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PRE-TRIAL CHAMBER I

Before: Judge Sanji Mmasenono Monageng, Presiding Judge
Judge Sylvia Steiner
Judge Cuno Tarfusser

SITUATION IN DARFUR, SUDAN

THE PROSECUTOR V. OMAR HASSAN AHMAD AL BASHIR

Public Document

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

Document to be notified, in accordance with regulation 31 of the *Regulations of the Court*, to:

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**Victims Participation and Reparations
Section**

Others

Pre-Trial Chamber I of the International Criminal Court (the “Chamber” and the “Court”, respectively) hereby issues the present decision on the failure by the Republic of Malawi to comply with the cooperation requests issued by the Court for the arrest and surrender of Omar Hassan Ahmad Al Bashir (“Omar Al Bashir”).

Background and submissions by the Republic of Malawi

1. On 31 March 2005, the United Nations Security Council issued Resolution 1593 (2005),¹ whereby it referred the situation in Darfur to the Court and “urge[d] all States and concerned regional and other international organizations to cooperate fully” with the Court.

2. On 4 March 2009, the Chamber issued its “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”² (the “4 March 2009 Decision”) where it stated in relation to the position of Omar Al Bashir as Head of State:

41. Furthermore, in light of the materials presented by the Prosecution in support of the Prosecution Application, and without prejudice to a further determination of the matter pursuant to article 19 of the Statute, the Chamber considers that the current position of Omar Al Bashir as Head of a state which is not a party to the Statute, has no effect on the Court’s jurisdiction over the present case.

42. The Chamber reaches this conclusion on the basis of the four following considerations. First, the Chamber notes that, according to the Preamble of the Statute, one of the core goals of the Statute is to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole, which “must not go unpunished”.

¹ S/RES/1593 (2005).

² ICC-02/05-01/09-3.

43. Second, the Chamber observes that, in order to achieve this goal, article 27(1) and (2) of the Statute provide for the following core principles:

- (i) *“This Statute shall apply equally to all persons without any distinction based on official capacity;”*
- (ii) *“[...] official capacity as a Head of State or Government, a member of 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;” and*
- (iii) *“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.”*

44. Third, the consistent case law of the Chamber on the applicable law before the Court has held that, according to article 21 of the Statute, those other sources of law provided for in paragraphs (1)(b) and (1)(c) of article 21 of the Statute, can only be resorted to when the following two conditions are met: (i) there is a lacuna in the written law contained in the Statute, the Elements of Crimes and the Rules; and (ii) such lacuna cannot be filled by the application of the criteria of interpretation provided in articles 31 and 32 of the Vienna Convention on the Law of the Treaties and article 21(3) of the Statute.

45. Fourth, as the Chamber has recently highlighted in its 5 February 2009 “Decision on Application under Rule 103”, by referring the Darfur situation to the Court, pursuant to article 13(b) of the Statute, the Security Council of the United Nations has also accepted that the investigation into the said situation, as well as any prosecution arising therefrom, will take place in accordance with the statutory framework provided for in the Statute, the Elements of Crimes and the Rules as a whole. (footnotes omitted)

3. On 4 March 2009 and 12 July 2010, respectively, the Chamber issued warrants of arrest against Omar Al-Bashir which are yet to be executed.³

4. On 6 March 2009 and on 21 July 2010, respectively, the Registry sent, at the Chamber's request, the "Request to all States Parties to the Rome Statute for the arrest and surrender of Omar Hassan Ahmad Al Bashir",⁴ and the "Supplementary request to all States Parties to the Rome Statute for the arrest and surrender of Omar Hassan Ahmad Al Bashir"⁵ (the "Cooperation Requests"), asking for cooperation from all States Parties in the arrest and surrender of Omar Al-Bashir pursuant to, *inter alia*, articles 89(1) and 91 of the Rome Statute (the "Statute"). The Republic of Malawi has been a State Party to the Statute since 1st December 2002 and was therefore notified of the Cooperation Requests.

5. On 18 October 2011, the Registry filed its "Report on the visit of Omar Al Bashir to Malawi" (the "Report"),⁶ whereby the Registrar informed the Chamber that:

- (i) various media had reported that Al Bashir had visited the Republic of Malawi on 14 October 2011 and had "attended a summit of the Common Market for Eastern and Southern Africa (COMESA) in Malawi's capital Lilongwe that took place from 4 to 15 October";
- (ii) she had sent a *note verbale* to the Embassy of the Republic of Malawi in Brussels on 13 October 2011 ("*Note*

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

⁴ ICC-02/05-01/09-7.

⁵ ICC-02/05-01/09-96.

⁶ ICC-02/05-01/09-136-Conf and Conf Anx 1 to 4.

Verbale”),⁷ reminding the Republic of Malawi of its legal obligations under the Statute and asking for its cooperation for the arrest and surrender of Al Bashir “in the event that the latter would enter Malawi’s territory”; and

(iii) no reply had been received so far.

6. In her *Note Verbale*, the Registrar: (a) reminded the Republic of Malawi that the obligation to arrest and surrender persons subject to an arrest warrant issued by the Court applied “to all persons subject to an arrest warrant including President Al Bashir”;⁸ (b) warned the Republic of Malawi that, pursuant to article 87(7) of the Statute, “where a State Party fails to comply with a request for cooperation by the Court contrary to the provisions of the Statute, the Court may make a finding of non-cooperation and refer the matter to the UN Security Council”;⁹ and (c) invited the competent authorities of the Republic of Malawi to consult with the Court in case of any difficulty with respect to the execution of the Cooperation Requests, as provided for in article 97 of the Statute. No consultation was ever undertaken by the competent authorities of the Republic of Malawi, nor did they raise any problem with regard to the execution of the Cooperation Requests or provide any relevant information to the Court in that respect.

7. On 19 October 2011, the Chamber issued its “Decision requesting observations about Omar Al-Bashir’s recent visit to Malawi”,¹⁰ ordering the Registrar to transmit a copy of the Report to the competent authorities of the Republic of Malawi and inviting those authorities to submit, in conformity

⁷ ICC-02/05-01/09-136-Conf, Anx 4.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ ICC-02/05-01/09-137.

with regulation 109(3) of the Regulations of the Court (the “Regulations”), any observations on the Report, in particular with regard to the alleged failure by the Republic of Malawi to comply with the Cooperation Requests.

8. On 11 November 2011, the Registry filed publicly its “Transmission of the observations from the Republic of Malawi”,¹¹ together with two confidential annexes. In confidential annex 2 (the “Observations from the Republic of Malawi”), the Republic of Malawi submitted the following observations with regard to its failure to comply with the Cooperation Requests issued by the Court:

The Ministry [of Foreign Affairs] wishes to confirm that His Excellency President Omar Hassan Ahmad Al Bashir, the President of the Republic of Sudan attended a COMESA Summit that was held at Lilongwe in the Republic of Malawi from 14th – 15th October 2011. The Ministry wishes to state that in view of the fact that His Excellency Al Bashir is a sitting Head of State, Malawi accorded him all the immunities and privileges guaranteed to every visiting Head of State and Government; these privileges and immunities include freedom from arrest and prosecution within the territories of Malawi.

