

The Immunity Provision in the AU Amendment Protocol

Separating the (Doctrinal) Wheat from the (Normative) Chaff

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Abstract

In July 2014, the African Union adopted a new Protocol amending the Protocol on the African Court. In doing so it included a provision stating that certain state officials shall be immune from prosecution during their tenure of office. This article discusses whether the immunity provision is a reflection of customary international law or whether, on the contrary, it violates international law and undermines the Statute of the International Criminal Court.

1. Statement of the Issues

In July 2014, the African Union (AU) adopted a Protocol amending the Protocol on the African Court ('Amendment Protocol'),¹ and included a provision on immunity for certain state officials.² The hero-villain trend so characteristic of the international criminal justice debate is clearly on show in the disagreement concerning the immunities provision of the Amendment Protocol.³ While the AU has consistently viewed its position on immunities as reflective of customary international law, those opposed to the Amendment Protocol and the inclusion of immunities have argued that that it is inconsistent with international law or, at best, undermines the Statute of the International Criminal Court (ICC).⁴

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¹ 2014 Draft Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (AU EX.CL/846 (XXV)).

² Art. 46*Abis* of the Amendment Protocol.

³ See D. Tladi, 'When Elephants Collide it is the Grass that Suffers: Cooperation and the Security Council in the Context of the AU/ICC Dynamic', 7 *African Journal of Legal Studies* (2014) 381, at 381 where the author described debates on the ICC-AU relationship as being 'characterised by an ideological chasm that has pitted villains against protagonists — with both sides casting the other villains intent on wanton destruction and themselves as protagonists fighting the good fight.'

⁴ See e.g. J. Njeri Kariri, 'Can the New African Court Truly Deliver Justice for Serious Crimes?', *ISS Today*, 8 July 2014, available online at www.issafrika.org (visited 7 October 2014).

As with much of the debate related to international criminal justice, and the ICC in particular, especially in relation to the latter's relationship with Africa, much of the positions on both sides of the divide ignore the nuances of what is a complex area of law. In the jockeying for positions, the line between doctrinal positions and normative policy assertions become blurred (and sometimes disappear altogether). The doctrinal question whether immunities of certain officials before international courts is consistent with modern international law is very often answered by the normative policy postulation that the AU should not have included the immunities provision in the Amendment Protocol. Conversely, the normative postulation questioning the wisdom of prosecuting heads of state is met by a reference to a provision in the ICC Statute. Added to the mix is very often an empirical assertion, either that a position will result in impunity or will lead to the destabilization of a country or region. Further complicating the discourse is the resort by commentators to the political rationale or objective behind the Amendment Protocol, i.e. an assertion, not necessarily untrue, that the Amendment Protocol, and the immunity provision in particular, is a response to the prosecutions of African heads of state by the ICC.⁵ However, whatever the motives of the AU in adopting the Amendment Protocol, any evaluation of the instrument and its provisions must be done on its merit, unclouded by the political considerations that gave rise to the instrument.⁶ This is to say, the instrument cannot be contrary to international law *just because* the motives of its creators were less than angelic.

The purpose of this article is to try to synthesize from the mixture of normative, doctrinal and empirical positions often advanced in favour of preserving or excluding immunities in the Amendment Protocol, the position under international law. At the outset,

⁵ See for an assessment A. Abass, 'The Proposed Criminal Jurisdiction for the African Court: Some Problematical Aspects', 60 *Netherlands International Law Review* (2013) 27-50.

⁶ At any rate Abass, *supra* note 5, at 42 *et seq.* argues that it is overly simplistic to suggest that the Amendment Protocol was adopted only to respond to the ICC, pointing to, *inter alia*, the desire of the AU to ensure an African trial for Hissène Habré as a contributing factor independent of the ICC. See also A. Abass, 'Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges', 24 *European Journal of International Law* (2013) 933-946, at 935 who says: 'The pervasive, but arguably erroneous assumption is that Africa began prospecting for international criminal jurisdiction *after* and as a *consequence* of the fall out over the Al Bashir arrest warrant.' The AU's concern for what it termed the abuse of the principle of universal jurisdiction may similarly also be advanced as a reason for the AU's pursuit of criminal jurisdiction for the African Court. See e.g. § 9 of AU Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction, Assembly/AU/Dec.213 (XII), which requested the Commission to 'examine the implications of the [African] Court being empowered to try international crimes such as genocide, crimes against humanity and war crimes.' It is however, difficult to deny that the ICC-AU tension was, at the very least, an impetus for the speedy finalisation of the Amendment Protocol. See e.g. § 10(iv) AU Decision on Africa's Relationship with the International Criminal Court (ICC), Ext/Assembly/AU/Dec.1 (October 2013) in which the AU, after lamenting ICC responses to the AU's concerns, decides to 'fast track the process of expanding the mandate of the African Court on Human and Peoples' Rights (AfCHPR) to try international crimes, such as genocide, crimes against humanity and war crimes.'

and in order to exclude it from the analysis altogether, I wish to state, upfront, my normative policy position: The decision of the AU to provide for the immunity of officials sends out wrong signals about its commitment to the fight against impunity. Devoid of this normative policy question, this paper seeks to place the immunity provision of the Amendment Protocol in context of international law, including the ICC Statute. I begin in the next section by describing the various arguments that have been made both in support of the provision and in opposition to it. I then, in the section that follows, provide an evaluation of the immunities clause in the context of the international law and in light of the arguments that have been made, both in support and opposition. Finally, I offer some concluding remarks.

