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CASE COMMENTARY

PROSECUTING PRESIDENT AL BASHIR, AND THE SHORT ARM OF JUSTICE

Prosecutor v Omar Hassan Ahmad Al Bashir[1]

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1. INTRODUCTION

In this decision the Pre-Trial Chamber of the International Criminal Court (ICC) condemned Malawi, as a member state of the ICC, for the failure to comply with the request to arrest and surrender the President of Sudan, Omar Al Bashir. Significantly, the Chamber determined that the traditionally sacrosanct concept of immunity of Heads of State no longer applied before an international court or tribunal. Whilst the intention to create universal jurisdiction over perpetrators of war crimes and crimes against humanity is extremely laudable, the legal reasoning by the Chamber is regrettably unsound. If the decision remains unchallenged, the implication is that no Head of State, whether or not they are a signatory to the ICC, is immune from prosecution on the mere basis of the ICC's status as an international court.

As international law currently stands, jurisdiction over non-member states has to be derived from a higher authority. In the case of Sudan, such authority and resulting jurisdiction does indeed exist by virtue of United Nations Security Council (UNSC) Resolution 1593, which refers the situation in Darfur to the ICC. This resolution implies powers to arrest and prosecute President Al Bashir, and had the Chamber relied on this authorisation to confirm its jurisdiction, no criticism could be raised. The need for such a Resolution (especially where non-member states are concerned) highlights the problem of the ICC's dependence on the UNSC. The paralysing effect of this dependence can be seen most clearly and recently in the case of Syria, where despite repeated calls by the UN Commissioner for Human Rights, no such referral to the ICC has taken place due to the exercise of veto powers in the

[1] Decision pursuant to Article 87 (7) of the Rome Statute on the failure by the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir ICC-02/05-01/09-3: Pre-Trial Chamber I of the International Criminal Court 12 December 2011.

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Security Council. It would therefore appear that despite the Pre-Trial Chamber's reasoning in the Bashir case, the ICC has a long way to go before its universal jurisdiction can be considered established.

2. THE FACTS

On March 31 2005 the UNSC passed Resolution 1593 which referred the situation in Darfur to the ICC and "urge[d] all States and concerned regional and other international organizations to cooperate fully" with the court. On March 4 2009 the Pre-Trial Chamber published its *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir* (hereafter the March 4 2009 Decision) in which it asserted the ICC's jurisdiction over Omar Al Bashir despite his position as the current head of a state not party to the Rome Statute. This conclusion was based on the fact that one of the central aims of the Rome Statute is to end impunity for the perpetrators of the most serious international crimes. Furthermore, the Pre-Trial Chamber stated that Article 27(1) and (2) provides that the Rome Statute applies to all people equally regardless of their position, and capacity as a Head of State did not exempt a person from criminal responsibility.[2] The Pre-Trial Chamber stated that customary international law rules establishing the immunity of serving heads of state did not bar the Court from exercising its jurisdiction. The Chamber determined that because the Security Council had referred the matter to the ICC, it had also intended that any prosecution would take place within the framework of the Rome Statute.

On March 4 2009 and July 12 2010, the Chamber issued an arrest warrant against Omar Al-Bashir.[3] All State Parties were then sent a request for cooperation in accordance with Articles 89(1) and 91 of the Rome Statute "for the arrest and surrender" of President Al Bashir.[4] Despite this request, together with a verbal reminder,[5] the Republic of Malawi received President Al Bashir on a state visit as a guest and participant of a summit of regional leaders in Lilongwe in October 2011. Subsequently, the Pre-Trial Chamber ordered the Registrar to transmit a copy of their report on the visit (and non-cooperation with the request for arrest) to the Republic of Malawi, and to ask for the Republic's observations.

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[2] Articles 27(1) and (2) and 98(1) and (2) of the Rome Statute 1998 are essential to the discussion at hand, and are therefore reproduced in full at the end of this Case Commentary.

[3] ICC-02/05-01/09-1; ICC-02/05-01/09-95.

