2015 Journal for Juridical Science 40(1):50-68

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South Africa's obligation as member state of the International Criminal Court: the Al-Bashir controversy

1. Introduction

This article is a commentary on the judgement of the North Gauteng High Court on 24 June 2015 in the matter of *The Southern Africa Litigation Centre v Minister of Justice and Constitutional Development*,[1] which dealt with the recent controversy surrounding the South African government's failure to arrest Mr Omar Hassan Ahmed al-Bashir, president of the Republic of Sudan, to be prosecuted by the International Criminal Court (ICC).

This judgement will be analysed with particular reference to the ICC's Pre-Trial Chamber *Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court*,[2] to which the North Gauteng court referred. The judgement of 24 June was preceded by an order of the court on 14 June, which declared the state's conduct constitutionally invalid, having failed to take steps to arrest and/or detain Mr Bashir. The state was ordered to take all reasonable steps to "prepare to arrest President Bashir without a warrant in terms of section 40 (1) (k) of the Criminal Procedure Act, 51 of 1977 and detain him, pending a formal request for his surrender from the International Criminal Court".[3] The judgement under discussion is the court's reasons for this order.

The primary issue was whether a decision taken by the South African cabinet, affirmed by a ministerial notice, was sufficient to suspend South Africa's duty to arrest a sitting head of state against whom the ICC had issued warrants of arrest for war crimes, crimes against humanity, and genocide.[4] The judgement elicited extensive political comment.[5] From the South African government's perspective in terms of what cabinet decided and the steps they took prior to President Bashir's visit, the varied responses received reflect the serious value and legal complexity they faced, but arguably also show the extent to which South Africa's image as

1 Unreported, case number 27740/2015. (accessed on 25 June 2015).
2 No ICC 02/05-01/09. (accessed on 10 July 2015).
3 *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development*:par. [2].
4 *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development*:par. [1].
5 See, for example, Williams 2015; Marais 2015; Davis 2015; Etheridge 2015.

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an open, democratic and constitutional state committed to the rule of law has been tarnished.[6]

The commentary in this article will be in the form of a literature overview with a parallel analysis of the judgement and relevant case law.

2. Background to the case

The Southern Africa Litigation Centre, a non-governmental organisation based in Johannesburg, South Africa, brought the application.[7] The applicants received confirmation that Sudanese President Bashir was to visit South Africa in June 2015 at the invitation of the African Union (hereinafter "the AU"), who was hosting a summit in Gauteng.

As the host country for the summit, South Africa was expected to enter into a host agreement with the AU Commission, which required, among other things, that South Africa agree to accord privileges and immunities to the members and staff members of the Commission as well as "the delegates and other representatives of Inter-Governmental Organisations attending the Meetings".[8] These privileges and immunities are further contained in the Vienna Convention on Diplomatic Relations of 1961, which was enacted in South Africa in terms of the *Diplomatic Immunities and Privileges Act* (hereinafter "the *Immunities Act*").[9] In order to give national effect to the host agreement, the South African minister of international relations and cooperation had the host agreement published in *Government Gazette* No. 38860, which publication included the privileges and immunities accorded to delegates and attendees.[10]

It is common cause that the ICC had issued two warrants of arrest against President Bashir.[11] The first was on 4 March 2009 for war crimes and crimes against humanity. On 12 July 2010, a second warrant was issued against him for the crime of genocide.[12] President Bashir is suspected of

6 De Vos 2015.

7 *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development*: applicant's founding affidavit par [1].

8 *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development*: respondents' answering affidavit par. 3.7. This was required in terms of the OAU Convention.

9 37/2001. See *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development*: respondents' answering affidavit par 3.9.

10 *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development*: respondents' answering affidavit par. 3.11.

11 The ICC assumes jurisdiction in terms of article 13(b) of the Rome Statute when a matter is referred to it by the Security Council.

12 *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development*: applicant's founding affidavit paras. [15] and [16]. The ICC prosecutor initially applied for an arrest warrant for war crimes, crimes against humanity, and genocide, but the Pre-Trial Chamber refused the warrant of arrest in respect of the genocide charge. This was successfully appealed by the prosecutor to the Appeals Chamber ((https://jutalaw.co.za/media/filestore/2015/08/southern_africa_litigation_centre) accessed on 5 July 2015))

being criminally responsible "for attacks against a section of the civilian population of Darfur, Sudan, including murdering, exterminating, raping, torturing and forcibly transferring large numbers of civilians, and pillaging their property".[13] As a result, the ICC Registry requested the cooperation of member states to the Rome Statute in arresting and surrendering President Bashir in the event that he set foot in their territories.[14]

