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Lessons from the Al-Bashir Debacle: Four Issues for ICJ Clarification

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Abstract: At its thirtieth ordinary session, the AU decided that the United Nations General Assembly (UNGA) be asked to seek an advisory opinion from the International Court of Justice (ICJ) on the question of immunity of head of states and other senior officials, in relation to articles 27 and 98 of the Rome Statute of the International Criminal Court 1998 (Rome Statute) and states parties' obligations under international law. The issue of immunity in the context of state cooperation obligations under the International Criminal Court (ICC) legal regime lies at the heart of the Al-Bashir case, and is a contentious issue that has contributed to the deteriorating relationship between the ICC and the AU. Against the backdrop of the Al-Bashir case and the key issues arising in the case warranting clarification that we identify in this article − the meaning of article 98(1) in the context of head of state immunity, solving potential conflicting treaty obligations to (not) cooperate, waiver of head of state immunity by the UNSC, and hierarchy of sources of international law on the relevant issues − we contend that seeking clarification from the ICJ is indeed a more advantageous and appropriate way forward for African states to pursue than the proposed collective withdrawal from the ICC. To this effect, we also argue for the unsuitability of collective withdrawal as a solution to the AU/African states' concerns around ICC prosecution.

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A. Introduction

The question of head of state immunity particularly in the context of state cooperation obligations under the legal regime of the International Criminal Court (ICC) has been a contentious issue that contributed to the deteriorating relationship between the ICC and the African Union (AU). The issue lies at the heart of the Al-Bashir case and has resulted in the

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AU adopting decisions on non-cooperation with the ICC in the arrest and surrender of Al-Bashir (despite states' cooperation obligations under, *inter alia*, the Rome Statute of the International Criminal Court 1998 (Rome Statute)) and on collective withdrawal of African states from the Rome Statute. In addition, at its thirtieth ordinary session, the AU decided that the United Nations General Assembly (UNGA) be asked to seek an advisory opinion from the International Court of Justice (ICJ) on the question of immunity of head of states and other senior officials, in relation to articles 27 and 98 of the Rome Statute and states parties' obligations under international law.

Against the background of the issues arising in the Al-Bashir case, we identify and discuss key issues of contention that require clarification. We begin with providing a brief contextual background (part B) and considering the rationale advanced by African states for their non-cooperation with the ICC in the arrest and surrender of Al-Bashir, as the rationale highlights issues of contention (part C). We then establish the suitability of seeking clarification from the ICJ and provide different perspectives on four of the contentious issues – (1) the meaning of article 98(1) in the context of head of state immunity, (2) solving potential conflicting treaty obligations to (not) cooperate, (3) waiver of head of state immunity by the UNSC, and (4) hierarchy of sources of international law on the relevant issues − stemming from the Al-Bashir case and warranting clarification (part D). To support our contention that seeking clarification from the ICJ is indeed a more advantageous and appropriate way forward for African states to pursue than their proposed withdrawal from the ICC, the article ends with establishing the unsuitability of withdrawal as a solution to the contentions in relation to the ICC, including a brief consideration of the impact of withdrawal by African states from the ICC (part F). It should be emphasised that while this article draws from the Al-Bashir case, African states' frustration with the ICC goes beyond to other cases in which issues around immunity and cooperation also arose (for example, in relation to Libya and Kenya).

B. Contextual background

The Rome Statute of the International Criminal Court 1998 (Rome Statute)[1] envisages a complementary relationship between its states parties and the ICC.[2] Pursuant to this principle, states parties are required to either prosecute Rome Statute crimes in their national courts or have mechanisms in place for the arrest and surrender to the ICC of persons that the ICC seeks to prosecute and are within states parties' jurisdiction. Related to the procedural aspects of the complementarity principle is the issue of state cooperation with the

1 UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998); UNTS 90.

2 Ibid., preamble & article 17.

ICC.[3] Accordingly, the Rome Statute places a general obligation on states parties to 'cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court'.[4] This obligation includes 'arrest and surrender' of persons against whom a warrant of arrest has been issued.[5]

Contrary to the obligation of African states parties to the Rome Statute to cooperate with the ICC, the AU took a decision that AU member states shall not cooperate with the ICC, in relation to the execution of the arrest warrants issued by the ICC against President Omar Hassan Ahmad Al-Bashir of The Sudan (Al-Bashir) and the late Colonel Qadhafi of Libya.[6] The AU's non-cooperation decision places African states parties in an intricate position. On the one hand, they have obligations towards the AU that they must comply with, otherwise face sanctions; and on the other hand, they have obligations under the Rome Statute to cooperate with the ICC in the investigation and prosecution of international crimes. This situation is exacerbated by the customary international law rule which obligates granting head of state immunity in national proceedings. The case of Al-Bashir is not only illustrative of this complexity but raises questions that necessitate the need to seek further clarification from a relevant international judicial body other than the ICC, given that, as noted subsequently, the ICC has thus far failed to satisfactorily (in a consistent and adequately reasoned manner) clarify the questions.

In addition to the non-cooperation decision, in January 2017, the AU adopted the ICC Withdrawal Strategy, which basically calls for collective withdrawal of African states from the Rome Statute/ICC; a call that was influenced by, inter alia, the Al-Bashir case.[7] Some African states have individually indicated their intention to withdraw from the Rome

3 For other issues/questions related to the procedural aspects of complementarity, see for example *Jann K. Kleffner*, Complementarity in the Rome Statute and National Criminal Jurisdictions, New York 2008, pp. 163–233.

4 Rome Statute, article 86.

5 Ibid., articles 58(5) & 89(1).

6 AU Assembly, Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Doc. Assembly/AU/13(XIII), Decision No. Assembly/AU/Dec.245(XIII) Rev. 1, Thirteenth Ordinary Session, 1–3 July 2009, para 10; AU Assembly, Decision on the Implementation of the Assembly Decisions on the International Criminal Court, Doc. EX.CL/670(XIX), Decision No. Assembly/AU/Dec.366(XVII), Seventeenth Ordinary Session, 30 June–1 July 2011, para 6.

7 AU Assembly, Decision on the International Criminal Court, Doc. Doc. EX.CL/1006(XXX), Decision No. Assembly/AU/Dec.622(XXVIII), Twenty-Eighth Ordinary Session 30–31 January 2017, para 8. See also AU, Withdrawal Strategy Document, para 4, https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan._2017.pdf (last accessed on 15 March 2018). The document also raised concerns around 'selectivity', 'inequality' and 'perceptions of double standards' that have resulted in 'progressively worsening relationships between the ICC and the AU' (see paras 1–3 & 8).

Statute. Examples being Burundi,[8] South Africa[9] and The Gambia[10] that submitted withdrawal notifications.[11] At the time of writing, The Gambia[12] and South Africa[13] had revoked their withdrawal notifications; but Burundi's withdrawal became effective on 27 October 2017,[14] making it the first African state to exit the Rome Statute. However, there has in fact been opposition from some African states to withdrawal, resulting in some states adopting the Strategy document with reservations while others wanted to study it first.[15]

Recently, at its thirtieth ordinary session in January 2018, the AU decided that the United Nations General Assembly (UNGA) should be approached regarding seeking an advisory opinion from the ICJ, 'on the question of immunities of a Head of State and Government and other Senior Officials as it relates to the relationship between Articles 27 and 98 and the obligations of States Parties under International Law'.[16] It also demanded 'a declarato-

8 United Nations, Burundi: Withdrawal, C.N.805.2016.TREATIES-XVIII.10 (Depositary Notification), 27 October 2016.

9 United Nations, South Africa: Withdrawal, C.N.786.2016.TREATIES-XVIII.10 (Depositary Notification) (19 October 2016).

10 United Nations, Gambia: Withdrawal C.N.862.2016.TREATIES-XVIII.10, 10 November 2016.

11 AU Assembly, Decision No. Assembly/AU/Dec.622(XXVIII), note 7, para 6.

12 United Nations, Gambia: Withdrawal of Notification of Withdrawal, C.N.62.2017.TREATIES-XVIII.10 (Depositary Notification), 10 February 2017; International Criminal Court, ASP President welcomes Gambia's Decision Not to Withdraw from the Rome Statute, ICC-ASP-20170217-PR1274, 17 February 2017, https://www.icc-cpi.int/Pages/item.aspx?name=PR1274 (last accessed on 15 March 2018).

13 United Nations, South Africa: Withdrawal of Notification of Withdrawal, C.N.121.2017.TREATIES-XVIII.10 (Depositary Notification), 7 March 2017; International Criminal Court, ASP President Welcomes the Revocation of South Africa's Withdrawal from the Rome Statute, 11 March 2017, https://www.icc-cpi.int/Pages/item.aspx?name=pr1285 (last accessed on 15 March 2018). South Africa's withdrawal was however not couched in conclusive terms since the basis of the withdrawal, as stipulated in the depository notification, was the fact that it was made without following relevant domestic processes hence unconstitutional and invalid. At the end of 2017, the government indicated that it still intends to withdraw from the Rome Statute and would seek parliamentary approval of its withdrawal notice (see *Peter Fabricius*, South Africa Confirms Withdrawal from ICC, Daily Maverick, 7 December 2017, https://www.dailymaverick.co.za/article/2017-12-07-south-africa-confirms-withdrawal-from-icc/ (last accessed on 7 Aril 2018).

14 International Criminal Court, Situation in the Republic of Burundi, ICC-01/17, https://www.icc-cpi.int/burundi (last accessed on 15 March 2018); AU Assembly, Decision on the International Criminal Court, Doc. EX.CL/1068(XXXII), Decision No. Assembly/AU/Dec.672(XXX), Thirtieth Ordinary Session, 28–29 January 2018, para 4.