2. Immunity before the African Court: Unpacking the Case for and Against

A. Scope of Immunity in the Amendment Protocol

Before addressing some of the issues that have been raised, concerning the immunity provision in the Amendment Protocol, it is useful to set out the provision and attempt to identify its scope. Article 46*Abis* of the Amendment Protocol provides as follows:

No charges shall be commenced or continued against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.

As a preliminary point, irrespective of the broader legal issues pertaining to immunity under international law, the text of Article 46*Abis* is ambiguous and not well drafted.⁷ Firstly, , the meaning of the phrase ‘or anybody ... entitled to act in such capacity’, which first appeared in the decision of the AU Extraordinary Summit of October 2014,⁸ is unclear. A broad interpretation of the phrase could refer to any number of persons including potentially all ministers and even all members of parliament in some states.⁹ At its narrowest, the provision could mean a deputy Head of State or Government.¹⁰ The former interpretation, being dependent on the constitutional system of each state, is inherently relative and would result in

⁷ See Njeri Kariri, *supra* note 4.

⁸ Paragraph 10(i) of the Decision on Africa’s Relationship with the International Criminal Court (ICC), *supra* note 6.

⁹ Section 90 of the Constitution of the Republic of South Africa, 1996, provides that the Deputy President, a Minister designated by the President, a Minister designated by other members of the cabinet, the Speaker of Parliament until the parliament designates one of its members, may act as Head of State.

¹⁰ Under Sec. 147(3) of the Constitution of Kenya, only the Deputy President may hold the office of the acting President in the absence of the President. See also Art. II Section 6 of the Constitution of the United States.

different rules being applicable to officials from different states. The latter, narrower, interpretation is more objective and thus more consistent with the objective of the decision in which the phrase first appeared, i.e. to prevent the prosecution of Kenya's Head of State and his deputy. Admittedly there might be a fair degree of uncertainty in general international law itself regarding the beneficiaries of immunities. For example much has been made of the fact that the International Court of Justice (ICJ) in the *Arrest Warrant* case, in addressing the question of immunities of Ministers for Foreign Affairs, described 'certain holders of high ranking office in a state' in an illustrative rather than an exhaustive list.¹¹ However, the ambiguity of the ICJ approach to the list of officials entitled to immunities may be somewhat overstated. First, it is not clear that in its oft-cited proposition, the ICJ was referring specifically to persons entitled to immunity *ratione personae* since the ICJ only speaks of immunities for these office bearers, which could include immunity *ratione materiae*.¹² Moreover, the International Law Commission (ILC) has seemingly adopted a compromise by deciding that only the troika (Head of State, Head of Government and Minister for Foreign Affairs) enjoy immunity *ratione personae*.¹³ At any rate, it is unnecessary to resolve the conceptual issue of who enjoys immunity under general international law for the purposes of this article since this interesting conceptual discussion does not affect the doctrinal question at issue. It need only be said that the ambiguity in Article 46*Abis* does not result from conceptual uncertainty but rather from drafting difficulties. The choice of interpretation, broad or narrow, does not affect the doctrinal issue discussed below.

The second ambiguity relates to whether Article 46*Abis* aims at providing two different regimes of immunity i.e. immunity *ratione personae* and immunity *ratione*

¹¹ The ICJ, in addressing the question of whether Ministers for Foreign Affairs benefit from immunity, stated 'certain holders of high-ranking office in a State, *such as* the Head of State, Head of Government and Minister for Foreign Affairs enjoy immunities from jurisdiction in other States, both civil and criminal.' (emphasis added). See ICJ, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgement of 14 February 2002, ICJ Reports (2002) 3, § 53.

¹² *Ibid.* It is interesting to note, in this regard, that the ICJ compared the immunities it was referring to, to those enjoyed by diplomatic and consular officials. While the former may be said to enjoy immunity *ratione personae*, the latter clearly only enjoy immunity for acts performed in official capacity.

