

A Structuralist Approach to the ICC/AU Conflict over the Immunity of Al-Bashir

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Abstract

Between 2009 and 2019, a conflict emerged between the African Union and the International Criminal Court (ICC) over whether the then-incumbent President of Sudan, Omar al-Bashir, enjoyed immunity from arrest. The African Union maintained that Al-Bashir, as a head of state, continued to enjoy immunity from arrest, while the ICC in a number of judgments found that Al-Bashir's immunity had been extinguished and he must therefore be arrested. Each organisation relied on conflicting interpretations of international law in order to support their respective positions. In this article, I examine these conflicting interpretations according to Martti Koskenniemi's structuralist approach to international law, particularly in respect of his work on the indeterminacy of international law and the structural biases of international institutions. In doing so, I aim to produce a deepened understanding of the conflict, as well as an institutional critique of both organisations.

Keywords: African Union; International Criminal Court; Koskenniemi; Immunity; Al-Bashir; ICC; Structuralism

Introduction*

In 2009 and 2010 the International Criminal Court (ICC) issued arrest warrants for the then-incumbent President of Sudan, Omar Hassan Ahmad al-Bashir, for his alleged role in crimes against humanity, war crimes and genocide, committed against the Fur, Masalit and Zaghawa groups in the region of Darfur, in western Sudan.¹ The arrest warrants were the first issued by the ICC for a sitting head of state. Upon issuing the warrants, the ICC requested its States Parties, many of which are African states, to arrest and surrender Al-Bashir to the Court's jurisdiction. In response, the African Union issued a *Decision of Non-compliance* in terms of which it directed its member states not to comply with the ICC's request on the basis that Al-Bashir, as a head of state, enjoyed personal immunity from arrest.² Subsequent to the issuing of the arrest warrants, Al-Bashir visited the territories of a number of States Parties, and on each occasion was allowed to leave without steps being taken for his arrest, preventing the ICC from trying him for his alleged crimes. The ICC persisted in its contention that despite being a head of state, Al-Bashir did not enjoy immunity from arrest.

In support of their respective positions on Al-Bashir's immunity, the ICC and African Union each cited opposing interpretations of the law. The African Union's *Decision of Non-compliance* and its subsequent echoing of that decision elsewhere, were based on an interpretation of international law in terms of which Al-Bashir as a head of state continues to enjoy immunity under customary international law and, according to the Rome Statute, States Parties could therefore not be requested to arrest him (I refer to this argument as the 'immunity interpretation'). The ICC on the other hand, in its decisions sanctioning Chad, Malawi, the Democratic Republic of Congo (DRC), South Africa and Jordan, for not arresting Al-Bashir while he was in their respective territories, cited a number of other interpretations of international law (the 'customary law interpretation,' 'waiver interpretation,' 'analogy interpretation,' 'Genocide Convention interpretation,' and 'customary law interpretation 2.0') each of which determined that Al-Bashir did not enjoy immunity from arrest.

The conflict gave rise to one of the most notable debates in international criminal law in recent history, resulting in a large body of academic commentary. The bulk of discussion concerned the correct legal answer (the above 'interpretations') to the question, with each argument being supported by some commentators and criticised by

* This article was originally submitted in partial fulfilment of the LLM degree at the University of Melbourne.

1 'Warrant of Arrest for Omar Hassan Ahmad Al Bashir' 4 March 2009 (ICC-02/05-01/09-1); 'Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir' 12 July 2010 (ICC-02/05-01/09-95).

2 AU *Decision of Non-compliance—Decision on the Meeting of African States to the ICC Rome Statute* (3 July 2009) AU Doc Assembly/AU/Dec 245 (XIII).

others.³ Another theme that emerged from the commentary was the development of an impasse between the African Union and the ICC and how to resolve it.⁴ While I draw on both groups of commentary, in this article I consider the problem of Al-Bashir's immunity from another angle, according to the structuralist approach advanced by Martti Koskeniemi.⁵ By taking a step back and attempting to analyse the problem in light of Koskeniemi's work, I will analyse how each institution has come to prefer certain interpretations of the law, and use this as a basis for institutional critique. While, since his ousting and arrest in 2019, Al-Bashir clearly no longer enjoys immunity, the conflict that existed between the ICC and the AU remains pertinent, particularly as an illustration of the nature of international law, as applied by influential international organisations.

This article commences by setting out key elements of Koskeniemi's structuralist approach to international law, particularly his arguments in respect of language, indeterminacy, and structural bias. This will be followed by a description of the intricacies of the legal question posed by the arrest warrants for Al-Bashir, as well as the various legal answers proffered by the African Union and ICC respectively. I consequently analyse the legal question and answers from a structuralist approach, considering its indeterminacy and the possible structural biases of the African Union and ICC in arriving at their legal answers in the following section. I conclude by

