

The Duty on South Africa to Arrest and Surrender President 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 Summit Meeting of the African Union. The Sudanese President, Omar Hassan Al-Bashir, under an arrest warrant of the International Criminal Court (ICC) for, inter alia, genocide, attended this summit. As a State Party to the ICC 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 treaty law, namely, the Host State Agreement under which the summit was held, not to arrest Al-Bashir. The South African High Court, applying South Africa's Implementation of the Rome Statute Act as well as the ICC Statute, concluded that there was a duty to arrest Al-Bashir, and additionally, that there was no countervailing duty not to arrest him. This article, against the background of the decision of the High Court as well as the decision of the Pre-Trial Chamber of the ICC with respect to the Democratic Republic of the Congo, considers the various legal rules, both international and domestic, applying to the case of Al-Bashir. The article concludes that the judgment of the High Court ignores fundamental rules of international law.

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1. Introduction: Statement of the Issues

In June 2015, President Omar Hassan Al-Bashir of Sudan attended the African Union 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 by the International Criminal Court (ICC).¹ With Al-Bashir's attendance of the summit, the *potential* conflict of obligations that arises as a result 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 (High Court of South Africa) determining that there was a duty on the part of South African authorities to arrest Al-Bashir and to surrender him to the ICC.²

While South Africa's experience with respect to this 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 failure to cooperate with the duty to arrest and surrender Al-Bashir before the Bureau of the Assembly of States Parties to the ICC. In other instances, states such as the Democratic Republic of the Congo (DRC), Malawi and Chad, appeared before the Pre-Trial Chambers of the ICC.³ Before June 2015, there has been already seven cases of non-execution of the ICC's order for the arrest and surrender of Al-Bashir, namely by Kenya, Djibouti, Chad (twice), Malawi,

- 1 On 4 March 2009, the Pre-Trial Chamber I issued a warrant of arrest for President Al-Bashir for crimes against humanity, see Warrant of Arrest for Omar Hassan Ahmad Al-Bashir, *Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber I, 4 March 2009. On 12 July 2010, the ICC issued a second warrant of arrest for genocide, see Second Warrant of Arrest for Omar Hassan Ahmad Al-Bashir, *Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber I, 12 July 2010.
- 2 *Southern African Litigation Centre v. Minister of Justice and Constitutional Development and Others* (27740/2015), High Court of South Africa, Gauteng Division, Pretoria, 24 June 2015 (hereinafter 'High Court Decision'). The matter is far from over at the time of writing this article. Although, at the time of writing, leave to appeal has been denied by the High Court, the respondents have indicated an intention to petition, directly, the Supreme Court of Appeal. In addition, at the time of writing an investigation that could lead to a contempt of court process was underway, the Pre-Trial Chamber of the ICC has requested South Africa to provide information 'on the circumstances surrounding' Al-Bashir's departure with a view to making a decision under Art. 87(7) ICCSt., and South African authorities have been publicly talking about withdrawal from the ICCSt. in consequence of the High Court Decision.
- 3 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, *Al Bashir* (ICC-02/05-01/09-139), Pre-Trial Chamber I, 12 December 2011 (hereinafter 'Malawi Decision'); 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, *Al Bashir* (ICC-02/05-01/09-140), Pre-Trial Chamber I, 13 December 2011 (hereinafter 'Chad Decision'); 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 (hereinafter 'DRC Decision').

Nigeria and the DRC. 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 African Union (AU) decisions, has avoided any potential conflict of obligations between the AU system and the ICC Statute by consistently 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 Jacob Zuma, the 2010 World Cup and the funeral of former President Nelson Mandela. This has now been confirmed in a judgment of a South African court.⁴ However, the decision to host the AU summit made the potential conflict real for South Africa. The tried and tested method of requesting 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 view, there was no incentive for Sudan to agree not to attend at the highest level, since attendance would provide Sudan with an opportunity to embarrass the ICC — that South Africa could be embarrassed in the process would only be collateral damage.

