PRESIDENTIAL IMMUNITY AND THE INTERNATIONAL CRIMINAL COURT'S 'EXCEPTION'- A CRITIQUE*

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Abstract

The International Criminal Court (ICC), governed by the 1998 Rome Statute, was set up with the ostentisible objective to end impunity. Much stress has been laid upon the ICC's crucial function in this regard and the weight of the burden placed on the ICC to ensure this objective. However, the ICC was also set up with the primary responsibility, vested to it as an international organization, to respect the sovereignty, political independence and territorial integrity of individual nations. In this article, the author seeks to contend that the ICC, in its recent decisions, has embarked on a dangerous trend of prioritizing its first objective while simultaneously pushing this very important duty to the backseat.

Abstrak

Mahkamah Pidana International (ICC), yang didasari oleh Statuta Roma (1998), didirikan dengan salah satu tujuan utama yakni untuk mengakhiri impunitas. Tujuan tersebut sangat ditekankan, dan menjadi beban yang sangat besar untuk dijalankan oleh ICC. Namun di sisi lain, ICC juga didirikan sebagai organisasi internasional yang harus menghargai kedaulatan, kemandirian politik, dan integritas teritorial dari negara. Melalui artikel ini penulis ingin mengkritisi ICC dalam salah satu putusannya yang terbaru, karena memulai suatu trend berbahaya yakni mengutamakan salah satu tujuannya dan menyisihkan tujuan lain yang sebetulnya sangat penting.

Keywords: *presidential immunity, international criminal court, international court of justice.*

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A. Introduction

The ICC issued in 2009 and 2010, arrest warrants for the incumbent Head of State for Sudan, President Omar Al Bashir[1]. The decision to issue a warrant for a sitting Head of State drew mixed responses from the world community. (Jalloh, 2009) While, the need for the international community to step into Sudan is a political question, here, the Author primarily aims at evaluating the reasoning of the ICC from a purely legal standpoint. The ICC issued a detailed judgment on the validity of the arrest warrant as a response to Malawi's decision to not arrest President Bashir while on an official visit there. Before moving further, it is necessary to clarify a few pertinent points. Firstly, the nation of Sudan is not a state-party to the ICC. Under the Vienna Convention on the Laws of Treaties, states not party to a treaty are not accorded any obligations under any provision of that treaty ("Vienna Convention on Laws of Treaties," 1969) While, the question of Sudan's obligations under the Security Council's referral power under article 13(b) of the Rome Statute is a completely separate debate[2]. It is important to note that Malawi is a party to the Rome Statute and as such is obligated to assist the Court in the implementation of its decisions. ("Rome Statute of the International Criminal Court," 1998)

In this context, it becomes necessary to refer specifically to article 98 of the Rome Statute. The article reads:

> "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."("Rome Statute of the International Criminal Court," 1998)

It is settled under international

[1] *Warrant for Arrest,* ICC-02/05-01/09-1 and ICC-02/05-01/09-95.

[2] The situation in Sudan was referred to the ICC by the Security Council in 2005 via Resolution *1593, at Clause 1.*

criminal law that the Head of State enjoys immunity ratione personae. (Watts, 1994) The ICJ in the *Tehran Case* held that the immunity accorded to heads of state is fundamental to the continuance of diplomatic relations. ("U.S. v. Iran," 1980) Such immunities are *inviolable* ("United Nations Immunities Convention," 1946) and necessary for the maintenance of foreign relations. Hence, nations have an international obligation to respect such immunities of Heads of State's from arrest requests. Article 98 calls on the nations to respect the same principle.

The ICC, although, did give a different spin to the interpretation on this provision in the *Malawi* decision. It stated "*To interpret article 98(1) in such a way so as to justify not surrendering Omar Al Bashir on immunity grounds would disable the Court and international criminal justice in ways completely contrary to the purpose of the Statute Malawi has ratified.*" ("The Prosecutor v. Omar Hassan Ahmad Al Bashir," 2011) To further the objective of ending impunity, the ICC believed it necessary to read the provisions in light of the preamble. However, the preamble also expresses the clear legislative intent of the Diplomatic Conference to not allow the ICC to infringe upon the political independence of nations. It need not be explained in much detail, the way in which, arrest of an incumbent Head of State, affects the functioning, and thereby, the sovereignty of a nation.

The judgment referred to the objective of the ICC to end impunity without taking into account its duty under the principles mentioned in the same preamble to the statute, which call for it to respect the independence of states. While the Preamble of a statute can be of assistance in the interpretative analysis of the provisions (Winckel, 1999), it is important that any such interpretation is based on a holistic analysis of the principles enshrined in the Preamble and not by selectively choosing certain principles and examining them in isolation.

