

# **The Duty on South Africa to Arrest and Surrender Al-Bashir under South African and International Law:**

## **A Perspective from International Law**

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**Abstract:** In June 2015, South Africa hosted the African Union Summit. The Sudanese President, Al Bashir, under an ICC arrest warrant for, *inter alia*, genocide, attended the Summit. As a State Party to the Rome Statute, South Africa was under a duty to arrest Al Bashir. Yet, South Africa is also under a duty, both under customary international law and the treaty law (the Host Country Agreement under which the Summit was held) not to arrest him. The South Africa High Court, applying South Africa's Implementation of the Rome Statute Act and the Rome Statute, concluded that there was a duty to arrest Al Bashir, and also that there was no countervailing duty not to arrest him. This article, against the background of the decision of the High Court decision as well as the decision of Pre-Trial Chamber in the *DRC decision*, considers the various legal rules, both international and domestic, applying to the situation of Al Bashir. The article concludes that the judgment of the Court ignores the fundamental rules of international law.

### **1. Introduction — Statement of the Issues**

In June 2015, President Al-Bashir of Sudan attended the African Union (hereinafter 'AU') Summit hosted in South Africa. The result was a Court process that revealed the legal complexities surrounding the execution of the arrest warrant issued against Al-Bashir.<sup>1</sup> With Bashir's attendance of the Summit, the *potential* conflict of obligations that arise as a result

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<sup>1</sup> On 4 March 2009, the ICC Pre-Trial Chamber I issued a warrant of arrest for Omar Hassan Al-Bashir for crimes against humanity: Warrant of Arrest for Omar Hassan Ahmad Al-Bashir, ICC-02/05-01/09, 4 March 2009. On 12 July 2010, the ICC issued a second warrant of arrest for genocide: Second Warrant of Arrest for Omar Hassan Ahmad Al-Bashir, ICC-02/05-01/09, 12 July 2010.

of the arrest warrant became real for South Africa. The aftermath – although I hasten to add that the full repercussions will continue to unfold – of the circumstances of Al-Bashir’s arrival in and departure from South Africa, without being arrested by South African authorities, was a judgment by the North Gauteng High Court (hereinafter the ‘NGHC’) determining that there was a duty to arrest Al-Bashir and to surrender him to the International Criminal Court (hereinafter the ‘ICC’).<sup>2</sup>

While South Africa’s experience with the conflict of obligations caused a stir, several African states had already faced the dilemma. Some of these states, in particular Djibouti and Kenya, have had to explain their non-cooperation with the duty to arrest and surrender of Al-Bashir before the Bureau of the Assembly of States Parties to the ICC. In other instances, States (Democratic Republic of Congo, Malawi and Chad) appeared before the Pre-Trial Chambers of the ICC.<sup>3</sup> Before June 2015 there had been already seven cases of non-execution of the order of the Court for the arrest and surrender of Al-Bashir (Kenya, Djibouti, Chad (twice), Malawi, Nigeria and the Democratic Republic of Congo). For South Africa, at least before June 2015, this potential conflict of obligations had, for the most part, been mainly academic.

It has been widely reported that South Africa, since the adoption of the AU decisions, has avoided any potential conflict of obligations between the AU system and the ICC Statute system by always requesting the Sudanese Head of State not to honour invitations to South African events. In this regard, a few examples include the two inaugurations of President Zuma, the 2010 World Cup and the funeral of former President Mandela (this has now been confirmed in a judgment by South African court).<sup>4</sup> However, the decision to host the Summit made the potential conflict real for South Africa. The tried and tested method of requesting

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<sup>2</sup> *Southern African Litigation Centre v Minister of Justice and Constitutional Development and Others*, Case Number: 27740/2015, 23 June 2015. The matter is far from over at the time of writing this article. The Respondents have expressed an intention to appeal the judgment; at the time of writing an investigation that could lead to a contempt of court process was underway; there will be hearing before an ICC Pre-Trial Chamber on the non-cooperation of South Africa, which itself is subject to appeal; and South African authorities have been publicly talking about withdrawal from the Rome Statute in consequence of the judgment.

<sup>3</sup> See *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, the Prosecutor v Al Bashir*, Pre-Trial Chamber I, 12 December 2011 (ICC-02/05-01/09); *Decision Pursuant to Article 87(7) on the Failure of the Republic of Chad to Comply with the Cooperation Request Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmed Al Bashir, The Prosecutor v Al Bashir*, Pre-Trial I, 13 December 2011 (ICC-02/05-01/09); and *Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court, The Prosecutor v Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber II, 9 April 2014 (ICC-02/05-01/09).

<sup>4</sup> See for discussion *Southern African Litigation Centre v Minister of Justice*, *supra* note 2, at § 12.

the Sudanese Head of State not to attend was not an option in this case and could not prevent the conflict. Technically, it was not a South African meeting to begin with and it was not South Africa as such issuing the invitations. Moreover, from a political angle, there was no incentive for Sudan to agree not to attend at the highest level, since attendance would provide Sudan an opportunity to embarrass the ICC – that South Africa might be embarrassed in the process would only be collateral damage.

In 2012, the United States faced a similar, although slightly less complex dilemma Al-Bashir decided that he would attend the high level segment United Nations General Assembly.<sup>5</sup> While there may be a strong political interest in the US to arrest and surrender Al-Bashir, the US is not a State Party to the Rome Statute and, therefore, is not under an obligation to arrest under the Statute. At the same time, the United States has obligations both under customary international law and the UN Charter. On the other hand, the US has also obligations under the host country agreement with the United Nations not to arrest and surrender a State Official invited by the UN on official business, such as Al Bashir. In the end, in the specific case having kept US policymakers at the edge of their collective seats, Al-Bashir decided not to attend the UN High Level Event – electing not to take the risk of arrest.

Against this background the position of South Africa was rather more complex on account of its leadership position in the African Group, its membership to the African Union, including any agreement signed to host AU meetings, and as a party to the ICC Statute. It was not just a conflict between political interests and legal obligations. It was a multilevel conflict between disparate legal rules, both international and domestic, with political interest thrown in as garnish.

## **2. The Background**

South Africa has a developed, and much applauded, legislation implementing the Rome Statute, the Implementation of the Rome Statute Act (hereinafter the ‘Implementation Act’).<sup>6</sup>

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<sup>5</sup> ‘Sudan’s President Omar Al Bashir Seeks Visa for UN Meet’, BBC Report, 17 September 2013, available at <http://www.bbc.com/news/world-africa-24131200> (last accessed 1 July 2015).

<sup>6</sup> The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002. See for discussion of various aspects of the Implementation Act M. du Plessis, ‘South Africa’s Implementation of the ICC Statute’ (2007) 5 *Journal of International Criminal Justice* 460. See also A. Katz, ‘An Act of Transformation: The Incorporation of the Rome Statute of the ICC into National Law in South Africa’ (2003) 12 *African Security Review* 25.