In 2012, the USA faced a similar, although slightly less complex dilemma when Al-Bashir decided that he would attend a high-level segment of the United Nations (UN) General Assembly.⁵ While there may be a strong political interest in the USA to arrest and surrender Al-Bashir, the USA is not a State Party to the ICC Statute and, therefore, is not under an obligation to arrest under the Statute. At the same time, the USA has obligations both under customary international law and the UN Charter. On the other hand, the USA has obligations under the host country agreement with the UN not to arrest and surrender a state official, such as Al-Bashir, invited by the UN on official business. In the end, with the specific case having kept US policymakers at the edge of their collective seats, Al-Bashir decided not to attend this 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 of states, its membership within the AU, 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 ICC Statute: the Implementation of the Rome Statute of the International

4 See for discussion High Court Decision, § 12.

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

Criminal Court Act, 2002 (Implementation Act).⁶ 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 in the tensions between the two bodies. While South Africa has not been shy, not only at AU events, but also so-called ‘ICC friendly’ events,⁷ to question some practices of the Court, it has also sought to lower the anti-ICC sentiments at AU events.⁸ Its role as a peacemaker in tensions between the AU and ICC, 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 ICC 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 ICC Statute that would 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 judgment handed down by the North Gauteng High Court in *Southern African Litigation Centre*. After a description of the judgment, I outline the duty to cooperate under the ICC 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

6 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’, 5 *Journal of International Criminal Justice (JICJ)* (2007) 460. See also A. Katz, ‘An Act of Transformation: The Incorporation of the Rome Statute of the ICC into National Law in South Africa’, 12 *African Security Review* (2003) 25.

7 See e.g. General Assembly Sixty-Seventh Session, Agenda Item 73, Report of the International Criminal Court, 1 November 2012, South African Statement on file with author: ‘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’. Similarly, in its statement on the same agenda item, during General Assembly Sixty-Fifth Session, South African Statement on file with author, 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’.

8 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 African Union decisions largely on account of South Africa’s view that obligations under the ICCSt. cannot simply be ignored. See 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), § 6.

rules, at both the domestic and international levels, before offering some concluding remarks.

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 North Gauteng High Court, 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 were 'compelled to take all reasonable steps to arrest President Al-Bashir'.⁹ 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 to place the discussion in context.

The decision of the Court in the *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 ICC Statute, heads of state do not enjoy immunity for crimes contained in the ICC Statute.¹⁰ In particular, the North Gauteng High Court stated that 'similar provisions [removing immunity] are expressed in the Implementation Act'.¹¹ The ICC Statute provisions on immunity, the Court held, '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'.¹² Additionally, the Court referred 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'.¹³

The second proposition forming the basis of the North Gauteng High Court's judgment relates to the content of the Host State Agreement between South Africa and the AU.¹⁴ The Host State Agreement provides, in part, that the South African government shall accord the members of the AU Commission and staff members, the delegates and other representatives of intergovernmental organizations attending the meetings the privileges and immunities set forth in Sections (C) and (D) and Articles V and VI of the General Convention

⁹ High Court Decision, § 2.

¹⁰ *Ibid.*, § 28.8.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*, §§ 28.9, 30, where the Court stated that Al-Bashir 'does not enjoy immunity in accordance with the rules of customary international law'.

¹⁴ Agreement between the Republic of South Africa and the Commission of the African Union on the Material and Technical Organization 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 from 14 to 15 June 2015 (on file with author) (hereinafter 'Host State Agreement').

on the Privileges and Immunities of the Organisation of African Unity (OAU).¹⁵

The General Convention on the Privileges and Immunities of the OAU (General Convention), for its part provides that '[r]epresentatives 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'.¹⁶

The North Gauteng High Court first determined that the General Convention is irrelevant for the purposes of disposing of the matter since South Africa never ratified it.¹⁷ Secondly, the North Gauteng High Court established that the Host State Agreement, on its terms, 'does not confer immunity on the Member States or their representatives or delegates'.¹⁸ Rather, the North Gauteng High Court asserted that it 'confers immunity on the members and staff of the AU Commission, and on delegates and representatives of Intergovernmental Organisations'.¹⁹ In other words, 'delegates' refers to delegates of intergovernmental organizations and not delegates of AU Member States.

The third important element of the North Gauteng High Court's decision is that the Minute in the Government Gazette 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'.²⁰ In other words, since the Minute in the Government Gazette recognizing the summit is subordinate legislation, it must be trumped by the provisions of the Implementation Act.