The Ministry wishes to inform the esteemed Registry of the ICC that Malawi accorded His Excellency President Al Bashir these privileges and immunities in line with the established principles of public international law, and in accordance with the Immunities and Privileges Act of Malawi.

The Ministry further wishes to state that Sudan, of which His Excellency President Al Bashir is Head of State, is not a party to the Rome Statute and, in the considered opinion of the Malawi authorities, Article 27 of the Statute which, inter – alia, waives the immunity of the Heads of State and Government, is not applicable.

The Ministry also wishes to inform the esteemed Registry of the Court of the ICC that Malawi, as a member of the African Union, fully aligns itself with the position adopted by the

¹¹ ICC-02/05-01/09-138 with confidential annexes 1 and 2.

African Union with respect to the indictment of the sitting Heads of State and Government of countries that are not parties to the Rome Statute.

The Ministry accordingly wishes to inform the esteemed Registry of ICC that in view of the foregoing, Malawi could not arrest His Excellency, President Omar Hassan Ahmad Al Bashir when he visited the country to attend the COMESA Summit.

Applicable Law and Discussion

9. The Chamber notes articles 13, 21, 27, 86, 87, 98 and 119 of the Statute and rule 195 of the Rules of Procedure and Evidence (the “Rules”).

Preliminary Issue

10. As a preliminary matter, the Chamber notes that, although they received a warning by the Registry prior to the visit of Omar Al Bashir, the authorities of the Republic of Malawi decided neither to respond to the Court nor to arrest the suspect. This indicates to the Chamber that the Republic of Malawi did not respect its obligation, enshrined in article 86 of the Statute, to fully cooperate with the Court.

11. The Republic of Malawi did not respect the sole authority of this Court to decide whether immunities are applicable in a particular case. This is established by article 119(1) of the Statute, which provides that “[A]ny dispute concerning the judicial functions of the Court shall be settled by the decision of the Court”. Moreover, rule 195(1) states:

When a requested State notifies the Court that a request for surrender or assistance raises a problem of execution in respect of article 98, the requested State shall provide any information relevant to assist the Court in the application of article 98. Any concerned third State or sending State may provide additional information to assist the Court.

12. Therefore the Chamber concludes that, in this respect, the Republic of Malawi did not cooperate with the Court in order to resolve the issue. The Republic of Malawi should have brought the matter to the attention of the Chamber, together with any available information, in order for the Chamber to make its determination.

Issue Presented to the Court

13. That said, due to the significance of the issues before the Court the Chamber will decide the issue of Malawi's non-cooperation on the merits. The Chamber considers that the arguments raised by the Republic of Malawi to justify its refusal to execute the Cooperation Requests may be summarized as follows:

- i) Al Bashir is a sitting Head of State not Party to the Rome Statute and therefore Malawi accorded him immunity from arrest and prosecution in line with "established principles of public international law" and in accordance with the "Immunities and Privileges Act of Malawi" (the "First Argument");
- ii) The Republic of Malawi, being a member of the African Union, decided to fully align itself with "the position adopted by the African Union with respect to the indictment of sitting Heads of State and Government of countries that are not parties to the Rome Statute" (the "Second Argument").

14. With respect to the Second Argument, the Chamber notes that the Republic of Malawi does not provide the Chamber with any specific document which articulates the "position adopted by the African Union". The Chamber, however, understands this argument as challenging the existence of

a warrant of arrest against a sitting Head of State of a country not party to the Statute, and reminds the Republic of Malawi that it has already rejected such an argument in its 4 March 2009 Decision at the time of the *issuance* of its first warrant of arrest against Omar Al Bashir when it decided that, in accordance with article 27 of the Statute, “the current position of Omar Al Bashir as Head of a state which is not a party to the Statute, has no effect on the Court’s jurisdiction over the present case”.

15. The Chamber notes, however, the various African Union resolutions requiring its members not to cooperate with the Court regarding the warrant of arrest against Omar Al Bashir.¹² The sole legal justification the African Union gives for why its legal position is compatible with the Statute is by reference to “the provisions of Article 98 of the Rome Statute of the ICC relating to immunities”.¹³ The Chamber considers the specific provision referenced by the African Union to be article 98(1) of the Statute. Therefore, the Chamber’s analysis, contained below, as to how article 98(1) of the Statute relates to the present circumstances will also address the legal viability of the African Union position relied upon by the Republic of Malawi.

¹² 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. 5.

¹³ 3 July 2009 AU Decision, para. 10; 30 June-1 July 2011 AU Decision Decision, para. 5.

16. The Chamber is of the view that the First Argument presented by the Republic of Malawi raises the following issue: under the Statute, namely whether sitting Heads of States not parties to the Statute enjoy immunity with respect to the *enforcement* of a warrant of arrest issued by the Court, by national authorities.

17. The Chamber considers that, although not expressly referred to in the Observations from the Republic of Malawi, article 98(1) of the Statute is the applicable article in this respect. This article reads as follows:

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.

18. The Chamber notes the Observations from the Republic of Malawi where they say that “Sudan, of which His Excellency President Al Bashir is Head of State, is not a party to the Rome Statute and, in the considered opinion of the Malawi authorities, Article 27 of the Statute which, inter – alia, waives the immunity of the Heads of State and Government, is not applicable”. The remarks suggests that Malawi concedes, and the Chamber agrees, that a waiver of immunity would obviously not be necessary with respect to a third State which has ratified the Statute. Indeed, acceptance of article 27(2) of the Statute, implies waiver of immunities for the purposes of article 98(1) of the Statute with respect to proceedings conducted by the Court. However, for the reasons set out below, the Chamber rejects the argument presented by the Republic of Malawi, with respect to States not parties to the Statute, that international law affords immunity to Heads of States in respect of proceedings before international courts.

Irrelevance of Internal Law

19. The Chamber notes that the First Argument raised in the Observations from the Republic of Malawi seems to have two parts: the first part refers to established principles of international law and the second part refers to the national law of the Republic of Malawi.

20. The Chamber will not consider the second part of the First Argument as article 98(1) of the Statute only refers to international law and thereby excludes any possibility for the requested State to rely on its national law, in order not to comply with a cooperation request sent by the Court. This is furthermore in line with established principles of international law as embodied in article 27 of the 23 May 1969 Vienna Convention on the Law of Treaties which states:

A Party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

21. Therefore, to the extent the Republic of Malawi refers to its internal law in order to justify its failure to comply with the Cooperation Requests, such an argument is rejected by the Chamber *in limine*.

Immunity of Heads of States in International Proceedings

22. The Chamber will now assess whether, under international law, either former or sitting heads of States enjoy immunity in respect of proceedings before international courts.