In the diplomatic world, South Africa has also been seen as playing a prominent role in serving as a bridge between the ICC and the AU side in the tensions between the two. While South Africa has not been shy, not only at AU events, but also at ‘ICC-friendly’ events,<sup>7</sup> to question some practices of the Court, it has also sought to lower the anti-ICC sentiments at AU events.<sup>8</sup> Its role as a peacemaker in the AU-ICC tension coupled with the lauded Implementation Act made the looming conflict of obligations all the more interesting and potentially far reaching. From a legal perspective, it raised a number of interpretative questions about the duty, under the Rome Statute, to cooperate in the arrest and surrender of Al-Bashir. It also raised questions about the interpretation of the Implementation Act since it was, after all, that legislation and not the Rome Statute that would be interpreted falls to be applied.

The purpose of this article is to assess whether, as a matter of South African domestic law, there was a duty to arrest Al-Bashir and surrender him to the ICC. As will become apparent, this assessment necessarily requires an assessment of international law and South Africa’s international law obligations. I begin in the next section by giving an overview of the NGHC judgment in the *Southern African Litigation Centre v Minister of Justice*. After a description of the judgment, I outline the duty to cooperate under the Rome Statute. I then provide an overview of the provisions of the Implementation Act relevant to cooperation and, in particular, arrest and surrender. Finally, I provide an assessment of the potential conflicts of various rules, at both the domestic and international levels, before offering some concluding remarks.

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<sup>7</sup> See for example South African Statement, at the General Assembly Sixty-Seventh Session, on Agenda Item 73 ‘The Report of the International Criminal Court’, 1 November 2012, in which South Africa said: ‘we do wish to express our concern at the manner in which the decision on Palestine was made [the decision of the previous Prosecutor not open up investigations on the basis of uncertainty surrounding the status of Palestine].. Given the passage of time, the developments within the United Nations system, including the admission of Palestine as a member to UNESCO and the sheer number of states, including States Parties, that recognise Palestine, we were disappointed by the unwillingness of the Office of the Prosecutor to make a firm decision.’ (statement on file with the author). Similarly, in its statement on the same agenda item, during the sixty-fifth session of the General Assembly, South Africa made the following remarks concerning the investigations in Libya and the apparent decision to prosecute only one side, ‘If, however, the Court is seen as a “victor’s court”, this will have a negative perception on the image, credibility and integrity of the Court as an independent dispenser of justice’ (statement on file with the author).

<sup>8</sup> The caveat to the call for non-cooperation requesting African States to ‘balance, where applicable, their obligations to the AU with their obligations to ICC’ was introduced into the AU decisions largely on account of South Africa’s view that obligations under the Rome Statute cannot simply be ignored. See § 6 AU Decision on the Progress Report of the Commission on the Implementation of Decision Assembly AU/Dec.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC), July 2010, Doc Assembly/AU/10(XV).

### 3. The Judgment of the North Gauteng High Court in *Southern African Litigation Centre*

On 13 June 2015, on the evening of Al-Bashir's arrival in South Africa, the Southern Africa Litigation Centre made an urgent application to the NGHC, requesting that the Court order South African authorities to arrest and surrender Al-Bashir. The Court, having heard arguments, ordered, *inter alia*, that the South African authorities are 'compelled to take all reasonable steps to arrest President Bashir'.<sup>9</sup> While the purpose of this article is not to provide an analysis of the judgment, a brief description of the reasons for the judgment is warranted in order to place the discussion in context.

The decision of the Court in *Southern African Litigation Centre* case is based on several propositions. The first important proposition on which the judgment is based is that, because of the Rome Statute, Heads of State do not enjoy immunity for Rome Statute crimes.<sup>10</sup> In particular, the GNHC states that 'similar provisions [removing immunity] are expressed in the Implementation Act.'<sup>11</sup> The Rome Statute provisions on immunity, the Court states, 'means that the immunity that might otherwise have attached to President Bashir as Head of State is excluded or waived in respect of crimes and obligations under the Rome Statute.'<sup>12</sup> Additionally, the Pretoria Court refers to a decision by the Pre-Trial Chamber of the ICC stating that the immunities of Al-Bashir 'have been implicitly waived by the Security Council...'<sup>13</sup>

The second proposition forming the basis of the NGHC's judgment relates to the content of the Host Agreement between South Africa and the African Union (hereinafter the 'Host Agreement').<sup>14</sup> The Host Agreement provides, in part, that the South African Government shall accord the Members of the Commission and Staff Members, the delegates and other representatives of Inter-Governmental Organizations attending the Meetings the

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<sup>9</sup> *Southern African Litigation Centre v Minister of Justice*, *supra* note 2, at § 2.

<sup>10</sup> *Ibid.* at § 28.8

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.* at § 28.9. See also § 30 where the Court states that Al-Bashir 'does not enjoy immunity in accordance with the rules of customary international law.'

<sup>14</sup> Agreement between the Republic of South Africa and the Commission of the African Union on the Material and Technical Organisation of the Meetings of the 30th Ordinary Session of the Permanent Representatives Committee from 7 to 9 June 2015, the 27th Ordinary Session of the Executive Council from 10 to 12 June and the 25th Ordinary Session of the Assembly on 14 to 15 June 2015 (on file with author).

privileges and immunities set forth in Sections C and D, Articles V and VI of the General Convention on the Privileges and Immunities of the OAU.<sup>15</sup>

The General Convention on the Privileges and Immunities of the OAU (hereinafter the 'General Convention'), for its part provides that 'Representatives of Member States' shall be accorded, inter alia, 'immunity from personal arrest or detention' and '[s]uch other privileges, immunities and facilities ... as diplomatic envoys enjoy...'<sup>16</sup>

The NGHC first determines that the General Convention is irrelevant for the purposes of disposing of the matter since South Africa never ratified it.<sup>17</sup> Second, the NGHC determines that Host Agreement, on its terms, 'does not confer immunity on the Member States or their representatives or delegates.'<sup>18</sup> Rather, the NGHC asserts, it 'confers immunity on the members and staff of the AU Commission, and on delegates and representatives of Inter-governmental Organisations.'<sup>19</sup> In other words, 'delegates' refers to delegates of intergovernmental organisations and not delegates of AU member states.

The third important element of the NGHC's decision is that the Minute in the Government Gazette recognising the Summit purporting to confer immunities on the Summit, to the extent that it could be read to confer immunities on al-Bashir, 'could not 'trump' the international agreement *i.e.* Rome Statute or the subsequent Implementation Act.'<sup>20</sup> In other words, since the Minute in the Government Gazette recognising the Summit is subordinate legislation, it must be trumped by the provisions of the Implementation Act.

#### **4. Obligation to Cooperate under the Rome Statute**

##### **A. Nuts and Bolts of Cooperation**

It is a truism that cooperation is central to the success of the ICC.<sup>21</sup> The ICC does not have at its disposal the tools necessary to achieve its objectives without State cooperation.<sup>22</sup> It does

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<sup>15</sup> Article VIII of the Host Agreement.

<sup>16</sup> Section C, Article V (1) of the General Convention.

<sup>17</sup> See generally *Southern African Litigation Centre v the Minister of Justice*, *supra* note 2, at § 28.4.

<sup>18</sup> *Ibid.*, at § 28.10.1

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*, at § 31.

<sup>21</sup> 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' (2014) 7 *African Journal of Legal Studies* 381 at 386.

