
5. Heads of state and other government officials before the International Criminal Court: the uneasy revolution continues

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1. INTRODUCTION

The adoption of the Rome Statute of the International Criminal Court (ICC) just over 20 years ago marked an uneasy revolution in international law and practice.¹ For the first time in history, 120 States voted to create a permanent Court of last resort to hold accountable individuals accused of committing the most serious crimes under international law: war crimes, crimes against humanity, genocide, and, in the future, the crime of aggression. The Court's jurisdiction over aggression was activated on 17 July 2018,² and the Statute now includes all four 'core' crimes, each of which may be said to have the status of *jus cogens*.³ These are crimes defined by international law *sensu stricto*, that 'protect fundamental values of the international legal community as a whole', and 'articulate a *ius puniendi* of that community'.⁴

¹ Leila Nadya Sadat and S. Richard Carden, 'The New International Criminal Court: An Uneasy Revolution', 88 *Georgetown Law Journal (Geo LJ)* (2000) 381.

² Although the Nuremberg Tribunal dubbed aggression the 'supreme international crime', Judgment, 'International Military Tribunal (Nuremberg), Judgment and Sentences', 41 *The American Journal of International Law (AJIL)* (1947) 172–333, at 186 [hereafter *Nuremberg Judgment*], it took 20 years to activate the ICC's jurisdiction over that crime, and it is subject to a less compulsory regime than jurisdiction over the other crimes. ICC Res. ASP/16/Res. 5, Activation of the jurisdiction of the Court over the crime of aggression, 14 December 2017 (activating the Court's jurisdiction over the crime of aggression as of 17 July 2018).

³ See e.g., M. C. Bassiouni, 'International Crimes: Jus Cogens and Obligatio Erga Omnes', 59 *Law and Contemporary Problems (Law & Contemp Probs)* (1996) 63–74, at 68; A. Orakhelashvili, *Peremptory Norms in International Law* (Oxford: Oxford University Press, 2006); M. M. Whiteman, 'Jus Cogens in International Law, with a Projected List', 7 *Georgetown Journal of International and Comparative Law (GA J Intl & Comp L)* (1977) 609–626; D. Donat Cattin, 'Intervention of Humanity or the Use of Force to Halt Mass-Atrocity Crimes, the Peremptory Prohibition of Aggression and the Interplay between Jus ad Bellum, Jus in Bello and Individual Criminal Responsibility on the Crime of Aggression', in P. Acconoci, et al. (eds), *International Law and the Protection of Humanity: Essays in Honor of Flavia Lattanzi* (Leiden, Netherlands: Brill Nijhoff, 2017) 353.

⁴ C. Kreß, 'International Criminal Law', *Max Planck Encyclopedia of Public International Law* (2009), available online at www.legal-tools.org/doc/de7638/pdf. See also A. Cassese, *International Criminal Law* (2nd edn., Oxford: Oxford University Press, 2008); J. Paust et al., *International Criminal Law: Cases and Materials* (4th edn., Durham: Carolina Academic Press, 2013), at 6–22; G. Werle and B. Burghardt, *Principles of International Criminal Law* (3rd edn., Oxford: Oxford University Press, 2014), at 10 ('Today there is no doubt that the Nuremberg Principles are firmly established as customary international law.').

A fundamental principle of the Rome Statute is that all defendants are equal before it.⁵ Following the example of Article IV of the Genocide Convention,⁶ Article 27(1) (Irrelevance of Official Capacity) provides:

This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

This provision codifies the customary international law rule that whatever immunities an official might otherwise have under international law cannot be pled as a bar or a defense to criminal responsibility, *ratione materiae*.

Article 27(2) complements Article 27(1), as follows:

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

Article 27 has been referred to as the ‘most profound article ever to be written into a multi-lateral treaty’,⁷ and yet was, during the ICC negotiations, ‘uncontested throughout the discussions, and ... relatively easy to agree on’.⁸ The International Criminal Tribunals for the former Yugoslavia and Rwanda, which had similar provisos in their Statutes,⁹ found the provision represented ‘a rule of customary international law’,¹⁰ as did the Special Court for Sierra Leone in the *Charles Taylor* case.¹¹ This is unsurprising. As I have written elsewhere, the substantive rules of the Rome Statute must be grounded in customary international law, given that the Security Council may refer situations involving non-State Parties and their nationals to the Court. The Council cannot ‘create’ rules of international law, it can only apply them.¹²

⁵ The Statute applies only to natural persons. Art. 25 ICCSt., adopted on 17 July 1998 (entered into force 1 July 2002).

⁶ UN Convention on the Prevention and Punishment of the Crime of Genocide Art. IV, 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951). Article IV of the Convention provides: ‘Persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals’.

⁷ Prince Zeid Ra’ad Zeid Al-Husseini, ‘For Love of Country and International Criminal Law’, 24 *American University International Law Review (Am U Intl L Rev)* (2008) 647–664, at 656.

⁸ Per Saland, ‘International Criminal Law Principles’, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute; Issues, Negotiations, Results* (The Hague: Kluwer Law International, 1999) 189, at 202.

⁹ Art. 7(2) ICTYSt.; Art. 6(2) ICTRSt.

¹⁰ Decision on Preliminary Motion, *Prosecutor v. Slobodan Milosevic* (IT-99-37-PT), 8 November 2001, at 28. The Chamber noted that Jean Kambanda, who had pled guilty before the ICTR, had not asserted his immunity as the former Prime Minister of Rwanda in the case brought against him for genocide. *Ibid.*, at 26.

¹¹ Decision on Immunity from Jurisdiction, *Prosecutor v. Charles Taylor* (SCSL-2003-01-I), 31 May 2004, at 52.

¹² See generally, L. N. Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (Ardsley, NY: Transnational Publishers, 2002), at 7; P. C. Szasz, ‘The Security Council Starts Legislating’, 96 *AJIL* (2017) 901–905. (‘It has long

Today the meaning of Article 27 is hotly disputed, however. Individuals on the receiving end of the Court's investigations, subpoenas and warrants have protested its application to them, particularly in light of Article 98's potential application,¹³ and have successfully had their governments (over which they often preside) take up their cause. This has led several States Parties to the Rome Statute to assert that they are unable (and unwilling) to surrender individuals who may have immunity under international law to the ICC without the consent of their State of nationality. The most recent example was the Hashemite Kingdom of Jordan, which pleaded 'fundamental rules and principles of international law' that required it to refuse to execute an arrest warrant of the Court for President Al-Bashir of Sudan on the basis of his alleged immunity under international law. Although the Kingdom's argument was cast procedurally, in terms of the interaction of Article 98(1) with Article 27(2), the brief essentially asserts that Heads of State remain immune under international law so long as they remain in office, whether the jurisdiction before which they are sought is a national or international court.

This Chapter examines the 'original understanding' of Article 27 and Article 98 and their inclusion in the Rome Statute (Part 2), the current controversy regarding their application by the Court (Part 3), and endeavors to resolve existing controversies by reference to 'first principles' of international criminal law (Part 4). Part 4 also addresses, albeit briefly, the decision of the Appeals Chamber on Jordan's appeal in the *Al-Bashir* case, which found that Al-Bashir could not benefit from immunity before the court and that Jordan was therefore required to surrender him. It is impossible in a few short pages to summarize the entire decade of debate on this subject; but I touch on some of the most essential points. I conclude that current efforts to rewrite the meaning of Article 27 represent an effort to change existing customary international law and impose, *post facto*, a new interpretive gloss on Article 27, fundamentally

been accepted that intergovernmental organizations (IGOs) cannot legislate international law ... Exceptionally, a few IGOs are empowered to adopt international legal rules that could become binding on their members, but these states could opt out by raising a timely objection.') But see *Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, Minority Opinion of Judge Marc Perrin de Brichambaut (The Prosecutor v. Omar Hassan Ahmad Al-Bashir)* (ICC-02/05-01/09), 6 July 2017 (PTC II) [hereafter *South Africa Minority Opinion*] suggesting although scholars disagree on the powers of the UN Security Council to set aside customary international law ... the 'prevailing opinion [is] that Article 103 should be read extensively—so as to affirm that charter obligations prevail also over United Nations Member States' customary law obligations'. *Ibid.* at 61 (citing *International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi, A/CN.4/L.682, 13 April 2006, at 345). Although the ILC Study Group admits that the Security Council cannot contravene a *jus cogens* norm, *ibid.* at 346, the broad assertion that it can set aside customary international law or create new rules of international law is virtually un-footnoted, and seems at odds with current understandings of the limits of the Council's powers. See e.g., N. D. White and A. Abass, 'Countermeasures and Sanctions', in M. D. Evans (ed.), *International Law* (Oxford: Oxford University Press, 2003), at 518 ('Article 103 gives obligations arising out of the UN Charter pre-eminence over obligations arising under any other international treaty, though it is not clear that this affects member States' customary rights.' *Ibid.*).

¹³ Art. 98(1) ICCSt. provides: '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.'

changing its meaning and scope. It is the view of this writer that doing so ‘informally’ is inconsistent with the canons of treaty interpretation applicable to the Rome Statute;¹⁴ and cannot, therefore, be effectuated by the Court’s judges, but would instead require an amendment to the Statute. Such an amendment would arguably work irreparable harm to the Statute itself and the social values and policies that the Rome Statute protects. To the extent that States believe the International Criminal Court’s investigations and proceedings infringe upon their sovereignty, the proper solution is for them to work to prevent the commission of Rome Statute crimes and, in cases in which atrocity crimes have been committed, to bring cases against the perpetrators in their national courts.

2. THE ORIGINAL UNDERSTANDING

The treaty adopted in 1998 was the product of many years of negotiations, and decades of prior drafts, scholarly drafts and political and intellectual debate. Generally speaking, early instruments setting forth rules for the conduct of war did not suggest the idea of individual criminal responsibility for their breach, although there are accounts of war crimes trials which are centuries old.¹⁵ Thus, the 1907 Hague Convention suggested inter-state reparations as a remedy for violations of the rules,¹⁶ but that seemed insufficient to prevent their abuse during World War I. The 1919 *Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties*¹⁷ established by the allied powers to assess responsibility after the war concluded that there should be an international ‘high tribunal’ for the trial of ‘enemy persons’ alleged to have committed ‘offences against the laws and customs of war and the laws of humanity’.¹⁸ The US dissenters to that Report objected not only to the conceptual revolution it offered but alleged that Heads of State, in particular, could not be brought before an international court but were only morally ‘responsible to mankind’ and only legally responsible to their ‘people’ as their ‘agent’ to whom they must answer in law.¹⁹ Head of State immunity was seen as a core principle of sovereignty, an extension of the Sun King’s apocryphal statement, *l’état, c’est moi*. It was thus unsurprising that, although the Treaty of Versailles provided for the trial of the Kaiser, following Germany’s defeat, the Netherlands nonetheless refused his extradition.²⁰

Most efforts to establish an international criminal court following World War I did not clearly address the issue of head of state immunity. The International Law Association (ILA)

¹⁴ L. N. Sadat and J. M. Jolly, ‘Seven Canons of ICC Treaty Interpretation: Making Sense of Article 25’s Rorschach Blot’, 27 *Leiden Journal of International Law (Leiden J Intl L)* (2014) 755–788.

¹⁵ See e.g., M. P. Scharf and W. A. Schabas, *Slobodan Milosevic on Trial: A Companion* (London: Bloomsbury Academic, 2002), at 39 (‘The history of international war crimes trials begins with the 1474 prosecution of Peter von Hagenbach’).

¹⁶ Convention (IV) Respecting the Laws and Customs of War on Land Art. 3, 18 October 1907, 2277 UNTS 539 (entered into force 26 January 1910).

¹⁷ Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties ‘Report Presented to the Preliminary Peace Conference’, 14 *AJIL* (1920) 95–154.

¹⁸ *Ibid.* at 123.

¹⁹ *Ibid.* at 135–136.

²⁰ L. Sadat, ‘The Proposed Permanent International Criminal Court: An Appraisal’, 29 *Cornell International Law Journal (Cornell Intl LJ)* (1996) 665–726, at 670 (formerly Wexler).

drafts of 1924²¹ and 1926²² omitted any reference, although the 1926 draft proposed an Article on the diplomatic immunities of Court personnel when travelling to or from The Hague on the business of the Court,²³ and proposed both State and individual criminal responsibility.²⁴ The 1928 Draft of the International Association of Penal Law²⁵ was similarly silent. It was not until the 1941 Draft of the London International Assembly that there was an explicit mention of crimes committed by Heads of State.²⁶ Indeed, the draft of the London International Assembly Statute provided for jurisdiction over war crimes in four scenarios, the first two of which presage the development of the doctrine of ‘complementarity’ at the International Criminal Court, and one of which explicitly addressed the criminal responsibility of Heads of State, as follows:

- (a) Crimes in respect of which *no* national court of any of the United Nations has jurisdiction;
- (b) Crimes in respect of which a national court of any of the United Nations has jurisdiction, but which the State concerned elects not to try in its own courts;
- (c) Crimes which have been committed or which have taken effect in several countries or against nationals of different countries; and
- (d) Crimes committed by Heads of State.²⁷

Article 7 of the London Charter for the International Military Tribunal (IMT) at Nuremberg expressly included a provision regarding the potential immunity of a Head of State or other government official, to wit:

²¹ International Law Association, *Report of the Twenty-Third Conference, September 8th–13th, 1924, Draft Statute for the Permanent International Criminal Court* (London: Sweet & Maxwell, 1925), at 74–111.

²² International Law Association, *Report of the Twenty-Fourth Conference, August 5th–11th, 1926, The Permanent International Criminal Court* (London: Sweet & Maxwell, 1925), at 106–309. At the 1926 meeting, a resolution on the creation of an international criminal court was approved. *Ibid.* at 183.

²³ *Ibid.* at Art. 6.

²⁴ *Ibid.* at Art. 24 (a charge may be lodged against a state and/or a subject or citizen of a state).

