Omar al-Bashir, fearing the warrant issued against him Wednesday will bring even more conflict in Darfur.' See also 'Darfur group welcomes warrant', *Al Jazeera*, 6 March 2009: South Africa called the ICC's decision 'regrettable' and indicated that it concurred with the African Union's initial response to the warrant in that it will impact negatively on the current peace process.

<sup>73</sup> The neighbouring states of Chad, Uganda, Kenya, Central African Republic and the Democratic Republic of Congo are states parties.

<sup>74</sup> *Prosecutor v Ahmad Harun & Ali Kushayb*, Warrant of Arrest for Ahmad Harun and Warrant of Arrest for Ali Kushayb, issued 27 April 2007.

<sup>75</sup> Sudan's Justice Minister Ali al-Mardi announced: 'We would never accept that any Sudanese national stand trial outside the national legal framework, even if he was among those who took up arms and fought against the government': quoted in J. Fisher, 'ICC claims further isolate Sudan', *BBC*, 27 February 2007, available at <<http://news.bbc.co.uk/2/hi/africa/6401607.stm>>. See also 'African Union says Sudan judiciary will look into Darfur crimes', *Sudan Tribune*, 11 September 2008, available at <<http://www.sudantribune.com/spip.php?article28590>>.

<sup>76</sup> Mahfuz Faidul, spokesperson for President al-Bashir, has continued to threaten a strong response from Sudan if the prosecution proceeds: 'it will be nothing less than ending all our agreements with the United Nations'. 'Sudan President vows not extradite a "single cat" to the ICC', *Sudan Tribune*, 18 December 2008, available at <<http://www.sudantribune.com/spip.php?article29615>>.

<sup>77</sup> The Second Vice President, Ali Osman Taha, argued that the arrest warrant has no legal basis as President Bashir enjoys immunity as a head of state 'in accordance with

There are limited options to secure Sudan's cooperation. The Prosecutor has used his regular reports to draw the matter of Sudan's continued non-cooperation to the attention of the Security Council.<sup>78</sup> The Council's response was merely to restate—in a non-binding instrument—the obligation to cooperate with the ICC under Resolution 1593.<sup>79</sup> The PTC noted that, in the face of continued non-cooperation, it may make a judicial finding of non-cooperation and refer the matter to the Security Council.<sup>80</sup> The PTC also referred to Article 103 of the Charter, stressing that Sudan's obligations under the Charter prevail over other international agreements. However, the relevance of this provision to Sudan in this context is not entirely clear, as Sudan is not likely to be under any other international obligation not to surrender its President. It is improbable that the Government of Sudan will react to this statement and execute the arrest warrant. Furthermore, the Security Council is unlikely to adopt enforcement action to secure the arrest and surrender of President Bashir. It has not done so in relation to the arrest warrants issued by the ICTY or the ICTR<sup>81</sup> and will most likely not do so in Sudan, given the sensitivity of the peace process and the opposition to the arrest warrant amongst African and Arab states.<sup>82</sup>

The second category of states to consider is that of states parties to the Rome Statute. The arrest warrant and a request for cooperation have now been transmitted to all states parties. Immunity may become a pressing issue should

the ICJ and legal precedents by many European courts and even US courts': 'Sudan plans to undertake intensive campaign against ICC decision', *Sudan Tribune*, 5 March 2009.

<sup>78</sup> Initially, the Prosecutor reported that a degree of cooperation from Sudan was forthcoming. However, in his sixth report, he indicated that the 'degree of cooperation ... no longer exists'. In the most recent report to the Security Council, the Prosecutor reaffirmed the lack of cooperation on the part of the Government of Sudan: Eighth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005), 3 December 2008.

<sup>79</sup> Presidential Statement, S/PRST/2008/21, 16 June 2008: 'The Security Council takes note of the seventh briefing of the Prosecutor of the ICC pursuant to resolution 1593 ... recalls its decision, under Chapter VII of the United Nations Charter, 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 ICC and the Prosecutor ... while stressing the principle of complementarity ... the Council urges that the GoS and all other parties to the conflict in Darfur 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'.

<sup>80</sup> Art. 87(7), Rome Statute. For a discussion as to which is the appropriate body to initiate these proceedings, the PTC or the Prosecutor, see G. Sluiter, 'Obtaining Cooperation from Sudan: Where is the Law?', (2008) 6 *JICJ* 871.