On the basis of three specific events, it is safe to mention that the South African government could hardly have been unprepared for the furore caused by this case. In 2009, the invitation extended to Bashir to attend South African President Jacob Zuma's inauguration came to naught when government was alerted that the applicant (who incidentally was the same NGO as in the case under discussion) was preparing papers to apply for his arrest.[15] Then came the Zimbabwe torture case,[16] which related to a raid carried out by the Zimbabwean police on the Harare headquarters of that country's opposition party in 2007. A number of opposition members were detained and tortured after the raid. A dossier of these human rights violations was compiled in South Africa, and the South African authorities were requested to investigate the torture allegations in terms of South Africa's obligations as a member of the ICC and, more particularly, in accordance with its *Implementation of the Rome Statute of the International Criminal Court Act* (hereinafter "the *Implementation Act*").[17] Following the South African authorities' refusal to launch such an investigation, a successful application was brought in the North Gauteng High Court to set that decision aside, which judgement the Supreme Court of Appeal[18] and, finally, the South African Constitutional Court[19] subsequently confirmed. In the third instance, on 9 April 2014, the Pre-Trial Chamber of the ICC delivered an important judgement concerning the Democratic Republic of the Congo's obligation as an ICC member state to

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who ordered the Pre-Trial Chamber to reconsider, after which the latter also granted the warrant for the genocide charge ((accessed on 5 July 2015)).

13 *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development*: applicant's founding affidavit par. [17]. The first warrant lists seven counts, including five counts of crimes against humanity that involve murder, extermination, forcible transfer, torture, and rape; two counts of war crimes, including intentionally directing attacks against a civilian population as such, or against individual civilians not taking a direct part in hostilities, and pillaging. The second warrant lists three counts of genocide against the Fur, Masalit and Zaghawa ethnic groups within the meanings of articles 6(a) and 6(c) of the Rome Statute.

14 With the ICC acting pursuant to articles 89(1) and 91 of the Rome Statute.

15 *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development*: applicant's founding affidavit par [9].

16 *Southern Africa Litigation Centre v National Director of Public Prosecutions* 2012 3 All SA 198 GNP. For a case discussion, see Strydom 2012:820-827.

17 *Act* 27/2002.

18 *National Commissioner, South African Police Service v Southern African Human Rights Litigation Centre* 2014 2 SA 42 SCA.

19 *National Commissioner, South African Police Service v Southern African Human Rights Litigation Centre* 2015 1 SA 315 CC.

arrest President Bashir while he was attending a meeting in that country. This arrest also did not happen.

Surely, the South African state law advisors and, in particular, the office of the Minister of International Relations and Cooperation, who was the fifth respondent in the case under discussion, could not have been unaware of these events. Furthermore, it is mind-boggling that no regard was given to the countervailing views on South Africa's obligations as an ICC member state vis-à-vis non-member states of the ICC, which views are discussed in paragraph 5, and which could potentially have provided the respondents in the case under discussion with some defence.

3. The North Gauteng court's judgement

3.1 Reasoning

As the essential question requiring its judgement, the court considered whether a South African cabinet decision, coupled with a ministerial notice, was of adequate force to suspend South Africa's duty to arrest a head of state in accordance with its duties and obligations in terms of the *Implementation Act*.[20] Following various introductory issues,[21] the court addressed the respondents' claim regarding the criminal jurisdiction immunity that President Bashir allegedly enjoyed in South Africa.[22] It is this claim of immunity for sitting heads of state (in terms of customary international law) in the context of the North Gauteng court's judgement that will be examined more closely in the following sections.

Section 4 of the *Immunities Act* includes the following stipulation:

> A head of state is immune from criminal and civil jurisdiction of the courts of the Republic, and enjoys such privileges as - (a) heads of state enjoy in accordance with the rules of customary international law; (b) are provided for in any agreement entered into with a state or government whereby immunities and privileges are conferred upon such a head of state; or (c) may be conferred on such head of state by virtue of section 7(2) [i.e. in the absence of an agreement with the state, by way of notice in the Government Gazette] …[23]

20 *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development*:par. [1].

21 *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development*:par. [2]-[27].

22 *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development*:par. [28] *et seq*.

23 Section between square brackets own insertion. Section 7(2) determines that the minister may, when it is "not expedient" to enter into an agreement such as contemplated by subsection (1) "and if the conferment of immunities and privileges is in the interest of the Republic", confer such immunities and privileges on a person or organisation as may be specified by notice in the *Gazette*".

Although the *Immunities Act* enacted into national law certain specified international conventions,[24] the court said, the General Convention on the Privileges and Immunities of the Organisation of African Unity (OAU) – articles V and VI, on which the respondents relied to claim immunity for Bashir[25] – was not one of them and, thus, was not domesticated into South African law.[26] The court then continued:[27]

> The only grounds on which President Bashir could conceivably be alleged to enjoy immunity would be as a head of state or in terms of the June agreement. But in fact, neither basis confers immunity on him. Significantly however the notice promulgated by the 5th Respondent makes no reference to section 4 of the Immunities Act.