<sup>22</sup> See, e.g., B. Swart, 'General Problems' in A. Cassese, P. Gaeta and J. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary (Volume II)* (2002) at 1589. See also B. Swart, 'Arrest and

not have a police force to arrest persons with outstanding warrants of arrest; it does not have agencies to effect the seizure of documents or the freezing of assets; nor does it have prisons to hold persons who are found guilty of commission of crimes under its Statute. It is utterly reliant on the cooperation of member states and other entities to achieve its objectives. In this respect, the international criminal tribunals, including the ICC, have been described as giants without limbs.<sup>23</sup> Cooperation, in a sense, provides it with the limbs necessary to carry out its function and mandate.

The centrality of cooperation for the ICC is reflected in the elaborate regime on cooperation established in the Rome Statute. Part Nine, on cooperation, contains sixteen articles, addressing various aspects of cooperation. Article 86 provides a general duty on states parties to ‘cooperate fully with the Court in its investigation and prosecution of crimes within [its] jurisdiction.’ In addition, Part Nine contains provisions on, for example, the modalities for the Court to request cooperation.<sup>24</sup> The Statute also details the various forms of cooperation.<sup>25</sup> These include, for example, assistance with the identification and whereabouts of persons, the taking of evidence, the questioning of persons, the service of documents, execution of searches and the freezing and seizure of assets.<sup>26</sup> In addition, the Rome Statute includes a catch-all ‘any other type of assistance’ not prohibited by law.<sup>27</sup>

By far the most important, and far reaching form of cooperation, is the obligation to arrest and surrender a person sought by the Court.<sup>28</sup> The Rome Statute provides that a state, faced with a request to arrest and surrender a person, ‘shall ... comply with the request to arrest and surrender’.<sup>29</sup> The Statute also provides directives for how a state should deal with competing requests for the arrest and surrender of a person,<sup>30</sup> as well as the procedural modalities for giving effect to the obligation to arrest and surrender.<sup>31</sup>

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Surrender’ in A. Cassese, P. Gaeta and J. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary (Volume II)* (2002) at 1640. A. Ciampi, ‘The Obligation to Cooperate’ in A. Cassese, P. Gaeta and J. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary (Volume II)* (2002) at 1607.

<sup>23</sup> See Swart ‘General Problems’, *supra* note 22, at 1598.

<sup>24</sup> Art. 87 of the Rome Statute.

<sup>25</sup> See generally Art. 93 of the Rome Statute.

<sup>26</sup> *Ibid.*

<sup>27</sup> Art. 93(1) (l) of the Rome Statute.

<sup>28</sup> See generally, Arts 89, 90, 91 and 92

<sup>29</sup> Art. 98(1) of the Rome Statute.

<sup>30</sup> See Art. 90 of the Rome Statute.

<sup>31</sup> Art. 91 of the Rome Statute.

## **B. *The Source of the Duty to Arrest the Sudanese President***

As a general matter, the ICC only has jurisdiction over crimes within its jurisdiction occurring in the territory of a state party or committed by a person who is national of a state party.<sup>32</sup> Where jurisdiction is based on the former element, i.e. crimes occurring in the territory of a state party, the nationality of the accused persons is irrelevant. In other words, where crimes under the jurisdiction of the Court are committed by a national of non-state party in the territory of a state party, the Court will have jurisdiction. Similarly, where the jurisdiction is based on the nationality of the accused, i.e. the accused is a national of a state party; it is irrelevant whether the acts in question were committed on the territory of a non-state party or state party.

Al-Bashir is accused of committing crimes within the jurisdiction of the ICC,<sup>33</sup> committed in Darfur, Sudan. Sudan, of course, is not a state party and therefore, the territorial basis of ICC's jurisdiction is inapplicable. Furthermore, al-Bashir is not a national of a state party, since Sudan is not a state party. The Court's jurisdiction over al-Bashir, therefore, flows from an exception over the two general bases of jurisdiction. Under the Rome Statute, the ICC will also have jurisdiction over a situation referred to it by the Security Council acting under Chapter VII of the United Nations Charter.<sup>34</sup> The Security Council referred the situation in Darfur in 2005 and thereby brought the crimes committed in Darfur within the jurisdiction of the Court.<sup>35</sup>

With the referral of the situation in Darfur to the ICC and the decision by the Court to indict and issue an arrest warrant against al-Bashir, a duty arose on states parties *under the Rome Statute*, to cooperate with the Court, including in the arrest and surrender of al-Bashir. It should be emphasised that there is no duty on states parties to cooperate in relation to al-Bashir under Security Council Resolution 1593 (the resolution referring the situation in Darfur to the ICC).<sup>36</sup> Under the resolution, a duty to cooperate is placed only on the situation state, i.e. Sudan, while states parties have a duty to cooperate under the Rome Statute. The limited scope of the obligation to cooperate in Resolution 1593 has two implications relevant

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<sup>32</sup> See Art. 12 of the Rome Statute.

<sup>33</sup> *Warrant of Arrest for Omar Hassan Ahmad Al Bashir, In the Case of the Prosecutor v Omar Ahmad Al Bashir*, Pre-Trial Chamber I, 4 March 2009 (ICC-02/05-01/09); *Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, In the Prosecutor Omar Hassan Ahmad Al Bashir*, 12 July 2010 (ICC-02/05-01/09).

<sup>34</sup> Art. 13 of the Rome Statute.

<sup>35</sup> UNSC RES 1593 (2005).

<sup>36</sup> For an analysis of this as well as other limitations of the referring resolutions, see D. Tladi, 'ICC and UNSC: Point Scoring and the Cemetery of Good Intentions' 10 October 2014 *ISS Today*.

for the analysis below. First, non-states parties, with the exception of Sudan, do not have a duty to cooperate with the ICC in the arrest and surrender of Al-Bashir, or for that matter with respect to any other form of cooperation. Second, the duty of states parties to cooperate with the ICC does not enjoy the superior status of obligations flowing from Chapter VII resolutions of the UN Security Council. Thus, the duty on states to cooperate with the ICC in the arrest and surrender of al-Bashir does not enjoy superiority over other rules of international law.<sup>37</sup>

### ***C. The Intersection of the Law on Immunities and the Duty to Cooperate***

President al-Bashir, as Head of State, has immunity and inviolability under customary international law.<sup>38</sup> This means that he is immune from the exercise of jurisdiction by a foreign state, including arrest.<sup>39</sup> Article 27 of the Rome Statute excludes the application of immunity in proceedings before the Court. This exclusion applies to any accused person whether the accused is a national of state party or not.<sup>40</sup> Thus, under Article 27 of the Rome Statute, al-Bashir does not have immunity before the Court. This, however, applies to proceedings before the ICC itself and does not necessarily affect immunities he may enjoy under domestic courts. The finding in *Southern African Litigation Centre v the Minister of Justice*, that immunities ‘that might otherwise have attached to President Bashir as Head of

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<sup>37</sup> Cf. *DRC decision*, *supra* note 3, giving a contrary interpretation of the implications of UNSC resolution 1593. See also Nerina Boschiero ‘The ICC Judicial Finding on Non-Cooperation Against the DRC and No Immunity for Al Bashir Based on UNSC Resolution 1593’ (2015) 13 *Journal of International Criminal Justice* 625. This interpretation of the law is evaluated below.

