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THE CONTINUING STORY OF THE INTERNATIONAL CRIMINAL COURT AND PERSONAL IMMUNITIES

Harmen van der Wilt

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The continuing story of the International Criminal Court and personal immunities.

1) Introduction

Immunities of state officials for international crimes are a highly controversial topic. As is well known, the International Criminal Court (hereafter: ICC) has issued a warrant for the arrest and surrender of the incumbent president of Sudan Al Bashir and has held that his current position as Head of a state – which is not a party to the Rome Statute – ‘has no effect on the Court’s jurisdiction over the present case.’¹ After Chad and Malawi – both States Parties to the Rome Statute – had refused to surrender Al Bashir when he visited those countries, the Pre Trial Chamber – in a different composition – held these states liable for their failure to comply with the cooperation requests issued by the Court.² This final decision in its turn spawned a fierce reaction from the African Union Commission which expressed its ‘deep regret’, arguing that the decision purported to change customary international law in relation to immunity *ratione personae*.³ In the meantime, the Protocol on the Statute of the African Court of Justice and Human Rights that seeks to expand the judicial powers of that court with criminal jurisdiction has preserved the personal jurisdiction of acting heads of states.⁴

The ICC was not swayed by this vociferous resistance and reiterated its position that states-parties are under an obligation to cooperate with the Court and surrender Al-Bashir, when the Democratic Republic of Congo appeared reluctant to do so.⁵ However, while Pre Trial Chamber I in the Malawi/Chad cases predicated its decision on customary international law, Pre Trial Chamber II in the case against Congo referred to the Resolution of the Security Council that prompted Sudan to cooperate fully with the Court. The Chamber subsequently invoked Article 103 of the UN Charter, which gives precedence to obligations of and ensuing

¹ ICC, Situation in Darfur, Sudan, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-3, 4 March 2009, § 41.

² ICC, Situation in Darfur, Sudan, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, No.: ICC-02/05-01/09, 12 December 2011.

³ Press Release of 9 January 2012 on the Decision of Pre-Trial Chamber I of the International Criminal Court pursuant to Article 87(7) of the Rome Statute on the Alleged Failure by the Republic of Chad and the Republic of Malawi to Comply with the Cooperative Requests Issued by the Court with respect to the Arrest and Surrender of President Omar Hassan Al Bashir of the Republic of the Sudan.

⁴ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, African Union, First Meeting of the Specialized technical Committee on Justice and Legal Affairs, 15-16 May 2014, Addis Abeba, Ethiopia, STC/Legal?Min7 (1) Rev. 1, Article 46Abis: “No charges shall be commenced or continued against any serving African Union Head or 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”.

⁵ ICC, Situation in Darfur, Sudan, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court, ICC-02/05-01/09, 9 April 2014.

from the Charter over all contrary obligations.⁶ The itinerant President of Sudan has continued causing headaches to both African countries and the ICC, lastly at the occasion of his visit to South Africa, where the Executive flouted the injunction of a domestic court to arrest and detain Al Bashir, pending a formal request for his surrender from the ICC.⁷

The position of heads of states of non-states parties vis à vis the International Criminal Court and the issue of their immunity have triggered much scholarly debate.⁸ Most writers have been rather critical on the Malawi/Chad decisions of December 2011 and have favoured the 'Security Council' solution.⁹ In this contribution to the honour of Mirjan Damaska I will defend the – seemingly radical and by no means generally accepted opinion, expressed by the second decision of the PTC I (In re Malawi) that seeks to ground the entire abolition of personal immunities before the ICC (including those of heads of states that have not ratified the Rome Statute) on customary international law and not on a Resolution of the Security Council. Different from most of the analyses of my esteemed colleagues, I will not engage in a meticulous legal assessment. Nor will I inquire whether the non-immunity of heads of states before international courts has indeed solidified into a rule of customary international law. Such an investigation would exceed the scope of this contribution.¹⁰ I would rather follow a normative approach and sustain my support for the PTC decision with some reflections on the development of the concept of national sovereignty, against the backdrop of the burgeoning philosophy of international criminal law.

