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Kenya's provisional warrant of arrest for President Omar al Bashir of the Republic of Sudan

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Summary

At the end of November 2011 a Kenyan High Court ordered that, if ever President Omar al Bashir of the Republic of Sudan steps on Kenyan territory, he should be arrested and transferred into the custody of the International Criminal Court (ICC). In pursuit of this ruling, the same court in January 2012 issued a provisional warrant of arrest for President Bashir. In issuing the ruling and the provisional arrest warrant, the Court observed that it was implementing the decision of the ICC, which issued warrants of arrest for Bashir in March 2009 and July 2010 for crimes against humanity and genocide, respectively, which he allegedly committed in the Darfur conflict. The contribution argues that, first, the Court missed an opportunity to clarify the issue of the tension existing between provisions of the Rome Statute, particularly article 27 relating to the irrelevance of official capacity, and article 98(1) relating to co-operation with respect to waiver of immunity and consent to surrender a head of state whose country is not a state party to the Rome Statute. Secondly, the Court's declaration that the principle of universal jurisdiction has acquired jus cogens *status and its application to the Bashir case was not correct.*

1 Introduction

On 27 August 2010, President Omar al Bashir of the Republic of Sudan attended the promulgation of the new Constitution of Kenya 2010

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at Uhuru Park, Nairobi. Again in October 2010, Bashir was to attend an Intergovernmental Authority on Development (IGAD) summit meeting in Nairobi on the future of Sudan but, due to the uproar at his presence in Kenya from various quarters, the meeting was shifted to Addis Ababa, Ethiopia. Also, the African Union (AU) summit meeting that was to be held in Malawi in July 2012 ran into problems because of Bashir. Malawi, which was to play host, requested that Bashir not be invited to attend the meeting.[1] Malawi, a party to the Statute of the International Criminal Court (ICC), stated that it had an obligation to arrest Bashir, who was wanted by the ICC, were he to visit Malawi. After the death of President Bingu wa Mutharika in April 2012, who had played host to Bashir in October 2011, President Joyce Banda, his successor, stated that there was a risk of damaging relations with Malawi's donors (Western countries)[2] were the country not to comply with the decision of the ICC to arrest Bashir. As a consequence of Malawi's insistence that Bashir was not welcome, the AU decided to move the meeting to Addis Ababa.

Bashir's presence in Kenya in August 2010 became a subject of discussion in Kenya and around the world, because in March 2009, Pre-Trial Chamber I (PTC I) of the ICC had issued a warrant of arrest for him as a result of the investigation by the Chief Prosecutor of the ICC in the Darfur situation. As a result of Bashir's visit and Kenya's failure to arrest and hand him over to the ICC, the International Commission of Jurists-Kenya Chapter (KICJ) (the applicant) petitioned the High Court of Kenya seeking to find Kenya in violation of its obligations under the Rome Statute of the ICC.[3] The application was motivated by, *inter alia*, 'the development, strengthening and protection of the rule of law, and in particular to keep under review all aspects of the rule of law and human rights within the Republic of Kenya, and take such action as will be of assistance in promoting or ensuring the enjoyment of these rights'.[4] Kenya became a state party to the Rome Statute in 2005.

On 28 November 2011, Kenyan High Court Judge Nicholas Ombija ruled that, should Bashir ever visit Kenya again, he should be arrested

1 For a discussion, see D Akande 'The African Union, the ICC and universal jurisdiction: Recent developments' *EJIL Talk!* 29 August 2012 http://www.ejiltalk.org/the-african-union-the-icc-and-universal-jurisdiction-some-recent-developments/ (accessed 7 September 2012).

2 Aljazeera 'Malawi cancels AU summit over Sudan's Bashir' 9 June 2012 http://www.aljazeera.com/news/africa/2012/06/20126974132905285.html (accessed 15 September 2012) (observing that Joyce Banda, Malawi's new President, wanted Bashir to stay away to avoid straining ties with key donors for her impoverished country).

3 See Republic of Kenya, In the High Court at Nairobi, Misc Criminal Application 685 (2010), 28 November 2011 (unreported) (on file with author).

4 As above.

and handed over to the ICC.[5] The judge ordered that the Attorney-General and the Internal Security Minister enforce the directive, and hand over the Sudanese leader to the ICC.[6] Sudan reacted to the ruling by threatening to expel Kenya's ambassador to Sudan and recall its own ambassador to Kenya. President Bashir gave Kenya two weeks to rescind the ruling.[7] Meanwhile, the Kenyan government sent a special envoy to Sudan to reassure Bashir that the government would appeal the ruling.[8] In this regard, Foreign Minister Moses Wetangula was quoted as assuring the Sudan government that 'the government of Kenya ... expresses its deep concern at the very unhelpful High Court ruling and will do everything in its powers to ensure that the ruling does not undermine in any way whatsoever the very cordial and fraternal relations that exist between Kenya and Sudan'.[9]

This article argues that in its ruling, the Court missed an opportunity to clarify the issue of the tension existing between provisions of the Rome Statute, particularly article 27, relating to the irrelevance of official capacity, and article 98(1), relating to co-operation with respect to a waiver of immunity and consent to surrender a head of state whose country is not a state party to the Rome Statute. Secondly, the Court's declaration that the principle of universal jurisdiction has acquired *jus cogens* status, and its application to the Bashir case was not correct.