23. The Chamber notes that as early as March 1919, in the aftermath of the First World War, the Commission on the Responsibility of the Authors of the

War and on Enforcement of Penalties¹⁴ recommended the establishment of a High Tribunal rejecting the idea of immunities even for Heads of States:

In theses circumstances, the Commission desire to state expressly that in the hierarchy of persons in authority, there is no reason why rank, however exalted, should in any circumstances protect the holder of it from responsibility when that responsibility has been established before a properly constituted tribunal. This extends even to the case of heads of States. An argument has been raised to the contrary based upon the alleged immunity, and in particular the alleged inviolability, of a sovereign of a State. But this privilege, where it is recognized, is one of practical expedience in municipal law, and is not fundamental. However, even if, in some countries, a sovereign is exempt from being prosecuted in a national court of his own country the position from an international point of view is quite different.

24. In the aftermath of the Second World War, two international tribunals were established, respectively in Nuremberg and in Tokyo. Article 7 of the Charter of the International Military Tribunal¹⁵ states as follows:

The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

25. The International Military Tribunal sitting in Nuremberg reaffirmed such a principle in its judgment issued on 1st October 1946¹⁶:

The principle of International Law, which under certain circumstances protects the representatives of a State, cannot be applied to acts which are condemned as criminal by International Law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.

¹⁴ American Journal of International Law, 1920 (14), at 116.

¹⁵ Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, Signed at London on 8 August 1945, United Nations – Treaty Series, 1951, n° 251, at 279.

¹⁶ The Trial of German Major War Criminals, Proceedings of the International Military Tribunal sitting at Nuremberg, Part 22 (22nd August, 1946 to 1st October, 1946), at 447.

26. Article 6 of the Charter of the International Military Tribunal for the Far East, sitting in Tokyo, established on 19 January 1946 by the Supreme Commander for the Allied Powers, states as follows:

Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

27. In its judgment, the International Military Tribunal sitting in Tokyo¹⁷ convicted defendant Hiroshi Oshima, the Japanese Ambassador in Berlin, despite his assertion that he was protected by his diplomatic immunity:

OSHIMA's special defence is that in connection with his activities in Germany he is protected by diplomatic immunity and is exempt from prosecution. Diplomatic privilege does not import immunity from legal liability, but only exemption from trial by the Courts of the State to which an Ambassador is accredited. In any event this immunity has no relation to crimes against international law charged before a tribunal having jurisdiction. The Tribunal rejects this special defence".

28. In 1950, the United Nations General Assembly adopted¹⁸ the "Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal". Principle III states:

The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.

¹⁷ The Tokyo Judgment, The International Military Tribunal for the Far East (I.M.T.F.E.), 29 April 1946-12 November 1948, Volume I, Röling and Rüter(eds), APA, University Press Amsterdam BV, Amsterdam 1977, at 456.

¹⁸ General Assembly, Official Records, 5th session, Supp. N°12, U.N. Doc.A/1316 (1950).

29. Article 7(2) of the International Tribunal for the Former Yugoslavia¹⁹

Statute likewise states:

The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

30. In several occasions, especially after the transfer of Slobodan Milosevic, the International Tribunal for the Former Yugoslavia ("ICTY") stated that article 7(2) was declaratory of customary international law:

*Individuals are personally responsible, whatever their official position, even if they are heads of State or government ministers: Article 7(2) of the Statute and article 6(2) of the Statute of the International Criminal Tribunal for Rwanda [...] are indisputably declaratory of customary international law.*²⁰

31. Article 6(2) of the International Tribunal for Rwanda ("ICTR") Statute²¹ is identical to article 7(2) of the ICTY Statute.

32. In its Draft Code of Crimes against the Peace and Security of Mankind²², the International Law Commission adopted the same principle. Article 7 of this Draft Code, entitled "Official position and Responsibility" indeed states:

¹⁹ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, adopted by Resolution 827 of the United Nations Security Council (25 May 1993).

²⁰ ICTY, the Prosecutor v. Anton Furundzija, case n° IT-95-17/1-T, Judgement, 10 December 1998, para. 140; see also ICTY, the Prosecutor v. Slobodan Milosevic, Case n° IT-99-37-PT, Decision on Preliminary Motions, 8 November 2001, para. 28.

²¹ Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, adopted by Resolution 955 of the United Nations Security Council on 8 November 1994.

²² International Law Commission, Draft Code of Crimes against the Peace and Security of Mankind, adopted by the Commission at its forty-eight session, from 6 May to 26 July 1996, General Assembly, Official Records, 51st Session, Supp. N° 10; U.N. Doc. A/51/10.

The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as Head of State or Government, does not relieve him of criminal responsibility or mitigate punishment.

33. The International Court of Justice (“ICJ”) held, in the “Arrest Warrant Case”,²³ that although customary international law provided for immunity with regard to *national courts*, for certain officials such as the incumbent Minister of Foreign Affairs, and *a fortiori* for Heads of State and Government, even in the case of a suspected commission of war crimes or crimes against humanity, such immunities could not be opposed by a criminal prosecution of an international court:

Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council Resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter’s Statute expressly provides, in article 27, paragraph 2, that “immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.”²⁴

34. The ICJ in the “Arrest Warrant Case” is concerned solely with immunity across national jurisdictions. The ICJ majority referenced the international tribunal provisions addressing immunity, including article 27 of the Statute, and concluded that these provisions “do not enable it to conclude that any such an exception exists in customary international law *in regard to national courts*.”²⁵ The ICJ majority discussion of customary international law immunity is therefore distinct from the present circumstances, as here an

²³ Arrest warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, 14 February 2002, I.C.J. Reports 2002.

²⁴ *Ibid.*, at para. 61.

²⁵ *Ibid.*, at para. 58 (emphasis added).

international court is seeking arrest for international crimes. This distinction is meaningful because, as argued by Antonio Cassese, the rationale for foreign state officials being entitled to raise personal immunity before national courts is that otherwise national authorities might use prosecutions to unduly impede or limit a foreign state's ability to engage in international action.²⁶ Cassese emphasised that this danger does not arise with international courts and tribunals, which are "totally independent of states and subject to strict rules of impartiality".²⁷

35. Following the ICJ ruling in the "Arrest Warrant Case", the Appeals Chamber of the Special Court for Sierra Leone, applying article 6(2) of its Statute²⁸ which is identical to article 6(2) of the ICTR Statute and article 7(2) of the ICTY Statute, 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".²⁹ As explained by that Court:

A reason for the distinction, in this regard, between national courts and international courts, though not immediately evident, would appear due to the fact that the principle that one sovereign state does not adjudicate on the conduct of another state; the principle of state immunity derives from the equality of sovereign states and therefore has no relevance to international criminal tribunals which are not organs of a state but derive their mandate from the international community.

36. Therefore, the Chamber finds that the principle in international law is that immunity of either former or sitting Heads of State can not be invoked to

²⁶ A. Cassese, *International Criminal Law* (Oxford University Press, 2nd ed., 2008), at 312.