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- 3 Dapo Akande, 'The Legal Nature of Security Council Referrals to the ICC and Its Impact on Al Bashir's Immunities' (2009) 7 *Journal of International Criminal Justice* 333; Paola Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?' (2009) 7 *Journal of International Criminal Justice* 315; Dov Jacobs, 'The Frog That Wanted to Be an Ox: The ICC's Approach to Immunities and Cooperation' (2015) *The Law and Practice of the International Criminal Court* 295; Claus Kreß, 'The International Criminal Court and Immunities under International Law for States Not Party to the Court's Statute' in Morton Bergsmo and Ling Yan (eds), *State Sovereignty in International Criminal Law* (Torkel Opsahl Academic EPublisher 2012); Ntombizozo Dyani-Mhango, 'South Africa's Dilemma: Immunity Laws, International Obligations, and the Visit by Sudan's President Omar Al Bashir' (2017) 26(3) *Washington International Law Journal* 535; Erika De Wet, 'The Implications of President Al Bashir's Visit to South Africa for International and Domestic Law' (2015) 13 *Journal of International Criminal Justice* 1049.
 - 4 Paola Gaeta and Patryk I Labuda, 'Trying Sitting Heads of State: The African Union versus the ICC in the Al Bashir and Kenyatta Cases' in Charles Chernor Jalloh and Ilias Bantekas (eds), *The International Criminal Court and Africa* (Oxford University Press 2017); Dire Tladi, 'When Elephants Collide It Is the Grass That Suffers: Cooperation and the Security Council in the Context of the AU/ICC Dynamic' (2014) 7 *African Journal of Legal Studies* 381; Max du Plessis, 'The Omar Al-Bashir Case: Exploring Efforts to Resolve the Tension between the African Union and the International Criminal Court' in Tiyanjana Maluwa, Max du Plessis and Dire Tladi (eds), *The Pursuit of a Brave New World in International Law* (Brill 2017) 431.
 - 5 Martti Koskeniemi, *The Politics of International Law* (Hart, 2011); Martti Koskeniemi, 'What Is Critical Research in International Law: Celebrating Structuralism' (2016) 29 *Leiden Journal of International Law* 727; Martti Koskeniemi, *From Apology to Utopia. The Structure of International Legal Argument: Reissue with New Epilogue* (Cambridge University Press 2005).

considering the enhanced understanding of the legal field and the possible grounds of criticism, the analysis has revealed.

Koskenniemi's Structuralist Approach to International Law

In this section I consider certain interrelated aspects of Koskenniemi's approach to international law, which I draw on later in the article in analysing the immunity disagreement between the ICC and African Union.

Structuralism

In his work Koskenniemi employs, among others, a structuralist approach as developed by the twentieth century French structuralists Ferdinand de Saussure and Claude Levi-Strauss. While it has been applied across various disciplines (for example, linguistics by de Saussure and anthropology by Levi-Strauss), structural analysis at its core involves separating that which is immediately visible in social life from the hidden underlying structure which produces it.⁶ Structuralists are of the view that by revealing the workings of the hidden framework ('deep structure'), we may better understand that which is immediately visible ('surface') and therefore become more capable of dealing with our concerns about it.⁷ Koskenniemi uses structural analysis in order to better understand the workings of international law. He argues that there is 'an unproblematic international legal "there-ness" that has to do with "states" that "exist" and "consent" and exercise "jurisdiction" over "territories" and "peoples" that have "rights" and so on.'⁸ A structuralist analysis of international law allows us to question these givens, how they are created and instituted, and thus whether or not the way in which they are used by international lawyers is convincing.⁹

International Law as a Language

In his structural analysis, Koskenniemi draws on linguistic structuralism, treating international law as a language (the 'surface') with its own particular grammar (its 'deep structure').¹⁰ By identifying the rules of this grammar, we see what it is possible to say in the language of international law.¹¹ The ability to speak the language of international law may also be expressed as a professional competence. Koskenniemi writes that 'competence is the ability to use grammar in order to generate meaning by doing things in argument.'¹² Competent international lawyers (even if they have not themselves

6 Koskenniemi, 'What Is Critical Research' (n 5) 728; David Kennedy, 'Critical Theory, Structuralism and Contemporary Legal Scholarship' (1985) 21(2) *New England Law Review* 209, 248–259.

7 Koskenniemi, 'What Is Critical Research' (n 5) 728.

8 *ibid.*

9 Koskenniemi, *From Apology to Utopia* (n 5) 728.

10 Koskenniemi, 'What Is Critical Research' (n 5) 728.

11 Koskenniemi, *From Apology to Utopia* (n 5) 589.

12 *ibid* 571.

explicitly identified these rules) will adhere to the grammar of international law in making a legal argument. It is in fact the use of this grammar which demonstrates the characteristics of a competent international lawyer (a native language-speaker). Conversely, a person who does not adhere this grammar in making an argument would be considered an incompetent international lawyer or layperson (without the ability to speak the language).

What then is this grammar? According to Koskenniemi, a fundamental element of this grammar is opposition between certain principles and concepts.¹³ The central opposition identified in *From Apology to Utopia* is ‘the tension between concreteness and normativity that structures all (competent) international legal speech.’¹⁴ Koskenniemi argues that international law must show that it is normative, concrete, and based on what international society actually is, ‘that it does not only tell what States do or will but what they *should* do or will.’¹⁵ There is therefore an inherent tension in the language of international law as ‘[t]he more concrete an argument is, the less normative it appears, and *vice-versa*.’¹⁶ This central opposition may split into further oppositions, which together make up the ‘argumentative architecture of international law’ within which international lawyers make arguments.¹⁷

Indeterminacy

In treating international law as a language, Koskenniemi finds that while it is highly structured according to certain grammatical rules, it is fundamentally indeterminate, as it allows for ‘the taking of any conceivable position in regard to a dispute or a problem.’¹⁸ The grammar of international law allows for a good legal argument to be made in support any course of action of an international actor. The grammar of international law therefore does not determine what law is made or how it is interpreted, as it allows for many different things to be said, or rather, many different positions to be taken. As Koskenniemi writes, ‘[a] grammar is not a description of what native language-speakers say in fact—it is an account of *what it is possible to say* in that language.’ Therefore, while ‘international law is highly structured as a language, it is quite fluid and open-ended as to what can be said in it.’¹⁹

Koskenniemi explains that international law is indeterminate because it is based on the decisions of political actors who ‘have contradictory priorities and rarely know with clarity how such priorities should be turned into directives to deal with an uncertain

13 *ibid* 565.

