

The Seesaw Exercise of Immunity Obligations Under International (Criminal) Law Outside the “Security Council Route”

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Introduction

The International Criminal Court can exercise jurisdiction over Heads of States (“HoS”) that are not party to the Rome Statute provided the alleged offenses are committed in State party territory. However, the problem arises in the enforcement of such jurisdiction as it involves State-to-State interactions in the process of arrest and surrender of the HoS, as concerns over the application of diplomatic immunity arise. The State which receives the warrant for arrest and surrender (“requested State”), is in a unique predicament which involves the complex balancing exercise of following its Rome State obligation on one side of this jurisdictional seesaw and the diplomatic rights it owes to the HoS under international law on the other. Recently, the States have been pulled out of this conflict-of-norms dilemma and the see-saw has rested comfortably on the side of the Rome State obligations, as seen in *Al-Bashir* case, following the “Security Council Route.” However, we recognize the possibility of the Security Council being paralyzed by an unreasonable veto despite such grave atrocities being committed at large. To ensure that perpetrators will not go unpunished, we postulate four distinct and independent approaches operating outside the ambit of this Security Council Route for the requested State to employ in order for it to comply with its Rome Statute obligations while also being compliant with international law and not breaching any immunity obligations.

I. Exposition of the “Security Council Route”

Looking back at the [situation in Darfur](#) concerning the Sudanese HoS Omar Al-Bashir, there were several concerns before the International Criminal Court (“ICC”) regarding the African Union States’ conflicting obligations in the arrest and surrender of Al-Bashir. These conflicting obligations were to grant HoS immunity as under customary international law

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or treaty on the one hand versus the obligation to arrest and surrender the HoS under Part IX of the Rome Statute on the other. Despite Sudan not being a party to the Rome Statute and Al-Bashir being a HoS and holding diplomatic immunity, the ICC was capable of exercising its jurisdiction and requesting his arrest and surrender on account of the Security Council Resolution 1593. The S.C. Resolution obligated all States, including Sudan, to “cooperate fully” with the ICC. The ICC found two equally effective immunity-displacing interpretations of the S.C. Resolution: *firstly*, by “cooperating fully” the [immunities of Al-Bashir were implicitly waived](#) and *secondly*, “cooperating fully with the Court” would entail that the Rome Statute governs the terms of Sudan’s cooperation, thereby [triggering Article 27\(2\) which renders any immunity inapplicable](#). Additionally, the dilemma of conflicting obligations is resolved by virtue of Articles 25 and 103 of the UN Charter, which gives precedence to the Security Council (S.C.) Resolution obligation over any other international obligations.

II. Security Council Paralysis—A Cause for Concern

Having now discussed the Security Council Route, we must acknowledge that circumstances can arise wherein an S.C. Resolution for the alleviation of the systematic wide-spread human rights violations cannot be passed due to political consideration. For example, one can imagine a circumstance wherein a HoS of one of the permanent five members (P5 Members) or its close ally has committed war crimes and genocide against the [marginalized Yemeni community in Djibouti](#), a State Party to the Rome Statute. As the jurisdictional requirements in Article 12(2) of the Rome Statute are disjunctive, the ICC has jurisdiction because the conduct in question occurred on [State Party territory](#), despite the individual in question being from a Non-State party to the Rome Statute. Subsequently, requests for arrest and surrender had been made under Article 89 to numerous States (party and non-party) where this HoS is travelling or visiting. However, these States refrained from following the request in light of HoS immunity under international law. Thus, the international community’s last straw is to turn to the tried and tested Security Council Route to resolve this conflict of obligations and ensure that the immunities are removed for the purpose of the ICC to effectively exercise its jurisdiction over this individual. However, the cause for concern arises when the matter reaches the Security Council, as a P5 member can veto the resolution. Such a dreary scenario would vitiate one of the very purposes for which the ICC was set up, [“putting an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crime.”](#) Therefore, we postulate the method and means for a State Party to carry out its Rome Statute obligations to arrest and surrender superseding its immunity obligations under international law. This would consequently serve the object of putting an end to impunity, in the event of a Security Council paralysis when the ICC has jurisdiction and grave crimes threatening the peace, security and well-being of the world have been/are being committed by a HoS.

III. Immunity Obligations

In certain circumstances, [State officials can avail immunity from foreign state jurisdictions](#). The HoS can benefit from two types of immunities: immunity *ratione materiae*, i.e., functional immunity that is available to all state officials with regard to their official acts; and [immunity ratione personae](#), i.e., personal immunity that is [limited to a group of high ranking state officials such as the HoS](#), including the Head of Government and Minister of Foreign Affairs. Sufficient [state practice and opinio juris](#) indicate that the immunity of the HoS results from customary international law and the HoS cannot be deprived of it because other States so decide.

Immunity of the HoS could also be protected under treaty law. The [VCDR](#) sets out the [special rules, privileges, and immunities and reflects customary international law](#). Therefore, parties to VCDR are bound by their [obligations to provide immunity](#). Moreover, there have been instances of states entering into specific bilateral or [multilateral treaties](#) for providing immunity to their respective officials.

IV. Rome Statute Obligations

Articles 27 and 98 primarily address the issue of immunity under the Rome Statute. While Article 27(1) provides that the official capacity of a person shall not be an exemption from criminal responsibility, Article 27(2) further clarifies the same and explicitly denies international and national law immunities as a bar to the jurisdiction of ICC. Article 98 provides that the Court shall not make any request for surrender or assistance, in furtherance of which the requested state will act inconsistently with its other international obligations of providing immunity unless a waiver of such aforesaid immunity is obtained.