²⁷ *Ibid.*

²⁸ Statute of the Special Court for Sierra Leone, annex to the Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council Resolution 1315(2000) of 14 August 2000, signed at Freetown, on 16 January 2002.

²⁹ Special Court for Sierra Leone, Appeals Chamber, *The Prosecutor v. Charles Ghankay Taylor*, Case Number SCSL-2003-1-AR72(E), Decision on Immunity from Jurisdiction, 31 May 2004, paras 51-52.

oppose a prosecution by an international court. This is equally applicable to former or sitting Heads of States not Parties to the Statute whenever the Court may exercise jurisdiction. In this particular case, the Chamber notes that it is exercising jurisdiction following a referral by the United Nations Security Council made under Chapter VII of the United Nations Charter, in accordance with article 13(b) of the Statute.

Immunity of Heads of State With Respect to Requests for Arrest and Surrender

37. The Chamber notes that there is an inherent tension between articles 27(2) and 98(1) of the Statute and the role immunity plays when the Court seeks cooperation regarding the arrest of a Head of State. The Chamber considers that Malawi, and by extension the African Union, are not entitled to rely on article 98(1) of the Statute to justify refusing to comply with the Cooperation Requests.

38. First, as described above, immunity for Heads of State before international courts has been rejected time and time again dating all the way back to World War I.³⁰

39. Second, there has been an increase in Head of State prosecutions by international courts in the last decade. Only one international prosecution of a Head of State had been initiated when the judgment in the “Arrest Warrant Case” was rendered; this trial (Slobodan Milosevic) began only two days before this judgment was issued and its existence is not even referenced by the ICJ majority. Subsequent to 14 February 2002, international prosecutions against Charles Taylor, Muammar Gaddafi, Laurent Gbagbo and the present case show that initiating international prosecutions against Heads of State have gained widespread recognition as accepted practice.

³⁰ *Supra*, paras 23-35.

40. Third, the Statute now has reached 120 States Parties in its 9 plus years of existence, all of whom have accepted having any immunity they had under international law stripped from their top officials. All of these states have renounced any claim to immunity by ratifying the language of article 27(2): “[i]mmunities 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 jurisdiction over such a person”.³¹ Even some States which have not joined the Court have twice allowed for situations to be referred to the Court by United Nations Security Council Resolutions, undoubtedly in the knowledge that these referrals might involve prosecution of Heads of State who might ordinarily have immunity from domestic prosecution.³²

41. Fourth, all the States referenced above have ratified this Statute and/or entrusted this Court with exercising “its jurisdiction over persons for the most serious crimes of international concern”.³³ It is facially inconsistent for Malawi to entrust the Court with this mandate and then refuse to surrender a Head of State prosecuted for orchestrating genocide, war crimes and crimes against humanity. 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.

42. The Chamber considers that the international community’s commitment to rejecting immunity in circumstances where international courts seek arrest for international crimes has reached a critical mass. If it ever was appropriate to

³¹ Statute, art. 27(2).

³² S/RES/1593 (2005); S/RES/1970 (2011).

³³ Statute, art. 1.

say so, it is certainly no longer appropriate to say that customary international law immunity applies in the present context.

43. For the above reasons and the jurisprudence cited earlier in this decision, the Chamber finds that customary international law creates an exception to Head of State immunity when international courts seek a Head of State's arrest for the commission of international crimes. There is no conflict between Malawi's obligations towards the Court and its obligations under customary international law; therefore, article 98(1) of the Statute does not apply.

Consequences of the Chamber's findings for States Parties

44. Furthermore, the Chamber is of the view that the unavailability of immunities with respect to prosecutions by international courts applies to any act of cooperation by States which forms an integral part of those prosecutions.

45. Indeed, the cooperation regime between the Court and States Parties, as established in Part IX of the Statute, can not in any way be equated with the inter-state cooperation regime which exists between sovereign States. This is evidenced by the Statute itself which refers in article 91 of the Statute to the "distinct nature of the Court", and in article 102 of the Statute which makes a clear distinction between "surrender", meaning the delivering up of a person by a State to the Court, and "extradition", meaning the delivering up of a person by one State to another as provided by treaty, convention or national legislation.

46. Indeed, it is the view of the Chamber that when cooperating with this Court and therefore acting on its behalf, States Parties are instruments for the enforcement of the *jus puniendi* of the international community whose exercise

has been entrusted to this Court when States have failed to prosecute those responsible for the crimes within its jurisdiction.

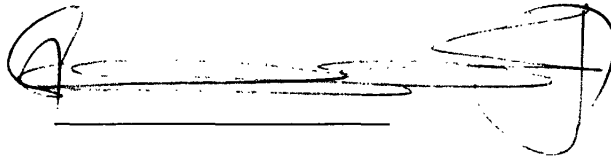
47. The Chamber therefore finds, in accordance with article 87(7) of the Statute that the Republic of Malawi has failed to comply with the Cooperation Requests contrary to the provisions of the Statute and has thereby prevented the Court from exercising its functions and powers under this Statute. The Chamber decides to refer the matter both to the United Nations Security Council and to the Assembly of States Parties.

FOR THESE REASONS, THE CHAMBER

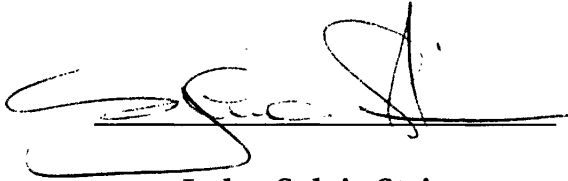
FINDS, in accordance with articles 86, 87(7) and 89 of the Statute, that the Republic of Malawi: (i) failed to comply with its obligations to consult with the Chamber by not bringing the issue of Omar Al Bashir's immunity to the Chamber for its determination and (ii) failed to cooperate with the Court by failing to arrest and surrender Omar Al Bashir to the Court, thus preventing the Court from exercising its functions and powers under the Statute; and

ORDERS the Registrar to transmit the present decision to the Security Council through the Secretary General of the United Nations and, to the Assembly of States Parties to the Statute.

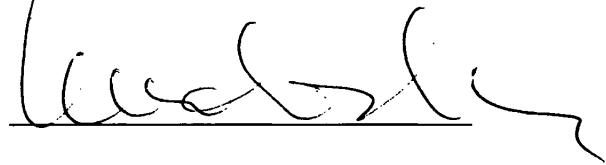
Done in both English and French, the English version being authoritative.



