The International Criminal Court and the Duty to Arrest and Surrender
The Case of Omar Al-Bashir in South Africa

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I. Statement of the Issues

In June 2015, President Al-Bashir of Sudan attended the African Union (hereinafter “AU”) Summit hosted in South Africa. The result was a Court process that revealed the legal complexities surrounding the execution of the arrest warrant issued against Al-Bashir.1 With Al-Bashir’s attendance of the Summit, the potential conflict of obligations between South Africa’s obligations to cooperate with the ICC and the other obligations. As is now well-known, the duty to cooperate is central to the Rome Statute.2 In particular, while Al-Bashir might have no immunities before the ICC by virtue of Art. 27, he retains his immunities, including inviolability, from foreign national jurisdiction. Thus, while South Africa has a duty to arrest, under customary international law, it is obliged to respect his immunities and inviolability. The potential conflict that arises is dealt with under the Rome Statute by Art. 98, which provides that the ICC may not request cooperation if cooperation would require a State to act inconsistently with its obligations under international law on immunities.3

The aftermath – although I hasten to add that the full repercussions will continue to unfold – of the circumstances of Al-Bashir’s arrival in and departure from South Africa, without being arrested by South African authorities, was a judgment by the North Gauteng High Court (hereinafter the “NGHC”) determining that there was a duty to arrest Al-Bashir and to surrender him to the International Criminal Court (hereinafter the “ICC”).4

While South Africa’s experience with the conflict of obligations caused a stir, several African states had already faced the dilemma. Some of these states, in particular Djibouti and Kenya, have had to make “appearances” before the Bureau of the Assembly of States Parties to the ICC to explain their non-cooperation with the duty to arrest and surrender of Al-Bashir. Others, most notably the Democratic Republic of Congo, Malawi and Chad, have had to appear before the Pre-Trial Chambers of the ICC.5 All told, before June 2015, there had been seven cases of non-cooperation with the duty to arrest and surrender Al-Bashir – Kenya, Djibouti, Chad (twice), Malawi, Nigeria and the Democratic Republic of Congo. For South Africa, at least before June 2015, this potential conflict of obligations had, for the most part, been mainly academic. It has been widely reported that South Africa has, since the adoption of the AU decisions, avoided the conflict of obligations by always requesting the Sudanese head of state not to honor invitations to South African events – examples, in this regard, include the two inaugurations of President Zuma, the 2010 World Cup and the funeral of former President Mandela – this has now been confirmed in a

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1 On 4 March 2009, the ICC Pre-Trial Chamber I issued a warrant of arrest for Omar Hassan Al-Bashir for crimes against humanity: ICC (Pre-Trial Chamber I), Decision of 4.3.2009 – 02/05-01/09 (Warrant of Arrest for Omar Hassan Ahmad Al-Bashir). On 12 July 2010, the ICC issued a second warrant of arrest for genocide: ICC (Pre-Trial Chamber I), Decision of 12.7.2010 – 02/05-01/09 (Second Warrant of Arrest for Omar Hassan Ahmad Al-Bashir).


3 Art. 98 (1) provides as follows: “The Court may not proceed with a request for surrender or assistance which would require the State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity […]”.

4 High Court of South Africa, Decision of 23.6.2015 – 27740/2015 (Southern African Litigation Centre v. Minister of Justice and Constitutional Development and Others). The matter is far from over at the time of writing this article. The respondents have expressed an intention to appeal the judgment; at the time of writing an investigation that could lead to a contempt of court process was underway; there will be hearing before an ICC Pre-Trial Chamber on the non-cooperation of South Africa, which itself is subject to appeal; and South African authorities have been publicly talking about withdrawal from the Rome Statute in consequence of the judgment.