[4] ICC-02/05-01/09-7.

[5] ICC-02/05-01/09-136-Conf, Anx 4. The verbal reminder was sent to Malawi's Embassy in Brussels on the day before the presidential visit.

In its response,[6] the Malawian Ministry of Foreign Affairs claimed that President Al Bashir was a serving Head of State, and therefore Malawi should "accord ... him all the immunities and privileges guaranteed to every visiting Head of State and Government" including freedom from arrest and prosecution whilst on their territory. Since Sudan was not a party to the Rome Statute, Article 27 (waiving the immunity of heads of state) was not applicable. Moreover, Malawi accepted the position of the African Union on the matter, which upheld the immunity of serving heads of states not parties to the Rome Statute, challenged the warrant of arrest by the International Criminal Court for that reason, and asked its members for non-cooperation with the Court. On December 12 2011, the Pre-Trial Chamber handed down its decision on the issue of Malawi's non-cooperation.

3. THE DECISION

The Pre-Trial Chamber stated that Article 119(1) of the Rome Statute established the ultimate authority of the ICC to decide if immunities should be applied and respected in an individual situation. More significantly, it found that Malawi had ignored rule 195(1), according to which a member State aware of the existence of a problem with regard to a request for surrender or arrest should "provide any information relevant to assist the Court in the application of Article 98".

The Chamber rejected Malawi's first argument that President Al Bashir was immune from prosecution because he was a serving Head of State and Sudan was a non-signatory to the Rome Statute. They then considered the African Union position,[7] which formed the basis of Malawi's second argument that Article 98(1) justified refusing to comply with the Cooperation

[6] Transmission of the observations from the Republic of Malawi, ICC-02/05-01/09-138 with confidential annexes 1 and 2.

[7] African Union, Assembly, 'Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Tribunal (ICC) Doc. Assembly/AU/13(XIII)', 3 July, 2009, Assembly/AU/Dec.245(XIII) Rev 1 ('3 July 2009 AU Decision'), para. 10; African Union, Assembly, 'Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC) Doc. Assembly/AU/10(XV)', 27 July 2010, Assembly/AU/Dec.296(XV), paras 5-6; African Union, Assembly, 'Decision on the Implementation of the Decisions on the International Criminal Court (ICC) Doc. EX.CL/639(XVIII)', 30-31 January 2011, Assembly/AU/Dec.334(XVI), para 5; African Union, Assembly, 'Decision on the Implementation of the Assembly Decisions on the International Criminal Court – Doc. EX.CL/670(XIX)', 30 June-1 July 2011, Assembly/AU/Dec.366(XVII) (30 June-1 July 2011 AU Decision, para 10; 30 June-1 July 2011 AU Decision, para 5.

requests. The Chamber asserted that immunity for Heads of State in prosecutions by international tribunals and courts had been rejected over and over again since the days of World War I, citing numerous authorities in support of the conclusion that such immunity no longer existed where an international court issued an arrest warrant for international crimes, including the ICJ decision in *Democratic Republic of the Congo v Belgium* (the *Arrest Warrant* case)[8] and the ruling of the Special Court for Sierra Leone, Appeals Chamber in *Prosecutor v Charles Ghankay Taylor*.[9] The Chamber also sought support from Cassese, admitting that personal immunity before *national* courts may prevail since national authorities may use prosecutions to further their own interest and limit a foreign state's "ability to engage in international action".[10] However, such a danger did not exist in the case of prosecutions by *international* courts and tribunals (emphasis added), which were "totally independent of states and subject to strict rules of impartiality."[11]

The Chamber concluded that on the basis of these authorities it was now "a principle in international law that immunity of either former or serving Heads of State cannot be invoked to oppose a prosecution by an international court"[12] whether or not the States were party to the Rome Statute. The Chamber added that the exercise of jurisdiction of the ICC in this case followed from a referral by the UNSC under its Chapter VII powers.