Basically, I will argue that international criminal justice entails a partial erosion of state sovereignty. And because high ranking state officials, like heads of states, are identified with the state – a connection that is reflected in the concept of immunities itself – this

⁶ Decision on the Cooperation of the Democratic Republic of the Congo, n. 5, § 31. Compare the searching analysis by Nerina Boschiero, 'The ICC Judicial Finding on Non-cooperation Against the DRC and No Immunity for Al-Bashir Based on UNSC Resolution 1593', 13 *Journal of International Criminal Justice* (2015), 625-653.

⁷ See *Southern African Litigation Centre v. the Minister of Justice and Constitutional Development and Others*, High Court of South Africa, Gauteng Division, Pretoria, Case Number: 27740/2015, 24 June 2015, § 11, available at: <http://www.southernafricalitigationcentre.org/cases/ongoing-cases/south-africasudan-seeking-implementation-of-icc-arrest-warrant-for-president-bashir/> (last visited 26 August 2015). For an excellent analysis, see Erika de Wet, 'The implications of the visit of Al Bashir to South Africa for international and domestic law' (on file with the author, forthcoming in *Journal of International Criminal Justice*).

⁸ See, amongst others, Dapo Akande, 'International Law Immunities and the International Criminal Court', 98 *American Journal of International Law* (2004), 407; Paola Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?' 7 *Journal of International Criminal Justice* (2009), 315; Claus Kress, 'The International Criminal Court and Immunities under International Law for States Not Party to the Court's Statute', in: Morten Bergsmo and Ling Yan (eds.) *State Sovereignty and International Criminal Law FICHL Publication Series No. 15* (2012), 223; Dire Tladi, 'The ICC Decisions on Chad and Malawi: On Cooperation, Immunities and Article 98', 11 *Journal of International Criminal Justice* (2013), 199.

⁹ Compare the references to countless blogposts by Boschiero (n. 6) in footnotes 59 and 60. She expresses preference for this construction as well.

¹⁰ In its 'Malawi decision', the PTC pointed at a number of developments, including 'the increase in Head of State prosecutions by international courts in the last decade' and concluded that 'the international community's commitment to rejecting immunity in circumstances where international courts seek to arrest for international crimes has reached a critical mass.' PTC I, 12 December 2011, n. 2, § 42. Claus Kress who, like the present writer, supports the customary international law approach, 'seriously doubts that a 'compelling defence is possible at this stage of the development of the law' (Kress, n. 8, 263).

encroachment will backfire on these state officials through their loss of immunities. The very concept of international criminal justice is incompatible with the preservation of immunities before international criminal courts.

The article is structured as follows. Section 2 will briefly summarize the current state of international law in respect of immunities by addressing the distinction between functional and personal immunities and the difference between immunities within the horizontal (inter-state) and vertical context. Section 3 elaborates the core of the argument that immunities cannot be reconciled with international criminal justice. In section 4 I will discuss how the 'Security Council solution' and the 'customary international law approach' conceive the translation of the vertical relationship between the ICC and states to inter-state relations, a problem that is reflected in the contradiction between Article 27 and Article 98(1) of the Rome Statute. And finally, in section 5, I will summarize my main findings and ponder on the question whether our dear friend Mirjan Damaška would agree with my bold ideas.

2) Immunities: State of the Art in international law

In the context of prosecution for international crimes, courts and legal doctrine have distinguished between functional and personal immunities (immunity *ratione materiae* and immunity *ratione personae*, respectively).¹¹ Functional immunities pertain to the 'official' conduct of state representatives that can be considered as actions of the state. It conveys the idea of sovereign equality and that no state should sit in judgment over the actions of another state (in line with the maxim *Par in parem non habet imperium*). Personal immunity attaches to certain representatives of the state while they are in office. It covers both official acts and private conduct but evaporates with the official leaving office. To a certain extent, both immunities are complementary. Whereas functional immunities potentially benefit a vast category of state officials and offer permanent protection, the conduct that is covered by the immunity is limited (only 'official' acts). On the other hand, personal immunities entail comprehensive shelter against criminal prosecution, but only for a restricted number of state officials (heads of states, ministers of foreign affairs, diplomats) and they are temporary in nature.¹²

The landmark decision of the House of Lords in the case of former dictator of Chile, Augusto Pinochet, is often advanced as proof that functional immunities for international crimes are on the wane.¹³ One should perhaps be cautious not to jump to conclusions, because the Lords all vented their separate (and slightly differing) opinions and the judgment arguably

¹¹ For a very lucid explanation, see Robert Cryer, Håkan Friman, Darryl Robinson, Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, 3rd ed. Cambridge 2014, 542.