15 For further reading on oppositions to withdrawal, see *Elise Keppler*, AU's 'ICC Withdrawal Strategy' Less than Meets the Eye: Opposition to Withdrawal by States, Human Rights Watch, 1 February 2017, https://www.hrw.org/news/2017/02/01/aus-icc-withdrawal-strategy-less-meets-eye (last accessed on 15 March 2018); *Sarah R. Lansky*, Africans Speak Out against ICC Withdrawal: Governments Signal Continued Support for Court, Human Rights Watch, 2 November 2016, https://www.hrw.org/news/2016/11/02/africans-speak-out-against-icc-withdrawal (last accessed on 16 March 2018).

16 AU Assembly, Decision No. Assembly/AU/Dec.672(XXX), note 14, paras 2(iii), 4 & 5(ii).

ry/interpretative clarification of the relationship between Article 27 (irrelevance of official capacity) and Article 98 (Cooperation with respect to waiver of immunity and consent to Surrender) and other contested issues relating to the conflicting obligations of States Parties to cooperate with the ICC' be sought from the ICC Assembly of States Parties.[17] The issue of an advisory opinion request in the AU's decision is formulated in broad terms around immunity and cooperation. The subsequent actual request would have to be more specific, clearly and precisely delineating some of the complexities around this broader question that the Al-Bashir case, for example, has brought to the fore.

It should be noted that prior to the 2018 decision, in 2012, the AU Assembly had made a request to the AU Commission 'to consider seeking an advisory opinion from the International Court of Justice regarding the immunities of State Officials under international law'.[18] It is unclear why it took the AU another six years to follow through with the proposal. Theresa Reinhold, for instance, suggested that the delay might have been caused by the AU's fear that 'the ICJ would find in favor of the ICC's position'.[19] In any case, the AU Commission itself does not have standing to approach the ICJ for an advisory opinion. Thus, the 2018 decision is directed at the UNGA, which has standing in such matters.[20]

C. Al-Bashir and rationale for non-cooperation by African states

The UN Security Council (UNSC) is empowered, acting under Chapter VII of the Charter of the United Nations 1945 (UN Charter),[21] to refer a situation to the ICC if it appears that a Rome Statute crime has been committed.[22] Accordingly, it referred the situation in Darfur to the ICC.[23] Following an investigation of this situation, the ICC issued two arrest warrants ♂ one in 2009 and the other in 2010 ♂ against Al-Bashir for crimes against humanity, war crimes and genocide.[24] Subsequently, the ICC transmitted to the Sudanese govern-

17 Ibid., para 5(i).

18 AU Assembly, Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court (ICC) Doc. EX.CL/710(XX), Decision No. Assembly/AU/Dec.397(XVIII) (Eighteenth Ordinary Session, 29–30 January 2012) para 10.

19 *Theresa Reinold*, African Union v International Criminal Court: Episode MLXIII (?), EJIL:*Talk!* (23 March 2018), https://www.ejiltalk.org/african-union-v-international-criminal-court-episode-mlxiii/ (last accessed on 9 April 2018).

20 See UN Charter, article 96(a).

21 59 Stat. 1031; TS 993; 3 Bevans 1153.

22 Rome Statute, art 13(b).

23 See UN Security Council Resolution 1593 (2005) of 31 March 2005, SCOR (Res. & Dec.) 131, UN Doc. S/RES/1593 (2005) para 1.

24 ICC Pre-Trial Chamber I issued the arrest warrants after it considered that 'there are reasonable grounds to believe that Omar Al Bashir is criminally responsible as an indirect perpetrator, or as an indirect co-perpetrator' for crimes against humanity and war crimes (in relation to the first arrest warrant issued on 4 March 2009) and three counts of genocide (in relation to the second arrest warrant issued on 12 July 2010). See, generally, *Prosecutor v Omar Hassan Ahmad Al Bashir*

ment, states parties to the Rome Statute and UNSC members that are non-states parties 'both warrants of arrest, together with cooperation requests for the arrest and surrender to the Court of Omar Al Bashir'.[25]

On several occasions, the AU called for deferral of the proceedings against Al-Bashir and for the UNSC to withdraw the referral.[26] Since this was not heeded to, the AU called on African states to not cooperate in the arrest and surrender of Al-Bashir to the ICC. This rationale for non-cooperation is enunciated by the Assembly of the AU, deciding that 'in view of the fact that the request by the African Union has never been acted upon, the AU Member States shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El

(Warrant of Arrest for Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-1 (4 March 2009) PT Ch I, & *Prosecutor v Omar Hassan Ahmad Al Bashir* (Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-94 (12 July 2010) PT Ch I.

25 See *Prosecutor v Al Bashir*, ICC-02/05-01/09-94, note 24, p. 29 in which the ICC Pre-Trial Chamber I decided 'that, as soon as practicable, the Registry shall (i) prepare a supplementary request for cooperation seeking the arrest and surrender of Omar Al Bashir for the counts contained in both the first and the second warrant of arrest, and containing the information and documents required by articles 89(1) and 91 of the Statute, and by rule 187 of the Rules; and (ii) transmit such request to competent Sudanese authorities in accordance with rule 176(2) of the Rules, to all States Parties to the Statute and all the United Nations Security Council members that are not States Parties to the Statute'; and directed 'the Registrar, as appropriate, to prepare and transmit to any other State any additional request for arrest and surrender which may be necessary for the arrest and surrender of Omar Al Bashir to the Court pursuant to articles 89 and 91 of the Statute, and if the circumstances so require, to prepare and transmit a request for provisional arrest in accordance with article 92 of the Statute'. See also, *Prosecutor v Omar Hassan Ahmad Al Bashir* (Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court) ICC-02/05-01/09-195 (09 April 2014) PT Ch II, para 3, confirming that '[o]n 6 March 2009 and 21 July 2010, the Registry, acting upon PTC I's request, issued the "Request to all States Parties to the Rome Statute for the arrest and surrender of Omar Hassan Ahmad Al Bashir" as well as the "Supplementary request to all States Parties to the Rome Statute for the arrest and surrender of Omar Hassan Ahmad Al Bashir" (the "2009 and 2010 Requests"). These requests called for the cooperation of all States Parties in the arrest and surrender of Omar Al Bashir, pursuant to, inter alia, articles 89(1) and 91 of the Rome Statute'. See further, *Prosecutor v Omar Hassan Ahmad Al Bashir* (Decision Following the Prosecutor's Request for an Order Further Clarifying that the Republic of South Africa is under the Obligation to Immediately Arrest and Surrender Omar Al Bashir) ICC-02/05-01/09-242 (13 June 2015) PT Ch II, para 2, in which ICC pre-Trial Chamber II reiterating that '[i]mmediately after their issuance, both warrants of arrest, together with cooperation requests for the arrest and surrender to the Court of Omar Al Bashir, have been transmitted, inter alia, to all States Parties to the Rome Statute, including the Republic of South Africa'.

26 AU Assembly, Decision No. Assembly/AU/Dec.366(XVII), note 6, paras 3 & 6; AU Assembly, Decision on the Progress Report of the Commission on the Implementation of Previous Decisions on the International Criminal Court (ICC), Doc. Assembly/AU/18(XXIV), Decision No. Assembly/AU/Dec.547(XXIV) (Twenty-Fourth Ordinary Session, 30–31 January 2015) para 3; AU Assembly, Decision on the International Criminal Court, Doc. EX.CL/952(XXVIII), Decision No. Assembly/AU/Dec.590(XXVI) (Twenty-Sixth Ordinary Session, 30–31 January 2016) para 2(iii); AU Assembly, Decision No. Assembly/AU/Dec.622(XXVIII), note 7, para 2(iii).

Bashir of The Sudan'.[27] Hence, some African states parties have failed to cooperate with the ICC in the arrest and surrender of Al-Bashir when he was in their territory, advancing justifications for their non-cooperation; with some being commended by the AU for complying with its non-cooperation decision.[28] In the subsequent paragraphs, we consider selected examples of African states where the issue of cooperation in the arrest and surrender of Al-Bashir has arisen. The limited scope of this article does not allow for a detailed discussion of these or consideration of all the examples.[29]

In 2010, Al-Bashir visited Kenya. The government stated that it had to balance its obligations towards the AU with those towards the ICC and gave preference to complying with AU obligations, resulting in the failure to arrest Al-Bashir − that is, not complying with its obligations under the Rome Statute – a position that was endorsed by the AU.[30] However, the Court of Appeal of Kenya recently ruled that 'Kenya was and is bound by its international obligations to cooperate with the ICC to execute the original warrant issued by the ICC for the arrest of President Al Bashir when he visited Kenya on 27th August, 2010 and in future should he return to Kenya if the warrants are still in force'.[31] It found that Kenya had an 'overriding obligation to cooperate', since 'it was legitimate for Kenya to disregard President Al Bashir's immunity and execute the ICC's request for cooperation by arresting him', taking into consideration customary international law, the UN Charter, the Rome Statute and the International Crimes Act No. 16 of 2008 as well as the fact that Kenya is a

27 AU Assembly, Decision No. Assembly/AU/Dec.245(XIII) Rev. 1, note 6, para 10.

28 It should be noted that non-African states have also failed to arrest Al-Bashir. For example, Jordan has been found, by ICC Pre-Trial Chamber II, to have breached its obligations under the Rome Statute by failing to arrest and surrender Al-Bashir when he was on Jordanian territory on 29 March 2017; the ICC then referred the matter of Jordan's non-compliance to the Assembly of States Parties of the Rome Statute and the UNSC. See, generally, *Prosecutor v Omar Hassan Ahmad Al Bashir* (Decision under Article 87(7) of the Rome Statute on the Non-Compliance by Jordan with the Request by the Court for the Arrest and Surrender or Omar Al-Bashir), ICC-02/05-01/09-309 (11 December 2017) PT C II.

29 For further information on Al-Bashir's reported travels, see, e.g., *Prosecutor v Omar Hassan Ahmad Al Bashir* (Report of the Registrar on Action Taken in Respect of Information Received Relating to Travels by Mr Omar Al-Bashir to States Not Party to the Rome Statute between 7 April 2017 and 6 March 2018) ICC-02/05-01/09-325 (7 March 2018) PT Ch II.