²⁵ *Revue Internationale de Droit Pénal*, No. 3, pp. 293 (French) (1928). An English translation of the draft statute prepared by Professor V. V. Pella, as adopted by the International Association for Penal Law in 1928, and subsequently revised in 1946 can be found at UN Secretary General, *Historical Survey of the Question of International Criminal Jurisdiction*, at 75–88, UN Doc. A/CN.4/7/Rev.1, UN Sales No. V.8 (1949).

²⁶ United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London: HMSO, 1948) 99, at 101–102, available online at www.unwcc.org/wp-content/uploads/2017/04/UNWCC-history.pdf (‘The members of the London International Assembly took great pains to destroy the prevailing theory, defended at Versailles by the United States representatives, that a head of State cannot be held personally responsible or tried for having framed a policy of aggression or one which disregards the fundamental laws of mankind, and that even for violations of positive law he is responsible only to the tribunals and laws of his own country. It was unanimously agreed that rank and position, however exalted, confers no immunity upon the accused in respect of war crimes ...’).

²⁷ R. J. Alfaro (Special Rapporteur on the Question of International Criminal Jurisdiction), *Report on the Question of International Criminal Jurisdiction*, UN Doc. A/CN.4/15 and Corr.1, 3 March 1950, p. 5, in *Yearbook of the International Law Commission (YB Intl L Com)*, Vol. II (1950), available online at http://legal.un.org/docs/?path=../ilc/documentation/english/a_cn4_15.pdf&lang=E.

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.²⁸

This provision was bitterly contested by the accused, but readily accepted by the Tribunal, which famously opined, in sweeping terms, that

The principle of international law, which under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings. Article 7 of the Charter expressly declares [quoting the language]. ...*the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under international law.*²⁹

This holding was adopted by the International Law Commission in its 1950 formulation of the Nuremberg Principles,³⁰ and is expressed in Article IV of the Genocide Convention of 1948. It suggests that, since international law established the immunities in the first place, it can remove them in cases of war crimes, crimes against humanity, crimes against peace, and genocide, whether prosecuted before an international court (like the IMT or the international penal tribunal contemplated by Article VI of the Genocide Convention) or a national court exercising jurisdiction in the State on the territory of which an act of genocide was committed.³¹

Thus, the Nuremberg Charter and Judgment prevailed over the US objections of 1919, and became understood as both customary international law and codified in international treaties.³² It subsequently found voice in the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda,³³ and in the Statutes of the Special Court for Sierra Leone³⁴ and the Extraordinary Chambers in the Courts of Cambodia.³⁵

Given this backdrop, it is easy to understand why 'irrelevance of official position' was simply not a major issue during negotiation of the Rome Statute. The 1993 Report of the International Law Commission's Working Group on a Draft Statute for an International

²⁸ The Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945, 8 UNTS 279, reprinted in 39 *AJIL* (Supp. 1945) 257.

²⁹ *Nuremberg Judgment*, *supra* note 2, at 221.

³⁰ *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, Rep. of the Int'l Law Comm'n to the Gen. Assembly*, UN Doc. A/1316 (1950), reprinted in [1950] 2 *YB Intl L Com* 364, 374, 376, UN Doc. A/CN.4/SER.A/1950/Add.1, available online at http://legal.un.org/ilc/texts/instruments/english/commentaries/7_1_1950.pdf.

³¹ The 1949 Geneva Conventions seem to have contemplated a form of universal jurisdiction for prosecution, but are silent regarding the question of Head of State immunity.

³² Werle and Burghardt, *supra* note 4, at 11.

³³ Art. 7(2) ICTYSt.; Art. 6(2) ICTRSt.

³⁴ Art. 6(2) SCSLSt.

³⁵ Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, Art. 29, NS/RKM/1004/006 (27 October 2004). It is also found in the Apartheid Convention, Article III of which provides that 'international criminal responsibility shall apply ... to individuals, members of organizations and institutions and representatives of the State ...'. G.A. Res. 3068 (XXVIII), 28 UN GAOR Supp. (No. 30) at 75, International Convention on the Suppression and Punishment of the Crime of Apartheid Art. 3, 30 November 1974, 1015 UNTS 243 (entered into force 18 July 1976).

Criminal Court omitted the question entirely,³⁶ because the Commission had bifurcated work on the Court from its work on the *Draft Code of Crimes against the Peace and Security of Mankind*,³⁷ which had engaged on this issue for many years.³⁸ The same was true of the 1994 Draft Statute for the Court, which was also silent on the question of irrelevance of official position.³⁹ In the words of the Commission, the 1994 draft was intended to be ‘primarily ... [an] adjectival and procedural instrument’.⁴⁰ Thus to find the International Law Commission’s text on ‘irrelevance of official position’ requires a *renvoi* to the *1996 Draft Code of Crimes*, which provided, in Article 7:

The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment.⁴¹

The Commentary to this Article indicates that this was not just intended to ‘prevent an individual ... from invoking his official position as a circumstance absolving him from responsibility’.⁴² Rather, ‘the author of a crime under international law cannot invoke his official position to escape punishment in appropriate proceedings’. The Commentary concludes:

The absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings is an essential corollary of the absence of any substantive immunity or defence. *It would be paradoxical to prevent an individual from invoking his official position to avoid responsibility for a crime only to permit him to invoke this same consideration to avoid the consequences of this responsibility.*⁴³

Once the General Assembly established a Preparatory Committee to discuss the ILC’s 1994 Draft,⁴⁴ the Preparatory Committee essentially consolidated the work on the Court with the

³⁶ *Report of the Working Group on the Question of an International Criminal Jurisdiction*, in *Report of the International Law Commission on the Work of its Forty-Fourth Session*, 47 UN GAOR Supp. (No. 10), UN Doc. No. A/47/10 (1992).

³⁷ The early work of the Commission on the *Draft Code* included provisions on irrelevance of official capacity. See e.g., *Report of the International Law Commission on the Work of its Second Session*, *Report of J. Spiropoulos on the Draft Code of Offenses Against the Peace and Security of Mankind*, UN Doc. A/CN.4/25, 26 April 1950, at 87–88 (irrelevance of official capacity).

³⁸ J. Crawford, ‘The ILC’s Draft Statute for an International Criminal Tribunal’, 88 *AJIL* (1994) 140–152, at 141.

³⁹ *Report of the International Law Commission*, UN GAOR, 49th Sess., Supp. No. 10, UN Doc. A/49/10 (1994) [hereafter *1994 Draft Statute*]. On the drafting history of the 1994 draft, see Sadat, *Proposed International Criminal Court*, *supra* note 20, at 665–668 and 684–686; see also J. Crawford, ‘The ILC Adopts a Statute for an International Criminal Court’, 89 *AJIL* (1995) 404.

⁴⁰ *1994 Draft Statute*, *supra* note 39, at 71, cmt.

⁴¹ *Draft Code of Crimes Against the Peace and Security of Mankind with Commentaries*, in *Report of the International Law Commission on the Work of its Forty-Eighth Session (A/51/10)* (1996); see also *Draft Code of Crimes Against the Peace and Security of Mankind*, Art. 13, in *Report of the International Law Commission on the Work of its Forty-Third Session (A/46/10)* (1991) (‘The official position of an individual who commits a crime against the peace and security of mankind, and particularly the fact that he acts as head of State or Government, does not relieve him of criminal responsibility.’).

⁴² *Ibid.* at 27, at 6.

⁴³ *Ibid.*

⁴⁴ Although the ILC had recommended that the General Assembly convene a diplomatic conference ‘to study the draft statute and ... conclude a convention on the establishment of an international criminal

work on the draft code, and throughout the various iterations of the drafting process, precursors of what became Article 27 of the Rome Statute were present in each new iteration of the draft statute. This was not true of Article 98, which was introduced late in the negotiations at the 1998 Diplomatic Conference by Singapore,⁴⁵ and was inserted in the Statute largely without change or debate.⁴⁶

Although it often difficult to piece together the legislative history of the Rome Statute, as particularly during the Preparatory Committee process many discussions were held informally or documents were circulated without being given an official UN Conference Document Number (meaning that they were not archived),⁴⁷ there is very little change from iteration to iteration with respect to the provision which ultimately became Article 27 of the Statute.⁴⁸ Contemporaneous writings about the negotiation of the Statute indicate that Article 98's subsequent inclusion was in no way meant to undermine the fundamental principles codified in Article 27: it was instead meant to allow a State requested to surrender a diplomat accredited to it or a search of diplomatic premises within its borders to comply with its pre-existing international legal obligations in so doing. In the words of two delegates to the Rome Conference, '[Article 98] does not reduce the effect of article 27 in any way. A person sought for arrest for

court', *ILC 1994 Draft Statute*, *supra* note 39, at 90, instead the General Assembly established an Ad Hoc Committee to review the ILC Draft. *Resolution on the Establishment of an International Criminal Court*, GA Res 49/53, 49th Sess., 84th plen mtg, UN Doc. A/RES/49/53, 17 February 1995. The work of the Ad Hoc Committee led to the establishment of the Preparatory Committee by the General Assembly. The Preparatory Committee held six official meetings at the UN Headquarters in New York City from 25 March to 12 April, and 12 to 30 August 1996, from 11 to 21 February, 4 to 15 August, and 1 to 12 December 1997, and from 16 March to 3 April 1998. For a summary of these Preparatory Committee proceedings, see *Report of the Preparatory Committee on the Establishment of an International Criminal Court (Proceedings of the Preparatory Committee During March–April and August 1996)*, Vols. I and II, UN GAOR, 51st Sess., Supp. No. 22, UN Doc. A/51/22, 13 September 1996; *Decisions Taken by the Preparatory Committee at its Session Held from 11 to 21 February 1997*, UN Doc. A/AC.249/1997/L.5, 12 March 1997; *Decisions Taken by the Preparatory Committee at its Session held from 4 to 15 August 1997*, UN Doc. A/AC.249/1997/L.8/Rev.1 (1997); *Decisions Taken by the Preparatory Committee at its Session Held from 1 to 12 December 1997*, UN Doc. A/AC.249/1997/L.9/Rev.1, 18 December 1997; *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, UN Doc. A/CONF.183/2/Add.1, 14 April 1998; *Report of the Inter-sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands*, UN Doc. A/AC.249/1998/L.13, 4 February 1998. In addition, several informal inter-sessional meetings took place resulting in revised drafts of the Statute. The International Institute of Higher Studies in Criminal Sciences (ISISC) in Siracusa, Italy hosted four of these inter-sessional meetings held from 3 to 8 December 1995, 10 to 14 July 1996, 29 May to 4 June 1997 and 17 to 21 November 1997. M. C. Bassiouni, 'Historical Survey: 1919–1998', in M. C. Bassiouni (ed.), *The Statute of the International Criminal Court* (Ardsley, NY: Transnational Publishers, 1998) 1, at 24. The final intersessional meeting, held in Zutphen, the Netherlands, in January 1998, produced the Zutphen Intersessional Draft. *Report of the Intersessional Meeting from 19 to 30 January 1998 in Zutphen, the Netherlands*, UN Doc. A/AC.249/1998/L.13, 4 February 1998. For a chronology of the Preparatory Committee process, as well as the Diplomatic Conference, see generally Sadat, *Transformation of International Law*, *supra* note 12, at 8–19 and sources cited.

⁴⁵ Proposal Submitted by Singapore, UN Doc. A/CONF.83/C.1/WGIC/L7.

⁴⁶ See W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn., Oxford: Oxford University Press, 2016), at 1343–1344.

⁴⁷ M. C. Bassiouni, 'Introduction', in M. C. Bassiouni and W. A. Schabas (eds), *The Legislative History of the International Criminal Court* (2nd edn., Leiden, Netherlands: Brill Nijhoff, 2016) i, at xviii.

⁴⁸ Schabas, *supra* note 46, at 594–596.

prosecution by the Court cannot claim an immunity based on official capacity nor does such capacity effect the jurisdiction of the Court over the person'.⁴⁹

States ratifying the Rome Statute after its adoption in 1998 accepted the common understanding of Article 27 as removing Head of State (and other official) immunities in front of the Court. France, for example, was required by the French Constitutional Council to amend its constitution to ratify the Statute.⁵⁰ The Constitutional Council found that Article 27 of the Rome Statute was inconsistent with the legal regime set forth in the French Constitution, which contained immunities from criminal prosecution for the French President, members of Parliament, and other members of the French Cabinet (*gouvernement*). Additionally, because the ICC could be seized in a case involving the application of a French amnesty law or a French statute of limitations, the Council found that constitutional revision was required. In response, France amended its constitution by a vote of 848 to 6 and proceeded to ratify the treaty by an overwhelming majority vote.⁵¹ The experience of other countries was similar.⁵² This is because, as Otto Triffterer noted in the first edition of his commentary on the Rome Statute, the position that developed in international law 'has to be contrasted with *domestic* law where Head of State immunity in criminal proceedings might be regarded as absolute ... at least until developed in the Pinochet case'.⁵³ The International Court of Justice affirmed this position in the *Yerodia* case, noting in a key paragraph that 'immunities enjoyed under international law by an incumbent or former Minister ... do not represent a bar to criminal prosecution ... [in respect to] criminal proceedings before certain international criminal courts, where they have jurisdiction ... [including] ... the future International Criminal Court created by the 1998 Rome Convention'.⁵⁴

3. CURRENT CONTROVERSIES AT THE INTERNATIONAL CRIMINAL COURT REGARDING IMMUNITIES

The common understanding of Article 27 and Article 98 were challenged by states seeking to check the Court's power almost immediately upon the Statute's entry into force. As noted above, Article 98 had been the object of very little attention during the Statute's negotiation.⁵⁵

⁴⁹ K. Prost and A. Schlunck, 'Article 98: Cooperation with Respect to Waiver of Immunity and Consent to Surrender', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Baden-Baden: Nomos, 1999) 1132. I cite the first edition as evidence of what the negotiators in Rome believed the portent of Articles 27 and 98 was at the time of the Statute's adoption.

⁵⁰ CC decision No. 98-408DC, 22 January 1999, J.O. 1317. See generally, L. N. Sadat, 'The Nuremberg Paradox', 58 *American Journal of Comparative Law (Am J Comp L)* (2010) 151–204.

⁵¹ Sadat, *Nuremberg Paradox*, *supra* note 50, at 194–195.

