

The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities

Dapo Akande*

Abstract

This article considers whether states are obliged or permitted to arrest Sudanese President Omar al Bashir pursuant to a warrant of arrest issued by the International Criminal Court (ICC). The article considers the extent to which the ICC Statute removes immunities which would ordinarily be available to state officials. It is argued that the removal of the immunity by Article 27 of the ICC Statute applies also at the national level, when national authorities act in support of the ICC. The article examines the application of Article 98 of the ICC Statute and considers the legal nature of Security Council referrals to the ICC. It is argued that the effect of the Security Council referral is that Sudan is to be regarded as bound by the ICC Statute and thus by Article 27. Given that the Statute operates in this case not as a treaty but by virtue of being a Security Council resolution, the removal of immunity operates even with regard to non-parties. However, since any (implicit) removal of immunity by the Security Council would conflict with customary international law and treaty rules according immunity to a serving head of state, the article considers the application of Article 103 of the United Nations (UN) Charter in this case.

1. Introduction

In issuing the arrest warrant for the Sudanese President, Al Bashir,¹ the Pre-Trial Chamber (PTC) of the International Criminal Court (ICC) directed

* Visiting Associate Professor of Law and Robina Foundation International Fellow, Yale Law School; University Lecturer in Public International Law and Yamani Fellow, St Peter's College and Faculty of Law, University of Oxford. [dapo.akande@law.ox.ac.uk]

1 Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber I, 4 March 2009 [henceforth: '*Al Bashir Arrest Warrant*'].

the Registry to transmit a request for arrest and surrender of Al Bashir to (i) all states parties to the ICC Statute and (ii) all UN Security Council members that are not states parties to the Statute. States parties to the ICC Statute are under an obligation to cooperate with the Court and this includes obligations to comply with requests for arrest and surrender.² The issuance of that arrest warrant raises the question whether the states receiving the request for arrest are under an obligation to arrest Al Bashir were he to travel to their territory. In fact, one may go so far as to ask whether other states are even permitted by international law to arrest Al Bashir?

These questions arise because under international law, serving heads of state are accorded immunity from the criminal jurisdiction of foreign states.³ Under customary international law, the person of the head of state is regarded as inviolable⁴ when abroad and immunity from criminal jurisdiction includes immunity from arrest.⁵ In addition, treaties may also confer immunity on the serving head of state when abroad, for example where the serving head of state is part of that state's delegation to an international organization he will be covered by the immunity which attaches to representatives of states to international organizations.⁶ Or where both states are parties to it, the UN Convention on Special Missions (1969)⁷ will also afford immunity. In the context of the Al Bashir arrest warrant, it is important to note that the immunity accorded to a serving head of state, *ratione personae*, from foreign domestic criminal jurisdiction (and from arrest) is absolute and applies even when he is accused of committing an international crime. The International Court of Justice made this clear in the *Arrest Warrant Case*.⁸ Although it was speaking of the position of the Foreign Minister, the rule enunciated by the Court applies with greater force for the head of state. The ICJ stated that: '[i]t has been unable to deduce ... 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

2 Arts 86 and 89 [ICCSt].

3 R. Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (Oxford: Oxford University Press (OUP), 2008), 169; D. Akande, 'International Law Immunities and the International Criminal Court', 98 *American Journal of International Law* (2004) 407, 409; A. Watts, 'The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers', 247 *Recueil des Cours* (1994-III) 13; C. Wickremasinghe, 'Immunities Enjoyed By Officials of States and International Organizations', in M. Evans (ed.), *International Law* (2nd edn., Oxford: OUP, 2006), 407.

4 H. Fox, *The Law of State Immunity* (2nd edn., Oxford: OUP, 2008), 667 *et seq.*

5 *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, 2008 ICJ Reports, § 170: 'A Head of State enjoys in particular "full immunity from criminal jurisdiction and inviolability" which protects him or her "against any act of authority of another State which would hinder him or her in the performance of his or her duties"', quoting from *Arrest Warrant Case (Democratic Republic of Congo v. Belgium)*, 2002 ICJ Reports, at 22, § 54.

6 See, for example, Art. IV Convention on the Privileges and Immunities of the United Nations, 13 February 1946, 90 UNTS 327.

7 Arts 21, 39 and 31.

8 *Arrest Warrant Case*, *supra* note 5.

they are suspected of having committed war crimes or crimes against humanity'.⁹

The answer to the question of whether states are entitled to act on the arrest warrant issued by the ICC and arrest Al Bashir and surrender him to the Court depends on whether the immunities that Al Bashir would ordinarily be entitled to enjoy have been removed. This, in turn, depends on the legal nature of Security Council referrals of situations to the ICC. Many have noted the significance of an international tribunal issuing an arrest warrant for a serving head of state. Of course, this is not the first time that this has happened. The International Criminal Tribunal for the former Yugoslavia issued a warrant for Milošević while he was head of the state of the Federal Republic of Yugoslavia and the Special Court for Sierra Leone indicted Charles Taylor while he was President of Liberia. One commentator has stated¹⁰ that there has been no hand-wringing by other states about Al Bashir's immunity and suggest that this is a matter of interest only to academics. This is incorrect. The Arab League, in a resolution expressing concern at the decision of the PTC to issue the arrest warrant against Al Bashir emphasized immunity of heads of states.¹¹ Other states may not have commented on the issue of immunity but this is only because states will only be faced with the issue in practice if Al Bashir travels abroad and they are called upon to arrest him. In that scenario, states will have to consider not only this particular case but also the precedent that they wish to set. They will also have to consider what obligations they may have under the ICC Statute, under other treaties (including the UN Charter) and under customary international law.

One state that is under a clear international law obligation to arrest Al Bashir is Sudan. Although that state is not a party to the ICC Statute, it is obliged to cooperate with the ICC by virtue of Security Council Resolution 1593 which referred the situation in Darfur to the ICC. As the PTC points out,¹² in paragraph 2 of that resolution, the Security Council decided that 'the Government of Sudan, and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution'. Under Article 25 of the UN Charter, Sudan is obliged to accept and carry out decisions of the Security Council. Resolution 1593 thus creates an explicit international law obligation for Sudan, but one which that state has not been complying with. That obligation includes the obligation to arrest any Sudanese official that the Court decides ought to be arrested and turned over to the Court.

