An Advisory Opinion On Head of State Immunity

En Vejledende Udtalelse om Immunitet af Statsoverhoveder

master's thesis

by

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Abstract

This master thesis examines the legal and political issues and challenges that can arise from a potential ICJ advisory proceeding on head of states immunities. Its purpose is to clarify whether the need for legal clarity on the widely disputed topic is desirable when balanced against the perceived consequences for the ICC.

Head of states immunity constitutes a core rule of international law its purpose being ensuring peaceful relations between sovereign states. Along with the rise of international criminal law, absolute immunity for incumbent heads of state has been challenged by the creation of international criminal tribunals. As the only permanent international criminal court, the ICC repudiates all immunities otherwise enjoyed under international law.

This master thesis demonstrates how the ICC has challenged the scope of these provisions by applying them to a third state with the indictment of the, now former, Sudanese President, Omar al-Bashir, causing not only legal but also political concerns for several state parties. Whereas this master thesis concludes that there is indeed legal ground for the indictment, it also finds that the ICC has stretched the law beyond its breaking point as a result of some of its legal findings. On this background the AU has sought an advisory opinion from the ICJ.

With an interdisciplinary approach and with attention to the political context for the ICC, and with comparison to previous advisory proceedings, this master thesis finds sufficient reason to conclude that an advisory opinion comes at the expense of severe negative implications for the ICC, which may affect the international criminal law system more broadly. Despite the evident need for legal clarity, an advisory opinion has an undermining effect on the already challenged ICC. The legal and political issues are discussed further in a broader context of deterrence, impunity, and the ICC's new strategic plan.

Based on the analysis, the master thesis presents a recommendation for ensuring the best outcome from a potential advisory proceeding.

"The issue is emotive because it is a microcosm for the longstanding battle for the soul of international law: will international law – at its core – protect sovereignty and immunity implied by it or will it pursue a brave new world by promoting accountability and justice for the victims of atrocity crimes."[1]

[1] Dire Tladi, "The International Law Commission's recent work on exceptions to immunity: charting the course for a brave new world in international law?," *Leiden Journal of International Law,* vol. 32, no. 1 (2019), 187.

List of Abbreviations

ACHPR	African Court of Human and Peoples' Rights
ASP	Assembly of States Parties to the Rome Statute
AU	African Union
EU	European Union
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	United Nations Tribunal for Rwanda
ICTY	United Nations International Tribunal for the Former Yugoslavia
ILC	International Law Commission
IMT	International Military Tribunal at Nuremberg
MFA	Ministry of Foreign Affairs
OTP	Office of the Prosecutor (ICC)
PTC	Pre-Trial Chamber
SCSL	Special Court for Sierra Leone
UN	United Nations
UNGA/GA	United Nations General Assembly
UNSC/SC	United Nations Security Council
UK	United Kingdom
US	United States
VCLT	Vienna Convention of the Law of Treaties
WWI/II	World War I/II

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Chapter I: Introduction

"L'état c'est moi"

- Louis XIV

1.1 Head of State Immunity in International Law

International law, a concept that covers the body of principles and rules which states agree to apply within the international legal order. A body of principles and rules deriving from treaties, customs and principles of law as recognised among states.

The principle of sovereign equality is found at the very heart of international law and constitutes the foundation for international relations.[2] It is from the principle of sovereign equality that the rules on immunity derives, a concept that protects the state and its highest-ranking officials from prosecution by foreign states.[3] The theoretical basis for state immunity and head of state immunity share the same roots but have evolved into two separate theoretical branches, even though much resemblance remains. The ruler was initially considered a personification of the state, and hence the immunity of the state and its ruler thus remained absolute.[4] In modern theory, the special legal status of heads of states stems from a combination of the equality- and sovereignty-principle, together with the maintenance of international peace and security, and the promotion of friendly relations.[5]

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[2]The 1648 Peace of Westphalia is traditionally perceived as the transition to a territorial form of rule with horizontal equality among states. This perception of a radical transition has, however, been challenged. For more hereon, *see:* Andreas Paulus, *International law and international community*, in: David Armstrong (eds.), Routledge Handbook of International Law, 2009, 59-64. The principle is also codified as a cornerstone in the UN Charter, Article 2(1): *"The Organization is based on the principle of the sovereign equality."*

[3] Selman Ozdan, "Immunity vs. Impunity in International Law: A Human Rights Approach," *Baku State University Law Review*, vol. 4, no. 1, 38.

[4] International Law Commission, *Preliminary report on immunity of State officials from foreign criminal jurisdiction*, UN Doc. A/CN.4/601, 20 May 2008, para. 78; Hazel Fox and Phillipa Webb, *The Law of State Immunity*, 3rd edition, 2013, 544; Marc Weller, *The Struggle for an international constitutional order*, in: David Armstrong (eds.), Routledge Handbook of International Law, 2009, 182-185; Astrid Kjeldgaard-Pedersen, *Statsrepræsentanters Immunitet*, 2005,128.

[5] *Vienna Convention Convention on Diplomatic Relations 1961*, Vienna, 18 April 1961, *United Nations Treaties Series*, vol. 500 (available at http://legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf), preamble; Jurisdictional immunity, as a legal term, establishes a right for a sovereign State. This right provides an "*exemption from the exercise of the power to adjudicate as well as to the non-exercise of all other administrative and executive powers by whatever measures or procedures by another sovereign State*", cf. International Law Commission, *Yearbook of the International Law Commission*, 1979, vol. II, no. I, UN Doc. A/CN.4/323, para. 51; Kjeldgaard-Pedersen, *supra* note 4, 129.

The immunity privileges are assigned with practical considerations for safeguarding the functions of the representative of the state, as expressed in the preamble of the *1961 Vienna Convention on Diplomatic Relations*: *"Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States."*[6] These underlying considerations for head of state immunity and immunities for other state representatives emphasise that it is hardly surprising to discover, why attempts to circumvent this fundamental principle is challenging.

Rules on immunity have indeed been challenged alongside the development of international criminal law;[7] before the 20th century, it would have been unthinkable to prosecute foreign state officials for international crimes, but changes occurred in the aftermath of WWI with the waiver of Kaiser Wilhelm II's immunity, even though it did not lead to prosecution due to the refusal of Dutch authorities to extradite him.[8] This tendency developed further in the aftermath of WWII when it became possible to impose individual criminal responsibility on state officials at the Nuremberg and Tokyo trials.[9] The horrors witnessed during WWII caused cracks in the otherwise impermeable shield of immunity enjoyed by the holders of official positions.[10] The development has continued since then with the establishment of international criminal courts and tribunals, their main task being to end impunity for international crimes – regardless of the official status of the perpetrator.[11]

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[6] *Vienna Convention on Diplomatic Relations*, Vienna, 18 April 1961, *United Nations Treaty Series*, vol. 500, preamble (available at http://legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf).

[7] International criminal law has various definitions in the literature. For the purpose of this master thesis, international criminal law is defined as the branch of public international law that concerns the direct criminal responsibility of individuals. *See* also: Robert Cryer, *International Criminal Law*, in: Malcolm D. Evans (ed.), International Law, 4th edition, 2014, 752-753.

[8] Commission of the responsibility of the Authors of the War and on enforcement of penalties, "Report Presented to the Preliminary Peace Conference, 29 March 1919" (Reprinted) *The American Journal of International Law*, vol. 14. No 1/2 (1920), 116; *See also,* William A. Schabas, *The Trial of the Kaiser*, 2018, 163, 167-168.

[9] Mark A. Summers, "Immunity or Impunity? The Potential Effect of Prosecutions of State Officials for Core International Crimes in States Like the United States That Are Not Parties to the Statute of the International Criminal Court," *Brooklyn Journal of International Law*, vol. 31, no. 2 (2006), 463.

[10] Article 7 of the IMT reads: "*[t]he official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment."*. The marking of WWII as a turning has, however, been criticised for being an over-simplification, since it does reflect the complexity of geopolitics within countries and regions. The trend towards holding heads of state accountable, also domestically, in the aftermath of WWII has been more widespread in Europe. For the purpose of this master thesis is the aftermath of WWI, and in particular the end of WWII where immunity was more clearly denounced in the IMT Charter, recognised as the turning point for the internal fight against impunity, as the subsequent international tribunals are built upon the heritage of the Nuremberg and Tokyo Trials. For more case studies hereon *see*: Ellen, L. Lutz, *Prosecutions of Heads of State in Europe*, in: Ellen L. Lutz and Caitlin Reiger (eds.) Prosecuting Heads of State, (2009), 25-45; Patrick Kimani, "The Implications of Stripping Immunities of Heads of States on State Cooperation and the Effectiveness of Trial," *Strathmore Law Review*, vol. 1, no. 2 (2016), 76.

[11] Fox and Webb, *supra* note 4, 130.

The tragedies experienced in Former Yugoslavia and Rwanda caused renewed attention to impunity in the 1990s with the establishment of the two UN *ad hoc* tribunals, ICTY and ICTR in 1993 and 1994.[12] Before the 1990s, only a few former state leaders have been tried for gross human rights abuses, and these were mainly prosecuted at "political trials" without due process or independent judiciary.[13] With the *ad hoc* tribunal, ICTY, came the first indictment of a sitting head of state, Slobodan Milošević, for crimes committed during the Yugoslav Wars.[14] Eighteen months after the establishment of the ICTY, the SC decided to react to the genocide in Rwanda by establishing another UN *ad hoc* tribunal, ICTR, to prosecute genocide and other systematic, widespread violations of international humanitarian law in Rwanda. The investigation led to the prosecution and life imprisonment of the Rwandan prime minister, Jean Kambanda, for genocide and crimes against humanity.[15] Subsequent to the *ad hoc* tribunals, the international community has established a number of other *ad hoc*-, hybrid and specialised tribunals including the Special Panels for Serious Crimes in East Timor, the Special Court for Sierra Leone, a specialised war chamber in Bosnia, the Extraordinary Chambers in the Courts of Cambodia, and the Special Tribunal for Lebanon, all of which share a common *raison d'être;* to fight impunity and the principle of no distinction of official capacity for prosecution.[16] This development throughout the 20th century fertilised the ground for a permanent international criminal law institution, which became a reality in 1998 with the adoption of the Rome Statute.

The development in the 20th century encompasses the blooming of human rights and an emerging focus on accountability and ending impunity for the gravest of international crimes. The changes also capture the essence of international law as something non-static under the constant influence of the social and political context.[17] The rationale behind accountability can not only be found in punishment but also a means of deterrence, the idea being to discourage sitting heads of states from committing heinous crimes, by ensuring limits to the exercises of sovereign statehood.[18]

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[12] *See*: UN Security Council resolution 827, S/RES/827, 25 May 1993; UN Security Council resolution 955, S/RES/955, 8 November 1994.
[13] Lutz and Reiger, *supra* note 10, 2.
[14] It should be noted, that Milošević had been ousted from power before his transfer to the Hague and had been under house arrest in Belgrade for three months. The case nevertheless represents one of the key developments in the area of international prosecutions of head of states.
[15] *The Prosecutor v. Jean Kambanda*, Judgement and Sentence, International Criminal Tribunal for Rwanda, 4 September 1998.
[16] Lutz and Reiger, *supra* note 10, 8.
[17] For more on the development in immunity and a three-part model hereon, *see:* Fox and Webb, *supra* note 4, 26-48; and *also:* Kjeldgaard-Pedersen, *supra* note 4, 62-71.
[18] Mattia Cacciatory, "Al-Bashir: why the ICC is between a rock and a hard place," *The Conversation*, 12 April 2019 (available at https://theconversation.com/al-bashir-why-the-icc-is-between-a-rock-and-a-hard-place-115388).

The development has, however, not been uncontested; the political muscle an incumbent head of state wields emphasises why prosecutions of head of states remains a challenge. Prosecutions of a head of state are inherently more politicised than those of their underlining, and consequently, the surrender of a head of state is not without great difficulty. With the underlying rationale for a head of state enjoying immunity from foreign criminal jurisdiction as a prerequisite for peaceful conduct and friendly relations between states, it follows that the development of international prosecutions of heads of states has not been uncontested.

There tends to be a division in the immunity debate with a human rights approach on one side, claiming that immunities of state officials are a means for impunity, and a traditional international law approach on the other side, emphasising the menace in friendly relations and impact on international peace and security.[19] The dispute is, therefore, often over the trade-off between peace versus justice. It is thus not surprising that the head of states immunities has become one of the most disputed subjects in international criminal law, with only a few issues drawing as much attention at both the academic and the practical level.[20] Countless academic interpretations of current international law on immunities with just as many different approaches do not aid to finding answers to the outstanding questions, on whether international law recognises exceptions to immunities or indeed whether it should. In this regard the ICC has been a vanguard for criminal proceedings against heads of states, aiming to end impunity for perpetrators of the most serious crimes.

1.2 ICC and Immunities

The immunity provisions in the Rome Statute, the founding Statute of the ICC, captures the development in international criminal law since the post-WWII period.

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[19] For more on this debate, *see* e.g.: Geoffrey Robertson, "Ending Impunity: How International Criminal Law Can Put Tyrants on Trial," *Cornell International Law Journal*, vol. 38, no. 3 (2005); Dire Tladi, *supra* note 1; O'Keefe, Roger, "State Immunity and Human Rights: Heads and Walls, Hearts and Minds," *Journal of Transnational Law*, vol. 44, no. 4 (2012).

[20] The debate on state immunity has been a recurrent topic at the ASP. A special segment was included in the 12th session of the ASP on state immunity requested by the AU, where the attention was drawn on the relationship between peace and justice. *See* ICC Assembly of States Parties, *Special segment as requested by the African Union: Indictment of sitting Heads of State and Government and its consequences on peace and stability and reconciliation*, ICC-ASP/12/61, 27 November 2013.
The issue of consequences of indictments of head of states for the peace and stability was further addresses on the opening speech by Charles Jalloh. For a transcript of the speech, *see*: Charles Chernor Jalloh, "Reflections on the indictment of Sitting Head of State and Government and Its Consequences for Peace and Stability and Reconciliation in Africa," *African Journal of Legal Studies*, vol. 7 (2014).

The immunity provisions in the Rome Statutes abolish any immunity that heads of states have enjoyed hitherto when tried by the ICC.[21] Since its invocation in 2002, The Court has initiated more cases against heads of states than any other criminal court, but this has proved to be far from an easy task, and immunity has become one of the most pressing issues for the Court.

The 2009 indictment of the sitting Sudanese president, Omar al-Bashir, proved to be a particularly contentious case, and it has not yet been possible to have al-Bashir extradited to the Hague.[22] The arrest warrants have been issued after the SC referred the situation in Darfur to the ICC in 2005, but from the very beginning has Sudan, as a non-state party to the ICC, left no doubt that they do not consider the ICC arrest warrants as legally valid without their consent. Sudan has, therefore, consistently refused to surrender al-Bashir to the ICC, and al-Bashir himself pronounced after the issuance of the first arrest warrant: "*It is not worth the ink it is written with – they can eat it."*[23]

Despite continued cooperation requests by the ICC for member states to arrest and surrender the Sudanese president, al-Bashir has continued to travel abroad including to the territories of ICC member states.[24] The PTC have been consistent in their conclusions on the failures of member states to comply with their obligations to cooperate with the Court, and the ICC Appeals Chamber recently confirmed that al-Bashir does not enjoy immunity.[25] The decisions have, nevertheless, fuelled the debate over the obligations of member states to arrest and extradite a third state's incumbent president.[26]

The dispute over the *al-Bashir* case should be seen in a broader context of the relationship between the AU and the ICC. Whereas African states vehemently supported the establishment of an international criminal court as well as actively engaging in the drafting of the Rome Statute, this support has, however, been diminishing as a direct consequence of the ICC's indictments of African state leaders. [27] The AU has expressed concern over meddling in volatile domestic situations by

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[21] Kimani, *supra* note 10, 77.

[22] al-Bashir was ousted from power when he was overthrown by the Sudanese military on 11th April 2019, after massive civilian protests demanding the removal of the president. The protests, beginning in December 2018, was initially a result of the rising costs due to a sharp currency devaluation. *See*: BBC News, "Letter from Africa: why people keep cash under the mattress in Sudan," BBC News, 10 January 2019 (available at https://www.bbc.com/news/world-africa-XXXXXX-XXXXand New York Times, "Sudan's President Omar al-Bashir is Ousted, but Not His Regime", *New York Times,* 11 April 2019 (available at https://www.nytimes.com/2019/04/11/world/africa/sudan-omar-hassan-al-bashir.html)

[23] Paul Moorcraft, *Omar Al-Bashir and Africa's Longest War*, 2015, 169.

[24] al-Bashir has made at least 115 reported trips since the issuance of the first ICC arrest warrant on 4th March 2009. He has visited at least thirty-two countries, including fourteen member states, eleven non-member-states, and eight signatory states according to a "mapping Bashir" research project: *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, amicus curiae observations (Professor Michael A. Newton), ICC Appeals Chamber, ICC-02/05-01/09-361, 14 June 2018, para. 6.

[25] *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Judgement, ICC Appeals Chamber, ICC-02/05-01/09-397, 6 May 2019, para. 1-11.

[26] For the purpose of this master thesis, a 'third state' refers to a non-member state of the Rome Statute.

[27] There are, however, still supporters of the ICC to be counted among the AU members, including Botswana, Ghana, Nigeria and Tanzania. *See:* Gino Naldi and Konstantinos D. Magliveras, *The International Criminal Court and the*

prosecutions of state leaders, jeopardising fragile peace-processes, and has accused the OTP of politicised and biased selection of cases with the deliberate targeting of the African continent.[28] The fraught relationship between the ICC and the AU has led to threats of African mass-withdrawals from the Rome Statute.[29] The indictment of al-Bashir has only increased tensions, and it is in the midst of this challenging situation that the AU has sought a request for an advisory opinion on head of state immunity.

1.3 AU's Request for an Advisory Opinion

The *al-Bashir* case emphasises the controversial nature of head of states immunity, and the embedded political nature is reflected in the expressed concerns over the indictment's interference in the domestic situation in Darfur.[30] Whereas the state parties do not enjoy personal immunity as otherwise, this is not the case for states that have not consented to the ICC's jurisdiction. The *al-Bashir* case has ultimately proven to be so contentious, that though unsuccessfully, the AU, has tried to defer the situation pursuant to Article 16 of the Rome Statute.[31] As a result of the disagreement with ICC's handling of the question of personal immunities of third states, the AU has pushed for an ICJ advisory opinion hereon at the GA. At the 73rd GA, the AU submitted a request for the inclusion of an extra item in the provisional agenda under the heading "*Request for an advisory opinion of the International Court of Justice on the consequence of legal obligations of States under different sources of international law with respect to immunities of Heads of State and Government and other senior officials*" which was adopted. [32] The GA can, thereby, now formally discuss the agenda item, and later decide whether they will submit an official request to the ICJ. According to the AU, the hope for an advisory opinion is rooted in the wish for providing legal

African Union, A problematic Relationship, in: Charles Chernor Jalloh and Ilias Bantekas (eds.), The International Criminal Court and Africa, 2017, 114-117; Charles Chernor Jalloh, "Regionalizing International Criminal Law?," *International Criminal Law Review*, vol. 9 (2009) 446; Pillai, Priya, "The African Union, The International Criminal Court, and the International Court of Justice: At the Fault Lines of International Accountability," *American Society of International Law*, 22 August 2018 (https://www.asil.org/insights/volume/22/issue/10/african-union-international-criminal-court-and-international-court).

[28] Charles Chernor Jalloh, "*supra* note 27, 446.

[29] *See:* African Union, *Withdrawal Strategy Document, Draft 2,* 12 January 2017 (available at https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan._2017.pdf). Thus far, only Burundi has withdrawn from the Rome Statute. South Africa initiated a withdrawal process but revoked its notification.

[30] Assembly of the African Union, *Decision on the meeting of African State Parties to the Rome Statute of the International Criminal Court*, AU Doc Assembly/AU/13(XIII), 3 July 2009, para. 3.

[31] Assembly of the African Union, *Decision on the International Criminal Court*, AU Doc. EX.CL/952 (XXVIII), 31 January 2016.

[32] UN General Assembly, *Request for an advisory opinion of the International Court of Justice on the consequences of legal obligations of States under different sources of international law with respect to immunities of Heads of State and Government and other senior officials,* UN Doc. A/73/144, 18 July 2018.

clarity on the questions arising from the *al-Bashir* case.[33] Albeit, it appears as an opportune avenue for reaching finality through a third institution, the current situation of the Court gives rise to further consideration; the ICC is not only balancing against a troubled relationship with the African member states but has, since its beginning, faced severe resistance from non-member states, especially from the United States. The criticism from the United States reached new heights when the Prosecutor announced she would initiate an investigation in Afghanistan in 2017 of alleged war crimes of American nationals.[34] Furthermore, the acquittals of the former head of state of the Ivory Coast, Laurent Gbagbo and former DRC vice-president Jean-Pierre Bemba, might have demonstrated the Judge's impartiality and independence but has spawned severe criticism of the effectiveness and credibility of the Court.[35]

It is with this context in mind, that the prospects for an advisory proceeding at the ICJ, that, after all, questions, ICC's jurisprudence should be questioned. The highly challenging situation for the ICC requires consideration for the challenges that might follow if the GA decides to submit a request for an advisory opinion.

The situation is relatively new with the adoption of the AU request in September 2018, why there is scarce literature on the subject. This master thesis is thus an attempt to fill in the analytical gap for the legal and political challenges that can arise from an advisory proceeding with a thorough analysis hereof. As this introduction has shown, head of states immunities is a fundamental rule and measure for peaceful relations and is at the same time a significant obstacle for those seeking a brave new world with no impunity for the worst perpetrators. The divide over justice for victims and peaceful relations between sovereign states is at the heart of the dispute, why it is of the utmost importance to shed light on events that can have an impact for the future application of immunities. An advisory opinion may provide legal clarity, but with the challenging climate of the ICC, there may be a risk that the legal clarity will not come without repercussions. This is ultimately where the motivation for the thesis is to be found - exploring whether an advisory opinion is a sound avenue for seeking legal clarity for questions on head of states immunities.

At the time of writing, there are still a number of uncertainties linked to a potential advisory opinion process. These unknowns make it even more urgent to analyse the challenges and issues that can

[33] UN General Assembly, *Request for an advisory opinion of the International Court of Justice on the consequences of legal obligations of States under different sources of international law with respect to immunities of Heads of State and Government and other senior officials,* UN Doc. A/73/144, 18 July 2018, paras. 2-6.
[34] *Situation in the Islamic Republic of Afghanistan,* Decision, ICC-01/17-1, 3 November 2017.
[35] Anna Holligan, "Laurent Gbagbo case: Ivory Coast leader's rattles ICC foundations," *BBC News,* 15 January 2019 (available at https://www.bbc.com/news/world-africa-46874517).

arise thereof, and how to avoid some of the potential consequences and to ensure the most appropriate outcome.

1.4 Research Question and Outline

Bearing the motivation for this master thesis in mind, the following research question is formulated:

What are the legal and political issues and challenges of a potential ICJ advisory opinion on head of state immunity?

To answer the research question, the master thesis is divided into three different analytical parts and a final recommendation.
Chapter III conducts a legal analysis of the ICC's decisions in the *al-Bashir* case. This provides a foundation for an understanding of the legal issues and later discussing these in relation to a potential advisory opinion. This analysis examines the main legal findings in selected decisions from 2011 up until the 2019 appeal judgement and makes an assessment of the legal validity of the decisions.
Chapter IV provides an analysis of advisory proceedings. This chapter investigates previous advisory proceedings to gain an understanding of how they can contribute as a mechanism for dispute settlement, how previous advisory requests has been handled in the GA, and how UN member states have received advisory opinions.
Chapter V, the final analysis, builds upon the previous chapters and examines the legal and political challenges and issues that can arise from an advisory proceeding, together with a discussion of the implications in a broader perspective.
Based on the findings of the three-part analysis, a recommendation for ICC member states is made, outlining possible approaches in the attempt to ensure the most appropriate outcome of an advisory opinion.
The overview of the structure of the analysis has now been outlined and will be followed with a section on the modus operandi. It is, therefore, now time to turn to the methodology of this master thesis.

Chapter II: Methodology

2.1 Qualitative Desk Research

The research design for this master thesis is based on qualitative desk research; this implies that the methodologies employed consist of a desk review of primary and secondary sources that are treated qualitatively. The primary sources include, but are not limited to, international treaties, case law, and reports. The secondary sources comprise books, journal articles, and internet sources.

Chapter III follows a traditional legal-dogmatic method, with interpretation of sources of international law. The analysis builds on the five recognised sources of laws, mainly treaties, international custom, general principles of law, and, as subsidiary means, judicial decisions and expert opinions from scholars and national jurists, as stipulated in the ICJ statute Article 38(1).[36]
At the outset, the analysis clarifies the status of head of state immunity under general international law, relying on primary, and to a lesser extent, secondary sources of international law. The status under general international law is interpreted in order to better engage in the discussion of conflicting obligations of the ICC member states.

The case law of ICC will be interpreted in accordance with the applicable law set out in Article 21 of the Rome Statute.[37] The application of Article 21 sets out the hierarchy of sources and stipulates the special status of the Rome Statute in relation to applicable law, the Court shall apply, in the first place, the Statute, elements of crimes and its rules on procedure and evidence .

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[36] Article 38 of the ICJ Statute reads: *"1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognised by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principle of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicist of the various nations, as a subsidiary means for the determination of the rule of law".*

[37] Article 21 of the Rome Statute reads: "*The Court shall apply: (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence; (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict; (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards. 2. The Court may apply principles and rules of law as interpreted in its previous decisions. 3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status".*

The interpretation of international conventions will be conducted in accordance with Articles 31 and 32 of the VCLT.[38] This method of interpretation is used to analyse the scope of the relevant immunity provisions of the Rome Statute set out in Article 27 and 98. The same interpretation principles are, furthermore, used in relation to the UN Charter and the scope of its Article 103.

The methodology is supplemented with *travaux préparatoires*, as set out in Article 32 of the VCLT, in relation to the immunity provision of the Rome Statute, and when analysing the intention of SC resolution 1593.

The analysis highlights specific legal arguments used by the respective ICC Chambers that have constituted the legal ground for the decisions. The ICC documents that are used include relevant decisions from the *al-Bashir* case, including dissenting opinions and *amicus curiae* briefs. For a more thorough elaboration of the legal reasoning, the UN Charter and the *Convention on the Prevention and Punishment of the Crime of Genocide* (hereinafter the *Genocide Convention*), and SC resolution 1593 will be included in the analysis.

The traditional legal-dogmatic approach constitutes the operational framework for analysing the legal validity of the indictment of al-Bashir together with the alleged conflicting obligations with the ICC's cooperation requests for arrest and surrender of al-Bashir vis-à-vis other sources of international law.

Chapter IV conducts a qualitative analysis of the process of previous advisory proceedings. The chapter includes an analysis of statements in the GA and statements during the advisory proceedings at the ICJ. The selection of the examined advisory opinions is based on the categorical distinction by Anthony Aust between advisory opinions on "politically complex"- and "trivial" matters. It is a part of the underlying assumption of this master thesis that head of state immunity is also a politically emotive subject, why the distinction serves a useful analytical purpose.

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[38] VCLT Article 31on general rules of interpretation reads *"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of their object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended"*.
VCLT Article 32 on supplementary means of interpretation reads: *"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 32, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable"*.

Chapter V presents a qualitative analysis of the legal and political issues and challenges that can arise from an advisory opinion. Due to the scarce literature on the subject, the analysis is based on the two preceding chapters combined with expert interviews. The chapter furthermore includes a conceptual, analytical framework of David Bosco, to analyse state behaviour towards the ICC. The analysis builds on the findings in Chapter IV on negotiations for an advisory request, participation at the ICJ, together with the reception of advisory opinions by UN member states. Thus, the sources used stems from a combination of advisory opinions, written and oral statements, and academic literature.

2.2 Interdisciplinarity

The method of this endeavour draws on several disciplines respectively, international law, international relations and ethics. The integration of judicial, political, and ethical perspectives will, in this case, provide a more holistic approach to the issue at hand. International law on immunities and the interpretations thereof cannot successfully be separated from the current political context; to treat the law on immunities in a vacuum would be inadequate. Only by adopting a cross-disciplinary approach, will it be possible to acquire an original and nuanced assessment, which in turn requires the awareness of the political undercurrents and ethical considerations of the law of immunities. Consequently, an interdisciplinary approach provides for a better framework in which to analyse a potential advisory opinion on head of state immunity and to discuss the political, legal and ethical issues connected therewith.

As Chapter III deals with the legal validity of the ICC's case law, it would not be appropriate or meaningful to bring political or ethical aspects into this part of the analysis. The starting point must, therefore, be legal. The last part of Chapter III does, however, include ethical and political reflections on the incentives for pursuing different legal avenues on head of state immunity.