4. Obligation to Cooperate under the ICC Statute

A. Nuts and Bolts of Cooperation

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

15 Art. VIII Host State Agreement.

16 Sect. C, Art. V(1) General Convention.

17 See generally High Court Decision, § 28.4.

18 *Ibid.*, § 28.10.1.

19 *Ibid.*

20 *Ibid.*, § 31.

21 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 386.

22 See e.g. B. Swart, 'General Problems', in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II (Oxford University Press, 2002) 1589. See also B. Swart, 'Arrest and Surrender', in Cassese, Gaeta and Jones (eds), *ibid.*, 1640. A. Ciampi, 'The Obligation to Cooperate', in Cassese, Gaeta and Jones (eds), *ibid.*, 1607.

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.²³ 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 ICC Statute. Part Nine, on cooperation, contains 16 Articles, addressing various aspects of cooperation. Article 86 provides a general duty on State 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.²⁴ The ICC Statute also details the various forms of cooperation.²⁵ These include, for example, assistance with the identification and whereabouts of suspects, taking of evidence, questioning of persons, service of documents, execution of searches and freezing and seizure of assets.²⁶ In addition, the ICC Statute includes a catch-all 'any other type of assistance' not prohibited by law.²⁷

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

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 an individual who is national of a State Party.³² Where jurisdiction is based on the former element, that is, crimes occurring in the territory of a State Party, the nationality of the accused 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, that is, 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.

23 See Swart, *supra* note 22, at 1598.

24 Art. 87 ICCSt.

25 See generally Art. 93 ICCSt.

26 Art. 93 ICCSt.

27 Art. 93(1) ICCSt.

28 See generally, Arts 89, 90, 91, 92 ICCSt.

29 Art. 98(1) ICCSt.

30 See Art. 90 ICCSt.

31 Art. 91 ICCSt.

32 See Art. 12 ICCSt.

Al-Bashir is accused of committing crimes within the jurisdiction of the ICC,³³ committed in Darfur, Sudan. Sudan, of course, is not a State Party, and thus, 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 Statute, the ICC also has jurisdiction over a situation referred to it by the Security Council acting under Chapter VII of the UN Charter.³⁴ The Security Council referred the situation in Darfur in 2005 and thereby brought the crimes committed in Darfur within the jurisdiction of the Court.³⁵

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 State Parties *under the ICC Statute*, to cooperate with the Court, including in the arrest and surrender of Al-Bashir. It should be emphasized that there is no duty on State Parties to cooperate in relation to Al-Bashir under Security Council Resolution 1593, the resolution referring the situation in Darfur to the ICC.³⁶ Under this Resolution, a duty to cooperate is placed only on the situation state, Sudan, while State Parties have a duty to cooperate under the ICC Statute. The limited scope of the obligation to cooperate in Resolution 1593 has two implications relevant for the analysis below. First, non-State 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. Secondly, the duty of State Parties to cooperate with the ICC does not enjoy the superior status of obligations flowing from Chapter VII resolutions of the 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.³⁷

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.³⁸ This means that he is immune from the

33 Warrant of Arrest for Omar Hassan Ahmad Al Bashir, *Al Bashir* (ICC-02/05-01/09-1), Pre-Trial Chamber I, 4 March 2009; Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, *Al Bashir* (ICC-02/05-01/09-95), Pre-Trial Chamber I, 12 July 2010.

34 Art. 13 ICCSt.

35 SC Res. 1593, 31 March 2005.

36 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', *ISS Today*, 10 October 2014.

37 Cf. DRC Decision, which provides a contrary interpretation of the implications of SC Res., *supra* note 35. See also N. Boschiero, 'The ICC Judicial Finding on Non-Cooperation Against the DRC and No Immunity for Al Bashir Based on UNSC Resolution 1593', 13 *JICJ* (2015) 625. This interpretation of the law is evaluated below.

38 See generally Judgment, Case Concerning the Arrest Warrant 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), 14 February 2000 (hereinafter 'Arrest Warrant Judgment'); See Draft Articles 3 and 4 of the ILC Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction, provisionally adopted, in Report of the International Law

exercise of jurisdiction by a foreign state, including arrest.³⁹ Article 27 of the ICC Statute excludes the application of immunity in proceedings before the Court. This exclusion applies to any accused whether the person is a national of State Party or not.⁴⁰ Thus, under Article 27 of the ICC 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* that immunities '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',⁴¹ will be discussed in Section 6 of this article.