⁵² ICRC Advisory Service on International Humanitarian Law, *Issues Raised with Regard to the Rome Statute of the International Criminal Court by National Constitutional Courts, Supreme Courts and Councils of State* (January 2010), available online at www.icrc.org/en/document/send-page-print-page-increase-text-size-decrease-text-size-issues-raised-regarding-rome (noting issues in Albania, Belgium, Chile, Colombia, Costa Rica, Côte d'Ivoire, Honduras, Luxembourg, Madagascar, Moldova, Spain, and Ukraine).

⁵³ O. Triffterer, 'Article 27: Irrelevance of official capacity', *supra* note 49, at 502.

⁵⁴ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, [2002] ICJ Report 3, at 61.

⁵⁵ See also Schabas, *supra* note 46, at 1037.

However, ‘creative lawyers’ in the Bush administration relied upon it to negotiate bilateral immunity agreements (BIAs) with other States to prevent the future surrender to the Court of any US nationals, thereby focusing attention on this provision of the Statute.⁵⁶ Worried about exposure of its military personnel and top civilian leadership to investigation and prosecution, the US objected to the Court’s jurisdiction over non-State Party nationals. Having failed to persuade other delegations as to the correctness of its position on this question during the Statute’s negotiation, it set about on a capital to capital offensive against the treaty, seeking to use Article 98(2) to immunize its nationals from any prosecution before the Court. The European Parliament took the view that the US BIAs are inconsistent with the Rome Statute,⁵⁷ as did the former US head of delegation to the Rome Conference, who has argued that the US attempt to exempt all of its nationals is overbroad.⁵⁸ Undaunted, however, by 2006, only four years after the Rome Statute had entered into force, the US had negotiated more than 100 such agreements.⁵⁹

As the US campaign against the Court was getting underway, the Court received referrals of its first cases. The first situations referred came from African States Parties: Uganda, the Democratic Republic of the Congo, and the Central African Republic.⁶⁰ The first Prosecutor welcomed these ‘self-referrals’ as they entailed situations involving the ongoing commission of atrocity crimes, and the cooperation (and invitation) of the territorial state to intervene. Although reliance upon the self-referral system clearly involved some risks for the Court about which many scholars commented negatively,⁶¹ it also provided the Court with its first

⁵⁶ L. N. Sadat, ‘Summer in Rome, Spring in The Hague, Winter in Washington? US Policy towards the International Criminal Court’, 21 *Wisconsin International Law Journal (Wis Intl LJ)* (2003) 557–597.

⁵⁷ *European Parliament Resolution on the International Criminal Court (ICC)*, Eur. Parl. Doc. P5 TA(2002)0449 (26 September 2002).

⁵⁸ D. Scheffer, ‘Article 98(2) of the Rome Statute: America’s Original Intent’, 3 *Journal of International Criminal Justice (J Intl Crim Jus)* (2005) 333–353, at 334. The legality of US BIAs and their consistency with the Rome Statute has also been the subject of much academic debate. See H. van der Wilt, ‘Bilateral Agreements between the United States and States Parties to the Rome Statute: Are They Compatible with the Object and Purpose of the Statute?’, 18 *Leiden J Intl L* (2005) 93–111; A. Bogdan, ‘The United States and the International Criminal Court: Avoiding Jurisdiction through Bilateral Agreements in Reliance on Article 98’, 8 *International Criminal Law Review (Int Crim L Rev)* (2008) 1–54. L. B. Bautista, ‘A Legal Analysis of US Bilateral Immunity Agreements’, 20 *World Bulletin* (2003) 28–50; J. Crawford, P. Sands, and R. Wilde, *In the Matter of the Statute 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 online at <https://www.legal-tools.org/doc/7f2edf/pdf/>; J. Ralph, ‘Europe, the United States, and the International Criminal Court’, in *Defending the Society of States: Why America Opposes the International Criminal Court and its Vision of World Society* (Oxford: Oxford University Press, 2007) 151, at 156–163.

⁵⁹ Coalition for the International Criminal Court Factsheet, Status of US Bilateral Immunity Agreements (BIAs), as of 11 December 2006, available online at www.iccnw.org/documents/CICCFs_BIAstatus_current.pdf.

⁶⁰ See ICC Press Release, ‘President of Uganda refers situation concerning the Lord’s Resistance Army (LRA) to the ICC’ (ICC-20040129-44), 29 January 2004; ICC Press Release, ‘Prosecutor receives referral of the situation in the Democratic Republic of Congo’ (ICC-OTP-20040419-50), 19 April 2004; ICC Press Release, ‘Prosecutor receives referral concerning Central African Republic’ (ICC-OTP-20050107-86), 7 January 2005.

⁶¹ See e.g., W. A. Schabas, ‘“Complementarity in Practice”: Some Uncomplimentary Thoughts’, 19 *Criminal Law Forum (Crim LF)* (2009) 5–33; M. H. Arsanjani and W. Michael Reisman, ‘The Law-in-Action of the International Criminal Court’, 99 *AJIL* (2005) 385–403.

defendants and an opportunity to prove that the Court could work. Although commentators sometimes complained that each of the three cases involved an African nation, 'African sovereignty' was protected because African leaders had themselves invoked the jurisdiction of the Court. Moreover, the individuals investigated and ultimately prosecuted in those cases were high-ranking leaders of rebel organizations who could not realistically claim the protection of international law in terms of immunities, and Article 27, therefore, presumably did not come into play.

Following the indictment and issuance of warrants of arrest against Sudanese President Omar Al-Bashir, however, the Article 27 question surged to the fore. These warrants, issued in 2009 and 2010,⁶² provoked an intense backlash amongst some African governments that the Court was 'targeting Africa', and, like the US approach to protecting its military, African States engaged in creative lawyering to 'fix' the problem. Omar Al-Bashir did not accept the legitimacy of the ICC's legal action, and argued vociferously, in political and legal fora, that as a Head of State, and particularly of a non-State Party, he was immune from prosecution before the ICC.⁶³ The first Pre-Trial Chamber hearing his complaint disagreed. It found that Article 27 answered the question of Al-Bashir's immunity, and concluded, without much analysis, that he was not immune, and that Sudan's status as a non-State Party had no effect on the Court's jurisdiction.⁶⁴

Al-Bashir, however, continued to challenge the Court and its jurisdiction, traveling widely to ICC State and non-States Parties alike.⁶⁵ The Registry of the Court, meanwhile, sent requests for cooperation to all States Parties to the Rome Statute to effectuate his arrest. Al-Bashir nonetheless traveled to Malawi in 2011, after which the Registrar of the Court issued a *Note Verbale* reminding Malawi of its obligations of cooperation under the Rome Statute, and inviting consultations from that government in case of 'any difficulty' that might arise in carrying

⁶² Situation in Darfur, Sudan, *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al-Bashir (The Prosecutor v. Omar Hassan Ahmad Al-Bashir)*, (ICC-02/05-01/09), (PTC I, 4 March 2009) (concluding that the 'current position of Omar Al-Bashir as Head of a state which is not a party to the Statute, has no effect on the Court's jurisdiction over the present case'. *Ibid.* at 41) [hereafter *First Al-Bashir Arrest Warrant*]. A second warrant was issued adding the crime of genocide. Situation in Darfur, Sudan, *Second Warrant of Arrest for Omar Hassan Ahmad Al-Bashir (The Prosecutor v. Omar Hassan Ahmad Al-Bashir)*, (ICC-02/05-01/09-95), (PTC I, 12 July 2010).

⁶³ See e.g., BBC, 'Warrant issued for Sudan's leader', *BBC News* (4 March 2009), available online at news.bbc.co.uk/2/hi/africa/7923102.stm (reporting that Al Bashir said the ICC could 'eat' the arrest warrant); Patrick Worsnip, 'No quick way to enforce IC warrant for Bashir', *Reuters* (5 March 2009), available online at www.reuters.com/article/sudan-court-enforcement/no-quick-way-to-enforce-icc-warrant-for-bashir-idUSN0533860520090305 (noting that Sudan has repeatedly said it does not recognize the jurisdiction of the ICC). See also sources cited *infra* note 65.

⁶⁴ *First Al-Bashir Arrest Warrant*, *supra* note 62. Pre-Trial Chamber I took the same view with respect to the application for an arrest warrant against Muammar Gaddafi. Situation in the Libyan Arab Jamahiriya, *Decision on the Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, (ICC-01/11), at 9 (PTC I, 27 June 2011).

⁶⁵ See e.g., M. Simons, 'South Africa Should Have Arrested Sudan's President, I.C.C. Rules', *New York Times* (6 July 2017), available online at www.nytimes.com/2017/07/06/world/africa/icc-south-africa-sudan-bashir.html; R. Gladstone, 'Ignoring International Warrants, Sudan's Leader Says He'll Visit Moscow', *New York Times* (3 July 2017), available online at www.nytimes.com/2017/07/03/world/africa/omar-hassan-bashir-sudan-russia.html.

out the arrest.⁶⁶ Malawi responded that as a sitting Head of State Al-Bashir was entitled to all privileges and immunities ‘under public international law’, including freedom from arrest and prosecution. In addition, the government of Malawi suggested that Article 27 could not apply to Al-Bashir because Sudan is not a party to the Rome Statute, arguing that it was simply following the position of the African Union on this question.⁶⁷

Pre-Trial Chamber I rejected Malawi’s arguments, which relied primarily on Article 98(1) of the Rome Statute, although Malawi also seemed (like Jordan more recently), to rely upon Al-Bashir’s inherent (and in its view inviolable) immunity under public international law. The Pre-Trial Chamber noted that, following the precedents of the Nuremberg and Tokyo tribunals, as well as the sources identified in Part 2 above, ‘immunity of either former or sitting Heads of State cannot be invoked to oppose a prosecution by an international court’ whether or not the State in question is a party to the Rome Statute.⁶⁸ The Court noted that the increasing acceptance of the Rome Statute by States, including the provisions of Articles 27(1) and (2), reinforced its view that ‘the international community’s commitment to rejecting immunity in circumstances where international courts seek arrest for international crimes has reached a critical mass’,⁶⁹ and found that ‘customary international law creates an exception to Head of State immunity when international courts seek a Head of State’s arrest for the commission of international crimes’.⁷⁰

In a second opinion issued on the same day, this time involving Al-Bashir’s travels to the Republic of Chad, Pre-Trial Chamber I recited the relevant provisions of its decision regarding the non-cooperation of Malawi, and came to the same conclusion, finding both that customary international law rendered him subject to the jurisdiction of the International Criminal Court, and that Article 98(1) was not a valid legal basis for Chad’s failure to arrest Al-Bashir.⁷¹

⁶⁶ *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 (The Prosecutor v. Omar Hassan Ahmad Al-Bashir)*, (ICC-02/05-01/09), (PTC I, 13 December 2011), at 6 [hereafter *Malawi Decision*].

⁶⁷ *Ibid.* at 8. The African Union issued several decisions requiring its members not to cooperate with the Court regarding the warrants of arrest issued against Al-Bashir. See e.g., African Union, Assembly, Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Tribunal (ICC) Doc. Assembly/AU/13(SXIII), at 10, AU Doc. Assembly/AU/Dec.245(XIII) Rev. 1 (3 July 2009), available online at [https://archive.au.int/collect/auassemb/import/English/Assembly%20AU%20Dec%20245%20\(XIII\)%20_E.pdf](https://archive.au.int/collect/auassemb/import/English/Assembly%20AU%20Dec%20245%20(XIII)%20_E.pdf); African Union, Assembly, Decision on the Implementation of the Assembly Decisions on the International Criminal Court – Doc. EX.CL/670(XIX), at 5, AU Doc. Assembly/AU/Dec.366(XVII) (30 June–1 July 2011), available online at [https://archive.au.int/collect/auassemb/import/English/Assembly%20AU%20Dec%20366%20\(XVII\)%20_E.pdf](https://archive.au.int/collect/auassemb/import/English/Assembly%20AU%20Dec%20366%20(XVII)%20_E.pdf) (referring to the provisions of Art. 98 of the Rome Statute).

⁶⁸ *Malawi Decision*, *supra* note 66, at 38.

⁶⁹ *Ibid.* at 42.

⁷⁰ *Ibid.* at 43. I agree with Professor Harmen van der Wilt that the reasoning of the *Malawi Decision* is consistent with well-trodden understandings of immunities before international courts. See Harmen van der Wilt, *The Continuing Story of the International Criminal Court and Personal Immunities* (draft received by the author).

⁷¹ *Decision Pursuant to Article 87(7) of the Rome Statute on the refusal of 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 (The Prosecutor v. Omar Hassan Ahmad Al-Bashir)*, (ICC-02/05-01/09), (PTC I, 13 December 2011), at 13–14.

Malawi and Chad argued that their actions were mandated by African Union resolutions intended to limit prosecutions against Heads of State.⁷² In a decision in 2009, the African Union requested a ‘comparative analysis of the implications of the practical application of Articles 27 and 98 of the Rome Statute’.⁷³ The purpose of undertaking this analysis was to move the Court toward assessing ‘regional input ... in determining whether or not to proceed with prosecution; particularly against senior state officials’.⁷⁴ At the eighth session of the Court’s Assembly of States Parties in 2009, South Africa advanced a proposal on behalf of all African parties to the Rome Statute to extend the power to defer ICC cases to the UN General Assembly. There was very little support voiced for this proposal at the ASP.⁷⁵

The decision by the ICC Prosecutor to open an investigation into the post-election violence that had occurred in Kenya in 2007 and the Court’s approval of the Prosecutor’s request⁷⁶ further inflamed the situation between the African Union and the Court. The Members of the African Union, meeting as Heads of State, responded over the next several years by taking Decisions reiterating its criticism of the Al-Bashir arrest warrants, requesting its Members to amend Article 16 of the Rome Statute to permit the UN General Assembly to suspend cases before the Court,⁷⁷ and supporting Kenya’s request for a Security Council deferral of the Situation under Article 16 of the Rome Statute.⁷⁸ Although Decisions are binding upon AU Members under some circumstances, many provisions of the AU Decisions ‘request’

⁷² *Al-Bashir Arrest Warrant*, *supra* note 62.

