# The Rome Statute as Evidence of Customary International Law

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# 6 An Exception to Personal Immunity for International Crimes: Article 27(2) and Custom

## 6.1 Introductory remarks

This Chapter analyses the relationship between article 27(2) of the Rome Statute and customary international law on the issue of an exception to personal immunity for the commission of international crimes. Article 27(2) of the Rome Statute clearly provides that international immunities cannot bar the ICC from exercising its jurisdiction.[1] Some commentators have argued that 'the non-availability of international immunity rights *ratione materiae et personae* with respect to persons, as articulated in article 27(2), is declaratory of customary international law'.[2] In contrast, the African Union (AU) commented that under customary law sitting heads of State are granted immunities before an international court.[3] Meanwhile, the ICJ in its 2002 *Arrest Warrant* case said that it could not 'conclude that any such an exception exists in customary international law in regard to national courts'.[4] A question would arise whether a customary rule exists claiming non-availability of personal immunity for committing international crimes.

The central issue here is whether article 27(2) of the Rome Statute was and is declaratory of a customary rule about non-availability of personal immunity. The sub-questions are whether: (1) article 27(2) was declaratory of a pre-existing or emerging customary rule permitting an exception to per-

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1 1998 Rome Statute, art 27.

2 Claus Kreß and Kimberly Prost, 'Article 98' in O. Triffterer and K. Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* 2125; *The Prosecutor v Al Bashir* (Request by Professor Claus Kreß with the assistance of Erin Pobjie for leave to submit observations 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"') ICC-02/05-01/09-346 (30 April 2018), para 5; Paola Gaeta and Patryk I. Labuda, 'Trying Sitting Heads of State: The African Union versus the ICC in the Al Bashir and Kenyatta Cases' in C.C. Jalloh and I. Bantekas (eds), *The International Criminal Court and Africa* (Oxford: OUP 2017) 149.

3 Extraordinary Session of Assembly of the African Union, 'Decision on Africa's Relationship with the International Criminal Court (ICC)', Ext/Assembly/AU/Dec.1 (October 2013), §§ 9-10; *The Prosecutor v Al Bashir* (The African Union's Submission 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) ICC-02/05-01/09-370 (16 July 2018) [African Union's Submission], para 10.

4 *Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v Belgium*), Judgment, [2002] ICJ Rep 3 [2002 *Arrest Warrant* case of the ICJ], 24, para 58.

sonal immunity at the time when the Rome Statute was adopted; and (2) article 27(2) is declaratory of a customary rule leading to a denial of personal immunity for committing international crimes.

For this purpose, section 6.2 briefly addresses the regime of immunity in international law and examines challenges to this legal system. The text of article 27(2) of the Statute is discussed in section 6.3, which stipulates an exception to the customary rule respecting personal immunity of senior officials. The preparatory works of article 27 and other texts relating to immunity are also analysed in this section. It appears that article 27(2) was not declaratory of a 'pre-existing customary rule' permitting an exception to personal immunity from arrest. Section 6.4 examines the practice of personal immunity before the adoption of the Rome Statute and argues that a customary rule of no personal immunity from arrest was not established or emerging. Lastly, section 6.5 observes positions and practice after the adoption of the Rome Statute to evaluate whether the practice enshrined in the text of article 27(2) has been sufficiently developed and accepted as a modified (new) customary rule. The evidence examined in this section includes the jurisprudence of international criminal tribunals, national legislation and cases, as well as the resolutions of the UN Security Council and the International Law Commission's work. Section 6.5 argues that it is now immature for a rule as set out in article 27(2) to emerge under customary law, providing an exception to personal immunity from arrest for the commission of international crimes. Chapter 6 concludes that article 27(2) of the Rome Statute neither was of a declaratory nature nor is declaratory of a customary rule providing an exception to absolute personal immunity from arrest for committing international crimes.

## 6.2 Immunity under international law

This section first briefly examines the well-developed regime of immunity under international law and then explains challenges to immunities for the commission of international crimes.

### 6.2.1 Regime of immunity in international law

State immunity is generally considered as a doctrine of customary international law.[5] It derives from the principle of sovereignty and equality that '*par in parem imperium non habet*'.[6] In the 1812 *Exchange v McFaddon*, the US Chief Justice Marshall explained that:

5 Xiaodong Yang, *State Immunity in International Law* (New York: CUP 2012) 34.

6 Bartolus de Saxoferrato, *Tractatus de regimine civitatis* (1354), cited in Peter-Tobias Stoll, 'State Immunity' in R. Wolfrum (ed) (2011) *MPEPIL*, para 4. *Contra* Yang, ibid, 44-58.

> This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction which has been stated to be the attribute of every nation.[7]

Thus, States and their property are exempted from the local jurisdiction of another State.[8]

In the modern era, the ruler of a State differs from a State entity under international law. In order to ensure the function of foreign States, such as serving diplomats and other officials abroad for specific missions, individuals are also entitled to immunity from the jurisdiction of receiving States.[9] These persons enjoy either diplomatic immunity or head of State immunity. Diplomatic immunity derives from the function, while the immunity of a sitting head of State also comes from its status.[10] As Arthur Watts has written, heads of State enjoy immunity for their functional need as well as the 'considerations that they are the personification of their States' in international relations.[11]

The immunity a person enjoys is divided into two categories: functional immunity (immunity *ratione materiae*) relating to acts of agents of State, and personal immunity (immunity *ratione personae*) attaching to particular office-holders. Functional immunity means that all State officials enjoy immunity for their acts of State in connection with the exercise of their official functions, and receiving States must respect their immunity from local jurisdiction. Personal immunity indicates that sitting senior officials are immune from legal proceedings of foreign courts for their acts in office, including their actions on behalf of the State and private acts.[12] Although personal immunity is controversial for high-ranking diplomats, generally senior State officials, namely, foreign ministers, heads of governments and heads of State enjoy it.[13]

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7 *Schooner Exchange v McFaddon*, 11 U.S. 116 (1812), p 137. See also *Al-Adsani v UK* (Judgment) ECtHR Application No. 35763/97 (21 November 2001), 123 ILR 24, para 54, it is about immunity in civil proceedings.

8 Stoll, 'State Immunity', paras 4-12.

9 Chanaka Wickremasinghe, 'Immunities Enjoyed by Officials of States and International Organisations' in M. Evans (ed), *International Law* (Oxford: OUP 2010) 381-82.

10 Stoll, 'State Immunity', para 79.

11 For the notion of heads of State, see Arthur Watts, 'Heads of State' in R. Wolfrum (ed) (2010) *MPEPIL*, paras 1-4.

12 *Prosecutor v Blaškić* (Judgement on the request of the Republic of Croatia for review of the Decision of Trial Chamber II of 18 July 1997) ICTY-95-14-AR108*bis* (29 October 1997), para 38; Andrea Bianchi, 'Immunity versus Human Rights: The Pinochet Case' (1999) 10 *EJIL* 237, 262-65.

13 'Report of the International Law Commission', GAOR 63rd Session Supp No 10, UN Doc A/63/10 (2008), para 307; Arthur Watts, 'The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers' (1994) 247 *Recueil des cours* 100, Chapter III; 2002 *Arrest Warrant* case of the ICJ, 20, para 51. For further discussions, see Malcolm Shaw, *International Law* (8th edn, Cambridge: CUP 2017) 1211-13.

Compared with functional immunity, personal immunity covers a narrower range of actors, but a wider range of acts. Personal immunity is practically absolute in criminal cases. In addition, functional immunity never ceases for shielded people, while personal immunity exists as long as the person is in office and lapses when the person leaves office. Serving foreign ministers, heads of governments and heads of State abroad enjoy both functional and personal immunities. Sitting presidents, therefore, can invoke both immunities to challenge criminal proceedings of other States for their official and private acts carried out before or during their period of office. If a president were out of office, s/he cannot enjoy personal immunity but may still invoke functional immunity for his/her official acts during his/her period of office.

Some of these ideas are restated in international instruments, such as the Vienna Convention on Diplomatic Relations,[14] the UN Convention on Special Missions[15] and the UN Convention on Jurisdictional Immunities of States and Their Property.[16] The rule of personal immunity of senior officials is generally recognised in customary international law, although it has not been stipulated in a multilateral treaty.[17] The international immunity is a veil

14 Vienna Convention on Diplomatic Relations, 18 April 1961, 24 April 1964, 500 UNTS 95, arts 39(2) and 29.

15 Convention on Special Missions, 8 December 1969, 21 June 1985, 1400 UNTS 23, arts 21 and 29.

16 United Nations Convention on Jurisdictional Immunities of States and Their Property, adopted on 2 December 2004, but has not yet entered into force.

17 Jurisdictional Immunities of the State Judgment, 122, para 53; *Case concerning Certain Questions of Mutual Assistance in Criminal Matters* (*Djibouti v France*), Judgment, [2008] ICJ Rep 177 [Questions of Mutual Assistance Judgment], 236, 238, paras 170, 174; 2002 *Arrest Warrant* case of the ICJ, 11, 21, paras 20-21, 52; *Al-Adsani v UK* (Judgment), para 54; Asad Kiyani, 'Al-Bashir & the ICC: The Problem of Head of State Immunity' (2013) 12 *Chinese J Intl L* 467, 472-74; 'Second report on immunity of State officials from foreign criminal jurisdiction, by Roman Anatolevich Kolodkin, Special Rapporteur', UN Doc A/CN.4/631 (2011), paras 90-93, 'preliminary report', UN Doc A/CN.4/601, paras 30-31; Xiumei Wang, 'The Immunity of State Officials from Foreign Criminal Jurisdiction' (2010) 30 *Journal of Xi'an Jiaotong University* (*Social Sciences*) 67, 69; Roozbeh Baker, 'Customary International Law in the 21st Century: Old Challenges and New Debates' (2010) 21 *EJIL* 173, 189; Daniel Singerman, 'It's Still Good to Be the King: An Argument for Maintaining the Status Quo in Foreign Head of State Immunity' (2007) 21 *Emory Intl L Rev* 413; Kerry O'Neill, 'A New Customary Law of Head of State Immunity?: Hirohito and Pinochet' (2002) 38 *Stanford J Intl L* 289; Watts, 'The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers', 36-37; Paola Gaeta, 'Official Capacity and Immunities' in A. Cassese *et al* (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: OUP 2002) 979; Bianchi, 'Immunity versus Human Rights: The Pinochet Case'; Marian Nash Leich, 'Contemporary Practice of the United States Relating to International Law' (1983) 77 *AJIL* 298, 306. For more discussions in recent literatures, see Rosanne van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (Oxford: OUP 2008); Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes* (Leiden: Brill 2015) 304-07. But see 2002 *Arrest Warrant* case of the ICJ (Dissenting Opinion of Judge *ad hoc* Van den Wyngaert), paras 8-39.

protecting officials for their acts from the jurisdiction of other States, rather than their domestic authority.[18] If home States decide to initiate proceedings against these people at their national courts, no question of international immunity will arise at all. In addition, local legal proceedings would be permitted when appropriate authorities have expressly waived these immunities.[19]

### 6.2.2 Challenges to immunity for committing international crimes

Recently, challenges to immunities have arisen. This subsection analyses challenges to immunities and theories to invalidate immunities.

#### *6.2.2.1 Challenges to immunity*

Alongside the development of international criminal law and the prosecution of international crimes, there has been controversy about the scope and the applicability of absolute immunity.[20] If senior officials are alleged to have committed core international crimes, such as war crimes, crimes against humanity and genocide, do they continue to enjoy immunity from arrest and detention? One argument is that it would be too great an interference with other States and the conduct of international relations of sitting senior officials to be subject to other States' jurisdiction.[21] By contrast, Antonio Cassese explained that:

> In the present international community respect for human rights and the demand that justice be done wherever human rights have been seriously and massively put in jeopardy, override the principle of respect for state sovereignty. The new thrust towards protection of human dignity has shattered the shield that traditionally protected state agents.[22]

The ILC in a commentary to the 1996 *Draft Code of Crimes* observed that:

> It would be paradoxical to allow the individuals who are, in some respects, the most responsible for the crimes covered by the Code to invoke the sovereignty of the State and to hide behind the immunity that is conferred on them by virtue of their positions particularly since these heinous crimes shock the conscience of mankind, violate some of the most fundamental rules of international law and threaten international peace and security.[23]

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18 Bianchi, 'Immunity versus Human Rights: The Pinochet Case'.

19 Vienna Convention on Diplomatic Relations, art 33. Although State officials are immune for their official actions on behalf of a State, a State, to which the wrongful official acts are attributable, might be held liable for such behaviour.

20 Bianchi, 'Immunity versus Human Rights: The Pinochet Case'; UN Doc A/CN.4/631 (2011), paras 90-93.

21 *R v Bartle, Evans and Another and the Commissioner of Police for the Metropolis and Other, Ex Parte Pinochet* (Judgment) [2000] 1 AC 147 (24 March 1999), [1999] UKHL 17, 38 ILM 581 (1999) [*R v Ex Parte Pinochet et al* (No 3), 38 ILM 581 (1999)], *Lord Millett*, p 644.

22 Cassese *et al* (eds), *Cassese's International Criminal Law* 246.

23 UN A/51/10 (1996), para 50, pp 26-27, commentary to art 7, § (1).

Some scholars have also argued that the person who initiates and plans these crimes should be prosecuted,[24] whereas the immunity of senior officials against criminal prosecution seems to be inconsistent with the goal to end impunity. In these circumstances, different proposals have been advanced to remove immunities for the commission of international crimes.[25]

These challenges are not merely theories. An evaluation of these challenges may occur in certain contexts. For example, the issue of immunity arose when Belgium planned to exercise universal jurisdiction over a foreign minister of Congo for alleged international crimes.[26] Serving senior officials immunities seem to prevent the exercise of universal jurisdiction to narrow the impunity gap.[27] In addition, debates about personal immunity may also arise when a head of a non-party State to the Rome Statute is involved in ICC proceedings. In 2005, the UN Security Council through its Resolution 1593, referred the Darfur, Sudan Situation to the ICC.[28] The ICC issued two arrest warrants for Al Bashir, a sitting president of Sudan, for alleged war crimes, crimes against humanity and genocide during the Darfur conflict.[29] The execution of the two warrants is still pending. If Al Bashir were arrested and surrendered to the Court by a State Party, this rare situation might give rise to the question whether that State violated the customary rule respecting personal immunity from arrest enjoyed by a sitting head of a non-party State. These considerations and challenges call for an analysis of proposals that disregard international immunities in specific situations.[30]

24 2002 *Arrest Warrant* case of the ICJ (Joint Separate opinion of Judges Higgins, Kooijmans and Buergenthal), para 8.

25 Andrew Clapham, *Brierly's the Law of Nations* (7th edn, Oxford: OUP 2012) 273-77.

26 2002 *Arrest Warrant* case of the ICJ.

27 2002 *Arrest Warrant* case of the ICJ (Dissenting Opinion of Judge *ad hoc* Van den Wyngaert), paras 16-19.

28 UN Doc S/RES/1593 (2005).

29 *The Prosecutor v Al Bashir* (Warrant of Arrest for Omar Hassan Ahmad Al Bashir, PTC I) ICC-02/05-01/09-1 (4 March 2009) [First Warrant of Arrest for *Al Bashir*], para 41; *First Warrant of Arrest* Decision for *Al Bashir*, para 45; *The Prosecutor v Al Bashir* (Judgment on the appeal of the Prosecutor against the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir', A Ch) ICC-02/05-01/09-73 (3 February 2010); *The Prosecutor Al Bashir* (Second Decision on the Prosecution's Application for a Warrant of Arrest, PTC I) ICC-02/05-01/09-94 (12 July 2010); *The Prosecutor v Al Bashir* (Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, PTC I) ICC-02/05-01/09-95 (12 July 2010).

30 For other scenarios, see Triffterer and Burchard, 'Article 27', 1042.

#### *6.2.2.2 Theories to repudiate immunities*

There are some theories on lifting international immunities. One view argues that former senior officials cannot invoke functional immunity as a challenge in criminal proceedings before a competent court.[31] There are various rationales for abrogating functional immunity from a customary rule perspective. Firstly, one view claims that international crimes are not within the ambit of governmental functions but are private acts falling outside immunity protection.[32] Based on this private acts argument, functional immunity cannot be invoked for committing international crimes.[33] Other commentators argue that functional immunity cannot be circumvented through the idea of private acts. In their view, an exception exists to the customary rule of respecting functional immunity for the commission of international crimes (for example, war crimes, crimes against humanity and genocide).[34] Cassese neither supported the private acts argument nor adopted the idea of an exception.[35] He argued that if there is a new rule of customary law for committing international crimes, offences of international crimes are not immune from jurisdiction by invoking functional immunity. The idea of an exception indicates the modification of the traditional customary rule respecting absolute personal immunity, while Cassese's viewpoint demands the establishment of a new customary rule. The exceptional idea and the new rule view, in effect, are similar to each other.

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31 2002 *Arrest Warrant* case of the ICJ, 25-26, para 61; Kreß and Prost, 'Article 98', 2126-27.

32 *R v Ex Parte Pinochet et al* (No 3), 38 ILM 581 (1999), Lord Browne-Wilkinson, p 595, Lord Hutton, p 638. See also Rosanne van Alebeek, 'National Courts, International Crimes and the Functional Immunity of State Officials' (2015) 59 *Netherlands Intl L Rev* 5, 18-19; 'Report of the International Law Commission', UN Doc A/46/10 (1991), pp 12, 15, 18 and 22; 2002 *Arrest Warrant* case of the ICJ, 25-26, para 61. *Contra* 2002 *Arrest Warrant* case of the ICJ (Joint Separate opinion of Judges Higgins, Kooijmans and Buergenthal) pp 63-90; 2002 *Arrest Warrant* case of the ICJ (Dissenting Opinion of Judge *ad hoc* Van den Wyngaert), para 36; Claus Kreß, 'Reflections on the *Iudicare* Limb of the Grave Breaches Regime' (2009) 7 *JICJ* 789, 803-04.

33 For criticism of this view, see Andrea Gattini, 'War Crimes and State Immunity in the *Ferrini* Decision' (2005) *JICJ* 224, 234 and fn 41.

34 *R v Ex Parte Pinochet et al* (No 3), 38 ILM 581 (1999), Lord Hope of Craighead, p 626, Lord Saville of Newdigate, p 643, Lord Millett, p 651, Lord Phillips of Worth Matravers, p 661; 2002 *Arrest Warrant* case of the ICJ (Dissenting Opinion of Judge *ad hoc* Van den Wyngaert), para 36; 2002 *Arrest Warrant* case of the ICJ (Dissenting Opinion of Judge Al-Khasaweh), para 6; *Jones v Ministry of Interior for the Kingdom of Saudi Arabia et al* (Opinions of the Lords of Appeal for Judgement in the Cause), [2006] UKHL 26, [2006] 2 WLR 1424, [2007] 1 AC 270 (14 June 2006), [*Jones v Saudi Arabia and et al*, [2006] UKHL 26], Lord Hoffmann, para 85; Antonio Cassese, 'When May Senior State Officials be Tried for International Crimes? Some Comments on the *Congo v Belgium* Case' (2002) 13 *EJIL* 853, 866-69.