14 *ibid* 573; Koskenniemi, *Politics of International Law* (n 5) 38–40.

15 Koskenniemi, *From Apology to Utopia* (n 5) 573–574.

16 *ibid* 574.

17 *ibid* 588–589.

18 *ibid* 564.

19 *ibid* 572.

future.’²⁰ International actors therefore agree to rules with exceptions, rules from different sources, rules which may contradict one another, and potentially opposing underlying principles.²¹ Koskenniemi therefore concludes that,

It follows that it is possible to defend *any* course of action—including deviation from a clear rule—by professionally impeccable legal arguments that look from rules to their underlying reasons, make choices between several rules as well as rules and exceptions, and interpret rules in the context of evaluative standards.²²

The ability of an international lawyer to argue any outcome therefore also ties back to the ability to speak the language as a professional competence. It is ‘not “winning” or “losing” but the ability to take on opposite sides in *any* international controversy that [is] the key to professional competency.’²³

Structural Bias

Having found that the language of international law is indeterminate, Koskenniemi questions why international lawyers nevertheless continue to reach certain and often predictable answers to legal questions: ‘[i]f the legal vocabulary really is so open-ended and contradictory, why do legal institutions nevertheless regularly end up supporting the same actors or interests?’²⁴ In order to examine this question, Koskenniemi finds that we must look beyond international law as a language with its own grammar (which determines ‘*what it is possible to say* in that language’),²⁵ to what the conditions are ‘within which important rules and policies emerge from the mass of legal materials available and within which they come to be interpreted and applied in certain ways instead of other *prime facie* plausible ways.’²⁶ Therefore, while the legal grammar determines how we make legal arguments, the legal interpretations or policies we prefer and argue for are not determined by the grammar, but by something different, which Koskenniemi refers to as the ‘structural bias’ of the institution making the decision.²⁷

The structural bias to which Koskenniemi refers are those conditions of an institution (or specialist area of international law),²⁸ whether they be its history, its economic preferences or political concerns, which lead the lawyers within that institution to arrive at certain legal policies or interpretations of the law. This structural bias makes legal

20 *ibid* 590.

21 *ibid*.

22 *ibid* 591.

23 *ibid* 569.

24 Koskenniemi, ‘What Is Critical Research’ (n 5) 734.

25 Koskenniemi, *From Apology to Utopia* (n 5) 589.

26 Koskenniemi, ‘What Is Critical Research’ (n 5) 732.

27 *ibid* 728.

28 Koskenniemi, *Politics of International Law* (n 5) 65–68.

institutions ‘serve typical, deeply embedded preferences.’²⁹ Thus, ‘irrespective of indeterminacy, *the system still de facto prefers some outcomes or distributive choices to other outcomes or choices.*’³⁰ As such, Koskenniemi says that the ‘task of legal research would be to understand legal professionalism not just by examining what institutions say but what makes them *choose* from equally plausible alternatives the ones they do, and draw from them the conclusions they draw.’³¹

The task of considering structural bias can be understood better by Koskenniemi’s suggestion that when approaching a question of international law, rather than asking ‘what would be a better rule or policy’ one might ask, ‘what does it take to *believe* that this rule or this policy is the better one?’³² This formulation highlights the fact that legal rules or interpretations are not automatically produced by the law but are in fact ‘chosen by leading participants in influential and easily identifiable institutions.’³³ Furthermore, this formulation ‘points to the need to understand how such choices reflect the background conditions within which some choices seem ‘good’ and others ‘bad’, some policies appear plausible while others seem implausible.’³⁴ Koskenniemi writes that,

Owing to its indeterminacy, the legal “grammar” itself does not generate those choices – though it helps to justify them. Instead, the choices reflect background conditions about the epistemic, economic, ideological, psychological and other such “truths” and self-evidences that institutions have come to accept in more or less unthinking terms.³⁵

In order to understand how certain interpretations of the law are reached (and even become settled law) it is therefore necessary to consider the structural bias of the institution responsible for reaching that interpretation. This is considered below in respect of the ICC and African Union and their respective interpretations of the Al-Bashir immunity problem.

The Problem of Al-Bashir’s Immunity

In this section I consider the problem of Al-Bashir’s immunity: the facts upon which the problem is based, the legal question which the facts raise, and the many legal answers which have been advanced by the African Union and ICC, in purporting to solve this legal question.

29 Koskenniemi, *From Apology to Utopia* (n 5) 607.

30 *ibid.*

31 Koskenniemi, ‘What Is Critical Research’ (n 5) 732.

32 *ibid* 730.

33 *ibid* 732.

