

Name: Loyce Mrewa

Student ID: MRWLOY001

Qualification: Master of Laws in Public Law

Title: The Legality of using the United Nations Security Council to bind third parties to the Rome Statute

Supervisor: Dr. Cathleen Powell

Word-count: 22 849

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the Master of Laws in Public Law (Coursework and Dissertation) in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

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VCLTIO

Vienna Convention on the Law of Treaties between
States and International Organizations or between
International Organizations of 1986

List of Abbreviations

ASP	Assembly of State Parties to the ICC
CIL	Customary International Law
EctHR	European Court of Human Rights
GA	General Assembly of the United Nations
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunals of Rwanda
ICTY	International Criminal Tribunals of Yugoslavia
PTC	Pre-Trial Chamber of the ICC
Relationship Agreement	Relationship Agreement between the International Criminal Court and the United Nations
RS	Rome Statute of the International Criminal Court
SC	United Nations Security Council
SCSL	Special Court for Sierra Leone
UN	United Nations
UN Charter	Charter of the United Nations
VCLT	Vienna Convention on the Law of Treaties of 1969

CHAPTER 1 INTRODUCTION

The International Criminal Court (ICC) is an independent international criminal court.¹ This Court, despite being a judicial organ, has a relationship with the United Nations Security Council (SC), an intergovernmental political body.² This is intriguing and unusual when contrasted with the position at the domestic level where the doctrine of separation of powers or *trias politica* applies.³ Organs within the legal and political field which should normally be separate at the domestic level often work jointly and have overlapping duties at the international level.⁴ This is evidenced by the establishment of the International Criminal Tribunal of Rwanda (ICTR) and the International Criminal Tribunal of Yugoslavia (ICTY) which were instituted through SC Resolutions.⁵ The ICC differs from these tribunals in that its interaction with the SC is based on its governing statutory instrument, the Rome Statute of the International Criminal Court (RS),⁶ as well as the Relationship Agreement between the Court and the United Nations (UN).⁷

However, the interaction of law and politics can lead to problems and is contentious since the legitimacy of institutions which are linked to political bodies is subject to scrutiny by the international community.⁸ The consequential problems emanating from the linkages between law and politics in the international sphere will be examined in this dissertation. In particular, the SC referral mechanism to the ICC and its associated problems will be explored. The primary focus will be an investigation of the procedure used to refer a situation to the ICC, provided in Article 13 (b) of the Rome Statute. This provision which enables third parties, non-State Parties,⁹ to be bound to the ICC by virtue of an SC referral as well as other consequential effects

¹ Preamble of the Rome Statute of the International Criminal Court (Rome Statute).

² Preamble & Article 1 of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations, ICC-ASP/3/Res.1 (2004) (Relationship Agreement).

³ B.C. Mubangizi & N. Tshishonga 'Political and community oversight for good governance in South Africa'(2013)48 *Journal of Public Administration* 299 at 306.

⁴ Franklin Berman 'The Relationship between the International Criminal Court and the Security Council' in Herman A.M. von Hebel, Johan G. Lammers & Jolien Schukking (eds) *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (1999) 175.

⁵ United Nations Security Council *Resolution 827 S/RES/827* (1993) established the ICTY; United Nations Security Council *Resolution 1315 S/RES/1315* (2000) established the ICTR.

⁶ Article 13(b) of its Rome Statute provides a legal basis for the SC to refer situations to the International Criminal Court.

⁷ Preamble & Article 1 of the Relationship Agreement.

⁸ Berman op cit note 4 at 175.

⁹ Article 2 (1)(h) of the Vienna Convention on the Law of Treaties of 1969 (VCLT).

will be analysed. In addition, the effect of an SC referral at the vertical and horizontal level will be evaluated. The vertical level involves the SC's competence to impose measures on states and institutions such as the ICC. The horizontal level relates to how SC decisions affect the relationship between states.

1.1 Background

The ICC is an international criminal court that was established and is subsequently governed by a treaty specifically referred to as the Rome Statute of the ICC.¹⁰ The ICC is therefore a treaty-based institution.¹¹ The Rome Statute, being a treaty, is subject to the established principles of the law of treaties.¹² The ICC is also bound to the general rules of the law of treaties because it is governed by a treaty, the Rome Statute, and is a treaty-based institution.¹³ The Rome Statute, as with other treaties, was brought into existence through negotiation by States Parties.¹⁴ The State Parties to the ICC therefore played a large role in defining the rules and regulations that would govern the ICC.

States Parties to the ICC had a responsibility, in the drafting process, to ensure that the provisions of the Rome Statute were in accordance with widely recognised principles of the law of treaties. States Parties to the Rome Statute also had a responsibility to ensure that provisions of the RS were not inconsistent with international peremptory norms which are binding on all states.¹⁵ This is important since treaties create rights and obligations for States Parties and should therefore not establish obligations that violate *jus cogens* and other established principles of international law.¹⁶

¹⁰ Article 1 of the Rome Statute; Hugh Thirlway *The Sources of International Law* (2014) 195.

¹¹ Jens David Ohlin 'Peace, Security and Prosecutorial Discretion' in Carsten Stahn & Göran Sluiter (eds) *The Emerging Practice of the International Criminal Court* (2009) 187.

¹² Hugh Thirlway 'Treaty Law and the Law of Treaties in Recent Case-Law of the International Court' in Dr. M. Craven & Prof. M. Fitzmaurice (eds) *Interrogating the Treaty: Essays in the Contemporary Law of Treaties* (2005) 7; Jan Klabbers *The Concept of Treaty in International Law* (1996) 38-39.

¹³ Article 1 of the Rome Statute; Thirlway op cit note 10 at 195; Ohlin op cit note 11 at 187.

¹⁴ Antonio Cassese *International Criminal Law* (2008) 340-3.

¹⁵ Klabbers op cit note 12 at 38-39.

¹⁶ *Ibid* at 2 & 38-39.

Against this backdrop, the RS should be in accordance with general principles of the law of treaties such as *pacta tertiis nec nocent nec prosunt*.¹⁷ This principle stipulates that treaties cannot bind third parties, non-State Parties,¹⁸ that have not expressed consent to be bound to a treaty.¹⁹ State consent is an important principle in international law which is linked with sovereignty and the principle of autonomy.²⁰ A state cannot be bound to a treaty without expressing its consent.²¹ The RS should therefore be legally binding towards State Parties to the RS only. However, the RS claims to be applicable to third parties by virtue of an SC referral within Article 13 (b) of the Rome Statute.²²

The SC has at present referred two situations to the ICC through Resolutions 1593 (2005) and 1970 (2011), which addressed the situations in Sudan and Libya respectively.²³ These referrals were issued against third parties, ie non-State Parties to the RS.²⁴ According to the law of treaties these states should not be bound to comply with the provisions of the RS.²⁵ Nevertheless, the ICC was able to obtain jurisdiction in these cases through the use of the SC's Chapter VII powers as stipulated under Article 13 (b) of the RS.²⁶ Resolution 1593 (2005) will be used as an example to analyse the procedure of referring a situation to the ICC through Article 13 (b) of the Rome Statute. This Resolution was selected since it is especially

¹⁷ Malgosia Fitzmaurice 'Third Parties and the Law of Treaties' (2002) 6 *Max Planck Yearbook of United Nations Law* 37 at 38.

¹⁸ Article 2 (1)(h) of the VCLT.

¹⁹ Fitzmaurice op cit note 17 at 38.

²⁰ Dapo Akande 'Prosecuting Aggression: The Consent Problem and the Role of the Security Council' (2010) *Oxford Institute For Ethics, Law, And Armed Conflict: Working Paper* at 13, available at <http://www.elac.ox.ac.uk/downloads/dapo%20akande%20working%20paper%20may%202010.pdf>, accessed on 13 March 2017.

²¹ Ibid.

²² Hans-Peter Kaul 'The International Criminal Court- Its Relationship to Domestic Jurisdictions' in Carsten Stahn & Göran Sluiter (eds) *The Emerging Practice of the International Criminal Court* (2009) 33; Dapo Akande 'The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC' (2012) 10 *Journal of International Criminal Justice* 299 at 305.

²³ International Criminal Court 'Situations under investigation' available at <https://www.icc-cpi.int/pages/situations.aspx>, accessed on 13 March 2017.

²⁴ Article 2 (1)(h) of the VCLT.

²⁵ Fitzmaurice op cit note 17 at 38; Article 34 of the Vienna Convention on the Law of Treaties of 1969 (VCLT).

²⁶ International Criminal Court 'Situation in Darfur, Sudan' available at <https://www.icc-cpi.int/darfur>, accessed on 13 March 2017; International Criminal Court 'Situation in Libya' available at <https://www.icc-cpi.int/libya>, accessed on 13 March 2017.

contentious, as the ICC issued arrest warrants for a number of accused persons including Sudan's incumbent President Omar Al-Bashir.²⁷

The ICC issued two arrest warrants in respect of President Omar Al-Bashir.²⁸ He was charged with ten counts, namely, five counts of crimes against humanity, two counts of war crimes and three counts of genocide.²⁹ The case against President Omar Al-Bashir is controversial since it involves a third party, a state that is not party to the RS. Also, it deals with a sitting head of state, who is normally shielded from prosecution by virtue of immunity grounded in customary international law (CIL).³⁰

The case involving President Al-Bashir will be used to investigate the ICC's competence in having jurisdiction over third parties. This, as well as its ability to override CIL, specifically Al-Bashir's immunity, will be explored. Moreover, the effect of SC referrals at the vertical and horizontal levels will be analysed. The exploration at the horizontal level will be narrowed to the examination of Al-Bashir's immunity. The case against Al-Bashir has been contentious and raised issues around whether his immunity was lifted by the SC.

The controversial nature of the case and the discrepancy over whether Al-Bashir's immunity was removed is evident in the widespread non-compliance it has received. States Parties' non-compliance with the warrant to arrest and surrender Al-Bashir has led to the failure to bring the accused before the Court.³¹ Despite the fact that the ICC issued the warrants in 2009 and 2010, at present Al-Bashir is still at large.³² At the moment, nine State Parties, namely Sudan, Nigeria, Kenya, Chad, Uganda, Djibouti, Malawi, Democratic Republic of Congo and South Africa have failed to cooperate

²⁷ International Criminal Court 'Situation in Darfur, Sudan' available at <https://www.icc-cpi.int/darfur>, accessed on 13 March 2017.

²⁸ *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-1, 4 March 2009 p.7-8; *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Second Decision on the Prosecution's Application for a Warrant of Arrest, ICC-02/05-01/09-94, 12 July 2010 p.28.

²⁹ *Ibid.*

³⁰ Cassese op cit note 14 at 264.

³¹ International Criminal Court 'Al Bashir Case' available at <https://www.icc-cpi.int/darfur/albashir>, accessed on 13 March 2017 President Al-Bashir is still at large.

³² *Al Bashir* supra note 28; International Criminal Court 'Al Bashir Case' available at <https://www.icc-cpi.int/darfur/albashir>, accessed on 13 March 2017 President Al-Bashir is still at large.

with the ICC's request for the arrest and surrender of President Al-Bashir.³³ Malawi, Chad, Democratic Republic of Congo and Sudan have been referred to the ASP and SC according to Article 87 (7) of the RS which allows for such a finding.³⁴

South Africa will be used as a point of reference in analysing the effect of SC referrals at the horizontal level. What will be determined is whether Resolution 1593 removed the immunity of Al-Bashir and, if so, whether this abrogation filters down to states. Examination will primarily centre on whether the CIL obligation for states to respect the immunity of another state is removed by SC referrals. South Africa was selected since it is the latest State to fail to arrest and surrender President Al-Bashir to the ICC.³⁵ Also, its failure to arrest and surrender has led to a number of domestic judgements in the High Court, Supreme Court and Constitutional Court.³⁶ Furthermore, the Al-Bashir arrest saga could have influenced South Africa's decision

³³ *The 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-02/05-01/09-195, 09 April 2014 para.34 & para.20 (President Al-Bashir has visited Kenya, Nigeria without being arrested); *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir, ICC-02/05-01/09-151, 26 March 2013 para.23; *The 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, ICC-02/05-01/09-139, 12 December 2011, para. 47; *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Prosecutor's Request for a Finding of Non-Compliance Against the Republic of the Sudan, ICC-02/05-01/09-227, 09 March 2015 para.19; *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute, ICC-02/05-01/09-266, 11 July 2016, para.16; *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute, ICC-02/05-01/09-267, 11 July 2016 para.15; The International Criminal Court 'Al Bashir case: ICC Pre-Trial Chamber II schedules a hearing on South Africa's cooperation on 7 April 2017' available at <https://www.icc-cpi.int/Pages/item.aspx?name=PR1264>, accessed on 13 March 2017.

³⁴ *Al-Bashir (Malawi)* supra note 33 at para. 47; *Al-Bashir (Chad)* supra note 33 at para.23; *Al-Bashir (Congo)* supra note 33 at para.34; *Al-Bashir (Sudan)* supra note 33 at para.19.

³⁵ The International Criminal Court 'Al Bashir case: ICC Pre-Trial Chamber II schedules a hearing on South Africa's cooperation on 7 April 2017' available at <https://www.icc-cpi.int/Pages/item.aspx?name=PR1264>, accessed on 13 March 2017.

³⁶ *Southern Africa Litigation Centre v Minister of Justice And Constitutional Development and Others* (27740/2015) [2015] ZAGPPHC 402; 2016 (1) SACR 161 (GP); 2015 (5) SA 1 (GP); [2015] 3 All SA 505 (GP); 2015 (9) BCLR 1108 (GP) (24 June 2015) para.39; *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016) para.124; *Minister of Justice and Constitutional Development and Others v. Southern Africa Litigation Centre* (CCT 75/16) para.47.

to withdraw from the ICC.³⁷ South Africa filed a declaration of withdrawal on the 16th of October 2016.³⁸ However, the High Court of South Africa recently held that the withdrawal, filed without Cabinet approval, was unconstitutional and invalid, and ordered the Executive to revoke its declaration of withdrawal.³⁹ As a result, South Africa is still a State Party bound to comply with ICC decisions;⁴⁰ including the obligation to arrest and surrender President Al-Bashir - an obligation which arose through the issuing of the arrest warrants against him by the ICC.⁴¹ Moreover, even if the withdrawal had been valid, it would only take effect after a full year therefore obligations which arose before the submission of the declaration of withdrawal would remain valid, during this period.⁴² The controversy surrounding the South African withdrawal attempt and the domestic cases before its domestic courts make the use of this State as an example interesting.

The main issues, centre on the legality of Article 13 (b) of the RS and the effects of SC referrals at the vertical and horizontal levels, are analysed through the lens of Article 13 (b) of the RS. This means that the exploration will focus on the legality of using this provision as a legal basis on which to violate the law of treaties and CIL. In other words, the investigation will centre on whether the ICC can lawfully use the SC to perform tasks which it is unable to carry out itself, such as violating the law of treaties and CIL. The relationship between the ICC and the SC will be examined below in greater detail to analyse the nature of the connections between these two bodies.

a. Relationship agreement between ICC and SC

Although a relationship between the ICC and the SC is evident from Article 13 (b), Article 2 of the RS makes this relationship explicit. It simply states that the ICC and the UN need to establish an agreement to bring the two bodies into a relationship.

³⁷ The International Criminal Court 'Minister of Justice of South Africa visits the International Criminal Court, meets with Court President' available at <https://www.icc-cpi.int/Pages/item.aspx?name=PR1256>, accessed on 13 March 2017.

³⁸ Article 127 (2) of the RS.

³⁹ *Democratic Alliance v Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening)* (83145/2016) [2017] ZAGPPHC 53 (22 February 2017) para.81 & 84.

⁴⁰ Article 86 of the Rome Statute.

⁴¹ *Al Bashir* supra note 28.

⁴² Article 127 (1) of the RS.