35 Cassese *et al* (eds), *Cassese's International Criminal Law* 247-48; Cassese, 'When May Senior State Officials be Tried for International Crimes? Some Comments on the *Congo v Belgium* Case', 864, 870-75.

Although no consensus exists among scholars on the approach to lifting functional immunity, it is less controversial that State officials cannot invoke functional immunity in criminal proceedings of foreign States for alleged international crimes.[36] The issue of 'Immunity of State officials from foreign criminal jurisdiction' is on the ILC's agenda. Draft article 7 of the Fifth Report under the title of 'crimes in respect of which immunity does not apply' provides exceptions to functional immunity in relations to some crimes.[37] A large majority of the Commission has voted in favour of this draft article.[38]

It remains debatable whether a sitting senior official continues to enjoy personal immunity when the person is suspected of committing an international crime. If the official still enjoys personal immunity, local authorities of another State cannot exercise jurisdiction. The ICC and academics have developed several theories to deal with the tension between impunity and personal immunity, for example, waiver of immunity through signing treaties or UN Security Council resolutions, and a new customary rule of

36 Darryl Robinson, 'Immunities' in R. Cryer *et al* (eds), *An Introduction to International Criminal Law and Procedure* 540-65; Clapham, *Brierly's the Law of Nations* 276-77; Otto Triffterer and Christoph Burchard, 'Article 27' in O. Triffterer and K. Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article* (3rd edn, Munich: Hart/Beck 2016) 1052; Kreß and Prost, 'Article 98', 2127; Dapo Akande, 'International Law Immunities and the International Criminal Court' (2004) 98 *AJIL* 407, 413; Gaeta, 'Official Capacity and Immunities', 981-83; Kreß, 'Reflections on the *Iudicare* Limb of the Grave Breaches Regime', 803-05; Pedretti, *Immunity of Heads of State and State Officials for International Crimes* 156-91, 307-08; Cassese *et al* (eds), *Cassese's International Criminal Law* 240-47. *Prosecutor v Milošević* (Decision on Preliminary Motions) ICTY-02-54-PT (8 November 2001); *Prosecutor v Krstić* (Judgement) ICTY-98-33-A (1 July 2003) [*Krstić* Appeals Chamber Judgment], para 26; *Mario Luiz Lozano v the General Prosecutor for the Italian Republic* (Sentence, Supreme Court of Cassation) 31171/2008, ILDC 1085 (IT 2008), paras 6-7; *Re Hilao and ors v Estate of Ferdinand Marcos* (Interlocutory Appeal Decision), 25F 3d 1467 (9th Cir 1994), para 28; *R v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte* (Opinions of the Lords of Appeal for Judgement in the Cause), [1998]3 WLR 1456, [1998] UKHL 41 (25 November 1998) [*R v Ex Parte Pinochet et al* (No 1), [1998]3 WLR 1456]; *R v Ex Parte Pinochet et al* (No 3), 38 ILM 581 (1999), Lord Browne-Wilkinson, p 595, Lord Millett, p 652; Institute of International Law, Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law, Vancouver 2001/II (IIL Vancouver Resolution), art 13 (2). But see James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford: OUP 2012) 500; UN Doc A/CN.4/631 (2011), para 33 and fn 75.

37 'Fifth report on immunity of State officials from foreign criminal jurisdiction, by Special Rapporteur, Concepción Escobar Hernández', UN Doc A/CN.4/701 (2016), para 220.

38 UN Doc A/72/10 (2017), para 74, pp164-65. Eight members from Algeria, China, France, German, India, the Russia Federation, the UK, and the US voted against draft article 7 about the exception to functional immunity.

non-availability of personal immunity.[39] The issue of whether violations of *jus cogens* can repudiate personal immunity in criminal proceedings also deserves discussion but digresses from the focus of this Chapter.[40]

This Chapter qualifies personal immunity enjoyed by senior serving officials: heads of State, heads of government or ministers of foreign affairs. The premise of this Chapter is that competent authorities must respect personal immunity of sitting senior officials under customary law unless appropriate authorities collectively agree to remove it or separately waive it through a treaty or an explicit declaration.[41] This Chapter examines the relationship between article 27(2) of the Rome Statute and custom concerning personal immunity for committing international crimes. For this purpose, the next section examines the text of article 27(2) of the Rome Statute.

39 *Al Bashir Malawi* Cooperation Decision 2011, para 43; *Al Bashir Chad* Cooperation Decision 2011; *The Prosecutor v. Al Bashir* (Transcript, AC) ICC-02/05-01/09-T-4-ENG, ICC-02/05-01/09-T-5-ENG, ICC-02/05-01/09-T-6-ENG (10-12 September 2018); Dov Jacobs, 'The Frog That Wanted to Be an Ox: The ICC's Approach to Immunities and Cooperation' in C. Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford: OUP 2015) 281-304. For a waiver-based approach, see Akande, 'International Law Immunities and the International Criminal Court'; Dapo Akande, 'The Legal Nature of Security Council Referrals to the ICC and Its Impact on Al Bashir's Immunities' (2009) 7 *JICJ* 333; Cedric Ryngaert and Michiel Blommestijn, 'Exploring the Obligations for States to Act upon the ICC's Arrest Warrant for Omar Al-Bashir: A Legal Conflict between the Duty to Arrest and the Customary Status of Head of State Immunity' (2010) 5 *ZIS* 428, 435-38; *The Prosecutor v Al Bashir* (Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, PTC II) ICC-02/05-01/09-195 (9 April 2014) [*Al Bashir DRC* Cooperation Decision 2014]. Custom-based approach, see Paola Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?' (2009) 7 *JICJ* 315, 320; Jordan Paust, 'Genocide in Rwanda, State Responsibility to Prosecute or Extradite, and Nonimmunity for Heads of State and Other Public Officials' (2011) 34 *Houston J Intl L* 57, 71-84; Kreß and Prost, 'Article 98', 2125, 2128-39; Watts, 'Heads of State', paras 10-11; Claus Kreß, 'The International Criminal Court and Immunities under International Law for States Not Party to the Court's Statute' in M. Bergsmo and Y. Ling (eds), *State Sovereignty and International Criminal Law*, 223; Triffterer and Burchard, 'Article 27', 1041-42, 1053-54.

40 For discussions, see *Al-Adsani v UK* (Judgment) ECtHR Application No. 35763/97 (21 November 2001) 123 ILR 24, para 54; *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v Rwanda*), Jurisdiction and Admissibility, Judgment, [2006] ICJ Rep 6, 32, para 64; *Jones v Saudi Arabia and et al*, [2006] UKHL 26; *Jurisdictional Immunities of the State Judgment*, 140-41, paras 93, 95; Bingbing Jia, 'Immunity for State Officials from Foreign Jurisdiction for International Crimes' in M. Bergsmo and Y. Ling (eds), *State Sovereignty and International Criminal Law*, 88-92.

41 Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*; 2002 *Arrest Warrant* case of the ICJ, 20-21, paras 51-52.

## 6.3 Personal immunity: article 27(2) of the Rome Statute

Article 27 of the Rome Statute under the title of 'the irrelevance of official capacity' stipulates that:

> 1. 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.
> 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

This section analyses different understandings of article 27 to survey whether article 27(2) departs from or restates a customary rule. This section first reviews the interpretation of article 27(2) in connection with article 27(1) and then observes the scope of personal immunity embedded in article 27(2). Last, it examines the structure of the Rome Statute about immunity.

### 6.3.1 Understanding of articles 27(1) and (2): personal immunity

A plain reading of article 27(2) shows that 'immunities under international law' do not 'bar the ICC from exercising its jurisdiction' over the person who enjoys such immunities. This reading means that personal immunities attaching to an individual in international law are irrelevant to the ICC's jurisdiction for alleged crimes falling within its jurisdiction. By comparison with article 27(1), further clarification of the purport of article 27(2) is necessary to clarify which provision covers the issue of personal immunity in international law.

Different views exist among scholars about the interpretation of the two paragraphs in article 27. Some commentators argue that article 27(1) includes both the principle of individual criminal responsibility and the principle of no immunity for international crimes.[42] Others consider that article 27(1) demonstrates the consent of States Parties to remove either personal or functional immunity of their representatives, while article 27(2) affirms the absence of immunities in ICC proceedings.[43] Both viewpoints, however, do not reflect the drafters' intention. The text of article 27(1) echoes the principle of individual criminal responsibility. This principle has repeatedly been provided, in article 7 of the Nuremberg Charter,[44] article 6 of the

42 Clapham, *Brierly's the Law of Nations* 274 and fn 162.

43 Pedretti, *Immunity of Heads of State and State Officials for International Crimes* 248-50; Cassese *et al* (eds), *Cassese's International Criminal Law* 240-47, 318-19.

44 Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis, 8 August 1945, (1951) 82 UNTS 284 [Nuremberg Charter].

Tokyo Charter,[45] the judgments of the IMT and the IMTFE, Principle III of 1950 ILC Nuremberg Principles, articles 7(2) and 6(2) of the Statutes of the ICTY and the ICTR, and article 7 of the ILC's 1996 Draft Code of Crimes.[46] These rules concern official capacity as a substantive defence for individual responsibility as opposed to State responsibility.

In contrast to article 27(1), no predecessor of article 27(2) existed in these instruments mentioned above.[47] It seems that article 27(2) was initially inserted to avoid immunities prejudicing the principle of individual criminal responsibility before the ICC as set out in article 27(1). During the Preparatory Committee's first two sessions, some States expressed concerns about the 'question of diplomatic or other immunity from arrest and other procedural measures taken by or on behalf of the Court'.[48] The Preparatory Committee compiled two proposals on this issue.[49] The first proposal provided that '[i]n the course of investigation or procedures performed by, or at request of the Court, no person may make a plea of immunity from jurisdiction irrespective of whether on the basis of international or national law'. The second proposal stated that '[t]he special procedural rules, the immunities and the protection attached to the official capacity of the accused and established by internal law or by international conventions or treaties may not be used as a defence before the Court'.[50]

Later on, this paragraph was rephrased as '[a]ny immunities or special procedural rules […] may not be relied upon to prevent the Court from exercising its jurisdiction in relation to that person'. In a footnote to this paragraph, the Preparatory Committee pointed out that it 'would be required in connection with procedure as well as international judicial cooperation'.[51] This paragraph with the text of the footnote was repeated in subsequent Drafts, while the phrase 'procedure as well as' was deleted in a later footnote.[52] The examination of the preparatory works indicates that article 27(2) was inserted to remove immunities in national and international law as a potential substantive defence to individual liability, but it was finally included to remove immunities or other procedural bars of State officials.

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45 Tokyo Charter, 4 Bevans 21.

46 UN Doc A/51/10(1996), para 50, p 27, commentary to art 7, § (4)-(5).

47 UN Doc A/49/10 (1994), pp 20-73.

48 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', UN Doc A/51/22 (1996), Vol I, para 85.

49 ibid.

50 ibid.

51 'Decision taken by the Preparatory Committee at its Session held from 11 to 21 February 1997' (12 March 1997), UN Doc A/AC.249/1997/L.5, p 22 and fn 14.

52 'Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen' (4 February 1998), Netherlands, UN Doc A/AC.249/1998/L.13, pp 54-55 and fn 86; 'Report of the Preparatory Committee on the Establishment of an International Criminal Court' (14 April 1998), UN Doc A/CONF.183/2, pp 31-32 fn 77.

In discussing article 27(1), the drafters also mentioned 'immunity'.[53] However, it is unclear what mode of immunity the drafters had in mind: immunity in national or in international law.[54] Since functional immunity amounts to a substantive defence to liability, the immunities under international law might be considered.[55] The drafters may have considered the removal of functional immunity for the violation of international law.[56] This viewpoint explains why some scholars support an interpretation whereby article 27(1) includes immunity in international law.[57] In addition, one may note that the ILC considered the issue of personal immunity in its commentary on the 1996 *Draft Code of Crimes*. Article 7 of the *Draft Code of Crimes* concerning 'official position and responsibility' provides that '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'. The ILC observed that

> Article 7 is intended to prevent an individual who has committed a crime against the peace and security of mankind from invoking his official position as a circumstance absolving him from responsibility or conferring any immunity upon him, […]. […] As further recognised by the Nurnberg Tribunal in its Judgment, the author of a crime under international law cannot invoke his official position to escape punishment in appropriate proceedings. 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.[58]

Based on this interpretation, one may conclude that the absence of personal immunity is contemplated by article 27(1) of the Rome Statute, while article 27(2) merely confirms the non-availability of personal immunity.

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53 Schabas, *The International Criminal Court: A Commentary on the Rome Statute* 595.

54 Schabas, *An Introduction to the International Criminal Court* 244.

55 Jacobs, 'The Frog That Wanted to Be an Ox: The ICC's Approach to Immunities and Cooperation'; Cassese *et al* (eds), *Cassese's International Criminal Law* 240-47, 318-19; Princeton Project on Universal Jurisdiction, 'The Princeton Principles on Universal Jurisdiction' (2001), pp 48-49.

56 The *Prosecutor v Kenyatta* (Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial, TC V (b)) ICC-01/09-02/11-830 (18 October 2013), paras 66, 70, 98; Eve La Haye, 'Article 49-Penal Sanctions' in ICRC (ed), *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Cambridge: CUP 2016), para 2877.

57 Clapham, *Brierly's the Law of Nations* 274 and fn 162; Pedretti, *Immunity of Heads of State and State Officials for International Crimes* 248-50; Cassese *et al* (eds), *Cassese's International Criminal Law* 240-47, 318-19.

58 UN Doc A/51/10(1996), para 50, p 27, commentary to art 7, § (6) (citations omitted). For a similar view, see *Ruto & Sang* Acquittal Decision 2016 (Reasons of Judge Eboe-Osuji), paras 263, 286-87.

Yet, the ILC's commentary does not strongly support this conclusion for two main reasons. Firstly, the IMT judgment does not indicate that the absence of procedural immunity is also embedded in article 7 of the Nuremberg Charter, or in article 27(1) of the Rome Statute. The doctrine of State consent, indicating Germany's waiver of personal immunity, played a role in establishing the IMT as well as its prosecution, which will be clarified in detail below in section 6.4.2. Secondly, the ILC proposed disregarding procedural immunities in 'appropriate judicial proceedings', for example, 'before an international criminal court' for committing international crimes.[59] This idea of the absence of personal immunity is expressly articulated in article 27(2) of the Rome Statute. Relying upon the preparatory works of the Rome Statute, it is more persuasive to conclude that article 27(2) instead of article 27(1) directly affects personal immunity.[60]

Further explanations of the relationship between individual criminal responsibility and the jurisdiction of the ICC provide another perspective to understand the two paragraphs of article 27. As pointed out by Judge Liu, '[w]hile […] a head of state cannot escape criminal responsibility and that this can be considered a rule of customary international law, it does not mean that person no longer has immunity from the jurisdiction of the ICC'.[61] The existence of jurisdiction is the precondition for the exercise of jurisdiction, while the existence of jurisdiction does not mean that jurisdiction would be exercised. Although Judge Liu aimed to distinguish the existence of jurisdiction from its exercise, this statement is also true with respect to a distinction between substantive criminal responsibility and procedural defences.[62]

Simply put, it is undeniable that sitting senior officials shall be criminally responsible for conducts, regardless of their official capacity.[63] The recognition of individual criminal responsibility is also a prerequisite for the acknowledgement of an exception to personal immunity. However, recognising individual criminal responsibility does not mean that immunity is automatically lifted before a court and an individual would be arrested and

59 ibid, fn 69: 'Judicial proceedings before an international criminal court would be the quintessential example of appropriate judicial proceedings in which an individual could not invoke any substantive or procedural immunity based on his official position to avoid prosecution and punishment.'

60 Kreß and Prost, 'Article 98', 2125; Jacobs, 'The Frog That Wanted to Be an Ox: The ICC's Approach to Immunities and Cooperation'; Gaeta, 'Official Capacity and Immunities', 978; Akande, 'International Law Immunities and the International Criminal Court', 419-20; Salvatore Zappalà, 'Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The *Gaddafi* Case before the French Cour de Cassation' (2001) 12 *EJIL* 595.

61 Daqun Liu, 'Has Non-Immunity for Heads of State Become a Rule of Customary International Law?' in M. Bergsmo and Y. Ling (eds), *State Sovereignty and International Criminal Law* 64.

62 *Krstić* Appeals Chamber Judgment (Dissenting Opinion of Judge Shahabuddeen), paras 7-9.

63 Jacobs, 'The Frog That Wanted to Be an Ox: The ICC's Approach to Immunities and Cooperation'.

prosecuted by disregarding a procedural defence (personal immunity) to exercise jurisdiction. The Rapporteur of the ILC on the subject of 'Immunity of State officials from foreign criminal jurisdiction' has clarified that immunity from criminal jurisdiction 'is procedural and not substantive in nature' and it means 'immunity from criminal process or from criminal procedure measures and not from the substantive law of the foreign State'. [64] A competent local jurisdiction cannot arrest or detain a person unless personal immunity is waived or removed by appropriate authorities or through a treaty[65] or by a Security Council resolution.[66] The immunities, in effect, prevent a tribunal from exercising jurisdiction to determine liability for crimes.[67] Article 27(2) indirectly confirms the idea that a person enjoying functional immunity and acting in an official capacity cannot invoke immunities to oppose individual responsibility or to reduce punishment. Meanwhile, the text of article 27(2) mainly serves a function in removing procedural immunity before the ICC.[68] The distinction between article 27(1) (irrelevance of official capacity to individual responsibility) and article 27(2) (irrelevance of personal immunity to the exercise of jurisdiction) should be kept in mind.[69]

To sum up, article 27 covers two different issues. Article 27(1) addresses the removal of a substantive defence to individual criminal responsibility, while article 27(2) concerns immunities as procedural barriers to the ICC's exercise of jurisdiction.[70] The drafting history of article 27 confirms this distinction. Article 27(1) endorses the principle of individual criminal responsibility for international crimes and dismissed immunity derived from

64 'Preliminary Report on immunity of State officials from foreign criminal jurisdiction, by Special Rapporteur Roman Anatolevich Kolodkin', UN Doc A/CN.4/601 (2008), para 102 (f) and (g).

65 Cassese *et al* (eds), *Cassese's International Criminal Law* 321-22; 2002 *Arrest Warrant* case of the ICJ, 24-26, paras 59-61.

66 *R v Ex Parte Pinochet et al* (No 1), [1998]3 WLR 1456, Dissenting opinion of Lord Slynn of Hadley, p 1474; R *v Ex Parte Pinochet et al* (No 3), 38 ILM 581 (1999), Dissenting opinion of Lord Goff of Chieveley, p 599.

67 Jacobs, 'The Frog That Wanted to Be an Ox: The ICC's Approach to Immunities and Cooperation'; Liu, 'Has Non-Immunity for Heads of State Become a Rule of Customary International Law?'.

68 2002 *Arrest Warrant* case of the ICJ, 24-25, paras 58-60.

69 Camilla Lind, 'Article 27' in M. Klamberg (ed), *The Commentary on the Law of the International Criminal Court* (Brussels: Torkel Opsahl Academic EPublisher 2017), confusing the two paragraphs.