34 *ibid.*

35 *ibid.*

Background

In March 2005, the United Nations Security Council ('UN Security Council'), acting under Chapter VII of the Charter of the United Nations,³⁶ issued Resolution 1593 ('SC Resolution 1593') in terms of which it identified the conflict in Darfur, Sudan, as 'a threat to international peace and security.'³⁷ The Resolution also referred the situation in Darfur to the Prosecutor of the ICC, allowing the ICC to gain jurisdiction over Sudan, a non-State Party, in accordance with Article 13(b) of the Rome Statute.³⁸ In this regard, the Resolution states that,

the Government of Sudan and all other parties to the conflict in Darfur shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognising that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organisations to cooperate fully.³⁹

In March 2009, Pre-Trial Chamber I of the ICC issued an arrest warrant against Al-Bashir for crimes against humanity and war crimes based on his alleged involvement in the Darfurian conflict.⁴⁰ This was followed in July 2010 with a second arrest warrant for the crime of genocide.⁴¹ The ICC issued official requests to its States Parties to arrest and surrender Al-Bashir.⁴² Subsequent to the issuing of the arrest warrants and prior to his ousting from power, Al-Bashir visited a large number of ICC States Parties, none of which took steps to arrest and surrender him, on the basis that he continued to enjoy immunity from arrest.

The Legal Question

The legal problem arises from a particular triangular relationship between the ICC, its States Parties, and a non-State Party (in this case Sudan), which activates certain provisions of the Rome Statute, namely Article 27(2) and Article 98(1). Article 27(2) states that '[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.' A person can therefore not rely on the immunity which they enjoy under customary international law in respect of the ICC (in a vertical relationship between the individual and the court). Article 27(2) is also interpreted as extinguishing immunity between States Parties which are understood to

36 UN, Charter of the United Nations (24 October 1945) 1 UNTS XV.

37 UNSC Res 1593 (31 March 2005) UN Doc S/RES/1593 1.

38 Rome Statute of the International Criminal Court (17 July 1998) 2187 UNTS 90.

39 SC Resolution 1593 para 2.

40 'Warrant of Arrest for Omar Hassan Ahmad Al Bashir' 4 March 2009 (ICC-02/05-01/09-1).

41 'Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir' 12 July 2010 (ICC-02/05-01/09-95).

42 'Request to all States Parties to the Rome Statute for the Arrest and Surrender of Omar Al Bashir' (ICC-02/05-01/09-7); 'Supplementary Request to all States Parties to the Rome Statute for the Arrest and Surrender of Omar Al Bashir' (ICC-02/05-01/09-96).

have waived their immunity in respect of other States Parties (horizontally) when joining the Rome Statute.⁴³ Article 27(2) does not, however, extinguish immunity between a State Party and a non-State Party. Therefore while an individual from a non-State Party does not enjoy immunity vertically in respect of the ICC, they may still enjoy immunity horizontally in respect of other states. This scenario is provided for by Article 98(1) which says that the ICC may not request States Parties to arrest a person in contravention of their responsibilities under international law (which includes customary international law) with respect to the ‘State or diplomatic immunity of a person... of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.’

The inter-relation between Article 27(2) and Article 98(1) therefore creates a problem of ICC efficacy. While the ICC may charge an individual from a non-State Party (where it has gained jurisdiction through a Security Council resolution or by other means) and that person enjoys no immunity before it, it is prevented from fully exercising its jurisdiction because its States Parties, upon which it is dependent, are prevented from arresting that person. In order to get around this predicament, various arguments have been raised which purportedly extinguish Al-Bashir’s immunity, thereby rendering Article 98(1) inapplicable. Others have argued that these arguments are invalid and Al-Bashir continues to enjoy immunity from arrest. The various legal positions (which I refer to as ‘interpretations’) that have been adopted to address this problem, are discussed below.

An Array of Legal Answers

Following the issuing of the first arrest warrant, in July 2009, the Assembly of the African Union (AU Assembly) issued its *Decision of Non-compliance*. This decision was based on the finding that Al-Bashir as a head of state continues to enjoy immunity from arrest under customary international law, and that Article 98(1) of the Rome Statute consequently prevents the ICC from requesting its States Parties to arrest him (the ‘immunity interpretation’). This interpretation essentially holds that no circumstances exist that have the effect of extinguishing Al-Bashir’s immunity, and therefore Article 98(1) must apply. Dire Tladi notes that this interpretation of the law does not reject the rules of the Rome Statute, instead, ‘it seems to be saying that the ICC is not being faithful to its own instrument by ignoring the implications of Article 98.’⁴⁴ The African Union has since reiterated this decision on a number of occasions and it remains the official position of the organisation.⁴⁵

43 Akande (n 3) 337–339; Jacobs (n 3) 296.

44 Dire Tladi, ‘Of Heroes and Villains, Angels and Demons: The ICC-AU Tension Revisited’ (2017) 60 *German Yearbook of International Law* 14.

45 For example, AU ‘Decision on the International Criminal Court’ (18 July 2016) AU Doc Assembly/AU/Dec 616 (XXCII) para 2 (iv).