Judge Sanji Mmasenono Monageng
Presiding Judge



Judge Sylvia Steiner



Judge Cuno Tarfusser

Dated this Monday, 12 December 2011

At The Hague, The Netherlands



Original: English

No.: ICC-02/05-01/09
Date: 13 December 2011

PRE-TRIAL CHAMBER I

Before: Judge Sanji Mmasenono Monageng, Presiding Judge
Judge Sylvia Steiner
Judge Cuno Tarfusser

SITUATION IN DARFUR, SUDAN

THE PROSECUTOR V. OMAR HASSAN AHMAD AL BASHIR

Public Document

**Corrigendum to the 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**

Document to be notified, in accordance with regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Mr Luis Moreno-Ocampo

Ms Fatou Bensouda

Counsel for the Defence

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives
Competent authorities of
the Republic of Malawi

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Deputy Registrar

Mr Didier Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Pre-Trial Chamber I of the International Criminal Court (the “Chamber” and the “Court”, respectively) hereby issues the present decision on the failure by the Republic of Malawi to comply with the cooperation requests issued by the Court for the arrest and surrender of Omar Hassan Ahmad Al Bashir (“Omar Al Bashir”).

Background and submissions by the Republic of Malawi

1. On 31 March 2005, the United Nations Security Council issued Resolution 1593 (2005),¹ whereby it referred the situation in Darfur to the Court and “urge[d] all States and concerned regional and other international organizations to cooperate fully” with the Court.

2. On 4 March 2009, the Chamber issued its “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”² (the “4 March 2009 Decision”) where it stated in relation to the position of Omar Al Bashir as Head of State:

41. Furthermore, in light of the materials presented by the Prosecution in support of the Prosecution Application, and without prejudice to a further determination of the matter pursuant to article 19 of the Statute, the Chamber considers that the current position of Omar Al Bashir as Head of a state which is not a party to the Statute, has no effect on the Court’s jurisdiction over the present case.

42. The Chamber reaches this conclusion on the basis of the four following considerations. First, the Chamber notes that, according to the Preamble of the Statute, one of the core goals of the Statute is to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole, which “must not go unpunished”.

¹ S/RES/1593 (2005).

² ICC-02/05-01/09-3.

43. Second, the Chamber observes that, in order to achieve this goal, article 27(1) and (2) of the Statute provide for the following core principles:

- (i) *"This Statute shall apply equally to all persons without any distinction based on official capacity;"*
- (ii) *"[...] official capacity as a Head of State or Government, a member of 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;" and*
- (iii) *"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."*

44. Third, the consistent case law of the Chamber on the applicable law before the Court has held that, according to article 21 of the Statute, those other sources of law provided for in paragraphs (1)(b) and (1)(c) of article 21 of the Statute, can only be resorted to when the following two conditions are met: (i) there is a lacuna in the written law contained in the Statute, the Elements of Crimes and the Rules; and (ii) such lacuna cannot be filled by the application of the criteria of interpretation provided in articles 31 and 32 of the Vienna Convention on the Law of the Treaties and article 21(3) of the Statute.

45. Fourth, as the Chamber has recently highlighted in its 5 February 2009 "Decision on Application under Rule 103", by referring the Darfur situation to the Court, pursuant to article 13(b) of the Statute, the Security Council of the United Nations has also accepted that the investigation into the said situation, as well as any prosecution arising therefrom, will take place in accordance with the statutory framework provided for in the Statute, the Elements of Crimes and the Rules as a whole. (footnotes omitted)

3. On 4 March 2009 and 12 July 2010, respectively, the Chamber issued warrants of arrest against Omar Al-Bashir which are yet to be executed.³

4. On 6 March 2009 and on 21 July 2010, respectively, the Registry sent, at the Chamber's request, the "Request to all States Parties to the Rome Statute for the arrest and surrender of Omar Hassan Ahmad Al Bashir",⁴ and the "Supplementary request to all States Parties to the Rome Statute for the arrest and surrender of Omar Hassan Ahmad Al Bashir"⁵ (the "Cooperation Requests"), asking for cooperation from all States Parties in the arrest and surrender of Omar Al-Bashir pursuant to, *inter alia*, articles 89(1) and 91 of the Rome Statute (the "Statute"). The Republic of Malawi has been a State Party to the Statute since 1st December 2002 and was therefore notified of the Cooperation Requests.

5. On 18 October 2011, the Registry filed its "Report on the visit of Omar Al Bashir to Malawi" (the "Report"),⁶ whereby the Registrar informed the Chamber that:

- (i) various media had reported that Al Bashir had visited the Republic of Malawi on 14 October 2011 and had "attended a summit of the Common Market for Eastern and Southern Africa (COMESA) in Malawi's capital Lilongwe that took place from 4 to 15 October";
- (ii) she had sent a *note verbale* to the Embassy of the Republic of Malawi in Brussels on 13 October 2011 ("*Note*

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

⁴ ICC-02/05-01/09-7.

⁵ ICC-02/05-01/09-96.

⁶ ICC-02/05-01/09-136-Conf and Conf Anx 1 to 4.

Verbale”),⁷ reminding the Republic of Malawi of its legal obligations under the Statute and asking for its cooperation for the arrest and surrender of Al Bashir “in the event that the latter would enter Malawi’s territory”; and

(iii) no reply had been received so far.

6. In her *Note Verbale*, the Registrar: (a) reminded the Republic of Malawi that the obligation to arrest and surrender persons subject to an arrest warrant issued by the Court applied “to all persons subject to an arrest warrant including President Al Bashir”;⁸ (b) warned the Republic of Malawi that, pursuant to article 87(7) of the Statute, “where a State Party fails to comply with a request for cooperation by the Court contrary to the provisions of the Statute, the Court may make a finding of non-cooperation and refer the matter to the UN Security Council”;⁹ and (c) invited the competent authorities of the Republic of Malawi to consult with the Court in case of any difficulty with respect to the execution of the Cooperation Requests, as provided for in article 97 of the Statute. No consultation was ever undertaken by the competent authorities of the Republic of Malawi, nor did they raise any problem with regard to the execution of the Cooperation Requests or provide any relevant information to the Court in that respect.

7. On 19 October 2011, the Chamber issued its “Decision requesting observations about Omar Al-Bashir’s recent visit to Malawi”,¹⁰ ordering the Registrar to transmit a copy of the Report to the competent authorities of the Republic of Malawi and inviting those authorities to submit, in conformity

⁷ ICC-02/05-01/09-136-Conf, Anx 4.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ ICC-02/05-01/09-137.

with regulation 109(3) of the Regulations of the Court (the “Regulations”), any observations on the Report, in particular with regard to the alleged failure by the Republic of Malawi to comply with the Cooperation Requests.

8. On 11 November 2011, the Registry filed publicly its “Transmission of the observations from the Republic of Malawi”,¹¹ together with two confidential annexes. In confidential annex 2 (the “Observations from the Republic of Malawi”), the Republic of Malawi submitted the following observations with regard to its failure to comply with the Cooperation Requests issued by the Court:

The Ministry [of Foreign Affairs] wishes to confirm that His Excellency President Omar Hassan Ahmad Al Bashir, the President of the Republic of Sudan attended a COMESA Summit that was held at Lilongwe in the Republic of Malawi from 14th – 15th October 2011. The Ministry wishes to state that in view of the fact that His Excellency Al Bashir is a sitting Head of State, Malawi accorded him all the immunities and privileges guaranteed to every visiting Head of State and Government; these privileges and immunities include freedom from arrest and prosecution within the territories of Malawi.