70 Cassese, 'When May Senior State Officials be Tried for International Crimes? Some Comments on the *Congo v Belgium* Case', 863; Akande, 'International Law Immunities and the International Criminal Court'; Jacobs, 'The Frog That Wanted to Be an Ox: The ICC's Approach to Immunities and Cooperation'; William A. Schabas, 'The Special Tribunal for Lebanon: Is a 'Tribunal of an International Character' equivalent to an 'International Criminal Court'?' (2008) 21 *Leiden J Intl L* 513, 526; Schabas, *The International Criminal Court: A Commentary on the Rome Statute* 596-600; Cassese *et al* (eds), *Cassese's International Criminal Law* 240-47, 318-22; the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, EX.CL/846 (XXV), Annex 5, 1 July 2014 and STC/Legal/Min/7 (I) Rev 1, 15 May 2014, arts 46A*bis* (Immunities) and 46B (individual criminal responsibility).

national law and international law, at most, including functional immunity.[71] The text of article 27(2) addresses the idea of non-availability of personal immunity.

### 6.3.2 Scope of personal immunity in article 27(2)

Another issue concerns the scope of personal immunity in article 27(2). As the text of article 27(2) suggests, possible invocation of personal immunity is *de facto* rejected at the ICC. By ratifying the Rome Statute, States Parties agreed to end absolute personal immunity before the ICC ('vertical personal immunity').[72] One issue that arises here is whether article 27(2) also includes a derogation from the customary rule of 'personal immunity from arrest' between or among States Parties ('horizontal personal immunity').

The first view is that personal immunity under article 27(2) is limited to vertical personal immunity. It means that no personal immunity may be invoked in the ICC's preliminary proceedings of investigation and its issuance of arrest warrants, as well as prosecution once the person concerned is before the ICC. The horizontal personal immunity from arrest by a State Party is therefore untouched in article 27(2).[73] The second opinion argues that personal immunity under article 27(2) contains both vertical personal immunity before the ICC and horizontal personal immunity from arrest amongst States Parties. Supporters interpret the immunities in a general sense, including any immunities for the purpose of ICC proceedings.[74]

The Pre-Trial Chamber of the ICC in its case law has never supported the first restrictive interpretation of personal immunity in article 27(2). For the effectiveness of ICC proceedings, States Parties vertically waived their immunities before the ICC, and they also waived the horizontal personal immunity from arrest before the jurisdiction of other States Parties in pro-

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71 *Krstić* Appeals Chamber Judgment (Dissenting Opinion of Judge Shahabuddeen), paras 7-9.

72 Akande, 'International Law Immunities and the International Criminal Court', 424.

73 Helmut Kreicker, *Völkerrechtliche Exemtionen Grundlagen und Grenzen Völkerrechtlicher Immunitäten Und Ihre Wirkungen Im Strafrecht* (International Law Exemptions: Fundamentals and Limitations of International Immunities and their Effects in Criminal Law), Vol II (Berlin: Max Planck Institute 2007) 1391, cited in Kreß and Prost, 'Article 98', 2125 and fn 43; Gaeta and Labuda, 'Trying Sitting Heads of State: The African Union versus the ICC in the *Al Bashir* and *Kenyatta* Cases', 147-48; *The Prosecutor v Al Bashir* (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") ICC-02/05-01/09-326 (12 March 2018) [Jordan's Appeal], paras 15-21; *The Prosecutor v Al Bashir* (The League of Arab States' Observations on 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") ICC-02/05-01/09-367 (16 July 2018), para 26.

74 Triffterer and Burchard, 'Article 27', 1053; Kreß and Prost, 'Article 98', 2125; Bruce Broomhall, International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law (Oxford: OUP 2004) 144.

ceedings governed by the Rome Statute. The Pre-Trial Chamber has generally upheld the second interpretation.[75] In its recent decisions, the ICC has supported the two-fold function of immunity in article 27(2). In its view, article 27(2) serves two functions:

> […] (i) it prevents States Parties from raising any immunity belonging to it under international law as a ground for refusing arrest and surrender of a person sought by the Court (vertical effect); and (ii) it prevents States Parties from invoking any immunity belonging to them when cooperation in the arrest and surrender of a person to the Court is provided by another State Party (horizontal effect).[76]

The vertical effect means that States Parties cannot invoke the personal immunity of their senior officials (from investigation, arrest, indictment and prosecution) in proceedings before the ICC.[77] The horizontal effect indicates that a State Party also cannot invoke personal immunity from arrest enjoyed by officials of other States Parties.[78] The Chambers held that article 27(2) 'excludes immunity from arrest'.[79] Indeed, the ICC has no means to arrest a suspect, and it has to rely on States to do so. The Pre-Trial Chamber has implicitly held that a non-party State can continue to invoke personal immunity from arrest enjoyed by its sitting senior officials in international law to challenge the exercise of jurisdiction by other States. When it comes to heads of a non-party State, in the ICC's wording, 'the irrelevance of immunities […] as enshrined in article 27(2) of the Statute has no effect on their rights under international law'.[80] In addition, the Pre-Trial Chamber of the ICC has restricted the removal of horizontal personal immunity from 'arrest' amongst States Parties for the purpose of ICC proceedings, thus leaving horizontal personal immunities from 'arrest/indictment/prosecution' in national proceedings intact. In other words, article 27(2) does not cover the

75 *Al Bashir DRC* Cooperation Decision 2014, para 26.

76 *Al Bashir Jordan* Cooperation Decision 2017, para 33; *Al Bashir South Africa* Cooperation Decision 2017, paras 76-80.

77 *Al Bashir South Africa* Cooperation Decision 2017, paras 77-78.

78 ibid, paras 79-80. See also *The Prosecutor v Al Bashir* (Request by Professors Robinson, Cryer, deGuzman, Lafontaine, Oosterveld, Stahn and Vasiliev for Leave to Submit Observations) ICC-02/05-01/09-337 (26 April 2018), paras 2, 6; *The Prosecutor v Al Bashir* (Request by Max du Plessis, Sarah Nouwen and Elizabeth Wilmshurst for leave to submit observations on 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"') ICC-02/05-01/09-338 (27 April 2018), paras 4-5.

79 *Al Bashir South Africa* Cooperation Decision 2017, paras 74-75; *Al Bashir Jordan* Cooperation Decision 2017, para 33.

80 ibid, para 82; Schabas, *The International Criminal Court: A Commentary on the Rome Statute* 600; Liu, 'Has Non-Immunity for Heads of State Become a Rule of Customary International Law?'; Manisuli Ssenyonjo, 'II. The International Criminal Court Arrest Warrant Decision for President Al Bashir of Sudan' (2010) 59 *ICLQ* 205, 210; R.H. Steinberg (ed), *Contemporary Issues Facing the International Criminal Court* (The Hague: Brill | Nijhoff 2016) 73-137.

latter personal immunities attaching to serving senior officials in traditional customary law before local jurisdictions of other States, including party and non-party States. Heads of States continue to enjoy personal immunity from another State's national criminal proceedings for committing international crimes.

To conclude, article 27(2) of the Rome Statute covers personal immunity from arrest between States Parties as well as (vertical) personal immunity between a State Party and the ICC. This provision covers the issue of non-availability of personal immunity from arrest by local authorities of States Parties for the ICC proceedings. Article 27(2) evidences a departure from the pre-existing traditional customary rule respecting personal immunity between States. An examination of article 98(1) of the Rome Statute, as well as article 19 of the *Relationship Agreement* between the ICC and the UN, further confirms this finding.

### 6.3.3 Structure of the Rome Statute and article 19 of the Relationship Agreement

A brief elaboration of article 98(1) of the Rome Statute is required on the issue of 'cooperation with respect to waiver of immunity'. Article 98(1) reads:

> 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.

Article 98(1) addresses the ICC's act and how a requested State cooperates with the ICC's requests for surrender or assistance. It is not the place here to address the procedural aspects of the request for surrender or assistance and the obligations to cooperate.[81] Article 98(1) does mention the terms 'immunity' and 'waiver of the immunity' under 'international law'. The phrase 'international law' means that immunity derived from national law is excluded, while personal immunity and diplomatic immunity of property under customary law are included. A plain reading of article 98(1) shows that this provision covers 'waiver of immunity' by a third State. This rule applies when waiver of a third State's diplomatic immunity of property and personal immunity is required.

Article 98(1) was included without sufficient time for a thorough discussion during the 1998 Rome Conference.[82] The preparatory works do not aid in understanding the meaning of 'third State'. This has become clear in

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81 Dov Jacobs, 'Commentary' in A. Klip and G. Sluiter (eds), *Annotated Leading Cases of the International Criminal Court*: *2005-2007*, Vol 23 (Antwerp: Intersentia 2010) 113-21; Dire Tladi, 'The ICC Decisions on Chad and Malawi: On Cooperation, Immunities and Article 98' (2013) 11 *JICJ* 199, 205-18.

82 Hans-Peter Kaul and Claus Kreß, 'Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises' (1999) 2 *YIHL* 143, 164.

the context of the *Al Bashir* case, in which Sudan is a non-party State. Some States repeatedly cited article 98(1) to justify refusal to cooperate. Although a State Party is not empowered by article 98(1) to determine unilaterally whether its cooperation is inconsistent with international law, these States' practice implies that these States support an interpretation of 'third State' by including non-party States. Consequently, the usage of the wording 'waiver' signifies that senior officials of a non-party State continue to enjoy personal immunity under traditional international law. Article 98(1) itself, therefore, gives strength to the existence of the traditional customary rule respecting personal immunity.[83] Articles 27(2) and 98(1) further indicate the recognition of the drafters that they did not intend to override but did intend to respect personal immunity from arrest in traditional customary law.[84] By accepting the two articles, States Parties did not aim to create a new general rule of non-availability of personal immunity from arrest in article 27(2). Heads of non-party States continue to enjoy personal immunity from arrest before other States under customary law.[85]

This interpretation is also supported in the negotiations of article 19 of the Relationship Agreement between the Court and the UN. Belgium wanted to confirm that there existed a customary rule of no immunity for international crimes and proposed a provision to deny personal immunity of UN officials for war crimes, crimes against humanity and genocide. Its proposal stated that '[p]aragraph 1 of this article [article 19] shall be without prejudice to the relevant norms of international law, particularly […] article 27 of the Statute, in respect of the crimes that come under the jurisdiction of the Court'.[86] Belgium's proposal, however, was rejected by the UN representative. The final version of article 19 of the Agreement confirms that UN officials are entitled to immunities, and the UN should agree to 'waive' immunity. Article 19 reads:

> […] the United Nations undertakes to cooperate fully with the Court and to take all necessary measures to allow the Court to exercise its jurisdiction, in particular by waiving any such privileges and immunities in accordance with the Convention on the Privileges and Immunities of the United Nations and the relevant rules of international law.[87]

Had the text of article 27(2) reflected a customary rule denying personal immunity for committing international crimes, there would be no need for such a provision under article 19.[88]

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83 James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford: OUP 2012) 501.

84 Liu, 'Has Non-Immunity for Heads of State Become a Rule of Customary International Law?', 66.

85 Schabas, *The International Criminal Court: A Commentary on the Rome Statute* 600.

86 'Proposal submitted by Belgium Concerning document PCNICC/2000/WGICC-UN/L.1', PCNICC/2000/WGICC-UN/DP.18.

87 Negotiated Relationship Agreement between the International Criminal Court and the United Nations, art 19.

88 Schabas, *The International Criminal Court: A Commentary on the Rome Statute* 601.

As mentioned above, the form of article 27(2) indicates a departure from a pre-existing customary rule respecting personal immunity from arrest. The structure of the Rome Statute further gives strength to this conclusion. The clause in article 27(2) is a treaty exception to the traditional customary rule respecting personal immunity.[89]

### 6.3.4 Assessment and conclusions

Article 27(2) concerns immunities as procedural barriers to the jurisdiction of the ICC. This provision serves a two-fold function about personal immunity. The text of article 27(2) rejects a possible invocation of personal immunity from arrest by a State Party to challenge another State Party for the effectiveness of the ICC proceedings. It evinces an exception to or a departure from traditional customary law. This exclusion of application of customary law through a treaty is acceptable.[90] The preparatory works show that its drafters indirectly recognised the existence of traditional customary law.[91] They did not aim to modify the pre-existing customary rule respecting personal immunity with an exception, or to create a new customary rule of non-availability of personal immunity between States for committing international crimes. The drafters employed the waiver approach through article 27(2) of the Statute to remove personal immunity from arrest between States Parties for the purpose of ICC proceedings. Article 98(1) of the Statute and article 19 of the *Relationship Agreement* also support such finding.

To sum up, after an examination of the text, its form and its preparatory works as well as the structure of the Rome Statute, it is appropriate to conclude that article 27(2) was an exception to the pre-existing customary rule respecting personal immunity from arrest in 1998. This clause with an exception was not of a norm-making nature because such an intent cannot be identified. The above examination does not evince whether article 27(2) was declaratory of a customary rule of non-availability of personal immunity for core international crimes (in criminal proceedings) in 1998.

Article 27(2) in its plain meaning stipulates that personal immunity in international law enjoyed by a senior official of a State Party cannot bar prosecution against that person by the ICC, once it has adjudicatory juris-

89 See also *The Prosecutor v Al Bashir* (Request by Prof. Flavia Lattanzi for leave to submit observations 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) ICC-02/05-01/09-341 (30 April 2018), para 3.

90 *Jones v Saudi Arabia and et al*, [2006] UKHL 26, Lord Bingham of Cornhill, para 33; Cassese *et al* (eds), *Cassese's International Criminal Law* 154; Jia, 'Immunity for State Officials from Foreign Jurisdiction for International Crimes', 86-87.

91 Schabas, *The International Criminal Court: A Commentary on the Rome Statute* 600-01; Liu, 'Has Non-Immunity for Heads of State Become a Rule of Customary International Law?', 66; Ssenyonjo, 'II. The International Criminal Court Arrest Warrant Decision for President Al Bashir of Sudan', 210-11.

diction.[92] Relying on a literal reading, some commentators argue that 'the non-availability of international immunity rights *ratione* […] *personae* with respect to persons, as articulated in article 27(2), is declaratory of customary international law'.[93] They claim that article 27(2) implies a rule that no vertical personal immunity can be invoked before an international court, which is 'direct enforcement of the *jus puniendi* of the international community'.[94] This new customary rule with an exception is based on the distinction between national and international proceedings.[95] This argument is relevant at the ICC for the issuance of arrest warrants against a sitting senior official of a non-party State as well as in subsequent proceedings. In addition, supporters also propose extending the scope of the elimination of personal immunity from 'punish' to 'arrest' of senior officials before national authorities. If the ICC issues arrest warrants, this expanded view enables a State Party to justify its arrest of a sitting senior official of another State, including a non-party State, for committing international crimes.[96]

The SCSL once upheld an interpretation that personal immunity under customary law can be disregarded before an 'international' court. The SCSL addressed some reasons for the distinction between national courts and international courts. Firstly, 'these tribunals are not organs of a State, but derive their mandate from the international community'.[97] Secondly, 'States have considered the collective judgment of the international community to provide a vital safeguard against the potential destabilizing effect of unilateral judgment in that area'.[98]

The reasons, however, are not sound. Firstly, the argument that international tribunals are a direct enforcement of the right to punish on behalf of the international community is rather ambiguous due to the vagueness of the concept of 'international community'. Secondly, in traditional international law, personal immunity is of a procedural nature and is mainly designed to protect 'international relations' between or among States, instead of the relations between a State and an international tribunal. The above construction of a new customary rule of denying personal immunity is mainly based on the nature of the proceedings. The new extended theory that there is a customary exception to personal immunity in certain international proceedings for international crimes implicitly shows that traditional

92 2002 *Arrest Warrant* case of the ICJ, 24-25, paras 58-60; Schabas, *The International Criminal Court: A Commentary on the Rome Statute.*

93 Kreß and Prost, 'Article 98', 2125.

94 Pedretti, *Immunity of Heads of State and State Officials for International Crimes*; Kreß and Prost, 'Article 98', 2128-33; Gaeta and Labuda, 'Trying Sitting Heads of State: The African Union versus the ICC in the *Al Bashir* and *Kenyatta* Cases', 146-47; Triffterer and Burchard, 'Article 27', 1041-42.

95 See Pedretti, ibid; Kreß and Prost, ibid, 2132-33; Gaeta and Labuda, ibid.

96 *Al Bashir Malawi* Cooperation Decision 2011, para 42.

97 *Prosecutor v Charles Taylor* (Decision on Immunity from Jurisdiction, A Ch) SCSL-2003-l-AR72 (E) (31 May 2004) [2004 *Charles Taylor* Jurisdiction Decision], para 51.

98 ibid.

personal immunity from arrest in national proceedings is also invalidated due to the international nature of the proceedings. Without a change of the traditional customary rule regarding personal immunity, this new customary rule is impractical.

Thirdly, the nature of certain 'international' proceedings for international crimes cannot account for the unavailability of personal immunity. States may collectively do what they are not allowed to do individually without risk of violation, such as the member States of the UN Security Council establishing the ICTY and the ICTR to exercise jurisdiction over sitting senior officials of former Yugoslavia and Rwanda.[99] Apart from the power of the UN Security Council, States in most cases are not allowed to do collectively what they individually have no power to do, for example, to remove personal immunity of senior officials of a State by establishing an international criminal tribunal without receiving the consent or a waiver of immunity by that State.[100] The principle of sovereign equality is not the only basis for personal immunity that also aims to protect international relations without interfering with high ranking representatives. We may agree that four States can establish an international criminal tribunal through a treaty to try international crimes and waive personal immunity of their own senior officials. This nature of the international proceedings in the tribunal, however, does not affect personal immunity of the fifth non-party State. The view that senior officials of the fifth non-party State enjoy no personal immunity before this tribunal is unaccepted.[101] Thus, the idea of invalidating personal immunity for international crimes on the basis of the nature of the international proceedings is not convincing.

A new theory of a customary rule with an exception to absolute personal immunity in international proceedings would not simplify the practice between States, but somewhat complicates the practice and the regime of immunity. The new theory does not sufficiently address why individuals cannot invoke personal immunity from arrest before a national court when an international tribunal issues the arrest warrant, whereas they can still invoke personal immunity from arrest before another national court when a national court issues the warrant for committing international crimes. If a modified (new) customary international rule concerning personal immunity is emerging, better construction of its content should rely on the nature of the crimes under international law. In other words, 'the practice that sitting senior officials are subject to the jurisdiction of other States for committing international crimes is universally upheld as a modified customary rule,

99 Schabas, 'The Special Tribunal for Lebanon: Is a 'Tribunal of an International Character' equivalent to an 'International Criminal Court'?', 527-28.

