AFRICAN HUMAN RIGHTS LAW JOURNAL

Prosecuting the President of Sudan: A dispute between the African Union and the International Criminal Court

Johan D van der Vyver[*]
IT Cohen Professor of International Law and Human Rights, Emory University School of Law, Atlanta, United States of America; Extraordinary Professor, Department of Private Law, University of Pretoria, South Africa

Summary

The indictment of the President of Sudan has provoked negative responses from the African Union, including a resolution that instructed member states of the AU not to co-operate with the ICC in arresting the President and surrendering him for trial in the ICC. The AU relied on article 98(2) of the ICC Statute in terms of which the ICC may not proceed with a request for surrender that would require a state to act inconsistently with its obligations under international law with respect to the sovereign immunity of, inter alia, *heads of state. However, it has been decided that under the rules of international law, sovereign immunity applies only to prosecutions in national courts and not to prosecutions in an international tribunal, and article 27(2) of the ICC Statute accordingly provides that sovereign immunity shall not bar the ICC from exercising jurisdiction over persons enjoying such immunity. It is argued in this article that article 98(2) contradicts article 27(2): If a head of state does not enjoy immunity against prosecution in the ICC, there is no immunity to be waived by the national state. A pre-trial chamber of the ICC did not base the obligation of state parties (Kenya and Chad) to arrest and surrender the Sudanese President for prosecution in the ICC on the provisions of article 27, but on the fact that the situation in Sudan was referred to the ICC by the*

* BCom LLB BA (Hons) (Philosophy) (Potchefstroom), LLD (Pretoria), LLD (*honoris causa*) (Zululand), LLD (*honoris causa*) (Potchefstroom); johan.vandervyver@up.ac.za

Security Council of the United Nations and a passage in the Security Council resolution calling on Sudan and all other parties to the conflict in Darfur to co-operate fully in bringing the President of Sudan to justice. The exact implications of article 98(2) therefore remain unresolved.

1 Introduction

On 4 March 2009, a pre-trial chamber of the International Criminal Court (ICC) issued a warrant for the arrest of Sudanese President Omar Hassan Ahmed Al Bashir to stand trial in the ICC on several charges based on crimes against humanity (murder, extermination, rape, torture and forcible transfer) and war crimes (intentionally directing attacks against the civilian population or individual civilians, and pillage) committed in Darfur.[1] Charges based on the crime of genocide were subsequently included in the warrant for his arrest.[2] The situation in Darfur was referred to the ICC by the Security Council of the United Nations (UN).[3]

The African Union (AU) did not take kindly to the indictment of President Al Bashir. A meeting of the AU held in July 2009 endorsed a decision of the African state parties to the Rome Statute of the International Criminal Court which proclaimed that 'the AU member states shall not co-operate pursuant to the provisions of article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of The Sudan'.[4] At the Review Conference of the ICC held in Kampala, Uganda, from 31 May to 11 June 2010, Malawi, speaking in its capacity as chair of the AU, stated that the indictment of heads of state could jeopardise effective co-operation with the ICC. Basic to the position taken by the African state parties was article 98(1) of the Statute of the International Criminal Court (ICC Statute), which provides:[5]

> 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.

---

1 *Prosecutor v Omar Al Bashir (Decision on the Prosecutor's Application for a Warrant of Arrest against Omar Hassan Ahmed Al Bashir)* Case ICC-02/05-01/09-3 (4 March 2009).

2 *Prosecutor v Omar Hassan Ahmad Al Bashir (Second Warrant of Arrest for Omar Hassan Ahmed Al Bashir)* Case ICC-02/05-01/09-59 (21 July 2009).

3 SC Res 1593 (2005) of 31 March 2005, UN Doc S/RES/1593 (2005).

4 Decision of the Meeting of African State Parties to the Rome Statute of the International Criminal Court, UN Doc Assembly/AU/13(XIII) (3 July 2009) para 10.

5 Art 98(1) Statute of the International Criminal Court, UN Doc A/CONF 183/9 (17 July 1998) as corrected by *procès-verbaux* of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 Jan 2002 (ICC Statute).

Since the accused is a sitting head of state and as such enjoys sovereign immunity from prosecution for any criminal offence, state parties of the ICC – according to the AU – cannot be required to surrender him for trial in the ICC without the consent of Sudan (a non-party state). Earlier, member states of the European Union stated in similar vein that their implementation legislation would not allow them to arrest and surrender President Al Bashir to stand trial in the ICC, and Denmark actually invited President Al Bashir to the international conference on climate change that was held in Copenhagen from 7 to 18 December 2009.[6]

The ICC's Rules of Procedure and Evidence confirm that the Court cannot, without the permission of the sending state, insist on the surrender to the Court of a person enjoying sovereign immunity.[7] In terms of the ICC Statute, the Court must first 'obtain the co-operation of the sending state for the giving of consent for the surrender',[8] and the Rules of Procedure and Evidence place an obligation on the requested state to provide information to the ICC that would assist it in seeking such consent.[9] Any other state may (not must) provide additional information to assist the Court in securing the surrender of the person to the Court in conformity with the rules of international law.[10]

The views expressed by the AU regarding the significance of sovereign immunity of the Sudanese President, as we shall see, were not supported by many analysts or by the ICC itself. They insisted that state parties are without further ado legally obliged to arrest and to surrender President Al Bashir for trial in the ICC, apparently basing their position on article 27 of the ICC Statute, which provides:[11]

> 1 The 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 person.