Chapter IV on the advisory function of the ICJ will mainly rely on a political science perspective, as the chapter focuses on the state behaviour in relation to the advisory process, i.e. negotiations, participation, and reception by UN member states.

Chapter V on an advisory opinion on head of state immunity builds on the previous chapters and includes both a legal, political, and ethical perspective when analysing and discussing the potential implications arising from an advisory opinion. The international law perspective enables an analysis of the outstanding legal questions on head of state immunity, as well as the implementation of a political science perspective, enables an analysis of state behaviour and their concerns of head of state

prosecutions. The political and ethical perspective contributes to the analysis and discussion of how an advisory opinion can have an impact on the ICC and the international criminal justice system.
The following recommendation will build upon the previous chapters and take into account the sensitive political climate. The recommendation is intended as a policy solution that seeks to create damage control for the ICC.
Most of the current literature on the subject matter is adopting an either strictly legal, ethical or political approach. Therefore, this master thesis is an attempt to assess the drivers and solutions to the immunity debate in a more comprehensive way, as well as an attempt to provide recommendations based on an interdisciplinary manner. The different chapters in this master thesis require different use of methods to provide meaningful answers that are neither to political nor too rigid and legalistic. In the spirit of the Master Programme of International Security and law, this master thesis adopts an approach where the contemporary conflict on head of state immunity is considered multiple, complex and volatile.[39]

2.3 Interviews

Two expert interviews have been conducted for this master thesis. The interviews have served as a valuable contribution for inspiration and have been useful for the inclusion of multiple perspectives, *qua* the different profession of the interviewees.

As a professor of international law and a serving member of UN's ILC, Charles Jalloh has contributed with his knowledge of expertise in the area of head of state immunity. Jalloh has furthermore participated as an external legal adviser to the African Union Commission during Jordan's appeal in the *al-Bashir* case, and has thus followed the case closely.

Respecting the wish of the second interviewee, the person in question will be referred to as an experienced employee from the Danish Ministry of Foreign Affairs. This interview has been particularly valuable for both national viewpoints as well as insights into the political and diplomatic issues in relation to the ICC and the request of an advisory opinion in the GA.

[39] See more on the introduction to the programme of International Security and Law at: https://www.sdu.dk/en/uddannelse/kandidat/securitylaw/introduktion.

The questions for the two interviews have been formulated with the thought of the respective expert's area of expertise. Some of the questions have, however, deliberately been asked to both interview persons in order to compare the answers, thereby gaining different perspectives. Besides the inspiring contribution to the writing process, the interviews have also been a valuable method, considering the limited literature on the potential advisory opinion. In the second interview, anonymity has been a priority allowing for a more informal and open conversation. By request, the interviews will not be quoted directly, but it will be apparent when the viewpoints of the interviewees are expressed in the analysis.

2.4 Limitations

The research question concerns an ongoing situation. For the purposes of the analysis, this constitutes a limitation due to the uncertainties related to a potential advisory process.
Furthermore, only scarce research has been conducted on a potential advisory opinion, and mainly non-exhaustive secondary sources of online blogs underlines the gap in the academic literature. The limitation does, however, have an inherent strength in the opportunity to contribute to the initial research on an ongoing discussion.

Another limitation of the present master thesis is the changing circumstances in Sudan.
As of 11th April 2019, al-Bashir was ousted from his 30-year rule as incumbent head of state, which changes the status of immunity that al-Bashir has been covered by hitherto.
The analysis will, however, be based on the pre-April situation, since this has been the premise of the indictment, and consequently remains relevant.
Furthermore, the question of head of state immunity of third states in relation to the ICC might have diminished the relevance *in concreto*, but is of significant relevance with respect to a similar situation of prosecutions by the ICC in the future, which is not unthinkable.[40] The legal questions related to al-Bashir's immunity as head of state should thereby also be treated for the purpose of forthcoming similar cases. A subsection in chapter III is nevertheless dedicated to the impact of the new situation for the obligations for ICC member states to arrest and surrender al-Bashir to the ICC.

[40] Annegret L. Hartvig, "The Climax of the Al-Bashir Saga: The ICC's Jordan Judgment," *völkerrecthsblog,* 20 May 2019 (available at https://voelkerrechtsblog.org/the-climax-of-the-al-bashir-saga/).

Chapter III: The ICC and Head of State Immunities

Having laid the foundation for this master thesis, it is now time to turn to the first of the three-part analysis. The starting point of the endeavour is an examination of how the ICC has handled the immunity question in the *al-Bashir* case, to come closer an answer to the research question.

The decisions in the case have become subject of dispute due the divergent legal reasoning for explaining why state parties have an obligation to cooperate with the ICC in relation to the arrest and surrender of al-Bashir. Hence, the decisions in the *al-Bashir* case have been widely criticised for being both divergent and inadequate in their legal reasoning.[41]

The present chapter is, therefore, devoted to a legal analysis of the most contentious issues in these decisions on non-cooperation. The status of head of state immunity under general international law will be presented, to begin with, for a better understanding of the dispute in the *al-Bashir* case, before moving on to the analysis of immunities under the Rome Statute.

3.1 Immunities under international law

Although immunity has been a recurrent subject in the ICC cases, the *al-Bashir* case has received exceptional attention. The reason for this stems from a combination of Sudan's status as a non-state party to the Rome Statute and al-Bashir's status as incumbent head of state of Sudan until the 11th of April 2019.[42]

As treaties by virtue of the principle *pacta tertiis nec nocent nec procent*, do not create obligations for third states without their consent, it follows that Sudan is not covered by the obligations arising from the Rome Statute.[43] The *pacta tertiis* principle implies that al-Bashir is covered by the existing immunity principles found under other sources of international law.

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[41] *See, e.g.,* Gabriel M. Lentner "Why the ICC won't get it right – The Legal Nature of UN Security Council Referrals and Al-Bashir Immunities", *Blog of the European Journal of International Law*, 24 July 2017 (available at: https://www.ejiltalk.org/why-the-icc-wont-get-it-right-the-legal-nature-of-un-security-council-referrals-and-al-bashir-immunities/); Asad G. Kiyani, "Al-Bashir & the ICC: The Problem of Head of State Immunity", *Chinese Journal of International Law*, vol. 12, no. 3 (2013), 470-471; Paola Gaeta "Guest Post: The ICC Changes Its Mind on the Immunity from Arrest of President Al Bashir, But It Is Wrong Again", *Opinio Juris*, 23 April 2014 (available at http://opiniojuris.org/2014/04/23/guest-post-icc-changes-mind-immunity-arrest-president-al-bashir-wrong/); Dire Tladi, "Cooperation, Immunities, and Article 98 of the Rome Statute: The ICC, Interpretation, and Conflicting Norms," *Proceedings of the Annual Meeting (American Society of International Law)*, Vol. 106 (2012), 307.

[42] Cf. Chapter I.

[43] *Pacta tertiis nec nocent nec prosunt* refers to the principle under international law that a treaty only binds the parties and does not create obligations for a third state. The principle is codified in VCLT Art. 34: "*A treaty does not create either obligations or rights for a third State without its consent"*.

Besides the 1961 Vienna Convention on Diplomatic Relations, there is no international convention that determines the scope of immunities of head of states. Hence, the scope of head of state immunity, primarily rests on customary international law.[44] Despite many different approaches to the immunity question, it is generally accepted that a distinction can be made between immunity *ratione materiae* and immunity *ratione personae*.[45] The former, also called functional immunity, is entitled to state officials acting in an official capacity, i.e. by virtue of performing official state functions regardless of the level of their post. The scope of immunity *ratione materiae* does not extend to acts performed in a private capacity, but the person concerned continues to enjoy immunity *ratione materiae* after the termination of office with regard to acts performed while in office.[46]

Meanwhile, Immunity *ratione personae*, or personal immunity, is derived from the official's status as a protection against any act of authority of another state that would hinder the performance of duties by the person concerned.[47] Personal immunity extends to acts performed in both an official and private capacity before and while in office. Since immunity *ratione personae* is assigned because of the official's post, the immunity ceases when the person concerned leaves the post.[48] It is not clear-cut which high-level state officials are entitled to immunity *ratione personae*, but according to the *Arrest Warrant* case, it includes at least heads of states, heads of governments and ministers of foreign affairs.[49] While the scope of immunity *ratione materiae* is more disputed, the dominant view is that high-level state officials enjoy immunity *ratione personae* in criminal proceedings regardless of the type of crime committed.[50]

For the purposes of this analysis, the distinction is essential, as al-Bashir has hitherto, as Sudan's head of state, enjoyed immunity *ratione personae*. It can, therefore, *prima facie*, be concluded that Sudan as a third state holds no obligations towards the Rome Statute, and al-Bashir by virtue of his capacity

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[44] Kjeldgaard-Pedersen, *Supra* note 4,130; Fox and Webb, *supra* note 4, 42; International Law Commission, *Preliminary report on immunity of State officials from foreign criminal jurisdiction*, UN Doc. A/CN.4/601, 20 May 2008, para. 31.

[45] International Law Commission, *Preliminary report on immunity of State officials from foreign criminal jurisdiction*, UN Doc. A/CN.4/601, 20 May 2008, para. 146; Mark A. Summers, "*supra* note 9, 464;

[46] International Law Commission, *Preliminary report on immunity of State officials from foreign criminal jurisdiction*, UN Doc. A/CN.4/601, 20 May 2008, para. 80.

[47] The ICJ found in the *Arrest Warrant* case: *"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.*" *Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of Congo v. Belgium*)*, Judgement, International Court of Justice, 14 February 2002, para. 54.

[48] International Law Commission, *Preliminary report on immunity of State officials from foreign criminal jurisdiction*, UN Doc. A/CN.4/601, 20 May 2008, para. 78-79.

[49] Ibid.

[50] International Law Commission, *Immunity of State Officials from Foreign Criminal Jurisdiction*, UN Doc. A/CN.4/631, 10 June 2010, para. 36; *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium),* Judgment, International Court of Justice, 14 February 2002, para. 58.

as incumbent head of state has been protected from foreign criminal prosecution by immunity *ratione personae*.

3.2 Immunities Under the Rome Statute and the Relationship Between Article 27 and 98.

A key objective of the ICC is to end impunity and hold the most responsible accountable for the international crimes that fall within the jurisdiction of the Court.[51] The prevailing rules on immunities are obviously presenting an obstacle to meet that end since the most important targets enjoy inviolable immunity *ratione personae* under customary international law. The ICC accommodates this obstacle with the two provisions that address the question of immunity of individuals allegedly responsible for the crimes set out in the Rome Statute. The relevant provisions can be found in Article 27 and Article 98. The interpretation of the scope and relationship of these two provisions has, however, proven to be ambiguous, not least in the *al-Bashir* case.

Hence, Article 27 explicitly denounces the relevance of official capacity and encompasses two provisions; Article 27(1) provides that state representatives are individually responsible for crimes falling under the Court's jurisdiction, and Article 27(2) provides that immunities that may have been attached to the official capacity hitherto, are not applicable under the Rome Statute.[52]

Article 27: Irrelevance of official capacity

1. *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 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.*
2. *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.*

Article 98, on the other hand, addresses the possible conflict that can arise between a request to cooperate with the Court and prevailing obligations under international law under which the requested state may find itself.

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[51]The preamble of the Rome Statue reads: *"Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes".*
Article 5 sets out the crimes within the jurisdiction of the Court and reads: *"The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression."*

[52]Astrid Kjeldgaard-Pedersen and Marc Schack, "Striking the Balance between Custom and Justice – Creative Legal Reasoning by International Criminal Courts," *International Criminal Law Review*, vol. 16 (2016), 928.

Article 98: Cooperation with respect to waiver of immunity and consent to surrender

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 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 of the surrender.*

The irrelevance of immunity is clearly stipulated in Article 27(2), but Article 98(1) is simultaneously a kind of 'buffer' for the preservation of immunity under certain circumstances.[53] The recurrent problem is the uncertainties in relation to what exactly constitutes competing obligation, and thus when Article 98 may be invoked. The interpretation of the relationship between Article 27(2) and Article 98(1) has proven to be of particular difficulty in the *al-Bashir* case, and there is still disagreement as to whether ICC member states are under an obligation to arrest and extradite al-Bashir, or whether they can invoke article 98(1).

3.3 The *al-Bashir* Case

Having established that Sudan is a non-state party to the ICC and thereby not covered by the Rome Statute, it is time to look at how the ICC has been able to circulate two arrest warrants for Sudan's now former President. It appears from Article 13 of the Rome Statute that when a situation has not been referred by a state party or opened *proprio motu*, the Court may exercise its jurisdiction when the SC refers a situation acting under Chapter VII of the UN Charter.[54] This is what happened in 2005 when the SC referred the situation in Darfur to the ICC by resolution 1593.[55]

The OTP initiated a formal investigation of the alleged crimes committed in Darfur and circulated subsequently two arrest warrants of al-Bashir based on the findings of the investigation.

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[53] Fox and Webb, *supra* note 4, 555.

[54] Article 13 of the Rome Statute on exercise of jurisdiction reads: *The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14; (b) A situation in which one or more of such crimes appears have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.*

[55] UN Security Council, *Resolution 1593*, S/RES/1593, 31 March 2005.

In the initial arrest warrant of 2009, the PTC I found reasonable ground to believe that al-Bashir is criminally responsible, as an indirect perpetrator or as an indirect co-perpetrator, for war crimes and crimes against humanity. The same was found in the second arrest warrant from 2010, but where the PTC previously did not include charges of genocide due to an erroneous standard of proof, the PTC now found that there was now also reasonable ground to include genocide charges against al-Bashir.[56] As described in the introduction, not only Sudan has refused to extradite al-Bashir, but also the many state parties that al-Bashir has visited since the issuance of arrest warrants. The ICC has repeatedly issued requests for cooperation to the states concerned, but as of today none of the member states he has visited has proven willing to arrest and surrender al-Bashir.[57] For a better understanding of the unwillingness to arrest and surrender al-Bashir, an analysis of the legal reasoning in the first PTC I decisions on the failure to comply with the cooperation requests by Malawi and Chad from 2011 will be made in the following.

3.4 The Scope of Article 27(2) and Exceptions under Customary International Law

In December 2011, the PTC issued their decisions on the failure of Malawi and Chad to comply with the cooperation request as issued by the ICC with respect to the arrest and surrender of al-Bashir. Malawi and Chad explained their competing obligations as members of the AU and decided to align themselves with the position adopted by the AU, on the indictment of sitting heads of states that are not a party to the Rome Statute.[58] Additionally, the PTC I found that this did not constitute competing obligations and Malawi and Chad, therefore, had invalidly relied on Article 98(1) of the Rome Statute to justify the non-compliance with the cooperation requests from the Court; hence, both Malawi and Chad had failed its obligation to cooperate with the ICC.[59] In relation to article 98(1) the Chamber highlighted that:

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[56] *The Prosecutor v. Omar Hassan Ahmad Al Bashir ("Omar Al Bashir"),* Arrest Warrant, Pre-Trial Chamber I, ICC-02/05-01/09-73, 4 March 2009, 3; *The Prosecutor v. Omar Hassan Ahmad Al Bashir ("Omar Al Bashir"),* Second Arrest Warrant, Pre-Trial Chamber I, ICC-02/05-01/09-95, 12 July 2010, 8.

[57]The ICC has issued decisions on non-cooperation against eight state parties with regard to their failures to arrest and surrender al-Bashir: Chad (2011 and 2013), Malawi (2013), Nigeria (2013), the DRC (2014), South Africa (2015), Uganda (2016), Djibouti (2016), and Jordan (2017).

[58] It was decided during an AU Assembly, that its member states shall not cooperate with the ICC with respect to the arrest and surrender of al-Bashir, *see* Assembly of the African Union, *"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*, Assembly/AU/Dec.296(XV), 27 July 2010, para 5.

[59] *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision, ICC-02/05-01/09-140, Pre-Trial Chamber I, 13 December 2011, para. 14.

"To interpret article 98(1) in such a way so as to justify not surrendering Omar Al Bashir on immunity grounds would disable the Court and international criminal justice in ways completely contrary to the purpose of the Statute Malawi has ratified."[60]

To read Article 98(1) in conformity with the object and purpose of the Rome Statute could seem like a compelling argument, but the Chamber failed to explain the purpose of said Article and to elaborate on exactly when Article 98(1) may be invoked.

The inviolable status of immunity *ratione personae* under customary international law seems like a reasonable ground for refusal of arrest and surrender of any third state president.

The wording of Article 98(1) confirms that immunities prevail for high-level state officials from non-state parties unless the state concerned agrees to cooperate. It could, therefore, be argued that the requested states, Malawi and Chad, do not have to cooperate with the ICC, before the Court accordingly have obtained a waiver of immunity by the non-state party, Sudan.[61]

Although the PTC I found that neither Malawi nor Chad could invoke Article 98(1), the Chamber ignored the outstanding issue of the relationship between Article 27(2) and Article 98(1).[62] The conclusion that Chad and Malawi had failed to cooperate with the ICC, by failing to arrest and surrender al-Bashir to the Court, and thus preventing the Court from exercising its functions and powers under the Rome Statute, could have been more adequate, had the Chamber addressed the purpose of Article 98 more carefully.

It seems that it violates the *pacta tertiis* principle if the Rome Statute removes the immunities attached to a state official from a non-state party without the latter's consent. Furthermore, to read Article 27(2) as covering third states, would not only violate the principle of *pacta tertiis* but eventually deem Article 98 superfluous.[63] The reason why the relationship between Article 27 and 98 was not further elaborated, can be found in the reliance on an alleged exception under customary international law for immunities:

"*The Chamber finds 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. There is no conflict between Malawi's obligations toward the Court and its obligations under customary international law; therefore, article 98(1) of the Statute does not apply."*[64]

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[60] *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision, ICC-02/05-01/09-139, 15 December 2011, para. 41.
[61] Erika de Wet, "Referrals to the International Criminal Court Under the Chapter VII of the United Nations Charter and the Immunity of Foreign State Officials," *AJIL Unbound*, Vol. 112, (2018), p. 34.
[62] Erika De Wet, "The Implications of President Al-Bashir's Visit to South Africa for International and Domestic Law," *Journal of International Criminal Justice*, vol. 13, no. 5 (2005), 8.
[63] De Wet, *supra* note 62, 10; Astrid Kjeldgaard-Pedersen, *supra* note 4*,* 244.
[64] *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision, ICC-02/05-01/09-139, Pre-Trial Chamber I, 15 December 2011, para. 43; *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision, ICC-02/05-01/09-140, Pre-Trial Chamber I, 13 December 2011, para. 13.

The Chamber did not refer to a new exception created by the ICC, but rather on the assumption that such an exception had already been created.[65] The Chamber found that practice showed that neither a former nor sitting head of state can oppose prosecution of an international court, and that immunity of heads of states has, since WWI, been rejected time and time again before international courts.[66] In support of this conclusion, the Chamber relied on the increase in prosecutions of heads of states after an *obiter dictum* finding in the ICJ Arrest Warrant case, where ICJ found that immunity otherwise enjoyed under international law may not apply before certain international courts, including before the ICC.[67] In this context, the PTC I referenced to the prosecutions in the past decade against Slobodan Milošević, Charles Taylor, Muammar Gaddafi, Laurent Gbagbo and the case against al-Bashir as sufficient proof of the widespread recognition and accepted practice of initiating international prosecutions against heads of states.[68]
Lastly the PTC I found that the:

"*[…] international community's commitment to rejecting immunity in circumstances where international courts seek arrest for international crimes has reached a critical mass. If it ever was appropriate to say so, it is certainly no longer appropriate to say that customary international law immunity applies in the present context."*[69]

Whereas this constitutes *prima facie* valid ground for the conclusion, the argumentation is flawed when looking more carefully at the alleged precedents. It appears from the examples on international prosecutions, that the cases either concerned former heads of state or heads of state where the immunity had been waived.[70] It is correct that there has been an increase in *initiating* prosecutions

[65] *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision, ICC-02/05-01/09-139, Pre-Trial Chamber I, 15 December 2011, para. 43.
[66] *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision, ICC-02/05-01/09-139, Pre-Trial Chamber I, para. 38; *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision, ICC-02/05-01/09-140, Pre-Trial Chamber I, 13 December 2011, para. 13.
[67] *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium),* Judgment, 14 February 2002, para. 61; Alexandre Skander Galand, "Looking for Middle Ground on the Immunity of Al-Bashir? Take the Third 'Security Council Route'," *EJIL: Talk!*, 23 October 2018 (available at https://www.ejiltalk.org/looking-for-middle-ground-on-the-immunity-of-al-bashir-take-the-third-security-council-route/).
[68] *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision, ICC-02/05-01/09-139, Pre-Trial Chamber I, 15 December 2011, para. 39. Chad para 13.
[69] *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision, ICC-02/05-01/09-139, Pre-Trial Chamber I, 15 December 2011, para. 39; *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision, ICC-02/05-01/09-140, Pre-Trial Chamber I, 13 December 2011, para. 42.
[70] Charles Taylor resigned as Liberia's president on 11 August 2003 and was arrested on 29 March 2006, which means he had not been in office for nearly three years when he was transferred to the SCSL, as noted by the Court, *see Prosecutor v. Charles Ghankay Taylor,* Decision on Immunity from Jurisdiction, Appeals Chamber, SCSL-2003-01-I, 31 May 2004, para. 59.
In the case of Muammer Gadaffi, is it not meaningful case to use as precedent, since the indictments of the Libyan head of state was *after* the indictment of al-Bashir, and because the ICC proceedings ended with his death in 2011.

against heads of states, but as of today, an incumbent head of state has yet to be surrendered to an international court. The cases on which the Chamber relied does therefore not constitute precedents for an increase in international prosecutions of incumbent heads of state. The issue with Malawi and Chad was the question of the potential arrest and surrender of an incumbent third head of state, and thus not a question of the initiation of a prosecution by the ICC.[71] Furthermore, to arrest and surrender a former head of state or those whose immunity has been waived is not in unconformity with customary rules of immunities, as the previous examples indicate, and is consequently not establishing evidence for any exception in customary international law.[72] At the relevant point in time, al-Bashir was still the sitting head of state, and since Sudan had not consented to waive his immunity, the former exception is not relevant for this case.

Furthermore, if the "international community's commitment" is built upon the number of ratifications to the Rome Statute that has entrusted the ICC with jurisdiction over the most serious crimes, it could be argued that indeed the same number of states have ratified Article 98, which then provides for an exception. The argument is, therefore, not convincing as it ignores the role of Article 98.

The reliance on an exception under customary international law in relation to the arrest and surrender of a sitting head of state to an international court has been widely criticised and for good reasons.

The legal reasoning of the 2011 decisions is, therefore, not compelling, and there is not sufficient practice to establish an exception under customary international law.[73] It seemed to be agreed that the legal rationale was unconvincing by the PTC II, since they have used different legal argumentation in subsequent decisions. For this reason, it is now time to move on to another legal argument that was initially used in a decision issued by the PTC II in 2014 against the DRC.

3.5 SC Resolution 1593(2005)

In 2014 the PTC II found that DRC had failed to cooperate with the Court by not arresting al-Bashir during a visit to the country. This decision revised the position from the PTC I decisions. Instead of

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At the time of transfer to the ICC the, Laurent Gbagbo's immunity has been waived beforehand by the government of the Ivory Coast, and Gbagbo was therefore not covered by immunity *ratione personae*.

Slobodan Milošević was indicted while he was president for FRY, but the reissuance of an arrest warrant was after he has lost his bid for re-election, resigned from office and arrested for corruption and abuse of power charges.

See Prosecutor v. Slobodan Milošević, Decisions on Preliminary Motions, Trial Chamber, IT-02-54, 8 November 2001. *see* also:. Kiyani, *supra* note 41, 487-489.

[71] Kiyani, *supra* note 41, 471.

[72] Kiyani, *supra* note 41, 488.

[73] *See* e.g.: International Law Commission, *Immunity of State Officials from Foreign Criminal Jurisdiction*, UN Doc. A/CN.4/631, 10 June 2010, para. 37; Erika De Wet, *supra* note 62, 8; Dapo, Akande, "The Immunity of Heads of States of Nonparties in the Early Years of the ICC," *American Journal of International Law Unbound,* vol. 112 (2018) 175-176; Asad G., Kiyani, *supra* note 41, 507-508.

an alleged exception under customary international law, the Chamber now relied on the referral by SC resolution 1593. This resolution acting under Chapter VII of the UN Charter constitutes a referral pursuant to Article 13(b) of the Rome Statute, and thereby sets out:

"1. Decides to refer the situation in Darfur since of 1 July 2002 to the Prosecutor of the International Criminal Court; 2. Decides that the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully;"[74]

According to the PTC II, the referral constitutes the legal ground for the Court's right to exercise jurisdiction over the situation in Darfur. In addition, the Chamber found that the SC had implicitly waived the immunity by which al-Bashir otherwise has been protected under. Additionally, the Chamber concluded that the referral had not only lifted the immunities at the vertical level, i.e. Sudan vis-à-vis the ICC but also at the horizontal level, i.e. Sudan vis-à-vis state parties.[75] The SC resolution thereby lifted any competing obligations, DRC might otherwise have had:

"*Since immunities attached to Omar Al Bashir are a procedural bar from prosecution before the Court, the cooperation envisaged in said resolution* (Res. 1593 ed.) *was meant to eliminate any impediment to the proceedings before the Court, including the lifting of immunities. Any other interpretation would render the SC decision requiring that Sudan "cooperate fully" and "provide any necessary assistance to the Court" senseless. (...) By virtue of said paragraph* (Para. 2, ed.) *the SC implicitly waived the immunities granted to Omar Al Bashir under international law and attached to his position as a Head of State. Consequently, there also exists no impediment at the horizontal level between the DRC and Sudan as regards execution of the 2009 and 2010 Requests."* [76]

The legal reasoning raises two essential questions; whether the resolution contains an implicit removal of al-Bashir's immunity, as argued by the PTC II, and ultimately whether the SC has the power to supersede the customary rule of immunity *ratione personae*.[77]
Beginning with the interpretation of resolution 1593, it is noticeable that there is no explicit mentioning of immunity, and on this ground, it has been argued that the resolution did in fact not

[74] UN Security Council, *Resolution 1593 (2005)*, UN Doc. S/RES/1593, 31 March 2005, preamble.
[75] *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision, ICC-02/05-01/09-195, Pre-Trial Chamber II, 9 April 2014, para. 29.
[76] Ibid.
[77] Abel Knottnerus, "The Immunity of al-Bashir: The Latest Turn in the Jurisprudence of the ICC," *EJIL: Talk!*, 15 November 2017 (available at https://www.ejiltalk.org/the-immunity-of-al-bashir-the-latest-turn-in-the-jurisprudence-of-the-icc/).

waive al-Bashir's immunity.[78] For the purposes of this analysis, it should, however, be examined whether there are indications of intent of the SC to actually waive al-Bashir's immunity.

Beside the lack of textual basis for claiming that a waiver of immunity is contained in the resolution, it should also be recalled that it concerns a fundamental rule of international law dealing with the peaceful international relations, and it could, therefore, be argued that it requires an explicit provision to that effect.[79] ICC Judge Brichambaut explained in his minority opinion in a later decision, that a waiver of immunity of a serving head of state, should be explicitly stated.

Judge Brichambaut based the argument on the ILC's third report on the immunity of state officials from foreign criminal jurisdiction.[80] The problem with this argument is, however, that the ILC report is not addressing the removal of immunity by the SC and thus not applicable in this context.[81]

The implementation of SC resolutions became relevant in the case *Al-Dulimi and Montana Management Inc. v. Switzerland* at the ECHR. The ECHR found that Switzerland had violated the right to fair hearing under Article 6 of the European Convention on Human Rights after Switzerland froze the applicant's assets pursuant to SC resolution 1483.[82] The resolution was adopted under Chapter VII and imposed an obligation to immediately freeze the financial assets of individuals or entities connected with the government of Iraq.[83] In relation to the obligations arising from SC resolution 1483, the ECHR found:

"*There must be a presumption that the Security Council does not intend to impose any obligation on member States to breach fundamental principles of human rights (...) it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law."*[84]

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[78]Kiyani, *supra* note 41, 475-478.

[79]Tom Maliti, "Debate on Whether Security Council Resolution Waives al-Bashir's Immunity Highlighted by Jordan's Appeal," *International Justice Monitor*, 13 September 2018 (available at https://www.ijmonitor.org/2018/09/debate-on-whether-security-council-resolution-waives-al-bashirs-immunity-highlighted-by-jordans-appeal/); André de Hoogh and Abel Knottnerus, "ICC Issues new New Decision on Al-Bashir's Immunities – But Gets the Law Wrong … Again," *EJIL: Talk!*, 18 April 2014 (available at https://www.ejiltalk.org/icc-issues-new-decision-on-al-bashirs-immunities-%E2%80%92-but-gets-the-law-wrong-again/); *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Response, ICC-02/05-01/09-326, Appeals Chamber, 12 March 2018, para. 70.

