



Registration Services Bureau as a company limited by guarantee and without share capital, presents itself to this honourable court as aggrieved by the inaction to effect the two arrest warrants. It has thus filed this application to try to have put into motion actions which hopefully would ensure the implementation of the orders of the ICC.

The Applicant presents itself to this honourable as an advocate and lobby body for the rights of victims of conflict related human rights violations and that it is a promoter of accountable actions between states and non-state actors.

The first respondent is the Attorney General of the sovereign state of the Republic of Uganda while the second respondent is stated to be a Minister of Justice and Constitutional Affairs in the sovereign state of the Republic of Uganda.

## **2. Representation:**

When this matter came up for hearing, Mr. Nicholas Opio of TASLAF Advocates, Tax and Legal Consultants appeared for the Applicant organisation while The Attorney General (The 1<sup>st</sup> Respondent) and Rt. Maj. Gen. Kahinda Otafiire, the Minister of Justice of Constitutional Affairs (The 2<sup>nd</sup> Respondent) were jointly represented by Mr. Jeffrey Atwine and Mr. Nathan Ebila Hillary (Principal State Attorney); respectively from the Chambers of the Attorney General.

## **3. Brief Facts:**

The brief facts of this case is that on 4<sup>th</sup> March 2009, the Pre-Trial Chamber I of the International Criminal Court (ICC) at The Hague, Netherlands issued a warrant of arrest against the now former President of the Republic of Sudan, Mr. Omar Hassan Ahmad Al Bashir for war crimes and crimes against humanity (In **the Case of the Prosecutor vs Omar Hassan Ahmad Al Bashir-Warrant of Arrest for Omar Hassan Ahmad Al Bashir- No. ICC-02/05-01/09**).



The same Pre-Trial Chamber I of the International Criminal Court (ICC) at The Hague, Netherlands subsequently issued another warrant of arrest against Mr. Omar Hassan Ahmad Al Bashir on the 12<sup>th</sup> July 2010 (**In the Case of the Prosecutor vs Omar Hassan Ahmad Al Bashir- Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir- No. ICC-02/05-01/09-95**).

Arising from the issuance of the arrest warrants, The Registry of the International Criminal Court (ICC) at The Hague, Netherlands on 6th March 2009, upon the directives of the Pre-Trial Chamber of the said court requested all states parties, the Republic of Uganda inclusive, to have arrested and surrendered to the Pre-Trial Chamber I of the International Criminal Court (ICC) at The Hague, Netherlands the said Mr. Omar Al Bashir (Request to All States Parties to the Rome Statute for the Arrest and Surrender of Omar Al Bashir).

A further request, pursuant to Articles 89 (1) and 91 of the Rome Statute seeking for co-operation of all states parties in the arrest and surrender of Mr. Omar Al Bashir was issued by the same Registry dated 21st July 2010 (Supplementary request to all States Parties to the Rome Statute for the Arrest and Surrender of Omar Hassan Ahmad Al Bashir).

During the period of subsistence of the arrest warrants, Mr. Omar Hassan Ahmad Al- Bashir is stated to have visited the Republic of Uganda in his capacity as President and Head of State of the Republic of Sudan on the 12<sup>th</sup> day of May, 2016 for the swearing in ceremony of the then newly elected president of Uganda. The said Mr. Omar Hassan Ahmad Al- Bashir allegedly again made an Official State Visit to the Republic of Uganda from the 13<sup>th</sup> day of November 2017 till the 16<sup>th</sup> day November, 2017 when he left.

It is alleged by the Applicant that on both occasions, the Government of the Republic of Uganda, which is a state party to the Rome Statute, failed to take the necessary steps to arrest and deliver to the Pre-Trial Chamber I of the



International Criminal Court (ICC) at The Hague, Netherlands Mr. Omar Al Bashir in spite of its having been notified of the existence of two arrest warrants issued by the Pre-Trial Chamber I of the International Criminal Court (ICC) at The Hague, Netherlands, against the Mr. Omar Al Bashir.

The applicant is thus aggrieved with the inaction of the Republic of Uganda and thus seeks orders and remedies as are specifically pleaded in this application.

