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“‘To be or not to be?’ The African Union and its Member States Parties’ participation as High Contracting States Parties to the Rome Statute of the International Criminal Court (1998)’

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### Abstract

*This article examines, under the light of international law, African States’ fascination and fall-out with the ICC. It examines the challenge to international institutions and to international justice for high crimes posed by the quasi-supranational African Union’s (AU) emergent practice of ordering its Member States Parties not to cooperate with ICC Arrest Warrants against African Heads of States/Governments. The legal substance of AU claims and the AU’s own interpretations of the standards of sovereign immunity and universal jurisdiction are also examined. The article shows that emergent AU recalcitrance to ICC orders is difficult to dismiss even though it may be contrary to current international law on the Law of Treaties which nullifies resort to domestic local law as a justification for breach of the strictures of international law. In particular, AU claims that universal jurisdiction and sovereign immunity should be redefined to suit their concerns contradict recent international efforts to combat impunity for international crimes.*

### Introduction:

On 14 June 2015, the North Guateng High Court of South Africa issued an interim order in the case of *Southern Africa Litigation Centre* (Applicant) and *the Minister of Justice and Constitutional Development & 9 Others* (Respondents)<sup>1</sup> preventing President Omar Al Bashir of Sudan from leaving the country. The President had travelled to South Africa to attend in Johannesburg the 25th AU Summit meeting scheduled for 7-15 June 2015. The Court held that Al Bashir must stay until it had decided on an application request to order the arrest and surrender President Al

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<sup>1</sup> Case No. 27740/15, North Gauteng HC, Pretoria

Bashir to the International Criminal Court (ICC)<sup>2</sup> in compliance with the court's arrest warrant charging him with war crimes, crimes against humanity, and genocide.

In its deposition to the Court, the Southern Africa Litigation Centre (SALC) had argued *inter alia* that because South Africa was a state party to the Rome Statute establishing the ICC, it had an obligation to assist the ICC in its effort to prosecute the offences alleged against a fugitive. Secondly, South Africa's commitment to the ICC objectives were clear in that she had domesticated the ICC Statute by adopting the Implementation of the Rome Statute of the ICC Act No.27 in 2002.<sup>3</sup>

The SALC correctly argued that the Implementation Act requires that South Africa cooperates with the ICC. Such cooperation "includes arresting and detaining fugitives from the ICC to ensure that individuals who have been indicted by the ICC are transported to the Netherlands to stand trial. Consequently, South Africa had an obligation under international and domestic law, to arrest President Bashir..." and to follow the Implementation Act Article 9 procedure for dealing with any fugitive from the ICC who arrives in South Africa.<sup>4</sup>

This view was strengthened by the fact that the former Director-General of the Department of International Relations and Cooperation,<sup>5</sup> the President of the Assembly of States to the Rome Statute of the ICC,<sup>6</sup> the UN Secretary General<sup>7</sup> had all unequivocally given the expectation that South Africa was mandated to cooperate with the ICC's arrest warrants against President Al Bashir. Under this light, by ignoring the North Guateng High Court Order of 14 June 2015 and facilitating Al Bashir's travel back to Sudan on 15 June 2015, the government of South Africa appears to have failed to uphold its own laws.

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<sup>2</sup> Rome Statute of the International Criminal Court, adopted 17 July 1998, 2187 U.N.T.S 90 (entered into force July 1, 2002).

<sup>3</sup> See Republic of South Africa Government Gazette Vol. 445 Cape Town 18 July 2002 No. 23642 at: [www.saflii.org/za/legis/num\\_act/iotrsoticca2002699.pdf](http://www.saflii.org/za/legis/num_act/iotrsoticca2002699.pdf)

<sup>4</sup> See also SALC's Founding and Supplementary Affidavits at: <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2015/06/Notice-of-Motion-founding-affidavit.pdf>; <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2015/06/Supplementary-Affidavit-Bashir-Matter.pdf>

<sup>5</sup> South African Government News Agency, "SA is obliged to arrest Al- Bashir, Says Ntsaluba" at: <http://www.sanews.gov.za/south-africa/sa-obliged-arrest-al-bashir-says-ntsaluba>

<sup>6</sup> ICC Press Releases, 13 June 2015 at:

[http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr1117.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1117.aspx)

However, the African Union appears to have been developing for a while now, unequivocal regional anti-ICC standards of its own. The South African Government could have been following and privileging these emergent regional African customary international law standards which the North Gauteng High Court had failed to recognize. But what is this emergent anti-ICC regional customary international law whose effect if it can be proved has for six years now quashed ICC hopes of prosecuting President Al Bashir for war crimes, crimes against humanity and genocide in Darfur? This raises the question of the sustainability of the AU - ICC relationship and the potential for ensuring against impunity for international crimes in Africa. Further, it raises wider questions about new challenges to international law's authority arising from supranational regional systems and quasi-supranational regional systems like the EU and the AU respectively. Part I examines the emergence of regional anti-ICC customary international law and AU *lex specialis* on the relationship of AU Member States Parties to the ICC. Part II evaluates, under the light of general international law, stakeholder incommensurabilities around sovereign immunity claims against ICC indictments. Part III examines the emergent AU's supranational functions and aspirations in the development of international criminal law. Part IV analyses the potential outcome of the troubled ICC-AU relationship, and the conclusion offers some tentative observations.

## I

### **Emergent anti-ICC Regional Customary International Law of the African Union**

The AU appears to have been developing anti-ICC regional laws for a considerable period now. The 13<sup>th</sup> African Union Summit on 6 July 2009 concluded that AU Member States Parties should "... not co-operate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities for the arrest and surrender of Sudanese President Omar al Bashir to the ICC."<sup>8</sup> President Jacob Zuma unequivocally stated that South Africa supported the AU position. "There is an African stance on this and we are not different from it. ... the United Nations Security Council should have listened to Africa before issuing the interdict".<sup>9</sup> This might be

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<sup>8</sup> South African Government News Agency, "AU leaders will not extradite Al Bashir" at: <http://www.sanews.gov.za/south-africa/au-leaders-will-not-extradite-al-bashir>

<sup>9</sup> South African Government News Agency, "AU leaders will not extradite Al Bashir" at: <http://www.sanews.gov.za/south-africa/au-leaders-will-not-extradite-al-bashir>

taken as evidence of *opinio juris* regarding the emergent regional anti-ICC customary international law.<sup>10</sup>

This African position was further entrenched/ codified by the outcomes of the *lex specialis* AU Extraordinary Summit on Africa-ICC Relationship held by the highest decision making organ of the AU – the Assembly on 12 October 2013.<sup>11</sup> The AU Assembly decided:

- That no International Court or Tribunal has capacity to commence or to continue charges against any serving AU Head of State or Government or anybody acting or entitled to act in such capacity during their term of office.
- That the trials by the ICC of President Uhuru Kenyatta and Deputy President William Samoei Ruto, who are the current serving leaders of the Republic of Kenya, should be suspended until they complete their terms of office.
- To fast track the establishment of the criminal jurisdiction of the African Court on Human and Peoples' Rights and to table for discussion at the Assembly of State Parties of the ICC, amendments to the ICC on immunity of heads of state and government among other matters.<sup>12</sup>

Even without the passage of much time,<sup>13</sup> the *lex specialis* outcomes of an AU Extraordinary Summit probably point to the emergence of *sudden or wild customary international law*<sup>14</sup> requiring none of custom's gradual crystalizing elements, including the passage of time to observe a consistent and uniform practice.<sup>15</sup> Prost and Clarke write that:

... the emergence of the hypothesis of “instant” customs, whereby custom is essentially based on the recognition, formally expressed in certain international instruments, of a

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<sup>10</sup> See especially the Asylum Case (Columbia v. Peru) International Court of Justice Reports (1950) p.266. See also Bin Cheng (1965) “United Nations Resolutions on Outer Space: Instant Customary International Law”, *Indian Journal of International Law* Vol. 3 p.23.

<sup>11</sup> Ext/Assembly/AU/Dec.1(Oct.2013). See also Dersso, S.A. (2013) “The AU’s Extraordinary Summit decisions on Africa-ICC Relationship” *EJIL: Talk* at: <http://www.ejiltalk.org/the-aus-extraordinary-summit-decisions-on-africa-icc-relationship/>

<sup>12</sup> Ext/Assembly/AU/Dec.1(Oct.2013)

<sup>13</sup> *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)* ICJ Reports (1969) p.4. The Court ruled that although the passage of only a short period of time is not necessarily, or of itself a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, state practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; - and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved. p. 43.

<sup>14</sup> Prost and Clarke (2006) “Unity, Diversity and the Fragmentation of International Law: How Much Does the Multiplication of International Organizations Really Matter?” *Chinese Journal of International Law*, Vol. 5, No. 2, 341–370

<sup>15</sup> “Even without the passage of any considerable period of time, a very widespread and representative participation in the Convention might suffice of itself, provided it included that of States whose interests were specifically affected”. *North Sea Continental Shelf Cases*, ICJ Reports (1969) p. 42.

“need for law”. Admittedly, solemn resolutions such as those emanating from the United Nations, have a decisive influence in the genesis of “instant” or “wild” customs. They are often regarded as their means of expression par excellence.<sup>16</sup>

The fact is that the pressing exigencies authored by the ICC’s pursuit of incumbent African Heads of States require immediate answers. African states have solidified their opposition to and distrust of the ICC by producing anti-ICC customary international laws and matching state practice evidenced also in the *Al Bashir Case* [2015]. These laws are evident also in:

1. The unequivocal outcomes of the *lex specialis* AU Extraordinary Summit on Africa-ICC Relationship held by the highest decision making organ of the AU – the Assembly on 12 October 2013.<sup>17</sup> The Assembly has authority to pass binding directives under Article 9(e) and (g) of the Constitutive Act of the African Union (2000).<sup>18</sup>
2. The refusal of Uganda, Chad, Kenya, Djibouti, Malawi, Congo South Africa and Egypt to be involved in detaining and surrendering President Al Bashir to the ICC.