In the light of the rather expansive duty to cooperate in the ICC Statute, the application of Article 27 to official of non-State Parties could create a conflict of obligations for State 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 ICC Statute may, therefore, result in a violation of the obligations of such a State Party under customary international law. In recognition of this potential conflict, the ICC 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'.⁴² The precise implications of this exception, in particular as applied to Al-Bashir, have been the subject of disagreement amongst scholars and Pre-Trial Chambers of the ICC. The different interpretations are discussed below at Section 6 of this article.⁴³

Commission on the Work of its Sixty-Fifty Session, Official Records of the General Assembly, Sixty-Eighty Session, Supplement No. 10 (hereinafter 'Draft Articles on the Immunity of Officials'). Cf. High Court Decision, § 28.8.

39 See § 5 of the Commentary to Draft Article 1, Draft Articles on the Immunity of Officials, where the ILC 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'.

40 The author's views on the application of Art. 27 ICCSt. to officials of non-State Parties are reflected more fully in D. Tladi, 'The Immunity Provision in the AU Amendment Protocol: Separating the (Doctrinal) Wheat from the (Normative) Chaff', 13 *JICJ* (2015) 3, especially at 14 *et seq.* See also D. Tladi, 'Immunity in the Era of "Criminalisation": The African Union, the ICC and International Law', *Japanese Yearbook of International Law* (2015) (forthcoming).

41 High Court Decision, § 28.8.

42 Art. 98(1) ICCSt.

43 See DRC Decision; Malawi Decision; Chad Decision. 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', 51 *International Legal Materials* (2012)

5. Giving Domestic Effect to Cooperation in South Africa

The Implementation Act was adopted in 2002 and provides for the comprehensive implementation of the ICC Statute.⁴⁴ It provides for the criminalization and prosecution of crimes falling within the ICC Statute as well as for cooperation with the ICC.⁴⁵ While the national criminalization and prosecution element, provided for in the first chapter 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 courts of South African jurisdiction even where the alleged offence was committed outside of South Africa and by a non-national.⁴⁶ 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.⁴⁷

Chapter Four of the Implementation Act provides for cooperation. For the most part, the Act follows closely the provisions of the ICC 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 ICC Statute, including the catch all ‘any other type of assistance’.⁴⁸ The Implementation Act then proceeds to provide details of the modalities for providing assistance.⁴⁹ As stated above, by far the most far-reaching form of cooperation is the duty to arrest and surrender. The Implementation Act, like

393; D. Akande, ‘The Legal Nature of the Security Council Referrals to the ICC and its Impact on Bashir’s Immunities’, 7 *JICJ* (2009) 333; P. Gaeta, ‘Does President Al Bashir Enjoy Immunity from Arrest?’ 7 *JICJ* (2009) 315; D. Tladi, ‘The ICC Decisions in Chad and Malawi: On Cooperation, Immunities and Article 98’, 11 *JICJ* (2013) 199. See also W. Schabas, ‘Introductory Remarks: Annual Ben Ferencz Session’, 106 *American Society of International Law Proceedings* (2012) 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! Blog of the European Journal of International Law, February 2012, available online at <http://www.ejiltalk.org/the-african-unions-response-to-the-iccs-decisions-on-bashirs-immunity-will-the-icj-get-another-immunity-Arrest-and-Surrender-of-President-Al-Bashir-under-South-African-and-International-Lawcase/> (visited 1 July 2015).

44 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’, 16 *South African Journal of Criminal Justice* (2003) 1, at 14 *et seq.*

45 *Ibid.*, at 2. See also M. du Plessis, ‘South Africa’s Implementation of the ICC Statute: An African Example’, 5 *JICJ* (2007) 460, at 461–462.

46 See Sect. 4(3) 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’.

47 *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)).

