

South Africa's failure to arrest President al-Bashir: an analysis of the Supreme Court of Appeal's decision and its implications

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Abstract

The ICC and many of its state parties disagree over whether President al-Bashir is entitled to respect for his immunities from those states. On the one hand, the ICC has requested al-Bashir's surrender, while, on the other, its state parties have refused to cooperate. The ICC's Pre-Trial Chamber has provided various justifications for its stance – that state parties are obliged to surrender al-Bashir – the most recent relating to the effect of the SC referral which gave the ICC jurisdiction on al-Bashir's immunities. The African Union has, however, consistently held that its member states, including those that are party to the Rome Statute, remain obliged to respect its immunities. It is argued that South Africa's Supreme Court of Appeal avoided engaging with the core issues in this debate, namely the scope of the obligation to comply with ICC requests for arrest and surrender as well as the arguments adopted by the PTC in finding that al-Bashir's immunities need not be respected. The SCA's approach is unwarranted in light of domestic principles of interpretation and also unjustifiably undermines the customary international law on immunities *ratione personae*. Ultimately, the court's reluctant engagement with the international legal issues can only serve to undermine the coherence of the international legal system and perpetuate the harm the ICC is doing to itself in persisting that its state parties are obliged to arrest President al-Bashir.

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BACKGROUND

The ICC's jurisdiction

In 2005, the Security Council (SC) decided 'to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court' (ICC),¹ allowing the ICC to exercise its jurisdiction in relation to alleged crimes in the region,² which it could otherwise not have done as Sudan is not party to the Rome Statute of the International Criminal Court (Rome Statute), and since the relevant offences were allegedly committed in Sudan.³ The Prosecutor subsequently opened an investigation into this situation, which led to the issuing of two arrest warrants for Omar al-Bashir, the President of Sudan, by the Pre-Trial Chamber (PTC).⁴

Even though the ICC can now exercise its jurisdiction over crimes committed in Darfur,⁵ it remains heavily reliant on states for the arrest and surrender of alleged criminals, as only they have the necessary enforcement jurisdiction and power to arrest alleged criminals for prosecution before the ICC. In this regard, to ensure its effectiveness, the ICC is authorised to 'transmit a request for the arrest and surrender of a person' and state parties must comply with such requests.⁶ The PTC thus proceeded to issue the arrest warrants, alongside a 'request for cooperation in the arrest and surrender of Omar Al Bashir'.⁷

Al-Bashir's immunities and state parties' obligations under the Rome Statute

By virtue of his position as a head of state, other states owe Sudan an obligation under customary international law to respect al-Bashir's

¹ Security Council Resolution 1593 (31 March 2005) UN Doc S/RES/1593.

² Rome Statute of the International Criminal Court, 2187 UNTS 3 (entered into force 1 July 2002) ('Rome Statute') art 13.

³ *Id* at art 12.

⁴ The first related to allegations of war crimes and crimes against humanity. See Pre-Trial Chamber, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (4 March 2009) No. ICC-02/05-01/09. The second related to allegations of genocide. See Pre-Trial Chamber, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir (12 July 2010) No ICC-02/05-01/09 ('Second Arrest Warrant').

⁵ Subject to an exclusion contained in the SC referral relating to non-Sudanese and non-party states' nationals. See SC Res 1593, par 6.

⁶ Rome Statute n 2 above at art 89(1). See also arts 86–87, under which state parties undertake a general obligation to cooperate with the ICC and allows the court to make requests for cooperation.

⁷ Second Arrest Warrant 20; Registrar, Supplementary Request to all States Parties to the Rome Statute for the Arrest and Surrender of Omar Hassan Ahmad Al Bashir (21 July 2010) No ICC-02/05-01/09.

immunities *ratione personae*.⁸ He is thus protected ‘against any act of authority of another State which would hinder him [...] in the performance of his duties’,⁹ and insofar as al-Bashir remains the President of Sudan, foreign states are obliged to refrain from arresting him. This constitutes a further obstacle to prosecuting President al-Bashir.

If Sudan were party to the Rome Statute, this might not be the case. Article 27(1) provides for the irrelevance of immunities in relation to alleged criminals’ international responsibility, while article 27(2) provides that immunities ‘shall not bar the Court from exercising its jurisdiction’, thereby revoking the procedural bar to the exercise of jurisdiction that respect for immunities ordinarily requires.¹⁰ Under the latter provision, state parties are deemed to have waived their officials’ immunities in relation to ICC proceedings and, arguably, in relation to ‘action taken by national authorities, where those authorities are acting in response to a request by the Court’,¹¹ even though this is neither explicitly provided for, nor an uncontested assertion.¹² Nevertheless, it remains clear that the Rome Statute cannot render irrelevant the immunities of non-party states’ officials, including those of President al-Bashir.¹³

The Rome Statute’s drafters foresaw the possibility that the ICC may have jurisdiction over an individual in respect of whom it may subsequently request states to assist it (by arresting and surrendering that person) that could result in the imposition of conflicting obligations on state parties; if that person was a state official, they would be under an obligation to respect that person’s immunity while also being obliged to arrest and surrender him or her to the ICC. In order to avoid such a scenario, article 98(1) provides that the Court cannot

⁸ This was also recognised by the Pre-Trial Chamber. See *eg* Pre-Trial Chamber II, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court (9 April 2014) No ICC-02/05-01/09 (‘DRC Decision’).