This ‘*emergent anti-ICC African customary international law*’ appears to be based on African states’ desire to be involved in the creation of a genuinely fair and unbiased international legal system - something that they have hitherto failed to achieve across the plethora of specialized areas of international law, except possibly in international labour law.<sup>19</sup> Nonetheless, the much complained about ICC focus on Africa may have forced African states’ hand into teaming up under the aegis of the AU and challenge what they perceive as a biased international legal order that, through slavery and colonisation, appears to have kept them apart as subjects and not partners in the pursuit of international objectives. Whatever the end result in what appears to be an AU attempt to re-negotiate a fairer and ‘unbiased international criminal law’ in their view, it is possible that the AU will seek to extend this re-negotiation process to other areas of international law by establishing and publicly implementing ‘*counter-unfair international law*’ AU

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<sup>16</sup> Prost and Clarke (2006) “Unity, Diversity and the Fragmentation of International Law: How Much Does the Multiplication of International Organizations Really Matter?” *Chinese Journal of International Law*, Vol. 5, No. 2, 341–370

<sup>17</sup> Ext/Assembly/AU/Dec.1(Oct.2013)

<sup>18</sup> Constitutive Act of the African Union, adopted July 11, 2000, OAU Doc. CAB/LEG/23.15 (entered into force May 26, 2001)

<sup>19</sup> African States were actively involved in the revision of International Labour Conventions and Recommendations, the majority of which had been established prior to their joining the ILO as sovereign independent States. That exercise resulted in the setting aside of numerous Conventions and Recommendations that make up the ILO legislative code. See Chigara, B. “Latecomers to the ILO and the authorship and ownership of the international labour code”, 29 *Human Rights Quarterly*, (2007). pp. 706 – 726.

customary international laws with the hope of enhancing equal treatment in the international legal system.

The African National Congress pointed out in the aftermath of the announcement of the interim prohibitive travel order that the ICC had lost its relevance,<sup>20</sup> suggesting perhaps that the South African government appears to have preferred its emergent regional anti-ICC customary international law obligations over its own domestic and wider international law obligations. What is the distinction between those obligations and perhaps more importantly, the basis of the South African government's choice in the *Al Bashir Case* [2015]?

The use of foreign law by South African Courts is sanctioned by the South African Constitution (1966). Section 39(1) provides that: When interpreting the Bill of Rights, a court, tribunal or forum (i) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (ii) must consider international law; and, (iii) may consider foreign law. It has been opined that: "The influence of foreign law may extend beyond the interpretation of the Bills of Rights provisions of the Constitution".<sup>21</sup> In spite of this constitutional authorisation, the Constitutional Court of South Africa's view is that the courts may "... derive assistance from public international law and foreign case law, but are in no way bound to follow it".<sup>22</sup>

Does this mean that South African Courts may consider AU constitutional customary international law but not regard it binding upon them? Quite the opposite because that would result in situations of impasse where the executive endorsed emergent AU customary international law, particularly that of a constitutional nature, as President Jacob Zuma appeared to do on 6 July 2009 at the 13<sup>th</sup> AU Summit in Libya; and then the Courts took a different position. That would make the idea of separation of powers a tautology. In fact the Constitutional Court of South Africa has repeatedly warned potential litigants that it would not venture into policy matters that are the province of the executive - *Mazibuko Case*.<sup>23</sup>

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<sup>20</sup> See Also The Guardian, "Sudan's President barred from leaving South Africa" at:

<http://www.theguardian.com/world/2015/jun/14/sudan-president-omar-al-bashir-south-africa-icc>

<sup>21</sup> Goiton, H. (2010) "The impact of Foreign Law on Domestic Judgments: South Africa", Law library of Congress at: <http://www.loc.gov/law/help/domestic-judgment/southafrica.php>

<sup>22</sup> *State v Makwanyane* 1995 (6) BCLR 694.

<sup>23</sup> *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC) ; 2010 (4) SA 1 (CC) (8 October 2009)

*The crux of AU tensions with the ICC*

In sum, a serious legal and political dispute appears to have arisen between the AU as policy maker for African states in certain matters of domestic governance and international affairs, and the ICC which is charged with prosecuting certain crimes of international concern. The dispute concerns the following:

- 1) The competence of the office of the ICC Prosecutor (OTP) and of the UN Security Council to order the surrender of serving African Heads of Government/States to the ICC once they have been charged in their individual capacity with offences that properly fall under the jurisdiction of the ICC.
- 2) The legality under international law of the AU's refusal to co-operate with the ICC by ordering its Member States Parties not to arrest or surrender persons against whom the ICC has issued international arrest warrants.<sup>24</sup>
- 3) The status under international law of AU Member States Parties that comply with the AU directive not to co-operate with the ICC regardless of their obligations under UN Charter Law and also under the *lex specialis* of international criminal law.
- 4) Rejection by the AU of *lex specialis* obligations under international criminal law and the AU's preferred interpretations of both universal jurisdiction, and sovereign immunity.

Prolongation of this dispute threatens to damage the legitimacy of the young and first permanent international criminal tribunal. It also risks trumping human rights with impunity, which may disillusion many that had pinned enormous hope on the advancement of human rights protection everywhere on the establishment of the ICC. Further, it risks obfuscating the scope of the notions of universal jurisdiction and sovereign immunity in international law. It also deepens further, the question about the supremacy/limits of UN law over posterior regional supranational laws of the AU and of the EU - a point raised by the European Court of Justice's (ECJ) Grand Chamber decision in the *Kadi case*.<sup>25</sup>

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<sup>24</sup> *Decisions and Declarations of the Assembly of the African Union*, Nineteenth Ordinary Session 15-16 July 2012, Addis Ababa, Ethiopia, AU Decision on the Implementation of the Decisions of the International Criminal Court, Doc.EX.CL/731 (XXI).

<sup>25</sup> Case C-402/05 P and C-415/05, P. *Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR I-6351. See also A. Posch (2009) "The Kadi Case: Rethinking the relationship between European Law and International Law?" *Colombia Journal of European Law* Vol.15 pp.1-5; J. Kokott and C. Sobotta (2012) "The Kadi Case: Constitutional Core-Values and International Law – Finding the Balance?" *European Journal of International Law* Vol. 23 No.4 pp.1015-24.

In its Advisory Opinion in the case concerning the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase* (1950)<sup>26</sup> the International Court of Justice (ICJ) stated that ‘Whether there exists an international dispute is a matter for objective determination’. That objectivity is ensured by referencing a list of considerations. The Permanent Court of Justice (PCIJ) referred to these in the *Mavrommatis Palestine Concessions Case* (1924)<sup>27</sup> when it stated that: ‘A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons’.

The AU remains adamant that the ICC warrant of arrest in the collapsed *Al Bashir case* is void as its object is a serving Head of State. This position introduces a clear conflict of interests between the ICC and the AU. The AU remains adamant that ICC arrest warrants against serving Heads of States trump the well-established principle of sovereign immunity,<sup>28</sup> while the Office of the Prosecutor (OTP) at the ICC perceives no link between sovereign immunity guarantees and personal crimes, the order of which could not be described as acts of a sovereign – pointing once more to a clear conflict of legal views between the two. Further, the AU insists that the ICC warrants of arrest against serving African Heads of State/Government constitute a threat to local peace initiatives and risk a return to or, an escalation of violence, while the ICC insists that such warrants are compelled by the pursuit of international justice for the most serious international crimes.

Therefore, a legal dispute, that is, a clash of interests, legal views and point(s) of law or fact(s) actually exists between the AU and the ICC. The only outstanding question is whether the AU can be characterised as a legal person for these purposes. UN Charter law recognises regional entities as legal persons. The UN has on several occasions entered peace mission agreements with the AU.<sup>29</sup>

## II

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<sup>26</sup> ICJ Reports, 195, p.74. See also B. Chigara ‘The Humwe principle: A social-ordering *grundnorm* for Zimbabwe and Africa?’ in R. Home, *Essays in African Land Law Vol.1*. (2011) Pretoria: Pretoria University Law Press (World Bank Project) 113- 133; SMG Koopmans (2008) *Diplomatic Dispute Settlement: the Use of Inter-State Conciliation*, The Hague: TMC Asser Press 11 -16.

<sup>27</sup> P.C.I.J., Series A, No. 2, p.11.

<sup>28</sup> A point repeated by the AU in its *Draft Decision of the 24<sup>th</sup> AU Summit on the ICC and the African Court of Justice and Human Rights*, Doc. Assembly/AU/18 (XX14); and also by Mokhari, State Counsel in Case No. 27740/15, North Gauteng HC, Pretoria. See also News 24 “Failure to arrest Al Bashir” at:

<http://www.news24.com/SouthAfrica/News/LIVE-Court-to-hear-Al-Bashir-arrest-application-20150615>

<sup>29</sup> S/RES/1769 (2007) para. 1.



## Stakeholder incommensurabilities around sovereign immunity claims against ICC indictment

The 2009 warrant for Al Bashir was the first in which the ICC sought the arrest of a sitting head of state, triggering accusations by the AU of victimisation of African leaders. The South African Government's defence in the North Gauteng High Court centered on the blanket immunity that the South African government had extended to all AU Summit delegates attending the AU's 25<sup>th</sup> Summit in reliance upon the Diplomatic Immunities and Privileges Act No. 37 (2001). According to State Counsel, Mokhari, this raises no conflict between South African Law and International Law.<sup>30</sup> Sooner, this raises the additional questions of:

- 1) Whether immunity is available for offences *jus cogens*, including genocide, and for crimes against humanity?
- 2) What the consequences are in international law of the AU's claims that no Court has capacity to charge or prosecute any of its Heads of State or Government while they are in office for high crimes that international law has provided universal jurisdiction for.

### *Regarding universal jurisdiction offences*

Modern international law provides for universal jurisdiction for certain crimes, authorising all states and particular international tribunals to prosecute persons alleged to have committed any such crimes, whether or not the prosecuting state/tribunal had other links to the accused or to the territory where the offence(s) had occurred.<sup>31</sup> Universal jurisdiction offences offend all of humanity regardless of their particular victims or, of the particular location or territory they occurred. They include war crimes, crimes against humanity, genocide and torture.