5 See ICC (Pre-Trial Chamber I), Decision of 12.12.2011 – 02/05-01/09 (Decision Pursuant to Art. 87 (7) on the Failure of the Republic of Malawi to Comply with the Cooperation Request Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, the Prosecutor v. Al Bashir); ICC (Pre-Trial Chamber I), Decision of 13.12.2011 – 02/05-01/09 (Decision Pursuant to Art. 87 (7) on the Failure of the Republic of Chad to Comply with the Cooperation Request Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, the Prosecutor v. Al Bashir); and ICC (Pre-Trial Chamber II), Decision of 2.4.2014 – 02/05-01/09 (Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court, The Prosecutor v. Omar Hassan Ahmad Al Bashir).

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judgment by South African court. However, the decision to host the Summit made the potential conflict real for South Africa. The tried and tested method of requesting the Sudanese head of state not to attend could not prevent the conflict since, technically, this was not South Africa’s meeting to begin with. Moreover, politically, there would be no incentive for Sudan to agree not to come, since attendance of the meeting would provide Sudan an opportunity to embarrass the ICC – that South Africa might be embarrassed in the process would only be collateral damage.

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

II. The Judgment of the NGHC in Southern African Litigation Centre

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

The decision of the Court in Southern African Litigation Centre case is based on several propositions. The first important proposition on which the judgment is based is that, immunity for Rome Statute crimes.

The second proposition forming the basis of the NGHC’s judgment relates to the content of the Host Agreement between South Africa and the African Union (hereinafter the “Host Agreement”). The Host Agreement provides, in part, that “Representatives of Member States” shall be accorded, inter alia, “immunity from personal arrest or detention” and “[s]uch other privileges, immunities and facilities […] as diplomatic envoys enjoy […]”.

The NGHC first determines that the General Convention is irrelevant for the purposes of disposing of the matter since South Africa never ratified it. Second, the NGHC determines that Host Agreement, on its terms, “does not confer immunity on the Member States or their representatives or delegates.” Rather, the NGHC asserts, it “confers immunity on the members and staff of the AU Commission, and on delegates and representatives of Inter-governmental Organisations that might otherwise have attached to President Bashir as head of state is excluded or waived in respect of crimes and obligations under the Rome Statute.” Additionally, the Pretoria Court refers to a decision by the Pre-Trial Chamber of the ICC stating that the immunities of Al-Bashir “have been implicitly waived by the Security Council […]”.

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sations.” 17 In other words, “delegates” refers to delegates of intergovernmental organisations and not delegates of AU member states.

The third important element of the NGHC’s decision is that the Minute in the Government Gazette recognising the Summit purporting to confer immunities on the Summit, to the extent that it could be read to confer immunities on al-Bashir, “could not ‘trump’ the international agreement i.e. Rome Statute or the subsequent Implementation Act.” 18 In other words, since the Minute in the Government Gazette recognising the Summit is subordinate legislation, it must be trumped by the provisions of the Implementation Act.

III. Giving Domestic Effect to Cooperation in South Africa

The Implementation Act was adopted in 2002 and provides for the comprehensive implementation of the Rome Statute. 19 It provides for the criminalization and prosecution of Rome Statute crimes as well as for cooperation with the ICC. 20 While the national criminalization and prosecution element, provided for in Chapter one of the Implementation Act, is not the focus of this article, it is worth stating that the Implementation Act adopts a rather broad basis of jurisdiction, granting South African court’s jurisdiction even where the alleged offence was committed outside of South Africa and by a non-national. 21

Chapter Four of the Implementation Act provides for cooperation, which largely follows the Rome Statute. Sec. 8 of the Implementation Act, for example, provides that an arrest warrant issued by the ICC must be endorsed by magistrate “for execution in any part of the Republic.” 22 It is noteworthy that the Implementation Act does not provide discretion for the magistrates in whether to endorse the arrest warrant. Rather it provides that on receipt of the request to arrest and surrender a magistrate “must endorse the warrant of arrest”. 23

The provisions in the Implementation Act relating to the actual surrender of a person under an arrest warrant of the ICC are quite elaborate. 24 The Act requires that a magistrate hold an inquiry in order to establish three facts, namely, whether the arrest warrant applies to the person in custody, the person has been arrested in accordance with procedures laid down in domestic law and whether the fundamental rights of the person as provided for in the Constitution have been respected. 25 In addition, the magistrate must satisfy him or herself that the person is wanted by the ICC for prosecution of an alleged offence, the imposition of a sentence or to serve a sentence already imposed by the ICC.

