

## IS PRESIDENT AL-BASHIR IMMUNE FROM ARREST?

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### Introduction

This paper considers whether states parties to the Rome Statute of the International Criminal Court<sup>1</sup> are required to arrest Omar al-Bashir, President of the Republic of the Sudan, if he enters their territory. It concludes that the better view is that they have no obligation to do so. In fact, doing so would violate customary international law, since he possesses immunity *ratione personae*.

### Background

The conflict in Darfur started in February 2003. The Sudan Liberation Movement/Army and the Justice and Equality Movement began an armed struggle, accusing the Sudanese government of oppressing black Africans, who form the majority of the population in Darfur and other regions in the south of the Sudan. Arabs, who predominate further north, are the majority of the national population and dominate the Sudanese government. The Sudanese government has been accused of involvement or complicity in atrocities (as have rebel groups).

On 31 March 2005 the United Nations Security Council, acting under Chapter VII of the United Nations Charter, adopted Resolution 1593, referring the situation prevailing in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court (in accordance with Article 13(2) of the Statute).<sup>2</sup> On 4 March 2008 Pre-Trial Chamber I of the Court issued an arrest warrant for President al-Bashir on charges of war crimes and crimes against humanity but, by a majority, refused to

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<sup>1</sup>Rome Statute of the International Criminal Court (opened for ratification 17 July 1998, entered into force 1 July 2002).

<sup>2</sup>*Resolution 1593* SC Res 1593, S/Res/1593 (2005).

include a charge of genocide.<sup>3</sup> On an appeal by the Prosecutor, the Appeals Chamber overturned the decision regarding the genocide charge and remanded the case to Pre-Trial Chamber I,<sup>4</sup> which issued another arrest warrant in respect of genocide.<sup>5</sup>

President al-Bashir has subsequently travelled to Chad and Kenya, which are both parties to the Rome Statute, without being arrested. This followed the adoption by the Assembly of the African Union of a resolution calling on members not to arrest him. The failure to arrest President al-Bashir caused considerable controversy. Several European Union states summoned Kenyan Ambassadors to explain the failure to arrest President al-Bashir.<sup>6</sup> Pre-Trial Chamber I reported the visits to the Assembly of States Parties and the Security Council “in order for them to take any measure they may deem appropriate.”<sup>7</sup>

### Analysis

International law accords a serving head of state immunity *ratione personae*: that is, personal immunity for all acts, whether or not done in an official capacity. This is to be distinguished from immunity *ratione materiae*, or functional immunity, which protects only acts that a person does in an official capacity.<sup>8</sup> The arrest of a head of state by another

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<sup>3</sup>*Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (Prosecutor v Al Bashir)* ICC-02/05-01/09-3, 4 March 2009.

<sup>4</sup>*Prosecutor v Al Bashir* ICC-02/05-01/09-T-1, 3 February 2010.

<sup>5</sup>*Second Decision on the Prosecution's Application for a Warrant of Arrest (Prosecutor v Al Bashir)* ICC-02/05-01/09-94, 12 July 2010.

<sup>6</sup>“Kenyan ambassadors summoned over Omar al-Bashir’s visit” (2010) “BBC News” <<http://www.bbc.co.uk/news/world-africa-11156184>>

<sup>7</sup>*Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's presence in the territory of the Republic of Kenya (Prosecutor v Al Bashir)* ICC-02/05-01/09-107, 27 August 2010 at 4; *Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad (Prosecutor v Al Bashir)* ICC-02/05-01/09-109, 27 August 2010 at 4.

<sup>8</sup> Robert Cryer and others *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, Cambridge, 2007) at 423.

state would violate this immunity. Since President al-Bashir is a head of state, he would appear to be protected by this immunity.