100 Pedretti, *Immunity of Heads of State and State Officials for International Crimes* 295.

101 Micaela Frulli, 'Piercing the Veil of Head-of-State Immunity: The Taylor Trial and beyond' in C.C. Jalloh (ed), *The Sierra Leone Special Court and its Legacy: The Impact for Africa and International Criminal Law* (2013) 327; Christian Tomuschat, 'Obligations Arising for States without or against Their Will' (1993) 241 *Recueil des cours* 195, 269.

regardless of whether such proceedings are brought before national or international courts'.[102] Once a customary rule provides an exception to personal immunity for committing international crimes, personal immunities would not be procedural bars for the exercise of jurisdiction over these officials in international criminal tribunals.[103]

Finally, yet equally important, some tribunals have rejected the construction that relies on the nature of the court. The Appeals Chamber of the ICTY in *Blaškić* recognised that functional immunity does not disappear simply because the tribunal is international.[104] In the *Krstić* case, Judge Shahabuddeen in his dissenting opinion claimed that 'there is no substance in the suggested automaticity of the disappearance of the immunity just because of the establishment of international criminal courts'.[105] Both cases refer to functional immunity from testifying based on an order issued by the ICTY, but their findings are equally true as to personal immunity. No tendency seems to indicate that immunity of senior officials would be abrogated simply due to the international nature of the court, as will be seen below.[106] The nature of crimes is the main concern in the following analysis with respect to an exception to 'personal immunity from arrest' encompassed in article 27(2), whereas evidence concerning the international nature of the court is assessed when necessary.

## 6.4 Non-availability of personal immunity for international crimes: was article 27(2) declaratory of custom?

The main issue in this section is whether article 27(2) was declaratory of a customary rule about non-availability of personal immunity from arrest for committing international crimes before 1998. This section looks into the 1919 Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties (1919 Report of the Commission on Responsibilities), the 1919 Treaty of Versailles, article 7 of the Nuremberg Charter as well as other post-World War II practice to show that article 27(2) was not declaratory of such a customary rule in 1998.

102 2002 *Arrest Warrant* case of the ICJ (Dissenting Opinion of Judge *ad hoc* Van den Wyngaert), para 31.

103 Cassese, 'When May Senior State Officials be Tried for International Crimes? Some Comments on the *Congo v Belgium* Case', 864. He may also support a customary rule that declines personal immunity by virtue of 'international crimes' rather than 'international courts'.

104 *Prosecutor v Blaškić* (Decision on the Objection of the Republic of Croatia to the Issue of *subpoena duces tecum*) ICTY-95-14-PT (18 July 1997), paras 38-45.

105 *Krstić* Appeals Chamber Judgment (Dissenting Opinion of Judge Shahabuddeen), para 11.

106 Akande, 'International Law Immunities and the International Criminal Court'.

### 6.4.1 1919 Report of the Commission on Responsibilities and Treaty of Versailles

The Commission on Responsibilities in its 1919 Report said that it desired:

> […] to state expressly that in the hierarchy of persons in authority, there is no reason why rank, however exalted, should in any circumstances protect the holder of it from responsibility when that responsibility has been established before a properly constituted tribunal. This extends even to the case of heads of states. An argument has been raised to the contrary based upon the alleged immunity, and in particular the alleged inviolability, of a sovereign of a state. But this privilege, where it is recognised, is one of practical expedience [sic] in municipal law, and is not fundamental. However, even if, in some countries, a sovereign is exempt from being prosecuted in a national court of his own country the position from an international point of view is quite different.[107]

This paragraph, however, cannot stand as supporting evidence for non-availability of personal immunity. The first two sentences are not relevant to procedural immunity but rather to substantive responsibility.[108] The view in the last two sentences is also contestable. Although immunities under international law are not only of practical expediency in municipal law but also a customary rule in contemporary international law, it is true that international immunities do not aim to prevent people from being prosecuted in their own country. The last sentence simply stresses the difference between immunities under national and international law, which is irrelevant to the issue of personal immunity.

The following paragraphs of the Commission on Responsibilities' 1919 Report should not be disregarded. The Report further stated that '[w]e have […] proposed the establishment of a high tribunal […] and included the possibility of the trial before that tribunal of a former head of a state with the consent of that state itself secured by articles in the Treaty of Peace'.[109] What the Commission finally proposed was not the removal of immunity enjoyed by a sitting head of State without consent, but rather a removal of immunity of 'a former head of State [the Kaiser of Germany] with the consent of that State'. The Commission on Responsibilities' 1919 Report indirectly confirmed the functional immunity of former heads of States, far from disregarding personal immunity of a head of a State.

According to article 227 of the 1919 Treaty of Versailles, the former German Kaiser William II was indicted for prosecution before a special tribunal. The indictment was achieved through Germany's waiver of immunity by

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107 'Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference' reprinted in (1920) 14 *AJIL* 95 [Report of the Commission on Responsibilities], 116; *Al Bashir Malawi* Cooperation Decision 2011, para 23.

108 Princeton Project on Universal Jurisdiction, 'The Princeton Principles on Universal Jurisdiction' (2001), Principle 5 and its commentary, pp 48-51; 2002 *Arrest Warrant* case of the ICJ, 24, para 58.

109 Report of the Commission on Responsibilities, 116.

signing the Treaty of Versailles, despite the fact that Germany may have had little choice.[110] More details about this indictment are significant. William II was a former head of State who did not enjoy personal immunity. Practices of prosecution of former heads of States exist, but the consent of their States should not be ignored. Even for a former head of State who has been deposed and whose monarchy no longer exists, he still enjoyed functional immunity, not to mention personal immunity, if he was in office.

The Commission on Responsibilities proposed a text on responsibility in article III of its draft provisions for the special tribunal, which was a predecessor of article 7 of the Nuremberg Charter and article 27(1) of the Rome Statute. Article III provided that 'all persons belonging to enemy countries, however high their position may have been, without distinction of rank, including chiefs of states, who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution'. The US delegate reserved for this article.[111] The US objected to the idea of individual responsibility of a sitting head of State in international law because 'no precedents are to be found in the modern practice of nations'. The US also referred to the *Schooner Exchange v McFaddon* case and argued that 'proceedings against [a head of a State] might be wise or unwise, but in any event they would be against an individual out of office and not against a [person in his position] and thus in effect against the state'.[112] This statement shows that even the principle of individual responsibility for a head of State such as article 27(1) of the Rome Statute provides had not yet been generally recognised at that time. It is not persuasive to argue that States would begin to acknowledge a rule of non-availability of personal immunity of a sitting head of State before such a 'high tribunal'. These sources support the view that in 1919 customary law continued to recognise personal immunity of heads of State, even before international tribunals.

### 6.4.2 Article 7 of the Nuremberg Charter and article 6 of the Tokyo Charter

Article 7 of the Nuremberg Charter provides that '[t]he 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.' The text of article 6 of the Tokyo Charter is a bit different from that of article 7. Article 6 adds that 'official position and the fact that an accused acted pursuant to order of his government or of a superior may be considered in mitigation of punishment if the Tribunal determines'. Articles 6 and 7 of the two Charters are often deemed supporting evidence for a customary rule of non-availability of personal immunity.

110 *Contra Ruto & Sang* Acquittal Decision 2016 (Reasons of Judge Eboe-Osuji) ICC-01/09-01/11-2027-Red-Corr (5 April 2016), para 261.
111 Report of the Commission on Responsibilities, 127-53.
112 ibid, 135-36.

Both articles were initially designed to distinguish individual criminal responsibility from State responsibility for committing international crimes, instead of coping with personal immunity.[113] At the London Conference, the US made Draft Proposals for the later London Agreement.[114] An Annex regarding modes of liability and defences stated that '[a]ny defence based upon the fact that the accused is or was the head or purported head or other principal official of a State is legally inadmissible and will not be entertained'.[115] The Soviet Union also proposed a draft.[116] Its draft contained a 'statute of the international military tribunal'. Article 28 of this Soviet draft proposed that '[t]he official position of persons guilty of war crimes, their position as heads of States or as heads of various departments shall not be considered as freeing them from or in mitigation of their responsibility'.[117] Amalgamating the American and Soviet texts, a draft text of the later Nuremberg Charter submitted to the London Conference provided that '[t]he official position of defendants, whether as heads of State or responsible officials in various Departments, shall not be considered as freeing them from responsibility or mitigating punishment'.[118] Except for a minor change, this provision was retained substantially in article 7 of the Nuremberg Charter.

The examination of the draft proposals demonstrates that article 7 of the Nuremberg Charter was designed to remove a potential defence for acting on behalf of the State to free an individual from responsibility. The IMT adopted such an interpretation of article 7 of the Nuremberg Charter. With reference to article 7, the IMT judgment wrote:

> Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced. […] The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings. […] He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorising action moves outside its competence under international law.[119]

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113 Schabas, *Genocide in International Law*, *The Crime of Crimes* 369-71; 'Formulation of Nuremberg Principles, Report by Jean Spiropoulos, Special Rapporteur', UN Doc A/CN.4/22 (1950), p 192.

114 'American Draft of Definitive Proposal, Presented to Foreign Ministers at San Francisco, April 1945'; 'Revision of American Draft of Proposed Agreement, June 14, 1945'; and 'Revised Draft of Agreement and Memorandum Submitted by American Delegation, June 30, 1945', in *Report of Robert H. Jackson*, *United States Representative to the International Conference on Military Trials: London*, *1945* (Washington, DC: USGPO 1949) [*Report of Robert H. Jackson*].

115 'Revised Draft of Agreement and Memorandum Submitted by American Delegation, June 30, 1945', in *Report of Robert H. Jackson* 124, 180-81.

116 'Draft of Agreement Presented by the Soviet Delegation, July 2, 1945'; 'Draft Showing Soviet and American Proposals (in Parallel Columns)', in *Report of Robert H. Jackson* 180.

117 UN Doc A/CN.4/22 (1950), p 183.

118 'Draft of Agreement and Charter, Reported by the Drafting Subcommittee, July 11, 1945', in *Report of Robert H. Jackson* 194; UN Doc A/CN.4/22 (1950), pp 182-87.

119 *France et al v Göring et al*, (1948) 1 TMWC 171, p 223.

Individuals cannot hide behind the veil of acting on behalf of a State. Article 7 pierced the veil of immunity in national law and functional immunity in international law. Article 6 of the Tokyo Charter itself shared the same function as article 7.

The drafting history and the IMT's construction of article 7 of the Nuremberg Charter show that both articles 6 and 7 of the Tokyo and Nuremberg Charters respectively, which are similar to article 27(1) of the Rome Statute, pertain to substantive defences of official position. The two provisions do not answer whether personal immunities were automatically lifted before the two tribunals for committing international crimes.

### 6.4.3 Post-World War II practice

After World War II, no evidence shows that the IMT and the IMTFE prosecuted sitting senior State officials 'without consent'. Hitler, as a leader of Nazi Germany, committed suicide. The Japanese Emperor Hirohito was not prosecuted for political reasons.[120] The highest indicted state officials in IMTFE were former prime ministers. Göring was prosecuted for war crimes and crimes against humanity. When Göring was prosecuted, he was a president of the Reichstag, a legislative body of Germany, rather than a senior official enjoying personal immunity. The IMT also prosecuted and sentenced Dönitz, who succeeded Hitler as the head of State, for war crimes and war of aggression.[121] Dönitz himself did not raise an objection to the prosecution by virtue of personal immunity.

Also, article 1 of the London Agreement provided that '[t]here shall be established after consultation with the Control Council for Germany an International Military Tribunal'.[122] The Control Council for Germany had the capacity as local sovereign of Germany authority at that time, although it was created by the Allied powers acting as a *de facto* legislator.[123] The phrase 'consultation with the Control Council for Germany' implies that Germany consented to remove the personal immunity of senior officials before the IMT. Besides, one may note that in rejecting the assertion of Hiroshi Ōshima, the Japanese ambassador to Germany, the IMTFE held that 'this [diplomatic] immunity has no relation to crimes against international law charged before a tribunal having jurisdiction'.[124] This statement also does not directly show the irrelevance of personal immunity of senior officials for international crimes but rather is related to the IMTFE's jurisdiction and Ōshima's diplomatic immunity. Accordingly, the practice of post-World War II confirms

120 Gaeta, 'Official Capacity and Immunities', 981 and fn 18; Pedretti, *Immunity of Heads of State and State Officials for International Crimes* 252; Triffterer and Burchard, 'Article 27', 1044; O'Neill, 'A New Customary Law of Head of State Immunity?: Hirohito and Pinochet'.

121 *France et al v Göring et al*, (1948) 1 TMWC 171.

122 Nuremberg Charter.

123 *Justice* case, (1948) 3 TWC 3, pp 964-65.

124 *US et al v Araki et al*, Judgment, p 1189.

individual responsibility of senior officials, instead of supporting a denial of personal immunity of senior officials.

### 6.4.4 1946 GA Resolution and 1950 Nuremberg Principle III

Other sources frequently referred to in this context are 1946 UN General Assembly Resolution 95(I),[125] and Principle III of the ILC's 'Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal' (1950 ILC Nuremberg Principles).[126] The legal status of the two documents should be noted. The 1946 Resolution 95(I) did not attach or refer to a consolidated text of the Nuremberg principles, and the General Assembly never adopted the 1950 ILC Nuremberg Principles. The irrelevance of official capacity under article 7 of the Nuremberg Charter was recognised by the General Assembly in 1946 Resolution 95(I).[127] Principle III of the 1950 ILC Nuremberg Principles was also based on article 7 of the Nuremberg Charter,[128] which provided that 'the fact that a person who committed an act which constitutes a crime under international law acted as head of State or responsible government official did not relieve him from responsibility under international law'.[129] As noted above, both documents do not deal with personal immunity as a procedural bar, but rather the issue of acting on behalf of a State as a defence to individual responsibility.

### 6.4.5 Assessment and conclusions

Article IV of the 1948 Genocide Convention also merits brief discussion.[130] Article IV reads that '[p]ersons 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'. William Schabas comments that the drafters of the Convention in that article only provide responsibility for genocide, instead of depriving senior officials of immunity who are in office.[131] In contrast, commentators and ICC Judge Perrin De Brichambaut have argued that personal immunities were 'removed' or 'waived' by States Parties to the Genocide Convention.[132] In their view, per-

125 UN Doc A/RES/95 (I).

126 'Formulation of the Nuremberg Principles', in 'Report of the International Law Commission covering its second session, 5 June – 29 July 1950', UN Doc A/CN.4/34 (1950), pp 374-78; 'Formulation of the Nuremberg Principles', GA Res 488 (V) (1950), UN Doc A/RES/488 (V), para (1).

127 UN Doc A/RES/95 (I).

128 'UN Doc A/CN.4/34 (1950), p 375, para 104.

129 ibid.

130 Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 12 January 1951, 78 UNTS 277.

131 Schabas, *Genocide in International Law*, *The Crime of Crimes* 54-55, 369-71.

132 *Al Bashir South Africa* Cooperation Decision 2017 (Minority Opinion of Judge Marc Perrin De Brichambaut), paras 8, 30.

sonal immunities were not attached to senior officials in accordance with article IV.[133] This argument implicitly recognises the rule of respecting personal immunities.

The above authorities provide no similar wording to that provided in article 27(2). Immunities constitute no bar for the exercise of jurisdiction in the IMT and the IMTFE, while personal immunities were not expressly removed in their founding instruments. This factual situation does not lead to the conclusion that a rule of non-availability of personal immunity existed for these crimes. In fact, most individuals involved in the proceedings were not sitting senior officials. The issue of personal immunity did not arise before the two tribunals. The evaluation of these sources demonstrates that they are all echoed in article 27(1) of the Rome Statute. Similarly, article 7 of the 1996 ILC Draft Code of Crimes and article 7(2) of the 1993 ICTY Statute, as well as article 6(2) of the 1994 ICTR Statute share the same feature. All these instruments are irrelevant to personal immunity but confirm either a rule of functional immunity by removing that immunity with 'consent' or a rule of individual criminal responsibility in international law. Relying on the authorities referred to above, commentators supporting an exception to immunity seem to conflate the issue of no defence for official acts with the issue of no exception to personal immunity. In establishing these tribunals to exercise jurisdiction over international crimes, these States did not intend to abrogate personal immunity in traditional customary law.

The observations demonstrate a lack of support for an emerging customary rule before 1998 recognising non-availability of personal immunity from arrest for committing international crimes. No sufficient practice or *opinio juris* exists to support a pre-existing or an emerging customary rule that there was no personal immunity in national or international proceedings for committing international crimes. The construction of article IV of the Genocide Convention does not undermine this finding. This section concludes that article 27(2) was not declaratory of a customary rule of non-availability of personal immunity from arrest for committing international crimes before adoption of the Rome Statute.

## 6.5 Non-availability of personal immunity for committing international crimes: is article 27(2) declaratory of custom?

By lifting personal immunity from arrest for international crimes, article 27(2) of the Rome Statute provides an exception to the existing customary rule respecting personal immunity. The traditional customary rule is

133 Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities', 350-51; Göran Sluiter, 'Using the Genocide Convention to Strengthen Cooperation with the ICC in the Al Bashir Case' (2010) 8 *JICJ* 365,378; *Al Bashir South Africa* Cooperation Decision 2017 (Minority Opinion of Judge Marc Perrin De Brichambaut), paras 21-37 and fn 16.

modified unless sufficient evidence of State practice and *opinio juris* support an exception to absolute personal immunity for committing international crimes.[134] This section examines practice and new trends after 1998 to answer whether article 27(2) is declaratory of a modified (new) customary rule with respect to personal immunity to date.

### 6.5.1 Immunity for international crimes: national and international cases

After adoption of the Rome Statute in 1998, some national and international decisions seem to show a denial of immunity for international crimes.

#### *6.5.1.1 1999 Pinochet case (the UK) and 2001 Gaddafi case (France)*

The 1999 *Pinochet* (*No 3*) case was the first challenge to immunity for torture before the UK's House of Lords.[135] When Augusto Pinochet, the former Head of State of Chile, was visiting the UK for medical treatment in 1998, Spain requested the UK to extradite him for charges of torture in the Spanish Court. The UK issued two warrants for his arrest. The High Court quashed one of the warrants because Pinochet was immune from prosecution as a former head of State.[136] During the appeal before the House of Lords, the majority agreed that Pinochet enjoyed no functional immunity for acts of torture as defined in the 1984 Convention against Torture.[137] Despite different grounds for the dismissal of immunity, the *Pinochet* case represents a change of direction for the issue of immunity.[138] This case, however, dealt with functional immunity of former senior officials rather than personal immunities of sitting senior officials. The majority of the House of Lords supported the view that incumbent senior State officials still enjoy personal immunity before national courts, even if they committed torture.[139] In 2004, a UK district court rejected an application for an arrest warrant for then sitting President of Zimbabwe Robert Mugabe for alleged torture.[140] The judge held that:

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134 Robinson, 'Immunities', 562-64.

135 *R v Ex Parte Pinochet et al* (No 3), 38 ILM 581 (1999).

136 Bianchi, 'Immunity versus Human Rights: The Pinochet Case'.

137 *R v Ex Parte Pinochet et al* (No 3), 38 ILM 581 (1999), Lord Browne-Wilkinson, p 595, Lord Hope of Craighead, p 626, Lord Saville of Newdigate, p 643; Lord Millett, p 651. A majority of six to one with Lord Goff of Chieveley dissenting in respect of the immunity issue. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 26 June 1987, 1465 UNTS 85.

138 For an analysis of this case, see Andrea Gattini, '*Pinochet* Cases' in R. Wolfrum (ed) (2007) *MPEPIL*, paras 13-18.

139 *R v Ex Parte Pinochet et al* (No 3), 38 ILM 581 (1999), p 644.

140 *Application for a Warrant for the Arrest of Robert Mugabe*, First instance, 14 January 2004, ILDC 96 (UK 2004).

