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Legal Arguments to Rebut the AU Position on Immunities regarding the Bashir Case

by Dr. David Donat Cattin, *Secretary-General Parliamentarians for Global Action (PGA)*

The apparently legal "dispute" between the AU and the ICC is political in nature, given the absence of legal basis for the arguments presented by the African Union Commission in a press release dated 9 January 2012 and entitled "*Press Release on the Decisions of Pre-Trial Chamber I of the International Criminal Court (ICC) Pursuant to Article 87(7) of the Rome Statute on the Alleged Failure by The Republic of Chad and The Republic of Malawi to Comply With the Cooperation Requests Issued by the Court With Respect to the Arrest and Surrender of President Omar Hassan Al Bashir of the Republic of the Sudan*" (http://www.au.int/en/content/press-release-decisions-pre-trial-chamber-i-international-criminal-court-icc-pursuant-articl).

This Press Release was followed by the adoption of a draft resolution by the AU Head of States and Governments that aims at renovating (and even escalating) the measures of non-cooperation of African States with the ICC regarding the case against Sudanese President Bashir, also extended to Kenyan President Kenyatta and Vice-President Ruto, and the any other African dignitaries covered by personal immunities who could be accused before the ICC.

The below points are made with the view of rebutting one-by-one the arguments put forward by the African Union, also through the use of legal arguments that represents the basics of the law of international organisations.

At the outset, however, it would be unacceptable that the Executive branches of States Parties to the Rome Statute, making use of a position and a decision taken by an International Organization, would object or challenge the legal arguments made by an independent Court fulfilling its judicial mandate. Under the general principles of separation of powers and the Rule of Law, the Executive power cannot interfere with the Judiciary in its independent task of interpreting and applying the law.[1]

Whether South Africa, Sudan or any other AU Member State agree or disagree with the conclusions of the Court, it does not matter. Once all the applicable procedures are exhausted, these States have to respect and comply with the decision of the Court, even if they would characterise such a decision as unfair or wrong.

[1] "The rule of law [...] refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency." Cf. United Nations Secretary-General, *Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, 5, U.N. Doc. S/2004/616 (Aug. 23, 2004).

As article 119 ("Settlement of Disputes"), paragraph 1, clearly stipulates: "*Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.*" Only in cases where there would be a dispute between two or more States Parties concerning the interpretation or application of the Statute, and only if the Assembly of States Parties would fail in negotiating and solving the dispute, that matter may be brought to the attention of the International Court of Justice for the settlement of this inter-state dispute by the Assembly of States Parties. [2]

1. The international legal regime on diplomatic immunities is certainly not fulfilling the ideals and aspirations of human rights defenders world-wide. The jurisprudence of the International Court of Justice in the "Arrest Warrant" case (DRC v. Belgium, also known as the Yerodia case, Feb. 2002) has probably marked a partial retrogression of international law in this critical field, even if such jurisprudence does not reduce the extraordinary importance that the principle of "no-immunities" has had for international criminal law since the Moscow Declaration of 1943 with which the Allied Powers agreed on the general principles of law to be applied in Nuremberg
[See: http://avalon.law.yale.edu/wwii/moscow.asp - At that time, the Fuhrer of Germany was a sitting Head of State protected by "personal" immunities: Hence, the Moscow Declaration and the Nuremberg Tribunal Statute of 1945 have a "constitutional" value].

But while this particular ICJ judgement regretfully rejects the notion that there is an exception "*ratione materiae*" for genocide, crimes against humanity and war crimes to the rule of general international law that immunity from arrest applies for certain high officials (i.e. sitting Ministers for Foreign Affairs or Presidents) when a case is initiated against them before a foreign national jurisdiction, the same controversial judgement recognises that such an exception does indeed exist before "competent International jurisdictions" such as the ICTY, ICTR and ICC (see *below* para. 61 of the "Arrest Warrant" case judgement, also cited by the ICC Pre-Trial Chamber in its judicial findings on non-cooperation of Malawi and Chad).