The prohibition of genocide is a *jus cogens* norm.<sup>9</sup> The prohibitions on war crimes and crimes against humanity are probably also *jus cogens* norms.<sup>10</sup> It has been contended that immunity is displaced in cases involving international crimes that involve the violation of a *jus cogens* norm, since such norms prevail over all other international law norms. The minority of the Grand Chamber of the European Court of Human Rights in *Al-Adsani v United Kingdom* put it this way in a case about torture:<sup>11</sup>

The acceptance therefore of the *jus cogens* nature of the prohibition of torture entails that a state allegedly violating it cannot invoke hierarchically lower rules (in this case, those on state immunity) to avoid the consequences of the illegality of its actions.

In *Jones v Ministry of Interior for the Kingdom of Saudi Arabia* Lord Hoffmann exposed the fallacy in this reasoning:<sup>12</sup>

The *jus cogens* is the prohibition on torture. But the United Kingdom, in according state immunity to the Kingdom, is not proposing to torture anyone. Nor is the Kingdom, in claiming immunity, justifying the use of torture. It is objecting in limine to the jurisdiction of the English court to decide whether it used torture or not.

Similarly, Hazel Fox QC notes:<sup>13</sup>

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<sup>9</sup>*Armed Activities on the Territory of the Congo (New Application 2002) (Democratic Republic of the Congo v Rwanda)* [2006] ICJ Rep 6 at 28.

<sup>10</sup> See M Cherif Bassiouni "International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*" (1996) 59 LCP 63 at 68.

<sup>11</sup>*Al-Adsani v United Kingdom* (2001) 34 EHRR 273 at 298-299 (Grand Chamber).

<sup>12</sup>*Jones v Ministry of Interior for the Kingdom of Saudi Arabia* [2006] UKHL 26, [2006] 1 AC 270 at [44].

<sup>13</sup>Hazel Fox *The Law of State Immunity* (Oxford University Press, Oxford, 2002) at 525.

State immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict a prohibition contained in a *jus cogens* norm but merely diverts any breach of it to a different method of settlement.

Lord Hoffmann observed:<sup>14</sup>

To produce a conflict with state immunity, it is therefore necessary to show that the prohibition on torture has generated an ancillary procedural rule which, by way of exception to state immunity, entitles or perhaps requires states to assume civil jurisdiction over other states in cases in which torture is alleged.

The view that there was such a rule was rejected by the International Court of Justice in the *Arrest Warrant* case.<sup>15</sup> That case related to immunity *ratione personae* of a minister of foreign affairs, but the immunity of ministers of foreign affairs can hardly be supposed to be more extensive than that of heads of state. It was also rejected in the context of state immunity by the Grand Chamber of the European Court of Human Rights in *Al-Adsani*.<sup>16</sup>

A rule of customary international law requires two elements. The first is state practice, which must be extensive, representative and virtually uniform.<sup>17</sup> The second is *opinio juris*, which means that states must have considered themselves legally bound to act in the way that they did.<sup>18</sup> Since the general principle, which pre-dates the development of *jus cogens* norms, is that heads of state have immunity, the burden is on those claiming there is an exception for alleged breaches of such norms to meet the requirements for a rule of customary international law. It is not necessary for the claimed rule to meet the more stringent

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<sup>14</sup> *Jones v Ministry of Interior for the Kingdom of Saudi Arabia*, above n 12, at [45].

<sup>15</sup> *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* [2002] ICJ Rep 3 at 21.

<sup>16</sup> *Al-Adsani v United Kingdom*, above n 11.

<sup>17</sup> *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v The Netherlands)* [1969] ICJ Rep 3 at 72.

<sup>18</sup> *Ibid*, at 73-74.

criteria for a *jus cogens* norm, since it is simply an exception to an ordinary rule of customary international law.

There is hardly any state practice supporting the view that there is an exception to immunity *ratione personae* for breaches of *jus cogens* norms. Suits against various head of state and foreign ministers were brought under Belgium's universal jurisdiction law, but this led to Belgium's loss at the International Court of Justice in the *Arrest Warrant* case. The logic of the reasoning of the Italian Court of Cassation in *Ferrini v Federal Republic of Germany*<sup>19</sup> would suggest the recognition of such an exception, but the case itself related to state immunity, so its value as state practice in this context is doubtful.