⁷³ See e.g., African Union, Assembly, Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Tribunal (ICC) Doc. Assembly/AU/13(SXIII), at 8(v), AU Doc. Assembly/AU/Dec.245(XIII) Rev. 1 (3 July 2009), available online at [https://archive.au.int/collect/auassemb/import/English/Assembly%20AU%20Dec%20245%20\(XIII\)%20_E.pdf](https://archive.au.int/collect/auassemb/import/English/Assembly%20AU%20Dec%20245%20(XIII)%20_E.pdf).

⁷⁴ *Ibid.*

⁷⁵ African Union States Parties to the Rome Statute, Annex VI of the 8th Session of the Assembly of States Parties to the Rome Statute, 18 November 2009 and author’s notes.

⁷⁶ Situation in the Republic of Kenya, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, (ICC-01/09), (PTC II, 31 March 2010).

⁷⁷ African Union, Assembly, Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/DEC.270 (XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC) Doc. Assembly/AU/10 (XV), AU Doc. Assembly/AU/Dec.296 (XV) (July 2010), available online at [https://archive.au.int/collect/auassemb/import/English/Assembly%20AU%20Dec%20296%20\(XV\)%20_E.pdf](https://archive.au.int/collect/auassemb/import/English/Assembly%20AU%20Dec%20296%20(XV)%20_E.pdf).

⁷⁸ African Union, Assembly, Decision on the Implementation of the Decisions on the International Criminal Court Doc. EX.CL/639(XVIII), AU Doc. Assembly/AU/Dec.334(XVI) (January 2011), available online at [https://archive.au.int/collect/auassemb/import/English/Assembly%20AU%20Dec%20334%20\(XVI\)%20_E.pdf](https://archive.au.int/collect/auassemb/import/English/Assembly%20AU%20Dec%20334%20(XVI)%20_E.pdf). The African Union urged African States to vote for an amendment to Article 16 of the Rome Statute to allow for the UN General Assembly to defer cases for a year. It reiterated these positions in 2011, see AU Assembly, Decision on the Implementation of the Assembly Decisions on the International Criminal Court, *supra* note 67, and 2012, see African Union, Assembly, Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court (ICC), AU Doc. Assembly/AU/Dec.397(XVIII) (January 2012), available online at [https://archive.au.int/collect/auassemb/import/English/Assembly%20AU%20Dec%20397%20\(XVIII\)%20_E.pdf](https://archive.au.int/collect/auassemb/import/English/Assembly%20AU%20Dec%20397%20(XVIII)%20_E.pdf); African Union, Assembly, Decision on the Implementation of the Assembly Decisions on the International Criminal Court (ICC), AU Doc. Assembly/AU/Dec.419(XIX) (July 2012), available online at [http://archive.au.int/collect/auassemb/import/English/Assembly%20AU%20Dec%20419%20\(XIX\)%20_E.pdf](http://archive.au.int/collect/auassemb/import/English/Assembly%20AU%20Dec%20419%20(XIX)%20_E.pdf).

or ‘urge’ non-cooperation of AU Members with the ICC.⁷⁹ Thus, although the Decisions are of undeniable political relevance, their formal legal effect is unclear.⁸⁰ Unlike the European Union, the African Union does not involve ‘a significant devolution of national authority to the continental body’.⁸¹ Moreover, the formal AU positions espoused regarding the Sudan and Kenyan situations were not shared by all African States, many of which expressed concern or opposition to them either in the African Union itself,⁸² or explicitly or implicitly in meetings of the ICC ASP.⁸³ This was equally true of African civil society organizations. In early 2011, several NGOs condemned the vote of Kenya’s Parliament supporting a withdrawal from the

⁷⁹ See e.g., Decision 296 of 27 July 2010, *supra* note 77, reiterating ‘its Decision that AU Member States shall not cooperate with the ICC in the arrest and surrender of President El-Bashir of The Sudan’, at 5, but ‘Requests Member States to balance, where applicable, their obligations to the AU with their obligations to the ICC’, *ibid.* at 6. In this Decision the AU also decided to ‘reject for now’ the request by the ICC to open a Liaison Office to the AU in Addis Ababa. *Ibid.* at 8.

⁸⁰ Assembly of the African Union, Rules of Procedure, rules 33 and 34 (July 2002). The Assembly can take three types of Decisions: Regulations, Directives, and ‘Recommendations, Declarations, Resolutions, Opinions, etc’. While Regulations and Directives are legally binding and ‘shall be automatically enforceable thirty days after the date of publication’, the latter category of Decisions, which includes Declarations and Resolutions, is ‘not binding and are intended to guide and harmonise the viewpoints of Member States’. *Ibid.* See also C. Heyns, E. Baimu and M. Killander, ‘The African Union’, 46 *German Yearbook of International Law (German YB Intl L)* (2003) 252–283, at 263 (‘Unlike the EU, which has powers to issue legally binding directives, the AU does not enjoy similar powers.’)

⁸¹ Although Art. 23(1) of the Constitutive Act does permit the imposition of political or economic sanctions against a Member State that fails to comply with the decisions and policies of the Union, Resolutions—and some Decisions—are not binding, and many states have responded to AU Decisions urging withdrawal from the ICC with either indifference or opposition. See, e.g., C. Johnson, ‘African Union: Resolution Urges States to Leave ICC’, *Global Legal Monitor* (20 February 2017) (noting Nigeria and Senegal’s opposition to withdrawal from the ICC), available online at www.loc.gov/law/foreign-news/article/african-union-resolution-urges-states-to-leave-icc/.

⁸² See e.g., African Union, Assembly, Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Tribunal (ICC) Doc. Assembly/AU/13(SXIII), AU Doc. Assembly/AU/Dec.245(XIII) Rev. 1 (3 July 2009), available online at [https://archive.au.int/collect/auassemb/import/English/Assembly%20AU%20Dec%20245%20\(XIII\)%20_E.pdf](https://archive.au.int/collect/auassemb/import/English/Assembly%20AU%20Dec%20245%20(XIII)%20_E.pdf) (Chad entered a reservation to the language deciding that ‘AU Member States shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of The Sudan’. *Ibid.*); African Union, Assembly, Decision on International Jurisdiction, Justice, and the International Criminal Court (ICC) Doc. Assembly/AU/13 (XXI), n. 2, AU Doc. Assembly/AU/Dec.482 (XXI) (May 2013), available online at [https://archive.au.int/collect/auassemb/import/English/Assembly%20AU%20Dec%20482%20\(XXI\)%20_E.pdf](https://archive.au.int/collect/auassemb/import/English/Assembly%20AU%20Dec%20482%20(XXI)%20_E.pdf) (reservation entered by the Republic of Botswana on the entire Decision).

⁸³ See e.g., Statement by Lesotho on Behalf of the African State Parties to the Rome Statute at the Thirteenth Session of the Assembly of States Parties to the Rome Statute (8 December 2014) (‘The African Union (AU) repeated calls for noncooperation should not obscure the consistent, active backing for the ICC among African governments and civil society across the African continent.’). African States have also discouraged other African nations from withdrawing from the Rome Statute. See e.g., Statement by Ghana to the Sixteenth Session of the Assembly of States Parties to the Rome Statute (6 December 2017); Statement by the Gambia at the Sixteenth Session of the Assembly of States Parties to the Rome Statute (6 December 2017). See also CICC, Press Release, *ICC: African Countries Support Court* (17 December 2014), available online at www.iccnw.org/documents/ICC_African_Countries_Support_Court.pdf (summarizing statements by over a dozen African countries expressing strong support for the Court’s work at the 13th Assembly of States Parties).

Rome Statute⁸⁴ and Kenyans for Peace with Truth and Justice, a civil society ‘coalition of over thirty Kenyan and East African legal, human rights, and governance organizations ... convened in the immediate aftermath of the disputed 2007 presidential election’,⁸⁵ urged the government to cooperate with the ICC.⁸⁶

Following the election of ICC defendants Uhuru Kenyatta and William Samoei Ruto as President and Deputy President, respectively, of Kenya, the African Union urged the ICC to withdraw the indictments against them.⁸⁷ In an Extraordinary Session held in October of 2013, the African Union complained of the ‘unprecedented’ indictments and proceedings against the sitting President and Deputy President of Kenya,⁸⁸ and declared that the ICC trials of Kenyatta and Ruto should be suspended.⁸⁹

Civil society organizations continued to protest the actions of the Kenyan Government and the African Union. International NGOs supported Kenyan civil society as well.⁹⁰ In May of 2013, Kenyans for Peace with Truth and Justice wrote a memo in response to the Kenyan Ambassador’s letter to the UN Security Council to defer the Kenyan cases before the ICC, arguing that Kenyatta had insisted while running for President that he could manage his professional duties and his personal obligations to cooperate with the ICC.⁹¹ Following Trial Chamber V(A)’s initial decision to excuse Ruto from trial, Kenyans for Peace with Truth and Justice wrote an open letter to the President of the ICC complaining that,

Allowing Mr. Ruto to miss sections of his trial owing to his ascendancy to the Deputy Presidency panders to the whims of the accused and accords him preferential treatment purely on the basis of his position as a state officer. This creates a distinction in treatment of state and non-state officers by the Court. The decision contradicts the essence of Article 27 on equal application of the statute without distinction based on official capacity.⁹²

⁸⁴ Dr. W. Kapinga, Statement on the Application for Summons by the International Criminal Court Chief Prosecutor Against 6 Persons for Their Alleged Complicity in Crimes Against Humanity Arising out of the 2007 Kenyan Post Election Violence (21 January 2011).

⁸⁵ Kenyans for Peace with Truth and Justice, Memo Responding to Kenyan Ambassador’s Letter to the UNSC on ICC Cases (17 May 2013).

⁸⁶ Kenyans for Peace with Truth and Justice, Press Statement on the Confirmation of Charges (20 January 2012). See, e.g., Parliamentarians for Global Action, Integrity of the Rome Statute Campaign, available online at www.pgaction.org/campaigns/icc/integrity.html.

⁸⁷ AU Assembly, Decision on International Jurisdiction, Justice, and the International Criminal Court (ICC), *supra* note 82.

⁸⁸ African Union, Assembly, Decision on Africa’s Relationship with the International Criminal Court (ICC), AU Doc. Ext/Assembly/AU/Dec.1 (October 2013), available online at https://au.int/sites/default/files/decisions/9655-ext_assembly_au_dec_decl_e_0.pdf.

⁸⁹ *Ibid.*

⁹⁰ See e.g., Parliamentarians for Global Action, Integrity of the Rome Statute Campaign, available online at www.pgaction.org/campaigns/icc/integrity.html.

⁹¹ Kenyans for Peace with Truth and Justice, Memo Responding to Kenyan Ambassador’s Letter to the UNSC on ICC Cases (17 May 2013).

⁹² Kenyans for Peace with Truth and Justice, Open Letter to the President of the ICC on the Decision on William Ruto’s Excusal from Continuous Presence at his Trial (9 July 2013).

In 2013, the long-awaited Security Council Resolution on the Kenya deferral was put to a vote. Seven ICC Non-Party States voted for deferral;⁹³ eight States, all ICC States Parties joined by the US,⁹⁴ abstained.⁹⁵ The Resolution failed.

Returning to the ICC Assembly of States Parties the following year, the Kenyan government pressed its case, this time arguing that Kenyatta should not have to be present at his trial due to his obligations as a Head of State.⁹⁶ Concerned about a threatened mass withdrawal of African States, the ICC Assembly of States Parties amended Rule 134 in November 2013, to add three new provisions to the ICC's trial procedure:⁹⁷ (1) the use of video technology (Rule 134*bis*);⁹⁸ (2) the possibility of excusal from trial if there are 'exceptional circumstances', (Rule 134*ter*);⁹⁹ and (3) a special rule (Rule 134*quater*) for '[a]n accused ... who is mandated to fulfill extraordinary public duties at the highest national level may ... request to the Trial Chamber to be excused and to be represented by counsel only; the request must specify that the accused explicitly waives the right to be present at the trial'.¹⁰⁰ This last provision, of course, is a special procedural immunity for high-ranking government officials, which is arguably inconsistent with the Statute itself.¹⁰¹ It is worth noting that the Kenyan courts asked to rule upon the issue of Omar Al-Bashir's immunity *in Kenya* found that the Rome Statute required his arrest because 'State immunity is accorded only to sovereign acts and is not available if the acts in question amount to international crimes'.¹⁰² The Appeals Court and the lower court found that the Kenyan Constitution, legislation, and international law required Al-Bashir's arrest and surrender to the Court.¹⁰³

⁹³ Azerbaijan, China, Morocco, Pakistan, Russian Federation, Rwanda, and Togo are all ICC non-party States.

⁹⁴ Argentina, Australia, France, Guatemala, Luxembourg, Republic of Korea, UK, and the US, are all, with the exception of the US, ICC States.

⁹⁵ S.C. Pres. Statement 2013/S/RES/11176 (15 November 2013), available online at www.un.org/News/Press/docs/2013/sc11176.doc.htm.

⁹⁶ Kenyans for Peace with Truth and Justice objected, stating 'allowing certain individuals to absent themselves from the trials on the basis of their status violates the principle of equality before the law'. Kenyans for Peace with Truth and Justice, Statement at the Assembly of States Parties (21 November 2013). This perspective seems consistent with Kenyan public opinion at the time. One independent public opinion poll designed to gauge attitudes towards the ICC cases from November 2013 showed 'that 42% of those polled support[ed] the trial of the cases before the ICC as opposed to 30% who prefer[red] the cases to be dropped. In the same poll, 67% of those polled would want the president and deputy to attend their trials before the ICC.' *Ibid.*

⁹⁷ ICC-ASP/12/Res.7 (27 November 2013).

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.* This rule has been applied to conditionally excuse Mr. Samoei Ruto from attendance at trial. *Reasons for the Decision on Excusal from Presence at Trial under Rule 134quater (The Prosecutor v. William Samoei Ruto and Joshua Arap Sang)*, (ICC-01/09-01/11-1186), (TC V(A), 18 February 2014).

