

Immunity of State Officials before the International Criminal Court (ICC): the indictment of President Al-Bashir

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Abstract

This Article is devoted to discussing the issuing of an arrest warrant by the International Criminal Court (ICC) for Sudanese President, Omar Al-Bashir, in connection to the alleged international crimes, inter alia, genocide, crimes against humanity and war crimes committed in Darfur. After issuing the arrest warrant by the ICC, a number of legal questions have arisen, which this article is devoted to examining. The first question is whether the ICC jurisdiction could be exercised over a serving Head of state of a non-party to the ICC Statute. To what extent are incumbent Heads of state or Government are protected under customary international law on immunities in respect of international crimes? To what extent can such immunities of sitting Heads of state be disregarded by the ICC? Also, this Paper casts light on the relationship between Articles 27 and 98 of the ICC Statute in the light of non-states parties to the Rome Statute. Furthermore, it discusses the obligation of non-state parties to cooperate in giving effect to the arrest warrant by the ICC. Finally, it critically analyses the legality and effects of the Security Council referral to the ICC with respect to the crimes committed in Darfur.

Introduction

On 4 March 2009, the Pre-Trial Chamber of the International Criminal Court (ICC) announced the issuance of an arrest warrant against Sudanese President Al-Bashir in relation to genocide, crimes against humanity and war crimes committed in Darfur.¹ The decision of the Court was based on the Prosecutor's application of 14 July 2008 for the aforementioned crimes, including genocide committed in Darfur, Sudan. However, the ICC Prosecutor's application was in response to Security Council Resolution 1593, acting under Chapter VII of the United Nations Charter, referring the situation in Darfur, Sudan, to the

Prosecutor of the International Criminal Court,² in accordance with Article 13(b) of the Rome Statute.³ Given the material evidence and other information submitted by the prosecutor, the Pre-Trial Chamber stated that it was satisfied that there is factual evidence to believe that President Al-Bashir masterminded the commission of

² United Nations Security Council Resolution 1593, S/RES/1593 (2005), issued on 31 March 2005 (hereinafter the "UN Security Council Resolution, S/RES/1593 (2005)"), (Paragraph 1: *Decides* to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court).

³ T.M.C. Asser Instituut, & Den Haag, *Elementary International Law*, T.M.C. Asser Press, 2009, p.276, (Article 13 (b) of the ICC: A situation in which one or more of such crimes appears to have been Committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations).

¹The Pre-Trial Chamber's Warrant of Arrest for Omar Hassan Ahmad Al Bashir (No.: ICC-02/05-01/09), issued on 4 March 2009. (See also: <http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf>).

genocide, war crimes and crimes against humanity within the jurisdiction of the ICC.⁴

The arrest warrant against President Al-Bashir of Sudan was also in line with the Report published by the International Commission of Inquiry on Darfur to the United Nations Secretary-General, which stated a number of crimes that were committed in Darfur.⁵ The Commission established that “the Government forces, the Janjaweed and militias conducted indiscriminate attacks, including killing of civilians, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement, throughout Darfur. These acts were conducted on a widespread and systematic basis, and therefore may amount to crimes against humanity or other international crimes.”⁶ The Report further indicated that a number of crimes were committed at large scale such as attacks, many people have been arrested and detained, and many have been held *incommunicado* for prolonged periods and tortured. The vast majority of the victims of all of these violations have been from the Fur, Zaghawa, Massalit, Jebel, Aranga and other so-called ‘African’ tribes.⁷

Besides, the Commission’s Report indicated that there are “1,65 million internally displaced persons in Darfur, and more than 200,000 refugees from Darfur in neighbouring Chad.”⁸ Apart from indicating crimes against humanity and war crimes that were committed in Darfur, the

Commission Report indicated, however, that intent to commit genocide did not materialise.⁹

Given the Security Council referral to the ICC of Darfur situation, it has been noted that “in issuing the arrest warrant against President Al-Bashir, the Court specified that the request for an arrest and surrender must be circulated to: all states parties to the ICC Statute; and all UN Security Council members that are not parties to the Statute.”¹⁰

The obligation to cooperate is incumbent upon States parties to the ICC, including arrest and surrender. The issuance of an arrest warrant in respect of international crimes against President Bashir, who possesses personal immunity, raises some questions: Can a sitting Head of State of a non-party to the Rome Statute be prosecuted by the ICC? To what extent could (non) state parties to the Rome Statute give effect to the ICC’s arrest warrant against an incumbent Head of State [Sudan] without violating the rules of customary international law on immunities?