<sup>81</sup> For example, the President of the ICTY has in the past reported non-cooperation to the Security Council in relation to Croatia and the Federal Republic of Yugoslavia. The Security Council responded merely by issuing further calls for cooperation and confirming that states are under a general obligation to cooperate with the ICTY.

<sup>82</sup> The Security Council could utilize one or several methods to ensure compliance, including sanctions or embargoes, conditionality of aid, and, ultimately, the authorisation of the use of force.



President Bashir travel to or through the territory of another state, or indicate his intention to do so. All states parties to the Rome Statute are under a general obligation to cooperate with the ICC<sup>83</sup> and a specific obligation to arrest and surrender an individual where a state has received a request to do so.<sup>84</sup> However, customary international law stipulates that a state arresting an incumbent head of state possessing immunity on its territory would violate international law. Moreover, Article 98(1) of the Rome Statute provides that the ICC '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 of a third state, unless the Court can first obtain the cooperation of that third state for the waiver of immunity'. The language of Article 98(1) recognizes that a state's other international commitments may override the duty to cooperate with the ICC. The provision is designed to avoid a situation of competing international obligations.<sup>85</sup> The best view is that the term 'third state' refers to a non-party state, thus Article 98(1) applies only to requests for the arrest and surrender of nationals of states not party to the Rome Statute.<sup>86</sup> Accordingly, in the circumstances presented by the arrest warrant for President Bashir, Article 98(1) would normally preclude the ICC from proceeding with a request for arrest and surrender, unless Sudan was to waive the immunity.

A state party presented with an opportunity to execute the arrest warrant must determine whether immunity prevents it from cooperating with the ICC's request or whether the referral from the Security Council, and now the decision of the PTC, varies the ordinary position. Article 97 of the Rome Statute provides that where a state party receiving a request identifies problems that may prevent it from acting upon the request, it shall consult the ICC to resolve the matter.<sup>87</sup> The most likely approach is that the requested state would rely on the reasoning of the PTC that the referral rendered the statutory framework of the ICC, including Article 27, applicable to the referral. The requested state would conclude that it would not be acting inconsistently with customary international law if it was to arrest and surrender President Bashir to the ICC and there would be no need to bring the potential conflict to the attention of the ICC. Depending on the mechanisms adopted by the implementing legislation in the requested state, it is possible that the issue of the immunity of President Bashir may be raised in proceedings before the courts of the requested state, and the authorities of the requested state may take a different view of the immunity issue from that adopted

<sup>83</sup> Art. 86, Rome Statute. Article 59(1) reiterates the obligation of states parties to arrest indicted individuals found within their territory.

<sup>84</sup> Art. 89(1), Rome Statute.

<sup>85</sup> Schabas, *An Introduction to the ICC*, *loc. cit.*, fn. 45, at 233.

<sup>86</sup> Akande, fn. 19. States parties are considered to have waived immunity by virtue of Article 27(2) and to have accepted the possibility of the surrender of their officials by a third state to the ICC.

<sup>87</sup> This includes a situation where the execution of the request would require the receiving state to breach an obligation to a third state: Art. 97(c), Rome Statute.

by the PTC. The requested state would then have to draw the conflict of obligations to the attention of the ICC. The best view is that it is for the ICC—most likely the PTC—to decide whether the conditions set out in Article 98 apply.<sup>88</sup> Given the approach adopted by the PTC to the immunity issue, the PTC would be likely to hold that Article 98 is inapplicable. It is not clear whether the decision of the PTC on this issue would be binding on the state concerned, and various approaches to this issue have been adopted in the national implementing legislation.<sup>89</sup>

Alternatively, the requested state could assert that Resolution 1593 imposed a ‘higher’ obligation, which would override the duty of the requested state under customary international law to respect the immunity of state officials of other states. The main difficulty with this argument is that, while Resolution 1593 ‘urges all States ... to cooperate fully’ with the ICC and the Prosecutor, the duty to cooperate is binding only in relation to Sudan and other parties to the conflict in Darfur.<sup>90</sup> Based on the reasoning of the House of Lords in *Al-Jedda*, it could be argued that Article 103 should not be limited to mandatory measures and should instead extend to all measures adopted under Articles 41 and 42 of the Charter.<sup>91</sup> The requested state could assert that Resolution 1593 overrides its duty under customary international law to respect the immunity of state officials. Resolution