At this point, it is important to note that, even if the minister had indeed published the notice in terms of section 4 of the *Immunities Act*, it would have been immaterial. This was confirmed by the court's subsequent finding, namely that, because the host agreement between South Africa and the AU conferred no immunity on heads of state, President Bashir could only possibly have claimed immunity based on customary international law.[28] However, head-of-state immunity in terms of customary international law is expressly excluded by the Rome Statute and the *Implementation Act*. This means that "the immunity that might otherwise have attached to President Bashir as head of state is excluded or waived in respect of crimes and obligations under the Rome Statute".[29] I shall now elaborate upon this finding by the court, as well as its reference to the ICC Pre-Trial Chamber's finding that Bashir's immunity in terms of customary international law as head of state was "implicitly waived by the Security Council", obligating South Africa to arrest and surrender the Sudanese president.[30]

The court then proceeded to explain the reasons why South Africa's host agreement with the AU, as later published in the *Government Gazette*, could not provide immunity to Bashir. Bolstering the argument of the immateriality of whether or not the notice was, in fact, published in

24 These are the Convention on the Privileges and Immunities of the Specialized Agencies, 1947; the Convention on the Privileges and Immunities of the United Nations, 1946; the Vienna Convention on Consular Relations, 1963, and the Vienna Convention on Diplomatic Relations, 1961.

25 *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development*: respondents' answering affidavit paras. 3.7-3.9.

26 *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development*:par. 28.4.

27 *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development*:par. 28.6.

28 *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development*:par. 28.7.

29 *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development*:par. 28.8.

30 As mentioned, there are strong countervailing scholarly opinions on this and other important complex and incidental matters on which I shall elaborate in par. 5, despite the fact, as indicated above, that none of these matters were raised by the respondents in the case under discussion.

terms of section 4 of the *Immunities Act*, the court reasoned and found – rightly, in my view – that the discretion the minister was allowed in terms of section 4 to grant immunity would have required her to take a *lawful*[31] decision.[32] And in this case, she would not have been able to do so, because it would have been contrary to South African law and the country's international obligations. Furthermore, as De Vos argues,[33] had she done so, she would have unlawfully encroached on the legislature's terrain. In addition, referring to the AU's convention on immunities, the court found that the convention also could not have trumped existing South African law and the country's international obligations.[34] The OAU convention was not domestically enacted and, even though South Africa passed the *Immunities Act* after the OAU convention was adopted, the choice not to ratify the latter suggested that the South African legislature clearly intended "not to confer blanket immunity on AU bodies, meetings and officials that attend them" in South Africa.[35]

Next, the North Gauteng court turned to the judgement by the ICC's Pre-Trial Chamber delivered on 9 April 2014.

3.2 The ICC's Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court

Because the facts underlying the ICC Pre-Trial Chamber's *Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court* (hereinafter "the *ICC Pre-Trial Chamber judgement*")[36] bore a striking resemblance to the facts of the case before the North Gauteng court, the court referred to it.[37]

As Bashir was, on the occasion of the Democratic Republic of the Congo (DRC) case, attending a Common Market for Eastern and Southern Africa in that country in February 2014, the ICC had requested the DRC (along with all other member states to the Rome Statute) to arrest Bashir in the event that he set foot in the country. In addition to the general request to all state parties,[38] the ICC issued a *Decision Regarding Omar Al-Bashir's Visit to the Democratic Republic of the Congo*, in which the DRC was

31 Own emphasis.
32 *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development*:par. 28.12.
33 De Vos 2015.
34 *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development:*par. 28.13.
35 *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development:*par. 28.13.2.
36 No ICC 02/05-01/09. http://www.icc-cpi.int/iccdocs/doc/doc1759849.pdf (accessed on 10 July 2015).
37 *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development*:paras. 31 and 32.
38 In terms of articles 86 and 89 of the Rome Statute.

requested to immediately arrest the Sudanese president.[39] Because the DRC then failed to arrest Bashir when he indeed arrived in the country, the ICC subsequently issued the *Decision Requesting Observations on Omar Al-Bashir's Visit to the Democratic Republic of the Congo*, inviting the DRC to submit observations as to why it failed to adhere to the ICC's request for cooperation.[40] In its response to the ICC, the DRC alleged that its non-compliance with the request for Bashir's arrest and surrender was due to "time and legal constraints".[41] The Pre-Trial Chamber was, however, not convinced of the DRC's responses.