<sup>38</sup> See generally *Case Concerning the Arrest Warrant 11 April 2000 (DRC v Belgium)*, Judgment of 14 February 2000, *ICJ Reports* 2000, 3.; See Draft Articles 3 and 4 of the ILC Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction, provisionally adopted, in the Report of the International Law Commission on the Work of its Sixty-Fifth Session, (6 May – 7 June and 8 July – 9 August 2013), Official Records of the General Assembly, Sixty-Eighth Session, Supplement No. 10 (A/68/10). Cf. *Southern African Litigation Centre v Minister of Justice*, *supra* note 2, at § 28.8.

<sup>39</sup> See paragraph 5 of the Commentary to Draft Article 1 of the Draft Articles on the Immunity of Officials, *supra* note 38, where the Commission states that ‘foreign criminal jurisdiction should be understood as meaning the set of acts linked to judicial processes whose purpose is to determine the criminal responsibility of an individual, including coercive acts that can be carried out against persons enjoying immunity in this context’.

<sup>40</sup> The author’s views on the application of Article 27 to officials of non-states parties are reflected more fully in D. Tladi, ‘The Immunity Provision in the AU Amendment Protocol: Separating the (Doctrinal) Wheat from the (Normative) Chaff’ (2015) 13 *Journal of International Criminal Justice* 3, especially at 14 *et seq.* See also D. Tladi, ‘Immunity in the Era of “Criminalisation”: The African Union, the ICC and International Law’ (2015) *Japanese Yearbook of International Law* (forthcoming).

State is excluded or waived in respect of crimes and obligations under the Rome Statute’,<sup>41</sup> will be discussed in Section 6.2 of this article.

In the light of the rather expansive duty to cooperate in the Rome Statute, the application of Article 27 to official of non-states parties might create a conflict of obligations for states parties charged with cooperating in, for example, the arrest and surrender of Al-Bashir. In other words, the relationship between non-state parties and state parties continue to be governed by customary international law which bestows on a Head of State immunity *ratione personae*. The arrest of an official of a non-state party by a state party pursuant to its obligations under the Rome Statute might, therefore, result in a violation of the obligations of such a state party under customary international law. In recognition of this potential conflict, the Rome Statute includes an exception to the duty to cooperate in Article 98. Article 98 provides that the Court may not request cooperation for cooperation in the form of surrender or assistance if that cooperation or assistance would ‘require the requested state to act inconsistently with its obligations under international law’ relating to ‘State or diplomatic immunity of a person or third State’.<sup>42</sup> The precise implications of this exception, in particular as applied to al-Bashir, have been the subject of disagreement amongst scholars and ICC Pre-Trial Chambers. The different interpretations are discussed below at section 6.2.<sup>43</sup>

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<sup>41</sup> *Southern African Litigation Centre v the Minister of Justice*, *supra* note 2, at § 28.8.

<sup>42</sup> Art. 98(1) of the Rome Statute.

<sup>43</sup> See *Malawi, Chad and DRC decisions*, *supra* note 3. See for discussion A. Greenwalt, ‘Introductory Note to the International Criminal Court: Decisions Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi and Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Al Bashir and African Union Response’ (2012) 51 *International Legal Materials* 393; D. Akande, ‘The Legal Nature of the Security Council Referrals to the ICC and its Impact on Bashir’s Immunities’ (2009) 7 *Journal of International Criminal Justice* 333; P Gaeta, ‘Does President Al Bashir Enjoy Immunity from Arrest?’ (2009) 7 *Journal of International Criminal Justice* 315; D. Tladi, ‘The ICC Decisions in Chad and Malawi: On Cooperation, Immunities and Article 98’ (2013) 11 *Journal of International Criminal Justice* 199. See also W. Schabas; ‘Introductory Remarks: Annual Ben Ferencz Session’ (2012) *American Society of International Law Proceedings* 305. 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*, February 2012, available at <http://www.ejiltalk.org/the-african-unions-response-to-the-iccs-decisions-on-bashirs-immunity-will-the-icj-get-another-immunity-case/> (last accessed 1 July 2015).

## 5. Giving Domestic Effect to Cooperation in South Africa

The Implementation Act was adopted in 2002 and provides for the comprehensive implementation of the Rome Statute.<sup>44</sup> It provides for the criminalisation and prosecution of Rome Statute crimes as well as for cooperation with the ICC.<sup>45</sup> While the national criminalisation and prosecution element, provided for in Chapter one of the Implementation Act, is not the focus of this article, it is worth stating that the Implementation Act adopts a rather broad basis of jurisdiction, granting South African court's jurisdiction even where the alleged offence was committed outside of South Africa and by a non-national.<sup>46</sup> It is also worth pointing out that in a celebrated, though still recent judgment, the Constitutional Court has determined that there is a duty *to investigate* even where the alleged offender is not on the territory of South Africa.<sup>47</sup>

Chapter Four of the Implementation Act provides for cooperation. For the most part, the Act follows closely the provisions of the Rome Statute. Section 14, for example, provides for areas of cooperation and judicial assistance and includes the same types of cooperation as identified in Article 93 of the Rome Statute, including the catch all 'any other type of assistance'.<sup>48</sup> The Implementation Act then proceeds to provide details of the modalities for providing assistance.<sup>49</sup> As stated above, by far the most far reaching form of cooperation is the duty to arrest and surrender. The Implementation Act, like the Rome Statute, therefore dedicates several provisions on arrest and surrender. Section 8 of the Implementation Act, for example, provides that an arrest warrant issued by the ICC must be endorsed by magistrate 'for execution in any part of the Republic'.<sup>50</sup> It is noteworthy that the Implementation Act does not provide discretion for the magistrates in whether to endorse the arrest warrant. Rather it provides that on receipt of the request to arrest and surrender a

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<sup>44</sup> For a detailed discussion see M. du Plessis, 'Bringing the International Criminal Court Home: The Implementation of the Rome Statute of the International Criminal Court Act 2002' (2003) 16 *South African Journal of Criminal Justice* 1 at 14 *et seq.*

<sup>45</sup> *Ibid.* at 2. See also M. du Plessis, 'South Africa's Implementation of the ICC Statute: An African Example' (2007) 5 *Journal of International Criminal Justice* 460, at 461-462.

<sup>46</sup> See s 4 (3) of the Implementation Act which provides, in addition to the normal territorial and nationality basis of jurisdiction, jurisdiction over an offence if the person, 'after the commission of the offence is present in the territory of the Republic'.

<sup>47</sup> *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* 2014 (12) BCLR 1428 (CC). See also *National Commissioner, South African Police Service and Another v Southern African Human Rights Litigation Centre and Another* 2014 (2) SA 42 (SCA).

<sup>48</sup> See s 14 of the Implementation Act, in particular s 14(1) for the catch all provision.