9 *Ibid.*, §58.

10 C. Chung, 'Justice for Bashir: What's Different Today?', *EJIL: Talk!*, 5 March 2009, available at <http://www.ejiltalk.org/justice-for-bashir-whats-different-today/> (visited 1 April 2009).

11 Arab League Council, Resolution on the Decision of Pre-Trial Chamber 1 to the International Criminal Court against the President of the Republic of Sudan, Hassan Ahmad Al Bashir, 4 March 2009. For an unofficial translation of the resolution, see [http://www.iccnw.org/documents/09.03.04.ALResolution.on.Omar.Al-Bashir.\(EN\).Unofficial.Translation.\(2\).pdf](http://www.iccnw.org/documents/09.03.04.ALResolution.on.Omar.Al-Bashir.(EN).Unofficial.Translation.(2).pdf) (visited 12 April).

12 *Al Bashir Arrest Warrant*, *supra* note 1, §§240–248.

2. The Decision of the PTC on the Immunity Question

In its decision to issue the arrest warrant, the PTC only addressed the question of Al Bashir's immunity implicitly. The PTC considered that 'the current position of Omar Al Bashir as Head of a state which is not a party to the Statute, has no effect on the Court's jurisdiction over the present case.'¹³ The PTC reached this decision based on a number of considerations. It stated that one of the core goals of the Statute is to put an end to impunity and observed that Article 27, which in its view provides 'core principles', was included in the Statute in order to achieve this core goal. Article 27 of the ICC Statute provides 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.

The PTC also based its ability to exercise jurisdiction on the view that:

[B]y referring the Darfur situation to the Court, pursuant to article 13(b), the Security Council of the United Nations has also accepted that the investigation into the said situation, as well as any prosecution arising therefrom, will take place in accordance with the statutory framework provided for in the Statute, the Elements of Crimes and the Rules as a whole.¹⁴

Implied in the Court's statements is the view that the Security Council has implicitly adopted Article 27 and thus implicitly sanctioned the exercise of jurisdiction by the Court over a serving head of state who would otherwise be immune from jurisdiction.

However, stating that the *Court* may exercise jurisdiction over a serving head of state and that serving heads of state do not possess immunity *vis-à-vis* the *Court* does not exhaust the immunity question. In order for the ICC to exercise jurisdiction in practice, it will need to obtain custody of Al Bashir. Unless Al Bashir chooses to surrender himself voluntarily (which is most unlikely), the Court needs a state to arrest him and turn him over to the Court. At that stage, the question will arise whether Al Bashir is immune from arrest by *national authorities* acting to support the Court. Where the request is to arrest a person who is, as is the case here, ordinarily entitled to immunity from the exercise of foreign criminal jurisdiction (including immunity from arrest), the question is how to reconcile the tension between the obligation of states to accord immunity and the statement that immunity shall not bar the Court from exercising jurisdiction. After all, to allow immunity at the national level

¹³ *Ibid.*, §41.

¹⁴ *Ibid.*, §45.

to defeat arrest and surrender to the Court is to prevent the Court from exercising its jurisdiction.

3. The Application of Article 98 ICC Statute and its Relationship with Article 27

The PTC's decision did not consider whether immunity is to be respected at the national level. This is a regrettable and an amazing oversight by the Chamber. Amazing because there is a provision in the Court's Statute that addresses this question. Despite the proclamation of the irrelevance of immunity and official capacity in Article 27 of the ICC Statute, Article 98 of the Statute points the other way. Article 98(1) states that the:

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.

If the immunity is provided by treaties such as the Special Missions Convention or the UN Immunities Convention, Article 98(2) will also be relevant.¹⁵

It is regrettable that the PTC chose to ignore Article 98 in its analysis because the PTC proceeded to make a request for arrest and surrender in circumstances where immunity is in issue. A reader of the decision would think that the PTC was unaware that Article 98 appears to apply in precisely this sort of case. The PTC ought to have dealt with the applicability of Article 98 and how it relates to Article 27 before proceeding to issue the request for arrest and surrender to states parties and Security Council members. The PTC is under an obligation to satisfy itself that it would not be requiring those states to act inconsistently with their international obligations relating to immunity.

There is a clear tension between Articles 27 and 98. The two provisions were drafted by different committees in the preparation of the Rome Statute¹⁶ and no thought appears to have been given to their consistency with one another. One way of reconciling the tension between the two provisions is to take the position that Article 27 removes immunity with respect to *the Court* and applies only to actions by the Court, but that Article 98 preserves those same immunities with respect to action to be taken *by national authorities*. However, the better view is that Article 27 removes immunities, even with respect to

15 See D. Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits', 1 *Journal of International Criminal Justice* (2003) 618, 645. Art. 98(2) provides that: 'The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.'

16 O. Triffterer, 'Article 27', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Baden Baden: Nomos Verlagsgesellschaft, 1999).

action taken by national authorities, where those authorities are acting in response to a request by the Court. The reasons for this are explored more fully elsewhere,¹⁷ but in summary such a position is warranted because reading Article 27 as applying only to actions by the Court would render parts of that provision practically meaningless. This is because the Court has no independent powers of arrest: It must rely on national authorities. A proclamation that immunities shall not bar the exercise of jurisdiction by the Court while leaving such immunities intact with respect to arrests by national authorities would mean that the Court would hardly be in a position to apply Article 27 and exercise its jurisdiction. This is because the ICC would not gain custody of persons entitled to immunity except where such persons are surrendered by their state (in which case their immunity would be waived and Article 27 would be irrelevant) or through voluntary surrender. This would confine Article 27 to the rare case where a person entitled to immunity surrendered voluntarily, in which case the person is unlikely to claim immunity. The effect of the argument would be to make an important provision directed at combating impunity inoperable for most practical purposes. To read the treaty in this way would be contrary to the principle of effectiveness in treaty interpretation. According to this principle, a treaty interpreter must read all applicable provisions of a treaty in a way which gives meaning to all of them harmoniously and 'is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility'.¹⁸

Further evidence that Article 27(2) also removes immunity at the national level comes from the text of that provision which states that not only international law immunities, but also national law immunities, shall not bar the exercise of the Court's jurisdiction. The Court does not apply national law, only national authorities do. The statement that national law immunities shall not bar the Court's jurisdiction would be redundant unless it was directed at authorities who would otherwise be bound by national law — national authorities.