The Chamber admitted that there existed "an inherent tension"[13] between Articles 27(2) and 98(1) of the Rome Statute where the Court had issued a Request for Arrest and Surrender of a Head of State. Nonetheless, Malawi and the African Union could not rely on Article 98(1) to justify non-cooperation. The authorities clearly established that the immunity of a Head of State vanishes in the face of prosecution by an international tribunal or court. Whilst the prosecution of only one current Head of State had been initiated at the time of the "Arrest Warrant Case" judgment (in the case of Charles Taylor), since then proceedings had begun against Slobodan Milosevic, Muammar Gaddafi, Laurent Gbagbo, and now Omar Al Bashir. Evidently, international prosecutions against Heads of State could now be seen as accepted practice. Furthermore, the ratification of the Rome Statute and in particular Article 27(2) by 121 States Parties supported the argument that international practice stripped immunity from top officials under national and

[8] Judgment, 14 February 2002, ICJ Reports 2002.
[9] Case Number SCSL-2003-1-AR72(E), Decision on Immunity from Jurisdiction, 31 May 2004, paras 51-52.
[10] A Cassese, International Criminal Law (Oxford University Press, 2nd ed, 2008), 312.
[11] Ibid.
[12] ICC-02/05-01/09-139, at para 36.
[13] Ibid, at para 37.

international law in the face of prosecutions by the International Criminal Court. For Malawi to ratify the Rome Statute, and then refuse to surrender Al Bashir, who was sought to be prosecuted for inciting genocide, war crimes and crimes against humanity, was at the very least inconsistent and "contrary to the purpose of the Statute Malawi ha[d] ratified".[14]

The Chamber therefore concluded that customary international law of immunities no longer applied when an international court requested the arrest and surrender of a Head of State wanted for international crimes and that Article 98(1), in this instance, did not apply. The Chamber ordered the Registrar to transmit the present decision to the UNSC and to the Assembly of States Parties to the Rome Statute.

4. COMMENTARY

Some critics have argued that the logic applied by the Chamber in this decision is at least partially flawed, although the result is to be welcomed. Akande, for instance, states that the effect of the decision is not only to render customary international law of immunities applying to current Heads of State obsolete, but also Article 98 of the Rome Statute itself.[15] More importantly, the reasoning of the Chamber ignores the fact that the Rome Statute is a treaty instrument, binding on only the signatories.[16] Akande asserts that criminal liability of a non-State party does not arise simply from the international nature of the court or tribunal seeking the arrest of the Head of State of a non-party. It could be deemed to arise, however, where the UNSC refers the matter to the ICC for investigation and prosecution. On becoming a member of the United Nations, Sudan, the country in question, has entrusted the Security Council with the power to take any action it deems fit (under the powers conferred by Chapter VII of the Charter) to maintain international peace and security, including the referral of the situation to an international tribunal or court.

According to Akande a state is under an obligation to consider whether an official's immunity prevents the host state from cooperating with the ICC's request to surrender or arrest that official.[17] Having examined the apparent conflict between Article 98(1) and (2), and Article 27 of the Rome Statute he

[14] Ibid, at para 41.

[15] D Akande, 'ICC Issues Detailed Decision on Bashir's Immunity (. . . At long Last . . .) But Gets the Law Wrong' EJIL: Talk, 15 December 2011: available at: http://www.ejiltalk.org/icc-issues-detailed-decision-on-bashir's-immunity-at-long-last-but-gets-the-law-wrong/ (accessed 1 July 2013).

[16] See Article 34 Vienna Convention on the Law of Treaties.

[17] Dapo Akande 'International Law Immunities and the International Criminal Court' (2004) 98 Am J Int'l L 396, 409, 420.

concludes that the immunity of non-state parties remains unaffected since they are not signatories to the treaty.[18] Even more significantly, he argues that Article 98 has the effect of relieving a host state from its responsibility to surrender a suspect, where international law obligations provide for immunity of a non-state party.[19] This is the same position taken by the African Union in the case of President Al Bashir.