<sup>88</sup> J. Crawford, P. Sands and R. Wilde, *Joint Opinion, in the Matter of the International Criminal Court and in the Matter of Bilateral Agreements Sought by the United States Under Article 98(2) of the Statute*, 5 June 2003, available at <<http://www.amicc.org/docs/Art98-14une03FINAL.pdf>>; S. Zappala, ‘The Reaction of the US to the Entry into Force of the ICC Statute: Comments on UN SC Resolution 1422 (2002) and Article 98 Agreements’, (2003) 1 *JICJ* 114, 129; Akande fn. 19, 431–432. See also Council of the European Union, ‘EU Guiding Principles Concerning Arrangements between a State Party to the Rome Statute of the International Criminal Court and the United States Regarding the Conditions to Surrender of Persons to the Court’, 30 September 2002, (2003) 42 *ILM* 240, 241. This interpretation is also supported by Rule 195 of the ICC Rules of Procedure and Evidence, which provides that when a receiving state has raised a problem of execution under Article 98 of the Rome Statute, the requested state must provide any information relevant to the ICC in the application of Article 98.

<sup>89</sup> See the various positions discussed by Akande, fn. 19, 431–432; Several commentators contend that the decision is a judicial one, and should be left to the ICC: Crawford *et al.*, *ibid.*, para. 58(6); B. Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law*, (2003) 145; and S. Wirth, ‘Immunities, Related Problems, and Article 98 of the Rome Statute’, (2001) 12 *Crim LF* 429, 458.

<sup>90</sup> Although paragraph 2 is called a ‘decision’, which normally indicates a mandatory direction and engages Article 25 of the Charter, the word ‘urges’ does not suggest a legal obligation. Practice of the Security Council dictates that an obligation is only created by the Council where it uses mandatory language, such as ‘requires’ or ‘member states shall’.

<sup>91</sup> *R (on the Application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, per Lord Bingham, paras 33–34, citing Frowein and Krisch in Simma (ed.), *The Charter of the United Nations: A Commentary* (2nd ed. 2002).

1593 would in a sense absolve the requested state from any claim by Sudan that it had violated international law if it arrested and surrendered President Bashir to the ICC.<sup>92</sup>

In relation to the third category of states, states that are not party to the Rome Statute, there is no general obligation to cooperate with a request by the ICC for the arrest and surrender of President Bashir. Resolution 1593 is addressed to all states, including states not party to the Rome Statute, but recognizes that third states do not have an obligation to cooperate with the ICC. However, the resolution does urge such states to cooperate, although it uses non-obligatory language. While the arrest warrant and the request for surrender have been transmitted to members of the United Nations that are not party to the Rome Statute, the PTC also acknowledged that non-states parties are not required to comply with its request for cooperation.<sup>93</sup> Absent future resolutions imposing a binding obligation to cooperate, there is therefore no obligation on a non-state party to arrest and surrender President Bashir to the ICC. A third state could decide to do so on a voluntary basis; however, it would potentially violate the immunity of Sudan were it to do so. The state would have to rely on arguments that the referral had removed the immunity of officials of Sudan or that Article 103 extends to non-mandatory measures adopted by the Council under Chapter VII of the Charter, as discussed above.

Another possible mechanism to obtain custody of President Bashir may be his apprehension by peacekeeping forces in Sudan. The ICC may find itself in the same situation as the ICTY, in which a multinational force already deployed on the ground is the only force with the capabilities to execute the arrest warrant.<sup>94</sup> Article 87(6) of the Rome Statute confirms that there is no general obligation for intergovernmental organisations to cooperate with the ICC, although such organisations are not precluded from doing so on a voluntary basis pursuant to a negotiated agreement. The mandate of UNAMID does not currently include the arrest and surrender of persons sought by the ICC. It is unlikely that its mandate would be extended to include this task, and such a step would be risky. United Nations operations on the ground depend on a degree of cooperation, or at the very least non-interference, by forces under the command of President Bashir. Authorising UNAMID to arrest and surrender President Bashir would threaten

<sup>92</sup> An interstate action before the International Court of Justice could eventuate if Sudan asserted that the arrest and surrender of President Bashir would be a violation of its sovereignty by the requested state, assuming of course that jurisdiction existed in relation to the dispute.

<sup>93</sup> Para. 249, *Arrest Warrant Decision*.