6 See D Akande 'Denmark invited Sudanese President Bashir to Climate Change Conference' *EJIL Talk* 19 November 2009 http://www.ejiltalk.org/denmark-invited-sudanese-president-bashir-to-climate-change-conference (accessed 31 July 2011).

7 Rules of Procedure and Evidence Rule 195(2) Official Records of the Assembly of State Parties to the Rome Statute of the International Criminal Court, First Session, New York, 3-10 September 2002, Part IIA (2002) (RPE).

8 Art 98(2) ICC Statute.

9 Rule 195(1) RPE (n 7 above).

10 As above.

11 Art 27 ICC Statute.

2 Factual basis of the dispute

In July 2010 Chad hosted President Al Bashir at a summit of the Sahel-Saharan states held in N'Djamena, thereby becoming the first state party to the ICC Statute to harbour 'knowingly and willingly a fugitive ... wanted by the Court' – for which it was severely criticised by No Peace Without Justice.[12] The reprimand was based on the assumption that Chad, as a state party to the ICC Statute, was obliged to arrest a person against whom the ICC had issued an arrest warrant without first having to obtain the co-operation of Sudan.

President Al Bashir was subsequently also hosted, on two occasions, by the Republic of Kenya, also a state party to the ICC Statute: in August 2010 as a guest of the Kenyan government at a function to celebrate the signing of Kenya's new Constitution; and thereafter again as a participant in a summit for Inter-Governmental Authority for Development that was held in Nairobi on 30 October 2010 to discuss the forthcoming referendum for the secession from Sudan of the southern region of that country.

The ICC entered into discussions with Kenyan officials regarding that country's failure to arrest President Al Bashir. At a meeting between the President of the ICC's Assembly of State Parties, Ambassador Christian Wenaweser of Liechtenstein and the Minister of Foreign Affairs of the Republic of Kenya, which took place in New York on 17 September 2010 – that is, after the Sudanese President's first visit to Kenya – the Minister explained his government's refusal to execute the arrest warrant in view of 'his country's competing obligations toward the Court, the African Union, and regional peace and stability'.[13] On 2 July 2011, the African Union stated in similar vein that the indictment of President Moammar Gadhafi to stand trial in the ICC 'seriously complicates' the AU's efforts to broker a settlement in the Libyan civil war and decided that its 'member states shall not co-operate in the execution of the arrest warrant'.[14]

Whereas Chad and Kenya interpreted the 'conflict' between articles 27(2) and 98(1) as affording preference to sovereign immunity of a head of state over a request for surrender of a person to stand trial in the ICC, a pre-trial chamber of the ICC took the opposite view. It from the outset maintained 'that the current position of Omar Al Bashir as head of a state which is not a party to the [ICC] Statute, has no

12 No peace without justice, International Criminal Justice Programme 'NPWJ calls on ICC and state parties to respond strongly to Chad=s failure to arrest President Bashir of Sudan' http://www.npwj.org/ICC/NPWJ-calls-ICC-and-States-Parties-respond-strongly-Chad=s-failure-arrest-President-Bashir-Sudan (accessed 31 July 2011).

13 ICC Press Release of 21 September 2010 'President of the Assembly of States Parties meets Minister of Foreign Affairs of Kenya' Doc ICC-ASP-20100921-PR575.

14 Decision on the Implementation of the Assembly Decisions on the International Criminal Court Doc EX.CL/670 (XIX) para 6.

effect on the Court's jurisdiction over the present case'.[15] The pre-trial chamber, when granting the application for an arrest warrant against President al-Bashir, decided that Sudan, though not a state party to the ICC Statute, 'has the obligation to fully co-operate with the Court',[16] and in its final decision ordered that 'a request for co-operation seeking the arrest and surrender of Amar Al Bashir' be transmitted to all state parties to the ICC Statute and to all members of the Security Council of the United Nations.[17] On 25 October 2010, when President Al Bashir's second visit of 30 August to Kenya was pending, a pre-trial chamber requested Kenya to report to the chamber, no later than 29 October, about any problem that would impede or prevent his arrest and surrender when he visits the country.[18]

The pre-trial chamber thereby 'appears to have considered that the President of Sudan did not benefit from any immunity at international law under the circumstances, that therefore state parties would not find themselves confronted with conflicting obligations, and that consequently article 98(1) found no application'.[19] The Court's reasoning seems to be that sovereign immunity applies to prosecutions of heads of state and certain other high-ranking government officials in national courts only, and does not apply to prosecutions in international tribunals.

