I. INTRODUCTION

This contribution will consider the issue of immunity under the Rome Statute in light of the Rome Statute implementation legislation adopted by South Africa, Kenya and Uganda. In doing so it will consider the relevance of immunity in relation to both cooperation in arrest and surrender, and domestic prosecutions under these legal instruments. The primary aim here is to catalogue and analyze how South Africa, Kenya and Uganda have chosen to give effect to their obligations – both general and specific – under the Rome Statute as they relate to immunities. However, in so doing it will also reveal what these state see as the proper construction of immunity under the Rome Statute – and specifically the relationship between article 27(2) and article 98(1) – by the manner in which they formulate their domestic cooperation regimes. Although it is strictly speaking up to the Court to formulate its construction of the immunity question (something which it has failed to do yet) and the practice of states is not a formal consideration in this process, these provisions might well have some indirect effect on how this relationship is constructed. If only to question the dominant construction of the Rome Statute’s immunity provisions by academics, who themselves have relied on state practice in support of their position. In a more direct respect, how African states address the immunity question (both in terms of cooperation and prosecution) will likely influence other states in region incorporate their obligations under the Rome Statute through implementing legislation and other domestic legal measures.

In order to provide a comprehensive discussion of these issues this contribution will be divided into five parts: Part 1 will discuss immunity under customary international in order to provide its historical background and current state of development; Part 2 will consider the issue of immunity under the Rome Statute, and the conflicting relationship between articles 27 and 98 in particular; Part 3 will then consider the relevance of immunity under the implementing legislation in South Africa, Kenya and Uganda insofar as cooperation in arrest and surrender of individuals to the ICC; Part 4 will consider the relevance of immunity under these acts insofar as domestic prosecution of war crimes, genocide and crimes against humanity (“Rome Statute crimes”) are concerned; and Part 5 will make some concluding remarks.

Before doing so it is necessary to note the continuing relevance of the ‘immunity question’. President al-Bashir of Sudan has been subject to an arrest warrant since March 2009, becoming the first sitting head of state to be indicted by the ICC. Since

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1 Lecturer, Faculty of Law, University of KwaZulu-Natal.
2 ICC, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, ICC-02/05-01/09, 4 March 2009. [hereinafter Bashir Arrest Warrant I]. In their original ruling, the judges of the ICC’s Pre-Trial Chamber issued an arrest warrant against President al-Bashir for a total of five counts of war crimes and crimes against humanity, but rejected the genocide charges leveled by Prosecutor Luis Moreno-Ocampo. The Prosecutor appealed this decision,
then he has visited Kenya and Chad – both of whom are party to the Rome Statute – as well as a number of states that are not. He remains at large, and despite both the Pre-Trial Chamber and the Appeals Chamber having considered the al-Bashir arrest warrant, there remains uncertainty over the question of immunity in relation to proceedings against al-Bashir and states’ cooperation obligations in this regard.

2. IMMUNITY UNDER INTERNATIONAL LAW

Immunities have long been considered a legitimate and necessary feature of international law. As Cryer et al note:³

"The law of immunities as ancient roots in international law, extending back not hundreds, but thousands, of years. In order to maintain channels of communication and thereby prevent and resolve conflicts, societies needed to have confidence that their envoys could have safe passage, particularly in times when emotions and distrust were at their highest. Domestic and international law developed to provide both inviolability for the person and premises of a foreign State’s representatives and immunities from the exercise of jurisdiction over those representatives."

That said, the utility of such immunities has decreased in recent times with the advent of modern communication technologies and professional diplomatic corps. What is more, rise of international criminal law has produced a sometimes competing good: prosecuting those most responsible for international crimes. As a result, there is often an inevitable tension between these two imperatives and, although there is some movement towards resolving this tension in favor of combating impunity, immunities continue to be an absolute (if temporary) bar to prosecution in certain instances.

Immunities can be divided into functional immunity (also known as immunity ratione materiae or subject-matter immunity) and personal immunity (also known as immunity ratione personae or procedural immunity). Immunity ratione materiae relate to conduct carried out on behalf of a State. This form of immunity is based on the notion that "a State may not sit in judgment on the policies and actions of another State, since they are both sovereign and equal".⁴ For this reason, functional immunity

⁴ Ibid. 422. The ICTY Appeals Chamber explains the rational for functional immunity as follows: "State officials acting in their official capacity... are mere instruments of a State and their official actions can only be attributed to the State. They cannot be the subject of sanctions and penalties for conduct that is not private but undertaken on behalf of a State. In other words, State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoy so-called "functional immunity." Appeals Chamber, Prosecutor v Blaskic, Judgment on the
does not attach to *all conduct* performed by state officials, rather it only applies to conduct carried out within the official capacity. However, immunity in respect of such conduct is permanent (immunity does not lapse when the official ceases to hold office) and cannot be waived by the state concerned, as it is the conduct itself and not the office bearer that forms the basis of that immunity. This form of immunity is more commonly raised in civil matters.\(^5\) Immunity *ratione personae* “provides complete immunity of the person of certain officeholders while they carry out important representative functions.”\(^6\) In contrast to functional immunity, personal immunity is absolute (i.e. it covers both private and public acts committed by officials), but temporary (i.e. it only applies insofar as the person holds the office in question) and can be waived by the State concerned.

As far as international criminal law is concerned, there is near universal acceptance of the principle that international crimes cannot be covered by immunity *ratione materiae*, before international or domestic tribunals, albeit for differing reasons. The International Military Tribunal at Nuremberg – established after World War II to punish Nazi crimes – held that such immunity does not apply to ‘acts condemned as criminal by international law’.\(^7\) Similarly, both *ad hoc* UN Tribunals contained a provision stating that “[t]he official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment”.\(^8\)

The same is true in much of domestic jurisprudence on immunity *ratione materiae*. The most famous decision on the irrelevence of functional immunity being the *Pinochet* case where, albeit for different reasons, the UK House of Lords found that General Pinochet could not rely on functional immunity in order to avoid being extradited for allegations of torture.\(^9\) The best explanation of the inapplicability of such immunity in respects of international crimes was that given Lord’s Browne-Wilkinson and Hutton, to the effect that “functional immunity does not protect certain

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\(^5\) Cryer, *supra* note 4, at 422. Precisely which officials benefit from such immunity is not clear and subject to some debate. Heads of State and Government clearly do, and the ICJ has added to this Foreign Ministers, however the Court’s finding that “diplomatic and consular agents, [and] certain holders of high ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs” enjoy immunity *ratione personae* suggests that more officials might be added to this list. *Arrest Warrant* case, para. 51.


\(^7\) Article 7(2) of the ICTY Statute and 6(2) of the ICTR Statute.

\(^8\) *R v Bow Street Metropolitan Stipendiary Magistrate and others ex parte Pinochet Ugarte* (No. 3) [1999] 2 All ER 97, HL.
international crimes because international law does not protect the same acts that it prohibits and condemns.\(^{10}\)

The relevance of immunity *ratione personae* in the prosecution of international crimes is more complex. Here one must separate proceedings before international tribunals and those before domestic courts.

Support for the proposition that customary international law immunity *ratione personae* does not apply to individuals in proceedings before *international* courts can be found in the jurisprudence of a number of such courts, as well as academic writings. Since the failed prosecution of Kaiser Wilhelm II under the 1919 Treaty of Versailles, international courts and tribunals have either expressly or by implication considered such immunities to be irrelevant for their purposes.\(^{11}\) The Statute of the post-World War II Nuremburg Tribunal stated: “Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan”.\(^{12}\) Although the *ad hoc* UN Tribunals of the 1990’s did not contain a specific provision addressing immunity *ratione personae*, the ICTY indicted Slobodan Milosevic while he was still a sitting head of state. Similarly, the *hybrid* Special Court for Sierra Leone similarly (but not without controversy) held that “the principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court”.\(^{13}\) Finally, in the * Arrest Warrant* case the ICJ stated that:\(^{14}\)

> “[A]n incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention.”

Once again the reason for such immunities being removed before international courts and tribunals is not subject to the same unanimity. For some, this removal is automatic (and axiomatic) given the supranational nature of these courts; which

\(^{10}\) Cryer, supra note 4, at 430. See further Chinkin, ‘Regina v Bow Street Stipendiary Magistrate, Ex Parte Pinochet Ugarte (No. 3)’, 93 *AJIL* (2003), 703. See however Akande at 414-415.

\(^{11}\) Article 227 of the Treaty of Versailles states: “The Allied and Associated Powers publicly arraign William II of Hohenzollem, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties. A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan...”.