¹⁰¹ See International Crimes Database, *ICD Brief 5: The International Criminal Court on Presence at Trial: The (In)validity of Rule 134quater* (September 2014), available online at www.internationalcrimesdatabase.org/upload/documents/20140904T143535-ICD%20Brief%20-%20Abel%20S%20%20Knottnerus.pdf.

¹⁰² *Attorney General & 2 Or. v. Kenya Section of the International Commission of Jurists*, Civil Appeal 105 of 2012 and Criminal Appeal 274 of 2011 (Consolidated) (16 February 2018) [hereinafter *Kenyan Appeals Court Judgment*].

¹⁰³ *Ibid.*

The AU's objections to the Kenya cases ended only with the dismissal of those cases in 2014 by the Prosecution and in 2016 by a Trial Chamber.¹⁰⁴ Meanwhile, Al-Bashir continued to travel widely and to challenge his arrest. He attended a Common Market for Eastern and Southern Africa Summit (COMESA) in Kinshasa, and the Democratic Republic of the Congo refused to execute the warrants pending against him. The DRC argued that he had been invited by the African Union, which had issued a recent decision providing that no serving AU Head of State or Government shall be required to appear before any international court or tribunal during their term of office.¹⁰⁵ In addition, in the DRC's view, Article 98(1) of the Statute required it to obtain the waiver of the Sudanese government to surrender Al-Bashir given his immunity under customary international law as a Head of State.¹⁰⁶ The Pre-Trial Chamber, incorrectly in my view given the provision's status as customary international law, but following the views of some authors,¹⁰⁷ found that Article 27(2) could not apply to non-States Parties to the Rome Statute as they had not adhered to the Statute. Nonetheless, the Chamber relied upon Resolution 1593 of the Security Council ordering the Government of Sudan to fully cooperate with the Court as implicitly waiving Al-Bashir's immunity.¹⁰⁸ It further found that any conflict between the obligation *not* to arrest Al-Bashir stemming from the AU treaty would be trumped by Article 25 and 103 of the UN Charter, and referred the DRC's noncompliance to the Assembly of States Parties and the Secretary General of the United Nations.

Following this decision, the African Union amended the proposed Statute of the African Court of Justice and Human Rights on 26 June 2014 providing:

¹⁰⁴ The Prosecutor officially withdrew charges against President Kenyatta in December 2014. *Notice of withdrawal of the charges against Uhuru Muigai Kenyatta (The Prosecutor v. Uhuru Muigai Kenyatta)*, (ICC-01/09-02/11-983), (TC V(B), 5 December 2014). In April 2016, a divided Trial Chamber vacated the charges in the last remaining case at the ICC related to the Kenya situation, finding that there was not enough evidence to proceed. *Public redacted version of Decision on Defence Applications for Judgments of Acquittal (The Prosecutor v. William Samoei Ruto and Joshua Arap Sang)* (ICC-01/09-01/11-2027-Red-Corr.), (TC V(B), 5 April 2016). But see *Dissenting Opinion of Judge Olga Herrera Carbuca (The Prosecutor v. William Samoei Ruto and Joshua Arap Sang)*, (ICC-01/09-01/11-2027-AnxI), (TC V(B), 5 April 2016) (concluding that there was enough evidence to proceed with a trial of Mr. Ruto, even in the face of many witnesses being unwilling to risk their lives by testifying, because there was other evidence of Mr. Ruto's culpability). In response to this decision, the ICC Prosecutor noted that the case had been 'eroded by a perfect storm of witness interference and politicization'. Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding Trial Chamber's decision to vacate charges against Messrs William Samoei Ruto and Joshua Arap Sang without prejudice to their prosecution in the future (6 April 2016), available online at www.icc-cpi.int/Pages/item.aspx?name=otp-stat-160406.

¹⁰⁵ *Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al-Bashir's Arrest and Surrender to the Court (The Prosecutor v. Omar Hassan Ahmad Al-Bashir)*, (ICC-02/05-01/09), (PTC II, 9 April 2014) [hereafter *DRC Decision*].

¹⁰⁶ *Ibid.* at 18–19.

¹⁰⁷ See e.g., D. Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits', 1 *J Intl Crim Just* (2003) 618–650; D. Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al-Bashir's Immunities', 7 *J Intl Crim Just* (2009) 333–352. But see D. Tladi, 'The ICC Decisions on Chad and Malawi: On Cooperation, Immunities, and Article 98', 11 *J Intl Crim Just* (2013) 199–221.

¹⁰⁸ *DRC Decision*, *supra* note 105, at 26–30.

No charges shall be commenced or continued before the court against any Serving Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure in office.¹⁰⁹

This provision is part of the ‘Malabo Protocol’, by which the yet to be established African Court of Justice and Human Rights could acquire jurisdiction over international and transnational crimes. While observers were generally positive about the potential establishment of an African Regional Criminal Court, concern has been expressed by some that the motivation may simply be ‘an attempt by the AU to shield African heads of state and senior state officials from being held to account’.¹¹⁰ Moreover, given the exceptionally long tenure of most African Heads of State,¹¹¹ waiting until a Head of State leaves office would mean that, to a significant degree, immunity would be tantamount to impunity.¹¹²

Following the adoption of the Malabo Protocol (which, according to the African Union, has been signed by 15 countries and ratified by none)¹¹³ the issue of Al-Bashir’s immunity resurfaced again. In June 2015, the South African government permitted Omar Al-Bashir to attend an African Union summit in South Africa. South Africa’s high court issued an interim order barring Bashir from leaving the country in order to hear an application by the Southern African Litigation Centre to force authorities to arrest him.¹¹⁴ The ICC called upon South Africa to

¹⁰⁹ Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Article 46A *bis*, EX.CL/846(XXV) (May 2014).

¹¹⁰ Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court* (2016), available online at www.refworld.org/pdfid/56a9ddcf4.pdf. Kenyans for Truth and Justice, ‘Seeking Justice or Shielding Suspects? An analysis of the Malabo Protocol on the African Court’ (23 November 2016), available online at <http://kptj.africog.org/wp-content/uploads/2016/11/Malabo-Report.pdf> (suggesting that the granting of immunity to sitting heads of state would ‘seem to undermine the *raison d’être* of the Court’).

¹¹¹ M. George, ‘A Look at Presidential Term Limits in Central Africa ahead of Elections’, *Lex Lata, Lex Ferenda* (6 January 2016), available online at law.wustl.edu/harris/lexlata/?p=918; African Center for Strategic Studies, *Term Limits for African Leaders Linked to Stability* (23 February 2018), available online at <https://africacenter.org/spotlight/term-limits-for-african-leaders-linked-to-stability/> (finding that 18 countries in Africa do not adhere to presidential term limits. In the ten African countries where term limits have been evaded since 2000, the average time in power is 22 years).

¹¹² See generally, C. Maina Peter, ‘Fighting Impunity: African States and the International Criminal Court’, in E. A. Ankumah (ed.), *The International Criminal Court and Africa: One Decade On* (Cambridge: Intersentia, 2016) 1.

¹¹³ African Union, List of Countries Which Have Signed, Ratified/Accessed to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (last updated 20 May 2019), available online at <https://au.int/sites/default/files/treaties/36398-sl-PROTOCOL%20ON%20AMENDMENTS%20TO%20THE%20PROTOCOL%20ON%20THE%20STATUTE%20OF%20THE%20AFRICAN%20COURT%20OF%20JUSTICE%20AND%20HUMAN%20RIGHTS.pdf>. Kenya’s Cabinet Secretary for Foreign Affairs of the Republic of Kenya reiterated Kenya’s commitment to ratifying the Protocol in February 2018, but it has yet to do so. See Nzau Musau, ‘Kenya Gives Nod to Creation of African Version of ICC’, *The Saturday Standard* (Kenya) (5 February 2018), available online at <https://www.standardmedia.co.ke/article/2001268545/kenya-gives-nod-to-creation-of-african-version-of-icc>.

¹¹⁴ *Southern Africa Litigation Centre v. Minister of Justice and Constitutional Development & others*, 2015 (5) SA 1 (GP) (24 June 2015) [hereafter *South African High Court Judgment*]. See also O. Bowcott and J. Grierson, ‘Sudan President Barred from Leaving South Africa’, *The Guardian* (15 June 2015), available online at www.theguardian.com/world/2015/jun/14/sudan-president-omar-al-bashir-south-africa-icc.

detain Al-Bashir and ‘spare no effort in ensuring the execution of the arrest warrants’.¹¹⁵ In response to the interim order issued by the High Court, the South African government permitted Al-Bashir to fly out of the country while the High Court was hearing the application to arrest Bashir. Following the hearing, the High Court held that Al-Bashir should have been detained.¹¹⁶ The government’s actions were condemned by the High Court judges,¹¹⁷ over 100 civil society organizations,¹¹⁸ and the international community.¹¹⁹

Pre-Trial Chamber II was seized with the question whether South Africa had failed to comply with its obligations under the Statute by not arresting and surrendering Omar Al-Bashir to the Court while he was on South African territory, and whether a formal finding of non-compliance should be sent to either the ICC ASP or the Security Council under Article 87(7) of the Statute.¹²⁰ South Africa challenged the reasoning of the *DRC Decision*, arguing that Security Council Resolution 1593 could not constitute a waiver of immunities for Al-Bashir, and that the Chamber should call upon the UN Security Council to ask the International Court of Justice for an Advisory Opinion on the question of Resolution 1593’s meaning.¹²¹

Pre-Trial Chamber II addressed the question of Al-Bashir’s possible immunity by first examining whether the Host Agreement concluded between South Africa and the AU for the purpose of the AU Summit protected him. The Chamber was not persuaded that it did. The Chamber then turned to the issue of Article 27(2)’s application, finding that it excluded the immunity of Heads of State, both vertically and horizontally.¹²² This was true for States Parties to the Statute, and States providing a waiver of immunity.¹²³ As regards States not party to the Rome Statute, the Chamber found that these States ‘have no obligation to cooperate with the Court and the irrelevance of immunities based on official capacity as enshrined in article 27(2) of the Statute has no effect on their rights under international law’.¹²⁴ The Chamber resolved the question by referring, as Pre-Trial Chamber I had, to Security Council Resolution 1593. The Resolution not only imposed an obligation of cooperation on Sudan (as the *DRC decision* had found), but the referral via Article 13(b) of the Statute triggers the application of the ICC

¹¹⁵ *Ibid.*

¹¹⁶ O. Bowcott, ‘Sudan President Omar Al Bashir Leaves South Africa as Court Considers Arrest’, *The Guardian* (15 June 2015), available online at www.theguardian.com/world/2015/jun/15/south-africa-to-fight-omar-al-bashirs-arrest-warrant-sudan.

¹¹⁷ N. Onishi, ‘Omar al-Bashir, Leaving South Africa, Eludes Arrest Again’, *New York Times* (15 June 2015), available online at www.nytimes.com/2015/06/16/world/africa/omar-hassan-al-bashir-sudan-south-africa.html?_r=0.

¹¹⁸ Human Rights Watch, *Civil Society Declaration on Sudanese President Omar al-Bashir’s Visit to South Africa Without Arrest* (1 July 2015), available online at www.hrw.org/news/2015/07/01/civil-society-declaration-sudanese-president-omar-al-bashirs-visit-south-africa.

¹¹⁹ Bowcott and Grierson, Sudan President Barred from Leaving South Africa, *supra* note 114.

¹²⁰ *Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al Bashir (The Prosecutor v. Omar Hassan Ahmad Al Bashir)*, (ICC-02/05-01/09), (PTC II, 6 July 2017), at 21 [hereafter *South Africa Decision*].

¹²¹ *Ibid.* at 40.

¹²² *Ibid.* at 71–73.

¹²³ *Ibid.* at 78–80.

¹²⁴ *Ibid.* at 82. This unfootnoted assertion appears to be at odds with the view taken by the International Law Commission in 1996 and the view of the International Court of Justice in 2002 in the *Yerodia* case. 1996 ILC *Draft Code of Crimes against the Peace and Security of Mankind*, *supra* note 41, Art. 7; *Arrest Warrant Case*, *supra* note 54, at 60.

Statute in its entirety, including Article 27(2).¹²⁵ The Chamber noted, by Majority, that it was not considering the Security Council Resolution to constitute a ‘waiver’ of Al-Bashir’s immunity; instead, reading Article 27(2) and Security Council Resolution 1593 together, the Chamber found there was simply no immunity to be had.

The Pre-Trial Chamber then turned to the question of Article 98’s application, finding that it ‘provides no rights to States Parties to refuse compliance with the Court’s requests for cooperation’.¹²⁶ Instead, it is the ‘Court, and not ... the State Party, [which has] the responsibility to address the matter’ of any cooperation difficulties that a pre-existing treaty obligation may pose in implementing a State’s duty of cooperation.¹²⁷ In short, the State is required under this view to respect orders from the Court rather than engaging in unilateral (and oppositional) interpretations of the Rome Statute.

In an odd passage, the Pre-Trial Chamber found that the absence of an explicit exclusion of immunity in the Genocide Convention meant that neither Article IV nor Article VI of the Convention could be read as an implicit exclusion of immunities.¹²⁸ This dictum was neither necessary to the case, nor, in the view of this writer, carefully reasoned.¹²⁹ The Minority Opinion of Judge Perrin de Brichambaut is more convincing in this regard. Article IV of the Genocide Convention states that all persons committing genocide are liable for punishment ‘whether they are constitutionally responsible rulers, public officials or private individuals’.¹³⁰ This provision—by its terms—and in the views of scholars having studied the matter in depth¹³¹—means what it says: that immunities cannot be raised as a defense to a charge of genocide either in the territorial state or before an ‘international penal tribunal’. Moreover, as Judge Perrin de Brichambaut notes, a teleological reading of the Genocide Convention suggests that permitting personal immunities to be invoked would be completely incoherent because, in part, the prohibition of genocide is a *jus cogens* norm. Upholding immunities would run counter to the object and the purpose of the Genocide Convention. For this reason, he notes that Sudan itself waived the immunities of Al-Bashir by ratifying the Genocide Convention, as did South Africa.¹³²

Judge Perrin de Brichambaut also took up the relationship between Article 27(2) and Article 98(1). In this part of his opinion, he was unable to opine definitively regarding the effect of Resolution 1593. Thus, he found it simply easier to rest the immunities issue on the ratification by both Sudan and South Africa of the Genocide Convention.¹³³ The obvious difficulty with this analysis is that it would exclude charges of war crimes or crimes against humanity, and

¹²⁵ *South Africa Decision*, *supra* note 120, at 88.