#### **4. The Cause of Action :**

The Applicant having been aggrieved by the inaction of the Republic of Uganda in its international obligation being a State Party to the Rome Statute filed a Notice of Motion accompanied by affidavits specifying the reasons of grievance in this Honourable Court on the 15<sup>th</sup> day of November, 2017 under the **High Court (International Crimes Division) Practice Directions, Legal Notice No. 10 of 2011; section 17 of the International Criminal Court Act, Act No.10 of 2010, sections 5 and 141 of the Trial on Indictments Act Cap. 23** of the Laws of Uganda and other applicable laws for orders that;

- i) There be issued a warrant of arrest against Mr. Omar Hassan Ahmad Al-Bashir, the President of the Republic of Sudan whenever he sets foot within the territory of or under the control of the Republic of Uganda
- ii) The Respondents be ordered to effect the said warrant of arrest when and whenever the said Mr. Omar Hassan Ahmad Al-Bashir, the President of the Republic of Sudan sets foot within the territory of or under the control of the Republic of Uganda.
- iii) Any such further order, writ, or direction as the honourable Court shall deem to be just in the circumstances
- iv) Costs of the application

The Applicant further sought for the following declaration by this Honourable Court that;



- The failure and or refusal by the Respondents to take steps to arrest and surrender to the ICC the said Omar Hassan Ahmad Al-Bashir on the occasion of his visit to Uganda on May 12, 2016 and November 13- November 16, 2017 was inconsistent with and in violation of **sections 2 (a) (b) and (e), 17 (2) of the International Criminal Court Act, Article 89 (1) (a) of the Rome Statute** and is in breach of the **United Nations Security Council Resolution 1593 of 2005**.

#### **5. Grounds of this Application:**

The grounds of this application as gathered from the Notice of Motion and the affidavits of Mr. Christ Ongom, the Executive Director of Uganda Victims Foundation, dated 14<sup>th</sup> November 2017, are that:

- 1) The Republic of Uganda signed up to the Rome Statute on March 17, 1999 and ratified it on June 14, 2002. To give full effect to the Rome Statute, the Republic of Uganda subsequently enacted the International Criminal Court Act, No. 11 of 2010, on May 25, 2010 and that the objective of the Act is to give the Rome Statute the force of law in Uganda and enable it to implement obligations assumed by Uganda thereunder
- 2) That the Rome Statute and the International Criminal Court Act provide for close co-operation with the ICC regarding the arrest and surrender of persons for whom arrest warrants have been issued for crimes referred to in the Rome Statute
- 3) That through The High Court (International Crimes Division) Practice Directions Legal Notice No.10 of 2011, Uganda set up the International Crimes Division of the High Court (previously War Crimes Division of the High Court) to try offenses related to genocide, crimes against humanity, war crimes, terrorism, human trafficking, piracy and any other international crimes as may be provided for under law.

- 4) That on March 31, 2005, the Security Council, acting under Chapter VII of the Charter of the United Nations, adopted Resolution 1593 (2005), whereby it referred the situation in Darfur, Sudan since 1<sup>st</sup> July 2002, to the Prosecutor of the International Criminal Court and urged States to cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to the resolution.
- 5) That there are two outstanding warrants of arrest against Omar Hassan Ahmad Al- Bashir issued by the International Criminal Court on March 4, 2009 for a number of war crimes, crimes against humanity and July 12, 2010 for the crime of genocide. These warrants remain unexecuted.
- 6) That as a state party to the Rome Statute, Uganda was notified of the requests for arrest and surrender of Omar Hassan Ahmad Al- Bashir to the International Criminal Court pursuant to warrants issued on March 18, 2009 and August 31, 2010. On the occasion of the visit in November of 2017, Uganda was further notified by the ICC of the requests to arrest and surrender the said Omar Hassan Ahmad Al- Bashir.
- 7) That Omar Hassan Ahmad Al- Bashir came to Uganda on May 12, 2016 and attended the swearing in –ceremony of the President of Uganda, and again on a State visit on November 13- November 16, 2017. Despite the existence of the said warrants of arrest and the Respondents in utter disregard of their obligations under the Rome Statute, International Law and the Laws of Uganda, wilfully failed, neglected or refused to enforce the above-mentioned warrants of arrest.
- 8) That Uganda was subsequently found by the Pre-Trial Chamber II of the International Criminal Court to be in breach of its international obligation and referred to the Security Council of the United Nations and the Assembly of the States Parties to the Rome Statute.
- 9) That the Applicant is apprehensive that Omar Hassan Ahmad Al- Bashir will once again, in the near future be coming to Uganda for a state and



other visits. Particularly, the Applicant is aware of the coming to Uganda of the said Omar Hassan Ahmad Al- Bashir in the week starting November 13, 2017 to November 16, 2017 for a State visit.'