\(^{12}\) Article 6, *Charter of the International Military Tribunal* (1946).

\(^{13}\) SCSL, *Prosecutor v. Charles Taylor*, Immunity from Jurisdiction, No. SCSL-03-01-I (May 31, 2004), para. 52.

\(^{14}\) ICJ, *DRC v Belgium*, (2004), at para. 61. Hereinafter the “*Arrest Warrant case*.”
precludes the rationale for granting such immunity in the first place from applying to them. Others take a more cautious (and correct) view, noting that the question of whether such immunities are removed depends on the provisions of the court in questions founding instrument, and the manner in which it was established.\(^\text{15}\) In this regard the ICC is different from all previous international tribunals in that it was established by a universal, multilateral treaty (i.e. the consent of states) and not by a Security Council Resolution (ICTY, ICTR) or by a Special Agreement between a state and the UN, or an agreement amongst the victorious powers or a peace treaty.\(^\text{16}\) As we shall see below, this question has important consequences for the question of whether the irrelevance of immunity before international courts extends to the cooperation of states in arresting and surrendering individuals to such courts.

Conversely, there is considerable authority for the opposite proposition insofar as domestic courts are concerned, namely that immunity \textit{ratione personae} continues to apply in such proceedings.\(^\text{17}\) In this regard Cryer \textit{et al.} note that "while inroads have been made into functional immunity, State practice and jurisprudence have consistently upheld personal immunity, \textit{regardless of the nature of the charges}".\(^\text{18}\) Most clearly (and authoritatively), in the \textit{ Arrest Warrant} case the ICJ held that Belgium had "failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of Congo enjoyed under international law" when it issued an arrest warrant for him for crimes against humanity and war crimes.\(^\text{19}\) This has been confirmed by a number of domestic courts in subsequent decisions in the UK (in respect of General

\(^\text{15}\) Akande notes: “Whether or not those wanted for prosecution by an international criminal tribunal may rely on international law immunities to exempt themselves from its jurisdiction depends, firstly, on the provisions of the statute establishing that tribunal... [and secondly] on the nature of the tribunal: how it was established and whether the state of the official sought to be tried is bound by the instrument establishing the tribunal.” Akande, \textit{supra} note 5, at 417.

\(^\text{16}\) For this reason, Akande argues, in respect of the ICC, that "since only parties to a treaty are bound by its provisions, a treaty establishing an international tribunal cannot remove immunities that international law grants to officials of states that are not party to the treaty. Those immunities are rights belonging to the nonparty states and those states may not be deprived of their rights by a treaty to which they are not party.” \textit{Ibid.} See however Gaeta, ‘Official Capacities and Immunities’, in \textit{The Rome Statute of the International Criminal Court: A Commentary} (2002), at 993-96.

\(^\text{17}\) Akande notes: “Judicial opinion and state practice on this point are unanimous and no case can be found in which it was held that a state official possessing immunity \textit{ratione personae} is subject to the criminal jurisdiction of a foreign state when it is alleged that he or she has committed an international crime”. Akande, \textit{supra} note 5, at 411.

\(^\text{18}\) Cryer, \textit{supra} note 4, at 425.

\(^\text{19}\) \textit{DRC v Belgium}, para. 75.
Pinochet, albeit *obiter*), Belgium, France, Spain and the United States, amongst others.

As to the scope of personal immunity, while it is clearly applies to Heads of State and according to the ICJ Foreign Minister as well, it remains to be determined which other officials enjoy this form of immunity whilst in office. In the *Arrest Warrant* case, the ICJ held:

“[T]he functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.”

Therefore, under customary international law Heads of State and certain other officials enjoy absolute personal immunity, even for international crimes, before the domestic courts of other states.

In summary, the state of development of international law regarding the application of immunities to international criminal law is as follows: Immunity *ratione materiae* (or functional immunity) does not apply to such prosecutions, regardless of the forum (i.e. international or domestic). Immunity *ratione personae* (or personal immunity) arguably does not apply before most (if not all) international courts but continues to apply before domestic court’s unless a waiver from the state concerned can be obtained.

This is only half the question: Firstly, the issue of whether immunities apply before the ICC – both in terms of the exercise of jurisdiction by the Court and in terms of the obligation on states to cooperate in arrest and surrender proceedings – must be resolved under the Rome Statute itself. Secondly, even if certain officials enjoy immunity *ratione personae* before South African, Kenyan and Ugandan courts – either in terms of arrest and transfer proceedings under the Rome Statute or domestic

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20 For instance, Lord Nicholls in the first Pinochet case held that ‘...there can be no doubt that if Senator Pinochet had still been the head of the Chilean state, he would have been entitled to immunity’ (see *R v Bow St Magistrate, ex parte Pinochet Ugarte*, [1998] 4 All ER (Pinochet 1) at 938). Lord Millett in the third Pinochet case said that ‘Senator Pinochet is not a serving head of state. If he were, he could not be extradited. It would be an intolerable affront to the Republic of Chile to arrest him or detain him’ (see *R v Bow St Magistrate, Ex p. Pinochet (No.3)* [1999] 2 All E.R. 97, 126-27, 149,179, 189 (H.L.) (per Goff, Hope, Millett, Phillips, L.JJ.); *Plaintiffs A, B, C, D, E, F v.Jiang Zemin*, 282 F.Supp.2d 875 (N.D. Ill. 2003); *Tachiona v. Mugabe*, 169 F.Supp.2d 259 (S.D.N.Y. 2001); *Arrest Warrant Against General Shaul Mofaz* (Bow St. Mag. Ct. Feb. 12, 2004) 53 *Int'l & Comp. L. Q.* 769, 771.


22 *Arrest Warrant case*, para. 45.
prosecutions under their implementing legislation – this does not automatically mean such will uphold such immunity. Rather, this would ultimately depend on the applicable domestic law: the implementing legislation, and more broadly the role that international law plays in the particular domestic legal order.\textsuperscript{23}

The remaining part of this paper will consider these questions by addressing the question immunity under the Rome Statute and the three implementing acts insofar as cooperation is concerned, and thereafter under the domestic regimes established under those acts for prosecuting international crimes.

3. **THE ROME STATUTE AND IMMUNITY**

The Rome Statute has *prima facie* conflicting provisions on immunity. Article 27(1) states:

“This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.”

This provision is generally understood as referring to *functional* immunity, making it clear that it is inapplicable to any individual before the ICC. It is based on article 7(2) of the ICTY Statute (and 6(2) of the ICTR Statute). For the purposes of the Rome Statute this is not controversial as it simply restates the now accepted position under international law.\textsuperscript{24} Admittedly this provision is not a model of clarity, and is not limited to *functional* immunity alone.

The Rome Statute’s personal immunity provision *proper*, is article 27(2) which states:

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

This provision makes clear that such immunities do not apply when the Court is exercising *jurisdiction over an individual*. This itself is not controversial, as noted above in the *Arrest Warrant* case the ICJ explicitly cited article 27(2) as an exception to the customary international law diplomatic immunity that certain state officials enjoy.\textsuperscript{25} It is novel however, the statute of the ICTY and ICTR do not contain a correlative provision.

The difficulty comes in trying to reconcile article 27(2) with article 98(1), which states:

\textsuperscript{23} This does not mean that the country concerned will be able to rely on that provision to avoid responsibility for the breach of its obligations *under international law* to respect such immunity.

\textsuperscript{24} However, it does impact upon South Africa’s *Rome Statute Act* (2002).

\textsuperscript{25} *Arrest Warrant* case, para. 61.
“The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.”

A number of approaches have been adopted to reconciling this contradiction, with varying effects on the integrity of the two provisions.26

The approach adopted by most academics has been to interpret article 27 as a waiver by a State party of any immunity that might otherwise apply to their officials before the ICC, limiting article 98(1)’s application to the case of officials from a state that is not a party to the Rome Statute.27 Proponents of this argument generally argue that as a matter of logic, and the doctrine of effective construction, “the removal of immunity in Article 27 must be understood as applying not only in relation to the ICC itself, but also in relation to states acting at the request of the ICC”.28

The upshot of this interpretation is that the ICC has a bifurcated immunity system: one for officials from states that are a party to the Rome Statute, and one for officials from states who are not parties. For officials from state parties, neither functional nor personal immunity applies with respect to any proceeding connected to the ICC, as the state has waived any rights such officials may have to such immunities through Article 27. For officials from non-state parties, since those states have not ratified the Rome Statute they have not, as a matter of treaty law, waived the applicable immunities enjoyed by their officials and thus article 98(1) preserves their immunity and provides that their arrest and surrender can only be carried out by a state party if “the Court can first obtain the cooperation of that third State for the waiver of the immunity”.

