

The Continuing Functions of Article 98 of the Rome Statute

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Abstract

According to the current jurisprudence of the International Criminal Court, Article 98 of the Rome Statute does not forbid the issuance of an arrest warrant for a sitting head of state. The African Union Commission vehemently objects to this reading of Article 98. Because it viewed the function of Article 98 as forbidding such arrest warrants, it views the current jurisprudence as effectively reading Article 98 out of the Statute, with no continuing function. This article demonstrates the continuing function of Article 98. This continuing function includes immunities resulting from agreements under Article 98(2), as well as customary immunities pertaining to property, persons, diplomatic immunity, and state immunity. Countering the rhetoric and providing a close analysis of the current state of Article 98 in ICC jurisprudence is useful, both with respect to understanding the current operation of Article 98 and to reflect on balancing multiple maximands of criminal law, human rights law, and the international law of immunity.

A. Introduction

On 9 January 2012, the African Union Commission issued a press release (AU Press Release) on the decisions of Pre-Trial Chamber I of the International Criminal Court (ICC) on the “alleged” failure by Chad and Malawi to comply with the cooperation requests with respect to the arrest and surrender of President Al Bashir of Sudan.¹ The press release asserts that the decision has the effect of “Rendering Article 98 of the Rome Statute redundant, non-operational and meaningless[.]”² The African Union Commission believed that Article 98 provided for the immunity of President Al Bashir.

To the African Union Commission, the answer to the question “what remains of Article 98 after the Pre-Trial Chamber’s ruling” is simple: nothing. The African Union is hardly alone in this opinion. But is this accurate?

¹ African Union Press Release N° 002/201 (9 January 2012) available at <http://www.au.int/en/sites/default/files/PR-%20002-%20ICC%20English.pdf> (last visited 2 May 2012).

² *Id.*, emphasis removed.

This article assesses the claim that, should the Pre-Trial Chamber's ruling become the consensus jurisprudence of the ICC, Article 98 has been effectively read out of the Rome Statute that it has been rendered redundant, non-operational, and/or meaningless. Fundamentally, this article asserts that the discrete immunities addressed by Article 98 must be analyzed individually to understand the effect of the recent decisions of the Pre-Trial Chamber I. Once this analysis is done, it seems likely that many of the immunities provided for in Article 98 remain intact. Countering the rhetoric and providing a close analysis of the current state of Article 98 in ICC jurisprudence is useful, both with respect to understanding the current operation of Article 98 and to reflect on larger issues of incorporating the demands of conflicting legal traditions into international criminal law.

The structure of this article is as follows. It begins with a brief procedural history to provide the immediate context of the key findings of the Pre-Trial Chamber I in Part B. Part C provides an initial textual analysis of Article 98. Article 98(2) is analyzed in Part D. Parts E, F, and G address Article 98(1), discussing immunities pertaining to property, diplomatic immunity, and state immunity respectively. The nuanced approach to the power of international tribunals arguably exemplified in the *Blaskić* decision is noted in Part H. Part I discusses the omission of the term "arrest" in the text of Article 98. The article concludes with Part J reflecting on the issue of balancing multiple maximands of criminal law, human rights law, and the international law on immunity.

This article is more descriptive than normative. It analyzes the likely continuing function of Article 98 given current jurisprudence, without attempting to suggest the ideal solution for how the goals of international law on immunity can best be reconciled with the goals of criminal law or human rights law. While closely examining current jurisprudence, it does not seek to relitigate it.

Describing the continuing function of Article 98 is in part achieved by dissecting the Article and taking a micro-level view of how it may operate, clause by clause, and subject by subject. This approach is emphasized earlier in the article, particularly in Parts D-G. At another level, describing the continuing function of Article 98 allows for an analysis of the more general phenomenon of resolving disputes between various conflicting areas of law. This approach is emphasized later in the article, particularly in the conclusion in Part J. The fact that Article 98 has a continuing function is demonstrated with both approaches.

B. Procedural History and Key Findings

The 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 Bashir³ (Malawi Decision) includes a section entitled “Background and submissions by the Republic of Malawi”.⁴ This background will not be recapitulated in full here, but a brief introduction to the procedural history will be provided for the convenience of the reader. For the sake of simplicity, the emphasis in this study will be on the Malawi Decision, given that the decision regarding Chad is largely analogous.

Malawi became a State Party to the Rome Statute on 1 December 2002. The United Nations Security Council Resolution 1593 (2005)⁵ referred the situation in Darfur, a region in Sudan, to the ICC, allowing the exercise of jurisdiction under Article 13(b) of the Rome Statute. Almost four years later, on 4 March 2009, Pre-Trial Chamber I issued the Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir.⁶ The Pre-Trial Chamber issued warrants of arrest against President Al Bashir on 4 March 2009⁷ and 12 July 2010.⁸ The Registry sent cooperation requests to all States Parties, including Malawi, on 6 March 2009⁹ and 21 July 2010.¹⁰

³ *Situation in Darfur, Sudan in the Case of the Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision Pursuant to Article 87 (7) of the Rome Statute, ICC-02/05-01/09-139 (Pre-Trial Chamber I), 12 December 2011 [Malawi Decision].