¹³ At its 65th Session, in the context of its work on Immunity of State Officials from Foreign Criminal Jurisdiction, the ILC adopted Draft Arts 3 and 4 on immunity *ratione personae* as covering all acts, whether in private or official capacity, performed by Heads of State, Heads of Government and Ministers for Foreign Affairs; see Chapter 5 of the Report of the International Law Commission on the Work of its Sixty-Fifth Session (6 May to 7 June and 8 July to 9 August 2013) General Assembly Official Records Sixty-Eighth Session, Supplement 10 (A/68/10). This is a compromise approach because some within the Commission, including the author, were of the view that, notwithstanding the *Arrest Warrant* case neither the logic of immunity *ratione personae* or state practice justified extending that type of immunity to Ministers for Foreign. Also see *infra* note 17.

materiae, or only one.¹⁴ Moreover, if the aim is to establish only one regime, it would be unclear whether the regime would be immunity *ratione materiae* or immunity *ratione personae*. An ordinary meaning of Article 46*Abis* appears to support two separate categories.¹⁵ The first category, approximating immunity *ratione personae*, would be applicable to ‘Heads of State or Government’ and ‘anybody acting or entitled to act in such capacity’. The second category, approximating immunity *ratione materiae*, would apply to ‘other senior officials based on their functions’. The phrase, ‘based on their functions’ in Article 46*Abis*, appears to only qualify ‘other senior officials’ and not ‘Heads of State or Government, or anybody acting or entitled to act in such capacity’. An interpretation of Article 46*Abis* as establishing two categories of immunities would also be consistent with applicable principles of international law.¹⁶ Assuming this interpretation were the more correct interpretation, it would mean that, contrary to the conclusions of the ILC and the ICJ decision in the *Arrest Warrant* case, immunity *ratione personae* under the Statute of the African Court would not be extended to Ministers for Foreign Affairs.¹⁷

An alternative interpretation of Article 46*Abis* is that it establishes only immunity *ratione personae*. Under such an interpretation, the qualifier ‘based on their functions’ does not qualify the extent of immunity but rather forms part of the description of the senior officials. In other words, senior officials, defined in terms of their functions, enjoy the same type of immunity of Heads of State or Governments and other anyone acting or entitled in

¹⁴ See Chapter 5 of the Report of the International Law Commission on the Work of its Sixty-Fifth Session (6 May to 7 June and 8 July to 9 August 2013) General Assembly Official Records Sixty-Eighth Session, Supplement 10 (A/68/10). At its 66th Session, in the context of its work on Immunity of State Officials from Foreign Criminal Jurisdiction, the ILC adopted Draft Article 5 on immunity *ratione materiae* as applicable to state officials acting as such. See Chapter 9 of the Report of the International Law Commission on the Work of its Sixty-Sixth Session (5 May to 6 June and 7 July to 8 August 2014), General Assembly Official Records Sixty-Ninth Session, Supplement 10 (A/69/10).

¹⁵ The general rule on interpretation of treaties, in Art. 31(1) of the Vienna Convention on the Law of Treaties (VCLT), requires the terms of a treaty to be given their ordinary meaning in context and in the light of the treaty’s object and purpose.

¹⁶ Under the Vienna rules of interpretation, in particular Art. 31(3)(c) VCLT, ‘relevant rules of international law applicable in the relations between the parties’ are to be taken into account in the interpretation of treaties. On the notion of two categories of immunities under international law, see the work of the ILC, *supra* note 14.

¹⁷ See ICJ *Arrest Warrant* case, *supra* note 11, § 54 where the Court held that Ministers for Foreign Affairs enjoy immunity *ratione personae*. Whether Ministers for Foreign Affairs should enjoy immunity *ratione personae* was a matter of intense debate during the ILC’s consideration of the topic. Although the ILC decided to include Ministers for Foreign Affairs, at § 5 of the Commentary to Draft Art. 3, the ILC states as follows: ‘On the one hand, some members of the Commission pointed out that the Court’s judgment [in the *Arrest Warrant* case] was not sufficient grounds for concluding that a customary rule existed, as it did not contain a thorough analysis of the practice and that several judges expressed opinions that differed from the majority view. One member of the Commission who considered that the Court’s judgment does not that there is a customary rule nevertheless said that, in view of the fact that Court’s judgement in that case had not been opposed by States, the absence of a customary rule does not prevent the Commission from including [Minister for Foreign] among the persons enjoying immunity *ratione personae*.’

that capacity. Indeed the phrase ‘based on their functions’ appears to have been drawn from the ICJ’s reasoning for extending immunity *ratione personae* to Ministers for Foreign Affairs in the *Arrest Warrant* case.¹⁸ This interpretation is supported mainly by the fact that in its earlier decisions leading to the adoption of Article 46*Abis*, the AU has never made a distinction between the immunities of heads of state and those of other senior state officials.¹⁹ Moreover, such an interpretation would resolve the inconsistency between the first interpretation and the ICJ decision relating to Ministers for Foreign Affairs. Although Article 46*Abis* could be read as establishing two categories of immunities, namely immunity *ratione materiae* and immunity *ratione personae*, on a balance it appears that this second alternative is more convincing. Under this interpretation, however, other officials whose functions do not exhibit the characteristics identified by the Court in the *Arrest Warrant* case as indicating immunity *ratione personae* would not have immunity before the African Court’s criminal law section. Finally, consistent with the *Arrest Warrant* case, the immunity, being immunity *ratione personae*, may be relied upon only while the individual in question holds the relevant office.²⁰