<sup>49</sup> See du Plessis, *supra* note 44, at 10 *et seq.*

<sup>50</sup> S 8(2) of the Implementation Act.

magistrate ‘must endorse the warrant of arrest’.<sup>51</sup> The only condition, it appears, is that the arrest warrant and accompanying documents must show ‘that there a sufficient grounds for the surrender of that person to the’ ICC.<sup>52</sup>

The provisions in the Implementation Act relating to the actual surrender of a person under an arrest warrant of the ICC are quite elaborate.<sup>53</sup> The Act requires that a magistrate hold an enquiry in order to establish three facts, namely, whether the arrest warrant applies to the person in custody, the person has been arrested in accordance with procedures laid down in domestic law and whether the fundamental rights of the person as provided for in the Constitution have been respected.<sup>54</sup> In addition, the magistrate must satisfy him or herself that the person is wanted by the ICC for prosecution of an alleged offence, the imposition of a sentence or to serve a sentence already imposed by the ICC. If, in the view of the relevant magistrate, these requirements have been complied with, then ‘the magistrate *must* order that such a person be surrendered to the Court’.<sup>55</sup> The Act does provide for appeal to the High Court on the grounds that one of the above-mentioned requirements has not been met.<sup>56</sup> Other aspects covered in the Implementation include processes related to the removal of the person once the appeals processes have been completed,<sup>57</sup> and provisional arrests.<sup>58</sup>

Subsequent to the decision of the ICC to issue an arrest warrant against al- Bashir on 4 March 2009, the South African Department of Justice, on 9 May transmitted the arrest warrant, with a request for cooperation, to a magistrate. The arrest warrant was endorsed by Chief Magistrate Desmond Nair on the same day.<sup>59</sup> This means that there is currently a South African arrest warrant for al- Bashir. However, while under Article 27 of the Rome Statute al- Bashir does not have immunity before the ICC, he retains immunity under customary international law. This means that South Africa is under an obligation towards to Sudan not to arrest and surrender. The issuance of an arrest warrant by South African courts against al- Bashir may itself amount to a violation of his immunity and inviolability.<sup>60</sup>

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<sup>51</sup> *Ibid.*

<sup>52</sup> S 8 (1) of the Implementation Act.

<sup>53</sup> See generally s 10 of the Implementation of Act, titled ‘Proceedings before competent court after arrest for the purposes of surrender’.

<sup>54</sup> S 10 (1) of the Implementation Act.

<sup>55</sup> S 10 (5) of the Implementation Act. (Emphasis added)

<sup>56</sup> S 10 (8) of the Implementation Act.

<sup>57</sup> S 11 of the Implementation Act.

<sup>58</sup> S 9 of the Implementation Act.

<sup>59</sup> Copy of the endorsed arrest warrant on file with the author.

<sup>60</sup> See generally *Arrest Warrant case*, *supra* note 38.

The Implementation Act is generally viewed as following the approach of the Rome Statute and removing immunity. Du Plessis for example states unequivocally that under the Implementation Act, the jurisdiction of South African courts ‘trump immunities which usually attach to officials of governments.’<sup>61</sup> This assertion is based on section 4(2) of the Implementation which provides that notwithstanding any other law to the contrary, including customary international law or treaty law, the fact that a person was a Head of State or government or state official is neither a ‘defence to a crime’ or ‘ground for possible reduction of a sentence’. Yet the ordinary meaning of these words does not amount to an ouster of immunity. This provision rather addresses the criminal accountability of an individual, that is, the substantive accountability or responsibility, whereas immunity is a procedural notion applying to the ‘right’ of a court to entertain a matter. The International Court of Justice has held in this respect that ‘immunity from criminal jurisdiction ... does not mean impunity...’<sup>62</sup> More to the point, the ICJ stated that ‘[i]mmunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts.’<sup>63</sup> In this respect, it is worth pointing out that Article 27 of the Rome Statute contains two paragraphs. The first paragraph provides that the official capacity of an accused, including their capacity as a Head of State, ‘shall in no case exempt a person from criminal responsibility’.<sup>64</sup> Like the section 4(2) provision that official capacity is not a defence to crime, this provision removes official capacity as a substantive defence to the commission of crimes but does not address the matter of immunity. Article 27, however, contains a second paragraph, not included in the Implementation Act, which states that ‘[i]mmunities ... which may attach to the official capacity of a person ... shall not bar the Court from exercising jurisdiction.’<sup>65</sup> This suggests that section 4(2) of the Implementation Act does not remove immunities at all, but applies only to the availability of defences to the commission of crime. Indeed, in a well-considered analysis of the matter, du Plessis, while suggesting that section 4(2) does remove immunity recognises this distinction and states that it will be up to the Courts to interpret the provision.<sup>66</sup> There is another reason why reliance on section 4(2) to remove immunities is ill-considered. It should be remembered that section 4(2) applies to the exercise of jurisdiction over Rome Statute crimes by the South African courts i.e. it is not directly applicable to cases of arrest and surrender.

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<sup>61</sup> See du Plessis, *supra* note 45, at 474.

<sup>62</sup> *Arrest Warrant case*, *supra* note 38, at § 60.

<sup>63</sup> *Ibid.*

<sup>64</sup> Art 27(1) of the Rome Statute.

<sup>65</sup> Art 27(2) of the Rome Statute.

<sup>66</sup> See du Plessis, *supra* n 45, at 476.

Although section 4(2) neither removes inviolability nor applies to arrest and surrender, there is another provision in the Implementation Act that applies to arrest and surrender. Section 10(9) of the Implementation Act provides that the fact that a person is, inter alia, a Head of State ‘does not constitute a ground for refusing to issue an order’ for surrender. As du Plessis points out, this provision is unambiguous in its effect, i.e. the mere fact that a person is entitled to inviolability is in itself not a justification for not ordering surrender.<sup>67</sup> This means that even if a South African court itself cannot exercise jurisdiction over a Head of State like al- Bashir, this does not apply to the arrest and surrender processes described above. It is noteworthy that while Article 98 of the Rome Statute provides an exception to the duty to cooperate on the basis of immunity as described above, a similar provision does not exist in the Implementation Act. Indeed section 10(9) of the Implementation Act, stating that the status of a person is not a ground for refusing surrender, suggests that the legislator intended to explicitly exclude the effects of Article 98.

In light of the above, the following two conclusions can be drawn regarding the text of the Implementation Act as pertains to heads of state like al-Bashir. First, South African courts are not permitted to exercise jurisdiction over heads of state, even in relation to Rome Statute crimes. In this regard, the provisions of section 4(2) of the Implementation apply only to criminal responsibility and not to procedural immunities. Second, notwithstanding the retention of immunity before South African courts for the purposes of the exercise of jurisdiction over Rome Statute crimes, inviolability *per se* is not a ground for not ordering arrest and surrender. It should be noted, however, that while section 4(2) of the Implementation Act contains the qualifier, ‘[d]espite anything to the contrary’, section 10(9) is not similarly qualified. This means that section 10(9) of the Implementation Act does not have the ‘trumping’ effect of section 4(2) and should be read, ‘without doing violence to [its] wording’,<sup>68</sup> in such a way as being consistent with other legislative rules.

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<sup>67</sup> S 10(9) of the Implementation Act, which provides as follows: ‘The fact that a person to be surrendered is a person contemplated in section 4 (2) (a) or (b) does not constitute a ground for refusing to issue an order contemplated in subsection (5).’

<sup>68</sup> *Arse v Minister of Home Affairs and Others* 2012 (4) SA 544 (SCA), at § 19.