The European Court of Human Rights (ECtHR) stated in *Korbeley v Hungary* that:

International law applies the guarantee of *nullum crimen sine lege* to itself and not to domestic law. 'Customary international law', 'the legal principles recognised by civilised nations' and 'the legal principles recognised by the community of nations' constitute a *lex* which classifies certain types of behaviour as prosecutable and punishable according to the norms of the community of nations (through international organisations or the States belonging to the international community), irrespective of whether the domestic law contains a comparable criminal offence or whether the relevant treaties have been incorporated into domestic law. The gravity of war crimes and crimes against humanity – namely the fact that they endanger international peace and security and mankind as such – is irreconcilable with leaving their punishability within the ambit of domestic laws<sup>32</sup>

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<sup>30</sup> Verbatim reporting of the proceedings can be found on News 24 website at:

<http://www.news24.com/SouthAfrica/News/LIVE-Court-to-hear-Al-Bashir-arrest-application-20150615>

<sup>31</sup> See also J Birkett, "International Legal Theories Evolved at Nuremberg" 23 *International Affairs*, (1947), pp.317 – 325; B F Smith, *Reaching Judgment at Nuremberg* (New York: Basic Books Inc. Publishers, 1977).

<sup>32</sup> Application No. 9174/02 (2010) 50 E.H.R.R. 48 pp.1197.

Regarding torture, Lord Millet and Lord Phillips concurred in the *Pinochet Case* that: ‘... The systematic use of torture was an *international crime* for which there could be no immunity even before the [Torture] Convention came into effect and consequently there is no immunity under customary international law for the offences relating to torture alleged against the applicant.’<sup>33</sup> Their Lordships’ view was shared also by the judges of the Spanish National Court’s Criminal Division who held in a Plenary Session of 5 November 1998 that: ‘... Spain is competent to judge the events (that Senator Pinochet of Chile was accused of, and which had taken place in Chile during his rule of that country) by virtue of *the principle of universal prosecution for certain crimes – a category of international law* – established by our internal legislation.’<sup>34</sup>

Per Lord Browne-Wilkinson,<sup>35</sup> the *jus cogens* nature of the international crime of torture justifies States in taking universal jurisdiction over torture wherever committed. Offences *jus cogens* may be punished by any State because the offenders are common enemies of all of mankind and all nations have an equal interest in their apprehension and prosecution. One of the purposes of the Convention against Torture (1984) was to introduce the principle *aut dedere aut punire*, that is, either you extradite or you punish perpetrators of torture.<sup>36</sup>

Article 5 of the Rome Statute establishing the International Criminal Court<sup>37</sup> authorizes the Court to prosecute offences of a similar nature. These are offences that should never escape the attention of States because their effects transcend all of humanity. This is the *raison d’être* of the existence of the ICC. What this means is that regarding claims of sovereign immunity, sovereigns themselves are immune only for those of their actions that are consistent with the function of their offices as Heads of State/Government, and personally liable for any of their actions that lie outside the functions of the office of Head of State/Government.

Although being developed with new vigour, the doctrine of individual liability is well established in international law. The first recorded episode is the fifteenth century trial at Bresach of a war criminal accused of trampling underfoot the laws of God and humanity<sup>38</sup> – possibly the equivalent of the charge of crimes against humanity under Article 5 of the Rome Statute and for

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<sup>33</sup> *ex parte Pinochet Ugarte*, (No.3), [1999] H.L. 2 WLR, p.829.

<sup>34</sup> *ex parte Pinochet Ugarte*, [1998] H.L. 3 WLR, p.1463.

<sup>35</sup> *ex parte Pinochet Ugarte* (n.33) supra, p.841.

<sup>36</sup> Ibid. p.843.

<sup>37</sup> 7 ILM 1002 (1998); 2187 UNTS 90.

<sup>38</sup> See J Birkett, “International Legal Theories Evolved at Nuremberg” 23 *International Affairs*, (1947), pp.317 – 325 p.317.

which the principle of universal jurisdiction also applies.<sup>39</sup> The Nuremberg proceedings,<sup>40</sup> for all their weaknesses, especially the common charge of victors' justice, affirmed that same principle that, individuals who breach international criminal law shall be made to answer in a court of law for those breaches. In recent times *ad hoc* and hybrid tribunals have been established to try persons alleged to have committed grave breaches of international law. The purpose of these tribunals is to hear cases against individuals accused of violating international criminal law.

The ECtHR summarised the particular characteristics of war crimes and crimes against humanity in *Korbeley v Hungary* as follows:

1. Their international status is linked with their definition at a supranational level either on the basis of natural law ... or by reference to the protection of the 'foundations of the international community', or by citing the threat posed by these activities to all humanity: their perpetrators are 'enemies of the human race'. Thus, *the significance of these offences is too great to allow their punishment to be made dependent upon their acceptance by, or the general penal-law policy of, individual States. (emphasis added)*
2. *It is the international community that prosecutes and punishes war crimes and crimes against humanity: it does so, on the one hand, through international tribunals, and, on the other hand, by obliging those States which wish to be part of the community of nations to undertake their prosecution. (emphasis added)*
3. *The prosecution and punishment of war crimes and crimes against humanity may only proceed within the framework of legal guarantees; it would be contradictory to protect human rights without such guarantees. But these international guarantees cannot be replaced or substituted by the legal guarantees of domestic law.<sup>41</sup> (emphasis added)*

Therefore, the supranational quality of the crimes for which Al Bashir has been charged, and their supranational and international definitional qualities which make them crimes against all of humanity lock out the possibility that a lone actor like South Africa, or a regional group like the AU would have capacity to render them susceptible to the exceptions afforded under the doctrine of diplomatic immunities and privileges. Put simply, that doctrine does not apply to this category of offences whether the perpetrator is a Head of State or less than that.<sup>42</sup>

By rejecting the ICC's request for Al Bashir's arrest the AU is opposing and seeking to replace with its own *de lege ferenda*, current international law which does not recognise jurisdictional

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<sup>39</sup> See also ex parte *Pinochet Ugarte*, (n.33) supra, p.843. Examining the consequent dynamic of the operation of the principles of universal jurisdiction and complementarity, see also X. Philipe (2006) 'The Principles of universal jurisdiction and complementarity: how do the two principles intermesh?' *International Review of the Red Cross* Vol 88 No. 862 pp.375-98.

<sup>40</sup> "Judgment of the Nuremberg International Military Tribunal", (1947), 41 *American Journal of International Law*, p.172.

<sup>41</sup> Application No.9174/02 (2010) 50 E.H.R.R. 48 pp.1196.

<sup>42</sup> See especially *Germany v Italy*, Judgment, I.C.J. Reports 2012, p. 99, and also D. Akande and S. Shah (2011) "Immunities of State Officials, International Crimes, and Foreign Domestic Courts" 21 *European Journal of International Law*, No.4 pp. 815-52.

immunities and privileges for Article 5 crimes of the Rome Statute establishing the ICC. Africa's own Human Rights Court appears constrained to circumnavigate the political inclinations of its masters. In *Femi Falana v. The African Union*<sup>43</sup> the Court on Human and Peoples' Rights insisted that it had no jurisdiction *rationae personae* to entertain cases of human rights breaches so long as a Member State had not expressly declared that such a case can be heard by the Court.<sup>44</sup> So far, only five States (Burkina Faso, Ghana, Malawi, Mali and Tanzania) have made an express declaration accepting the Court's jurisdiction to hear cases of human rights violations against them. This suggests that immunising themselves from possible human rights claims is a major concern for African States, hence the rapid development of anti-ICC directives by the AU, coupled with the rapid establishment of institutions that would give the impression that African States do not need the ICC at all.

It is expected that the African Court will be merged with the African Court of Justice to form the African Court of Justice and Human Rights (ACJHR).<sup>45</sup> As soon as the Merger protocol<sup>46</sup> enters into force, all cases being heard by the African Court will be transferred to the human rights section of the ACJHR while other cases will remain in the general section of the Court - Article 5, Protocol on the Statute of the African Court of Justice and Human Rights. Commentators have expressed fears that the merger could potentially relegate human rights to the backdrop as Member States Parties shift their attention to other 'high state' issues such as border disputes and constitutional issues that will fall under the general section of the court.<sup>47</sup>

#### *The Role of the AU in the management of African issues, interests and aspirations*

The *Al Bashir Case* [2015] shows that institutionally, African states appear to have progressed from a loose coalition of states under the regional umbrella of the Organization of African Union (OAU), that was established in 1963 primarily to ensure political independence for colonised African states; to a much closer quasi-supranational union of states concerned with their own collective position in the global management of a much wider and varying range of issues, interests and aspirations under the framework of the new African Union. Among the

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<sup>43</sup> Application No. 001/2011 (26 June 2012).

<sup>44</sup> *Ibid.*, par. 73. See also *Michelot Yagombaye v. Republic of Senegal*, Application No. 001/2008; *Soufiane Ababou v. People's Democratic Republic of Algeria*, Application No. 002/2011; *Daniel Amare and Malugeta Amare v. Republic of Mozambique & Mozambique Airlines*, Application No. 004/2011.

<sup>45</sup> In July 2008 at the 11<sup>th</sup> AU Summit Member States adopted the 'Merged Protocol' of the new court which will replace earlier Protocols establishing the African Court on Human and Peoples' Rights and the African Court of Justice as the principal judicial organ of the AU.

<sup>46</sup> *Protocol on the Statute of the African Court of Justice and Human Rights*, 48 I.L.M 314 (2009).