The answers to the foregoing questions of whether state parties are entitled to give effect to the arrest warrant issued by the ICC for arrest and surrender of Al-Bashir to the Court depends on whether the immunities to which President Al-Bashir would ordinarily be entitled have been removed.

Does the ICC have the legal basis to prosecute President Al-Bashir?

On 17 July 1998, the Rome Statute was adopted establishing the International Criminal Court (ICC), with power to exercise its jurisdiction over

⁴The Warrant of Arrest for Al-Bashir, *supra* note 1.

⁵ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General of Geneva 25th January 2005, p.3. (See Also the Warrant of Arrest for Omar Al-Bashir, *supra* note 1).

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ Gaeta Paola, *Does President Al Bashir Enjoy Immunity from Arrest?*, Journal of international criminal justice, vol. 7, issue 2, 2009, p. 316.

persons responsible for the most serious crimes of concern to the international community.¹¹ According to the ICC preamble, it is a permanent judicial institution whose jurisdiction is complementary to that of national criminal jurisdictions. Article 5(1) of the Rome Statute provides “that the Court has jurisdiction to try most serious crimes, including the crimes of genocide, crimes against humanity, war crimes and the crime of aggression.”¹² In doing this, however, the Court has to exercise its functions and jurisdiction as laid down in its Statute, particularly on the territory of States Parties or by virtue of special agreement with the Court as enshrined in Article 4 of the ICC Statute.¹³

Similarly, the ICC Statute preamble provides that the Court’s prime focus is to eliminate the reign of impunity by virtue of Article 27 of the ICC Statute, which provides: “This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. 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.”¹⁴

Clearly, the provision generally eliminates both immunity *ratione personae* and immunity *ratione materiae* attached to state officials irrespective of their capacity in respect of international crimes. The ICC Statute removes expressly immunities of State officials including Heads of State or Government. Article 27 has become standard in the founding legal framework of international tribunals. Paragraph (1) of the provision does not address the issue of immunity accorded by international law to state officials, rather addresses the substantive responsibility of state officials with respect of international crimes. Paragraph (2) explicitly waives international and national immunity. On this point, it can be underlined that immunities accorded to state officials, whether under national or international law, shall not bar the court from exercising its jurisdiction over such a person. Truly speaking, immunities of state officials who are state parties to the ICC Statute are subject to the jurisdiction of the ICC and the provision contains an automatic waiver of immunity entitled to them.¹⁵ Obviously, the Court does not have independent power to arrest and must depend on the states’ willingness to arrest and transfer the wanted person. This is absolutely true to states parties, which demonstrated waiver of immunities to its Heads of state or other state officials enjoying immunity by signing on to the Rome Statute. In this connection, it is important to note that Sudan is not state to the Rome Statute; therefore its nationals are not subject to the jurisdiction of the ICC. The issuance of an arrest warrant by the Pre-Trial Chamber of the ICC before addressing the question of immunity accorded to incumbent Sudanese Head of state

¹¹ T.M.C. Asser Instituut & Den Haag, *supra* note 3, p.273.

¹² *Ibid.*

¹³ *Ibid.*, Article 4 (2) of Rome Statute states “The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.”

¹⁴ *Ibid.*, p. 278.

¹⁵ Williams Sarah and Lena Sheri, The Arrest Warrant for President Al-Bashir: Immunities of Incumbent Heads of State and the International Criminal Court, *Journal of conflict & security law*, vol. 14, issue 1, 2009, p.74.

[Omar Al-Bashir] by customary international law, would be addressing the issue in an utterly haphazard manner.

In this sense, the Pre-Trial Chamber was fully aware that President Al- Bashir is protected by status (personal) immunity, and Sudan is not party to the ICC Statute. Neither has it entered in a special agreement with the Court as provided in Article 4, paragraph 2, of the ICC Statute.

It is quite relevant to question whether under the legal framework of the ICC a particular state regardless of being a non-party to the Rome Statute is bound by the removal of immunity set out in the Article 27. In this view, one must state that the ICC was established by the Rome Statute, through a treaty-based obligation. Consequently, Article 27(2) binds states parties; *inter alia*, “states parties have assented, by ratifying the Rome statute, to deny themselves their right of procedural immunity under customary international law.”¹⁶ Clearly, one would strongly contend that states may make a treaty, which creates obligations, but these obligations cannot be extended to non-states parties in absence of express consent. This is in harmony with international law pursuant to Article 34 of the Vienna Convention on the Law of Treaties, which provides: ¹⁷“A treaty does not create either obligations or rights for a third State without its consent.”