3 Sovereign immunity in international law

Article 98(1) was seemingly designed to uphold the rules of international law pertaining to jurisdictional immunity of foreign states and diplomats and the immunity from execution of the property of a foreign state.[20] According to Rinoldi, it 'clashes with the spirit of the Statute and ... with article 27(2)', which discard immunities and special procedural rules that may attach to the official capacity of a person indicted to stand trial in the ICC.[21]

---

15 *Prosecutor v Omar Al Bashir* (n 1 above) para 41.

16 n 1 above, para 241.

17 n 1 above, para 93.

18 ICC Press Release of 26 October 2010, UN Doc ICC-CPI-20101026-PR589.

19 WA Schabas *The International Criminal Court: A commentary on the Rome Statute* (2010) 1042.

20 K Prost & A Schlunck 'Co-operation with respect to waiver of immunity and consent to surrender' in O Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (1999) 1131. As to those immunities, see the Vienna Convention on Diplomatic Relations 1961 UN Doc A/Conf 20/13 (16 April 1961).

21 D Rinoldi & N Parisi 'International co-operation and judicial assistance between the International Criminal Court and states parties' in F Lattanzi & WA Schabas (eds) *Essays on the Rome Statute of the International Criminal Court* (1999) 339 389; and see also P Saland 'International criminal law principles' in RS Lee (ed) *The International Criminal Court: The making of the Rome Statute: Issues, negotiations, results* (1999) 189 202 (observing that there seems to be a contradiction between the two articles, 'at

Triffterer observed 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 (citing the exact wording of article 27(2)) 'bar the Court from exercising its jurisdiction over such a person', since the ICC Statute does not permit trials *in absentia*.[22] That might well be the case, because non-party states cannot be compelled to co-operate with the Court, and co-operation evidently includes the waiver by a government of sovereign immunity of its officials. However, leaving aside for the moment the implications of article 27(2), immunity in respect of crimes within the jurisdiction of the ICC will terminate when the official vacates the office that afforded him or her such protection, and if he or she should then enter the territory of a state party, that state party will in any event be entitled, and indeed obliged, to arrest that person and surrender him or her for prosecution in the ICC. The problem attending the arrest and surrender of President Al Bashir is slightly different. Although Sudan, being a non-party state, cannot be compelled to surrender its President to stand trial in the ICC, the question here is whether a state party such as Chad and Kenya were obliged to arrest the Sudanese President when he set foot in their respective countries.

The judgment of the British House of Lords in the case against Augusto Pinochet[23] is authority for the proposition that a head of state enjoys complete immunity from criminal prosecution (and from civil liability) while he or she remains in office (immunity *ratione personae*),[24] but after having vacated that office, only remains immune from prosecution for crimes committed while he or she occupied that office if these crimes were committed in his or her official capacity (immunity *ratione materiae*).[25]

---

least if "the third State" mentioned in article 98 is interpreted to not only a non-party state but also a party to the Rome Statute'); P Gaeta 'Official capacity and immunities' in A Cassese *et al* (eds) *The Rome Statute of the International Criminal Court: A commentary* (2002) 975 986 (referring to 'a problem of co-ordination of arts 98(1) and 27(2)').

22 O Triffterer 'Irrelevance of official capacity' in O Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (1999) 501 513; and see also Gaeta (n 21 above) 992.

23 *R v Bow Street Metropolitan Stipendiary Magistrate & Others, Ex Parte Pinochet Ugarte (Amnesty International & Others Intervening) (No 3)* [1999] 2 All ER 97; and for an overview of the court=s decision in regard to sovereign immunity, see S Wirth 'Immunities, related problems, and article 98 of the Rome Statute' (2001) 12 *Criminal Law Forum* 429 434-439.

24 See *Siderman De Blake v Republic of Argentina* 965 F 2d 699 718-19 (9th Cir 1992); *LaFontant v Aristide* 844 F Supp 128 131-32 (EDNY 1994).

25 *Hatch v Baez* 14 S Ct Rep New York (7 Hun 596) 600 (1876); 5 American International Law Cases (1873-1968) 434 435 (1876) (official acts of a former president of the Dominican Republic); and see also A Watts 'The legal position in international law of heads of states, heads of government and foreign ministers' (1994-III) 247 *Recueil des cours* 19 88-89; R Jennings & A Watts (eds) *Oppenheim's international law* (1992) para 456.