¹² *Ibidem*.

¹³ *R v. Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte* (No. 3) [1999], 2 All ER 97, HL (hereafter: Pinochet-case).

applied to the limited issue whether functional immunities for *torture* still prevailed.¹⁴ Indeed, Lord Millet referred to torture when he argued that

‘the offence is one which could only be committed in circumstances which would normally give rise to the immunity. The international community had created an offence for which immunity *ratione materiae* could not possibly be available. International law cannot be supposed to have established a crime having the character of *ius cogens* and at the same time to have provided immunity which is co-extensive with the obligation to impose.’¹⁵

However, the findings of Lord Browne-Wilkinson and Lord Hutton that ‘these acts could not rank for immunity purposes as performance of an official function’ suggest a wider bearing that is not restricted to torture, but covers all international crimes.¹⁶

While former heads of states and other high officials who have stepped down from office may have reason to fear prosecution for international crimes, personal immunity still persists and offers complete protection, at least in the context of inter-state relations. To be sure, the International Court of Justice (ICJ) in the *Arrest Warrant* case was ‘unable to deduce from State practice that there exists under customary international law any (...) exception (to personal immunity) for war crimes or crimes against humanity.’¹⁷ However, in its famous *obiter dictum* the ICJ emphasized that *immunity* from jurisdiction did not necessarily imply *impunity*, adding that ‘immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts.’¹⁸ The ICJ identified four circumstances in which an incumbent or former state official – in this particular case the Minister of Foreign Affairs of the Democratic Republic of the Congo, Mr. Yerodia – might be subject to criminal proceedings. First, he would not enjoy any criminal immunity under international law before the domestic courts of his home country. Secondly, he would cease to enjoy immunity if the State which he represented decided to waive that immunity. Thirdly, he would be exposed to criminal prosecution in another State after he had left office, in respect of acts committed prior or subsequent to his period in office and in respect of acts committed during that period of office in a private capacity. And finally, an incumbent or former Minister of Foreign Affairs may be subject to criminal proceedings before ‘certain international criminal courts, where they have jurisdiction.’¹⁹ For the purpose of this article, the last situation is obviously the most relevant. The ICJ explicitly mentioned the ICC as an

¹⁴ Compare R. van Alebeek, *The Immunity of States and their Officials in the Light of International Criminal Law and International Human Rights Law*, Oxford 2008, 237.

¹⁵ Pinochet-case, 179.

¹⁶ Pinochet-case, 114 (Browne-Wilkinson) and 166 (Hutton).

¹⁷ ICJ, 14 February 2002 General List No. 121, Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), § 58.

¹⁸ Arrest Warrant case, § 60.

¹⁹ Arrest Warrant case, § 61. For a searching analysis of this important judgment, see Antonio Cassese, ‘When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case’ 13 *European Journal of International Law* (2002), 853.

example of such international criminal courts.²⁰ Article 27, section 2 of the Rome Statute unambiguously holds that ‘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 provision espouses one of the famous Nuremberg Principles.²¹

As Article 27 of the Rome Statute does not distinguish between functional immunity and personal immunity and therefore stipulates that no state official enjoys immunity before the Court, the position of incumbent heads of states before the ICC clearly deviates from the one he still holds before foreign domestic courts. The question is why this should be so. It seems to be a good idea to start the discourse with some reflections on the rationales for immunities.