In August 2011, Chad, an ICC State Party, failed to arrest Al-Bashir when he was on its territory to attend the inauguration of the President of Chad. Similarly, when Al-Bashir attended the Common Market for Eastern and Southern Africa (COMESA) Summit in Malawi, he was not arrested, despite Malawi also being an ICC State Party.⁴⁶ Both countries were referred to the ICC for non-cooperation with the ICC's request to arrest and surrender Al-Bashir. Both countries argued that they did not have an obligation to arrest Al-Bashir on the basis of the African Union's *Decision of Non-compliance* and the requirements of Article 98(1) of the Rome Statute. In the twin *Malawi* and *Chad* decisions,⁴⁷ Pre-Trial Chamber I of the ICC found that both countries had an obligation to arrest Al-Bashir as he did not enjoy immunity under customary international law. This was based on a finding that customary international law no longer recognises immunity before international courts (the 'customary law interpretation'). The reasoning in these decisions was heavily criticised on the basis that the Chamber conflated vertical immunity before international courts (which it is widely accepted is no longer recognised under customary international law) and horizontal immunity between a State Party and non-State Party.⁴⁸ The decision therefore also wholly ignored the Rome Statute's provision for horizontal immunity under Article 98(1). The African Union responded to the decision by issuing a press release in 2012 which 'expresse[d] its deep regret' that the decisions of Pre-Trial Chamber I had the effect of '[p]urporting to change customary international law in relation to immunity *ratione personae*' and '[r]endering Article 98 of the Rome Statute redundant, non-operational and meaningless.'⁴⁹

The next time the court had to deal with the immunity question was in the *DRC Decision: Al-Bashir* in February 2014, had attended another COMESA Summit, this time in the DRC, but had not been arrested by the DRC.⁵⁰ The DRC also defended its failure to comply with the ICC's request by citing the instructions of the African Union

46 Dyani-Mhango (n 3) 542.

47 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 (*The Prosecutor v Omar Hassan Ahmad Al Bashir* 12 December 2011 (ICC PTC I); Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir (ICC-02/05-01/090139); Decision Pursuant to Article 87(7) on the Failure 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 Ahmed Al-Bashir (ICC-02/05-01/09-140-tENG).

48 Jacobs (n 3) 307; Dyani-Mhango, (n 3) 543.

49 African Union, Press Release No. 002/2012 <http://www.iccnw.org/documents/PR-_002-_ICC_English_2012.pdf> accessed 3 September 2019.

50 'Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court' (*Prosecutor v Omar Hassan Ahmad Al Bashir*) (9 April 2014) (ICC, PTC II); 'Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court' (ICC-02/05-01/09).

and arguing that Al-Bashir continued to enjoy immunity from arrest.⁵¹ Subsequent to the extensive criticism levelled against the *Malawi* and *Chad* decisions, the court resorted to different reasoning. The court recognised that Article 98 prevents States Parties from arresting a person who enjoys immunity but found that Al-Bashir's immunity had in fact been extinguished by SC Resolution 1593. The court reasoned that the Resolution, which, as quoted above, directed that 'the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide necessary assistance to the Court and the Prosecutor',⁵² contains an *implicit waiver* of Al-Bashir's immunity by Sudan, rendering Article 98(1) inapplicable, and States Parties free to arrest Al-Bashir (the 'waiver interpretation').

In June 2015 Al-Bashir visited South Africa to attend the Summit of the African Union. South Africa, a State Party to the ICC, did not take steps to arrest and surrender Al-Bashir to the ICC, despite a domestic court ordering that it do so on the basis of domestic legislation.⁵³ In the Majority Opinion of Pre-Trial Chamber II in the *South Africa Decision*,⁵⁴ the Chamber again found that States Parties such as South Africa did have an obligation to arrest Al-Bashir. This time, however, the Chamber did not identify an implicit waiver in SC Resolution 1593 but found that the Resolution made Sudan analogous to an ICC State Party, and that it had therefore waived its immunity in terms of Article 27 of the Statute (the 'analogy interpretation'). The Minority Opinion delivered by Judge Perrin de Brichambaut,⁵⁵ also found that Al-Bashir did not enjoy immunity from arrest and that South Africa had been obligated to arrest him. Judge Perrin de Brichambaut found that there was reason to doubt the validity of the 'analogy interpretation', instead favouring an interpretation in terms of which Sudan and South Africa's accession to the Genocide Convention, after extensive interpretation of that Convention, had the effect of extinguishing Al-Bashir's immunity in respect of the warrant for the crime of genocide ('Genocide Convention interpretation').

In March 2017 Al-Bashir visited the Hashemite Kingdom of Jordan in order to attend the League of Arab States Summit, where, by now predictably, Jordan despite being an ICC State Party, failed to arrest the Sudanese president. On 11 December 2017, Pre-trial

51 Dyani-Mhango (n 3) 552.

52 SC Resolution 1593 para 2.

53 *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others* [2015] ZAGPPHC 402.

54 'Majority Opinion of Pre-Trial Chamber II in *The Prosecutor v Omar Hassan Ahmad Al Bashir* 6 July 2017 (ICC PTC II); 'Decision under Art 87(7) of the Rome Statute on the Non-compliance by South Africa with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir' (ICC-02/05-02/09-302).

55 Minority Opinion of Judge Marc Perrin De Brichambaut" (*Prosecutor v Omar Hassan Ahmad Al Bashir*) 6 July 2017 (ICC PTC II); 'Decision under article 87(7) of the Rome Statute on the Non-compliance by South Africa with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir' (ICC-02/05-02/09-302).