⁴ *Id.*, 3-8.

⁵ SC Res. 1593, 31 March 2005.

⁶ *Situation in Darfur, Sudan in the Case of the Prosecutor v. Omar Hassan Ahmad Al Bashir (“Omar Al Bashir”)*, Decision Requesting Observations, ICC-02/05-01/09-3 (Pre-Trial Chamber I), 4 March 2009.

⁷ *Situation in Darfur, Sudan in the Case of the Prosecutor v. Omar Hassan Ahmad Al Bashir (“Omar Al Bashir”)*, Warrant of Arrest, ICC-02/05-01/09-1 (Pre-Trial Chamber I), 4 March 2009.

⁸ *Situation in Darfur, Sudan in the Case of the Prosecutor v. Omar Hassan Ahmad Al Bashir (“Omar Al Bashir”)*, Second Warrant of Arrest, ICC-02/05-01/09-95 (Pre-Trial Chamber I), 12 July 2010.

⁹ *Situation in Darfur, Sudan in the Case of the Prosecutor v. Omar Hassan Ahmad Al Bashir (“Omar Al Bashir”)*, Request to all States Parties to the Rome Statute for the arrest and surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-7 (Pre-Trial Chamber I), 6 March 2009.

Pursuant to Rule 195(1), Malawi (and any concerned third State or sending State) had the option of notifying the Court “that a request for surrender or assistance raises a problem of execution in respect of article 98.” To the knowledge of this author, no such notification was provided. The Malawi Decision reports that Malawi did not respond to the Court.¹¹

According to the Registry’s 18 October 2011 Report on the visit of Omar Al Bashir to Malawi,¹² President Al Bashir visited Malawi on 14 October 2011. In response to the request of the Pre-Trial Chamber,¹³ as reflected in the Registry’s Transmission of the observations from the Republic of Malawi,¹⁴ Malawi submitted that President Al Bashir was not arrested due to domestic and international law pertaining to the immunities accorded to President Al Bashir as a sitting Head of State.

The Malawi Decision’s critical finding is that “customary international law creates an exception to Head of State immunity when international courts seek a Head of State’s arrest for the commission of international crimes.”¹⁵ The Malawi Decision ultimately finds that Malawi “failed to comply with its obligations to consult with the Chamber by not bringing the issue of Omar Al Bashir’s immunity to the Chamber for its determination”¹⁶ and “failed to cooperate with the Court by failing to arrest and surrender Omar Al Bashir to the Court”¹⁷ and orders the Registrar to transmit the decision to the United Nations Security Council and to the Assembly of State Parties.

¹⁰ *Situation in Darfur, Sudan in the Case of the Prosecutor v. Omar Hassan Ahmad Al Bashir (“Omar Al Bashir”)*, Supplementary request to all States Parties to the Rome Statute for the arrest and surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-96 (Pre-Trial Chamber I), 21 July 2010.

¹¹ Malawi Decision, *supra* note 3, 8, para. 10.

¹² *Situation in Darfur, Sudan in the Case of the Prosecutor v. Omar Hassan Ahmad Al Bashir (“Omar Al Bashir”)*, Report on the visit of Omar Al Bashir to Malawi, ICC-02/05-01/09-136-Conf and Conf Anx 1 to 4 (Pre-Trial Chamber I), 18 October 2011.

¹³ *Situation in Darfur, Sudan in the Case of the Prosecutor v. Omar Hassan Ahmad Al Bashir (“Omar Al Bashir”)*, Decision requesting observations about Omar Al-Bashir’s recent visit to Malawi, ICC-02/05-01/09-137 (Pre-Trial Chamber I), 19 October 2011.

¹⁴ *Situation in Darfur, Sudan in the Case of the Prosecutor v. Omar Hassan Ahmad Al Bashir*, Transmission of the observations from the Republic of Malawi, ICC-02/05-01/09-138 with confidential annexes 1 and 2 (Pre-Trial Chamber I), 11 November 2011.

¹⁵ Malawi Decision, *supra* note 3, 20, para. 43.

¹⁶ Malawi Decision, *supra* note 3, 21.

¹⁷ *Id.*

While the purpose of this article is not to evaluate the Malawi Decision as such, it is reasonable to presume that the Pre-Trial Chamber was not seeking to contest the maxims that each provision in a treaty should be given real effect¹⁸ or that interpretation cannot rewrite provisions of a treaty,¹⁹ but rather that Article 98, if correctly understood, neither preserves nor denies immunities. Rather, Article 98 withdraws the power of the ICC to issue demands to States that create a conflict with the law of immunities, but does not determine when those immunities (and resultant conflict) exist.