⁹ *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* 2000 ICJ Rep 3, par 53.

¹⁰ Rome Statute n 2 above at art 27(2).

¹¹ Akande ‘The legal nature of Security Council referrals to the ICC and its impact on al Bashir’s immunities’ (2009) 7/2 *Journal of International Criminal Justice* 333 337–338.

¹² O’Keefe *International criminal law* (2015) 14 47.

¹³ Vienna Convention on the Law of Treaties, 1155 UNTS 331 (entered into force 27 January 1980) art 34. The Pre-Trial Chamber also recognises this. See DRC Decision, n 8 above at par 26.

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 [...] immunity [...] unless the Court can first obtain the cooperation of that third state for the waiver of immunity.¹⁴

Prima facie, article 98(1) seems applicable in relation to President al-Bashir, thereby precluding the court from requesting states to arrest and surrender him. The PTC also recognised that this provision was intended to ensure that incompatible obligations will not be imposed upon ICC state parties.¹⁵ However, as mentioned above, the court has issued requests for assistance in his arrest and surrender, in response to which an obligation has been imposed on African Union (AU) member states to refrain from arresting al-Bashir.¹⁶ He has since travelled to twenty-four other states, including seven ICC state parties, without being arrested.¹⁷ In response to these (and other anticipated) visits, the PTC issued several orders relating to the state parties' obligation to comply with such requests.

Initially, the PTC found that both the SC referral and the Rome Statute oblige state parties to cooperate with the ICC in these requests.¹⁸ Textual support for the SC's imposition of such an obligation is non-existent where respect for immunities is mandated and the AU has already expressed its conflicting stance on the scope of state parties' obligations under the Rome Statute. The PTC subsequently changed its approach, deciding that

¹⁴ Rome Statute n 2 above at art 98.

¹⁵ DRC Decision par 27.

¹⁶ AU Assembly, Declaration 245 (XIII) Rev1 (3 July 2009) par 10. See also AU Decision 296 (XV) (27 July 2010) par 5; 'Decision on the progress report of the commission on the implementation of the assembly decisions on the international criminal court' (30 January 2012) AU Doc EX CL/710(XX) par 6.

¹⁷ For state parties to the Rome Statute, see: https://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx. For visits of President al-Bashir since 2009, see: <http://qz.com/630571/sudans-president-has-made-74-trips-across-the-world-in-the-seven-years-hes-been-wanted-for-war-crimes/>. The State Parties to the Rome Statute which President al-Bashir has visited since 2009 are Chad, Djibouti, the Democratic Republic of Congo, Kenya, Malawi, Nigeria and South Africa.

¹⁸ Pre-Trial Chamber, Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's presence in the territory of the Republic of Kenya (27 August 2010) preamble; Pre-Trial Chamber, 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 the Republic of Chad (27 August 2010) preamble; Pre-Trial Chamber, 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 (12 May 2011) preamble; Pre-Trial Chamber, Decision requesting Observations about Omar Al Bashir's Recent Visit to Malawi (19 October 2011) preamble.

‘customary international law creates an exception to Head of State immunity when international courts seek a Head of State’s arrest for the commission of international crimes’.¹⁹ This alleged exception, if it exists, would have the effect of making the ICC’s requests for assistance compliant with article 98, as state parties would not be obliged to respect al-Bashir’s immunities and could thus cooperate freely with such requests without violating any obligations owed to Sudan. However, presumably because it recognised that the evidence relied upon to reach this conclusion was unconvincing,²⁰ and that, in any event, such an exception would not necessarily require that immunity before national authorities also be lifted,²¹ the PTC shifted its view once again.

In relation to the Democratic Republic of Congo, the PTC found that the failure to arrest the Sudanese President was unlawful as the SC, in referring the situation to the ICC and deciding that Sudan will ‘cooperate fully with [...] the Court’,²² had ‘implicitly waived the immunities granted to Omar Al-Bashir under international law and attached to his position as a Head of State’.²³ It is true that the SC has broad powers under Chapter VII of the United Nations Charter (UNC) and member states are obliged to comply with the SC’s decisions, an obligation which takes precedence over other conflicting obligations.²⁴ However, as discussed in further detail below, the PTC’s conclusion was that state parties do not remain obliged to refrain from arresting al-Bashir.