26 Prosacically, this apparent contradiction can be explained by the fact that article 27 and article 98 were drafted by different committees in Rome. Triffterer, ‘Article 27’, in O. Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article (1999).
28 For example, Akande notes: “[A]n interpretation that allows officials of states parties to rely on international law immunities when they are in other states would deprive the Statute of its stated purpose of preventing impunity and ensuring that the most serious crimes of international concern do not go unpunished. Furthermore, the removal of immunity from the exercise of the Court’s jurisdiction contained in Article 27 would be nullified in practice if Article 98(1) were interpreted as allowing parties to rely on the same immunities in order to prevent the surrender of their officials to the Court by other states. This argument is supported by the principle that “[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.” Thus, the removal of immunity in Article 27 must be understood as applying not only in relation to the ICC itself, but also in relation to states acting at the request of the ICC. This argument is supported by the fact that, as discussed above, the removal is contained not only in Article 27(2)-which stipulates that immunities are not to bar the ICC from exercising jurisdiction-but also in Article 27(1).” Akande, supra note 5, at 423 – 424.
The same result can be reached by another interpretation that focuses on article 98 rather than article 27. On this interpretation, set out by Gaeta, the reference in article 98 to “third states” should be interpreted as non-states parties. The result is the same, except that instead of seeing article 27(2) as the waiver by states parties of the obligations on all other states under article 98 to grant diplomatic immunity ratione personae, article 98 is read as only recognizing that obligation in respect of non-states parties. Of the two arguments the former (article 27 waiver argument) is preferable, but neither one is entirely satisfactory.

The problem with the article 27 waiver argument is that its proponents – to varying degrees – fail to take seriously the difference between the Court’s exercise of its jurisdiction, and the obligation of cooperation on states. Some see no distinction – eliding the two completely – whilst others acknowledge the formal distinction but gloss over it in practice, losing sight of its significance in the process. All overstate the effect of separating the exercise of jurisdiction from cooperation obligations on the Court’s efficacy in combatting impunity for international crimes. The implicit assumption of this construction of the article 27/98 relationship is that the distinction itself is of no value, or not of sufficient value to give these provisions a purpose in and of themselves. As we see below there is support for maintaining this distinction in the Statute, and in fact there is at least one other example of this separation in practice.

As a result, proponents of this argument incorrectly rely on the doctrine of effective construction in supporting of their interpretation of articles 27 and 98. This doctrine – based on the maxim Ut Res Magis Valeat Quam Pereat – takes on different forms but can best be understood as to require that one “avoid interpretations which would leave any part of the provision to be interpreted without effect”. Proponents of the article 27 waiver argument use it as the basis for reading down the effect of article 98(1), as Akande notes:

“[R]eading Article 27 as applying only to actions by the Court would render parts of that provision practically meaningless… because the Court has no independent powers of arrest. A proclamation that immunities shall not bar the exercise of jurisdiction by the Court while leaving such immunities intact with respect to arrests by national authorities would mean that the Court would hardly be in a position to apply Article 27 and exercise its jurisdiction. …”.

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29 See also Gaeta, supra note 17, at 993-4.
30 See Akande, supra note 5, at 420.
31 Translation: “That the thing may rather have effect than be destroyed”.
33 Akande notes further: “To read the treaty in this way would be contrary to the principle of effectiveness in treaty interpretation. According to this principle, a treaty interpreter must read all applicable provisions of a treaty in a way which gives meaning to all of them harmoniously and is not free to adopt a reading that would result in reducing whole clauses
The problem with relying on this doctrine is two-fold: First, it misconstrues it in favor of an interpretation that increases (or does not decrease) the Statute’s effectiveness in achieving its purpose, and not one that makes the provisions themselves effective. Employing the doctrine of effective construction in this manner is, with respect, conflates it with the teleological approach to interpretation. Second, if proper consideration is given to the distinction between the exercise of jurisdiction by the Court, and the obligations on states parties to cooperate, there can be no argument that they must be read together in order for each to have an “effect”, their function lies in regulating oftentimes related but distinct aspects of the Rome Statute.

What is more, the proper application of the doctrine might well result in the opposite result, as the article 27 waiver argument leaves article 98(1) considerable less effective. This is particularly true if one considers the article 27 waiver 2.0 argument as applied to states referred to the Court by the Security Council, to which we will now turn.

The article 27 waiver – which created a two-tier immunity system for states parties and non-states parties – was shaken by events on the ground: namely the arrest warrant issued for President al-Bashir in March 2009. The problem being that the strict application of the argument would mean that al-Bashir – as the head of state of a non-party state (or a “third state”) – would benefit from article 98(1). For this reason the article 27 waiver argument was extended to states such as Sudan by arguing that referrals by the Security Council effectively place their subject-states in the same position of state parties insofar as immunities are concerned. In terms of this argument the Security Council’s decision to confer jurisdiction on the ICC in terms of the Rome Statute is considered to include every provision of the Statute that defines how the exercise of such jurisdiction is to take place, including article 27(2). The only difference being that the source of that country’s obligations to accept the provisions of the Statute are derived from article 25 of the UN Charter. On this view, the immunities of the President al Bashir (and more recently Colonel Gadhafi) are removed by article 27 thus states parties are not required to seek a waiver of Bashir’s head of state immunity from Sudan before arresting him and surrendering him to the ICC under article 98.
As will be discussed below, the contention that this argument conflates the exercise of jurisdiction by states and obligations of cooperation on states is even more convincing insofar as Security Council referrals are concerned. This is because the two legal concepts are by no means coextensive in such circumstances: Security Council Resolutions 1593 and 1970 implicitly recognizes this. Even though the Security Council is empowered to compel states to cooperate with the Court, it chose not to impose cooperation obligations on states other than Sudan and Libya respectively, rather is merely urged them to do so.

The main problem with this addition to the waiver argument is that, on its proponent’s construction of the article 27/98 relationship, it in effect renders article 98 “practically meaningless”. The only other way that a matter can come into the Court’s jurisdiction is through an ad hoc self-referral by a non-states party under article 12 of the Rome Statute. However, in such circumstances that state is bound to “cooperate with the Court without any delay or exception in accordance with Part 9”. The effect of article 98 would be limited to circumstances where an official of a non-state party is sought by the Court for crimes committed on the territory of a state party – jurisdiction thus flowing from ordinary base of jurisdiction (territorality). This is not impossible, Jean-Pierre Bemba is currently being tried by the ICC for crimes allegedly committed in the Central African Republic, although he is a national of the DRC. He was one of four Vice-Presidents in the DRC’s transitional government, although he was not in office (and therefore not the beneficiary of immunity) when the Court issued a warrant for his arrest in 2008. Charles Taylor, the former President of Liberia, is standing trial for his part in the Sierra Leone war. However, this leaves very little for article 98(1) to do.

It is worth noting that proponents of both versions of the waiver argument cite state practice in support of this construction, as Akande notes:

“The view that Article 98(1) applies only to officials of nonparties has been taken by scholars and by some ICC parties. This view is reflected in the legislation of a number of ICC parties implementing their obligations under the ICC Statute.”

Although it is not suggested that such practice amounts to a subsequent agreement between states parties as to the interpretation of these provisions – pursuant to article 31(3)(b) of the Vienna Convention on the Law of Treaties (1969) – it is offered as persuasive nonetheless.

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38 See article 25 of the UN Charter and Resolution 827.
39 Article 12(3), Rome Statute.
40 Akande goes on to list section 23(1) of the UK’s International Criminal Court Act of 2001, as well as the “identical provisions and language are used in the relevant legislation of Malta and Ireland”. See Further, he notes that the implementation legislation of Canada and New Zealand “goes even further and appears to provide that no person may rely on international law immunities in proceedings instituted pursuant to an ICC request for arrest and surrender.” Akande, supra note 5, at 422.
41 See Akande, supra note 5, 425-426.
The alternate approach to the article 27/article 98 relationship is to maintain a strict separation between ‘the power of an international court to exercise its jurisdiction over an individual’ and ‘the powers and obligations of states when requested to carry out coercive acts against individuals protected by personal immunities’,\(^\text{42}\) and argue that article 27 of the Rome Statute refers only to the former, and article 98 the latter.

In this regard Gaeta correctly notes:\(^\text{43}\)

“[T]he ‘inapplicability’ of the rules of customary international law on personal immunities before international criminal courts does not \textit{per se} imply the ‘inapplicability’ of said rules when it comes to the arrest and surrender to an international criminal court by the competent national authorities of a given state.”