First, the Pre-Trial Chamber pointed out that, since the ICC's request for states' cooperation in the Bashir matter was issued four years prior to the ICC request to the DRC specifically, the country could hardly plead that it experienced time constraints.[42] Drawing a comparison with the South Africa/Bashir matter, I have already alluded to the fact[43] that the South African government could equally not have been unprepared for the controversy that its decision not to arrest the head of the Sudanese state would cause.

Secondly, the DRC's claim that the ICC request put them in a "delicate and unmanageable situation" was, in effect, caused by the DRC's own disregard of "article 97 of the Statute and rule 195 of the Rules of the existence of a problem related to article 98(1) of the Statute which prevented it from discharging its obligations as a State Party to the Statute prior to or during the visit of Omar Al Bashir and before his departure".[44] The DRC made no attempts to adhere to article 97 of the Rome Statute, which requires a member state to communicate with the ICC when, in a situation as contemplated in article 98, an ICC request for cooperation would cause the state to act contrary to international law. Instead, the Pre-Trial Chamber stated that the passivity, with which the DRC treated the request, not only disregarded article 97, but also showed disdain for article 119(1) of the Rome Statute, which determines that "any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court".[45] Applying these principles to the South Africa/Bashir case under discussion, although there is no indication in the judgement or the court papers that the ICC, as it did in the DRC case, re-alerted South Africa to its obligations towards the ICC with regard to President Bashir before

39 ICC Pre-Trial Chamber judgement:par. [6].
40 http://www.icc-cpi.int/iccdocs/doc/doc1741131.pdf (accessed on 5 July 2015).
41 ICC Pre-Trial Chamber judgement:par. [11].
42 ICC Pre-Trial Chamber judgement:par. [14].
43 Under par. 2 of this article.
44 ICC Pre-Trial Chamber judgement:par. [15]. According to article 97 of the Rome Statute, where a state party receives a request for cooperation by the ICC and that party identifies problems that impede or prevent the execution of the request (such as those provided for in article 98, which in essence determines that the ICC may not require a state to cooperate where such a request will cause the state to act contrary to its obligations under international law), the state party must consult with the ICC "without delay in order to resolve the matter".
45 ICC Pre-Trial Chamber judgement:par. [16].

his South African visit, no authority exists which compelled the ICC to do so. On the other hand, there is also no indication that the South African authorities, well aware that Bashir was to attend the AU summit, made any attempts to engage with the ICC prior to, or during Bashir's presence in South Africa – something it was obligated to do in terms of article 97 of the Rome Statute.

Thirdly, the DRC argued that, despite the stipulations of article 27 of the Rome Statute, which divests heads of state of immunity, Bashir enjoyed immunity as "Head of a member State of the African Union".[46] On 12 October 2013, the AU passed a resolution that no AU head of state or government shall be required to appear before any international court or tribunal during their term of office. As a result of that resolution, so the DRC argued, the request to arrest Bashir was inconsistent with its obligation under international law with respect to state or diplomatic immunity.[47] This argument emphasises the inherent tension between the stipulations of articles 27 and 98 of the Rome Statute and the fact that, under international law, sitting heads of state enjoy personal immunities from criminal jurisdiction before national courts of foreign states, "even when suspected of having committed one or more of the crimes that fall within the jurisdiction" of the ICC.[48] It is, therefore, significant to take note of how the Pre-Trial Chamber dealt with this argument. The Chamber first confirmed the established international law rule of personal immunity of sitting heads of state and cited in confirmation thereof the International Court of Justice's judgement in 2000.[49] To prevent a member state from acting contrary to international law when requested to cooperate with the ICC, article 98(1) of the Rome Statute directs the ICC to secure the cooperation of the third state for the waiver of the immunity of its head of state.[50] Thus, because the ICC did not secure such a waiver of Bashir's immunity from Sudan, adhering to the ICC's request to the DRC to arrest Bashir would have caused the DRC to act contrary to international law. However, the ICC Pre-Trial Chamber responded by alerting the DRC to the terms of the United Nations Security Council (UN SC) resolution 1593 (2005), which states, *inter alia*, that the government of Sudan "*shall*"[51] cooperate and assist the ICC: "Since immunities attached to Omar Al Bashir are a procedural bar from prosecution before the Court, the cooperation

46 ICC Pre-Trial Chamber judgement:par. [19].
47 ICC Pre-Trial Chamber judgement:par. [19].
48 ICC Pre-Trial Chamber judgement:par. [19].
49 Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v Belgium*) 14 February 2002:paras. [53]-[59]. (accessed on 11 July 2015). Although the ICJ's judgement pertained to a sitting minister of foreign affairs, it can be equally applied to the immunity *ratione personae* that a sitting head of state or government enjoys under international law. The ICJ made it clear that immunity and inviolability protect an individual in order to perform his/her duties on behalf of his/her state (see par. [54]).
50 ICC Pre-Trial Chamber judgement:par. [27].
51 Pre-Trial Chamber's own italics.