[80] *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Minority Opinion of Judge Marc Perrin De Brichambaut, ICC-02/05-01/09-302, 16 July 2017, para. 67.

[81] The ILC report addresses waiver of immunity in relation to foreign criminal jurisdiction, but does not mention either international courts or SC referrals, International Law Commission, *Immunity of State Officials from Foreign Criminal Jurisdiction*, UN Doc. A/CN.4/646, 24 May 2011, paras. 32-55.

[82] *Case of Al-Dulimi and Montana Management Inc. v Switzerland*, Judgement, 5809/08, ECHR, 21 June 2016, para. 6;

[83] Security Council, *Resolution 1483,* S/RES/1483(2005), 22 May 2003, para. 23.

[84]*Case of Al-Dulimi and Montana Management Inc. v Switzerland*, Judgement, 5809/08, ECHR, 21 June 2016, para. 140.

Following this argument by the ECHR, it could be argued, that the same presumption must prevail in regard to potential derogations on fundamental principles of customary international law, that relates to the maintenance of international peace and security.[85]

Although not having explicitly waived al-Bashir's immunity, the purpose of the referral of the situation in Darfur to the ICC must be, however, questioned, should it not include the possibility for the prosecution of those responsible for the alleged atrocities. In this light, it would only be meaningful with a purposive reading of the resolution with a broad interpretation of "cooperate fully".[86] Looking at the language of other Chapter VII resolutions, there seems to be a general acceptance of a purposive interpretation of broadly-formulated resolutions. This viewpoint is supported by state practice when, for example, the phrasing "all necessary means" or "all necessary measures" is generally accepted as including all military measures, e.g. aerial or on the ground, if no limitations are otherwise stipulated.[87] If the most drastic form of SC measures can be invocated with such a general term, it would then be consistent to accept that the SC can use the same general language when it concerns the personal immunity of a non-member state to the ICC. [88]

It has been suggested that the uncertainty regarding the meaning of resolution 1593 should be sought by a request of elaboration by the SC.[89] Consequently, it could prove useful to look at the meeting record of the SC during the adoption, perhaps providing clarity on the underlying intention.

The first observation regarding the meeting record is the disagreement over the adoption of the resolution, reflected in the voting hereon.[90] From the voting explanations, it appears that immunity from prosecution has been a core subject in the dispute. The representative from the United States, Mrs Patterson, emphasised the following in the explanation on their abstention:

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[85] This case was also used by Jordan in the appeal case in *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Response, ICC-02/05-01/09-326, Appeals Chamber, 12 March 2018, para. 70.

[86] de Wet, "*supra* note 61, p. 34.

[87] In SC resolution 1973, the SC authorised the use of all necessary measures against the Libyan Government, the SC explicitly excluded foreign occupation force, i.e. ground troops, cf. UN Security Council, *Resolution 1973(2011),* S/RES/1973, 17 March 2011, para. 4.

[88]de Wet, *supra* note 61, 36-37; Talita de Souza Dias, "The Security Council Route to the Derogation from Personal Head of State Immunity in the Al-Bashir Case: How Explicit must Security Council Resolutions be?," *Blog of the European Journal of International Law*, 19 September 2018 (available at https://www.ejiltalk.org/the-discussion-of-the-security-council-roots-to-the-derogation-from-personal-immunities-in-the-al-bashir-case-how-explicit-must-security-council-resolutions-be/).

[89] Dov Jacobs, "Immunities and the ICC: my two-cents on three points," *Spreading the Jam*, 10 September 2018 (available at https://dovjacobs.com/2018/09/10/immunities-and-the-icc-my-two-cents-on-three-points/).

[90] Resolution 1593 was adopted by the votes 11 in favour (Argentina, Benin, Denmark, France, Greece, Japan, Philippines, Romania, Russian Federation, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania) and 4 abstaining (Algeria, Brazil, China and the United States of America), *see:* UN Security Council, *5158th meeting,* UN Doc. S/PV.5158, 31 March 2005, 2.

"*The United States continues to fundamentally object to the view that the ICC should be able to exercise jurisdiction over the nationals, including government officials, of States not party to the Rome Statute. That strikes at the essence of the nature of sovereignty. Because of our concerns, we do not agree to a Security Council referral of the situation in Darfur to the ICC and abstained in the voting on today's resolution."*[91]

This statement supports the view that the SC members have been aware that an ICC referral would suggest the exercise of jurisdiction over government officials. Notwithstanding the fundamental disagreement over this mandate, it seems clear for the Council members that the jurisdiction over the responsible perpetrators is an underlying premise of a referral to the ICC.[92]

The preamble of resolution 1593 stipulates: "*Taking note of the existence of agreements referred to in Article 98-2 of the Rome Statute"*, which could be interpreted as a limitation of the ICC mandate in Darfur in relation to immunities.

To that, Brazil stated:

"The text just approved contains a preambular paragraph through which the Council takes note of the existence of agreements referred to in article 98-2 of the Rome Statute. My delegation has difficulty in supporting a reference that not only does not favour the fight against impunity but also stresses a provision whose application has been a highly controversial issue. We understand that it would be a contradiction to mention, in the very text of a referral by the Council to the ICC, measures that limit the jurisdictional activity of the Court."[93]

Denmark, a member of the SC at the time, nevertheless emphasised in their explanatory statement for voting in favour:

"*As regards the formulation regarding the existence of the agreements referred to in article 98, paragraph 2, of the Rome Statute, Denmark would like to stress that the reference is purely factual; it is merely referring to the existence of such agreement. Thus, the reference in no way impinges on the integrity of the Rome Statute."*[94]

The statements are important for the understanding of the intention of resolution 1593 by some of the Council members.[95] The mandate of the Rome Statute, including the possibility for the Court to prosecute state officials, has been considered extensively – whether they have been the reason for

[91] UN Security Council, *5158th meeting,* UN Doc. S/PV.5158, 31 March 2005, 2.
[92] *See* e.g. the statement from Brazil, France, United Kingdom and Greece: UN Security Council, *5158th meeting,* UN Doc. S/PV.5158, 31 March 2005.
[93] UN Security Council, *5158th meeting,* UN Doc. S/PV.5158, 31 March 2005, 11.
[94] UN Security Council, *5158th meeting,* UN Doc. S/PV.5158, 31 March 2005, 6.
[95] Japan, Denmark, France, United Kingdom, Greece, Romania and Brazil were among the Council members that stressed ICC's prerogatives in relation to impunity.

abstention or approval. As the resolution constitutes a referral of a situation to the ICC, it seems reasonable to suggest that it implies the Court's powers to exercise its jurisdiction without limitations, unless otherwise is explicitly mentioned. It could even be argued, that it would deem the resolution obsolete if the ICC were to conduct an investigation, but eventually proved unable to hold the alleged perpetrators to account.

Furthermore, the explicit reference to Article 98(2) and not Article 98 as a whole could suggest, that the SC finds that only international agreements can constitute an obstacle for the cooperation with the Court and not other obligations under international law, as stipulated in Article 98(1).

Despite the Council member's disagreement, the resolution was adopted.[96] Based on the meeting records along with a purposive reading of resolution 1593, it can be argued, that resolution 1593 did, in fact, entrust the ICC with a mandate to conduct an investigation into the alleged violations of international humanitarian law and human rights law in Darfur, thus holding those responsible accountable in accordance with the Rome Statute.

The Russian Federation addressed the issue in 2018 during an SC meeting, where the Deputy Permanent Representative, Mr Kuzmin, explained:

" (…) *According to customary law, there are no exceptions to the personal immunity of high officials, while all other government officials enjoy functional immunity. What the ICC has created, therefore, is a situation where we are seeing States consistently refusing to comply with the warrants issued by The Hague for the arrest of the President of the Sudan. This is not surprising. Governments act based on their international legal obligations. This situation will continue to steadily erode the level of trust in the International Criminal Court. That, alas, is the reality and our assessment of the situation. I am therefore unfortunately compelled to say that the ICC today is not a body capable of effectively carrying out the tasks that the Security Council originally entrusted to it."*[97]

It is clear from the statement, that the Russian Federation does not find that resolution 1593 has waived the immunities of government officials 13 years after its adoption. However, the statement also refers to the tasks "originally entrusted to it", and it could be argued that the 2018 statement is a result of the unfortunate development for the ICC in the *al-Bashir* case. In this context it is worth to quote the statement the Russian Federation during the adoption of the resolution, which they voted in favour of:

[96] *See* note 90 above.

[97] Permanent Mission of the Russian Federation to the United Nations*, Statement by Mr. Gennady Kuzmin, Deputy Permanent Representative of the Russian Federation to the United Nations, at the Security Council on the Sudan and South Sudan*, 20 June 2018 (available at http://russiaun.ru/en/news/sud20062018).

" The members of the Security Council have frequently reaffirmed that the struggle against impunity is one of the most important elements of a long-term political settlement in Darfur and the Sudan as a whole. All who are guilty of gross violations of human rights in Darfur must be duly punished, as is rightly pointed out in the report of the International Commission of Inquiry. We believe that the resolution adopted today by the Security Council will contribute to an effective solution in the fight against impunity in Darfur in the context of providing for the normalization and stability of the situation in that region of the Sudan." [98] (emphasis added)

Comparing the two statements, it could be argued, that the Russian Federation originally intended to entrust the ICC with jurisdiction to hold *all* the responsible accountable. Nothing in that statement implies that immunity should prevail for the perpetrators. China follows the same pattern; whereas they abstained in the voting on adoption and expressed concern over the possible exercise of jurisdiction over non-state parties of the Rome Statute, China was more explicit in 2018 when they stated:

"China has long been of the view that Heads of State enjoy privileges and immunities under international law by virtue of their office and that the referral of a situation by the Security Council to the ICC in no way necessarily undermines or strips the immunity enjoyed by such Heads of State."[99]

The change in attitude toward the scope of resolution 1593, might also constitute an explanatory factor for, why the SC has not followed up un implementation of the resolution, despite continued referrals on non-cooperation by the ICC.[100] However, the original intention of the resolution seems to confer jurisdictional power to the ICC in order to hold the responsible accountable for atrocities committed in Darfur.

For this part, it is, therefore, reasonable to argue that al-Bashir's immunity was implicitly waived in resolution 1593, provided that the ICC did not find conflicting obligations in relation to Article 98(2). The mandate of the ICC in the case of Sudan hence lies in the conferred jurisdictional power by virtue of the referral under Chapter VII, for which the *ad hoc* tribunals ICTY and ICTR have set a precedent for.[101]

[98] UN Security Council, *5158th meeting,* UN Doc. S/PV.5158, 31 March 2005, 6.
[99] UN Security Council, *8290th meeting,* UN Doc. S/PV.8290, 20 June 2019, 9.
[100] The following decisions on non-cooperation has been referred to the SC: Chad 2011, Malawi 2011, Nigeria 2013, the DRC 2014, South Africa 2015, Uganda 2016, Djibouti 2016, and Jordan 2017.
[101] For another opinion, *see*: Gabriel M. Lentner, "Why the ICC won't get it right – The Legal Nature of UN Security Council Referrals and Al-Bashir Immunities", *Blog of the European Journal of International Law*, 24 July 2017 (available at: https://www.ejiltalk.org/why-the-icc-wont-get-it-right-the-legal-nature-of-un-security-council-referrals-and-al-bashir-immunities/).

The problem is that it has been called into doubt whether the SC has the power to override fundamental principles of customary international law. As ICC Judge Brichambaut argued:

"*the current state of the law does not allow a definite answer to be reached in relation to the question of whether this resolution removes the immunities of Omar Al Bashir, contrary to the Majority's position in relation to that matter."*[102]

The question that will be examined in the following is, therefore, whether it is for the SC to supersede rules of customary international law.

3.5.1 The Scope of Article 103 of the UN Charter

The functions and the powers of the SC are laid out in Article 24 of the UN Charter, stipulating that the SC has the primary responsibility for international peace and security.[103] It follows that Sudan, as a UN member state, has to accept and carry out the decisions of the Council in accordance with Article 25 of the Charter.[104] Article 103 of the Charter stipulates that, in the event of conflicting obligations, members of the UN are obliged to carry out the decisions set forth in the UN Charter, including decisions adopted by the SC. Article 103 reads:

"In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."[105]

For the purposes of this analysis, it is relevant to examine whether "any other international agreement" covers customary international law. Besides the interpretation of the resolution itself, the other main criticism, regarding the SC referral, relates to the alleged obligation to arrest and surrender al-Bashir by virtue of Article 103. This criticism relies namely upon the assumption that Article 103 of the Charter only has precedence over other international treaties and thus not over the rules of

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[102] *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Minority Opinion of Judge Marc Perrin De Brichambaut, ICC-02/05-01/09-302, 16 July 2017, para. 83.

[103] Article 24 of the UN Charter reads: *"1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf. 2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters, VI, VII, VIII, and XII.".*

[104] Article 25 of the UN Charter reads: "*The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present charter*".

[105] *Charter of the United Nations and the Statute of the International Court of Justice*, San Francisco, 24 October 1945, United Nations Treaty Series XVI, Article 103.

customary international law, such as head of state immunity.[106] In subsequent decisions, the Chamber has also confirmed that Article 98 cannot be invoked due to the superseding status of Article 103 of the UN Charter.[107]

Albeit this essential provision has both a decisive role for the present case as well as great significance in general, the scope of Article 103 remains somewhat unclear. A more thorough analysis will, therefore, require an interpretation in accordance with the VCLT Article 31 and 32.[108] Even though "international agreement" may be interpreted as merely written agreements, and rightly so in many other circumstances, it also constitutes a rather restrictive interpretation which leaves out the context together with the object and purpose of the UN Charter and the role of the SC more specifically.[109] Reading the Charter as a whole, including the preamble, stipulating the purposes and principles of the UN, it can be discussed whether a restrictive reading of Article 103 would be in good faith.[110]

Turning to the *travaux préparatoires* of the Charter, it appears, however, that no general agreement was reached that the obligations deriving from the Charter should take precedence over all other commitments.[111] The negotiations show that a proposal for an explicit reference for any other obligations, including those arising from customary international law, was not included.[112] The wording and the *travaux préparatoires* thereby provide little support for a broad interpretation.[113] Subsequently, it would be adjacent to suggest a restrictive interpretation of Article 103.

A narrow interpretation does, however, not take into account the subsequent development in international law; SC practice suggests that there is an acceptance of the superseding nature of Article 103 in relation to customary international law over time.[114] As Erika de Wet points out, SC resolution

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[106] *See e.g.* Kiyani, *supra* note 41, 478; Alexander Orakhelashvili, *The Acts of the Security Council: Meaning and Standards of Review*, in: A. von Bogdandy and R. Wolfrum (eds.), Max Planck Yearbook of United Nations Law, Volume 11, 2007, 149-150.

[107] *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision, ICC-02/05-01/09-195, Pre-Trial Chamber II, 9 April 2014, paras. 30-32.

[108] Cf. Chapter II, Methodology.

[109] Cf. VCLT Article 31(1); *see also* Astrid Kjeldgaard-Pedersen, "Hvis Al-Bashir Kommer Forbi: Skal Danmark Udlevere Sudans Præsident til Den Internationale Straffedomstol?," *Ugeskrift for Retsvaesen*, No. 27, 28, 29 (2009), 244.

[110] Article 1(1) of the UN Charter reads: *"The Purposes of the United Nations are: To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;".*

[111] Bruno Simma et al., *The Charter of the United Nations A Commentary, Volume II*, 2nd edition, 2002,1293

[112] Simma et al., *supra* note 111, 1295-1297.

[113] Rain Liivoja, "The Scope of the Supremacy Clause of the United Nations Charter," *The International and Comparative Law Quarterly*, vol. 57, no. 3 (2008), 612

[114] *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Amicus Curiae Observations (Professor Nicholas Tsagourias), ICC-02/05-01/09-355, 9 June 2018, para 21.; International Law Commission, *Fragmentation of International Law*: *Difficulties Arising from the Diversification and Expansion of International Law,* UN Doc. A/CN.4/L.682, 13 April 2006, para. 345: "*In any case, the practice of the Security Council has continuously been grounded on an understanding that Security Council resolutions override conflicting customary law*".

1846 (2008) addressing piracy before the coast of Somalia, constitutes an example on an SC decision that broadens the scope of existing international rules on piracy and deviates from both treaty and customary rules of law of the sea.[115]

It could likewise be argued, that Article 103, despite its wording, is covering customary international law, and that it should be read in connection with Article 25 and the Charter as a whole.[116] A restrictive reading, taking into account the Councils primary role of international collective security, would simply lead to an unreasonable interpretation which only endows a limited mandate to the international body with the primary responsibility for international peace and security.[117] Finally, a restrictive reading of Article 103 may ensure a more appropriate outcome in certain cases, but this interpretation has gained ground neither in the theory nor in practice.[118] A restrictive reading would not only lead to an unreasonable interpretation but also have an undermining effect on the efficiency of the SC's authoritative decisions and the UN Charter as the international constitution.[119] Concludingly, there seem to be reasonable grounds to argue that it is within the powers of the SC to waive immunity *ratione personae*, and that the Council, in fact, did that in resolution 1593.

The reliance on the SC referral has been utilised by the Court in two ways; one stating that SC resolution 1593 has implicitly waived al-Bashir's immunity, as was seen in the previous section, and another variant arguing that the SC has imposed Article 27(2) on Sudan.[120] The SC referral has been maintained as the legal basis, but the PTC II and the Appeals Chamber has argued that al-Bashir does not enjoy immunity because the Council, by virtue of their referral, has placed Sudan in a similar position as a state-party. When the SC extends the Rome Statute as a whole to Sudan, it follows that

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[115] The resolution *inter alia* permits certain states to enter the Somali territorial waters in a manner consistent with action permitted on the high seas. For further analysis of how UNSC Res. 1846 has broadened the scope of existing international law rules on piracy, *see e.g.:* Tulio Treves, "Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia," *EJIL*, Vol. 20, No. 2 (2009). *See* also: International Law Commission, "Fragmentation of international law: Difficulties arising from the diversification and expansion of international law," Un Doc. A/CN.4/L.682, 13 April 2006, para. 345.

[116] Simma et al*., supra* note 111, 1298-1299.

[117] de Wet, *supra* note 62, 36.

[118] International Law Commission, *Fragmentation of International Law*: *Difficulties Arising from the Diversification and Expansion of International Law,* UN Doc. A/CN.4/L.682, 13 April 2006, para. 345; Simma et al., *supra* note 111,1292; *see also* Kjeldgaard-Pedersen, *supra* note 109, 244.

[119]Sophie Papillon, "Has the United Nations Security Council Implicitly Removed Al Bashir's Immunity?," *International Criminal Law Review*, vol. 10 (2010), 285-287; Liivoja, *supra* note 113, 611-612. For a discussion on the UN Charter as the international constitution, *see* Simma et al., *supra* note 111,1295-1296.

[120] *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision, ICC-02/05-01/09-302, 6 July 2017, para. 48; Knottnerus, Abel, "The Immunity of al-Bashir: The Latest Turn in the Jurisprudence of the ICC," *Blog of the European Journal of International Law*, 15 November 2017 (available at https://www.ejiltalk.org/the-immunity-of-al-bashir-the-latest-turn-in-the-jurisprudence-of-the-icc/)

Article 27(2) applies equally to Sudan and deems Article 98(1) irrelevant.[121] This reasoning has also been widely criticised, but for similar reasons as the first "SC route", namely that nothing in the resolution has suggested that a non-member could become, in effect, a state party.[122] From what have been seen in this section, it seems that this argument is valid, as it follows the same logic as the first SC reasoning. By virtue of the resolution, the Rome Statute applies to the situation in Darfur, cf. Denmark's statement. Thus, Sudan has become subject to the treaty-based regime of the Rome Statute, including Article 27(2).[123] Albeit the same underlying legal rationale, it is however problematic with this seemingly different legal reasoning, as it leaves an impression of divergent case law in the *al-Bashir* case. Furthermore, it could also be argued that the second "SC route" is overly complicated when referring to Sudan as a state party without their consent, which gives the impression that the ICC has not been able to support the first rationale why they have had to make another variant hereof. The first "SC route" is, based on this analysis, the preferable route to follow for the ICC, but the different legal routes in the decisions have inarguably increased the confusion and been unhelpful to the effect of clarifying the legal questions.[124]

In summary, there is a significant improvement in the legal reasoning from the alleged exception under customary international law to the reliance on the SC referral – an improvement of a magnitude, that the legal reasoning got in line with international law. Despite the valid legal reasoning, the problems of lack of elaboration remains, and the question of the role of Article 98 has still not been answered, as it was merely concluded that Article 98(1) was inapplicable in the decisions.
Before moving to the findings in the recent appeal judgement, the minority opinion of Judge Brichambaut in the 2017 South Africa decision on non-cooperation with respect to the arrest and surrender of al-Bashir will be looked into. This opinion opened for a new legal reasoning, namely the Genocide Convention to which Sudan is a state party.

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[121] *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision, ICC-02/05-01/09-302, 6 July 2017, para. 49; de Wet, *supra* note 61, 34.
[122] For a criticism of this legal argument, *see* André de Hoogh and Abel Knottnerus, "ICC Issues New Decision on Al-Bashir's Immunities – But Gets the Law Wrong … Again," *Blog of the European Journal of International Law*, 18 April 2014 (available at https://www.ejiltalk.org/icc-issues-new-decision-on-al-bashirs-immunities-%E2%80%92-but-gets-the-law-wrong-again/); Tladi has also called this argument "*fiction(…)based on no legal rules*", *see:* Peter Fabricius "Can SA and ICC Resolve Their Differences?," *Daily Maverick*, 13 September 2018 (available at https://www.dailymaverick.co.za/article/2018-09-13-can-sa-and-the-icc-resolve-their-differences/).
[123] Lena Sherif and Sarah Williams, "The Arrest Warrant for President al-Bashir: Immunities of Incumbent Heads of State and the International Criminal Court," *Journal of Conflict & Security Law* (2009), Vol. 14 No. 1, 83.
[124] This appears also from the AU request, *see* UN General Assembly, *Request for an advisory opinion of the International Court of Justice on the consequences of legal obligations of States under different sources of international law with respect to immunities of Heads of State and Government and other senior officials,* UN Doc. A/73/144, 18 July 2018, para. 2-6.

3.6 Article IV and VI of the Genocide Convention

The inability of the three-panel PTC II judges to reach a unanimous decision in the 2017 South Africa case has been described as a confirmation of the lack of clear legal position on a number of contested points of law in relation to head of state immunities.[125] It should be underlined that despite the divergent views, there was agreement on the bottom-line conclusion, namely that al-Bashir did not enjoy immunity and that member states, in this case, South Africa, had an obligation to arrest and surrender him to the Hague.[126] Thus, agreeing with the majority conclusion, the legal basis should, according to the minority opinion, not rely on resolution 1593, but rather on the Genocide Convention.[127]

"The combined effect of a literal and contextual interpretation of article IV of the Genocide Convention, in conjunction with an assessment of the object and purpose of this treaty lead to the conclusion that Omar Al-Bashir does not enjoy personal immunity, having been "charged" with genocide within the meaning of article VI of the Genocide Convention."[128]

As previously mentioned, the PTC I found reasonable grounds to believe that al-Bashir is criminally responsible as an indirect perpetrator or as an indirect co-perpetrator for, *inter alia,* the crime of genocide in the second arrest warrant.[129] The immunities otherwise enjoyed under international law is arguably incompatible with the obligations arising from the Genocide Convention. As Sudan is a state party to the Convention, it follows that he does not enjoy immunity, cf. Article IV.[130] The majority of judges did not agree to this, stating that the Genocide Convention does not explicitly

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[125] Max du Plessis and Dire Tladi, "The ICC's immunity debate – the need for finality," *Blog of the European Journal of International Law*, 11 August 2017 (available at https://www.ejiltalk.org/the-iccs-immunity-debate-the-need-for-finality/). It should, however, be noted that the decision was reached unanimously, but Judge Brichambaut appended a minority opinion.

[126] *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Minority Opinion of Judge Marc Perrin De Brichambaut, ICC-02/05-01/09-302, 16 July 2017, para. 1.

[127] Ibid.

[128] Article IV of the Genocide Convention reads: *"Persons committing genocide, or any other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals".*
Article VI of the Genocide Convention reads: *"Persons charged with genocide or any other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction".*
See: The Prosecutor v. Omar Hassan Ahmad Al Bashir, Minority Opinion of Judge Marc Perrin De Brichambaut, ICC-02/05-01/09-302, 16 July 2017, para. 100.

[129] *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Second Arrest Warrant, Pre-Trial Chamber I, ICC-02/05-01/09-95, 12 July 2010, 8

[130] *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Minority Opinion of Judge Marc Perrin De Brichambaut, ICC-02/05-01/09-302, 16 July 2017, para. 106; *see* also: Michelle Toxopeüs, "Immunity of Heads of States: The Al Bashir Case," *Helen Suzman Foundation*, 1 August 2017 (available at https://hsf.org.za/publications/hsf-briefs/immunity-of-heads-of-states-the-al-bashir-case); Nerina Boschiero, "The ICC judicial Finding on Non-cooperation Against the DRC and No Immunity for Al-Bashir Based on UNSC Resolution 1593," *Journal of International Criminal Justice*, vol. 13 (2015), 652-653.

provide for the waiver of immunities as the Rome Statute.[131] The wording of Article IV suggests otherwise: *"Persons committing genocide (...) shall be punished, whether they are constitutionally rulers, public officials or private individuals."*(emphasis added). Consequently, it seems as Article IV does, in fact, provide for the waiver of immunities, also for head of states.[132] It has been argued that Article VI amounts to a unique form of *aut dedere aut judicare*.[133] This is a valid interpretation of the provision, but the problem in extraditing al-Bashir to the ICC is found in the wording: *"Persons charged with genocide (...) shall be tried by a competent tribunal of the State in the territory of which, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.*" (emphasis added).

It follows, that since Sudan has *not* accepted the jurisdiction of the ICC, there is no obligation arising from the Genocide Convention for either Sudan or member states to extradite al-Bashir to the Court.[134] It appears from the *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v. Serbia*) (hereinafter the *Genocide* case) that ICJ reached the same conclusion. Even though the ICJ found that the Respondent had violated its obligation under Article IV to cooperate with the ICTY, the finding of the ICJ still implies that the international penal tribunal must have jurisdiction over the party concerned. [135]

Though it has been suggested otherwise, the reliance on the Genocide Convention for an obligation to surrender al-Bashir does not seem adequate.[136] The missing link is the lack of consent from Sudan in relation to ICC's jurisdiction. It can be argued, however, that the obligations stemming from the Genocide Convention *in connection* with the SC referral, place an additional duty for cooperation with the ICC for Sudan and ICC member states.

Provided that the SC referral has placed Sudan in a similar position as a state party, it could be argued that Sudan has a similar obligation to cooperate with the ICC, as Serbia had towards ICTY in the *Genocide* case. What remains imperative is, that the legal basis for the obligation to cooperate with the ICC lies in the SC referral. The Genocide Convention can, in that regard, endow the ICC with a procedural advantage, but it cannot constitute the legal basis alone.[137]

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[131] *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision, ICC-02/05-01/09-302, 6 July 2017, para. 109.
[132] Boschiero, *supra* note 130, 653.
[133] Göran Sluiter, "Using the Genocide Convention to Strengthen Cooperation with the ICC in the Al *Bashir* Case," *Journal of International Criminal Justice*, vol. 8 (2010), 366.
[134] For another opinion, *see*, e.g.: Boschiero, *supra* note 130, and Sluiter, *supra* note 133, 365-382.
[135] *Case Concerning Application of the Convention of the Prevention and Punishment of the Crime of Genocide (Bosnia v. Serbia)*, Judgement, International Court of Justice, 26 February 2007, para. 449.
[136] Cf. minority opinion of Judge Brichambaut.
[137] Sluiter, *supra* note 133, 382.

The alleged exceptions under customary international law, the two "SC routes", and the obligations under the Genocide Convention, are the most disputed legal arguments in the *al-Bashir* case. Thus, the analysis has found that the first argument constituted a too optimistic interpretation by the PCT I; the SC-arguments are in line with international law, even though the different approaches by the PTC II made them appear as two different legal rationales; and finally, the Genocide Convention can not solely constitute the legal ground for the indictment and the requests for cooperation, but Article IV and VI of the Convention constitute, arguably, a stronger legal case when seen in connection with the SC referral.