3) On the incompatibility of immunities and international criminal justice

Whereas functional immunities are usually understood against the backdrop of the high authority of the sovereign state which does not tolerate superior authority to sit in judgment of its acts, personal immunities derive from more practical considerations. Criminal prosecution of high state officials would seriously impede their traveling abroad and thus affect international relations. By and large that distinction is warranted and makes sense, but one should beware not to exaggerate it at the risk of simplifying matters. In case of personal immunities, the symbolic ‘perfection’ and inviolability of the state is also at stake. This similarity in the underlying rationales for functional and personal immunities comes in particular to the fore in the case of prosecution for international crimes before international criminal tribunals. In elaborating on the different contexts – international versus domestic – in which immunity issues had to be assessed, the Appeals Chamber of the Special Court for Sierra Leone in the Taylor case made an important observation:

‘A reason for the distinction, in this regard, between national courts and international courts, though not immediately evident, would appear due to the fact that the principle that one sovereign state does not adjudicate on the conduct of another state: the principle of state immunity derives from the equality of sovereign states and therefore has no relevance to international criminal tribunals which are not organs of a state but derive their mandate from the international community.’²²

Cryer et al. have criticized this passage in the Taylor case as it would

²⁰ Ibidem.

²¹ Nuremberg Principle, Geneva, 29 July 1950, UNGA OR, 5th Session, Supp. No. 12, UN Doc. A/1316 (1950), Principle 3: ‘The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible government official does not relieve him from responsibility under international law.’

²² Special Court for Sierra Leone, *Prosecutor v. Taylor*, Decision on Immunity from Jurisdiction, SCSL-2003-01-I, 31 May 2004, § 51.

‘misidentify the rationale for personal immunity. The principle *par in parem non habet iudicium* is the basis for functional immunity, not personal immunity. Personal immunity exists to protect international relations by precluding any basis to interfere with high representatives without the consent of their sending State.’²³

As indicated above, I find this proposition too rigid. The Taylor decision conveys that – apart from any practical considerations – personal immunities serve to protect states from embarrassing insults of their high representatives that will immediately backfire on themselves. The reference to ‘conduct’ in the decision may not be entirely apposite (as it indeed points in the direction of functional immunities and therefore confuses both specimen), but the Appeals Chamber in my view intentionally wished to emphasize that the rationales of both immunities are not very far apart.

The Appeals Chamber’s finding in *Taylor* conveys the message that international criminal tribunals owe less deference to the state’s sovereignty than states do owe to each other on a mutual basis. That is a crucial observation, because international criminal law enforcement indeed, by definition, implies an incursion of the sovereignty of a state. After all, international criminal tribunals and the ICC intervene in the domestic prerogatives of a state, by claiming the right to start criminal prosecutions, which exemplifies the state’s sovereign power.²⁴ The discussion centers around the question when – in what situations – such intervention is warranted. Larry May has famously developed his two principles – the security principle and the international harm principle – in order to shed light on the issue.²⁵ May starts from the premise that the State’s primary assignment is to seek and guarantee the freedom, security and well-being of its citizens. It can be considered as the State’s *raison d’être*. If a state defaults on this primordial obligation – either by suppressing its own citizens, or by failing to protect them against systematic violence by others – the state forfeits (part of) its sovereignty and it provides a good *prima facie* case for intervention by the international community, through the appropriation of criminal law enforcement. Such an intervention, however, implies – next to the incursion of a state’s sovereignty – deprivation of fundamental rights of the accused and therefore May postulates the fulfillment of another principle: the humanitarian crisis must involve the interests of the entire international community (international harm principle).²⁶ According to May, crimes against humanity would in particular qualify. Now one might discuss the relative weight and relevance of these principles and question whether they need *both* be triggered.²⁷ But that

²³ Cryer et al., n. 11, 563.

²⁴ Whether these international tribunals enjoy ‘primacy’ (as in the case of the ad hoc tribunals) or act on the basis of complementarity (the ICC) is of secondary importance. The point is that they have the authority to overrule territorial jurisdiction.

²⁵ Larry May, *Crimes against Humanity: A Normative Account*, Oxford 2005.

²⁶ May, n. 25, 82/83.