<sup>47</sup> G. Muigai 'From the African Court on Human and Peoples' Rights to the African Court of Justice and Human Rights' in M. Ssenyonjo (ed.), *The African Regional Human Rights System: 30 Years after the African Charter on Human and Peoples' Rights* (The Hague: Martinus Nijhoff, 2011), p.282.

fourteen objectives of the new organization in Article 3 are the following: the collective pursuit of greater unity and solidarity between the African countries and the peoples of Africa; the collective defence of the sovereignty, territorial integrity and independence of its Member States; the acceleration of the political and socio-economic integration of the continent; and *the promotion and defence of African common positions on issues of interest to the continent and its peoples*.<sup>48</sup>

Other principles that in theory reflect the new thinking and new approaches among African states include the principle of participation by African peoples in the activities of the organisation;<sup>49</sup> the establishment of a common defence policy for the African continent;<sup>50</sup> the right of the AU to intervene in Member States' internal affairs to ensure against war crimes, genocide and crimes against humanity;<sup>51</sup> the right of Member States Parties to request intervention of the AU in order to restore peace and security;<sup>52</sup> the promotion of self-reliance;<sup>53</sup> the promotion of gender equality;<sup>54</sup> the promotion of social justice to ensure balanced economic development;<sup>55</sup> and the condemnation and rejection of unconstitutional changes of government.<sup>56</sup>

How the AU applies each of these ideas has enormous potential not only to support multilateral initiatives in each regard, but also to enhance tension with international institutions such as the ICC. At its 11<sup>th</sup> Ordinary Session held in Sharm El-Sheikh Egypt,<sup>57</sup> the Assembly of Heads of States and Government asked the AU Commission to consider a request to the ICJ for an advisory opinion on the legality of ICC Warrants of Arrest issued against African heads of state.

The argument that African crimes are for African Courts and Tribunals and no-one else appears to have been championed by the AU itself in hastily establishing African Union Courts and instruments with overlapping and even unclear jurisdictions perhaps first, to fend off perceived discriminatory foreign attempts to 'meddle' in African affairs and second, to want to appear to

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<sup>48</sup> Constitutive Act of the African Union, *adopted* July 11, 2000, OAU Doc. CAB/LEG/23.15 (entered into force May 26, 2001), Article 3(d).

<sup>49</sup> *Ibid.*, Article 4 (c).

<sup>50</sup> *Ibid.*, Article 4 (d).

<sup>51</sup> *Ibid.*, Article 4 (h).

<sup>52</sup> *Ibid.*, Article 4 (j).

<sup>53</sup> *Ibid.*, Article 4(K).

<sup>54</sup> *Ibid.*, Article 4 (l).

<sup>55</sup> *Ibid.*, Article 4(n).

<sup>56</sup> *Ibid.*, Article 4 (p). Discussing the AU's rejection of Military governments following the overthrow of civilian governments in both Madagascar (2010) and Mali (2012) see also B. Chigara, 'What Should a Re-constituted Southern African Development Community (SADC) Tribunal Be Mindful of to Succeed?' 81 *Nordic Journal of International Law* (2012), 341.

<sup>57</sup> *Decision of the AU Assembly on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction*. Doc. Assembly/AU/14 (XI), at the Eleventh Ordinary Session, 30 June- 1 July 2008, Sharm El-Sheikh, Egypt.

be willing and able to prosecute international offences. The ICC's complementary jurisdiction is triggered by the unwillingness or inability of States with jurisdiction to prosecute alleged crimes.<sup>58</sup>

### III

#### **The AU and the ICC: To be or Not to be?**

African states were critically instrumental in the establishment of the ICC. In particular they were most helpful in securing the minimum number of ratifications required for the Court to begin to operate.<sup>59</sup> Recently, the AU has expressed dissatisfaction with certain provisions of the Rome Statute, particularly Article 13(b). Scholars sympathetic to AU concerns have gone so far as claiming that the provision 'violates the global constitution,'<sup>60</sup> namely, the Vienna Convention on the Law of Treaties (1969) – (VCLT) which is widely accepted to be both a codification and development of customary international law on treaty law.<sup>61</sup> By implication, the AU appears to question the Security Council's Article 16 conferred discretionary competence to stop commencement or progression with investigations or prosecution for a period of 12 months, which can be renewed endlessly, by successive resolutions of the same body.

The Rome Statute appears to have rendered the notion of Head of State immunity redundant by operation of Article 27. This seems to be the provision of the Statute which the AU is most troubled about. If Head of State immunity has become the sore point of African States regarding a Court that they effectively brought to life by ratifying it in rapid succession to achieve the required minimum 60 High Contracting States Parties, the view taken above, in relation to the AU's pre-occupation with human rights becomes questionable. If this is correct, then the

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<sup>58</sup> Article 17 Rome Statute Establishing the International Criminal Court, 37 ILM 1002 (1998); 2187 UNTS 90. See also L. Yang "On the Principle of Complementarity in the Rome Statute of the International Criminal Court, 4 *Chinese Journal of International Law* (2005), 121.

<sup>59</sup> Article 126(1) of the Rome Statute required ratification by 60 countries to come into force on 1<sup>st</sup> July 2002, 17 of which were African States.

<sup>60</sup> L. Casey and D. Rivkin, Jr., 'The Limits of Legitimacy: The Rome Statute's Unlawful Application to Non-State Parties', 44 *Virginia Journal of International Law* (2003) 63-89, p. 64. The author opined thus: 'By claiming the right to subject the citizens of non-party States to the authority of the International Criminal Court (ICC), the 1998 Rome Statute violates the global constitution. That constitution, which is unwritten but real, contains a number of basic principles around which the international community is organized. The two most fundamental of these principles are that: (1) the ultimate authority over the world's affairs is vested in sovereign and independent nation-states; and (2) each of those states is, at least in law, equal. As a result, rules of international law in general, and the authority of international institutions in particular, cannot be imposed—either by treaty or custom—on states that have not consented to them. Although that content maybe implied in certain circumstance can be consent be dispensed with altogether. That, however, is precisely what the ICC states parties have done in their efforts to incorporate "universality" into the Rome Statute'.

<sup>61</sup> Section 4 of the VCLT (articles 34-36), establishes as a general rule that a treaty does not create either obligations or rights for a third state without its consent.

purpose of the AU's observable haste to establish an African Court of Justice and Human Rights becomes a suspicious mechanism to shorten the otherwise flexibly long reach of the ICC's arm.

Article 27 provides that:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

This strongly worded section of the Rome Statute is clear that any individual who oversees or plays any part in the commission of crimes against humanity in breach of Article 5 can be tried before the ICC irrespective of their official capacity. By ratifying the Rome Statute, all Member States Parties have demonstrated good faith towards the obligations arising from that treaty in accordance with the edict *pacta sunt servanda*.

Nonetheless the AU appears incensed by what it perceives as the ICC's failure in its dealings with African States, to recognise and reconcile the diplomatic protections inscribed in Article 98 with Article 27's fire and thunder against anyone allegedly involved with Article 5 crimes. Article 98 provides that:

1. 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 international law with respect to the State or diplomatic immunity of a person or property of a third State for the waiver of the immunity.
2. 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 pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the State for the giving of consent for the surrender.

Particularly in light of the recently collapsed *Al Bashir Case*, the AU appears irrevocably adamant that the Rome Statute should be reviewed to ensure a refinement of the understanding and application of the obligations befalling States consequent upon the principle of universal jurisdiction under international law. The Rome Statute authorises the Secretary-General of the United Nations to convene a Review Conference to consider amendments to the Statute.

A review conference was held in Kampala, Uganda from 31 May to 11 June 2010. At the conference, some Member States Parties to both the ICC and the AU suggested amendments to some provisions of the Rome Statute.<sup>62</sup> In particular, AU Member States Parties sought amendments regarding articles 16, 27, 53 and 98. Still, Article 16 remains the provision that the AU is most concerned about.<sup>63</sup>

*The Prosecutor v. Omar Hassan Ahmad Al Bashir*<sup>64</sup>

Concerted effort of the AU to nullify ICC activities against serving heads of State in Africa has been consistent, pointing to a shared belief among those States that their position reflected the correct position in international law, and perhaps that others will acquiesce with them.<sup>65</sup> The AU had reacted swiftly to the ICC's activities regarding the Darfur crisis. At its 11<sup>th</sup> Ordinary Session held from 30 June to 1 July 2008, merely two weeks before the Prosecutor had applied for Al Bashir's arrest warrant, the AU adopted a decision regarding the 'abuse of the principle of universal jurisdiction'.<sup>66</sup> At that meeting the AU discussed recommendations from an earlier meeting of the Ministers of Justice and Attorney Generals held in Addis Ababa, Ethiopia on 18 April 2008.<sup>67</sup> The AU resolved that:

- 1) The abuse of the principle of *universal jurisdiction* was an alarming development that could endanger international peace and security.
- 2) The uses sought for the principle represented a threat to the *sovereignty and territorial integrity* of the targeted African states.

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<sup>62</sup> Report of the Working Group on the Review Conference, ICC-ASP/8/20, available at [www.icc-cpi.int/iccdocs/asp\\_docs/RC2010/WGRC-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/WGRC-ENG.pdf)

<sup>63</sup> See, S.M. Weldehaimanot, 'Arresting Al-Bashir: The African Union's Opposition and the Legalties' 19 *African Journal of International and Comparative Law* (2011), 208-235.

<sup>64</sup> ICC-02/05-01/09.

<sup>65</sup> This is how norms of customary international law arise or fail to arise when their instigators fail to enlist support of others to their idea. See especially B. Chigara, *Legitimacy Deficit in Custom: A deconstructionist Critique* (2001) Ashgate, Aldershot p.20.

<sup>66</sup> Decision of the AU Assembly on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction. Doc. Assembly/AU/14 (XI), at the Eleventh Ordinary Session, 30 June- 1 July 2008, Sharm El-Sheikh, Egypt.

<sup>67</sup> Ibid., para. 1.



- 3) The arrest warrants by the prosecutor ‘*shall not be executed in African Union Member States Parties*’<sup>68</sup> based on that principle.