C. Initial Textual Analysis

In *Does President Al Bashir Enjoy Immunity from Arrest?*²⁰ Paola Gaeta observes that it is important to distinguish between the question of what is legal for the ICC under the Rome Statute (i.e., Is the ICC authorized to issue to States Parties a request for surrender of the President of Sudan?)²¹ and the question of whether it is legal for States other than Sudan to enforce the warrant against Al Bashir under customary international law (i.e., Would a State commit a wrongful act *vis-à-vis* Sudan should it decide to arrest and surrender President Al Bashir?).²²

Prof. Gaeta argues forcefully that the ICC is not authorized to issue such a request for surrender, and that a State would commit a wrongful act should it decide to honor the request. The authors of the African Union press release clearly concur, although in part for different reasons.

It is necessary to review the text of Article 98 in order to provide an initial textual analysis. It states in full:

“(1) 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

¹⁸ See *Legal Consequences of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276* (1970), Advisory Opinion, ICJ Reports 1971, 16, 35, paras 66-67.

¹⁹ *Quark Fishing Limited v. United Kingdom* (dec.), ECHR No. 15305/06, 19 September 2006.

²⁰ P. Gaeta, ‘Does President Al Bashir Enjoy Immunity from Arrest?’, 7 *Journal of International Criminal Justice* (2009) 2, 315-332.

²¹ See *id.*, 329.

²² See *id.*, 327.

property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

(2) The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.”

Clearly, Article 98 is on the face of it concerned with Prof. Gaeta’s first question—what is legal for the ICC under the Rome Statute. Article 98(1) and Article 98(2) both concern themselves with what the Court may not do, not what States Parties may do.

Read together, it is clear that Article 98(1) pertains to certain aspects of the customary international law of immunity, while Article 98(2) refers to certain international agreements. Article 98(1) mentions two types of immunity: diplomatic or State immunity. Article 98(2) only mentions in general agreements that require cooperation of a sending State. Article 98(1) indicates two types of request: for surrender or assistance. Article 98(2) indicates only one type of request: for surrender. Article 98(1) specifies two types of entities: a person or a piece of property. Article 98(2) specifies one type of entity: a person.

D. The Function of Article 98(2) Remains Unaffected For Now

The discussion in the Malawi Decision is clearly focused on Article 98(1) to the exclusion of Article 98(2). The Malawi Decision notes an “inherent tension” between Articles 27(2) and 98(1), but decides that Article 98(1) cannot be relied on to justify refusing to comply with the cooperation requests for the arrest of President Al Bashir.²³

Article 98(2) does not discuss customary law but instead “obligations under international agreements pursuant to which the consent of a sending

²³ Malawi Decision, *supra* note 3, 18, para. 37.

State is required to surrender a person of that State to the Court[.]” The language implies explicit agreements, in contrast with the customary law norms addressed in Article 98(1).²⁴ Article 98(2) has no applicability to the customary law norms regarding head of State immunity. Neither Chad nor Malawi has a specific agreement with Sudan requiring the consent of Sudan before honoring their obligations to the Court.

The Malawi Decision identifies two arguments in raised by Malawi.

- i. Al Bashir is a sitting Head of State not Party to the Rome Statute and therefore Malawi accorded him immunity from arrest and prosecution in line with “established principles of public international law” and in accordance with the “Immunities and Privileges Act of Malawi” (the “First Argument”);
- ii. The Republic of Malawi, being a member of the African Union, decided to fully align itself with “the position adopted by the African Union with respect to the indictment of sitting Heads of State and Government of countries that are not parties to the Rome Statute” (the “Second Argument”).²⁵

The Malawi Decision noted various African Union resolutions²⁶ requiring its members not to cooperate with the warrant of arrest against President Al Bashir.²⁷ The Pre-Trial Chamber summarizes these resolutions as based on Article 98(1), and thus applies the same response to both the “First Argument” and the “Second Argument”. Thus, by its own terms, the

²⁴ See generally, C. Kress & K. Prost, ‘Article 98’, in O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd ed. (2008), 1601-1629.

²⁵ Malawi Decision, *supra* note 3, 9, para. 13.

²⁶ ‘Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Tribunal (ICC)’, African Union Assembly/AU/Dec.245(XIII) Rev.1, 3 July 2009, para. 10; ‘Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC)’, African Union Assembly/AU/Dec.296(XV), 27 July 2010, paras 5-6; ‘Decision on the Implementation of the Decisions on the International Criminal Court (ICC)’, African Union Assembly/ AU/Dec.334(XVI), 30-31 January 2011, para. 5; ‘Decision on the Implementation of the Assembly Decisions on the International Criminal Court’, African Union Assembly/AU/Dec.366(XVII), 30 June-1 July 2011, para. 5.

²⁷ Malawi Decision, *supra* note 3, 10, para. 15.

Malawi Decision does not address the immunities of Article 98(2). Without a specific challenge to a request for surrender based on and considered under Article 98(2), there is no clear reason to suggest that Article 98(2) has been nullified, or indeed affected, by the ICC's current jurisprudence.