Although criminal conduct is not for purposes of immunity *ratione materiae* precluded from the range of official acts of a head of state,[26] it seems self-evident that conduct which constitutes customary law offences will never qualify as part of the official functions of a head of state.[27] That, at least, is the policy position reflected in the ICC Statute, and in this respect the ICC Statute does not deviate from the existing rules of customary international law.[28] The International Criminal Tribunal for the former Yugoslavia (ICTY) has decided accordingly that under customary international law individual persons may be held liable for the war crime of torture 'whatever their official position, even if they are heads of state or government ministers'.[29]

In the *Arrest Warrant* case, the International Court of Justice (ICJ) endorsed the principle, as a norm of customary international law, that immunity from prosecution does not mean impunity in respect of the crime committed:[30]

> Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.

The ICJ thus distinguished between criminal responsibility and jurisdictional immunity and went on to specify circumstances in which immunities enjoyed by certain public officials under international law would not bar a criminal prosecution:

- The beneficiaries of criminal immunity do not enjoy that immunity under international law in their own countries, and may therefore

---

26 *Marcos & Marcos v Federal Department of Police* (1990) 102 *International Law Reports* 198 203-204 (Switzerland Federal Tribunal) (2 November 1989).

27 *In re Goering & Others* (1946) 13 *International Law Reports* 203 221 (noting that sovereign immunity does not apply to 'acts condemned as criminal by international law'); *Democratic Republic of Congo v Belgium* 2002 ICJ 3, dissenting judgment of Van den Wyngaert J para 36 (14 February 2002) (noting that war crimes and crimes against humanity will never be part of official duties); and see also D Akande & S Shah 'Immunities of state officials, international crimes, and foreign domestic courts' (2011) *European Journal of International Law* 815 (agreeing that international crimes will not come within the reach of immunity *ratione materiae*, but basing that conclusion not on the *jus cogens* disposition of the norms rendering the conduct criminal or on the assumption that international criminal conduct cannot form part of official acts, but rather on the jurisdiction conferred on municipal courts).

28 G Palmisano 'The ICC and third states' in Lattanzi & Schabas (n 21 above) 391 410; and see A Bianchi 'Immunity versus human rights: The *Pinochet* case' (1999) 10 *European Journal of International Law* 237 259-60 (noting that considerable support can be drawn from state practice in support of the proposition that individuals can be held responsible for international crimes regardless of their official position); GM Danilenko 'ICC jurisdiction and third states' in Cassese *et al* (n 21 above) 1871 1881 (noting that one cannot claim immunity for *ius cogens* crimes).

29 *Prosecutor v Anto Furund iya* Case IT-95-I-T para 140 (10 December 1998).

30 *Democratic Republic of Congo v Belgium* 2002 ICJ 3 (14 February 2002) para 60.

be brought to trial in the courts of those countries in accordance with the relevant rules of domestic law.[31]

- The persons entitled to sovereign immunity will forfeit the immunity from foreign jurisdiction if the state which they represent or have represented has decided to waive that immunity (the immunity vests in the state and not in the state official).
- The immunities accorded by international law will not preclude prosecutions in other states for crimes committed prior or subsequent to his or her period of office, as well as for acts committed in his or her personal capacity while in office, after the person concerned ceases to hold the office to which that immunity was attached.
- The official concerned may be subject to criminal prosecution in certain international criminal courts such as the ICC.[32]

This latter cautious assessment was given definitive substance by the Appeals Chamber of the Special Court for Sierra Leone in the case against Charles Taylor.[33] Taylor, a former President of neighbouring Liberia, claimed sovereign immunity. The Court noted that the above decision of the ICJ affording sovereign immunity to the minister of foreign affairs of the Democratic Republic of the Congo applied to prosecutions of an official of state A in state B; that the Special Tribunal for Sierra Leone is not a national court of Sierra Leone but an international criminal court;[34] and that the principle of sovereign 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'.[35]

A distinction must accordingly be made between prosecutions of state officials in the national courts of a foreign state, on the one hand, and prosecutions of state officials in an international tribunal on the other. Upholding this distinction for purposes of safeguarding heads of state (and ministers of foreign affairs) against prosecution in national courts for core international crimes has indeed been severely criticised. As noted by Judge Van den Wyngaert in her dissenting opinion in the *Arrest Warrant* case, '[i]mmunity should never apply to crimes under international law, neither before international courts nor national courts'.[36] The South African implementation legislation of the ICC Statute provides in similar vein that a person who '[i]s or was a head of state or government, a member of a government or parliament, an

31 See also Prost & Schlunck (n 20 above) 1132.

32 *Democratic Republic of Congo v Belgium* (n 30 above) para 61.

33 *Prosecutor v Taylor* 128 *International Law Reports* 239 (31 May 2004).

34 *Democratic Republic of Congo v Belgium* (n 30 above) para 42.