Further, the Assembly requested the Chairperson of the AU to present the matter before the Security Council and the UN General Assembly for consideration and to urgently hold a meeting between the AU and EU to discuss the matter with a view to finding a lasting solution to this problem and to ensure that those warrants are withdrawn and not executable in any country.<sup>69</sup> Additionally, the AU Assembly requested all UN Member States Parties, particularly the EU States, to impose a moratorium on the execution of those warrants until all the legal and political issues had been exhaustively discussed between the AU, the EU and the UN.<sup>70</sup>

Ever since ‘abuse of the principle of universal jurisdiction’ claims were raised in the June/July 2008 Regular Session of the AU Assembly, it has remained a standing agenda item and a subject matter of decisions of the regular sessions in which the AU continually denigrates the ICC. In July 2009 the AU Assembly echoed its conviction about the need for an international regulatory body with competence to review and/or handle complaints arising out of the abuse of universal jurisdiction claims.<sup>71</sup> At about the same time, the UN General Assembly invited Member States Parties to submit their views on the principle.<sup>72</sup> The UN General Assembly acknowledged that ‘the legitimacy and credibility of the use of universal jurisdiction are best ensured by its responsible and judicious application consistent with international law’. Under the maxim *aut dedere aut punire* the principle still requires either the extradition or punishment of perpetrators of serious crimes against all of humanity.

Notwithstanding, at its nineteenth Ordinary Session held between 15-16 July 2012 the AU urged Member States Parties to use the *principle of reciprocity* to defend themselves against the abuse of the principle of universal jurisdiction.<sup>73</sup> It also reiterated its previous call for the withdrawal of ICC warrants of arrest against African Leaders. Further, it declared that Member States Parties shall not execute these ICC warrants on their own territories.<sup>74</sup> The standoff between the AU and the ICC remains unresolved. Its resolution might well depend on the occasion of a

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<sup>68</sup> Ibid., para. 5.

<sup>69</sup> Ibid., para 6 and 7.

<sup>70</sup> Ibid.

<sup>71</sup> *Decision of the AU Assembly on the Scope and Application of the Principle of Universal Jurisdiction*, Doc.Assembly/AU/11 (XIII) para. 3.

<sup>72</sup> *Resolution of the UN General Assembly on the Scope and Application of the Principle of Universal jurisdiction*, 16 December 2009, UN Doc., A/RES/64/117.

<sup>73</sup> *Decisions and Declarations of the Assembly of the African Union, Nineteenth Ordinary Session 15 – 16 July 2012, Addis Ababa, Ethiopia, AU Decision on the Implementation of the Decisions of the International Criminal Court*, Doc.EX.CL/731(XXI) par.5.

<sup>74</sup> Ibid., para.6.

restatement of international law regarding the principle of universal jurisdiction and the sovereign immunity of state officials - a very unlikely prospect in the foreseeable future given the strengthening of the general international commitment to ensure the recognition, promotion and protection of human rights by ensuring the prosecution of those alleged to have used public authority in particular to commit human rights offences.

*Diplomatic and sovereign immunity travails – the ICC Orders v AU Directives*

There is also a concerted effort among AU Member States Parties to insist on an interpretation of diplomatic and sovereign immunities that if accepted would hinder ICC prosecutions against those that might use public authority to commit human rights crimes, pointing to a shared belief among those States that their position reflected the correct position in international law, and that others will acquiesce with them. This is evidenced by a number of invaluable State practices on the African continent. Firstly, Chad hosted President Al Bashir in July 2010 at a summit of the Sahel Saharan states held in N'Djamena, thereby becoming the first State Party to the Rome Statute to harbour 'knowingly and willingly a fugitive...wanted by the Court'. Chad attracted severe criticism from NGOs and observers.<sup>75</sup> The objugation was based on the assumption that Chad, as a State Party to the Rome Statute would arrest, detain and facilitate transfer formalities to The Hague of any person against whom the ICC had issued an arrest warrant.

Subsequently, President Al Bashir was hosted on two occasions in 2010, by the Republic of Kenya - another State Party to the Rome Statute, as a guest of the Kenyan government during the August celebrations on the occasion of Kenya's new Constitution. He was hosted a second time as participant to a summit for the Inter-Governmental Authority for Development (IGAD) held in Nairobi in October 2010 to discuss the forthcoming referendum for the secession of Southern Sudan from Sudan.

The ICC sought explanations for the refusal of Chad (2013), Malawi (2011) and Kenya (2010) to honour the arrest warrant against President Al Bashir. At a meeting which took place in New York in the aftermath of President Al Bashir's visit to Kenya, between the President of the ICC Assembly of State Parties (ASP), Ambassador Christian Wenaweser of Liechtenstein, and the Kenyan Minister of Foreign Affairs – Kenya explained that it had refused to execute the arrest

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<sup>75</sup> J.D van der Vyer, 'Prosecuting the President of Sudan: A dispute between the African Union and the International Court', 11 *African Human Rights Law Journal* (2011) 683, p.686.

warrant because it believed that it had ‘*competing obligations toward the Court, the AU, and regional peace and stability*’.<sup>76</sup>

In addition to explicit AU directives to not comply with ICC arrest warrants against serving Heads of State, African States have invoked what they perceive to be interpretational tensions arising out of the substantive provisions of Articles 27(2) and 98(1) of the Rome Statute establishing the ICC regarding the matter of sovereign immunity of a serving Head of State.

Nonetheless, the ICC Pre-trial Chamber is of the view that ‘the current position of Omar Al Bashir as Head of a State which is not party to the Rome Statute, has no effect on the Court’s jurisdiction over the present case’ – a universal jurisdictional basis of the offences alleged against the fugitive leader.<sup>77</sup> When it had approved the application for the arrest warrant against Al Bashir, the pre-trial chamber had decided that Sudan, though not a Member State Party to the Rome Statute, ‘has an obligation to fully co-operate with the Court’.<sup>78</sup> Moreover, in its final decision the Court had ordered that ‘... a request for co-operation seeking the arrest and surrender of Al Bashir’ be transmitted to all Member States Parties to the Rome Statute and to all members of the Security Council of the United Nations.<sup>79</sup> On 25 October 2010, when President Al Bashir was supposed to visit Kenya for the second time that year, the Pre-trial Chamber requested Kenya to report to it, no later than 29 October about any problem that would prevent his arrest and surrender during his visit.<sup>80</sup>

The Pre-trial Chamber went ahead to declare that it ‘considered that the President of Sudan did *not benefit from any immunity at international law under the circumstances*. Therefore, State Parties would not find themselves confronted with conflicting obligations and consequently article 98(1) found no application’.<sup>81</sup> The Court’s position seems to be that while sovereign immunity of Heads of State and other high-ranking government officials can be exercised for national offences, it certainly could not be exercised against ICC offences. The legal implications of the Court’s reasoning are worth probing not least because they threaten a complete breakdown of relations between the Court itself and its AU Member States Parties.

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<sup>76</sup> ICC Press Release of 21 September 2010 ‘President of the Assembly of States Parties meets Minister of Foreign Affairs of Kenya’ Doc ICC-ASP-20100921-PR575. (Emphasis added)

<sup>77</sup> *Prosecutor v Omar Al Bashir*, Case No. ICC-02/05-01/09 (4 March 2009), para 41.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*, para. 93.

<sup>80</sup> ICC Press Release of 26 October 2010, UN Doc ICC-CPI 2010101026-PR589.

<sup>81</sup> W. A Schabas, *The International Criminal Court: A commentary on the Rome Statute*, (Oxford: Oxford University Press, 2010), p.1042. (Emphasis added).

Rinoldi writes that Article 98(1) ‘clashes with the spirit of the Rome Statute and... with Article 27(2)’ which discards immunities and special procedural rules that may attach to the official capacity of a person indicted to stand trial before the ICC.<sup>82</sup> The purpose of Article 98(1) is quite clear, but it poses problems in the operation of the ICCs jurisdiction.<sup>83</sup> In practice, making the surrender of an official of a non-State Party dependent upon a waiver of immunity by the same non-State Party involved could in the wording of Article 27(2) ‘bar the Court from exercising its jurisdiction over such a person’ since the Rome statute does not permit trials *in absentia*.<sup>84</sup> This is true in the context that non-Party States are not obliged to co-operate with the Court, and co-operation implies automatically a waiver of sovereign immunity of government officials. However, the main question regarding Al Bashir’s arrest warrant is, whether a State party, in this case, Chad, Malawi, Kenya and South Africa were obliged to arrest him the moment he set foot on their respective countries.

The British House of Lords in the case against Augusto Pinochet<sup>85</sup> established that a Head of State *enjoys complete immunity* from criminal prosecution (and from civil liability) while he or she is in office (immunity *ratione personae*), but after vacating office, only remains immune from prosecution for crimes committed while he or she occupied that office, where these crimes are committed in his or her official capacity (immunity *ratione materiae*). In the *Arrest Warrant* case,<sup>86</sup> the ICJ was asked to consider whether personal immunity precludes the exercise of foreign jurisdiction over international crimes. The ICJ opined thus:

Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person whom it applies from all criminal responsibility.<sup>87</sup>

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<sup>82</sup> D.Rinoldi & N Parisi, ‘International co-operation and Judicial Assistance between the International Criminal Court and States Parties’ in F. Lattanzi & W.A Schabas (eds.) *Essays on the Rome Statute of the International Criminal Court* (Italy: Il Sirente, 1999) p, 389.

<sup>83</sup> Article 98(1) was seemingly designed to uphold rules of jurisdictional immunity of foreign states and diplomats, and the immunity from execution of property belonging to foreign states. See K. Prost & A. Schlunk, ‘Co-operation with respect to waiver of immunity and consent to surrender’ in O Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (1999) 1131. The immunities are enshrined in the Vienna Convention on Diplomatic Relations 1961 UN Doc A/Conf 20/13 (16 April 1961).

<sup>84</sup> O. Triffterer ‘Irrelevance of official capacity’ in O. Triffterer (ed.), *Commentary on the Rome Statute of International Criminal Court*, *ibid.*, pp.501-503.

<sup>85</sup> *R v Bow Metropolitan Stipendiary Magistrate & Others, Ex Parte Pinoche Urgate* (Amnesty International & Others Intervening) (No 3) [1999] 2 All ER 97.

<sup>86</sup> *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgement of 14 February 2002, [2002] ICJ Rep. 3.

<sup>87</sup> *Ibid.*, para. 60.