48 See Sect. 14 Implementation Act, in particular Sect. 14(l) for the catch-all provision.

49 See du Plessis, *supra* note 44, at 10 *et seq.*

the ICC 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'.⁵⁰ 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 magistrate 'must endorse the warrant of arrest'.⁵¹ The only condition, it appears, is that the arrest warrant and accompanying documents must show 'that there are sufficient grounds for the surrender of that person to the' ICC.⁵²

The provisions in the Implementation Act relating to the actual surrender of a suspect under an arrest warrant of the ICC are quite elaborate.⁵³ The Act requires that a magistrate hold an enquiry 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.⁵⁴ 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'.⁵⁵ The Act does provide for appeal to the High Court on the grounds that one of the above-mentioned requirements has not been met.⁵⁶ Other aspects covered in the Implementation Act include processes related to the removal of the person once the appeals processes have been completed,⁵⁷ and provisional arrests.⁵⁸

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 2009, 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.⁵⁹ This means that there is currently a South African arrest warrant for Al-Bashir. However, while under Article 27 of the ICC 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

50 Sect. 8(2) Implementation Act.

51 *Ibid.*

52 Sect. 8(1) Implementation Act.

53 See generally Sect. 10 Implementation Act, entitled 'Proceedings before competent court after arrest for the purposes of surrender'.

54 Sect. 10(1) Implementation Act.

55 Sect. 10(5) Implementation Act (emphasis added).

56 Sect. 10(8) Implementation Act.

57 Sect. 11 Implementation Act.

58 Sect. 9 Implementation Act.

59 Copy of the endorsed arrest warrant on file with the author.

arrest warrant by South African courts against Al-Bashir may itself amount to a violation of his immunity and inviolability.⁶⁰

The Implementation Act is generally viewed as following the approach of the ICC Statute and removing immunity. Max 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.’⁶¹ This assertion is based on Section 4(2) of the Implementation Act, 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 (ICJ) has held in this respect that ‘immunity from criminal jurisdiction ... does not mean impunity.’⁶² More to the point, the ICJ stated that ‘[i]mmunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts.’⁶³ In this respect, it is worth pointing out that Article 27 of the ICC 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.’⁶⁴ Like the provision under Section 4(2) 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.’⁶⁵ 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 recognizes this distinction and states that it will be up to the courts to interpret the provision.⁶⁶ 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 ICC Statute crimes by the South African courts, that is, it is not directly applicable to cases of arrest and surrender.

Although Section 4(2) neither removes inviolability nor applies to arrest and surrender, there is another provision in the Implementation Act that applies

60 See generally Arrest Warrant Judgment.

61 See du Plessis, *supra* note 44, at 474.

62 Arrest Warrant Judgment, § 60.

63 *Ibid.*

64 Art. 27(1) ICCSt.

65 Art. 27(2) ICCSt.

66 See du Plessis, *supra* note 44, at 476.

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. The mere fact that a person is entitled to inviolability is in itself not a justification for not ordering surrender.⁶⁷ 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 ICC 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 crimes falling under the ICC Statute. In this regard, the provisions of Section 4(2) of the Implementation Act apply only to criminal responsibility and not to procedural immunities. Secondly, notwithstanding the retention of immunity before South African courts for the purposes of the exercise of jurisdiction over crimes contained in the ICC Statute, 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',⁶⁸ in such a way as being consistent with other legislative rules.

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

A. General

While the Implementation Act applies to the *Al Bashir* case, 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

67 Sect. 10(9) 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)'.

68 *Arse v. Minister of Home Affairs and Others* (2012 (4) SA 544 (SCA)), § 19 (hereinafter 'Arse Case').

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 ICC Statute. Thus, paradoxically, the Implementation Act 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 multilayered conflict described above — the conflict between the Implementation Act and customary international law as one layer and conflict between customary international law and the ICC Statute as another layer — is further exacerbated by the fact that there appears to also be a conflict in the domestic laws. The South African Diplomatic Immunities and Privileges Act (DIPA) has provisions that require the respect of Al-Bashir's immunities.⁶⁹ 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.