The stance of Akande and the African Union appears to be in direct conflict with that of the Pre-Trial Chamber which relies heavily on the ICJ's *opinio juris* in the *Arrest Warrant* case and even extends it. The *Arrest Warrant* case established that the personal immunity of foreign officials remained intact before national courts. However, the majority of judges proposed *obiter dicta* that immunity may not exist before international criminal courts or tribunals, where such courts have jurisdiction,[20] and this suggestion was unquestioningly accepted by the Pre-Trial Chamber of the ICC. The Pre-Trial Chamber also relies on the view of the Special Court for Sierra Leone (SCSL), which held that "the principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court",[21] having considered the Statutes of the Nuremberg and Tokyo International Military Tribunals, the ad hoc international criminal courts as well as the permanent ICC, and the Arrest Warrant and Pinochet[22] cases.

However, it is submitted that the Pre-Trial Chamber, in relying on these authorities as establishing a general principle, fails to consider the matter of jurisdiction. As Akande points out, whether an official is permitted to rely on international law immunities "to avoid prosecutions by international tribunals depends on the nature of the tribunal: how it was established and whether the State of the official sought to be tried is bound by the instrument establishing the tribunal."[23] For instance, the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) were established through Security Council Resolutions[24] under Chapter VII powers, and the provisions in the Statutes establishing those tribunals are therefore binding on all UN members, including those that remove the immunity of Heads of State. Treaty

[18] Ibid p 421.
[19] Ibid p 424.
[20] Above para 61. Judges Higgins, Kooijmans and Buergenthal delivered a Joint Separate Opinion, para 79.
[21] *Prosecutor v Charles Taylor*, supra, footnote 18, para 52.
[22] *R v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte* (No. 3) [2000] 1 AC 147; [1999] 2 WLR 827 HL.
[23] Above p 417.
[24] UNSCR 827 of 25th May established the ICTY, and UNSCR 955 of 8th November 1994 established the ICTR.

provisions establishing an international court or tribunal, however, are by virtue of Article 34 of the Vienna Convention on the Law of Treaties[25] only binding on the parties to that treaty and are therefore incapable of removing international law immunities of non-party states. The Pre-Trial Chamber therefore erroneously relies on the mere fact of its status as an international tribunal trying international crimes as a sufficient reason to remove the immunity of non-state parties. Akande sums up the situations in which international immunities may be ignored before international courts or tribunals as "(1) ... the instruments creating those tribunals expressly or implicitly remove the relevant immunity, and (2) ... the state of the official concerned is bound by the instrument removing the immunity."[26]

Malawi's written representations with regard to its action (or rather non-action), referred to by the Chamber in its decision, highlight the apparent conflict between Articles 27 and 98 of the Rome Statute. Article 27(1) provides for criminal responsibility regardless of 'official capacity as a Head of State or Government', and Article 27(2) provides that 'immunities … shall not bar the Court from exercising its jurisdiction over such a person.' By contrast, Article 98(1) seemingly preserves customary international law immunity. In fact, it obliges the Court not to:

> proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law … unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

This apparent conflict can be explained and overcome if one looks at who the provisions refer to. Article 27(2) presents an unprecedented waiver of immunity of officials before the ICC. There is no corresponding provision in the instruments setting up the IMTs at Nuremberg and Tokyo or the ICTY and ICTR. However, this voluntary waiver of immunity before the ICC only

[25] Ibid. The general rule in Article 34 of the Vienna Convention, also known by the maxim *pacta tertiis nec nocent nec prosunt* undoubtedly reflects customary international law: see David Harris, *Cases and Materials on International Law*, 7th ed, Sweet and Maxwell p 686. However, Article 38 provides that "Nothing … precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognised as such." This allows room for development, and the possibility that a treaty may in the future apply to non-signatories *erga omnes*, if it were to be recognised as customary international law established by *opinio juris* and state practice. It remains to be seen how likely such *erga omnes* application of the Rome Statute would be, especially in the face of strong resistance by 3 of the P5 members of the UN Security Council, the African Union, and other influential countries.