²⁷ In a general positive appraisal of May’s work, I have criticized the international harm principle which I consider redundant, see Harmen van der Wilt, ‘Crimes against humanity: a category *hors concours* in (international) criminal law?’ in: B. van Beers, L. Corrias, W. Werner (eds.) *Humanity across International Law and Biolaw*, Cambridge 2014, 25-42.

is not our major concern here. The great merit of May's analysis is that he has provided justificatory reasons for infringement of sovereignty by international criminal law enforcement.

If we accept that international criminal courts are authorized to make incursions on a state's sovereignty, it requires only a small step to understand that this must have repercussions for – personal and functional – immunities. After all, both functional and personal immunities connote the identification of the state and its representatives, as was obviously suggested in the Taylor decision. For sure, this relationship has developed overtime and is less 'intimate' than in the past. We are far removed from mediaeval times when the king embodied the state.²⁸ But remnants of this identification persist until this very day and certainly are displayed in the positivist conception of the legal system in which states are the sole subjects of international law. That conception dovetailed with the 'act of state' doctrine which shielded the individual, acting de jure on behalf of or in fact authorized by the state, from responsibility. The severance between the state and its 'representatives' came about after the Second World War when the Nuremberg Tribunal acknowledged that individuals could incur criminal responsibility under international law, without the necessary implication of the state.²⁹ But until this very day the rather close connection between the state and its representatives is demonstrated by the frequent coincidence of state responsibility and individual responsibility.³⁰ Moreover, it is still reflected, as I contended before, in the very institute of immunity.

The erosion of the state's sovereignty as the result of the proliferation of international criminal justice has an interesting and perhaps surprising effect on immunities. Whereas the identification of the state with its officials has previously served as the major argument for their preservation, it is now instrumental to their demolition. It is now possible to combine the elements briefly exposed above in order to sustain my main point. The close connection between the state and its representatives in the face of international criminal law enforcement has two consequences. For one thing, representatives of the state cannot hide behind the shield of the sovereign state because the very fabric of sovereignty has been eroded. Secondly, the (implied) assault on state sovereignty – the assault is not accidental, but intentional, because international criminal law enforcement requires piercing the cuirass of sovereignty – must have repercussions for the state representatives, because the

²⁸ The medieval political theology postulates a similarity between the eternal corporation (*universitas*) and the Dignity that never dies (*Dignitas quae non moritur*). The latter is epitomized in the King whose eternal body is preserved by the dynasty. For a profound and beautiful analysis, see Ernst H. Kantorowicz, *The Kings Two Bodies; A Study in Medieval Political Theology*, Princeton 1957, especially 383-450.

²⁹ For a concise but clear exposition of the developments in international law, see John P Cerone, 'Much Ado About Non-state Actors: The vanishing Relevance of State Affiliation in International Criminal Law', 1-12.

³⁰ See for reflections on the relationship between state responsibility and individual responsibility: M. Spinedi, 'State Responsibility v. Individual Responsibility for International Crimes: *Tertium Non Datur?*' 13 *European Journal of International Law* (2002), 895 and A. Nollkaemper, 'Concurrence between Individual Responsibility and State Responsibility in International Law', 52 *International and Comparative Law Quarterly* (2003), 615.

state itself cannot be criminally prosecuted. After all, corporate criminal responsibility is unknown under the Rome Statute.³¹

Obviously, any decision to intervene by the ICC does not automatically involve the guilt of state representatives. Their individual responsibility must be assessed by a court of law. It does, however entail that their liability cannot be excluded systematically and on principle. This argument can be sustained by other considerations. For one thing, international criminal law enforcement is all-inclusive. The nature of the crimes does not allow that some individual suspects get off scot free.³² That principle has been accepted in the context of functional immunity, but the same applies in respect of personal immunities. Secondly, international criminal law enforcement focuses on those bearing the greatest responsibility.³³ That intention cannot be reconciled with an axiomatic preclusion from criminal responsibility of those who plan, organize and initiate systematic repression of people. It follows that personal immunities cannot be reconciled with the ambition of international criminal justice to intervene and mete out justice, whenever states appear to be incapable of doing so.