Finally, the practice of the parties to the ICC Statute suggests that they view Article 27 as removing immunity not only at the stage where the defendant is before the Court, but also at the national level. A number of states have adopted domestic implementing legislation which implicitly or explicitly take the view that officials of other states may not be entitled to international law immunity from arrest when a request for arrest has been made by the ICC.¹⁹

17 Akande, *supra* note 3, 419–426.

18 *United States — Standards for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/AB/R, at 23 (Appellate Body Report, May 1996). See generally, R. Gardner, *Treaty Interpretation* (Oxford: OUP, 2008), 159–161.

19 See § 48, Canada's Crimes Against Humanity and War Crimes Act (2000), inserting a new § 6.1 into the Extradition Act (1999); § 31(1), New Zealand's International Crimes and International Criminal Court Act (2000); § 23, United Kingdom's International Criminal Court Act (2001); Art. 6, Swiss Federal Law on Cooperation with the International Criminal Court (2001), which permits arrest despite any question of immunity but provides the Swiss Federal Council shall decide on 'questions of immunity relating to article 98 in conjunction with article 27 of the Statute which arise in the course of execution of the request' (emphasis added); Malta's International Criminal Court Act (2002) c. 453 (inserting a new Art. 26S into the Extradition Act, c. 276); § 10(9), South

Although interpreting Article 27 as removing immunities vis-à-vis national authorities acting in response to an ICC request makes it possible to give meaningful effect to that provision, that interpretation highlights the tension with Article 98. If it were always the case that Article 27 removes the international law immunity of officials of states even with respect to national authorities of other states, then Article 98 would, in turn, be deprived of all meaning. Elsewhere,²⁰ I have argued (as have others²¹) that this tension can be resolved and meaning given to both provisions by making a distinction between immunities accruing to non-parties to the ICC Statute and those accruing to ICC parties. Immunities of officials are rights belonging to the state of the official. Nothing in the ICC Statute can remove the immunity belonging to *non-parties* to the Statute since that treaty cannot create obligations for third states.²² Therefore, Article 98 expressly allows parties to give effect to immunity obligations they owe to non-parties. However, the position is different with regard to parties. As between parties to the ICC Statute, immunities of officials of parties are removed by Article 27 when such persons are wanted by the ICC. Therefore, if an ICC party were to arrest and surrender an official of another ICC party at the request of the Court, the arresting state would not, under Article 98(1), be an 'act[ing] inconsistently with its obligations under international law with respect to the state or diplomatic immunity of a person ... of a third state'. The Court is therefore free to proceed with a request for arrest and surrender of serving heads of state (or other officials normally immune) of an ICC party.

This distinction between the position of parties and non-parties is supported by the national legislation of some ICC parties (such as the United Kingdom, Malta, the Republic of Ireland and Samoa).²³ Canada, which has legislation that provides that no immunity shall bar execution of a request for arrest by the ICC (Extradition Act 1999, section 6.1) has also taken the view that Article 98 should be interpreted as requiring the Court not to issue requests for surrender where this would require violation of immunities of non-parties.²⁴

Africa's Implementation of the Rome Statute of the International Criminal Court Act (2002); Art. 6(3), Croatia's Law on the Application of the Statute of the International Criminal Court (2003); §32, Trinidad and Tobago's International Criminal Court Act (2006); §61, Republic of Ireland's International Criminal Court Act (2006); Art. 32, Samoan International Criminal Court Act (2007). Art. 489 of Estonia's Code of Criminal Procedure (2003) also appears to deny immunity with regard to arrests in execution of ICC's request given that it does not provide for such immunity but Art. 492(6) dealing with European arrest warrants explicitly bars execution of such warrants with respect to persons entitled to immunity under international law unless a waiver is obtained. See also § 25 of the Commonwealth's Model Law to Implement the Rome Statute of the International Criminal Court.

20 Akande, *supra* note 3, 421–229.

21 See the authors cited in Akande, *supra* note 3, at 422, fn 97.

22 Art. 34, Vienna Convention on the Law of Treaties (1969) (VCLT).

23 See *supra* note 19.

24 See the joint paper circulated by delegates from Canada and the United Kingdom at the July–August 1999 session of the ICC Preparatory Commission, quoted by B. Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford: OUP, 2003), 144.

4. The Effect of Security Council Referrals: Is Sudan in an Analogous Position to that of an ICC Party?

Applying the distinction between the immunities of parties and that of non-parties with respect to the ICC to the case of President Bashir is complicated. The problem in the *Al Bashir* case is that although Sudan is not a party to the ICC Statute, the case arises out of a Security Council referral. The key point is whether Sudan is to be considered as being in the position of a party to the Statute. It can only be considered as being in an analogous position to a party if the provisions of the Statute (including those relating to immunity) are binding on it with regard to the ICC referral. The Security Council in Resolution 1593 decided that Sudan must cooperate fully with the Court but did not explicitly make the Statute binding on it, nor did it expressly address the question of immunity. The PTC was right to hold in the *Al Bashir Arrest Warrant Decision* that the Security Council has accepted that investigations and prosecutions from the Darfur situation ‘will take place in accordance with the statutory framework provided for in the Statute, the Elements of Crimes and the Rules as a whole.’²⁵ This is because the Security Council, in referring the situation regarding Darfur to the ICC, was taking advantage of a provision in the ICC Statute (Article 13(b)) which permits such referrals and must therefore be deemed to have expected the Statute of the Court to provide the governing framework.²⁶ In the case of the Darfur referral, this expectation can also be implied from the various references in Resolution 1593 to the Statute of the Court.²⁷ More generally, given that the Security Council, in referring a situation to the ICC, intends the Court to take action (to investigate and prosecute as appropriate), and given that the Security Council itself provides no procedure by which the investigation and prosecution is to take place the Security Council must be taken as expecting the Statute to be the governing law. In order for the decision to refer a situation to the Court to be effective, one must imply a decision that the Court take such action as it can take. The Court can only act in accordance with its Statute since Article 1 of that Statute provides that ‘[t]he jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.’²⁸ As this is the case, a decision by the Security Council that the Court may act implies a decision that it act within its Statute. This implication arises unless the Security Council were to provide