The Negotiated Relationship Agreement between the International Criminal Court and the United Nations (Relationship Agreement) came into force on 4 October 2004.⁴³ It was established and entered into force after approval by the General Assembly of the United Nations (GA) as well as the Assembly of State Parties to the ICC (ASP).⁴⁴

The purpose of the Relationship Agreement is to define the relations and liaisons between the ICC and the UN.⁴⁵ It is, *prima facie*, a legal basis for the relationship between the UN and the ICC. The full relationship is expressed when Article 2 of the RS and Article 1 of the Relationship Agreement are read jointly. The SC, being a UN organ,⁴⁶ is also brought into relationship with the ICC through this Relationship Agreement.⁴⁷ This is implied as the relationship between the UN and the ICC would likely extend to include organs of the UN such as the Security Council, as they are also part of the UN.

The principles guiding the interaction between the ICC and the UN include the need to ‘...respect each other’s status and mandate....’ and act in accordance with each body’s statutory instrument: the RS and the UN Charter respectively.⁴⁸ The ICC’s independence and legal personality are also recognized as a principle.⁴⁹ The UN and the ICC also agree to cooperate with each other as far as necessary for the purpose of meeting common objectives and in accordance with their respective governing instruments.⁵⁰

Provisions such as Article 13 (b) of the RS reflect the cooperation between these two bodies since the SC uses the referral mechanism to the ICC as a method of

⁴³ International Criminal Court, Negotiated Relationship Agreement between the International Criminal Court and the United Nations available at <https://www.icc-cpi.int/pages/item.aspx?name=icc-un-rel-agr>, accessed on 13 March 2017.

⁴⁴ Article 2 of the Rome Statute; Article 23 of the Relationship Agreement.

⁴⁵ Article 1(1) of the Relationship Agreement.

⁴⁶ Article 7 (1) of the UN Charter.

⁴⁷ Article 1 of the Relationship Agreement establishes the relationship between the UN and the ICC.

⁴⁸ Article 2 (2) (3) of the Relationship Agreement.

⁴⁹ Article 2 (1) of the Relationship Agreement.

⁵⁰ Article 3 of the Relationship Agreement.

implementing decisions made whilst acting under its Chapter VII powers.⁵¹ As a result, the ICC plays a role in the maintenance and restoration of international peace and security since the SC adopts decisions under its Chapter VII powers for this purpose.⁵² The ICC's impact on the maintenance and restoration of international peace and security has been confirmed in academia.⁵³

Moreover, Article 17(1) of the Relationship Agreement specifically outlines the relationship between the ICC and the SC in terms of information sharing with respect to situations where the crimes within the jurisdiction of the ICC are alleged to have been committed. The Relationship Agreement thus lists the links between the ICC and the UN in respect of a number of matters including cooperation, information sharing, and the governing principles regulating their work. Other regulated matters, in this agreement, include financing and procedural issues relating to the enforcement and implementation of the Agreement.⁵⁴

The SC and Article 13 (b) of the RS are specifically mentioned only in Article 17 (1) of the Relationship Agreement. However, as aforementioned, this is done in respect of cooperation arrangements relating to information sharing procedures once the referral procedure is triggered. It does not describe the complex intricacies of the interactions between these two bodies. Article 17 (1) of the Relationship Agreement read together with Article 13 (b) of the RS, sets out a skeletal statutory framework. For the sake of clarity, it is preferable to have a complete picture of the referral mechanism and the relations between the ICC and the SC.

Further investigation into this unique arrangement is required, beyond the parameters of the basic statutory framework. The relationship between the ICC and the SC can be better observed through analysis of the practice of referring situations to the ICC. This will be conducted through an analysis of Resolution 1593 (2005) which referred

⁵¹ Article 13 (b) of the Rome Statute specifies that the Security Council refers a situation acting under its Chapter VII powers which means that the ICC works conjunctively with the Council to enforce the decisions of the Council before the Court.

⁵² Article 24 & Chapter VII of the UN Charter.

⁵³ Luigi Condorelli & Santiago Villalpando 'Relationship of the Court with the United Nations' in Antonio Cassese, Paola Gaeta & John R.W.D. Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* (2002) 222.

⁵⁴ Articles 8-23 of the Relationship Agreement.

the situation in Darfur, Sudan to the ICC. Additional background information on Resolution 1593 (2005) will therefore be provided in order to fully appreciate the effect of the SC's involvement in situations referred to the ICC.

b. Resolution 1593 [2005]

Resolution 1593 (2005) was issued by the SC on 31 March 2005 at its 5158th meeting and based on the report of the International Commission of Inquiry on Darfur (Commission),⁵⁵ which was requested by the SC pursuant to Resolution 1564 (2004).⁵⁶ The SC requested the Secretary-General to establish the Commission in order to investigate alleged violations of international human rights and humanitarian law allegedly committed during the armed conflict in Darfur, Sudan.⁵⁷ The Commission found that widespread and systematic crimes amounting to crimes against humanity, as well as serious violations of international human rights and humanitarian law which may amount to war crimes, were committed in Darfur, Sudan.⁵⁸

The Commission recommended that the SC refer the situation to the ICC without delay as it constituted a threat to international peace and security, a threat repeatedly affirmed by the SC.⁵⁹ The SC heeded the Commission's advice and adopted Resolution 1593 (2005), which referred the situation in Sudan to the ICC.⁶⁰ The SC acknowledged the Commission's report in the Resolution, which illustrates the level of importance afforded to the report.⁶¹ The need to respond swiftly in order to maintain and restore international peace and security is also demonstrated by the adoption of Resolution 1593 (2005). The Resolution was adopted shortly after the submission of the Commission's report. The Commission submitted its report on 1

⁵⁵ United Nations Security Council Resolution 1593 S/RES/1593 (2005) preamble.

⁵⁶ Ibid para.12.

⁵⁷ Ibid.

⁵⁸ United Nations Security Council *Report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur S/2005/60* (2005) 3-4.

⁵⁹ Ibid at 5.

⁶⁰ Resolution 1593 S/RES/1593 (2005) para.1.

⁶¹ Ibid.

February 2005 and the SC issued Resolution 1593 on 31 March 2005, less than two months after the report.⁶²

According to the text of Resolution 1593 (2005), it was issued under Chapter VII of the Charter of the United Nations.⁶³ The SC referred the situation to the Prosecutor of the ICC and asserted that 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...’.⁶⁴ The SC referral gave the ICC jurisdiction over Sudanese nationals, ie nationals from a non-State Party.⁶⁵ Sudan’s referral to the ICC and its obligation to ‘...cooperate fully...’ with the ICC and its Prosecutor means that it is subject to the jurisdiction of the Court.⁶⁶

This interpretation of the text in Resolution 1593 is also consistent with that of the ICC in the issued arrest warrant of 2009. The ICC found that Sudan was bound to the Rome Statute by virtue of the SC Resolution.⁶⁷ This meant that the investigation and prosecution of the case would be conducted in accordance with its provisions.⁶⁸ Also, the binding nature of the referral can be inferred from the language used; the use of the word ‘...shall...’ suggests that this is an obligation since it can be interpreted to mean mandatory.⁶⁹ The language used in the Resolution shows that the SC made Sudan legally bound to the decisions of the ICC. The SC has the competence to make such binding decisions on all Members of the UN, including Sudan,⁷⁰ by virtue of the use of its Chapter VII powers.⁷¹

⁶² Resolution 1593 S/RES/1593 (2005); United Nations Security Council *Report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur S/2005/60* (2005) 3-4.

⁶³ *Resolution 1593 S/RES/1593* (2005) preamble - para.1.

⁶⁴ *Resolution 1593 S/RES/1593* (2005) para.2.

⁶⁵ Akande op cit note 22 at 305-6; Dapo Akande ‘The Legal Nature of Security Council Referrals to the ICC and Its Impact on Al Bashir’s Immunities’ (2009) 7 *Journal of International Criminal Justice* 333 at 336.

⁶⁶ *Resolution 1593 S/RES/1593* (2005) para.2; Akande op cit note 22 at 305-6; Akande op cit note 65 at 336.

⁶⁷ *The 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, 04 March 2009 para.45.

⁶⁸ Ibid.

⁶⁹ Bryan A. Garner *Black’s Law Dictionary* 10 ed (1996) 1585; *Resolution 1593 S/RES/1593* (2005) preamble-para.2.

⁷⁰ United Nations ‘Member States’ available at <http://www.un.org/en/member-states/#gotoS>, accessed on 13 March 2017. Sudan became a United Nations Member State in 1956.

⁷¹ Article 25 & 48 of the UN Charter.

However, the word ‘...shall...’ is used in relation to Sudan and other parties to the conflict in Sudan, suggesting that only these are bound to fully comply with the ICC.⁷² The SC simply ‘...urges...’ other states to cooperate with the ICC.⁷³ The use of the word ‘...urges...’ shows that it is merely encouraging compliance rather than commanding cooperation.⁷⁴ Furthermore, the referral to the Prosecutor instead of the ICC itself reflects the SC’s respect for the independence and autonomy of the Court.⁷⁵ This is since the Prosecutor of the ICC has the autonomy to investigate whether crimes falling within the jurisdiction of the ICC have been committed, and to determine whether to prosecute or withdraw a referred situation.⁷⁶

Noteworthy is the fact that Resolution 1593 (2005) did not explicitly refer to Article 13 (b) of the Rome Statute. This is curious because Article 13 (b) of the RS is, *prima facie*, the legal basis upon which the SC can refer situations to the ICC and the ICC can receive such referrals.⁷⁷ There is a possibility that the SC refrained from doing so since it can also justify its referral by virtue of the Relationship Agreement between the ICC and the UN. This would make explicit reference to Article 13 (b) in the Resolution of the RS redundant.

This possibility seems remote, however, as the Relationship Agreement was not mentioned either. There might have been a power struggle at play. This is pure speculation, but the SC could have avoided expressly mentioning Article 13 (b) of the RS as a way of averting being perceived as subject to the provisions of the RS. The acknowledgement of Article 13 (b) of the RS as a basis for referring Sudan to the ICC would implicitly give the ICC an element of power over the procedure of referring a situation.

Resolution 1593 also includes other matters such as financing, an invitation to report measures taken in response to the Resolution, and other incidental and miscellaneous

⁷² Phillip Wardle ‘The Survival of Head of State Immunity at the International Criminal Court’ (2011) 18 *Australian International Law Journal* 181 at 203-5; Resolution 1593 S/RES/1593 (2005) para.2.

⁷³ Resolution 1593 S/RES/1593 (2005) para.2.

⁷⁴ Wardle op cit note 72 at 203-5; Resolution 1593 S/RES/1593 (2005) para.2.

⁷⁵ Berman op cit note 4 at 174.

⁷⁶ Ibid.

⁷⁷ Article 17 (1) of the Relationship Agreement; Article 13 (b) of the Rome Statute.

matters.⁷⁸ The financing arrangement is questionable, given that no financing was stipulated as emanating from the UN.⁷⁹ One would expect funding from the UN since the SC, a UN organ,⁸⁰ referred the situation to the Court.⁸¹ Funding for the investigation and adjudication of the referred situation is to be drawn from the States Parties to the Rome Statute as well as voluntary contributions from third states.⁸² This suggests that the SC has the autonomy to refer cases to the ICC even without providing financial support which could conceivably cripple the Court from adjudicating effectively due to lack of funding.

Some scholars have argued that the SC's decision to withhold UN funding was unlawful and raised 'UN constitutional matters', as the GA is the organ competent to determine the UN budget and decisions related to allocation of UN funds.⁸³ The GA's failure to award funds was constitutional. However, it is uncertain whether the denial of funding in the Resolution was 'pre-empt[ive]' of GA action, or whether it was a decision made by the SC outside its competence.⁸⁴ If the latter is true then the SC overstepped its competence and acted *ultra vires*. The SC's action would be inconsistent with Article 17 of the UN Charter and Article 13 of the Relationship Agreement. These provisions stipulate that the GA has competence in budgetary matters, rather than that of the SC.⁸⁵ In addition to this, the SC would have violated the obligation to comply with the UN Charter in the discharge of its duties.⁸⁶

Moreover, its actions would be inconsistent with Article 115 (b) of the RS where the ICC stipulates and anticipates receiving funds in respect of referrals from the United Nations. The issue of funding, in this instance, illustrates that the relationship between the two bodies is not without problems and can lead to issues in the functioning of the Court, particularly with regard to the financing of the trials of

⁷⁸ Resolution 1593 S/RES/1593 (2005) para.3-9.

⁷⁹ Resolution 1593 S/RES/1593 (2005) para.7.

⁸⁰ Article 7 of the UN Charter.

⁸¹ Resolution 1593 S/RES/1593 (2005) para.1

⁸² Resolution 1593 S/RES/1593 (2005) para.7.

⁸³ Robert Cryer 'Sudan, Resolution 1593, and International Criminal Justice' (2006) 19 *Leiden Journal of International Law* 195 at 206-7.

⁸⁴ *Ibid.*

⁸⁵ Articles 13 of the Relationship Agreement.

⁸⁶ Articles 3 of the Relationship Agreement.

defendants who might be brought before the Court through the referral mechanism. Although this is an important consideration, with the potential for contention and conflict, it will not be examined during the research project, which focuses on the legality of using Article 13 (b) of the RS to bind third parties to the RS.

c. Conclusion

The Relationship Agreement between the ICC and the SC shows how these two bodies interact with one another as political and judicial bodies working jointly to maintain and restore international peace and security. This relationship is possible within the international sphere since international law is often interlinked with politics.⁸⁷ However, even with a regulatory framework such as the Relationship Agreement governing their relationship and coordinating their functions, problems can arise. This is illustrated in Resolution 1593 where problems such as the question of financing, identified above, can surface even in the initial stage of the referral procedure. Other concerns which surface in the context of implementation of this resolution will be explored in subsequent chapters. The research question and structure of the research are outlined below.

1.2 Research Question

The main question this paper addresses is whether a treaty-body, such as the ICC, can use the SC to bind third parties to the Rome Statute. This will be examined by exploration of a number of related questions. These include whether the Rome Statute can bind third parties through Article 13 (b) of the RS. Other questions relate to whether Article 13 (b) of the RS can be used to circumvent CIL, for instance head of state immunity, and whether this provision lawfully limits principles in international law such as state consent.

1.3 Problem Statement and Methodology

It is doubtful whether State Parties to the Rome Statute have the competence to use a political body such as the SC to compel non-State Parties to be bound to the provisions of the Rome Statute. This is especially because treaties such as the Rome Statute are subject to negotiation by states before being adopted. It is therefore

⁸⁷ Berman op cit note 4 at 175.

necessary to investigate whether the States Parties decision to include a provision such as Article 13 (b) within the Rome Statute is lawful. Additionally, Article 13 (b) of the RS has the potential to violate other rules of CIL such as the doctrine of immunity when defendants from third states are brought before the ICC. This is because immunity before the ICC is removed by the RS in respect of States Parties rather than in respect of individuals from third states.⁸⁸

Article 13 (b) of the RS and its consequential effects on third parties and CIL will be analysed using Resolution 1593 (2005) and Al-Bashir's immunity as an example. This will help to establish whether or not the ICC can lawfully rely on or use the SC to perform tasks which it is itself unable to carry out. An outline of the law of treaties and its application to third parties will be provided. This will be conducted with the aim of determining whether Article 13(b) of the RS can be used as a legal basis from which to limit the principle of state consent and *pacta tertiis nec nocent nec prosunt*.⁸⁹

The issue, relating to President Al-Bashir's immunity, will be used as an example to examine whether the ICC through the use of Article 13 (b) of the RS can circumvent CIL such as the doctrine of head of state immunity. The limitation of Al-Bashir's immunity is implied by the SC's referral of the situation in Sudan to the Prosecutor of the ICC for investigation and subsequent prosecution if appropriate.⁹⁰ The prosecution of Al-Bashir would only be possible if immunity granted to sitting heads of state was waived or removed before the ICC. An examination of the doctrine of immunity will therefore be undertaken to illustrate under which circumstances it can be limited within CIL, by virtue of SC action and before the ICC. This will enable further examination of the effect of applying Article 13 (b) of the RS in view of establishing its legality, specifically, whether this statutory provision can be used to limit CIL, including head of state immunity.