The ICJ thus endorsed the principle, as a norm of customary international law.<sup>88</sup> The ICJ's distinction between criminal responsibility and jurisdictional immunity also led it to specify certain circumstances in which immunities enjoyed by public officials under international law would not preclude a criminal prosecution:<sup>89</sup>

1. The beneficiaries of criminal immunity do not enjoy that immunity under international law in their own countries, and may therefore be brought to trial in their domestic courts in accordance with the relevant rules of domestic law.
2. The persons entitled to sovereign immunity will forfeit that immunity from foreign jurisdiction if the State which they represent or have represented, decides to waive that immunity.<sup>90</sup>
3. The immunities accorded under customary international law will not preclude prosecutions in other States for crimes committed prior to or, subsequent to an official's period in office, as well as for acts committed in his or her personal capacity while in office, after the person concerned ceases to hold office to which that immunity was attached.
4. The official concerned may be subject to criminal prosecution in certain international criminal courts.<sup>91</sup>

The ICJ's *obiter dicta* regarding the inapplicability of personal immunities before 'certain international criminal courts' played a crucial role in the *Taylor case*<sup>92</sup> before the Special Court of Sierra Leone (SCSL) – a hybrid Court of the UN and the government of Sierra Leone established in pursuance of Security Council Resolution 1315 (2000) for the prosecution of 'crimes against humanity, war crimes and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone'.<sup>93</sup>

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<sup>88</sup> There is a raging debate over the ambiguity of certain *obiter* questions in the ICJ's judgement in the *Arrest Warrant* case particularly pertaining to the issue of functional immunity for international crimes and its relationship with personal immunity for these crimes from international jurisdiction. Some scholars have pointed to the inconsistency in application of the functional immunity question before the ICJ and other international criminal tribunals, fearing that it leads to further fragmentation of international law. See R. van Alebeek, 'The Judicial Dialogue between the ICJ and International Criminal Courts on the Question of Immunity', in L. van den Herik & Carsten Stahn (eds.), *The Diversification and Fragmentation of International Criminal Law* (Boston: Martinus Nijhoff Publishers, 2012), pp.94-116.

<sup>89</sup> J.D van der Vyver, 'Prosecuting the President of Sudan: A dispute between the African Union and the International Court', 11 *African Human Rights Law Journal* (2011) 683, pp.689-690.

<sup>90</sup> The rationale behind this is that the immunity vests in the state and not the state official.

<sup>91</sup> *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgement of 14 February 2002, [2002] ICJ Rep. 3., para. 61.

<sup>92</sup> *Prosecutor v Taylor*, 128 International Law Reports 239 (31 May 2004).

<sup>93</sup> UN website at: <http://www.un.org/en/sc/documents/resolutions/2000.shtml>

Charles Taylor, a former President of Liberia, claimed sovereign immunity from the alleged offences. The SCSL made clear that the above decision of the ICJ granting sovereign immunity to the minister of Foreign Affairs of the DRC applied to prosecutions of an official of State A in State B. The SCSL observed that it was not a national court of Sierra Leone but an international criminal court, and that the principle of sovereign immunity ‘derives from the equality of sovereign States and therefore had no relevance to international criminal tribunals which are not organs of a State but derive their mandate from the international community’ in general.<sup>94</sup>

In her dissenting opinion in the *Arrest Warrant* case Judge Van den Wyngaert opposed the SCSL approach that sovereign immunity claims should be limited to prosecutions of international criminals before national courts. For her, ‘... immunity should never apply to crimes under international law, neither before international courts nor national courts’.<sup>95</sup> Her position is mirrored in the legislation implementing the Rome Statute into South Africa’s domestic law. It provides that a person who ‘... is or was a head of state or government, a member of a government or parliament, an elected representative or a government official’ can be prosecuted in a South African court for crimes within the subject matter jurisdiction of the ICC, ‘despite any other law to the contrary, including customary and conventional international law.’<sup>96</sup>

Overall, the practice regarding sovereign immunity claims appears to vary from that of the ICJ position from tribunal to tribunal. While the *Pinochet* case and the *Arrest Warrant* case referred to domestic court approaches, an *obiter dictum* in the *Arrest Warrant* case and the *ratio decidendi* in the *Taylor* case made it distinctively clear that a Head of State (or minister of foreign affairs) does not possess sovereign immunity against prosecutions before an international tribunal. This is understandable in light of the mandate of international criminal tribunals to bring perpetrators of *jus cogens* crimes to book. By implication, if a Head of State does not enjoy immunity from prosecution before the ICC, and to borrow from Article 98(1) there are ‘... no obligations under international law with respect to the State or diplomatic immunity of a person’ to be waived. Article 27 of the Rome Statute appears to buttress this same view. Therefore, the AU position not to cooperate with ICC orders raises serious demands on international law to change or risk alienating the AU completely.

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<sup>94</sup> *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgement of 14 February 2002, [2002] ICJ Rep. 3. para. 51.

<sup>95</sup> Dissenting judgement of Van den Wyngaert, J para 36. She went ahead to criticize the ICJ for its ‘formalistic reasoning’ and its disregard for the principle of accountability of international crimes and the *jus cogens* nature of these crimes. She was reacting to the conclusion of the ICJ that personal immunity continued to apply to international crimes based on perusal of relevant state practice.

<sup>96</sup> Section 4(2) (a) Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.

## IV

### Possible outcomes of the troubled ICC-AU relationship

In light of the above discussion, Article 98(1) appears problematic, at least in regard to the object and purpose of the Rome Statute itself, which is to stop impunity for *crimes jus cogens*. It appears to be completely redundant in light of the rule regarding statutory interpretation *verba accipienda ut sortiantur affectum*,<sup>97</sup> which sanctions a presumption against finding any redundant words or phrases in any written legal instrument that carries the force of law.

This raises the question of how Articles 98(1) and 27(2) could be reconciled to give effect to the object and purpose of the Rome Statute establishing the ICC. Some scholars have recommended confining application of Article 27(2) to Member State Party officials and making the provisions of Article 98 applicable only to State officials of non-Party States.<sup>98</sup> Others distinguish between the competence of the ICC to prosecute and inflict punishment on the beneficiary of sovereign immunity, despite their official capacity, if and when they surrender to the ICC on the one hand; and on the other, the duty of the Member State Party to surrender such a person to stand trial at the ICC.<sup>99</sup> In this sense the only possible relevance of Article 98(1) would then relate to the duty of a Member State Party to surrender a foreign state official to the ICC for prosecution if this would violate an obligation of that State Party under the rules of immunity and privileges of international law.<sup>100</sup>

Conversely, the conundrum created by the operation of Articles 27 and 98 could be resolved by concluding that Article 27 trumps Article 98. The AU-EU Expert Group suggests that ‘... as regards Member States Parties *inter se*, the immunities from foreign legal process otherwise available under international law pose no bar to the surrender of persons to the Court.’<sup>101</sup> In furtherance of the above suggestion, it is argued that where alleged criminals are citizens of a non-Member State who find themselves in the ICC as a result of a UN referral, non-member States that would otherwise have no obligation to cooperate without their consent in cases triggered by the other two mechanisms, have the same obligation as Member States Parties to the

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<sup>97</sup> This maxim means that words are to be construed in such a way that they have legal effect.

<sup>98</sup> D. Akande, ‘The legal nature of Security Council referrals to the ICC and its impact on Al Bashir’s immunities’ 7 *Journal of International Criminal Justice*, (2007) 333 – 339.

<sup>99</sup> See for example, A. Dworkin & K. Ilipoulis ‘The ICC, Bashir and the immunity of heads of state’ available at <http://www.crimesofwar.org/commentary/the-icc-bashir-and-the-immunity-of-heads-of-state/>

<sup>100</sup> J.D van der Vyer, ‘Prosecuting the President of Sudan: A dispute between the African Union and the International Court’, 11 *African Human Rights Law Journal* (2011) 683, p.692.

<sup>101</sup> *Report of the AU-EU Technical Ad hoc Expert Group on the Principle of Universal Jurisdiction, 16 April 2009, Brussels.*

Rome Statute.<sup>102</sup> This position assumes that the UN SCRR might be silent on the obligation of non-State Parties to the Rome Statute.

The SCRR further complicates matters by requiring the Government of Sudan and all other parties in the conflict in Darfur to cooperate fully with, and provide necessary assistance to the ICC but recognizing also that non-States Parties to the Rome Statute have no obligation under the Statute to co-operate fully. Thus, the Resolution merely ‘urges all States and concerned regional and other international organizations to co-operate fully’.<sup>103</sup> Some scholars place their emphasis selectively on the use of the word ‘urges’ rather than on the referral *per se*. This cluster insists that:

It is perfectly conceivable that the Security Council could adopt as resolution having as its sole object the decision that all member states shall cooperate with the Court. It would even seem natural that a decision to this effect be included in a resolution where the Security Council decides to refer the situation to the ICC. It could even be argued that one of the implications of a SC referral is that all states are automatically put under an international obligation to comply with requests for cooperation by the Court.<sup>104</sup>

Further, the argument that SCRRs blur the distinction between the obligations of Member States Parties and non-States Parties to the Rome Statute as far as co-operation with the Court is concerned appears invalid specifically because paragraph 2 of SC Resolution 1593 which expressly rules out such a consequence arising.<sup>105</sup>

There is persuasive argumentation to the effect that a SCRR ought to impose an obligation to co-operate on non-Member States Parties. Referrals are made under Chapter VII of the UN Charter. The very fact that they are made under Chapter VII underlines the seriousness of the matter in relation to the peace and security mandate of the Council. In the same vein, it has been argued that, “... when the operative paragraphs of a Security Council Resolution made pursuant to Chapter VII authority indicate a direct order, the Resolution becomes binding as law and mandatory as policy” upon those States that the resolution is directed towards.<sup>106</sup>

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<sup>102</sup> A. Ciampi, ‘The Proceedings against President Al Bashir and the Prospects of their Suspension under Article 16 ICC Statute’, 6 *Journal of International Criminal Justice* (2008) 885-897, p. 895.

<sup>103</sup> United Nation Security Council Resolution 1593, UN Doc., S/RES1593 (2005), at para.2.

<sup>104</sup> L. Condorelli and A. Ciampi, ‘Comments on the Security Council Referral of the Situation in Darfur to the ICC’, 3 *Journal of International Criminal Justice* (2005) 590-599, p. 593.