¹⁹ See eg Pre-Trial Chamber, 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 (13 December 2011) par 43; Pre-Trial Chamber, 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 by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir (13 December 2011) par 13; Pre-Trial Chamber, Order Regarding Omar Al-Bashir’s Potential Visit to the Republic of Chad and to the State of Libya (15 February 2013) par 10.

²⁰ Akande ‘ICC issues detailed decision on Bashir’s immunity (... at long last...) but gets it wrong’ *EJIL Talk!* available at: <http://www.ejiltalk.org/icc-issues-detailed-decision-on-bashir%E2%80%99s-immunity-at-long-last-but-gets-the-law-wrong/>.

²¹ *Ibid*; Jacobs ‘The frog that wanted to be an ox: the ICC’s approach to immunities and cooperation’ in Stahn (ed) *The law and policy of the International Criminal Court* (2015) 281 294.

²² Security Council Resolution 1593 n 1 above at par 2.

²³ DRC Decision n 8 above at par 29.

²⁴ Charter of the United Nations, 1 UNTS XVI (entered into force 24 October 1945) arts 25 and 103.

South Africa is one of the state parties that failed to arrest President al-Bashir when he visited the country in June 2015 to attend an AU Assembly. '[T]he government took no steps to arrest him',²⁵ despite the PTC's request for assistance, the fact that South Africa is party to the Rome Statute, the South African High Court prohibited President al-Bashir's departure from South Africa, and the PTC's decision that South Africa was under an 'obligation under the Rome Statute to immediately arrest Omar Al Bashir and surrender him to the Court' due to the SC's implicit waiver of his immunities.²⁶ Rather, the South African executive's decision seems to have been influenced by the view, expressed by the AU, that, by virtue of article 98(1), it is not obliged to cooperate with the ICC in this matter.

Owing to this failure to arrest al-Bashir, domestic proceedings were brought by the Southern Africa Litigation Centre against the Minister of Justice and Constitutional Development and others. The High Court found that President al-Bashir's departure from South Africa 'demonstrates non-compliance with that [aforementioned] order' for assistance.²⁷ In those proceedings, the respondents had relied on a provision of the Hosting Agreement for the AU Assembly and a government notice which accorded immunity to certain persons within the context of the Assembly. While it was held that the agreement did 'not confer immunity on President Bashir' as the notice did not apply to a head of state,²⁸ leave to appeal was granted by the Supreme Court of Appeal of South Africa (SCA), principally because that there was a 'fresh argument advanced by the Government'.²⁹

THE SCA'S JUDGMENT

The government's novel argument was that the customary international law on immunities and the relevant implementing domestic legislation 'qualified the obligation of South Africa, that would otherwise exist as a state party to the Rome Statute, to arrest and surrender a head of state for whom the ICC has issued an arrest warrant in respect of the commission of international crimes'.³⁰

²⁵ *The Minister of Justice of South Africa v The Southern Africa Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016) ('SCA judgment') par 4.

²⁶ Pre-Trial Chamber II '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 (13 June 2015) par 9.

²⁷ SCA judgment n 25 above at par 39.

²⁸ *Id* at pars 2811 and 30.

²⁹ *Id* at par 25.

³⁰ *Id* at par 16. See also par 14.

The relevant domestic provision is section 4(1)(a) of the Diplomatic Immunities and Privileges Act 37 of 2001 (the DIPA) which provides that

[a] head of state is immune from the criminal and civil jurisdiction of the courts of the Republic, and enjoys such privileges as heads of state enjoy in accordance with the rules of customary international law.

The SCA thus proceeded to establish the extent to which customary international law on immunities requires courts to refrain from exercising jurisdiction in respect of foreign heads of state,³¹ concluding that ‘[o]rdinarily [...] President Al Bashir was entitled to inviolability while in South Africa’.³²

Next, it sought to address the relationship between customary international law (and the DIPA) on the one hand, and South Africa’s obligations under the Rome Statute (alongside its domestic implementing legislation: the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (Implementation Act)) on the other. The SCA commenced by explaining that the Constitution of the Republic of South Africa, 1996, (the Constitution) recognises that ‘[c]ustomary international law is law in the Republic [of South Africa] unless it is inconsistent with the Constitution or an Act of Parliament’.³³ It also explained that ‘[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law’.³⁴ In light of this, the SCA sought to interpret the relevant provisions of the Implementation Act and reasoned in the following way:

As international law requires state parties to international agreements to comply with the obligations they have assumed under those agreements, an interpretation of the Implementation Act that results in South Africa not complying with its obligations under the Rome Statute is to be avoided if possible.³⁵

³¹ *Id* at pars 66–85.

³² *Id* at par 85.

³³ The Constitution of the Republic of South Africa, 1996 (‘Constitution’) s 232; SCA judgment n 25 above at par 62.