¹⁶ *Ibid.*

¹⁷ T.M.C. Asser Instituut & Den Haag, *supra* note 3, p.134 (Article 34 of VCLT: A treaty does not create either obligations or rights for a third State without its consent). (See also http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf).

The provision satisfactorily expounds that a non-state party is not bound by a treaty-based-obligation. Therefore, the jurisdiction of the ICC ought to be exercised over crimes committed by individuals of state parties and within those territories. Clearly, an automatic waiver of immunity laid down in Article 27(2) has nothing to do with a non-party to the Rome Statute.

Are States Parties to the ICC Statute bound to cooperate by Arresting and Surrendering President Al-Bashir to the ICC?

The arrest warrant and a request for cooperation have now been transmitted to all states parties.¹⁸ At this stage, the sticking point is this: are states parties to the ICC Statute obliged to give effect to the request by the ICC to arrest and surrender President Al-Bashir in light of Article 98, which requires the Court not to proceed with the request if the given state would act inconsistently with its obligations under international law with respect to immunities?

Some views have been expressed on the obligation incumbent upon states parties to cooperate with the ICC Statute. Firstly, in view of the principle of complementarity, States parties to the Rome Statute are required to cooperate in observance of treaty obligations and in accordance with their domestic laws, including with the arrest and surrender of suspects to the ICC.¹⁹ However, this obligation does not rule out the initial responsibility of a state to punish any international crimes in light of Article 98 of the ICC Statute, except in the absence of this possibility.²⁰

¹⁸ Williams Sarah and Lena Sheri, *supra* note 15, p.85.

¹⁹ Hazel Fox, *The law of State Immunity*, 2nd Ed, Oxford University Press, 2008, p.678.

²⁰ *Ibid.*

Accordingly, the state parties have obligation to cooperate with the Court since it does not have police to enforce its decision but rather depends on the cooperation of states to arrest and surrender the suspected official to the custody of the ICC.²¹ By the principle of *pact sunt servanda* states parties to the Rome Statute are obliged to comply with the ICC pursuant to Article 26 of the Vienna Convention on the Law of Treaties, which provides that: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith”.²²

This provision precisely obliges state parties to the ICC Statute to fulfil the obligations thereto. It can also be noted that the obligation to cooperate by states parties in respect of the ICC’s request to arrest and surrender President Al-Bashir protected by immunity would be violating international law on immunities of officials from non-party state to the ICC Statute. Interestingly, in the *Prosecutor v. Blaskic*, the Appeals Chamber of the ICTY reasoned that even if an international obligation is addressed to states they have latitude to make choice in identifying the persons responsible for, and determine the internal organs competent to carry out the order.²³

However, it can be argued, on one hand, that it is an obligation of states parties to cooperate with the ICC pursuant to the Rome Statute, but, on the other hand, arresting and transferring President Al-Bashir entitled to immunity would be breaching the rules of customary international law

on immunities possessed by sitting Heads of state.²⁴

In contrast, in the *Arrest Warrant Case Congo vs Belgium*, the International Court of Justice (ICJ) made it clear that there is no exception to immunities of incumbent ministers for foreign affairs or Heads of State and Government under customary international law.²⁵ However, the Court stated four exceptional circumstances in which criminal proceedings can be lodged against a person entitled to immunity:²⁶

“First, such persons enjoy no criminal immunity under international law by an incumbent or former minister for foreign in their own countries, and may thus be tried by those countries’ courts in accordance with the relevant rules of domestic law. Second, they will cease to enjoy immunity from foreign jurisdiction if the state which they represent or have represented decides to waive that immunity. Third, after a person ceases to hold the office of Minister for foreign affairs, he or she will no longer enjoy immunities accorded by international law in other states. Fourth, an incumbent or former minister for foreign affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction.”²⁷

In view of the foregoing, the Court held that immunity cannot be a shield before international tribunals such as the ICTY, the ICTR, established by the Security Council under Chapter VII of the UN Charter, and the ICC Statute. Arguably,

²¹Dapo Akande, *International law Immunities and the International Criminal Court*, American Journal of International law, Vol 98, Issue No.1, 2004, p. 420-421.

²² T.M.C. Asser Instituut & Den Haag, *supra* note 3, p.133.

²³ T.M.C. Asser Instituut & Den Haag, *supra* note 3, p. 425, para. 43 (*Prosecutor v. Tihomir Blaskic* Judgement on the request of Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997).