4) The ICC, states parties and states not parties to the Statute: a complex triangle

The previous section has revealed that incumbent heads of states and other officials do not enjoy personal immunities before international criminal tribunals, including the ICC. Whereas this conclusion is of paramount importance from a principled point of view, its practical relevance is slight, because states, while under an obligation to do so, would usually not be inclined to surrender their highest representatives and expose them to the Court. The latter must therefore often rely on other states that might seize the opportunity to apprehend the state official, suspected of international crime, whenever he visits their country and subsequently surrender him to the Court. However, it is not axiomatic that other states can similarly ignore the personal immunities of state officials in their horizontal

³¹ Article 25 (1) of the Rome Statute explicitly states that the Court shall have jurisdiction over *natural* persons. For an investigations of the possibilities to introduce corporate criminal responsibility in the Statute *de lege ferenda*, see Harmen van der Wilt, 'Corporate Criminal Responsibility for International Crimes: exploring the Possibilities', 12 *Chinese Journal of International Law* (2013), 43.

³² The Preamble of the Rome Statute in general terms affirms that 'the most serious crimes of concern to the international community as a whole must not go unpunished' without making any exception for any perpetrator. In respect of the actor, it emphasizes the need 'to put an end to impunity for the perpetrators of these crimes', again without any distinction.

³³ Article 1 of the Statute of the Special Court for Sierra Leone (Freetown, 16 January 2002) explicitly provides that 'The Special Court shall (...) have the power to prosecute persons who bear the greatest responsibility for international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of an implementation of the peace process in Sierra Leone'. The Rome Statute does not have an equivalent provision but the ICC Prosecutor has indicated that, in the selection of cases, he would in particular pay attention to the circumstance that the individual belonged to those "who bear the greatest responsibility for the most serious crimes." Prosecutorial Strategy, 2009-2012, 1 February 2010, The Hague, § 19; available at <http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPPProsecutorialStrategy20092013.pdf>. (last visited on 2 September 2015)

relations with other states. In other words: the issue of immunities is not restricted to the (vertical) relation between a state and the Court; it has horizontal ramifications. This complexity has been widely acknowledged in legal literature. Dire Tladi, for instance, argues that ‘ (...) even if the assertion that customary international law excludes immunities in proceedings before international courts were correct (...) this would apply only as between the state official appearing before the court and the international court or tribunal concerned and would not, by itself, affect the relationship between states *inter se*.’³⁴ Article 98 (1) of the Rome Statute refers to this horizontal (inter-state) dimension. It provides that ‘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 co-operation of that third State for the waiver of the immunity.’ It is generally acknowledged that this article applies only to third states that are not a party to the Rome Statute, because States Parties have already waived any claims to immunity by ratifying the Rome Statute and such a waiver ‘must extend to the triangular relationship between the Court, the requested State Party and the “third” State Party.’³⁵

The real problems in the realm of lasting immunities occur therefore in the relations between the ICC and states not party to the Statute, as already emerged in the frequent collisions in respect of the requested surrender of Al Bashir. The issue boils down to two questions:

- a) Do international law immunities preclude the ICC from exercising jurisdiction over an incumbent head of State (etc.) that is not a party to the Statute? (The one-dimensional, vertical connection)
- b) Would States Parties violate their obligations under international law by complying with an ICC-request to surrender the incumbent head of state, not party to the Rome Statute? (the ‘triangular connection’)

Kress correctly holds that these two questions should be distinguished and that the former logically precedes the latter.³⁶ However, although these questions are legally separate, both Pre Trial Chambers, preferring the Security Council solution and favouring the ‘customary international law- approach’ respectively, have been inclined to connect them and lump them together. The Pre Trial Chamber in the Congo case started from the assumption that the lifting of immunities – as provided in Article 27(2) Statute – only applied to States Parties.³⁷ The only way to remedy this inconvenience was to secure a waiver of the non-

³⁴ Dire Tladi, ‘The Immunity Provision in the AU Amendment Protocol; Separating the (Doctrinal) Wheat from the (Normative) Chaff’, 13 *Journal of International Criminal Justice* (2015) , 14/15.

³⁵ Kress, n. 8, 239. For a similar point of view, Akande, n. 8, 423–425. See also ICC, Prosecutor v. Al Bashir, 12 December 2011, n.2, § 18: ‘(...) acceptance of article 27(2) of the Statute, implies waiver of immunities for the purposes of article 98(1) of the Statute with respect to proceedings conducted by the Court.’