The Ministry wishes to inform the esteemed Registry of the ICC that Malawi accorded His Excellency President Al Bashir these privileges and immunities in line with the established principles of public international law, and in accordance with the Immunities and Privileges Act of Malawi.

The Ministry further wishes to state that Sudan, of which His Excellency President Al Bashir is Head of State, is not a party to the Rome Statute and, in the considered opinion of the Malawi authorities, Article 27 of the Statute which, inter – alia, waives the immunity of the Heads of State and Government, is not applicable.

The Ministry also wishes to inform the esteemed Registry of the Court of the ICC that Malawi, as a member of the African Union, fully aligns itself with the position adopted by the

¹¹ ICC-02/05-01/09-138 with confidential annexes 1 and 2.

African Union with respect to the indictment of the sitting Heads of State and Government of countries that are not parties to the Rome Statute.

The Ministry accordingly wishes to inform the esteemed Registry of ICC that in view of the foregoing, Malawi could not arrest His Excellency, President Omar Hassan Ahmad Al Bashir when he visited the country to attend the COMESA Summit.

Applicable Law and Discussion

9. The Chamber notes articles 13, 21, 27, 86, 87, 98 and 119 of the Statute and rule 195 of the Rules of Procedure and Evidence (the “Rules”).

Preliminary Issue

10. As a preliminary matter, the Chamber notes that, although they received a warning by the Registry prior to the visit of Omar Al Bashir, the authorities of the Republic of Malawi decided neither to respond to the Court nor to arrest the suspect. This indicates to the Chamber that the Republic of Malawi did not respect its obligation, enshrined in article 86 of the Statute, to fully cooperate with the Court.

11. The Republic of Malawi did not respect the sole authority of this Court to decide whether immunities are applicable in a particular case. This is established by article 119(1) of the Statute, which provides that “[A]ny dispute concerning the judicial functions of the Court shall be settled by the decision of the Court”. Moreover, rule 195(1) states:

When a requested State notifies the Court that a request for surrender or assistance raises a problem of execution in respect of article 98, the requested State shall provide any information relevant to assist the Court in the application of article 98. Any concerned third State or sending State may provide additional information to assist the Court.

12. Therefore the Chamber concludes that, in this respect, the Republic of Malawi did not cooperate with the Court in order to resolve the issue. The Republic of Malawi should have brought the matter to the attention of the Chamber, together with any available information, in order for the Chamber to make its determination.

Issue Presented to the Court

13. That said, due to the significance of the issues before the Court the Chamber will decide the issue of Malawi's non-cooperation on the merits. The Chamber considers that the arguments raised by the Republic of Malawi to justify its refusal to execute the Cooperation Requests may be summarized as follows:

- i) Al Bashir is a sitting Head of State not Party to the Rome Statute and therefore Malawi accorded him immunity from arrest and prosecution in line with "established principles of public international law" and in accordance with the "Immunities and Privileges Act of Malawi" (the "First Argument");
- ii) The Republic of Malawi, being a member of the African Union, decided to fully align itself with "the position adopted by the African Union with respect to the indictment of sitting Heads of State and Government of countries that are not parties to the Rome Statute" (the "Second Argument").

14. With respect to the Second Argument, the Chamber notes that the Republic of Malawi does not provide the Chamber with any specific document which articulates the "position adopted by the African Union". The Chamber, however, understands this argument as challenging the existence of

a warrant of arrest against a sitting Head of State of a country not party to the Statute, and reminds the Republic of Malawi that it has already rejected such an argument in its 4 March 2009 Decision at the time of the *issuance* of its first warrant of arrest against Omar Al Bashir when it decided that, in accordance with article 27 of the Statute, “the current position of Omar Al Bashir as Head of a state which is not a party to the Statute, has no effect on the Court’s jurisdiction over the present case”.

15. The Chamber notes, however, the various African Union resolutions requiring its members not to cooperate with the Court regarding the warrant of arrest against Omar Al Bashir.¹² The sole legal justification the African Union gives for why its legal position is compatible with the Statute is by reference to “the provisions of Article 98 of the Rome Statute of the ICC relating to immunities”.¹³ The Chamber considers the specific provision referenced by the African Union to be article 98(1) of the Statute. Therefore, the Chamber’s analysis, contained below, as to how article 98(1) of the Statute relates to the present circumstances will also address the legal viability of the African Union position relied upon by the Republic of Malawi.

¹² 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. 5.

¹³ 3 July 2009 AU Decision, para. 10; 30 June-1 July 2011 AU Decision Decision, para. 5.

16. The Chamber is of the view that the First Argument presented by the Republic of Malawi raises the following issue: under the Statute, namely whether sitting Heads of States not parties to the Statute enjoy immunity with respect to the *enforcement* of a warrant of arrest issued by the Court, by national authorities.

17. The Chamber considers that, although not expressly referred to in the Observations from the Republic of Malawi, article 98(1) of the Statute is the applicable article in this respect. This article reads as follows:

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.

18. The Chamber notes the Observations from the Republic of Malawi where they say that “Sudan, of which His Excellency President Al Bashir is Head of State, is not a party to the Rome Statute and, in the considered opinion of the Malawi authorities, Article 27 of the Statute which, inter – alia, waives the immunity of the Heads of State and Government, is not applicable”. The remarks suggests that Malawi concedes, and the Chamber agrees, that a waiver of immunity would obviously not be necessary with respect to a third State which has ratified the Statute. Indeed, acceptance of article 27(2) of the Statute, implies waiver of immunities for the purposes of article 98(1) of the Statute with respect to proceedings conducted by the Court. However, for the reasons set out below, the Chamber rejects the argument presented by the Republic of Malawi, with respect to States not parties to the Statute, that international law affords immunity to Heads of States in respect of proceedings before international courts.

Irrelevance of Internal Law

19. The Chamber notes that the First Argument raised in the Observations from the Republic of Malawi seems to have two parts: the first part refers to established principles of international law and the second part refers to the national law of the Republic of Malawi.

20. The Chamber will not consider the second part of the First Argument as article 98(1) of the Statute only refers to international law and thereby excludes any possibility for the requested State to rely on its national law, in order not to comply with a cooperation request sent by the Court. This is furthermore in line with established principles of international law as embodied in article 27 of the 23 May 1969 Vienna Convention on the Law of Treaties which states:

A Party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

21. Therefore, to the extent the Republic of Malawi refers to its internal law in order to justify its failure to comply with the Cooperation Requests, such an argument is rejected by the Chamber *in limine*.

Immunity of Heads of States in International Proceedings

22. The Chamber will now assess whether, under international law, either former or sitting heads of States enjoy immunity in respect of proceedings before international courts.