The Implementation Act is generally viewed as following the approach of the Rome Statute and removing immunity. Du Plessis for example states unequivocally that under the Implementation Act, the jurisdiction of South African courts “trump immunities which usually attach to officials of governments.” 26 This assertion is based on sec. 4 (2) of the Implementation which provides that notwithstanding any other law to the contrary, including customary international law or treaty law, the fact that a person was a head of state or government or state official is neither a “defence to a crime” or “ground for possible reduction of a sentence”. Yet the ordinary meaning of these words does not amount to an ouster of immunity. This provision rather addresses the criminal accountability of an individual, that is, the substantive accountability or responsibility, whereas immunity is a procedural notion applying to the “right” of a court to entertain a matter. The International Court of Justice has held in this respect that “immunity from criminal jurisdiction […] does not mean impunity […]” 27 More to the point, the ICJ stated that “[i]mimmunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts.” 28 In this respect, it is worth pointing out that Art. 27 of the Rome Statute contains two paragraphs. The first paragraph provides that the official capacity of an accused, including their capacity as a head of state, “shall in no case exempt a person from criminal responsibility”. 29 As the sec. 4 (2) provision that official capacity is not a defence to crime, this provision removes official capacity as a substantive defence to the commission of crimes but does not address the matter of immunity. Art. 27, however, contains a second paragraph, not included in the Implementation Act, which states that “[i]mimmunities […] which may attach to the official capacity of a person […] shall not bar the Court from exercising jurisdiction.” 30 This suggests that sec. 4 (2) of the Implementation Act does not remove immunities at all, but applies only to the availability

19 For a detailed discussion see du Plessis, South African Journal of Criminal Justice 16 (2003), 1 (14 f.).
21 See sec. 4 (3) of the Implementation Act which provides, in addition to the normal territorial and nationality basis of jurisdiction, jurisdiction over an offence if the person, “after the commission of the offence is present in the territory of the Republic”.
22 Sec. 8 (2) of the Implementation Act.
23 Sec. 8 (2) of the Implementation Act.
of defences to the commission of crime. Indeed, in a well-
considered analysis of the matter, du Plessis, while suggest-
ing that sec. 4 (2) does remove immunity recognises this
distinction and states that it will be up to the Courts to inter-
pret the provision.31 There is another reason why reliance on
sec. 4 (2) to remove immunities is ill-considered. It should be
remembered that sec. 4 (2) applies to the exercise of jurisdic-
tion over Rome Statute crimes by the South African courts
i.e. it is not directly applicable to cases of arrest and surren-
der.

Although sec. 4 (2) neither removes inviolability nor ap-
plies to arrest and surrender, there is another provision in the
Implementation Act that applies to arrest and surrender. Sec. 10 (9)
of the Implementation Act provides that the fact that
a person is, inter alia, a head of state “does not constitute
a ground for refusing to issue an order” for surrender. As du
Plessis points out, this provision is unambiguous in its effect,
and must be considered in light of the reasoning above, i.e.
the mere fact that a person is entitled to inviolability is in
itself not a justification for not ordering surrender.32 This
means that even if a South African court itself cannot exer-
cise jurisdiction over a head of state like Al-Bashir, this does
not apply to the arrest and surrender processes described
above.