The Pre-Trial Chamber could conceivably have addressed the matter with an explicit consideration of Article 98(2). To this author's knowledge, Malawi has not suggested Article 98(2) was implicated by the African Union resolutions. It is perhaps interesting to consider whether it might have done so. Article 98(2) states in full:

“The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.”

It is reasonable to suspect that the authors of Article 98(2) did not have the Constitutive Act of the African Union specifically in mind when referencing “international agreements,” or more specifically “obligations under international agreements[.]” This author cannot find support for such a suggestion in the preparatory documents to the Diplomatic Conference at Rome or commentaries upon the Rome Statute. Nonetheless, it is unclear whether the agreement to abide by resolutions of an intergovernmental organization, combined with resolutions that conflict with a request for surrender, could be reasonably used as a basis to object to a request for surrender under Article 98(2). In particular, it is unclear that the Constitutive Act of the African Union is an agreement “pursuant to which the consent of a sending State is required to surrender a person of that State to the Court”, even with the subsequent resolutions, although consent of the sending State would clearly remove the conflict in this instance.

It is at least questionable whether all member States of the African Union must comply as a matter of law with all decisions and policies of the African Union as asserted in the AU Press Release. The argument for the applicability of Article 98(2) might admit that obligations flowing from the decisions of the African Union do not enjoy any inherent superiority from obligations under the Rome Statute (being neither *jus cogens* nor bearing the weight conferred by Article 103 of the United Nations Charter), but would assert that any relevant legal obligation created as a result of an agreement

will activate the restrictions in Article 98(2). It is true that the African Union was created in part to strengthen the structures provided by the Organization of African Unity and the African Economic Community, adding weight to the argument that the decision in question was legally binding. That said, it is unclear whether all African Union decisions create the sort of legally binding obligations that might occur from European Union decisions, for example. Rule 33 of the Rules of Procedure of the Assembly of the Union indicates that while some Decisions are binding, other Decisions are mere recommendations, declarations, resolutions, or opinions intended to guide and harmonize the viewpoints of Member States. Other controversies regarding Article 98(2) have questioned whether Article 98(2) was meant merely for agreements already in existence when the Rome Statute was agreed upon.²⁸ It is perhaps worth noting that Member States could make reservations to the decision, as evidenced by Mali's reservation.

This issue ultimately requires resolution under Article 119(1) of the Rome Statute, which states in pertinent part "[a]ny dispute concerning the judicial functions of the Court shall be settled by the decision of the Court." The existence of Article 119(1) and the Court's resulting *compétence de la compétence* does not exclude others opining on these issues, but it is critical to resolving any dispute as to the actual continuing function of Article 98.

E. The Function of Article 98(1) with Respect to Property Remains Presumably Unaffected

The discussion on Article 98(1), including the Malawi Decision, has focused on immunity of a person of a third State. Article 98(1), however, clearly discusses more than immunity of a person. Article 98(1) states in full:

"1. 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."

²⁸ See e.g. *Amnesty International, 'INTERNATIONAL CRIMINAL COURT: US efforts to obtain impunity for genocide, crimes against humanity and war crimes'*, IOR 40/025/2002, August 2002.

What sort of immunity of property of a third State was considered at the Rome Diplomatic Conference? Kimberly Prost and Claus Kress, delegates at the Rome Conference, write in Otto Triffterer's Commentary that "it was the inviolability of diplomatic premises that was at the heart of the debate on article 98 para. 1".²⁹ One can imagine how an overzealous State might use the pretext of a request for assistance from the Court to trespass on the inviolability of diplomatic premises.

Article 98(1) does not refer to all "obligations" or all "obligations under international law" but rather specifically "obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State[.]" The phrase "with respect to the State or diplomatic immunity of a person or property of a third State" must have had meaning, or it would not have been included. One aspect of that meaning is readily explainable, even without the question of arrest of high state officials. For example, one might suggest that the ICC may not order that the bank accounts and other property of States and diplomats would be subject to seizure, if that violated the specific obligations under international law in question. Again, Article 119(1) clearly indicates that such questions must ultimately be resolved by the ICC itself.

F. The Continuing Function of Article 98(1) with Respect to Diplomatic Immunity is Unclear

The Malawi Decision is not clear as to whether, in analyzing head of State immunity of President Al Bashir, it is considering the "State [...] immunity of a person" or the "diplomatic immunity of a person". The only specific reference to diplomatic immunity is the brief mention of the decision of the International Military Tribunal for the Far East denying the relevance of diplomatic immunity to the prosecution of Hiroshi Oshima, the Japanese Ambassador in Berlin.³⁰ This is in a list of citations intended to settle the question "whether, under international law, either former or sitting heads of States enjoy immunity in respect of proceedings before

²⁹ C. Kress & K. Prost, *supra* note 24, 1607.

³⁰ Malawi Decision, *supra* note 3, 14, para. 27, citing The Tokyo Judgment, The International Military Tribunal for the Far East (I.M.T.F.E.), 29 April 1946-12 November 1948, Volume I, Röling and Rüter (eds), (1977), 456.

international courts”.³¹ Head of State immunity is not specifically mentioned in Article 98, requiring those looking for a head of State immunity to find it by implication somewhere else in the text. “State immunity” and “diplomatic immunity” are often used in a somewhat loose manner, so a specific look at each is helpful.