³⁴ *Ibid.*

³⁵ SCA judgment n 25 above at par 86.

The SCA first sought to interpret the provisions of the Implementation Act which affords jurisdiction to South African courts in respect of crimes and, in particular, section 4(2)(a) which provides that:

despite any other law to the contrary, including customary and conventional international law, the fact that a person is or was a head of State [...] is neither a defence to a crime; nor a ground for any possible reduction of sentence once a person has been convicted of a crime.

While the SCA appreciated the difficulty in considering this provision – the domestic equivalent to article 27(1) of the Rome Statute – as creating ‘an international crimes exception to head of state immunity’ in South Africa,³⁶ (which operates as a procedural bar to prosecution and is thus unrelated to the aspects of the proceedings mentioned in the provision) it found that this provision is ‘a clear indication that South Africa does not support immunities when people are charged with international crimes’.³⁷

In light of this, the SCA repeatedly emphasised that recognising President al-Bashir’s immunity ‘would create an anomaly’.³⁸ The SCA also considered the domestic principle under which ‘the conferral of a power conveys with it all ancillary powers necessary to achieve the purpose of that power’ to support this view.³⁹ In ascertaining that ‘[t]he purpose of the power to prosecute international crimes in South Africa is to ensure that the perpetrators of such crimes do not go unpunished’,⁴⁰ the principle of implied necessary powers reinforced, according to the SCA, its view that respecting al-Bashir’s immunity would be anomalous.⁴¹ The obligation ‘to interpret the Implementation Act in a way that promotes the spirit, purport and objects of the Bill of Rights’,⁴² as well as the purpose of the Implementation Act – ‘to ensure that South Africa conforms to its obligations under the Rome Statute’⁴³ – further supported the SCA’s conclusion.⁴⁴

In its subsequent consideration of ‘the domestic provisions dealing with requests for assistance from the ICC’, the SCA explained that sections 8–10

³⁶ *Id* at par 93.

³⁷ *Ibid.*

³⁸ *Id* at pars 94–95.

³⁹ *Id* at par 95.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Id* at par 87.

⁴³ *Id* at pars 89–90.

⁴⁴ *Id* at par 96.

of the Act provide the framework in which requests for the arrest and surrender of a person from the ICC should be dealt with.⁴⁵ Most pertinent for present purposes is section 10,⁴⁶ under which, following the arrest of the relevant person, it must be established ‘whether the warrant applies to the person in question; whether the person has been arrested in accordance with the procedures laid down in domestic law; and whether the person’s rights as contemplated in the Bill of Rights have been respected[...].’⁴⁷ The SCA also identified the lack of domestic discretion in relation to decisions to surrender persons to the ICC, subject to the fulfilment of these conditions.⁴⁸

In this regard, the government argued that arresting and surrendering al-Bashir would not respect his rights ‘to freedom and security of the person and [...] freedom of movement’ as contemplated in the Bill of Rights.⁴⁹ Thus, it would not have been possible to surrender him. The SCA pointed out that this argument could only succeed if his immunity had not been revoked by the Implementation Act; otherwise, the limitation on those rights would be justified.⁵⁰ At this stage, the SCA quoted section 10(9) of the Implementation Act: ‘The fact that the person to be surrendered is a person contemplated in section 4(2)(a) or (b) does not constitute a ground for refusing to issue an order [...]’ for surrender, thereby characterising the government’s argument that President al-Bashir could not be arrested and surrendered as an ‘absurdity’.⁵¹ According to the SCA, if the government was right, ‘section 10(9) would serve no purpose at all’.⁵²

In light of the constitutional prioritisation of domestic law where it conflicts with international law the SCA concluded

that when South Africa decided to implement its obligations under the Rome Statute by passing the Implementation Act it did so on the basis that all forms of immunity, including head of state immunity, would not constitute a bar [...] to South Africa cooperating with the ICC by way of arrest and surrender of persons

⁴⁵ *Ibid.*

⁴⁶ *Id* at par 97.

⁴⁷ *Id* at par 98. See also: Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (‘Implementation Act’) s 10(1).

⁴⁸ SCA judgment n 25 above at par 98; Implementation Act n 48 above at s 10(5).

⁴⁹ SCA judgment n 25 above at par 99.

⁵⁰ *Ibid.*

⁵¹ *Id* at par 101.