25 *Al Bashir Arrest Warrant Decision*, *supra* note 1, § 45.

26 Although the resolution does not refer to Art. 13(b), it is clear that the drafters of the resolution intended to use the procedure provided for in that provision as this is the only provision that would allow the ICC to exercise jurisdiction. Specific reference was made to Art. 13 by the Argentinian ambassador explaining his country’s decision to vote in favour of Res. 1593: See Report of the 5158th meeting of the Security Council, 31 March 2005, UN Doc. S/PV. 5158, at 7.

27 The Security Council recalls provisions of the Statute in three preambular paragraphs of Res. 1593 and in § 4 ‘also encourages the Court, as appropriate and in accordance with the Rome Statute, to support international cooperation with domestic efforts to promote the rule of law, protect human rights and combat impunity in Darfur.’ (emphasis in original)

28 See Art. 1 (second sentence), ICCSt.

otherwise. And if the Security Council were to provide that the Court should act otherwise than in accordance with its Statute, it is doubtful that the Court would be competent to do so, in spite of the Security Council decision.²⁹ Therefore, there would appear to be little need to specify, in the Security Council resolutions providing for referrals, that the Court is to operate in accordance with its Statute, as the Court could not do otherwise. The very decision to refer a situation to the Court is a decision to bring whatever individuals may be covered by the referral within the jurisdiction of the Court and therefore within the operation of its Statute. The very decision to refer also affects the position of parties to the Statute indirectly in that it raises the possibility that obligation (to cooperate) will be invoked by the Court.

Despite the fact that the very decision to refer a situation regarding a non-party implies a decision that the Court act in accordance with its Statute, the question remains whether the Statute is binding on that non-party. At a minimum, the referral of a situation to the ICC is a decision to confer jurisdiction on the Court (in circumstances where such jurisdiction may otherwise not exist). That decision is made under Chapter VII of the UN Charter and by Article 25 of the Charter 'Members of the United Nations agree to accept and carry out the decisions of the Security Council ...'. The decision to confer jurisdiction on an international tribunal does not of itself necessarily require members to do anything (though the Security Council may, of course, require cooperation). Nonetheless, the decision to confer jurisdiction must be accepted by the members. They are legally bound to accept that the Court has jurisdiction in the circumstance in which the Security Council has conferred jurisdiction. Article 25 estops them, as a matter of law, from taking a contrary position. Moreover, since the jurisdiction and functioning of the Court must take place in accordance with the Statute, a decision to confer jurisdiction is a decision to confer it in accordance with the Statute. Thus, all states (including non-parties) are bound to accept that the Court can act in accordance with its Statute. In this sense, at least, a non-party to the Statute is bound by the Statute in the case of a referral — in the sense that it is bound to accept the jurisdiction of the Court and legality of the Court's operation in accordance with its Statute.

In the present context, there is a further reason for regarding the Security Council as subjecting Sudan to the Statute and for regarding the whole of the Statute as binding on that state. By requiring Sudan to cooperate fully with the Court,³⁰ the resolution explicitly subjects Sudan to the requests and decisions of the Court. Since the Court must, under its own Statute, act in accordance with the Statute, making the decisions of the Court binding on Sudan is to subject Sudan to the provisions of the Statute indirectly.

29 Recall that the Court, as an institution, is not a member of the United Nations and is therefore not bound by Security Council resolutions and moreover, the Court is bound by the Statute. Art. 103 of the UN Charter would be inapplicable as the Court is not a member of the United Nations. See generally, D. Sarooshi, 'The Peace and Justice Paradox: The International Criminal Court and the UN Security Council', in D. McGoldrick, P. Rowe and E. Donnelly (eds), *The Permanent International Criminal Court* (Oxford: Hart Publishing, 2004).

30 SC Res. 1593, §2, quoted in the text *supra* note 27.

For the reasons stated above, the Statute, including Article 27, must be regarded as binding on Sudan. The Security Council's decision to confer jurisdiction on the ICC, being (implicitly) a decision to confer jurisdiction in accordance with the Statute, must be taken to include every provision of the Statute that defines how the exercise of such jurisdiction is to take place. Article 27 is a provision that defines the exercise of such jurisdiction in that it provides that 'immunities ... which may attach to the official capacity of a person, whether under international law or national law, shall not bar the Court from exercising jurisdiction over a person'. The fact that Sudan is bound by Article 25 of the UN Charter and implicitly by SC Resolution 1593 to accept the decisions of the ICC puts Sudan in an analogous position to a party to the Statute. The only difference is that Sudan's obligations to accept the provisions of the Statute are derived not from the Statute directly, but from a UN Security Council resolution and the Charter.

Since Sudan is to be treated as bound by the Statute and as if it were a party to it, then the tension between Articles 27 and 98 becomes easier to resolve. In accordance with analysis above, an interpretation of Article 98 which bars the Court from requesting the arrest and surrender of officials of state parties or states bound by the Statute under a Security Council resolution would be to deprive that part of Article 27(2) which refers to international law immunities of practically all meaning. In line with earlier analysis, the only way to give meaningful effect to the statement in Article 27(2) that international law immunities shall not bar the Court's exercise of jurisdiction is to hold that that provision not only removes immunity with respect to the Court, but also with respect to national authorities, acting to support the exercise of the Court's jurisdiction. Thus, the international law immunities of Sudanese officials (including the immunity of the head of state) are removed as a result of the Statute and the referral by the Security Council. This lack of immunity then means that under Article 98, a state party to the Statute would *not* be acting 'inconsistently with its obligations under international law' by arresting and surrendering Al Bashir to the ICC. Without the potential bar to cooperation present in Article 98, states parties are under an obligation under Article 89 to comply with the request for arrest and surrender issued by the Court.