²⁴Williams Sarah and Lena Sheri, *supra* note 15, p.85.

²⁵ Case concerning the Arrest Warrant of 11 April 2000 (Congo v. Belgian), (hereinafter referred to as Arrest Warrant Case), 2002 ICJ REP. 121; 41 ILM 536, 541 (2002), para.58.

²⁶ *Ibid*.

²⁷ *Ibid*, para. 61.

however, the ICJ provided no guideline to be used, beyond referring to the three existing international criminal tribunals. This approach, however, did not envisage different legal bases of these international courts.²⁸ Conversely, in the *Prosecutor v. Blaskic*,²⁹ the Appeals Chamber of the ICTY clearly dismissed the possibility of the international tribunal to bring to justice the state officials whose acts are attributable to a state. The Court expressed that state officials are mere instruments of states and their official acts can only be attributable to the state. They cannot be held responsible for conduct that is not private but performed in the name of the state. It is further noted that state officials enjoy functional immunity in the light of well-established rules of customary international law, therefore they cannot be prosecuted for acts performed in the course of their official duties.

Unfortunately, the ICJ side-stepped to elaborate the bottom-line question of immunity of serving Heads of state recognised under customary international law, which cannot be disregarded implicitly. Given the existing lack of clarity on immunity entitled to incumbent Heads of state, the international nature of the ICC does not *per se* give itself a green light to exercise its jurisdiction extraterritorially.

Are non-states parties to the ICC Statute obliged to cooperate with the ICC?

This part discusses non-party states and Sudan in particular, which, of course, appears in the present case.

²⁸ Williams Sarah and Lena Sheri, *supra* note 15, p.75-76.

²⁹ T.M.C. Asser Instituut & Den Haag, *supra* note 3, p. 424, para. 38 (*Prosecutor v. Tihomir Blaskic* Judgement on the request of Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997).

As already noted, Article 34 of the Vienna Convention on the Law of Treaties provides that: “treaty does not create either obligations or rights for a third State without its consent”³⁰. Therefore, States that are not party to the ICC Statute are not obliged to cooperate with a request by the ICC for the arrest and surrender of President Al-Bashir. In other words, the ICC Statute is a treaty and treaties do not impose obligations or create rights for non-parties (third State/non-contracting party) without their express consent.

According to Akande, immunities are special rights belonging to non-states parties which states parties to a certain treaty cannot deprive them of³¹. As such, neither the international tribunal nor states parties to a treaty can request a non-party state to cooperate. It was further stated that “the immunities are conferred to prevent foreign states from unduly interfering in the affairs of other states and from exercising jurisdiction over another state in circumstances where it has not consented. It makes little difference whether the foreign states seek to exercise the judicial jurisdiction unilaterally or through some collective body that the state concerned has not consented to. To suggest that immunity is non-existent before an international tribunal that has not been consented to by the relevant state is to allow subversion of the policy underpinning international law immunities”³². Accordingly, Article 4, paragraph 2, of the Rome Statute provides that:³³ “The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.”

³⁰ *Ibid*, p.134.

³¹ Dapo Akande, *supra* note 21 p.420-421.

³² *Ibid*.

³³ T.M.C. Asser Instituut & Den Haag, *supra* note 3, p. 273.

The provision requires the signing of special agreement with the court in order to exercise its jurisdiction over non-contracting states. Besides that, under Article 12, paragraph 3, of the ICC Statute,³⁴ non-states parties must by unilateral declarations assent to the ICC jurisdiction or accession, so that the Court may exercise its jurisdiction over territories of non-parties to the Statute. Also, Article 87, paragraph 5, of the ICC Statute states that:³⁵ “The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.”

Unlike the States Parties to the Rome Statute, non-contracting states can only give effect to the request by the ICC on condition that they have unmistakably expressed their consent. Admittedly, Security Council Resolution 1593(paragraph 2) urged all parties in the conflict in Darfur to cooperate fully with the ICC,³⁶ among others non-party states to the ICC Statute. According to this view, the Security Council should recognise that third states are under no obligation to cooperate with the ICC. As earlier noted, even if the ICC is

handling the present case in response to the Security Council referral, it is important to recall that the jurisdiction of the ICC under the Rome Statute is a treaty based and not directly linked to the UN Charter; therefore, it cannot purport to have primacy over other international obligations.