30 AU Assembly, Decision on the Implementation of the Decisions on the International Criminal Court, Doc. EX.CL/639(XVIII), Decision No. Assembly/AU/Dec.334(XVI) (Sixteenth Ordinary Session, 30–31 January 2011) para 5, stating that by receiving Al-Bashir, Kenya (and Chad) 'were implementing various AU Assembly Decisions on the warrant of arrest issued by ICC against President Bashir as well as acting in pursuit of peace and stability in their respective regions'. See also AU Assembly, Decision No. Assembly/AU/Dec.366(XVII), note 6, para 5, stating that by receiving Al-Bashir, Kenya (as well as Chad and Djibouti) 'were discharging their obligations under Article 23 of the Constitutive Act of the African Union and Article 98 of the Rome Statute as well as acting in pursuit of peace and stability in their respective regions'.

31 *Attorney General and Others v Kenya Section of International Commission of Jurists*, Civil Appeal No. 105 of 2012 consolidated with Criminal Appeal No. 274 of 2011, Judgment of 16 February 2018, p. 57.

UN member.[32] The Court further supported its position on disregarding Al-Bashir's immunity with reference to article 143(4) of the Kenyan Constitution, which provides that '[t]he immunity of the President under this Article shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity'.[33] Accordingly, it concluded that the government's failure to arrest Al-Bashir was inconsistent with applicable international and domestic instruments.[34]

In 2011, Al-Bashir visited Malawi. The government failed to arrest and surrender him because, as it stated: Al-Bashir enjoys immunities and privileges which Malawi recognises; article 27 of the Rome Statute which waives immunity is not applicable to Sudan as a non-state party; and Malawi 'fully aligns itself with the position adopted by the African Union with respect to the indictment of the sitting Heads of State and Government of countries that are not parties to the Rome Statute'.[35] The AU commended Malawi, reaffirming 'that by receiving President Bashir, the Republic of Malawi, like Djibouti, Chad and Kenya before her, were implementing various AU Assembly Decisions on non-cooperation with the ICC on the arrest and surrender of President Omar Hassan Al Bashir of The Sudan'.[36] The ICC considered Malawi's justifications and, firstly, found that Malawi 'failed to comply with its obligations to consult with the Chamber by not bringing the issue of Omar Al Bashir's immunity to the Chamber for its determination'. It further established that Malawi's obligation to grant immunity under customary international law was not applicable and thus not in conflict with its obligations towards the ICC.[37] It therefore concluded that Malawi 'failed to cooperate with the Court by failing to arrest and surrender Omar Al Bashir to the Court, thus preventing the Court from excising its functions and powers under the Statute'.[38]

Also, in 2011, Al-Bashir visited Chad without being arrested.[39] The government's rationale for its non-cooperation with the ICC was similar to that of Malawi and other African

32 Ibid., pp. 56–57.

33 Ibid., p. 57.

34 Ibid., p. 58. For further analysis of the case, see *Tim F. Hodgson*, Kenyan Appeals Court Strongly Affirms that Al-Bashir Cannot Claim Immunity as a Defense against the ICC's Arrest Warrants (27 February 2018), http://opiniojuris.org/2018/02/27/kenyan-appeals-court-strongly-affirms-that-al-bashir-cannot-claim-immunity-as-a-defense-against-the-iccs-arrest-warrants/ (last accessed on 15 March 2018).

35 *Prosecutor v Omar Hassan Ahmad Al Bashir* (Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-139-Corr (13 December 2011) PT Ch I, para 8 (emphasis omitted).

36 AU Assembly, Decision No. Assembly/AU/Dec.397(XVIII), note 18, para 7.

37 Ibid., paras 36 & 43.

38 Ibid., para 47.

39 *Prosecutor v Omar Hassan Ahmad Al Bashir* (Decision Pursuant to Article 87(7) of the Rome Statute on the Refusal of the Republic of Chad to Comply with the Cooperation Requests Issued

states. As an AU member, it claimed to be unable to comply with the ICC's request due to 'the common position adopted by the African Union in respect of the international warrant of arrest issued by the Prosecutor against Mr Omar Al Bashir'.[40] In 2013, when Al-Bashir again visited Chad, the country once more failed to comply with its obligations to cooperate with and to consult the ICC.[41] As noted previously, the AU commended Chad for receiving, and not arresting, Al-Bashir.[42]

Following a notification that Al-Bashir was to visit the Democratic Republic of Congo (DRC) in 2014 to attend the Common Market for Eastern and Southern Africa (COMESA) summit, the ICC 'requested the DRC to immediately arrest and surrender Omar Al Bashir to the Court'.[43] However, the visit took place; and Al-Bashir was not arrested.[44] The government of the DRC stated that it received the list of the COMESA summit delegates late with no time to consult with the ICC, that Al-Bashir was not invited by the DRC but by a regional organisation and that as a state party to the Rome Statute and AU member, it was placed 'in a "complex, ambiguous and major situation"' as the arrest and surrender of Al-Bashir (a foreign head of state who enjoys certain immunities) would have had 'heavy consequences' and 'legal, diplomatic and security implications'.[45] While acknowledging its cooperation obligation, the government of the DRC was of the view that 'such an international obligation was subject to the application of article 98(1) of the Statute, which calls for the Court to "first obtain the cooperation of that third State for the waiver of the immunity"'.[46] It further cited Al-Bashir's visit to Chad, Djibouti, Kenya and Nigeria and their governments' non-cooperation being influenced by Al-Bashir's immunity.[47] The AU subsequently commended the DRC 'for complying with AU Decision for non-cooperation for the arrest and surrender of President Omar Al Bashir of the Republic of Sudan'.[48]

In 2015, Al-Bashir visited South Africa. The government did not arrest him, despite being reminded by the ICC prior to his visit of its obligation to arrest and surrender him and

by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-140-tENG (13 December 2011) PT Ch I, para 3.

40 Ibid., para 7.

41 *Prosecutor v Omar Hassan Ahmad Al Bashir* (Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir) ICC-02/05-01/09-151 (26 March 2013) PT Ch II, paras 11 & 23.

42 AU Assembly, Decision No. Assembly/AU/Dec.397(XVIII), note 18, para 7; AU Assembly, Decision No. Assembly/AU/ Dec.334(XVI), note 30, para 5; AU Assembly, Decision No. Assembly/AU/Dec.366(XVII), note 6, para 5.

43 *Prosecutor v Al Bashir*, ICC-02/05-01/09-195, note 25, para 6.

44 Ibid., para 7.

45 Ibid., para 12, see also para 19.

46 Ibid., para 18.

47 Ibid., para 20.

48 AU Assembly, Decision No. Assembly/AU/Dec.547(XXIV), note 26, para 18.

to consult the ICC in case of any difficulties in complying with the request.[49] South Africa's rationale for non-cooperation was primarily based on Al-Bashir's incumbent Head of State immunity and its obligations towards the AU.[50] The AU responded to South Africa's non-cooperation in the following words:

> *COMMENDS the Republic of South Africa for complying with the Decisions of the Assembly on non-cooperation with the arrest and surrender of President Omar Al Bashir of The Sudan and DECIDES that by receiving President Bashir, the Republic of South Africa was implementing various AU Assembly Decisions on the warrants of arrest issued by the ICC against President Bashir and that South Africa was consistent with its obligations under international law;*[51]

However, South African domestic courts (the High Court and Supreme Court of Appeal) found the failure to arrest Al-Bashir to be in contravention of the country's domestic and international obligations.[52]

In its subsequent notification of its withdrawal from the ICC, submitted to the UN Secretary General, the government stated that it 'was faced with the conflicting obligation to arrest President Al Bashir under the Rome Statute, the obligation to the AU to grant immunity in terms of the Host Agreement, and the General Convention on the Privileges and Immunities of the Organization of African Unity of 1965[[53]] as well as the obligation under customary international law which recognises the immunity of sitting heads of state'.[54] Moreover, in its submission to the ICC justifying its non-cooperation, the South African government cited the 'dilemma' it was faced with in relation to the 'peace-justice relationship' and argued that it did not fail to comply with its obligations due to the immunity that Al-Bashir enjoyed which had not been expressly waived by Sudan or implicitly waived by

49 See *Prosecutor v Al Bashir*, ICC-02/05-01/09-242, note 25, para 3.

50 See, generally, *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and others* [2015] ZAGPPHC 402; 2016 (1) SACR 161 (GP); 2015 (5) SA 1 (GP); [2015] 3 All SA 505 (GP); 2015 (9) BCLR 1108 (GP) (*Bashir* HC); *Minister of Justice and Constitutional Development and others v Southern Africa Litigation Centre* [2016] ZASCA 17 (SCA); 2016 (4) BCLR 487 (SCA); [2016] 2 All SA 365 (SCA); 2016 (3) SA 317 (SCA) (*Bashir* SCA); *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre* CC-T75/16 (appeal withdrawn).