23. The Chamber notes that as early as March 1919, in the aftermath of the First World War, the Commission on the Responsibility of the Authors of the

War and on Enforcement of Penalties¹⁴ recommended the establishment of a High Tribunal rejecting the idea of immunities even for Heads of States:

In theses circumstances, the Commission desire to state expressly that in the hierarchy of persons in authority, there is no reason why rank, however exalted, should in any circumstances protect the holder of it from responsibility when that responsibility has been established before a properly constituted tribunal. This extends even to the case of heads of States. An argument has been raised to the contrary based upon the alleged immunity, and in particular the alleged inviolability, of a sovereign of a State. But this privilege, where it is recognized, is one of practical expedience in municipal law, and is not fundamental. However, even if, in some countries, a sovereign is exempt from being prosecuted in a national court of his own country the position from an international point of view is quite different.

24. In the aftermath of the Second World War, two international tribunals were established, respectively in Nuremberg and in Tokyo. Article 7 of the Charter of the International Military Tribunal¹⁵ states as follows:

The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

25. The International Military Tribunal sitting in Nuremberg reaffirmed such a principle in its judgment issued on 1st October 1946¹⁶:

The principle of International Law, which under certain circumstances protects the representatives of a State, cannot be applied to acts which are condemned as criminal by International Law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.

¹⁴ American Journal of International Law, 1920 (14), at 116.

¹⁵ Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, Signed at London on 8 August 1945, United Nations – Treaty Series, 1951, n° 251, at 279.

¹⁶ The Trial of German Major War Criminals, Proceedings of the International Military Tribunal sitting at Nuremberg, Part 22 (22nd August, 1946 to 1st October, 1946), at 447.

26. Article 6 of the Charter of the International Military Tribunal for the Far East, sitting in Tokyo, established on 19 January 1946 by the Supreme Commander for the Allied Powers, states as follows:

Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

27. In its judgment, the International Military Tribunal sitting in Tokyo¹⁷ convicted defendant Hiroshi Oshima, the Japanese Ambassador in Berlin, despite his assertion that he was protected by his diplomatic immunity:

OSHIMA's special defence is that in connection with his activities in Germany he is protected by diplomatic immunity and is exempt from prosecution. Diplomatic privilege does not import immunity from legal liability, but only exemption from trial by the Courts of the State to which an Ambassador is accredited. In any event this immunity has no relation to crimes against international law charged before a tribunal having jurisdiction. The Tribunal rejects this special defence".

28. In 1950, the United Nations General Assembly adopted¹⁸ the "Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal". Principle III states:

The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.

¹⁷ The Tokyo Judgment, The International Military Tribunal for the Far East (I.M.T.F.E.), 29 April 1946-12 November 1948, Volume I, Röling and Rüter(eds), APA, University Press Amsterdam BV, Amsterdam 1977, at 456.

¹⁸ General Assembly, Official Records, 5th session, Supp. N°12, U.N. Doc.A/1316 (1950).

29. Article 7(2) of the International Tribunal for the Former Yugoslavia¹⁹ Statute likewise states:

The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

30. In several occasions, especially after the transfer of Slobodan Milosevic, the International Tribunal for the Former Yugoslavia ("ICTY") stated that article 7(2) was declaratory of customary international law:

*Individuals are personally responsible, whatever their official position, even if they are heads of State or government ministers: Article 7(2) of the Statute and article 6(2) of the Statute of the International Criminal Tribunal for Rwanda [...] are indisputably declaratory of customary international law.*²⁰

31. Article 6(2) of the International Tribunal for Rwanda ("ICTR") Statute²¹ is identical to article 7(2) of the ICTY Statute.

32. In its Draft Code of Crimes against the Peace and Security of Mankind²², the International Law Commission adopted the same principle. Article 7 of this Draft Code, entitled "Official position and Responsibility" indeed states:

¹⁹ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, adopted by Resolution 827 of the United Nations Security Council (25 May 1993).

²⁰ ICTY, the Prosecutor v. Anton Furundzija, case n° IT-95-17/1-T, Judgement, 10 December 1998, para. 140; see also ICTY, the Prosecutor v. Slobodan Milosevic, Case n° IT-99-37-PT, Decision on Preliminary Motions, 8 November 2001, para. 28.

²¹ Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, adopted by Resolution 955 of the United Nations Security Council on 8 November 1994.

²² International Law Commission, Draft Code of Crimes against the Peace and Security of Mankind, adopted by the Commission at its forty-eight session, from 6 May to 26 July 1996, General Assembly, Official Records, 51st Session, Supp. N° 10; U.N. Doc. A/51/10.

The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as Head of State or Government, does not relieve him of criminal responsibility or mitigate punishment.

33. The International Court of Justice (“ICJ”) held, in the “Arrest Warrant Case”,²³ that although customary international law provided for immunity with regard to *national courts*, for certain officials such as the incumbent Minister of Foreign Affairs, and *a fortiori* for Heads of State and Government, even in the case of a suspected commission of war crimes or crimes against humanity, such immunities could not be opposed to a criminal prosecution by an international court:

Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council Resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter’s Statute expressly provides, in article 27, paragraph 2, that “immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.”²⁴

34. The ICJ in the “Arrest Warrant Case” is concerned solely with immunity across national jurisdictions. The ICJ majority referenced the international tribunal provisions addressing immunity, including article 27 of the Statute, and concluded that these provisions “do not enable it to conclude that any such an exception exists in customary international law *in regard to national courts*.”²⁵ The ICJ majority discussion of customary international law immunity is therefore distinct from the present circumstances, as here an

²³ Arrest warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, 14 February 2002, I.C.J. Reports 2002.

²⁴ *Ibid.*, at para. 61.

²⁵ *Ibid.*, at para. 58 (emphasis added).

international court is seeking arrest for international crimes. This distinction is meaningful because, as argued by Antonio Cassese, the rationale for foreign state officials being entitled to raise personal immunity before national courts is that otherwise national authorities might use prosecutions to unduly impede or limit a foreign state's ability to engage in international action.²⁶ Cassese emphasised that this danger does not arise with international courts and tribunals, which are "totally independent of states and subject to strict rules of impartiality".²⁷

35. Following the ICJ ruling in the "Arrest Warrant Case", the Appeals Chamber of the Special Court for Sierra Leone, applying article 6(2) of its Statute²⁸ which is identical to article 6(2) of the ICTR Statute and article 7(2) of the ICTY Statute, 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".²⁹ As explained by that Court:

A reason for the distinction, in this regard, between national courts and international courts, though not immediately evident, would appear due to the fact that the principle that one sovereign state does not adjudicate on the conduct of another state; the principle of state immunity derives from the equality of sovereign states and therefore has no relevance to international criminal tribunals which are not organs of a state but derive their mandate from the international community.

36. Therefore, the Chamber finds that the principle in international law is that immunity of either former or sitting Heads of State can not be invoked to

²⁶ A. Cassese, *International Criminal Law* (Oxford University Press, 2nd ed., 2008), at 312.

²⁷ *Ibid.*

²⁸ Statute of the Special Court for Sierra Leone, annex to the Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council Resolution 1315(2000) of 14 August 2000, signed at Freetown, on 16 January 2002.