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5 P Ogemba 'Court issues warrant against Sudan's Bashir', *Daily Nation on the Web* 28 November 2011 http://allafrica.com/stories/201111282128.html (accessed 12 December 2011). Again, on 23 January 2012, Judge Ombija issued a provisional warrant of arrest against President Omar al-Bashir with strict consequences to Internal Security Minister George Saitoti if the government failed to obey the order. The judge said that 'he was satisfied with the information provided by the ICJ-Kenya Chapter to issue the provisional warrant of arrest urgently as provided under section 32 of the International Crimes Act (ICA).' He also observed that 'it is necessary to ensure [Omar al-Bashir] will not obstruct or endanger the ongoing investigations into the crimes for which he is allegedly responsible and that he will not continue with the commission of the crimes'. See P Ogemba 'Kenya court issues new Bashir warrant' *Daily Nation on the Web* 23 January 2012 http://allafrica.com/stories/201201241147.html (accessed 25 January 2012).

6 As above.

7 Sudan threatened sanctions on Kenya, including imposing a no-fly zone over Sudanese air by flights originating in or bound for Kenya; the expulsion of Kenyan nationals from Sudan; and the stopping of all Kenyan exports to Sudan (Sudan being a large importer of Kenyan tea). J Gitau International Commission of Jurists-Kenya Chapter (KCIJ) (e-ail communication) (on file with author).

8 *Daily Nation on the Web* 28 November 2011 http://allafrica.com/stories/201111300076.html (accessed 12 December 2011). See 'Country to appeal Bashir arrest order'. On 20 December 2011, the Attorney-General, Githu Muigai, lodged an appeal in the Court of Appeal seeking a temporary suspension of the arrest warrant against Bashir. The Court ruled that the Attorney-General's arguments were insufficient to suspend the warrant, and thus the warrant should stay in effect until the appeal is heard on merit. See E Latif 'Bashir warrant in force until appeal is heard' *Capital FM (Nairobi)* 20 December 2011 http://allafrica.com/stories/201112201033.html (accessed 27 December 2011).

9 As above.

2 International Commission of Jurists-Kenya Chapter's application

2.1 Background and pleadings

Following President Bashir's visit to Kenya in August 2010, the KICJ sued the Attorney-General and the Minister of State for Provincial Administration and Internal Security of Kenya as first and second respondents respectively, arguing *inter alia* that Kenya enhanced her commitment to fight against impunity by domesticating the Rome Statute in the domestic laws through the enactment of the International Crimes Act 2008 (ICA 2008), which entered into force on 1 January 2009;[10] that the ICA 2008, like the Rome Statute, does not recognise immunity on the basis of official capacity; that despite the Kenyan government being averse to or not aware of its commitments and obligations under international and municipal law, President Bashir was invited and hosted by the good government of Kenya at the promulgation of the new Kenyan Constitution on 27 August 2010; that the presence of Bashir in Kenyan territory was in violation of Kenya's obligations under the Rome Statute, the ICA 2008 and the new Kenyan Constitution of 2010; that the failure, neglect or refusal to arrest Bashir violated the basic tenets of international law; and that the hosting of Bashir by the Kenyan government raised very serious concerns over Kenya's commitment to combating impunity for the most serious crimes against humanity.[11]

It was the contention of the applicant that the disjointed approach in responding to the requests from the ICC was testimony of the different interests at play in the Grand Coalition Government (of Kenya) and

10 Specifically, arts 29 and 30 were cited by the applicant. Sec 29 provides: '(1) If a request for surrender is received, other than a request for provisional arrest referred to in section 28(2), the Minister shall, if satisfied that the request is supported by the information and documents required by article 91 of the Rome Statute, notify a judge of the High Court in writing that it has been made and request that the judge issue a warrant for the arrest of the person whose surrender is sought. (2) If a notice is sent to a judge under subsection (1), the Minister shall also send to the judge a copy of the request and supporting documents.' Sec 30 provides: '(1) After receiving a request under section 29, the judge may issue a warrant in the prescribed form for the arrest of the person if the judge is satisfied on the basis of information presented to him that – (a) the person is or is suspected of being in Kenya or may come to Kenya; and (b) there are reasonable grounds to believe that that person is the person to whom the request for surrender from the ICC relates. (2) The judge shall give reasons for the issue or refusal to issue a warrant under subsection (1).'

11 See n 3 above.

thus it was in the applicant's interest to prosecute the application in line with its objectives and mandate.[12]

The first and second respondents argued, *inter alia*, that a request for a provisional warrant of arrest could only be made by the ICC, and thus the applicant lacked *locus standi* as it had not demonstrated its interest in the case, nor had it shown that it had been instructed to act on behalf of the ICC; that foreign requests in matters of mutual legal assistance or extradition are channelled through the Attorney-General who, if satisfied as to the authenticity of the request, will move to the High Court for issuance of a warrant and conduct proceedings on behalf of the requesting party, the process not being done by an individual or any authority; and that there was no evidence of a request by the ICC to the Kenyan government for a provisional arrest warrant for Bashir, therefore the High Court lacked jurisdiction to hear, determine or give the orders sought in the application. It is instructive to note that the respondents never raised the issue of Bashir's immunity as a sitting head of state.