Chamber II found that Jordan had failed to comply with its obligation under the Statute by not executing the Court's request for the arrest of Omar al-Bashir while he was on its territory.⁵⁶ As in the Majority Opinion of the *South Africa Decision*, the Majority Opinion of the court based this finding on the analogy interpretation, creating some much-needed continuity. Jordan was, however, granted leave to appeal, and the matter for the first time reached the Appeals Chamber of the ICC. On 6 May 2019, in the *Jordan Decision*, the ICC Appeals Chamber found that Jordan had erred in its obligations to the ICC as Al-Bashir did not enjoy immunity.⁵⁷ What was surprising, however, was that in order to reach this conclusion, the Appeals Chamber revived the much-disparaged *Malawi and Chad Decision*, once again relying on a version of the customary law interpretation. This decision, rather than bringing the debate to an end, has attracted widespread criticism,⁵⁸ and has further extended the uncertainty over the vexed question of head of state immunity.

The Indeterminacy of the Immunity Question

The above section showed that a number of legal answers have been advanced to solve the legal question of whether or not Al-Bashir as a head of state enjoyed immunity from arrest. Each of these answers—or as I have referred to them, ‘interpretations’—has received substantial support. The ‘customary law interpretation’, while criticised in the form in which it was presented in the *Malawi and Chad Decisions*, has been advocated in another form by Claus Kreß and was endorsed by the Appeals Chamber in the *Jordan Decision*.⁵⁹ The ‘waiver interpretation’ was relied on in the *DRC Decision* and is defended by Erika de Wet.⁶⁰ The ‘analogy interpretation’ was relied on by the Majority in the *South Africa Decision* and is advocated by Dapo Akande and Claus Kreß.⁶¹ The ‘Genocide Convention interpretation’ is supported by Judge Perrin de Brichambaut’s

56 *Prosecutor v Omar Hassan Ahmad Al-Bashir* 11 December 2017 (ICC PTC II); ‘Decision Under Article 87(7) of the Rome Statute on the Non-compliance by Jordan with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir’ (ICC-02/05-01/09).

57 *Appeals Chamber, Judgment in the Jordan Referral re Al-Bashir Appeal (Prosecutor v Omar Hassan Ahmad Al-Bashir)* 6 May 2019, (ICC-02/05-01/09 OA2).

58 Dov Jacobs, ‘You have just Entered Narnia: ICC Appeals Chambers Adopts the Worst Possible Solution on Immunities in the Bashir Case’ *Spreading the Jam* (6 May 2019) <<https://dovjacobs.com/2019/05/06/you-have-just-entered-narnia-icc-appeals-chamber-adopts-the-worst-possible-solution-on-immunities-in-the-bashir-case/>> accessed 5 September 2019; Dapo Akande, ‘ICC Appeals Chamber Holds that Heads of State Have No Immunity Under Customary International Law Before International Tribunals’ (6 May 2019) <<https://www.ejiltalk.org/icc-appeals-chamber-holds-that-heads-of-state-have-no-immunity-under-customary-international-law-before-international-tribunals/>> accessed 5 September 2019; Astrid Kjeldgaard-Pederson, ‘Is the Quality of the ICC’s Legal Reasoning an Obstacle to Its Ability to Deter International Crimes?’ (forthcoming) *Journal of International Criminal Justice*.

59 Kreß (n 3).

60 De Wet (n 3).

61 Kreß (n 3); Akande (n 3); Akande Dapo, ‘The Immunity of Heads of State of Nonparties in the Early Years of the ICC (2018) 112 AJIL Unbound 172.

Minority Opinions in the *South Africa Decision* and the *Jordan Decision* of Pre-Trial Chamber II, and was also endorsed by the Appeals Chamber in the *Jordan Decision*. The ‘immunity interpretation’ is supported by the African Union, various African States, and by Paola Gaeta, Dire Tladi and Ntombizozo Dyani-Mhango.⁶²

While each interpretation has received substantial support, each has also been the subject of criticism or counter-arguments. Yet no interpretation has been regarded as inept. Each interpretation, furthered by either an institution or academic commentator, has been regarded as a competent legal argument. This suggests that each interpretation has been expressed in the language of international law, according to its grammatical rules. The lawyers of each institution, as well as the various academics mentioned, are well-versed in this language, allowing them to make competent legal arguments. And they have produced a *number* of such arguments, making the question of Al-Bashir’s immunity an example of international law’s indeterminacy.

The various interpretations are also consistent with Koskeniemi’s explanation as to why international law is indeterminate. Each interpretation relies on a number of different sources and conflicting principles. While the ‘waiver’ and ‘analogy interpretations’ rely on the issuing of a Security Council Resolution, the ‘Genocide Convention interpretation’ relies on a treaty drafted seventy years ago. The ‘waiver interpretation’ is criticised by Tladi because it does not adhere to the rules of interpretation,⁶³ while it is supported by De Wet on the basis that special rules of interpretation apply to Security Council resolutions.⁶⁴ Finally, the ‘customary law interpretation’ and the ‘immunity interpretation’ disagree on the current status of customary international law in respect of head of state immunity. The Al-Bashir immunity question allows for a wide array of sources and principles to be relied on, leading to a number of different interpretations of international criminal law.

While academic commentators will support the interpretation they find most convincing, the array of competent legal arguments made, indicates that this legal question is indeterminate and therefore, that the African Union and the Chambers of the ICC each have a *choice* as to which interpretation to adopt. And yet, the legal institutions of the ICC and AU have firmly held that their diverging legal interpretations are correct and directed unequivocally that they must be followed by their member states. In order to understand the underlying reasons why this is so, it is necessary to move from an analysis of the law as language, to an analysis of the structural biases of these institutions, so as to examine why they have chosen particular interpretations over other equally plausible options.