envisaged in said resolution (by Sudan)[52] was meant to eliminate any impediment to the proceedings before the Court, including the lifting of immunities."[53] Therefore, the Pre-Trial Chamber noted, the AU resolution stating that no sitting head of state shall be required to appear before an international court or tribunal caused conflict not only between the AU and the ICC, but also between the AU resolution and the SC resolution 1593.[54] Such a conflict should be resolved with reference to article 25 of the UN Charter, which deals with the acceptance and duty by states to carry out SC decisions and was confirmed by the International Court of Justice in its advisory opinion on Namibia,[55] and article 103 of the UN Charter, which stipulates that, in situations of conflict between the charter and any other international agreement obligations, the charter obligations prevail.

Based on these arguments, the ICC Pre-Trial Chamber dismissed the DRC's reasons for its failure to arrest Bashir. Accepting the Pre-Trial Chamber's conclusions, the North Gauteng High Court in the South Africa/Bashir matter found that the respondent's arguments "based on immunities provided for in the host agreement and on AU membership are misguided".[56]

It is interesting to note that, on 12 December 2011, the Pre-Trial Chamber delivered judgement on a similar matter when Malawi also failed to arrest President Bashir.[57] In its judgement on Malawi's arguments, which were very similar to the arguments raised by the DRC, the Chamber considered former or sitting heads of state's immunity under international law in respect of proceedings before *international courts*[58] to find that Malawi failed its international obligations in not arresting Bashir. It traced the history of the notion of rejecting immunities, even for sitting heads of state, but lamentably never dealt with immunities in relation to national courts exercising criminal jurisdiction over sitting heads of state.

3.3 The concluding section of the North Gauteng High Court's judgement

In conclusion, the North Gauteng court pointed out that the respondents' arguments seemed to have been solely founded "on the relevant Statutes and legislative documents", but that the respondents at no stage made

52 Author's insertion.
53 ICC Pre-Trial Chamber judgement:par. [29].
54 ICC Pre-Trial Chamber judgement:par. [30].
55 Legal consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding SC Resolution 279 (1970) 21 June 1971:par. 116. http://www.icj-cij.org/docket/files/53/9371.pdf (accessed on 11 July 2015).
56 *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development*:par. 32.
57 ICC Case 02/05-01/09. http://www.icc-cpi.int/iccdocs/doc/doc128148.pdf (accessed on 11 July 2015).
58 Own italics.

any attempt to explain or justify their failure to obey the court order of 14 June 2015 to arrest President Bashir.[59] For example, the respondents at no stage pleaded necessity, which, based on the necessity of preserving the regional and international comity of states, could arguably have justified the South African government's disregard of its national and international obligations. The court observed:

> Having regard to the principle of separation of powers between the executive, legislative and judicial arms of the State, it is in any event clear that this Court would not have concerned itself with policy decisions which in their nature fall outside our ambit. As a court we are concerned with the integrity of the rule of law and the administration of justice.[60]

Of course, this remark flies in the face of current accusations, particularly from the South African government, that the judiciary is encroaching on the executive's terrain.[61]

Finally, the court[62] pointed out that courts were not the forum where regional and international policy considerations should be aired, and deemed it prudent to invite the ICC "to take cognisance of the issues that arise in this matter", because, as the judgement demonstrated, South Africa "is not the only Rome statute signatory that has failed to carry out its duties in terms of that statute when it could have done so because of a conflict between its regional affiliation on the one hand and its broader international obligations on the other".

As pointed out earlier,[63] the ICC Pre-Trial Chamber in the DRC/Bashir matter remarked that the tension was not so much between the AU and the ICC, but rather between the AU resolution and the SC resolution 1593. I propose that this remark is equally applicable to the South Africa/Bashir controversy. Therefore, I shall now turn to a reflection on the legal effect of a UN SC referral of a matter to the ICC. More specifically, I shall consider whether a SC resolution in the form of resolution 1593 is of sufficient force to suspend the personal immunity of sitting heads of state, particularly non-members of the ICC, as bestowed on them by international law.