[26] Ibid, p 418.

applies to states parties of the Rome Statute, who as signatories have chosen to surrender their right to immunity. Non-party States have not signed up to the provisions of the Rome Statute, nor have they ratified it, and their position therefore remains untouched. At no point in time have non-signatories surrendered their right to immunity under customary international law. Article 98 can in fact be seen as supporting the position of non-party States by respecting customary international law obligations and the rights of parties not subject to the provisions of the Rome Statute. Articles 27 and 98 therefore represent no conflict at all, they simply apply to different groups.

As undesirable as it may seem in the pursuit of justice, this deliberate preservation by the authors of the Rome Statute of customary international law immunities of non-party states cannot be overlooked. The desperate attempt by the Pre-Trial Chamber to rectify this situation and ignore Article 98 gives no credit to the ICC. Alternatively, the Chamber should have chosen the less controversial approach to base the authority to remove Al Bashir's immunity simply on the fact that the Security Council referred the situation in Darfur to the ICC. It is argued that this referral implies the power to seek arrest and prosecution of Al Bashir, and to that end the customary international law immunity of a non-party state was suspended by virtue of the Security Council Resolution. Approaching the matter from this angle, there would be no debate as to the jurisdiction of the court over a non-party state.

Any real criticism of Malawi's failure to comply with the request to arrest and surrender Al Bashir should have focused on their obligation to have brought their concerns with regard to the Court's request to its attention immediately, in accordance with Article 97. Equally Rule 195 of the ICC's Rules of Procedure and Evidence obliged Malawi to 'provide any information relevant to assist the Court in the application of Article 98', and clearly Malawi failed in this obligation.

Akande suggests an alternative argument in order to establish jurisdiction of the Court, and justify stripping Al Bashir of immunity.[27] He points out that UNSC Resolution 1593 imposes an obligation on the Government of Sudan to "cooperate fully" with the ICC. This could be interpreted as suggesting that Sudan itself is to be considered analogous to a state party and therefore bound by the Rome Statute and the application of Article 27, thus removing immunity from Al Bashir.

Other non-members of the ICC, whilst urged by UNSC Resolution 1593 to cooperate with the ICC, have no obligation under the Rome Statute, as is explicitly observed in the SCR. Unlike with the ad hoc tribunals, no explicit

[27] D Akande, 'Who is obliged to arrest Bashir?' EJIL: Talk, 13 March, 2009: available at http://www.ejiltalk.org/who-is-obliged-to-arrest-bashir?/ (accessed 1 July 2013).

obligation to cooperate with the tribunals has been imposed on non-member states. Akande suggests that there could be a *permission* to act and arrest Bashir instead of an obligation, because his immunity could be seen to have been removed by the resolution. Non-member States could be deemed to be relieved from an international law duty to observe Al Bashir's immunity if they so choose, whereas member states could be perceived to be under an actual obligation to ignore Al Bashir's immunity.

The Chamber's condemnation of Malawi should have been based on this obligation of a member state, arising from UNSC Resolution 1593, to cooperate with the ICC. The blanket assertion that jurisdiction arises automatically due to the international nature of the ICC is legally questionable as well as unnecessary. The Chamber would have been better advised to rely solely on UNSC Resolution 1593, subjecting Sudan to the jurisdiction of the Court, and by implication also subjecting it to the Rome Statute and therefore Article 27. Effectively, Al Bashir's immunity is not just removed before the Court but also before other nations acting in support of the court.