B. Arguments on the Immunity Provisions in the Amendment Protocol

As a normative proposition, arguments against the immunity provision in the Amendment Protocol are numerous and are often based on the fight against impunity. However, as a doctrinal question, arguments against the immunity provisions in the amendment protocol have tended to revolve around its consistency with international law and the ICC Statute in particular. Jemima Njeri Kariri, for example, puts forward primarily normative arguments against the immunity provision. She observes that the immunity provision is a ‘setback to advancing democracy and the rule of law’ and provides a ‘protective veil that denies justice to victims and is detrimental to accountability’.²¹ These are arguments that suggest that the African Union *should not* have included the immunity provision. Although not focused on the legal doctrinal question about the place of immunity in international (and domestic) law,

¹⁸ In the ICJ *Arrest Warrant* case, *supra* note 11, at § 53, the Court states that to determine the extent of the immunities of Ministers for Foreign Affairs it ‘must first consider the nature of the functions exercised by a Minister for Foreign Affairs’.

¹⁹ See e.g. § 9 of the Decision on Africa’s Relationship with the International Criminal Court (ICC), Ext/Assembly/AU/Dec.1 (Oct 2013).

²⁰ See § 61 of the ICJ *Arrest Warrant* case, *supra* note 11. See also Draft Art. 4(1) of the ILC’s preliminary Draft Articles on the Immunity of State Officials, *supra* note 14. See especially § 2 of the commentary to Draft Art. 4.

²¹ Njeri Kariri, *supra* note 7.

Njeri Kariri postulates, as a legal position, that ‘the immunity provision flouts international law and is contrary to the national laws of African states like Kenya and South Africa’.²²

The doctrinal argument, questioning the legal basis of an immunity provision in the Amendment Protocol can be illustrated by reference to Chacha Bhoke Murungu’s observations on the African Court.²³ Murungu asserts, citing Article 27 of the ICC Statute, that ‘immunity of state officials is no longer a valid defence for the commission of international crimes’.²⁴ This position is also one that appears to have been advanced by the ICC in its decisions in the *Malawi* and *Chad* non-cooperation cases.²⁵ More to the point, Murungu asks whether extending the jurisdiction of the African Court to cover ICC-crimes (along with Article 46*Abis*) ‘has a legal basis under the ICC Statute’.²⁶ The ICC Statute, he asserts, ‘does not expressly allow or even imply that regional courts ... be conferred with jurisdiction’ over ICC-crimes.²⁷ On the basis of his analysis he concludes that ‘it is difficult to establish a clear legal basis’ for extending the jurisdiction of the African Court in the ICC Statute.²⁸ Indeed, Murungu suggests that the very process of establishing the criminal section of the African Court was ‘contrary to the provisions of the ICC Statute’ in relation to cooperation.²⁹ Murungu’s critique of the extension of jurisdiction of the African Court is based on the issues of immunity of African heads of state raised by the AU. He states, for example, that the only purpose behind the AU’s attempts to expand the jurisdiction of the African Court is to ‘protect some of its leaders’.³⁰

The arguments of Murungu are reflective of the whispers in the corridors of ICC meetings, even if not always captured in the literature. These arguments can be reduced to three related propositions. First, customary international law does not provide for immunity of officials before international courts. Second, the provision of immunity in Article 46*Abis* is inconsistent with international law or, at best, goes against the trend of practice. Finally,

²² *Ibid.*

²³ C. Bhoke Murungu, ‘Towards a Criminal Chamber in the African Court of Justice and Human Rights’, 9 *Journal of International Criminal Justice (JICJ)* (2011) 1067-1088.

²⁴ *Ibid.*, at 1077.

²⁵ See e.g. Decision Pursuant to Article 87(7) on the Failure of the Republic of Malawi to Comply with the Cooperation Request Issued by the Court with respect to the Arrest and Surrender of Omar Hassan Ahmed Al Bashir, *Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber I, 12 December 2011, §§ 18 and 36. See more recently Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court, *Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber II, 9 April 2014.