To determine whether President Al Bashir is covered by diplomatic immunity, one can look at Article 1 of the Vienna Convention on Diplomatic Relations,³² specifically Article 1(e) (“A ‘diplomatic agent’ is the head of the mission or a member of the diplomatic staff of the mission”)³³ and Article 31(1) (“A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State.”).

Any attempt by the Court to request the arrest or surrender of accredited diplomatic agents of a third state (widely interpreted as a non-State Party) would be subject to a legitimate objection under Article 98(1).

What is the purpose of diplomatic immunity? There are a variety of potential answers,³⁴ but perhaps the most widely accepted answer is present in the Chapeau of the Vienna Convention on Diplomatic Relations, namely: “the purpose of such privileges and immunities is not to benefit individuals *but to ensure the efficient performance of the functions of diplomatic missions*” (emphasis added).

There is no evidence that President Al Bashir was formally recognized as a diplomat by Chad or Malawi. This is unsurprising, as his presence would not be necessary to ensure the efficient performance of the functions of diplomatic missions. The accredited Sudanese diplomatic corps can do that for Sudan without President Al Bashir’s personal presence. Neither the letter nor the spirit behind diplomatic immunity supports lending President Al Bashir such immunity.

³¹ Malawi Decision, *supra* note 3, 12, para. 22.

³² Vienna Convention on Diplomatic Relations, UN Doc. A/Conf.20/13; 500 U.N.T.S. 95; 55 *American Journal of International Law* (1961) 4, 1062; U.K.T.S. No. 19, (1965). The Convention is widely considered to codify customary international law on diplomatic immunity.

³³ Further specifying in Article 1.a “The ‘head of the mission’ is the person charged by the sending State with the duty of acting in that capacity” and in Article 1.d “The ‘members of the diplomatic staff’ are the members of the staff of the mission having diplomatic rank”.

³⁴ See L. J. Shapiro, ‘Foreign Relations Law: Modern Developments in Diplomatic Immunity’, *New York University Annual Survey of American Law* (1989), 281-306, 282-283.

Because there is no explicit claim of diplomatic immunity, one may reasonably assert that diplomatic immunity remains relatively untouched by the Malawi Decision. That said, there are a few potential problems with this assertion.

First, there is the reference to the diplomatic immunity of Ambassador Hiroshi Oshima. This may have only been intended as relevant by analogy, if head of State immunity is considered to be purely an aspect of state immunity. Alternatively, and counter to the analysis above, head of State immunity could be seen as an aspect of diplomatic immunity. A third possibility is that head of State immunity is somehow an amalgam of the two. One influential monograph states on head of State immunity that “Former simple certainties gave way to more complex considerations, leading to the emergence of a body of rules which is in many respects still unsettled, and on which limited State practice casts an uneven light.”³⁵ Or, as Hazel Fox notes in *The Law of State Immunity* on head of State immunity, “[T]here have been differences as to whether these immunities are special to the holder or merely aspects of State or diplomatic immunity.”³⁶ While this author does not believe diplomatic immunity is directly implicated by the Malawi Decision, given the contested and ambiguous status of head of State immunity, others may disagree.

Second, one could assert that the power to find the immunity attached to the head of State inapplicable necessarily includes the power to disregard the immunity of mere diplomats. There is widespread support for the proposition that while the scope of head of State immunity may be contested, it is at least the equivalent of the immunities attached to diplomats. From a perspective limited to the question of the power to interfere with sovereignty, one might say that the power to order the arrest of a sitting head of State is such a great intrusion on sovereignty, that not also being able to disregard diplomatic immunities would be absurd. While this is an understandable perspective, it does fail to concern itself with the particular emphasis of modern international criminal law in general and the ICC in particular on prosecuting senior leadership. This will be explored further in Part J of this article (regarding the balancing of maximands).

Due to the lack of clarity with respect to the Malawi Decision and the unsettled nature of the law on head of State immunity, the effect of Article

³⁵ A. Watts, ‘The Legal Position in International Law of Heads of State, Heads of Government and Foreign Ministers’, *Recueil de Cours*, 247 (1994-III), 52.

³⁶ H. Fox, *The Law of State Immunity*, 2nd ed. (2008), 686.

98(1) after the Malawi Decision on diplomatic immunity is ultimately unclear. As described in Part E, immunity regarding property, whether through diplomatic immunity or State immunity, is probably unaffected by this decision. The Malawi Decision could be read as implying that diplomatic immunity of a person is not a constraint on the ICC when it requests cooperation or surrender. The better reading, however, is that the Malawi Decision leaves diplomatic immunity untouched, although hardly reinforced.