35 *Democratic Republic of Congo v Belgium* (n 30 above) para 51.

36 Dissenting judgment of Van den Wyngaert J (n 27 above) para 36; and see also J Dugard & G Abraham 'Public international law' (2002) *Annual Survey of South African Law* 140 165-166.

elected representative or a government official' can be prosecuted in a South African court for crimes within the subject matter jurisdiction of the ICC, '[d]espite any other law to the contrary, including customary and conventional international law'.[37]

Nevertheless, the rules relating to sovereign immunity articulated in the *Pinochet* case and in the *Arrest Warrant* case apply to prosecutions in a national court. An *obiter dictum* in the *Arrest Warrant* case and the *ratio decidendi* of *Prosecutor v Charles Taylor* made it abundantly clear that a head of state (and minister of foreign affairs) do not possess sovereign immunity against prosecutions in an international tribunal. Consequently, if a head of state does not enjoy immunity from prosecution in the ICC, there are – in the words of article 98(1) – no 'obligations under international law with respect to the state or diplomatic immunity of a person' to be waived. Article 27 of the ICC Statute endorsed this state of the law.

4 Redundancy of article 98(1)

The rule of customary international law proclaiming that sovereign immunity does not apply to prosecutions in the ICC renders the provisions of article 98(1) totally redundant; and well-established rules of statutory interpretation sanction a presumption against a finding of redundancy of any words or phrases in – let alone an entire subsection of – a written legal instrument with the force of law.[38] This raises the question how one could possibly reconcile article 98(1) with the dictates of article 27.

Akande proposes that the tension between articles 27 and 98 may be resolved by confining article 27(2) to state party officials and making the provisions of article 98 applicable to state officials of non-party states.[39] Other analysts have sought to bridge the gap by distinguishing between, on the one hand, the competence of the ICC to prosecute and inflict punishment on the beneficiary of sovereign immunity, despite his or her official capacity, if and when he or she is surrendered to the Court, and, on the other, the duty of a state party to surrender that

37 Sec 4(2)(a) Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.

38 The presumption is encapsulated in the maxim *verba accipienda ut sortiantur affectum* (words are to be construed in such a way that they have some [legal] effect).

39 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* 333 339.

person to stand trial in the ICC.[40] The only possible relevance of article 98(1) would then relate to the duty of a state party to surrender a foreign state official to the ICC for prosecution in that Court if this would violate an obligation of the state party under the rules of immunity and privileges of international law.[41] Under the rules of international law, the custodial state can request the government of the accused to waive the immunity or privilege of, for example, its head of state or a member of that government's diplomatic corps; and if that were to happen, the suspect may be surrendered for trial in the ICC.

The person to be prosecuted can, of course, also voluntarily surrender him- or herself to stand trial in the ICC.[42] This happened, for example, in the case against Bahar Idriss Abu Garda, Chairperson and General Co-ordinator of Military Operations of the United Resistance Movement in Darfur. The charges in this case were based on an attack carried out on 29 September 2007 against an AU peace-keeping mission at the Haskanita Military Group Site in North Darfur. A pre-trial chamber of the ICC on 7 May 2009 issued a summons to appear (not an arrest warrant) against Abu Garda, he voluntarily appeared before the pre-trial chamber on 18 May 2009, and on 8 February 2010 the pre-trial chamber declined to confirm the charges against him.[43] It should be noted that the indictment of Mr Abu Garda did not in any way involve sovereign immunity, but does show that persons suspected of international wrongdoing might consider it in their best interest to have their day in court.

Attempts to afford empirical relevance to article 98(1) along the lines suggested above will have the effect of rendering article 27 redundant, which again is not to be presumed. And, since article 27 is based on a sound norm of customary international law (proclaiming that sovereign immunity does not apply to prosecutions in international tribunals), the balance between upholding the practical sustainability of either

40 See eg A Dworkin & K Iliopoulis 'The ICC, Bashir, and the immunity of heads of state' *Crimes of war* 3 http://www.crimesofwar.org/commentary/the-ICC-bashir-and-the-immunity-of-heads-of-state/ (accessed 31 October 2011) (stating that state parties must respect the immunity of officials of non-party states and can only be compelled to surrender officials of another state party); and see also Palmisano (n 28 above) 410; D Robinson 'The Rome Statute and its impact on national law' in Cassese *et al* (n 21 above) 2; M du Plessis 'International criminal courts, the International Criminal Court, and South Africa's implementation of the Rome Statute' in J Dugard *International law: A South African perspective* (2005) 174 209 n 193.

41 See Prost & Schlunck (n 20 above) 1132.

42 LN Sadat *The International Criminal Court and the transformation of international law: Justice for the new millennium* (2002) 202-203 (also mentioning the possibility that the perpetrator can be brought before the ICC without, or independent of, the court=s request); and see also Triffterer (n 22 above) 513; Gaeta (n 21 above) 994.