⁵² *Ibid.*

charged with such crimes before the ICC, where an arrest warrant had been issued and a request for cooperation made.⁵³

As a result of this finding on the basis of domestic law, the SCA did not address the arguments relating to the effect of the SC's referral on al-Bashir's immunities.⁵⁴

THE SCA'S FLAWED REASONING

One of the SCA's preliminary considerations in interpreting the Implementation Act's provisions was that it is required to 'prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law'.⁵⁵ However, the SCA reasoned that 'an interpretation of the Implementation Act that results in South Africa not complying with its obligations under the Rome Statute is to be avoided if possible'.⁵⁶

Thus, the SCA sought to determine South Africa's obligations under the ICC. It recognised that article 27 precludes a state party's national who is 'being prosecuted before the ICC to claim immunity from prosecution [because...] all Party States have waived any immunity that their nationals would otherwise have enjoyed under customary international law'.⁵⁷ It also discussed article 98, in respect of which it recognised 'that there appear to be two views'.⁵⁸

The first is that the provision

operates to protect Party States from the obligation to cooperate with requests from the ICC for arrest and surrender or assistance where that would involve their breaching their obligations to respect personal inviolability under customary international law towards non-Party States,

and the second, that

as non-Party States and their nationals are ordinarily brought within the jurisdiction of the ICC by way of a Security Council reference under Article

⁵³ *Id* at par 103.

⁵⁴ *Id* at par 106.

⁵⁵ *Id* at par 62.

⁵⁶ *Id* at par 86.

⁵⁷ *Id* at par 59.

⁵⁸ *Id* at par 60.

13(b), Article 27 is thereby made applicable to the non-Party State and therefore it is not open to it to rely on Article 98.⁵⁹

The SCA thus identified ‘a tension between Articles 27 and 98 that has not as yet been authoritatively resolved’ in relation to requests from the ICC for assistance to surrender the national of a non-party state, over which the ICC can only exercise jurisdiction as a result of an SC referral.⁶⁰ In other words, it proclaimed that there is uncertainty regarding the effect of the SC’s referral in relation to immunities. Does the SC’s decision that Sudan ‘shall cooperate fully with [...] the Court’ implicitly waive Sudan’s immunity or effectively put it in the position of a state party which would make article 27 applicable to Sudanese officials (including in relation to national proceedings), or is neither of these the case, meaning that state parties must continue to respect al-Bashir’s immunities? If the latter is true, are state parties nevertheless also obliged to arrest and surrender al-Bashir following the issuing of an impermissible request and, as such, have been placed in a position under which they have irreconcilable obligations?

This unresolved tension regarding the effect of the SC referral’s lies at the core of the ICC’s inability to prosecute al-Bashir. One view on this has led the PTC to request assistance and find state parties to be in breach of their obligations under the Rome Statute.⁶¹ The other view continues to inform the

⁵⁹ *Ibid.*

⁶⁰ *Ibid.* The latter view expressed by the SCA is not identical to the PTC’s reasoning in determining that al-Bashir’s immunities were not applicable. The SCA’s view is analogous to the argument that the SC’s referral effectively places Sudan in the position of a state party which would make art 27 applicable to Sudanese officials, including with regard to ICC-related proceedings before domestic courts. See Akande n 11 above at 305–306. The SCA’s view diverges in that it assumes that the SC’s decision to afford the ICC jurisdiction over a non-party state makes the Rome Statute applicable to that state. The former approach is based on an interpretation of the SC’s decision that Sudan will ‘cooperate fully’ with the ICC to have placed it in a position equivalent to that of a state party. These views, however, have the same practical effect for present purposes, although the reasoning of the SCA’s view is questionable in this regard. Its view becomes more confusing in light of its view that art 98 can ordinarily be relied upon by states. At face value, art 98 merely limits the ICC’s authority to make requests for cooperation; it says nothing about state parties’ rights or obligations. Thus, it is not a provision which states can directly rely upon, at least not without further interpretation. In any event, the SCA’s claim that art 27 would render immunities irrelevant before domestic proceedings would also not necessarily follow from the fact that a state is brought under the ICC’s jurisdiction (although, as explained below, this seems to be the stance in the South African legislation implementing the Rome Statute). The PTC’s view differs in that it finds al-Bashir’s immunities to have been implicitly waived by the SC’s referral, thereby preventing states from relying on related obligations to refrain from arresting and surrendering al-Bashir.

⁶¹ *Eg* n 19 above.

state parties' refusal to cooperate with the ICC in respect of requests for assistance relating to President al-Bashir. It is thus regrettable that the South African court did not adopt a stance in respect of this tension.

Rather, the SCA proceeded by considering section 4 of the Implementation Act, which sought to implement and was a paraphrase of article 27(1) of the Rome Statute, concluding that this provision indicates South Africa's lack of support for immunities in all circumstances. Nevertheless, article 27(1) only proclaims the irrelevance of the immunities of state parties' officials, and this only in respect of their substantive responsibility. By contrast, it is silent on the immunities of non-party states and also on the immunities of state parties' officials as a procedural bar to the exercise of the ICC's jurisdiction, let alone in relation to other national authorities' exercise of jurisdiction. Thus, contrary to the SCA's finding, this provision does not necessarily indicate South Africa's disregard for immunities in all circumstances at least, if it is interpreted according to its objective, to give effect to the Rome Statute domestically.