4. The legal nature and effect of a Security Council referral to the ICC

Article 13 of the Rome Statute determines that the ICC has jurisdiction where a state party refers a matter to the court; where the SC refers a

59 *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development*:par. 33.
60 *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development*:par. 33.
61 Legalbrief Team 2015.
62 *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development*:par. 34.
63 Under par. 3.2 of this article.

matter to the court acting in terms of chapter VII of the UN Charter, or where the ICC prosecutor initiates an investigation. When the SC issued resolution 1593 (2005),[64] it was acting under chapter VII of the UN Charter, which means that it deemed the situation in Darfur to be a threat to international peace and security.[65]

The main objective of the UN is to maintain peace and security through its organs established for this purpose. The SC is the executive body of the UN and has the primary responsibility for maintaining international peace and security. In terms of article 25, the SC has the power to take decisions that are binding on all member states of the UN, and member states "agree to accept and carry out the decisions of the Security Council". Of the 196 countries of the world, only three are not members of the UN.[66]

Article 103 of the UN Charter stipulates that, "in the event of a conflict between the obligations of the Members of the UN under the present Charter and their obligations under any other *international agreement*,[67] their obligations under the present Charter shall prevail". In my view, therefore, article 103 trumps any reliance on the AU resolution that no sitting head of state shall be required to appear before an international court or tribunal. For this reason, I cannot agree with Dyani-Mhango[68] where he argues that a state willing to arrest Bashir based on the ICC's authority via the SC, and in disregard of the AU's resolution not to cooperate with the ICC, would be committing an international "wrongful act".[69] I support his argument, however, that a non-member of the ICC is under no obligation to arrest Bashir, as such an arrest could be in contravention of international customary law, unless again the trigger for ICC jurisdiction is a SC resolution that obligates all UN member states to cooperate with the court.

With its resolution 1593 (2005),[70] the SC – acting in terms of chapter VII of the UN Charter – referred the situation in Darfur to the prosecutor of the ICC, and:

> (2) Decides 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, while recognizing that States not party to the

64 (accessed on 5 May 2015).

65 Under article 39 of the UN Charter, action by the SC is triggered where a situation is a "threat to the peace, breach of the peace or act of aggression". See Dugard 2012:183, who points out that this is a political decision made by a political body, "subject to the possibility of a veto by one of the permanent powers".

66 Rosenberg n.d. These are Kosovo (which has not gained complete international recognition), Taiwan (which was replaced by China as a member of the UN in 1971), and the Vatican City.

67 Own emphasis.

68 Dyani-Mhango 2013:120.

69 That is, where the ICC jurisdiction is triggered by a SC resolution.

70 (accessed on 5 July 2015).

> Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully; (3) Invites the Court and the African Union to discuss practical arrangements that will facilitate the work of the Prosecutor and of the Court, including the possibility of conducting proceedings in the region, which would contribute to regional efforts in the fight against impunity; (4) Also encourages the Court, as appropriate and in accordance with the Rome Statute, to support international cooperation with domestic efforts to promote the rule of law, protect human rights and combat impunity in Darfur; (5) …; (6) Decides that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State …

Despite the fact that Sudan is not a party to the Rome Statute, resolution 1593 clearly placed an obligation on it to cooperate with the ICC, not "as if" it was an ICC member, but because the SC has the power to order it to do so, and Sudan as a member of the UN has an obligation to comply with the order. Because the SC is a political body and not a court of law, it can safely be argued that the resolution contemplated that the ICC and its system was to be used to take the necessary and ordinary steps. The resolution did not explicitly, but by necessary implication, make the Rome Statute binding on Sudan. Furthermore, although the resolution did not specifically address the question of immunity, it must by necessary inference be accepted that the SC placed the Sudan matter in the hands of the ICC system, that pertinently denies sitting heads of state immunity.[71] Put differently, as the UN Charter itself does not provide any framework within which investigation and prosecution of international crimes can take place, the only inference is that the UN SC contemplated investigation and prosecution to take place by the ICC, thus expecting such a process to be governed by the ICC Statute.

Akande points out that the ICC Pre-Trial Chamber's failure, in its judgement authorising the arrest of Bashir, to also consider immunity in respect of national jurisdictions and not only immunity in respect of the court was a "regrettable" and an "amazing oversight by the Chamber", because, unless Bashir voluntarily handed himself over to the court, he would have to be arrested and handed over by a state.[72] In such a case, immunity of sitting heads of state would inevitably be raised.[73] Earlier,[74] I raised a similar point with regard to the Chamber's judgement in the Malawi/Bashir case,[75] and, therefore, agree with Akande's observation.

71 Akande 2009:337.
72 Akande 2009:337.
73 Dyani-Mhango 2013:106.
74 Under par. 3.2 of this article.
75 (accessed on 11 July 2015).

However, in my view, that oversight was partly rectified in the Chamber's subsequent judgement in the DRC/Bashir matter discussed earlier. The operative word, though, is *partly*, as article 103 of the UN Charter only provides for the supremacy of UN obligations over obligations "under any other international agreement". It, therefore, does not trump state obligations to respect head-of-state immunity arising from customary international law. This is possibly the reason why resolution 1593 placed no obligation on non-state parties of the ICC. The position of ICC member states, however, is very different. The reasoning adopted by the Chamber in the DRC/Bashir matter is underpinned by pragmatism and the ICC's pursuit to end impunity for the gross violation of human and humanitarian rights. The Chamber's reasoning further resonates with what Akande proposes, and with supplementary arguments that the author and others present.