²⁶ See Murungu, *supra* note 23, at 1077.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Ibid.*

Article 46*Abis* undermines the ICC Statute. These legal propositions about immunity for ICC-crimes are often based on statements about the effect of immunity on the fight against impunity. The granting of immunity is said to be contrary to the AU commitment to protecting the sanctity of life and condemning and rejecting impunity.³¹ Steven Lamony of the Coalition for the International Criminal Court is quoted as saying ‘Africa should be moving forward in the fight against impunity, not regressing’.³² Similarly Netsanet Belay of Amnesty International has said that the decision ‘undermines the integrity of the African Court’.³³

The AU itself has defended the need for immunities both on normative and doctrinal grounds. While, in the specific context of the arrest and surrender of Al Bashir, the AU has based its arguments on the related duty of African states parties to respect the immunities of the Sudanese President consistent with Article 98 of the ICC Statute,³⁴ the AU has also made broader argument concerning immunities before international tribunals as well.³⁵ According to a recent decision of the AU, under customary international law, ‘Heads of State and other senior state officials are granted immunities during their tenure of office’.³⁶ Further, this decision does not limit the application of these immunities to domestic courts. Indeed, addressing the consequences of the customary international law position, the decision declares that ‘no charges shall be commenced or continued before any International Court or Tribunal against any serving AU Head of State or Government’.³⁷ As a doctrinal proposition and more explicitly, the AU has maintained that ‘immunities provided for by international law apply not only to proceedings in foreign domestic courts *but also to international tribunals*’, and that states cannot circumvent its obligations in this regard ‘by establishing an international tribunal’.³⁸ To provide for immunities of heads of state and other officials in the

³¹ International Justice Resource Centre, ‘African Union Approves Immunity for Government Officials in Amendment to African Court of Justice and Human Rights Statute’, 2 July 2014, available online at www.ijrcenter.org/2014/07/02/african-union-approves-immunity-for-heads-of-state-in-amendment-to-african-court-of-justice-and-human-rights-statute (visited 10 August 2014).

³² *Ibid.*

³³ *Ibid.*

³⁴ The Art. 98 question is considered in D. Tladi, ‘The ICC Decisions in Chad and Malawi: On Cooperation, Immunities, and Article 98’, 11 *JICJ* (2013) 199 and will not be addressed in this article.

³⁵ See e.g. Opening Statement by the Legal Counsel of the AU Commission at the First Session of the Specialised Technical Committee on Justice and Legal Affairs, held from 6-14 May 2014 in Addis Ababa where the Legal Counsel links the insertion of Article 46*Abis* to ‘proceedings against African Heads of State and Government’.

³⁶ See § 9 of the Decision on Africa’s Relationship with the International Criminal Court (ICC), Ext/Assembly/AU/Dec.1 (Oct 2013).

³⁷ *Ibid.*, at § 10(i).

³⁸ See AU Commission Press Release 02/2012 on the Decision of Pre-Trial Chamber of the International Criminal Court (ICC) Pursuant to Article 87(7) of the Rome Statute on the Alleged Failure by the Republic of

Amendment Protocol, is therefore, from the AU's perspective, is to act in furtherance of international law.

The AU does not dispute the legality of arrangements such as those in Article 27 of the ICC Statute, which provides that neither immunity nor other special procedural rules attaching to the official capacity of a person constitute a bar for the ICC exercising jurisdiction over an individual.³⁹ The AU, instead, approaches Article 27 as a treaty rule applicable only to state parties and that for non-state parties, the rules of customary international law relating to immunities remain intact. In response to the decisions of the ICC on non-cooperation by Malawi and Chad, the AU issued a press release which stated, in part, that: 'immunities of State officials are rights of the State concerned and a treaty only binds parties to the treaty. A treaty may not deprive non-Party States of rights which they ordinarily possess.'⁴⁰ This position essentially presents Article 27 ICC Statute, and similar provisions in the statutes of other international tribunals, as exceptions to the rules of customary international law relating to immunities and applying only as between parties to the constitutive treaties. The immunities provision in the Amendment Protocol are, from this perspective, seen not only as acceptable but as reflecting customary international law. This has been the legal basis of the AU's call for non-cooperation with the ICC's call for the arrest and surrender of Al Bashir.⁴¹ According to the AU, Article 27 leaves intact customary international law on immunities and the waiver of immunities implied by Article 27 applies only between states parties to the ICC Statute. Thus while there may be a duty on states

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, 9 January 2012. See also D. Akande, 'The African Union's Response to the ICC's Decisions on Bashir's Immunity: Will the ICJ Get Another Immunity Case?' *EJIL Talk* blogpost, 8 February 2012 who states that 'what the AU wants is an opinion [from the ICJ] that would clarify the immunity (or otherwise) of *State officials from prosecution by the ICC* and from enforcement action taken by States acting at the request of the ICC'. (Emphasis added).

³⁹ Art. 27(1) ICCSt. states that the 'Statute shall apply equally to all persons without distinction any distinction based on official capacity. In particular, official capacity as a Head of State or Government, member of a Government ... 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.' Art. 27(2) provides 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 jurisdiction over such a person'.

⁴⁰ AU Commission Press Release 02/2012, *supra* note 38.