⁸⁸ Akande op cit note 65 at 339 Article 27 of the Rome Statute removes immunity for individuals from State parties whilst Article 98 is applicable to persons from non-state parties.

⁸⁹ Fitzmaurice op cit note 17 at 38.

⁹⁰ Akande op cit note 65 at 336.

CHAPTER 2 THE DOCTRINE OF IMMUNITY

2.1 Introduction

This chapter will analyse the doctrine of immunity and how it is traditionally removed without SC involvement. The intention is to assess what the position of the ICC would be without SC involvement. The doctrine of immunity in CIL will be examined including the rationales for immunity. Thereafter the methods of removing immunity within CIL and before the ICC will be explored.

2.2 The Position in Customary International Law

The doctrine of immunity is grounded in, and reflects sovereign equality of states.⁹¹ Immunity precludes a state from adjudicating over the legality of another state's actions.⁹² The rationale for according immunity to individuals is to ensure that officials are able to carry out international duties that 'transcend national obligations', and to facilitate the effective functioning of international relations.⁹³ Immunity is therefore is a right of states;⁹⁴ which is given to its officials as a means of enabling them to carry out their duties in order to achieve state objectives effectively.⁹⁵ It is provided in international law, CIL and through treaties, as well as in national domestic law.⁹⁶

However, this research project will focus on immunity within international law in particular, since this is the most relevant to the subject under examination, and the SC referral mechanism is grounded within international law. Moreover, the SC's competence is based on the UN Charter, an international treaty, and the referral mechanism concerns an international court, the ICC. The doctrine of immunity is widely agreed upon as being part of the *corpus* of CIL.⁹⁷ There are two types of

⁹¹ Dapo Akande & Sangeeta Shah 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2011) 21 *The European Journal of International Law* 815 at 825; Steven Freeland 'A prosecution too far? Reflections on the accountability of heads of state under International Criminal Law' (2010) 41 *Victoria University of Wellington Law Review* 179 at 192-3.

⁹² Rosanne Van Alebeek *The Immunity of States and their Officials in International Criminal Law and International Human Rights Law* (2008) 1; Akande & Shah op cit note 91 at 825; Freeland op cit note 91.

⁹³ *International Military Tribunal (Nuremberg)*, Judgment of 1 October 1946 p.56.

⁹⁴ Akande op cit note 65 at 339.

⁹⁵ *Nuremberg* supra note 93 at p.56.

⁹⁶ Cassese op cit note 14 at 264.

⁹⁷ *Ibid.*

immunity, namely personal immunity and functional immunity.⁹⁸ The former is also known as immunity *ratione personae* and applies to both private and official acts since it attaches to the position or status of an individual.⁹⁹ On the other hand, functional immunity, also known as immunity *ratione materiae*, applies to acts committed in an official capacity by state officials.¹⁰⁰

Personal immunity has a wider subject matter application than functional immunity since it attaches to both private and official acts, whilst the latter is only applicable to official acts. However, according to the *Arrest Warrant* case, personal immunity covers only a limited category of senior officials including incumbent Heads of State, Heads of Government, and Ministers of Foreign Affairs.¹⁰¹ This is in contrast to functional immunity whose scope of application includes all state officials or agents, both high and low ranking.¹⁰²

Immunity *ratione personae* is the most obviously applicable type of immunity to incumbent heads of state such as Al-Bashir since it specifically attaches to such high ranking positions.¹⁰³ Immunity *ratione materiae*, on the other hand, can also be applicable to incumbent heads of state in relation to acts committed in their official capacity.¹⁰⁴ This is especially since these types of immunities may exist simultaneously and overlap.¹⁰⁵ This means that President Al-Bashir can enjoy both functional and personal immunities concurrently.¹⁰⁶ However, functional and personal immunities are grounded under different types of law, namely substantive and procedural law respectively.¹⁰⁷ This distinction influences the application of immunity before courts as well as how it can be lifted and the consequential effects of such removal.

⁹⁸ Antonio Cassese 'When May Senior Officials Be Tried for International Crimes? Some Comments on the Congo v Belgium Case' (2002) 13 *European Journal of International Law* 853 at 863.

⁹⁹ Cassese op cit note 98 at 863; Cassese op cit note 14 at 265-6; Akande & Shah op cit note 91 at 818.

¹⁰⁰ Cassese op cit note 14 at 265-6.

¹⁰¹ *Arrest Warrant Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002 para.51.

¹⁰² Cassese op cit note 14 at 266.

¹⁰³ *Ibid* at 265-6.

¹⁰⁴ Cassese op cit note 98 at 863.

¹⁰⁵ Cassese op cit note 14 at 266-7.

¹⁰⁶ *Ibid*.

¹⁰⁷ *Ibid* at 266.

Functional immunities relate to substantive law and are a substantive defence to prosecution.¹⁰⁸ This as well as their *erga omnes* nature demonstrates that functional immunities can be used to shield officials from prosecution before a court of law if their acts are considered to have been carried out in their official capacity.¹⁰⁹ This protection extends even after officials leave office.¹¹⁰ However, functional immunities can be lifted if they are waived by the issuing state or if international crimes are committed.¹¹¹ This will be elaborated in more detail in the next section.

Personal immunities are part of procedural law and pose a procedural bar to the jurisdiction of courts.¹¹² This means that a court's civil or criminal jurisdiction is simply delayed, during the period when immunities are applicable, without resulting in exoneration or impunity.¹¹³ This also shows that individuals who possess personal immunity are shielded from criminal or civil jurisdiction rather than criminal responsibility.¹¹⁴ Foreign domestic courts and international criminal courts such as the ICC can therefore prosecute as soon as the jurisdictional bar is removed, waived or lost.

The above analysis briefly touched on the removal of immunity which ceases in different respects depending on the type of immunity, whether functional or personal.¹¹⁵ The lifting of immunity also depends on whether the accused is before a foreign domestic court or an international court; this will be analysed in greater detail below.

2.3 The Removal of Immunity

The removal of immunity and its associated consequences differ depending on the forum. The accused may be standing before an international criminal court such as the ICC, or before foreign domestic courts applying CIL, or be in a situation where the removal of immunity is sanctioned through an SC resolution (analysed in Chapter

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ *Ibid* at 267.

¹¹² Cassese *op cit* note 14 at 266; Cassese *op cit* note 98 at 863-4.

¹¹³ Cassese *op cit* note 14 at 266; Cassese *op cit* note 98 at 867.

¹¹⁴ Cassese *op cit* note 98 at 867.

¹¹⁵ Cassese *op cit* note 14 at 267-73; Cassese *op cit* note 98 at 863-4.

Three). In this chapter, the position before the ICC and foreign domestic courts will be analysed to give a background to, and complete picture of, the circumstances surrounding the removal or waiver of immunity. This will lead to a clearer delineation of the SC's power, when the effect of SC resolutions on immunity is distinguished from the position in CIL and international criminal courts. This will also lead to greater insight into how the SC's influence on the ICC changes the immunity of accused persons before the court.

a. Position before foreign domestic courts

i. Personal immunities

Personal immunities, as analysed above, apply to both official and private acts whilst the relevant official is in office.¹¹⁶ This means that foreign domestic courts cannot lift immunity and prosecute officials whilst they are still in office, as they are bound to observe CIL which is binding on all states.¹¹⁷ The binding nature of CIL on states is confirmed in the ICJ case known as *Continental Shelf*.¹¹⁸ Sitting heads of state such as Al-Bashir are therefore exempt from prosecution by foreign domestic courts during their term in office. This inviolability has been confirmed in various cases such as those involving heads of state such as *Fidel Castro* and *Mugabe*.¹¹⁹

However, personal immunities cease after an individual leaves office, at which time they may be prosecuted for acts committed during their time in office, even by foreign domestic courts.¹²⁰ This is logical since personal immunities attach to the position or status of an individual and should therefore be lifted once an individual vacates the position and loses the status to which his or her immunities apply.¹²¹ President Al-Bashir can therefore be prosecuted in foreign domestic courts after he leaves office, for the crimes committed during his time in office. The situation differs in respect of functional immunity which attaches to acts committed in official

¹¹⁶ Cassese op cit note 14 at 265-6; Cassese op cit note 98 at 863-4.

¹¹⁷ *Continental Shelf (Libyan Arab Jarnahiriya/Malta)*, Judgment, I.C.J. Reports 1985 para. 27.

¹¹⁸ *Ibid.*

¹¹⁹ *Tachiona v. Mugabe*, 169 F Supp 2d 259 (SDNY 2001) at 265 & 303 retrieved from: <http://law.justia.com/cases/federal/district-courts/FSupp2/169/259/2424159/>, accessed on 13 March 2017; Cassese op cit note 98 at 860 & 863-4; Akande & Shah op cit note 91 at 819-20.

¹²⁰ *Ibid.*

¹²¹ Cassese op cit note 14 at 265-6.

capacity by state officials.¹²² The lifting of functional immunity and how it differs from personal immunity will be examined below.

ii. Functional immunity

Functional immunity remains applicable even after an official leaves office, since the immunity attaches to official acts rather than the position as with personal immunities.¹²³ As a result, officials accorded functional immunity cannot be prosecuted for official acts committed whilst in office once they leave office.¹²⁴ However, unlawful acts committed in official capacity can be attributed to the state and lead to civil liability.¹²⁵ There is an exception to the application of functional immunity in respect of international crimes. The *Nuremberg* judgment found that the doctrine of immunity cannot be applied to acts that are regarded as criminal in international law.¹²⁶ The Court reasoned that international crimes could not be considered as state acts, and that immunity therefore could not shield individuals from criminal responsibility and accountability.¹²⁷

The Court's reasoning in the *Nuremberg* judgment demonstrates that functional immunity can be removed if the most serious crimes that shock the world are committed.¹²⁸ This is confirmed in various domestic cases. These include well-known cases such as *Nuremberg*, *Pinochet*, *Eichman* and domestic cases from courts such as France, the Netherlands, the United Kingdom, the United States of America, Poland, Spain and Mexico.¹²⁹ These courts clarified the removal of functional immunity at the domestic level.¹³⁰ Scholars such as Cassese also reason that the removal of functional immunity with respect to international crimes is part of the *corpus* of CIL.¹³¹

¹²² Cassese op cit note 14 at 264-6.

¹²³ Cassese op cit note 98 at 863.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ *Nuremberg* supra note 93 at p.56.

¹²⁷ *Ibid.*

¹²⁸ *Ibid* at 56, 100, 110 & 175.

¹²⁹ *Nuremberg* supra note 88 at p. 56, 100, 110 & 174-5; Cassese op cit note 98 at 870-4 (lists the case law mentioned above).

¹³⁰ *Ibid.*

¹³¹ Cassese op cit note 98 at 871-4.

Cassese makes a persuasive case by identifying and outlining various state practice and *opinio juris*, emanating from the case law of international and domestic courts.¹³² The evidence presented by Cassese includes the aforementioned case law, as well as others from various courts, which interpret and clarify international law.¹³³ These courts reason that functional immunity is removed when an individual is accused of committing international crimes.¹³⁴ The scholarly interpretation therefore shows the CIL position whilst case law clarifies functional immunity within international law via judicial interpretation. The consistency between the scholastic position and judicial interpretation of functional immunity is persuasive and highlights how an exception to the application of functional immunity indeed exists. However, other scholars such as Akande and Shah diverge from the reasoning of the aforementioned Courts and that of Cassese, finding unconvincing the argument that international crimes cannot be considered as state acts.¹³⁵

Akande and Shah criticise the finding by raising several counterarguments. They assert that the removal of functional immunity is based on the presumed illegality of an act.¹³⁶ This infringes upon presumption of innocence since allegations will not yet have been confirmed when immunity is removed.¹³⁷ However, Akande and Shah's argument is not convincing because functional immunity is a substantive defence to prosecution.¹³⁸ Its removal simply hinders use of the automatic defence of functional immunity; one of the defences a defendant can use to avoid criminal responsibility in court.¹³⁹ This removal therefore cannot be considered as presumed guilt.

Akande and Shah also assert that the sovereignty of an act does not depend on its legality but rather on whether it is 'governmental'.¹⁴⁰ They raise a valid point but fail to recognise that the removal of functional immunity in respect of international

¹³² Ibid at 870-4.

¹³³ *Nuremberg* supra note 88 at p. 56, 100, 110 & 174-5; Cassese op cit note 98 at 870-4.

¹³⁴ Ibid.

¹³⁵ Akande & Shah op cit note 91 at 830-2.

¹³⁶ Ibid.

¹³⁷ Ibid.

¹³⁸ Cassese op cit note 14 at 266; Cassese op cit note 98 at 863.

¹³⁹ Fabián O. Raimondo *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (2008) at 137.

¹⁴⁰ Akande & Shah op cit note 91 at 830-2.

crimes has become part of CIL.¹⁴¹ This entry into the *corpus* of CIL makes the removal legally binding on all states and their officials regardless of whether a state agrees with the relevant rule or not.¹⁴² The CIL position also shows wide acceptance by states who appear to be more inclined to end impunity or to individually prosecute international crimes as a means of deterrence, rather than strictly adhering to the principle of sovereignty. Given the foregoing, Akande and Shah's argument is unpersuasive and will not be utilised here, other than to illustrate the diverging views around the subject.

The judicial and scholastic position in support of the lifting of functional immunity for international crimes also illustrates that individuals are liable for committing international crimes even if these were sanctioned by the state.¹⁴³ This is since acts of criminality, widely recognized as such, will not be tolerated if these are perpetrated in the international community, even if carried out by individuals acting on behalf of states.¹⁴⁴ As a result, functional immunity cannot be used to shield criminal responsibility and accountability in respect of international crimes.

The removal of functional immunity in relation to international crimes is rational since certain international crimes are also prohibited as *jus cogens* (peremptory norms). These international crimes, although disputed, include aggression, piracy, slavery, torture as well as genocide, war crimes and crimes against humanity.¹⁴⁵ As a result, states and their officials have a duty to comply with *jus cogens* since these are international principles that are universally recognized and accepted by states in the international community, and from which no derogation is possible.¹⁴⁶

¹⁴¹ Cassese op cit note 98 at 873-4.

¹⁴² *Continental Shelf* supra note 117 at para. 27; *North Sea Continental Shelf, Judgment*, I.C.J. Reports 1969, para.73-4 stipulates that extensive and consistent state practise, rather than universal acceptance, is necessary for a rule to become part of customary international law which is binding on all states. The officials of the State would be bound since they act on behalf of their States therefore meaning that the obligations of their State would also extend to them whilst acting in their official capacity.

¹⁴³ *Nuremberg* supra note 93 at 110; Cassese op cit note 98 at 870-4.

¹⁴⁴ Ibid.

¹⁴⁵ M. Cherif Bassiouni 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*' (1996) 59 *Law & Contemporary Problems* 63 at 68.

¹⁴⁶ Article 53 of the VCLT.

Another justification is that peremptory norms supersede other obligations since they are hierarchically superior to general international law including CIL and the rights arising therein such as functional immunity.¹⁴⁷ This means that *jus cogens* trump functional immunity granted in CIL.¹⁴⁸ As a result, individuals who violate *jus cogens*, by perpetrating international crimes that are prohibited under *jus cogens*, are criminally responsible and liable regardless of whether or not their actions have been authorized by their state.¹⁴⁹ This viewpoint is consistent with the normative hierarchy theory where *jus cogens* supersede functional immunity.¹⁵⁰ In appropriate cases the violation of international crimes could entail both individual criminal responsibility as well as state responsibility.¹⁵¹

iii. *Consequences of removing immunity*

As has been argued in section 2.2 of this chapter, President Al-Bashir can enjoy both functional and personal immunities concurrently since these exist simultaneously and overlap.¹⁵² This means that the removal or lifting of immunity, functional and personal, will have different implications before foreign domestic courts. The crimes of which President Al-Bashir is accused include genocide, crimes against humanity and war crimes.¹⁵³ These crimes are recognized as international crimes and prohibited as part of *jus cogens*.¹⁵⁴ Case law from international and domestic courts also verifies that serious international crimes such as piracy, slavery, genocide, crimes against humanity, war crimes and torture are part of CIL.¹⁵⁵ This is because

¹⁴⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, I.C.J. Order of 13 September 1993, separate opinion of Judge Lauterpracht para. 100.