- 10) That previously when Omar Hassan Ahmad Al- Bashir came to Uganda on May 12, 2016, the Respondents failed and/ or refused to effect arrest on him despite the existence of the said warrants of arrest.
- 11) That the Applicant is apprehensive that should Omar Hassan Ahmad Al- Bashir come to Uganda, the Respondents in total disregard of the law will once again fail to effect an arrest against him as they previously did.

In a supplementary affidavit dated the 11<sup>th</sup> day of December 2017, Mr. Christ Ongom, deposed in paragraph 2 that between the 13<sup>th</sup> of November, 2017 and the 16<sup>th</sup> of November, 2017, Mr. Omar Hassan Ahmad Al-Bashir came and left Uganda while on a State Visit.

In paragraphs 3 and 4 of the supplementary affidavit of Mr. Ongom, it is averred that during the aforementioned occasion of the State Visit, the Republic of Uganda received a further request from the ICC to arrest and surrender Mr. Omar Al Bashir but that following Uganda's failure and, or refusal to arrest and surrender Mr. Omar Al Bashir, the Registrar of the ICC filed a report to the Pre-Trial Chamber of the ICC detailing the issuance of a *note verbale* to the Republic of Uganda reminding it of its obligations under the Rome Statute as a State party.

In response to the claims raised by the Applicant, Mr. Richard Adrole, a Principal State Attorney in the Attorney General's chambers swore an affidavit in reply to the motion specifically stating in Paragraph 2 of the same that the motion before this court had been overtaken by events, was lifeless, spent, moot and academic.

Mr. Adrole further averred in Paragraph 6 that the government of the Republic of Uganda acted faithfully in accordance with an African Union position which was



pursuant to Article 98 of the Rome Statute not to arrest and surrender Mr. Omar Al Bashir.

In Paragraphs 7, 8 and 9, Mr. Adrole states that Mr. Omar Al Bashir is no longer the president of Sudan and therefore the immunities as resolved by African Union against sitting heads of states no longer applied to him and that since he is currently imprisoned at Kobar Maximum Prison, in the Republic of Sudan there is no possibility of him coming to visit Uganda in the capacity of a head of state. In conclusion in paragraph 11, Mr. Adrole averred that it was not practicable to enforce the ICC issued arrest warrant against a person who was not physically present in Uganda.

#### **6. Parties Submissions:**

When this matter came up for hearing, Mr. Nicholas Opio, for the Applicant submitted that Mr. Omar Al Bashir was a wanted person having been named as a perpetrator of serious crimes against humanity with two arrest warrants issued by Pre-Trial Chamber II of the International Criminal Court (ICC) hanging over his head. Mr Opio added that since the arrest warrants were of international nature, they ought to be acted upon by the state of Uganda given the fact that the State of Uganda enacted the International Criminal Court Act of 2010 thus domesticating the Rome Statute which includes amongst its provisions the obligation of giving effect to arrest warrants issued by the ICC as provided for under Section 26 of the ICC Act.

Mr. Opio went on further to elaborate that Section 26 of the ICC Act sets out the procedure for effecting such arrest warrants and the authority which had the duty for enforcing the same with such obligation being binding on the state of Uganda as provided for under domestic and international law of the High Court (International Crimes Division) Practice Direction and section 17 of the ICC Act.





In his further argument, Mr. Opio submitted that the respondents admitted the facts of the instant application as could be seen specified in paragraphs 3 to 9 of the affidavit in support of the motion, including the fact that Uganda is a state party to the Rome Statute and that it did fail to arrest Mr. Bashir which was a clear acceptance of failure to meet its international obligations. In this regard, Mr Opio called for judgement in admission against the respondents to be entered by this honourable court.

As regards the processes undertaken by ICC in relations to the visits of Mr. Omar Al Bashir to Uganda, Mr. Opio informed court that in relation to the first visit, the ICC Pre-Trial Chamber issued a decision in that respect on 12<sup>th</sup> May 2016 and sent it to the United Nations Security Council and that again in respect of Mr. Bashir's second visit to Uganda on 13<sup>th</sup> November 2017 while no decision was issued , a *note verbale* was sent to the governmental authorities of Uganda protesting such as visit and notifying Uganda of its international obligations to effect the standing arrest warrants against Mr. Omar Al Bashir.