62 Gaeta (n 3); Tladi (n 44); Dyani-Mhango (n 3).

63 Tladi (n 44).

64 De Wet (n 3).

The Structural Biases of the Legal Institutions

In this section I consider the possible structural biases of the ICC and the African Union, which could plausibly lead them to prefer particular interpretations in respect of Al-Bashir's immunity over other possible interpretations. I consider which conditions of the ICC would make the 'customary law interpretation', 'waiver interpretation', 'analogy interpretation' and 'Genocide Convention interpretation' seem correct from the perspective of the ICC's Chambers, and which conditions of the African Union would make the 'immunity interpretation' appear correct to the Assembly of the African Union. In other words, what is it about the make-up of these institutions, that have them '*choose from equally plausible alternatives the ones they do*'?⁶⁵

I do not attempt a comprehensive account of each organisation's structural bias as that would require extensive research into the beliefs, backgrounds and concerns of each institution's practitioners, beyond the scope of this article. Instead, I have limited myself to considering a small number of self-evident historical, political and practical conditions of the institutions which would plausibly influence the legal interpretations adopted by each.

The International Criminal Court

The ICC was established in July 2002 with the coming into force of the Rome Statute. It is the first international criminal court to come into being through a multilateral treaty and the first permanent international criminal court. The central aim behind the establishment of the ICC was to bring about an end to impunity for the most serious international crimes. As affirmed in the preamble of the Rome Statute, 'the most serious crimes of concern to the international community as a whole must not go unpunished and [...] their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.'⁶⁶

Effectiveness in realising this central aspiration has been a key concern of the ICC since inception. Former ICC President, Judge Silvia Fernández de Gurmendi, stated in 2016 that '[e]nhancing the efficiency and effectiveness of the Court is the main priority for my term as President as it is vital to maintain and increase the confidence of the international community in the Court.'⁶⁷ While the effectiveness of the ICC may to an extent be achieved through the internal organisation of the court, it is most heavily reliant on the external cooperation of its States Parties. As written by Antonio Cassese

65 Koskeniemi, 'What Is Critical Research' (n 5) 732.

66 Rome Statute, Preamble.

67 Silvia Fernández de Gurmendi, 'International Criminal Court Today: Challenges and Opportunities' (at the Keynote speech at Seminar "International Criminal Court – the Past, the Present and the Future", 9 June 2016) <<https://www.icc-cpi.int/itemsDocuments/1600609-Helsinki-keynote-speech-ICC-President-Fernandez.pdf>> accessed 2 September 2019.

in respect of the International Criminal Tribunal for the former Yugoslavia (ICTY), but with equal application to the ICC:

The ICTY remains very much like a giant without arms and legs – it needs artificial limbs to walk and work. And these artificial limbs are state authorities. If the co-operation of states is not forthcoming, the ICTY cannot fulfil its functions. It has no means at its disposal to force states to co-operate with it.⁶⁸

The cooperation of States Parties is particularly necessary in arresting and surrendering persons for whom the ICC has issued an arrest warrant. Without its own police force to make arrests, it is wholly dependent on state cooperation in bringing persons accused of international crimes to trial.

The importance of state cooperation to the ICC's effectiveness in trying persons accused of international crimes, means that it is in the ICC's interest for there to be an obligation on states to comply with its requests for arrests. In other words, the ICC would be able to operate more efficiently if it can obligate states to arrest and surrender a person for whom it has issued a warrant. Consequently, it would be to the ICC's advantage to find that Al-Bashir does not enjoy immunity and that there is therefore a legal obligation on its States Parties to arrest and surrender him, and possibly to arrest and surrender other heads of state for whom the ICC may issue an arrest warrant in the future.

As a court, the ICC may be supposed to be concerned exclusively with the law and not with practical (or even political) considerations such as its own effectiveness. As Koskeniemi writes in respect of the role of 'the judge' in international law, 'the judge personifies impartiality, rising above national and other group interests,' whose 'commitment is a commitment to the substance of the law as neutral and objective rules whose formal validity guarantees their distance from 'politics' whether in the guise of power, interest or ideology.'⁶⁹ However, as has been discussed, the rules of international law are indeterminate: '[f]or every rule there is a counter-rule or a soft standard that allows the judge to choose.'⁷⁰ In many cases the law will therefore be open to interpretation, and the judge will employ a 'subjective evaluation' in coming to his or her decision.⁷¹ Therefore, the dilemma is that 'the role of the judge is defined by reference to a commitment to neutral rules,' while '[t]he actual experience of judging

68 Antonio Cassese, 'On the Current Trends Towards Criminal Prosecution of Breaches of International Humanitarian Law' (1998) 9 *European Journal of International Law* 1, 13, quoted in Johan van der Vyver, 'The Al Bashir Debacle' (2015) 15 *African Human Rights Law Journal* 559, 575.