Despite being a minority position amongst academics, this interpretation has much to recommend it. Textually, article 27(2) is open to narrow interpretation that focuses on the Court’s exercise of jurisdiction and not the cooperate regime which involves the rights and obligations of states. Consider the different wording chosen in article 27(1) – which refers to the \textit{Statute} – compared to article 27(2) which refers to the Court’s \textit{jurisdiction}. As far as article 98(1) is concerned it must be noted that it applies to “requests for surrender or \textit{assistance}” therefore its scope is wider than, and therefore not coextensive with, that of article 27. Contextually, articles 27 and 98 are from different sections of the Rome Statute. Although some provisions relating to states obligations appear in other parts of the statute, they should be limited to Part 9. First, Part 9 is headed ‘International Cooperation and Judicial Assistance’. Second, article 88 states “States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part”. No such provision exists in respect of the rest of the Rome Statute.

What is more, while the issue of requests for surrender and the exercise of jurisdiction are easy to conflate, as they seem to be part of one and the same process, jurisdictional provisions are conceptually separate from cooperation provisions. Returning to first principles, article 27 confirms that the existence of immunity \textit{ratione personae} is neither a bar to the Court’s \textit{prescriptive jurisdiction} (loosely article 27(1)), nor to its \textit{enforcement jurisdiction} (article 27(2)).\(^\text{44}\) Whilst article 98 makes states obligation to exercise, \textit{inter alia}, their \textit{enforcement jurisdiction} in respect

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\(^{42}\) Gaeta, \textit{supra} note 37, at 325.

\(^{43}\) \textit{Ibid.}

\(^{44}\) O'Keefe notes: ”Jurisdiction is not a unitary concept. On the contrary, both the long-standing practice of states and doctrinal writings make it clear that jurisdiction must be considered in its two distinct aspects, viz. jurisdiction to prescribe and jurisdiction to enforce. Jurisdiction to prescribe or \textit{prescriptive jurisdiction}...refers, in the criminal context, to a state’s authority under international law to assert the applicability of its criminal law to given conduct, whether by primary or subordinate legislation, executive decree or, in certain circumstances, judicial ruling. Jurisdiction to enforce or \textit{enforcement jurisdiction}...refers to a state’s authority under international law actually to apply its criminal law, through police and other executive action, and through the courts. More simply, jurisdiction to prescribe refers to a state’s authority to criminalize given conduct, jurisdiction to enforce the authority, \textit{inter alia}, to arrest and detain, to prosecute, try and sentence, and to punish persons for the commission of acts so criminalized. O'Keefe, R. 2004. Universal Jurisdiction: Clarifying the basic concept. \textit{Journal of International Criminal Justice}, \textit{2}. 736 – 737.
of foreign official enjoying immunity conditional on the waiver of such immunity by that ‘third state’.

The separation of the exercise of jurisdiction by the Court, and the creation (and qualification) of cooperation obligations, is recognized in other parts of the Rome Statute and has been upheld by the Court itself in the form of arrest warrant proceedings. Although the provisions relating to arrest warrants are clumsily formulated, on the interpretation given to them by the Court the mere issuance of an arrest warrant under article 58 does not trigger obligations to arrest. Rather, it must be subject to an additional request for cooperation issued by the registry under article 89. In this regard Sluiter notes:45

“Strictly speaking, one should distinguish the arrest warrant from the request for arrest and surrender. The former is not susceptible to review at the national level, whereas the latter is subject to the requirements of Article 91(2)(c), and must be supported by sufficient evidence. An interim release on account of insufficient evidence is, therefore, not based on the ultra vires character of the warrant, but on an alleged court violation of Article 91(2)(c).”

Therefore, like article 27, an arrest warrant under article 58 that is conditional on an additional provisions contained in part 9 to create an obligation of arrest on states seems illogical is the two are seen as one and the same. But it makes sense if one considers article 58 as the Court’s exercise of its enforcement jurisdiction to subjecting a person to arrest, and then article 89 as relating to the obligations on states to give cooperate in enforcing that warrant.

Proponents of the article 27 waiver argument would most likely contend that this is a conservative, overly-technical (or worse still sophist) interpretation of the Rome Statute, and in particular the relationship between the Court’s jurisdiction and states cooperation obligations. However, one might counter that this strict separation is not only clear but necessary (and progressive) in some respects.

As noted above, although the two often happen at the same time – most times but not always – they are not coextensive. There are at least two (possibly three) practical examples of when the Court’s jurisdiction must be separate from, or more than, the obligations of states to give effect to it.

The first is the Security Council referral, where the Court’s ability is exercise jurisdiction is extended beyond the scope of the obligations on states parties to cooperate under the Rome Statute. Not only is this separation necessary to allow the Court to exercise jurisdiction over Security Council referrals, viewing these two as coextensive would render the ICC far less effective insofar as cooperation insofar these referrals are concerned. This is because the Security Council has the power to make all states cooperate with an investigation and prosecution initiated under article 13(b) by virtue of Article 25 of the UN Charter, thereby expanding the cooperation

obligations regime beyond states parties to the Rome Statute. Although the Council has refrained from doing so in respect of the Darfur and Libyan referrals, it has done so in respect of the ad hoc Tribunals and there is no obvious reason why it cannot do the same in respect of the ICC. However, in such instances, if the Court’s jurisdiction and cooperation regime were coextensive (and therefore mutually limiting) the Court would not be able to benefit from the expanded cooperation regime provided for by the Council.

The second is in circumstances of voluntary surrender. While initially considered unlikely, nine individuals have voluntarily appeared before the Court already. The first person to voluntarily appear before the Court under this procedure was Bahr Idriss Abu Garda, who appeared in May 2009 on the basis of a summonses issued by Pre-Trial Chamber I on 7 May 2009 relating to an attack on peacekeepers in Sudan. During the initial hearing the Prosecutor indicated that he would not seeking an arrest warrant as Abu Garda had indicated his willingness to appear voluntarily. He was followed by Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus who voluntarily appeared in June 2010 pursuant to a summons issued in August 2009 in connection with the same attack. On 8 February, 2010, Pre-Trial Chamber I refused to confirm the charges against Abu Garda, whilst the charges against Banda and Jerbo were confirmed unanimously by Pre-Trial Chamber I on 7 March 2011. In April 2011, six Kenyans appeared before Pre-Trial Chamber II following a summonses issued in respect of their roles in the 2008 post-electoral violence.

The third possible situation where the Court will exercise jurisdiction in situations where no cooperation obligations on states are involved is surrender by a non-state

46 In this regard, Sluiter sets out three possible models of cooperation available to the Council insofar as international judicial mechanisms are concerned: “First, the Council could simply refer a situation without any reference to cooperation; this would mean that the ‘normal’ regime of the Statute applies and that only obligations for states parties can be established. In case the Council opts for the imposition of obligations for states non-parties there would be the choice, as to the substance of the duties, to apply the ICC Statute mutatis mutandis, or to develop a separate, possibly more demanding regime.”

47 The Council clearly intended that only the referred states themselves were under an obligation under Chapter VII to “cooperate fully”, the resolution merely urges all States and concerned regional and other international organizations to cooperate fully. See SCR 1593 (2005) and SCR 1970 (2011). The use of urges with regard to the latter in contrast to decides and shall with regard to the former is significant. This is because the importance of language in determining the Council’s intention cannot be overstated. See ICJ, Namibia Case, para. 114.

48 Security Council Resolution 827 (1993) – which established the ICTY – states that “…all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute”. (para. 4) This phrase was repeated verbatim in SCR 995 (1994) establishing the ICTR.

49 An alternate, less coercive, means that an arrest warrant available to the Prosecutor to secure the attendance of the suspect before the Court is to request the Pre-Trial Chamber to issue a summons for his or her appearance under article 58(7). Such a request will only be granted if the Pre-Trial Chamber is satisfied that ‘there are reasonable grounds to believe that the person committed the crime’, and that the summons alone will be sufficient to secure the accused’s attendance.
actor. Although there is no provision for it in the Rome Statute, there is precedent for regional or international peace enforcement operations arresting and surrendering accused person to international courts.\footnote{Both KFOR and UNMIK arrested ICTY suspects and transferred them to The Hague under Security Council Resolution 1244 which (at para. 14) “[demanded] full cooperation by all concerned, including the international security presence, with the International Tribunal for the Former Yugoslavia”. See Prosecutor v. Nikolic, Interlocutory Appeals Decision, No. IT-94-2-AR73 (June 5, 2003). See further Akande, supra note 5, at note 116.}

In all three of these instances Part 9 of the Rome Statute (which contains states cooperation obligations) in no way conditions the Court’s exercise of jurisdiction, as the two are conceptually separate. If this were not the case, then Court would not be able to exercise jurisdiction over such individuals. If this is the case, then by parity of reasoning the exercise of article 27 should not condition the application of article 98. Considered in this light, it is difficult to accept the \textit{article 27 waiver} proponents contention that article 98(1) must be read down in order to give article 27(2) purpose, as it functions in at least two if not three instances where article 98 is not even in play.