In support to the position that the state of Uganda had the obligation to effect the arrest against Mr. Omar Al Bashir, Mr. Opio cited the decision of the Pre-Trial Chamber II in *The Prosecutor v Omar Hassan Ahmad Al Bashir, Decision on the Co-operation of the Democratic Republic of the Congo regarding Omar Al Bashir's Arrest and Surrender to the Court, ICC-02/05-01/09* dated 9<sup>th</sup> April 2014 which noted that where there is conflict between regional obligations and municipal law, obligations under international law always supersede any other obligations which decision Mr Opio implored this honourable court to find persuasive to allow this application.

Additionally, in support this very same position, Mr Opio, referred to the Kenyan case of *Kenya Section of the ICJ VS AG and others M/A 685/2010* in which the High Court of Kenya while ordering the issuance of an arrest warrant in respect of Mr. Bashir underlined the obligation of Kenya as a member of the international

community with similar sentiments being echoed in South Africa where its High Court in case of *South African Litigation Centre vs Ministry of Justice and Constitutional Development and Others Case Number 27740/2015* similarly restated state obligations in terms of implementing ICC warrants and thus he asked this honourable court to find that since these two decisions were coming from common law jurisdictions they should be found persuasive and thus this court should arrive at the same position.

In answer to the submissions made by Mr. Opio Nicholas, Mr. Ebila Hillary Nathan, a Principal State Attorney, while opposing the application conceded that indeed at the time Mr. Omar Al Bashir visited Uganda as stated in the application before this court, indeed two arrest warrants issued by the ICC were subsisting against him but that for good reasons such as the existence of an African Union (AU) Resolution barring any member State from arresting or effecting any arrest warrant of ICC against any sitting African head of state should not be effected as a result of the AU's unhappiness with the conduct of ICC that the ICC was being used by some quarters to target Africans and so the state of Uganda could not effect the ICC arrest warrants.

Additionally, Mr. Ebila explained to court that in fact this court should consider dismissing the instant application since it was now irrelevant as the state of Uganda was now willing to effect the arrest warrants against Mr. Omar Al Bashir subsequent to the fact that he had been overthrown as head of state of the Republic of Sudan and thus lost the immunity as was resolved by the AU and so the bar on AU members not to effect of the ICC arrest warrants against sitting heads of states could no longer apply to him.

On the submission made by Mr. Opio Nicholas that the state of Uganda may fear to arrest Mr. Omar Al Bashir even when he was no longer President, Mr Ebila asked this court to consider it as being speculative for being not supported by any evidence and thus should be discarded.

On the issue that Uganda is not willing to meet its obligations under international law to arrest Mr. Al Bashir, Mr. Ebila while seeking the guidance of this honourable court in this respect, urged this court to take note of the fact that the state of Uganda had acted in good faith in compliance with the African Union Resolution which had blocked all African states from effecting any warrants issued by the ICC on any African head of like Mr. Omar Al Bashir and so the state of Uganda should be not be judged adversely since it had acted in concert with the dictates of the regional body, urging this honourable court thus to dismiss the instant application with the contempt it deserved for the reasons he had given.

#### **7. Decision of Court:**

Arising from the parties' submissions above, two issues seems to me worthwhile exploring and resolving upon and these are ; firstly whether an arrest warrant issued by the ICC can be effected against Omar Hassan Al Bashir whenever he sets foot within the territory of or that which is under the control of the Republic of Uganda; and secondly whether the failure and or refusal by the Respondents to take steps to arrest and surrender to the ICC the said Omar Hassan Ahmad Al-Bashir on the occasion of his previous visits to Uganda on May 12, 2016 and between November 13<sup>th</sup> to November 16<sup>th</sup> , 2017 was inconsistent with and in violation of sections 2 (a) (b) and (e), 17 (2) of the International Criminal Court Act, Article 89 (1) (a) of the Rome Statute and is in breach of the United Nations Security Council Resolution 1593 of 2005.

I will address both issues concurrently. It is a matter of fact that The Rome Statute which brought into existence the International Criminal Court (ICC) was adopted on 17 July 1998 by 120 founding states and came into force on 1<sup>st</sup> July 2002, the same date on which the International Criminal Court was set and began to operate as a contribution towards a collective global effort to build a safer world for



everyone with the primary mission to help put an end to impunity against mass atrocities.