Later on, the Kenyans for Justice and Development Trust (KEJUDE), through its trustees Andrew Okiya, Omtata Okoiti and Augustinho Neto Oyugi, joined the proceedings as the third respondent. KEJUDE *inter alia* argued that the decision of the Assembly of the AU taken at Sirte, Libya in July 2009, directing all the members of the AU to withhold co-operation with the ICC in respect of the arrest and surrender of Bashir, still stood; that the AU has called on the United Nations (UN) Security Council to invoke article 16 of the Rome Statute to suspend the warrant against Bashir; that Kenya as a member of the AU is bound by the decisions and resolutions of the AU; that as a neighbour to Sudan, Kenya declaring a warrant of arrest against Bashir is an act of aggression whose execution shall jeopardise or risk the lives and property of an estimated 500 000 Kenyans in Sudan; and that the issuance of the warrant of arrest by the Kenyan courts may lead to a deterioration of the relations between the two states.

2.2 Applicant's prayers

The applicant sought the following orders: that the Court issues a provisional warrant of arrest against President Bashir; that it orders the second respondent to effect the said arrest warrant, if and when the said Bashir sets foot within the territory of the Republic of Kenya; and

12 As above. Apparently, the applicant, on learning that President Bashir was to visit Kenya again in October 2012, had written to the two principals in the Grand Coalition Government, President Kibaki and Prime Minister Odinga, calling on them to take [Kenya's] international and domestic obligations seriously. In his response, Prime Minister Odinga observed that the presence of President Bashir in Kenya's territory on 27 August 2010 '[had not been] a matter of mutual agreement with the Grand Coalition'.

that it issues such further orders, writ or direction as it deems fit and just in the circumstances.

2.3 Judgment

As a matter of fact, the Court easily established that Kenya had ratified the Rome Statute on 15 March 2005 and followed up this action by domesticating the Rome Statute by passing the ICA 2008, which came into force on 1 January 2009. The Constitution of Kenya 2010, which was promulgated on 27 August 2010, states in the Sixth Schedule, clause 7(1), that all laws in force immediately before the effective date (read 27 August 2010) continue in force and should be construed with the alterations, adoptions, qualifications and exceptions necessary to bring it into conformity with the Constitution.

2.3.1 Establishing jurisdiction

The Court held that the Rome Statute formed part of the laws of Kenya by virtue of the fact that article 2(5) of the Constitution of Kenya 2010 states that the general rules of international law form part of the law of Kenya. This position is further buttressed by section 41(1)[13] of the ICA 2008 and article 2(6)[14] of the Constitution of Kenya 2010. In establishing its jurisdiction to decide the application, the Court observed that 'the Constitution of Kenya 2010 does not in anyway reject the role of the international institutions such as the ICC'.[15] Thus, it noted that the Constitution of Kenya 2010 envisages that those exercising judicial authority to be guided by *inter alia* such principles as 'human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised'.[16] The Court, whilst observing that these values could not be given fulfilment by Kenya acting in isolation of the community of nations, noted that it was essential to recognise and facilitate the role of the ICC operating in the framework of the Rome Statute, in the framework of the Kenyan legal system. In this regard, the Constitution of Kenya 2010 gives

13 It states: 'The provisions of the Rome Statute specified in subsection (2) shall have the force of law in Kenya in relation to the following matters: (a) the making of the requests by the ICC to Kenya for assistance and the method of dealing with these requests; (b) the conduct of an investigation by the Prosecutor or the ICC; (c) the bringing and determination of proceedings before the ICC; (d) the enforcement in Kenya of sentences of imprisonment or other measurers imposed by the ICC, and any related matters; (e) the making of requests by Kenya to the ICC for assistance and the method of dealing with those requests.'

14 It states: 'Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.'

15 n 3 above.

16 Art 10(2)(b).

the High Court jurisdiction to hear any questions in respect of the interpretation of the Constitution, including the determination of[17]

> the question whether any law is inconsistent with or in contravention of this Constitution; the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution; any matter relating to constitutional powers of state organs in respect of country government and any matter relating to the constitutional relationship between the levels of government; and a question relating to conflict of law under article 191; and any other jurisdiction, original or appellate, conferred on it by legislation.

In the end, the Court concluded that both the Constitution of Kenya 2010 and the ICA 2008 grant it jurisdiction to enforce the Rome Statute.

2.3.2 Applicable principles

The Court considered the application of the principle of universal jurisdiction to the case. Under this principle, any state is empowered to bring to trial persons accused of international crimes regardless of the place of the commission of the crime or the nationality of the offender. Rightly, the Court noted that the principle was first proclaimed in customary international law in the seventeenth century with regard to piracy. Any state was authorised to arrest and bring to justice persons suspected of engaging in piracy, whatever their nationality and the place of the commission of the offence because pirates were regarded as 'enemies of all mankind' (*hostis humani generis*).