> Whilst international law evolves over a period of time international customary law which is embodied in our Common Law currently provides absolute immunity to any Head of State. […] Robert Mugabe is President and Head of State of Zimbabwe and is entitled whilst he is Head of State to that immunity. He is not liable to any form of arrest or detention […].[141]

French courts held a slightly different view on the matter of personal immunity. In the 2001 *Gaddafi* case, the Court of Cassation of France examined whether Gaddafi as a serving head of State was immune from the national court of France for complicity in acts of terrorism.[142] In the beginning, the Court of Appeal ruled that since the end of World War II the principle of immunity admits some exceptions for acts outside the realm of the duties of a head of State. In addition, considering the gravity of the crime, Gaddafi could not enjoy immunity from jurisdiction.[143] The Prosecutor appealed on the interpretation of personal immunity. The Prosecutor argued that a sitting head of State enjoys absolute immunity from jurisdiction and no exception could be made, no matter how grave the crime charged. The Court of Cassation of France overturned the Court of Appeal's ruling. The Court of Cassation in its judgment held that 'in international law, the reported crime [acts of terrorism], regardless of its gravity, does not provide exceptions to the principle of the immunity from jurisdiction of foreign heads of State in office, the indictment division failed to consider the above-mentioned principle'.[144]

The Court of Cassation implicitly upheld that 'exceptions to the principle of the immunity of jurisdiction of a sitting head of State' before a national court exist, but these exceptions 'in international law' do not include 'the reported crime', acts of terrorism.[145] Nevertheless, it is unclear what exceptions the Court had considered, treaty derogations from custom for committing international crimes or the gravity of core international crimes. The *Gaddafi* case, therefore, does not directly support the contention that core international crimes provide exceptions to absolute personal immunity before an international tribunal.

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141 ibid, paras 5, 7.

142 *Advocate General v Gaddafi* (Appeal Judgment, Court of Cassation, France) 00-87215 (13 March 2001), ILDC 774 (FR 2001); Zappalà, 'Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Gaddafi Case before the French Cour de Cassation'.

143 *General Prosecutor v Gaddafi*, ibid, para 1; Thomas Marguerite, 'General Prosecutor *v* Gaddafi' in A. Nollkaemper and A. Reinisch (eds), *Oxford Reports on International Law in Domestic Courts* (28 October 2008), Facts, F4, F5,

144 *General Prosecutor v Gaddafi*, ibid, paras 1, 10.

145 Yann Kerbrat and Thomas Marguerite, '*General Prosecutor v Gaddafi*' in A. Nollkaemper and A. Reinisch (eds), *Oxford Reports on International Law in Domestic Courts*, Analysis, A6.

#### *6.5.1.2 The ICJ: 2002 Arrest Warrant case (Belgium v Congo)*

Both the *Pinochet* and *Gaddafi* cases were cited by Belgium in the 2002 *Arrest Warrant* or *Yerodia* case before the ICJ.[146] In the *Arrest Warrant* case, Belgium issued an international arrest warrant for the incumbent Minister for Foreign Affairs of Congo, Mr Yerodia Ndombasi, for alleged war crimes and crimes against humanity. Congo contended that Belgium violated rules of international law including the rule of respect for diplomatic immunity.[147] Belgium argued that the immunities attaching to incumbent ministers of foreign affairs could not be invoked to protect them when they are suspected of having committed war crimes or crimes against humanity.[148] Based on a distinction between the immunity for ordinary crimes and the immunity for international crimes, Belgium argued that 'an exception to the immunity rule was accepted in the case of serious crimes under international law'. Congo insisted that 'under international law as it currently stands, there is no basis for asserting that there is any exception to the principles of absolute immunity from criminal process of an incumbent Minister for Foreign Affairs where he or she is accused of having committed crimes under international law'.[149]

The majority of the ICJ rejected Belgium's arguments about personal immunity.[150] The ICJ held that no exception to personal immunity exists under customary law before the jurisdiction of other States, regardless of the nature of the crime. The ICJ found that:

> It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.[151]

This finding was affirmed in a subsequent case before the ICJ.[152] The ICJ also cited articles 6 and 7 of the Tokyo and Nuremberg Charters, articles 6(2) and 7(2) of the ICTR and ICTY Statutes as well as article 27 of the Rome Statute. The ICJ concluded that 'these rules do not enable it to conclude that any such an exception exists in customary international law in regard to national courts'.[153] The ICJ affirmed the immunity of foreign ministers for commit-

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146 2002 *Arrest Warrant* case of the ICJ (Counter Memorial of the Kingdom of Belgium), 28 September 2001, paras 3.5.92-3.5.93.

147 2002 *Arrest Warrant* case of the ICJ, 8, para 12.

148 2002 *Arrest Warrant* case of the ICJ (Counter Memorial of the Kingdom of Belgium), para 0.26 (d).

149 2002 *Arrest Warrant* case of the ICJ, 24, para 57.

150 2002 *Arrest Warrant* case of the ICJ (Dissenting Opinion of Judge *ad hoc* Van den Wyngaert).

151 2002 *Arrest Warrant* case of the ICJ, 24, para 58.

152 *Questions of Mutual Assistance* Judgment.

153 2002 *Arrest Warrant* case of the ICJ, 24, para 58.

ting international crimes as a customary rule. Without a doubt, its conclusion also extends to heads of State and heads of government.[154]

Furthermore, a statement in paragraph 61 of the judgment of the *Arrest Warrant case* is significant. It stated that:

> […] an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in article 27, paragraph 2, that […].[155]

This statement seems to open a door for non-availability of personal immunity before 'international tribunals'.[156] This statement should be understood systemically, and other reasoning of the ICJ should not be overlooked. The ICJ first noted that 'jurisdiction does not imply absence of immunity'.[157] It then clarified that immunity from jurisdiction does not automatically mean impunity for crimes committed, 'irrespective of their gravity'. In its wording, '[j]urisdictional immunity may well bar prosecution for a certain period or for certain offences'.[158] Consequently, the ICJ described in paragraph 61some plausible circumstances in which immunity does not bar criminal prosecution. The first three ways are prosecution by their own countries, waiver of immunity and prosecution of former state officials. For the first three alternatives: personal immunity in international law is never a bar for prosecution by the State to which the suspect belongs; the waiver of immunity ceases personal immunity as a bar; and the prosecution of former officials means that the prosecution is outside a 'certain period'.

The fourth alternative, as cited above, is the prosecution of an incumbent minister for foreign affairs for international crimes by international criminal tribunals, if they have jurisdiction.[159] In the fourth alternative, the ICJ referred to three examples of the ICTY, the ICTR and the ICC. The ICJ noted that the UN Security Council established the former two tribunals, while the procedural bar to the ICC was deprived by virtue of article 27(2) of the Rome

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154 Cassese *et al* (eds), *Cassese's International Criminal Law* 320; Kreicker, *Völkerrechtliche Exemtionen Grundlagen Und Grenzen Völkerrechtlicher Immunitäten Und Ihre Wirkungen Im Strafrecht*, cited in Kreß and Prost, 'Article 98', 2128 and fn 58; 2002 *Arrest Warrant* case of the ICJ (Dissenting Opinion of Judge *ad hoc* Van den Wyngaert), paras 16-19.

155 2002 *Arrest Warrant* case of the ICJ, 25, para 61.

156 Akande, 'The Legal Nature of Security Council Referrals to the ICC and Its Impact on Al Bashir's Immunities', 334.

157 2002 *Arrest Warrant* case of the ICJ, 24-25, para 59.

158 ibid, 25, para 60.

159 ibid, 25-26, para 61. For comments on the ICJ's view concerning the prosecution of former State officials, see 2002 *Arrest Warrant* case of the ICJ (Joint Separate opinion of Judges Higgins, Kooijmans and Buergenthal), para 85; Cassese, 'When May Senior State Officials be Tried for International Crimes? Some Comments on the *Congo v Belgium* Case', 867-74.

Statute. The ICJ, however, did not clarify why personal immunity may not be a bar to criminal proceedings 'before certain international criminal courts, where they have jurisdiction': denied automatically for the nature of the international proceedings of the court or the nature of the crimes, waived by signing a treaty, or deprived by the UN Security Council.

By virtue of its reasoning, the ICJ may agree that personal immunity is not a bar before the two *ad hoc* tribunals due to the removal of immunity by the Security Council.[160] The ICJ may also support the view that States Parties cannot invoke personal immunity before the ICC pursuant to article 27(2). However, the ICJ stated that 'although various international conventions […] requiring [States] to extend their criminal jurisdiction, such extension […] in no way affects immunities under customary international law'.[161] It seems that the ICJ in the *Arrest Warrant* case would disagree with the idea that the horizontal personal immunity from arrest under customary law is disregarded as long as the arrest warrant was issued by a competent 'international' court. Judge Van den Wyngaert in her dissenting opinion also did not argue for a distinction of immunity based on the nature of the court.[162] The ICJ did not aim to disregard personal immunity from arrest based on the 'international' nature of the court.

To sum up, the ICJ provided certain avenues for States to narrow the impunity gap arising from an invocation of personal immunity. Meanwhile, by rejecting Belgium's arguments, personal immunity from arrest in customary law was acknowledged by the ICJ for committing crimes, regardless of their gravity.

#### *6.5.1.3 The SCSL and the ICTY: Charles Taylor and Milošević*

Some cases of international criminal tribunals show a trend of eroding the customary rule respecting personal immunity, notably the *Charles Taylor* case at the Special Court for Sierra Leone (SCSL),[163] the *Slobodan Milošević* case at the ICTY,[164] and several ICC decisions in the *Al Bashir* case.[165] The following paragraphs focus on the *Charles Taylor* and *Milošević* cases.

In the *Charles Taylor* case, an indictment and an arrest warrant were issued when Charles Taylor was the sitting President of Liberia. The issue before the Appeals Chamber of the SCSL was whether he was entitled to immunity from the court's jurisdiction.[166] The Appeals Chamber considered the international nature of the SCSL[167] and emphasised the ICJ's finding in

160 See section 6.5.3.
161 2002 *Arrest Warrant* case of the ICJ, 24-25, para 59.
162 ibid, Dissenting Opinion of Judge *ad hoc* Van den Wyngaert, paras 8-39.
163 2004 *Charles Taylor* Jurisdiction Decision.
164 *Milosević* Decision on Preliminary Motions, paras 28-33.
165 *Al Bashir Malawi* Cooperation Decision 2011; *Al Bashir Chad* Cooperation Decision 2011; *Al Bashir DRC* Cooperation Decision 2014.
166 2004 *Charles Taylor* Jurisdiction Decision, para 20.
167 ibid, paras 41-42.

the *Arrest Warrant* case that personal immunity could not prevent Taylor from being subject to international proceedings.[168] The Appeals Chamber drew a distinction between international and national courts on the issue of personal immunity. The Chamber concluded that 'the principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court'.[169] The *Charles Taylor* decision seems to indicate removal of personal immunity of a sitting head of State for committing international crimes.[170]

The Appeals Chamber's reasoning is, however, not sound.[171] Firstly, article 6(2) of the Statute of the SCSL substantially used the same wording as article 7(2) of the ICTY Statute and article 27(1) of the Rome Statute. In fact, the SCSL was not established by the Security Council acting under Chapter VII of the UN Charter, but through the Agreement between the UN and Sierra Leone. Secondly, the *Charles Taylor* decision relied heavily on the last alternative in paragraph 61 of the ICJ's *Arrest Warrant* case to uphold an emerging trend of no personal immunity before 'international criminal tribunals'.[172] As mentioned above, the last alternative cannot be exclusively construed as depriving personal immunity for the nature of international proceedings. The waiver-exception and the power of the Security Council are also grounds for the non-availability of personal immunity before an international tribunal. That passage, therefore, does not directly support the non-availability of personal immunity for committing international crimes before international courts. Thirdly, the Chamber also referred to the opinion of Lord Millett in the *Pinochet* (No 3) case.[173] Lord Millett's idea was that in the future the rank of a person accused of committing international crimes affords no defence, which evidences the irrelevance of official capacity as a defence. Lord Millett also wrote that:

> Immunity *ratione personae* is a status immunity. […] If he [Pinochet] were [a serving head of State], he could not be extradited. It would be an intolerable affront to the Republic of Chile to arrest him or detain him. […] The nature of the charge is irrelevant; his immunity [*ratione personae*] is personal and absolute.[174]

The Appeals Chamber of the SCSL also cited other sources to support its argument. It indeed mixed the issue of individual responsibility with the issue of personal immunity.[175] In brief, the reasoning in the *Charles Taylor*

168 ibid, para 52.
169 ibid, paras 51-52.
170 ibid.
171 But see Kreß and Prost, 'Article 98', 2136. For an analysis of the international nature of a court, see Schabas, 'The Special Tribunal for Lebanon: Is a 'Tribunal of an International Character' equivalent to an 'International Criminal Court'?', 523.
172 2004 *Charles Taylor* Jurisdiction Decision, para 50.
173 *R v Ex Parte Pinochet et al* (No 3), 38 ILM 581 (1999), Lord Millett, p 652.
174 ibid, Lord Millett, pp 644, 651 (italics added).
175 2004 *Charles Taylor* Jurisdiction Decision, paras 44-49.

decision does not support a new rule of non-availability of personal immunity for committing international crimes.

In the *Milošević* case, the ICTY prosecuted Slobodan Milošević, a sitting head of State of the Federal Republic of Yugoslavia (FRY). Milošević challenged the jurisdiction of the ICTY and the illegal surrender of the FRY based on his status as president.[176] The Trial Chamber dismissed this motion because in its view article 7(2) of the Statute of ICTY reflected a customary international rule.[177] The Trial Chamber also oversimplified the issue by conflating a defence of official capacity with the issue of immunity. Also, one fact in this case should not be overlooked. The fact that the FRY voluntarily surrendered Milošević to the ICTY shows that personal immunity was not a problematic issue for the prosecution of Milošević before the ICTY, because his home State had waived his immunity – at least implicitly. This *Milošević* case, therefore, also does not support a rule of non-availability of personal immunity under customary law.[178]

#### *6.5.1.4 Pre-Trial Chambers of the ICC: Al Bashir cooperation decisions*

Al Bashir is a sitting head of State that is not a party to the Rome Statute. Debates have occurred in the ICC's Darfur Situation as to Al Bashir's personal immunity.[179] The Darfur Situation was referred to the ICC by the Security Council.[180] It is undeniable that the ICC can exercise jurisdiction over the alleged crimes. However, Al Bashir as a head of State enjoys personal immunity embedded under customary law, leading to his protection from investigation, arrest, indictment and prosecution by foreign authorities.[181] A question arises whether Al Bashir can invoke personal immunities from arrest before the ICC and national authorities of States Parties.

The legality of the ICC's issuance of warrants concerns the issue of personal immunity. In the *First Warrant of Arrest* Decision, Pre-Trial Chamber I of the ICC concluded that Al Bashir did not enjoy personal immunity before the ICC because article 27(2) applies to a non-party State.[182] The Chamber relied on the treaty provision to remove his personal immunity without explaining why this provision prevails over existing customary law respect-

176 *Prosecutor v Milošević* (Preliminary Protective Motion) ICTY-99-37-PT (9 August 2001), p 5; *Milošević* Decision on Preliminary Motions, paras 26-34.

177 *Milošević* Decision on Preliminary Motions, paras 28, 34.

178 The *Milošević* case in connection with the position of the Security Council is analysed in detail in section 6.5.3.

179 1998 Rome Statute, art 27; Luigi Condorelli and Santiago Villalpando, 'Can the Security Council Extend the ICC's Jurisdiction?' in A. Cassese *et al* (eds), *The Rome Statute of the International Criminal Court: A Commentary* 634; First Warrant of Arrest for *Al Bashir*.

180 UN Doc S/RES/1593 (2005).

181 Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*; Pedretti, *Immunity of Heads of State and State Officials for International Crimes* 57-100.

182 *First Warrant of Arrest* Decision for *Al Bashir*, para 41.

ing personal immunity. It remained silent on whether article 27(2) is a declaration of customary law recognising an exception to personal immunity. The *First Warrant of Arrest* Decision, therefore, may not be relevant for ascertaining a customary rule with an exception to personal immunity.[183]

In analysing the reasoning behind this decision, Paola Gaeta argues that article 27(2) may apply to senior officials of non-party States by virtue of its customary nature.[184] In her view, no personal immunity before the ICC exists since article 27(2) is a reflection of customary law acknowledging non-availability of personal immunity. Her idea seems to have been partly followed by subsequent decisions of the ICC. Pursuant to article 87(7) of the Rome Statute, the ICC has made several decisions for failure to comply with the cooperation requests for the arrest and surrender of Al Bashir.[185] Some of these decisions are closely related to the present issue of personal immunity under customary law.[186]

*Malawi decision: personal immunity before the ICC*

In 2011, Pre-Trial Chamber I of the ICC in the *Malawi* decision held that in international law no personal immunity can be invoked to oppose a prosecution by an international court.[187] It also concluded that in international proceedings there is a customary exception to absolute personal immunity

183 For observations of the Chamber's four reasons, see Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?', 322-25; Kreß, 'The International Criminal Court and Immunities under International Law for States Not Party to the Court's Statute', 241-42.

184 Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?', 322-25. See also *The Prosecutor v Al Bashir* (Request by Professor Paola Gaeta for leave to submit observations 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-02/05-01/09-349 (30 April 2018), para 1.

185 As of 31 December 2017, there are 13 States Parties' non-cooperation decisions in the *Al Bashir* case. 2010 Kenya Cooperation Decision, ICC-02/05-01/09-107; 2010 Chad Cooperation Decision, ICC-02/05-01/09-109; 2011 Djibouti Cooperation Decision, ICC-02/05-01/09-129; *Al Bashir* Malawi Cooperation Decision 2011; *Al Bashir Chad* Cooperation Decision 2011; *Al Bashir Chad* Cooperation Decision 2013; *Al Bashir Nigeria* Cooperation Decision 2013, ICC-02/05-01/09-159; *Al Bashir DRC* Cooperation Decision 2014 ; *Al Bashir Sudan* Cooperation Decision 2015, ICC-02/05-01/09-227; *Al Bashir Djibouti* Cooperation Decision 2016, ICC-02/05-01/09-266; *Al Bashir Uganda* Cooperation Decision 2016, ICC-02/05-01/09-267; *The Prosecutor v Al Bashir* (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, PTC II) ICC-02/05-01/09-302 (6 July 2017) [*Al Bashir South Africa* Cooperation Decision 2017]; *The Prosecutor v Al Bashir* (Decision under Article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir, PTC II) ICC-02/05-01/09-309 (11 December 2017) [*Al Bashir Jordan* Cooperation Decision 2017].

186 Watts, 'Heads of State', paras 10-11; Kreß and Prost, 'Article 98', 2128-39; *Al Bashir Malawi* Cooperation Decision 2011, para 43; *Al Bashir Chad* Cooperation Decision 2011. For a critical analysis of the *Malawi* and *Chad* decisions, see Tladi, 'The ICC Decisions on Chad and Malawi: On Cooperation, Immunities and Article 98', 204-05.

187 *Al Bashir Malawi* Cooperation Decision 2011, para 36.

from arrest recognised in traditional customary law.[188] The following paragraphs focus on the 2011 *Malawi* Decision.