¹⁴⁸ Alebeek op cit note 92 at 219-21.

¹⁴⁹ *Nuremberg* supra note 93 at p.110; Cassese op cit note 98 at 870-4.

¹⁵⁰ Alebeek op cit note 92 at 219-21.

¹⁵¹ Cassese op cit note 98 at 864.

¹⁵² Cassese op cit note 14 at 266-7.

¹⁵³ *Al Bashir* supra note 28.

¹⁵⁴ Bassiouni op cit note 145 at 68.

¹⁵⁵ *Reservations to the Convention on Genocide*, Advisory Opinion, I.C.J. Reports 1951 p.23; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, Separate Opinion of Higgins, Kooijmans and Buergenthal para. 31, 46 & 60; *Prosecutor v. Anto Furundzija*, IT-95-17/1-T, Judgement of 10 December 1998 para. 138 & 156; *Attorney- General of the Government of Israel v. Eichmann* in District Court of Jerusalem, Criminal Case No. 40/61, Judgment of 11 December 1961 para.12 retrieved from: www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Israel/Eichmann_Judgement_11-12-1961.pdf, accessed on 13 March 2017.

such crimes are widely agreed upon as criminal in the international community reflecting *opinio juris* and state practice.

Judicial practice also demonstrates that these international crimes are subject to the exercise of universal jurisdiction, by any state, without the need of a causal link between the state and the crime.¹⁵⁶ According to the *Eichmann* case ‘...crimes which offended the whole of mankind and shocked the conscience of nations are grave offences against the law of nations itself ("delicta juris gentium").’¹⁵⁷ This is also confirmed in the *Reservations to the Convention on Genocide* case since crimes that ‘...shock the conscience of mankind and results in great losses to humanity...’ are subject to universal jurisdiction by any state.¹⁵⁸

As aforementioned, President Al-Bashir is accused of having committed international crimes, namely genocide, crimes against humanity and war crimes.¹⁵⁹ Functional immunity is lifted in respect of these crimes given the CIL position, and the normative hierarchy theory stipulating the status of these crimes as *jus cogens* trumps functional immunity.¹⁶⁰ The functional immunity of President Al-Bashir is removed making him, *prima facie*, subject to universal jurisdiction exercised by any foreign domestic courts. However, Al-Bashir is also entitled to personal immunity which shields him from prosecution during his term in office.¹⁶¹ Although one form of immunity, functional, is removed the other applicable personal immunity would also need to be removed before he could be prosecuted by a domestic court.¹⁶² President Al-Bashir is therefore covered by personal immunity and can only be prosecuted before foreign domestic courts after he leaves office.¹⁶³

The examination of the doctrine of immunity before foreign domestic courts, showed the removal of functional and personal immunity within CIL and the associated consequences. The position of immunity before foreign domestic courts, in relation

¹⁵⁶ *Arrest Warrant* supra note 155 at para.31 & 46.

¹⁵⁷ *Eichmann* supra note 155 at para.12.

¹⁵⁸ *Reservations to the Convention on Genocide* supra note 155 at p.23

¹⁵⁹ *Al Bashir* supra note 28.

¹⁶⁰ Alebeek op cit note 92 at 219-21; *Nuremberg* supra note 93 at p.56; Cassese op cit note 98 at 873-4.

¹⁶¹ *Arrest Warrant* supra note 155 at para. 84-5.

¹⁶² Cassese op cit note 14 at 266.

¹⁶³ *Arrest Warrant* supra note 155 at para. 84-5.

to applicability and removal, largely reflects the position of immunity within CIL. The reason for this is that these courts are bound to respect and comply with principles of CIL, and at times have jurisdiction over a case by virtue of universal jurisdiction grounded in CIL. However, Resolution 1593 referred the situation in Sudan to the ICC rather than foreign domestic courts. The approach in this Court is more relevant to the subject under discussion ie the use of the SC to subject third parties to the ICC's jurisdiction.

The ICC does not presently have President Al-Bashir in custody but it is necessary to analyse how immunity is normally abrogated before this Court.¹⁶⁴ This analysis will also help to illustrate the obligations placed on states to arrest and surrender President Al-Bashir. The lifting of immunity before the ICC will be examined below.

b. Position before the ICC

The Rome Statute recognizes one legal regime of immunity for States Parties and one for non-States Parties. This is illustrated by provisions of the RS, particularly Articles 27 and 98, which regulate immunity for State Parties and non-State Parties respectively.¹⁶⁵ According to scholars, such as Burchard, Article 27 (1) of the RS expressly lifts functional immunity whilst Article 27 (2) of the RS removes personal immunities.¹⁶⁶ In addition, the language used in these provisions can be interpreted to support the views expressed within academia.

Article 27 (1) of the RS refers to the granting of immunity based on 'official capacity' which suggests that immunity is attached to individuals serving in their public capacity.¹⁶⁷ The provision also lists examples of positions in which individuals can serve an official capacity, which includes '...Heads of State or Government or, member of a Government or parliament, an elected

¹⁶⁴ International Criminal Court 'Al Bashir Case' available at <https://www.icc-cpi.int/darfur/albashir> accessed on 28 February 2017 President Al-Bashir is still at large.

¹⁶⁵ Akande op cit note 65 at 339.

¹⁶⁶ Christoph Burchard 'Article 27: Irrelevance of official Capacity' in Otto Triffterer & Kai Ambos (eds) *Rome Statute of the International Criminal Court : A Commentary* 3 ed (2016)1040.

¹⁶⁷ Ibid.

representative...'.¹⁶⁸ Article 27 (2) of the RS refers to the 'official capacity of a person' which suggests that immunities would be attached to the official status of a person.¹⁶⁹ This can be inferred from the fact that the provision explicitly links official capacity to a person, which suggests that official capacity emanates from the status or specific position occupied by an individual, unlike Article 27 (1) which only refers to official capacity generally. However, reference to both official capacity and a person also implies that both functional and personal immunities may be applicable. The applicability of both types of immunity is endorsed by scholars such as Burchard.¹⁷⁰

Gaeta argues that Article 27(1) of the Rome Statute is in accordance with CIL since functional immunities are lifted in respect of international crimes.¹⁷¹ However, Article 27 (2), which is applicable to personal immunity, departs from CIL since immunity for State Parties is relinquished when an accused is brought before the Court.¹⁷² This derogates from the position in CIL where personal immunities are absolute during the relevant official's period in office.¹⁷³ Article 27 of the RS can generally be construed as a waiver of immunity for States Parties to the Rome Statute since the statutory instrument to which they are legally bound includes a provision that removes immunity.¹⁷⁴

The distinction between the position in CIL and that within international criminal courts such as the ICC is evident. Even sitting heads of state accorded immunity *ratione personae* can be prosecuted by the ICC.¹⁷⁵ On the other hand, there is the CIL position, where immunity allows for prosecutions only after one leaves office.¹⁷⁶ However, the ICC position should not be regarded as a complete departure from CIL.

¹⁶⁸ Article 27 (1) of the Rome Statute; Otto Triffterer 'Article 27: Irrelevance of official Capacity' in Otto Triffterer (ed) *Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* 2ed (2008) at 788.

¹⁶⁹ Burchard op cit note 166 at 1040.

¹⁷⁰ Ibid at 1054.

¹⁷¹ Paola Gaeta 'Official Capacity and Immunities' in Antonio Cassese, Paola Gaeta & John R.W.D. Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* (2002) 990.

¹⁷² Ibid at 991-2& 1000.

¹⁷³ Akande & Shah op cit note 91 at 815 & 818.

¹⁷⁴ Wardle op cit note 72 at 187.

¹⁷⁵ This is illustrated by Article 27 (1) of the RS which removes immunity even for incumbent heads of state.

¹⁷⁶ Akande & Shah op cit note 91 at 815 & 818.

The RS recognises immunities, in Article 27 of the RS, that are granted to high level officials including sitting heads of state but these are simply waived before the ICC, for States Parties.¹⁷⁷

It appears that immunity is more easily lifted in respect of the ICC, which utilises a statutory provision necessitating the waiver of immunity before the Court. The ICC therefore has an easier method of dealing with immunity from jurisdiction than foreign domestic courts. It is difficult for foreign domestic courts to remove or lift immunity, and this is compounded by the CIL position which grants absolute personal immunity while the relevant official is in office.¹⁷⁸ This can be contrasted with the ICC that uses Article 27 of the RS to remove immunity.¹⁷⁹

State Parties, by ratifying the RS, have expressly agreed to be bound to this statutory instrument.¹⁸⁰ They have waived their immunity which is expressed through Article 27 of the RS.¹⁸¹ This differs from foreign domestic courts who usually do not have the consent of the individuals being indicted before their court, and are therefore bound to respect the doctrine of immunity grounded in CIL. However, Article 27 (2) is *prima facie* inapplicable to Al-Bashir since Sudan is not a State Party to the ICC.

Article 98 (1) of the RS which applies to non-States Parties is *prima facie* the most applicable provision to the *Al-Bashir* case. This is because Sudan is a non-State Party to the Rome Statute and therefore a third party which, in principle, should not be subject to the jurisdiction of the ICC without its express consent.¹⁸² Article 98 (1) of the RS obligates the ICC to refrain from issuing requests for arrest and surrender in cases dealing with third states that have not ratified the Rome Statute. According to this provision the ICC cannot issue requests for arrest and surrender that are inconsistent with duties of states under international law unless the third state

¹⁷⁷ Wardle op cit note 72 at 187.

¹⁷⁸ Akande & Shah op cit note 91 at 815 & 818.

¹⁷⁹ Wardle op cit note 72 at 187.

¹⁸⁰ Article 2 (1) (b) of the VCLT.

¹⁸¹ Wardle op cit note 72 at 187.

¹⁸² Fitzmaurice op cit note 17 at 38.

consents to the ICC's jurisdiction or waives its immunity. This is rational since immunity is protected within customary international law.¹⁸³

Article 98 (1) of the RS therefore seems to imply that the decisions of the ICC cannot supersede customary international law. A reading of Article 27(2) of the RS validates this inference since an interpretation of the language in the text suggests that it is merely a waiver of immunity and that the provision does not in and of itself lift or remove immunity.¹⁸⁴ According to Article 98 of the RS, the immunities of third parties can be removed only if waived. The ICC would thus not be able to remove the immunity of President Al-Bashir without the involvement of the SC. The ICC would be prevented from even issuing an arrest warrant if immunity against President Al-Bashir was not waived or removed.¹⁸⁵

If immunity is not removed, States Parties would also be hindered from arresting and surrendering President Al-Bashir before the ICC.¹⁸⁶ This would render the adjudication of a case impossible as trials in *absentia* are prohibited at the ICC.¹⁸⁷ The removal of immunity is therefore crucial to the prosecution of individuals from non-State Parties. If the SC is competent to limit immunity, its contribution will be indispensable to the functioning of the ICC in matters relating to third parties.

2.4 Conclusion

The exploration of the doctrine of immunity in CIL demonstrated that President Al-Bashir is covered by both functional and personal immunity.¹⁸⁸ However, the functional immunity of President Al-Bashir is removed in respect of the international crimes of which he is accused.¹⁸⁹ However, foreign domestic courts are unable to prosecute him since his personal immunity survives until after he leaves office.¹⁹⁰ The relationship between functional and personal immunity within CIL was also demonstrated and contrasted with the position within the ICC.

¹⁸³ Cassese op cit note 14 at 264.

¹⁸⁴ Wardle op cit note 72 at 187.

¹⁸⁵ Article 98 (1) of the Rome Statute.

¹⁸⁶ Article 98 of the Rome Statute.

¹⁸⁷ Article 63 of the Rome Statute.

¹⁸⁸ Cassese op cit note 98 at 863; Cassese op cit note 14 at 266-7.

¹⁸⁹ *Nuremberg* supra note 93 at p.110; Cassese op cit note 98 at 870-4.

¹⁹⁰ Cassese op cit note 14 at 265-6; Cassese op cit note 98 at 863-4.

The ICC respects the CIL position in the context of Article 27 (1) of the RS but this is not the case for Article 27 (2) of the RS on personal immunities.¹⁹¹ Article 27 (2) of the RS lifts personal immunity even during an official's term in office, which is inconsistent with the CIL position.¹⁹² Examination into the position at the ICC also showed that immunity is regulated differently depending on the status of the state ie whether it is a State Party or non-State Party.¹⁹³ This is rational since it is a treaty-based institution which should comply with the law of treaties, binding only states that have expressly agreed to be bound.¹⁹⁴

The analysis in this chapter also revealed the probable necessity of SC involvement in cases involving non-State Parties, which would otherwise be impossible to adjudicate. This is implied by Article 98 (1) of the RS which stipulates that the ICC is not able to even issue an arrest warrant if the relevant third party has not waived its immunity. The inability of the ICC to issue a warrant for the arrest and surrender of defendants before the Court would render the adjudication of a case impossible as trials in *absentia* are prohibited.¹⁹⁵ The SC's powers will be examined in Chapter Three to determine whether it is able to remove immunity protected within CIL.

¹⁹¹ Gaeta op cit note 171 at 990.

¹⁹² Gaeta op cit note 171 at 991-2& 1000.

¹⁹³ Akande op cit note 65 at 339. Article 27 of the RS applies to State Parties and Article 98 of the RS applies to non-States Parties.

¹⁹⁴ Fitzmaurice op cit note 17 at 38.

¹⁹⁵ Article 63 of the Rome Statute.

CHAPTER 3 SECURITY COUNCIL REFERRAL AS A TRIGGER OF ICC JURISDICTION

3.1 Introduction

This chapter will examine the SC referral mechanism to the ICC. The legal basis of this referral mechanism and the problems that arise from conferring jurisdiction in this manner will be outlined. The issues raised by compelling third parties to be subject to the ICC's jurisdiction will be narrowed to those relating to Resolution 1593 (2005). As stated, these include the lack of state consent to the ICC's jurisdiction and the removal of Al-Bashir's immunity. This chapter will examine the effect of SC resolutions on the principle of state consent and head of state immunity, with a view to establishing whether these can be limited by the SC in order to enable effective prosecution by the ICC.

3.2 The Legal Basis of the Security Council Referral Mechanism

The referral of situations to the Prosecutor of the International Criminal Court for investigation by the SC is a method of triggering the ICC's jurisdiction over a case or situation.¹⁹⁶ According to Article 13 (b) of the Rome Statute, the statutory and governing instrument of the ICC, the powers of the SC to refer cases to the Prosecutor of the ICC for investigation are enshrined within its Chapter VII powers. However, it is not the only method of triggering the ICC's jurisdiction which may also be set off through a referral to the Prosecutor by States Parties,¹⁹⁷ a *proprio motu* investigation by the Prosecutor,¹⁹⁸ and referrals by states that accept the jurisdiction of the ICC on an ad hoc basis ie in respect of a particular crime.¹⁹⁹

The SC referral mechanism is an exceptional procedure of triggering the ICC's jurisdiction, in which a political body is utilised to facilitate jurisdiction to the ICC. It is the only method of triggering the ICC's jurisdiction that involves a third party to the Court such as the SC. The other procedures of setting off the Courts jurisdiction, described above, involve either the Prosecutor of the ICC, States Parties to the ICC or states that have voluntarily accepted the jurisdiction of the ICC.²⁰⁰ These are all

¹⁹⁶ Article 13 (b) of the Rome Statute.

¹⁹⁷ Article 13 (a) & 14 of the Rome Statute.

¹⁹⁸ Article 13(c) & 15 of the Rome Statute.

¹⁹⁹ Article 12 (3) of the Rome Statute.

²⁰⁰ Article 12 (3), 13 (c) & 13 (a) of the Rome Statute.

bound to the ICC and are part of the ICC through legal means such as ratification, ad hoc acceptance of jurisdiction, or the need to carry out their mandate as in the case of the Prosecutor.²⁰¹ However, the SC is independent of the ICC as it is not bound to the RS's provisions; according to the Relationship Agreement, the SC is bound to the UN Charter.²⁰² However, the SC does appear to be subject to the RS in certain ways, for instance, Article 13 (b) of the RS makes it clear that the SC needs to issue the referral according to its Chapter VII powers.