51 AU Assembly, Decision No. Assembly/AU/Dec.590(XXVI), note 26, para 2.

52 See, generally, *Bashir* HC and *Bashir* SCA, note 50.

53 OAU Doc. CAB/LEG/24.2/13.

54 See Declaratory Statement by the Republic of South Africa on the Decision to Withdraw from the Rome Statute of the International Criminal Court, in: United Nations, South Africa: Withdrawal, note 9, p. 2. As stated previously, the government subsequently rescinded its withdrawal notification following a High Court ruling (*Democratic Alliance & another v Minister of International Relations and Cooperation & Others*, Case No: 83145/2016, Judgment, 22 February 2017, para 84 (*Democratic Alliance*)) that found the withdrawal notification to be invalid and unconstitutional on procedural grounds.

the UNSC through its referral resolution thus precluding the request for cooperation by virtue of article 98 of the Rome Statute.[55] It added a reference to Chad, Malawi, DRC, Djibouti, Nigeria and Uganda who have faced similar challenges in relation to the arrest and Surrender of Al-Bashir.[56] Moreover, it went further to argue that 'international criminal courts and tribunals are created for a specific purpose and have to operate within the cultural, political and diplomatic realities that confront them when dealing with particular issues' and that the ICC 'risks undermining its effectiveness if it fails to recognise these contextual realities of each case'.[57] It is worth noting that the government's current position contradicts its position in 2009 on the same matter, during which the country's officials, following the invitation of Al-Bashir to attend the South African president's inauguration, confirmed that he would be arrested upon his arrival in the country, in execution of the ICC's warrants of arrest.[58] This resulted in Al-Bashir declining the invitation.[59]

The ICC Pre-Trial Chamber II issued a decision on 6 July 2017, in which it unanimously found that South Africa 'failed to comply with its obligations under the Statute by not executing the Court's request … while [Al-Bashir] was on South African territory between 13 and 15 June 2015'.[60] This finding was, inter alia, based on South Africa's cooperation obligation under the Rome Statute, the inapplicability of Al-Bashir's immunity by virtue of the UNSC referral while acting under Chapter VII of the UN Charter and the fact that a state party to the Rome Statute cannot unilaterally refuse compliance with the Court's request for arrest and surrender.[61] The AU was displeased with the finding as it expressed

> *deep concern with the decision of the Pre-Trial Chamber II of the ICC on the legal obligation of the Republic of South Africa to arrest and surrender President Al Bashir of The Sudan, which is at variance with customary international law and CALLS ON Member States of the African Union, particularly those that are also State Parties to the ICC, to oppose this line of interpretation of their legal obligations under the Rome Statute;*[62]

55 *Prosecutor v Omar Hassan Ahmad Al Bashir* (Submission from the Government of the Republic of South Africa for the purposes of proceedings under Article 87(7) of the Rome Statute) ICC-02/05-01/09-290 (17 March 2017) PT Ch II, paras 20 and 52.

56 Ibid., para 22.

57 Ibid., para 24.

58 See *Bashir* HC, note 50, para 12.

59 Ibid.

60 *Prosecutor v Omar Hassan Ahmad Al* Bashir (Decision under Article 87(7) of the Rome Statute on the Non-Compliance by South Africa with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir) ICC-02/05-01/09-302 (6 July 2017) PT Ch II, paras 123 & 140.

61 Ibid., paras 107–108 & 127–134.

62 AU Assembly, Decision No. Assembly/AU/Dec.672(XXX), note 14, para 3(i).

In 2016, Al-Bashir was not arrested during a visit to Uganda to attend the inauguration ceremony of President Yoweri Museveni.[63] As in the case of South Africa, prior to his visit, the ICC reminded Ugandan authorities 'of Uganda's obligations, as a State Party to the Statute, to cooperate with the Court for the immediate arrest and surrender of Omar Al-Bashir to the Court, pursuant to article 89(1) of the Statute, in the event that he attended the inauguration ceremony in Uganda [and of] 'its obligation to consult with the Court should it foresee any difficulties in implementing the request for cooperation by the Court'.[64] The rationale for Uganda's non-cooperation in the arrest and surrender of Al-Bashir was set out as follows:

> *(i) 'the invitation to President Al-Bashir was informed by the standpoint that good relations with all countries in the region is essential to the maintenance of peace and security and that continuous engagement of all the leaders, Al-Bashir included, is both important and unavoidable'; and (ii) the African Union Assembly of Heads of State and Government had decided that the African Union member states, in accordance with article 98 of the Statute concerning immunities, shall not cooperate with the Court's request for arrest and surrender of Omar Al-Bashir to the Court.*[65]

Again in 2016, Al-Bashir travelled to Djibouti to attend the inauguration of President Ismail Omer Gaili without being arrested.[66] The government's rationale for non-cooperation with the ICC reads as follows:

> *(i) it lacks the national procedures required under Part 9 of the Statute for the arrest and surrender of suspects to the Court, including Omar Al-Bashir; (ii) article 98(1) of the Statute precludes the arrest and surrender to the Court of Omar Al-Bashir since he is entitled to immunity as a serving Head of State; (iii) Djibouti, as a member of the African Union, must respect the decision of the African Union directing its member states, in accordance with article 98 of the Statute, not to cooperate with the Court's request for arrest and surrender of Omar Al-Bashir to the Court; and (iv) within the context of the Intergovernmental Authority on Development (IGAD), Djibouti is part of the peace process in the Republic of the Sudan and the Republic of South Sudan.*[67]

63 *Prosecutor v Omar Hassan Ahmad Al Bashir* (Decision on the Non-Compliance by the Republic of Uganda with the Request to Arrest and Surrender Omar Al-Bashir to the Court and Referring the Matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute) ICC-02/05-01/09-267 (11 July 2016) PT Ch II, paras 4 and 5.

64 Ibid., para 4.

65 Ibid., para 7 (footnote omitted).

66 *Prosecutor v Omar Hassan Ahmad Al Bashir* (Decision on the Non-Compliance by the Republic of Djibouti with the Request to Arrest and Surrender Omar Al-Bashir to the Court and Referring the Matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute) ICC-02/05-01/09-266 (11 July 2016), para 4.

67 Ibid., para 6 (footnotes omitted).

While the ICC observed that it was 'sensitive to these political considerations', it emphasised 'that State Parties to the Statute must pursue any legitimate, or even desirable, political objectives within the boundaries of their legal obligations vis-à-vis the Court' and that 'it is not in the nature of legal obligations that they can be put aside or qualified for political expediency'.[68] Accordingly, it found that Djibouti failed to comply with its cooperation obligation,[69] just like in 2011 when Djiboutian authorities did not also arrest Al-Bashir while he was on their territory.[70] As noted previously, Djibouti has been commended by the AU for receiving, and not arresting, Al-Bashir.[71]

The rationales advanced by the African states above reflect key issues, that require further clarification, relating to: immunity in the context of cooperation obligations including the meaning of article 98(1) and application/waiver of immunity; possible conflicting obligations and how to resolve them; and the hierarchy of sources of international law on the relevant issues. These issues are dependent on context, that is, whether in national or international proceedings, and have been at the heart of domestic litigation relating to the arrest and surrender of Al-Bashir, for example, in South Africa and Kenya.

D. Issues Warranting Clarification

As noted previously, the AU decided to approach the UNGA with regard to seeking an advisory opinion from the ICJ on the immunity question concerning the relationship between articles 27 and 98 of the Rome Statute and concerning the obligations of states parties under international law. The complexity of the immunity question in the context of ICC prosecution requires, inter alia, clarification of the interpretation of article 98(1) of the Rome Statute and addressing questions of hierarchy of obligations/sources of law and questions of the waiver of immunity by the UNSC. These issues are considered in the subsequent subsections, and with emphasis on national proceedings context where relevant. Before addressing them, we briefly elaborate on the suitability of the ICJ as an appropriate alternative forum to clarify the issues.

I. Suitability of the ICJ

Some scholars suggest that approaching the ICJ for an advisory opinion request could 'be viewed as an attempt to control the ICC' since it 'would be tantamount to side-lining the Court in favour of another forum for adjudication[, that is] to circumventing the authority

68 Ibid., para 14.

69 Ibid., para 16.

70 *Prosecutor v Omar Hassan Ahmad Al Bashir* (Decision Informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's Recent Visit to Djibouti) ICC-02/05-01/09-129 (12 May 2011) PT Ch I.

71 AU Assembly, Decision No. Assembly/AU/Dec.366(XVII), note 6, para 5.

of the [Court] and would [thus] allow the AU to engage in forum shopping'.[72] This, so they argue, 'is likely to produce tension between the ICC and the ICJ'.[73] However, while the ICC should be able to interpret the provisions of the Rome Statute with finality, the decisive questions go beyond; and the perceived bias in ICC prosecutions implies that any respective interpretation from the ICC would not be seen by the AU/African states as objective.[74] In fact, various scholars have criticised ICC decisions on the immunity issue for being insufficiently reasoned, unpredictable and inconsistent.[75]

The ICJ is empowered to 'give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request'.[76] As noted previously, the AU decision to approach the ICJ identifies the UNGA as the body to bring the advisory opinion request, which in terms of the UN Charter has standing to bring such requests.[77] The issues warranting clarification are, despite their political nuances, of a legal nature. Hence, the ICJ is a suitable body to address the issues. In providing political and legal reasons in support of the ICJ being a suitable body to approach, Dapo Akande rightly states that '[m]oving the matter to the ICJ would allow for the [relevant] obligations under [different] sources of law to be considered separately and then allow the ICJ to consider what the overall position is under general international law'.[78] He states further that given the current mistrust by AU/African states towards the ICC and the tension between them, 'the authority of the ICJ as a court not tied to

72 *Nabil M. Orina*, Should the ICJ render an advisory opinion on the immunity question re Articles 27 & 98 of the Rome Statute? (24 March 2018), https://www.icjafrica.com/single-post/2018/03/24/Should-the-ICJ-render-an-advisory-opinion-on-the-immunity-question-re-Articles-27-98-of-the-Rome-Statute (last accessed on 8 April 2018).

73 Ibid.

74 For further reading on the perceived bias and selectivity in ICC prosecutions, see for example, Max du Plessis/Tiyanjana Maluwa/Annie O'Reilly, Africa and the International Criminal Court, International Law 2013/01, pp. 2–3, available at: http://www.dphu.org/uploads/attachements/books/books_3820_0.pdf (last accessed on 18 April 2018); *W. Chadwick Austin/Michael Thieme*, Is the International Criminal Court Anti-African?, Peace Review: A Journal of Social Justice 28 (2016), pp. 342–350; *Valérie Arnould*, A Court in Crisis? The ICC in Africa, and Beyond, Egmont Paper 93 (2017), pp. 4–7, http://aei.pitt.edu/87212/1/egmont.paper_.93.pdf (last accessed on 18 April 2018); *Tor Krever*, Africa in the Dock: On ICC Bias, (30 October 2016), http://criticallegalthinking.com/2016/10/30/africa-in-the-dock-icc-bias/ (last accessed on 18 April 2018).