## **6. In Search of Legal Coherence in an Apparently Incoherent Network of Rules**

### **6.1 General**

While the Implementation Act applies to the case of Al- Bashir, there are conflicts between the different legal rules at various levels, making the legal position unclear at best and incoherent at worst. The Implementation Act, while in my view retaining al-Bashir's immunity before South African courts for the purposes of prosecution, strips him of inviolability for the purposes of arrest and surrender – an essential element of immunity. At the one level, this creates a conflict with the rules of customary international law. Paradoxically, the same provisions of the Implementation Act stripping al-Bashir of his inviolability are not only consistent with, but in furtherance of, other rules of international law in the form of the Rome Statute. Thus, paradoxically, the Implementation is both at odds and in line with international law. This is an important point because the international law friendly framework requires that our domestic law is interpreted in the light of international law and South Africa's international law obligations. If our international law obligations themselves are conflicting, the task of an interpreter seeking to make sense of the various rules becomes arduous.

The multi-layered conflict described above, i.e. the conflict between the Implementation Act and customary international law as one layer; and conflict between customary international law and the Rome Statute as another layer; is further exacerbated by the fact that there appears to also be a conflict in the domestic laws. The Diplomatic Immunities and Privileges Act (hereinafter the 'DIPA') has provisions that require the respect of Bashir's immunities.<sup>69</sup> The law, as it pertains to the duty to arrest and surrender of al-Bashir, is therefore complex as it consists of various rules that are both mutually reinforcing and conflicting.

### **6.2 International Law and the Duty to Arrest and Surrender**

As stated above, it is settled law that heads of state, like al-Bashir, have immunity *ratione personae* before the domestic courts of foreign states.<sup>70</sup> The International Law Commission (hereinafter the 'ILC') has described immunity *ratione personae* as immunity attaching to the

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<sup>69</sup> Diplomatic Immunities and Privileges Act 37 of 2001.

<sup>70</sup> See *supra* note 38.

so-called Troika, i.e. heads of state, heads of Government and Ministers for Foreign Affairs.<sup>71</sup> It is clear from the work of the ILC that immunity includes inviolability.<sup>72</sup> The obligations on South Africa to respect the immunity (including the violability) of al-Bashir is owed to Sudan by virtue of customary international law.

Although the Rome Statute, in Article 27, does not recognise immunity for proceedings before the Court, as stated above, this applies to proceedings before the ICC itself and does not affect the customary international law rules governing the relationship between states that are party to the Rome Statute and states that are not party to the Rome Statute.<sup>73</sup> The judgment of the NGHC in *Southern African Litigation Centre v the Minister of Justice*, however, suggests that by virtue of Article 27 and the nature of the crimes for which al-Bashir stands accused, the obligation owed to Sudan to respect al-Bashir's immunities no longer exists.<sup>74</sup> However, this is clearly not correct. The ICJ, in the *Arrest Warrant* case, dismissed the notion that immunity ceases to exist in cases of serious international crimes.<sup>75</sup> In another judgment, the ICJ emphasised that the rule of international law relating to immunities 'is one of the fundamental principles of the international legal order.'<sup>76</sup>

I should emphasize that Article 27 is itself not inconsistent with customary international law, since the rules of customary international law to which the ICJ refers in the *Arrest Warrant* case operate as between states and are not applicable to international courts and tribunals.<sup>77</sup> While Article 27 of the Rome Statute itself is not inconsistent with customary international law, the fact that the Court may exercise jurisdiction over heads of state, including of non-state parties, creates the potential that state parties may be obliged, under the cooperation

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<sup>71</sup> See Draft Article 3 of the Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction, *supra* note 38.

<sup>72</sup> See § 5 of the Commentary to Draft Article 1 of the Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction, *supra* note 38. See also *Arrest Warrant case*, *supra* note 38, at § 58.

<sup>73</sup> Article 27(2) provides that immunities 'shall not *bar the Court* from exercising jurisdiction' (emphasis added).

<sup>74</sup> *Southern African Litigation Centre v Minister of Justice*, *supra* note 2, at § 28.8.

<sup>75</sup> *Arrest Warrant case*, *supra* note 38, at § 58 where the Court states that it 'has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability ...'

<sup>76</sup> *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)*, Judgment of 3 February 2012, *ICJ Reports* 2012, 99, at § 56. See also the separate opinion of Judge *ad hoc* Bula Bula in the *Arrest Warrant case*, *supra* note 38, at § 31 and 41.

<sup>77</sup> *Arrest Warrant case*, *supra* n 38, at § 58, where, after considering provisions in instruments establishing international courts and tribunals which exclude immunity, finds that 'these rules likewise do not enable it to conclude that [an exception to immunities] exists in customary international law *in regard to national courts*.' (Emphasis added).

framework described in Section 3 above, to cooperate in the arrest and surrender of heads of non-state parties. Fulfilment of the duty to arrest and surrender a head of non-state party would place a state party in breach of an international obligation owed to such a non-state party and thus engage the international responsibility of that state. In the current case, the duty on South Africa to arrest and surrender al-Bashir would place South Africa in the position of having to breach the obligation owed to Sudan not to violate al-Bashir's immunities. As described above, the Rome Statute foresees this conflict and attempts to address by creating an exception to cooperation in Article 98 of the Statute.<sup>78</sup>

How Article 98 impacts on the duty to cooperate in the arrest and surrender of al-Bashir has been the subject of conflicting judicial decisions and literature. The majority of scholars take the view that because the situation in Sudan was referred to the ICC by the Security Council, by virtue of the priority accorded to Security Council decisions, Sudan becomes like a Party to the ICC such that the exception to Article 98 does not apply to it.<sup>79</sup> It is apposite to point out that the NGHC in *Southern African Litigation Centre v the Minister of Justice* appears to rely on Security Council Resolution 1593 to support its conclusion that al-Bashir does not have immunity, although the NGHC does not explain the basis for its conclusion.<sup>80</sup> However, in its first two cases of non-cooperation, the ICC itself did not adopt this approach.<sup>81</sup> In a decision that was widely criticised, including by the current author, the Court proceeded to decide the matter as if Article 98 was not part of the Statute.<sup>82</sup> The Court, in essence, held that immunity did not apply before international courts.<sup>83</sup> While, in my view, this assessment is correct, it has nothing to do with Article 98 since the latter provision is not concerned with immunity before the Court – the subject of Article 27 – but rather with the duty to cooperate and the exception from that duty.

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<sup>78</sup> Article 98(1) provides that the 'Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under the international law with respect to the State or diplomatic immunity of a person or property of a third State.' Article 98(2) provides that the 'Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements ...'

<sup>79</sup> See for example Akande, *supra* note 43.

<sup>80</sup> During the hearing, on being asked which specific provision of Resolution 1593 removed the immunity of al-Bashir, Counsel for the Applicant pointed to paragraph six, which purports to remove jurisdiction over nationals of non-state parties. Needless to say, this provision is completely unrelated to the question of immunities, but the response satisfied the Court and did not draw a response from Counsel for the Respondent.

<sup>81</sup> See *Malawi and Chad decision*, *supra* note 3.

<sup>82</sup> For discussion, see the literature cited in *supra* note 43

<sup>83</sup> See, e.g. *Malawi decision*, *supra* note 3, at § 14.