The SC in Resolution 1593 explicitly mentioned that it referred the situation in Sudan in accordance with its Chapter VII powers.²⁰³ This could be interpreted as merely affirming the legal basis upon which the referral mechanism is grounded within the UN Charter, which is the SC's governing statutory instrument.²⁰⁴ The SC derives its power from the UN Charter rather than the RS.²⁰⁵ The inclusion of Chapter VII powers within the RS is therefore merely a confirmation of this legal basis rather than an instruction or assigned duty for the SC to issue decisions in a certain manner. This is obvious since the SC as aforementioned is not bound to the RS but is only subject to the provisions of the UN Charter.²⁰⁶

Article 13 (b) of the RS demonstrates the importance of the SC's Chapter VII powers. This warrants closer scrutiny of the scope and limitations to the exercise of this power. It is important to understand the legal basis of the referral mechanism and the power that the ICC derives from the use of Article 13 (b) of the Rome Statute, which is the basis for the utilisation of the SC's power. The SC's Chapter VII powers will be examined in greater detail in the following section.

²⁰¹ Article 12 (1) of the RS; Article 12 (2) (3) of the RS; Article 13 (c) & 15 of the RS.

²⁰² Article 3 of the Relationship Agreement.

²⁰³ Resolution 1593 S/RES/1593 (2005) preamble - para.1.

²⁰⁴ Article 2 of the Relationship Agreement The United Nations acts in accordance with and has responsibilities under the UN Charter. This means that the UN and its organs such as the SC are bound to act in accordance with the UN Charter.

²⁰⁵ Louise Arbour and Morten Bergsmo 'Conspicuous absence of jurisdictional overreach' in Herman A.M. von Hebel, Johan G. Lammers & Jolien Schukking (eds) *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (1999) 140.

²⁰⁶ Article 3 of the Relationship Agreement.

3.3 The Security Council's Chapter VII powers

The Security Council is mandated to maintain international peace and security and has wide-ranging powers to fulfil its mandate;²⁰⁷ these are enshrined within Chapters VI, VII, VIII, and XI of the UN Charter.²⁰⁸ Chapter VII enshrines the most extensive of the SC's powers.²⁰⁹ These powers are also the treaty basis upon which referrals to the ICC are effected.²¹⁰ According to Article 13 (b) of the RS, the involvement of the Security Council in the ICC is by virtue of the exercise of its Chapter VII powers. This provision reflects reality as exemplified by the language in Resolution 1593, which makes specific reference to Chapter VII and the maintenance of international peace and security.²¹¹ The Security Council is obligated to qualify situations and events in accordance with Article 39 of the UN Charter.²¹² This is owing to the fact that the exercise of its Chapter VII powers is set off by the qualification of events and situations as '...threats to the peace, breaches of the peace, and acts of aggression...'.²¹³

The Security Council has wide discretion to determine whether situations fulfil the criteria in Article 39 of the UN Charter, and whether enforcement action is to be adopted to respond to such situations.²¹⁴ The SC can adopt enforcement measures enshrined within Articles 40, 41 and 42 of the Charter after situations are qualified within the meaning of Article 39 of the UN Charter.²¹⁵ Article 40 of the UN Charter regulates provisional measures, while Article 41 is concerned with enforcement measures not involving the use of force.²¹⁶ Article 42 of the UN Charter sanctions the use of force: '...by air, sea, or land forces as may be necessary to maintain or restore international peace and security....'.²¹⁷

²⁰⁷ Article 24 (1) (2) of the Charter.

²⁰⁸ Article 24 (1) (2) of the Charter.

²⁰⁹ David Schweigman *The Authority of the Security Council under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice* (2001) 33.

²¹⁰ Article 13 (b) of the Rome Statute.

²¹¹ Security Council Resolution 1593 *S/RES/1593 (2005)* at preamble.

²¹² Article 39 of the UN Charter; De Wet op cit note 231 at 133.

²¹³ Article 39 of the UN Charter; De Wet op cit note 231 at 133.

²¹⁴ Article 39 of the UN Charter; De Wet op cit note 231 at 2 & 133; Stefan Talmon 'The Security Council as World Legislature' (2005) 99 *The American Journal of International Law* 175 at 180.

²¹⁵ Article 39 of the UN Charter; De Wet op cit note 231 at 133; Schweigman op cit note 209 at 33-4.

²¹⁶ Articles 40 & 41 of the UN Charter.

²¹⁷ Article 42 of the Charter; Schweigman op cit note 209 at 33-4.

The use of force by the SC in the exercise of its Chapter VII powers is therefore an exception to the prohibition within Article 2(4) of the UN Charter.²¹⁸ The SC's ability to use force during enforcement measures is striking and illustrates its extensive power since it is able to limit principles that are part of CIL such as '...non-use of force...'.²¹⁹ Decisions made within the scope of the SC's Chapter VII powers are adopted with the aim to '...maintain and restore international peace and security....' a function over which it has primary responsibility.²²⁰ These decisions are binding on Member States of the UN according to Articles 25 and 48 of the UN Charter.²²¹ Case law of the International Court of Justice (ICJ) such as *Lockerbie* has also affirmed the binding nature of the SC's Chapter VII decisions.²²² This case and other cases within the ICJ's jurisprudence are authoritative since they are clarifications of international law by the main judicial organ of the UN, which is competent to issue advisory opinions on legal matters.²²³

The binding nature of Chapter VII decisions means that the Member States of the UN are legally bound to comply with the decisions of the Security Council.²²⁴ Sudan, a Member State of the UN, is bound by the decision, in Resolution 1593, to refer it to the Prosecutor of the ICC for investigation and subsequent prosecution if appropriate.²²⁵ The SC's Chapter VII decisions are also consistent with the principle of state consent, an important principle in international law.²²⁶ States are deemed to have given consent to be bound via Article 25 of the UN Charter.²²⁷ Additionally, these decisions supersede other obligations arising from other treaties.²²⁸

²¹⁸ Inger Österdahl *Threat to peace: The Interpretation by the Security Council of Article 39 of the UN Charter* (1998) at 26.

²¹⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, para.73.

²²⁰ Article 39 & Article 24 (1) of the UN Charter.

²²¹ Article 25 & 48 of the UN Charter.

²²² *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America/ United Kingdom)*, Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992, para. 40.

²²³ Articles 92 & 96 of the Charter.

²²⁴ Article 48 of the UN Charter; *Lockerbie* supra note 222.

²²⁵ United Nations 'Member States' available at <http://www.un.org/en/member-states/#gotoS>.

²²⁶ Dire Tladi & Polina Dlagnekova 'The will of the state, consent and international law: piercing the veil of positivism' (2006) 21 *SA Public Law* 111 at 112.

²²⁷ Akande op cit note 65 at 335 & 341.

²²⁸ Article 103 of the UN Charter.

However, the Security Council's competence to adopt and issue decisions under its Chapter VII powers is not unrestricted. This is confirmed by the ICTY in the *Tadic* case where the court pronounced on the possibility of limiting the SC's enforcement action within its Chapter VII powers.²²⁹ The *Tadic* case refers to possible '...constitutional...' limitations on the SC's powers, enshrined within Article 24 (2) of the UN Charter.²³⁰ As with the case of the jurisprudence of the ICJ, that of other international criminal courts is also authoritative since it clarifies international law.

Article 24 (2) of the UN Charter obligates the SC to act in accordance with the purposes and principles of the UN. The SC is also bound to comply with *jus cogens* since these are peremptory norms from which no derogation is possible.²³¹ Scholars such as de Wet have identified limitations to the SC's power which emanate from Article 24 (2) of the UN Charter.²³² The obligation to comply with the purposes and principles of the UN, in Article 24 (2) of the RS, is required in the SC's exercise of its powers, including those within its Chapter VII powers. This would include decisions and enforcement measures adopted under its Chapter VII powers such as referring a situation to the ICC.²³³ This can be inferred from Article 24 (2) of the UN Charter, which stipulates that the Security Council is to act in accordance with the Purposes and Principles of the UN in the discharge of its mandate, the maintenance of international peace and security.²³⁴ This duty would therefore include all action adopted in executing its mandate.

An ICJ advisory opinion also confirmed the limitations to the SC's power arising from the UN Charter, where the Court found that: 'The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment....'²³⁵ This ICJ finding, that of the ICTY, as well as the content of Article

²²⁹ *Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2 October 1995 at para.28.

²³⁰ *Ibid.*

²³¹ Erika de Wet *The Chapter VII Powers of the United Nations Security Council* (2004) at sections 3 and 4 of Chapter 5; Article 53 of the VCLT.

²³² De Wet *op cit* note 231 at sections 3 and 4 of Chapter 5.

²³³ Article 24 (2) of the UN Charter.

²³⁴ Article 24 (1) of the UN Charter.

²³⁵ *Admission of a State to the United Nations (Charter, Art. 4)*, Advisory Opinion: I.C.J. Reports 1948, p.64.

24 of the UN Charter demonstrates that the SC's competence under Chapter VII is limited in certain respects.²³⁶ However, the purposes and principles of the UN are phrased in broad and generic language which limits legal certainty regarding the scope of the limitations and whether there is an established hierarchy in the relevant norms.²³⁷

The purposes of the UN which are relevant to the SC include compliance with principles of justice and international law, respect for human rights and self-determination.²³⁸ As well as striving to achieve international cooperation in resolving international disputes, and harmonisation of action undertaken in respect of collective action adopted to ensure the maintenance of international peace and security.²³⁹ The principles to be respected include the recognition of the sovereign equality of all Member States, acting in good faith, not dealing with matters within the domestic jurisdiction of Members, unless necessary for the exercise of Chapter VII powers, and ensuring non-Members' compliance with the principles of the UN in the maintenance of peace and security.²⁴⁰

Given the foregoing, it is questionable whether the SC has the competence to supersede, Al-Bashir's, immunity and the principle of state consent grounded in the sovereign equality of states.²⁴¹ This is especially since the SC has an obligation to act in accordance with the purposes and principles of the UN, including compliance with the principles of justice and international law, as well as respecting the principle of sovereign equality of Member States.²⁴² The SC also has an obligation to act in accordance with CIL, such as respecting the immunity of sitting heads of state.²⁴³ This can be inferred from the obligation to comply with principles of justice and

²³⁶ *Tadic* supra note 229 at para.28; *Admission of a State to the United Nations* supra note 235 at p.64; Article 24(2) of the UN Charter.

²³⁷ Hitoshi Nasu 'Chapter VII Powers and the Rule of Law: The Jurisdictional Limits' (2007) 26 *Australian Year Book of International Law* 87 at 88-9; Devon Whittle 'The Limits of Legality and the United Nations Security Council: Applying the Extra-Legal Measures Model to Chapter VII Action' (2015) 26 *European Journal of International Law* at 675.

²³⁸ Article 1 of the UN Charter.

²³⁹ Article 1 of the UN Charter.

²⁴⁰ Article 2 of the UN Charter.

²⁴¹ Akande & Shah op cit note 91 at 825; Freeland op cit note 91 at 192-3 (in relation to immunity); Francesco Salerno 'Treaties Establishing Objective Regimes' in Enzo Cannizzaro (ed) *The Law of Treaties Beyond the Vienna Convention* (2011) 232 (in relation to state consent).

²⁴² Article 24 (2), Article 1 (1) & Article 2 (1) of the UN Charter.

²⁴³ Cassese op cit note 14 at 264.

international law.²⁴⁴ This view is supported by scholars such as Akande who suggest that the SC has a duty to comply with general international law, including CIL.²⁴⁵

However, the abrogation of immunity by the SC is imperative for the prosecution of President Al-Bashir, since as a sitting head of state he is accorded immunity from jurisdiction which is protected within CIL.²⁴⁶ The limitation of the principle of state consent is also important since, according to the law of treaties, a third party such as Sudan cannot be bound to a treaty such as the Rome Statute without its consent.²⁴⁷ The effect of SC referrals on immunity as well as its competence to limit the principle of state consent will be examined in the following section.

3.4 The Security Council's Competence to limit international law

a. State consent

State consent, as aforementioned, is grounded in the principle of sovereign equality which is a principle of the UN.²⁴⁸ It is also a cornerstone of the principle of autonomy and sovereignty which empowers a state to determine the rights and obligations by which it will be legally bound.²⁴⁹ A state is thus only bound to a treaty if it expresses consent to be bound.²⁵⁰ The decision to be bound should, in principle, be determined solely by the relevant state.²⁵¹

However, this is not always the case. Chapter 1, section 1.1, illustrated that the SC referral mechanism to the ICC binds third parties to the RS, in doing so it violates state consent.²⁵² Denying non-State Parties the right to express willingness to be bound to a treaty, such as the RS, and treaty-based institutions is a violation of the principle of sovereignty. This is especially given that a state has the right to make

²⁴⁴ Dapo Akande 'The International Court of Justice and the Security Council: Is there Room for Judicial Control of Decisions of the Political Organs of the United Nations?' (1997) *46 International & Comparative Law Quarterly* 309 at 317-22.

²⁴⁵ Ibid.

²⁴⁶ Akande & Shah op cit note 91 at 825; Freeland op cit note 91 at 192-3.

²⁴⁷ Article 34 of the VCLT.

²⁴⁸ Salerno op cit note 241 at 232; Article 2 (1) of the UN Charter.

²⁴⁹ Salerno op cit note 241 at 232.

²⁵⁰ Ebru Coban-Ozturk 'The International Criminal Court, Jurisdiction and the Concept of Sovereignty' (2014) *10 European Scientific Journal* 141 at 150-1.

²⁵¹ Ibid.

²⁵² Kaul op cit note 22 at 33.

decisions that affect it, including whether or not to be subjected to the jurisdiction of a treaty-based institution.²⁵³

The SC as analysed above has a duty to comply with the purposes and principles of the UN including sovereignty, a principle of the UN.²⁵⁴ However, certain purposes and principles of the UN are not absolute and can be limited where objectively justified. The SC is permitted to infringe the principle obligating ‘...[non]interference in matters within the domestic jurisdiction of any State...’ if this is necessary in carrying out its enforcement action under Chapter VII.²⁵⁵ In other words, the SC is obligated to respect matters that are essentially within the domestic jurisdiction of a state to the extent that doing so does not prejudice the exercise of its Chapter VII powers.²⁵⁶

State consent, as aforementioned, is grounded in sovereign equality but can be limited through Article 2 (7) of the UN Charter.²⁵⁷ This is because the principle of sovereignty is intertwined with the concept of domestic jurisdiction which can be limited through Article 2 (7) of the UN Charter.²⁵⁸ Given the foregoing, Resolution 1593 (2005) which was issued under the SC’s Chapter VII powers can restrict the principle of state consent.²⁵⁹ This is endorsed by scholars such as Berman who argue that SC referrals to the ICC override state consent, which is ordinarily a prerequisite for the ICC to have jurisdiction.²⁶⁰ The SC therefore has a treaty basis for limiting principles such as state consent and sovereignty.²⁶¹ Scholars such as de Wet also agree with the possibility of limiting state sovereignty but argue that an exception exists in the case of the core elements of this concept, such as the territorial integrity of a state.²⁶²

²⁵³ Coban-Ozturk op cit note 250 at 150-1.

²⁵⁴ Article 2 (1) & Article 24 of the UN Charter.

²⁵⁵ Article 2(7) of the UN Charter.

²⁵⁶ Article 2 (7) of the UN Charter.

²⁵⁷ Salerno op cit note 241 at 232; Article 2 (1) of the UN Charter.

²⁵⁸ Djura Ninčić *The Problem of Sovereignty in the Charter and in the Practice of the United Nations* (1970) 137.

²⁵⁹ United Nations Security Council Resolution 1593 S/RES/1593 (2005) preamble.

²⁶⁰ Berman op cit note 4 at 176; Article 12 of the Rome Statute.

²⁶¹ Article 2 (7) of the UN Charter.

²⁶² *Ibid* at 194-5.