75 See, for example, *Dapo Akande*, An International Court of Justice Advisory Opinion on the ICC Head of State Immunity Issue, EJIL:*Talk!* (31 March 2016), https://www.ejiltalk.org/an-international-court-of-justice-advisory-opinion-on-the-icc-head-of-state-immunity-issue/ (last accessed on 8 April 2018); ibid.; *Reinold*, note 19.

76 Statute of the International Court of Justice 1945, article 65.

77 UN Charter, article 96(a).

78 *Akande*, An International Court of Justice Advisory Opinion on the ICC Head of State Immunity Issue, note 75.

the Rome Statute and which is the principal international tribunal on matters of general international law is the key to making progress' on the contentious issues.[79]

In relation to arguments around undermining the authority of the ICC, it is worth noting that approaching the ICJ is just one part of the AU's two-pronged approach to seeking clarification on the immunity issue. The other part, as stated previously in the AU's decision, entails seeking 'a declaratory/interpretative clarification' on the issues of immunity and conflicting obligations to cooperate from a working group of experts convened by the ICC Assembly of States Parties.[80] But, due to the ICC's legitimacy crisis, the credibility of its decisions, including those from an ICC Assembly of States Parties working group that is not comprised only of African states parties, would most likely be questioned by AU/African states, especially if not in their favour. The Rome Statute, however, recognises the competence of the ICJ in resolving disputes between states parties. Specifically, the ICC Assembly of States Parties has the power to recommend referral of disputes 'between two or more States Parties relating to the interpretation or application' of the Rome Statute to the ICJ.[81] It could thus, subject to the situation qualifying as a dispute between states parties, defer the issues to the ICJ since the AU's decision on approaching the ICC Assembly of States Parties is enunciated as one of 'interpretive' clarification on identified Rome Statute provisions. It is of course left to the ICJ to decide on how to exercise its discretion; whether or not to offer its opinion on the issues, and whether to do so in relation to all the issues or only some of them and defer others to the ICC.

II. Four issues warranting clarification[82]

The number of issues to be considered by the ICJ would depend on how the UNGA phrases the question(s) and on how the ICJ choses to exercise its discretion (that is, should it decide to rule only on selected issues). In this section, we have identified and discussed four issues that require clarification.

1. Interpretation of article 98(1) of the Rome Statute

The ICC has noted 'that there is an inherent tension between articles 27(2) and 98(1) of the Statute and the role immunity plays when [it] seeks cooperation regarding the arrest of a Head of State'.[83] However, it asserts that this does not warrant an interpretation of 'article 98(1) in such a way so as to justify not surrendering Omar Al Bashir on immunity

79 Ibid.

80 AU Assembly, Decision No. Assembly/AU/Dec.672(XXX), note 14, para 5(i).

81 Rome Statute, article 119(2).

82 This section draws on parts from *Lilian Chenwi/Franziska Sucker*, South Africa's Competing Obligations in Relation to International Crimes, Constitutional Court Review VII (2015), pp. 199–245, 216–241.

83 *Prosecutor v Al Bashir*, ICC-02/05-01/09-139-Corr, note 35, para 37.

grounds', as such an interpretation 'would disable the Court and international criminal justice in ways completely contrary to the purpose of the [Rome] Statute'.[84] How then should article 98(1) be interpreted in the context of the immunity question?

Article 98(1) of the Rome Statute provides:

> *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, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.*

A couple of issues can be noted from the provision. Firstly, it relates to a situation where a cooperation request conflicts with the requested state's obligation under customary or conventional international law to grant immunity.[85]

Secondly, it is explicitly directed at the ICC's behaviour in such a conflicting situation and not at states parties. It stipulates that the '*Court* may not proceed'; which can be contrasted with other provisions in the Rome Statute such as articles 93(4) and 95 that are directed at states parties, providing that 'a *State party* may deny' and 'the requested *State* may postpone'.[86] It would thus seem that if article 98(1) is properly applied, it excludes a right of the requested state to refuse to execute a request for arrest and surrender.[87]

Thirdly, the use of 'may' in article 98(1) needs to be carefully considered in order to establish whether or not it limits the ICC's power to request arrest and surrender.[88] Does it prevent the ICC from making such requests in certain contexts, and if so, which contexts? It is essential to understand if, in the Rome Statute context, 'may' implies an optional or mandatory act, as it could be imperative. 'May' denotes either '[t]o be permitted to' or '[t]o be a possibility' or '[l]oosely, is required to; shall; must', while 'shall' designates an obligation to do something and 'shall not' an obligation to not do something, thus implying 'an imperative command'.[89] The Al-Bashir case points to the importance of understanding the exact meaning of the phrase 'may not proceed' in article 98(1). Does it imply no permission

84 Ibid., para 41.

85 This conflict is explored further in the subsequent sub-section 4 of this article.

86 Emphasis added.

87 See *Ilias Bantekas*, International Criminal Law, Oxford/Portland, 2010, p. 439 arguing that in situations where a multiple, competing request is premised on a treaty or customary obligation with a third party, states parties can depart from the obligation to assist or surrender to the court.

88 Pro limitation of the ICC's power, see, e.g., *Poala Gaeta*, Does President Al Bashir Enjoy Immunity from Arrest?, Journal of International Criminal Justice (7)2 (2009), p. 328.

89 Bryan A Garner (ed.), Blacks Law Dictionary, 8th ed. Eagan 2004, p. 1000. For case law confirming the permissive nature of 'may' and on 'may' being synonymous with 'shall' or 'must' in an effort to effectuate legislative intend, see William H. S. Bell/Clifford Cooper/*Brian D. Burne*, Bell's South African Legal Dictionary, 3rd ed., Durban, 1951, p. 482, and *John B. Saunders*, Words and Phrases Legally Defined, 3rd ed., London, 1988-1990, p. 342 et seq.

(or no possibility) to proceed, or does it refer to a permission (or a possibility) in terms of a choice to either proceed or not proceed?

An interpretation that points to 'no permission' to proceed is not only consistent with the relevant provisions in the equally authentic French and Spanish version of the Rome Statute (which if translated literally, both mean 'not being allowed to')[90], but seems legally meaningful since the ICC is not obligated to request assistance but rather has 'the authority to make requests';[91] that is, merely the permission to do so. Such an interpretation would imply that, if the ICC has not obtained a waiver of immunities from the third state, the requested state would not commit an international wrongful act if it refuses to cooperate with the ICC. Hence, in the Al-Bashir case, since the ICC has not obtained a waiver of immunities from Sudan, it would not be allowed to proceed with the cooperation request, which in turn implies that states parties can lawfully disregard the request. Such an understanding would be based on an assumption that the granting of a waiver must be obtained from the third state, in this case Sudan, and can neither expressly nor implicitly be waived by another actor, such as by the UNSC through a referral.[92]

If one considers the interpretation of 'shall' as meaning obligation to do something and 'shall not' as obligation to not do something, the permission or possibility in terms of a choice (to do or not do something) thus could become a key element for interpreting 'may' or 'may not'. In this context, the *travaux preparatoires* of the Rome Statute has to be looked at in order to establish if its drafters were aware that the ICC is not obligated to request assistance but, in terms of article 87(1)(a) of the Rome Statute, has 'the *authority* to make requests to States Parties for cooperation'.[93] If so, then article 98's reiteration of this 'authority' could indicate an obligation on the part of the ICC to consider any conflicting obligations in relation to third states before exercising its discretion whether to proceed or not to proceed with a request. This approach would imply that conflicting obligations cannot be grounds for a refusal to execute a request for arrest and surrender if it is established that the ICC did make the request after careful consideration of the conflict.[94] Applying this approach to Al-Bashir and considering the ICC's view that there is no conflicting obligations due to the implicit waiver of Al-Bashir's immunity by UNSC Resolution 1593

90 Rome Statute, article 128. The French text reads: 'La Cour ne peut poursuivre l'exécution d'une demande de remise ou d'assistance'; and the Spanish text reads: 'La Corte no dará curso a una solicitud de entrega o de asistencia'. See, also, the German text ('Der Gerichtshof darf kein Überstellungs- oder Rechtshilfeersuchen stellen').

91 Rome Statute, article 87.

92 The question of whether the UNSC is permitted to waive immunities, and whether it has, through its referral, waived Al Bashir's immunity is considered below (C.II.3).

93 Emphasis added.

94 See *Robert Cryer/Håkan Friman/Darryl Robinson/Elizabeth Wilmshurst*, An Introduction to International Criminal Law and Procedure, Cambridge 2010, p. 513.

(2005),[95] states parties will be obligated to execute the ICC's request irrespective of an express waiver of immunities by Sudan.

2. Solving potential conflicting treaty obligations

The Al-Bashir case highlights possible conflicts between obligations to cooperate (stemming from, *inter alia*, UN Charter through UNSC Resolution 1593 and/or the Rome Statute) and obligations to not cooperate (stemming from the Constitutive Act of the AU by virtue of the AU non-cooperation decision)[96]. While the binding nature of obligations to cooperate is beyond controversy, the legal nature of AU decisions is not clarified in the Constitutive Act of the AU. However, failure to comply with AU decisions would attract sanctions.[97] Thus, in order to avoid such, AU member states have to comply with this decision, which would, however, be in direct conflict with a potential obligation to cooperate. This raises the question of which obligation prevails.

If a cooperation obligation stems from the UNSC referral, article 103 of the UN Charter serves to solve the issue of conflict with the cooperation obligation deriving from the AU Constitutive Act in favour of the UN Charter obligation. Since the cooperation obligation in the UNSC Resolution 1593 is directed at the parties to the Sudan conflict and merely urges other states to cooperate fully,[98] only for the parties to the conflict does the cooperation obligation prevail over obligations towards the AU (unless the ICJ interprets, based on a non-literalist approach, that 'urge' is of an obligatory nature and thus all UN member states are bound by virtue of article 25 of the UN Charter). For other African states parties to the Rome Statute, their cooperation obligations possibly stem from the Rome Statute and/or other applicable treaties (other than the UN Charter). Consequently, these obligations to cooperate and obligations towards the AU to not cooperate cannot be solved with article 103 of the UN Charter. If the UNSC had not urged other states to cooperate but obliged them to do so, then article 103 would have been applicable in solving the conflict.