In a 2017 decision, The PTC II issued yet another decision, this time on the non-compliance with the ICC's cooperation request by Jordan. The decision came after al-Bashir's visit in 2017 during the 28th Summit of the League of Arab States in Amman. Before the arrival of the Sudanese president, Jordan informed the ICC about the visit in accordance with Article 97 of the Rome Statute. Jordan claimed, however, that al-Bashir enjoyed personal immunity under customary international law, and that immunity had been waived by neither Sudan nor the SC. With reference to Article 27(2) and 98(1), Jordan concluded:

"*Nothing in the two articles mandates the State Party to the Rome Statute to waive the immunity of a third State and act inconsistently with its obligations under the rules of general international law on the immunity of a third State."*[138]

The PTC II concluded otherwise, as they found that Jordan failed to meet its obligations under the Rome Statute. On 21st February 2018, the PTC granted leave to appeal on three issues by Jordan, following the decision on non-cooperation.[139] The opportunity for the Court to streamline its legal reasoning with the appeal judgement was evident. The following section will, therefore, turn to the latest judgement in the *al-Bashir* case.

[138] *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Report of the Registry on information received regarding Omar Al Bashir's potential travel to the Hashemite Kingdom of Jordan, ICC-02/05-01/09-293-Conf-Anx1-Corr, 29 March 2017, 3.
[139] The PTC II decided to grant leave to appeal on the following issues: (1) Jordan's duty to respect the immunity of al-Bashir according to the Rome Statute and the 1953 Convention, (2) state obligations flowing from resolution 1953 (3) referral of non-compliance to the SC and ASP. *See*, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on Jordan's request to leave appeal, ICC-02/05-01/09-319, 21 February 2018, paras. 2-3; Michail, Vagias, "Is Sudan an Indispensable Party in the Al-Bashir Immunity Appeal? A Monetary Gold Question for the ICC," *Opinio Juris*, 29 August 2018 (available at http://opiniojuris.org/2018/08/29/is-sudan-an-indispensable-party-in-the-al-bashir-immunity-appeal-a-monetary-gold-question-for-the-icc/).

3.7 The Jordan Appeal Judgement

The judgement from the Appeals Chamber was issued on 6th May 2019, after a special order in the proceeding, with the invitation of both state parties, regional organisation, and professors to submit *amicus* briefs. The judgement on the first two grounds of the appeal was reached unanimously, re. that al-Bashir do not enjoy personal immunity and that resolution 1593 gives the power to the Court to exercise jurisdiction over Darfur in accordance with the Rome Statute. The Appeals chamber could, thereby, confirm the impugned decision by the PTC II concerning the failure of Jordan to comply with the Court's request to arrest and surrender al-Bashir.[140]

The Appeals Chamber offered two legal avenues for explaining why there is no personal immunity vis-à-vis the ICC: customary international law and the SC-referral, respectively.
Firstly, the Appeals Chamber considered the question of customary international law, even though the question was not strictly on appeal.[141] In this context, the Appeals Chamber unanimously found that Article 27(2) reflects the status of customary international law, as it concluded that there is no immunity *ratione personae* under customary international law vis-à-vis an international Court.[142]
Furthermore, the Appeals Chamber upheld that Jordan was under an obligation to "cooperate fully" by virtue of SC resolution 1593. As these obligations also encompass article 27(2) of the Rome Statute, Jordan had failed to comply with the obligations necessary for the effective exercise of the Court's jurisdiction. The findings on SC resolution 1593 are in line with the previous decisions by the PTC II and do also support the legal findings of the present analysis.

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[140] The Appeals Chamber did, however, reverse the impugned decision with respect to the referral of Jordan to the ASP and the SC. For an analysis hereon, *see*: Hemi Mistry "Guest post: The Appeals Chamber's Chastisement of PTC II for its Article 87(7) Referral Gameplaying," *Spreading the Jam,* 8 May 2019 (available at https://dovjacobs.com/2019/05/08/guest-post-the-appeals-chambers-chastisement-of-ptc-ii-for-its-article-877-referral-gameplaying/).

[141] Since it appeared that the PTC II did not endorse this argument, and had proceeded to a new legal rationale, i.e. SC resolution 1593. As expressed by Jordan: *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, The Hashemite Kingdom of Jordan's response to the observations submitted by Professors of International Law pursuant to rule 103 of the Rules of Procedure and Evidence, ICC-02/05-01/09-368, 16 July 2018, para. 37; Professor Claus Kreß did however argue, during his *amicus curiae* brief, that the Court should rely on customary international law, and not SC referrals that are political and cannot be used outside the Darfur referral. *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Written observations of Professor Claus Kreß as amicus curiae, with the assistance of Ms Erin Pobjie, on the merits of the legal questions presented in The Hashemite Kingdom of Jordan's appeal, Appeals Chamber, ICC-02/05-01/09-368, 18 June 2018, para. 7.
See also: Keilin Anderson, "I*CC* Appeals Chamber resurrects controversial customary international law argument to find Al-Bashir has no immunity before international courts," *ILA reporter*, 15 May 2019 (available at http://ilareporter.org.au/2019/05/icc-appeals-chamber-resurrects-controversial-customary-international-law-argument-to-find-al-bashir-has-no-immunity-before-international-courts-keilin-anderson/).

[142] *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Judgement, ICC Appeals Chamber, ICC-02/05-01/09-397, 6 May 2019, paras. 1-11.

Lastly, the Appeals Chamber was not persuaded by the alleged error in the PTC II that the 1953 Arab League Convention on Privileges and Immunities suffices as a means for invocating Article 98(2). The PTC II and the Appeals Chamber could not establish that Sudan was a member of the treaty, why the immunities stemming from the 1953 Convention, in fact, did not cover al-Bashir in the Arab League context. However, the Chamber also found, that Article 98(2) in any event was not applicable to the 1953 Convention.[143] The latter conclusion was, however, not further elaborated, and it leaves the question of conflicting treaty obligations under Article 98(2) unanswered.
The Appeals Chamber did, however, decide to reverse the impugned decision that the PTC II had referred the matter of Jordan's non-compliance to the ASP and the SC pursuant to Article 87(7). The Appeals Chamber found that the PTC II had erred when it found that Jordan had not sought consultation with the Court regarding the visit of al-Bashir.[144]

In sum, the Appeals Chamber managed to bring, to a certain extent, the strands of previous decisions together, thereby also leaving an impression of a more streamlined interpretation of head of states immunities in relation to third states. The judgment by the Appeals Chamber does, however, still leave unanswered or insufficiently elaborated questions behind; Firstly, the legal reasoning of the judgment was still insufficient with respect to conflicting treaty obligations under Article 98(2). Secondly, the findings of customary international law were not just dubious but also unhelpful to the future process, as it allows for further criticism of the Court's method of interpretation of customary international law.[145] The judgement does therefore, ultimately, constitute a failure to ensure the Appeals Chamber's embedded opportunities to clarify the outstanding legal questions. This opportunity for the Court to clarify and streamline their legal reasoning could even be perceived as an alternative for seeking an advisory opinion from the ICJ. In hindsight, and despite the, partly, correct legal findings on al-Bashir's immunity, it must be acknowledged that the lack of elaborated

[143] *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Judgement, ICC-02/05-01/09-397, Appeals Chamber, 6 May 2019, para. 14; *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision, ICC-02/05-01/09-309, Pre-Trial Chamber II, 11 December 2017, paras. 30-32.
[144] Of the eight ICC decisions on non-cooperation of state parties, only two (Nigeria 2013 and South Africa 2015), has not been referred to the ASP and SC. The appeal judgement, together with Nigeria and South Africa, show that there can be mitigating factors with respect to cooperation with the ICC. The many referrals also emphasise the lack of follow up by the SC on the implementation of their own resolutions.
According to Hemi Mistry, however, the reverse of the third issue on appeal represents an important attempt to draw a line under the "referral gameplaying" of the Pre-Trial Chambers. *See* Hemi Mistry "Guest post: The Appeals Chamber's Chastisement of PTC II for its Article 87(7) Referral Gameplaying," *Spreading the Jam,* 8 May 2019 (available at https://dovjacobs.com/2019/05/08/guest-post-the-appeals-chambers-chastisement-of-ptc-ii-for-its-article-877-referral-gameplaying/).
[145]Dov Jacobs, "You have just entered Narnia: ICC Appeals Chamber adopts the worst possible solution on immunities in the Bashir case," *Spreading the Jam*, 6 May 2019 (available at https://dovjacobs.com/2019/05/06/you-have-just-entered-narnia-icc-appeals-chamber-adopts-the-worst-possible-solution-on-immunities-in-the-bashir-case/).

argumentation has removed this potential avenue, especially with the reappearance of the issue of customary international law.

3.8 The Ousting of al-Bashir

The 11th of April 2019 marked the end of al-Bashir's 30-year rule in Sudan.[146] The overthrow of al-Bashir is not only a remarkable political development but also essential from a legal point of view. As al-Bashir is not the sitting head of state anymore, he is no longer protected by immunity *ratione personae* in relation to private and officials acts.[147] The absolute immunity that al-Bashir has enjoyed hitherto under customary international law, even in relation to the alleged crimes, has ended with his termination of office. It follows that al-Bashir is now covered by the more limited immunity *ratione materiae*.[148]

The graveness of his alleged crimes is a decisive factor for why the protection of immunity *ratione materiae* might not apply. This conclusion is drawn, *inter alia,* from the work of the ILC on the immunity of state officials from foreign criminal jurisdiction, and the adoption of Draft Article 7 in 2017.[149] The Draft Article 7 provides for exceptions for immunity *ratione materiae* in respect to certain core crimes of international law.[150] As al-Bashir faces charges of three of the six crimes, it

[146]Declan Walsh and Joseph Goldstein, "Sudan's President Omar Hassan al-Bashir is Ousted, but Not His Regime, *New York Times,* 11 April 2019 (available at https://www.nytimes.com/2019/04/11/world/africa/sudan-omar-hassan-al-bashir.html).

[147] Dire Tladi, *supra* note 1, 170.

[148] Cf. Section 3.1. *Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of Congo v. Belgium*)*, Judgement, International Court of Justice, 14 February 2002, para. 61; Sherif and Williams, *supra* note 123, 535, 550.

[149]*Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium),* Judgment, 14 February 2002, para. 58. *See* also: Tladi, *supra* note 1, 187; Kjeldgaard-Pedersen, *supra* note 109;

[150] The crimes included in Draft Article 7 are respectively: *crimes of genocide, crimes against humanity, war crimes, crime of apartheid, torture, and enforced disappearance.*
International Law Commission, *Immunity of State officials from foreign criminal jurisdiction*, UN Doc. A/CN.4/L.893, 10 July 2017, paras. 1-2.
For the nuanced interpretation, the context of the adoption of Draft Article 7 should not be overlooked; whereas voting only seldom occurs in the ILC, but the decision regarding the Draft Article 7 proved to be difficult and with great resistance from some of the ILC members, which emphasise how much tension and division the topic of immunity can create. In the strong explanations of vote it was noted several times, that Draft Article 7 did not reflect existing international law by either a discernible trend in state practice or international jurisprudence.
See: International Law Commission, *Provisional summary record of the 3378th meeting*, UN Doc. A/CN.4/SR.3378, 20 July 2017. The discussion on exceptions to immunity *ratione materiae* is also dividing states, which is particular apparent in connection with Draft Article 7, when delegates urged the ILC to approach the subject matter with care, because of the political sensitivity that immunity carries. Whereas Spain, Ireland, and Netherland were among delegates that expressed support and recognised exceptions to functional immunity, United States, Australia, Belarus, and Israel not find that Draft Article 7 reflects customary international law.
For more statements, *see:* United Nations General Assembly, UN Doc. GA/L/3585 (Meeting Coverage), 31 October 2018 ("*Concluding Review of Report, Sixth Committee Delegates Urge International Law Commission to Approach Controversial Issues with Care, Political Sensitivity")* (available at https://www.un.org/press/en/2018/gal3585.doc.htm).

follows that this constitutes an exceptional situation and that al-Bashir might no longer be covered by either immunity *ratione personae* or immunity *ratione materiae* from foreign criminal jurisdiction.[151]

Be that as it may, nothing suggests that Sudan is more willing to extradite al-Bashir now, and since he was ousted from power, the Military Council has rejected the surrender of the former president to the Hague.[152] Furthermore, despite the change in the legal status of al-Bashir, it still does not change the fact that Sudan is not a member of the ICC. It follows from the counterarguments to the ICC decisions, that the underlying premise is intact - there is no obligation in the Rome Statute to surrender former heads of state of non-state parties, why it doubtful that states hitherto being unwilling to comply with the cooperation requests, will change this position in the post-April situation.[153]

Having been placed in a similar situation as a state party, cf. the second "SC-route", Sudan should have the right to prosecute al-Bashir domestically, by virtue of the principle of complementarity.[154] Since the ousting of al-Bashir, Sudan's Military Council has said that they would do so. The potential prosecution domestically obviously makes for an opportunity, but it still remains to be seen whether Sudan will execute a prosecution.[155]

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[151] *Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of Congo v. Belgium*)*, Judgement, International Court of Justice, 14 February 2002, para. 61; Sherif and Williams, *supra* note 123, 75; Kiyani, *supra* note 41, 473; International Law Commission, Immunity of State officials from foreign criminal jurisdiction, UN Doc. A/CN.4/L.893, 10 July 2017, paras. 1-2.

[152] Declan Walsh, "Sudan's Omar al-Bashir Charged in Connection With Killing of Protesters," *New York Times*, 13 May 2019 (available at https://www.nytimes.com/2019/05/13/world/africa/al-bashir-charged-sudan.html); DW News, "Sudan's Military Council Says Won't Extradite al-Bashir," *DW News*, 12 April 2019 (available at https://www.dw.com/en/sudan-military-council-says-wont-extradite-al-bashir/a-48296372).

[153] At the time of writing, it has even been declared that Uganda's Government will consider to grant al-Bashir asylum, should he flee to the neighbouring African country to avoid prosecution, *See* e.g.: Elias Biryabarema, "Uganda says it is willing to consider asylum for Sudan's ousted leader Bashir," *Reuters*, 17 April 2019 (available at https://www.reuters.com/article/us-uganda-sudan-bashir/uganda-says-it-is-willing-to-consider-asylum-for-sudans-ousted-leader-bashir-idUSKCN1RT0WA).

It should, however, also be noted that some member states have declared they will prosecute al-Bashir. A Kenyan Court of Appeal has, for example, issued a decision affirming that the Kenyan government have an obligation to cooperate. The obligations stems, according to Kenya, from customary international law, the UN Charter, the Rome Statute, and the International Crimes Act pursuant to the principle *pacta sunt servanda*, cf. *Criminal Appeal No. 274 of 2011*, Court of Appeal at Nairobi, 17 February 2018, 55-56.

[154] The principle of complementarity is set out in the preamble and Article 1 of the Rome Statute. It is written in the preamble: "*Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions".*

[155] Nima Elbagir, Farai Sevenzo, and Sarah El Sirgany, "Sudan will prosecute Bashir but won't hand him over, military says," *CNN,* 13 April 2019 (available at https://edition.cnn.com/2019/04/12/africa/sudan-army-bashir-intl/index.html)

3.9 From Getting the Law Wrong to Having it on Its Side - The Problem with ICC's Divergent Case Law

This chapter has examined the divergent legal reasoning in the *al-Bashir* case, and the analysis has demonstrated where the legal dispute and confusion stem from. Despite some detours, the ICC has improved their legal reasoning significantly since the 2011 decisions – from getting the law wrong to having it on its side by relying on the SC resolution 1593. The problem is that the non-stringent approach challenges the credibility of the Court and thus has to face justified criticism, as noted by Charles Jalloh during the Appeals Hearing:

"If this interpretation of the meaning of the resolution was so obviously intended, why did it take the ICC Pre-Trial Chamber 17 years to identify this as the correct legal theory for stripping away immunity?"[156]

The way that both states and the ICC have dealt with the question of immunity in the *al-Bashir* case has arguably damaged the authority of the Court.[157] Not only have the member states of the ICC not respected the arrest warrants issued by the Court, but the Chambers' divergent legal reasoning have weakened its legitimacy as well. Despite the steadfast conclusions, the legal analyses of the respective Chambers have been both divergent, and the alleged exception under customary international law is a way of stretching the law beyond its breaking point, why criticism of the Court is inevitable.[158]
The lack of unanimity in the South Africa and Jordan decisions, has also been the subject of criticism and served as evidence of the unreliability of the decisions, even though the judges did agree on the bottom-line conclusion that al-Bashir is not immune from arrest and member states have an obligation to cooperate with the ICC.[159]

One of the key imperatives for the ICC is not only to prosecute but eventually to deter senior leaders from committing international crimes. The lack of consistent and well-reasoned decisions in the *al-Bashir* case comes at this expense, as it might be an additional factor, for why member states ignore their obligations to cooperate with the Court. A further problem is the SC's lack of follow up procedures, with the compliance of Resolution 1593, despite appeals from the Chief Prosecutor, Fatou

[156] *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Appeal Hearing, ICC-02/05-01/09-T-6, 12 September 2018, 13; The 17 years refers to the period from the issuance of SC resolution 1593 to the appeal hearing.
[157] David Bosco, *Rough Justice the International Criminal Court in World of Power Politics*, 2014, 180-182; Paola Gaeta and Patryk I. Labuda, *Trying Sitting Heads of State,* in Charles Chernor Jalloh and Ilias Bantekas (eds.), The International Criminal Court and Africa, 2017, 138-140.
[158] Kjeldgaard-Pedersen and Schack, *supra* note 52, 933.
[159] Max du Plessis and Dire Tladi, "The ICC's immunity debate – the need for finality," *Blog of the European Journal of International Law*, 11 August 2017 (available at https://www.ejiltalk.org/the-iccs-immunity-debate-the-need-for-finality/).

Bensouda, to the SC, where she has underlined that the costly inaction has the potential of undermining the fight against impunity.[160]

Immunities pose obstacles for the ICC with respect to its core function, putting an end to impunity for the most serious of crimes. In this light, the deployment of "creative legal reasoning" is a way of protecting the Court's *raison d'être*.[161] The Appeals Chamber could have chosen an approach strictly focusing on the Rome Statute, but decided to open up for a more general interpretation with regard to customary internal law. This approach can be seen as a creative way to create a safety net for a "Court without arms" in future cases without an SC referral.[162]

Such a creative approach raises, however, ethical concerns in regard to the application of international criminal law and can undermine the idea of the fundamental principle of impartiality. In addition to this, in the long term, this course of action entails a potential risk to the fight against impunity, possibly affecting the criminal justice system as a whole. As explained by Astrid Kjeldgaard-Pedersen and Marc Schack:

"Indeed, the long-term effects may be far more detrimental to the fight against the impunity than the short-term effects of granting immunity to high-ranking state officials in accordance with a 'safe bet' application of contemporary norms of customary international law (...) This practice may serve the short- term goal of ensuring convictions and bringing justice to victims in a concrete case. But at the same time risks undermining the 'rule of law' ideals upon which the entire international criminal justice system is, and should be, built. [163]

Having said that, it is essential to emphasise, that this present chapter has argued that the post-2011 decisions are in line with international law. The problem is still the inability to adopt a rigorous approach, and not least, the reopening of the debate over customary international law after the appeal judgement. Furthermore, the continued dispute over legal questions requires a solution. At this point, it seems unlikely that the appeal judgement has contributed to this finality. While the reason of the dispute may also be rooted in political considerations, the ICC has not been able to resolve the fundamental and irreconcilable difference in the interpretation of the immunity question.[164]

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[160] UN News, "ICC Prosecutor asks Security Council to act on outstanding arrest warrants," *UN News*, 12 December 2017 (available at https://news.un.org/en/story/2017/12/639172-icc-prosecutor-asks-security-council-act-outstanding-arrest-warrants).

[161] Kjeldgaard-Pedersen and Schack, *supra* note 52, 933-934.

[162] Annegret L. Hartvig, "The Climax of the Al-Bashir Saga: The ICC's Jordan Judgment," *völkerrecthsblog,* 20 May 2019 (available at https://voelkerrechtsblog.org/the-climax-of-the-al-bashir-saga/).

[163] Ibid.

[164] Fabricius, Peter, "Can SA and ICC Resolve Their Differences?," *Daily Maverick*, 13 September 2018 (available at https://www.dailymaverick.co.za/article/2018-09-13-can-sa-and-the-icc-resolve-their-differences/)

Subsequently, it may be suggested that an ICJ advisory opinion providing the necessary clarity on immunity, is a potential avenue for reaching finality.[165] At least this analysis has shown the legal roots for the request. However, this path requires a careful examination of the potential challenges arising hereof, especially bearing the challenging political climate in mind. What remains open after this chapter is therefore whether an advisory opinion is an appropriate tool for reaching finality in the immunity debate, and for this purpose, the next chapter will provide an analysis of the contribution of previous advisory proceedings.

[165] Max du Plessis, "Time to Resolve the Debate Over Immunity and the International Criminal Court," *Ghatham House*, 26 October 2017, (available at https://www.chathamhouse.org/expert/comment/time-resolve-debate-over-immunity-and-international-criminal-court); Abel Knottnerus, "The Immunity of al-Bashir: The Latest Turn in the Jurisprudence of the ICC," *Blog of the European Journal of International Law*, 15 November 2017 (available at https://www.ejiltalk.org/the-immunity-of-al-bashir-the-latest-turn-in-the-jurisprudence-of-the-icc/).

Chapter IV: Advisory Proceedings at the International Court of Justice

Having dealt with the divergent case law of the ICC and examined the legal controversy that has arisen thereof, it is now time to turn the analysis of the advisory proceedings at the ICJ. It has been seen that the AU advocates for an advisory opinion to solve the outstanding legal questions on obligations concerning head of states immunity. The present chapter will, therefore, seek to establish a framework for the forthcoming analysis on a potential advisory opinion on head of states immunities. This chapter will conduct an examination of advisory opinions to provide an understanding of the advisory function and what can be expected from an advisory opinion, based on a comparison with previous proceedings. The chapter is structured in accordance with the advisory process; hence, the chapter will begin with an examination of the purpose of the advisory function and prerequisites for initiating advisory proceedings, followed by a section on the advisory proceeding at the court, and, finally, the reception of the outcome by UN member states.

4.1 The Purpose of the Advisory Function

In addition to the function of settling international disputes, the principal UN judicial organ, the ICJ, is empowered by virtue of Article 65(1) of the ICJ Statute to give advisory opinions: *"The Court may give an advisory opinion on any legal question of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request."*[166]
From the cross-reference to Article 96 of the UN Charter, it follows that the AU cannot request the ICJ themselves. Subsequently, the GA, as an authorised organ, will have to submit a potential request to the ICJ for an advisory opinion on head of state immunity.[167] Since the GA will be the requesting organ, this chapter will focus on how previous proceedings have been conducted and later received in this forum.

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[166] *Statute of the International Court of Justice, 18 April 1946, (available at* https://www.refworld.org/docid/3deb4b9c0.html), Article 65(1).
[167] Article 96 of the UN Charter reads: *"1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question. 2.Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities."*
The ICJ has no power to initiate an advisory proceeding *propriu motu*, and a written request in accordance with Article 96 is thus a necessary prerequisite. Five UN Organs and 15 UN Specialised agencies are currently authorised to submit advisory requests, *See* e.g., Hugh Thirlway, "The International Court of Justice," in Evans, Malcolm D., "*International Law*," (2014), 611; Anthony Aust, "Advisory Opinions," *Journal of International Dispute Settlement*, vol. 1 no. 1 (2010), 131.

The nature of advisory opinions is non-binding, and the purpose is not, according to the ICJ, to actively settle disputes between states, but merely to offer legal advice to the international organs requesting them based on the relevant international legal principles and rules.[168]
Therefore, advisory opinions do not oblige states or international organs to refrain from any action that may be conflicting with the advisory opinion. Only in exceptional circumstances, when it has been expressly provided for, may an advisory opinion have binding force.[169] Whereas consent is the premise behind ICJ's jurisdiction in contentious cases, the non-binding character of advisory opinions implies that:

"It follows that no State (…) can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should undertake."[170]

Because of the non-binding nature, it is debated in the literature, whether advisory opinions have any impact, but it is often asserted that they do have legal value and carry moral and normative authority due to the special status of the ICJ.[171]According to the Court, advisory opinions:

"(…) are often an instrument of preventive diplomacy and help to keep the peace. In their own way, advisory opinions also contribute to the clarification and development of international law and thereby to the strengthening of peaceful relations between States."[172]

When a request comes from the GA, it requires a sufficient number of votes for a resolution to be adopted and submitted to the ICJ. There is no express provision neither in the UN Charter, the ICJ Statute nor the Rules of the Court guiding the majority required to pass a resolution; thus, the procedure is determined by the general rules governing the requesting organ.[173] The voting procedure in the GA is regulated under Article 18 of the UN Charter, in which a distinction is drawn between "important questions" and "other questions". Whereas the former requires a two-thirds majority actually present and voting, the latter only requires a simple majority.[174] It seems,

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[168] *Legality of the Threat or use of Nuclear Weapons,* Advisory Opinion, International Court of Justice, 8 July 1996, para 14.
[169] Thirlway, *supra* note 167, 610.
[170] Thirlway, *supra* note 167, 612.
[171] For more on this debate, *see:* Teresa F. Mayr and Jelka Mayr-Singer, "Keep the Wheels Spinning: The Contributions of Advisory Opinions of the International Court of Justice to the Development of International Law," *Zeitschrift für ausländisches öfentliches Recht und Völekerrecht*, vol. 76, no. 2 (2016); Amr, *supra* note 178, 111.
[172] The International Court of Justice, "Advisory Jurisdiction," *ICJ*, n/a (available at https://www.icj-cij.org/en/advisory-jurisdiction).
[173] Mahasen M. Aljaghoub, *The Advisory Function of the International Court of Justice 1946-2005,* 2006, 247-248.
[174] Article 18 of the UN Charter reads: *"1. Each member of the General Assembly shall have one vote. 2. Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting. These questions shall include: recommendations with respect to the maintenance of international peace and*

however, that there is no stringent approach in relation to advisory opinions, and some of the requests concerning, arguably, matters over international peace and security, including the advisory opinion on *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (hereinafter *the Kosovo* advisory opinion), and *Legality of the threat or use of Nuclear Weapons* (hereinafter *the Nuclear Weapons* advisory opinion), and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (hereinafter *the Wall* advisory opinion) were all adopted by majority lower than two-thirds, but were, however, assumed to be duly adopted.[175] The latest advisory opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (hereinafter *the Chagos* advisory opinion) were likewise adopted by majority lower than two-thirds.[176] Advisory requests that could be argued to fall under the category of "important questions", do, thereby, not necessarily require a two-thirds majority.

4.2 The Discretionary Powers of the ICJ

Before the ICJ proceeds with an advisory request, the Court has to decide whether it has jurisdiction *ratione personae* and if so, whether it has competence *ratione materiae*.[177] In relation to the latter, Article 65 of the ICJ Statute implies that the Court is entitled to use its discretion as the Article reads: "*The Court may give an advisory opinion(…)"* (emphasis added). The wording of Article 96 of the UN Charter similarly stipulates that the GA and the SC "*may request"* the ICJ, which only underlines that they are not obliged to do so.[178] The ICJ expressed in the *Chagos* advisory opinion

security, the election of the non-permanent members of the Security Council, the election of the members of the Economic and Social Council, the election of members of the Trusteeship Council in accordance with paragraph 1(c) of Article 86, the admission of new Members to the United Nations, the suspension of the rights and privileges of membership, the expulsion of Members, questions relating to the operation of the trusteeship system and budgetary questions. 3. Decisions on other questions, including the determination of additional categories of questions to be decided by a two-third majority, shall be made by a majority of the members present and voting."

[175] *The Nuclear* advisory opinion addressed the legality of the threat or use of nuclear weapons; *the Kosovo* advisory opinion concerned the unilateral declaration of independence by Kosovo; *the Wall* advisory opinion addressed the legality of the construction of the wall by Israel in the occupied Palestinian territory; *the Chagos* advisory opinion addressed the lawfulness of the decolonisation of Mauritius and the legal consequences of the continued administration of the United Kingdom over the Chagos Archipelago and the inability of resettlement of those of Chagossian origin. The request for an advisory opinion on Nuclear weapons was adopted by 127 votes in favour with 30 against and 23 abstentions. The advisory request for *the Wall* was adopted with 90 votes in favour, 8 against and 74 abstentions. *The Kosovo* advisory request was adopted with 77 in favour, 6 against and 74 abstentions.
For more on the voting procedure*, see:* d'Argent, *Advisory Opinions*, in Andreas Zimmerman and Christian J. Tams (eds.), The Statute of the International Court of Justice a Commentary, 3rd edition, 2019, 1783-1812.

[176] The Chagos Draft resolution was adopted by 94 votes to 15, with 65 abstentions, *See* Un General Assembly, *88th Plenary Meeting,* A/71/PV.88, 22 June 2017, 18.

[177] Aust, *supra* note 167, 113.