G. The Continuing Function of Article 98(1) with Respect to State Immunity of a Person Aside from Heads of State or Government is Unclear

The Malawi Decision does not precisely identify the source of head of State immunity in Article 98(1), and indeed Article 98(1) does not explicitly mention head of State immunity. As described in Part F, diplomatic immunity is not a promising source for head of State immunity in Article 98(1). That leaves State immunity as a source for head of State immunity.

As described in Jürgen Bröhmer's article *Diplomatic Immunity, Head of State Immunity, State Immunity: Misconceptions of a Notorious Human Rights Violator*,³⁷ State immunity, diplomatic immunity, and head of State immunity can be (and to Bröhmer, should be) considered separate concepts.³⁸ Bröhmer continues in his later article, *Immunity of a Former Head of State General Pinochet and the House of Lords: Part Three*: "Diplomatic immunity is enjoyed by (former or present) diplomats only, head of State immunity is tied to being or having served as head of State and State immunity is tied to being a State."³⁹ Similarly, Oppenheim's International Law states "The law relating to the position of Heads of State

³⁷ J. Bröhmer, 'Diplomatic Immunity, Head of State Immunity, State Immunity: Misconceptions of a Notorious Human Rights Violator', 12 *Leiden Journal of International Law* (1999) 2, 361-371.

³⁸ See also e.g. J. L. Mallory 'Resolving the Confusion Over Head of State Immunity: The Defined Rights Of Kings' (particularly "Head of State Immunity Distinguished from Sovereign and Diplomatic Immunity"), 86 *Columbia Law Review* (1986) 1, 169-197.

³⁹ J. Bröhmer, 'Immunity of a Former Head of State General Pinochet and the House of Lords: Part Three:', 13 *Leiden Journal of International Law* (2000) 1, 229, 233.

abroad has affinities with, but is now separate from, that relating to State immunity (which has a common origin in the identification of a sovereign with his State) and the treatment of diplomatic envoys (who also represent sovereign States).⁴⁰

That said, there is a widespread view that head of State immunity is implicated by Article 98(1), even though it is not specifically listed. Perhaps Article 98(1) could have been written more explicitly to clearly indicate that it did or did not include head of state immunity. It is possible that the ambiguity on this point and other points was by design, given the unsettled state of the law on this issue.

The Malawi Decision implies, however, that under the ICC's jurisprudence thus far head of State immunity is implicated by Article 98(1). Otherwise, Article 98(1) would not be considered in tension with Article 27(2) with respect to head of State immunity.⁴¹ If head of State immunity is considered an aspect of State immunity, does it naturally follow that all State immunity referenced by Article 98(1) has been made ineffective with respect to requests from the ICC?

This question raises similar questions as the question of the impact of the Malawi Decision on diplomatic immunity. One might assert that issuing an arrest warrant against a sitting head of State is such an infringement of sovereignty that it would be absurd to cavil at lesser violations of sovereignty. However, if the jurisprudence develops in a manner that focuses on a balance between the multiple goals of preserving diplomatic intercourse while convicting the most culpable and providing a right to remedy, one can imagine a differentiated approach to diverse claims of State immunity. Immunity attached to being a member of a special mission might also be considered part of State immunity, but might be protected for the same reason diplomats and diplomatic premises might be protected even while head of state immunity is essentially disregarded.

H. A Note on Prosecutor v. Tihomir Blaskić

When considering the interaction between immunities related to property and those related to persons, it is interesting to reflect on the 29 October 1997 decision regarding, *inter alia*, the power of the International

⁴⁰ R. Jennings & A. Watts (eds.), *Oppenheim's International Law*, 9th ed. (1992), Vol. I, Part 3, para. 447, 1034.

⁴¹ Malawi Decision, *supra* note 3, 18, para. 37.

Criminal Tribunal for the former Yugoslavia (ICTY) to issue binding orders and requests to States and individuals regarding evidentiary materials (Blaskić Decision).⁴² It does not directly address the power to arrest. Nonetheless, in context, this decision demonstrates that the power to act against traditional notions of sovereignty in a profound, high-profile manner (e.g. demand the arrest of a sitting head of State and government) does not imply the power to act in what might be considered a low-profile, minor impingement upon sovereignty (e.g. require a government agent directly to produce a document). The Blaskić Decision was well-known at the time, and the issues raised therein would likely have been in the minds of those crafting Article 98 as well as Article 72 (regarding the “Protection of National Security Information”).

Despite the supremacy of the ICTY over national judiciaries, the Appeals Chamber found that the ICTY could not address binding orders to a State official acting in their official capacity under Article 29 of the ICTY Statute (regarding “Co-operation and judicial assistance”).⁴³ State immunity did not prevent the ICTY from ordering binding orders and requests to States, nor could States withhold documents and other evidentiary materials, yet nonetheless the Appeals Chamber found it crucial to quash a *subpoena duces tecum* addressed to the Croatian Defense Minister and Croatia, allowing only a binding order addressed to Croatia alone.⁴⁴

By 1999, it was shown that the ICTY considered that it had the authority to indict a sitting head of State and head of government,⁴⁵ despite the ban on addressing binding orders under Article 29 to State officials acting in their official capacity. While both an indictment for sitting head of State and an order addressed to a State official acting in their official capacity might be considered interferences with sovereignty, the Blaskić Decision demonstrates the capacity of international tribunals to take nuanced approaches to the questions of how the demands of the customary international law of immunity can interact with a functioning international criminal tribunal.