The Court then observed that the Rome Statute obligations were in any case customary international law which a state could not contravene. Violating customary international law, the Court noted, 'is intentionally violating fundamental rules of international public policy ... which would be detrimental to the international legal system and how that system and the society it serves defines itself'.[18] The duty to prosecute international crimes, the Court also noted,[19]

> has developed into *jus cogens* and customary international law, thus delegating states to prosecute perpetrators wherever they may be found. The states party to the ICC Statute are under a duty to prosecute or extradite perpetrators to the ICC for prosecution.

17 Art 165(3)(d).

18 n 3 above.

19 As above.

Citing the classic cases, including those of *Pinochet*[20] and *Eichmann*,[21] and the German Penal Code and Italian Criminal Code, the Court observed that a state may prosecute persons accused of international crimes regardless of their nationality, the place of commission of the crime, the nationality of the victim and even whether or not the accused is in custody or at any rate present in the state.

Whilst applying the principles of international law to the facts of the case, the Court held that[22]

> the High Court in Kenya clearly has jurisdiction not only to issue a warrant of arrest against any person, irrespective of his status, if he has committed a crime under the Rome Statute, under the principle of universal jurisdiction, but also to enforce the warrants should the Registrar of the ICC issue one.

In addition, the Court, after reviewing the approaches adopted in the jurisdictions of Australia, Canada and the United Kingdom, established that the applicant had *locus standi* and the issues raised by the application were justiciable.

In conclusion, the Court posed a very pertinent question: What happens when the warrants are issued and the Minister for Internal Security fails, neglects or refuses to execute them? In answering, the Court averred that any legal person, the applicant included, who has the requisite mandate and capacity to enforce or to execute the warrant may be at liberty to do so. Following this ruling, the Court in January 2012 issued a provisional warrant of arrest for President Bashir.

3 Analysing the judgment

As observed above, the respondents never raised the issue of President Bashir's immunity in their pleadings. Presumably, following the *non ultra petita* rule, that is why the Court also never considered it. Nevertheless, in my considered opinion, the Court missed an opportunity to give clarity on the tension existing between the

20 For a full record on this, see *Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet, R v* [1998] UKHL 41; [2000] 1 AC 61; [1998] 4 All ER 897; [1998] 3 WLR 1456 (25 November 1998); *Pinochet, In re* [1999] UKHL 1; [2000] 1 AC 119; [1999] 1 All ER 577; [1999] 2 WLR 272 (15 January 1999); *Pinochet, Re* [1999] UKHL 52 (15 January 1999); and *Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet* [1999] UKHL 17 (24 March 1999).

21 *Attorney-General of the Government of Israel v Eichmann* 36 ILR 5 (1961).

22 n 3 above.

different provisions of the Rome Statute, in particular articles 27[23] and 98(1).[24] Article 27 relates to the irrelevance of official capacity, while article 98(1) relates to co-operation with respect to a waiver of immunity and consent to surrender of a head of state whose country is not a state party to the Rome Statute. It should be recalled that the ICC's Pre-Trial Chamber (PTC) ignored discussing this issue when it first issued arrest warrants for President Bashir. According to Akande, 'the PTC ought to have dealt with the applicability of article 98 and how it relates to 27 before proceeding to issue the request for arrest and surrender to states parties, and Security Council members'.[25] Several countries in Africa, including Chad and Malawi, have been reported to the UN Security Council by the ICC for failure to arrest Bashir when he visited them.[26] Considering that Kenya is a state party to the Rome Statute and Sudan is not, the Kenyan court missed an opportunity to clarify the tensions arising out of the competing obligations existing between the two articles.

3.1 Irrelevance of official capacity *vis-à-vis* immunities of a sitting head of state

Immunity is the right not to be submitted to the exercise of foreign jurisdiction.[27] Its underlying purpose is the maintenance of peaceful relations between states and the settlement of disputes by consent rather than the *diktat* of one state, and to that end international law recognises the independence and equality of states and accordingly requires restraint from subjecting one state to adjudication of its

23 It states: '(1) This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity of 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 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.'

24 It states: '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 state or diplomatic immunity of a person or property of a third state, unless the court can first obtain the co-operation of that third state for the waiver of the immunity.'

25 D Akande 'The legal nature of Security Council referrals to the ICC and its impact on Al Bashir's immunities' (2009) 7 *Journal of international Criminal Justice* 337.

26 ICC 'Pre-Trial Chamber I (PTC I) informs the United Nations Security Council and the Assembly of States Parties about Chad's non-co-operation in the arrest and surrender of Omar Al Bashir' Press Release ICC-CPI-20111213-PR756, 13 December 2011 http://www.icc-cpi.int/NR/exeres/371A3E88-35C6-4C54-8C98-60B92D3E140A.htm (accessed 4 February 2012).