In light of the above, the following two conclusions can
be drawn regarding the text of the Implementation Act as
pertains to heads of state like Al-Bashir. First, South African
courts are not permitted to exercise jurisdiction over heads
of state, even in relation to Rome Statute crimes. Second, not-
withstanding the retention of immunity before South African
courts for the purposes of the exercise of jurisdiction over
Rome Statute crimes, inviolability per se is not a ground for
not ordering arrest and surrender. It should be noted, howev-
er, that while sec. 4 (2) of the Implementation Act contains
the qualifier, “[d]espite anything to the contrary”, sec. 10 (9)
is not similarly qualified. This means that sec. 10 (9) of the
Implementation Act does not have the “trumping” effect of
sec. 4 (2) and should be read, “without doing violence to [its]
wording”.33 in such a way as being consistent with other
legislative rules.

IV. In Search of Legal Coherence in an Apparently Inco-
herent Network of Rules

1. General

While the Implementation Act applies to the case of Al-
Bashir, there are conflicts between the different legal rules at
various levels, making the legal position unclear at best and
incoherent at worst. The Implementation Act, while retaining
Al-Bashir’s immunity before South African courts for the
purposes of prosecution, strips him of inviolability for the
purposes of arrest and surrender – an essential element of
immunity. At the one level, this creates a conflict with the
rules of customary international law. Paradoxically, the same
provisions of the Implementation Act stripping Al-Bashir of
his inviolability are consistent with and in furtherance of the
Rome Statute.

The multi-layered conflict described above, i.e. the con-
\footnotesize{\textsuperscript{34}}\textsuperscript{34}iplomatic Immunities and Privileges Act 37 of 2001.
\footnotesize{\textsuperscript{35}}\textsuperscript{35}See generally ICJ Reports 2000, 3 (Case Concerning
\footnotesize{\textsuperscript{36}}\textsuperscript{36}See Draft Article 3 of the Draft Articles on the Immunity
\footnotesize{\textsuperscript{37}}\textsuperscript{37}See § 5 of the Commentary to Draft Article 1 of the Draft
\footnotesize{\textsuperscript{38}}\textsuperscript{38}See Draft Articles 3 and 4 of the ILC Draft Articles on the Immunity
\footnotesize{\textsuperscript{39}}\textsuperscript{39}See Draft Article 3 of the Draft Articles on the Immunity
\footnotesize{\textsuperscript{40}}\textsuperscript{40}Cf. High Court of South Africa, Decision of
\footnotesize{\textsuperscript{41}}\textsuperscript{41}Cf. High Court of South Africa, Decision of
\footnotesize{\textsuperscript{42}}\textsuperscript{42}Cf. High Court of South Africa, Decision of
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that are not party to the Rome Statute. 38 The judgment of the NGHC in Southern African Litigation Centre v. the Minister of Justice, however, suggests that by virtue of Art. 27 and the nature of the crimes for which Al-Bashir stands accused, the obligation owed to Sudan to respect Al-Bashir’s immunities no longer exists.39 However, this is clearly not correct. The ICJ, in the Arrest Warrant case, dismissed the notion that immunity ceases to exist in cases of serious international crimes.40 In another judgment, the ICJ emphasised that the rule of international law relating to immunities “is one of the fundamental principles of the international legal order.”41

As explained earlier, the Rome addresses the potential conflict between customary international law and the duty to cooperate in Art. 98. How Art. 98 impacts on the duty to cooperate in the arrest and surrender of Al-Bashir has been the subject of conflicting judicial decisions and literature.42 The majority of scholars take the view that because the situation in Sudan was referred to the ICC by the Security Council, by virtue of the priority accorded to Security Council decisions, Sudan becomes like a Party to the ICC such that the exception to Art. 98 does not apply to it.43 It is apposite to point out that the NGHC in Southern African Litigation Centre v. the Minister of Justice appears to rely on Security Council Resolution 1593 to support its conclusion that Al-Bashir does not have immunity, although the NGHC does not explain the basis for its conclusion.44 However, in its first two cases of non-cooperation, the ICC itself did not adopt this approach.45 In a decision that was widely criticized the Court proceeded to decide the matter as if Art. 98 was not part of the Statute.46 The Court, in essence, held that immunity did not apply before international courts.47 While, in my view, this assessment is correct, it has nothing to do with Art. 98 since the latter provision is not concerned with immunity before the Court – the subject of Art. 27 – but rather with the duty to cooperate and the exception from that duty.