[178] For another opinion *see*, Mohamed Sameh M. Amr, *The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations*, 2003, 107. Amr argues, that the discretionary powers of ICJ is an abstract interpretation of article 65 of the ICJ Statute.

that the Court holds the same discretionary powers in giving an advisory opinion as the authorised organs have in requesting one:

"The Court has recalled many times in the past that Article 65, paragraph 1, of its Statute, which provides that 'The Court may give an advisory opinion…', should be interpreted to mean that the Court has a discretionary power to decline to give an advisory opinion even if the conditions of jurisdiction are met."[179]

Looking at the history of the ICJ, the Court has accepted all advisory requests hitherto, with an advisory request by the WHO as the only exception. The rejection was, however, only due to the Court's missing jurisdiction *ratione personae.*[180] In other words, the ICJ has never refused to render an advisory opinion on the grounds of lacking competence *ratione materiae*, despite careful consideration in certain cases.[181] The ICJ has furthermore emphasised, that an advisory request may not be refused unless there are "compelling reasons".[182] However, it remains unclear what "compelling reasons" more specifically entail, especially with the acceptance of several advisory requests directly linked to political disputes in mind. In this context it should be stressed that the ICJ cannot accept a request that is purely political in its scope, since the ICJ as a legal organ will add no significant value by trying to solve the question at hand, and will have to decline the opinion requested.[183] The Court seems nevertheless willing to consider a question legal if it has political aspects, as long as it also has a legal character.[184] A question can accordingly be considered legal when it has a legal aspect, is formulated in terms of the law, is related to a breach of obligations under international law, and the opinion can be based on international law.[185] This approach implies that the ICJ is inclined to ignore political incentives, and even potential negative impact on a political situation:

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[179] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, International Court of Justice, 25 February 2019, para. 63; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, International Court of Justice, 9 July 2004, para. 44; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, International Court of Justice, 22 July 2010, para. 29.
[180] The request submitted by the WHO for an advisory opinion on the *Legality of the Threat or Use by a State of Nuclear Weapons in Armed Conflicts* was rejected in 1996, on the ground that the question of the legality of nuclear weapons was outside the scope of activities of the WHO, why they could not seek a request. The request was refused on the ground of lack of jurisdiction *ratione personae.*
[181] Thirlway, *supra* note 167, 612.
[182] Ibid.
[183] *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, Advisory Opinion, International Court of Justice, 20 July 1962, 155.
[184] *Legality of the Threat or use of Nuclear Weapons,* Advisory Opinion, International Court of Justice, 8 July 1996, para.14; *see* also: Gerald Fitzmaurice, *The law and procedure of the International Court of Justice,* 1986, 116.
[185] Amr, *supra* note 178, 88.

"The Court moreover considers that the political nature of the motives which may be said to have inspired the request and the political implications that the opinion given might have are of no relevance in the establishment of its jurisdiction to give such an opinion."[186]

For the purposes of this analysis, a useful categorical distinction has been made by Anthony Aust between advisory opinions on more trivial matters, so-called "housekeeping matters" and on contentious disputes or "politically controversial matters".[187] The former category is able to assist the UN in the proper exercise of its functions, in accordance with the purpose of the advisory function, but it follows from the political controversial advisory opinions that they concerns "(…) *problems that can be resolved (if at all) only by difficult and lengthy political negotiations, not by an Advisory Opinion."*[188] According to Aust, of the 28 advisory opinions that have been rendered as of today, only a handful of them have fallen under the category of "politically controversial matters", such as *the Nuclear Weapons, the Wall* and *the Kosovo* advisory opinion.[189] The recent *Chagos* advisory opinion is arguably also falling under this category, seen in the light of its subject matter and the dispute it has caused.[190] Although the distinction may oversimplify the political context of "housekeeping matters", as they may carry great political importance for the states and international organisations concerned, the distinction remains useful for an analytical purpose.[191]

The five highlighted advisory opinions have been directly linked to political disputes and have therefore generally attracted more attention in the literature and public debate. A common denominator for these advisory proceedings is also the lack of consent from one of the "parties to the conflict".[192] Despite not being a requirement, the lack of consent might pose an obstacle for the compliance with the legal findings of the ICJ, seeing the rules governing international law are

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[186] *Legality of the Threat or use of Nuclear Weapons,* Advisory Opinion, International Court of Justice, 8 July 1996, para.13. In the same paragraph, the Court concluded that despite the political character, the question:
"does not suffice to deprive it of its character as a 'legal question' and 'to deprive the Court the competence expressly conferred on it by its Statute. In addition, the Court found that any political incentives for the request "are of no relevance in the establishment of its jurisdiction to give such an opinion.".

[187] Aust, *supra* note 167, 131.

[188] Ibid.

[189] Ibid., For an overview of previous advisory opinions, *see*: https://www.icj-cij.org/en/decisions/advisory-opinion/1946/2019/desc.Other advisory opinions may, arguable, also belong to this category, for example, *the Western Sahara* advisory opinion, but the present analysis will focus on the highlighted advisory opinion due to limitations of the scope of this chapter.

[190] The advisory opinion of decolonisation and the right of self-determination has been considered a bilateral dispute, why it has been seen as inappropriate, for example by ICJ Judge Donoghue:
Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Dissenting Opinion of Judge Donoghue, International Court of Justice, 25 February 2019, para. 1.

[191] The Western Sahara advisory opinion serves again as an example, as it concerned the disputed territory of Western Sahara and the independence of the Sahrawi population.

[192] *The Nuclear Weapon* advisory opinion constitutes in this regard a special case, but it can be argued that the nuclear possessor states posed a party in this advisory proceeding.

utterly dependent on state's consent.[193] Whether these advisory opinions have resolved or made progress for the underlying issues, is, however, too premature to conclude for this analysis. Bearing in mind the contentious climate, that the request for an advisory opinion on head of state immunity stems from, and the political animal of head of state prosecutions, it is of interest for this master thesis to examine previous advisory proceedings that likewise have had contentious underlying issues. The present analysis will, therefore, place particular emphasis on the four mentioned cases to present just how these advisory proceedings have played out.

4.3 Preparations for Advisory Requests

Advisory proceedings with the GA as the requesting organ begin with the filing of a written request to the Court, which reflects the outcome of a collective-drafting process. In contentious cases, requests are usually carefully prepared by a single party, but the final resolution of an advisory request is often the result of political negotiations with more parties involved in the drafting process.[194] It follows that there is an opportunity to influence the request for submission, but that it may be challenging in the event of politically opposing opinions.[195]

Clashes of wills and positions on advisory requests have been apparent in the preparation phase of the advisory proceedings of both *the Nuclear Weapons*-, *The Wall*-, *Kosovo*- and *the Chagos* advisory opinions. The disagreements in these cases have been reflected in the voting pattern, which has been characterised by a relatively high number of states voting against and a high number of abstentions.[196] In all of these cases, the voting procedure has been followed by explanations for the lack of support for an advisory opinion. The political nature of the questions has been a common denominator, something that has been pointed out by sceptical states for why advisory opinions have been perceived either superfluous, inappropriate or utterly problematic for the future cause of action.[197] In this context, it is also interesting, that a recurrent argument by states who have opposed an advisory opinion, has been the emphasis on the political nature of the dispute,

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[193] As Dov Jacobs explained in relation to the Chagos case: "*Of course, one can regret that international law still works on the evil consent-based system, but that's the way it is."* Dov Jacobs, "ICJ Chagos Advisory Opinion: UK asked to end its administration of the islands, but the colonizer still wins…", *Spreading the Jam*, 26 February 2019 (available at https://dovjacobs.com/tag/chagos/).

[194] Hugh Thirlway, *The International Court of Justice*, 2016, 116.

[195] Malcolm N. Shaw QC, *Rosenne's Law and Practice of the International Court 1920-2015 Volume I,* 5th edition, 2016, 355.

[196] See Note 177 above.
Shaw QC, *supra* note 195, 303.

[197] The Kosovo advisory opinion represents in particular an example where opponents asserted that an advisory opinion were not only inappropriate but was also likely to menace further political progress of the peace negotiations.

whereas proponents often have emphasised the need for legal clarification, and the importance *erga omnes*.[198] It could be argued that the political considerations should be disregarded, as the ICJ merely provides legal clarity, which may be an indirect tool for dispute settlement by making progress in the debate, even when the dispute is overly political. A point of view the Court itself has emphasised:

"Indeed, in situations in which political considerations are prominent it may be particularly necessary for an international organisation to obtain an Advisory Opinion from the Court as to the legal principles applicable with respect to the matter under debate."[199]

Although the request for *the Nuclear Weapons* advisory opinion did not meet as much resistance in the GA voting as the other cases presented above, many states found that the political nature of nuclear weapons made an advisory opinion hereon unhelpful, as Germany expressed it in their written statement to the Court:

"Nuclear weapons are not only a means of warfare like other weapons. Their main purpose is political: they are meant to help prevent any kind of war. Their use cannot be assessed using the norms of international law without such an assessment turning from a judicial into a political one."[200]

The Court did, however, not find that the political aspects sufficed to deprive the legal character of the question.[201] *The Kosovo* advisory opinion represents another example of how opponents stressed that an advisory opinion could be a menace to the political progress in the peace negotiations, but the ICJ nevertheless accepted the request.[202]

The political context has played a big role in the advisory opinions on "politically controversial matters", and it cannot be excluded that politics have been a part of the motivation for seeking the

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[198] Both of these arguments were expressed by Mauritius at the GA, when they stated*: "It addresses colonialism and decolonization — a matter of interest to all Members and to the Organization as a whole"*, *see*: UN General Assembly, *88th plenary meeting*, UN Doc. A/71/PV.88, 22 June 2017, 7.

[199] *Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt*, Advisory Opinion, International Court of Justice, 20 December 1980, para. 33.

[200] Written Statement by the Government by the Federal Republic of Germany, *on the request made to it by the United Nations General Assembly for an advisory opinion on the following question: "Is the threat or use of nuclear weapons in any circumstance permitted under international law?",* 20 June 1995 (available at https://www.icj-cij.org/files/case-related/95/8704.pdf), p. 2. The request for an advisory opinion on Nuclear weapons was adopted by 127 votes in favour with 30 against and 23 abstentions.

[201] *Legality of the Threat or use of Nuclear Weapons,* Advisory Opinion, International Court of Justice, 8 July 1996, para 13.

[202] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, International Court of Justice, 22 July 2010, paras. 26-29.

requests just as it has been out of political concerns that some states have abstained or voted against these advisory opinions.[203]

For the same reason, a clash of opinions in the formulation of the question to the ICJ can occur, why this phase of the advisory proceeding is crucial.[204] A large number of states involved in the drafting process may deprive the request of precision and ultimately make it a task for the ICJ to interpret the precise meaning of the legal question.[205] This has also raised concerns among states, and the UK Government, for example, has stressed the importance of the drafting process to the GA. The UK explained that an interpretation of unclear questions by the ICJ is unhelpful to both the Court and the states, and the GA needs to ensure that the intended question is eventually also the question answered by the ICJ.[206] The Court has stated, pursuant to Article 96 of the Statute and Article 102 of the rules of the Court, that they can give an advisory opinion on any legal question, even if it is abstract.[207] The formulation of the question was, for example, a concern for the United States in relation to the *Nuclear Weapons* advisory opinion, in which they found that the question submitted to the Court were both vague and abstract, and thus the ICJ would provide no practical assistance to the GA, were they to accept the request.[208] The Court also rejected this argument and found that the formulation of the question was precise and clear.[209]

The precise formulation of the question can also be seen as an attempt to ensure a certain outcome, in particular in situations where self-interests are at stake. In this regard, the formulation of *the Chagos* advisory request presents an example on the importance of the drafting process. The term

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[203] *See* e.g. the statement from Italy on behalf of the European Union: UN News, "General Assembly Adopts Text Requesting International Court of Justice to Issue Advisory Opinion on West Bank Separation Wall," *UN News*, 8 December 2003 (available at https://www.un.org/press/en/2003/ga10216.doc.htm)

[204] Shaw finds that the formulation of request, in in particular the concrete, should be done very careful, asn that the question submitted carry the same importance in advisory proceedings as in contentious cases: Shaw QC, *supra* note 195, 335.

[205] Shaw QC, *supra* note 195, 355.

[206] Written statement by the United Kingdom, Request by the United Nations General Assembly for an Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 16 June 1995, paras. 1.1-1.5.

[207] Art. 102(3) Rules of Court reads: "(...) the Court may give an advisory opinion on any legal question, abstract or otherwise", *Legality of the Threat or use of Nuclear Weapons,* Advisory Opinion, International Court of Justice, 8 July 1996, para. 14.

[208] In their written statement United States declared: *"The question presented is both vague and abstract, addressing complex issues that are the subject of consideration among interested States and within other bodies of the United Nations that have an express mandate to address these matters. An Opinion by the ICJ concerning the question presented would provide no practical assistance to the General Assembly in carrying out its functions under the Charter. Such an Opinion has the potential of undermining progress already made or being made on this sensitive subject and, therefore, is contrary to the interests of the United Nations Organizations." See* Written Statement by United States of America, *Request by the United Nations General Assembly for an Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, 20 June 1995; *See,* also United Kingdom, Written Statement, *Request by the United Nations General Assembly for an Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, 16 June 1995, paras. 1.1-1.5.

[209] *Legality of the Threat or use of Nuclear Weapons,* Advisory Opinion, International Court of Justice, 8 July 1996, para. 14.

'sovereignty' was avoided in the twofold question, and the Court was, therefore, not asked whether Mauritius has sovereignty over the Chagos Islands, but if the process of decolonisation of Mauritius was lawfully completed in relation to the separation of the Chagos Islands from its territory.[210] The precise formulation thereby accommodated the risk that the Court would refuse to give an advisory opinion on the grounds that it concerned a bilateral dispute that could circumvent the principle of consent.[211] Furthermore, the many references to GA resolutions reinforced the multilateral undertones combined with the general interest in the UN for an advisory opinion.[212] In addition, this could also be seen as a way to reach particular legal conclusions, without having the ICJ addressing issues of UK or Mauritian sovereignty.[213] The importance of a careful drafting of the question for an advisory opinion can be decisive for the process and could lead to one of the following scenarios; the Court declines the request if the question is not legal or there are other "compelling reasons", the advisory opinion contributes only with a limited clarification of the legal issues due to the formulation of the question, or the Court is unable to address what the Court finds to be the real issue at hand potentially leading to the Court's redrafting of the question.[214]

Furthermore, the resolutions for advisory opinions have hitherto been adopted in a similar manner, containing one or several preambles followed by the concrete question(s). The preambles have occasionally highlighted the prevailing view of the majority of the requesting organ in relation to

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[210] The following questions were submitted to the Court by the GA:
"(a) Was the process of decolonization of Mauritius lawfully completed when Mauritius was granted independence in 1968, following the separation of the Chagos Archipelago from Mauritius and having regard to international law, including obligations reflected in General Assembly resolutions 1514 (XV) of 14 December 1960, 2066 (XX) of 16 December 1965, 2232 (XXI) of 20 December 1966 and 2357 (XXII) of 19 December 1967?;
(b) What are the consequences under international law, including obligations reflected in the above-mentioned resolutions, arising from the continued administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago, including with respect to the inability of Mauritius to implement a programme for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin?"
See also*:* Marko Milanovic, "ICJ Advisory Opinion Request on the Chagos Islands," *Blog of the European Journal of International Law*, 24 June 2017 (available at https://www.ejiltalk.org/icj-advisory-opinion-request-on-the-chagos-islands/) and Milena Sterio, "ICJ Advisory Opinion in the Chagos Archipelago Case: Self-Determination Re-Examined?," *Intlawgrrls*, 6 March 2019 (available at https://ilg2.org/2019/03/06/icj-advisory-opinion-in-the-chagos-archipelago-case-self-determination-re-examined/).

[211] Julia, Wagner "The Chagos Request and the Role of the Consent Principle in the ICJ's Advisory Jurisdiction, or: What to do when Opportunity Knocks," *Questions of International Law*, vol. 55 (2018), 177-180; *See* also Statement by Ambassador Matthew Rycroft, Permanent Representative to the United Nations, at the General Assembly Meeting, *to discuss request for an advisory opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965*, 22 June 2017.

[212] UN General Assembly resolution A/RES/71/292, *Request for an advisory opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965,* A/RES/71/292, 22 June 2017; On the formulation of the request, *see* also: Marko Milanovic, "ICJ Delivers Chagos Advisory Opinion, UK Loses Badly," *Blog of the European Journal of International Law*, 25 February 2019 (available at https://www.ejiltalk.org/icj-delivers-chagos-advisory-opinion-uk-loses-badly/).

[213]Milena Sterio, "ICJ Advisory Opinion in the Chagos Archipelago Case: Self-Determination Re-Examined?," *Intlawgrrls*, 6 March 2019 (available at https://ilg2.org/2019/03/06/icj-advisory-opinion-in-the-chagos-archipelago-case-self-determination-re-examined/).

[214] Shaw QC, *supra* note 195, 335; Aljaghoub, *supra* note 173, 116.

the nature of the answers it would provide. Thus, the framing of the question and the resolution submitted to the ICJ may have an impact on the subsequent proceeding, although the ICJ has refrained from openly referring to the preambles.[215] However, if a request for an advisory opinion has been submitted to the Court, and the Court decides to give an advisory opinion, states are still provided with an opportunity to present their legal interpretation of the question. The next section will therefore turn to the proceeding at the Court, to present how states have previously participated in advisory proceedings.

4.4 Proceedings at the Court

Contrary to contentious cases, there are, at least theoretically, no 'parties' in an advisory procedure, and the role of the participating states and international organisations is, or at least should be, limited to that of an *amicus curiae*.[216] The lack of parties is also one important factor contributing to the often made assertion that advisory proceedings are less controversial than contentious cases.[217] However, this assumption relies merely on the theoretical differences, and it seems premature to suggest that no state or international organisation perceives itself as a party in advisory proceedings. To suggest that Israel and Palestine, for example, did not feel like parties in a bilateral dispute in *the Wall* advisory proceeding and the UK and Mauritius in *the Chagos* advisory opinion might disregard the political reality.

It is stated in Article 66 of the ICJ Statute that organisations and states authorised to appear before the Court, may submit written or oral statements along with comments on the statements made by other states or organisations.[218] Participation in advisory proceedings is voluntary, and no account

[215] Shaw QC, *supra* note 195, 349.
[216] Malcolm N. Shaw QC, *Rosenne's Law and Practice of the International Court 1920-2015 Volume III,* 5th edition, 2016, 1742.
[217] Rüdiger Wolfrum, *Advisory Opinions: Are they a Suitable Alternative for the Settlement of International Disputes*, in: Rüdiger Wolfrum and Ina Gätzschmann (eds.), International Dispute Settlement: Room for Innovations?, 2013, 39-40.
[218] Article 66(2) reads: *The Registrar shall also, by means of a special and direct communication, notify any state entitled to appear before the Court or international organization considered by the Court, or, should it not be sitting, by the President, as likely to be able to furnish information on the question, that the Court will be prepared to receive, within a time-limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question."*
Article 66(4) reads: *"States and organizations having presented written or oral statements, or both shall be permitted to comment on the statements made by other states or organizations in the form, to the extent, and within the time-limits which the Court, or, should it not be sitting, the President, shall decide in each particular case. Accordingly, the Registrar shall in due time communicate any such written statements to states and organizations having submitted similar statements.".*

can, therefore, be taken, if a state has not informed the Court on its position on the question at hand.[219]

Another principal difference between contentious and advisory procedures, at least theoretically, is the assumption that the requesting organ and states merely assist the Court in reaching a well-founded opinion on the subject matter, and the submission of evidence and arguments is not a means to convince the Court of their respective claim, as in contentious proceedings.[220]

In reality, the difference between contentious and advisory proceedings may be less clear than suggested by the above; states may have self-interests for seeking a specific outcome, and the requesting organisation may also have a preferred opinion aligned with a particular standpoint.[221] This may also explain the high number of participating states in these advisory proceedings who have submitted written statements.[222] If a state or international organisation is able to submit convincing legal evidence, it may very well have an impact on the opinion of the Court, if the legal evidence reflect prevailing rules of international law directly connected to the request and indispensable for the proper interpretation hereof.[223]

In *the Kosovo* advisory proceeding, Denmark submitted a written statement, in which they underlined that the final status of Kosovo preferably should have been settled through a negotiated agreement reached between the parties concerned instead of seeking an advisory opinion.[224] In the written statement Denmark maintained that no general prohibition exists in international law against declarations of independence, and concluded additionally that: "*An opinion of the Court calling into question the status of Kosovo as an independent State could have a detrimental effect on peace and security in Kosovo and the region as a whole"*.[225]

This statement not only shows how it is possible to provide legal viewpoints from a state but also reflects the previous point on the different argumentation for not wanting an advisory opinion on certain politically sensitive matters.

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[219] Shaw QC, *supra* note 216, 1742.
[220] Advisory opinions are based upon the procedural principle *jura novit curia*, which means that 'the Court knows the law'; Thirlway, *supra* note 194, 115.
[221] Thirlway, *supra* note 194, 115.
[222] There was, for example, altogether 52 states that participated in the written proceeding for *the Kosovo* advisory opinon. For a complete list over written statements, *see*: https://www.icj-cij.org/en/case/141/written-proceedings
[223] *Western Sahara,* Advisory Opinion, International Court of Justice, 16 October 1975, para. 52.
[224] Written Statement by the Government of Denmark, *Request for an Advisory Opinion, Accordance with International Law of the Unliteral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo,* 17 April 2009 (available at https://www.icj-cij.org/files/case-related/141/15664.pdf), 1.
[225]Written Statement by the Government of Denmark, *Request for an Advisory Opinion, Accordance with International Law of the Unliteral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo,* 17 April 2009 (available at https://www.icj-cij.org/files/case-related/141/15664.pdf), 3.

In comparison, Serbia found in their 372 pages written statement that the declaration of independence was not in accordance with international law.[226] Furthermore, Serbia asserted the competence of the ICJ to give an advisory opinion and was, according to the statement, not able to find any compelling reasons for the Court to refuse to render such an opinion. Instead of expressing political considerations, Serbia relied on the need for legal clarity that could be brought forward by an advisory opinion.[227]

Based on previous written statements, the intervening party may not only provide factual evidence on the subject matter but eventually comment on the scope of the question**,** which has been brought forward time and time again - especially about what should not be advised on. These expressed 'pitfalls' emphasise the political nature of some of the advisory requests, and therefore has the Court been encouraged in many of these advisory proceedings to avoid addressing certain aspects of the subject matter. In its written statement in *the Kosovo* advisory opinion, Denmark used the opportunity to express its views on the scope of the question ("*Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?")*. The Court was made aware of the specific and narrow character of the question submitted, and Denmark encouraged the Court to refrain from providing an opinion outside the scope of the question.[228]

This relates to the ICJ's discretionary powers, that not only cover the request *in toto*, but eventually also the scope of the question, and whether there should be any part hereof the Court will refrain from answering.[229] In the Kosovo advisory opinion, the Court adopted a narrow reading of the question and expressed that:

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[226] Written Statement by Serbia, *Accordance with international law of the unilateral declaration of independence by the provisional institutions of self-government of Kosovo*, 17 April 2009, para. 941.

[227] Written Statement by Serbia, *Accordance with international law of the unilateral declaration of independence by the provisional institutions of self-government of Kosovo*, 17 April 2009, para. 47.

[228] In the written statement, Denmark expressed the following:
"*The Danish Government does not doubt that the Court will be acutely aware of the specific and narrow character of this question. At the same time, the Danish Government deems it important to underline that the question before the Court concerns only the conformity of Kosovo's declaration of independence of international law. The crucial date is 17 February 2008. It would be going beyond the request, and the particular diplomatic context leading to its adoption, were the Court to respond to other questions such as Kosovo's statehood, the legality of recognitions and non-recognitions by third States, or any future negotiations between Kosovo and Serbia. In particular, it is to be noted that the Court has not been asked to advise on the consequences ensuing from its findings regarding the question put before it. This is an issue which the General Assembly and the Member States of the United Nations have expressly reserved for the political process within the UN and beyond. The creation of a new State is the result of a predominantly political process possibly spanning over many years. It would not be helpful to Kosovo and Serbia, the UN or other interested parties, nor to the Court itself, if the Court were to enter into such unchartered waters in an attempt to contribute to the political mapping."*
Written Statement by the Government of Denmark, *Request for an Advisory Opinion, Accordance with International Law of the Unliteral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo,* 17 April 2009 (available at https://www.icj-cij.org/files/case-related/141/15664.pdf), 2-3.

[229] Wolfrum, *supra* note 217, 13.

"The question posed by the General Assembly is clearly formulated. The question is narrow and specific; it asks for the Court's opinion on whether or not the declaration of independence is in accordance with international law. It does not ask about the legal consequences of that declaration. In particular, it does not ask whether or not Kosovo has achieved statehood. Nor does it ask about the validity or legal effects of the recognition of Kosovo by those States which have recognized it as an independent State."[230]

The narrow interpretation by the Court and the avoidance of Kosovo's statehood highlight the attention given to the political situation. Possibly, the many written statements along the line of the Danish position, have been a decisive factor for the Court's narrow interpretation of the question.[231] Whereas the Court is seemingly reluctant to decline a request for an opinion, the determination of the scope of the questions shows that the Court uses its discretionary powers in a flexible manner.[232] This proves how nothing in the advisory procedure is 'freezing' the question after it has been forwarded to the Court from a duly authorised organ, as in contentious cases.[233]
The ICJ discretionary powers thereby constitute a somewhat flexible mechanism and provide the Court with greater room for manoeuvre than in contentious proceedings. The flexibility to interpret the scope of the question, can ultimately constitute concerns for both states and international organisations based on the uncertainty on the outcome, cf. the UK's statement.

From this section it has been established that not only is there a possibility for states and international organisations to participate in the advisory proceeding, but that it is custom, at least in these "politically controversial" advisory proceedings, to do so. The opportunity implies that participants can draw attention not only to relevant factual findings but also to the scope of the advisory request. Having examined the perceived importance of the question, and the custom of states to participate at the advisory proceeding, the next section will examine the reception and impact of the previous advisory opinions.

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[230] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo,* Advisory Opinion, International Court of Justice, 22 July 2010, para. 51.
[231] *See* also: Written Statement by Switzerland, Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Govemment of Kosovo, 25 May 2009; Written statement by Ireland, Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Govemment of Kosovo, 17 April 2009, 1-3, Written Statement by France, Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Govemment of Kosovo, 7 April 2009, 25.
[232] In another advisory opinion concerning the *Interpretation of the Agreement of 25 March of 1951 between the WHO and Egypt* the ICJ nearly rewrote the entire question, in order for the Court to identify "*the true legal question under consideration in the World Health Assembly".*Hugh Thirlway, "The International Court of Justice 1989-2009: At the Heart of the Dispute Settlement System?," *Netherlands International Law Review* (2010), 378;
[233] Shaw QC, *supra* note 216, 1733.

4.5 Outcome and Reception

Bearing in mind the non-binding nature of advisory opinions - despite under rare circumstances where decisions on compulsory jurisdiction have been made beforehand - it is of interest to examine what kind of impact the advisory opinions on "politically controversial matters" have on international law and state behaviour. Before turning to the reception in the GA, the chapter will begin by looking briefly at the outcome of some of the advisory opinions.
Firstly, it appears from *the Kosovo* advisory opinion that the ICJ avoided some of the more controversial subjects, in line with the proposition in the Danish statement. The Court concluded that Kosovo's adoption of the declaration of independence did not violate any applicable rule of international law.[234] Whereas this was seen as a political success for many states, which had opposed the advisory opinion, Serbia found that the main issues arising from the declaration of independence remained unanswered.[235] On one hand, *the Kosovo* advisory opinion can be perceived as a responsible response by the Court in paying attention to the political context. On the other hand, you may question its usefulness. The minimalist approach by the ICJ could be seen as a missed opportunity for providing legal clarification on questions related to the right to statehood and secession.[236] The minimalist approach endorsed by the Court, might ultimately reflect a trade-off between legal clarification and peaceful settlements of international disputes.[237] The reason why the ICJ shielded away from addressing the substance of the question might be a reaction to the many interventions by states, which stressed the scope of the question in their statements.[238]

In *the Wall* advisory opinion, the Court concluded that the construction of the wall was contrary to international law.[239] This opinion has been criticised for the sparseness of the Court's reasoning throughout the opinion. As formulated by ICJ Judge Higgins in her separate opinion:

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[234] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, International Court of Justice, 22 July 2010, para. 122.
[235] UN News, "Adopting Consensus Resolution, General Assembly Acknowledges World Court Opinion on Kosovo, Welcomes European Union Readiness to Facilitate Process of Dialogue," *UN News*, 9 September 2010 (available at https://www.un.org/press/en/2010/ga10980.doc.htm); Christian Walter, *The Kosovo Advisory Opinion*, in Christian, Walter, Antje von Ungern-Sternberg, and Abushov, Kavus, (eds.), Self-Determination and Secession in International Law, 2014, 16-18.
[236] Astrid Kjeldgaard-Pedersen, "Kosovo-sagen: Blev vi overhovedet klogere?," *Information*, 2 August 2010 (available at https://www.information.dk/debat/2010/08/kosovo-sagen-overhovedet-klogere?lst_cntrb).
[237] Christian Walter, *The Kosovo Advisory Opinion*, in Christian, Walter, Antje von Ungern-Sternberg, and Abushov, Kavus, (eds.), Self-Determination and Secession in International Law, 2014, 25-26.
[238] *See* note 230 and 233 above.
[239] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, advisory opinion, International Court of Justice, 9 July 2004, para. 163.