95 *Prosecutor v Al Bashir*, ICC-02/05-01/09-242, note 25, paras 4–7, with reference to *Prosecutor v Al Bashir*, ICC-02/05-01/09-195, note 25, paras 28–31.

96 AU Assembly, Decision No. Assembly/AU/Dec.245(XIII) Rev. 1, note 6, para 10.

97 Article 23(2) of the Constitutive Act of the African Union (2000), OAU Doc. CAB/LEG/23.15, stipulates that 'any Member State that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly'. See also *Max du Plessis/Christopher Gevers*, Balancing Competing Obligations: The Rome Statute and AU Decisions, ISS Paper 225 (2011), p. 1, who argue that, based on article 23 and the doctrine of implied powers, AU Assembly decisions 'are potentially binding on member states'.

98 The UNSC decided 'that the *Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully* with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, *urges all States and concerned regional and other international organizations to cooperate fully*'. See UNSC Resolution 1593, note 23, para 2 (emphasis added).

Generally, the relations between rules generated by the two different treaties are governed by the three general principles on conflict resolution: (a) *lex posterior derogat legi priori* (a later law repeals an earlier one); (b) *lex posterior generalis non derogat priori speciali* (a later law, general in character, does not derogate from an earlier one, which is special in character); and (c) *lex specialis derogat legi generali* (a special law prevails over a general law).

The first point to note in applying these principles is that neither the obligation to cooperate nor the obligation to not cooperate with the ICC in relation to the arrest and surrender of Al-Bashir is more general or special in character relational to each other. Both obligations are rather specific, with directly opposite instructions on the same subject matter. AU member states that are states parties to the Rome Statute are required, on the one hand, to arrest and surrender Al-Bashir to the ICC and, on the other hand, to set aside this obligation and not cooperate in his arrest and surrender.

A second consideration relates to the timeline of the obligations. The obligation towards the AU exists since July 2009, following the Assembly of the AU's non-cooperation decision. The cooperation obligation towards the ICC in relation to crimes against humanity and war crimes (triggered by the first formal request) exists since March 2009.[99] In relation to the crime of genocide, the obligation exists since July 2010 (triggered by the second formal request).[100] Hence, applying the *lex* posterior principle, while in relation to crimes against humanity and war crimes the obligation towards the AU is the later one and should thus prevail, in relation to genocide, the obligation towards the ICC is the later one and should thus prevail. Should further formal cooperation or non-cooperation requests be issued by the ICC or the AU, the application of the *lex posterior* principle for solving the conflict would result in absurdity. Moreover, article 30(3) of the Vienna Convention on the Law of Treaties 1969 (VCLT),[101] which 'effectively codifies the *lex posterior* rule',[102] requires that the rule only applies in situations where there are either identical parties in the later treaty or, in addition to all the parties of the earlier treaty, new state parties. This brings to the fore another challenge of using the rule to resolve this conflict because not all AU members are parties to the Rome Statute and vice versa.

In the absence of an alternative international law rule governing the relationship between international and regional obligations, both obligations, though conflicting, remain equal in ranking. Hence, the importance of clarification on the relationship between the two treaty obligations and other principles that can/should be applied in the resolution of any

99 See *Prosecutor v Omar Hassan Ahmed Al Bashir* (Request to All States Parties to the Rome Statute for the Arrest and Surrender of Omar Al Bashir) ICC-02/05-01/09-7 (6 March 2009) PT Ch I.

100 See note 25 above.

101 UN Doc. A/Conf.39/27; 1155 UNTS 331; 8 ILM 679 (1969); 63 AJIL 875 (1969).

102 *Christopher J. Borgen*, Resolving Treaty Conflicts, George Washington International Law Review 37 (2005), pp. 573, 603; see also *Jan B. Mus*, Conflicts between Treaties in International Law, Netherlands International Law Review XLV (1998), pp. 219, 220.

conflict between them and whether or not it remains the responsibility of each government to not enter into conflicting obligations.

3. Waiver of immunity of head of states by the UNSC

A two-tier immunity structure is established under the Rome Statute. One relates to officials from states parties and the other concerns officials from non-states parties. Under article 27 of the Rome Statute, states parties accept that immunities do not bar ICC prosecution. According to article 98(1) of the Rome Statute, the ICC may not proceed with a request for surrender if it requires '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, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity'. The two tiers are not contradictory because the first tier governs the ICC's exercise of jurisdiction over an accused person before it, while the second tier applies only in the context of states parties' obligations to cooperate with the ICC in the context of a request for surrender of incumbent heads of non-states parties.[103]

In relation to Al-Bashir, Sudan is not a party to the Rome Statute. Some scholars argue that the UNSC resolution rendered Sudan akin to a State Party; hence, Sudan should be seen as bound by the Rome Statute and thus its article 27 (i.e. there has been an implicit waiver of immunity).[104] Though the UNSC could and has sought to impose treaty obligations on non-state parties while acting under Chapter VII,[105] the implication of the UNSC referral is that the investigation and prosecution will take place in accordance with the Statute, Elements of Crime and Rules of Procedure and Evidence. This has been confirmed by the ICC Pre-Trial Chamber I, which held that Al-Bashir's position as Head of a non-State Party has no effect on the ICC's jurisdiction over the case due to the core principles of

103 See *William A. Schabas*, An Introduction to the International Criminal Court, Cambridge 2011, p. 247, stating that articles 27 & 98(1) of the Rome Statute are not inconsistent or incompatible.

104 *Dapo Akande*, The Legal Nature of Security Council Referrals to the ICC and its Impact on Al-Bashir's Immunities, Journal of International Criminal Justice 7 (2009), pp. 333, 341–342. But see *Dire Tladi*, The Duty on South Africa to Arrest and Surrender President Al-Bashir under South African and International Law: A Perspective from International Law, Journal of International Criminal Justice 13 (2015), pp. 1027, 1043; Gaeta, note 88, p. 324, who argue that the UNSC does not render Sudan a State Party.

105 See, e.g., UNSC Resolution 1373 (2001) (imposing obligations on all States arising from the International Convention for the Suppression of the Financing of Terrorism 1999, UN Doc. A/RES/54/109; 39 ILM 270 (2000); TIAS No. 13075); UNSC Resolution 1874 (2009) (imposing on North Korea the Treaty on Non-Proliferation of Nuclear Weapons 1968 (729 UNTS 161; 7 ILM 8809 (1968); 21 UST 483) after it had announced its withdrawal); UNSC Resolution 1757 (2007) (giving effect to the Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon 2007 (2461 UNTS 257) after the Lebanese parliament refused to ratify it).

article 27 of the Rome Statute and above implication of the referral, among other things.[106] The Chamber subsequently held that the UNSC, by referring the situation in Darfur to the ICC while acting under Chapter VII of the UN Charter, did implicitly waive Al-Bashir's *personal immunity in the ICC proceedings*.[107] This line of reasoning is mainly based on the fact that UN member states, and therefore also Sudan, are required to carry out Chapter VII measures by virtue of article 25 of the UN Charter. It is supported by the assertion that article 103 of the UN Charter determines that, in the event of a conflict, obligations under the UN Charter are paramount over *all* obligations 'under any other international agreements'. The ICC held further that a UNSC referral resolution requiring 'full' cooperation from a UN member state who is a non-state party to the Rome Statute (in this case Sudan) would be rendered meaningless if it had to be interpreted to exclude an implicit waiver of immunities.[108]

Arguably, rendering Sudan a state party via the UNSC referral resolution and hence applying section 27 of the Rome Statute to Sudan in *ICC proceedings,* is at the very least, problematic in light of the general principle of international law *pacta tertiis nec nocent nec prosunt* – '[a] treaty does not create either obligations or rights for a third State without its consent' – enshrined in article 34 of the VCLT. However, decisive for the Al-Bashir case is personal immunity *in national proceedings*. A close look at article 98(1) of the Rome Statute and the legal effect of a UNSC referral within the purposes of the Rome Statute supports the contrary view on implicit waiver of Al-Bashir's by the UNSC, particularly *in relation to national proceedings*. Article 98(1) is the only provision in the Rome Statute that speaks to the possibility of waiving immunity, and such waiver must be given by the third state (that is, the non-party state that the person claiming immunity represents – in the case of Al Bashir, Sudan (which has not waived Al Bashir's immunity)). The Statute does not explicitly provide alternative approaches to a waiver of immunity. On the legal effect of a UNSC referral, article 13(b) of the Rome Statute is instructive: A referral serves as a trigger for the ICC's jurisdiction and this includes the jurisdiction over crimes committed in the territory, or by nationals, of a non-state party to the Rome Statute. Had the parties to the Rome Statute intended to confer further legal effects to UNSC referrals (other than triggering jurisdiction), they could and should have explicitly stated so. Thus, within the purposes of the Rome Statute and the UNSC referral provision in the Statute, an implied waiver possibility in *national proceedings* by virtue of a UNSC referral would, at the very least, be problematic.[109]

106 *Prosecutor v Omar Hassan Ahmad Al-Bashir* (*Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al-Bashir*), ICC-02/05-01/09-3 (4 March 2009) PT Ch I, paras 41 & 42–45.

107 *Prosecutor v Al Bashir*, ICC-02/05-01/09-242, note 25, para 7 (citing *Prosecutor v Al Bashir*, ICC-02/05-01/09-195, note 25, paras 29 & 31).

108 *Prosecutor v Al Bashir*, ICC-02/05-01/09-195, note 25, para 29.