⁴² *Prosecutor v. Tihomir Blaskić*, Judgment, IT-95-14-108bis: Blaskic (Interlocutory), 29 October 1997.

⁴³ *Id.*, 57.

⁴⁴ *Id.*, 58.

⁴⁵ Slobodan Milošević had not yet been removed from power when the initial indictment (‘Kosovo’) was issued on 22 May 1999.

I. The Absence of the Term “Arrest”

Article 98 does not mention arrest. One might reasonably wonder whether this was merely an oversight, and ask what conclusions may be drawn from the absence of this term. Amnesty International places significant emphasis on this absence, suggesting that given a warrant for an arrest, the proper procedure is to object under Rule 195(1), but until a decision is made on that objection, the State Party is obliged to arrest the individual involved.⁴⁶

Prof. Gaeta’s framework is helpful in analyzing this suggestion. Article 98 is first and foremost binding upon the ICC itself. The obligations of the receiving State are a separate question. The ICC is bound not to issue requests that violate Article 98. While the text of Article 98 does not mention arrest, an arrest warrant that required the arrest and surrender of an individual to the ICC necessarily involves consideration of Article 98, as an arrest warrant issued by the ICC does not simply suggest that the suspect is arrested without being surrendered. Therefore, for the purposes of analyzing the restrictions on the ICC, the absence of the term “arrest” does not make a material difference. The Office of the Prosecutor should not pursue, and no Pre-Trial Chamber should permit, any request for surrender that in their own estimation would violate Article 98 regardless of the absence of the term “arrest.”

For the State who objects to a warrant for an arrest, however, the situation may be slightly different. While the State may consider a warrant for arrest to constitute a violation of Article 98, Amnesty International’s argument is plausible that the absence of the term “arrest” may have been intentional, and implies that a State Party must obey even an arrest warrant that the State believes violates Article 98, at least to the degree of arresting the subject of the warrant and filing an objection to surrender under Rule 195(1). This is buttressed by the ultimate finding of the Malawi Decision, that the failure to submit the issue of President Al Bashir’s immunity to the Chamber was a separate failure from the failure to arrest and surrender President Al Bashir.⁴⁷

One might imagine that, should such a Rule 195(1) objection be ultimately successful after an arrest was carried out, the sending State would

⁴⁶ Amnesty International, ‘Bringing Power to Justice: Absence of Immunity for Heads of State Before the International Criminal Court (2010)’, IOR 53/017/2010, 52.

⁴⁷ Malawi Decision, *supra* note 3, 21.

not be satisfied with the analysis that the ICC made the receiving State act against its own evaluation of international law of immunities. This might particularly be the case in the somewhat unlikely scenario that an ICC arrest warrant against a sitting head of State was sealed and the arrest came as a surprise to the sending of State. That said, much as the International Military Tribunals at Nuremberg and in the Far East put potential war criminals on greater notice that they might be held to account on an individual basis, so might sending States be said to be on greater notice that State officials indicted by the ICC are subject to the ICC's own interpretation of the international law of immunities.

With the growing jurisprudence on this subject, those who have reason to believe they may be arrested despite a colorable claim of immunity are at least on somewhat better notice that their claim of immunity may not always succeed. The greater the possibility that such claims will not be honored, the greater the detrimental effect on the goals behind the international law of immunity. The potentially chilling effect on face-to-face high-level diplomatic discourse and traditional notions of sovereignty may be weighed against the international law norms and human rights norms, as well as eventually the general legal norm towards certainty and clarity.

J. Conclusion: Balancing Multiple Maximands

Article 98 does not purport to provide a definitive answer to the current state of the international law of immunity. International criminal law faces the difficult problem of integrating and making meaningful multiple conflicting traditions, particularly the universality of human rights (and to some degree the law of armed conflict) with the restrictions of classical public international law on immunities and criminal law, not to mention the idea from human rights law to a right to a remedy.⁴⁸ Implementing the international law of immunity in a modern international criminal law context is a difficult issue, which the International Law Commission cannot come to a consensus on. Broadly speaking, it is an issue the Institute of International Law has had to revisit repeatedly, in 1891, 1954, 1991, 2001,

⁴⁸ For an intriguing analysis of these tensions, see D. Robinson, 'The Identity Crisis of International Criminal Law', 21 *Leiden Journal of International Law* (2008) 4, 925-963.

and 2009.⁴⁹ The House of Lords of the United Kingdom, when faced with the extradition of Augusto Pinochet, was wrestling with a difficult related conundrum in which reasonable people (including the Lords themselves) disagree.⁵⁰ Article 98 provides the contours of how the ICC must evaluate the international law of immunity in the context of its requests. In determining the legality of its own requests and the responses to those requests, the ICC must evaluate the current state of the international law of immunity and how it applies to the situations before it. Different institutions, such as the International Court of Justice, may resolve the tensions between various traditions in ways that conflict with the ICC.