43 *Prosecutor v Bahar Idriss Abu Garda (Decision on the Confirmation of Charges)* Case ICC-02/05-02/09-243-Conf (8 February 2010). Application by the prosecutor for leave to appeal that decision was refused; *Prosecutor v Bahar Idriss Abu Garda (Decision on the Prosecutor's Application for Leave to Appeal the Decisions on the Confirmation of Charges)* Case ICC-02/05-02/09-267 (23 April 2010).

the one or the other provision in the ICC Statute therefore clearly leans toward favouring article 27.

Saland notes the obvious: Article 98(1) was not properly co-ordinated with article 27 of the ICC Statute.[44] This should come as no surprise, since the two provisions were drafted by different working groups (article 27 by the Working Group on General Principles of Criminal Law and article 98 by the Working Group on Co-operation and Judicial Assistance) and, given the time constraints under which the drafters had to complete their mandate in Rome, proper co-ordination of all the provisions in the ICC Statute was not always practically possible. And so, difficult choices have to be made.

Those choices should clearly favour the general principles of criminal justice reflected in Part 3 of the ICC Statute and which include article 27. Article 98(1) indeed exemplified the sensitivity of the drafters to upholding international law principles centred upon state sovereignty, which was designed to secure 'that no obstacle or impediment is set to the exercise of ... official functions'.[45] However, customary international law restricted sovereign immunity to prosecutions in national courts, and article 27 endorsed that salient norm of customary international law.

5 Complementarity concerns

However, there is one further matter that might influence one's preferences in this regard. Upholding article 27 does implicate the principle of complementarity, which has come to be recognised as perhaps the most basic component of prosecutions in the ICC. The tenth paragraph of the Preamble to the ICC Statute proclaims that 'the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions'. Article 1 of the ICC Statute mentions the principle of complementarity as one of the cornerstones of the ICC regime.[46] Article 17 lays down rules of admissibility of cases to be applied by the ICC, based on the principle of complementarity. The point to be emphasised is that the competence to bring the perpetrator(s) of crimes within the jurisdiction of the ICC to justice remains the prime responsibility of national states.[47] The principle of complementarity thus reflects 'deference to the interests of principally-

44 Saland (n 21 above) 189 205 n 25; and see also Akande (n 39 above) 337.

45 Gaeta (n 21 above) 986.

46 Art 1 ICC Statute; and see B Swart & G Sluiter 'The International Criminal Court and international criminal co-operation' in HAM von Hebel *et al* (eds) *Reflections on the International Criminal Court: Essays in honour of Adriaan Bos* (1999) 91 105.

47 P Benvenuti 'Complementarity of the International Criminal Court to national criminal jurisdictions' in Lattanzi & Schabas (n 21 above) 21 22 23-25 29 39.

affected states'.[48] Its underlying premise was 'to ensure that the Court did not interfere with national investigations or prosecutions except in the most obvious cases'.[49]

Complementarity thus recognises the evident fact that national states are ideally more suited and practically better equipped to bring the perpetrators of crimes, including international crimes, to justice.[50] At the Review Conference in Kampala, the delegates adopted by general agreement a resolution emphasising the importance of what came to be known as 'positive complementarity'[51] and which had been defined by the Assembly of State Parties as[52]

> all activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes included in the Rome Statute, without involving the Court in capacity building, financial support and technical assistance, but instead leaving these actions and activities for states, to assist each other on a voluntary basis.

The resolution on complementarity adopted by the Review Conference recognised 'the desirability for states to assist each other in strengthening domestic capacity to ensure that investigations and prosecutions of serious crimes of international concern can take place at the national level'.[53]

The problem, then, is this: Under the rules of customary international law, state parties are not permitted to prosecute in their municipal courts a foreign national who can claim sovereign immunity, unless the foreign state agrees to forfeit the immunity of the person concerned; yet state parties are in virtue of article 27 under a duty to arrest that foreign national if he or she were to set foot in their national territory and surrender him or her to the ICC to be prosecuted for a crime

48 M Morris 'Complementarity and conflict: States, victims, and the ICC' in SB Sewall & C Kaysen (eds) *The United States and the International Criminal Court* (2000) 195 197; and see also A Dieng 'International Criminal Court: From paper to practice – Contribution from the International Criminal Court for Rwanda to the establishment of the International Criminal Court' (2002) 25 *Fordham International Law Journal* 688 697; JT Holmes 'Complementarity: National courts versus the ICC' in Cassese *et al* (n 21 above) 1.

49 Holmes (n 48 above) 675.

50 Sadat (n 42 above) 114; JE Alvarez 'Crimes of states/Crimes of hate' (1999) 24 *Yale Journal of International Law* 365 476-78; Holmes (n 48 above) 673.