B. 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.⁷⁰ The International Law Commission (ILC) has described immunity *ratione personae* as immunity attaching to the so-called 'Troika', namely, heads of state, heads of government and ministers for foreign affairs.⁷¹ It is clear from the work of the ILC that immunity includes inviolability.⁷² 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 ICC Statute, in Article 27, does not recognize 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 ICC Statute and states that are not party to the Statute.⁷³ The judgment of the North Gauteng High Court in *Southern African Litigation Centre*, 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

69 Diplomatic Immunities and Privileges Act 37 of 2001.

70 See the references set out in *supra* note 37.

71 See Draft Article 3, Draft Articles on the Immunity of Officials.

72 See § 5 of the Commentary to Draft Article 1, Draft Articles on the Immunity of Officials. See also Arrest Warrant Judgment, § 58.

73 Art. 27(2) ICCSt. provides that immunities 'shall not bar the Court from exercising jurisdiction' (emphasis added).

no longer exists.⁷⁴ 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.⁷⁵ In another judgment, the ICJ emphasized that the rule of international law relating to immunities 'is one of the fundamental principles of the international legal order'.⁷⁶

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.⁷⁷ While Article 27 of the ICC Statute 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 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 ICC Statute foresees this conflict and attempts to address by creating an exception to cooperation in Article 98.⁷⁸

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.⁷⁹ It is apposite to point out that the North Gauteng High Court in *Southern African Litigation Centre* appeared to rely on Security Council

74 High Court Decision, § 28.8.

75 Arrest Warrant Judgment, § 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'.

76 Judgment, *Jurisdictional Immunities of the State (Germany v. Italy; Greece Intervening)*, 3 February 2012, § 56 (hereinafter 'Jurisdictional Immunities Judgment'). See also the Separate Opinion of Judge ad hoc Bula Bula, Arrest Warrant Judgment, §§ 31, 41.

77 Arrest Warrant Judgment, § 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).

78 Art. 98(1) ICCSt. 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'. Art. 98(2) ICCSt. 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'.

79 See e.g. Akande, 'The Legal Nature of the Security Council Referrals to the ICC', *supra* note 43.

Resolution 1593 to support its conclusion that Al-Bashir does not have immunity, although the North Gauteng High Court does not explain the basis for its conclusion.⁸⁰ However, in its first two cases of non-cooperation, the ICC did not adopt this approach.⁸¹ In a decision that was widely criticized, including by the current author, the Court proceeded to decide the matter as if Article 98 was not part of the Statute.⁸² The Court, in essence, held that immunity did not apply before international courts.⁸³ 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.

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 27.⁸⁴ 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.⁸⁵ Although the question of immunity before the ICC is only of tangential relevance for this article, I pause to point out that there is no basis for this conclusion in the ICC 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.⁸⁶ 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.⁸⁷ 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

80 During the hearing, on being asked which specific provision of SC Res., *supra* note 35, removed the immunity of Al-Bashir, counsel for the applicant pointed to § 6, 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.

81 See *Malawi Decision*; *Chad Decision*.

82 For discussion, see the literature cited in, *supra* note 40.

83 See e.g. *Malawi Decision* § 14.

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

85 DRC Decision, § 26, the 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.' DRC Decision, § 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'.

86 See also Tladi, 'The Immunity Provision in the AU Amendment Protocol', *supra* note 40, at 13.

87 See DRC Decision, § 29.

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.⁸⁸ The problem is that it is based purely on a fiction and cannot be substantiated either by reference to the ICC Statute or Resolution 1593. For one thing, Resolution 1593 places a duty on Sudan, it does not waive immunities of Sudan. The Security 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.⁸⁹ The notion of an implicit waiver of immunity is, therefore, a fiction. Secondly, subsequent to the adoption of Resolution 1593, and in the light of the controversy about whether Resolution 1593 affects the immunities of Al-Bashir, the Security 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 ICC 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 President.⁹⁰ Moreover, the ICC transmitted its decisions on the non-cooperation of Malawi, Chad and the DRC to the Security Council. The Security 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 ICC Statute to arrest Al-Bashir, is dependent on the interpretation given 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

88 See e.g. Gaeta, *supra* note 43.

89 See ILC, *Third Report on the Immunity of State Officials from Foreign Criminal Jurisdiction*, 24 May 2001, §§ 39–42 (Special Rapporteur Mr Roman Kolodkin).

90 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*, UN Doc. S/PV.6887, 13 December 2012, at 16. In the following year, the Russian Federation made a similar statement. See *Security Council per verbatim record*, UN Doc. 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 Security 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. See *Security Council per verbatim record*, UN Doc. S/PV.7337, 12 December 2014, at 4.