In fact, it is section 10(9) of the Implementation Act that lifts the procedural bar to prosecution ordinarily afforded by immunities for surrender-related proceedings. Although this provision could indicate support for the position that the South African executive was required to arrest al-Bashir, since its application is not expressly qualified to state parties, the Implementation Act was intended to ensure that South Africa carries out its obligations under the Rome Statute 'in terms of the said Statute'.⁶² Thus, it is reasonable to conclude that section 10(9), which seeks to give effect to South Africa's obligation to cooperate with the ICC by arresting and surrendering persons when requested to do so, is intended to operate only in relation to persons for whom the ICC has lawfully requested states' assistance, in accordance with article 98(1).

It is true that the obligation to cooperate with the ICC is enshrined within the Rome Statute and is not qualified upon the fact that compliance with relevant requests by the ICC would not violate a state's obligation to respect immunities under international law. In other words, although the ICC can only lawfully request states' assistance in respect of persons that states can arrest without violating their immunity, the obligation to cooperate is not made explicitly contingent upon such a request being lawful on these terms. Nevertheless, in accordance with the customary principle of treaty

⁶² SCA judgment n 25 above at par 91.

interpretation enshrined in article 31(3)(c) of the Vienna Convention on the Law of Treaties, the obligation to cooperate should be interpreted, insofar as possible, in accordance with '[a]ny relevant rules of international law applicable in the relations between the parties'.⁶³ As the SCA recognised, South Africa was under an obligation to respect al-Bashir's immunities, at least insofar as the effect of the SC's referral on such immunities is left unaddressed.⁶⁴ Thus, the South African court should have attempted to interpret the obligation to cooperate with the ICC in a manner compatible with the obligation to respect al-Bashir's immunities.

In interpreting the obligation of cooperation, other provisions of the Rome Statute are also relevant,⁶⁵ and article 98(1) creates the possibility of an interpretation that would reconcile the two obligations. Under this provision, 'the ICC may not request ICC parties to arrest and surrender [...] state officials of non-parties',⁶⁶ unless the relevant state cooperates with the ICC and waives these immunities.⁶⁷ It thus becomes possible to interpret the obligation of cooperation as applicable only to requests made in accordance with article 98. Otherwise, state parties would incur conflicting obligations, a result which is to be avoided when possible.⁶⁸

As a result, it is reasonable to interpret the obligation of cooperation in the Rome Statute, as well as section 10(9) of the Implementation Act – which provides for the irrelevance of immunities as 'a ground for refusing to issue an order' for surrender in relation to ICC requests⁶⁹ – as applicable only in relation to requests for assistance from the ICC to cooperate in relation to its own nationals, nationals of other state parties (as they have waived their officials' immunities under the Rome Statute's article 27, if this provision is also interpreted as waiving immunities before domestic courts for relevant proceedings), or third states which have cooperated with the court 'for the waiver of the immunity' (in accordance with article 98(1)). Some state parties' implementing legislation supports this interpretation, in differentiating between the irrelevance of state parties officials' immunities and the preservation of non-party states officials' immunities in the context

⁶³ Vienna Convention on the Law of Treaties, 1155 UNTS 331 (entered into force 27 January 1980) ('VCLT') art 31(3)(c).

⁶⁴ SCA judgment n 25 above at par 85.

⁶⁵ VCLT n 63 above, art 31(2).

⁶⁶ Akande 'The jurisdiction of the court over nationals of non-parties' (2003) 1/3 *Journal of International Criminal Justice* 618 642.

⁶⁷ The ICC can invite such assistance. See Rome Statute n 2 above at art 87(5).

⁶⁸ O'Keefe n 12 above at [14.88].

⁶⁹ Implementation Act n 47 above at s 10(9).

of ICC-related proceedings (subject to a waiver of such immunities obtained by the ICC).⁷⁰

Perhaps the other factors considered by the SCA (the principle of implied necessary powers, compatibility with the Bill of Rights, and the purpose of the Implementation Act) could have outweighed the factors in favour of this alternative interpretation. If this were the case, it would have been more prudent for the SCA to consider and dismiss the alternative interpretation suggested above, rather than merely ignoring it and justifying this decision by virtue of the Constitution's prioritisation of parliamentary Acts over customary international law, when the latter is inconsistent with the former.⁷¹ However, the Constitution is clear. South African courts '*must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law*'.⁷² As is now evident, the SCA's attempt to interpret its domestic law in a manner compatible with South Africa's international legal obligations was somewhat superficial. The alternative interpretation suggested is a reasonable one and would be consistent with international law. It would avoid being incompatible with South Africa's obligations under the Rome Statute as well as its customary and AU obligations to respect al-Bashir's procedural immunities *ratione personae*. Thus, it should have been preferred over the SCA's chosen interpretation.