Following the criticism, when next faced with a case in which Art. 98 was invoked to justify non-cooperation; the Pre-Trial Chamber II reversed the finding in Malawi and Chad concerning the scope of Art. 27.48 First, the Court held that Art. 27, as a general rule, applies to heads of state parties and that heads of state parties would, in principle enjoy immunities before the ICC.49 Although the question of immunity before the international court itself is only of tangential relevance for this article, I pause to point out that there is no basis for this conclusion in the Rome Statute. As I read the Statute, Art. 27 applies to anyone who happens to find themselves before Court. Moreover, such a view is based on as-

38 Art. 27 (2) provides that immunities “shall not bar the Court from exercising jurisdiction” (emphasis added).


40 ICJ Reports 2000, 3, § 58 (Case Concerning the Arrest Warrant 11 April 2000 ([DRC v. Belgium]), where the Court states that it “has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability […].”

41 ICJ Reports 2012, 99, § 56 (Jurisdictional Immunities of the State [Germany v. Italy; Greece Intervening]). See also the separate opinion of Judge ad hoc Bula Bula in ICJ Reports 2000, 3, §§ 31, 41 (Case Concerning the Arrest Warrant 11 April 2000 [DRC v. Belgium]).


43 See for example Akande, Journal of International Criminal Justice 7 (2009), 333.

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

45 See Malawi and Chad decision, supra note 5.

46 For discussion, see the literature cited in fn. 42.

47 See, e.g. ICC (Pre-Trial Chamber I), Decision of 12.12.2011 – 02/05-01/90 (Decision Pursuant to Article 87 (7) on the Failure of the Republic of Malawi to Comply with the Cooperation Request Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmed Al Bashir, the Prosecutor v. Al Bashir), § 14.

48 See the ICC (Pre-Trial Chamber II), Decision of 9.4.2014 – 02/05-01/09 (Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court, The Prosecutor v. Omar Hassan Ahmad Al Bashir), §§ 26 f.

49 ICC (Pre-Trial Chamber II), Decision of 9.4.2014 – 02/05-01/09 (Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court, The Prosecutor v. Omar Hassan Ahmad Al Bashir), § 26, Pre-Trial Chamber states “Given that the Statute is a multilateral treaty governed by the rules set out in the Vienna Convention on the Law of Treaties, the Statute cannot impose obligations on third States without their consent. Thus, the exception to the Court’s exercise of jurisdiction provided for in Article 27 should, in principle, be confined to those States Parties who have accepted it.” At § 27, the Pre-Trial Chamber states that when “the exercise of jurisdiction by the Court entails the prosecution of a Head of State of a non-State Party, the question of personal immunities might validly arise. The solution provided for in the Statute to resolve such conflicts is found in Article 98 (1) of the Statute.”
The notion of an implicit waiver of immunity is, therefore, a fiction. Second, subsequent to the adoption of Resolution 1593, and in the light of the controversy about whether Resolution 1593 affects the immunities of Al-Bashir, the Council could have adopted a subsequent resolution confirming that indeed its intention was to waive the customary international law immunities of Sudanese officials. Moreover, twice a year, after the Prosecutor’s briefing on ICC’s activities in the situation in Sudan, members of the Security Council hold a debate on the report of the Prosecutor. The only member of the Security Council that has consistently referred to the question of immunities has been Russia. Russia’s position has consistently been that Security Council Resolution 1593 had no effect on the immunities enjoyed under international law by the Sudanese. Moreover, the ICC transmitted its decisions on the non-cooperation of Malawi, Chad and the DRC to the Security Council. The Council has never acted on them, suggesting that, in its view, there is no non-compliance with its referral in Resolution 1593.