51 Res ICC-ASP/RC/Res 1 (8 June 2010).

52 Resolutions Adopted by the Assembly of State Parties, Annex IV, Appendix, para 16 Assembly of State Parties to the Rome Statute of the International Criminal Court, Resumed Eighth Session, New York, 22-25 March 2010, UN Doc ICC-ASP/8/20/Add 1 24; and see also WW Burke-White 'Proactive complementarity. The International Criminal Court and national courts in the Rome system of international justice' (2008) 49 *Harvard International Law Journal* 53 54 (appealing to the ICC to 'participate more directly in efforts to encourage national governments to prosecute international crimes themselves').

53 Res ICC-ASP/RC/Res 1 (n 51 above) para 8.

within the jurisdiction of the ICC. Implementation of the principle of complementarity is therefore precluded by this state of affairs.[54]

It is submitted, though, that positive complementarity places a special burden on state parties with a special interest in bringing a foreign head of state or other state official to justice to canvass consent of the state in which the sovereign immunity of the suspect is vested so that it can exercise its complementarity jurisdiction; and if that state cannot succeed in obtaining such consent, then prosecution in the ICC remains the only alternative. In the case of President Al Bashir, complementarity concerns applying to state parties are in any event of academic interest only, since the crimes of which the Sudanese President is accused occurred in his own country and the alleged victims shared his nationality. There are no states other than Sudan that can claim a special interest in the matter based on the jurisdictional principle of territoriality or active nationality. Sudan itself and the ICC seem to be the only alternative prosecuting forums, and sovereign immunity of President Al Bashir does not apply to prosecutions in either Sudan or the ICC. Under the rules of complementarity, Sudan remains entitled to challenge proceedings in the ICC against its president by merely conducting a *bona fide* investigation into the allegations of his wrongdoing.[55]

6 ICC's reasoning

Efforts to avoid the redundancy of article 98(1) have prompted some analysts to base the duty of states to arrest and surrender President Al Bashir for trial in the ICC on grounds other than the dictates of article 27, notably on the fact that the situation in Darfur was referred to the ICC by the Security Council.[56] It must be emphasised, though, that in ICC matters the Security Council only has those powers entrusted to it by the ICC Statute; it cannot instruct the ICC to exercise jurisdiction over offences not included in the subject matter jurisdiction of the Court, or to prosecute persons not subject to the jurisdiction *ratione personae* of the Court. By the same token, it cannot issue orders for the ICC to conduct a trial, in violation of the principle of complementarity, in instances where the national court with a special interest in the matter is willing and able to bring the suspect to justice. In this respect, the ICC differs radically from the *ad hoc* tribunals (the ICTY and the International Criminal Tribunal for Rwanda (ICTR)) that were created by, and as organs of, the Security Council. Nothing, though, would

54 See Dissenting Judgment of Van den Wyngaert J (n 27 above) para 37.

55 Art 19 read with art 17 ICC Statute.

56 See eg Dworkin & Iliopoulis (n 40 above) 3-4 (stating that 'in referring the situation in Darfur to the ICC, [the Security Council] imposed on Sudan by implication all the obligations of a state party to the Court').

preclude the Security Council, acting under its chapter VII powers, from instructing states to co-operate with the ICC if the Council were to find that non-co-operation would constitute a threat to international peace and security. Where the Security Council has not specifically decided that the failure of states to co-operate with the ICC is a threat to international peace and security, the question remains whether the power of referral afforded by the ICC Statute to the Security Council implies a duty of states to make arrests and surrender suspects for trial in the ICC.

When the Security Council referred the situation in Darfur to the ICC, it did decide that[57]

> the government of Sudan and all other parties to the conflict in Darfur shall co-operate fully with and provide any necessary assistance to the Court and the prosecutor pursuant to this resolution and, while recognising that states not party to the Rome Statute have no obligation under the Statute, urges all states and concerned regional and other international organisations to co-operate fully.

The obligation included in this directive could arguably be confined to co-operating in the pending investigation into the situation in Darfur. However, the wording of the ICC Statute relating to Security Council referrals seems to go well beyond these confines.

Article 13(2) provides that

> [t]he Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if .... [a] situation ... is referred to the prosecutor by the Security Council acting under chapter VII of the Charter of the United Nations.

This wording implies that the reach of a Security Council referral is not confined to conducting an investigation, but extends to the exercise of jurisdiction emanating from the investigation. Calling on states to co-operate therefore includes co-operation in all matters that would facilitate the exercise of jurisdiction with respect to the crimes within the subject matter jurisdiction of the court.

It is interesting to note that the ICC itself preferred a much more restricted focus of the duty of state parties to co-operate in bringing President Al Bashir to justice; one conspicuously designed to avoid a ruling as to the discrepancy between articles 98(1) and 27(2). The pre-trial chamber of the ICC preferred to leave this discrepancy to rest until another day.