First, with reference to the ICC's jurisdictional regime, Akande argues:[76]

> ... the Court has no independent powers of arrest: It must rely on national authorities. A proclamation that immunities shall not bar the exercise of jurisdiction by the Court while leaving such immunities intact with respect to arrests by national authorities would mean that the Court would hardly be in a position to apply Article 27 and exercise its jurisdiction ... To read the treaty in this way would be contrary to the principle of effectiveness in treaty interpretation.

When regarding the jurisdictional regime of the ICC, one must not lose sight of the fact that the Rome Statute is premised on the principle of "complementarity".[77] Without the cooperation of states, the court cannot act and achieve its stated goals. If a case is referred to it by way of a resolution passed by the international community's chief executive arm for the maintenance of international peace and security, it must be accepted that the SC contemplates that criminal investigation by the court will follow. Without the cooperation of member states of the ICC, any attempts to maintain international peace and security make a mockery of the UN system, perpetuating the immunity enjoyed by the violators of the most heinous international crimes.

Secondly, state practice by a number of parties to the ICC suggests that they regard article 27 of the Rome Statute as removing immunities by adopting national implementation legislation.[78] South Africa's passing of the *Implementation Act*, in effect, formalised its support of the ICC as "part of a continuum, a process that was catalysed in Nuremburg, and which strives for a world where the worst criminals are dealt with as 'international' offenders".[79] But, as Du Plessis mentioned, the "true test for the ICC Act would come when an international criminal makes his or her appearance

76 Akande 2009:338.
77 Du Plessis 2008:1.
78 Akande 2009:338; Du Plessis 2003:16.
79 Du Plessis 2003:16.

on (*sic*) our country".[80] This test came in 2015, and many would argue that South Africa failed.

5. Countervailing views with regard to matters raised and incidental to this case discussion

In the context of immunity of sitting heads of state before the ICC, or, for that matter, where any international criminal court or tribunal is concerned, Gaeta[81] argues that, although the issue and circulation (among ICC members) of the arrest warrant of Al-Bashir did not violate international law, it did not obligate state members of the ICC to comply with an arrest and surrender request, because the request would be in violation of article 98(1) of the ICC Statute. To recall, that article determines that the ICC 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 …, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity". In my view, the author correctly posits the international position of immunity of incumbent heads of state with reference to the arrest warrant case:[82] "facing domestic charges of international crimes, (they) are entitled to immunity from arrest and from criminal prosecution in the territory of foreign states …".[83] He correctly points out that, in the case of a domestic court which is endorsing an ICC arrest warrant, this warrant is not a domestic warrant issued by a national authority and may be lawfully endorsed by the domestic court. Neither, in my view, can it be said that the arrestee in such a case is facing "domestic charges". This was only incidentally addressed by the ICJ judgement in the Arrest Warrant judgement. In that case, the ICJ was not called upon and did not address a number of outstanding issues.[84] Gaeta states that it is one thing to accept that an international court may lawfully disregard personal immunity in issuing a warrant of arrest, but another to expect a state requested by that court to lawfully disregard immunities simply because the issuing court is international. Central to the main gist of Gaeta's argument is:[85]

> However, I do not think that, at present, the logic of international criminal justice works quite this way: the fact that an international criminal court is endowed with jurisdiction over a particular case but is deprived of enforcement powers, does not imply that national judicial authorities are permitted to do whatever an international court asked them to do; and more so if that court has been established by virtue of a treaty, like the ICC, and therefore its authority derives

80 Du Plessis 2003:16.
81 Gaeta 2009:316.
82 See footnote 48 for case detail.
83 Gaeta 2009:317.
84 Gaeta 2009:319.
85 Gaeta 2009:325.

> from an instrument based upon consent. Clearly the constitutive instrument of an international court can derogate from the rules of customary international law on immunities with the (sic) respect to the exercise of jurisdiction by national authorities, including the execution of an arrest warrant issues (sic) by an international court.

Before proceeding with the further discussion of Gaeta's countervailing views, I shall point out that, in my view, this statement contradicts the author's previous assertion on the strength of the Arrest Warrant case that a national authority may lawfully endorse a warrant of arrest on account of its being issued by an international court, and to which I have added, because the arrestee is not facing "domestic charges".