"It might have been expected that an advisory opinion would have contained a detailed analysis, by reference to the texts, the voluminous academic literature and the facts at the Court's disposal (...) Such an approach would have followed the tradition of using advisory opinions as an opportunity to elaborate and develop international law."[240]

What seems important in this context is the exclusive reliance on GA and SC resolutions, not binding under Chapter VII, in support of the Court's conclusion on the illegality of the settlement, despite, allegedly, plenty of other sources on the subject matter.[241]
Finally, in *the Chagos* advisory opinion, the ICJ concluded:

"*The process of decolonization of Mauritius was not lawfully completed when that country acceded to independence in 1968, following the separation of the Chagos Archipelago (...) the United Kingdom is under an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possible."*[242]

Worth mentioning is how the ICJ came to this conclusion; the key findings of the Court occupy less than ten pages, which seems particularly underwhelming compared to its strong findings on customary international law; the Court relied on the GA resolution 1504(XV) as conclusive evidence for self-determination under customary international law in 1965. The ICJ did not support their findings by state practice or *opinio juris* but ascribed a normative character to the said resolution with respect to self-determination.[243]
Albeit further analysis of each advisory opinion could be useful, this short examination shows that the substance can be criticised for not being thorough enough in its elaborations. In particular, the Court has found strong evidence on customary international law, though with reference to only limited sources. [244]

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[240] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, advisory opinion, International Court of Justice, 9 July 2004, para. 23.
[241] Walter, *supra* note 235, 23.
[242] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, International Court of Justice, 25 February 2019, paras. 175, 178.
[243] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, International Court of Justice, 25 February 2019, para. 153; Marko Milanovic, "ICJ Delivers Chagos Advisory Opinion, UK Loses Badly," *Blog of the European Journal of International Law*, 25 February 2019 (available at https://www.ejiltalk.org/icj-delivers-chagos-advisory-opinion-uk-loses-badly/).
[244] Dov Jacobs, "ICJ Chagos Advisory Opinion: UK asked to end its administration of the islands but the colonizer still wins…" *Spreading the Jam,* 26 February 2019 (available at https://dovjacobs.com/2019/02/26/icj-chagos-advisory-opinion-uk-asked-to-end-its-administration-of-the-islands-but-the-colonizer-still-wins/) Milena Sterio, "ICJ Advisory Opinion in the Chagos Archipelago Case: Self-Determination Re-Examined," *Intlawgrrls*, 6 March 2019 (available at https://ilg2.org/2019/03/06/icj-advisory-opinion-in-the-chagos-archipelago-case-self-determination-re-examined/).

The issuance of the advisory opinions has been followed by a response in the GA and, in some of the cases, a vote on resolutions for compliance with the legal findings of the opinions.[245] Based on the voting pattern following the issuance of the concerned advisory opinions, it seems as if they do have some effect among UN member states; following *the Chagos* advisory opinion, a resolution calling for Mauritius' complete decolonisation was recently adopted in the GA, wherein the UK is demanded to unconditionally withdraw its colonial administration from the area within six months.[246] The resolution was adopted by a recorded vote of 116 in favour to 6 with 56 abstentions; described as a "crushing defeat" for the UK.[247] The voting shows that there were fewer abstentions and votes against this resolution than was the case in the vote for the advisory request.[248] The authority of an advisory opinion might be reflected herein, and the opinions coming from a Court with a high judicial esteem may have a justifying effect for actions taken in conformity with the advisory opinion.[249]

The Wall advisory opinion is another example of how the majority of the UN member states voted in favour of Israel's compliance with the advisory opinion and demanded Israel "*to halt construction on its security barrier in the West Bank, tear down the portions built on Palestinian land, and provide reparations to Palestinians whose lives have been harmed by the wall".*[250] Whereas there was also a majority when the request was adopted, the following resolution for compliance had fewer abstentions and votes against, like *the Chagos* advisory opinion. Denmark was one of the states that abstained in the vote on an advisory request but subsequently voted in favour of the compliance by Israel. The Netherlands, speaking on behalf of the European Union, acknowledged the advisory opinion and voted in favour of the text in the spirit of consensus. There

[245] In the case of Kosovo, the GA adopted a resolution to welcome readiness to facilitate dialogue between Serbia and Kosovo. UN News, "Adopting Consensus Resolution, General Assembly Acknowledges World Court Opinion on Kosovo, Welcomes European Union Readiness to Facilitate Process of Dialogue," *UN News*, 9 September 2010 (available at https://www.un.org/press/en/2010/ga10980.doc.htm).

[246] UN News, "General Assembly Adopts Welcomes international Court of Justice Opinion on Chagos Archipelago, Adopts Text Calling for Mauritius' Complete Decolonization, *UN News,* 22 May 2019 (available at https://www.un.org/press/en/2019/ga12146.doc.htm).

[247] Marko Milanovic, "ICJ Delivers Chagos Advisory Opinion, UK Loses Badly," *Blog of the European Journal of International Law*, 25 February 2019 (available at https://www.ejiltalk.org/icj-delivers-chagos-advisory-opinion-uk-loses-badly/).

[248] The Draft resolution for the Chagos advisory request, A/71/L.73, was adopted by 94 votes to 15, with 65 abstentions (resolution 71/292).

[249] Mayr and Mayr-Singer, *supra* note 171, 430; *see:* d'Argent, *Advisory Opinions*, in Andreas Zimmerman and Christian J. Tams (eds.), The Statute of the International Court of Justice a Commentary, 3rd edition, 2019, 1624.

[250] UN News, "General Assembly Emergency Session Overwhelmingly Demands Israel's Compliance with International Court of Justice Advisory Opinion," *UN News*, 20 July 2004 (available at https://www.un.org/press/en/2004/ga10248.doc.htm).

was, however, disagreement with some of the elements of the advisory opinion.[251] The statement on behalf of the European Union shows that concerns over the advisory opinion were not dissolved, but that the voting reflected the position of the majority and that concerns over the substance of the findings were not sufficient to abstain or vote against the call for Israel's compliance.
If the non-binding advisory opinions were not considered to be of neither legal weight nor authority, it could also be argued that less resistance would arise than seen in the presented advisory proceedings, and it has even been argued that advisory opinions may play a more important role in international relations than judgement, because: *"The persuasive nature of advice is often superior to force and coercion."*[252] In order to support this assumption, the reception of "parties" directly affected should be discussed.

Whether the UK will comply with the GA's demand following *the Chagos* opinion remains to be seen.[253] The UK's attempt to oppose an advisory opinion on what they perceive to be a bilateral dispute and their insistence that the opinion is non-binding and "*in no way a legal ruling that decided on the dispute"*[254] indicates that they will be reluctant to comply, insofar the pressure from the GA majority can be resisted. The UK has continuously stated that the bilateral nature of the dispute requires their consent for a judicial process to be initiated at the ICJ.[255]
After the issuance of *the Kosovo* advisory opinion the then Foreign Minister of Serbia, Vuk Jeremic, stated: "*The Republic of Serbia does not an shall not recognize the unilateral declaration of independence of Kosovo."*[256] This statement highlights the difficulty in making progress by advisory opinions on issues, that are deeply politically rooted. Immediately after the issuance of the

[251] United Nations, "General Assembly Emergency Session Overwhelmingly Demands Israel's Compliance With International Court of Justice Advisory Opinion," *United Nations Meeting Coverage and Press Releases*, GA/10248, 20 July 2004 (available at https://www.un.org/press/en/2004/ga10248.doc.htm).
[252] Mayr and Mayr-Singer, *supra* note 171, 430; Manfred Lachs, "Some Reflections on the Contribution of the International Court of Justice to the Development of International Law," *Syracuse Journal of International Law and Commerce*, vol. 10, no. 2 (1983), 249.
[253]Sterio, Milena, "ICJ Advisory Opinion in the Chagos Archipelago Case: Self-Determination Re-Examined?," *INTLAWGRRLS,* 6 March 2019 (available at https://ilg2.org/2019/03/06/icj-advisory-opinion-in-the-chagos-archipelago-case-self-determination-re-examined/).
[254]Aljezeera, "Britain Loses UN Vote over Chagos Islands," *Aljezeera*, 22 May 2019 (available at https://www.aljazeera.com/news/2019/05/britain-loses-vote-chagos-islands-190522160820797.html).
[255] Statement by Ambassador Matthew Rycroft, Permanent Representative to the United Nations, at the General Assembly Meeting, *to discuss request for an advisory opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965*, 22 June 2017.
[256] UN News, "Adopting Consensus Resolution, General Assembly Acknowledges World Court Opinion on Kosovo, Welcomes European Union Readiness to Facilitate Process of Dialogue," *UN News*, 9 September 2010 (available at https://www.un.org/press/en/2010/ga10980.doc.htm).

opinion, Serbia also presented a draft resolution declaring "*That unilateral secession cannot be an acceptable way for resolving territorial issues."*[257]

The statement by Serbia also raises questions of whether advisory opinions on "politically controversial matters" are likely to be resolved by a legal opinion, when the problem to a large if not predominant extent, is political. The relationship between Kosovo and Serbia is still constrained, and Serbia still refuses to recognise Kosovo.[258] It has however been frequently asserted, that the advisory opinion helped the settlement of the Kosovo conflict, because it politically facilitated the acceptance of diplomatic independence, and has thereby had a positive effect.[259] The positive effect between the main stakeholders is, however, less obvious.

The Wall advisory opinion is another example on the unwillingness to accept the non-binding opinion as determinative for state practice. Israel has continued the settlement project in the West Bank and has claimed: "*We should not be so quick to treat advisory opinions as if they were binding and Palestinian obligations were voluntary."* Furthermore, Israel asserted that they would "*reject wholeheartedly the attempts to use the law as a political weapon as if it applied to Israel and no one else."*[260] The latter statement raises an important point, as it emphasises that the issue of the interrelationship between law and politics resurfaces in terms of implementation in the cases of politically sensitive matters.[261] It also goes back to the lack of consent in these opinions, which seem to pose an obstacle for actual compliance with the legal findings of the Court.[262]

It could be argued, that the moral and legal weight of advisory opinions in connection with pressure from the GA could lead to compliance, but scarce state practice from the examined advisory opinions support this.[263] From these cases, the persuasive nature of advice is questionable, and the usefulness for the actual conflict is easy to overlook. Be that as it may, the legal clarification may in

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[257]UN News, "Adopting Consensus Resolution, General Assembly Acknowledges World Court Opinion on Kosovo, Welcomes European Union Readiness to Facilitate Process of Dialogue," *UN News*, 9 September 2010 (available at https://www.un.org/press/en/2010/ga10980.doc.htm).

[258] Ibid.

[259] Christian Walter, *The Kosovo Advisory Opinion, What It Says and What It Does Not Say*, In: Christian Walter, Antje von Ungern-Sternberg, and Kavus Abushov (eds.), Self-Determination and Secession in International Law, 2014, 15.

[260] UN News, "General Assembly Emergency Session Overwhelmingly Demands Israel's Compliance with International Court of Justice Advisory Opinion," *UN News*, 20 July 2004 (available at https://www.un.org/press/en/2004/ga10248.doc.htm)

[261] Shaw QC, *supra* note 216, 1766,

[262] *Western Sahara,* Advisory Opinion, International Court of Justice, 16 October 1975, paras. 22-23; Dapo Akande, "Can the International Court of Justice Decide on the Chagos Islands Advisory Proceedings without the UK's Consent?" (available at https://www.ejiltalk.org/can-the-international-court-of-justice-decide-on-the-chagos-islands-advisory-proceedings-without-the-uks-consent/).

[263] Barbara Surk, "Push for Deal Between Kosovo and Serbia Puts National Divisions on Display," *New York Times*, 29 April 2019 (available at https://www.nytimes.com/2019/04/29/world/europe/kosovo-serbia.html).
https://www.armscontrol.org/ACT/2016_07/Features/Looking-Back-The-1996-Advisory-Opinion-of-the-International-Court-of-Justice).

itself be valuable, and it can be argued, that advisory opinions on for example territorial integrity and decolonisation may have a normative impact on the international community more broadly. The opinion coming from the principal judicial organ of the UN combined with the pressure stemming from the reception of the GA majority may subsequently influence the norms and perception governing the international community henceforth.[264]

The question remains, however, whether the ICJ should refrain from rendering advisory opinions, when the request is related to apparent contentious disputes, with small prospects for compliance. The prospects for compliance and usefulness may eventually also be a question for consideration in relation to a potential advisory opinion on head of state immunity.

4.6 What to Expect?

This chapter has presented the advisory function of the ICJ and has demonstrated how the GA and the Court have handled previous advisory proceedings. The focus has been on the advisory proceedings that, for analytical purposes, have been categorised "politically controversial" as these presumably provide for a better comparison with a potential advisory opinion on head of states immunities. It has been seen that neither political aspects nor political incentives for seeking an advisory opinion constitute a bar for the Court to render an advisory opinion, as long as the question encompasses legal aspects. The analysis has further pointed to the problem of the Courts seemingly blinkered approach of accepting advisory requests without taking into consideration the political process in which it was adopted.

The approach of the Court has been divergent, but the *Kosovo* advisory opinion indicates that the Court does not adopt a rigid approach in terms of interpretation of the scope of the question. In this regard, the formulation, as well as subsequent statements on the scope, seems to have been decisive for what the ICJ chose (not) to address. Whereas the impact of advisory opinions is generally disputed in the literature, this analysis has shown that advisory opinions have had an effect based on the reception of the GA majority, i.e. with resolutions for compliance or acknowledgement of the opinion as a steppingstone for the facilitation of dialogue. However, based on the examined advisory opinions, the effect in practice has been less impressive; a consequence of the lack of consent and the non-binding nature. Political self-interests pose an obstacle and state practice suggests, that when these interests are at stake, the state involved is not inclined to comply with the

[264] Kushtrim Istrefi, Limitations of the ICJ Opinion on Kosovo, *Jurist*, 12 August 2010 (available at https://www.jurist.org/commentary/2010/08/limitations-of-the-icj-opinion-on-kosovo/).

advisory opinion. In summary, advisory opinions on "politically controversial matters" may not make progress on the underlying conflict, but they appear to have a legal value. The problem is that advisory opinions may be an exercise in political confrontation, why it could be argued that the Court should not adopt a blinkered approach but rather consider the underlying political dispute more carefully. The discretionary powers exist for a reason and should there be prospects of an intensified political conflict following the advisory opinion, these may very well constitute "compelling reasons" for refusing to give an advisory opinion. In the same way, it should be stressed that it ultimately lies in the hands of the requesting organ to consider the usefulness of an advisory opinion and whether the advisory opinion will provide any practical assistance to the GA, as the requesting organ should give such future advisory opinions and their usefulness for the concrete conflict more attention. The limited effect of these advisory opinions does not necessarily deprive advisory opinions of their potential as an instrument of preventive diplomacy or clarification and development of international law; aspects that can strengthen the international law system governing the conduct of states in a broader framework.

All of these perspectives are thereby something to be considered in relation to a potential advisory opinion on head of state immunity.
This chapter has provided a foundation for a better understanding of the advisory function, what it requires and the aspects with which they can contribute. What remains open after also having examined the legal roots of the dispute in the *al-Bashir* case, is an analysis of the issues and challenges arising from a potential advisory opinion on head of state immunity.

Chapter V: An ICJ Advisory Opinion on Head of State Immunity

Having dealt with ICC's decisions on head of state immunities and previous advisory proceedings, it is now time to combine these analyses from the preceding chapters to conduct the final analysis of the legal and political issues arising from a potential advisory opinion on head of state immunity. This chapter examines the need for legal determination, building on chapter III, balanced against the legal as well as the potential political implications. The challenges and issues are analysed with chapter IV in mind, together with the political context of the ICC.
The analysis leads up to a discussion at the end of the chapter, on the implications of a potential advisory opinion in a broader perspective of the ICC as an institution and the criminal justice system.

Based on the analysis in Chapter III, it is clear that outstanding legal questions are stemming from the *al-Bashir* case, which the Appeals Chamber has been unable to clarify sufficiently in the 6th of May 2019 judgement. The appeal judgement, despite combining previous decisions, has left the impression that ICC has been unable to streamline its legal reasoning sufficiently, and the immunity debate is therefore far from over but in severe need of finality.
In that light, an advisory opinion may constitute a possible route to make progress on this contentious issue. Legal clarification has been sought for a long time, and despite not being the purpose of the advisory function, an advisory opinion on head of state immunity can be a tool of dispute settlement, if the necessary clarity is provided on the legal obligations for arrest and surrender of a third state president. An advisory request could thus reflect a negotiated engagement between the AU and the ICC by taking recourse to available international justice mechanisms. It signals a hope for the ICJ to clarify the obligations under international law as well as drawing a line under the immunity debate.

The question is, however, whether ICJ is the right forum for seeking finality, as the ICC has competence to interpret their Statute, allowing for an advisory opinion to also be seen as an undermining process for the ICC, with an opinion on ICC's jurisprudence coming from a third judicial institution. However, it is not only the AU that has suggested an advisory opinion as a possible route; in his separate opinion in the South African case, ICC Judge Brichambaut found that it would be an

appropriate course of action to request for an advisory opinion on some of the outstanding legal questions.[265]

At this point it should, however, be emphasised that the ICC has the power to determine any dispute concerning the judicial function of the court by virtue of Article 119(1) of the Rome Statute.[266] Whereas Article 119 is a product of negotiation between those who wanted an independent Court, and those who wanted the Court to act within a broader framework of dispute settlement, Article 119(1) expresses that ICC is the "mater of its own house" and thereby reflects the principle of competence-competence. Furthermore, the dispute can involve more than two parties, and it is possible that it is not a dispute between states, but could be, as in this case, a dispute between states and an organ of the Court.[267] Furthermore, Article 119(2) creates a flexible mechanism to handle disputes between two or more states, but the Article is applicable when the Court cannot settle the matter in pursuance of Article 119(1), and such a dispute shall hereinafter be referred to the ASP. The ASP then has the possibility to settle the dispute themselves or recommend further means of settlement, for example, through a referral to the ICJ.

What should be emphasised from the above, is that the ICC has the power to at least try to settle the dispute themselves, and that the ASP in this regard could play an essential role.

The question is whether it is possible for the Court or the ASP to draw a line under the dispute, or if the situation has become too challenging to be solved internally.

An advisory opinion on head of state immunity could thereby constitute a possible avenue but at the same time a conundrum. With the need for legal clarity on one hand and the integrity and independence of the ICC on the other, the question arises whether a referral of the dispute to another judicial institution will come at the expense of another strike against the ICC who is already on its knees. The scarce literature on the subject emphasises the need for an elaborate assessment of the potential course of action, and the potentials of an advisory opinion should therefore be weighed

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[265] *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Minority Opinion of Judge Marc Perrin De Brichambaut, ICC-02/05-01/09-302, 16 July 2017, para. 97. Judge Brichambaut's mentioning of an advisory opinion was also mentioned in the AU request; UN General Assembly, *Request for an advisory opinion of the International Court of Justice on the consequences of legal obligations of States under different sources of international law with respect to immunities of Heads of State and Government and other senior officials,* UN Doc. A/73/144, 18 July 2018, para 6.

[266] Article 119 of the Rome Statute on settlement of disputes reads: *"1. Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court. 2. Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court."*

[267] Timothy O'Neill, "Dispute Settlement under the Rome Statute of the International Criminal Court: Article 119 and the Possible Role of the International Court of Justice," *Chinese Journal of International Law*, vol. 5, no. 1 (2006), 70.

against the challenges and issues that may arise thereof. This final chapter will therefore provide an analysis of the legal and political challenges and issues that can arise from an advisory proceeding on head of states immunities.

5.1 Preliminary Challenges for Initiating an Advisory Process

At the outset, it should be recalled from the introduction that the prospect for an advisory opinion depends on whether a resolution will be adopted at the GA**.**

The adoption of the AU request during the 73rd GA in September 2018 did not meet any rejections, but the adoption was, however, not equivalent to an acceptance of submission of a request to the ICJ, but merely an acceptance to formally discussing an advisory opinion on head of states immunities in the GA.[268] At the time of writing, the official deliberations have not started yet, which presumably indicate a postponement until after the ICC appeal judgement.[269] As the judgement has now been issued, the discussions in the GA can thus be expected to begin soon. The findings on customary international law in the appeal judgement may be another indication that the agenda item will be pushed forward by the AU soon. However, to submit a request to the ICJ, the advocates will have to gain the necessary support from other UN member states. Based on Chapter IV, it is not clear from the GA's practice whether a request for an advisory opinion on head of states immunity falls within the category "important questions" or "other questions," cf. Article 18 of the UN Charter. It is thereby not evident whether a passing vote will require a two-thirds majority, or a simple majority of the members present and voting, but based on the examined advisory opinions, there is sufficient reason to expect that an advisory request on head of state immunity will only require a simple majority. Whether it is possible to achieve the required number of votes remains to be seen, but there could be a justified feeling by some ICC member states that it is opportune to seek an opinion based on the longstanding discussion over indictments of head of states in combination with the divergent legal reasoning in the *al-Bashir* case.[270] Nevertheless, based on previous statements in the ASP general debate, there could also be, a feeling among other ICC member states that the political climate require renewed support for the ICC and therefore will stand by ICC's decisions.[271] Furthermore, it might

[268] UN General Assembly, *Organization of the seventy-third regular session of the General Assembly, adoption of the agenda and allocation of items*, UN Doc. A/73/250, 19 September 2018, 97.
[269] The view that deliberations will begin after the appeal was supported by both interviewees.
[270] This is the authors own assumption, as no member state, beside the African states, has apparently expressed direct support for an advisory opinion yet.
[271] *See* e.g.: Statement by Sweden, *At the General Debate 17th Session of the Assembly of States Parties to the Rome Statute*, 5 December 2018; Statement by the Netherlands, *At the General Debate 17th Session of the Assembly of States Parties to the Rome Statute*, 5 December 2018; Statement by Norway; *At the General Debate 17th Session of the*

also be excepted that support for an advisory request can be found among non-member states, since the PTC I, and the Appeals Chamber's finding on customary international law implies that the ICC has a claim to jurisdiction over nationals of states that have not consented to its authority.[272]

If indeed the AU can pass the vote, the ICJ will hereinafter have to decide whether they have jurisdiction *ratione personae* and competence *ratione materiae*. Provided that the request comes from the GA, an authorised organ, the ICJ has jurisdiction *ratione personae*.[273] The remaining question thus concerns whether the ICJ has the actual competence to render an advisory opinion on the subject matter. If there are apparent political aspects of the question submitted, or even a political motivation behind the request, the previous practice of ICJ suggests that it would not constitute a bar for the Court in rendering its advisory opinion, and thereby deemed within the ICJ's competence *ratione materiae*.[274] Compared to previous advisory requests, it could be expected that ICJ will adopt a similar position as in, for example, *the Kosovo-*, *the Wall-,* and the *Nuclear Weapons* advisory opinions, where they referred to the legal nature of the questions. As described previously, this master thesis prevails on the assumption that immunities of head of states are not merely a legal but also a political subject reflecting the political concerns over international relations and the preservation of sovereignty between states. The same applies in the *al-Bashir* case, which has been reflected in the political arguments against the arrest warrants and the alleged meddling in domestic affairs, as the AU stated: *"Notes with great concern the unfortunate consequences that the indictment has had on the delicate processes underway in the Sudan (...)."*[275] Be that as it may, the previous analysis

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Assembly of States Parties to the Rome Statute, 5 December 2018, Statement by Ireland, *At the General Debate 17th Session of the Assembly of States Parties to the Rome Statute*, 5 December 2018; Statement by Canada, *At the General Debate 17th Session of the Assembly of States Parties to the Rome Statute*, 5 December 2018; Statement by France, *UN Security Council, 8290th meeting,* UN Doc. S/PV.8290, 20 June 2019, 6.

It should also be noted, that a special segment on head of state immunity as requested by the AU was included in the 12th ASP. From the report it appears, that there has been a division between states on the subject matter. Some states emphasised that prosecutions cannot be allowed to jeopardise peace, while other states said that the integrity of the Rome Statute cannot be compromised, and the independence of the Court is paramount. *See*:

ICC Assembly of States Parties, *Special segment as requested by the African Union: Indictment of sitting Heads of State and Government and its consequences on peace and stability and reconciliation*, ICC-ASP/12/61, 27 November 2013; Coalition for the International Criminal Court, *Report on the 12th Session of the Assembly of States Parties to the Rome Statute*, 20-28 November 2013, 6-9 (available at http://www.iccnow.org/documents/asp12_report.pdf)

[272] The view that ICC shall have no jurisdiction over third states has been clearly expressed by, for example, United States, China and Russia: in relation to the *al-Bashir* case, *see:* Permanent Mission of the Russian Federation to the United Nations*, Statement by Mr.Gennady Kuzmin, Deputy Permanent Representative of the Russian Federation to the United Nations, at the Security Council on on the Sudan and South Sudan*, 20 June 2018 (available at http://russiaun.ru/en/news/sud20062018); Statement by China: UN Security Council, *8290th meeting,* UN Doc. S/PV.8290, 20 June 2019, 8-9; Statement by United States: UN Security Council, *8290th meeting,* UN Doc. S/PV.8290, 20 June 2019, 12-14.

[273] Cf. UN Charter Article 96(1).

[274] Aljaghoub, *supra* note 173, 57.

[275] Assembly of the African Union, *Decision on the meeting of African State Parties to the Rome Statute of the International Criminal Court*, AU Doc Assembly/AU/13(XIII), 3 July 2009, para. 3; Alexander Skander Galand, "Guest Post: Is the International Criminal Court in Need of Support to Clarify the Status of Heads of States' Immunities?," *Opinio Juris*, 11 September 2015 (available at http://opiniojuris.org/2015/09/11/guest-post-is-the-

showed, that political motivation or political implications will not constitute sufficient reasons for the Court to refuse to give the advisory opinion, as long as there is still a legal element.[276]

Even though the previous practice suggests that the ICJ will deem a request on head of state immunity within its jurisdiction *ratione personae* and competence *ratione materiae*, the question still stands, whether ICJ could be inclined to use its discretion in this particular case. Bearing in mind the lack of precedents of the Court using its discretionary powers, even on what has been termed "politically controversial matters," it appears unlikely that the ICJ will use its discretion for the first time in this case. It remains, however, to be seen whether the ICJ will find that there are unprecedented "compelling reasons" for not accepting the advisory request, based on the direct linkage to another independent court and the possible interpretation of its treaty-regime.[277]

It is, therefore, now time to turn to an analysis of the outstanding legal issues in the aftermath of the appeal judgement.

5.2 The Need for Legal Clarity

At the outset, the request submitted by the AU at the 73rd GA is comprehensive and eventually also covers a range of sub-questions. Based on the interviews, this request does not constitute the final question, and it is therefore still uncertain, how broad or narrow the final question will be.

From the explanatory memorandum, it follows that the AU's request is directly related to the obligations of the Rome Statute vis-à-vis the obligations arising from other sources of law.[278] The request may be interpreted as a question of the relationship and hierarchy between Article 27 and Article 98 of the Rome Statute. The analysis of Chapter III supports the need for clarification on the invocation of Article 98, which has remained one of the most disputed issues in the *al-Bashir* case. The question not only relates to the invocation of Article 98 in general, but also in relation to the

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international-criminal-court-in-need-of-support-to-clarify-the-status-of-heads-of-states-immunities/); Bosco, *supra* note 157, 170-173.

[276] *Legality of the Threat or use of Nuclear Weapons,* Advisory Opinion, International Court of Justice, 8 July 1996, para.13. In the same paragraph, the Court concluded that despite the political character, the question:
"does not suffice to deprive it of its character as a 'legal question' and 'to deprive the Court the competence expressly conferred on it by its Statute. In addition, the Court found that any political incentives for the request "are of no relevance in the establishment of its jurisdiction to give such an opinion.".

[277] Orina, Nabil M., "Should the ICJ Render an Advisory Opinion on the Immunity Question re Articles 27 & 98 of the Rome Statute?," *African Group of Experts on International Justice*, 24 March 2018 (available at https://www.icjafrica.com/single-post/2018/03/24/Should-the-ICJ-render-an-advisory-opinion-on-the-immunity-question-re-Articles-27-98-of-the-Rome-Statute); Mudukuti, Angela, "Immunity, Accountability and Politics – The AU's bid for an ICJ Advisory Opinion, *Groningen Journal of International Law*, 25 June 2018 (available at https://grojil.org/2018/06/25/immunity-accountability-and-politics-the-aus-bid-for-an-icj-advisory-opinion/).