This purpose can best be seen as reflected in **Article 1 of the Rome Statute** which reads:

*“An International Criminal Court (“the Court”) is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.”*

Over time this purpose has been explained and expounded in various jurisdictions with the South African High Court noting in the *Southern Africa Litigation Centre vs The Minister of Justice and Constitutional Affairs and Others Case Number 27740/2015* that;

*“The Rome Statute’s structures of international criminal justice are grounded in the core principle of complementarity. The Statute devises a system of international criminal justice wherein the primary responsibility for the investigation and prosecution of those most responsible for serious violations of international law rests on domestic jurisdictions. In principle, a matter will only be admissible before the ICC where the state party concerned is either unable or unwilling to investigate and prosecute, which operates so as to ensure ‘respect for the primary jurisdiction of States’ and is based on ‘considerations of efficiency and effectiveness.’”*

From the above clear definition of the purpose of the court decisions of courts overtime have reemphasised the purpose of the ICC. Examples of such courts include the High Court of South Africa which has made decisions of

jurisprudential relevance to the issue and which relevance is not contended upon by any of the parties before me, I would make findings that since the state of Uganda domesticated the Rome Statute in very similar terms the principle and purpose in line the definitions above then it had joined the honourable quest for humankind peaceful coexistence through good governance and the punishment of impunity whenever and wherever it arises, the state of Uganda would be applauded for this very bold act.

As regards to the duty of states to co-operate with the ICC, my examination of various international treaties show that this is a well-established principle under international law.

For example, **Article 1 (3) of the United Nations Charter** states that the Purposes of the United Nations are:

**“... (3) To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; “**

This position is emphasised in the preamble of the Rome Statute which provides that:

**“General obligation to cooperate States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.”**

The above preamble lays emphasis on the fact that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking necessary measures at

the national level and enhancing international cooperation so as to put an end to the impunity by perpetrators of these inhuman crimes.

This duty is further emphasised in **Article 86 of the Rome Statute** which deals with the obligation of states parties after ratification and the domestication of the Rome Statute into national law. This particular provision of the law provides for states parties to co-operate with the International Criminal Court.

Of significance, however, is **Article 89 (1)** which relates to the duty of states to arrest and surrender accused persons to the International Criminal Court. It provides and I quote;

**Article 89 (1):**

**“...The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender...”**

The fact of an arrest warrant being issued by the ICC being regarded as a result of the recognition that there has occurred serious crimes or that there exist crimes of grave nature such as genocide and war crimes which are considered an affront to humanity as a whole and whose handling to logical conclusion are of concern to the international community whose prevention reaches the status of *jus cogens*, an overriding and fundamental principle of international law, then the keeping in check of the recurrence of such crimes is important and fundamental to international public order justify the purpose of The Rome Statute which grants overall jurisdiction over these said crimes and how they should be handled.



Given the above fact The Rome Statute serves as a binding instrument on the state parties that are interested in the maintenance of good international public order whether they are signatories or not. *See: The Kenya Section of the International Commission of Jurists vs Attorney General and Another.*

In as far as the state of Uganda is concerned, there is no iota of question that it is indeed a state party to the Rome Statute for not only did it deposit its instrument of ratification of the Rome Statute on the 14<sup>th</sup> June 2002 but additionally went on to domesticate the same by enacting the International Criminal Court Act 11 of 2010.

The reading of the preamble of International Criminal Court Act 11 of 2010 of Laws of Uganda, provides an insight into the intention of the state of Uganda in as far as it interest in working in community with other nations in combat serious international crimes which threatens humankind.

Theses intentions include the giving of effect to the ICC Statute, the providing for offences under the laws of Uganda corresponding to offences within the jurisdiction of the ICC and other connected matters and the granting of the courts in Uganda the jurisdiction to try crimes defined under the Rome Statute such as war crimes, crimes against humanity and genocide. These are all good intentions of a nation which would want to see the world peaceful.