One final issue worth mentioning before looking at how the Court has considered this question is that of who decides when the conditions in article 98 are met. The language of that article is not clear on this, stating that “the Court may not proceed” unless it can obtain a waiver from a state where such is necessary to prevent “the requested State to act inconsistently with its obligations under international law”, but it does not explicitly give the Court the power to determine when this is the case. An argument could be made that it is the responsibility of states themselves to determine the applicability of their international obligations to other states. Notably, article 97 requires a state party that receives a request from the Court "in relation to which it identifies problems which may impede or prevent the execution of the request ... shall consult with the Court without delay in order to resolve the matter." This too is vague on who decides and whether, if it is the Court, states are bound by such a determination. Rule 195(1) of the Court’s Rules of Procedure and Evidence suggests that it is the Court that decides whether article 98 applies,\footnote{The rule states: “When a requested State notifies the Court that a request for surrender or assistance raises a problem of execution in respect of article 98, the requested State shall provide any information relevant to assist the Court in the application of article 98. Any concerned third State or sending State may provide additional information to assist the Court.” \textit{Akande}, supra note 5, at 431.} but the procedure for doing so remains unclear.\footnote{Akande suggests: “[O]n a matter of such importance, it can only be assumed that the state concerned is entitled to a decision by the Pre-Trial Chamber. Although this issue is not specifically covered in the list of functions of the Pre-Trial Chamber in Article 57 of the Statute, Rule 195 arguably grants procedural rights to concerned third states or sending states in any hearings before the Pre-Trial Chamber.” \textit{Akande}, supra note 5, at 431.} As to whether the state concerned is bound by this determination, no such power is explicitly given to the Court under this article (or Part 9 generally) and to imply such a “far-reaching” power would seem to be a stretch.\footnote{\textit{Ibid.}} Once again the question of the proper distinction between article 27 and article 98 re-emerges here. Under article 119 of the Rome Statute – which deals with Settlement of Disputes – a dispute “concerning the judicial function of the Court…shall be settled
by the decision of the Court". Those who favour the article 27 waiver argument would likely see article 98 disputes as concerning the judicial function of the Court. On the hand, those who maintain a strict separation between the exercise of jurisdiction by the Court and cooperation obligations on states parties might consider such a dispute as a non-judicial one, governed by article 119(2) of the Rome Statute. Notably, the African Union has adopted the latter position, whilst non-African implementing legislation is equivocal on the matter. As a result, the position of the implementing acts on this question is therefore highly relevant.

Unfortunately, there is as yet no definitive ruling from the Court on the relationship between articles 27 and 98 of the Rome Statute and the effect of those provisions for non-party states. The Court’s consideration of this issue to date has been oblique, if not obfuscatory, and as a result it is not clear exactly what approach it has taken. In its decision regarding the issuing of an arrest warrant for President al-Bashir of Sudan, the Pre-Trial Chamber blithely noted: “[T]he current position of Omar Al Bashir as Head of a state which is not a party to the Statute, has no effect on the Court’s jurisdiction over the present case.”

The Court went on to give four ‘explanations’ for its position, although none address the central question of the proper construction of the relationship between article 27(2) and article 98(1). This remarkably unsatisfactory discussion of this crucial issue by the Court is disappointing to say the least. Following the Prosecutor’s successful appeal on the genocide charges, the Pre-Trial once again had an opportunity to address the immunity issue that it failed to take up. Proponents of both constructions of the article 27/98 relationship can conceivably rely on the Court’s terse statement in support of their thesis: the article 27 waiver proponents interpreting it as rejecting the relevance of immunity outright, their counterparts focusing on the reference to the “Court’s jurisdiction”, and not the cooperation of states parties. Then, when the

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54 Article 119 allows for two distinct procedures to be followed in the event of such disagreement. First, disputes over the judicial functions of the court must be settled by the court itself. Secondly, disputes that do not pertain to judicial functions – that arise between two or more state parties – and relate to the interpretation or application of the Statute, shall be referred to the Assembly of States Parties who may (a) seek to settle the dispute itself or; (b) make recommendations on further means of dispute settlement, notably including referral to the International Court of Justice in conformity with the Statute of that Court. See further Pellet ‘Settlement of disputes’ in Cassese et al (eds), *The Rome Statute: A Commentary*, 1843.

55 See, for example, Akande, *supra* note 5, at 431.

56 See ‘Ministerial Meeting of African States Parties to the Rome Statute of the ICC’ 8 - 9 June 2009 Addis Ababa, MinICC/Legal. The AU have raised the article 98 issue – although not consistently – in its objections to the al-Bashir arrest warrant, as has the Arab League.

57 Akande notes: “The national statutes that deal with the immunity of foreign officials when a request for arrest has been made by the ICC reveal that states have taken differing views on the identity of the body entitled to decide the issue”. Akande, *supra* note 5, at 431.

58 *Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Al Bashir (ICC-02/05-01/09)*, Pre-Trial Chamber I, 4 March 2009, at para. 41.

59 Notably, the Pre-Trial Chamber ordered the registrar to transmit the ‘request for cooperation’ both to States Parties and Members of the Security Council; making it difficult to
latter were directly implicated by the debacle of al-Bashir’s visit to Kenya in August 2010 the Court elected to cite both the Rome Statute and the UN Charter in support of the “clear obligation” on Kenya “cooperate with the Court in relation to the enforcement of such warrants of arrest”. However, in October 2010, when al-Bashir was expected to visit Kenya once again, the Pre-Trial Chamber (noting article 97) asked Kenya to “inform the Chamber… about any problem which would impede or prevent the arrest and surrender of Omar Al Bashir in case he visits the Republic of Kenya”. The impact of this on the immunity question is once again unclear. On the one hand, it could be read either as a rhetorical statement, on the other it might be read as a not-to-subtle hint to Kenya to “[notify] the Court that a request for surrender or assistance raises a problem of execution in respect of article 98”, as required under Rule 195.

The upshot of this is that as yet there is as yet no clear decision from the ICC on the relationship between articles 27 and 98 of the Rome Statute and the effect of those provisions for non-party states.

4. IMMUNITY, COOPERATION AND AFRICAN IMPLEMENTATION LEGISLATION


South Africa’s Rome Statute Act (2002) is silent on the relevance of immunity in relation to cooperation requests and the relationship between articles 27 and 98. Contrary to Kenya and Uganda’s implementing legislation, the Rome Statute Act’s immunity provision focuses on the impact of immunity in domestic prosecutions and makes no mention of immunity in relation to cooperation with the ICC. What is more, the Act’s immunity provision appears to address the question of immunity ratione materiae (not ratione personae), making it irrelevant to article 27(2) and article 98(1).

In terms of section 8 of the ICC Act, when South Africa receives a request from the ICC for the arrest and surrender of a person for whom the ICC has issued a warrant of arrest, it must refer the request to the Director-General of Justice and Constitutional Development with the necessary documentation to satisfy a local court that there are sufficient grounds for the surrender of the person to The Hague. As we shall see


[62] The ICC Act states, in section 4(2)(a), that notwithstanding “any other law to the contrary, including customary and conventional international law, the fact that a person . . . is or was a head of State or government, a member of a government or parliament, an elected representative or a government official . . . is neither: (i) a defence to a crime; nor (ii) a ground for any possible reduction of sentence once a person has been convicted of a crime”. See below.

[63] Section 8(1) of the Rome Statute Act (2002).
when we consider Kenya and Uganda’s implementation legislation, this is the point at which the question of article 98’s application would arise, however the Rome Statute Act (2002) makes no mention of article 98. It merely directs the Director-General to forward the request (along with the necessary documentation) to a magistrate who must endorse the ICC’s warrant of arrest for execution in any part of the Republic.\(^{64}\)

It is worth noting that in practice the South African government has taken the position that immunity is not a bar to cooperation, as evidenced by the belated (and begrudging) revelation that the al-Bashir arrest warrant had been endorsed by a South African magistrate, is active in the Republic and that President al-Bashir would be arrested should he be present in the Republic. At no point was mention made of article 98, which could be construed as an implicit endorsement of the article 27 waiver 2.0 argument.