The Sudanese Government has not entered in any agreements with the ICC. Consequently, like other non-states parties, Sudan is not bound by the Rome Statute, and its nationals are not subject to the jurisdiction of the ICC. However, turning back to UNSC Resolution 1593, the Security Council obliges Sudan to cooperate fully with and provide any necessary assistance to the ICC.³⁷ It is highly improbable that Sudan would comply with the ICC request to arrest its Head of State enjoying immunity. Sudan strongly argued that “its national courts have jurisdiction in relation to its own nationals and that it will not extradite or surrender any national for facing trial elsewhere.”³⁸ Sudan has flatly contended that it will not cooperate with the ICC whatsoever.³⁹ And the prospect of President Al-Bashir’s voluntary surrender to the ICC is extremely unlikely.

It is worth noting that the specific recognition of immunity from prosecution by the ICC of American citizens (not subject to the ICC jurisdiction) who commit war crimes is most unfortunate. With regards to the case of Sudan, the rationale behind this exemption should also apply to Sudanese nationals precisely because Sudan is not a party to the Rome Statute. If US citizens cannot be subject to the ICC jurisdiction, which is

³⁴ *Ibid*, p. 276(Article 12(3) of the ICC Statute: If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9).

³⁵ *Ibid.*, p.287.

³⁶United Nations Security Council Resolution 1593, *supra* note 2.(Paragraph 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.

³⁷ *Ibid*

³⁸ ‘African Union says Sudan judiciary will look into Darfur crimes,’ Sudan Tribune, 11 Sept 2008, (<http://www.sudantribune.com/spip.php?article28590>).

³⁹ *Ibid*.

similarly not signatory to the Rome Statute, why does this have to apply to Sudanese nationals? As matter of law, Sudan is under no obligation to comply with the so-called ICC requests.

Whichever way one looks at Security Council resolution, the inevitable conclusion is that non-party states are under no obligation to cooperate in light of Resolution 1593 and the Rome Statute. However, since Sudan is non-compliant and non-cooperative in the light of Resolution 1593, one would suggest that the Security Council needs to adopt a further resolution imposing non-forcible measures, such as economic coercion or arms embargoes calculated to compel Sudan to waive immunity of its head of state. Probably this would considerably put pressure on Sudan to cooperate in light of Security Council Resolution 1593 with respect to the ICC request. I will discuss later the ramification of the UN Security Council referral.

The relationship between article 27 and 98 of the ICC Statute

What is the relationship between Articles 98(1) and 27(2) both of the Rome Statute? Article 27(2) of the ICC Statute automatically and unequivocally removes immunity of state officials irrespective of their official capacity, while Article 98 (1) of the Statute precludes acting contrary to international obligations. Article 98(1) provides that:⁴⁰ “The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the

waiver of the immunity.”⁴¹ The provision requires the ICC to seek assistance for surrender of a Head of State in a manner that does not breach international obligations on immunities. Surprisingly, the Pre-Trial Chamber of the ICC decided to issue an arrest warrant for President Al-Bashir prior to addressing the question of his personal immunity. The approach of the Pre-Trial Chamber sounds like Article 27 is the only basis to pursue its goal. Initially, the Court ought to have dealt with the application of both provisions.

The reasoning of the ICC raises a question: are these two provisions not mutually exclusive? Striking the balance between the immunity of state official and the prosecution of international crime remains pretty controversial. Article 98(1) allows the ICC to make a request for arrest and surrender to non-states parties provided that waiver of immunity has been obtained and would not be against international law on immunities of Heads of State or Government. In other words, the Court had to carefully take into account the issue of immunities before pushing for states to execute its request, an act which clearly violates international obligations. Article 27(2) is inapplicable to non-contracting states to the Rome Statute except in case of accession, or special agreement between the non-parties with the Court to exercise its jurisdiction over its nationals, as laid down in Articles 4(1) and 12(3) of the ICC Statute.⁴² As such, Articles 27 and 98 are not mutually exclusive.

It is worth empathizing that Article 27 provides that possession of immunities by state officials is

⁴⁰T.M.C. Asser Instituut & Den Haag, *supra* note 3, p.290.

⁴¹ The Rome Statute Article 98.

⁴²T.M.C. Asser Instituut & Den Haag, *Supra* note 3, pp. 273, 276.

not a bar to the ICC from exercising its jurisdiction, while Article 98 precludes the Court from requesting cooperation from state parties that would result in breach of their international obligations in respect to immunities of foreign state officials. If one would make an objective interpretation of Article 98, it proves to be a significant barrier to the exercise of the ICC's jurisdiction as long as there is no waiver of immunity of state official by a non-party state.