¹²⁶ *Ibid.* at 99.

¹²⁷ *Ibid.* at 100.

¹²⁸ *Ibid.* at 109.

¹²⁹ As has been the case with many recent ICC decisions, important legal statements are often proffered *ex cathedra* by the Court’s Chambers with absolutely no or very few references to legal sources. L. N. Sadat, ‘Fiddling While Rome Burns? The Appeals Chamber’s Curious Decision in Prosecutor v. Jean-Pierre Bemba Gombo’, *EJIL: Talk!* (12 June 2018), available online at www.ejiltalk.org/fiddling-while-rome-burns-the-appeals-chambers-curious-decision-in-prosecutor-v-jean-pierre-bemba-gombo/.

¹³⁰ Convention on the Prevention and Punishment of the Crime of Genocide Art. IV, 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951).

¹³¹ W. A. Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn., Cambridge: Cambridge University Press, 2009), at 369.

¹³² *South Africa Minority Opinion*, *supra* note 12 at 21.

¹³³ *Ibid.* at 39–106.

makes application of the Rome Statute contingent upon a State's ratification of other international treaties.

4. THE WAY FORWARD: A RETURN TO FIRST PRINCIPLES

As others have noted, the six Pre-Trial Chambers of the ICC that have examined the question have all concluded that States Parties to the Rome Statute have an obligation to arrest Omar Al-Bashir (and other Heads of State), but have not been consistent in their reasoning.¹³⁴ Early decisions relied upon the Rome consensus and the Nuremberg lineage of the International Criminal Court to find it completely obvious that his immunities before an international court could not prevent his arrest and surrender. The constant drumbeat of the US and the African Union's opposition (among others), however, and an avalanche of scholarly work protesting the application of the Statute to Heads of State and to non-States Parties,¹³⁵ has had the effect of pushing the Court's Chambers to reconsider their views. The decision of the Appeals Chamber in the Jordan case represented an opportunity to consider this inquiry in fuller perspective and to, perhaps, resolve the questions presented in a clear and satisfactory manner. Yet there were worrying aspects of the case as well.

First, it must be acknowledged that the controversy about Head of State immunity before the International Criminal Court has its origin in a political, not a legal question. The history of international criminal law, from the Nuremberg Tribunal forward, clearly posits the removal of immunities of all kinds, from all persons, with respect to the commission of the core, *jus cogens*, crimes, before international criminal courts. One need only look to the work of the

¹³⁴ See e.g., A. Knottnerus, 'The Immunity of al-Bashir: The Latest Turn in the Jurisprudence of the ICC', *EJIL: Talk!* (15 November 2017), available online at <https://www.ejiltalk.org/the-immunity-of-al-bashir-the-latest-turn-in-the-jurisprudence-of-the-icc/> (noting that in different decisions the Chamber has come to the same conclusion by relying on customary international law (2011), arguing that the Security Council waived Al-Bashir's immunity (2014), and because the Security Council referral situated Sudan in a similar position as States Parties (2017)); Y. Tan, 'The ICC's South Africa Non-Compliance Decision: Effect of Security Council Resolution 1593 on Referring the Darfur Situation', 10 *Amsterdam Law Forum* (2018) 72–76. ('Decisions of the ICC are not consistent. . . . [t]hese different approaches also evidence the disagreement with regard to the effect of Resolution 1593; such inconsistency in the ICC's findings may undermine the predictability of its law.' *Ibid.* at 77.)

¹³⁵ See e.g., D. J. Scheffer, 'US Policy and the ICC', 32 *Cornell International Law Journal* (Cornell Intl Lj) (1999) 529; Statement by Russia, Reports of the Secretary-General on the Sudan and South Sudan, Official Records of the Security Council, Provisional verbatim record of the 7963rd meeting, UN Doc. S/PV.7963 (8 June 2017) ('the obligation to cooperate, as set forth in resolution 1593 (2005), does not mean that the norms of international law governing the immunity of the Government officials of those States not party to the Rome Statute can be repealed, and presuming the contrary is unacceptable.'). See D. M. Amann and M. N. S. Sellers, 'The United States of America and the International Criminal Court', 50 *Am J Comp L Supp* (2002) 381–404; W. A. Schabas, 'United States Hostility to the International Criminal Court: It's All About the Security Council', 15 *European Journal of International Law* (Eur J Intl L) (2002) 701–720. See also P. Gaeta, 'Does President Al-Bashir Enjoy Immunity from Arrest?', 7 *J Intl Crim Jus* (2009) 315–332 (arguing that although the 'ICC arrest warrant is a lawful coercive act against an incumbent head of state', because Sudan has not waived the immunities of Al-Bashir, 'states parties to the Statute are not obliged to execute the ICC request for surrender of President Al-Bashir, and can lawfully decide not to comply with it'). See also C. Cherner Jalloh and I. Bantekas (eds), *The International Criminal Court and Africa* (Oxford: Oxford University Press, 2017).

International Law Commission and the establishment of the ad hoc international criminal tribunals referenced above, as well as to the Nuremberg and Tokyo tribunals themselves, to see that this is so. As the late Cherif Bassiouni wrote many years ago, after the Nuremberg trial, ‘a new rule of customary international law was established, namely that international immunities do not apply to international prosecutions for certain international crimes’.¹³⁶ An examination of the text and negotiating history of the Rome Statute, as well as writings of participants to the negotiations and the reactions of States upon ratification, clearly indicates that States and the negotiators to the diplomatic conference understood Article 27(1) and 27(2) to place the future Court squarely within the Nuremberg precedent and customary international law.

It is equally clear that Article 98’s adoption was not meant to undermine the principle that ‘irrelevance of official position’ effectively removed immunities *ratione materiae* as well as ‘temporal immunity’ from prosecution. As mentioned above, Article 98 did not receive much attention in Rome. Subsequently, however, with the pincer-like attacks on the Court’s jurisdiction by the US and the African Union, the interpretation of Article 98 has surged to the fore.¹³⁷ Indeed, following the entry into force of the Rome Statute, individuals finding themselves on the receiving end of the Court’s warrants—or even potentially so—began a concerted political campaign to attack the moral and legal legitimacy of the Court and its work. The US led the charge both during the Diplomatic Conference and afterwards, appointing itself as the guardian of the frontiers of sovereignty at Rome and protesting in and out of the negotiations that the treaty was flawed. It endeavored to kill the treaty on the last day of the conference by requesting that the Statute be put to a vote, which it ultimately lost in a humiliating diplomatic defeat.¹³⁸ Although it signed the Statute under President Bill Clinton, and re-engaged with the Court for the eight years of Barack Obama’s presidency, it launched a global anti-ICC campaign during the years of George W. Bush’s presidency, a reprise of which was recently outlined by John Bolton, who briefly served as National Security Adviser to President Donald Trump.¹³⁹ While much of Bolton’s speech simply repeated his earlier views, one of the new threats was to:

[R]espond against the ICC and its personnel to the extent permitted by US law. Ban [ICC] judges and prosecutors from entering the United States. We will sanction their funds in the US financial system, and, we will prosecute them in the US criminal system. We will do the same for any company or state that assists an ICC investigation of Americans.¹⁴⁰

¹³⁶ M. C. Bassiouni, *Introduction to International Criminal Law* (Ardsley, NY: Transnational Publishers, 2003), at 73.

¹³⁷ C. Kreß and K. Prost, ‘Article 98: Cooperation with respect to waiver of immunity and consent to surrender’, in O. Triffterer and K. Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn., München: C.H. Beck, 2016) 2122.

¹³⁸ The Rome Statute was overwhelmingly approved with a vote of 120 to 7, with 21 States abstaining. See Bassiouni, Historical Survey, *supra* note 44, at 31–33.

¹³⁹ J. Bolton, *Protecting American Constitutionalism and Sovereignty from International Threats*, Remarks delivered to the Federalist Society (10 September 2018), available online at www.justsecurity.org/60674/national-security-adviser-john-bolton-remarks-international-criminal-court/.

¹⁴⁰ *Ibid.* In April, the Trump administration made good on its threat and revoked the entry visa for ICC prosecutor Fatou Bensouda. Judith Kelley, ‘The U.S. revoked the visa for the ICC prosecutor: That bodes poorly for international criminal justice’, *Washington Post*, April 3, 2019 available online at <https://www.washingtonpost.com/politics/2019/04/08/us-revoked-visa-icc-prosecutor-that-bodes-poorly-international-criminal-justice/>.

The legal arguments offered by the US have been repeatedly rebuffed by myself and others,¹⁴¹ particularly its efforts to create an ‘American exception’ to international criminal justice.

The state sovereignty argument of the US was, and still is, particularly troubling. As a legal matter, the four core crimes embedded in the Rome Statute involve *jus cogens* prohibitions that States simply cannot contract out of.¹⁴² As a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia found in *Furundžija*, a norm’s *jus cogens* status results in a series of consequences, including its non-derogable nature, even in times of emergency,¹⁴³ the non-applicability of statutes of limitations,¹⁴⁴ that it ‘must not be excluded from extradition under any political offence exemption’,¹⁴⁵ and the prohibition against ‘expelling, returning or extraditing a person to another State where there are substantial grounds for believing’ that person would be subjected to a violation of the norm.¹⁴⁶ The Tribunal noted (in discussing the question of torture, the crime in question):

The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture. It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law In short, in spite of possible national authorisation by legislative or judicial bodies to violate the principle banning torture, individuals remain bound to comply with that principle Furthermore, at the individual level, that is, that of criminal liability, it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction.¹⁴⁷

Thus, while the Rome Statute can, and does, accommodate the needs of State sovereignty to a significant degree—including through the complementarity regime, protection of national security information, and the inclusion of Article 98—it does not affect the customary international law status of *jus cogens* crimes, but, through the operation of Article 27, makes clear that official positions that might normally receive immunities under international law simply cannot be successfully invoked before the Court.

As a political matter, there was little sympathy for the US position, which has been generally perceived to be mean-spirited and self-serving, particularly in light of the embrace of

¹⁴¹ Sadat, *Uneasy Revolution*, *supra* note 1. See also Amann and Sellars, *supra* note 135, at 389–390.

¹⁴² See sources cited at *supra* note 3.

¹⁴³ Judgment, *Prosecutor v. Furundžija* (IT-95-17/1-T), Trial Chamber II, 10 December 1998, at 144 (citations omitted). See generally, W. A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (2nd edn., Cambridge: Cambridge University Press, 2008), at 101–102.

¹⁴⁴ *Furundžija* Judgment, *supra* note 143, at 157.

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.* at 144.

¹⁴⁷ *Ibid.* at 155–156. See also Bassiouni, *International Crimes*, *supra* note 3; A. Cassese, ‘The Hierarchy of Rules in International Law: The Role of Jus Cogens’, in *International Criminal Law*, *supra* note 4, at 198–212.

torture as national policy by the Bush administration,¹⁴⁸ the illegal invasion of Iraq in 2003,¹⁴⁹ and the Obama administration's campaign of targeted killing by drones.¹⁵⁰ Although cast as putatively procedural protections and law of treaty arguments, the US position on the ICC boils down to the argument that the US and its citizens cannot be held legally accountable for the commission of ICC crimes because the US is a superpower. A significant majority of States have pushed back against US assertions of exceptionalism when they contravene fundamental norms of international law,¹⁵¹ and properly so.¹⁵²

The objections of the African Union to the ICC's jurisdiction over the nationals of non-States Parties and government officials have had a friendlier, if wary, reception, at least in some quarters. If the US argument for exceptional treatment rests upon its self-perception as the guardian of a benign, if imperial, *pax Americana*, African objections were largely protestations of imperial and neo-colonial mistreatment by the ICC. In 2013, addressing the Extraordinary Summit of the African Union in Addis Ababa, Uhuru Kenyatta, Kenya's President (who had been indicted by the Court) stated:

The ICC has been reduced into a painfully farcical pantomime, a travesty that adds insult to the injury of victims. It stopped being the home of justice the day it became the toy of declining imperial powers ... It is a fact that this court performs on the cue of European and American governments against the sovereignty of African States and peoples that should outrage us. People have termed this situation 'race hunting', I find great difficulty adjudging them wrong.¹⁵³

¹⁴⁸ See e.g., P. Sands, *Torture Team: Rumsfeld's Memo and the Betrayal of American Values* (New York: Palgrave Macmillan, 2008); K. J. Greenberg and J. L. Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (Cambridge: Cambridge University Press, 2005); Human Rights Watch, *Report: Getting Away with Torture: The Bush Administration and Mistreatment of Detainees* (12 July 2011), available online at www.hrw.org/report/2011/07/12/getting-away-torture/bush-administration-and-mistreatment-detainees#.

¹⁴⁹ See e.g., J. Hagan, J. Kaiser and A. Hanson, *Iraq and the Crimes of Aggressive War: The Legal Cynicism of Criminal Militarism* (Cambridge: Cambridge University Press, 2015).

¹⁵⁰ L. N. Sadat, 'America's Drone Wars', 45 *Case Western Reserve Journal of International Law (Case W Res J Intl L)* (2012) 215–234; M. E. O'Connell, *The Right to Life in War and Peace: A Legal and Moral Critique of Targeted Killing*, Remarks for the Institute of Theology and Peace (Hamburg) (15 August 2012).

¹⁵¹ See e.g., Statement by Secretary General Kofi Annan, United Nations Secretary General's address to the General Assembly, New York (23 September 2003), available online at www.un.org/webcast/ga/58/statements/sg2eng030923.htm (rejecting the 'pre-emptive war doctrine'). See also M. E. O'Connell, *The Myth of Preemptive Self-Defense*, The American Society of International Law Task Force on Terrorism Papers (August 2002); L. N. Sadat, 'Terrorism and the Rule of Law', 3 *Washington University Global Studies Law Review (Wash U Global Stud L Rev)* (2004) 135–154.