The Chamber's decision can be criticised on other, albeit less imaginative grounds. Gaeta asserts that whilst the rules of customary international law on immunities do not apply to an international tribunal or court (even where a state is not a member of a treaty-based court), these customary rules cannot be disregarded by a state itself.[28] Therefore, whilst the arrest warrant by the ICC following UNSC Resolution 1593 was lawful, the request to states parties to arrest and surrender President Al Bashir was not, and is contrary to Article 98(1) and therefore an *ultra vires* act.[29] Gaeta relies on the ICJ's opinion in the *Arrest Warrant* case, referring expressly to Article 27(2) of the Rome Statute that "immunities… 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". She does, however, point out that the ICJ at no stage considered if states had any duty or right to disregard customary international law on immunities in order to comply with a request for cooperation by an international tribunal or court.[30] The unhelpful fact that the ICC does not have any enforcement powers in its own right does not relieve states from their duty to respect immunities, simply in order to comply with a request by the ICC. In the Bashir case, Gaeta raises the unlikely possibility that the ICC could have got around this problem by seeking a waiver of Bashir's immunity from Sudan. Should such a waiver of

[28] P Gaeta, 'Does President Al Bashir enjoy immunity from arrest?' [2009] *Journal of International Criminal Justice* 315.
[29] Ibid, p 8.
[30] Ibid.

immunity have been granted, the court's request for cooperation and arrest would have been lawful.[31]

Whilst Gaeta's consideration of states' obligations adds an interesting dimension to the discussion, even the very starting point of her argument has to be considered with caution. Gaeta accepts unquestioningly that, by virtue of the ICJ's opinion, Article 27 applies even to non-signatories of the Rome Treaty, and the immunity of officials is, as a matter of principle, removed before international courts. In her words:

> "[i]nternational criminal courts are not organs of a particular state; they act on behalf of the international community as a whole to protect collective or even universal values, and thus to repress very serious international crimes."[32]

This is an expression of laudable intentions, with which she credits the ICC. However it cannot be overlooked that the ICC is a membership-based court, and Gaeta's blanket acceptance of the removal of immunities before the court is by no means a settled argument. Simply but persuasively put, "[i]f neither State A nor State B has the power to ignore the personal immunity of State C without consent, then the two together cannot create an international court and bestow upon it a power that they do not possess. The problem remains whether it is two States, or twenty, or sixty: they cannot bestow a power that they do not possess."[33] It is submitted, therefore, that the argument promoted by Akande, that jurisdiction is triggered and immunity is removed through the Security Council Resolution, is a much safer one. This point is also lent support by Jacobs,[34] who similarly to Akande fails to accept as inevitable the conclusion that the *Arrest Warrant* case establishes the abolition of immunity of Heads of State before an international tribunal. As Jacobs points out, the effect of the Chamber's blanket assertion that immunity no longer applies before an international criminal court would be that other leaders like Obama, Medvedev, and Hu could be prosecuted at any time for international crimes by the ICC. Such impunity may be morally desirable, and certainly was the intention of the authors of the Rome Statute. Sadly it is, however, not universally accepted, given the existing power structure of the Security Council, the continuing resistance by three of the P5 members

[31] Ibid, p 6.
[32] Ibid, p 4
[33] R Cryer, H Friman, D Robinson, E. Wilmshurst, *An Introduction to International Criminal Law and Procedure*, 2nd edn (Cambridge University Press 2010) 551.
[34] D Jacobs, 'Obama, Medvedev and Hu Jintao may be prosecuted by International Criminal Court, Pre-Trial Chamber concludes' 15th December 2011: available at http://humanrightsdoctorate.blogspot.com.

towards the ICC, and the very nature of this treaty-based court requiring voluntary membership and ratification of its Statute.

Jacobs' point goes to the very core of this characteristic of the ICC, by emphasising that it is a court established by consent, and non-parties can only be subjected to its jurisdiction by condemnation of the international community as a whole via a Security Council referral utilizing its Chapter VII powers. Significantly, three of the five permanent members have refused to sign up to the Rome Statute, and the use of their veto powers has in past situations thwarted a condemnation by Security Council referral. The ICC now sadly has an ill-fated reputation of being a court for Africa, and potentially the Middle East rather than a truly international one. This highly sceptical view taken particularly by the African Union,[35] cannot altogether be shaken off.