Furthermore, the relationship between Articles 27 and 98 does not appear to be ambiguous. In this view, it has been put that "the two provisions were drafted by different committees in the preparation of the Rome Statute and no thought appears to have been given to their consistency with one another."⁴³

It has been suggested that the application of two provisions "is to take the position that Article 27 waives immunity with respect to the Court and applies only to actions by the Court, but Article 98 preserves those same immunities with respect to action to be taken by national authorities."⁴⁴

However, the Court does not have the power to arrest; it relies merely on the willingness of states to cooperate with the Court. As noted elsewhere, another possibility is when President Al-Bashir voluntarily surrenders himself before the seat of the ICC, although it sounds rather improbable.

It has been noted that construing and reading both provisions (27 and 98 of the ICC Statute) should give a harmonious meaning and that the Court "is not free to adopt a reading that would result in reducing whole clause or paragraphs of a treaty to

redundancy or inutility".⁴⁵ To avoid overlapping of the two provisions or redundancy of one article, it is important to interpret them in light of the Vienna Convention on the Law of Treaties, which requires interpretation of treaty provisions to be in good faith and in accordance with the natural meaning of wording and in light of its object and purpose.⁴⁶ However, most recently, the ICC clarified that in case of clash in applying Articles 27 and 98 of the ICC Statute, Article 27 takes precedence.

Incorporating the Rome Statute in the national legislations of states parties would possibly end the conflict of interpretation. A number of states have already incorporated the ICC Statute in their national legislations for example, UK, Malta, the Republic of Ireland and Samoa.⁴⁷ It is noteworthy that Canada, as state party to the Rome Statute, explicitly stated that immunity of state officials shall not bar the execution of the ICC's request for an arrest warrant.⁴⁸ On the other hand, Canada made it clear that Article 98 should not be interpreted in a manner that permits the ICC to issue an arrest warrant that would violate immunities of non-party states to the ICC Statute.⁴⁹ Reading Article 98 to require a prior waiver of immunity by Sudanese authority before the ICC can issue an arrest warrant conforms to Section 23 of the ICC Act 2001, which provides: "Any state or diplomatic immunity attaching to a person by reason of a connection with a state party

⁴³ Dapo Akande, *supra* note 21, p.337.

⁴⁴ *Ibid.*

⁴⁵ *Ibid*, p.338.

⁴⁶ T.M.C. Asser Instituut & Den Haag, *supra* note 3, p.133 (Article 31 (1) of VCLT: 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 its object and purpose).

⁴⁷ Dapo Akande, *supra* note 21, p.338.

⁴⁸ *Ibid.*

⁴⁹ *Ibid*, p.339

to the ICC Statute does not prevent proceedings under this Part in relation to that person.

(2) Where—(a) state or diplomatic immunity attaches to a person by reason of a connection with a state other than a state party to the ICC Statute, and (b) waiver of that immunity is obtained by the ICC in relation to a request for that person's surrender,"⁵⁰

It is reasonable to stress that ratification of the Rome Statute, in view of Article 27, becomes operative in the removal of immunities possessed by officials of states parties to the ICC Statute. Article 98 prevents the ICC from issuing an arrest warrant for a state official of non-state party, without first obtaining the cooperation of the non-contracting/third state removing the immunity of its state official. As already noted, acting otherwise would be inconsistent with the rules of customary international law on immunities.

The effects of the Security Council referral to the ICC (Darfur Situation)

What is the legality of Security Council Resolution 1593 to a non-party state (Sudan) to the ICC Statute, whose incumbent Head of state is protected by immunity? What are the effects of the Security Council referral on the Sudanese government? The case of the Sudanese President Al-Bashir was referred to the Prosecutor of the ICC by the Security Council, by virtue of Resolution (1593) adopted under Chapter VII of the UN Charter.⁵¹ According to Article 24 of the UN Charter, the Security Council has primary

responsibility in matters relative to the maintenance of international peace and security.⁵²

Additionally, Article 25 of the UN Charter provides:⁵³ "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." Thus, the Security Council, acting under Chapter VII of the UN Charter, can take (non) binding measures (pursuant to Article 25 urging all member states to cooperate in giving effects the decisions of the Security Council). Apparently, the Security Council relied on the obligation derived from Article 25 of the Charter to adopt binding resolution 1593 under Chapter VII, obliging Sudan to comply with the ICC request. Can it be said that, due to the precedence of the constitutional character of the UN Charter in conflict with other obligations stemming from international agreements as set forth in Article 103⁵⁴, Security Council resolution 1593 overrides the rules of customary international law on immunities?