¹⁵² Unfortunately, the current administration has responded to this by withdrawing the US from various international organizations including, most recently, the Human Rights Council. See Gardiner Harris, 'Trump Administration Withdraws US from U.N. Human Rights Council', *New York Times* (19 June 2018), available online at www.nytimes.com/2018/06/19/us/politics/trump-israel-palestinians-human-rights.html.

¹⁵³ E.-M. Gekara and D. Opiyo, 'President Kenyatta's Stinging Attack on ICC and Europe', *Daily Nation* (Nairobi) (12 October 2013), available online at www.nation.co.ke/news/politics/Uhuru-Kenyatta-AU-Summit-ICC/1064-2029784-opkfd1z/index.html.

The following year the statements of African leaders were similarly forceful.¹⁵⁴ The media, scholars, and the ICC itself felt the sting of remarks such as this, not because of the truth they contained as regards individuals credibly believed to be responsible for some of the most serious crimes of concern to the international community as a whole, but because Africa had in fact suffered extensively from colonial and imperial ambitions in the past. The failure of the international community to fully recognize the evils colonialism had brought to the continent or pay reparations for past wrongs makes the ICC's initial focus on situations from Africa subject to being miscast as yet another form of Western oppression. As Charles Jalloh and Ilias Bantekas have noted:

[T]he memories of colonization are still vivid in the African Psyche and these have played no small part in the reactions of the African Union (AU) and individual African states. The brutal nature of colonialism and its pernicious effects on entire nations and peoples cannot be underestimated. Nor can such experiences be divorced from the realities that many continue to live today, in Africa and across the world.¹⁵⁵

Yet the African situations before the Court also represent an opportunity for the international community—through the institution of the ICC—to protect the human rights of African victims. Their right to justice—as well as to reparations and other remedies for the sufferings endured as a result of colonialism—is arguably being misappropriated by Heads of State seeking to protect their status and position, ironically relying upon the very doctrines that gave the right to European monarchs to wage war against and engage in conquest of African lands in the first place.

AU leaders and their allies are seeking to convert legitimate political grievances into problematic legal doctrine. The position taken by the AU and by Jordan in its Appeal is an attempt to force ICC States Parties—as well as non-States Parties—to assert a right of Head of State immunity barring their leaders from prosecution *before an international court* for crimes against humanity, genocide, war crimes and aggression. Yet the judges of the Court must—as they have been doing since 2009—resist the political pressure exerted upon them and instead say ‘what the law is’,¹⁵⁶ in a manner faithful to the canons of treaty interpretation that bind them under Article 21 of the Rome Statute as well as the Vienna Convention on the Law of Treaties. While the text of Article 98(1) is complex and admittedly not free from ambiguity when read in tandem with Article 27, given that Article 27 codifies a rule of customary international law that deprives individuals from relying upon immunities attached to their position with respect to core crimes, any interpretation of Article 98 must take this into account.¹⁵⁷ Since individuals

¹⁵⁴ M. Swart, ‘Towards a Multi-layered System of International Criminal Justice’, in E. A. Ankumah and B. B. Ferencz (eds), *The International Criminal Court and Africa: One Decade On* (Cambridge: Intersentia, 2016) 143.

¹⁵⁵ C. Chernor Jalloh and I. Bantekas, ‘Conclusion’, 371 in Jalloh and Bantekas, *supra* note 135.

¹⁵⁶ *Marbury v. Madison* (5 U.S. 137, 138 (1803)).

¹⁵⁷ See in this respect the helpful analysis of Amicus Curiae Robinson, Cryer, deGuzman, Lafontaine, Oosterveld, and Stahn, in the *Al Bashir* case. *Amicus Curiae Observations of Professors Robinson, Cryer, deGuzman, Lafontaine, Oosterveld, and Stahn (The Prosecutor v. Omar Hassan Ahmad Al-Bashir)* (ICC-02/05-01/09-362) (18 June 2018). See also *Amicus curiae observations submitted by Prof. Flavia Lattanzi pursuant to rule 103 of the Rules of Procedure and Evidence on the merits of the legal questions presented in ‘The Hashemite Kingdom of Jordan’s appeal against the ‘Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the*

are not immune from prosecution before an international court for Rome Statute crimes, to the extent that the individual hails from an ICC State Party, they clearly must be rendered to the Court as a result of Article 27(2) and customary international law.

Because the ICJ in the *Yerodia* case recognized the temporal immunity of at least incumbent Heads of State and Foreign Ministers before national courts, presumably someone like Al-Bashir could not be directly prosecuted in South Africa, for example, should he travel there whilst still serving as Head of State.¹⁵⁸ The question then is whether the bar to a domestic prosecution applies before an international court that has jurisdiction. In this case, the jurisdiction of the Court is triggered by the Security Council, which undoubtedly has the power and the authority to remove his temporal immunity to be prosecuted before an international court. This is not because the Council is ‘creating’ a new rule of international law in so doing, but *because it is enforcing an existing rule*. The parameters of the Council’s waiver are set forth in the Rome Statute itself and in the text of the Security Council Resolutions issued by it effectuating the referral. Whether implicit or explicit, it seems clear that the Council, through its referral, is indeed reinforcing the customary international law enshrined in Article 27 that official position is irrelevant to an individual being charged before an international court. Writers asserting the ‘absolute immunity of Heads of State’ under international law¹⁵⁹ conflate, in the view of this writer, inter-State immunity from the criminal jurisdiction of national legal process from the question of that immunity before international courts; indeed, they ignore almost completely differences between the application of immunities on a vertical, as opposed to a horizontal, level.

We now return to Jordan’s appeal of the Court’s decision of 11 December 2017 concluding, based upon the *South Africa* decision, that Jordan was under an obligation to arrest and surrender Al-Bashir to the Court when he traveled to Jordan to attend the 28th Arab League Summit in Amman on 29 March 2017.¹⁶⁰ Jordan was given leave to appeal. In its brief it argued that Article 98(1) allowed it to refuse to arrest Al-Bashir; that Article 27(2) did not remove Al-Bashir’s immunity under conventional and customary international law;¹⁶¹ that Article 98(2) also applied and that the Convention on the privileges and immunities of the League of Arab States immunized Al-Bashir from arrest and surrender; that the Rome Statute cannot impose obligations on or deny rights to States not parties to the Statute (reprising the US

arrest and surrender [of] Omar Al-Bashir’ of 12 March 2018 (The Prosecutor v. Omar Hassan Ahmad Al-Bashir) (ICC-02/05-01/09 OA2) (18 June 2018).

¹⁵⁸ Had the *South Africa Decision* of Pre-Trial Chamber II stopped there it would have been unobjectionable. However, the addition of the language in paragraph 82 regarding the inapplicability of Art. 27(2) was problematic, at least in the manner in which it was phrased.

¹⁵⁹ See e.g., Akande, *The Legal Nature of Security Council Referrals to the ICC*, *supra* note 107, at 334 (relying upon cases involving inter-State application of immunities to assert that immunity of Heads of State and foreign ministers is ‘absolute ... even when he is accused of committing an international crime’ and assuming that the rule is the same for international courts).

¹⁶⁰ *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 Hassan Ahmad Al-Bashir (The Prosecutor v. Omar Hassan Ahmad Al-Bashir) (ICC-02/05-01/09), (PTC II, 11 December 2017).*

¹⁶¹ *The Hashemite Kingdom of Jordan’s appeal against the ‘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 (The Prosecutor v. Omar Hassan Ahmad Al-Bashir)’ (ICC-02/05-01/09), (12 March 2018) [hereafter Jordan Appeal].*

argument of 1998 et seq.);¹⁶² and that Security Council Resolution 1593 did not affect Jordan's obligations under international law to accord immunity to Omar Al-Bashir.¹⁶³ Jordan's position means that the ICC may never, in spite of Article 27(2), exercise jurisdiction over a sitting Head of State—whether or not a State Party to the Statute—without a waiver of his or her State of nationality, because Article 98 would always serve as a bar to surrender.¹⁶⁴ Jordan's answer to the impunity presented by its legal position parallels the response of the International Court of Justice in the *Yerodia* case: that immunity is not tantamount to impunity because 'immunity *ratione personae* enjoyed by a Head of State from foreign criminal jurisdiction ends when he or she ceases to hold that office'.¹⁶⁵ Given that Al-Bashir has been the President of Sudan since he took power in 1989, and shows no sign of relinquishing it any time soon, although the last elections were marred by a boycott from the main opposition parties, that might be a very long wait indeed.¹⁶⁶

Jordan's perspective is revealed by its use of the term 'foreign court'.¹⁶⁷ The ICC, however, is not a foreign court, it is an international court. That requires the analysis to be profoundly different, as outlined above.¹⁶⁸ This being the case, the answer to Jordan's appeal is simple: Al-Bashir cannot benefit from immunity before the Court due to the combined effect of Articles 27, 13(b), and Security Council Resolution 1593. It is not possible, as Sir Michael Wood argued during the oral proceedings, for the Court to ignore Article 27 'when [it] construe[s] Article 98'.¹⁶⁹ Each provision of the Statute must be read 'in context' and consistently

¹⁶² *Ibid.* at 20.

¹⁶³ *Ibid.* at 41.

¹⁶⁴ *Ibid.* at 62–64.

¹⁶⁵ *Ibid.* at 61. Jordan's brief ignores the history of Art. 27 and the sources cited above, including the cases of other international courts and tribunals, and the work of scholars, including those present during the Rome negotiations. Perhaps for this reason, on 29 March 2018, the Court invited submissions from amicus curiae on several additional questions, and received several submissions on 18 June 2018, with supplemental views. To access these submissions, see *Prosecution Response to the Observations of Eleven Amici Curiae (The Prosecutor v. Omar Hassan Ahmad Al-Bashir)* (ICC-02/05-01/09-369), at 2, n. 4 (16 July 2018), available online at www.icc-cpi.int/CourtRecords/CR2018_03719.PDF. During the Appeals Chamber hearing held on 10 September, Jordan complained about the large number of submissions as creating 'an advisory opinion ... that has very little to do with Jordan'. *Appeals Hearing, Transcript (The Prosecutor v. Omar Hassan Ahmad Al-Bashir)* (ICC-02/05-01/09-T-4-ENG), (10 September 2018), at 27, lines 23–25 [hereafter Transcript, 10 September 2018].

¹⁶⁶ BBC, 'Profile: Sudan's Omar al-Bashir', *BBC News* (6 April 2016), available online at www.bbc.com/news/world-africa-16010445.

¹⁶⁷ *Jordan Appeal, supra* note 161. Dire Tladi argued the same thing to the Appeals Chamber. Transcript, 10 September 2018, *supra* note 165, at 89, lines 16–18.

¹⁶⁸ Darryl Robinson dismissed the 'international court' argument out of hand in his argument to the Appeals Chamber. *Appeals Hearing, Transcript (The Prosecutor v. Omar Hassan Ahmad Al-Bashir)*, (ICC-02/05-01/09-T-5-ENG) (11 September 2018), at 16, lines 16–24. He argued that you can look at 'all the textbooks you want ... there's no rule like that'. With due respect, none of the texts cited by him included any of the great authors of international criminal law, including Professor M. C. Bassiouni, who have clearly and thoughtfully outlined the important distinction between the horizontal and vertical application of international criminal law. The current President of the ICC, Judge Oboe-Osuji, took the same position in the *Ruto* case. *Decision on Defence Application for Judgments for Acquittal, Separate Reasons of Judge Oboe-Osuji (The Prosecutor v. William Samoei Ruto and Joshua Arap Sang)*, (ICC-01/09-01/11), (5 April 2016), at 215, 223, 226.

¹⁶⁹ Transcript, 10 September 2018, *supra* note 165, at 31, line 1; 32, line 2.

with the ‘object and purpose’, of the Rome Statute,¹⁷⁰ which is to ensure that the ‘most serious crimes of concern to the international community as a whole must not go unpunished’.¹⁷¹ It is also consistent with Article 21(1), which requires the judges of the Court to have recourse to other sources of international law in case of gaps or ambiguities. Indeed, I would argue that any other solution would constitute an *ex cathedra* pronouncement of the Court’s judges; it would also be completely inconsistent with the customary international law (and *jus cogens*) norms embedded in the Rome Statute. As Professor Claus Kreß noted in his submissions to the Court, ‘customary international law provides the Appeals Chamber with the key for a legally correct decision’.¹⁷²

In May 2019, the ICC Appeals Chamber rendered a decision on the *Al-Bashir* case, holding that Jordan should have arrested Al-Bashir, but that Jordan would not be referred either to the ICC Assembly of States Parties or to the Security Council for noncompliance.¹⁷³ The Appeals Chamber relied upon customary international law as well, holding not that a rule existed removing any immunities before international courts and tribunals, but instead, advancing the even stronger position that:

There is neither state practice nor *opinio juris* that would support the existence of head of state immunity under customary international law vis-à-vis an international court. To the contrary, such immunity has never been recognized in international law as a bar to the jurisdiction of an international court.¹⁷⁴

The Appeals Chamber noted that the burden of proving such a rule would be squarely on the party arguing for its existence, consistent with classic doctrines of public international law.¹⁷⁵ It noted that the absence of a rule of customary international law recognizing head of state immunity before an international court is ‘explained by the different character of international courts when compared with domestic jurisdictions’.¹⁷⁶ The Appeals Chamber also found that although domestic jurisdictions ‘constitute an expression of a State’s sovereign power, which is necessarily limited by the sovereign power of other States’, international courts, conversely, ‘act on behalf of the international community as a whole’.¹⁷⁷ Thus, the Appeals Chamber rejected the arguments of the African Union and other amici who took the position that ‘the immunity *ratione personae* of Heads of State is absolute, even in the case of genocide, on the

¹⁷⁰ Vienna Convention on the Law of Treaties Art. 31, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

¹⁷¹ ICCSt., *supra* note 5, at preamble cl. 4.