<sup>94</sup> H. Zhou, 'The Enforcement of Arrest Warrants by International Forces: From the ICTY to the ICC', (2006) 4 *JICJ* 202, 217; G. A. Knoops, *Surrendering to International Criminal Courts: Contemporary Practice and Procedures* (2002).

this cooperation or non-interference.<sup>95</sup> Yet a deliberate UNAMID policy to take no action in respect of an outstanding ICC warrant, although potentially preserving the fragile relationship with the Government of Sudan, could be destructive to the principled basis of UN operations. It is also potentially in violation of the legal obligations of troop-contributing states under either Resolution 1593 or the Rome Statute and the relationship agreement between the ICC and United Nations itself.<sup>96</sup>

## 6. Other Considerations

The issue of the arrest warrant has triggered a number of mixed responses as to whether or not the decision will render a peaceful solution to the conflict in Darfur more difficult. It also prompted the expulsion from Sudan of 13 humanitarian organisations immediately following the issue of the warrant. Several commentators are concerned that the issue of the arrest warrant may damage the already fragile 2005 peace agreement between the north of Sudan and semi-autonomous south and perhaps reignite violence.<sup>97</sup> The support of mainly western states has added to the concerns of the African Union that the ICC is exercising double standards due to its focus on African states.<sup>98</sup> Others consider that the arrest warrant comes shortly after the signing of the memorandum of understanding between the Justice and Equality Movement and the Government of Sudan in Doha, and threatens to derail the peace process.<sup>99</sup>

Before the decision of the PTC, the Security Council was said to be considering whether to issue a request to the ICC under Article 16 of the Rome Statute for the 'investigation or prosecution' to be deferred for a renewable period of 12 months. Deferring the investigation or prosecution would address concerns that a trial in respect of President Bashir will frustrate peace efforts in the region. A deferral will require a resolution of the Council acting pursuant to its powers under Chapter VII of the Charter.<sup>100</sup> This step had been supported by a number

<sup>95</sup> It appears that representatives of the ICC may consider this to be a necessary consequence of the issue of an arrest warrant. A special adviser to the Prosecutor has commented: 'UNAMID will not be able to carry out their tasks if they have to liaise with criminals who are ordering crimes against civilians', quoted from A. Duval Smith, 'Britain blocks prosecution of Sudan's ruler', *The Observer*, 14 September 2008.

<sup>96</sup> Negotiated Relationship Agreement between the International Criminal Court and the United Nations, (2004) ICC-ASP/3/Res.1, Art. 3.

<sup>97</sup> 'Sudan's peace deals in "jeopardy"', *Washington Post*, 5 March 2009. See news: 'Bashir to be arrested outside Sudan: China, AU and Arab League have warned the arrest warrant could destabilize the region. Bashir attends Arab Summit in Doha' (29 March 2009, *Reuters*).

<sup>98</sup> 'ICC warrant raises questions on leaders targeted', *The Associated Press*, 5 March 2009.

<sup>99</sup> 'Bashir attacks West over warrant', *Al Jazeera*, 5 March 2009.

<sup>100</sup> For further discussion, see A. Ciampi, 'The Proceedings against President al Bashir and the Prospects of Their Suspension under Article 16 ICC Statute', (2008) 6 *JICJ* 885.

of states,<sup>101</sup> the Peace and Security Council of the African Union,<sup>102</sup> the Arab League<sup>103</sup> and non-governmental organisations, including the International Crisis Group.<sup>104</sup> The Council, at least initially, appeared to recognize the potential benefits of a deferral.<sup>105</sup> Four of the five permanent members of the Council were reported to have endorsed the plan, although not always unequivocally.<sup>106</sup> The lack of cooperation from Sudan in the last few months of 2008 appeared to have dampened support for this option.<sup>107</sup> There is also some dispute as to whether Article 16 applies to a situation referred by the Council and the stage of proceedings at which it may be invoked.<sup>108</sup> Yet, since the issue of the arrest

<sup>101</sup> A number of states indicated their preference for the Council to request a deferral in the 63rd session of the General Assembly: official records, see <<http://www.un.org/ga/63/generaldebate>>. The Coalition for an International Criminal Court has collated relevant excerpts, available at <<http://www.iccnw.org/documents/GA.63rd.General-Debate.Compilation.2008.pdf>>.

<sup>102</sup> Communiqué of the 142nd Meeting of the Peace and Security Council, African Union, 21 July 2008, PSC/MIN/Comm(CXLII), para. 11(i).