5. Are Non-parties Permitted to Arrest Al Bashir?

In the *Al Bashir* case, the PTC directed that the request for arrest and surrender be transmitted not only to Sudan and to ICC parties but also to all members of the UN Security Council, even if not party to the Statute. No reason is given as to why members of the UN Security Council are to receive the request for arrest and surrender. It is possible that transmission of the request to Security Council members is only for information since the case arises out of a referral by the Security Council. However, the decision also directs the Registrar to prepare and transmit any additional request for arrest and

surrender to *any other* states, as appropriate (presumably, if Al Bashir were to show up in another state). It is worth noting that in the PTC's decision concerning the other persons sought by the prosecutor with regard to crimes committed in Darfur, the PTC directed that a request for the arrest and surrender of Ahmad Harun and Ali Kushayb be transmitted to four specific non-parties to the ICC Statute (Egypt, Eritrea, Ethiopia, Libya).³¹ This was in addition to the transmission of the request to ICC parties and members of the UN Security Council. The transmission of requests for arrest and surrender raise two questions: (i) Are non-parties *obliged* to cooperate with the Court in these cases? (ii) Even if not obliged to cooperate, are non-parties *permitted* to arrest persons who would ordinarily possess immunity under international law?

A. Are Non-parties Obligated to Cooperate with the Court?

Non-parties to the ICC Statute ordinarily have no obligation to cooperate with the Court. The ICC Statute is a treaty and treaties may not impose obligations (or rights) for non-parties (third states) without the consent of that state.³² Therefore, nothing in the ICC Statute can of itself impose obligations of cooperation on non-parties unless those non-parties accept those obligations. But does this position change where the ICC is acting in a case referred to the Court by the Security Council? Security Council referrals may only be made under Chapter VII of the Charter³³ When the Security Council acts in this way, it may choose to impose obligations on all states. The obligation of all states, especially of non-parties, will derive from the UN Security Council resolution and from the Charter. Moreover, those obligations will prevail over other obligations that those states will have under other international treaties. When the Security Council created the ad hoc international criminal tribunals it imposed obligations on all UN members to cooperate with those tribunals, meaning that all states had an obligation to arrest person wanted by those tribunals.³⁴ The position with regard to the ICC would therefore not be novel were the Security Council to impose obligations on all states. Moreover, one of the purposes of the referral mechanism in Article 13(b) of the ICC Statute is to reduce the need for reliance on ad hoc tribunals, so one should not be surprised were the Security Council to take a similar approach as it would with an ad hoc tribunal that it creates.

However, in the case of the Sudan referral, the Security Council has only imposed explicit obligations of cooperation on one non-party (Sudan). There is no explicit obligation in Resolution 1593 for other states to cooperate with the Court. All that the Security Council does is that it 'urges all states and

31 ICC, Decision on the Prosecution Application under Art. 58(7), *Ahmad Muhammad Harun ('Ahmad Harun') and Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')* (ICC-02/05-01/07-1), available at <http://www.icc-cpi.int/iccdocs/doc/doc279807.PDF> (visited 12 April 2009).

32 Art. 34 VCLT.

33 Art. 13(b) ICCSt.

34 SC Res. 827 (1993), § 4 (ICTY); SC Res. 955 (1994) § 2 (ICTR).

concerned regional and international organizations to cooperate fully'. An urging to cooperate is manifestly not intended to create an obligation to do so. The word 'urges' suggests nothing more than a recommendation or exhortation to take certain action. That there is no obligation on non-parties to cooperate with the ICC is made clear by the Security Council 'recognizing that states not party to the Rome Statute have no obligation under the Statute'.³⁵ Therefore, it is clear that non-parties have no obligation to arrest Al Bashir (or the other accused persons sought by the ICC in relation to crimes in Darfur), were he to come within their territory.

B. Are Non-parties Permitted to Arrest Persons Who Ordinarily Possess Immunity Under International Law?

The second question of relevance here is whether non-parties are *permitted* to arrest Al Bashir given that those non-parties ordinarily have obligations to respect the immunity of a foreign head of state (as well as other immunities he may possess depending on the capacity in which he is in their state). Does the 'urging' of the Security Council suffice to give these states permission to violate their obligations under other parts of international law? Article 103 of the UN Charter provides that 'in the event of a conflict between obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'. However, that provision may not be combined with the urging of the Security Council in order to displace obligations of member states. As already pointed, the urging of the Security Council is no more than a recommendation and creates no obligation for states. There is therefore no conflict of obligations as envisaged by Article 103. Recommendations made by the Security Council do not, in general, come within the scope of Article 103 and do not prevail over existing legal obligations.³⁶

Some have argued that some types of recommendations do come within the scope of Article 103 and therefore prevail over conflicting obligations. The recommendations in question are authorizations of the Security Council to states to take action under Chapter VII for the maintenance of international peace and security.³⁷ The same view was taken by the English House of Lords

35 SC Res. 1593, §2.

36 R. Bernhardt, 'Article 103', in B. Simma (ed.), *The Charter of the United Nations: A Commentary* (2nd edn., Oxford: OUP, 2002), 1296, §12: 'When UN organs, including the Security Council, adopt non-binding resolutions, Article 103 is not applicable. This follows from the text of the Article, which speaks only of obligations (meaning legal obligations). However, there are additional reasons for excluding recommendations and other non-binding pronouncements from the scope of Article 103'.