In the *Malawi* Decision, two issues merit discussion. The first issue is whether Omar Al Bashir enjoys personal immunity from arrest and prosecution before the ICC. Malawi argued that article 27 of the Rome Statute does not apply to Sudan, and Al Bashir as a sitting head of non-party State to the Statute enjoyed immunity from arrest and prosecution in accordance with principles of international law.[189] Pre-Trial Chamber I agreed that the acceptance of article 27(2) implies no immunity, but it rejected the idea that 'with respect to non-party State to the Rome Statute, international law provides immunity to Heads of State in proceedings'.[190] The Chamber concluded that 'the principle in international law is that immunity […] cannot be invoked to oppose a prosecution by an international court'.[191]

It is disputable whether Pre-Trial Chamber I reasonably justified its conclusions. First and foremost, the provisions and instruments (i.e., the 1919 Report of the Commission on Responsibilities, articles 7 and 6 of the Nuremberg and Tokyo Charters, the judgments of the IMT and IMTFE, Principle III of Nuremberg Principles, articles 7(2) and 6(2) of the Statutes of the ICTY and the ICTR, as well as article 7 of the Draft Code of Crimes) referred to in this case are related to the issue of individual responsibility rather than the issue of personal immunity. Most examples here, as mentioned above, are evidence of a substantial defence. Schabas commented that '[n]ot only was the reference rather inexact, when the report [of the Commission on Responsibilities] is read as a whole it is actually rather more supportive of the position opposite to that taken by the Pre-Trial Chamber'.[192] The Pre-Trial Chamber conflated the substantive defences with the procedural personal immunities. A defence of official capacity, belonging to an individual, is distinct from the invocation of personal immunity of a head of State, only waived by a State.[193] These sources are not relevant to the ongoing debate about non-availability of personal immunity at the ICC.[194]

In addition, it seems that the Pre-Trial Chamber also misunderstood the reasoning of the ICJ in the *Arrest Warrant* case. The Chamber held that the ICJ's judgment confirmed a customary international rule respecting personal immunity. It explained that the ICJ simply affirmed immunity under customary law 'before national courts of foreign States'. In its view, it adhered to the ICJ's reasoning with respect to personal immunity before international criminal tribunals.[195] Thus, similar to the SCSL in *Charles Taylor*, this Pre-Trial Chamber of the ICC upheld an exception to personal immunity by

188 ibid, para 43.
189 ibid, paras 13, 18.
190 ibid, para 18.
191 ibid, para 36.
192 Schabas, *The International Criminal Court: A Commentary on the Rome Statute* 602.
193 UN Doc A/CN.4/631 (2011), para 19.
194 Kiyani, 'Al-Bashir & the ICC: The Problem of Head of State Immunity', 487-500.
195 *Al Bashir Malawi* Cooperation Decision 2011, paras 33-34.

differentiating between international courts and national courts, instead of resorting to Belgium's argument in distinguishing the nature of the crimes. The ICC Pre-Trial Chamber's interpretation of the ICJ's *Arrest Warrant* case went too far.

To support its contention, the Pre-Trial Chamber also cited the *Milošević* case and the *Charles Taylor* case. The Chamber held that international tribunals are 'totally independent of states and subject to strict rules of impartiality'.[196] It added that 'the rationale for foreign state officials being entitled to raise personal immunity before national courts is that otherwise, national authorities might use prosecutions to unduly impede or limit a foreign state's ability to engage in international action'. By referring to the impartiality of international courts and the risk of abusing State authorities by national courts, the Chamber aimed to establish a new customary rule recognising no personal immunity before international courts for international crimes. However, this argument is less supported for non-availability of personal immunity before international courts. The impartiality and independence of international courts does not justify automatically invalidating personal immunity enjoyed by senior officials of a State, although they may be stimuli for States to waive immunities before these courts. The reasoning based on the potential abuse of State authority and the impartiality of international courts does not provide sound legal grounds for modification of a customary rule before international tribunals.[197]

*Malawi decision: personal immunity from arrest by national authorities*

The second issue in the *Malawi* Decision remains whether such a customary rule, of no personal immunity before international courts, extends to an arrest and surrender where international courts seek an arrest. This issue relates to horizontal personal immunity from arrest at the national level. The Chamber held that a modified customary international rule is formed denying absolute personal immunity from arrest. The Chamber provided four reasons. Firstly, the Chamber held that personal immunity does not constitute an admissible plea in international proceedings. Secondly, the Chamber referred to several cases of the ICC and the ICTY in holding that 'initiating international prosecutions against Heads of State have gained widespread recognition as accepted practice'.[198] Thirdly, the Chamber held that about two-thirds of all UN member States have ratified the Rome Statute evidence a significant erosion of personal immunity before the ICC. Lastly, in its view, the relinquishing of personal immunity is required for the ICC's exercise of jurisdiction.[199] The Chamber concluded that 'the international community's

196 ibid, para 34; Cassese *et al* (eds), *Cassese's International Criminal Law* 312.
197 Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?', 321.
198 *Al Bashir Malawi* Cooperation Decision 2011, para 39.
199 ibid, paras 38-41.

commitment to rejecting immunity in circumstances where international courts seek arrest for international crimes has reached a critical mass'.[200]

The first consideration relies on the conclusion of the first issue that article 27(2) is a reflection of customary international law for the absence of personal immunity in international proceedings. Its second argument simply referred to the fact of prosecution, leaving aside the legal basis for prosecution untouched. The first two considerations are not relevant to the issue of personal immunity from arrest. The third ground that about two-thirds of the States are parties to the Statute showing a denial of personal immunity from arrest among these States, does not automatically imply a general and consistent rule under customary law. As examined above, the voluntary waiver requirement implies that States Parties respect personal immunity in custom. The last argument is appealing but not sufficient to prove that personal immunity from arrest enjoyed by senior officials of non-party States is removed. Based on irrelevant evidence and flawed arguments, Pre-Trial Chamber I concluded that current customary international rule recognises 'an exception to the traditional customary rule on absolute personal immunity before international proceedings seeking arrest for the commission of international crimes'.[201] In short, most sources mentioned in the *Malawi* Decision are irrelevant, and some decisions are rendered with flawed arguments. Its reasoning does not lead to its conclusion.

*Other decisions of the ICC*

The ICC's jurisdiction is a preliminary question for further practical issues regarding individual criminal responsibility and cooperation among States. Three questions should not be confused: (1) can the ICC exercise jurisdiction over senior officials benefiting from personal immunity; (2) is the ICC empowered to issue an arrest warrant against that person; and (3) is a State Party as a host State obliged to arrest and surrender that person? The Pre-Trial Chamber disregarded personal immunity from arrest before national authorities of other States by concluding that Malawi is obliged to arrest Al Bashir. An identically-composed Pre-Trial Chamber I reached the same conclusions in the 2011 Chad Decision.[202]

Trial Chamber V (A) in the *Kenyatta* case in 2013 followed the rulings of the *Malawi* Decision.[203] In this case, Kenyatta as President of the Republic of Kenya since 2013 was charged with crimes against humanity.[204] In 2014, he appeared before the ICC for a 'status conference'. Since Kenya is a party to the Rome Statute, personal immunity was not an issue before the Chamber. The Chamber also relied on the evidence referred to in the *Malawi* Decision.

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200 ibid, para 42.
201 ibid, para 43.
202 *Al Bashir Chad* Cooperation Decision 2011.
203 *Muthaura et al* Decision on Confirmation of Charges.
204 *The Prosecutor v Kenyatta* (Transcript, TC V) ICC-01/09-02/11-T-22-ENG (14 February 2013), p 6, lines 4-11.

The Chamber confirmed the ruling of the *Malawi* Decision and suggested that personal immunity is denied before international judicial bodies under customary law.[205] The *Kenyatta* case does not firmly evince the customary law of non-availability of personal immunity.

Subsequent decisions of the ICC do not adhere to the conclusions in the *Malawi* Decision.[206] In the 2014 *DRC* decision, Pre-Trial Chamber II stated that under international law, a sitting head of State enjoys personal immunities from criminal jurisdiction and inviolability before national courts of foreign States even when suspected of having committed the crimes that fall within the jurisdiction of the ICC.[207] Pre-Trial Chamber II added that as provided in article 27(2) of the Rome Statute, 'there is an exception to personal immunities of Heads of State for prosecution before an international criminal jurisdiction'.[208] This statement indirectly recognised the customary rule respecting personal immunity. Alternatively, the Pre-Trial Chamber held that the Security Council implicitly waived the immunity of Al Bashir.[209] The word 'waiver' enhances the contention that the Chamber acknowledged personal immunity under current international law. Other ICC non-cooperation decisions followed the same approach to show that the immunity has been removed.[210] These ICC non-cooperation decisions did not reject a general customary rule respecting personal immunity for international crimes but indirectly affirmed the idea of the non-existence of a new customary rule. In its recent *South Africa* and *Jordan* decisions, the Pre-Trial Chambers of the ICC endorsed that an incumbent head of a State still enjoys personal immunity under customary law. They agreed with lifting immunity on the basis that this was a consequence of the Security Council resolution.[211]

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205 The *Prosecutor v Kenyatta* (Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial, TC V(b)) ICC-01/09-02/11-830 (18 October 2013), para 32. For further reading, see Leila N. Sadat and Benjamin Cohen, 'Impunity through Immunity: The Kenya Situation and the International Criminal Court' in E.A. Ankumah (ed), *The International Criminal Court and Africa: One Decade On* (Antwerp: Intersentia 2016) 101.

206 *Al Bashir Chad* Cooperation Decision 2013, para 21; *Al Bashir Nigeria* Cooperation Decision 2013.

207 *Al Bashir DRC* Cooperation Decision 2014, para 25.

208 ibid.

209 ibid, para 29.

210 *The Prosecutor v Al Bashir* (Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the States Parties to the Rome Statute) ICC-02/05-01/09-266 (11 July 2016), para 11; *The Prosecutor v Al Bashir* (Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of States Parties to the Rome Statute) ICC-02/05-01/09-267 (11 July 2016), para 11.

211 *Al Bashir South Africa* Cooperation Decision 2017, para 68; *Al Bashir South Africa* Cooperation Decision 2017 (Minority Opinion of Judge Marc Perrin De Brichambaut) ICC-02/05-01/09-302-Anx (6 July 2017); *Al Bashir Jordan* Cooperation Decision 2017, para 27.

Judge Eboe-Osuji in his separate opinion in *Kenyatta* Decision declared that 'customary international law does not recognise immunity for a head of state against prosecution before an international tribunal'.[212] In the 2016 *Ruto & Sang* acquittal decision, Judge Eboe-Osuji reviewed history and argued that 'article 27 is quite simply a codification of customary international law'.[213] His crucial and contestable requirement for the non-availability of personal immunity is also the international character of the court. Judge Eboe-Osuji seems to assume that traditional customary law, in general, does not apply to head of a State facing prosecution before international tribunals. As analysed above, post-World War II practice does not show an independent status of vertical personal immunity, but a dependent status of it based on the consent of States. The viewpoint of Judge Eboe-Osuji is less supported.

In sum, most of the ICC's *Al Bashir* non-cooperation decisions did not claim non-availability of personal immunity for international crimes under customary law but recognise the existence of personal immunity from arrest at the national level. The case law of the ICC does not persuade that a customary rule has been established to lift personal immunity for committing international crimes.

### 6.5.2 National reactions to personal immunity for committing international crimes

Following the adoption of the Rome Statute, and decisions in the *Pinochet* case, the *Arrest Warrant* case and the *Al Bashir* case, States Parties to the Rome Statute and non-party States responded in different ways to issue of immunity. Recent national cases and legislation seem to show that States did not intend to erode the customary rule respecting personal immunity or to modify the rule with an exception for committing international crimes.

#### *6.5.2.1 National laws*

A few States specifically regulate personal immunity from criminal proceedings in international law in their national legislation.[214] This subsection surveys States Parties' legislation concerning international crimes and their implementing laws of the Rome Statute to show that national laws have

212 *The Prosecutor v Kenyatta* (Separate further opinion of Judge Eboe-Osuji) ICC-01/09-02/11-830-Anx3-Corr (18 October 2013), para 32.

213 *Ruto & Sang* Acquittal Decision 2016 (Reasons of Judge Eboe-Osuji), paras 238-94.

214 UN Doc A/CN.4/701, paras 43-46, Privileges and Immunities of Foreign States, International Organisations with Headquarters or Offices in Spain and International Conferences and Meetings held in Spain. Spain, Organic Act 2015, art 22; Hungary, Criminal Code 1978, as amended 2012, art 4(5); Ireland, Criminal Code 1997, art 2(2); Latvia, Criminal Code 1998, as amended 2013, art 2(2); Lithuania, Criminal Code 2000, as amended 2015, art 4(4).

either echoed or reaffirmed the finding that customary law respects personal immunity, regardless of the nature of the crimes committed.

*Belgium*

Belgium was the most active and leading State denying personal immunity for sitting heads of State for committing international crimes. Its national law seems to shows a contrary direction after the 2002 *Arrest Warrant* case.[215] Belgium's Act of 16 June 1993 allowed its courts to prosecute persons for genocide, war crimes and crimes against humanity based on universal jurisdiction, even *in absentia*.[216] After the adoption of the Rome Statute, article 5(3) of the 1993 *Act* was amended in 1999.[217] It provided that '[t]he immunity attributed to the official capacity of a person, does not prevent the application of the present Act.'[218] Based on this amended Act, Belgian courts accepted judicial complaints against some senior leaders of States, including Israeli Prime Minister Ariel Sharon, Cuban President Fidel Castro, the US former President George H.W. Bush and Vice President Richard Cheney, as well as former Chadian president Hissène Habré.[219]

In contrast to its court, the Belgian Ministry of Foreign Affairs was less advanced for the concern about political abuse of the law by prosecuting senior officials.[220] Since the entry into force of the Rome Statute, Belgium has modified the respective Act twice with respect to the issue of immunity under article 5(3).[221] Article 5(3) of the 1993 Act as amended by the Law of April 2003 reads: 'International immunity derived from a person's official capacity does not prevent the application of the present law except under those limits established under international law'.[222] Belgium's Code of Criminal Procedure[223] as modified by the Law of August 2003 confirmed that '[i]n accordance with international law, sitting foreign heads of state, heads of government and ministers of foreign affairs, whose immunity is

215 2002 *Arrest Warrant* case of the ICJ (Dissenting Opinion of Judge Oda), para 5.

216 Act of 16 June 1993 concerning the punishment of Grave Breaches of the Geneva Conventions of 12 August 1949 and their Additional Protocols I and II of 18 June 1977, art 7.

217 The Act of 16 June 1993, as modified by the Act of 10 February 1999 concerning the punishment of grave breaches of international humanitarian law, 38 ILM 921 (1999).

218 ibid, art 5 (3).

219 Malvina Halberstam, 'Belgium's Universal Jurisdiction Law: Vindication of International Justice or Pursuit of Politics Faculty Issue' (2003) 25 *Cardozo L R* 247.

220 Halberstam, 'Belgium's Universal Jurisdiction Law: Vindication of International Justice or Pursuit of Politics Faculty Issue', 250-51.

221 Law Amending the law of 16 June 1993 concerning the Prohibition of Grave Breaches of International Humanitarian Law and Article 144 *ter* of the Judicial Code), 23 April 2003, 42 ILM 749 (2003) [Law of 23 April 2003], art 4; art 13 of the Law of 5 August 2003 on Serious Violations of International Humanitarian Law [Law of 5 August 2003].

222 See Law of 23 April 2003, art 4 reads: 'Article 5, para 3 of the same law, modified by the law of February 10, 1999, is replaced by the following provision'.

223 Loi contenant le Titre préliminaire du Code de Procédure Pénale (Law containing the Preliminary Title of the Code of Criminal Procedure), 25 April 1878, updated version 22 October 2015.

recognised by international law, are immune from criminal prosecution'.[224] Accordingly, the provision that removed immunity for committing international crimes has been substantially repealed.[225]

*The Netherlands*

The implementing legislation in the Netherlands interpreted international law regarding personal immunity.[226] The 2003 Dutch International Crimes Act criminalised genocide, crimes against humanity and war crimes in conformity with the Rome Statute. The Act provides that 'foreign heads of state, heads of government and ministers of foreign affairs, *as long as* they are in office, and other persons in so far as their immunity is recognised under customary international law' are exempt from prosecution for international crimes.[227] The 2011 Netherlands Government Advisory Committee held that functional immunity should yield to the prosecution of international crimes. However, the Advisory Committee did not suggest that personal immunity would also cease to apply for the prosecution of international crimes. The Advisory Committee argued that 'the underlying reason for this [personal] immunity is to facilitate the smooth conduct of international relations'.[228] It even recommended amending the Dutch Disposal of Criminal Complaints (Offences under the International Crimes Act) Instructions with a more extended scope of persons who enjoy immunities recognised by customary law.[229]

*Other legislation*

A number of States Parties have not substantially implemented the rule of the Rome Statute in their national law. Several States' implementing laws implicitly support that in case of unsatisfactory consultation with the ICC,

224 Article 1*er* of the Code of Criminal Procedure, inserted by art 13 of Law of 5 August 2003. 'Conformément au droit international, les poursuites sont exclues à l'égard: des chefs d'Etat, chefs de gouvernement et ministres des Affaires étrangères étrangers, pendant la période où ils exercent leur fonction, ainsi que des autres personnes dont l'immunité est reconnue par le droit international'.

225 Pedretti, *Immunity of Heads of State and State Officials for International Crimes* 112-14. For similar provisions, see Latvia, Criminal Code 1998, as amended 2013, art 2(2); Hungary, Criminal Code 1978, as amended 2012, art 4(5), providing that they 'respect for international rules regarding immunity in exercising universal jurisdiction' over international crimes.

226 270 Act of 19 June 2003 containing rules concerning serious violations of international humanitarian law (International Crimes Act), 19 June 2003.

227 Netherlands, International Crimes Act 2003, art 16(a).

228 'Immunity for Foreign State Official: Advisory Report by the Netherlands Government Advisory Committee on Issues of Public International Law' (2011) 58 *Netherlands Intl L Rev* 461.

229 'Prosecution under this Act is excluded in respect of foreign heads of state, heads of government and ministers of foreign affairs as long as they are in office, and in respect of other persons insofar as their immunity is recognised by customary international law. The latter category includes diplomats accredited to the Netherlands and members of official missions'.

personal immunity under customary law could bar the request of the ICC for arrest.[230] In contrast, some States have stated that personal immunity is not a bar for the request of the ICC to arrest and surrender. The 1999 Extradition Act of Canada provides that '[d]espite any other law, no person who is the subject of a request for surrender by the International Criminal Court or by any international criminal tribunal that is established by resolution of the Security Council of the United Nations, may claim immunity under common law or by statute'.[231]

Kenya's implementing provisions stipulated that '[t]he existence of any immunity or special procedural rule attaching to the official capacity of any person is not a ground for refusing the execution of a request for surrender made by the ICC'.[232] Similar provisions were enshrined in the implementing laws of France, Germany, New Zealand, Norway, Switzerland and Trinidad and Tobago as well as Uganda.[233] In their view, immunity cannot be invoked for non-compliance with an ICC request. The implementing laws were closely connected with article 98(1) of the Statute. All these provisions indicate the attitude that these States can or cannot reject the request to cooperate with the ICC when there is no waiver of immunity or necessary consent. However, the provisions do not address the issue of personal immunity in custom. Without further observation, it is inappropriate to conclude that these rules evidence the belief of national legislators that an exception to personal immunity is an accepted practice in international law. For example, Kenya in 2014 proposed amending article 27 of the Rome Statute by adding a new paragraph to 'pause' prosecution of 'sitting' senior officials.[234] Although the proposal was unsuccessful, this instance demonstrates that Kenya, in fact, supports the ICC prosecuting sitting senior officials only after leaving office.