<sup>103</sup> 'Arabs reject "unbalanced" ICC request against Sudanese President', *Sudan Tribune*, 19 July 2008; 'Arab nations "agree Sudan action"', *BBC*, 19 July 2008, available online at <<http://news.bbc.co.uk/2/hi/africa/7515844.stm>>. A joint resolution issued by the Arab League announced 'solidarity with the Republic of Sudan in confronting schemes that undermine its sovereignty, unity and stability and their non-acceptance of the unbalanced, not objective position of the prosecutor general of the International Criminal Court': Decision of the Council of the League of Arab States at the Ministerial level on the request of the Prosecutor of the ICC for a warrant against the Sudanese President (19 July 2008), para. 2, available online (in Arabic) at <[http://www.arableagueonline.org/las/picture\\_gallery/verdict19-07-2008.pdf](http://www.arableagueonline.org/las/picture_gallery/verdict19-07-2008.pdf)>. See also 'Statement of the Council of the League of Arab States at the ministerial level in its extraordinary session to examine the developments in the situation in Darfur', (8 August 2004), available online (in Arabic) at <[http://www.arableagueonline.org/las/arabic/details\\_ar.jsp?art\\_id=2869&level\\_id=177](http://www.arableagueonline.org/las/arabic/details_ar.jsp?art_id=2869&level_id=177)>.

<sup>104</sup> N. Boustany, 'China expresses "grave concern" over indictment of Sudan's Bashir', *Washington Post*, 16 July 2008.

<sup>105</sup> Resolution 1828 takes note of the request by the African Union to defer the investigation by the use of Article 16, including the following wording: '*having in mind* concerns raised by members of the Council regarding potential developments subsequent to the application of the Prosecutor of the International Criminal Court of 14 July 2008, and *taking note* of their intention to consider these matters further': preambular paragraphs 8 and 9. The inclusion of this wording led to the United States abstaining in the vote on this resolution, indicating its dissatisfaction with the possibility of a request for deferral: UN Doc. S/PV.5497. For a criticism of the use of Article 16, see D. Scheffer, 'The Security Council's Struggle over Darfur and International Justice', (20 August 2008), available at <<http://jurist.law.pitt.edu/forumy/2008/08/security-councils-struggle-over-darfur.php>>.

<sup>106</sup> In relation to China, see A. Heavens, 'China urges deferral of Bashir war crimes case', *Reuters*, 7 January 2009.

<sup>107</sup> The most recent debate in the Council suggests that certain states are becoming less enthusiastic regarding the possible use of Article 16: 3 December 2008, UN Doc. S/PV.6028.

<sup>108</sup> For a discussion of the legal issues being raised, see R. Cryer, 'The Security Council, Article 16 and Darfur', 29 October 2008, Oxford Transitional Justice Research Working Paper Series.

warrant, both Russia and China have reiterated their concern regarding the arrest warrant.<sup>109</sup> More generally, a deferral specifically requested in relation to the trial of President Bashir would enable the Council to effectively select the targets of the ICC's investigations, which raises issues concerning the independence of the ICC from the political interference of the Council.<sup>110</sup>

If the investigation were to proceed, one issue possibly to be considered is complementarity.<sup>111</sup> The statement of the PTC that the statutory framework of the ICC is to apply to Council referrals confirms that the principle of complementarity will also apply. The day after the Prosecutor indicated his intention to open an investigation into the situation in Darfur, Sudan announced that it had established the Special Criminal Court on the Events in Darfur, with jurisdiction in respect of the situation in Darfur and the matters referred to by the Commission of Inquiry.<sup>112</sup> Sudan has made clear that the purpose of this tribunal is to divest the ICC of jurisdiction. However, there are serious concerns regarding the effectiveness of this tribunal, as to date its prosecutions have focused on ordinary crimes, often unrelated to the violence, and lower level offenders.<sup>113</sup> Moreover, the procedures adopted and the impartiality of the tribunal have also been questioned.<sup>114</sup> The PTC appeared to dismiss the tribunal as a possible option for the trial of President Bashir, finding that 'there was no indication that national proceedings may be conducted, or may have been conducted, at the national level' against President Bashir for any of the crimes contained in the request.<sup>115</sup>

Another option is the offer of an amnesty or asylum to President Bashir if he were to step down as head of state. In 2003, Charles Taylor was convinced to resign and accept asylum abroad in exchange for a pledge of immunity from prosecution. However, after witnessing the result of the deal negotiated with Taylor,<sup>116</sup>

<sup>109</sup> 'Darfur group welcomes warrant', *Al Jazeera*, 6 March 2009. Quoting China's foreign ministry spokesperson as expressing 'regret and worry' over the decision, and noting that 'China opposed anything that could disrupt efforts to realise peace in Darfur and in Sudan'.