The procedure of arrest under the Rome Statute provides that after the issuance of a warrant by the Court on the [request of the Prosecutor](#), a [request to the State can be made to arrest and surrender](#) the person in question. However, [the Court may not make such a request](#) on the existence of conflicting obligations to respect immunities under international law.

V. Resolving Conflicting Obligations—The Cessation of Impunity

Understanding how HoS immunity operates under international law and the Rome Statute, particularly Article 27, the prima-facie conflict in arresting the HoS or allowing for immunity and not doing so is unavoidable. We theorize four distinct and independent approaches outside the Security Council Route that can be adopted by the requested State, which would justify the arrest and surrender of the HoS notwithstanding the immunity obligations found in custom or treaty. *Firstly*, we put forth the International Court Theory; *Secondly*, the Surrogate Theory; *Thirdly*, that the Rome Statute Obligations displace immunity; and *Lastly*, the *Jus Cogens—Erga Omnes* Approach.

A. The International Court Theory

HoS under the doctrine of immunity *ratione personae* enjoy absolute immunity, as has been confirmed by the [International Court of Justice](#). However, such personal immunity is [enjoyed only before the domestic national jurisdictions](#) of other States. In *Arrest Warrant*, although the inalienable nature of the absolute HoS immunity was stressed upon, [a pertinent distinction was drawn holding that there is no immunity under customary international law before international criminal jurisdiction](#) but only domestic criminal jurisdiction. The Special Court of Sierra Leone confirmed this in [Taylor](#). More recently, the Appeals Chambers of the ICC in *Al-Bashir* held that there is neither State practice nor *opinio juris* that would support the existence of HoS immunity [under customary international law vis-à-vis an international court](#). Thus, this fundamental distinction between domestic and international jurisdiction absolves the requested State from not carrying out immunity obligations as they are not attracted to the paradigm of international courts such as the ICC. Thereby, the request for arrest and surrender can be complied with, without any competing or conflicting obligations.

B. The Surrogate Theory

[The joint concurring opinion](#) of the Appeals Chamber in *Al-Bashir* clarifies that the jurisdiction that the requested States exercise is not their own domestic criminal jurisdiction but rather the international criminal jurisdiction as a surrogate of the ICC. Thus, in these circumstances, where the State is acting on behalf of the ICC as a surrogate, there are no immunity obligations regarding the HoS. This is because the interactions are no longer bilateral between the States, but instead, between the International Court and the State of the HoS. Hence, the obligations of the requested State are not attracted and there are no conflicting obligations that hinder the following of its Rome Statute obligations.

C. Collective Reading of Rome Statute Obligations Displaces Immunity

Article 27 removes immunities, [not just before the ICC itself \(vertical level\), but also with respect to action taken by national authorities \(horizontal level\)](#) where those authorities are acting in response to a request by the Court. If Article 98(1) was to be interpreted as the Court allowing parties to rely on diplomatic immunity in order to prevent the surrender of their officials to the Court by other States, [it would effectively nullify Article 27](#), which removes such immunities. To read Article 27(2) as applying only to immunity before the Court would render at least one part of that provision *completely* meaningless and other parts *practically* meaningless. 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](#). Therefore, the intention of the drafters of Article 27 should be clearly understood as removing immunities at both the horizontal and vertical level so as to not render the provision ineffective.

Additionally as per Article 98, it is the [Court's responsibility](#), and [not of the State Party, to address any conflict that may exist](#) between a State Party's

duty to cooperate with the Court and that State's obligations to respect immunities under international law. Hence, [if the Court makes a request notwithstanding the supposed conflicting obligations, the requested State is bound to respect the same](#) and follow the process as laid down in the [Rome Statute](#), to apprehend and surrender the HoS to the ICC for prosecution.

D. The Jus Cogens—Erga Omnes Approach

The obligations arising from [jus cogens are non-derogable](#). They are of an [overriding character](#) and enjoy the highest rank in the [normative hierarchy over treaty law and custom](#). The prohibition of international crimes, such as those found in the Rome Statute constitute *jus cogens* norms and [ought to prevail over the rules that accord immunity under international law](#).

We argue that these [international crimes of a jus cogens character give rise to erga omnes obligations](#) to not grant immunity to the violators of such crimes. Therefore, [the jus cogens prohibition of these crimes encompasses the duty to prosecute and extradite such offenders](#) and its [consequential erga omnes obligations](#) would be the non-applicability of any immunities. Thus, the *erga omnes* obligation of not granting immunity in cases of Rome Statute crimes will prevail over the treaty or customary obligations granting immunity to the HoS.

Conclusion

The ICC stands testimony to the prevention of grave atrocities that shock the conscience of humanity and ensure that those who perpetrate such offenses are brought to justice. While the bedrock of international relations is sovereignty, which is the fountain that gives birth to diplomatic immunities, we must not err in making the fatal misconception that impunity can be availed in the garb of immunity. There are situations wherein offenders of such grave crimes either fall outside the Court's jurisdiction or cannot be produced before the Court owing to the incapability of their arrest in light of immunities. Irrespective of this, certain situations permit the jurisdiction and prosecution in furtherance of a S.C. Resolution as seen in [Sudan](#) and [Libya](#). However, these situations are the ideal scenarios and there is a very real possibility that a similar factual matrix arises where the ICC has jurisdiction, but the Security Council stands paralyzed by a veto and is unable to pass a resolution that would displace immunities and mandate States to arrest and surrender the HoS to the ICC. In a post-Covid world, the political landscape involving several P5 members is highly turbulent and volatile, thus aggravating the possibility of abuse of veto powers to further impunity. In this alarming scenario, the need for a remedy outside the nascent "Security Council Route" is magnified. Hence, in light of this need, we have postulated four remedies that we believe would best further the purpose of the establishment of the ICC and the objectives of international criminal law and human rights.