Gaeta proceeds[86] to argue that it is not illogical to argue that, on accepting that an international criminal court may exercise jurisdiction over persons with personal immunity, national courts (in the execution of the warrant) can be said not to be bound by customary international law. This, he argues, is because "the arrest warrant produces its autonomous legal effects and constitutes the legal basis upon which a state can surrender a person subject to the jurisdiction of the ICC". It is unclear what "autonomous legal effects" are so produced, except, I accept on the strength of the author's further arguments, that the requested state, in complying with the international court's request, may then be said to act wrongfully vis-à-vis the national state of the arrestee because of the immunity in terms of international customary law.

On the "tension" in the Rome Statute between article 27 (the customary international law personal immunity exclusion) and article 98 (the non-violation of international law determination), Gaeta[87] correctly, in my view, argues that "the ICC Statute contains a derogation from the international system of personal immunities for charges of international crimes, but only among states parties to the Statute". He proceeds to correctly argue that the exclusion of the derogation from personal immunities is only allowed at the vertical level, in other words from the international court downwards to states. It is, however, not operative horizontally and so, for example, it would be unlawful for any state, particularly a member state of the ICC, to issue a warrant of arrest for a person sought for ICC crimes, if that person is a citizen of a non-ICC member state. I have, however, argued in this article that when the primary authority for an arrest warrant is a SC resolution,[88] particularly in terms of UN Charter Chapter VII, against a sitting head of state of the UN but non-member of the ICC, there is a logical derogation of

86 Gaeta 2009:326.

87 Gaeta 2009:328.

88 See, however, Gaeta 2014:1, in which the author differs. In this writing the author contends that the SC referral constitutes one of the conditions for the exercise of ICC jurisdiction and not the source of the jurisdiction. See also Tladi 2013:221 who criticizes the ICC decisions on Chad and Malawi on their failures to accede to ICC requests for cooperation with it on account of the Court's failure to rigorously engage and pronounce on the (vexed) dichotomy between articles 27 and 98 of the Rome Statute.

sitting head of state immunity. To argue to the contrary would constitute a continued refusal by certain members of the international community to advance the fight against impunity for the worst violators of international human and humanitarian rights. Tladi[89] reflects on the conflicting network of international rules and proposes that, in cases of SC referrals to the ICC, it places an obligation on all UN member states to co-operate with the ICC; something, as I have pointed out, resolution 1593 (2005) did not do. Although I agree with his contention, I have argued, for the reasons set out above, that the obligation on member states of the ICC is, at the least, self-evident and logically inferable.

6. Conclusion

The resolution by the UN SC 1593 in 2005 to refer the situation in Darfur to the ICC represented a decision to grant the ICC jurisdiction over any individual and crimes over which it can lawfully exercise jurisdiction in terms of its statute. The obligations imposed on all states as members of the UN (including non-members of the ICC) compel them to accept SC resolutions. In the case of resolution 1593, UN member states were urged (as opposed to obliged) to cooperate with the ICC.[90] Member states of the ICC are, in terms of both their ICC and UN obligations, by law obligated to cooperate with the court,[91] including to assist in arresting individuals sought for heinous crimes.

Similar to the three judgements of the South African courts in the Zimbabwe torture case, the North Gauteng High Court's judgement in the South Africa/Bashir matter must be credited for again spelling out South Africa's international obligations and its own commitment to the rule of law. In my view, in their ill-conceived attempts to shield President Bashir, the respondents lost sight of the fact that the ICC was, in fact, acting on the authority of the SC. There is undoubtedly serious and substantial political underplay involved in the Bashir controversy.[92]

In responding to the matter, South Africa's Deputy Chief Justice has endorsed the idea of an African international criminal court, observing that "African leaders have no right to oppress their people and think there will be no consequences".[93] However, as the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (aimed at providing that court with jurisdiction over international crimes), which the AU adopted at its 23rd ordinary session in June 2014, identified "structural and financial challenges", it is doubtful whether an

89 Tladi 2015:23.
90 Akande 2009:344. It is pointed out that some types of recommendations by the SC do fall within the scope of article 103 of the charter, and thus takes preference over existing obligations.
91 Akande 2009:341.
92 Du Plessis 2010.
93 Lewis 2015.

African criminal court will become a reality soon.[94] Unsurprisingly, as some would argue, article 46A[95] of the final protocol provides: "No charges shall be commenced or continued before the Court against any serving African Union Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office."

Until such time as a functional African criminal court comes into operation, and while there is no clear political will not to grant immunity to sitting rogue governments and their heads of state and officials, courts of law remain the wrong forum "for the ventilation of regional and international policy", as Judge Mlambo pointed out.[96] One can only hope that reason eventually prevails for the sake of justice and the pursuit of compensation for countless slain or maimed victims, particularly on the African continent.

94 Lubbe 2014:223; Du Plessis 2012:11.
95 As quoted by Lubbe 2014:230.
96 *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development*:par. 34.

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