In other words, the "Arrest Warrant" case precedent can be interpreted as a negative jurisprudence for universal jurisdiction cases initiated by national Courts of Third States, but cannot be extended to cases commenced by the ICC or other international jurisdictions. This is also confirmed by the Charles Taylor case's jurisprudence
(See http://www.asil.org/insigh110.cfm).

Therefore, the ICC Pre-Trial Chamber decisions are not in contravention with customary international law on immunities, as mistakenly asserted in this AU Press Release.

2. Regarding the other main argument made by the AU Commission on compliance with AU decisions, one must underscore that the AU does not operate in a legal vacuum but is one of the "Regional Organizations" -which under Chapter VIII of the UN Charter must be "consistent with the Purposes and Principles of the United Nations" (cf. Art. 52, UN Charter). The mandate that the AU has on international peace and security (conflict-resolution) is derived from the UN Charter. All AU Member States are UN Member States.

This means that the AU cannot promote a peaceful resolution of the Darfur conflict without observing the provisions of all UN Security Council resolutions that are designed to restore

[2] In accordance with paragraph 2 of article 119, only in case there would be a dispute between two or more States Parties concerning the interpretation or application of the Statute, and the Assembly of States Parties would fail in negotiating and solving the dispute, the Assembly may bring this matter to the attention of the International Court of Justice for the settlement of this inter-state dispute.

international peace and security in the Darfur/Sudan under Chapter VII of the UN Charter, which entails legally binding measures.

UNSC Res. 1593 (2005) refers the Darfur situation to the ICC jurisdiction and it does so without any condition. The investigation and prosecution of atrocities in Darfur is identified by the Council as a measure to restore international peace and security under Article 41 of the UN Charter (not implying the use of force). No regional organisation with a mandate to restore international peace and security in conformity with the UN Charter can ignore the terms and implications of such a Resolution. Res. 1593 (2005) clearly stipulates that all States Parties to the Rome Statute, Sudan (a Non State Party) and any Party to the conflict in Darfur (Non State Actors) have an unconditional obligation to cooperate with the ICC.

From this reasoning, it flows that the AU Decisions on non-cooperation with the ICC in the Bashir case are in violation of UNSC Res. 1593 (2005) (which imposes an obligation to Sudan to fully cooperate with the ICC), of the UN Charter and of the AU Constitutive Act and should not be applied by AU Member States. In other terms, these AU Decisions have been adopted *ultra vires* (beyond the powers derived from the UN Charter and the AU Constitutive Act under its peace and security mandate) and are invalid.

3. UNSC Res. 1593 (2005) renders the Rome Statute fully applicable to the situation in Darfur, Sudan, including article 27 of the Rome Statute -the general principle of the law of "non-immunity"- which is a foundational element of the object and purpose of the treaty: "*To put an end to impunity for the most serious crimes of concern to the international community as a whole*" (cf. Preamble, Rome Statute). In order to avoid and prevent ambiguous interpretations, Article 27, paragraph 2, contains a conflict-clause, which resolves any interpretative issues that may arise by the language of article 98, paragraph 1.[3]

Article 98 para.1 remains applicable to safeguard the State or diplomatic immunity of property (i.e. diplomatic seats, archives etc.), as explained by Claus Kress and Kimberly Prost in their chapter on "Article 98" contained in the Triffterer's Commentary on the Rome Statute of the ICC (II ed., 2008). Article 27, para. 2, which reflects the object and purpose of the treaty, makes Article 98, para. 1, non-applicable with respect to the State or diplomatic immunity of a person, in situations in which there is a "sending State" (i.e. in case of Status of Forces Agreement or Status of Mission Agreements) from a State Non Party to the Rome Statute that is not obligated to cooperate with the ICC.

States Parties to the Rome Statute have an obligation to fully cooperate with the Court under article 86 and related provisions, which the Pre Trial Chamber deemed applicable – with article 27 – to render its judicial findings on Non-Cooperation of Chad and Malawi under article 87 para.7 of the Rome Statute.