To concretise the above intentions as forming the basis the **International Criminal Court Act 11 of 2010, Section 2** of Act provides additional clarity. I have reproduced it herein below;

**“Section 2:**

- a) To give the force of law in Uganda to the ICC Statute;**
- b) To implement obligations assumed by Uganda under the Statute;**



- c) To make further provision in Uganda’s law for the punishment of the international crimes of genocide, crimes against humanity and war crimes;
- d) To enable Uganda to co-operate with the ICC in the performance of its functions, including the investigation and prosecution of persons accused of having committed crimes referred to in the Statute;
- e) To provide for the arrest and surrender to the ICC of persons alleged to have committed crimes referred to in the Statute
- f) To provide for various forms of requests for assistance to the ICC;
- g) To enable Uganda Courts to try, convict and sentence persons who have committed crimes referred to in the Statute;
- h) To enable the ICC to conduct proceedings in Uganda; and to enforce any sentence imposed or order made by the ICC.”

Section 2 above grants the Rome Statute the force of law in Uganda and specifically provides for the arrest and surrender of those that are alleged to have committed international crimes under the jurisdiction of the state of Uganda.

This act of domesticating an international law is in consonance with provisions of **The Constitution of Republic of Uganda, 1995 (As Amended)** especially **Article 287** which recognises Uganda’s international commitments wherever it signifies its acceptance to international treaties and obligations. The import of this provision of the Constitution is better appreciated when read in total. I have thus taken the liberty to reproduce it here for avoidance of doubt;

**Article 287 (Reads):**

“...Where—

- (a) any treaty, agreement or convention with any country or international organisation was made or affirmed by Uganda or the Government on or after the ninth day of October, 1962, and was still in force immediately before the coming into force of this Constitution;
- or



**(b) Uganda or the Government was otherwise a party immediately before the coming into force of this Constitution to any such treaty, agreement or convention, the treaty, agreement or convention shall not be affected by the coming into force of this Constitution; and Uganda or the Government, as the case may be, shall continue to be a party to it...”**

An appreciation of the above provisions of the Constitution and the act of domestication into Uganda law of the Rome Statute through the International Criminal Court Act, Act 11 of 2010, implies that the state of Uganda was very cognisant of its obligation to the international community and thus was able and willing to enable international processes to be carried out within its territorial jurisdiction through due processes.

Relating the above conclusion to the process by which the ICC warrants when issued by the ICC, **Section 17 (2)** of the **International Criminal Court Act of 2010** is instructive. It provides as follows:

**Section 17 (2):**

**“...Notwithstanding subsection (1), a person charged with an offence against any of sections 7 to 16 may be arrested, or a warrant for his or her arrest may be issued and executed, and the person may be remanded in custody or on bail, even though the consent of the Director of Public Prosecutions to the institution of a prosecution for the offence has not been obtained, but no further proceedings shall be taken until that consent has been obtained.”**

**Section 17 (2) of the International Criminal Court Act** is reinforced by **Section 26 of the ICC Act** which lays down the procedure to be followed whenever the ICC requests for arrest and the surrender of a fugitive. It also makes provisions as to which state offices should be involved in this process. These include the offices of the minister concerned, a registrar and the Directorate of Public

Prosecutions. All these offices identified as crucial in effecting any requests by the ICC especially in terms of effecting arrest warrants.

With these provisions of the law in place and the fact that the state of Uganda willingly domesticated the Rome Statute making the state of Uganda to be a concerned state which is part and parcel of the international community moreover even a state party to the Rome Statute, then the proper conclusion would be to make finding that state of Uganda is obliged to implement to the dot the provisions of the Rome Statute and **MUST (Emphasis Added)** cooperate with the ICC whenever it requests for alleged perpetrators of mass atrocities to be held accountable.

This is more so because by the very act of the state of Uganda ratifying and domesticating the Rome Statute, the state of Uganda assumes such obligation on behalf of the international community to enforce orders and warrants as issued by the International Criminal Court.

Fortunately, this position was well clarified by the Supreme Court of Uganda in *Uganda vs Kwoyelo Constitutional Petition No. 1 of 2012*, for Hon. Justice Bart Katureebe, JSC (As he then was) in part when considering this particular aspect held that where the matter at hand concerns mass violations of human rights, then a country must pay heed to its international obligations since the United Nations Charter and the Universal Declaration of Human Rights both ensure the protection of fundamental human rights and also recognise the inherent dignity of humanity, equal rights before the law, and the protection of human rights through the rule of law.

The learned justice went on further to note that all the declarations and international treaties do set the stage for countries to have a common stand on the protection of human rights.