37 R. Kolb, 'Does Article 103 of the Charter of the United Nations Apply only to Decisions or also to Authorizations Adopted by the Security Council?', 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht/Heidelberg Journal of International Law (ZaöRV)* (2004) 21, at 31: '... [T]here are significant differences of legal construction between the "authorization-delegations" and the general recommendations. In one word: the "authorization-delegations" are

in *R (on the application of Al-Jedda) v. Secretary of State for Defence*.³⁸ Even if this is the case, the recommendation in Security Council Resolution 1593, section 2 does not fall within the category of authorizations. The notion of 'authorizations' refers to acts which are intended to provide permission to a party in order to enable it to perform an act which that party would otherwise be unable to perform or which it is otherwise debarred from performing. One does not need to be authorized to take action that one is already permitted to take. There is nothing in the text or history of Security Council Resolution 1593, section 2 to suggest that the Security Council intended to provide permission to any state to perform any particular act it could otherwise not perform. The natural reading of the text is that it was an exhortation to states to take such action to support the Court which was within their power to take.

Although Security Council Resolution 1593 does not on its face provide permission for non-parties to violate immunities which international law accords to serving heads of state, there is another argument that could be made in order to permit non-parties to execute the ICC's request for the arrest and surrender of Al Bashir. According to this argument, non-parties may rely on the removal of immunities in Article 27 of the Statute to deny international law immunities to Al Bashir were he to enter their territory after the ICC has exercised its jurisdiction and requested his arrest and surrender. Ordinarily non-parties would not be able to rely on the removal of immunity in the ICC Statute given that the removal of immunity is done by treaty. The removal of the immunity in effect creates a right for parties to take certain action with regard to officials of other states. Article 36 of the Vienna Convention on the Law of Treaties provides that treaties do not create rights for non-parties unless the parties intend them to do so. There is no indication in the Rome Statute that it is intended to create rights for other states. But the position in this case is different. Article 27 operates here not as a treaty provision but, as explained above, that provision is binding on Sudan, under the UN Charter, as an implicit part of a Security Council resolution referring the Darfur situation. Furthermore, as explained above, the best interpretation of Article 27 is that it removes the immunities that Sudanese officials would ordinarily be entitled to before national authorities acting in support of the ICC. Since the decision to remove the immunity operates by virtue of the Security Council resolution and not by treaty, all members of the United Nations are entitled to rely on it in the *Al Bashir* case.

more than the simple recommendations; their legal nature and density is greater. Consequently, it is possible to envision some special treatment of this class of legal acts, and thereby, also in respect of Article 103'.

38 [2007] UKHL 58, §§ 30–34 (Lord Bingham), available at <http://www.parliament.the-stationery-office.com/pa/ld200708/ldjudgmt/jd071212/jedda.pdf> (visited 12 April 2009). See also, the literature cited by Kolb, *ibid.*, and by the House of Lords at § 33 of its judgment, as well as R. Liivoja, 'The Scope of the Supremacy Clause of the United Nations Charter', 57 *International Comparative Law Quarterly* (2008) 583, at 567.

1. *The Interaction between Security Council Determinations, the ICC Statute and Immunity Obligations: The Operation of Article 103 of the UN Charter*

Even if it is accepted that because of the Security Council referral and the Security Council's implicit decision to subject Sudan to the Statute, all UN members are entitled to rely on Article 27, the question would arise as to how a *right* created by an Security Council resolution (a right to take action against officials otherwise possessing immunity, when such action follows from an ICC request) is to be reconciled with the international law obligations to accord immunity. Does Article 103 of the UN Charter apply here such that non-parties are able to give preference to the right which they are given through the implicit adoption of the Statute in Resolution 1593, *over* their obligations? There are two potential difficulties to the application of Article 103 here.

The first apparent obstacle is that there is not a conflict of obligations here. However, this obstacle is apparent only since this case does appear to fall within the authorizations which are taken as covered by Article 103.³⁹ This is a case of action under Chapter VII of the Charter and action intended to maintain the peace. Although the Security Council is able to require all states to cooperate with the ICC, and though ICC referrals might be more effective were it to do so, to require the Security Council to adopt an all or nothing approach is to deprive the Security Council of flexibility in taking action under Chapter VII. As Frowein and Krisch note, an interpretation of Article 103 that does not permit authorizations to prevail over treaty obligations would mean that:

[T]he Charter would not reach its goal of allowing the SC to take the action it deems most appropriate to deal with threats to the peace – it would force the SC to act either by way of binding measures or by way of recommendations, but would not permit intermediate forms of action. This would deprive the SC of much of the flexibility it is supposed to enjoy. It seems therefore preferable to apply the rule of article 103 to all action under articles 41 and 42 and not only to mandatory measures.⁴⁰

In this particular context, there may be good reasons for not wishing to require non-parties to cooperate with the Court. Such a proposal may make it less likely for a referral of a case to be adopted by the Security Council as non-parties to the state may object. However, the Security Council may wish to authorize such non-parties as are willing to assist in arresting and otherwise cooperating with the Court to do so.

Moreover, if the decision to remove immunities which would bar the jurisdiction of the ICC is a decision (though implicit) of the Security Council, it is binding under Article 25 of the Charter. Not only would it be binding on Sudan, the decision that immunities shall not bar the ICC from exercising its jurisdiction is one which all UN members are bound to accept. The *Namibia Advisory Opinion* of the International Court of Justice (ICJ) confirms that the Security Council is entitled to make decisions which are legally operative (in other words, they define a legal situation) with regard to one state but which

39 See the text at *supra* notes 36–37, and the authorities cited therein.

40 J. Frowein and N. Krisch, 'Article 42', in Simma, *supra* note 36, at 729.

also become binding on all states in so far as they are obliged to accept that the legal situation is as defined by the Security Council.⁴¹ In that case, although the Security Council resolution (Resolution 276) in question declared the illegality of South Africa's presence in Namibia, it did not explicitly require other states to do anything. That resolution went no further than calling upon states not to act inconsistently with the provision declaring the illegality of South Africa's continued presence. Nonetheless, the ICJ held that the resolution had consequences for all states, since other states were obliged not to recognize the illegality of South Africa's presence and obliged to refrain from acts which imply recognition of the legality of South Africa's presence in Namibia. The ICJ stated that:

... [W]hen the Security Council adopts a decision under Article 25 in accordance with the Charter, it is for member states to comply with that decision, including those members of the Security Council which voted against it and those Members of the United Nations who are not members of the Security Council. To hold otherwise would be to deprive this principal organ of its essential functions and powers under the Charter.⁴²

The ICJ also emphasized that whether or not the Security Council is to be regarded as having made a decision under Article 25 of the Charter does not depend solely on whether the Security Council uses mandatory language. Rather:

The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.⁴³

To conclude on this point, once the Security Council makes a *decision*, within the scope of its powers, by which it defines a legal situation or makes a determination, that determination or definition of the legal situation is binding on states.⁴⁴ Furthermore, whether a binding decision is made under Article 25 is to be determined by looking not just at the language of the resolution but the totality of the circumstances surrounding it.

Applied to the *Al Bashir* case, a determination by the Security Council — through the implicit adoption of the ICC Statute with respect to Sudan — that the immunity of Sudanese officials shall not bar the Court's jurisdiction, is enough to remove that immunity vis-à-vis all states. However, it is important

41 Advisory Opinion, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports, at 16.

42 *Ibid.*, §116.

43 *Ibid.*, §114.

44 E. Oberg, "The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ", 16 *European Journal of International Law* (2005) 879, 891.

to recall that though the immunity is removed, there is no obligation on non-parties to the ICC Statute to arrest. They are merely permitted to do so.

Even if it is accepted that the Security Council referral and the framework of the ICC Statute brought into effect for all states by the referral confers a right on all state to ignore international law immunities, this right can only be acted on if it can be shown that the right prevails over the obligations which states have under customary international law to accord immunity. There must be a basis to prefer the Security Council determination implicit in the referral over the obligations to accord immunity.

This leads to the second potential obstacle to the application of Article 103. In this case, the obligation to accord immunity to a serving head of state is an obligation which arises, in the main, under customary international law. Article 103 provides that obligations under the Charter prevail over obligations under any 'other international agreement'. It does not refer to a conflict between the Charter and customary international law. The question therefore arises whether that provision may be cited as justification for preferring a Charter based obligation (or in this case authorization) over an obligation under customary international law. The majority view among writers appears to be that given the nature of the Charter as a sort of 'constitutional' document, and given that treaties will in general prevail over customary law obligations, obligations under the Charter ought to be regarded as taking priority over the customary international law.⁴⁵ There seems to be no reason why the same should not apply to authorizations.

In summary, the removal of the immunity by Article 27 of the ICC Statute applies also at the national level (and not just with respect to the ICC). Referral of the situation to the ICC by the Security Council implicitly makes the Statute and Article 27 applicable to Sudan. Given that the Statute operates in this case not as a treaty but by virtue of a Security Council resolution, it may apply even to non-parties. They have no obligations under the Statute to arrest unless the Security Council explicitly requires this. However, they have the right to deny immunity as a result of the Security Council's implicit decision to adopt Article 27.

6. Does the Genocide Convention Provide an Obligation to Arrest?

In the *Al Bashir Arrest Warrant* decision, the PTC issued the arrest warrant only with respect to war crimes and crimes against humanity although the Prosecutor had sought that the warrant of arrest also cover genocide. The majority of the Chamber held that the materials provided by the prosecution

⁴⁵ See, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission, UN Doc. A/CN.4/L.682, 13 April 2006, §345. For a contrary view following an extensive analysis of the matter, see Liivoja, *supra* note 38.

failed to provide reasonable grounds to believe that Al Bashir and the Government of Sudan acted with the special intent to destroy in whole or in part the groups being targeted in Darfur.⁴⁶ The test applied by the majority with regard to the 'reasonable grounds to believe' requirement for issuing an arrest warrant has been criticized (rightly, in my view) as being unduly restrictive and erroneous.⁴⁷ The Prosecutor has appealed the decision of the PTC to reject the genocide charge to the Appeals Chamber.⁴⁸ Assuming the Appeals Chamber were to reinstate the genocide charge, the question arises whether this would create an obligation for parties to the Genocide Convention (1948) to arrest Al Bashir. The question arises because in the *Bosnian Genocide Convention Case*, the ICJ held that the Genocide Convention implicitly contains an obligation to cooperate with competent international courts, including an obligation to arrest persons suspected of genocide.⁴⁹

In that case, the ICJ found that Serbia had violated its obligation to punish genocide, as contained in Article 1 of the Genocide Convention, by failing to arrest and surrender to the ICTY persons wanted by that tribunal in connection with the genocide in Srebrenica.⁵⁰ The ICJ relied on Article VI of the Convention which provides that:

Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the state in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

The Court held that the ICTY was a competent international penal tribunal for the purposes of this provision. According to the Court, although the drafters of the Convention probably envisaged that such a tribunal would be created by treaty 'it would be contrary to the object of the provision to interpret the notion of 'international penal tribunal' restrictively in order to exclude from it a court which, as in the case of the ICTY, was created pursuant to a United Nations Security Council resolution adopted under Chapter VII of the Charter'.⁵¹ A similar argument may be applied with regard to the ICC when it is acting under Security Council referral.

46 *Al Bashir Arrest Warrant*, *supra* note 1, §§110–208.

47 M. Milanovic, 'The ICC Issues Arrest Warrant for Bashir but Rejects the Genocide Charge', 4 March 2009, *EJIL: Talk!*, available at <http://www.ejiltalk.org/icc-issues-arrest-warrant-for-bashir-but-rejects-the-genocide-charge/> (visited 12 April 2009); K. Heller, 'The Majority's Complete Misunderstanding of Reasonable Grounds', *EJIL: Talk!*, 5 March 2009, available at <http://opiniojuris.org/2009/03/05/the-majoritys-complete-misunderstanding-of-reasonable-grounds/> (last visited 12 April 2009).