²⁹ Special Court for Sierra Leone, Appeals Chamber, *The Prosecutor v. Charles Ghankay Taylor*, Case Number SCSL-2003-1-AR72(E), Decision on Immunity from Jurisdiction, 31 May 2004, paras 51-52.

oppose a prosecution by an international court. This is equally applicable to former or sitting Heads of States not Parties to the Statute whenever the Court may exercise jurisdiction. In this particular case, the Chamber notes that it is exercising jurisdiction following a referral by the United Nations Security Council made under Chapter VII of the United Nations Charter, in accordance with article 13(b) of the Statute.

Immunity of Heads of State With Respect to Requests for Arrest and Surrender

37. The Chamber notes that there is an inherent tension between articles 27(2) and 98(1) of the Statute and the role immunity plays when the Court seeks cooperation regarding the arrest of a Head of State. The Chamber considers that Malawi, and by extension the African Union, are not entitled to rely on article 98(1) of the Statute to justify refusing to comply with the Cooperation Requests.

38. First, as described above, immunity for Heads of State before international courts has been rejected time and time again dating all the way back to World War I.³⁰

39. Second, there has been an increase in Head of State prosecutions by international courts in the last decade. Only one international prosecution of a Head of State had been initiated when the judgment in the “Arrest Warrant Case” was rendered; this trial (Slobodan Milosevic) began only two days before this judgment was issued and its existence is not even referenced by the ICJ majority. Subsequent to 14 February 2002, international prosecutions against Charles Taylor, Muammar Gaddafi, Laurent Gbagbo and the present case show that initiating international prosecutions against Heads of State have gained widespread recognition as accepted practice.

³⁰ *Supra*, paras 23-35.

40. Third, the Statute now has reached 120 States Parties in its 9 plus years of existence, all of whom have accepted having any immunity they had under international law stripped from their top officials. All of these states have renounced any claim to immunity by ratifying the language of article 27(2): “[i]mmunities 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 jurisdiction over such a person”.³¹ Even some States which have not joined the Court have twice allowed for situations to be referred to the Court by United Nations Security Council Resolutions, undoubtedly in the knowledge that these referrals might involve prosecution of Heads of State who might ordinarily have immunity from domestic prosecution.³²

41. Fourth, all the States referenced above have ratified this Statute and/or entrusted this Court with exercising “its jurisdiction over persons for the most serious crimes of international concern”.³³ It is facially inconsistent for Malawi to entrust the Court with this mandate and then refuse to surrender a Head of State prosecuted for orchestrating genocide, war crimes and crimes against humanity. 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.

42. The Chamber considers that the international community’s commitment to rejecting immunity in circumstances where international courts seek arrest for international crimes has reached a critical mass. If it ever was appropriate to

³¹ Statute, art. 27(2).

³² S/RES/1593 (2005); S/RES/1970 (2011).

³³ Statute, art. 1.

say so, it is certainly no longer appropriate to say that customary international law immunity applies in the present context.

43. For the above reasons and the jurisprudence cited earlier in this decision, the Chamber finds that customary international law creates an exception to Head of State immunity when international courts seek a Head of State's arrest for the commission of international crimes. There is no conflict between Malawi's obligations towards the Court and its obligations under customary international law; therefore, article 98(1) of the Statute does not apply.

Consequences of the Chamber's findings for States Parties

44. Furthermore, the Chamber is of the view that the unavailability of immunities with respect to prosecutions by international courts applies to any act of cooperation by States which forms an integral part of those prosecutions.

45. Indeed, the cooperation regime between the Court and States Parties, as established in Part IX of the Statute, can not in any way be equated with the inter-state cooperation regime which exists between sovereign States. This is evidenced by the Statute itself which refers in article 91 of the Statute to the "distinct nature of the Court", and in article 102 of the Statute which makes a clear distinction between "surrender", meaning the delivering up of a person by a State to the Court, and "extradition", meaning the delivering up of a person by one State to another as provided by treaty, convention or national legislation.

46. Indeed, it is the view of the Chamber that when cooperating with this Court and therefore acting on its behalf, States Parties are instruments for the enforcement of the *jus puniendi* of the international community whose exercise

has been entrusted to this Court when States have failed to prosecute those responsible for the crimes within its jurisdiction.

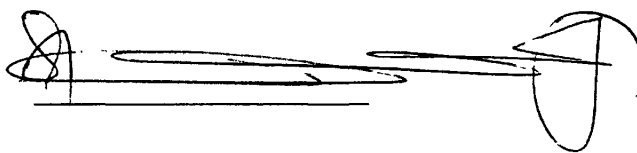
47. The Chamber therefore finds, in accordance with article 87(7) of the Statute that the Republic of Malawi has failed to comply with the Cooperation Requests contrary to the provisions of the Statute and has thereby prevented the Court from exercising its functions and powers under this Statute. The Chamber decides to refer the matter both to the United Nations Security Council and to the Assembly of States Parties.

FOR THESE REASONS, THE CHAMBER


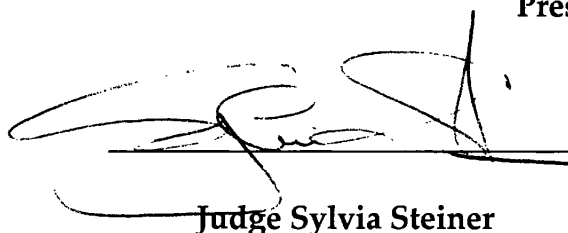
FINDS, in accordance with articles 86, 87(7) and 89 of the Statute, that the Republic of Malawi: (i) failed to comply with its obligations to consult with the Chamber by not bringing the issue of Omar Al Bashir's immunity to the Chamber for its determination and (ii) failed to cooperate with the Court by failing to arrest and surrender Omar Al Bashir to the Court, thus preventing the Court from exercising its functions and powers under the Statute; and

REFERS, pursuant to regulation 109(4) of the Regulations of the Court, the present decision to the President for transmission to the Security Council, through the Secretary General of the United Nations, and to the Assembly of States Parties to the Statute.

Done in both English and French, the English version being authoritative.



Judge Sanji Mmasenono Monageng
Presiding Judge



Judge Sylvia Steiner

Judge Cuno Tarfusser

Dated this Tuesday, 13 December 2011

At The Hague, The Netherlands

ANNEX

Explanatory note to the Corrigendum

Public

ANNEX

1. On 12 December 2011, the Chamber issued the “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”.¹

2. The following correction is made to the decision:

In the disposition, the original language:

ORDERS the Registrar to transmit the present decision to the Security Council through the Secretary General of the United Nations and, to the Assembly of States Parties to the Statute.

has been changed to:

REFERS, pursuant to regulation 109(4) of the Regulations of the Court, the present decision to the President for transmission to the Security Council, through the Secretary General of the United Nations, and to the Assembly of States Parties to the Statute.

¹ ICC-02/05-01/09-139.