Following the criticism, when next faced with a case in which Article 98 was invoked to justify non-cooperation; the Pre-Trial Chamber II reversed the finding in *Malawi* and *Chad* concerning the scope of Article 27.<sup>84</sup> First, the Court held that Article 27, as a general rule, applies to heads of state parties and that heads of state parties would, in principle enjoy immunities before the ICC.<sup>85</sup> Although the question of immunity before the international court itself is only of tangential relevance for this article, I pause to point out that there is no basis for this conclusion in the Rome Statute. As I read the Statute, Article 27 applies to anyone who happens to find themselves before Court. Moreover, such a view is based on assumption that customary international law establishes immunity for proceedings before international courts – it does not.<sup>86</sup> Having made the conclusion that, in principle heads of non-state parties are immune from the jurisdiction of the ICC, the Pre-Trial Chamber then asserts that the duty of cooperation with the ICC imposed by the Security Council on Sudan, amounts to a waiver of the immunity of Sudanese official.<sup>87</sup> While this is not exactly the same as the view espoused by the majority of authors on this subject, it is similar in that it is based on the fact that the situation in Sudan was referred to the ICC by the Security Council.

The idea espoused by the majority of writers, that the referral places Sudan in the position of a state party, is not accepted by some authors.<sup>88</sup> The problem is that it is based purely on a fiction, and cannot be substantiated either by reference to the Rome Statute or Resolution 1593 itself. For one thing, Resolution 1593 places a duty on Sudan, it does not waive immunities of Sudan. The Council does have the power to deviate from the rules of international law, but whenever it does, it does so expressly and not by implications. Linked to this point, as a general rule, immunity is never waived implicitly but explicitly.<sup>89</sup> The notion of an implicit waiver of immunity is, therefore, a fiction. Second, subsequent to the adoption of Resolution 1593, and in the light of the controversy about whether Resolution

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<sup>84</sup> See the *DRC decision*, *supra* note 3, at § at 26 *et seq.* For a detailed description of the decision and responses to the criticisms against it, see Boschiero, *supra* note 37.

<sup>85</sup> *Ibid*, at § 26, Pre-Trial Chamber states ‘Given that the Statute is a multilateral treaty governed by the rules set out in the Vienna Convention on the Law of Treaties, the Statute cannot impose obligations on third States without their consent. Thus, the exception to the Court’s exercise of jurisdiction provided for in Article 27 should, in principle, be confined to those States Parties who have accepted it.’ At § 27, the Pre-Trial Chamber states that when ‘the exercise of jurisdiction by the Court entails the prosecution of a Head of State of a non-State Party, the question of personal immunities might validly arise. The solution provided for in the Statute to resolve such conflicts is found in Article 98(1) of the Statute.’

<sup>86</sup> See also Tladi ‘The Immunity Provision in the AU Amendment Protocol’, *supra* note 40, at 13

<sup>87</sup> See *DRC decision*, *supra* note 3, at § 29.

<sup>88</sup> See, e.g. Gaeta, *supra* note 43.

<sup>89</sup> See International Law Commission, *Third Report on the Immunity of State Officials from Foreign Criminal Jurisdiction*, by the Special Rapporteur, Mr Roman Kolodkin, 24 May 2001 (A/CN.4/646), §§ 39 – 42.

1593 affects the immunities of al-Bashir, the Council could have adopted a subsequent resolution confirming that indeed its intention was to waive the customary international law immunities of Sudanese officials. Moreover, twice a year, after the Prosecutor's briefing on ICC's activities in the situation in Sudan, members of the Security Council hold a debate on the report of the Prosecutor. The only member of the Security Council that has consistently referred to the question of immunities has been Russia. Russia's position has consistently been that Security Council Resolution 1593 had no effect on the immunities enjoyed under international law by the Sudanese.<sup>90</sup> Moreover, the ICC transmitted its decisions on the non-cooperation of Malawi, Chad and the DRC to the Security Council. The Council has never acted on them, suggesting that, in its view, there is no non-compliance with its referral in Resolution 1593.

In my view whether or not there is a duty under the Rome Statute to arrest al-Bashir, is dependent on the interpretation one gives to Article 98, and, in particular, the phrase 'State and diplomatic immunity of a person or property of a third State'. Based on the ordinary meaning of these words, in their context and in the light of the object and purpose, since al-Bashir is neither a diplomat nor a state, the exception in Article 98 does not apply to him. Others, notably Claus Kreß, have argued that, in the context of criminal law, state immunity must be given a broader meaning to include Head of State immunity since it is difficult to see how a state could be arrested and surrendered.<sup>91</sup> It is not necessary to repeat the debate here. It suffices to say that if the argument proposed by Kreß is accepted, then there is no duty under the Rome Statute to arrest and surrender the Head of State of a State which is not party to the Statute (save if there is reliance on the Security Council resolution 1593). If, on the other hand, the narrow interpretation of 'State immunity' is accepted, then there is a duty to

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<sup>90</sup> For example, during the Security Council's consideration of the Report of the Prosecutor of the ICC in relation to the situation in Sudan, the Russian representative emphasized 'the important of the implementation by States of the relevant obligations regarding cooperation with the Court, *while complying with norms of international law in the matter of immunity of senior State officials.*' See Security Council per verbatim record, S/PV.6887 (13 December 2012), at 16. In the following year, the Russian Federation made a similar statement. See S/PV.7080 (11 December 2013). The only other state to refer to immunities in the course of these debates has been Australia, which was not on the Council when the Council referred the situation of Sudan to the ICC, and even their statement appears to be concerned with immunities before the ICC itself and not the customary international law immunities between states S/PV.7337, at 4.

<sup>91</sup> C. Kreß, 'The International Criminal Court and Immunities under International Law for States Not Party to the Court's Statute' in M. Bergsmo and L. Yan (eds), *State Sovereignty and International Criminal Law* (2012), at 236. The view of Claus Kreß is that the resolution of the al-Bashir matter lies not in Article 98. Rather, like Akande, Bashir cannot enjoy the benefits of Article 98 because the situation in Darfur was referred to the ICC by the Security Council.

arrest and surrender al-Bashir *under the Rome Statute*. This duty, however, would be in conflict with the rules of customary international law.

The complicated state of international law in relation South Africa's obligation with respect to al-Bashir under customary international law and the Rome Statute is further exacerbated by the fact that South Africa, when hosting the AU Summit, has had to conclude the Host Agreement with the AU, as is customary in these cases. As explained above, the NGHC interpreted the Host Agreement as not applying to Heads of State since the Host Agreement 'does not confer immunity on member states or their representatives or delegates.'<sup>92</sup> Rather, according to the NGHC, the Host Agreement 'confers immunity on the members and staff of the AU Commission, and on delegates and representatives of Inter-governmental Organisations.'<sup>93</sup> This interpretation is grossly inaccurate for the following two reasons. First, it ignores the fact that Article VIII of the Host refers to the General Convention on the Privileges and Immunities of the AU, and in particular, Articles V and VII of the said Convention. Article V (1) of the General Convention, as described above, provides that '[r]epresentatives of Member States' shall be accorded with 'immunity from personal arrest or detention ...' thus incorporating said immunities into the Host Agreement. Second, and more importantly, this interpretation ignores the basic rule of interpretation that words in a treaty are to be given their ordinary meaning, in their context and in the light of object and purpose of the treaty. This result of a non-contextual interpretation is absurd and would entail that persons not formally participating in the AU Summit are accorded immunities but actual participants would not. Therefore, one should conclude that in reality the Host Agreement also provides immunity to al-Bashir.