27 S Wirth 'Immunity for core crimes? The ICJ's judgment in the *Congo v Belgium* case' (2002) 13 *European Journal of International Law* 882.

disputes in the national courts of another state.[28] To allow the national court of another state to review judicially the propriety of a state's conduct would constitute a major intrusion into the internal administration of that state with the consequent loss of independence. The general purpose of immunity is to safeguard the ability of states to discharge their functions without interference, as well as to protect their dignity.[29]

Under customary international law, serving heads of state are accorded immunity from the criminal jurisdiction of foreign states.[30] Those immunities, as stated by the International Court of Justice (ICJ) in the *Case Concerning the Arrest Warrant of 11 April 2000* (*Arrest Warrant* case) are to protect the individual concerned against any act or authority of another state which would hinder him or her in the performance of his or her duties.[31] Immunity from criminal jurisdiction includes immunity from personal arrest or detention and extends even to cases where heads of state are suspected of having committed war crimes or crimes against humanity.[32] As observed by the ICJ:[33]

> A head of state enjoys in particular 'full immunity from criminal jurisdiction and inviolability' which protects him or her 'against any act of authority of another state which would hinder him or her in the performance of his or her duties'.

However, the policy and doctrine of international accountability mechanisms, especially courts and tribunals, have trumped the customary international law notion that heads of state enjoy immunity when they are alleged to have committed international crimes.[34]

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28 H Fox 'International law and restraints on the exercise of jurisdiction by national courts of states' in MD Evans (ed) *International law* (2006) 362.

29 n 27 above, 882. According to the ICJ in the *Arrest Warrant* case, Judgment, ICJ Reports 2002 para 51, 'in international law it is firmly established that ... certain holders of high ranking office in a state, such as the Head of State ... enjoy immunities from jurisdiction in other states, both civil and criminal'.

30 R Cryer *et al An introduction to international criminal law and procedure* (2007) 422.

31 *Case Concerning the Arrest Warrant of 11 April 2000* (*Democratic Republic of Congo v Belgium*) (Judgment) 14 February 2002 (*Arrest Warrant* case) ICJ Rep 2002, para 54.

32 M Ssenyonjo 'The ICC arrest warrant for President Al Bashir of Sudan' (2010) 59 *International and Comparative Law Quarterly* 209.

33 *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* [2008] ICJ Rep para 170, quoting from the *Arrest Warrant* case, para 54.

34 See eg C Gosnell 'The request for an arrest warrant in Al Bashir: Idealistic posturing or calculated plan?' (2008) 6 *Journal of International Criminal Justice* 841 843-844 (observing that the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) 'have held that the obligation to co-operate mandated by the Security Council acting under chapter VII prevails over any customary international law immunities that might otherwise exist').

For example, serving heads of state are not immune from the ICC jurisdiction by virtue of article 27 of the Rome Statute. Apparently, even before the coming into force of the Rome Statute, the ICJ in the *Arrest Warrant* case (albeit with respect to the Minister for Foreign Affairs) had established that[35]

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

In its decision, while referring the Republic of Malawi to the UN Security Council for failing to arrest and surrender Bashir when he visited the country in October 2011, the PTC dealt with the issue of immunities of serving heads of state *vis-à-vis* the ICC.[36] The Chamber, after reviewing heads of state's immunity before international courts since the end of World War I up until the establishment of the Special Court for Sierra Leone (SCSL),[37] held that[38]

> the principle in international law is that immunity of ...[a] sitting head of state cannot be invoked to oppose a prosecution by an international court. This is equally applicable to ... sitting heads of states not parties to the [Rome] Statute whenever the Court may exercise jurisdiction.

The matter of the immunity from arrest of a serving head of state has now been put to rest by the SCSL in the *Prosecutor v Charles Ghankay Taylor* case. The Court, while handing down judgment on 26 April 2012, affirmed the decision of its Appeals Chamber of 31 May 2004 that the sovereign equality of states does not prevent a head of state from being prosecuted before an international tribunal or court.[39]

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35 Para 61 *Arrest Warrant* case (n 31 above).

36 ICC Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Co-operation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Ahmad Al Bashir, ICC-02/05-01/09, 12 December 2011.

37 n 36 above, paras 23-35.

38 n 36 above, para 36.

39 Para 2, Summary Judgment *Prosecutor v Charles Ghankay Taylor*, SCSL-03-1-T, 26 April 2012. The court also observed that 'the official position of Charles Taylor as an incumbent Head of State at the time when the criminal proceedings were initiated against him was not a bar to his prosecution'. The Appeals Chamber had concluded that 'the principle of state immunity derives from the equality of sovereign states, and therefore has no relevance to international criminal tribunals which are not organs of a state but derive their mandate from the international community'. See *Prosecutor v Charles Ghankay Taylor*, Case SCSL-2003-10-I, Decision on Immunity from Jurisdiction, 31 May 2004. The motion was heard in the Appeals Chamber by Justices Emmanuel Ayoola, Gerorge Gelaga King and Renate Winter, http://sc-sl.org/SCSL-03-01-I-059.pdf (accessed 15 September 2012).

Nevertheless, there appears to be a contradiction between articles 27 and 98(1) of the Rome Statute.[40] The ICC itself acknowledged this fact when it observed that 'the Chamber notes that there is an inherent tension between articles 27(2) and 98(1) of the Statute and the role immunity plays when the Court seeks co-operation regarding the arrest of a head of state'.[41] Van der Vyver notes that[42]

> [a]rticle 98(1) clashes with the spirit of the Statute and ... with article 27(2), which discards immunities and special procedural rules that may attach to the official capacity of a person indicted to stand trial at the ICC.