109 See also *Gaeta*, note 88, 324.

Nonetheless, the ICC Pre-Trial Chamber II has provided an alternative argument, holding that 'the cooperation envisaged … was meant to eliminate any impediment to the proceedings before the Court, including the lifting of immunities', and that a different interpretation would render the UNSC decision 'senseless … since immunities attached to Al Bashir are procedural bars from prosecution before the Court'.[110] Thus, '"cooperation of … [Sudan] for the waiver of the immunity" as required under the last sentence of article 98(1) of the Statute, was already ensured by the language used in paragraph 2 of SC Resolution 1593(2005)'.[111]

Yet, in urging all states to cooperate with the ICC, the UNSC does not state that this cooperation implied waiver of immunity for it to be meaningful, nor does it call for states parties to disregard customary international law rules on personal immunities for purposes of cooperation with the ICC.[112] It is thus, arguably, problematic to interpret its referral resolution as implying that states parties are authorised to violate these rules without bearing any international responsibility, because if the UNSC had intended this, it could and should have explicitly said so, especially since Sudan, as a UN member, would then indeed have to accept such a Chapter VII decision by virtue of article 25 of the UN Charter. Interpretation of the referral resolution as devoid of an implicit waiver does not render the resolution meaningless because the resolution requires cooperation from some states, including Sudan, and in the *ICC proceedings* (as opposed to *national proceedings*), Al-Bashir has no immunity.

In the absence of a waiver, to disregard Al-Bashir's personal immunities in *national proceedings* and surrender him to the ICC would constitute an international wrongful act, even though this wrongful act would not infringe upon the jurisdiction of the ICC over Al-Bashir. Whether it would be a wrongful act in terms of domestic law in relation to Al-Bashir will depend on the status that a state's constitution accords to customary international law within its domestic legal system in the context of a conflict. Notwithstanding, it remains unclear whether the UNSC can waive immunity through a referral resolution; thus, an issue requiring clarification. Though this sub-section has focussed on waiver of immunity, it would be equally important to further elaborate on immunity before international criminal courts under international law, considering that African states hold the view, as evident from its future amended continental court structure,[113] that immunity be applicable to heads of states.

110 *Prosecutor v Al Bashir*, ICC-02/05-01/09-195, note 25, para 29.

111 Ibid.

112 While an argument could be made that states parties to the Statute have agreed to derogate from customary international law on immunities in relation to the arrest and surrender of a person representing another state party, this cannot be said in relation to individuals from a non-state party. In detail, see Chenwi/Sucker, note 82, 232 et seq.

113 See section D of this article.

4. Hierarchy between sources of law

In the context of immunity and the prosecution of international crimes and more specifically, in respect of domestic proceedings, the Al-Bashir case also brings to the fore the question of hierarchy between sources of law. More precisely, whether or not there is a hierarchy between international treaty provisions and customary international law rules? And if not, what are the applicable conflict resolution principles?

The existence of a cooperation obligation in the context of a case involving an individual representing a non-state party to the Rome Statute that enjoys personal immunity would directly conflict with the customary international law rule on personal immunity, 'the grant of which is now understood as an obligation under customary international law'.[114] Put differently, on the one hand, the arrest and surrender of Al-Bashir would render the granting of immunity in national proceedings impossible; on the other hand, the granting of immunity in national proceedings would preclude the state's relevant authorities from arresting and surrendering Al-Bashir to the ICC. This constitutes a norm conflict in the strict sense since a state that is bound by these two rules 'cannot simultaneously comply with its *obligations*'.[115]

Generally, there is no explicit provision for hierarchy between treaty and customary law obligations, resulting in the question of priority being highly controversial.[116] If one follows the approach that 'the arrangement of the sources in paras (1)(a) to (c) [of art 38 of the ICJ Statute] … does reflect a common-sense approach to the ranking of the sources'[117] or the approach that treaties are the primary source, while custom is the secondary source,[118] then the state party's treaty obligation to cooperate with the ICC has priority in relation to the customary international law rule on personal immunity in national proceedings. This is in line with the *lex superior derogat legi inferiori* principle (a law higher in the hierarchy repeals the lower one). However, if one follows the approach that treaties and customs enjoy the same normative superiority[119] or the approach that the wording of article 38(1) of the

114 *James Crawford*, Brownlie's Principles of Public International Law, Oxford 2012, p. 487 (including detailed evidence that 'the existence of this obligation is supported by ample authority').

115 *Wilfred Jenks*, The Conflict of Law-Making Treaties, British Yearbook of International Law 30 (1953), pp. 401, 426 (emphasis added).

116 See *Alain Pellet*, Article 38, in: Andreas Zimmermann/Karin Oellers-Frahm/Christian Tomuschat/Christian J. Tams (eds.) The Statute of the International Court of Justice: A Commentary, Oxford 2006, p. 778.

117 *Tom W. Bennett/Jonathan Strug*, Introduction to International Law, Cape Town 2013, p. 12.

118 *John Dugard*, International Law: A South African Perspective, Cape Town 2011, p. 27. See also *Martti Koskenniemi*, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, UN Doc. A/CN.4/L.682 (13 April 2006), p. 47 ('treaties generally enjoy priority *against* over custom').

119 See *Case concerning Military and Paramilitary Activities in and Nicaragua* (*Nicaragua v USA*) *ICJ Reports* (1986) 94, para 175, confirming that treaties and customs can be equal in ranking.

ICJ Statute does not indicate a hierarchy between treaties and customs,[120] which both regard treaty and customary law obligations as equal in ranking, then conflict resolution between the obligation to cooperate with the ICC and to grant immunity in national proceedings is more complex. The exception is where the general rule in question is one of *jus cogens* or an obligation *erga omnes*, thus enjoying the highest status.[121]

Article 103 of the UN Charter relates to conflicts between obligations deriving from the UN Charter and any other international agreement. If one accepts that the latter extends to customary law obligations,[122] it provides a solution in cases where either the treaty or the customary law obligation stems from the UN Charter. Since this does not apply to the obligation to grant immunity in national proceedings, in relation to Al-Bashir, article 103 is only relevant where the cooperation obligation derives from the UNSC resolution 1593 (that is, for the parties to the Sudan conflict).

Moreover, the Rome Statute does not include a conflict clause for conflicting obligations under customary international law vis-à-vis those under the Rome Statute.[123] Though the wording of article 98 of the Rome Statute reflects the objective of ensuring that a state party's cooperation obligation does not become incompatible with customary international law on immunity that binds the state party in relation to a non-state party, states parties have only explicitly agreed on the ICC's discretion to not proceed with its request for cooperation.

The question remains of whether the three above mentioned general principles on conflict resolution can be of assistance. Firstly, even though the formal request by Pre-Trial Chamber I to cooperate with the ICC in relation to Al-Bashir's arrest and surrender had intended to set aside the customary international law obligation to grant personal immunity in national proceedings, the latter is not more general vis-à-vis the former. Rather, both obligations are, to some extent, *lex specialis*, as they protect different legal interests: on the one hand, the prosecution of international crimes and, on the other, preventing states from interfering with the fulfilment of sovereign activities by foreign state representatives in their territories. Secondly, while the cooperation obligation would generally be the later law in relation to the obligation to grant immunity in national proceedings, to apply the *lex posterior* rule between treaties and customs would ignore the facts that '[t]here is a presumption of

120 See, e.g., *Carmen Thiele*, Fragmentierung des Völkerrechts als Herausforderung für die Staatengemeinschaft, Archiv des Völkerrechts 46 (2008), pp. 1, 7, stating that the arrangement in article 38 of the ICJ Statute is merely a listing from the generally more specific to the more general rules.

121 See, generally, *Andreas L. Paulus*, Jus Cogens in a Time of Hegemony and Fragmentation, Nordic Journal of International Law 74 (2005), p. 297.

122 On the question whether or not the phrase 'any other international agreement' extends to customary law obligations, see Chenwi/Sucker, note 82, 240 footnote 315.

123 It should be noted that article 21 of the Rome Statute does not apply in our present context as it is not *per se* a conflict clause and the hierarchical approach in it is restricted specifically laws that the ICC has to apply.

interpretation … that treaties are not intended to derogate from customary law'[124] and that an absurdity potentially occurs when no precise date can be assigned to the creation of an obligation due to the gradual development of a (customary law) rule.

In relation to domestic proceedings, some states (for example, South Africa) have explicit constitutional provision on the hierarchy of customary international law in case of conflict. However, the same explicit position is lacking in many African states' constitutions. It would thus be important to also get clarification regarding the hierarchy between the customary international law obligation to grant immunity in national proceedings vis-à-vis state's treaty obligation to cooperate with the ICC in the arrest and surrender of Al-Bashir, and thus his prosecution.

E. Unsuitability of Withdrawal as a Solution to African States' Concerns

Seeking clarification from the ICJ on the contentious issues that the Al-Bashir case brings to the fore, which the Rome Statute or other international law provisions do not provide clarification on, is a more advantageous and adequate way forward for African states than their withdrawal from the ICC. In particular, the latter is not a suitable solution to their concerns around ICC prosecution for various reasons, some of which we mention briefly in the subsequent paragraphs, and from a general as opposed to country-specific perspective.[125]

A major frustration with the ICC is the perceived 'selectivity and inequality' through the ICC's pursuance of largely African cases.[126] Moreover, African states perceive the international justice system as a whole as being unfair, due to 'systemic imbalance in international decision-making processes' that has resulted in 'unreliable application of the rule of law' as evident from the UNSC's referral and deferral practice that is based on 'the interests of its Permanent members rather than the legal and justice requirements'.[127]

Meanwhile, 'all international criminal prosecutions are selective in nature (since it will always be impossible to prosecute every international crime committed in situations of large scale violations of human rights and humanitarian law)'.[128] This inherent selectivity in international criminal justice can be influenced by political considerations or state interests,

124 *Michael Akehurst*, Hierarchy of Sources, British Yearbook for International Law 47 (1974/75), pp. 273, 275 et seq.

125 In relation to withdrawal of South Africa, for example, see *Frans Viljoen*, Five Reasons Why South Africa Should Not Withdraw from the ICC Statute, Daily Maverick (23 June 2015), http://www.chr.up.ac.za/index.php/centre-news-a-events-2015/1481-five-reasons-why-south-africa-should-not-withdraw-from-the-international-criminal-court-statute.html (last accessed on 10 April 2018).