Immunity *ratione personae* has been upheld by the French Court of Cassation in a case against Muammar Qaddafi,<sup>20</sup> the Spanish *Audiencia Nacional* in a case against Fidel Castro,<sup>21</sup> the United States District Court for the Southern District of New York in a case against Robert Mugabe,<sup>22</sup> and the Bow Street Magistrates Court in England in cases against President Mugabe<sup>23</sup> and Shaul Mofez, at that time the Israeli Minister of Defence.<sup>24</sup> The Danish government refused to arrest the Israeli Ambassador, Carmi Gillon, who was accused of responsibility for torture, on the basis of immunity *ratione personae*.<sup>25</sup> In the *Pinochet* case none of their Lordships contended that immunity *ratione personae* would be inapplicable. Lord Millett, while concluding that immunity *ratione materiae* did not apply, made clear that the position would be different in relation to immunity *ratione personae*, emphasising its absolute character.<sup>26</sup> The immunity has been upheld in cases of espionage, drug smuggling, murder and plots against the head of state.<sup>27</sup> It has been held that a foreign diplomat cannot be arrested

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<sup>19</sup> *Ferrini v Federal Republic of Germany* [2004] 128 ILR 658.

<sup>20</sup> *Qaddafi* (2001) 125 ILR 456.

<sup>21</sup> *Castro* (1999) 32 ILM 596.

<sup>22</sup> *Tachiona v Mugabe* 169 F. Supp. 2d 259 (S.D.N.Y. 2001)

<sup>23</sup> Colin Wardrick "Immunity and International Crimes in English Law" (2004) 53 ICLQ 769 at 770.

<sup>24</sup> *Ibid*, at 771-773.

<sup>25</sup> Jacques Hartmann "The Gillon Affair" (2005) 45 ICLQ 745.

<sup>26</sup> *R v Bartle, ex parte Pinochet* [1999] UKHL 17, [2000] 1 AC 147 at 171, 179.

<sup>27</sup> Cryer and others, above n 8, at 434.

even if he threatens the security of the state.<sup>28</sup> The state practice is overwhelming against the suggested norm, and accordingly it must be rejected.

Does the Rome Statute place an obligation on states parties to arrest President al-Bashir if he enters their territory? Two provisions of the Statute relate to immunity. Article 27(2) provides:

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 a person.

Article 98(1) provides:

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 co-operation of that third State for the waiver of the immunity.

These two provisions may seem contradictory at first glance. But they relate to different situations: Article 27(2) to invoking immunity before the Court and Article 98(1) to immunity from arrest.<sup>29</sup> There has been uncertainty over whether the term “third state” refers to all states other than the “requested State” or only to states not party to the Statute. The context supports the wider reading. This phrasing occurs nowhere else in the Statute, while the phrase “State not party to this Statute” is used on several occasions. It would appear that the term is used in contradistinction to the term “requested State”, which is used earlier in

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<sup>28</sup> *Rose v R* [1947] 3 DLR 618 (Que KB).

<sup>29</sup> Michiel Blommestijn and Cedric Ryngaert “Exploring the Obligations for States to Act upon the ICC’s Arrest Warrant for Omar Al-Bashir: A Legal Conflict between the Duty to Arrest and the Customary Status of Head of State Immunity” (Working Paper No 48, Leuven Centre for Global Governance Studies, 2010) at 26.

the provision.<sup>30</sup> This forecloses the argument that Article 98(1) is not applicable because Sudan is to be treated, in relation to his case, as a party to the Statute. So Article 98(1) means that, if President al-Bashir possesses immunity, the Court's act in requesting his arrest was *ultra vires* and states do not have to comply with it.<sup>31</sup>

It has been contended that the Security Council's referral of the situation in Darfur to the Court must be taken as removing President al-Bashir's immunity.<sup>32</sup> The Security Council has the power under Chapter VII of the Charter to abrogate immunity when it considers this to be necessary for the maintenance of international peace and security. The Charter prevails over other norms of international law, except *jus cogens* norms.<sup>33</sup> Paragraph 2 of the Resolution reads:

*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..."*

The Council did not expressly remove immunity. Can it remove it by implication? There is an analogy to waiver of immunity. A state can waive its immunity or that of its officials. It is well established that this waiver may be either express or by submission to the jurisdiction of the court. But the state practice and authorities do not support the notion that a state may impliedly waive immunity by treaty.<sup>34</sup> In *Argentine Republic v. Amerasia Shipping Corporation* the Supreme

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<sup>30</sup> Ibid, at 26 n 77.