The limitation of sovereignty and associated principles such as state consent is rational since sovereignty is no longer absolute.²⁶³ This is evidenced by the effect of *jus cogens* and CIL which are binding on states regardless of whether states have expressed consent to be bound.²⁶⁴ CIL is binding since universal acceptance is not necessary for a rule to enter the *corpus* of CIL.²⁶⁵ States are not permitted to derogate from *jus cogens* norms, whether they express consent to be bound is inconsequential.²⁶⁶

Sovereignty and state consent can also be limited in cases where the international community pursues common objectives such as international peace and security. This is demonstrated, for instance, when Article 25 and Article 2 (7) of the UN Charter are read together. Article 2 (7) of the UN Charter provides an exception to widely recognised international principles such as sovereignty, whilst Article 25 is an expression of consent by Member States to be bound to the decisions of the SC. The SC's decisions, within its powers,²⁶⁷ would include those adopted in the pursuit of international peace and security provided within its Chapter VII powers. The autonomy given to the SC to limit sovereignty, and state acceptance to be bound to its decisions, highlights the fact that sovereignty can be limited in the pursuit of more pressing priorities.

Furthermore, the SC's practice of qualifying internal situations as threats within the meaning of Article 39 of the UN Charter, also demonstrates the changing perceptions towards the principle of sovereignty. The SC intervenes and characterises internal situations, with or without international ramifications, within the meaning of Article 39 of the UN Charter.²⁶⁸ This illustrates the erosion of sovereignty since internal

²⁶³ Anel Ferreira-Snyman 'Sovereignty and the Changing Nature of Public International Law: Towards a World Law?' (2007) 40 *Comparative and International Law Journal of Southern Africa* 395 at 407.

²⁶⁴ *Bosnia* supra note 140 para.100 *jus cogens* supersede other obligations including SC resolutions; Article 53 of the VCLT stipulates that no derogation from *jus cogens* is possible; *North Sea Continental Shelf* supra note 142 para.73-4.

²⁶⁵ *North Sea Continental Shelf* supra note 142 at para.73-4.

²⁶⁶ Article 53 of the VCLT; *North Sea Continental Shelf* supra note 142 at para.73-4.

²⁶⁷ Article 24 (2) of the UN Charter lists the Security Council's powers including Chapters VI, VII, VIII, and XII.

²⁶⁸ Österdahl op cit note 218 at 18-19; De Wet op cit note 231 at 158-162 The SC has qualified situations without any international element in the case of Resolution 873 (1993) which was adopted to respond to a dictatorship in Haiti even though the undemocratic governments did not have an

matters within the domestic jurisdiction of states can be subject to international scrutiny, and intervention by bodies such as the SC. The overall objective of maintaining international peace and security trumps sovereignty.

It has been demonstrated that the Security Council is competent to limit sovereignty and state consent when referring a situation to the Prosecutor of the ICC for investigation. Sudan's sovereignty and state consent as a third party to the RS would therefore be limited in respect of cases referred to the Court, including that of President Al-Bashir. The removal of immunity through SC resolutions will now be examined below.

b. Immunity

Immunity, as with state consent, is grounded in the principle of sovereign equality of states,²⁶⁹ and protected within the CIL.²⁷⁰ Sovereignty, as illustrated in relation to the principle of state consent, can be limited by virtue of Article 2 (7) of the UN Charter. Immunity which is grounded in sovereignty, particularly sovereign equality,²⁷¹ can therefore be limited.²⁷² The SC would *prima facie* be able to limit sovereignty. However, immunity is protected within CIL, and the SC's competence to limit CIL is questionable. This is because the SC has a duty to comply with CIL, which can be deduced from its obligation to comply with the principles of justice and international law.²⁷³ Also, although Article 103 of the UN Charter refers to the SC's competence to override treaties, it is not obvious whether this also applies to CIL. Scholars such as Kiyani argue that though the SC has the competence to supersede international treaties, it cannot limit CIL.²⁷⁴

The SC's competence to lift immunity grounded in CIL is a contentious subject which has led to varying opinions being voiced. The main opinions will be examined

international element or potential international ramifications especially since at that time and still today most undemocratic governments are tolerated.

²⁶⁹ Akande & Shah op cit note 91 at 825 (in relation to immunity); Freeland op cit note 91 at 192-3 (in relation to immunity); Salerno op cit note 241 at 232 (in relation to state consent).

²⁷⁰ Cassese op cit note 14 at 264.

²⁷¹ Akande & Shah op cit note 91 at 824-5; Freeland op cit note 91 at 192-3.

²⁷² Article 2 (7) of the UN Charter.

²⁷³ Akande op cit note 214 at 317 -22.

²⁷⁴ Asad G. Kiyani 'Al-Bashir & the ICC: The Problem of Head of State Immunity' (2013)12 *Chinese Journal of International Law* 467 at 478.

in three distinct subsections. These subsections will outline the effect of SC resolutions on immunity at both the vertical and horizontal levels. The former relates to the relationship between the SC and the ICC, while the latter deals with interstate relations.²⁷⁵ The examination at different levels will be explored to uncover the possible ramifications of Resolution 1593 (2005), which are not entirely obvious.

i. The interpretation adopted by the ICC

The Pre-Trial Chamber of the ICC (PTC), in the arrest warrant decision of 2009, held that the investigation and prosecution of the *Al-Bashir* case would be conducted in accordance with the RS.²⁷⁶ This was one of the grounds used to justify a finding that the ICC had jurisdiction over the case.²⁷⁷ The ICC only explicitly addressed the removal of Al-Bashir's immunity, two years later, in its decision on the non-cooperation of Malawi and Chad with the arrest warrant issued against President Al-Bashir.²⁷⁸ In the Malawi decision, the ICC found that CIL provided an exception to head of state immunity before international courts, meaning that immunity was removed before such courts.²⁷⁹ In the Chad decision, the ICC simply reiterated its reasoning in the *Malawi* case.²⁸⁰ The ICC cited case law of other international courts including the Nuremberg tribunal, the Tokyo Tribunal, the ICTR and ICTY to demonstrate the CIL position.²⁸¹ The Court also found in the *Malawi* and *Chad* cases that these States had an obligation to arrest and surrender President Al-Bashir to the ICC since his immunity was removed.²⁸²

²⁷⁵ The differences between these levels are elucidated in more detail in the introduction.

²⁷⁶ *Al Bashir* supra note 67 para.45.

²⁷⁷ Ibid.

²⁷⁸ *Al Bashir (Malawi)* supra note 33 para.43; *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-140-tENG, 13 December 2011 para.13; Dapo Akande 'ICC Issues Detailed Decision on Bashir's Immunity (. . . At long Last . . .) But Gets the Law Wrong' (2011) *Blog of the European Journal of International Law (EJIL)* available at <http://www.ejiltalk.org/icc-issues-detailed-decision-on-bashir%E2%80%99s-immunity-at-long-last-but-gets-the-law-wrong/>.

²⁷⁹ *Al Bashir (Malawi)* supra note 33 para.43

²⁸⁰ *Al Bashir (Chad)* supra note 278 para.13.

²⁸¹ *Al Bashir (Malawi)* supra note 33 para.23-43; *Al Bashir (Chad)* supra note 278 para.13.

²⁸² *Al Bashir (Malawi)* supra note 33 para.44- 47; *Al Bashir (Chad)* supra note 278 para.13-14.

Gaeta supports the ICC's finding that immunity is removed before international courts.²⁸³ She considers this rule to be part of CIL, using similar justifications to that of the ICC, by citing practice before the ICTY, ICTR, Special Court for Sierra Leone (SCSL) and ICJ.²⁸⁴ However, she criticises the initial finding made during the arrest warrant judgement where the Court ruled that the RS would be applicable to Sudan.²⁸⁵ According to Gaeta, the SC is only a trigger of the ICC's jurisdiction which cannot confer Sudan the status of a State Party, an effect of applying the RS to Sudan.²⁸⁶ Provisions of the RS such as Article 27 of the RS, removing immunity for State Parties,²⁸⁷ would therefore be inapplicable.²⁸⁸

Gaeta also disagrees with the ICC's reasoning stipulating the removal of immunity between states, which would enable Malawi and Chad to arrest and surrender President Al-Bashir.²⁸⁹ She argues instead that the removal of immunity by the ICC would only apply at the vertical level, before the Court and Sudan, and not between or amongst states.²⁹⁰ States such as South Africa would therefore be obligated to respect the immunity of a sitting head of state such as President Al-Bashir. South Africa and other States Parties to the RS would also be barred from arresting and surrendering President Al-Bashir, since his immunity would still exist between states ie at the horizontal level.²⁹¹ Gaeta's views, as well as the ICC's finding in the Malawi and Chad decisions on non-cooperation illustrate the various views and interpretations adopted on this subject.

The finding that CIL contains a rule where immunity is removed before international courts is unpersuasive. It has been criticized by academics such as Akande who consider this finding to be essentially flawed.²⁹² This is especially because neither the

²⁸³ Paola Gaeta 'Does President Al Bashir Enjoy Immunity from Arrest' (2009) 7 *Journal of International Criminal Justice* 315 at 316- 322.

²⁸⁴ Ibid.

²⁸⁵ Ibid at 323-5.

²⁸⁶ Ibid at 324-5.

²⁸⁷ Akande op cit note 65 at 339.

²⁸⁸ Gaeta op cit note 283 at 324-5.

²⁸⁹ *Al Bashir (Malawi)* supra note 33 para.44- 47; *Al Bashir (Chad)* supra note 278 para.13-14.

²⁹⁰ Gaeta op cit note 283 at 329-30

²⁹¹ Ibid.

²⁹² Akande op cit note 278.

ICC nor Gaeta identifies or outlines state practice from States Parties to the RS.²⁹³ Also, the enunciated CIL exception removes the relevance of Article 98 of the RS, on respecting the immunities of third states, if immunity is removed before an international court.²⁹⁴ This would also violate the principle of effectiveness where provisions should be interpreted in a manner that will give effectiveness and ‘...meaning...’.²⁹⁵ The ICC also failed to acknowledge that the international courts it referenced applied their statutory instruments, which were binding on the relevant individuals for various reasons, and removed immunity.²⁹⁶ The Court’s reasoning was thus flawed for various reasons.

The ICC’s wrongful reasoning also extends to the obligations placed on Malawi and Chad to arrest and surrender President Al-Bashir. The ICC did not justify the removal of immunity at this level or acknowledge that immunity at different levels, horizontal and vertical, would vary.²⁹⁷ This shows that the Court’s reasoning was not well-thought out and rationalised. This is more obvious in view of Gaeta’s opinion that immunity at the horizontal level was not eradicated which was justified and more convincing than the ICC’s ruling.²⁹⁸ However, it is unclear whether the view of Gaeta relating to the obligations placed on states is correct. This is especially in view of the fact that it is based on the CIL argument which has been identified as incorrect.

However, the ICC’s position is inconsistent, especially in view of the reasoning used to justify the removal of immunity in the decision on the non-cooperation of the Democratic Republic of Congo (DRC).²⁹⁹ This case was decided three years after that of the *Malawi* and *Chad* cases and was based on different rationales. It departed from the reasoning in the *Chad* and *Malawi* cases without even mentioning the rationales adopted in the previous cases. In the *DRC* case, the Court found that heads of state were granted immunity in international law but this was removed before the

²⁹³ Akande op cit note 278 at Immunity Before International Tribunals.

²⁹⁴ *Al Bashir (Malawi)* supra note 33 para.20 & 36-43; Akande op cit note 65 at 338.

²⁹⁵ Akande op cit note 65 at 338.

²⁹⁶ Akande op cit note 278 at Immunity Before International Tribunals.

²⁹⁷ *Al Bashir (Malawi)* supra note 33 para.44- 47; *Al Bashir (Chad)* supra note 278, para.13-14.

²⁹⁸ Gaeta op cit note 283 at 329-30.

²⁹⁹ *Al Bashir (Congo)* supra note 33 para.34.

ICC through Article 27 (2) of the RS, which was applicable only in respect of States Parties, not third parties such as Sudan.³⁰⁰

The Court, in the *DRC* case, reasoned that the immunity of President Al-Bashir was removed as it was deemed a State Party by virtue of Resolution 1593 referring it to the Court.³⁰¹ It interpreted the language in the Resolution which obligates Sudan's full cooperation with the Court, as implicitly removing immunity.³⁰² It is questionable whether such a wide interpretation and broadening of the Resolution's language is correct. The overall position of the ICC is unsettled. This discrepancy is compounded by the lack of a doctrine of binding precedent and a hierarchy in the ICC's Chambers.³⁰³ This limits legal certainty and predictability regarding how the removal of immunity is interpreted by the ICC.

ii. *The need for explicit and clear language*

Scholars such as Wardle argue that the SC needs to explicitly specify derogations or huge departures from international law such as the limitation of immunity, which is protected within CIL.³⁰⁴ He further asserts that the SC needed to use explicit language in order to lift Al-Bashir's head of state immunity.³⁰⁵ The *Al-Jedda* case of the European Court of Human Rights (EctHR) also supports the need for explicit and plain language in SC Resolutions.³⁰⁶ The EctHR in *Al-jedda* made this finding in response to the United Kingdom's claim that the SC had implicitly authorised violations of human rights.³⁰⁷ This was allegedly implied through a SC Resolution that called for the adoption of '...all necessary measures to contribute to the maintenance of security and stability...'.³⁰⁸

³⁰⁰ *Al Bashir (Congo)* supra note 33 para.25-26.

³⁰¹ *Ibid* para.29.

³⁰² *Ibid*.

³⁰³ *Situation in the Democratic Republic of the Congo*, Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, para.30; Joseph Powderly 'The Rome Statute and the Attempted Corseting of the Interpretative Judicial function: Reflections on Sources of Law and Interpretative Technique' in Carsten Stahn & Göran Sluiter (eds) *The Emerging Practice of the International Criminal Court* (2009) 479- 80.

³⁰⁴ Wardle op cit note 72 at 198-200.

³⁰⁵ *Ibid*.

³⁰⁶ *Al-Jedda v. United Kingdom*, Application no. 27021/08, European Court of Human Rights, 7 July 2011 para.102 &105.

³⁰⁷ *Ibid* para.18 & 60.

³⁰⁸ *Ibid* para.105.

The EctHR's position provides some clarity on the importance of using clear and explicit language in SC resolutions, and demonstrates that the SC's intentions cannot be presumed.³⁰⁹ This is especially in cases where the obligations arising from an SC Resolution could be interpreted to violate international law, and the purposes and principles of the UN Charter to which it is duty-bound.³¹⁰ The EctHR judgement is persuasive and reliable since it emanates from an international court which helped to clarify international law, particularly the SC's obligations in the UN Charter.

The SC did not specify the removal of immunity of any officials in Resolution 1593 but simply acknowledged the obligations of states under Article 98 (2) of the RS.³¹¹ Article 98 (2) of the RS prevents the ICC from issuing arrest warrants in respect of the officials of third parties with immunity. According to this provision, States Parties are also obligated to respect international agreements and immunity grounded within international law.³¹² Although the SC expressly obligated Sudan and the parties to the conflict to fully cooperate with the ICC and the Prosecutor, it did not mention CIL or immunity.³¹³

The lack of specificity and precision in Resolution 1593 (2005) could suggest that immunity was not effectively abrogated. According to Wardle, President Al-Bashir's immunity is still intact.³¹⁴ At the vertical level, the ICC cannot prosecute him since immunity would bar the jurisdiction of the ICC in accordance with Article 98 of the Rome Statute. At the horizontal level, ie the relationship between states, states such as South Africa could also rely on Article 98 of the RS to justify non-compliance with the arrest warrant issued against President Al-Bashir. This is since Article 98 (1) of the RS maintains that the ICC cannot issue warrants of arrest in cases where it would lead to the violation of immunities protected within international law.

³⁰⁹ *Al-Jedda* supra note 306 para.102 &105.

³¹⁰ *Ibid.*

³¹¹ United Nations Security Council *Resolution 1593 S/RES/1593* (2005) preamble.

³¹² Article 98 (2) of the Rome Statute.

³¹³ Security Council Resolution 1593 S/RES/1593 (2005) para.2.