⁴¹ In its first decision on non-cooperation with respect to Omar Al Bashir, for example, the AU Summit requests the Commission and African states to engage in a process to clarify 'the Immunities of officials whose States are not party to the [Rome] Statute.' See § 8 of the AU Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Assembly/AU/Dec. 245(XIII) Rev. 1. See especially § 6 of the AU Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court (ICC), Assembly/AU/Dec.397 (XVIII) in which the AU Assembly reaffirms 'its understanding that Article 98(1) was included in the Rome Statute ... out of a recognition that the Statute is not capable of removing an immunity which international law grants to officials of States that are not parties to the Rome Statute'.

parties to the ICC to cooperate in the arrest and surrender of a head of a state party no such a duty exists in relation to the arrest and surrender of a head of non-state party.⁴² While this aspect is slightly tangential to the consideration of Article 46*Abis* of the Amendment Protocol, it does serve to illustrate the AU's understanding of immunities under customary international law and, more to the point, the perceived exceptionality of Article 27 of the ICC Statute.

Both the positions supporting the immunities provision and the position opposing immunities are based on doctrinal assumptions about the rules of general international law relating to immunities. I turn now to evaluate these doctrinal assumptions.

3. Evaluating the Doctrinal Argument Concerning the Immunity Provision

For convenience sake, I begin with an evaluation of the AU's argument on immunities. It is difficult to argue with the AU's assertion that that duty on States Parties to cooperate with the ICC cannot deprive non-states parties of their rights under customary international law. Treaties create rights and obligations only as between parties to the treaty and the rights of non-parties cannot be affected by the treaty.⁴³ Whether this means, as is argued by the AU, that there is no duty to cooperate in the arrest and surrender of Al Bashir is dependent on other legal questions, such the effect of a Security Council referral of a situation to the ICC and the interpretation of Article 98, both of which fall beyond the scope of the enquiry here.⁴⁴

While the assertion that the rights relating to immunities under customary international law of a non-state party cannot be affected by the duty to cooperate under the ICC Statute cannot be disputed, what does require closer scrutiny is the assertion that under customary international law heads of state (and other officials entitled to immunity) enjoy immunity before international courts and tribunals. This assertion seems to ignore the ICJ dictum in *Arrest Warrant* where the Court stated that, notwithstanding the customary international law rules on immunity of officials from foreign criminal jurisdiction, a state official may still be prosecuted before an international court under certain circumstances.⁴⁵

⁴² See AU Commission Press Release 20/2012, *supra* note 38.

⁴³ See generally Art. 34 VCLT.

⁴⁴ This aspect of the immunities debate has been considered in various articles. See e.g. D. Akande, 'The Legal Nature of the Security Council Referrals to the ICC and its Impact on Bashir's Immunities', 7 *JICJ* (2009) 333-352 and P. Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?' 7 *JICJ* (2009) 315-332. See also Tladi, *supra* note 34.

⁴⁵ ICJ, *Arrest Warrant* case, *supra* note 11, at § 61.

But there is a far more fundamental problem with the AU's postulation. The immunity of states officials, whether *ratione personae* or *ratione materiae*, under customary international law means, in essence, the immunity of state official from the jurisdiction of courts of *foreign states*. This immunity is an extension of the immunity of the state from the jurisdiction of other states based on the principle of sovereign equality of states.⁴⁶ International tribunals, like the ICC and the African Court, are not foreign states. The rationale for immunity of states and its officials — sovereign equality of states — does not apply to the exercise of jurisdiction of international courts and tribunals since, though created by states, they are not themselves states. In contrast, the AU has asserted that to hold that rules on immunities do not apply to proceeding before international courts would be allow to states to circumvent their obligations under international law by creating an international tribunal.⁴⁷ This argument might be applicable in the case of a tribunal created by a handful of states which exercise control over it. However, it is unconvincing when applied to a court having 122 states parties none of which can exercise control over its decisions.⁴⁸ Moreover, since the immunity of officials from the jurisdiction of the courts of *foreign states* can be shown to exist in the practice of states accepted as law, to extend this immunity to cover also proceedings before international courts and tribunals would require evidence of practice of states accepted as law, which does not exist.⁴⁹ Quite the contrary, if anything given the history of international criminal law adumbrated in, for example, the ICC decisions in *Malawi* and *Chad*, there appears to be practice going in the other direction i.e. towards excluding immunity.⁵⁰ Therefore, the AU argument that the insertion of Article 46*Abis* is not only consistent with, but is reflective of, customary international law is doctrinally flawed.

Does the fact that there is no rule under customary international law granting immunity to state officials before international criminal courts and tribunals mean, at the same time, that there is a rule denying them immunity? This was essentially the argument

⁴⁶ See e.g., § 6 of the commentary to Draft Art. 4 of the ILC's Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction, *supra* note 14.

⁴⁷ See AU Commission Press Release 20/2012, *supra* note 38.