<sup>31</sup> Ibid, at 29.

<sup>32</sup> See Dapo Akande "The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities" (2009) 7 JICJ 333.

<sup>33</sup> See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia) (Further Request for the Indication of Provisional Measures)* [1993] ICJ Rep 325 at 339-440

<sup>34</sup> Campbell McLachlan "Pinochet Revisited" (2002) 51 ICLQ 959 at 961 n 20.

Court of the United States rejected a submission that Argentina had impliedly waived immunity by certain treaties. Rehnquist CJ, delivering the judgment of the Court, said: "Nor do we see how a foreign state can waive its immunity ... by signing an international agreement that contains no mention of a waiver of immunity..."<sup>35</sup>

*Oppenheim's International Law* states:<sup>36</sup>

A state, although in principle entitled to immunity, may waive its immunity. It may do so by expressly submitting to the jurisdiction of the court before which it is sued, either by express consent given in the context of a particular dispute which has already arisen, or by consent given in advance in a contract or an international agreement ... A state may also be considered to have waived its immunity by implication, as by instituting or intervening in proceedings, or taking any steps in the proceedings relating to the merits of the case...

Implied waiver of immunity is only referred to in relation to participation in proceedings, which is regarded as constituting submission to the jurisdiction of the court. The International Law Commission's Draft Articles on the Jurisdictional Immunities of States and their Property<sup>37</sup> also support this view. Waiver by treaty is dealt with in Article 7(1), which provides:<sup>38</sup>

1. A state cannot invoke immunity from jurisdiction in a proceeding before a court of another state with regard to a matter or case if it has expressly consented to the exercise of jurisdiction by the court with regard to the matter or case:
  - (a) by international agreement;

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<sup>35</sup> *Argentine Republic v Amerasia Shipping Corporation* (1989) 109 US 683 at 693.

<sup>36</sup> Robert Jennings and Arthur Watts (eds) *Oppenheim's International Law* (9<sup>th</sup> ed, Longman, London, 1992) 351-355.

<sup>37</sup> *Yearbook of the International Law Commission, 1991* (United Nations, New York and Geneva, 1994) at Vol II, Part 2, at 13.

<sup>38</sup> *Ibid*, at Vol II, Part 2, 25.

- (b) in a written contract; or
- (c) by a declaration before the court or by a written communication in a specific proceeding.

The commentary states, in relation to Article 7(1):<sup>39</sup>

...there appear to be several recognisable methods of expressing or signifying consent...the consent should not be taken for granted, nor readily implied. Any theory of 'implied consent' as a possible exception to the general principles of state immunities outlined in this part should be viewed not as an exception in itself, but rather as an added explanation or justification for an otherwise valid and generally recognised exception. There is therefore no room for implying the consent of an unwilling state which has not expressed its consent in a clear and recognisable manner, including by the means provided in Article 8 [which relate to submission to the jurisdiction of a court].

It is unsurprising that states would reject the notion of implied waiver of immunity by treaty. States understandably attach great importance to immunity *ratione personae*, since it protects their most senior officials from interference by other states and is an expression of the sovereign equality of states. Further, as Lord Goff of Chieveley said in his dissenting opinion in *Pinochet (No 3)*, “what a trap would be created for the unwary, if state immunity could be waived in a treaty sub silentio.”<sup>40</sup> Some of their Lordships disagreed with his Lordship’s conclusion on this point,<sup>41</sup> but they were unable to cite previous instances of states impliedly waiving immunity by treaty or statements recognising implied waiver by treaty. It seems that states are only prepared to recognise implied waiver of immunity in the context of an affirmative act clearly consistent with the assertion of immunity, viz

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<sup>39</sup> Ibid, at Vol II, Part 2, 27.