[3] Article 72, para. 2, reads as follows: "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". (Emphasis added.) Given that *in absentia* trials are prohibited under the Rome Statute and that the exercise of jurisdiction entails the organisation of the investigation, prosecution and adjudication phases of Court-proceedings, the Court may not exercise jurisdiction in the absence of the arrest and surrender of an accused by States that are under an obligation to carry out arrest-operations, namely States Parties to the Rome Statute and States bound by decisions of the UN Security Council. Malawi and Chad (as States Parties) as well as Sudan (under UNSC Res. 1953) are under such a legally binding obligation.

4. The reality is that Mr. Bashir has used its influence and authority to turn the AU Summit of Heads of States and Governments into an anti-ICC "club", and the AU Commission has received the mandate to create legal and procedural problems to the ICC in connection with this prominent case.

The President of Botswana (a State Party to the Rome Statute) and the Prime Minister of Cote d'Ivoire (a Non State Party that should ratify soon) announced at the Assembly of States Parties in New York in December 2011 that Africa must support the Court without any conditions. Parliamentarians for Global Action (PGA) hopes that their message will be followed by action to veto the renewal of this unacceptable AU Decision on Non cooperation with the ICC, which is the daughter of the Sirte decision, written by the Gaddafi administration, at the AU summit of 2009.[4] Quite ironically, the only State that objected to that decision (after its adoption!) was Chad. AU Decisions must be taken unanimously by Member States, and each State can veto them.

In conclusion**, it is clear that the AU cannot promote a peaceful resolution of the Darfur conflict without observing the provisions of all UN Security Council resolutions that are designed to restore international peace and security in the Darfur/Sudan region under Chapter VII of the UN Charter, which entails legally binding measures.** The authority of the AU has its legal basis on the AU Constitutive Act, which provides with a precise norm of consistency between AU Decision on peace and security and legally-binding decisions taken by the UN Security Council under Chapter VII. In fact, the action that the AU has taken on the situation in Darfur may have a legal basis only if it complies with Chapter VIII of the UN Charter, which defines the limited role of Regional Organizations and arrangements in restoring and maintaining international peace and security.

UNSC Res. 1593 (2005) refers the Darfur situation to the ICC jurisdiction and it does so without any condition. The investigation and prosecution of atrocities in Darfur is identified by the Council as a measure to restore international peace and security under Art.41 of the UN Charter. No regional organisation with a mandate to restore international peace and security in conformity with the UN Charter can ignore the terms and implications of such a Resolution.

Excerpts from the Arrest Warrant case Judgement, Congo v. Belgium, ICJ (cf. http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=36&case=121&code=cobe&p3=4) – ***Emphasis added***.

[4] The persistent propaganda against the ICC by Sudan culminated in the adoption of a an African Union decision calling on its Member States to not cooperate with the ICC for the arrest and surrender of Sudanese President Omar Al Bashir. See AU Summit Sirte Decision of 3 July 2009 in which the AU "***decides*** *that in view of the fact that the request by the African Union [to the UN Security Council to adopt a resolution deferring for 12 months the Bashir investigation and prosecution] has never been acted upon, the AU Member States shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of The Sudan* [*Reservation entered by Chad]*". Compare with AU Assembly decision (Assembly/AU/Dec.296XV) adopted in Kampala on 27 July 2010 and "renewed" in 2011***, through which the AU "reiterates its Decision that AU Member States shall not cooperate with the ICC in the arrest and surrender of President El-Bashir of The Sudan; Requests Member States to balance, where applicable, their obligations to the AU with their obligations to the ICC".*** Al-Bashir's visits in 4 AU States Parties to the Rome Statute, namely Chad (twice), Kenya, Djibouti and Malawi pointed out to new challenges for the ICC in terms of cooperation of States with the Court. PGA members in these countries reacted to these visit, calling upon their government for an immediate explanation (regarding Kenya, with wide media impact). The PGA DRC National Group issued a press statement condemning the visit(s) of Al-Bashir and the failure to arrest him (this document is available at http://www.pgaction.org/uploadedfiles/PR%20PGA%20DRC%20Sept%2010.pdf).

"61. Accordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances.
First, such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law. *Secondly*, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity.
Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.
***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 "[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 its jurisdiction over such a person".**