The ratio of the ICC decision in the *Malawi case* was that there exists an exception under customary international law to the immunity available to a Head of State *when international courts seek a Head of State's arrest for the commission of international crimes.*("*The*

Prosecutor v. Omar Hassan Ahmad Al Bashir," 2011)

It is important to note that the International Court of Justice, in its landmark decision in 2000, in the *Arrest Warrant Case* has already established that immunity ratione personae do not disappear simply because a crime is of an international nature. However, the Court in this case went on to state that such immunity would not have been available had the prosecution been initiated by an *International Court*. ("Democratic Republic of the Congo v. Belgium," 2000) Therefore, the ICC decision must be read as removing immunities not only because; President Bashir was allegedly committing international crimes, but also because the ICC is an international court.

However, it is submitted that the reasoning is flawed for the reason that, in the absence of a definition of an international court, it must be established that the nature of an international court/tribunal is such that these immunities cease to exist. (Akande, 2004) It must be noted that the Arrest Warrant Case was based primarily on the Belgium's decision to initiate proceedings against the foreign minister of Congo. This case was primarily regarding prosecution for international crimes by *national courts*. Hence, in my opinion, the ICJ's observation regarding removal of immunities in international courts must be read as mere obiter.

B. Discussion

Further, the ratio of the *Arrest Warrant Case* that, *no exception exists under customary international law in regard to national courts, ("Democratic Republic of the Congo v. Belgium," 2000)* cannot be circumvented by two or more nations by setting up an international tribunal to bypass immunities otherwise available to Heads of States. The very real possibility of international courts being set up by a group of states solely to waive immunities and rights of certain officials may become a reality if the Arrest Warrant Case is interpreted to apply only to national jurisdictions and not to international courts. In his submissions, the Court appointed Amicus Curiae in the *Charles Taylor Case* recognized this problem. ("Prosecutor v. Charles Taylor," 2004)

Moving into the judgment itself, the ICC has relied on the judgments

of the ICTY and the identical clauses present in the statute of the ICTR to arrive at its decision. Firstly, both leading decisions against the existence of immunities, i.e. the *Blaskic ("Prosecutor v. Blaskic," 1997)* and *Krstic ("Prosecutor v. Krstic," 2003)* cases, can be distinguished on the basis that they deal with immunity ratione materiae and not ratione personae, (Akande, 2004) which is the case at hand here. Secondly, it must be noted that these tribunals were created by the UN Security Council acting under its Chapter-VII mandate.[3] The International Tribunal for Yugoslavia noted in Krstic that *"The Security Council has resorted to the establishment of a judicial organ in the form of an international criminal tribunal as an instrument for the exercise of its own principal function of maintenance of peace and security, i.e., as a measure contributing to the restoration and maintenance of peace in the former Yugoslavia." ("Prosecutor v. Krstic," 2003)*

In other words, the creation of a tribunal in the case of the ICTY was an exercise of the Security Council's power to enforce its own decisions, not through the cooperation of its members, but rather by acting on its own accord. The Security Council was not binding its members to the diktats of an independent organization but of a UN *subsidiary* organization.

Hence, members of the United Nations are deemed to have assented to the provisions governing these tribunals, including the ones which waive the immunity ratione personae of Heads of States. The ICC, on the other hand, is governed by a separate statute and is not established under the UNSC's Ch VII mandate. Thus, the consent of a state, to the provisions governing the ICC, cannot be assumed unless that state ratifies the Rome Statute.

The ICC also refers to the *Charles Taylor ("The Prosecutor v. Charles Ghankay Taylor," 2003)* decision to buttress its point ("The Prosecutor v. Omar Hassan Ahmad Al Bashir," 2011). However, both the ICC judgment and the Charles Taylor judgment are subject to the same criticism. They refuse to consider the existing state-practice in dealing with this matter. Many nations party to the ICC have cre-

[3] Security Council Resolutions 827 and 955, *Clause 1* reads: "Acting under Chapter VII of the Charter of the United Nations...".

ated enabling legislations in order to implement ICC's requests for arrest and surrender under article 58 (1) of the Rome Statute.The model legislation submitted by the Commonwealth, Kenya and Mauritius clearly show the distinction made between immunity ratione personae of officials belonging to nations, party to the Rome Statute, and those nations which have not acceded to or ratified the Rome Statute.[4] Thus, it casts serious aspersions on both these judgments and the importance with which the ICC treats state-practice while interpreting the Rome Statute.

Given the somewhat unsettled position of law in this area, it is submitted that the following twofold test must be applied to establish whether immunities exist before an international court:

a) It must be clearly established by the terms of the statute establishing such Court that immunities cannot be pleaded before it. (Akande, 2004; "Prosecutor v. Krstic," 2003)
b) The state in question is bound by the instruments creating the international court. (Akande, 2004)

The Rome Statute does not rule out immunities being pleaded absolutely. It provides for respecting of bilateral obligations ("Rome Statute of the International Criminal Court," 1998) and thereby, the obligation of states to respect the immunity ratione personae of Heads of other states. There exists in the Rome Statute, a tension between article 98 and article 27. (Akande, 2004) Existence of such tension, it is opined, is the reason that the ICC's statute does not absolutely rule out respect for international immunities. It is, as Professor Scharf puts it, a c*ompromise* between the universality and consent regimes. (Sharf, 2001) Hence, it is contended that the inherent ambiguity in the statute does not allow it to fulfill the first part of the two fold test.