Few national laws intend to invalidate personal immunity. The respective Croatian law stipulates that 'immunities and privileges shall not apply

230 For national laws, see Austria, Cooperation with the International Criminal Court 2002, § 9.1.3; Australia, International Criminal Court Act 2002, art 12(4); Argentina, Act Implementing the Rome Statute of the International Criminal Court 2001, arts 40 and 41; Liechtenstein, Act on Cooperation with the International Criminal Court and other International Tribunals 2004, arts 10.1(c) and 10.3.

231 Canada, Extradition Act 1999, § 6.1.

232 Kenya, International Crimes Act 2008, revised 2012, art 27(1)(a); Uganda, International Criminal Court Act 2010, arts 251(a) and (b).

233 France, Code of Criminal Procedure 2002, art 627.8; Germany, Law on Cooperation with the International Criminal Court 2002, art 1, para 70; Kenya, Act on International Crimes 2008, art 27; New Zealand, International Crimes and International Criminal Court Act 2000, reprinted 2012, art 31.1; Norway, Act 2001 concerning Implementation of the Statute of the International Criminal Court of 17 July 1998 (Rome Statute) in Norwegian law, art 2; Switzerland, Federal Law on Cooperation with the International Criminal Court 2001, art 6; Trinidad and Tobago, International Criminal Court Act 2006, art 31(1)(a); Uganda, International Criminal Court Act 2010, arts 251(a) and (b).

234 The ICC ASP, 'Report of the Working Group on Amendments', ICC-ASP/13/31, 7 December 2014, para 12. Proposal of amendments by Kenya to the Statute, C.N.1026.2013.TREATIES-XVIII.10 of 14 March 2014.

in procedures involving the crimes' within the jurisdiction of the ICC.[235] The laws in Burkina Faso, Comoros, Mauritius and South Africa shared a similar feature.[236] Article 27(2) was also duplicated in the 2000 East Timor Penal Regulation to deal with international crimes from 1974 to 1999.[237]

Many national laws seem to confirm personal immunity under customary law. Some national implementing laws repeated the provision under article 27(2) that the personal immunity is not a bar for the proceeding of the ICC, for instance, the laws in Ireland, the Philippines, Samoa and the UK.[238] These implementing provisions also qualify the immunity by stressing 'a connection with a State party to the ICC Statute'. The UK Act stipulates:

> Where —
>
> (a) state or diplomatic immunity attaches to a person by reason of a connection with a state other than a state party to the ICC Statute, and
>
> (b) waiver of that immunity is obtained by the ICC in relation to a request for that person's surrender,
>
> the waiver shall be treated as extending to proceedings under this Part in connection with that request.[239]

The Philippine legislation clearly states that '[i]mmunities that may be attached to the official capacity of a person under international law may limit the application of this [Philippine] Act'.[240] These implementing provisions dismiss personal immunity of nationals of a State Party to the Rome Statute. A waiver of immunity is required with regard to a person of a State not a party to the Statute. These implementing provisions, therefore, evince the continuation of personal immunity rather than a denial of it under customary law.

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235 Croatia, Law on the Implementation of the Statute of the International Criminal Court and the Prosecution of Crimes against International Law of War and Humanitarian Law 2003, art 6.4.

236 Burkina Faso, Act on the determination of competence and procedures for application of the Rome Statute of the International Criminal Court by the jurisdictions of Burkina Faso 2009, arts 7 and 15.1; Comoros, Act concerning the application of the Rome Statute 2011, art 7.2; Mauritius: International Criminal Court Act 2001, art 4; South Africa, Act implementing the Rome Statute of the International Criminal Court 2002, art 4(2)(a)(i) and 4(3)(c).

237 East Timor, Regulation for Special Panels for Serious Crimes 2000, § 15.2.

238 Samoa, International Criminal Court Act 2007, art 32(1); UK, International Criminal Court Act 2001, art 23(1); Ireland, International Criminal Court Act 2006, § 61.1; Iceland, Act on the International Criminal Court 2003, art 20.1; Malta, Extradition Act, art 26S; Philippines, Act on Crimes against International Humanitarian Law, Genocide, and Other Crimes against Humanity 2009, § 9(b); Estonia, Code of Criminal Procedure 2004, para 492(6).

239 UK, International Criminal Court Act 2001, art 23(2).

240 Philippines, Act on Crimes against International Humanitarian Law, Genocide, and Other Crimes against Humanity 2009, § 9(b).

### 6.5.2.2 *Practice of States Parties*

Through the ratification of the Rome Statute, States Parties consent to waive any immunity before the ICC and before the jurisdiction of other States Parties. This implies that personal immunity is not a bar to such proceedings with the consent of States Parties. Also, some States Parties claim that personal immunity of senior non-party State officials remains under international law. This part focuses on the practice, statements as well as reactions of States to personal immunity for international crimes.

*Belgium, Spain and Switzerland*

Analysing the practice of States that frequently exercise universal jurisdiction over international crimes would provide hints for their attitude towards the issue of personal immunity.

Rulings of Belgian courts demonstrate the same direction as its two amendments of law do. In the 2002 *Arrest Warrant* case, Belgium's proposal was rejected by the ICJ that no immunity exists before Belgian courts for serious crimes.[241] Belgium then withdrew the arrest warrant for Yerodia declared that the case was inadmissible because of his immunity. The Belgian delegation said that the majority of complaints concerning senior leaders who enjoyed immunity were declared inadmissible.[242] In the 2003 *Sharon et al* case, the defendants appealed to the Belgian Court of Cassation about an Indictments Chamber's ruling.[243] The Court of Cassation upheld that criminal actions against Ariel Sharon were inadmissible. According to the Court of Cassation, the 'principle of customary international criminal law relative to jurisdictional immunity was not impaired by article 27(2) of the Rome Statute before national courts of a third State claiming universal jurisdiction in *absentia* over genocide'.[244] The exercise of universal jurisdiction does not imply non-entitlement to personal immunity for international crimes. In addition, Sharon's personal immunity before Belgian courts was not removed by virtue of the 1948 Genocide Convention.[245] The Court upheld that any trial against Sharon would have to wait for his departure from office. Later on, the Court of Appeals cited the *Sharon et al* case and declared that Belgium lacked jurisdiction over Fidel Castro. One reason was also that Castro as a then sitting head of State could not be tried.[246] In 2005, a Belgian judge issued an international arrest warrant for Habré for alleged

241 2002 *Arrest Warrant* case of the ICJ, 32, para 78.

242 'Summary record of meeting with the Human Rights Committee of 13 July 2004 in relation to the fourth periodic report under the International Covenant on Civil and Political Rights', UN Doc CCPR/C/SR.2199, 23 July 2004, Belgium, para 10.

243 *H.A.S. et al v Ariel Sharon, Amos Yaron et al* (Decision Related to the Indictment of Ariel Sharon, Amos Yaron and others, Court of Cassation, Belgium) Case No. P.02.1139.F/1 (12 February 2003), 42 ILM 596 (2003) [*Sharon et al* case, 42 ILM 596 (2003)].

244 ibid, 600.

245 ibid, 599.

246 *José J. Basulto et al v Fidel Castro Ruz et al* (Court of Cassation, Belgium), 29 July 2003.

international crimes.[247] As a matter of fact, Habré was a former Chadian president at that time, and Chad waived his functional immunity.[248] All these rulings further demonstrate that Belgium changed its active position on personal immunity.

Spain is also advanced in exercising universal jurisdiction.[249] Unlike Belgium's view in the *Arrest Warrant case*, Spain always stresses that an incumbent head of State who enjoys personal immunity in international law cannot be prosecuted for international crimes in Spain based on universal jurisdiction. The National High Court in its 1999 finding argued that Castro could not be prosecuted in Spain because he was an incumbent head of State. The Court also stated that this finding did not conflict with its ruling in *Pinochet* [250] because Pinochet was a former head of State.[251] The National High Court in 2005 further rejected the complaint against Castro by virtue of the immunity of a sitting head of State.[252] The Swiss Federal Criminal Court in 2012 held that the four alternatives mentioned in the ICJ's *Arrest Warrant* case highlighted the emergence of exceptions to immunity from jurisdiction for international crimes.[253] Meanwhile, the Swiss court also affirmed that an incumbent minister still enjoys personal immunity during the period in which s/he held office.[254]

*African States and Other States Parties*

The African Union (AU), of which 33 of the 54 member States are States Parties to the Rome Statute, collectively adopted a resolution to confirm the customary rule respecting personal immunity of senior officials before

247 See *Obligation to Prosecute or Extradite* Judgment, 432, para 21.

248 See 'L'immunité de Hissène Habré définitivement levée, Lettre de M. Koudji-Gaou à M. Fransen' (Letter from the Minister of Justice of Chad on the Immunity of Hissène Habré to Belgium), 7 October 2002.

249 Belgium, Judicial Power Organisation Act 1985, amended 1999, art 23.4. Limitations to its universal jurisdiction, see art 1 of the Organisation Act No 1/2009.

250 *Augusto Pinochet* case (Order, Criminal Chamber, National High Court (Audiencia Nacional), Spain) No 1998/22605 (5 November 1998) and No 1999/28720 (24 September 1999), cited in Cassese, 'When May Senior State Officials be Tried for International Crimes? Some Comments on the *Congo v Belgium* Case', 860 and fn 19. For further summaries of the case, see 'Order of the Criminal Chamber of the Spanish Audiencia Nacional affirming Spain's Jurisdiction, 5 November 1998 (unofficial translation)' in R. Brody and M. Ratner (eds), *The Pinochet Papers: The Case of Augusto Pinochet Ugarte in Spain and Britain* (The Hague: Kluwer Law International 2000) 95-107.

251 *The Foundation for Human Rights v Fidel Castro* (Order, Criminal Chamber, National High Court, Spain) No 1999/2723 (4 March 1999), cited in Cassese, 'When May Senior State Officials be Tried for International Crimes? Some Comments on the *Congo v Belgium* Case', 860-61 and fn 21.

252 For other decisions of Spain, see *Al Bashir South Africa* Cooperation Decision 2017 (Minority Opinion of Judge Marc Perrin De Brichambaut), para 86 and fn 119.

253 *A v Public Ministry of the Confederation, B and C* (Decision, Federal Criminal Court, Switzerland) BB. 2011.140 (25 July 2012), paras 5.3.3-5.3.5.

254 ibid, para 5.4.2.

the ICC.[255] In addition, the AU in 2014 approved an amendment to the Protocol on the Statute of the African Court of Justice and Human Rights to respect immunities of serving African senior State officials for prosecution of international crimes. It provides that '[n]o charges shall be commenced or continued before the Court against any serving African Union 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 of office'.[256] In recent years, the AU in its *amicus curiae* observation reaffirmed personal immunity under customary law in national and international proceedings.[257] As mentioned before, Congo objected to the idea of the denial of personal immunity for war crimes and crimes against humanity in the *Arrest Warrant* case of the ICJ.[258] This discrepancy between treaty provisions at least shows that no consensus exists among African States Parties to the Rome Statute concerning a customary rule with an exception to personal immunity.

Furthermore, responses of States to Al Bashir's travels indicate their attitude towards the issue of denial of personal immunity. Al Bashir has frequently travelled abroad and been allowed access to 27 States in Africa, Arab countries and Asia despite warrants for his arrest.[259] Some of the States he

255 Assembly of the African Union, 'Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)', Assembly/AU/Dec.245 (XIII) 1-3 July 2009; '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)', Assembly/AU/Dec.296 (XV), 25-27 July 2010; African Union Press Release, 'On the Decision of the Pre-Trial Chamber of the ICC Informing the UN Security Council and the Assembly of the States Parties to the Rome Statute About the Presence of President Omar Hassan Al-Bashir of the Sudan Territories in the Republic of Chad and the Republic of Kenya' (29 August 2010); Extraordinary Session of Assembly of the African Union, 'Decision on Africa's Relationship with the International Criminal Court (ICC)', Ext/Assembly/AU/Dec.1(Oct. 2013), §§ 9-10. See also Gaeta and Labuda, 'Trying Sitting Heads of State: The African Union versus the ICC in the *Al Bashir* and *Kenyatta* Cases', 139-41.

256 The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, arts 28A and 46A*bis*.

257 *The Prosecutor v Al Bashir* (Order inviting expressions of interest as *amici curiae* in judicial proceedings (pursuant to Rule 103 of the Rules of Procedure and Evidence), AC) ICC-02/05-01/09-330 (29 March 2018), para 1; African Union's Submission, paras 10-12.

258 2002 *Arrest Warrant* case of the ICJ, 12, para 25.

259 *The Prosecutor v Al Bashir* (Report of the Registry on information received regarding Omar Al Bashir's travels to States Parties and Non-States Parties from 5 October 2016 to 6 April 2017 and other efforts conducted by the Registry regarding purported visits, Registry) ICC-02/05-01/09-296 (11 April 2017); *The Prosecutor v Al Bashir* (Report of the Registrar on the Information received as regards Travel by Omar Hassan Ahmad Al Bashir to the Republic of Uganda, Registry) ICC-02/05-01/09-307 (14 November 2017). These states were Algeria, Bahrain, Chad, China, Democratic Republic of Congo, Djibouti, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Jordan, India, Iran, Iraq, Kenya, Kuwait, Libya, Malawi, Mauritania, Morocco, Nigeria, Qatar, Saudi Arabia, South Africa, and South Sudan, Uganda, United Arab Emirates. As of the end of November 2017, 18 of 27 States are not States Parties to the Rome Statute.

has visited are Parties to the Rome Statute.[260] Chad consistently allowed Al Bashir to visit it and refused to arrest him and surrender him to the ICC.[261] Malawi claimed that since article 27(2) of the Rome Statute does not apply to a head of non-party State to the Rome Statute, Al Bashir was immune from arrest under customary law. Jordan and the League of Arab States[262] shared the same view as Malawi.[263] These States' persistent refusal to arrest Al Bashir evidence that, in their view, personal immunity remains a rule of customary law for the prosecution of international crimes, even if an arrest warrant was issued by an international tribunal.

Recent national decisions of South Africa also merit attention. In 2015, the Southern Africa Litigation Centre (SALC) applied to examine South Africa's government decision to respect the immunity of all State representatives to the AU Summit before the High Court of South Africa. The High Court admitted that customary law is a source for an individual to enjoy immunity.[264] Additionally, the Court relied on Security Council Resolution 1593 to remove the personal immunity of Al Bashir.[265] This decision was appealed to the South African Supreme Court. All judges in the Supreme Court supported personal immunity of heads of State under customary law. Also, the Supreme Court held that according to the 2002 South African Implementation of the Rome Statute of the ICC Act, when a person is prosecuted in South Africa for genocide, war crimes and crimes against humanity, international immunities have been removed, irrespective of whether the person is a sitting head of State not a party to the Rome Statute. In interpreting its national law, it seems that the Supreme Court follows Belgium's position prior to the ICJ's *Arrest Warrant* case.[266] Two concurring judges in the Supreme Court said that this decision 'would create an intolerable anomaly' because 'South Africa was taking a step that many other nations have not yet taken'.[267] It is unknown whether South Africa would follow in the Belgium's footsteps to

260 ICC, 'Twenty-Third Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005)' (9 June 2016), para 11; ICC, 'Twenty-Fifth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005)' (8 June 2017), para 13. These States are Chad, Kenya, Djibouti, Malawi, Nigeria, DRC, Uganda, South Africa, Jordan.

261 It is said that Al Bashir has visited Chad five times since 2010, the most recent visit was in December 2017.

262 The Arab League consists of 22 member States.

263 *Al Bashir Jordan* Cooperation Decision 2017, paras 7, 14-15; Jordan's Appeal, paras 15-21; *The Prosecutor v Al Bashir* (The League of Arab States' Observations on 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") ICC-02/05-01/09-367 (16 July 2018), para 26.

264 *The Southern Africa Litigation Centre v The Minister of Justice and Constitutional* (27740/2015) [2015] ZAGPPHC 402, para 2.

265 ibid.

266 *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17, para 103.

267 ibid, paras 103, 122.

exercise universal jurisdiction, and even widely investigate and prosecute sitting heads of State for committing international crimes. In short, South African domestic courts do not show an active position on a new customary rule with an exception to personal immunity for committing international crimes.

According to his travel map, Al Bashir has been denied access to some States.[268] Nevertheless, the fact that some of the 9 States Parties he has visited sometimes have not hosted him is not persuasive evidence to show that these States accepted an exception to personal immunity in custom. Some States changed their plans to host him in reaction to political pressure or to avoid potential immunity disputes. Malawi, Nigeria and Uganda indeed first denied but later allowed him access.[269] Botswana, France, Malaysia and Zambia announced that if Al Bashir visited, they would comply with the Rome Statute to arrest him. Their denial of access may indicate either their support for a new customary rule or an obligation to cooperate pursuant to the Rome Statute. Accordingly, a new customary rule that provides an exception to personal immunity for committing international crimes is at least not widely acknowledged by States Parties.

#### *6.5.2.3 Practice of non-party States*

Non-party States also play a role in modifying or creating a customary rule. Non-party States are not bound by the new immunity regime set out in article 27(2). Some non-party States have never accepted the waiver of immunity enshrined in the Rome Statute.[270] The statement of the Russian Federation in the Security Council meeting implicitly confirmed Al Bashir's immunity,[271] which stated: '[t]he ICC must respect the provisions of international law relating to the immunity accorded Heads of State and other senior officials during their tenure'.[272]

Al Bashir has also travelled to other non-party States, including Egypt.[273] Egypt shared the Russian view. China also abstained from arresting him when he visited the mainland. On another occasion, the Chinese delegation expressed in the UN General Assembly that 'China does not believe that the provisions of draft article 7 [the ILC's draft article concerning exceptions to functional immunity about international crimes] qualify as codification or

268 Al Bashir Trip Map, available at: http://bashirwatch.org [accessed 20 July 2018].

269 See Al Bashir Trip Map, Turkey, Malawi (1st visit allowed, 2nd visit denied), Nigeria (1st visit denied, 2nd allowed), Uganda (1st visit denied, 2nd allowed).

270 'Report of the Security Council Mission to Djibouti (on Somalia), the Sudan, Chad, the Democratic Republic of the Congo and Côte d'Ivoire, 31 May to 10 June 2008', UN Doc S/2008/460, para 60; 'Reports of the Secretary-General on the Sudan and South Sudan', UN SCOR, 7963rd meeting, UN Doc S/PV.7963 (8 June 2017).

271 UN Doc S/PV.7963 (8 June 2017).

272 ibid.