<sup>110</sup> A. Ciampi, fn. 100, 890.

<sup>111</sup> Art. 17(1)(a) requires the ICC to declare a case inadmissible where that case is being investigated or prosecuted by a state that has jurisdiction over it, unless that state is unwilling or unable genuinely to carry out the investigation or prosecution. Guidance as to what would constitute unable or unwilling is contained in Article 17(2) and (3).

<sup>112</sup> Annex to the letter dated 18 June 2005 from the Chargé d'affaires of the Permanent Mission of the Sudan to the United Nations addressed to the President of the Security Council: UN Doc S/2005/403; Decree Establishing the Special Criminal Court on the Events in Darfur, 7 June 2005.

<sup>113</sup> See 'Lack of Conviction: The Special Criminal Court on the Events in Darfur, A Human Rights Watch Briefing Paper', *Human Rights Watch*, 8 June 2006. See also 'Rhetoric vs Reality: The Situation in Darfur', *Human Rights Watch*, *Human Rights First and Save Darfur*, 2 December 2008.

<sup>114</sup> *Ibid.*

<sup>115</sup> Para. 50, *Arrest Warrant Decision*.

<sup>116</sup> In August 2003, Taylor accepted an offer from Nigeria to grant him asylum if he stepped down as head of state and ceased participating in atrocities. Following

it seems unlikely that President Bashir will resign; he may instead cling to power in order to avoid trial. Moreover, the effect of national amnesties on the jurisdiction of the ICC is not specified in the Rome Statute, although various provisions of the Rome Statute would arguably enable the ICC to support such an option if considered appropriate.<sup>117</sup>

## 7. Conclusion

The request for an arrest warrant in respect of President Bashir was a bold political move by the Prosecutor, which has been described as ‘nothing less than a demand for regime change’.<sup>118</sup> The request raised difficult issues, in particular the immunity of heads of state of states not party to the Rome Statute, the nature of the legal framework applicable in Council referrals to the ICC and the relationship between the Council and the ICC. Other issues such as the obligation of states to arrest and surrender President Bashir are now relevant, and questions such as complementarity may need to be considered in the future. Even now that the arrest warrant has been issued, it is unlikely that a trial of President Bashir will commence any time soon. Member states and the Council will have to balance the benefits to be gained from criminal accountability against the risks to the peace process in Sudan. Officials in Sudan have to decide whether to arrest and surrender President Bashir to the ICC, to retain him as president and face increased isolation from the international community or to arrange for his resignation and departure from office. The threat of international prosecution may in fact have increased support for President Bashir both within Sudan and in Africa, while undermining confidence in the ICC and in particular the Prosecutor. Several commentators have argued that the most effective way for the ICC to proceed would be to accept that the arrest warrant ‘can effectively be placed on hold for as long as the political climate for a voluntary surrender from Sudan is unfavourable’.<sup>119</sup> Instead, the Prosecutor should focus on securing the custody of other suspects accused of atrocities in Darfur, using sealed indictments if necessary. This would enable trials to commence, evidence to be presented and judgments delivered and would be ‘preparing the ground for a politically palatable surrender of Al Bashir when conditions are right’.<sup>120</sup>

repeated breaches, Taylor was eventually arrested in 2006 and transferred by Liberia to the custody of the Special Court of Sierra Leone.

<sup>117</sup> See: J. Gavron, ‘Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court’, (2002) 51 *ICLQ* 91; D. Mazjub, ‘Peace or Justice? Amnesties and the International Criminal Court’, (2002) 3 *Melb. JIL* 248; and D. Robinson, ‘Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court’, (2003) 14 *EJIL* 481.

<sup>118</sup> C. Gosnell, ‘The Request for an Arrest Warrant in *Al Bashir*: Idealistic Posturing or Calculated Plan?’, (2008) 6 *JICJ* 841.

<sup>119</sup> *Ibid.*, 850.

<sup>120</sup> *Ibid.*, 851.