In my view, whether there is a duty under the Rome Statute to arrest Al-Bashir or not, is dependent on the interpretation one gives to Art. 98, and, in particular, the phrase “State and diplomatic immunity of a person or property of a third State”. In my view, based on the ordinary meaning of the words, in their context and in the light of the object and purpose, since Al-Bashir is neither a diplomat nor a state, the exception in Art. 98 does not apply to him. Others, notably Klaus Kreß, have argued that in the context of criminal law state immunity must be given a broader meaning to include head of state immunity since it is difficult to see how a state could be arrested and surrendered. It is not necessary to repeat the debate here. It suffices to say that if the argument proposed by Kreß is accepted, then there is no duty under the Rome Statute to arrest and surrender Al-Bashir. If, on the other hand, the narrow interpretation of “State immunity” is accepted, then there is a duty to arrest and surrender Al-Bashir under the Rome Statute. This duty, however, would be in conflict with the rules of customary international law.

The complicated state of international law in relation South Africa’s obligation with respect to Al-Bashir under customary international law and the Rome Statute is further exacerbated by the fact that South Africa, when hosting the AU Summit, has had to conclude the Host Agreement with the AU as is customary. As explained above, the NGHC interpreted the Host Agreement as not applying to heads of state since the Host Agreement “does not confer immunity on member states or their representatives or delegates.” Rather, according to the NGHC, the Host Agreement “confers immunity on the members and staff of the AU Commission, and on delegates and representatives of Inter-governmental Organisations.” This interpretation is grossly inaccurate for the following two reasons. First, it ignores the fact that Art. VIII of the Host Agreement refers to the General Con-

Australia, which was not on the Council when the Council referred the situation of Sudan to the ICC, and even their statement appears to be concerned with immunities before the ICC itself and not the customary international law immunities between states, see S/PV.7337, p. 4.

Kreß, in: Bergsmo/Yan (eds.), State Sovereignty and International Criminal Law, 2012, § 236. The view of Klaus Kreß is that the resolution of the Al-Bashir matter lies not in Art. 98. Rather, like Akande, Bashir cannot enjoy the benefits of Art. 98 because the situation in Darfur was referred to the ICC by the Security.


See also Tladi, Journal of International Criminal Justice 13 (2015), 3 (13).

See ICC (Pre-Trial Chamber II), Decision of 9.4.2014 – 02/05-01/09 (Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court, The Prosecutor v. Omar Hassan Ahmad Al Bashir), § 29.


For example, during the Security Council’s consideration of the Report of the Prosecutor of the ICC in relation to the situation in Sudan, the Russian representative emphasized “the important of the implementation by States of the relevant obligations regarding cooperation with the Court, while complying with norms of international law in the matter of immunity of senior State officials.” See Security Council per verbis, S/PV.6887 (13.12.2012), p. 16. In the following year, the Russian Federation made a similar statement; see S/PV.7080 (11.12.2013). The only other state to refer to immunities in the course of these debates has been
vention on the Privileges and Immunities of the AU, and in particular, Art. V and VII of the said Convention. Art. V (1) of the General Convention, as described above, provides that “[r]epresentatives of Member States” shall be accorded with “immunity from personal arrest or detention [...]” thus incorporating said immunities into the Host Agreement. Second, and more importantly, this interpretation ignores the basic rule of interpretation that words in a treaty are to be given their ordinary meaning, in their context and in the light of object and purpose of the treaty. This result of this acontextual interpretation is an absurd interpretation in which persons not formally participating in the AU Summit are accorded immunities but the participants are not. The Host Agreement, therefore, also provides immunity to Al-Bashir.