<sup>105</sup> *Ibid.*

<sup>106</sup> L. Buzzard, ‘Holding an Arsonist Feet to the Fire? – The Legality and Enforceability of the ICC’s Arrest Warrant for the Sudanese President Omar Al Bashir’, 24 *American University International Law Review* (2009) 887-941 at 921-2.



Consequently, it would be ironic to suggest that a SC Resolution that was silent on the matter of co-operation automatically relieved non-Member States of their obligation to co-operate. The seriousness and urgency of the matter for which the SC Resolution was passed in the first place, would be defeated if non-Member States were not obliged to co-operate.

For the sake of normative consistency and maintenance of objectivity in international criminal law, a SCRR ought to be generally applicable to Member States Parties and to non-Member States Parties to the Rome Statute alike.

Hinging the duty of States to co-operate in bringing President Al Bashir to trial on the application of the tenuous conflict between, Articles 98(1) and 27(2) of the Rome Statute may have been prompted by a hope for a possible 'easy-way-out' that does not resolve issues around co-operation, sovereignty and immunity. Ideally, as far as UN SCRRs are concerned, the answer may lie with placing non-Member States Parties on an equal footing with Member States Parties.

In its Order of 14 April 1992 regarding *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States) (Provisional Measures)*<sup>107</sup> the ICJ stated that:

... Members of the United Nations are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter .... [W]hereas the Court, which is at the stage of proceedings on provisional measures, considers that prima facie this obligation extends to the decision contained in resolution 748 (1992); and ... in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention ....<sup>108</sup>

The Court appears here to draw attention to a definite hierarchy of sources of obligations under international law. That hierarchy privileges and prioritises obligations arising out of SCRs even over and above their multilateral treaty obligations – placing SCRs ahead of the list sources of international obligations referred to in Article 38(1) of the Statute of the ICJ that has become accepted as customary international law. Generally, one would expect obligations arising out of regional bodies such as the AU and EU to succumb to SC Resolutions in light of Article 53 of the Vienna Convention on the Law of Treaties (1969)<sup>109</sup> and also in light of the principle that

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<sup>107</sup> Order of 14 April 1992 regarding *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States) (Provisional Measures)*.

<sup>108</sup> *Ibid.*, p.7.

<sup>109</sup> "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and

national/local law cannot be invoked in defence of State breach of international law. However, the emergence of supranational regional organisations such as the EU, that the AU appears to be developing towards in some respects, appears to hold this position in contention. The *Kadi Case*<sup>110</sup> challenged the competence of the UN Security Council to compel Member States Parties of the EU to freeze assets of persons suspected of financing terrorism, even while exercising its executive Chapter VII mandate under the UN Charter.

Notwithstanding, the *Kadi Case* has raised a '*judicial review under the rule of law in a democratic State exception*' where human rights of individuals are concerned. That exception may not apply here because no one is being arbitrarily denied the opportunity to rebut the charges levelled against them. The purpose of the intended *Al Bashir* trial that the AU is seeking to frustrate by instigating non-cooperation with the OTP and the ICC is to give the accused a fair opportunity to see the evidence levelled against him, consider it and afford him a fair chance to rebut it. However, where the indictment of a State official with sovereign immunity originates from a Member State Party referral or from the powers of the prosecutor *proprio motu*, the potential for non-cooperation would still exist as international law would have no answer to it because of the conundrum associated with Articles 98(1) and 27(2) of the Rome Statute establishing the ICC.

#### *The legal merits and demerits of the AU's position vis-à-vis the ICC*

Forty-seven African states participated in the drafting of the Rome Statute<sup>111</sup> at the Rome Conference in July 1998 and many of them belonged to the like-minded group that pushed for the adoption of the final statute.<sup>112</sup> Delegations from African countries and other countries in the 'like-minded' group were in favour of automatic jurisdiction and also supported the final proposal<sup>113</sup> on jurisdiction which eventually made its way into the Rome Statute.<sup>114</sup> South Africa, a regional power, was instrumental in coordinating the efforts to have the Rome Statute ratified by as many African States.<sup>115</sup>

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recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

<sup>110</sup> Case C-402/05 P and C-415/05, P. *Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR I-6351.

<sup>111</sup> Coalition for the International Criminal Court, 'Africa and the International Criminal Court', available at: [http://www.iccnw.org/documents/Africa\\_and\\_the\\_ICC.pdf](http://www.iccnw.org/documents/Africa_and_the_ICC.pdf)

<sup>112</sup> Ibid.

<sup>113</sup> E. Wilmhurst, 'Jurisdiction of the Court', in R. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations and Results*, (Kluwer Law International 1999), 127-141, 133, 135.

<sup>114</sup> Coalition for the International Criminal Court, 'Africa and the International Criminal Court', available at: [http://www.iccnw.org/documents/Africa\\_and\\_the\\_ICC.pdf](http://www.iccnw.org/documents/Africa_and_the_ICC.pdf).

<sup>115</sup> H. Fischer, J. Dugard and A. McDonald (eds), *Yearbook of International Humanitarian Law*, vol 4, (TMC Asser, 2001), p.617.

At the time of writing, there are 122 Member States Parties to the ICC of which 33 are African countries making the region the most heavily represented in the Court's membership. Of the 60 founding Member States Parties of the ICC, 17 were African States. Despite the stand-off between the AU and the ICC, African countries continue to ratify the Rome Statute - the latest to do so is the Ivory Coast which became a member on the 18<sup>th</sup> of February 2013. But the AU continues to express dissatisfaction with certain provisions of the Rome Statute regardless. The AU's justifications for its stand seem inexpressible in law and appear to be incoherent. Some of them are examined below.

*a. The African Criminal Court Argument*

The AU has in the past declared that African states '... are not against international justice. It [just] seems that Africa has become a laboratory to test the new international law.'<sup>116</sup> Mamdani writes that the ICC is rapidly turning into a Western Court to try African crimes against humanity.<sup>117</sup> The claim that the ICC unfairly targets Africans, is arguably the most untenable of the AU's arguments because as has already been indicated above, four of the nine African situations before the ICC arose out of Member State Party Referrals, (MSPR) while the Darfur situation was a Security Council Resolution referral (SCRR). Articles 17(1) (d) and 53(1) (c) of the Rome Statute require the Prosecutor to consider those situations that have 'sufficient gravity to justify further action by the Court'. It has been established by the OTP that these situations involved thousands of wilful killings and large-scale sexual violence and abductions, and that collectively; they have resulted in the displacement of over five million people.<sup>118</sup> Other situations before the court also mirror similar crimes.

An observer has suggested transferring the hearings of ICC trials to African soil. This view is supported by some ICC Judges despite the apparent logistical challenges. It is believed that it would likely go a long way to '.... bridge the growing emotional distance between the Court and many of its supporters in Africa'.<sup>119</sup> While such an arrangement has the potential to enhance the legitimacy of the ICC, particularly in Africa, operationalizing it would be extremely difficult because it would almost require the Court to become mobile, something not envisaged at the outset, and certainly logistically demanding even to the extent of delaying justice for victims by

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<sup>116</sup> Comment by Jean Ping, immediate past Chairperson of the African Union Commission. BBC News, 'Vow to pursue Sudan over "crimes"', 27 September 2008, available at <http://news.bbc.co.uk/2/hi/africa/7639046.stm>

<sup>117</sup> M. Mamdani, 'Darfur, ICC and the New Humanitarian Order: How the ICC's "responsibility to protect" is being turned into an assertion of ne-colonial domination', *Pambazuka News* 396.

<sup>118</sup> K. Heller, 'Situational Gravity under the Rome Statute', in Carsten Stahn and Larissa van den Herik (eds.), *Future Directions in International Criminal Justice*, (Hague: TMC Asser, 2009), p.2.

<sup>119</sup> C.C Jalloh, 'Regionalizing International Criminal Law', *9 International Criminal Law Review* (2009), 445, p. 488.

several years more. Moreover, the AU has already rejected the idea of an ICC liaison office in Addis Ababa.<sup>120</sup>

Complaints that the ICC unfairly targets African States are losing weight particularly as the OTP is also currently conducting preliminary investigations into situations in Afghanistan, Georgia, Guinea, Colombia, Honduras, Korea and Nigeria.

*b. Discretion related challenges*

The AU seems to be particularly troubled by the reluctance of the UN Security Council to defer Al Bashir's prosecution in line with Article 16 of the Rome Statute.<sup>121</sup> There is an on-going debate as to whether Article 16 applies also to SCRs and at what stage of the proceedings Article 16 may be invoked.<sup>122</sup> Ciampi argues that if Articles 13 and 16 are interpreted systematically, it would be 'problematic to deny that the Security Council has the power to suspend the Court's investigations or prosecutions' for a period of 12 months regarding a situation it had referred to the ICC Prosecutor in the first place. He also adds that it is not easy to envisage limits to the discretion of the Security Council in relation to reasons of deferral. The UN Charter guarantees the Security Council wide powers as a political organ.<sup>123</sup>

But arguments abound in line with the suspicions of the AU that the proposed deferral of Al Bashir's case would risk extension of the discretionary powers of the Security Council under both the UN Charter and the ICC Statute. A deferral specially customised for Al Bashir's prosecution would risk recognition of the fact that the Security Council has power to select targets for the Court's investigations and prosecutions, including cases not to be commenced or proceeded with under the statute.<sup>124</sup> This implies political scrutiny of ICC functions by the Security Council and dismissal of court proceedings that fall outside its political agenda.

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<sup>120</sup> *Decision of the AU Assembly 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 at 15<sup>th</sup> Ordinary Session, 25-27 July, Kampala, Uganda.* Doc. Assembly/au/10(XV). para. 8.

<sup>121</sup> Article 16: No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

<sup>122</sup> See, S. Williams and L. Sherif, 'The Arrest Warrant for President Al Bashir: Immunities of Incumbent Heads of State and the International Criminal Court', *14 Journal of Conflict and Security Law* (2009) 71-92, p.91.