Responding to the refusal of Kenya and Chad to arrest and surrender President Al Bashir for prosecution in the ICC, a Pre-Trial Chamber on 27 August 2010 set proceedings in motion, which under article 87(7) of the ICC Statute apply '[w]here a state party fails to comply with a request to co-operate by the Court contrary to the provisions of this

57 SC Res 1593 (2005) (n 3 above) para 2.

Statute'.[58] It adopted two resolutions informing the Security Council of the UN and the Assembly of State Parties about President Al Bashir's visits to Kenya and Chad (respectively) 'in order for them to take any action they may deem appropriate'.[59] The decisions were forwarded to the Security Council by the President of the Assembly of State Parties on 28 August 2010.[60]

The Pre-Trial Chamber did not base the obligation of Kenya and Chad to execute the warrant of arrest on article 27; nor was any mention made of article 98(1) of the ICC Statute. It based the obligation of Kenya and Chad 'to co-operate with the Court in relation to the enforcement of ... [the] warrants of arrest' on a passage in SC Resolution 1593 (2005) which 'urges all states and concerned regional and other international organisations to co-operate fully' with the Court,[61] and on article 87 of the ICC Statute, which affords to the ICC authority to request co-operation of state parties with the Court.[62]

Confining the duty of states to co-operate in bringing President Al Bashir before the ICC on the wording of the Security Council's referral resolution was evidently prompted by an easy-out strategy, leaving a final decision on the application of, and the conflict between, articles 98(1) and 27(2) for another day. That day will break when the indictment of a state official with sovereign immunity derives from a state party referral or an investigation conducted by the prosecutor *proprio motu*. The problem will not simply go away.

---

58 Art 87(7) ICC Statute, which provides: 'Where a state party fails to comply with a request to co-operate ... the Court may make a finding to that effect and refer the matter to the Assembly of State Parties or, where the Security Council referred the matter to the Court, to the Security Council.'

59 *Prosecutor v Omar Hassan Ahmad Al Bashir (Decision informing the United Nations Security Council and the Assembly of State Parties to the Rome Statute about Omar Al-Bashir's presence in the territory of the Republic of Kenya)* Case ICC-02/05-01/09-107 (27 August 2010); *Prosecutor v Omar Hassan Ahmad Al Bashir (Decision informing the United Nations Security Council and the Assembly of State Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad)* Case ICC-02/05-01/09-109 (27 August 2010).

60 ICC Press Release of 9 September 2010, UN Doc ICC-CPI-20100921-PR575.

61 SC Res 1593 (2005) (n 3 above) para 2. Resolution 1593 also quite redundantly took note of 'the existence of treaties referred to in article 98-2 of the Rome Statute'. Article 98(2) deals with status of forces agreements and was abused by the United States under the Bush administration to secure that states enticed into signing 'article 98(2) agreements' with the United States will never surrender an American national to stand trial in the ICC. Reference to 'treaties under article 98-2' was without doubt a condition precedent for the United States not to veto Resolution 1593 (the United States and China abstained but did not veto the resolution).

62 Art 87 ICC Statute (relating to 'Requests for co-operation: General provisions'). One might have expected that a reference to art 86, which deals with 'General obligation to co-operate', would have been more appropriate.

7 Concluding observations

The ICC was established for the primary purpose of ensuring 'that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international co-operation'.[63] The Review Conference in its stocktaking Declaration on Co-operation emphasised 'the crucial role that the execution of arrest warrants plays in ensuring the effectiveness of the Court's jurisdiction' and further emphasised 'the primary obligation of state parties, and other states under an obligation to co-operate with the Court,[64] to assist the Court in the swift enforcement of its impending arrest warrants'.[65] Chad and Kenya were part of the body of states that endorsed the Declaration in Kampala by general agreement.

As matters currently stand, the arrest and prosecution of President Al Bashir seem practically impossible. This does not mean that his indictment to stand trial in the ICC is without drastic consequences. He remains for all ends and purposes under house arrest for fear that he might be arrested if he were to travel abroad. He consequently did not attend the inauguration on 9 May 2009 of Jacob Zuma as President of the Republic of South Africa, or the summit meeting of the AU that was held in Uganda on 19-27 July 2010.[66] Most notably, perhaps, was his conspicuous absence from the soccer World Cup championship that took place in South Africa in June/July 2010.

63 Preamble para 4 ICC Statute.

64 Non-party states can on an *ad hoc* basis contract an obligation to co-operate with the ICC. Art 12(3) ICC Statute.

65 Declaration on Co-operation Doc RC/ST/CP/2 para 5 (8 June 2010).

66 See JE Méndez 'The importance of justice and security' para 23 ICC Doc RC/ST/PJ/INF 3 (30 May 2010) (noting that President Al Bashir 'has become isolated').