While the international law relating to the arrest and surrender of Al-Bashir is in conflict, the conflict is not inevitable. It is generally accepted by all states and commentators that because of Art. 27, officials of states parties do not enjoy immunities for Rome Statute crimes, even from the jurisdiction of other state parties. In other words, if Sudan were a state party, then it would not be free to rely on the immunities of its heads of state to prevent the arrest and surrender of Al-Bashir. This means that conflict of obligations in relation to the arrest and surrender of Al-Bashir only arises in two situations. The first is where a head of a non-state party is accused of Rome Statute crimes on the territory of state party, i.e. the ICC has jurisdiction over a situation on the territory of state party. The second is in the case of a Security Council referral. In the case of the latter, the conflict would not arise if the Council had placed an obligation on all states to arrest and surrender. In such a case, the obligation to arrest and surrender would flow from the UN Security Council and would, by virtue of Art. 103 of the Charter, trump other obligations – and the Council is remains free to decide imposing such an obligation. This leaves the possible conflict only in those cases, which are yet to manifest, in which a head of non-state party is sought by the ICC for crimes committed on the territory of a state party.

3. Other Domestic Legislation Relevant to Immunities

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

In addition to the Implementation Act, therefore, an assessment of the legal position in relation to the arrest and surrender of al-Bashir in South Africa must take into account other legislative acts. The DIPA has several important provisions in this regard. Sec. 4 of the DIPA provides that a head of state enjoys the immunity that “heads of state enjoy in accordance with the rules of customary international law”. Although the NGHC dismissed this basis, principally on the ground that customary international law does not recognize immunity for Rome Statute crimes, as was explained earlier, this assertion has no basis in law. Sec. 4 of the DIPA, recognizing the immunity of heads of state under customary international law, must also be accounted for in the determination of the State of African law.

Additionally, sec. 6 (1) of the DIPA provides that “representatives of any state, participating in an international conference or meeting convened in the Republic enjoy [...] such privileges and immunities as [...]” are specifically provided for in any agreement entered into for that purpose [...]”58. As noted above, contrary to the NGHC interpretation, the Host Agreement entered into for the purpose of the Summit does provide immunities for heads of state, including Al-Bashir. In connection with the AU Summit, the NGHC refused to convey immunities also on the grounds that the Minister’s Minute, which sec. 6 (2) requires, could not trump the legislative provisions in the Implementation Act. This, however, is based on the erroneous belief that it is the Minister’s Minute that confers immunity. However, while sec. 6 (2) of the DIPA requires the Minister of International Relations and Cooperation to recognize the meeting, it is not the Minister’s minute that confers immunity, but the DIPA itself, in particular sec. 6 (1). In accordance with the Constitutional Court judgment in Quagliani, sec. 6 (1) (b) provides for the incorporation of the Host Agreement and the immunities provided therein.59

Thus, at the domestic law level, there is an apparent conflict between sec. 10 (9) of the Implementation Act and the various provisions of the DIPA under which al-Bashir could claim immunity and inviolability. This conflict has to be addressed through ordinary rules of interpretation, in particular, the rule that so far as possible legislative provisions should be interpreted in such a way as to promote consistency.60 What outcome such a process of interpretation yields is difficult to predict. Given the fundamental nature of the rules

57. Sec. 4 (1) (a) of the DIPA.
58. Sec. 6 (1) (b) of the DIPA.
59. South African Constitutional Court, Judgment – CCT24/08, CCT52/08 (President of the Republic of South Africa and Others v. Quagliani, President of the Republic of South Africa and Others v. van Rooyen and Another; Goodwin v. Director-General, Department of Justice and Constitutional Development and Others) – ZACC 1; 2009 (4) BCLR 345 (CC), § 37 and especially at § 42. See also generally Dugard, International Law, A South African Perspective, 4th ed. 2011, p. 55.
of immunity to international law and the international system, one possible interpretation would be to require the respect of immunity only for international conferences of international organisations such as the AU or the UN. This would mean that for other visits including state visits and personal visits, Al-Bashir, though still entitled to immunity and inviolability under international law, would not have such protection under South Africa law. The reasoning for the differentiation is that with respect to other visits, South Africa is free not to invite him – or to invite him but require him not come to South Africa.

V. Concluding Remarks

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

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

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61 See ICJ Reports 2012, 99, § 56 (Jurisdictional Immunities of the State [Germany v. Italy; Greece Intervening]).
62 See, e.g. supra note 21.