**Kenya’s International Crimes Act (2008)**

In contrast, Kenya’s *International Crimes Act* (2008) specifically addresses the relevance of immunity in relation to cooperation requests. Section 27(1) thereof – titled ‘Official capacity of person no bar to request’ – states that “[t]he existence of any immunity or special procedural rule attaching to the official capacity of any person shall not constitute a ground for (a) refusing or postponing the execution of a request for surrender or other assistance by the ICC; (b) holding that a person is ineligible for surrender, transfer, or removal to the ICC or another State under this Act; or (c) holding that a person is not obliged to provide the assistance sought in a request by the ICC”. However, section 27(1) is subject to the provision of section 115 of the *International Crimes Act*, which addresses *Requests involving conflict with other international obligations*.\(^{65}\) In terms of this section: “If a request by the ICC for assistance to which this Part applies concerns persons who, or information or property that, are subject to the control of another State or an international organisation under an international agreement, the Attorney-General shall inform the ICC to enable it to direct its request to the other State or international organisation”.\(^{66}\) The provision goes on to state that the Minister may postpone the request for assistance in such circumstances.\(^{67}\)

These provisions of Kenya’s *International Crimes Act* are remarkable for a number of reasons:

\(^{64}\) Section 8(2) of the *Rome Statute Act* (2002).

\(^{65}\) Section 27(2), *International Crimes Act* (2008) states: “Subsection (1) shall have effect subject to sections 62 and 115, but notwithstanding any other enactment or rule of law.”


\(^{67}\) Section 115(2), *International Crimes Act* (2008) states: “Where— (a) the ICC makes a request for assistance; (b) the ICC has not previously made a final determination on whether or not paragraph 1 of article 98 of the Rome Statute applies to that request; and (c) a request is made to the ICC to determine whether or not paragraph 1 of article 98 applies to the request for surrender, the Minister may postpone the request for assistance until the ICC advises whether or not it wishes to proceed with the request for assistance.”
First, section 27 of the Act relates to immunity *ratione personae* and its relevance to requests for cooperation in arrest and surrender or assistance from the ICC (or extradition from third states) and not domestic prosecutions (*contra* South Africa’s *Rome Statute Act*).

Second, the Act (section 115) expressly refers to article 98 of the Rome Statute and in doing so it arguably adopts an interpretation of the article 27/98 relationship that implicitly rejects the *article 27 waiver* argument. Section 115 is by no means perfect, it appears to imperfectly conflate article 98(1) and article 98(2) by referring to requests relating to “persons who, or information or property that, are subject to the control of another State or an international organisation *under an international agreement*”. This is different from article 98(1) which refers to “*obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State*”. What is more, the reference to persons, property or information “subject to the control of another State” is novel and potentially casts the net far wider that traditional immunity *ratione personae*. However, these difficulties aside, section 115 clearly does not distinguish between persons coming from states parties to the Rome Statute, as the *article 27 waiver* argument requires. Notably, other implementing acts do make such a distinction. In terms of the United Kingdom’s *International Criminal Court Act* (2001), “*any state or diplomatic immunity attaching to a person by reason of a connection with a state party to the ICC Statute does not prevent proceedings… [related to arrest and surrender] in relation to that person*”. In contrast, where “state or diplomatic immunity attaches to a person by reason of a connection with a state other than a state party to the ICC Statute” a waiver must be obtained from the state or organization concerned.

Third, the *International Crimes Act* charges the Court with making a request to the “third state” or organization. This will be done in terms of Rule 195 of the Court’s Rules of Procedure and Evidence, which states that “[w]hen a requested State notifies the Court that a request for surrender or assistance raises a problem of execution in respect of article 98, the requested State shall provide any information relevant to assist the Court in the application of article 98”. What happens thereafter is not clear from the wording of section 115. The most coherent reading suggests that if the request is refused by the third party and the Court decides not to proceed with the original request, then Kenya shall refused the original request for assistance. If the Court nevertheless decides to proceed with the original request regardless, the Kenya shall accede to it provided that “there is no other ground for refusing or postponing the request”. This suggests that Kenya considers itself bound by the Court’s decision in such circumstances.

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68 The title of the section specifically refers to article 27(2) of the Rome Statute.
70 Section 23(1), *International Criminal Court Act* (2001). According to section 23(6) ‘state or diplomatic immunity’ refers to “any privilege or immunity attaching to a person, by reason of the status of that person or another as head of state, or as representative, official or agent of a state, under— ... (c) any rule of law derived from customary international law.”
Finally, Kenya’s immunity provision makes it clear that personal immunity shall not be a bar to surrender of a person to another state as well, not merely the ICC. In this respect it might go beyond what is permissible under customary international law by allowing Kenya to extradite an official who would otherwise enjoy immunity at the request of a third country. In terms of the ICJ Arrest Warrant decision this would definitely amount to a violation of Kenya’s obligations under customary international law to the ‘sending state’.

Uganda’s ICC Act (2010)

Uganda’s ICC Act (2010) addresses the immunity of immunity in articles 25 and 26. Article 25(1), titled ‘Official capacity of person no bar to request’, states that “[t]he existence of any immunity or special procedural rule attaching to the official capacity of any person is not ground for – (a) refusing or postponing the execution of a request for surrender or other assistance made by the ICC; (b) holding that a person is ineligible for arrest or surrender to the ICC under this Act; or (c) holding that a person is not obliged to provide the assistance sought in a request by the ICC.” This is a carbon-copy of section 27 of Kenya’s Rome Statute Act (2002), with the exception of the reference to surrender to states.

In terms of article 25(2) of Uganda’s ICC Act (2010), this section is made subject to section 24(6) which states:

“If the [Justice] Minister is of the opinion that the circumstances set out in article 98 of the [Rome] Statute apply to a request for provisional arrest, arrest and surrender or other assistance, he or she shall consult with the ICC and request a determination as to whether article 98 applies.”

There are obvious similarities between this provision and Kenya’s correlative provision. Both address immunity ratione personae (i.e article 27(2) of the Rome Statute) in relation to cooperation requests rather than domestic prosecutions (in almost identical terms).

Further, like Kenya, Uganda makes this provision subject to article 98 of the Rome Statute through section 24(6) but makes no distinction between requests relating to state parties to the ICC and those not party. In this respect it contradicts, or at least does not confirm, the article 27 waiver argument in the same way that Kenya’s legislation does.

How section 24(6) will operate however is not clear ex facie. The provision grants the Minister the discretion to consult with the ICC and request a determination as to whether article 98 applies.\(^{74}\) This consultative process is closer to article 97 of the Rome Statute which provides that states must “consult with the Court without delay” if they receive a request from the Court “in relation to which it identifies problems which may impede or prevent the execution of the request”. Although the article goes

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\(^{74}\) Contrast this with section 115 of Kenya’s International Crimes Act which refers to “a request... made to the ICC to determine whether or not paragraph 1 of article 98 applies to the request for surrender”.\)
on to list what some of these problems might be, the list is clearly illustrative and not exhaustive. The obvious question is to whom might the Justice Minister consult? In terms of section 3 of the ICC Act – which contains definitions – reference to ‘the ICC’ includes any of the organs of the Court (i.e. the Prosecutor, the Registry, Chambers or the Presidency). This would seemingly preclude him from asking the ASP to make such a determination under article 119 of the Rome Statute (as discussed above). The request for “a determination” aspect however is closer to the procedure under article 98. Presuming this is the procedure that the Ugandan legislators where referring to then requests for a determination under section 24(6) of the ICC Act will be directed to the Court who will then make a determination on its applicability in the circumstances. Finally, unlike Kenya, Uganda chose to exclude extradition to “other States” from this procedure.

5. IMMUNITY AND DOMESTIC PROSECUTIONS UNDER THE IMPLEMENTATION LEGISLATION OF SOUTH AFRICA, KENYA AND UGANDA

In terms of the principle of complementarity, the prosecution of Rome Statute crimes is expected to take place before domestic courts in the ordinary course of events, with the ICC intervening only when the state concerned is either unwilling or unable to do so. Therefore, while the Rome Statute does not oblige states to establish the necessary legal frameworks to undertake these prosecutions, these are key to the effective functioning of the Rome Statute system. To this end, a number of states parties (including South Africa, Kenya and Uganda) have elected to include a framework for domestic prosecution within their implementing legislation. This raising the important question of the place of immunity provisions under these domestic frameworks, and in particular immunity ratione personae given that (as discussed above) this continues to apply before domestic courts regardless of the crime(s) being prosecuted.