The second part of the test is not fulfilled in the present case as Sudan is not a member of the Rome Statute. Consequently, it is submitted that President Bashir's immunity

[4] Refer: *Section 29 (2) (a) and (b)* of the Model International Criminal Court Act of the Commonwealth; Article 14 (1) and (4) of the International Criminal Court Act 2011 of Mauritius; Article *51 (2) (a) and (b)* of the International Crimes Act, 2008 of Kenya.

ratione personae as the Head of State of Sudan is intact and the ICC was incorrect in holding that it could initiate proceedings against him till such immunity was exhausted.

Finally, one must question whether the wide ambit granted to the interpretation of article 27 by the International Cirminal Court, has altogether rendered article 98 ineffective. The ICC has clearly resolved the tension between article 27 and article 98 by giving primacy to the former. It must be noted that the Security Council took special note of bilateral agreements between nations while conferring jurisdiction on the ICC.[5]The Security Council's decision to take note of the existence of bilateral agreements of the kind envisaged under article 98 (2) of the Rome Statute must be given interpretive value. As contended by Professor Gaeta, the Security Council's recognition of this international obligation does not give nations a *carte blanche* to violate rules relating to presidential immunity as established under peremptory norms of international law. (Gaeta, 2009) Furthermore, rule 195(2) of the ICC rules of procedure foreclose the option of the ICC to force nations, and therefore, by extension suggest through its decision, to act in contravention of their international law obligations. The rule states that "*The Court may not proceed with a request for the surrender of a per son without the consent of a sending State if, under article 98, paragraph 2, such a request would be inconsistent with obligations under an international agreement pursuant to which the consent of a sending State is required prior to the surrender of a person of that State to the Court.*"

Thus, the nature of the UNSC recommendation for cooperation must be interpreted narrowly to construe assistance in conformity with the Rome Statute and the Rules of Procedure of the ICC. This is precisely due to the lack of unequivocal wording that calls for nations to not comply with their bilateral or international obligations with respect to other states in order to comply with ICC arrest warrants. The UNSC resolution must not be construed as authorizing the ICC to issue requests to states to breach

[5] Perambulatory clauses, Resolution 1593, UNSC, (2005).

their legal obligations towards non-parties to the Rome Statute. It is important to note in this light that the Security Council's resolution contains the word 'urges'[6] and not obligatory words like 'decides' or 'declares'. Hence, the obligation on Malawi to comply with any subsequent ICC request for arrest of President Omar Al-Bashir is merely recommendatory rather than mandatory. This is in stark contrast with the word 'decides 'which it uses to indicate Sudan's obligations to the ICC[7]. Therefore, it is submitted that even if Sudan may have a binding obligation to accept ICC's requests for surrender of President Omar Al- Bashir, a similar responsibility does not vest itself upon Malawi.

C. Conclusion

In this context, it can be stated that the ICC was indeed established with a mandate of ensuring that the *most serious crimes of concern to the international community do not go unpunished. ("Rome Statute of the International Criminal Court," 1998)* However, collective international action, especially in the case of ICC where the nature of the 'international consensus' itself is questionable; must not disregard the principle of *sovereign equality of all states* elucidated in article 2 (1) UN Charter. ("Charter of the United Nations," 1945) It must be noted that the ICC statute, (as of 03/05/2012) has been ratified by 118 nations with prominent members of the world community conspicuous by their absence in the ratification list. The US, China, India etc have not ratified the ICC statute.[8] Unlike the UN Charter, the lack of membership of the ICC, poses a question as to the nature of the global consensus on the principles enshrined in the statute. While, it is not my argument that the ICC's locus to contribute to the development in the field of international law must be questioned, it is my contention that the ICC, for the reason of its membership, must exercise extreme caution while deciding on questions regarding the universal acceptance of certain principles of international criminal law. awing collective opposition from some corners of

[6] Resolution 1593, at clause 2.

[7] *Ibid.*

[8] A list of ratifications is available at: http://www.iccnow.org/?mod=romesignatures, last visited: 03/05/2012.

the world community(Jalloh, 2009). Distrust of the ICC's motives and the use of international organizations as vehicles of subjugation by a combined few over other nations, does not bode well for the successful functioning of the ICC itself. The ICC relies on the cooperation of its member nations for implementing its decisions and has no individual capacity in this regard. (Akande, 2004) In this context, it needs to be emphasized that alienation of its member nations through its actions would only prove to be detrimental for the ICC.

In conclusion, it is submitted that there exists no 'exception' to the existence of personal immunities under customary international law in case of prosecutions by international courts for international crimes. The twin mandate of the international criminal law framework, i.e. ending impunity while respecting the sovereignty inherent to nations in the global arena requires a special balancing act. The ICC, in its future decisions, must reconsider the ratio laid down by this judgment, and seriously question the legal tenability of this view. In any case, one must note that, the ICC is not bound by its earlier decisions and has the independence to begin its discussions a new on the same point of law. Since the principle of *stare decisis* does not find mention under art 21 of the Rome Statute of the International Criminal Court.

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