In evaluating the effect of Article 98, the judges of the ICC may be faced with surprising possibilities. For example, is it possible that heads of State may receive less protection under the international law of immunity than diplomats or mere property? The suggestion, at first glance, may seem absurd. Head of State immunity is arguably of a longer pedigree than State immunity and diplomatic immunity. Heads of State enjoy privileges ordinary diplomats lack. Interference with the head of State has traditionally been seen to have been of an attack on sovereignty of a higher magnitude than interference with the immunity of a diplomat. From the perspective of protecting the sovereignty of States, one might ordinarily begin and end with an emphasis on protecting the “sovereign,” or head of State. But there are other perspectives – that of the demand of international criminal law to punish the culpable, and that of the right to a remedy under human rights law. ICC judges may wish to look towards the initial impetus for including Article 98—the inviolability diplomatic premises.⁵¹

⁴⁹ See Institute of International Law, ‘Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crime’ (2009) available at http://www.idi-iil.org/idiE/resolutionsE/2009_naples_01_en.pdf (last visited 2 May 2012). (“Mindful that the Institute has addressed jurisdictional immunities of States in the 1891 Hamburg Resolution on the jurisdiction of courts in proceedings against foreign States, sovereigns and heads of State, the 1954 Aix-en-Provence Resolution on immunity of foreign States from jurisdiction and measures of execution, the 1991 Basle Resolution on the contemporary problems concerning immunity of States in relation to questions of jurisdiction and enforcement and in the 2001 Vancouver Resolution on immunities from jurisdiction and execution of heads of State and of Government in international law”).

⁵⁰ E.g. ‘Regina v. Bow Street Stipendiary Magistrate and others, ex parte Pinochet’, 37 International Legal Materials (1998) 6, 1302-1339.

⁵¹ C. Kress & K. Prost, *supra* note 24, 1607.

As with the ICTY Appeals Chamber in the Blaskić Decision, the ICC must take into account and be restrained by considerations of sovereignty while still seeking to pursue the object and purpose of the Rome Statute and of the larger tradition of international criminal law. Some, like Dapo Akande,⁵² believe the conflicts between various traditions can be elided, at least in this case, by reading a requirement to waive immunities into the command from the United Nations Security Council to cooperate with the ICC. Others may believe that such cooperation does not necessarily imply a waiver of the relevant immunities.

It is unclear how this might play out with respect to cross-border crimes that do not rely on a United Nations Security Council referral. For example, these issues may be raised with respect to a prosecution regarding the crime of aggression once the amendments to the Rome Statute regarding that crime enter into force. The Review Conference at Kampala, Uganda did not clarify the contours of the law to be applied under Article 98, nor did they support a robust immunity regime. To the contrary, the *Historical review of developments relating to aggression (2002)*⁵³ clearly supported (following *America v. Ernst von Weizsäcker et al.*) that heads of State had been historically prosecuted for aggression, unshielded by immunity.

The emphasis on holding the leadership of organizations and States accountable in international criminal courts and tribunals is not limited to the crime of aggression at the ICC. It is echoed in the choices of Prosecutors, the language surrounding the completion strategy of the ICTY and of other tribunals, and in the logic of holding those most culpable to account. Article 98, and the ICC jurisprudence thus far, leave many areas of ambiguity as to the application of the international law of immunity. The absence of such terms as “arrest” (as well as “assistance” or “property” in Article 98(2)) leave open questions as to the applicability of Article 98 in various situations not yet before the ICC. Should the ICC in the future make

⁵² See e.g. D. Akande and S. Shah, ‘Immunities of State Officials, International Crimes, and Foreign Domestic Courts’, 21 *European Journal of International Law* (2010) 4, 815–852; ‘The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir’s Immunities’, 7 *Journal of International Criminal Justice* (2009) 2, 333–352; D. Akande, ‘International Law Immunities and the International Criminal Court’, 98 *American Journal of International Law* (2004) 3, 407–433; D. Akande, ‘The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits’, 1 *Journal of International Criminal Justice* (2003) 3, 618–650.

⁵³ *Historical review of developments relating to aggression*, Preparatory Commission for the International Criminal Court, PCNICC/2002/WGCA/L.1, 24 January 2002, 56.

decisions at odds with others views on immunity, the answer may be found in the traditions informing international criminal law, as an important addition to the language of the Rome Statute itself.

Multiple maximands in competition with one another cannot each be fully realized. They must be balanced. Each honoring of an existing immunity may be seen as an ongoing violation of the right to a remedy. Each depreciation of an immunity in the name of punishing the culpable will be seen by some as an attack on the foundations of the international system. It will often be impossible to fully realize the objectives of multiple legitimate legal traditions. Under Article 119(1) of the Rome Statute, the ICC will have to resolve the continuing function of Article 98 as disputes continue to emerge.