³¹⁴ Wardle op cit note 72 at 205.

Wardle argues that Sudan has *prima facie* a duty to arrest and surrender its President before the ICC.³¹⁵ This obligation emanates from the SC Resolution where Sudan is mandated to ‘...cooperate fully ...’ with the ICC.³¹⁶ However, because President Al-Bashir’s immunity is not removed, Sudan can refrain from arresting and surrendering him before the ICC.³¹⁷ Wardle also contends that other states do not have an obligation to comply with the ICC since the SC Resolution simply encourages compliance rather than obligating it.³¹⁸

The language used in the Resolution suggests that states other than Sudan and the parties to its conflict are merely ‘...urged...’ to cooperate with the ICC.³¹⁹ Wardle’s argument is quite convincing but is yet to be supported by case law of the ICC or other courts. For this reason, caution needs to be exercised in relying upon his opinion entirely. The other perspectives on whether President Al-Bashir’s immunity was removed will be analysed further below.

iii. The use of the Rome Statute to lift immunity

Scholars such as Akande and Prost diverge from Wardle’s viewpoint. Prost asserts that explicit language is not necessary when the SC is acting under its Chapter VII powers.³²⁰ Prost contends that an SC decision which results in the abrogation of immunity can be valid without the need for explicit reference to its removal.³²¹ This is justified by reference to the UN Charter which does not necessitate explicit language in making SC decisions valid.³²² According to Prost, Sudan was placed in a position synonymous to that of a State Party to the Rome Statute through the SC referral.³²³ The use of the RS in the *Al-Bashir* case is confirmed by the ICC, in the arrest warrant and non-cooperation finding in the DRC judgement.³²⁴

³¹⁵ Wardle op cit note 72 at 200-1.

³¹⁶ Wardle op cit note 72 at 200-1; Security Council Resolution 1593 S/RES/1593 (2005) para.2.

³¹⁷ Wardle op cit note 72 at at 200-1.

³¹⁸ Wardle op cit note 72 at 203-5; Security Council Resolution 1593 S/RES/1593 (2005) para.2.

³¹⁹ *Ibid.*

³²⁰ Kimberly Prost ‘Article 98: Cooperation with respect to waiver of immunity’ in Otto Triffterer & Kai Ambos (eds) *Rome Statute of the International Criminal Court: A Commentary* 3 ed (2016) 2140-1.

³²¹ *Ibid.*

³²² *Ibid.*

³²³ Prost op cit note 320 at 2140-1; Akande op cit note 65 at 336.

³²⁴ *Al Bashir* supra note 67 para.45.

Akande echoes Prost and argues that Resolution 1593 (2005) conferred Sudan the status of a State Party to the Rome Statute.³²⁵ He also asserts, as does Prost, that Article 27(2) of the Rome Statute became applicable, which is a waiver of immunity applicable to States Parties.³²⁶ States Parties such as South Africa have a duty to comply with the decisions of the ICC such as the arrest warrants issued against President Al-Bashir.³²⁷ South Africa is therefore obligated to arrest and surrender President Al-Bashir,³²⁸ especially as the removal of immunity would make reliance on Article 98 of the RS impossible.³²⁹

Sudan would have a duty to cooperate with the ICC and to arrest and surrender President Al-Bashir since it is placed in the position of a State party.³³⁰ However, other non-State Parties to the RS would have no obligation to arrest and surrender President Al-Bashir. These States do not have any obligations under the RS and Resolution 1593 simply ‘...urged...’ cooperation with the ICC, which is not a binding duty.³³¹

The views of Akande and Prost are premised on the removal of immunity through the use of the RS.³³² The SC did not explicitly state that the ICC would apply the RS. It is logical to argue that the SC must have anticipated the application of the RS to the *Al-Bashir* case, because the ICC would not be able to apply any other law as the RS governs the functioning of the Court.³³³ Also, the Relationship Agreement between the SC and the ICC necessitates the use of the RS by the ICC to guarantee its independence.³³⁴

However, it is questionable whether the SC intended for the ICC to apply the RS to the extremes of using this instrument to limit CIL, which grants immunity to incumbent heads of state. As previously discussed, subsection ii of this section, it is

³²⁵ Akande op cit note 65 at 336.

³²⁶ Akande op cit note 65 at 339; Akande op cit note 278 at Security Council Referrals and Immunity.

³²⁷ Article 86 of the Rome Statute; *Al Bashir* (2009 decision) *supra* note 28.

³²⁸ Article 86 of the Rome Statute.

³²⁹ Prost op cit note 320 at 2140-1; Akande op cit note 65 at 336.

³³⁰ Akande op cit note 65 at 336; Prost op cit note at 315 at 2140-1; Article 86 of the Rome Statute.

³³¹ Wardle op cit note 72 at 203-5; Security Council Resolution 1593 S/RES/1593 (2005) para.2.

³³² Prost op cit note 320 at 2140-1; Akande op cit note 65 at 336.

³³³ Article 1 of the Rome Statute.

³³⁴ Article 2 of the Relationship Agreement.

necessary to use clear and specific language when SC Resolutions are interpreted in ways that constitute a significant departure from international law.³³⁵ However, the reasoning of Akande and Prost echoes the arguments made by the ICC in the *DRC* case in respect of using the RS to remove immunity making it persuasive.³³⁶ The difference lies in the ICC interpreting the language in the SC Resolution rather than using Article 27 (2) of the RS.

3.5 Conclusion

This chapter has outlined and examined the referral mechanism which shows the role and influence of the SC in the ICC's work. The scope of the SC's exercise of its powers under Chapter VII was examined. Decisions adopted under its Chapter VII powers, for instance, take precedence over international agreements and sovereignty by virtue of its powers within the UN Charter.³³⁷ The SC also has extensive powers which enable the limitation of the sovereign rights of states such as the principle of state consent and possibly that of immunity.³³⁸ This shows that the maintenance of international peace and security, the objective of carrying out Chapter VII powers, is so vital that the SC is able to circumvent even widely recognized and respected principles in the pursuit of its objectives.

However, the SC's ability to restrict rules of CIL is questionable and unsettled. The foregoing analysis, the ICC's and the differing opinions within academia, all indicate that whether Resolution 1593 (2005) effectively removed Al-Bashir's immunity is contentious. It is a grey area which is interpreted in varying ways in academia and by the judiciary of the ICC. The SC's competence to abrogate immunity is therefore subject to interpretation. Given this inconsistency it is difficult to establish the correct position. However, the ICC's view is one where the SC is competent to lift immunity.³³⁹ This would make the SC's involvement in the ICC imperative to its ability to adjudicate over cases involving third parties. This is evidenced by the

³³⁵ Wardle op cit note 72 at 198-200; *Al-Jedda* supra note 306 para.102 &105.

³³⁶ *Al Bashir* (Congo) supra note 33 para.29.

³³⁷ Article 2 (7) & Article 103 of the UN Charter; other relevant Chapter VII powers.

³³⁸ Article 2 (7) & Article 103 of the UN Charter; Salerno op cit note 241 at 232; Alebeek op cit note 92 at 277-8.

³³⁹ *Al Bashir (Malawi)* supra note 33 para.44- 47; *Al Bashir (Chad)* supra note 278 para.13-14; *Al Bashir* (Congo) supra note 33 para.29.

constraints posed by immunity grounded in CIL and Article 98 of the RS, analysed in Chapters Two and Three.

If the SC can abrogate immunity, which is the view adopted by the ICC,³⁴⁰ it is doubtful whether it is lawful for the ICC to use the SC to undertake actions which it is not able to perform on its own. The analysis in this chapter has led to the conclusion that the SC is able to supersede the principle of state consent protected within international law.³⁴¹ It is questionable whether States Parties to the Rome Statute are competent to limit state consent and possibly immunity through Article 13 (b) of the RS. The legality of this provision will be examined in Chapter Four.

³⁴⁰ Ibid.

³⁴¹ See Chapter 2, section 2.4 (a) of this paper.

CHAPTER 4 THE LAW OF TREATIES AND THIRD PARTIES

4.1 Introduction

This chapter will discuss the law of treaties within international law, particularly rules that have entered the *corpus* of CIL, with a view to depicting how treaties interact with and apply to third parties. This background will be used to examine whether Article 13 (b) of the RS, the treaty basis which enables the involvement of a third party in the work of the ICC, is lawful.³⁴² This exploration will focus on the ICC's competence to adopt a provision which uses third parties such as the SC to empower the Court to carry out functions which would otherwise be impossible under normal circumstances.

First, the principle of state consent to the ICC's jurisdiction will be examined; thereafter the law of treaties will be explored as it applies generally as well as in relation to third parties. The analysis will establish the legality of using Article 13 (b) of the RS to bind a third party and to circumvent international law including the principle of state consent and immunity.

4.2 State Consent to the Jurisdiction of the ICC

The principle of state consent is an important principle in international law which according to the ruling consent theory of international law is the cornerstone of the binding nature of international law.³⁴³ It is also intertwined with the principle of autonomy and sovereignty.³⁴⁴ These principles enable a state to determine the rights and obligations by which it will be legally bound.³⁴⁵ Sovereignty is a principle of international law possessed by all states in the international community.³⁴⁶ This section will discuss the principle of state consent in relation to the principle of sovereignty, and as a prerequisite for the exercise of the ICC's jurisdiction as a treaty-based institution.

³⁴² Kaul op cit note 22 at 33; Akande op cit note 22 at 305.

³⁴³ Tladi & Dlagnekova op cit note 197 at 112.

³⁴⁴ Salerno op cit note 241 at 232.

³⁴⁵ Ibid.

³⁴⁶ Ferreira-Snyman op cit note 263 at 406.

Consent to the jurisdiction of the ICC is important and is a precondition for the exercise of the Court's jurisdiction according to Article 12 of the RS.³⁴⁷ All three subparagraphs of this provision necessitate state consent. However, Article 12 of the RS appears to refer to States Parties to the Rome Statute and third states that have accepted the jurisdiction of the court in an ad hoc manner.³⁴⁸ This is implied by the language in the provision which refers to “[a] State which becomes a Party to this Statute...”, and is therefore legally bound to its provisions.³⁴⁹ Reference is also made to third states that are subject to the ICC's jurisdiction by virtue of having lodged a declaration, thus accepting consent.³⁵⁰ State consent, in respect of SC referrals, is not regulated within Article 12 or other provisions in the Rome Statute. This signals its irrelevance in the context of SC referrals before the ICC, at least from the perspective of the Court. Some scholars even argue that SC referrals override the state consent that the ICC requires in order to have jurisdiction.³⁵¹

However, the Rome Statute should be consistent with rules and principles of the law of treaties because treaties are governed by international law, which includes the law of treaties.³⁵² This is especially relevant in relation to the effect of treaties on third parties such as Sudan, seeing that state consent to be bound to a treaty is an important principle in the law of treaties and general international law.³⁵³ The relevant rules in the law of treaties will be explored in the section that follows.

4.3 The Law of Treaties

Treaty law and the law of treaties are two distinguishable concepts with different meanings.³⁵⁴ The former relates to the rights and obligations arising from treaties while the latter refers to the body of law which applies to and regulates the working of treaties.³⁵⁵ This section will focus mainly on the law of treaties and its associated principles. According to the Vienna Convention on the Law of Treaties of 1969 (VCLT), a treaty is ‘...an international agreement concluded between States in

³⁴⁷ Berman op cit note 4 at 176.

³⁴⁸ Ibid.

³⁴⁹ Article 12 (1) of the Rome Statute.

³⁵⁰ Article 12 (3) of the Rome Statute.

³⁵¹ Berman op cit note 4 at 176.

³⁵² Klabbers op cit note 12 at 38-39.

³⁵³ Thirlway op cit note 10 at 35; Article 34 of the VCLT; Tladi & Dlagnekova op cit note 197 at 112.

³⁵⁴ Thirlway op cit note 12 at 7.

³⁵⁵ Ibid.

written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'.³⁵⁶ A treaty is also intended to create rights and obligations for its parties.³⁵⁷ The Rome Statute fits the definition of a treaty as it was negotiated and concluded by states in order to create legally binding obligations and rights.³⁵⁸ As previously stated, this treaty should be compliant with the law of treaties which regulates the 'operation of treaties'.³⁵⁹

The law of treaties and its associated principles are codified in the VCLT.³⁶⁰ This instrument is specifically relevant for using as a reference since most of its treaty provisions reflect CIL.³⁶¹ This has been affirmed by the ICJ in a number of cases.³⁶² The ICJ cases specially affirm that Articles 26 to 28, 31 and 32 of the VCLT have attained the status of CIL.³⁶³ Scholars such as Lagerwall, David and Gautier also consider Articles 2(1), 34, 53 and 64 of the VCLT as reflecting customary status.³⁶⁴ Lagerwall, David and Gautier cite case law from various international courts, which affirm the entry of the stated provisions into the *corpus* of CIL.³⁶⁵ This research project will narrow the scope of discussion to the aforementioned treaty provisions of the VCLT identified as CIL. Article 38 of the VCLT stipulating that

³⁵⁶ Article 2 (1) of the Vienna Convention on the Law of Treaties (VCLT).

³⁵⁷ Klabbers op cit note 12 at 55.

³⁵⁸ Cassese op cit note 14 at 340-3.

³⁵⁹ Thirlway op cit note 12 at 7.

³⁶⁰ Klabbers op cit note 12 at 38-39.

³⁶¹ Thirlway op cit note 10 at 36; Karl Zemanek 'Vienna Convention on the Law of Treaties: United Nations Audiovisual Library of International Law', available at: <http://legal.un.org/avl/pdf/ha/vclt/vclt-e.pdf>, accessed on 13 March 2017

³⁶² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, para.160; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, I.C.J. Reports 2008, para.124; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, para. 65 & 145; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012 para. 100 & 113.

³⁶³ Ibid.

³⁶⁴ Anne Lagerwall 'Article 64: Emergence of a new peremptory norm of general international law ('jus cogens')' in Olivier Corten & Pierre Klein (eds) *The Vienna Conventions on the Law of Treaties: A Commentary Volume II* (2011) 1465; Philippe Gautier 'Article 2 Convention of 1986: Use of Terms' in Olivier Corten & Pierre Klein (eds) *The Vienna Conventions on the Law of Treaties: A Commentary Volume II* (2011) 60; Eric David 'Article 34 Convention of 1969: General Rule regarding third States' in Olivier Corten & Pierre Klein (eds) *The Vienna Conventions on the Law of Treaties: A Commentary Volume II* (2011)889-9.

³⁶⁵ Ibid.

treaty provisions which become CIL subsequent to the adoption of a treaty are binding on third parties, will also be referenced. This provision is not recognised as CIL but it simply states an obvious fact, namely, that states are bound by CIL, even if the CIL norm in question originated in a treaty.³⁶⁶

The RS should comply with the law of treaties particularly rules within the *corpus* of CIL and relating to third parties. This is because although states can contract out of certain rules of CIL by virtue of the adoption of a treaty opting out is only valid for States Parties rather than third parties.³⁶⁷ Also, CIL can be used as a supplementary source for interpreting the RS and may be used where the treaty is silent.³⁶⁸ The principle *pacta sunt servanda* codified in Article 26 of the VCLT stipulates that '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith'.³⁶⁹ It is a central element governing treaties,³⁷⁰ and applies to the performance and conclusion of treaties.³⁷¹ This principle asserts that the provisions of a treaty are binding on its State Parties, suggesting that non-parties cannot be legally bound. This is confirmed by the principle of *res inter alios acta nec nocet nec prodest* which can be seen as an extension of *pacta sunt servanda*.³⁷²

The principle of *res inter alios acta nec nocet nec prodest*, also expressed in Article 34 of the VCLT, prohibits treaties concluded by States Parties from having third party effect, thereby excluding third party rights and obligations.³⁷³ This principle is expressed within Articles 34, 53 and 64 of the VCLT which stipulates that treaties should grant rights or set obligations on States Parties only, thereby excluding third

³⁶⁶ Giorgio Gaja 'Article 38 of the Convention of 1969: Rules becoming binding on third States through international custom' in Olivier Corten & Pierre Klein (eds) *The Vienna Conventions on the Law of Treaties: A Commentary Volume II* (2011) 950; Thirlway op cit note 10 at 35-6.