In respect of this he said and I quote;

**“ ... In discussing these obligations and laws, I must express the view that when a country commits itself to international obligations, one must assume that it does so deliberately, lawfully and in its national interest. By the time the State goes through all the procedures of ratification and domestication, it must have seriously considered its overall national interest in the context of its role as a member of the United Nations. Therefore, a State cannot easily shun its obligations as and when it wishes so to do. This must particularly hold true when the issue at hand is the massive violations of the human rights...”**

On the other hand, the learned justice was apt to add a democratic state was obliged to ensure that international obligations could never be negated under any circumstances for doing so would be putting the international community at risk and that states did have obligations to ensure the prevention and the occurrence of crimes such as crimes against humanity and genocide which are considered of serious consequences to the international community.

The conclusions and holding above when applied to the issue at hand it would warrant to safely that the fact that the state of Uganda while receiving Mr. Omar Al Hassan in its territory and while being well aware of the existence of the two arrest warrants issued by the Pre-Trial Chamber of the International Criminal Court, was obliged to the international community as a democratic state, to set in motion the exigencies of ensuring that the provisions of the Rome Statute were implemented by setting in motion the process of having arrested and surrendered to the ICC of Mr. Omar Al Bashir since even **Sections 17 and 26 of the ICC Act 11 of 2010** of the Laws of Uganda clearly laid down the procedure for doing so.



Sadly, though, the state of Uganda twice failed to carry out this international duty and obligation, in relations to Mr. Omar Al Bashir which in my humble view was a negation of its acclaimed intention to the international community in the fight against impunity.

The failure of the state of Uganda thus when put in the perspective of the decision of High Court South Africa in the case of *The Southern Africa Litigation Centre vs the Minister of Justice and Constitutional Development, and Others (supra)*, would lend credence to the conclusion above for the High Court of South Africa while considering the question the country's duty to arrest a head of state against whom the ICC had issued arrest warrants could not be acted upon and thus suspended by virtue a cabinet resolution coupled with a ministerial notice, went on to find that South Africa's duties and obligations arising in international law and the Rome Statute were **NON-DEROGABLE** [Emphasis Mine] and that the State of South Africa was bound to interpret national legislation in accordance with international law and was bound to implement the Rome Statute and having found so the court went on to issue a warrant of arrest for Mr. Omar Al Bashir who was then visiting South Africa at the time.

This action of the High Court of South Africa was indeed a restatement of what action a state may take *vis a vis* its international obligation, a position which had been commented upon by a decision in the Constitutional Court of South Africa in *National Commissioner of the South African Police Service vs Southern African Human Rights Litigation Centre [2014] ZACC 30*, where the court while determining whether the South African Police Service had a duty to investigate crimes against humanity even if committed across the border like in Zimbabwe, the court went on to hold that the South African Constitution and the relevant laws in relations to international crimes must be interpreted in a manner which make them to comply with international law and the Rome Statute and that



the South African Police was under duty to investigate and prosecute crimes against humanity even if committed in another country.

Relatedly, the High Court of Kenya in *The Kenya Section of the International Commission of Jurists vs Attorney General and Another Miscellaneous Criminal Application 685 of 2010* while considering an application seeking for the issuance and the effecting of a provisional warrant of arrest against Mr. Omar Al Bashir whenever he would set foot in the territory of Kenya, while allowing the application, went on to make reference to the principle of universality which allowed a state to try those accused of international crimes regardless of where the crime was committed or the nationality of the offender.

Indeed the same court went on to note that the rationale for this principle when taken in light of serious crimes, was an authority to states to prosecute and punish, on behalf of the whole international community, persons responsible for serious crimes.

On this point, The High Court of Kenya held and I quote;

**“...the duty to prosecute international crimes has developed into *jus cogens* and customary international law thus delegating states to prosecute perpetrators wherever they may be found. The State parties to the ICC are thus under a duty to prosecute or extradite perpetrators to the ICC for prosecution...”**

Relating the above decisions to the instant matter, it is submitted by Mr. Ebila, representing the respondents, that Uganda could not execute its obligations towards the international community by arresting Mr. Omar Al Bashir whenever he set foot in Uganda on the basis that there existed an African Union (AU) Resolution forbidding member states from arresting or effecting an arrest warrant of ICC on an African head of state and that the state of Uganda being an active member of the AU duly complied with.