Additionally, it highlights the potential paralysis and impotence of the Court, unless it has jurisdiction through membership or a Security Council referral. Viewed from this angle, it is understandable, albeit legally questionable, that the Chamber sought to extend its own jurisdiction as a matter of principle, particularly in light of its established purpose of ending impunity for the perpetrators of the worst international crimes. There may, however, be a way out of this impasse. In his 2005 report on Darfur, Cassese suggests that rulings by international criminal courts and tribunals, if uncontested by States, *may become* customary international law (emphasis added), a point demonstrated by the fact that some renowned academics like Gaeta have already (at least partly) accepted the ICC's rulings including its interpretation of the ICJ opinion in the *Arrest Warrant* case, as new customary international law with the effect that it may indeed serve to remove the immunity of heads of state before an international tribunal. As the judges pointed out in the *Arrest Warrant* case, "the law… is in constant evolution, with a discernible trend to limiting immunity and strengthening accountability."[36] If state practice and *opinio juris* keep reinforcing the view that personal immunity is no barrier before an international court, this may emerge as customary international law.

[35] As reinforced by the decisions of the AU Assembly at its 19th summit. The AU endorsed the request for an advisory opinion from the ICJ on the question of immunities of Heads of States not party to the Rome Statute, effectively seeking a decision by the ICJ that is different from that reached by the Pre-Trial Chamber. The AU Assembly also asked its members to consider concluding bilateral agreements on the immunities of their officials, in an attempt to take advantage of Article 98 (2) of the Rome Statute. These developments have been discussed in more detail in Dapo Akande's blog at http://www.ejiltalk.org/the-african-union-the-icc-and-universal-jurisdiction-some-recent-developments posted on 29th August 2012.

[36] Arrest Warrant case, above, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para 75.

As it stands, however, the Chamber's decision is undoubtedly flawed. The somewhat desperate attempt to establish jurisdiction and lack of immunity highlights the precise difficulties the Court faces. Its legitimacy is dependent on either acceptance by its signatories (which regrettably are currently less than two thirds of the world's States and does not include three of the permanent members of the Security Council, i.e. Russia, China, and the United States), or on a Security Council Referral, which exists in the case of Darfur, but would be unlikely to occur in a situation involving said P5 members or indeed their allies. An example of such a situation is the current inactivity (recently condemned by the General Assembly) of the Security Council in the situation of Syria, which has historically enjoyed strong ties with the P5 member Russia.

5. CONCLUSION

What then is the solution in this ongoing quest to bring to justice international criminals who are traditionally immune from prosecution? Let us for a brief moment indulge the more impatient of us, who would rather not have to wait for the slow change in the customary international law of immunities, or the voluntary signing up of the rest of the world, in their own time, to the Rome Statute. Let us instead imagine it was within our power to shake up the system and create universal jurisdiction over such criminals. One could begin by attempting to assert sufficient political and diplomatic pressure on non-signatories to make them feel ostracised by the international community unless they become members of the ICC. As this may not be entirely successful and the jurisdiction of the ICC would still largely depend on Security Council Referrals, a shake-up of power distribution in the Security Council appears to be a fundamental requirement. Veto powers based on the post-WWII reality should be abandoned, and a fairer, perhaps rotating system should be introduced, and the Charter amended to reflect these changes. Once that has been achieved, the option to adopt the ICC as an instrument of the United Nations, rather than some willing signatories, should be put to the General Assembly, and a universally applicable justice system with its own permanent international criminal court would be the result. At last, the currently short arm of the international criminal justice system may be long enough to reach the worst perpetrators of war crimes and crimes against humanity, without exception, and impunity would no longer exist.

Unfortunately, it may be necessary to come back down to earth, in which case the only option is to remain positive that developing customary international law is indeed slowly eroding the immunity of Heads of State, leading to greater accountability for the commission of international crimes.

6. APPENDIX

Article 27

Irrelevance of official capacity

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of 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.
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.

7. ARTICLE 98

Cooperation with respect to waiver of immunity and consent to surrender

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

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