<sup>123</sup> L. Buzzard, 'Holding an Arsonist Feet to the Fire? – The Legality and Enforceability of the ICC's Arrest Warrant for the Sudanese President Omar Al Bashir', *24 American University International Law Review* (2009) 887-941, p. 889.

<sup>124</sup> S. Williams and L. Sherif, 'The Arrest Warrant for President Al Bashir: Immunities of Incumbent Heads of State and the International Criminal Court', *14 Journal of Conflict and Security Law* (2009) 71-92, p.91.

Some recommend that Article 16 should be read symmetrically with Article 13 as providing for the power of the Security Council to defer “a situation”, not “cases” pending before the ICC.<sup>125</sup> In addition to its inconsistency with the textual interpretation of Article 16, such a result would be hardly reconcilable with the general purport of the Rome Statute, premised on the establishment of an independent permanent court that is related to the UN system.<sup>126</sup>

It must be recognised that the UN is, as a matter of law, the final arbiter on international peace and security matters under Chapter VII of the UN Charter - a fact that remains trite amongst UN Members. Focusing only on the legality of the AU's position to not co-operate with the ICC over ICC indictments against African leaders, the AU position risks contradiction with the UN's blueprint for peace and security that is summarised by the discretionary competencies that have been ascribed to the organisation, particularly in the field of human rights protection as a means of ensuring international peace and security. The UN possesses discretionary powers under both the UN Charter, and the Rome Statute. Moreover, the maxim *pacta sunt servanda* requires AU Member States Parties to comply with decisions of the UN and to respect decisions of international tribunals as appropriate.

*c. Irresponsible use of discretion by the OTP*

The AU queries also the Office of the Prosecutor's (OTP) discretionary powers under Article 53 in the determination whether or not to prosecute. If after examining the gravity of the crime(s) and the interests of the victims, the Prosecutor believes that there are substantial reasons why an investigation would not serve the interest of justice, the Prosecutor may halt or refrain from commencing such investigation. The Prosecutor is obliged to 'inform the Pre-Trial Chamber' of the ICC and the refereeing State (in the case of a MSPR under Article 14), or the Security Council where a SCR is involved, the reason for reaching such a conclusion. In return, such a MSP or the Security Council can request the Pre-Trial Chamber to review the decision of the Prosecutor; and the decision of the Prosecutor would be effective only upon confirmation by the Pre-Trial Chamber. The Prosecutor can, at any time, reverse a decision whether to initiate an investigation or prosecution if she discovers new facts and information. Where the Prosecutor decides not to proceed with investigation or prosecution, the Pre-trial Chamber at the request of

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<sup>125</sup> S.M Weldehaimanot, 'Arresting Al-Basir: The African Union's Opposition and the Legalities' 19 *African Journal of International and Comparative Law* (2011), 208-235p, 230.

<sup>126</sup> L. Condorelli and A. Ciampi, 'Comments on the Security Council Referral of the Situation in Darfur to the ICC', 3 *Journal of International Criminal Justice* (2005) 590-599, p. 593. In the same vein exceptional circumstances would need to be identified, turning a situation already considered as warranting effective prosecution by the OTP into one which the ICC's exercise of jurisdiction threatens world peace and security.

the State making a referral under Article 14 or 13(b), can review the decision. If the decision of the Prosecutor is made in the interest of justice, the Pre-Trial Chamber may *sua sponte* review the decision.

Curiously, the Rome Statute is not clear whether interested parties such as Al Bashir and the AU - in the Darfur case may make the claim that: 'the prosecution would not serve justice' as a bar to the commencement or continuation of prosecution.<sup>127</sup> This could be critical in situations where the Prosecutor proceeds in spite of that claim being made. The Rules of Procedure are also mute on this point. The Pre-Trial Chamber seems to leave the determination of the question of 'interest of justice' entirely to the OTP. But to issue an arrest warrant, the Chamber is not obliged to satisfy itself that the interests of justice are protected.<sup>128</sup> Also, at the stage of confirmation of charges, the Chamber is not required to consider if the OTP had considered the interests of justice.<sup>129</sup> Despite the lack of provisions in the ICC rules regarding whether or not a party could raise such issues, this is one of the legal arguments the AU would have to explore. There is no procedural rigidity in international tribunals and the AU would have set a precedent for other parties to follow, and more interestingly open new channels for the possible review and amendment of the Rome Statute.

*d. Disruption of domestic peace building claims*

The AU insists that by prosecuting active participants in on-going or recently settled conflicts, the ICC risks prolonging the violence or endangering the fragile peace process.<sup>130</sup> Some African scholars have explored the plausibility of this sentiment, arguing that the political reality of the Sudan conflict may lend some support to the AU's argument.<sup>131</sup> They argue from a *conflict resolution perspective* that:

... the issuing of an arrest warrant by the ICC for Al Bashir can rightfully be construed as a provocative act and a potential conflict trigger, thereby explaining the AU's sentiments. The warrant is ill-timed and seeks to tamper with an essential element of the Sudan's peace process- the continued existence of both parties.<sup>132</sup>

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<sup>127</sup> S.M. Weldehaimanot, 'Arresting Al-Basir: The African Union's Opposition and the Legalities' 19 *African Journal of International and Comparative Law* (2011), 208-235, p.231.

<sup>128</sup> Rome Statute, article 58.

<sup>129</sup> Rome Statute, article 61.

<sup>130</sup> 'Communique of the 142<sup>nd</sup> meeting of the Peace and Security Council' African Union (2008).

<sup>131</sup> See for example, S. Odera, 'Politics of International Criminal Justice: The ICC's Arrest Warrant for Al Bashir and the African Union's Neo-Colonial Conspirator Thesis', in C. Murungu & J. Biegon (eds.), *Prosecuting International Crimes in Africa*, (Pretoria: Pretoria University Law Press, 2011), pp.145-160.

<sup>132</sup> *Ibid.*, p.153.

Proponents of the above view also criticize the OTP for neglecting the interests of justice in the discharge of its duties.<sup>133</sup> Some NGOs, including Human Rights Watch and Amnesty International have argued that the OTP should narrowly define what is meant by ‘interests of justice’ for which investigations and prosecution could be dropped.<sup>134</sup> In defence of the Court, the OTP made clear that the criteria for the exercise of article 53 of the Rome Statute ‘will naturally be guided by the objects of the Statute, namely, the prevention of serious crimes of concern to the international community through ending impunity’.

Further, the AU holds that ‘...there is a difference between the concepts of *interests of justice* and *interests of peace* and that the latter falls within the mandate of institutions such as the UN Security Council and not that of the Office of the Prosecutor’.<sup>135</sup> Some scholars have argued that in distinguishing the interests of peace from the interests of justice, the Prosecutor is reading too much meaning into the term. It may be trying to impose a literal approach to the legal interpretation of an expression that was intended to leave the exercise of prosecutorial discretion unfettered.<sup>136</sup>

## Conclusions

Africa’s new regional institution, the AU, appears keener than its predecessor to foster human rights protection and the rule of law in the region and to revise international law in order to ensure a genuinely fair and unbiased international legal system from which African states have historically been excluded. Whereas the OAU’s 39-year record regarding human rights protection appeared to be at best ambivalent, the AU approach appears frantic, prompted perhaps by a strong will to insulate themselves from the reach of the complimentary jurisdiction of the ICC, particularly that arising from UN Security Council referrals and also from the OTP of the ICC.

Nonetheless, the AU’s insistence on the redefinition of principles of international law, particularly the application of elements of the doctrines of universal jurisdiction, extra territorial jurisdiction and of diplomatic privileges and immunities appears to be an attempt to reformulate international law too far. Alternatively, it may be viewed as a genuine attempt to modernise

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<sup>133</sup> Ibid.

<sup>134</sup> Human Rights Watch, *The Meaning of ‘The Interests of Justice’ in Article 53 of the Rome Statute*, Policy paper (June 2005), available at <http://www.hrw.org/news/2005/06/01/meaning-interests-justice-article-53-rome-statute>. See also *Open Letter to the Chief Prosecutor of the International Criminal Court: Comments on the Concept of the Interests of Justice*, 17 June, 2005, AI Index: IOR 40/023/2005.

<sup>135</sup> ICC Policy paper on the ‘interests of justice’, Office of the Prosecutor, September 2004, available at <http://www.iccpi.int/NR/rdonlyres/.../ICCOTPIInterestsOfJustice.pdf>

<sup>136</sup> W. Schabas, ‘Prosecution Discretion v. Judicial Activism at the International Criminal Court’, 6 *Journal of International Criminal Justice* (2008), 731-61, p. 749.

international law through custom as provided for in Article 31(b) of the Statute of the International Court of Justice which is commonly referenced as the basic source of international law.

The AU's actions described in the foregoing could certainly be described as indicative of the formation of instant custom, or wild custom, or even civilised custom under the doctrine of customary international law. But could this emergent regional customary international law trump the international criminal law that it is challenging, which is a result of nearly seven decades of crystallisation of standards on the prohibition and enforcement against genocide, crimes against humanity and war crimes?

While the AU's messianic zeal to deliver and protect its Member States Parties from what it perceives as an unfair and biased international criminal law may have historical sympathies, it appears to be completely irrational and irreconcilable to the human rights and human security agendas of the twenty-first century because following it would result in the promotion of impunity for gross human rights violations such as those experienced in Darfur which are the subject of Al Bashir's indictment at the ICC.

The AU's agitations for a refinement of the doctrine of universal jurisdiction in order to nullify the reach of Articles 13(b), 16, 27 and 98 of the ICC on its Heads of States or government – the very persons who are most likely to commit the offences in question- is problematic and contradictory to well established doctrines of international law. The UN is unlikely to yield to the AU agitations for such radical changes to be made. But neither does the AU look likely to change its anti-ICC drumbeat anytime soon. It is likely that a new wave of economic and social embargoes similar to those of the 1970s and 1980s against apartheid-rule in both Rhodesia and South Africa could follow soon against AU states considered belligerent against their UN and ICC responsibilities. The European Union which regards the use of unilateral coercive action for the promotion of human rights worldwide as a tool of its foreign policy may be the first to take that initiative, followed by the usual consequences of human suffering in target states until a final solution is reached.