⁴⁸ For the suggestion that the ICC is indeed controlled by a few states see Statement by Ambassador Macharia Kamau, Permanent Representative of the Republic of Kenya on the Report of the ICC, 69th Session of the UN General Assembly, 30 October 2014 (on file with the author) urging the ICC to 'unshackle itself from a pernicious group of countries' whose control ensures that the Court 'represents [their] moral, ethical and, most disturbingly political values'. These countries, the statement continues, has a 'proprietaryship' over the ICC.

⁴⁹ In this regard, the ICJ in the *Arrest Warrant* case, *supra* note 11, at §§ 58 and 59, where the Court makes it clear that the rules relating jurisdiction of national courts, including immunities applicable before them, should be distinguished from the same relating to international courts.

⁵⁰ ICC, *Malawi* decision, *supra* note 25, at § 23 *et seq.*

advanced in *Malawi* and *Chad*.⁵¹ The experience with the Nuremburg Tribunal, the Tokyo Tribunal, the International Criminal Tribunal for the former Yugoslavia, the International Criminal for Rwanda, the Special Court for Sierra Leone and the Lebanon Tribunal constitutes practice of a denial of immunity. However, to transform the empirical fact — practice in the language of international law — to a rule of customary international law requires that the practice be accompanied by a sense of obligation, or *opinio iuris*.⁵² No evidence of such an acceptance of law is present in relation to immunity of state officials before international courts and tribunals and none is presented by the ICC Pre-Trial Chamber in *Malawi* and *Chad*. Indeed, in the debate over the arrest and surrender of Al Bashir, those arguing that there was indeed a duty to arrest have advanced as a legal reason not the fact that the court was an international court but rather that the situation was referred to the ICC by the Security Council, which, the argument goes, has the power to override customary international law.⁵³

Proponents of the view that there is a rule under customary international law denying immunity before international courts and tribunals may point to *Arrest Warrant*, where the ICJ⁵⁴ famously made the following observations:

immunities enjoyed under international law by an [official] do not represent a bar to criminal prosecution in certain instances. Fourthly, an [official enjoying immunity in national courts] may be subject to criminal proceedings before certain international criminal courts, [sic] where they have jurisdiction.⁵⁵

It bears mentioning that nothing in the quoted extract remotely suggests that anything about the status of immunities before international courts under customary international law. The ICJ was not here laying down a rule of international law but referring to *possible* avenues that may be followed for the prosecution of officials with immunity *if certain conditions were met*. The first avenue provided by the ICJ, for example, refers to the possibility of a person being tried before the courts of their own state.⁵⁶ Yet this can only happen if the national court in question has jurisdiction and the official in question has no immunity under domestic law. Similarly, an international court or tribunal can only try an individual if there is no jurisdictional bar, including immunity, to trying the individual. Whether or not the

⁵¹ *Ibid.*

⁵² See generally § 169 of the Report of the ILC at Sixty-Sixth Session (Chapter 10), *supra* note 14.

⁵³ See e.g. Akande, *supra* note 44. See *contra*, Tladi, *supra* note 34.

⁵⁴ ICC, *Malawi* decision, *supra* note 25, at § 34.

⁵⁵ ICJ, *Arrest Warrant* case, *supra* note 11, at § 61.

⁵⁶ *Ibid.*

international court or tribunal will have jurisdiction and whether or not there is a bar to the exercise of such jurisdiction will be dependent on the constitutive instrument establishing such a court or tribunal.⁵⁷ The argument that customary international law denies immunity before international courts is, therefore, unconvincing.

That there is no legal rule under customary international law denying immunity to state officials does not, of course, mean that a state official can plead immunity before a tribunal having jurisdiction which, by its constitutive instrument, has removed immunity such as Article 27 of the ICC Statute.⁵⁸ By the same token, however, the exclusion of immunity in a treaty establishing an international court or tribunal does not affect the relationship between a non-state party to the treaty and states parties. Thus, the fact that a state is party to the ICC Statute does not imply that such a state is no longer obliged to respect the immunity of an official from a state that is not a party to the Statute. Indeed even if the assertion that customary international law excludes immunities in respect of proceedings before international courts were correct — and I have argued that it is not — this would apply only as between the state official appearing before the court and the international court or tribunal concerned and would not, by itself, affect the relationship between states *inter se*.⁵⁹

If neither the AU argument that customary international law requires international courts to respect immunity nor the argument advanced by, *inter alia*, the ICC that customary international law denies immunity before international courts is correct, then how is Article 46*Abis* of the Amendment Protocol to be understood from the perspective of customary international law? If customary international law neither requires nor precludes the immunity before international courts and tribunals, then as matter of law the AU is free to include or exclude immunities as a bar to prosecution as it deems fit. This is consistent with the proposition made above that the existence or not of immunities before international courts and tribunals is dependent not on rules of customary international law but rather on the constitutive instrument establishing the court or tribunal. Whether the incorporation of immunities in an instrument establishing an international court or tribunal is desirable or not is a different question. Thus Article 46*Abis* is neither reflective of nor inconsistent with customary international law. The question may well be asked whether, under a treaty that is

⁵⁷ See *ibid.* where the ICJ refers to the constitutive instruments establishing the ICC, the ICTY and the ICTR.