While this would prevent the characterisation of the government's claim that President al-Bashir remained immune from proceedings as an 'absurdity',⁷³ it would not have resolved the central issue before the court, whether the failure to arrest President al-Bashir was unlawful. This would require the SCA to take a stance on the effect of the SC's referral on al-Bashir's immunities. The SCA could have reached the conclusion it did – that the failure to arrest and surrender al-Bashir was unlawful – in a manner that would comply with the constitutional requirement of interpreting domestic legislation in accordance with South Africa's international legal obligations, insofar as possible. However, it would need to uphold the PTC's view that the SC's referral effectively precludes state parties from upholding al-Bashir's immunities, which – as seen below – is far from convincing and –

⁷⁰ Eg International Criminal Court Act (2001) (United Kingdom) s 23; International Criminal Court Act (2002) (Malta) s 26S; International Criminal Court Act (2006) (Ireland) s 61.

⁷¹ SCA judgment n 25 above at par 103.

⁷² Constitution n 33 above, s 233 (emphasis added).

⁷³ SCA judgment n 25 above par 101.

as seen above – has been the cause of several African states’ discontent with the ICC. The SCA’s approach allowed it to decide the issue on the basis of domestic law, thereby bypassing the contentious international legal issue and ultimately dismissing the significance of the SC’s referral, as its conclusion meant that it became ‘unnecessary to address these’ arguments.⁷⁴

The government is reportedly considering taking this issue to the Constitutional Court, which would provide the South African judiciary with another opportunity to take a stance on the effect of the SC’s referral.⁷⁵ Therefore, it becomes particularly significant to assess briefly the effects of the SCA’s decision.

IMPLICATIONS OF THE DECISION

Insofar as it is true that the SC’s referral revokes al-Bashir’s immunities otherwise applicable before foreign domestic courts, the SCA’s decision is an ingenious one. South Africa’s domestic law is interpreted in a manner which secures the same result, avoiding a situation in which the government could rely on its internal law to justify non-compliance with the ICC’s request for assistance, which is impermissible as a matter of international law.⁷⁶ Simultaneously, the SCA is able to refrain from taking a stance on the effect of the SC’s referral on al-Bashir’s immunities, a contentious issue, particularly on the African continent. However, the view that the SC’s referral prevents state parties from being obliged to respect al-Bashir’s immunities does not seem to be true.

Relevantly, the AU acknowledged that the SC can lift state officials’ immunities, but stated that this should be done explicitly.⁷⁷ This has also been the view of other courts when ascertaining whether SC resolutions permitted states to act in a manner that would otherwise be unlawful,⁷⁸ and sound policy reasons also support this view.⁷⁹ Moreover, the PTC’s reasoning, that any other interpretation would be ‘senseless’, is not strictly

⁷⁴ *Id* at 106.

⁷⁵ See: <http://www.reuters.com/article/us-safrica-bashir-idUSKCN0X51ED>.

⁷⁶ VCLT n 63 above at art 27.

⁷⁷ AU Press Release 002/2012 available at:

https://www.issafrica.org/anicy/uploads/Decisions_of_Pre-Trial_Chamber_I_of_the_ICC.pdf.

⁷⁸ *Al-Jedda v The United Kingdom* App no 27021/08 (Judgment 7 July 2011) par 102.

⁷⁹ Milanovic ‘Al-Skeini and Al-Jedda in Strasbourg’ (2012) 23/1 *European Journal of International Law* 121 at 138.

speaking true as other alleged criminals could still be prosecuted as a result of the SC's referral.⁸⁰

On a textual analysis of the resolution, Sudan is under an obligation to 'cooperate fully' with the ICC, and thus required to waive al-Bashir's immunities. However, having an obligation as a matter of law does not mean that this obligation will be factually complied with. Thus, until Sudan decides to comply with this obligation, foreign states cannot arrest and surrender al-Bashir and thus the ICC cannot lawfully request their assistance. For what it's worth, Sudan also reminded 'the Council that the Sudan [...] is not party to the ICC. This makes the implementation of a resolution like this fraught with a series of procedural impediments ...'.⁸¹ In light of the AU's comment – that the SC could have explicitly waived al-Bashir's immunities – the SC could have decided that state parties should surrender nationals who are brought under the ICC's jurisdiction as a result of this referral and in relation to whom the ICC requests states' assistance, regardless of such states' other obligations or other provisions in the Rome Statute,⁸² but did not do so. Such a statement would clearly have the effect of waiving al-Bashir's immunities *vis-à-vis* ICC state parties in the context of related proceedings, rather than merely placing Sudan under an obligation to cooperate with the court, thereby requiring it to waive its officials' immunities (in accordance with article 98(1)).