³⁶⁷ Thirlway op cit note 10 at 133 & 136.

³⁶⁸ Ibid at 139.

³⁶⁹ Article 26 of the VCLT; Thirlway op cit note 10 at 31.

³⁷⁰ Ibid.

³⁷¹ Klabbers op cit note 12 at 39.

³⁷² Thirlway op cit note 10 at 35.

³⁷³ Thirlway op cit note 10 at 35; Thirlway op cit note 12 at 7.

parties.³⁷⁴ This principle also encompasses the rule of the ‘relative effect’ of treaties, where a treaty is legally binding only on its State Parties rather than third parties.³⁷⁵

From the foregoing, a treaty is *res inter alios acta* to non-State Parties and cannot bind third parties to its provisions.³⁷⁶ However, treaty provisions can be binding on third parties if they attain the status of *jus cogens* norms.³⁷⁷ The other methods of making treaties binding upon third parties will be explored further in the following section.

4.4 The Law of Treaties and Third Parties

The law of treaties especially as it applies to third parties will be analysed in this section. The previous section illustrated that the main principle which applies to and governs third party relations with a treaty is that of *pacta tertiis nec nocent nec prosunt*.³⁷⁸ However, treaties can bind third parties in certain cases. It has been demonstrated that treaty provisions can bind non-State Parties if they become part of CIL or attain *jus cogens* status.³⁷⁹ The ICJ has confirmed that treaty provisions can reflect CIL as well as emerging rules of CIL in the *North Sea Continental Shelf* and *Nicaragua* cases.³⁸⁰

A treaty can also create obligations on third parties upon a state’s assent to the treaty as provided in Article 36 of the VCLT.³⁸¹ Three conditions need to be fulfilled in order for a third state to be bound to a treaty: the state must assent to the treaty, must recognise and accept its obligations, and express the assent in writing.³⁸² However, assent can also be presumed if a state acts in accordance with the obligations of a treaty and in cases where a treaty does not prescribe the means of expressing consent for third parties.³⁸³ These conditions echo those undertaken by States Parties to a

³⁷⁴ Thirlway op cit note 12 at 7.

³⁷⁵ Article 38 of the VCLT; Thirlway op cit note 12 at 7.

³⁷⁶ Fitzmaurice op cit note 17 at 38.

³⁷⁷ Thirlway op cit note 12 at 7; Article 38 of the VCLT.

³⁷⁸ Fitzmaurice op cit note 17 at 38.

³⁷⁹ Thirlway op cit note 10 at 35-6; Thirlway op cit note 12 at 7; Article 38 of the VCLT.

³⁸⁰ *North Sea Continental Shelf* supra note 142 at para. 63-4 & 70; *Nicaragua* supra note 219 para. 73.

³⁸¹ Fitzmaurice op cit note 17 at 45-6.

³⁸² *Ibid* at 46.

³⁸³ *Ibid*.

treaty since the third party also has to articulate its consent according to specific procedural requirements.³⁸⁴ Also, the importance placed on the consent of the third state is similar to the prerequisite for States Parties to be bound to a treaty.³⁸⁵

Article 13 (b) of the RS applies to third parties. It is questionable though, whether the provision complies with the law of treaties and falls into any of the aforementioned exceptions regulating this subject and third party relations. This will be explored in the next section.

4.5 The Legality of Article 13 (b) of the Rome Statute

Article 13 (b) of the RS does not directly bind third parties. However, it does so indirectly by allowing for the SC to refer situations to the Court, including those from non-State Parties.³⁸⁶ This shows that the intent of this provision is to create obligations for third parties, since State Parties are already subject to and bound by the RS, therefore rendering Article 13 referrals of these states redundant. However, there is no evidence that the RS, specifically Article 13 (b) of the RS, falls within any of the aforementioned exceptions such as being part of *jus cogens*, CIL or allowing for assent by third parties. This is obvious since the ICC appears to rely on the SC as a basis of conferring its jurisdiction on non-State Parties. With this approach, compliance with the law of treaties may be seen as unnecessary. Also, Article 13 (b) of the RS is not affirmed as falling within any of the aforementioned exceptions by the case law of the ICC, nor can this be inferred from the provisions of the RS.

Article 13 (b) of the Rome Statute is *prima facie* a violation of the principle of *pacta tertiis nec nocent nec prosunt* where treaties cannot impose obligations on states that have not ratified a treaty.³⁸⁷ States are bound to respect rules of CIL, which should also include principles of the law of treaties, which have entered the *corpus* of CIL.³⁸⁸ These principles, aforementioned above, are codified in the VCLT which

³⁸⁴ Article 36 of the VCLT; Fitzmaurice op cit note 17 at 45-6.

³⁸⁵ The preamble of the VCLT stresses the importance of state consent to be bound to a treaty. This is also expressed in various other provisions such as Articles 11-15 of the VCLT.

³⁸⁶ Kaul op cit note 22 at 33.

³⁸⁷ Fitzmaurice op cit note 17 at 38.

³⁸⁸ *Continental Shelf* supra note 135 para. 27.

attained the status of CIL.³⁸⁹ It is curious why States Parties could then do away with this obligation and create a treaty in violation of the law of treaties when acting as a body of State Parties during negotiations.

State Parties to the ICC are not able to do together what they are unable to do individually, such as violating the law of treaties and head of state immunity, which are part of the *corpus* of CIL.³⁹⁰ Their decision to include a provision which would lead to the circumvention of CIL and other general principles of international law is questionable. The RS should comply with the law of treaties, particularly rules within the *corpus* of CIL and relating to third parties. Although States Parties to the RS can opt out of CIL through the treaty this is valid only between themselves as States Parties.³⁹¹

Article 13 (b) of the RS should not deviate from CIL to have third party effect. The deviation is inconsistent with the law of treaties and general international law.³⁹² The RS should therefore not grant rights and create obligations on third parties such as Sudan unless Article 13 (b) becomes part of CIL or *jus cogens*. The RS, including Article 13(b) is *res inter alios acta* to non-State Parties and cannot bind third parties such as Sudan to its provisions as provided within the law of treaties.³⁹³ Article 13 (b) of the RS is therefore unlawful since it violates the law of treaties. This violation leads to other consequential violations of CIL such as head of state immunity in the case of Al-Bashir. Article 13 (b) of the RS is therefore arguably invalid. It becomes questionable whether the SC can refer cases to the ICC on the basis of a provision that is unlawful and violates the law of treaties as well as CIL.

Article 13 (b) of the RS also cannot even be construed as beneficial to the SC. It does not confer any new power on the SC.³⁹⁴ It is in fact the ICC that is being empowered

³⁸⁹ Zemanek op cit note 361; Thirlway op cit note 10 at 36.

³⁹⁰ Alebeek op cit note 92 at 277; Dapo Akande 'International Law Immunities and the International Criminal Court' (2004) 98 *American Journal of International Law* 407 at 417-8.

³⁹¹ Thirlway op cit note 10 at 133 & 136.

³⁹² Ibid.

³⁹³ Fitzmaurice op cit note 17 at 38.

³⁹⁴ Berman op cit note 4 at 174.

by the SC.³⁹⁵ This is because that the SC derives its competence from the UN Charter, which is also regulated in the Relationship Agreement between the ICC and the UN.³⁹⁶ The treaty basis for referrals provided in Article 13 (b) of the RS benefits the ICC rather than the SC. The SC could derive some benefit in using the referral mechanism from a policy perspective since it would avoid setting up new criminal tribunals such as those of the ICTY and ICTR, which are costly.³⁹⁷ However, this advantage does not directly emanate from the RS.³⁹⁸

The practice of using a more powerful political body to bind third parties to obligations to which they have not consented sets an unwelcome precedent. This practice, even if it is adopted for the objective of maintaining and restoring international peace and security, goes beyond the scope of the UN Charter. Sudan and other Member States of the UN are deemed to have given consent to be bound to SC decisions owing to Article 25 of the UN Charter. However, Sudan could not have foreseen that ratifying the UN Charter would bring about obligations including being bound to the provisions of a treaty they had not ratified. Binding third states to a treaty goes beyond the scope of the UN Charter as this cannot be interpreted from its provisions. This action also cannot be regarded as directly advancing the maintenance of international peace and security, one of the main objectives of the UN according to its preamble and the UN purposes.³⁹⁹ Moreover, states primarily relinquished the competence to use force by ratifying the Charter but did not expressly do so in relation to the limitation of other sovereign rights.⁴⁰⁰

The SC would need to find other methods of referring situations to the ICC for investigation and subsequent prosecution where appropriate. This could be possible if it relied on the Relationship Agreement between the UN and the ICC. This might

³⁹⁵ Ibid.

³⁹⁶ Berman op cit note 4 at 174; Article 2 of the Relationship Agreement.

³⁹⁷ Berman op cit note 4 at 174-5.

³⁹⁸ Thirlway op cit note 12 at 7.

³⁹⁹ One of the main objectives of the UN Charter appears to be the maintenance of international peace and security. This is inferable from the preamble which refers to the importance of preventing the scourge of war as the first statement in the preamble. Also, the maintenance of international peace and security is listed as the first purpose in Article 1 of the UN Charter. The arrangement of provisions in the preamble and Article 1 of the UN Charter relating to its purposes suggests a hierarchy. This could mean that the level of priority given to the prevention of war and the maintenance of international peace and security is high.

⁴⁰⁰ Article 2 (4) of the UN Charter.

be a more appropriate legal basis for the SC to utilise. However, the utilisation of the Relationship Agreement could lead to difficulties. It is, for instance, debatable whether the ICC is able to deal with situations referred to it using the Relationship Agreement as a basis. The Rome Statute governs the jurisdiction and functioning of the ICC, which necessitates the inclusion of provisions relating to the referral mechanism procedure. A way to resolve such a problem could be through the amending of Article 2 of the RS, which stipulates the establishment of the Relationship Agreement. This provision could be amended to cross-reference the Relationship Agreement and the links between the ICC and the organs of the UN, such as the SC.

However, the SC would also likely run into similar problems as occasioned by Article 13 (b) of the RS, through its use of the Relationship Agreement as a basis to refer situations to the ICC. The Relationship Agreement is technically not a treaty, as it is between two organisations rather than states.⁴⁰¹ However, scholars such as Olufemi argue that the Relationship Agreement can be construed as a treaty.⁴⁰² The Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986 (VCLTIO) also stipulates that treaties can be entered into between international organizations.⁴⁰³ Although the VCLTIO is not yet in force, it mirrors Articles 1-72 of the VCLT of 1969,⁴⁰⁴ which is considered as reflective of CIL.⁴⁰⁵

The inclusion of a treaty provision on the conclusion of treaties between international organizations also demonstrates the ability of international organizations such as the UN and ICC to conclude treaties between themselves. The use of the Relationship Agreement, a treaty basis, could mean running into similar issues as those identified

⁴⁰¹ Article 2 (1)(a) of the VCLT of 1969 defines a treaty as an international agreement concluded between states.

⁴⁰² Elias Olufemi 'The Law of Treaties and the relationship between the Security Council and the International Criminal Court' in Dr. M. Craven & Prof. M. Fitzmaurice *Interrogating the Treaty: Essays in the Contemporary Law of Treaties* (2005) 189.

⁴⁰³ Article 2 (1)(a)(iii) of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986 (VCLTIO).

⁴⁰⁴ Anthony Aust 'Vienna Convention on the Law of Treaties (1969)' *Max Planck Encyclopedia of Public International Law [MPEPIL]* at Treaties with or between other Subjects of International Law available at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1498>, accessed on 9 March 2017.

⁴⁰⁵ Thirlway op cit note 10 at 36; Zemanek op cit note 361.

in the case of Article 13 (b) of the RS. However, if international organisations can conclude treaties then it becomes questionable whether Sudan would still be considered as a third party, as it is a Member State of the UN.⁴⁰⁶ One could argue that the UN acts as a body which binds Member States to the agreements it concludes but this will not be discussed as it is beyond the scope of this paper.

The above analysis illustrates that the use of the Relationship Agreement as a basis to refer situations to the ICC is a process with complex legal ramifications. The SC would do well to setup ad-hoc criminal tribunals, as was done in previous cases involving Yugoslavia and Rwanda. This would not be the most cost-effective way to proceed, but it would obviate the use of an unlawful and invalid provision such as Article 13 (b) of the RS, or other treaties such as the Relationship Agreement.

4.6 Conclusion

Article 13 (b) of the RS violates principles within the law of treaties as well as CIL. This makes the provision unlawful since it infringes CIL and other principles of international law. States Parties to the Rome Statute negotiated the RS and provisions such as Article 13 (b), and should have ensured that the provisions complied with international law. The inclusion of a provision such as Article 13 (b) of the Rome Statute is an attempt to use a powerful third party such as the SC to circumvent rules and principles of international law. This includes circumvention, brought about through the application of Resolution 1593 (2005), of principles within the law of treaties as well as consequential violations of CIL such as immunity.

As previously argued, this sets an unwelcome precedent where treaty-based institutions can bind third parties by virtue of a more powerful body such as the SC. This is not an acceptable development since treaty provisions that bind third parties in this manner are unlawful. The legally valid method of establishing new tribunals would be costly but necessary, in order to maintain legality in the SC's use of a judicial organ to assist in the discharge of its mandate.

⁴⁰⁶ United Nations 'Member States' available at <http://www.un.org/en/member-states/#gotoS>, accessed on 28 February 2017. Sudan became a United Nations Member State in 1956.

CHAPTER 5 CLOSING OBSERVATIONS AND RECOMMENDATIONS

5.1 Observations

The relationship between a judicial organ and a political body leads to legal anomalies, which includes the violation of the law of treaties and head of state immunity, in the case of Al-Bashir. The removal of immunity by the SC is debatable, for instance, and one of the complications arising when a political body is included in the work of a judicial organ. The controversial and contentious nature of the referral has translated to diminished levels of cooperation by States Parties at the horizontal level.⁴⁰⁷ This contention is raised by attempting to bind third states to a treaty-based institution governed by a treaty, they have not ratified.

Nevertheless, the linking of functions between a judicial organ and political body has the potential to end impunity as well as restoring international peace and security. This appears to be the belief of the SC and ICC, who refer to these objectives in the preamble of the SC resolution and that of the RS respectively. In principle, this is an honourable cause but its practical application is limited and leads to the problems previously identified. The use of Article 13 (b) of the RS, for instance, can lead to the prosecution of individuals from third states, but its treaty basis is unlawful, for the reasons set out in Chapter Four. These include its inconsistency with the law of treaties and its attempt to hinder the application of CIL with respect to third parties.⁴⁰⁸

In addition, Article 13(b) of the RS has the potential to violate other rules of CIL as demonstrated in relation to the doctrine of immunity, especially that of incumbent heads of state. The demerits of this provision appear to outnumber the merits which emanate from its use. Its questionable legal standing reduces levels of compliance and its unlawfulness possibly leads to invalidity. The use of the Relationship Agreement could be a possible alternative but its use potentially leads to complex legal ramifications. It is difficult to reconcile the findings in order to map a way forward. The successive section will make suggestions for the problems that have been identified.

⁴⁰⁷ *Al-Bashir (Malawi)* supra note 33 at para. 47; *Al-Bashir (Chad)* supra note 278 at para.23; *Al-Bashir (Congo)* supra note 33 at para.34; *Al-Bashir (Sudan)* supra note 33 at para.19.

⁴⁰⁸ Fitzmaurice op cit note 17 at 38; Thirlway op cit note 10 at 133 & 136.

5.2 Recommendations

The ICC should review Article 13 (b) of the RS in order to make it compliant with the law of treaties and to prevent its possible violation of CIL. The SC should use other means of enforcing its Chapter VII decisions rather than using Article 13 (b) of the RS, or basing decisions on the Relationship Agreement. From a policy perspective, the setting up of ad-hoc criminal tribunals, though not cost effective, is necessary given the apparent problems presented by the alternative. Cost-effectiveness and economy will have to take a backseat to compliance with the law: the law of treaties and CIL.

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