⁵⁸ *Ibid.*

⁵⁹ In the context of the ICCSt., this distinction is explained in Tladi, *supra* note 44, at 211 noting that Art. 27 ‘applies to defences, substantive or jurisdictional, that an individual *may raise before the ICC*. It does not, in any way, address the relationship between states nor does it address the relationship between the ICC and states parties.’ (emphasis in the original).

silent on immunities, state officials are entitled to claim immunities. Subject to the normal rules of interpretation, a court, national or international, having jurisdiction is entitled to exercise that jurisdiction unless there is a rule of international law prohibiting such exercise. This is not the same as saying, however, that there is a rule of international law excluding immunity.

A related question is whether Article 46*Abis* of the Amendment Protocol undermines the fight against impunity. The argument on which this is based appears to be that the extension of the African Court's jurisdiction to international crimes while also expressly including immunity will shield perpetrators from the reaches of justice. However, this argument does not follow. The effect of the extension of the African Court's jurisdiction is, *potentially*, to expand the reach of international criminal justice. It does not, as the argument may suggest, reduce this reach. Assuming African states that are not party to the ICC Statute become party to the expanded African Court, then the reach of the international courts to potential situations and perpetrators becomes enlarged. On the other hand, regardless of the number of states that fall within the jurisdiction of the expanded African Court, the reach of the ICC will remain unaffected.

The idea that Article 46*Abis* of the Amendment Protocol affects the reach of international criminal justice can only be based on a misconstruction of the relationship between the AU Court and the ICC. Under Article 46*Abis* the African Court will not have the competence to try the persons having immunity but this will not prevent the ICC from exercising jurisdiction against such persons if it has jurisdiction. Under the principle of complementarity, the ICC is of course barred from proceedings with trials where a court with competence is willing and able to exercise jurisdiction.⁶⁰ This procedural bar, however, applies only to state prosecutions and/or investigations and does not extend to the exercise of jurisdiction by regional courts. Although an amendment to the ICC Statute, to recognize the competence of regional courts for the purposes of complementarity has been transmitted to the Secretary-General by Kenya,⁶¹ this amendment is unlikely to be adopted by the Assembly

⁶⁰ See Arts 17, 18 and 19 ICCSt.

⁶¹ See ICC Working Group on Amendments Informal Compilation of Proposals to Amend the Rome Statute (on file with the author). It should be noted, that the Kenyan proposal only seeks to amend the Preambular paragraph relating to complementarity and does not address the substantive provisions in Arts 17, 18 and 19. As currently drafted, it is therefore unlikely to be sufficient to establish a complementarity role for the African Court. See also Note Verbale 560/2014 from the Permanent Mission of Kenya to the United Nations to the President of the Assembly of States Parties detailing the amendment proposals it submitted for consideration.

of States Parties. At any rate, until such a time as an amendment has been passed, from the perspective of the ICC, Article 46*Abis* should be a non-issue.

4. Conclusion

The expansion of the jurisdiction of the AU Court to include also international crimes has raised much controversy in international criminal justice circles — both diplomatic and academic. Even more controversial has been the decision by the AU to make provision for immunities of certain officials before the AU Court in the form Article 46*Abis*. In the back and forth of arguments for and against Article 46*Abis*, normative policy arguments, empirical statements and doctrinal arguments have been lumped together in a way that can result in confusion. This confusion has aided in the perpetuation of the hero-villain trend in which supporters of the ICC see themselves as heroes and the AU as villains and the supporters of the AU see themselves as heroes and the ICC as villains.

In the eagerness to put on the white hat and fight the evil other, basic principles of international law are conveniently covered in a heap of rhetoric and slightly bent doctrine. Much of the confusion created by the debate arises from the failure by commentators to make a distinction between the law relating to immunity and the wisdom (or desirability) of Article 46*Abis*. Supporters of Article 46*Abis* present it as salvaging international law and reclaiming the foundational international principle of sovereignty by preserving immunity. What is ignored in this narrative is that international law rules on immunity apply to the exercise of jurisdiction by domestic courts over officials of a foreign state and that customary international law neither requires immunity before international courts nor prevents it. Opponents of Article 46*Abis*, on the other hand, present it as doing harm to the fight against impunity by protecting officials from the reach of international courts. What is ignored is that the expansion of the jurisdiction of the African Court does not, in any way, affect the jurisdiction of other courts, including the ICC, and can in no way prevent the exercise of jurisdiction by those courts over individuals who may be immune from prosecution before the African Court by virtue of Article 46*Abis*.