273 They are Algeria, Bahrain, China, Egypt, Equatorial Guinea, Eritrea, Ethiopia, India, Iran, Iraq, Kuwait, Libya, Mauritania, Morocco, Qatar, Saudi Arabia, South Sudan, and the United Arab Emirates.

progressive development of customary international law'.[274] Following this logic, it is appropriate to conclude that China does not share the view that a new customary rule denying personal immunity is emerging, or current customary law provides an exception to personal immunity for committing international crimes.

Despite the US's supportive attitude towards the ICC in recent years,[275] it would be less convincing to say that the US also supports a denial of personal immunity.[276] The US 1976 Foreign Sovereign Immunities Act only allows the US to deny functional immunity in civil cases in relation to acts of torture and international crimes.[277] The US State Department also observed that 'the doctrine of head of state immunity is applied in the United States as a matter of customary international law'.[278] The US Court of Appeal in the 2012 *Samantar* case held that 'American courts have generally followed the foregoing trend, concluding that *jus cogens* violations are not legitimate official acts and therefore do not merit foreign official immunity but still recognising that head-of-state immunity, based on status, is of an absolute nature and applies even against *jus cogens* claims'.[279] The US is also less reluctant to accept such a new customary rule.

### 6.5.3 The UN Security Council and its resolutions

This subsection analyses the Security Council's binding resolutions to discover its attitude towards personal immunity. Security Council Resolution 827 and Resolution 1593, which created the ICTY and referred the Darfur Situation to the ICC respectively, are examined to show whether the Security Council intended to override the traditional customary rule of personal immunity or to confirm a new customary rule.

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274 China, 'Statement by Director-General XU Hong at the 72nd Session of the UN General Assembly on Agenda Item 81: Report of the International Law Commission on the work of its 69th session' (27 October 2017). For a similar idea see GAOR 69th session, 35th plenary meeting, UN Doc A/69/PV.35 (31 October 2014), Algeria.

275 William A. Schabas, 'International War Crimes Tribunals and the United States' (2011) 35 *Diplomatic History* 769.

276 'Statement of the United States of America Delivered by David Scheffer, US Ambassador at Large for War Crimes Issues before the Sixth Committee of the UN General Assembly, Agenda Item: The International Criminal Court' (19 October 2000).

277 US, Foreign Sovereign Immunities Act 1976, 28 USC 1605A (a)(1), amended by the Torture Victim Protection Act of 1991, 28 USC 1350.

278 John Crook, 'Contemporary Practice of the United States Relating to International Law' (2006) 100 *AJIL* 219, 219-20; Daniel Singerman, 'It's Still Good to Be the King: An Argument for Maintaining the Status Quo in Foreign Head of State Immunity' (2007) 21 *Emory Intl L Rev* 413; Michael Tunks, 'Diplomats or Defendants? Defining the Future of Head-of-State Immunity' (2002) 52 *D Law J* 651.

279 *Yousuf and ors v Samantar*, 699 F 3d 763 (4th Cir 2012), para 35; *Ye and ors v Former President Jiang Zemin and Falun Gong Control Office* (United States Department of State (intervening) and United States Department of Justice (intervening)), 383 F 3d 620 (7th Cir 2004), para 20. *Contra* see *Belhas et al v Ya'alon* (Appeal from the US District Court for the District of Columbia), [2008] USCADC 15 (15 February 2008), pp 6-8, 13.

It should first be clarified whether the Security Council is empowered to override or derogate from customary law. Some commentators argue that the Security Council has the power to remove personal immunity through a resolution backed up by the Chapter VII authority of the UN Charter.[280] Other commentators doubt the power of the Security Council, in particular, the impact of the Security Council on the application of the ICC legal framework.[281] Schabas argues that it is necessary to note the differences between the ICC and the UN *ad hoc* tribunals on the establishing mechanism.[282] The Security Council may have the power to deprive senior officials of the UN member States of personal immunity before *ad hoc* tribunals established by it; however, its power is strictly restrained by the Rome Statute about immunities, even acting by virtue of Chapter VII of the UN Charter.[283] Serving as a trigger mechanism under the Rome Statute, the Security Council has no more power than a State Party does.[284]

UK national law, however, provides that:

> The power conferred by section 1 of the United Nations Act 1946 (c. 45) (power to give effect by Order in Council to measures not involving the use of armed force) includes power to make in relation to any proceedings such provision corresponding to the provision made by this section in relation to the proceedings, but with the omission […] of the words 'by reason of a connection with a state party to the ICC Statute' [in section 23(1)], and of [sections 23(2)-(3)], as appears to Her Majesty to be necessary or expedient in consequence of such a referral as is mentioned in article 13(b) [of the Rome Statute].[285]

This provision enables a Security Council resolution to override any immunities of State, including non-party States, 'depending upon their wording'.[286] This provision confirms the power of the Security Council to remove personal immunity of non-party States of the Rome Statute but with an emphasis on the importance of the wording. The Pre-Trial Chamber of the ICC has also

280 Dapo Akande, 'The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC' (2012) 10 *JICJ* 299; Ssenyonjo, 'II. The International Criminal Court Arrest Warrant Decision for President Al Bashir of Sudan', 211; Kiyani, 'Al-Bashir & the ICC: The Problem of Head of State Immunity', 474-80; *The Prosecutor v Al Bashir* (Request by Professors Robinson, Cryer, deGuzman, Lafontaine, Oosterveld, Stahn and Vasiliev for Leave to Submit Observations) ICC-02/05-01/09-337 (26 April 2018), para 6. For more discussions, see *The Prosecutor v. Al Bashir* (Transcript, AC) ICC-02/05-01/09-T-4-ENG, ICC-02/05-01/09-T-5-ENG, ICC-02/05-01/09-T-6-ENG (10-12 September 2018).

281 Schabas, *The International Criminal Court: A Commentary on the Rome Statute* 604.

282 *Milošević* Decision on Preliminary Motions, paras 28-33; Schabas, ibid, 603; Liu, 'Has Non-Immunity for Heads of State Become a Rule of Customary International Law?'.

283 For discussions, see Kiyani, 'Al-Bashir & the ICC: The Problem of Head of State Immunity', 474-80.

284 *The Prosecutor v Ahmad Harun & Ali Kushayb* (Decision on the Prosecution Application under Article 58(7) of the Statute (2), PTC I) ICC-02/05-01/07-1-Corr (29 April 2007), para 16; Condorelli and Villalpando, 'Can the Security Council Extend the ICC's Jurisdiction?', 575.

285 UK, International Criminal Court Act 2001, art 23(5).

286 UK, International Criminal Court Act 2001 (Isle of Man) Order 2004, Explanatory Note.

implicitly confirmed the power of the Security Council to override immunity of a head of State under customary law.[287]

The following analysis is based on the assumption that the Security Council can override personal immunity by virtue of a resolution under Chapter VII of the UN Charter. Resolution 827 was adopted without a vote but by a general agreement of the Security Council under Chapter VII of the UN Charter.[288] Resolution 827 stated that 'all States shall cooperate fully with the Tribunal […] in accordance with the present resolution […] all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute'.[289]

The Security Council kept silent regarding the issue of immunity in its Resolution 827 and the annexed ICTY Statute. Also, the Federal Republic of Yugoslavia (FRY) did not claim that the ICTY violated personal immunity under customary law by issuing an arrest warrant and an indictment against Milošević.[290] Cassese wrote that 'the absence of any challenge to issuance of the ICTY of an arrest warrant, and the absence of any derogation provision regarding personal immunities indicate that States considered that it is unnecessary to include such a provision with regard to the exercise of jurisdiction by an international criminal court'.[291] Nevertheless, it is debatable why it is 'unnecessary' to include a provision derogating from personal immunity, such as article 27(2) of the Rome Statute. The element of 'unnecessary' could be explained for several reasons.

The first possible interpretation of 'unnecessary' might be that in the Resolution the Security Council implicitly intended to confirm a new customary rule for committing international crimes. This idea is not credible because the Security Council had no specifically targeted suspect in mind during the establishment of the ICTY. The Security Council would not have intended to confirm a customary rule eroding personal immunity for committing international crimes. The second interpretation is that the international nature of the court is sufficient to deprive personal immunity. This idea was mentioned in the *Charles Taylor* decision of the SCSL and the *Malawi* Decision of the ICC.[292] This argument is also less convincing as analysed above. Cassese would not support such a rule that is merely based on a distinction between international courts and national courts.[293] The third construction is that a

287 *Al Bashir DRC* Cooperation Decision 2014; *Al Bashir South Africa* Decision 2017.

288 UN Doc S/RES/827 (1993); James O'Brien, 'The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia' (1993) 87 *AJIL* 639.

289 UN Doc S/RES/827 (1993), para 4.

290 ICTY Press Release, 'Justice Minister of the Federal Republic of Yugoslavia gives Commitment to serve ICTY Arrest Warrant on Slobodan Milošević' (6 April 2001), J.L./P.I.S./585-e; *Prosecutor v Milošević* (Decision on Preliminary Motion) ICTY-99-37-PY (8 November 2001).

291 Cassese *et al* (eds), *Cassese's International Criminal Law* 322 and fn 26.

292 *Prosecutor v Milošević* (Decision on Preliminary Motion) ICTY-99-37-PY (8 November 2001), para 35; *Al Bashir Malawi* Cooperation Decision 2011, para 34.

293 Cassese, 'When May Senior State Officials be Tried for International Crimes? Some Comments on the *Congo v Belgium* Case', 864.

customary rule derogating from personal immunity for committing international crimes exists. Thus, it is not necessary to include this provision. Accordingly, the FRY's absence of a challenge based on Milošević's personal immunity further indicates that the FRY behaved in that way with a conviction of recognising the invalidation of personal immunity under customary law. The third interpretation is possible but not exclusive.

A more appropriate understanding might be that it is 'unnecessary' because the UN Security Council Resolution under Chapter VII of the UN Charter implicitly obliges States to waive personal immunity for the exercise of jurisdiction by the UN *ad hoc* tribunals.[294] This is an indirect legal effect of Security Council Resolution 827. According to article 25 of the UN Charter, these Security Council decisions have to be accepted and carried out by members of the UN. All States were obliged to carry out the whole Resolution 827 and the Statute through all possible measures.[295] The FRY, as a UN member as a successor to the Socialist Federal Republic of Yugoslavia, waived personal immunity enjoyed by its former head of State Milošević.[296] This interpretation indicates that the practice of non-availability of personal immunity is not sufficiently accepted to become a customary rule by the Security Council.

At the ICC, the drafters of the Rome Statute did not want States or the Security Council to pre-determine the focus of the ICC on targeted conduct and suspects. The Security Council can only refer a Situation rather than a case to the ICC.[297] The term 'immunity' was also absent from Resolution 1593 referring the Darfur Situation to the ICC. Resolution 1593 decided that:

> […] nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorised by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State.[298]

294 William A. Schabas, 'Kosovo, *Prosecutor v Milošević*, Decision on preliminary motions Case no IT-99-37-PT' in *Oxford Reports on International Law*, 21 May 2010.

295 1993 ICTY Statute, art 29: 'Co-operation and judicial assistance 1. States shall co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law. 2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to: (a) the identification and location of persons; (b) the taking of testimony and the production of evidence; (c) the service of documents; (d) the arrest or detention of persons; (e) the surrender or the transfer of the accused to the International Tribunal.'

296 This argument is supported by the *Prosecutor v Blaškić* (Decision on the Objection of the Republic of Croatia to the Issue of *subpoenae duces tecum*) ICTY-95-14-PT (18 July 1997), paras 83-86, 89.

297 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', UN Doc A/51/22 (1996), Vol I, para 146; Rod Rastan, 'Jurisdiction' in C. Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford: OUP 2015) 158.

298 UN Doc S/RES/1593 (2005), para 6. Similar formulations repeated in UN Doc SC/RES/1970 (2014), para 6 and UN Doc S/2014/348 (22 May 2014), para 7.

In the 2017 *South Africa* non-cooperation decision, Judge Perrin De Brichambaut in his minority opinion thoroughly examined the interpretation of Resolution 1593 by observing its ordinary meaning, context, object and purpose, statements by members of the Security Council and other UN Security Council's resolutions, as well as the subsequent practice of relevant UN organs and affected States. He concluded that a definite answer could not be reached regarding the removal of Al Bashir's immunity by virtue of Resolution 1593.[299] When the ICC Prosecutor reported to the Security Council about the non-cooperation issue in the *Al Bashir* case, the Russian Federation openly commented that '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 [sic] Government officials of those States not party [to] the Rome Statute can be repealed, and presuming the contrary is unacceptable'.[300] This statement further confirms the view that no implied agreement exists among members of the Security Council to refuse personal immunity.[301] It is doubtful that the Security Council intended to override it and lift Al Bashir's personal immunity through Resolution 1593.

In short, Resolutions 827 and 1593 are not enough credible evidence to demonstrate the Security Council's intention to 'override' traditional customary law or to 'confirm' a modified customary rule derogating from personal immunity. The absence of personal immunity in the Resolutions was not intended to alter or to override but instead to respect personal immunity under customary law. The following paragraphs analyse the work of the ILC to show its view on an exception to absolute personal immunity.

### 6.5.4 The work of the International Law Commission

The ILC's recent work has expressed its attitude towards the exception to the rule of personal immunity for committing international crimes. In the ILC's work on the issue of immunity, Roman A. Kolodkin and Concepción Hernández were appointed as Special Rapporteurs.[302] The first Rapporteur Kolodkin held that the 2002 ICJ judgment in the *Arrest Warrant* case was a correct landmark decision.[303] He supported that '[i]mmunity from international criminal jurisdiction appears to be fundamentally different from immunity from national criminal jurisdiction' and '[t]he principle of sovereign equality of States […] cannot be the rationale for immunity from

299 *Al Bashir South Africa* Cooperation Decision 2017 (Minority Opinion of Judge Marc Perrin De Brichambaut), paras 64-83; *Al Bashir Jordan* Cooperation Decision 2017 (Minority Opinion of Judge Marc Perrin De Brichambaut) ICC-02/05-01/09-309-9-Anx-tENG (11 December 2017), para 3.

300 UN Doc S/PV.7963 (8 June 2017).

301 *Al Bashir DRC* Cooperation Decision 2014, para 29.

302 UN Doc A/61/10 (2006), paras 257, 386; UN Doc A/62/10 (2007), para 376. The ILC also requested the Secretariat to prepare a background study on the topic.

303 UN Doc A/63/10 (2008), para 311.

international jurisdiction'.[304] However, in his viewpoint, the ILC's topic only concerns immunity from foreign criminal jurisdiction. A principle of immunity of State officials exists, and it is uncertain whether there is a trend of asserting the existence of a new rule for the exception to immunity.[305] Some members held that this argument is outdated,[306] and that he did not take into account the new development of international law about international crimes. Kolodkin emphasised that his ultimate goal was not to 'formulate abstract proposals as to what international law might be, but to work on the basis of evidence of the existing international law in the field'. Divergent views exist in the Commission concerning the issue of exception.[307] The second and present Rapporteur Hernández has submitted five reports to the ILC.[308] Her fifth report concluded that 'it had not been possible to determine the existence of a customary rule that allowed for the application of limitations or exceptions in respect of immunity *ratione personae*, or to identify a trend in favour of such a rule'.[309] Most of the Commission has agreed that the exceptions do not apply to State officials' personal immunity to foreign criminal jurisdiction relating to international crimes.[310]

### 6.5.5 Assessment and conclusions

This section shows that the *Arrest Warrant* case of the ICJ gave strength to personal immunity by openly stating it as a customary rule. Decisions of the ICC and the SCSL indicate a new trend of denying personal immunity before international tribunals. It is doubtful that a derogation from personal immunities can be grounded merely on the nature of the court. Other international jurisprudence, national cases and legislation, however, send a different message. The examination also demonstrates that both States Parties and non-party States, such as Belgium, China, Malawi, Russia, South Africa, the Netherlands, the UK and the US, Arab States as well as some other African States, generally respect personal immunity of senior officials.[311] The scarcity of hard practice and the lack of supporting *opinio juris* indicate the absence of widespread recognition of the rule that personal immunity is no

304 UN Doc A/CN.4/601 (2008), para. 103.
305 ibid; UN Doc A/CN.4/631 (2011), paras 90-93.
306 Huikang Huang, 'On Immunity of State Officials from Foreign Criminal Jurisdiction' (2014) 13 *Chinese J Intl L* 1.
307 UN Doc A/63/10 (2008), paras 295-98.
308 'Fourth Report on immunity of State officials from foreign criminal jurisdiction, by Special Rapporteur Concepción Escobar Hernández', UN Doc A/CN.4/686 (2015); UN Doc A/CN.4/701 (2016).
309 UN Doc A/CN.4/701 (2016), para 240; UN Doc A/72/10 (2017), para 83, pp 166-67.
310 UN Doc A/CN.4/686 (2015), paras 136-37; UN Doc A/CN.4/701 (2016), paras 19(f) and (g); UN Doc A/70/10 (2015), para 230.
311 Committee on International Criminal Court, 'Third Report, by Professor Göran Sluiter, Co-rapporteur (Part I), Professor William A. Schabas, Co-rapporteur (Part II)' in International Law Association Report of the 73rd Conference (Rio de Janeiro 2008) (ILA, London 2008) 605-06.

longer applicable in proceedings for international crimes under customary law.[312] To date, no such customary international rule is emerging to create an exception to personal immunity for international crimes in international and national proceedings. South African authorities still contend that personal immunity for international crimes continues under customary law.[313] Contrary to the view of its government, the decision of the South African Supreme Court might be the first departure at the national level. The reaction of the international community to its practice would be valuable evidence for further assessment of personal immunity under customary law for committing international crimes. At the present time, article 27(2) of the Rome Statute is not declaratory of a customary rule of non-availability of personal immunity for committing international crimes.

## 6.6 Concluding remarks

Identifying a customary rule is a good attempt to solve the issue regarding personal immunity of sitting heads of State for committing international crimes. This Chapter shows that the rationale of personal immunity for sitting senior officials is not only a requisite of their function but also the status of the State in international relations. Article 27(2) of the Rome Statute with a denial of personal immunity departs from a pre-existing customary rule; besides, it also acknowledges the customary rule by providing an exception to the customary rule about personal immunity. Thus, article 27(2) confirms the existing customary law respecting personal immunity in international law at the time when the Rome Statute was adopted. In addition, an examination of evidence of the two elements of customary law shows that a modification of the pre-existing customary rule is not yet mature enough to provide an exception to absolute personal immunity for committing international crimes. To date, the customary law rule respecting personal immunity remains intact to a certain extent in international law, regardless of the nature of the crimes. In conclusion, article 27(2) was not declaratory of a modified customary international rule providing non-availability of personal immunity for international crimes when the Rome Statute was adopted in 1998. Moreover, article 27(2) is also not declaratory of such a customary rule at the present time.

312 Robinson, 'Immunities', 540-65; Akande, 'International Law Immunities and the International Criminal Court'; UN Doc A/CN.4/701 (2016), paras 235-42. But see Kreß and Prost, 'Article 98', 2139.

313 Singerman, 'It's Still Good to Be the King: An Argument for Maintaining the Status Quo in Foreign Head of State Immunity'; Tunks, 'Diplomats or Defendants? Defining the Future of Head-of-State Immunity'.