[278] Cf. "*Request for an advisory opinion of the International Court of Justice on the consequences of legal obligations of states under different sources of international law with respect to immunities of Heads of State and Government and other senior officials"*

obligations of a state party to the Rome Statute when asked to arrest a head of state from a non-state party. In other words, a third state that has not accepted the treaty-regime.[279] To a large extent the debate has therefore, been based on whether any other obligations exist to take precedence over the obligations arising from the Rome Statute.

With regard to Article 98(2), it remains unclear what kind of international agreement that would constitute a bar from cooperation with the ICC. The Court has, for example, maintained that Article 98(2) do not apply to the 1953 Convention.[280] It is still not clear how the ICC reached this conclusion, and from a member states perspective, it is therefore interesting to clarify when exactly Article 98(2) may be invoked.

It is also unclear if there are any other obligations under international law that would be conflicting with the obligations to cooperate with the ICC, cf. Article 98(1), after the Appeals Chamber decided to reopen the debate on customary international law in its recent judgement. The interpretation has arguably resulted in the status of immunity *ratione personae* under customary international law once again requires clarification, which could have been avoided if the Appeals Chamber had not addressed the issue.[281] The judgement enhances the possibility that the advisory request will include the question of the status of immunity *ratione personae* under customary international law. From the ICC's perspective, this is not helpful as the opinion might both fall in line with the dominant position in international law but also with previous findings of the ICJ, cf. *the Arrest Warrant* case.[282] Even though the ICJ also found that incumbent Ministers of Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, including the ICC, nothing is stated in paragraph 61 of the said case which indicates that the ICJ deemed Article 27(2) applicable in relation to third states. Based on the findings in the *Arrest Warrant* case, there is ample reason to expect a similar finding in a forthcoming advisory opinion.[283] Such a finding by the ICJ, saying that Article

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[279] The question of Article 98 was highlighted as the main outstanding question in the interview Charles Jalloh, with respect to an advisory opinion.

[280] *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Judgement, ICC Appeals Chamber, ICC-02/05-01/09-397, 6 May 2019, para. 14.

[281] *"The Appeals Chamber has duly noted Jordan's complaint, registered during the hearing, that no question was certified as such by the Pre-Trial Chamber, as an issue on appeal.", The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Summary Judgement, Appeals Chamber, ICC-02/05-01/09, 6 May 2019, Para 35.

[282] In the *Arrest Warrant* case, the ICJ found: "*The Court has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation. It has been unable to deduce from this practice that there exists under customary international law, any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers of Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.", Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium),* Judgment, 14 February 2002, para. 58.

[283] *"Accordingly, the immunities enjoyed under International law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances. […] Fourthly, an 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*

27(2) does not reflect customary international law, would reflect poorly on ICC's jurisprudence and what was expected to be improved legal reasoning in the appeal judgement. The ICC's interpretation of customary international law is inarguably a thorn in the side of non-member states, as the interpretation implies that incumbent head of states of third states can be prosecuted at international courts without their consent.[284] Such legal reasoning may only increase the criticism of the Court by sceptics but can also increase the need for clarification from a member state's point of view. On this background, it can be expected that the appeal judgement will not only make the AU step up action for an advisory opinion but that the endeavour is likely to gain more support from member- as well as non-member states.

The above constitutes the more general outstanding questions of immunity *ratione personae* under the Rome Statute. According to the analysis in Chapter III, there is no exception to this principle under customary international law, and the immunity provision in Article 27(2) only covers states that have ratified the Rome Statute by virtue of the *pacta tertiis*-principle. The crucial legal question in the *al-Bashir* case thus is the significance of an SC referral acting under Chapter VII. As seen in Chapter III, the legal questions in this regard are twofold; on one hand the question of precision in the referrals in relation to a waiver of immunity, and on the other hand whether it is for the SC to waive immunity *ratione personae*. As seen in Chapter III, there are indications based on previous SC practice that it does not require an explicit reference, and that it is within the mandate of the SC to supersede norms of customary international law, including immunity *ratione personae*. The SC referral is the legal ground for the ICC issuance of requests for cooperation and the reason why member states have an obligation to arrest and surrender al-Bashir to the Hague. It follows that this is the legal issue in the *al-Bashir* case that is in urgent need of clarification.

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. The latter's Statute expressly provides, in Article 27, paragraph 2, that "[i]mmunties 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".
Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Judgment, 14 February 2002, para. 61.

[284] This view that the ICC should not have jurisdiction over non-state parties has, for example, been expressed by the United States, the Russian Federation and China: Permanent Mission of the Russian Federation to the United Nations, *Statement by Mr.Gennady Kuzmin, Deputy Permanent Representative of the Russian Federation to the United Nations, at the Security Council on on the Sudan and South Sudan*, 20 June 2018 (available at http://russiaun.ru/en/news/sud20062018); Bolton, John, "Speech Transcript: John Bolton on U.S. Policy Toward the International Criminal Court," *The Epoch Times*, 10 September 2018 (available at https://www.theepochtimes.com/speech-transcript-john-bolton-on-u-s-policy-toward-the-international-criminal-court_2656808.html); UN Security Council, *8290th meeting,* UN Doc. S/PV.8290, 20 June 2019, 9.

It has continuously been argued, that the ICC should have the final word on this matter. The Court did, however, not seize this opportunity, as the debatable appeal judgement has emphasised the need for yet another final word on the matter. Despite the maintenances of the bottom-line conclusion, namely that al-Bashir did not enjoy immunity *ratione personae* and that member states have an obligation to arrest and surrender him to the ICC, the legal reasoning has been neither sufficient nor streamlined. In addition, it has been argued, that the ICJ is better suited to provide a more holistic opinion on head of state immunity, and can potentially, address the whole range of arguments presented by the AU, rather than just the position of the ICC.[285] The question remains, however, whether the need for legal clarity should be placed before the appropriateness in giving an opinion on a question potentially addressing a specialised treaty of an independent court. Furthermore, based on Chapter IV, it is not given in advance, that an advisory opinion will render a carefully elaborated legal analysis, and therefore not a guarantee that the advisory opinion provides sufficient clarification on the subject. The clarity is, to a large extent, dependent on the formulation of the request, as seen in for example, *the Kosovo*- and *the Chagos* advisory opinions.

It has also been noted that an advisory opinion can become irrelevant, due to the *Arrest Warrant* case where the ICJ ruled on a similar matter.[286] Having examined the legal issues more carefully, it seems, however, that the ICJ could easily avoid a repetition of said case; the *Arrest Warrant* case neither addresses Article 98 of the Rome Statute and the obligations in relation to third states nor the impact of the SC referrals acting under Chapter VII.[287] It would, therefore, require a very general question from the GA and a hence similar vague opinion that does not address the heart of the legal issues from the *al-Bashir* case.

In summary, there are some outstanding legal issues, but the need for clarity by an advisory opinion may be dependent on how the issues and challenges in connection with such a proceeding are perceived. Therefore, it is time to consider some of the political aspects of a potential advisory proceeding.

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[285] Dapo Akande, "An International Court of Justice Advisory Opinion on the ICC Head of State Immunity Issue," *Blog of the European Journal of International Law*, 31 March 2016 (available at https://www.ejiltalk.org/an-international-court-of-justice-advisory-opinion-on-the-icc-head-of-state-immunity-issue/). *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Minority Opinion of Judge Marc Perrin De Brichambaut, ICC-02/05-01/09-302, 16 July 2017, para. 97.

[286] Nabil M Orina, "Should the ICJ Render an Advisory Opinion on the Immunity Question re Articles 27 & 98 of the Rome Statute?," *African Group of Experts on International Justice*, 24 March 2018 (available at https://www.icjafrica.com/single-post/2018/03/24/Should-the-ICJ-render-an-advisory-opinion-on-the-immunity-question-re-Articles-27-98-of-the-Rome-Statute);

[287] This viewpoint was supported by both interviewees.

5.3 The Incentive for an Advisory Opinion

Bearing the outstanding legal questions from the *al-Bashir* case in mind, an ICJ advisory opinion is arguably a way to have these questions answered by seeking an arbiter outside the ICC to ascertain whether competing claims regarding the law reside.[288] It has been argued that the AU's decision to seek an advisory opinion reflects negotiated engagement with the ICC, in order to reach finality and as a common effort to ensure a more solid judicial foundation for the ICC and thereby an improvement of the institution as a whole.[289]

This argument relates to the ethical considerations stemming from what was termed "creative legal reasoning" in Chapter III. As discussed, a dubious application of international law will not only tend to jeopardise the legitimacy of the ICC but also comes at the risk of undermining the international criminal justice system. The concern over different interpretations constitutes another argument that has been put forward by the AU:

"The divergence of States' practices and relying on their own interpretation rather than recourse to available international justice mechanisms thereby undermine the international justice system and the legal regime governing relations between States in its entirety."[290]

Once again, it should be emphasised that the analysis of Chapter III found that the ICC has correctly relied on the SC referral as the legal ground for indictment, but the problem is, in particular, the dubious reliance on customary international law and the confusion over the obligations. From this perspective, there is arguably also an ethical incentive for an advisory opinion; when relying exclusively on their own *raison d'être* to reach the desired outcome, that is putting an end to impunity, the ICC challenges core rules of international law. The Court is thereby risking their legitimacy when a proper application of international law is replaced by politics in particularly sensitive areas of international relations.[291] An advisory opinion from an arbiter is in this light, a welcome step, that

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[288] Kersten, Mark, "Negotiated Engagement – The African Union, the International Criminal Court, and Head of State Immunity," *Justice in Conflict*, 5 March 2018 (available at https://justiceinconflict.org/2018/03/05/negotiated-engagement-the-african-union-the-international-criminal-court-and-head-of-state-immunity/)

[289] This argument is also supported in the explanatory memorandum in the AU request in para. 10: *"Members of the United Nations will benefit from a General Assembly request for an advisory opinion of the International Court of Justice that will provide clarity to the evident ambiguity and to competing obligations under international law and will assist States in carrying out their legal obligations without undermining either the call for ending impunity or the legal regime governing the immunities of Heads of State and Government and other senior officials.";*
Kersten, Mark, "Negotiated Engagement – The African Union, the International Criminal Court, and Head of State Immunity," *Justice in Conflict*, 5 March 2018 (available at https://justiceinconflict.org/2018/03/05/negotiated-engagement-the-african-union-the-international-criminal-court-and-head-of-state-immunity/).

[290] UN General Assembly, *Request for an advisory opinion of the International Court of Justice on the consequences of legal obligations of States under different sources of international law with respect to immunities of Heads of State and Government and other senior officials,* UN Doc. A/73/144, 18 July 2018, para 12.

[291] Kjeldgaard-Pedersen and Schack,"*supra* note 52, 933.

has the potential of harmonising international law in the face of the inconsistent jurisprudence of the ICC, but there is nevertheless another side that needs to be taken into account, namely political considerations.

Whereas the above might give an idea of the underlying incentives for seeking an advisory opinion, it is nevertheless a one-sided interpretation and fails to include political motivational factors for seeking a request. The arrest of foreign state leaders is inarguably a politically sensitive matter where concerns over the bilateral relationship may take precedence over other considerations, especially when there is uncertainty regarding the obligations to arrest. In this light, the AU request may also contain a political incentive for the sake of circumventing decisions that require unpleasant political action by other states. An advisory opinion could thereby be an opportunity to gain a judicial opinion, which might contradict the findings of the ICC and thereby provides a shield against the cooperation requests. The picture that the incentive does not rest solely on legal concerns gets clearer when taking the strained relationship of the AU and the ICC into account. Whereas there was strong support in the first years of the ICC, this support has declined together with allegations of a biased selection of cases by the OTP with the deliberate targeting of African states.[292]

It could thereby at first hand be argued, that an advisory is a sound solution and an opportune way to settle the dispute between the ICC and the AU, and a preferable option over a mass withdrawal by African member states, that will leave the ICC in an even weaker place.[293] The subject of immunities has been a central concern for the AU, and the relationship between peace and justice has been brought forward many times by the African states together with requests for amendment of Article 16 the Rome Statute to accommodate the concerns that indictments and the quest for justice have allowed jeopardising peace and security.[294] Taken together with the divergent jurisprudence, this has, according to Dapo Akande, created a situation of mistrust between the AU and the ICC:

[292] African Union, *Withdrawal Strategy Document, Draft 2,* 12 January 2017 (available at https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan._2017.pdf); M. Cherif Bassiouni and Douglass Hansen, "The Inevitable Practice of the Office of the Prosecutor," *ICC Forum*, n/a (available at https://iccforum.com/africa).

[293] Mark Kersten, "Negotiated Engagement – The African Union, the International Criminal Court, and Head of State Immunity," *Justice in Conflict*, 5 March 2018 (available at https://justiceinconflict.org/2018/03/05/negotiated-engagement-the-african-union-the-international-criminal-court-and-head-of-state-immunity/); Johan D van der Vyver, "The Al Bashir Debacle," *African Human Rights Law Journal*, vol. 2 (2015), 264-267.

[294] ICC Assembly of States Parties, *Special segment as requested by the African Union: Indictment of sitting Heads of State and Government and its consequences on peace and stability and reconciliation*, ICC-ASP/12/61, 27 November 2013; Charles Chernor Jalloh, Dapo Akande, and Max du Plessis, "Assessing the African Union Concerns about Article 16 of the Rome State of the International Criminal Court," *African Journal of Legal Studies,* vol. 4 (2011), 6-7.

"There is such distrust, on this issue, between the AU and the ICC that it seems unlikely that African States will accept any decision on the matter. They have thus far refused to accept the correctness of the ICC decisions and there does not seem to be change on that issue coming over the horizon."[295]

The bid for an advisory opinion could thereby be seen as an attempt to solve the outstanding issues by an available international justice mechanism, something that seems to reflect engagement and an effort to establish a more solid foundation for the ICC's jurisprudence.

It is, however, unclear how an advisory opinion should solve what seems to be a fundamental distrust that goes beyond legal concerns, cf. Akande, which raises the question whether the advisory opinion is a genuine effort to find a solution. Despite the particular underlying reasons, it should be emphasised, that taking into account the context of the indictment and the relationship between the AU and the ICC, the motivation hardly rests on purely legal concerns. The underlying motivation is a crucial point since it is decisive for the reception of the opinion, as seen in Chapter IV. The reception on advisory opinions by the "parties" on "politically controversial matters" depends on the outcome, and whether the opinion corresponds with self-interests.[296] These observations highlight the underlying motivation that may rely on legal as well as political considerations, which also emphasise their inseparable nature. It should be stressed, however, that political incentives can affect the reception of an opinion and thereby its usefulness as was concluded in the previous chapter. Based on these sections, it is now time to look at how an advisory opinion may cause implications for the ICC.

5.4 Implications for the ICC

It is in light of the above that the implications for the ICC should be understood, and the pursuit of an advisory request can be perceived as something more than negotiated engagement.[297] Even if the request is a result of an endeavour to bring a lasting resolution to the long-disputed issue by seeking legal clarity by an available international justice mechanism, this would, arguably, not deprive such action of the negative implications for the ICC, taking the current situation into account.

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[295] Akande, Dapo, "An International Court of Justice Advisory Opinion on the ICC Head of State Immunity Issue," *Blog of the European Journal of International Law*, 31 March 2016 (available at https://www.ejiltalk.org/an-international-court-of-justice-advisory-opinion-on-the-icc-head-of-state-immunity-issue/).

[296] In this case, the parties could consist of the AU and other states that align them with AU's position with regard to *ratione personae*, and the ICC and its supporters on the other.

[297] Mark Kersten, "Negotiated Engagement – The African Union, the International Criminal Court, and Head of State Immunity," *Justice in Conflict*, 5 March 2018 (available at https://justiceinconflict.org/2018/03/05/negotiated-engagement-the-african-union-the-international-criminal-court-and-head-of-state-immunity/).

Building on David Bosco's conceptual framework in the book *Rough Justice – The International Criminal Court in a World of Power Politics*, a request for an advisory opinion by another judicial organ, can be seen as an attempt to control the ICC. Bosco outlines different patterns of state behaviour in relation to international courts and refers in this context to control as a deliberate strategy. Control is described as a potential pattern of behaviour, where states make an effort to control and shape the activities of the Court concerned. The most likely control mechanisms include, according to Bosco, alternative adjudication, failings to comply with court judgements, using the SC channel, and threats of exit from international courts.[298]

This pattern of behaviour can be read in connection with some of the actions undertaken by the AU including, the continued failings to comply with the ICC's cooperation requests, the unsuccessful attempt to defer the situation in Darfur pursuant to Article 16 of the Rome Statute, followed by a promulgation of the Malabo Protocol which sought to confer criminal jurisdiction in relation to a number of international and transnational crimes upon the ACHPR, together with the inclusion of Article 46*bis* on immunities, that conflicts with Article 27 of the Rome Statute, and the continued threat of mass withdrawal.[299] All of these actions, read together, suggest a behavioural pattern of control through the lens of Bosco's analytical framework. Considered the previous actions, an advisory request could be seen as another attempt to try to control the ICC by side-lining the Court in favour of another Court's jurisprudence, what Bosco calls "alternative adjudication."[300]

Furthermore, the use of alternative adjudication could not only constitute a method to control and shape the activities of the ICC but could also be a way to legitimise "forum shopping" between the Courts. An advisory proceeding would in this light have an undermining effect on the authority of the ICC and would set an unfortunate precedent for future sceptical states.[301]

This argument leads to another implication for the ICC, namely in the event of potentially conflicting jurisprudence. If the ICC and ICJ adopt a different approach to the same question, is it likely to create

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[298] Bosco, *supra* note 157, 14.

[299] Article 46A *bis* states that "*no charges shall be commenced or continued before the Court against any serving AU Head od State or Government, or anybody acting or entitled to act in such capacity or other senior state officials based on their functions, during their tenure in office."* . For an discussion on why the controversial immunity clause should be eliminated, *see:* Miriam, Abaya, "No Place for Immunity: The Arguments Against the African Criminal Court's Article *46bis*," *Temple International & Comparative Law Journal*, vol. 30, no. 2 (2016), 193-200.

[300] Nabil M. Orina, "Should the ICJ Render an Advisory Opinion on the Immunity Question re Articles 27 & 98 of the Rome Statute?," *African Group of Experts on International Justice*, 24 March 2018 (available at https://www.icjafrica.com/single-post/2018/03/24/Should-the-ICJ-render-an-advisory-opinion-on-the-immunity-question-re-Articles-27-98-of-the-Rome-Statute); Bosco, *supra* note 157, 19-20.

[301] Nabil Orina M., "Should the ICJ Render an Advisory Opinion on the Immunity Question re Articles 27 & 98 of the Rome Statute?," *African Group of Experts on International Justice*, 24 March 2018 (available at https://www.icjafrica.com/single-post/2018/03/24/Should-the-ICJ-render-an-advisory-opinion-on-the-immunity-question-re-Articles-27-98-of-the-Rome-Statute).

tensions between the two Courts.[302] Having in mind the non-binding character of an advisory opinion, it would leave the ICC in an awkward position, where ICC will have to decide the significance of the opinion. As expressed in the interview with the experienced employee from the Danish MFA, the situation could very well end with an opinion that reflects general international law. An opinion on head of state immunity under general international law, could create a difficult situation that does not take into account the special circumstances of the *al-Bashir* case. In that regard, it is also difficult to see how the opinion could form a part of the ICC's practice. Assuming that there are self-interests at stake, the respective parties will supposedly focus on the parts of the opinion that supports their claim, if the ICJ were to issue an opinion in accordance with general international law.
Leaving aside the non-binding nature, it would nevertheless reflect poorly if the ICC acts in direct conflict with an opinion from the UN's principal judicial organ, and it will create more reason for the sceptics to continue the criticism of the Court and its practice. Additionally, conflicting jurisprudence would presumably create further confusion and uncertainty, and could divide the ICC member states between those states who find that ICJ has provided an authoritative opinion and those who find that ICC's decisions should guide the understanding of the Rome Statute.[303]

It was in this context proposed elsewhere that a division of work between the two Courts could give the ICC more ownership over the process. A division of work would, in this regard entail a division over the legal questions related to the Rome Statute and the legal questions related to other sources of international law. More concrete, it could imply that ICC should provide clarity over Article 98 of the Rome Statute and the ICJ should handle the questions relating to the SC referral and the obligations in relation to third states that arisen thereof. A division of work between the Court's is, on the one hand, a more appropriate approach for the ICC but there is on the other hand not a clear incentive for the ICC to be a part of an advisory process that appears undermining for the ICC's independence and legitimacy. It would also require a decision over who represents ICC; i.e., the Presidency, the Registrar, the Prosecutor or the Court as a whole.
Dialogue and cooperation could be a better approach for both Courts and could enhance the possibility of a less painful process. The problem is, that such an approach requires that the ICC

[302] Nabil Orina M., "Should the ICJ Render an Advisory Opinion on the Immunity Question re Articles 27 & 98 of the Rome Statute?," *African Group of Experts on International Justice*, 24 March 2018 (available at https://www.icjafrica.com/single-post/2018/03/24/Should-the-ICJ-render-an-advisory-opinion-on-the-immunity-question-re-Articles-27-98-of-the-Rome-Statute);
Max Du Plessis and Dire Tladi, "The ICC's Immunity Debate – The Need for Finality," *Blog of the European Journal of International Law*, 11 August 2017 (available at https://www.ejiltalk.org/the-iccs-immunity-debate-the-need-for-finality/).
[303] The last point was also a concern expressed in the interview with the experienced employee from the MFA.

voluntarily agrees to be a part of the process, and this might not be the case. Instead, it is likely that the ICC will be asked to submit material, and if the ICC chooses to do so, e.g., by submission of previous judgements, this is more likely to constitute their part in the process.[304]

Another question is how the ICJ will handle a question on head of state immunity, and it is in this connection noteworthy that eight of the current judges were presiding in the case *Jurisdictional Immunities of the State (Germany v. Italy)*.[305] Although the case revolved around state immunity, which is different from head of state immunity, they arise from the same principle and have some basic similarities.[306] The judgement demonstrated a traditional view on state immunity, where the ICJ rejected the alleged exceptions of state immunity as proposed by Italy.[307] What is interesting in this context, is that seven out of the eight judges that are still presiding judges at ICJ today voted in favour of these findings.[308] *Germany v. Italy* can give an indication of how, at least half of the presiding judges, will handle a question of head of state immunity under general international law.

It could be, that the ICJ judges will be aware of the importance of the ICC as an institution, and in this light would protect the ICC by, for example, avoiding addressing the Rome Statute directly and the concrete findings of the respective ICC chambers in the *al-Bashir* case.
The *Genocide* case is, however, an example on, how the ICJ has approached such a situation previously. This case had an unusual feature, as many of the allegations brought before the ICJ had

[304] The view that ICC might not have an incentive to participate in an advisory proceeding was also expressed in the interview with the experienced employee from the MFA.
[305] In the case *Germany v. Italy*, the ICJ addressed the issue of the relationship between immunity of states before national courts, and the protection of fundamental human rights. The Court found that immunity must be granted even in severe human rights violations. For an analysis of the judgement, *see:* Olga Gerlich, "State Immunity or State Impunity? Human Rights and State Immunity Revisited in the ICJ's Judgment on the Case of the Jurisdictional Immunities of a State," *Adam Mickiewicz University Law Review*, vol. 2 (2013).
[306] Cf. Chapter I.
[307] the Court found, *inter alia,* with the votes fourteen to one:
"Finds *that the Italian Republic has violated its obligation to respect the immunity which the Federal Republic of Germany enjoys under international law by taking measures of constraint against Villa Vigoni."*
Jurisdictional Immunities of the State (Germany v. Italy), Judgement, International Court of Justice, 3 February 2002, para. 139(2).
[308] The judges, that are still presiding today, who voted in favour were the following; Judge Gaja (appointed as judge *ad hoc* at the time), Judge Xue, Judge Donoghue (Current Vice-President), Judge Yusuf (Current President), Judge Bennouna, Judge Abraham and judge Tomka.
The fifteen judges of the ICJ are respectively: President Abdulqawi Ahmed Yusuf (Somalia), Vice-President Xue Hanqin (China), Judge Peter Tomka (Slovakia), Judge Ronny Abraham (France), Judge Mohamed Bennouna (Morocco), Judge Antônio Augusto Cançado Trindade (Brazil), Judge Joan E. Donoghue (United States of America), Judge Giorgio Gaja (Italy), Judge Julia Sebutinde (Uganda), Judge Dalveer Bhandari (India), Judge Patrick Lipton Robinson (Jamaica), Judge James Richard Crawford (Australia), Judge Kirill Gevorgian (Russian Federation), Judge Nawaf Salam (Lebanon), Judge Yuji Iwasawa (Japan). Only Judge Conçado Trindade (brazil) voted against on the above findings.

already been subject to process and decisions of the ICTY.[309] In the judgement, the ICJ did not avoid looking very carefully at ICTY's findings, and the ICJ ended up criticising and rejecting the ICTY's use of the "overall control test" as applicable under the law of state responsibility.[310]Albeit a different context and tribunal, this case may serve as a worrisome example for the ICC, as it shows how ICJ previously has not taken a precautious approach towards another tribunal's findings.

Furthermore, the *Genocide* case provides a clear example on, how the relationship between the two Courts can be affected by an advisory opinion, as any potential interaction between international courts is complex. The different spheres of operation emphasise the complexity between the ICC and the ICJ. While both Courts are supranational, they differ on subject matter and jurisdiction. The ICC is a specialised Court that determines individual responsibility for international crimes, whereas the ICJ adjudicates disputes between states, and the starting point for determining obligations in relation to indictments of a sitting head of states is different, as the Rome Statute constitutes the legal basis for the ICC.[311] There has so far not been any real interaction between the two Courts, but a potential advisory opinion will change that, and the question is therefore whether this would be advisable, especially since the question to be put before the ICJ probably will relate to legal questions adjudicated by the ICC.[312] Furthermore, as discussed above, any political self-interests are likely to impact the reception of the advisory opinion, why the chapter will proceed with an analysis of the legal effect of an advisory opinion in order to discuss its potential usefulness.

5.5 Legal Effect of an Advisory Opinion

Having examined the implications that can arise from an advisory proceeding, the question remains what kind of legal impact an advisory opinion could get. A more general response would point to the "moral authority and significant legal weight" that advisory opinions have despite their non-binding

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[309] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Judgement, International Court of Justice, 26 February 2007, para. 212.

[310] Para. 404 of the *Genocide* case, stated: "*This is the case of the doctrine laid down in the Tadic´ Judgment. Insofar as the "overall control" test is employed to determine whether or not an armed conflict is international, which was the sole question which the Appeals Chamber was called upon to decide, it may well be that the test is applicable and suitable; the Court does not however think it appropriate to take a position on the point in the present case, as there is no need to resolve it for purposes of the present Judgment. On the other hand, the ICTY presented the "overall control" test as equally applicable under the law of State responsibility for the purpose of determining — as the Court is required to do in the present case — when a State is responsible for acts committed by paramilitary units, armed forces which are not among its official organs. In this context, the argument in favour of that test is unpersuasive*."