This proposition, however, can be said to be directly opposite to the duties and obligation of the state of Uganda *vis a vis* international community which entails rational action of states in implementing the Rome Statute for this very argument was indeed even raised before and considered by the Pre-Trial Chamber of the International Criminal Court in *The Prosecutor vs Omar Hassan Ahmad Al Bashir Decision on the Co-operation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court ICC-02/05-01/09-195* wherein the claim of the existence of an African Union resolution granting immunity from arrest to Mr. Omar Al Bashir against prosecution at the ICC was ruled out with the court emphasising that the obligations of members of the United Nations under the United Nations Charter prevail over any of their obligations under any other international agreements with the court going on to urge the government of the Democratic Republic of Congo to take all necessary measures to effect the arrest warrant and notifying the court accordingly pointing out that the **United Nations Security Council Resolution 1593** had waived of the immunity of Mr. Omar Al Bashir and thus required states to implement actions which would enable the arrest and surrendering of Mr. Omar Al Bashir to the ICC to answer for the serious charges levied against him, stressing that resolutions of the United Nations organs such as the Security Council superseded those of regional bodies.

In light of all above, it is clear to me the obligation of state of Uganda towards the international community cannot be abridged by invoking the issue of immunity from arrest arising from a regional body resolution such the African Union for, in the case of Mr. Omar Al Bashir, for such resolution would be considered inferior to that taken by the Security Council in addition to the fact of well documented state obligation towards humanity as a whole.

In the premises therefore, I would find that the state of Uganda could not and had no recourse to evoke the existence of an African Union regional resolution yet there was a superior action of the Security Council of the United Nations

subsisting and should have met head on its international obligations by effecting ICC arrest warrants against Mr. Omar Al Bashir who was required by the International Criminal Court in relation to crimes against humanity for which he should and must at all times be held accountable to the international community. By not doing Uganda negated its obligation to the international community and thus contravened **Article 12(1) of the Rome Statute** which states that “... a state which becomes a party to this statute thereby accepts the jurisdiction of the court with respect to the Crimes referred to in Article 5...” which Uganda even on its own domesticated through the ICC Act 2010.

Arising from the above, it is my finding that the state of Uganda failed in its obligation to the international community when it failed to arrest Mr. Omar Al Bashir when he set foot within the territory of Uganda which failure is condemnable. Accordingly, the state of Uganda is held responsible for its inaction on its obligations towards the international community in respect of its failure to implement actions required of not only state parties to the Rome Statute but of the international community.

#### **7. Orders:**

Arising from the above, I do make the following orders;

- i) The Arrest warrants issued by the International Criminal Court against Mr. Omar Hassan Ahmad Al-Bashir MUST be implemented by the state of Uganda through the clear processes laid down in Rome Statute as domesticated by the ICC Act 11 of Laws of Uganda, 2010.
- ii) For avoidance of any doubt this Honourable doth hereby issues its own arrest against Mr. Omar Hassan Ahmad Al-Bashir whenever he sets foot within the territory of or under the control of the Republic of Uganda.
- iii) The Respondents are ORDERED to effect the warrants of arrest in (i) (ii) when and whenever the said Omar Hassan Ahmad Al-Bashir, sets

foot within the territory of or under the control of the Republic of Uganda.

- iv) Addition I do make the declaration that the failure and or the refusal by the Respondents to take steps to arrest and surrender to the ICC the said Mr. Omar Hassan Ahmad Al-Bashir on the occasions of his visits to Uganda on May 12, 2016 and November 13 to November 16, 2017 was **INCONSISTENT** with and **IN VIOLATION** of **Sections 2 (a) (b) and (e), 17 (2)** of the **International Criminal Court Act, Article 89 (1) (a)** of the **Rome Statute** and breached **United Nations Security Council Resolution 1593** of **2005**.
- v) As this matter raises issues of national and international importance which ought to have been taken seriously by the respondents, who albeit did not do so, I do order the state of Uganda represented by the respondents to meet the costs of this application.

I do so order accordingly at the High Court International Crimes Division, Kampala, Uganda this 19<sup>th</sup> day of December, 2019.

.....

**DR. HENRY PETER ADONYO**

**(JUDGE)**

**HEAD OF THE INTERNATIONAL DIVISION OF THE HIGH COURT  
OF UGANDA**