Claus Krefß, 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.⁹¹ It is not necessary to repeat the debate here. It suffices to say that if the argument proposed by Krefß is accepted, then there is no duty under the ICC Statute to arrest and surrender the head of state of a state which is not party to the ICC 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 arrest and surrender Al-Bashir *under the ICC Statute*. This duty, however, would be in conflict with the rules of customary international law.

The complicated state of international law in relation to South Africa’s obligation with respect to Al-Bashir under customary international law and the ICC Statute is further exacerbated by the fact that South Africa, when hosting the AU summit, has had to conclude the Host State Agreement with the AU, as it is customary in these cases. As explained above, the North Gauteng High Court interpreted the Host State Agreement as not applying to heads of state since the Host State Agreement ‘does not confer immunity on member states or their representatives or delegates.’⁹² Rather, according to the North Gauteng High Court, the Host State Agreement ‘confers immunity on the members and staff of the AU Commission, and on delegates and representatives of Inter-governmental Organisations.’⁹³ This interpretation is grossly inaccurate for the following two reasons. First, it ignores the fact that Article VIII of the Host State Agreement 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 State Agreement. Secondly, 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 summit are accorded immunities but actual participants would not. Therefore, it should be concluded that in reality the Host State 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 State Parties do

91 C. Krefß, ‘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* (Torkel Opsahl Academic Epublisher, 2012) 223, at 236. The view of Claus Krefß is that the resolution of the Al-Bashir matter lies not in Art. 98 ICCSt. Rather, like Dapo Akande, Krefß holds that Al-Bashir cannot enjoy the benefits of Art. 98 ICCSt. because the situation in Darfur was referred to the ICC by the Security Council.

92 High Court Decision, § 28.10.1.

93 *Ibid.*

not enjoy immunities for crimes under the ICC Statute, 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 crimes under the ICC Statute on the territory of a State Party, that is, where 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 Security 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 Security Council and would, by virtue of Article 103 of the UN Charter, trump other obligations — and the Council 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.

C. Other Domestic Legislation Relevant to Immunities

In assessing the state of the domestic law with respect to the duty to arrest and surrender Al-Bashir, the starting point must be the Implementation Act. While Section 4(2) of the Implementation Act reserves for 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 emphasize 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’.⁹⁴ Although the North Gauteng High Court dismissed this basis, principally on the ground that customary international law does not recognize immunity for ICC Statute crimes, as was explained earlier,

94 Sect. 4(1)(a) DIPA.

this assertion has no basis in law. Section 4 of the DIPA, recognizing 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.’⁹⁵ As noted above, contrary to the interpretation reached by the North Gauteng High Court, the Host State Agreement entered into for the purpose of the summit does provide immunities for heads of state, including Al-Bashir. In connection with the summit, the North Gauteng High Court 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 recognize 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 State Agreement and the immunities provided therein.⁹⁶

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 so as to promote consistency.⁹⁷ 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,⁹⁸ one possible interpretation would be to require the respect of immunity only for international conferences of international organizations 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. 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.

95 Sect. 6(1)(b) DIPA.

96 *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)), § 37, and especially, § 42. See also generally J. Dugard, *International Law: A South African Perspective* (4th edn., Juta, 2011), at 55.

97 *Arse Case*, § 19.

98 See *Jurisdictional Immunities Judgment*, § 56.

7. Concluding Remarks

In an earlier contribution, I have written that the debates surrounding the ICC have tended to be characterized by the hero–villain dichotomy.⁹⁹ 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'.¹⁰⁰ Those who felt that South Africa did right by not arresting Al-Bashir take to criticizing the ICC, calling it imperialists and targeting Africa.¹⁰¹

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 out of this network of rules. For South African domestic law, tools include rules of interpretation to address apparently conflicting legislative norms. In cases of referrals by the Security Council, to prevent conflict of obligations, the Security 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.

99 See e.g. Tladi, *supra* note 21, at 381.

100 See, for example, N. Makhubu, 'Hitler of African' had 300 000 Blacks Slain', available online at <http://www.pressreader.com/south-africa/pretoria-news/20150626/281543699572327/TextView> (visited 2 July 2015).

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