While the international law relating to the arrest and surrender of al-Bashir is in conflict, the conflict is not inevitable. It is generally accepted by all states and commentators that the because of Article 27, officials of states parties do not enjoy immunities for Rome Statute crimes, even from the jurisdiction of other state parties. In other words, if Sudan were a state party, then it would not be free to rely on the immunities of its heads of state to prevent the arrest and surrender of al-Bashir. This means that conflict of obligations in relation to the arrest and surrender of al- Bashir only arises in two situations. The first is where a head of a non-state party is accused of Rome Statute crimes on the territory of state

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<sup>92</sup> *Southern African Litigation Centre v the Minister of Justice, supra* n 2, at § 28.10.1

<sup>93</sup> *Ibid.*

party, i.e. the ICC has jurisdiction over a situation on the territory of state party. The second is in the case of a Security Council referral. In the case of the latter, the conflict would not arise if the Council had placed an obligation on all states to arrest and surrender. In such a case, the obligation to arrest and surrender would flow from the UN Security Council and would, by virtue of Article 103 of the Charter, trump other obligations – and the Council is remains free to decide imposing such an obligation. This leaves the possible conflict only in those cases, which are yet to manifest, in which a head of non-state party is sought by the ICC for crimes committed on the territory of a state party.

### **6.3 *Other Domestic Legislation Relevant to Immunities***

In assessing the state of the domestic law with respect to the duty to arrest and arrest al-Bashir, the starting point must be the Rome Statute Implementation Act. While section 4(2) of the Implementation Act reserves itself a place of priority by declaring that ‘despite any other law to the contrary’, status shall not be a defence against responsibility. It is important to emphasise that section 4(2) does not apply to the question of arrest and surrender. Section 10(9) of the Implementation Act, which addresses arrest and surrender and provides that status shall not be a reason for refusing to arrest and surrender, does not include the same ‘despite any other law to the contrary’. Thus in assessing the state of South African law in relation to the arrest and surrender of al-Bashir, section 10(9) does not occupy a higher position than other legislative acts. It thus becomes important to consider other rules of South African law potentially applicable to the question of the arrest and surrender of al-Bashir.

In addition to the Implementation Act, therefore, an assessment of the legal position in relation to the arrest and surrender of al-Bashir in South Africa must take into account other legislative acts. The DIPA has several important provisions in this regard. Section 4 of the DIPA provides that a Head of State enjoys the immunity that ‘heads of state enjoy in accordance with the rules of customary international law’.<sup>94</sup> Although the NGHC dismissed this basis, principally on the ground that customary international law does not recognise immunity for Rome Statute crimes, as was explained earlier, this assertion has no basis in

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<sup>94</sup> S 4(1)(a) of the DIPA.

law. Section 4 of the DIPA, recognising the immunity of heads of state under customary international law, must also be accounted for in the determination of the South African law.

Additionally, section 6(1) of the DIPA provides that ‘representatives of any state, participating in an international conference or meeting convened in the Republic enjoy ... such privileges and immunities as ... are specifically provided for in any agreement entered into for that purpose...’<sup>95</sup> As noted above, contrary to the NGHC interpretation, the Host Agreement entered into for the purpose of the Summit does provide immunities for heads of state, including al-Bashir. In connection with the AU Summit, the NGHC refused to convey immunities also on the grounds that the Minister’s Minute, which section 6(2) requires, could not trump the legislative provisions in the Implementation Act. This, however, is based on the erroneous belief that it is the Minister’s Minute that confers immunity. However, while section 6(2) of the DIPA requires the Minister of International Relations and Cooperation to recognise the meeting, it is not the Minister’s minute that confers immunity, but the DIPA itself, in particular section 6(1). In accordance with the Constitutional Court judgment in *Quagliani*, section 6(1) (b) provides for the incorporation of the Host Agreement and the immunities provided therein.<sup>96</sup>

Thus, at the domestic law level, there is an apparent conflict between section 10(9) of the Implementation Act and the various provisions of the DIPA under which al-Bashir could claim immunity and inviolability. This conflict has to be addressed through ordinary rules of interpretation, in particular, the rule that so far as possible legislative provisions should be interpreted in such a way as to promote consistency.<sup>97</sup> What outcome such a process of interpretation yields is difficult to predict. Given the fundamental nature of the rules of immunity to international law and the international system,<sup>98</sup> one possible interpretation would be to require the respect of immunity only for international conferences of international organisations such as the AU or the UN. This would mean that for other visits including state visits and personal visits, al-Bashir, though still entitled to immunity and inviolability under international law, would not have such protection under South Africa law.

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<sup>95</sup> S 6(1) (b) of the DIPA.

<sup>96</sup> *President of the Republic of South Africa and Others v Quagliani, President of the Republic of South Africa and Others v Van Rooyen and Another; Goodwin v Director-General, Department of Justice and Constitutional Development and Others* (CCT24/08, CCT52/08) [2009] ZACC 1; 2009 (4) BCLR 345 (CC); at § 37 and especially at § 42. See also generally J. Dugard, *International Law: A South African Perspective* (4th edn.,Juta, 2011), at 55.

<sup>97</sup> *Arse v Minister of Home Affairs*, *supra* note 68, at § 19.

<sup>98</sup> See *Jurisdictional Immunities of the State case*, *supra* note 76, at § 56.

The reasoning for the differentiation is that with respect to other visits, South Africa is free not to invite him – or to invite him but require him not come to South Africa.

## 7. Concluding Remarks

In an earlier contribution I have written that the debates surrounding the ICC have tended to be characterised by the hero-villain dichotomy.<sup>99</sup> The events surrounding al-Bashir's visit to South Africa have been illustrative of this trend. Many who took the view that South Africa ought to have arrested al-Bashir, often took the position that those who disagreed were protecting a murderous 'Hitler of Africa'.<sup>100</sup> Those who felt that South Africa did right by not arresting al-Bashir take to criticising the ICC, calling it imperialists and targeting Africa.<sup>101</sup>

Amidst the name calling and point-scoring, basic rules of international law were forgotten. The law, both domestic and international, represents a network of conflicting rules which place a duty to arrest and surrender and, simultaneously, an obligation to refrain from doing so. However, relying on available tools, sense can be made of this network of rules. For South African domestic law, tools include rules of interpretation to address apparently conflicting legislative norms. In cases of Security Council referrals, to prevent conflict of obligations, the Council should, when referring situations, place an obligation on all states to cooperate with the Court. This would provide authority for states wishing to cooperate, but constrained by other obligations, to cooperate with the Court notwithstanding contrary obligations.

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<sup>99</sup> See, e.g. *supra* note 21 at 381.

<sup>100</sup> See e.g. N Makhubu ' "Hitler of African" had 300 000 Blacks Slain" available at <http://www.pressreader.com/south-africa/pretoria-news/20150626/281543699572327/TextView> (last accessed 2 July 2015).

<sup>101</sup> M Pheko 'The International Criminal Court is an Instrument of Imperialism!!' available at <http://mayihlomenews.co.za/the-international-criminal-court-is-an-instrument-of-imperialism/> (last accessed 3 July 2015).