126 On the perceived bias and selectivity in ICC prosecutions, see note 74.

127 AU, Withdrawal Strategy Document, note 6, paras 2–4.

128 *Mia Swart/Karin Krisch*, Irreconcilable Differences? An Analysis of the Standoff between the African Union and the International Criminal Court, African Journal of International Criminal Justice (2014), pp. 38–56, 41(also citing *Amal Alamuddin*, The Role of the Security Council in Starting and Stopping Cases at the International Criminal Court, in: Andraž Zidar/Olympia Bek-

particularly in the context of case referrals by a political body. In such contexts, therefore, perceived selectivity and the inequality that comes with it cannot be ruled out even in criminal prosecutions by an African court. The jurisdiction of the criminal section of the African Court of Justice and Human Rights (African Court) can be triggered by, inter alia, a referral of a case by the AU Assembly of Heads of States and Government or its Peace and Security Council (PSC) to the prosecutor of the African Court.[129] Only time will tell, and subject to the criminal section of the African Court becoming operational, if the same concerns that exist in relation to UNSC referrals will apply to the Assembly and PSC referral practice. Should this be the case, will African states then also withdraw from the African Court? As it is unlikely for collective withdrawal to rid the international criminal justice system of selectivity, it is more appropriate to focus on addressing elusive prosecution within the ICC and the challenges with UNSC referral/deferral practice, with the goal of ensuring fairness in how international criminal justice is carried out, which is an objective of the AU as stated below.

While it can be that some will escape ICC prosecution following a withdrawal, according to article 127(2) of the Rome Statute prosecution is still possible for future cases relating to alleged crimes that were committed while the state concerned was a party to the Rome Statute and for cases that were ongoing at the time of withdrawal. Put differently, in such situations withdrawals would not affect the ICC's jurisdiction. Accordingly, in the case of Burundi, as confirmed by the ICC, its investigation into '[a]lleged crimes against humanity committed in Burundi or by nationals of Burundi outside Burundi since 26 April 2015 until 26 October 2017' is not affected and thus ongoing,[130] despite its withdrawal becoming effective. In addition, there is always the possibility of a UNSC referral of non-state parties to the Rome Statute but who are UN member states, resulting in prosecution (subject to complementarity principle).

Further, African states cannot escape from complying with those cooperation obligations they had at the time of withdrawal.[131] In other words, states that currently have cooperation obligation in relation to Al-Bashir will continue to have such after withdrawal and are expected to comply with them. This highlights that a withdrawal then would not be a solution to concerns around, for example, reconciling obligations towards the ICC and those towards the AU. While in relation to investigations and cases underway the AU partly

ou (eds.), Contemporary Challenges for the International Criminal Court, London 2014, pp. 109–111 on inherent selectivity in international criminal justice).

129 See article 46F of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights 2014 (Amended African Court Protocol), AU Assembly, Decision on the Draft Legal Instruments, Doc. Assembly/AU/8(XXIII), Decision No. Assembly/AU/Dec.529(XXIII), Twenty-Third Ordinary Session, 26–27 Jun 2014, para 2 (not in force, with no ratifications and only 11 signatories by end of June 2018).

130 ICC, Situation in the Republic of Burundi, ICC-01/17, note 14.

131 See Rome Statute, article 127(2).

acknowledges this continuing obligation,[132] it fails to clearly recognise continuing obligations to cooperate in relation to the arrest and surrender of suspects, even for states parties that do not have cases or investigations but had cooperation obligations.

If African states withdraw from the Rome Statute, it is also questionable how they would effectively meet the objectives outlined in the AU's Withdrawal Strategy document given that the document is framed more like an engagement strategy.[133] Under its objectives, the following expected outcomes of the implementation of relevant AU decisions are listed:

a) Ensure that international justice is conducted in a fair and transparent manner devoid of any perception of double standards;
b) Institution of legal and administrative reforms of the ICC;
c) Enhance the regionalization of international criminal law;
d) Encourage the adoption of African solutions for African problems
e) Preserve the dignity, sovereignty and integrity of member states.[134]

How would African states be able to play a significant role in relation to objectives (a) and (b), if not part of the system? And while the establishment of a criminal section in the African Court speaks to objectives (c) and (d),[135] it comes with various concerns, including that the possibility of selectivity, unfairness and double standards cannot be ruled out. Another major concern relates to the African Court's recognition of immunity for serving heads of state or government (or those acting or entitled to act in this capacity) and other

132 AU, Withdrawal Strategy Document, note 7, para 10 ('those member states with ICC investigations or cases underway would still be liable to fulfil their obligations under the treaty in relation to those cases or investigations').

133 *Mark Kersten*, Negotiated Engagement: The Latest in the Africa-ICC Relationship, Justice Hub (7 March 2018), https://medium.com/@justice_hub/negotiated-engagement-the-latest-in-the-africa-icc-relationship-1f5b9bd71d0 (last accessed 3 July 2018).

134 Ibid., para 8. For a discussion of the Withdrawal Strategy, see *Patryk I. Labuda*, The African Union's Collective Withdrawal from the ICC: Does Bad Law make for Good Politics?, EJIL:*Talk!* (15 February 2017), https://www.ejiltalk.org/the-african-unions-collective-withdrawal-from-the-icc-does-bad-law-make-for-good-politics/ (last accessed on 9 April 2018).

135 It should be noted that the Amended African Court Protocol on the establishment of the criminal section of the African Court was adopted some years before the adoption of the withdrawal strategy document. However, the existence and functioning of the criminal section of the Court and the withdrawal strategy are connected, as regionalization of international criminal law is a key principle in the withdrawal strategy. In fact, enhancing ratification of the Amended African Court Protocol is stated in the document as forming part of the strategy (see AU, Withdrawal Strategy Document, note 7, paras 27–28 & 35). Also worth noting is the fact that both were partly or fully informed by discontent with, or limitations in, the ICC system. One of the grounds for adopting the Protocol is the non-inclusion of crimes that are peculiar to Africa such as unconstitutional changes of government in the ICC jurisdiction (*Ademola Abass*, Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges, European Journal of International Law 24 (2013), pp. 939–941). And as noted previously, the withdrawal strategy identifies issues of discontent with the ICC system (see note 7).

senior state officials based on their functions, while they are in office.[136] Hence, while under customary international law, personal immunity may only be raised before national courts of foreign states in relation to an indictment for international crimes, the AU has extended this to an international court, contrary to established customary international law. As a result, several scholars rightly view the provision as 'a major setback in the advance of international criminal justice', which 'can only be construed as in the interests of those African leaders fearful of an end to a culture of impunity'.[137] This speaks to the same concerns that African states have with the UNSC, namely serving the interests of others to the detriment of ensuring justice. Notwithstanding, the complementarity principle, subject to the ICC also recognising complementarity in relation to regional criminal jurisdiction, would imply that it can exercise jurisdiction where the grant of immunity in African regional law is seen as inability to prosecute by a state party.[138] In relation to the states who withdraw but are UN members, a UNSC referral can still see those who would enjoy immunity under the Amended African Court Protocol being indicted by the ICC.

F. Conclusion

The reasons advanced by African states for their non-cooperation with the ICC in ensuring Al-Bashir's prosecution for international crimes highlight the four key issues of contention that we identified as requiring clarification; namely the interpretation of article 98(1) of the Rome Statute, the hierarchy of obligations, the hierarchy of sources of law and the waiver of immunity of head of states by the UNSC. The different perspectives on these issues stemming from the case illustrate that 'the importance of getting the immunity question right cannot be overstated', since '[i]t implicates not just the first trial of a head of state by the ICC, but the relationship between African states and the ICC more broadly'.[139]

While a collective withdrawal, as called for by the AU, would not provide a solution to AU/African states' issues of contention with the ICC, the AU's decision to seek clarification from the ICJ on these issues is a welcome, appropriate and suitable way forward in

136 Amended African Court Protocol, article 46A*bis*.

137 *Garth Abraham*, Africa's Evolving Continental Court Structures: At the Crossroads?, South African Institute of International Affairs Occasional Paper 209 (2015), p. 14, available at: http://www.saiia.org.za/occasional-papers/669-africa-s-evolving-continental-court-structures-at-the-crossroads/file (last accessed on 18 March 2018).

138 It should be noted that the Amended African Court Protocol is silent on complementarity between the criminal section of the African Court and the ICC. Whether the African Court would defer to the ICC's version of complementarity in this context remains to be seen; but the AU and African states are already cautious about deference to the ICC, as the AU has asked its member states to 'ratify and domesticate' the Amended African Court Protocol, as a means 'to enhance principle of complementarity in order to reduce the deference to the ICC' (AU, Withdrawal Strategy Document, note 7, para 35).

139 *Christopher Gevers*, The ICC Pre-Trial Chamber's Non-Cooperation Decision on Malawi, War and Law (16 February 2012), available at: http://warandlaw.blogspot.co.za/2012/02/icc-pre-trial-chambers-non-cooperation.html (last accessed on 16 March 2018).

terms of safeguarding the progress made towards ensuring international criminal justice for the gravest crimes. African states and the AU are formally (in theory) committed to pursuing accountability for such crimes, as shown by, inter alia, their overwhelming support for the ICC, holding the largest regional representation. However, ratification of a treaty does not automatically equate to sincere commitment to its implementation.[140] In practice, the AU and some African state's commitment to non-impunity for international crimes is questionable, taking into consideration their non-cooperation with the ICC in the prosecution of such crimes and their recognition of immunity for heads of state and senior states officials before the criminal section of the African Court. And, although a protocol has been adopted that provides for a criminal section in the African Court, the support, as seen from the level of signatories (11) and ratifications (none) has clearly not been as overwhelming as that for the ICC.

140 For example, see generally, *Emilie M. Hafner-Burton/ Kiyoteru Tsutsui*, Human Rights in a Globalizing World: The Paradox of Empty Promises, American Journal of Sociology 110 (2005), pp. 1373–1411.