The present interpretation of the relevant SC resolution retains the coherence of states' obligations, allowing states to respect al-Bashir's immunities and, if adopted by the ICC, would also avoid requests which place state parties in a difficult position. At the same time, a mechanism for al-Bashir's prosecution remains, even if contingent upon Sudan's cooperation. In light of this, and given that Sudan has failed to waive its officials' immunities, the PTC's conclusion 'constitutes an inadmissible subordination of (non-)fact to law',⁸³ and demonstrates the ICC's persistence to secure the presence of

⁸⁰ De Hoogh & Knottnerus 'ICC decision issues new decision on al-Bashir's immunities – but gets the law wrong, again ...' 2014 *EJIL:Talk!* available at: <http://www.ejiltalk.org/icc-issues-new-decision-on-al-bashirs-immunities-%E2%80%92-but-gets-the-law-wrong-again/>; Gaeta 'The ICC changes its mind on immunity from arrest of President al-Bashir but it is wrong again' 2014 *Opinio Juris*, available at: <http://opiniojuris.org/2014/04/23/guest-post-icc-changes-mind-immunity-arrest-president-al-bashir-wrong/>.

⁸¹ Sudan, 31 March 2015, UN Doc S/PV.5158 at 12.

⁸² SCA judgment n 25 above at par 14.97

⁸³ De Hoogh & Knottnerus n 80 above; O'Keefe n 12 above at 572–573.

individuals under its jurisdiction for their prosecution, even if not in accordance with sound legal reasoning.

As a result, the ICC's legitimacy is brought into question and its state parties become alienated through attempts unjustifiably to impose obligations upon them. Moreover, limits to the ICC's effectiveness in prosecuting individuals brought under its jurisdiction as a result of the SC referral are highlighted – given the insufficient desire within the SC to ensure al-Bashir's prosecution through states' disregard for his immunities – as the court remains unable to secure al-Bashir's presence for his prosecution.

In this regard, although a view similar to the SCA's decision has been classified as 'irrefutable' and considered beneficial for the international community,⁸⁴ the SCA missed an opportunity to contribute in any meaningful way to the core international legal issue relating to requests for assistance by the court in relation to President al-Bashir by expressing its view on the matter – which could also be persuasive for other states' judiciaries, and may ultimately convince the ICC to change its stance on the issue. Ultimately, by failing to interpret South Africa's international legal obligations in a reconcilable manner, the significance of immunities afforded *ratione personae* – which, as acknowledged by the ICJ are a corollary of sovereign equality (a foundational international legal principle),⁸⁵ and which presumably the SC also continues to view as sufficiently beneficial to international relations, given that it did not oblige state parties to disregard immunities in this context to cooperate with the ICC, but which the SCA concluded had been departed from due to its interpretation of the Implementation Act – is somewhat undermined, at least within the South African legal system.

Even though the SCA found in favour of an obligation to arrest and surrender al-Bashir and it could thus be argued that this may contribute to the attainment of the ICC's purpose and the 'no impunity' project,⁸⁶ the decision is undermined by its reasoning. In taking for granted that South Africa was obliged to cooperate with the ICC in the arrest and surrender of President al-Bashir, the SCA assumes that this obligation extends to requests which exceed the authority granted to the ICC under the Rome Statute, by

⁸⁴ Eg Ellis, 15 June 2015, at: <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=ce111924-67bd-44dc-96b2-52b3cda40f55>.

⁸⁵ *Jurisdictional Immunities of the State (Germany v Italy)* [2012] ICJ Rep 99 par 57.

⁸⁶ Rome Statute n 2 above at preambular par 4.

requiring the arrest and surrender of a person in respect of whom states are obliged, by virtue of the law on immunities, to refrain from doing so. Implicitly, this gives undue deference to the PTC which, as it has demonstrated on numerous occasions, does not always reach decisions on a sound legal basis. Although state parties may in fact remain obliged to assist the ICC (at least from the ICC's perspective), if such an obligation results from a questionable legal basis, the coherence of the international legal system is compromised. The SCA's decision not only provides a route for other state parties to avoid ruling upon this issue, as they can often engage in analogous arguments,⁸⁷ but it fails to have a systemic impact on the resolution of the core issue – calling out the PTC's misguided reasoning and limiting the extent of state parties' obligations to cooperate with the ICC and ensuring the coherence of ICC state parties' obligations with the law on immunities – thereby perpetuating the harm being done to the ICC's effectiveness and legitimacy.

⁸⁷ Some state parties' implementing legislation do not explicitly differentiate between the applicability of immunity for state parties' and non-state parties' nationals. See *eg* ICC Act 2006 (Trinidad and Tobago) s 31; International Crimes Act 2008 (Kenya) s 27; International Crimes Act 2006 (Uganda) s 24; International Crimes and International Criminal Court Act 2000 (New Zealand) s 31; Crimes Against Humanity and War Crimes Act 2000 (Canada) s 48.