Undoubtedly, the Charter supersedes the obligations stemming from multilateral treaties that are inconsistent with it, but this is not the case of the UN Charter versus customary international law with relation to immunity accorded to sitting Heads of state. Can it be asserted that the sovereign will of states is always immaterial in light of the UN Charter? Whether the obligations stemming from the UN Charter supersede other obligation or not is a debatable view. Some regard

⁵⁰ The International Criminal Act 2001 (http://www.opsi.gov.uk/acts/acts2001/ukpga_20010017_en_3#pt2-pb6-11g23), accessed on 20th May 2013.

⁵¹ United Nations Security Council Resolution 1593, *supra* note 2.

⁵² T.M.C. Asser Instituut & Den Haag, *Supra* note 3, p.87.

⁵³ *Ibid.*

⁵⁴ UN Charter Article 103 "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".

the UN Charter as a quasi-constitutional document in international law. No matter the status of obligations thereto, it remains an international institution that has been created by states to meet the ends of member states.

Given the Security Council powers laid down in the UN Charter in adopting resolution 1593, Sudan is obliged to comply with Security Council resolution by a matter of fact that is a member state of the United Nations, irrespective of being a non-party state to the Rome Statute. In a similar resolution, the Security Council has urged all states to cooperate with the ICC. Understandably, the states parties to the ICC Statute are obliged to execute the Court's request for surrendering President Al-Bashir to the ICC, nevertheless this request is incompatible with Article 98 (1) of the Statute and its execution requires the breach of the rules of customary international law on immunities of incumbent Head of state of a non-party state. According to Gaeta, the Security Council referral to the ICC must be a mechanism designed to confer on the jurisdiction of the ICC to prosecute nationals of non-states parties to the ICC Statute in respect of international crimes.⁵⁵

However, nothing in the ICC Statute obliges the ICC to bring the issue to the attention of the Security Council as if the ICC is a subsidiary organ of the Security Council like the ICTY and the ICTR created by Security Council resolutions under Chapter VII. In view of the *Tadic Case*, the Court clarified that the ICTY and the ICTR are subsidiary organs of the Security Council whose purpose is a measure to restore international peace and security under Chapter VII of the UN

⁵⁵ Paola Gaeta, *supra* note 10, p.330.

Charter.⁵⁶ However, it is difficult to similarly explain that the creation of the ICC was in accordance with Chapter VII, yet it was created by individual states with the aim of ending the reign of impunity which is different from the spirit of Chapter VII of the Charter. In contrast, the international criminal tribunals were created by the Security Council in view of restoring international peace and security while the Rome treaty (Statute) was created to end the culture of impunity. For instance, crimes proscribed in Article 7(1) of the ICC Statute fall under the jurisdiction of the ICC,⁵⁷ but they can be committed in peacetime and go unpunished without need of applying Chapter VII.

Article 103 of the UN Charter mentions the precedence of the UN Charter over international agreements, but this does not mean that Security Council resolution urging states to cooperate with the ICC in and of itself demonstrates primacy of the Rome Statute since the Statute represents ideas of a few individual states. Conversely, the power of international tribunals to request for cooperation stems from the UN Charter under Chapter VII conferring on the Security Council authority to restore international peace and security. With respect to the ICC that was created through a treaty, the obligations stemming from the treaty cannot override other international obligations. Clearly, Article 103, noted above, prescribes the superiority of obligations stemming from the UN Charter in reference to the establishment of the ICTY and the ICTR.

⁵⁶ T.M.C. Asser Instituut & Den Haag, *Supra* note 3, p.276. (*Prosecutor v. Tadic*, Decision of the Appeals Chamber), pp. 418, 419, paras. 31, 38.

⁵⁷ *Ibid.* p.274(Article 7 (1) for example: murder, extermination, enslavement, torture.....).

Security Council Resolution 1593 (paragraph 2) obliges Sudan to cooperate fully with the ICC but did not make the Statute binding on it, nor did it address the question of immunity.⁵⁸ The Security Council simply referred the present case to the ICC in light of 13(b) of the ICC Statute which permits the Court to apply its statutory framework.⁵⁹ Both the Security Council and the ICC side-stepped the question of President Al-Bashir's immunity, as if waiver of immunity is automatic in the same way as for nationals of state parties to ICC Statute.