To him, article 98(1) recognises the legal rights of states to the protection of their heads of state (and other officials) under international law.

Whilst state parties who adopt the Rome Statute revoke the immunity of their heads of state (this is why many states have had to amend their constitutions before ratifying the Rome Statute), third states (states not parties to the Rome Statute) continue to have protection for their heads of state. According to Ssenyonjo, 'Sudan has not ratified the Rome Statute and so is not bound by article 27'.[43] Article 98(1) requires that the Court may not proceed with a request for arrest and surrender *unless it has obtained the consent and waiver of the third state (Sudan)*. Thus, the ICC must first seek a prior waiver by a third state (Sudan) of the immunity of the individual (Bashir). A waiver is required because the immunity of a head of state is a right that attaches to a state, and not the person of the head of state alone. Waiver and consent are the only means of removing other obligations under international law. There is no application for a waiver that has been made by the ICC to Sudan in the case of Bashir. Therefore, there is no competence under article 98(1) for the ICC to make a request for the surrender of Bashir to state parties of the ICC without a waiver of his immunity by Sudan; neither can the requirement of the waiver

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40 According to Akande (n 25 above 337), this is so because 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.

41 Para 37 Decision Pursuant to Article 87(7) (n 36 above). The Chamber went on to state that Malawi, and by extension the AU, are not entitled to rely on art 98(1) of the Statute to justify refusing to comply with the co-operation request. It gave four reasons for this: that immunity of heads of state before international courts has been rejected time and time again, dating all the way back to WWI; that there has been an increase in heads of state prosecutions by international courts in the last decade, giving examples of Slobodan Milosevic, Charles Taylor, Muammar Qaddafi and Laurent Gbagbo; that the 120 state parties to the Rome Statute have all accepted that any immunity they had under international law has been stripped from their top officials when they ratified the Statute; and that all states that have ratified the Statute cannot in turn interpret it in a way that disables and defeats the object of the Court and international justice. See paras 38-41.

42 JD van der Vyver 'Prosecuting the President of Sudan: A dispute between the African Union and the International Criminal Court' (2011) 11 *African Human Rights Law Journal* 687.

43 n 32 above 210 (my emphasis).

itself be vitiated by the Court. Thus, whilst Ssenyonjo concludes that '[t]he Rome Statute cannot create obligations for a non-state party without its consent, and as such the Statute cannot remove the official immunity enjoyed by a head of state of a non-state party',[44] Triffterer is of the view that 'making the surrender of an official of a non-party state enjoying sovereign immunity dependent upon a waiver of that immunity by the non-party state concerned, could in practice bar the Court from exercising its jurisdiction over such a person, since the ICC Statute does not permit trials *in absentia*'.[45]

Also, it has been posited that, whilst article 27 does not remove the immunity of the head of state of non-state parties to the Rome Statute, in the case of Bashir such immunity may be regarded as having been removed by UN Security Council Resolution 1593, which referred the situation in Darfur to the ICC under chapter VII of the UN Charter.[46] There is ample academic debate on the effect of Resolution 1593 on Sudan being a non-state party to the Rome Statute.[47] For example, according to Schabas, it is now *lex lata* that the UN Security Council can withdraw immunity from anyone and this is what it has done by

44 As above.

45 n 42 above 688.

46 n 32 above 211.

47 n 25 above 341-342. Akande argues that 'by requiring Sudan to co-operate fully with the Court, Resolution 1593 explicitly subjects Sudan to the requests and decisions of the Court ... The fact that Sudan is bound by article 25 of the UN Charter and implicitly by Resolution 1593 to accept the decision of the ICC puts Sudan in an analogous position to a party to the Statute. The only difference is that Sudan's obligations to accept the provisions of the Statute are derived not from the Statute directly, but from a UN Security Council resolution and the Charter.' Gosnell (n 34 above) 843 posits that 'the Darfur situation was referred to the ICC by the Security Council, acting under chapter VII of the UN Charter ... This disables Sudan from asserting any immunity against an ICC arrest warrant.' SM Weldehaimanot 'Arresting Al Bashir: The African Union's opposition and the legalities' (2011) 19 *African Journal of International and Comparative Law* 208 223-224: 'After reviewing the debates on the issue by different scholars *inter alia* concluding that for normative consistency and also objectivity, a UN SC referral resolution should have the effect of making non-member states parties to the Rome Statute [to comply] as far as the referred situation is concerned ... as far as UNSC referred situations are concerned, the solution is to place non-member states on the same footing as member states.' See IK Souare 'Sudan: What implications for President Al-Bashir's indictment by the ICC?' Institute for Security Studies Situation Report 25 September 2008 7 (arguing, unlike Akande and Gosnell, that 'the ICC and the UN signed a relationship agreement on 4 October 2004 ... Article 2(3) of this Agreement commits both the UN and ICC to respect each other's status and mandate. Thus all member states of the UN are bound by this agreement, which obligates them to respect the provisions of the Rome Statute. While the agreement does not establish a direct ICC jurisdiction over the UN members, it implies the acceptance, by the UN, of the provisions of the Rome Statute ... Should the UN Security Council therefore refer to the ICC a situation arising from events in a member state, such as Sudan ... that state has to respect and abide by the referral because of its membership of the UN.'