¹⁷² *Written [sic] observations of Professor Claus Kreß as amicus curiae, with the assistance of Ms Erin Pobjie, on the merits of the legal questions presented in ‘The Hashemite Kingdom of Jordan’s appeal against the ‘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’ of 12 March 2018 (ICC-02/05-01/09-326) (The Prosecutor v. Omar Hassan Ahmad Al-Bashir), (ICC-02/05-01/09-359), (18 June 2018); Transcript, 10 September 2018, supra note 165, at 107, lines 16–17.*

¹⁷³ *Prosecutor v. Omar Hassan Ahmad Al-Bashir*, (ICC-02/05-01/09 OA2), Judgment in the Jordan Referral re-Al Bashir Appeal (6 May 2019).

¹⁷⁴ *Ibid.* para. 1.

¹⁷⁵ *Ibid.* para. 116. See also *Lotus Case (France v. Turkey)* [1927] PCIJ.

¹⁷⁶ *Ibid.* para. 115.

¹⁷⁷ *Ibid.*

basis that any arrest or prosecution will inevitably interfere with their functions on behalf of the State, for so long as they remain in office'.¹⁷⁸

Because the Appeals Chamber's judgment was unanimous,¹⁷⁹ it seems unlikely that this issue will continue to be litigated at the International Criminal Court, although there will undoubtedly be heated conversations about it that continue at the ICC's Assembly of States Parties and even perhaps before the International Court of Justice given the campaign to bring this issue to the ICJ for decision. For this reason, it is worth addressing some additional arguments advanced either implicitly or explicitly by Jordan and its advocates during the hearing on Jordan's appeal in June 2018.¹⁸⁰

The first is that through the persistence of the arguments advanced by the US and members of the African Union, customary international law relating to immunities has now changed. If State practice is the key to determining the content of a rule of custom, the argument goes, the protestations of a significant number of States have the ability to change a rule of custom once created. Thus, even if there was a rule rendering Heads of State subject to the jurisdiction of the International Criminal Court and its cooperation regime at the time of the Court's founding, perhaps that custom no longer exists. There are several responses to that argument. First, the number of States actually protesting is relatively small. Even within the African Union's membership, a significant number of States have not supported the AU's positions on Al-Bashir's immunities. It is also relevant in this respect that the Malabo Protocol codifying this 'new norm' has not received a single ratification, and that the South African and Kenyan courts hearing the cases found that there is no immunity for Heads of States accused of Rome Statute crimes as a matter of customary international law.¹⁸¹

Second, the norm at issue is part of a *jus cogens* regime that, by its terms, is non-derogable. The 'nonconforming practice of a few violators of the norm' should not be the reference; rather, the question to be considered is 'what are the shared expectations and patterns of the community?'¹⁸² The Appeals Chamber explored in the 10 September 2018 hearing what the consequences of that *jus cogens* status might mean for its opinion—it is worth noting that

¹⁷⁸ *Ibid.* para. 84 (quoting the intervention of Mr. O'Keefe).

¹⁷⁹ The Chamber issued a five-member unanimous decision, accompanied by a four judge concurrence of nearly 200 pages further elaborating on the Head of State immunity question. *Prosecutor v. Omar Hassan Ahmad Al-Bashir*, (ICC-02/05-01/09 OA2), Joint Concurring Opinion, in the Jordan Referral re-Al Bashir Appeal (6 May 2019). The Joint Concurring Opinion, while very interesting, added unnecessary complexity to the case by taking up issues, such as the question of where the outer limits of the term 'international court' were, as I have written elsewhere. Leila Sadat, *Why the ICC's Judgment in the Al-Bashir case wasn't so surprising*, available online at <https://www.justsecurity.org/64896/why-the-iccs-judgment-in-the-al-bashir-case-wasnt-so-surprising/> (12 July 2019).

¹⁸⁰ The Court heard Jordan's Appeal on 10 September 2018. Although the Government of Sudan was invited to present its views, it did not appear in the case. Several Amicus Briefs were filed in the case. See *supra* note 165.

¹⁸¹ *South African High Court Judgment*, *supra* note 114; *Minister of Justice and Constitutional Development v. Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016) [hereafter *South African Supreme Court of Appeals Judgment*] (finding that the failure to arrest Al Bashir was unlawful and dismissing the government's appeal); *Kenyan Appeals Court Judgment*, *supra* note 102.

¹⁸² J. J. Paust, 'Customary International Law: Its Nature, Sources and Status as Law of the United States', in J. J. Paust (ed.), *International Criminal Law: Cases and Materials* (2nd edn., Durham, NC: Carolina Academic Press, 2003) 4–7.

many national courts, including most recently Kenya's Court of Appeals, concluded that Al-Bashir had no immunity because of the *jus cogens* nature of the crimes alleged.

Third, it is not clear that the relevant actors for assessing the content of the new rule should be African Heads of State, given that they are inherently self-interested in the content of the rule. African civil society and two African Courts have asserted the continued validity of the current rule by insisting upon its currency, and in the cases of the Kenyan and South African courts, finding those governments in violation of their Rome Statute treaty obligations in failing to cooperate with the ICC.¹⁸³ Customary international law arguably rests upon the general patterns of legal expectation (*opinio juris*) of humankind, not merely that of their representatives.¹⁸⁴

Fourth, as we saw with the US and its relationship to the Court, views change from administration to administration, suggesting that opposition to the rule embedded in Article 27 is not firm but varies with the political preferences of particular leaders. To the extent that the International Court of Justice was willing to admit of temporal immunities to the prosecution of Heads of State for core crimes, it was because, in its view, 'immunity does not mean impunity'.¹⁸⁵ Yet in the African context, Heads of State often have astonishingly long tenures, amounting essentially to lifetime appointments.¹⁸⁶ Other States have been following this trend, including most recently China, which removed the two-term limit on the presidency of Xi Jinping,¹⁸⁷ causing US President Donald Trump to chime in that 'President for life ... I think it's great. Maybe we'll have to give that a shot someday.'¹⁸⁸ Finally, one last argument could be the formation of a new 'Regional Custom' for Africa,¹⁸⁹ opting out of the regime applicable to the rest of the world in terms of immunity and official position. While such a regime would clearly be undesirable for the reasons aforementioned and has not yet been firmly established

¹⁸³ *South African High Court Judgment*, *supra* note 114; *South African Supreme Court of Appeals Judgment*, *supra* note 181; *Kenyan Appeals Court Judgment*, *supra* note 102.

¹⁸⁴ See e.g., *The Scotia* (81 U.S. 170, at 176 (1871)); *The Prize Cases* (67 U.S. 635, at 670 (1863)); *Ware v. Hylton* (3 U.S. 199, at 227 (1796)). See also *Statement by Claus Krieb, ICC Appeals Chamber hearing, Transcript*, 10 September 2018, *supra* note 165, at 107–114; International Law Commission, *Text of the draft conclusions on identification of customary international law adopted by the Commission and commentaries thereto*, in *Report on the work of the sixty-eighth session*, UN Doc. A/71/10 (2016), at 79–117.

¹⁸⁵ *Arrest Warrant Case*, *supra* note 54, at 48.

¹⁸⁶ See sources cited *supra* note 111. See also C. Felner, *Africa's 'Leaders for Life' Syndrome*, Council on Foreign Relations (18 December 2017), available online at www.cfr.org/backgrounder/africas-leaders-life-syndrome.

¹⁸⁷ BBC, 'China's Xi allowed to remain "president for life" as term limits removed', *BBC News* (11 March 2018), available online at www.bbc.com/news/world-asia-china-43361276. China notably takes an absolute approach to immunities. See Julian G. Ku, 'The Significance of China's View on the Jus Cogens Exception to Foreign Government Official Immunity', 26 *Duke Journal of Comparative & International Law (Duke J Comp & Intl L)* (2016) 503–515; see also Huang Huikang, 'On Immunity of State Officials from Foreign Criminal Jurisdiction', 13 *Chinese Journal of International Law (Chinese J Intl L)* (2014) 1–11, at 5 (immunities are required by principles of due process).

¹⁸⁸ See D. Shepardson, 'Trump praises Chinese president extending tenure "for life"', *Reuters* (3 March 2018), available online at www.reuters.com/article/us-trump-china/trump-praises-chinese-president-extending-tenure-for-life-idUSKCN1GG015 (quoting President Trump as saying, about Chinese President Xi Jinping: 'he's now president for life, president for life. And he's great And look, he was able to do that. I think it's great. Maybe we'll have to give that a shot someday'. *Ibid.*).

¹⁸⁹ See *Asylum (Colombia v. Peru)*, [1950] ICJ Rep 266.

in light of the Malabo Protocol's non-ratification, in the view of this writer it would also be legally impossible, given the non-derogable nature of the regime attaching to *jus cogens* crimes.

5. CONCLUSION

As I wrote many years ago, the core of the revolution worked in Rome was the transformation by the Rome Statute of international legal principles regarding the exercise of inter-State jurisdiction in criminal proceedings, to international legal principles regarding the exercise of jurisdiction by international courts.¹⁹⁰ This process began during the Nuremberg trial and judgment, which rejected the failure of 1919 and held that 'individuals have international duties which transcend the national obligations of obedience imposed by the individual state'¹⁹¹ and that States may do 'together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law'.¹⁹² This idea of primacy—of the law and of an international criminal court—was built into the Statutes of the first international criminal tribunals created after Nuremberg, the International Criminal Tribunals for the former Yugoslavia and Rwanda, which had strong enforcement powers as well, given their status as creations of the Security Council. The delegates to the Rome conference, however, were contemplating a new permanent court that could adjudicate cases in real time, coming from anywhere on the planet. More cautious than the framers of the ad hoc tribunals, they incorporated provisions clearly embodying the supremacy of the ICC's prescriptive jurisdiction but limited its adjudicative jurisdiction via the complementarity principle and other complex procedural mechanisms. They were even more cautious regarding the new Court's enforcement jurisdiction, about which they were uneasy as evidenced by the complexity of the Rules in Part 9 that are now creating so much difficulty in the Statute's application.¹⁹³

Nothing in the negotiating history suggests that they had any intention to limit the application of Nuremberg Principle III, depriving all before the Court of any immunities they might otherwise have had under international law. Indeed, Article 27(1) and (2), placed as they are in the General Part of the Statute, form core and fundamental bedrock principles of the Rome Statute system. Any examination of Article 98's effect, then, must start with the premise that Article 27 is essentially of 'constitutional' or primordial status within the Rome Statute itself,¹⁹⁴ as opposed to Article 98 which was meant to have a relatively limited effect that would allow the Court to take into account a State's existing international law obligations when considering a request for cooperation.

The explosion of litigation and scholarly writings around the interaction of these two provisions, sparked by the travels of then-President Al-Bashir of Sudan, should thus be seen for what they are: an effort to change the customary international law embedded in the Rome Statute during its adoption in 1998 and a challenge to the accountability principles that the Rome Statute contains. This has been sparked not by dysfunction or inappropriate activi-

¹⁹⁰ Sadat, *Transformation of International Law*, *supra* note 12, at 103.

¹⁹¹ *Nuremberg Judgment*, *supra* note 2, at 221.

¹⁹² *Ibid.* at 216.

¹⁹³ Sadat, *Transformation of International Law*, *supra* note 12, at 103–104.

¹⁹⁴ Sadat and Jolly, *supra* note 14.

ties of the Court but by the fact that ‘the Court is working’, as one member of civil society recently observed.¹⁹⁵ As noted above, just two years prior to the ICC Statute’s adoption, the International Law Commission itself had indicated its support for a provision like Article 27(1) and 27(2). Reading the submissions of Jordan and the African Union in Jordan’s recent appeal, it seems as if Nuremberg and the evils of impunity have been forgotten as States once again rally around their sovereigns as if they were the kings and queens of yore.

As scholars continue to debate the import of the Appeals Chamber’s decision in the *Al-Bashir* case, a serious effort is underway to bring this question to the International Court of Justice for an Advisory Opinion.¹⁹⁶ While thoughtful and well-intended, it could also be seen as an affront to the judges of the International Criminal Court, who have now rendered a series of opinions each reaffirming the applicability and enforceability of the Court’s arrest warrants in the *Al-Bashir* case, decisions that the Appeals Chamber has confirmed. It is not clear that an appeal to the ICJ would be anything other than a collateral attack on a decision of the ICC that is disliked by some segment of the academic community and States. As for Al-Bashir himself, he is now imprisoned in Sudan, having been toppled from power by his own people, and put on trial for corruption. Already credibly accused by the international community of presiding over the commission of atrocity crimes, including genocide, his track record of corruption and violence suggest that whatever policy reasons might be advanced in support of absolute immunity for Heads of State, they have little salience in his particular case.

In the view of this writer, to the extent that the political difficulties the Court is experiencing with some African States persist,¹⁹⁷ the solution should be diplomatic and political, not bending the law to fit the politics. If there are enough voices who believe that the Court’s current interpretation of the interplay between Articles 27 and 98 is incorrect, they can propose amending the Statute at the next Review Conference to include new text that will explicitly exempt Heads of State and, presumably, a list of other defined persons they believe to be immune from the Court’s reach.¹⁹⁸ If this is the desired outcome, it should be made explicit, not effectuated through judicial amendment of the Statute. Of course, this ‘new’ model has been tried before: it is the impunity paradigm that existed in 1919 and that protected the Kaiser.¹⁹⁹ It is unclear why States believe it will work better this time than it did the last time around. Perhaps the best solution is for States to support the Court, adhere to the original understanding of Article 27, and either prevent the commission of atrocity crimes altogether, or punish the perpetrators, of those crimes that are committed, in their national courts.

¹⁹⁵ Remarks of William Pace, Convener of the Coalition for the International Criminal Court, 16 April 2016, Conference held in honor of the opening of the Court’s Permanent Premises.

¹⁹⁶ D. Akande, ‘An International Court of Justice Advisory Opinion on the ICC Head of State Immunity Issue’, *EJIL: Talk!* (31 March 2016), available online at www.ejiltalk.org/an-international-court-of-justice-advisory-opinion-on-the-icc-head-of-state-immunity-issue/.

¹⁹⁷ And with the US.

¹⁹⁸ While not discussed in any of the briefs supporting Jordan, obviously the immunities contemplated would not stop at Heads of State but would include, at the very least, Foreign Ministers and undoubtedly other high-ranking individuals.

¹⁹⁹ See generally, W. A. Schabas, *The Trial of the Kaiser* (Oxford: Oxford University Press, 2018).