48 Prosecution's Application for Leave to Appeal the Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *Al Bashir* (ICC-02/05-01/09-12), available at <http://www.icc-cpi.int/NR/exeres/CC751CCC-B58D-49A8-8073-83E0D06D3717.htm> (visited 12 April 2009).

49 *Application of the Convention on the Prevention and Punishment of Genocide (Bosnia Herzegovina v. Serbia & Montenegro)* 2007 ICJ Reports.

50 *Ibid.*, §§439–450.

51 *Ibid.*, §445.

The ICJ then implied an obligation on states to cooperate with such competent international tribunals and to arrest persons wanted by the tribunal when the state on whose territory the person is found has accepted the jurisdiction of that tribunal. The Court does not say on what basis it implies this obligation of cooperation⁵² and there is nothing in the text or drafting history that gives an indication of this obligation to cooperate. However, it turns out that, in the view of the Court, this obligation of cooperation only exists under the Genocide Convention if the obligation otherwise exists under some other instrument. This follows from the ICJ's statement that 'the question whether the Respondent must be regarded as having 'accepted the jurisdiction' of the ICTY within the meaning of Article VI must consequently be formulated as follows: is the Respondent obliged to accept the jurisdiction of the ICTY, and to co-operate with the Tribunal by virtue of the Security Council resolution which established it, or of some other rule of international law?'⁵³

Thus, the reasoning of the ICJ with regard to this obligation to cooperate arising under the Genocide Convention is circular. Parties to the Genocide Convention are obliged to cooperate with competent international tribunals, and this includes an obligation to arrest suspects. The obligation to cooperate only exists if the parties have accepted the jurisdiction of the international tribunal. But they are only to be deemed to have accepted that jurisdiction where they have an obligation to cooperate with the tribunal. So the obligation to cooperate under the Genocide Convention follows from an obligation to cooperate under another international law rule. In the case of the ICC, application of this rule would mean that parties to the ICC Statute, who already have an obligation to cooperate with the ICC, have an additional obligation to cooperate under the Genocide Convention where genocide is alleged. Non-parties still have no obligation to cooperate unless the Security Council creates such an obligation. Therefore, for non-parties to the ICC Statute, little is gained by reliance on the Genocide Convention.

For ICC parties, the existence of an obligation to cooperate and arrest under the Genocide Convention opens up a different argument with regard to Al Bashir's immunity. Under Article IV of the Convention, '[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'. This statement appears to be directed primarily at removing a substantive defence based on official capacity. However, the provision must also be taken as removing any procedural immunities, as the availability of any such immunities would be mean that the persons mentioned in Article IV are not punished. Immunities are removed before the two types of courts provided

52 *Ibid.*, §443: 'For it is certain that once such a court has been established, Article VI obliges the Contracting Parties "which shall have accepted its jurisdiction" to co-operate with it, which implies that they will arrest persons accused of genocide who are in their territory even if the crime of which they are accused was committed outside it and, failing prosecution of them in the parties' own courts, that they will hand them over for trial by the competent international tribunal.'

53 *Ibid.*, §446.

for in Article VI in the Genocide Convention: The courts of the territory where the genocide occurred and a competent international penal tribunal whose jurisdiction is accepted the state in question.

Since, according to the ICJ's logic, states parties to the ICC Statute have an obligation to cooperate with the ICC when persons wanted for genocide are on their territory, and since Article IV of the Genocide Convention provides that even heads of state and public officials are to be punished, it could be argued the Genocide Convention imposes an obligation on ICC states to arrest those wanted for genocide, even if they are the head of state. This argument bypasses somewhat the application of Article 27 of the ICC Statute and the question of whether Sudan is to be regarded as in the position of a party to the ICC Statute. Here the obligation of ICC parties to arrest is based on the acceptance of the ICC's jurisdiction by that party and the imposition of ICC jurisdiction on Sudan. Furthermore, the removal of immunity is based on the acceptance of the Genocide Convention by the arresting party and by Sudan.

The other thing to be gained by finding an obligation to cooperate within the Genocide Convention is to allow the ICJ to exercise jurisdiction over a dispute about non-cooperation.⁵⁴

7. Immunities of Representatives to the United Nations

Despite the arguments above, there is one set of immunities that may not be removed by the Security Council. These are the immunities of representatives to the United Nations. These immunities are conferred by the UN General Convention on Privileges and Immunity.⁵⁵ However, they are also conferred by Article 105(2) of the UN Charter which provides that:

Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.

Under Article 105(3), the immunities set out in the UN General Convention are to be regarded as providing the necessary detail for the application of Article 105(2). Therefore, that treaty has a status similar to that of the Charter.⁵⁶ Since the immunities under the General Convention derive from the Charter, they are binding on the Security Council.

Therefore if Al Bashir were to travel to the United States to attend a meeting of the UN General Assembly (or to any other country for the purpose of representing his country at a UN meeting) he would be immune from arrest.

54 Art. IX of the Genocide Convention allows for reference of disputes concerning the interpretation or application of the Convention to the ICJ.

55 *Supra* note 38.

56 For a similar view with regard to the Headquarters Agreement with the United States, see Bernhardt, *supra* note 36, §10.

However, in such case, he would need a visa and the question would arise as to whether he could be denied entry. Under sections 11–13 of the United Nations' Headquarters Agreement with the United States (1947), the United States is under an obligation to permit entry of representatives to the Headquarter's district. This obligation exists irrespective of the relations between the US government and that of the state of the representative. Any necessary visas are to be granted as promptly as possible. Although the United States has, on occasion, argued that these nearly absolute obligations are subject to exception with regard to persons who in the view of the United States have violated international law or are 'wicked' people, these arguments have not been accepted by the UN.⁵⁷ Therefore, if Al Bashir were bold enough he would not only have the right to represent his state at UN meetings, he would be immune from arrest were he to do so.

57 See generally, M. Reisman, 'The Arafat Visa Affair: Exceeding the Bounds of Host State Discretion', 83 *American Journal of International Law* (1989) 519.