establishing *ad hoc* tribunals.[48] Moreover, it has also been noted that, whilst Resolution 1593 did not explicitly withdraw immunity of a head of state, it implicitly did so on the basis following, *inter alia*, (i) the Security Council referral to the ICC means that all individuals investigated and prosecuted via the referral are bound by the provisions of the Rome Statute; (ii) that when the SC decided in Resolution 1593 operative paragraph 2 that the government of Sudan 'shall co-operate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution' that included the lifting of the immunity; and (iii) that article 27 restates an already-existing principle of customary international law concerning the exercise of jurisdiction by any international court. Thus, it applies with respect to every person enjoying immunity under customary international law, regardless of whether the state this person represents is a party to the Rome Statute.[49] This position, however, is at variance with that of the AU, according to which[50]

> [t]he UN Security Council cannot lift President Bashir's immunity as any such lifting should have been [made] explicit. The mere referral of a 'situation' by the UN SC to the ICC or requesting a state to co-operate with the Court cannot be interpreted as lifting immunities granted under international law.

Whilst establishing the jurisdiction of the ICC in the Bashir case, the ICC did not undertake any analysis of article 27. Rather, it observed that, according to the Preamble of the Rome Statute, one of the core goals of the Court is to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole, which must not go unpunished.[51] The Chamber noted that in order to achieve the punishment of impunity, article 27 of the Rome Statute must be operationalised.[52] Thus, it is upon this reasoning that the ICC issued a warrant of arrest for President Bashir in the first place. Moreover, the immunities that exist in national or international law (for example constitutional law and all rules of general and special international law such as those contained in the 1961 Vienna Convention on Diplomatic Relations) will not bar the

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48 WA Schabas *An introduction to the International Criminal Court* (2007) 232.

49 n 32 above, 211; P Gaeta 'Does President Al Bashir enjoy immunity from arrest?' (2009) 7 *Journal of International Criminal Justice* 315 322-323.

50 African Union 'On the decisions of Pre-Trial Chamber I of the ICC pursuant to article 87(7) of the Rome Statute on the alleged failure by the Republic of Chad and the Republic of Malawi to comply with the co-operation requests issued by the Court with respect to the arrest and surrender of President Omar Hassan Al Bashir of the Republic of Sudan' Press Release no. 002/2012, Addis Ababa, 9 January 2012 2.

51 ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *Prosecutor v Omar Hassan Ahmad Al Bashir*, http://www.icc-cpi.int/iccdocs/doc/doc639096.pdf (accessed 23 January 2012).

52 n 32 above 212.

ICC from exercising jurisdiction.[53] However, this position has been contested by the AU, which has argued that[54]

> [t]he immunities provided for by international law apply not only to proceedings in foreign domestic courts but also to international tribunals ... States cannot contract out of their international legal obligations *vis-à-vis* third states by establishing an international tribunal.

According to the AU, article 98(1) was included in the Rome Statute out of the recognition that the Statute is not capable of removing an immunity which international law grants to the officials of states that are not parties to the Rome Statute.[55] Immunities of state officials are rights of the state concerned and a treaty only binds parties to that treaty. A treaty may not deprive non-party states of rights which they ordinarily possess. In the final analysis, the AU reiterates the position as enunciated in the *Arrest Warrant* case that 'immunity accorded to senior officials, *ratione personae*, from foreign domestic jurisdiction (and from arrest) is absolute and applies even when the official is accused of committing an international crime'.[56] Nevertheless, the decision of the SCSL in the *Charles Taylor* case seems to have rendered the argument of the AU unsustainable.

In my considered opinion, the Kenyan Court missed an opportunity to contribute or even close the debate concerning the competing obligations existing between articles 27 and 98(1) of the Rome Statute as, hitherto, the ICC has not helped much on this front.

3.2 Universal jurisdiction

In his judgment Judge Ombija observed that universal jurisdiction is a *jus cogens* obligation under international law. He defined *jus cogens* as[57]

> a peremptory norm of general international law accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Unfortunately, that is as far as the judge went. He did not elaborate.

Under the universal jurisdiction principle, each and every state has jurisdiction to prosecute particular offences.[58] The basis for this is that the crimes involved are regarded as particularly offensive to the international community as a whole. Enabling all states to share the right to jurisdiction in this way is meant to function as a guarantee

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53 O Triffterer *Commentary on the Rome Statute of the International Criminal Court: Observers' notes, article by article* (2008) 791.

54 n 50 above 2.

55 As above.

56 As above.

57 n 3 above.

58 MN Shaw *International law* (1997) 470.

against impunity and prevent the alleged perpetrators of heinous crimes from finding a safe haven in third countries.[59] There are two categories of offences that clearly belong to the sphere of universal jurisdiction – piracy and war crimes. Whilst there is not a generally-accepted definition of [universal] jurisdiction under customary and conventional international law,[60] attempts have nevertheless been made to define the principle. Under the Princeton Principles on Universal Jurisdiction, universal principle is[61]

> criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.