No matter whether Sudan is bound by the UN Charter in light of Article 25, Security Council resolution 1593 does not make Sudan totally lose its sovereign powers to decide otherwise with respect to the arrest warrant by the ICC. In any event, the sticking point remains that Sudan is a third state and cannot be considered to be a party to the Statute to the ICC Statute. If the Security Council goes ahead to demand Sudan to cooperate with the ICC in response to its referral that would be implicitly subjecting Sudan to the ICC Statute and making the Statute binding on it.

The Security Council has not lifted President Bashir's immunity either; any such lifting should have been explicit. The mere referral of a "situation" by the UNSC to the ICC or requesting a state to cooperate with the ICC cannot be interpreted as lifting immunities granted under

international law. The consequence of the referral is that the Rome Statute, including article 98, is applicable to the situation in Darfur.⁶⁰

Most recently, the African Union made a formal decision urging member states not to give effect to the arrest warrant by the ICC for President Al-Bashir: "Decide[d] that in view of the fact that the request by the African Union has never been acted upon (by UN Security Council), the AU Member States shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar Al-Bashir of The Sudan". This decision adopted by the AU policy organs pursuant to the provisions of Rule 33 of the Rules of Procedure of the Assembly is binding on Chad and Malawi and it would be wrong to seek to coerce them to violate or disregard their obligations to the African Union".⁶¹

Most importantly, however, the ICC can opt for referring the matter to the attention of the Security Council to adopt a further resolution(s) to specifically address the issue of personal immunity accorded by customary international to President Al-Bashir. In other words, a further resolution restated in mandatory language would put pressure on Sudanese authorities to waive immunity of its Head of State and subsequently be brought to justice. As a result, Sudan would

⁵⁸The SC Reso. 1593, *supra* note 2, Para 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."

⁵⁹T.M.C. Asser Instituut & Den Haag, *supra* note 3, p.290.

⁶⁰ Press Release N° 002/2012 in Addis Ababa, 9 January 2012 - The African Union Commission has noted with grave concern the decisions ICC-02/05-01/09-139 and ICC-02/05-01/09-140 of 12 and 13 December 2011, respectively, of Pre-Trial Chamber I of the International Court (ICC) on the alleged failure of the Republic of Malawi and the Republic of Chad to comply with the cooperation requests issued by the ICC with respect to the arrest and surrender of President Omar Al Bashir of the Republic of Sudan.

⁶¹ *Ibid.*

probably fully cooperate in light of its membership to the United Nations and regarding obligations thereto. Similarly, other states have to adhere to Security Council resolution, an obligation rooted in Article 25 of the UN legal framework. However, a suggestion is worthwhile for the ICC to consider legal challenges associated with immunities of state official before deciding to issue an arrest warrant. In view of the present case, it can be noted that the ICC was attempting to stretch its guiding principles in rendering justice and operate in a system seemingly manipulated, which is incompatible with principles of independence and impartiality of a judicial institution.

Conclusion

At this juncture, it is important to conclude that, on the issue of cooperation, Sudan vehemently opposes the obligation to cooperate because it is a non-party state to the Rome Statute establishing the ICC and consequently the Court lacks jurisdiction over crimes committed in Darfur. Al-Bashir, as an incumbent Head of State (Sudan), is accorded immunities under customary international law.

Security Council Resolution 1593 referring the Darfur situation to the ICC remains a bone of contention precisely because the Security Council referral raises a number of legal questions that were not addressed beforehand. Subjecting Sudan to the Rome Statute, even though it is a non-state party, is inconsistent with existing international customary law. The Security Council referral

appears to be creating conflicting signals: on one hand, it obliges Sudan to cooperate with the ICC when it is a party to Rome Statute, while on the other hand, it urges non-states parties to the ICC Statute to cooperate, a request that is inconsistent with international obligations on immunities accorded to State officials. It is worthwhile underlining that the ICC is neither a subsidiary organ of the Security Council nor has it been given a *carte blanche* by the Security Council in a sense that the court can be manipulated to circumvent its own statutory principles and succumb to the political decisions of the Security Council. Besides, the issuance of the arrest warrant by the ICC Pre-Trial Chamber has raised many contentions and scepticisms whether the Court lives up to its guiding principles. For example, the ICC lacks jurisdiction over US nationals who may be responsible for international crimes under jurisdiction of the ICC, by the fact that USA is a non-signatory to the ICC Statute. With regard to Sudan, the rationale behind this exception should also apply to the Sudanese nationals, including its Head of State. Consequently, the approach devised raises great controversy over the credibility of the Court, whether it is not a politically manipulated judicial institution that does not live up to its legal framework.

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