³⁶ Kress, n. 8, 225/226.

³⁷ ICC, Prosecutor v. Al Bashir, 9 April 2014 (n. 5), § 26: ‘(...) the exception to the exercise of the Court’s jurisdiction provided in article 27(2) of the Statute should, in principle, be confined to those States Parties who

party State (Sudan) under pressure of the Security Council and this waiver had already been implicitly obtained. After all, Resolution 1593(2005) stipulated that the “Government of Sudan [...] shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution”. That order to cooperate included the lifting of immunities, because ‘any other interpretation would render the SC decision requiring that Sudan “cooperate fully” and “provide necessary assistance to the Court” senseless.’³⁸ The implied waiver simultaneously resolved all problems in the inter-state context, because the ICC, by obtaining the waiver, had complied with the requirements under Article 98(1) Statute and could now proceed with requesting surrender from the Congo.

The Pre Trial Chamber in the Malawi/ Chad cases reached the same outcome but followed a different track. The connection between the vertical dimension and the horizontal relations between states, however, was equally clear. The PTC argued that (personal) immunities no longer prevail before international criminal courts and that states parties would *therefore* not act inconsistently with their obligations under international law by surrendering incumbent heads of states to the ICC (regardless of a SC Resolution). The Chamber explained its position by emphasizing that a state party that receives a request for surrender from the Court and to that purpose arrests a foreign head of state acts as a fiduciary of the Court. The arrest does not serve its own criminal law enforcement.³⁹ Claus Kress concurs with the finding of the PTC, commenting that ‘Pre Trial Chamber I was therefore justified to believe that the principles underlying the customary law exception to the international immunity *ratione personae* cover the triangular relationship in question.’⁴⁰

Both decisions reveal some common ground by forging a link between the abolition of immunities before international criminal courts and the concomitant obligation of states to sidestep immunities as well. From the perspective of effective international criminal law enforcement that makes sense. States are not likely to voluntarily expose their incumbent heads of states or other high officials to the Court. Article 27 Rome Statute would remain a dead letter if states parties were estopped from acting as the Court’s instruments. In my opinion, the reasoning of the PTC in the Malawi-case is superior from a legal perspective. The ‘Security Council solution’ is somewhat contrived. For one thing, the PTC in the Congo decision seems to forget that immunities are an asset of the state. States may be forced to waive an immunity, but it is far-fetched to speak of an ‘implicit waiver by the Security

have accepted it.’ For a similar point of view, see William A. Schabas, *The International Criminal Court; A Commentary on the Rome Statute*, Oxford 2010, 450: ‘(...) article 27(2) cannot apply to Heads of State of non-party States who retain their immunity under customary international law.’

³⁸ ICC, Prosecutor v. Al Bashir, 9 April 2014 (n. 5), § 29.

³⁹ ICC, Prosecutor v. Al Bashir, 12 December 2011 (footnote 2), § 46: ‘when cooperating with this Court and therefore acting on its behalf, States Parties are instruments for the enforcement of the *jus puniendi* of the international community whose exercise has been entrusted to this Court when States have failed to prosecute those responsible for the crimes within this jurisdiction.’

⁴⁰ Kress, footnote 8, p. 257.

Council'.⁴¹ Secondly, the 'power-play' of the Security Council governs the horizontal dimension as well. The Court is satisfied having obtained the 'waiver' and ignores the real predicaments of states facing conflicting obligations. The Pre Trial Chamber in the Malawi/Chad decision, on the other hand, acknowledges that waivers are irrelevant in the vertical relationship between the international criminal tribunals and states.⁴² Next, it explicitly addresses the inter-state context, by emphasizing that the states do not act out of self-interest, but as trustees of the Court. It yields a coherent picture of international criminal justice as a concerted affair.