The starting point for determining the relevance of such immunity to the prosecution of Rome Statute crimes in South Africa, Kenya and Uganda is to consider the provisions of particular implementing legislation. However, this is not the only consideration. One must also consider the position of customary international law immunities in each particular legal order, which turns on the place of international law with that order and its relationship with domestic legal norms. As we shall see, the question of whether states are obliged as a matter of international law to provide certain officials with immunity is only half the question, the other is whether the

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75 Article 97 'Consultations': "Where a State Party receives a request under this Part in relation to which it identifies problems which may impede or prevent the execution of the request, that State shall consult with the Court without delay in order to resolve the matter. Such problems may include, inter alia:
(a) Insufficient information to execute the request;
(b) In the case of a request for surrender, the fact that despite best efforts, the person sought cannot be located or that the investigation conducted has determined that the person in the requested State is clearly not the person named in the warrant; or
(c) The fact that execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State."

76 See Preambular paragraph 10 and article 17 of the Rome Statute.
domestic law of the states recognizes that obligation and enforces it. That is ultimately a constitutional matter.

Therefore, in order to determine the applicability of immunity in respect of domestic prosecutions in Kenya, South African and Uganda three questions must be asked:

(1) Does the implementation legislation address the issue of immunity vis-à-vis domestic prosecution? (2) What is the status of customary international law (immunity) within that State? (3) In the event of a conflict, how does the particular legal order address conflicts between domestic and international obligations?

Consequently, before considering the application of immunities in respect of the implementing legislation, and domestic law of South Africa, Kenya and Uganda generally, it is necessary to make the following general comments regarding the place of international law in domestic legal orders.

The first thing to note is that the status of international legal obligations is a question of domestic law, international law does not dictate how such obligations must be given effect to. The second is that there is no uniformity of practice in this regard. Traditionally scholars have used monism and dualism to describe the relationship between national and international law, although the usefulness of this theoretical divide has been criticized.

According to the monist school, there is one unified legal order rather than two distinct systems, that is: “international and municipal law… must be regarded as manifestations of a single conception of law”. Therefore, international law is automatically ’incorporated into municipal law without any act of adoption or transformation’. Accordingly, on this view, municipal courts are obliged to apply international law directly and no “act of adoption by the courts or transformation by the legislature” is required. The dualist school emphasises that the two are distinct legal regimes. Therefore, international law must be applied by domestic courts only if ‘adopted’ by such courts or ‘transformed’ into local law by legislation. When municipal law provides that international law applies in whole or in part within the jurisdiction, this is merely an exercise of the authority of municipal law, an adoption or transformation of the rules of international law. In this way a rule of international

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77 As Denza notes, "[F]or each national legislature and court, the starting point for any examination of the relationship [between international and domestic law] is its own constitution". Denza, 2003. The Relationship Between International and National Law. In: EVANS, M. D. (ed.) International Law. Although it does require states to take such measure to give effect to those obligations in certain instances. See Article 88 of the Rome Statute.
78 Denza notes: “There is no indication that either theory has had a significant input into the development will revision of national constitutions, into the debates in national parliaments about the ratification of international agreements, or into the decisions of national courts on questions of international law. Except as shorthand indications of the general approach within a particular state of implementation or application of international rules, these theories are not useful in examining the relationship between international law and national laws.” Ibid. 421.
80 Ibid. 43.
81 Ibid.
82 Ibid. 47
law can never *per se* become part of the law of the land; it must be made so by the express or implied authority of the state.\(^8^4\)

Further, as far as customary international law is concerned two approaches exist. The first, and more prominent, is the *doctrine of incorporation* in terms of which “customary rules are to be considered part of the law of the land and enforced as such, with the qualification that they are incorporated only so far as is not inconsistent with Acts of Parliament or prior judicial decisions of final authority”.\(^8^5\) Under this doctrine customary international law is part of the domestic law without further action by the legislature.\(^8^6\) Conversely, the *doctrine of transformation* is based on a strict dualist conception of international and national law, in terms of which before *any* rule or principle of international law can have any effect within the domestic jurisdiction, it must be expressly and specifically ‘transferred’ into municipal law by the use of the appropriate constitutional machinery, such as an act of parliament.\(^8^7\)

Insofar as monist countries are concerned, the ICC cooperation obligations (and the ‘waiver’ contained in article 27) will automatically part of the domestic legal order.\(^8^8\) However, the situation is different with dualist states, as they require that their international legal obligations to be incorporated into the domestic legal order in order for them to be binding domestically. Three African states have adopted such legislation: South Africa, Kenya and Uganda. Although other dualist African ICC States Parties might rely on the absence of such legislation for not cooperating with the Court, as a matter of international law this domestic deficiency does not affect their obligations to cooperate under the Rome Statute, nor can it mitigate the wrongfulness of their non-cooperation under international law.\(^8^9\) However, any breach of an international obligation – be it for a failure to cooperate in circumstances when they are obliged to do so or violating the immunity of a foreign official – will take place “only when the state concerned fails to observe its obligations on a specific occasion”.\(^9^0\)

**South Africa’s Rome Statute Act (2002)**

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\(^8^4\) Dugard, *supra* note 81, at 47
\(^8^5\) Brownlie, *supra* note 85, at 41.
\(^8^7\) Ibid. 139
\(^8^8\) The situation is somewhat complicated in the case of the Rome Statute as, even in monist countries, the obligations contained therein require domestic measures to be adopted in order to facilitate cooperation with the Court.
\(^8^9\) It is a well-established principle of international law that a state cannot rely on the provisions of its domestic law in order to justify the breach of an international obligation. See Article 27 of the Vienna Convention on the Law of Treaties, 1969 and Advisory Opinion of the Permanent Court of International Justice of 4 February 1932 in the *Case concerning the Treatment of Polish Nationals and other persons of Polish origin or speech in the Danzig Territory.* P.C.I.J., Series A/B, No. 44, pp. 24-25.
\(^9^0\) Brownlie argues that: “Arising from the nature of treaty obligations and from customary law, there is a general duty to bring internal law into conformity with obligations under international law...However, in general a failure to bring about such conformity is not in itself a direct breach of international law...”. Brownlie, *supra* note 85, at 35.
The position of South Africa is as follows: The ICC Act provides that notwithstanding “any other law to the contrary, including customary and conventional international law, the fact that a person … is or was a head of State or government, a member of a government or parliament, an elected representative or a government official … is neither – (i) a defence to a crime; nor (ii) a ground for any possible reduction of sentence once a person has been convicted of a crime”. Most commentators have interpreted this provision as removing immunity before South African courts. Dugard and Abraham argue that section 4(2)(a) of the ICC Act represents a choice by the legislature not to follow the ‘unfortunate’ Arrest Warrant decision, “of which it must have been aware”. However, this provision is clearly modeled on article 27(1) of the Rome Statute – which deals with the irrelevance of official capacity as a defence or as a ground for the reduction of sentence – and not article 27(2), which deals with personal immunity. Therefore, arguably while 4(2)(a) of the ICC Act effectively removes functional immunity of persons, it does not address personal immunity.

As far as the status of customary international law immunity under South African law is concerned, section 232 of the Constitution makes customary international law part of South African law. Therefore, whilst South Africa is by-and-large a dualist state, it follows the doctrine of incorporation insofar as customary international law is concerned. Applying this to the question of immunity, if section 4(2)(a) of the Rome Statute Act (2002) is understood as removing immunity ratione personae for international crimes then it would prima facie conflict with the applicable customary rules. However, section 232 conditions the applicability of customary international law as follows: “Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament”. Therefore, if the Rome Statute Act (2002) is interpreted as removing immunity ratione personae then it would do so notwithstanding the customary international law obligations on South Africa to observe it.

As a result, the question of the relevance of immunity ratione personae for domestic prosecutions under the Rome Statute Act (2002) depends wholly on the interpretation given to article 4(2)(a) of that Act. The argument made her is that this provision is based on article 27(1) of the Rome Statute and therefore relates to immunity ratione materiae only, however this is by no means the orthodox interpretation amongst

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92 Du Plessis notes: “In terms of the Act, South African courts, acting under the complementarity scheme, are thus accorded the same power to ‘trump’ the immunities which usually attach to officials of government as the International Criminal Court is by virtue of article 27 of the Rome Statute.”
93 Dugard and Abraham (2002)
94 Article 27(2) states: “Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.”
95 Section 231(4) of the Constitution states: “Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.”
academics. One argument that might be raised in favour of the interpretation of this section adopted here is based on the interpretive presumption contained in section 233 of the Constitution, which states: “When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law”. The counter argument to this might be a teleological one, to the effect that customary international law personal immunity is contrary to spirit, purport and object of South Africa’s Constitution.