[311] Priya Pillai, "The African Union, the International Criminal Court, and the International Court of Justice: At the Fault Lines of International Accountability," *American Society of International Law*, 22 August 2018 (available at https://www.asil.org/insights/volume/22/issue/10/african-union-international-criminal-court-and-international-court

[312] Priya Pillai, "The African Union, the International Criminal Court, and the International Court of Justice: At the Fault Lines of International Accountability," *American Society of International Law*, 22 August 2018 (available at https://www.asil.org/insights/volume/22/issue/10/african-union-international-criminal-court-and-international-court

character.[313] The legal effect of an advisory opinion on head of state immunity could in this regard be broader than in a judgement:

"[T]he effect of an advisory opinion is not confined to the parties as though it was a matter of a judgment; the opinion is authoritative erga omnes*, and is not restricted to the States or organizations that make written or oral statements or submit information or documents to the Court*." [314]

An advisory opinion on immunities could from this perspective also be beneficial in a Danish context due to §12 of the Danish Criminal Code that reads: *"The applications of the provisions of §§ 6-11(*on general conditions concerning the application of the provisions of the criminal law, ed.) *of this Act shall be subject to the applicable rules of international law."[315]*

Since the decisions in the *al-Bashir* case may have brought confusion of the applicable rules under international law, §12 of the Danish Criminal Code can be up for interpretation, and stress why the need for clarity is not only confined to African states. An advisory opinion could, in this light assist future practice with obligations to third states. An advisory opinion may, therefore, be of importance since it potentially can streamline state practice, and the legal regime governing the relations between states, as pointed out by the AU.[316]

For advisory opinions to be followed and thereby have harmonising legal effect, it requires that the opinion is able to guide the conduct of states. The examined advisory opinions in Chapter IV have had an impact, to a certain extent, in the way they have been received in the GA. As we have seen, these advisory opinions have been followed by the adoption of resolutions that either acknowledged the opinion or demanded compliance.
Seen in the context of an advisory opinion on head of state immunity, a similar course of action could be foreseen, with reluctance by some states to adoption of an advisory request, but a "pressure" to act in accordance with the opinion afterwards. The Nordic countries have, for example, reaffirmed the ICC's integrity and independence continuously, which may lead to consideration of a vote against or

[313] The International Court of Justice, "Advisory Function," *ICJ*, n/a (available at https://www.icj-cij.org/en/advisory-jurisdiction)
[314] Aljaghoub, *supra* note 173, 226.
[315] *The Danish Criminal Code,* order no. 977, 8 August 2017, §12. Translated from: "*Anvendelsen af §§ 6-11 (vedr. almindelige betingelser for strafferetlige bestemmelsers anvendelse red.) begrænses ved de i folkeretten anderkendte undtagelser".*
[316] This was also noted in the AU's request: UN General Assembly, *Request for an advisory opinion of the International Court of Justice on the consequences of legal obligations of States under different sources of international law with respect to immunities of Heads of State and Government and other senior officials,* UN Doc. A/73/144, 18 July 2018, para. 12.

an abstention in the GA for an advisory request.[317] If the ICJ's jurisprudence would be in conflict with the ICC's decisions, it would place the supportive countries of the ICC in a problematic position, since there may be a continued support for the ICC and their decisions, but it may become more difficult to express such support after an advisory opinion, should it be in conflict with ICC's decisions either directly or interpretative.
Another issue is, whether an advisory opinion will be able to guide the conduct of the "parties" to the dispute, i.e., the AU, Jordan, and the ICC. As it has been suggested elsewhere,

"However, it (an advisory opinion, ed.) *may not be as straightforward as it has been frequently suggested, and more importantly, whilst it is important to explore all legal avenues, one should ask – will the opinion (irrespective of the outcome) really help to settle the immunity question?"*[318]

Angela Mudukuti suggests that an advisory opinion that affirms ICC's legal reasoning will not settle the immunity question, as states who pursue a political agenda, will not comply.[319] In other words, an advisory opinion may only make progress on the issue insofar the opinion correlates with political self-interest. Whereas this is a sound argument that correlates with Bosco's conceptual framework for state behaviour, it still rests on the assumption that the opinion can move the issue further, if it favours AU's position. To assume that an advisory opinion that conflicts with ICC's jurisprudence would help settle the issue is equivalent to ignore the ICC itself as a party to the conflict. It could be, that the ICC will feel pressured to show acquiescence, and take into account the legal findings of the ICJ in its future practice, and, for example, draw a line under the alleged exception under customary international law. The weak position of the ICC could, in this context be a decisive factor for compliance, should the advisory opinion result in conflicting jurisprudence. Besides a potential pressure for compliance, the motivation for the ICC to review their decisions as well as future practice

[317] There were strong statements from a number of countries during the 17 ASP General Debate, including Norway, Sweden, Denmark and the Netherlands. *See* e.g.: Statement by Sweden, *At the General Debate 17th Session of the Assembly of States Parties to the Rome Statute*, 5 December 2018; Statement by the Netherlands, *At the General Debate 17th Session of the Assembly of States Parties to the Rome Statute*, 5 December 2018; Statement by Norway;
See e.g.: Statement by Sweden, *At the General Debate 17th Session of the Assembly of States Parties to the Rome Statute*, 5 December 2018; Statement by the Netherlands, *At the General Debate 17th Session of the Assembly of States Parties to the Rome Statute*, 5 December 2018; Statement by Norway; *At the General Debate 17th Session of the Assembly of States Parties to the Rome Statute*, 5 December 2018, Statement by Ireland, *At the General Debate 17th Session of the Assembly of States Parties to the Rome Statute*, 5 December 2018; Statement by Canada, *At the General Debate 17th Session of the Assembly of States Parties to the Rome Statute*, 5 December 2018; Statement by France, *UN Security Council, 8290th meeting,* UN Doc. S/PV.8290, 20 June 2019, 6.
[318] Angela Mudukuti, "Immunity, Accountability and Politics – The AU's bid for an ICJ Advisory Opinion, *Groningen Journal of International Law*, 25 June 2018 (available at https://grojil.org/2018/06/25/immunity-accountability-and-politics-the-aus-bid-for-an-icj-advisory-opinion/)
[319] Ibid.

is otherwise easy to overlook, as it may not only be perceived as a setback for the independence of the ICC but also in their fight against impunity.

To the question of the legal impact of an advisory opinion on the actual dispute over al-Bashir's immunity, it cannot be excepted to be significant. An advisory opinion may be of interest, however, from a purely legal point of view, mainly if the opinion addresses the core at the debate. However, the legal effect of an advisory opinion may depend on the underlying motivation for seeking the request:

"(…) an advisory opinion whatever its legal value, may not be of much consequence for the political development of the issue in connection with which it was requested, if the request was part of an exercise in confrontation, not a genuine effort to find a political solution of the problem.[320]

In sum, an advisory opinion might affect the apprehension of the head of state immunity and the legal obligations arising thereof for some states, especially those who are not directly involved in the *al-Bashir* dispute. However, to think that an advisory opinion will help settle the immunity questions is arguably ignoring the broader political context that the dispute has arisen in. Based on this analysis, it can therefore be concluded that there are legal and political challenges connected with a potential advisory opinion. While the opinion may not have a direct legal effect to the actual dispute, it still remains to be examined whether an advisory opinion may have an impact in a broader perspective of international criminal law, to which the discussion in the following section will turn to.

5.6 Impact on the International Criminal Justice System – Who is Afraid of the ICC?

Having analysed the legal and political challenges that can arise from a potential advisory opinion on head of state immunity, it is now time to discuss the broader impact on the international criminal justice system. The present chapter has argued that an advisory proceeding can cause a challenge for the ICC's legal integrity as well as political challenges. In continuation of this, it is imperative to emphasise the role of the ICC as the central pillar of the international criminal justice system. As an institution the ICC is a manifestation for the international endeavour for putting an end to impunity for the most serious crimes, and for contributing to the prevention of such crimes.[321] Prevention, or the creation of a global deterrent effect, is at the heart of the international criminal justice system and works by spreading the fear of being held accountable.[322] The question that arises is what impact an

[320] Shaw QC, *supra* note 216, 1765.
[321] *Cf.* the Preamble of the Rome Statute.
[322] Steven C. Roach, *Politicizing the International Criminal Court*, 2006, 2.

advisory proceeding can have on this fundamental goal for the ICC and the international criminal justice system.

Based on the lack of cooperation, it could be argued that the indictment of al-Bashir has not increased fear of being held accountable, on the contrary. In addition, an advisory request that questions ICC's demand for cooperation by an arbiter, sends the signal that the ICC is a paper tiger, who is not only unable to obtain cooperation from its member states, but also unable to prevent the indicted state leaders from remaining at large while the ICC's decisions are questioned in another Court.
While it could also be asserted that the success of the ICC to arrest alleged perpetrators was not overwhelming prior to the case against al-Bashir, it should still be stressed, that every failed attempt is likely to decrease the deterrent effect of the ICC, as the effect only materialises if there indeed is a credible threat of prosecution.[323] The ICC does not have its own police force or law enforcement body which makes it imperative that member states cooperate with the ICC's requests - a responsibility not only owed to the ICC but the victims of the alleged crimes.[324]
Whereas an advisory opinion will not inherently carry these many legal and political issues and challenges, it could be argued, that an advisory request could actually form a part of an undermining process of the authority and thus a downward spiral for the Court.

Hence, to focus only on the legal aspects of an advisory opinion without paying enough attention to the political realities, will present an inadequate analysis of the issues and challenges.
Not only is the ICC struggling with dissatisfaction from member states, but the ICC is also facing severe criticism coming from the outside. Continuously attacks from many non-member states, on the perceived defects of the institution, have played a crucial role in delegitimising the ICC.[325] This tireless effort, from especially the US, seems to constitute what Bosco calls "active marginalisation" of the Court, a mere attempt to ensure that the ICC will remain weak and ultimately leave it

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[324] Fulford, Adrian, "Who Arrest Those Accused by the ICC," *American Journal of International Law Unbound,* vol. 112 (2018), 168-171.
[325]E.g.Permanent Mission of the Russian Federation to the United Nations*, Statement by Mr.Gennady Kuzmin, Deputy Permanent Representative of the Russian Federation to the United Nations, at the Security Council on on the Sudan and South Sudan*, 20 June 2018 (available at http://russiaun.ru/en/news/sud20062018); The statement from John Bolton is a particular strong example on hereon. For a discussion on the legality of the threats against the ICC, *see*: Dapo Akande, "The Bolton Speech: The Legality of US Retaliatory Action Against Judges and Officials of the International Criminal Court," *Blog of the European Journal of International Law*, 14 September 2018 (available at https://www.ejiltalk.org/the-bolton-speech-the-legality-of-us-retaliatory-action-against-judges-and-officials-of-the-international-criminal-court/?fbclid=IwAR06Fvu6Qi_djUq-ANQq3zeqMrndaqpwS6Km3pBflYNQbXBaHsK9edPwgKQ). It should however be noted, that there were strong opposition in many of the statements by ICC member states during the general debate of the 17th ASP in December 2018, cf. note 271.

irrelevant.[326] The speech by the previous US National Security Advisor, John Bolton, to the Federalist Society in Washington in September 2018 was putting this pattern of active marginalisation into words when he said: "*We will let the ICC die on its own. After all, for all intent and purposes, the ICC is already dead to us."*[327]

To a certain degree, the ICC has placed itself in a difficult situation by not paying sufficient attention to its strength, prerogatives, and the political reality prevailing. Alleged exceptions under customary international law show how the Court tries to erode sovereignty in unprecedented ways, and such actions come at the expense of further criticism of the ICC's legitimacy, as expressed by Bolton:
"*In sum, an international court so deeply divisive and so deeply flawed can have no legitimate claim to jurisdiction over the citizens of sovereign nations that have rejected its authority."* [328]
Furthermore, this may also give a justified feeling for states to seek an advisory opinion to redeem the Court's failings, and in this light, it is possible to create a positive narrative for an advisory opinion and the benefits for the international community as a whole with the strengthening of the legal regime governing them.[329]
The problem is that there is a chance that the ICJ will provide an opinion based on general international law, and not concerning the Rome Statute *per se*. Such an opinion is less likely to endorse the position of ICC and could provide arguments for shielding state leaders from prosecution, if it merely affirms the status of immunity *ratione personae* under general international law. Such an advisory proceeding could leave the ICC weaker and in a more constrained position than before, and the advisory request signals the unwillingness to cooperate with the ICC's requests. Additionally, and advisory opinion endorsing absolute immunity of head of states, can be used a way to push an agenda on immunity in a "wrong direction", seen from a human rights perspective. With contributions to development of international law, an advisory opinion may have an impact on interpretation of immunity by states in the future, and it will therefore be a concern for the future fight against impunity, if UN's principal judicial organ delivers a traditionalist approach to immunity under general international law.

[326] Bosco, *supra* note 157, 12-13.
[327] The Epoch Times, "Speech Transcript: John Bolton on U.S. Policy Toward the International Criminal Court," *The Epoch Times*, 10 September 2018 (available at https://www.theepochtimes.com/speech-transcript-john-bolton-on-u-s-policy-toward-the-international-criminal-court_2656808.html).
[328] Ibid.
[329] UN General Assembly, *Request for the inclusion of an item in the provisional agenda of the seventy-third session,* UN Doc. A/73/144, 18 July 2018, para. 12.

The pressure that the ICC is under, and the challenges with cooperation, is arguably already reflected in the Court's practice. The recent unanimous refusal by the PTC II to open a formal investigation of the situation in Afghanistan, despite finding that the ICC has jurisdiction and the situation would be admissible, because an investigation "would not serve the interests of justice", clearly demonstrates the constraints the ICC is subjected to.[330] This decision has not only been criticised for being *ultra vires*, but also supports the idea of how politics is an integral part of international criminal justice with deliberate avoidance of situations that involves great powers.[331]

Another recent example is the release of the draft of the strategic plan for the OTP for 2019-2021; the new policy document signals a new, and more modest, strategy, with a change to the types of cases the OTP will consider bringing. While maintaining the overarching goal of holding those most accountable, the OTP acknowledges the significant setbacks by many failed cases.[332]
Albeit this strategic plan could be said not to be directly related to the request for an advisory opinion, it should be highlighted that the incentive for the developing a new strategic plan can be found in *inter alia* the challenging cooperation environment. The lack of cooperation and even openly hostile approaches to the Court demands new policy strategies for the OTP. The heart of the dispute, the unwillingness to arrest and surrender a sitting head of state, despite cooperation requests from the ICC, is the ultimate reason for an advisory opinion, and can thereby be placed in the broader context of non-cooperation. The type of cases that the OTP will consider taking henceforth presents a remarkable policy shift, and is for the argument worth quoting:

"Building on (previous policy documents), the Office will give increased consideration to the possibility to bringing cases that are narrower in scope, insofar as they focus on key aspects of victimisation, particular incidents, areas, or time periods, or a single accused. In particular, when appropriate, the Office will consider bringing cases against notorious or mid-level perpetrators who

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[330] *Situation in the Islamic Republic of Afghanistan*, Decision, Pre-Trial Chamber II, 12 April 2019, para. 87.
[331] Bosco, *supra* note 157, 19-20, 186; Dov Jacobs, "ICC Pre-Trial Chamber rejects OTP request to open an investigation in Afghanistan: some preliminary thoughts on an ultra vires decision," *Spreading the Jam*, 12 April 2019 (available at https://dovjacobs.com/2019/04/12/icc-pre-trial-chamber-rejects-otp-request-to-open-an-investigation-in-afghanistan-some-preliminary-thoughts-on-an-ultra-vires-decision/); Maria Varaki, "Afghanistan and the interest of justice," *Blog of European Journal of International Law*, 26 April 2019 (available at https://www.ejiltalk.org/afghanistan-and-the-interests-of-justice-an-unwise-exercise/); Patryk I. Labuda, "A Neo-Colonial Court for Weak States? Not Quite. Making Sense of the International Criminal Court's Afghanistan Decision," *Blog of European Journal of International Law*, 13 April 2019 (available at https://www.ejiltalk.org/a-neo-colonial-court-for-weak-states-not-quite-making-sense-of-the-international-criminal-courts-afghanistan-decision/)
[332] The OTP refers in this context to the *Ruto & Sang case*, *Bemba main case*, and *Ggabgo & Blé Goudé case*, *see* International Criminal Court, *Strategic Plan 2019-2021*, Office of the Prosecutor, 14 May 2019, para. 9;
Alex Whiting, "ICC Prosecutor Signals Important Strategy Shift in New Policy Document," *Just Security*, 17 May 2019 (available at https://www.justsecurity.org/64153/icc-prosecutor-signals-important-strategy-shift-in-new-policy-document/?fbclid=IwAR0vQVum5osWvYQzhkwbXCvUWfUm2b6jVnntxikz5XRzVD9hcxNORzOgUZk)

are directly involved in the commission of crimes, to provide deeper and broader accountability and also to ultimately have a better prospect of conviction in potential subsequent cases against higher-level accused. The Office will also emphasise evidential strength in its selection of suspects and charges, opting where appropriate for narrower but stronger cases over broader cases with higher risks of evidentiary weaknesses. While the scope of any particular case must always respond primarily to the available evidence, the Office will aim at whenever possible to pursue sequenced cases that build toward a body of cases that fully represent victimisation and hold the most responsible perpetrators accountable."

The new strategy plan can be understood as a direct consequence of the lack of support by member states and the unwillingness to cooperate with ICC, that now has to acknowledge their constraints and limitations with respect to their targets of, especially, higher-ranking perpetrators. This strategy also seems to reward uncooperative states and might even exclude the most difficult cases, where ICC, arguably, should be present.[333]

In this light, it is tempting to ask whether the hostile external environment against the Court, combined with the unwillingness of cooperation from member states even, has only had a deterrent effect on the ICC, thus feeling less inclined to pursue cases against the high-ranking perpetrators. The primary influence that states have on the success of the ICC relies on consent and cooperation, and the draft strategy and the selection of cases should be assessed with these factors in mind.

In light of the current realities facing the ICC, a more modest strategy might be a solution for the Court, hereby avoiding further active marginalisation and control, even though it could also be argued that such a strategy reflects these two things precisely. However, if the ICC continues to pay little, if any attention to its strength, its prerogatives and the political reality it might create even more damage to the Court and the international criminal system. The strategy thereby comes at a risk, but it could

[333] Dov Jacobs, "ICC Pre-Trial Chamber rejects OTP request to open an investigation in Afghanistan: some preliminary thoughts on an ultra vires decision," *Spreading the Jam*, 12 April 2019 (available at https://dovjacobs.com/2019/04/12/icc-pre-trial-chamber-rejects-otp-request-to-open-an-investigation-in-afghanistan-some-preliminary-thoughts-on-an-ultra-vires-decision/); Priya Pillai, "The African Union, the International Criminal Court, and the International Court of Justice: At the Fault Lines of International Accountability," *American Society of International Law*, 22 August 2018 (available at https://www.asil.org/insights/volume/22/issue/10/african-union-international-criminal-court-and-international-court).
The statement in March 2019 by US Secretary of State, Mike Pompeo, announcing that US will deny or revoke visas for ICC staff, can also be seen as way to deter and marginalise the Court, which was emphasised by the following statement "*these visa restrictions may also be used to deter efforts to pursued allied personnel including Israelis without allies consent."*, Jennifer Hansler, "US Denying Visas to International Criminal Court Staff," *CNN News*, 15 March 2019 (available at https://edition.cnn.com/2019/03/15/politics/pompeo-icc-visa-restrictions/index.html).

be argued that "modest successes are preferable to spectacular failures.", especially if the spectacular failures include the risk of the very existence of the ICC.[334]
The paramount issue remains the gradual undermining of the international criminal justice system and the ethical implications of the prospects for justice for victims of atrocities. The long and hard struggle for an international criminal justice system that encounters impunity for the responsible perpetrators of the most heinous crimes should not be made redundant.
The broader context shows the inappropriateness of an advisory opinion, but it is dubious whether it is possible to halt the process. The legal roots at the dispute are complex and raise questions over accountability and justice. The need for legal clarity is evident, but it does not seem that an advisory opinion is the appropriate way to settle the legal dispute.

For all of the above complex reasons, the pursuit of an advisory opinion contributes to the undermining process of the ICC, and the consequences of such a proceeding becomes even more severe when looking at the implications for the international criminal system as a whole. The fight against impunity and for deterrence for future war criminals gets harder to win, if states adopt a hostile approach and oppose to cooperate with the only permanent international criminal court.
Albeit the advisory opinion will have no binding legal effect, the symbolic action against the ICC will provide sufficient further damage to the Court, and thereby the international criminal justice system.

This discussion has, therefore, shown that the potential advisory opinion should be seen in a broader context of the current situation of the ICC, and it should thus be questioned whether it is the right time to seek an advisory opinion, or if the timing is likely to cause further menace for the ICC.
Based on the analysis and the discussion of this chapter, the unprecedented situation is arguably constituting "compelling reasons" for why the ICJ should not render an advisory opinion.
As mentioned in Chapter IV, it is not only the ICJ that are empowered with discretionary powers, so are eventually also the requesting organ. In this light, it should be emphasised that the GA has a responsibility to consider whether the need for legal clarity exceeds the perceived consequences. On this background, it is now time turn to a recommendation for the future cause of action. This

[334] Alex Whiting, "ICC Prosecutor Signals Important Strategy Shift in New Policy Document," *Just Security*, 17 May 2019 (available at https://www.justsecurity.org/64153/icc-prosecutor-signals-important-strategy-shift-in-new-policy-document/?fbclid=IwAR0vQVum5osWvYQzhkwbXCvUWfUm2b6jVnntxikz5XRzVD9hcxNORzOgUZk).

recommendation builds upon the analyses and provides recommendations to ensure the most appropriate outcome of an advisory opinion on head of state immunity.

Chapter VI Recommendation

This master thesis has analysed and discussed the inherent legal and political challenges stemming from a potential advisory proceeding. The analyses have shown that the ICC and the international criminal law system in particular is facing repercussions. It is on this background that the following recommendation paper is drafted. It follows that the recommendations prevail on the assumption, that the inherent challenges require guidelines for damage control of the consequences for the ICC. Several factors must be considered when evaluating the accommodation of the potential challenges, as seen in Chapter V. The following recommendations are a means to ensure the most appropriate outcome for the ICC and the international criminal justice system.

Recommendation 1: State parties should engage in the negotiations at the GA.

For especially smaller states, the political context may be a decisive factor, from intervening too much in the debate in the GA with an opposite position to the advocates. The Nordic countries could, in this regard, form a coalition that could raise concerns over a potential advisory process. Such a coalition could ensure a line accommodating a justice-friendly approach with the consideration for the integrity of the Rome Statute. It is, however, doubtful that the approach will convince other states who have another position. The symbolic support of the ICC is nevertheless essential, especially if the deliberations of an advisory opinion take place in a hostile environment against the Court and its practice. Engagement from pro-ICC states is important in order to try setting a blueprint on the negotiations, and eventually attempting to influence the drafting process.

Recommendation 2: The advisory request should focus on UNSC resolution 1593

Although it is uncertain just how much influence other than the advocates will have on the drafting process, considering the seemingly strong legal and political interests, the formulation of the question remains essential, and attention should be brought to the scope of the question.

A broadly formulated question may avoid a direct interpretation of the Rome Statute, but there is also an inherent risk, that a broadly formulated question, similar to the one presented at the 73rd GA, might result in an opinion on immunity under general international law. Seeing the ICJ's approach to immunity in previous cases, there is reason to expect that a broad question on head of states immunities will be in conflict with some of the legal findings by the ICC, especially if the ICJ addresses customary international law. As the ICJ has applied a traditional approach to immunity and has not been avoiding to directly address the findings of another specialised tribunal, cf. the *Genocide*

case, a question concerning the status of immunity *ratione personae* under customary international law would be a particular pitfall.

The preferable focus should be a question on SC referrals. Such a question is to be considered narrow and specific and has the potential to address the essential question arisen from the *al-Bashir* case. It should be emphasised, that a narrow question is not exempt from pitfalls, as a it invites for a concrete answer, and the risk is therefore that the opinion conflicts with the findings of the ICC.[335] A question on the significance of an SC resolution acting under Chapter VII is nevertheless a way to avoid directly addressing the Rome Statute – which should be left to the ICC. The SC-referral is, according to this master thesis, the valid legal basis for the ICC's jurisdiction over a third state, and it will, therefore, be a better foundation for the individual states to submit factual legal evidence to the ICJ that supports this interpretation.
Even though there is no ideal scope of the question, it seems to be a preferable path to follow, if the question focusses on the SC referral including the prerogatives under Article 103 of the UN Charter. Despite the risk of conflicting legal interpretations, it is more appropriate since it does not require a specific interpretation of the Rome Statute.

Recommendation 3: State parties should engage in the advisory proceeding at the ICJ
Since there are no "parties" in an advisory process and the roles of participating states are limited to that of *amicus curiae*, this should be taken advantage of.
State parties to the ICC should endorse the custom for written submissions in advisory proceedings. The statements should address the scope of the question, along with a legal interpretation. Participation also provides an opportunity to express reluctance for seeking an advisory opinion under the prevailing circumstances, and to stress the independence of the ICC and the Rome Statute.
Chapter IV has shown that written submission may have an impact on the ICJ's interpretation of the scope of the question. In this regard, the importance to do so must be emphasised, as it provides an opportunity to encourage the Court to avoid grey areas, as Denmark did in the *Kosovo* advisory proceeding.

[335] It is, however, not clear how the ICJ will approach a question on the interpretation of SC resolution. The ICJ has expressed in the *Kosovo* advisory opinion, that interpretation of SC resolution differs from the rules on treaty interpretation embodied in the VCLT. The ICJ highlighted in that regard the complex collective drafting process. An interpretation, according to the ICJ, would require analysis of statements by representatives of the SC, other resolutions on the same issue, and subsequent practice by relevant UN organs and affected states.
Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, International Court of Justice, 22 July 2010, para 94.

Finally, written submission to the ICJ should include a thorough legal analysis that should place particular emphasis on the SC resolution 1593 and its implication for the obligations for ICC member states vis-à-vis third states. The submission of legal evidence could well follow the ICJ's methods for interpretation of SC resolutions, cf. note 338, and thereby include interpretation of the drafting process of SC resolution 1593, subsequent practice and similar resolutions. Some of these areas has been analysed in relation to resolution 1593 in Chapter III.

Recommendation 4: State parties should continue to express their support for the integrity and independence of the ICC, and future disputes should be tried solved by the ASP.

Despite the outcome, it is essential that state parties express their support for the ICC after the issuance of the advisory opinion. Joint statements on behalf of state parties should reaffirm their support to the ICC, and the confidence in the Court's integrity is an integral part of the support. With the current political climate, where ICC is called into question, it remains imperative that state parties renew their support.

Future disputes should be solved by the ASP in consequence of the Court's inability to do so, as a means to continue the independence of the ICC. It is imperative for the integrity of the ICC that disputes are only referred to any other judicial dispute settlement mechanism as a last resort, and that the ASP should undertake such referrals in accordance with Article 119(2) of the Rome Statute.

Chapter VI Conclusion

The aim of this master thesis was to explore *the legal and political issues and challenges arising from a potential advisory opinion on head of states immunities.*
The underlying assumption for the research question was that the political nature of head of state prosecutions along with the weak position of the Court, would have an impact on an advisory proceeding. Based on the three-part interdisciplinary analysis, it can be concluded that a potential advisory opinion will cause legal and political challenges for the ICC that affects the entire international criminal justice system. The master thesis has shown the legal challenges relating to different scenarios of the outcome, including conflicting jurisprudence between the ICC and the ICJ, or an opinion that reflects immunity *ratione personae* under general international law. The political challenges revolve around the negative impact in the relationship between the AU and ICC as well as ICJ and ICC. The course of action contemplated by the AU is an inflexion point in the relationship between the parties, as the advisory proceeding can be comprehended as a means of control of the ICC and creates a false hierarchy between the two independent Courts.

The legal analysis has shown the unambiguous need for legal clarity on obligations to arrest and surrender state leaders of third states due to the divergent legal reasoning in the *al-Bashir* case.
However, compared to previous advisory opinions on "politically controversial matters," the master thesis finds that the prospects for reaching finality, or even progress, in the immunity debate by an advisory opinion is minor. Self-interests for states and the independence of the ICC are the reasons for why an advisory opinion is unlikely to make progress on the contentious issue and as such emphasise the inseparable relationship between international law and politics.

The legal and political challenges and issues stretch beyond the scope of the legal questions in dispute and can have wider implications on international criminal law and its international institutions. The root of the dispute concerns legal questions linked to international accountability and justice, and, depending on the outcome, the advisory opinion may come at the expense of a gradual undermining of the international criminal justice system.
Even though the ICC has stretched the law beyond its breaking point, the whole immunity debate is a step in the wrong direction – a step away from a culture of accountability.

Immunities of head of states are undeniably an emotive issue, a double-edged sword, striking the heart of international law, accountability and justice for the victims and protection of sovereignty. The trend for the former is more recent and has only seriously flourished since the mid of the last century. The fight for impunity has nevertheless been hard, and the crowning achievement of a permanent international criminal court is a landmark in that regard.

The current practice of the ICC is losing the confidence by some of the states who believed that the Court could fulfil its mandate. The lack of cooperation combined with difficult cases against the most political figures in a state, has left the ICC in a weak spot. The deterrence effect diminishes, and the ICC is showing its limitations by the new draft strategy from the OTP and the avoidance of difficult cases in which a hostile approach towards the Court is foreseen. It is in the context of the political reality, that the symbolic action of an advisory proceeding will add to the downward spiral of the ICC.

Consequently, as the central pillar in the international criminal justice system, an advisory opinion may have wider implications for the ICC beyond the legal questions themselves.
The legal and political issues and challenges are ultimately why this master thesis finds that there are "compelling reasons" to refuse to give an advisory opinion. The need for legal clarity does not in any way compensate for the undermining process of the ICC and for international criminal justice system by an advisory proceeding.

Based on the lack of precedents, there is little indication that the ICJ will refuse to render an advisory opinion. This master thesis has therefore included a recommendation with guidelines to ensure the most appropriate outcome for the ICC. These include the scope of the advisory request, engagement in the advisory proceeding and continued support for the ICC and its integrity.
After all, the world's only permanent International Criminal Court is, despite its shortcomings, something worth protecting and fighting for.

"Too often the emphasis had been on protecting leaders. But who speaks for the little guy?"

- Kofi Annan

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