<sup>40</sup> *R v Bartle, ex parte Pinochet*, above n 26, at 223.

<sup>41</sup> Ibid, at 114-15 per Lord Browne-Wilkinson, 169 per Lord Saville of Newdigate, 190 per Lord Phillips of Worth Matravers.

submission to the jurisdiction of the court. Since, as noted above, the rejection of implied waiver of immunity appears to be based upon the importance attached to immunity, the principle is also applicable in the context of a Security Council resolution.

Even if immunity can be removed by implication, it would have to be a necessary implication. This standard is not met here. Security Council resolutions are product of negotiation. It is entirely possible that some members of the Council were prepared to allow the situation to be referred to the Court but not to remove President al-Bashir's immunity. China, for instance, is on friendly terms with him. The Resolution is not deprived of effect by recognising his immunity. There are many other people who do not have immunity who could be charged. In addition, the obligation on Sudan to cooperate with the Court probably includes a requirement to deliver him up to it. What the Resolution does not contain is a clear statement that other states can ignore the fundamental principle of head of state immunity.

Dapo Akande has suggested that President's al-Bashir's immunity is removed by the Genocide Convention.<sup>42</sup> Article VI thereof provides: "Persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."<sup>43</sup> But again immunity is not removed expressly. Its removal is not even a necessary implication of the provision. As the International Court of Justice noted in the *Arrest Warrant Case*, immunity does not entail impunity. Sudan can try President al-Bashir without violating his immunity. If he is guilty of genocide, then Sudan is violating its obligation to punish him. Article IV is therefore not deprived of effect by declining to read it as removing his immunity *ratione personae*.

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<sup>42</sup> Dapo Akande "The Bashir Indictment: Are Serving Heads of State Immune from ICC Prosecution?" in *Debating International Justice in Africa: OTJR Collected Essays 2008-2010* (2010) University of Oxford Centre of Socio-Legal Studies.

<sup>43</sup> Convention on the Prevention and Punishment of the Crime of Genocide (opened for signature 9 December 1948, entered into force 12 January 1951), art IV.

Thus Article 98(1) is applicable. The Court's request for assistance is *ultra vires* and states do not have to comply with it.

### Conclusion

It is important to note the limited nature of the thesis that has been advanced in this paper. It has not been contended that President al-Bashir would possess immunity before the Court. Nor it is denied that Sudan has an obligation to procure him to the Court. The claim is simply that states parties to the Rome Statute (and other states) have no obligation to arrest him and would violate customary international law if they did so.

States place great importance on immunity *ratione personae*. It protects a serving head of state almost absolutely. States have not embraced any customary exception for international crimes breaching *jus cogens* norms. Article 98(1) of the Rome Statute precludes the Court from requesting states to arrest a person when that would conflict with their international obligations. The Security Council has not expressly President al-Bashir's immunity and it cannot impliedly do so. Article 98(1) therefore applies. Since the request for assistance was *ultra vires* the Court, states are under no obligation to comply with it. Doing so would violate their customary international law obligation to Sudan to respect the immunity *ratione personae* of its head of state.

It may be thought this state of affairs is unsatisfactory. Frankly, the author agrees. Sudan is most unlikely to transfer President al-Bashir to the Court. The Security Council has the power, acting under Chapter VII of the Charter, to expressly remove his immunity in the interests of international peace and security. It should exercise that power. It should also expressly require Sudan to transfer him to the Court and sanction non-compliance. The trial of President al-Bashir by the International Criminal Court would send a salutary message to other political leaders who might be inclined to use their control of the state to commit international crimes. In light of recent events in the Middle East and North Africa, including atrocities against protesters and other civilians, the trial of a local leader for crimes against his own people would be particularly timely.