**Kenya’s International Crimes Act (2008)**

As far as Kenya is concerned, section 7 of the International Crimes Act (2008) incorporates most of the General Principles of Criminal Law contained in Part 3 of the Rome Statute, “with the necessary modifications”, for the purposes of domestic prosecutions under the Act. Further it, gives these General Principles precedence over the relevant Kenyan laws. However, the Act excludes article 27 in its entirety from the list of General Principles that apply in such circumstances. This omission is remarkable as nowhere else in the International Crimes Act (2008) is the question of immunity addressed as far as domestic prosecutions are concerned.

The role of international law generally, and customary international law in particular, is more complex. Under the 1963 Constitution Kenya was a dualist state. To this end it adopted the International Crimes Act (2008) in order to “incorporate” the Rome Statute of the ICC into its domestic law and provide for its implementation. That Act – which came into force on 1 January 2009 – states that certain sections of the Rome Statute, including those relating to international co-operation and judicial assistance, shall ‘have the force of law in Kenya’. Therefore, under its own law Kenya is under an obligation to arrest and surrender person’s to the ICC in respect of whom the Court has issued a warrant of arrest.

However, the new Kenyan Constitution – which came into force on 27 August 2010 – changed all that. In terms of article 2(6) of the New Constitution: “Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.” In effect, this article converted Kenya into a “monist” state. The Commission for the Implementation of the Constitution – mandated under Section 5(6) of the 6th Schedule of the Constitution to inter alia “monitor, facilitate and oversee the development of legislation and administrative procedures required to implement this Constitution” – leaves little room for doubt in this regard, noting:

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96 Section 7(2)(b)(i), International Crimes Act (2008).
97 Article 2(5) of the New Constitution goes on to note: “The general rules of international law shall form part of the law of Kenya”.
98 CIC, Understanding Article 2(6) of the Constitution, <http://cickenya.org/content/understanding-article-26-constitution> (accessed 12 June 2011). With this in mind, article 94(5) and (6) make parliamentary approval necessary for the ratification process. Article 94(5) states: “no person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation”. This, according to the CIC, means that “[n]o treaty therefore can be ratified without prior approval by Parliament”. To this end a Bill will soon be presented to parliament that “to streamline the process of ratification of treaties in Kenya to ensure that Kenya’s international obligations thereunder are fulfilled”. Section 3 of the
“This provision while recognizing that all international and regional instruments, to which Kenya is party to, form part of the laws of Kenya also has the effect of making Kenya a Monist state, which is a shift from the Dualist state which Kenya was prior to the promulgation of the Constitution 2010... This is premised upon the recognition of a unity between international and national laws, among monist states.”

Further, section 2(5) of the Constitution provides the “[t]he general rules of international law shall form part of the law of Kenya”. The reference to general rules is confusing, but given the intentional shift to a monist regime it can reasonably be understood as referring to customary international law. If this is accepted then the immunity *ratio personae* enjoyed by heads of states and other officials under customary international law would apply in Kenya without need for further legislative action.

As immunity is not addressed in the *International Crimes Act* (2008), there is no conflict between norms in this regard. In any event, article 2(4) of the Kenyan Constitution states: “Any law... that is inconsistent *with this Constitution* is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid”. In this regard there is no hierarchy established between customary international law and ordinary legislation such as the *International Crimes Act*.

**Uganda’s International Crimes Act (2002)**

Like Kenya, Uganda’s *International Crimes Act* (2002) explicitly excludes the operation of article 27 in respect of domestic prosecutions of genocide, war crimes and crimes against humanity under the Act. In terms of article 19(1), certain *general principles of criminal law* contained in the Rome Statute apply to domestic prosecutions under the Act, “with any necessary modifications”. However, this list excludes article 27 from its ambit.

*Ratification of Treaties Bill* 2011. Gathii notes further: "This clause effectively removes the requirement of enacting domestic implementing legislation pursuant to a treaty unless Parliament and the Executive develop practice to the contrary. This seems to be the intention behind the 2010 Constitution, which omits provisions contained in prior drafts that contemplated that Parliament would have been authorised to consider and approve treaties and international agreements and the President empowered to sign instruments of consent of the Republic to be bound by treaties and international agreements. In my view, the omission of these provisions that were contained in the Harmonised Draft Constitution demonstrates that the drafters thought it unnecessary to mention the power of the President and Parliament with respect to authorising or signing treaties since these were automatically deemed to be a part of the laws of Kenya under Articles 2(5) and 2(6). As a consequence of Article 2(6), a treaty entered into by the Executive may lay the basis for a cause of action or the granting of a remedy without domestic implementing legislation by the National Assembly.” J. Gathii, ‘Making global treaties part of the Kenyan Constitution presents a legal quagmire and leaves implementation loopholes’, *Nairobi Law Monthly*, March 2011.
As to the status of international law in Uganda, the first thing to note is that Uganda is a dualist state.\textsuperscript{99} Pursuant to section 123(2)\textsuperscript{100} of the Constitution, Uganda’s parliament passed the \textit{Ratification of Treaties Act} (1998) which provides that Cabinet shall ratify all treaties, except for treaties relating to armistice, neutrality, peace or those that require an amendment to the Constitution; which must be ratified by parliament resolution.\textsuperscript{101} Thereafter, parliament passes the relevant legislation to give the treaty the force of law in Uganda. This was the process followed in respect of the \textit{ICC Act} (2010). In practice, despite an “unapologetically dualist”\textsuperscript{102} approach historically, in recent times Ugandan courts have become more open to international law principles although their theoretical basis for doing so is not clear.\textsuperscript{103}

The Constitution does not address the status of customary international law in Ugandan law, save for stating the Uganda’s foreign policy shall be based on “respect for international law and treaty obligations”.\textsuperscript{104} However, on balance it is safe to assume that, as a dualist state, Uganda follows the doctrine of transformation in respect of customary international law. To the extent that customary international law does apply in Uganda, section 2(2) of the Constitution states that “any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void”. This is a narrower clause than South Africa’s Constitution – which conditions the application of customary international law on its conformity with both the Constitution and Acts of Parliament. The only argument against the application of customary international immunities then would have to be based on a teleological interpretation of the Constitution.

\section*{6. CONCLUDING REMARKS}

From the above discussion it is clear that the issue of immunity remains one of the most divisive and debated aspects of the Rome Statute; not only in terms of its relevance for state cooperation under Part 9, but also for domestic prosecutions in

\textsuperscript{100} Which states: “Parliament shall make laws to govern ratification of treaties, conventions, agreements or other arrangements made [by the President]... .”
\textsuperscript{101} Section 2, \textit{Ratification of Treaties Act} 5 of 1998.
\textsuperscript{103} As Mulyagonja-Kakooza notes: “The jurisprudence of the Ugandan courts, especially in the past decades has become replete with inundations and practical application of international law. Interestingly, the courts have not been bogged down by the scholarly debate about theories of the relationship between international law and municipal law. Nonetheless, the courts’ application of international law does raise the question of the parameters or premise for the application. Notably, the reliance on international law has primarily been in respect of human rights and constitutional issues.” Mulyagonja-Kakooza, ‘International Human Rights and the Courts in Uganda’, paper presented at a \textit{Symposium on the Application of International Law}, Kampala 29 July 2010. \textit{Ibid.}
\textsuperscript{104} Article XXVIII(i)(b), Constitution of Uganda.
pursuance of the principle of complemenarity. Given the Court’s current clients, and the stated purpose of the ICC to bring those bearing the greatest responsibility for international crimes to justice, this ambiguity could not be more unsettling for the Court and states parties alike. This uncertainty has filtered into the implementing legislation of South Africa, Kenya and Uganda, which themselves have further muddied the water in this regard.

While clarity remains illusive these implementation instruments have a role to play in debate regarding how this issue is to be resolved. Ultimate responsibility for doing so seemingly lies with the Court itself, something which it has awkwardly refused to shoulder to date. In any event, ICC states parties from Africa should endeavour to bring clarity within and between their implementation legislation (both current and future) in order to make sure their positions on immunity – which appear to be somewhat at odds with the orthodox position – are given the fullest consideration possible in this process.