5) Some final reflections

In this contribution to a 'Festschrift' for Mirjan Damaška I have argued that (personal) immunities are fundamentally incompatible with international criminal justice. This implies that no head of state – irrespective of whether that state is a party to the Rome Statute or not – enjoys immunity before the ICC. Moreover, all states parties to the Rome Statute are under an obligation to arrest and surrender heads of states that are accused of 'core crimes', on the request of the ICC. And finally I am of the opinion that such an obligation is not dependent on a resolution by the Security Council, but emanates from customary international law.

I have tried to sustain my position by addressing the rationales for personal and functional immunity. Different from what is often contended, they do not diverge very much. Both reflect the intimate relationship between states and their representatives in that the infringement of immunity is considered as an affront to the sovereign power of the state. As international criminal justice by definition entails a partial erosion of the sovereignty of the state, the immunity of heads of states and other high officials cannot be left untouched.

The International Criminal Court and the scholarly community acknowledge that incumbent heads of states – even if the state is not a party to the Statute – do not enjoy immunity before the Court and that states parties should follow suit by surrendering these persons on request. However, this conclusion is reached by different tracks that I have dubbed colloquially as the 'Security Council solution' and the 'customary international law approach'. My preference for the latter approach glimmers through the theoretical considerations in section 3. However, I have attempted to demonstrate in section 4 that the Malawi/Chad decisions, while vehemently criticized, also offer a more elegant and convincing solution for the question how to translate the abolition of personal immunities before the ICC to the horizontal dimension.⁴³

⁴¹ ICC, Prosecutor v. Al Bashir, 9 April 2014 (n. 5), § 29: 'By virtue of (paragraph 2 of SC Resolution 1593 (2005)), the SC implicitly waived the immunities granted to Omar Al Bashir (...)'.

⁴² It should be recalled that the ICJ in the Arrest Warrant case identified the waiver by the state and the prosecution by international courts and tribunals as two *separate* exceptions to personal immunities.

⁴³ For all I know, the only academic writer who also favours this position is Claus Kress (n. 8). I feel indebted to him, as his acute observations have partially inspired me to write this article.

The 'customary international law approach' has a number of additional advantages. For one thing, it offers release from political bondage. The ICC is not dependent on a Resolution of the Security Council for the prosecution of the head of a state not party to the Statute. If the ICC already has jurisdiction on the basis of territoriality – because the effects of the conduct of the head of state have materialized on the territory of a State Part – a Resolution of the Security Council is redundant. In this context it may be noted that Paola Gaeta has correctly observed that a Resolution of the Security Council, within the legal framework of the Statute, 'merely' creates jurisdiction for the Court, beyond the system of state consent; it does not change or adapt the obligations of states.⁴⁴ But apart from these benefits, I prefer the 'customary international law' approach out of principle.

At the end of my contribution, I am tempted to ask myself whether Mirjan Damaška would agree with my analysis and point of view. In his searching article on the goals of international criminal justice Damaška addresses the problem of selectivity.⁴⁵ He somewhat laconically observes that 'to wait for the global community to supersede states as the dominant actor in the international arena would be to succumb to self-subversion, or worse, to surrender to the blackmail of perfection.' And he adds that 'it is better to bring some human rights abusers to justice than none at all: the best should not be the enemy of the good.'⁴⁶ It is a call to realism and pragmatism and I presume that Damaška could live with a decision of the Court not to pursue the prosecution of an incumbent head of state because it is not (yet) politically feasible. On the other hand, Damaška has often advocated the expressive and didactic function of international criminal justice.⁴⁷ International criminal law serves mainly to instill the general public with minimal notions of morality and the assurance that the most serious trespassers will be punished. Any categorical exclusion of state officials defies such a didactic objective and will breed cynicism. From that perspective, I am sure that Damaška will agree that the prosecution and trial of heads of states who are suspected of the worst imaginable crimes should at least be possible.

⁴⁴ Gaeta, n. 8, 322.

⁴⁵ Mirjan R. Damaška, 'What is the Point of International Criminal Justice?', 83 *Chicago Kent Law Review* (2008), 329.

⁴⁶ Damaška, n. 45, 362.

⁴⁷ Damaška, n. 45, 343-347 and M. Damaška, 'The Shadow Side of Command Responsibility', 49 *American Journal of Comparative Law* (2001), 455.