However, the challenge of relying on the principle to assert criminal jurisdiction over foreigners for acts committed abroad is evidenced by the reality that almost everything about it is contested. Even those states that have incorporated the principle into their national laws have reflected widely varied understandings of the concept.[62]

The universal principle has not only come under critical review in Africa but, in some instances, its application has created tension even among countries with long-standing political ties. Belgium's law on universal jurisdiction created tensions with the United States of America with the latter's Defence Secretary, Donald Rumsfeld, threatening to move the North Atlantic Treaty Organisation (NATO) headquarters from Brussels if the law remained in effect.[63] In Africa, the principle first attracted the attention of the AU when judges in France and Spain indicted some high-ranking Rwandan government officials for the shooting down of former Rwandan President Juvenal Habyarimana's plane, an act that sparked the 1994 Rwanda genocide. This resulted in the AU *inter alia* declaring that the abuse and misuse of the principle of universal jurisdiction by judges from non-African states against African leaders, *particularly Rwanda*, is a clear violation of the sovereignty and territorial integrity of these states.[64]

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59 G Bottini 'Universal jurisdiction after the creation of the International Criminal Court' (2004) 36 *New York University Journal of International Law and Politics* 512.

60 CC Jalloh 'Universal jurisdiction, universal prescription? A preliminary assessment of the African Union perspective on universal jurisdiction' (2010) 21 *Criminal Law Forum* 1 6.

61 Principle 1(1) Princeton University Program in Law and Public Affairs, The Princeton Principles on Universal Jurisdiction 28 (2001) http://www1.umn.edu/humanrts/instree/princeton.html (accessed 29 January 2012).

62 Dissenting Opinion by Judge *ad hoc* Van den Wyngaert in the *Arrest Warrant* case, para 46. See also dissenting opinion of Judge Oda's posting that 'the court has shown wisdom in refraining from taking a definitive stance [in respect of universal jurisdiction] as the law is not sufficiently developed' (para 12).

63 n 59 above 550.

64 Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, Doc Assembly/AU/14 (XI) para 5(ii) (my emphasis).

Leaving politics aside, the principle of universal jurisdiction in regard to international crimes that constitute violations of *jus cogens* is authorised by international law. In fact, states may accept and recognise a norm that creates an international crime as a basic principle of international law from which derogation is permitted but, in practice, they are free to determine for themselves whether the application of the universal principle is best to address the crime in question.[65] In other words, the competence of municipal tribunals to actually exercise the universal principle and the conditions under which such tribunals may actually exercise it are determined by the state concerned.[66]

Judge Ombija should not have applied the principle of universal jurisdiction in the Bashir case at all, as the case arises out of the jurisdiction of an international criminal tribunal, namely, the ICC. A distinction ought to be made between universal jurisdiction and the ICC. Whilst the former is an exceptional basis of jurisdiction which is exercised unilaterally by a state and does not necessarily involve an international organisation, the latter is exercised by an international body to which states have expressly agreed to delegate the power to enforce certain parts of international criminal law.[67] Simply put, the jurisdiction of an international tribunal is not constrained by where the crime was committed or the nationality of the accused or the victim. Mention must be made of the fact that at the Rome conference there was a heated debate between countries who argued in favour of including the universal jurisdiction in the ICC Statute and those who opposed it, such as the United States of America.[68] In the end, the jurisdictional scheme that was ultimately adopted in the treaty rejected universal jurisdiction, providing instead that the ICC could exercise jurisdiction when either the defendant was a national of the state party to the treaty or the crime was alleged to have been committed on the territory of a state party.[69]

4 Conclusion

Between November 2011 and January 2012, a Kenyan court ruled in favour of, first, the arrest and surrender, and, second, issued a provisional warrant of arrest for the Sudanese President Bashir should he ever visit Kenya again. In doing this, the court argued that it is

65 n 59 above 518.

66 I am grateful to the anonymous reviewer who drew me to this tangent of the argument.

67 n 59 above 513.

68 See generally MH Morris 'Universal jurisdiction in a divided world: Conference remarks' (2001) 35 *New England Law Review* 350.

69 As above.

implementing the decision of the ICC to which Kenya, as a state party, has obligations to execute. Unfortunately, in ordering the arrest and surrender of Bashir, the court did not expound on some of the most outstanding issues concerning the immunities possessed by a sitting president of a state which is not a state party to the Rome Statute. There clearly appears to be a clash between the obligations imposed by articles 27 and 98(1) of the Rome Statute. The Kenyan court would have scored a first had it resolved this issue, which the ICC has hitherto not fundamentally resolved.

The judge erred in applying the universal jurisdiction principle to the Bashir case because the Bashir indictment is founded upon the jurisdiction of the ICC and not that of the principle of universal jurisdiction. Moreover, it should be emphasised that the jurisdiction of the ICC is founded upon territorial (exercise of criminal jurisdiction by a state in its territorial home) and active personality (exercise of criminal jurisdiction by a state based on the nationality of the person) principles of jurisdiction.