69 Koskeniemi, *Politics of International Law* (n 5) 285.

70 *ibid.*

71 *ibid.*

[...] shows that rules never suffice but that evaluation and ‘ideology’ are part of the job.’⁷²

In the case of Al-Bashir, the ICC’s decisions in *Malawi*, *Chad*, *DRC*, *South Africa* and *Jordan* suggest that the court is not simply applying neutral legal rules. The Pre-Trial and Appeals Chambers in these decisions have adopted four different (and sometimes contradictory) legal interpretations in answering the immunity question, changing their interpretation (each time without explanation) most likely in response to criticism of their previous interpretation. As pointed out by Tladi, the only constant has been that the Court has each time found that Al-Bashir does not enjoy immunity and must be arrested: ‘[t]he legal reasons have changed like shifting sands, but the conclusion that he must be arrested has remained constant.’⁷³ He is of the view that ‘[t]he ICC, for its part, has been so determined to find that Al Bashir *must* be arrested whatever the legal constraints, that it has shifted from one legal basis to another, hoping that one, *any one*, will stick.’⁷⁴ The court’s jurisprudence on this question thus suggests that the ICC’s immunity decisions are not neutral but are affected by value judgments, arguably influenced by the institution’s structural bias.

The structural bias which would influence these decisions is likely related to the institution’s fundamental aim of fighting impunity. That aim would almost certainly be shared and regarded highly by those judges appointed to the court. In a case such as Al-Bashir, who has been accused of three international crimes and is most likely responsible for the egregious events in Darfur, an interpretation of the law in terms of which Al-Bashir does not enjoy immunity would appear more correct to a judge of the ICC. Furthermore, a finding that Al-Bashir does enjoy immunity would curtail the effectiveness of the ICC, conceivably undercutting the work of the court as a whole. In this context, it is unlikely that a judge would wish to undermine the institution to which he or she is professionally attached. We might therefore conclude that from the perspective of a judge, wedded ideologically to the principles of international criminal justice and professionally to the ICC, one of the interpretations in terms of which Al-Bashir *does not enjoy immunity* (whichever interpretation the judge finds most attractive) would appear ‘good’ while the ‘immunity interpretation’ would appear ‘bad.’

The African Union

The Constitutive Act of the African Union (‘Constitutive Act’) was adopted in Togo in 2000, entering into force in 2001.⁷⁵ The African Union was later formally inaugurated in South Africa in 2002. The African Union replaced the Organisation of African Union (OAU), an organisation which was established in 1963 with the central purpose of

72 ibid 286.

73 Tladi (n 44) 17.

74 ibid 22.

75 AU Constitutive Act 1 July 2000 (‘AU Constitutive Act’).

safeguarding the newly-realised independence and sovereignty of African states and eradicating all forms of colonialism and apartheid across the continent.⁷⁶ This included forms of neo-colonialism, as stated by Kwame Nkrumah, the Ghanaian president and founding member of the OAU, at its inaugural ceremony in Addis Ababa in 1963:

On this continent, it has not taken us long to discover that the struggle against colonialism does not end with the attainment of national independence. Independence is only the prelude to a new and more involved struggle for the right to conduct our own economic and social affairs; to construct our society according to our aspirations, unhampered by crushing and humiliating neo-colonialist controls and interference.⁷⁷

The OAU was largely successful in its task of opposing colonial regimes, providing effective support to liberation movements in a number of countries. It was, however, less successful in promoting the economic development of the continent, and its great respect for territorial sovereignty prevented it from intervening in a number of violent internal conflicts and coups. These failures led to the need for a new organisation, the African Union, sharing the ideology of the OAU, but with new provisions enabling more effective economic development and peacekeeping on the continent.

The African Union adheres to objectives and principles cited in its Constitutive Act, a number of which are relevant to its stance on immunity. First, continuing the work of the OAU, the African Union aims to ‘defend the sovereignty, territorial integrity and independence of its Member States.’⁷⁸ Second, it aims to ‘achieve greater unity and solidarity between the African countries and the peoples of Africa.’⁷⁹ Similarly, the Act states that an objective of the organisation is to ‘promote and defend African common positions on issues of interest to the continent and its peoples.’⁸⁰ Third, it aims to ‘promote peace, security, and stability on the continent.’⁸¹ In this regard, while the Union undertakes not to interfere in the internal affairs of its member states, it maintains the right to intervene in a member state ‘pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.’⁸² For example, in response to the conflict in Darfur, the African Union deployed more than 7 000 peacekeepers to the region and has been involved in the

76 AU Charter of the Organization of African Unity 25 May 1963; Art 33(1) of the Constitutive Act.

77 Kwame Nkrumah, ‘Dr. Kwame Nkrumah Speaks in Addis Ababa in 1963’ <https://consciencism.wordpress.com/history/dr-kwame-nkrumah-speaks-in-addis-ababa-in-1963/> accessed 20 August 2019.

78 AU Constitutive Act Art 3(b).

79 *ibid*, Art 3(a).

80 *ibid* Art 3(d).

81 *ibid* Art 3(f).

82 *ibid* Art 4(h).

negotiation of peace deals. Fourth, the Act states that the Union condemns and rejects impunity, a principle it has reiterated in many of its declarations.⁸³

The shared principle of ending impunity, reflects the harmonious and cooperative relationship between the African Union and ICC at their inception. Many African states were engaged in, and supportive of, the drafting of the Rome Statute. This had much to do with the events of the Rwandan genocide, less than a decade earlier, which ‘convinced many African governments of the need to support an international criminal justice regime that would confront impunity and persistence of mass human rights violations on the continent.’⁸⁴ In its early years, African states therefore played a significant role in the creation of the ICC, particular as it formed the largest regional block of ICC States Parties. Tensions, however, began to rise, as one after another of the ICC’s investigations were opened in Africa, without any investigations being opened in other regions (the first investigation opened outside of Africa was in January 2016 in Georgia). The focus on African states can to an extent be explained by the self-referral of states in some cases, and referral by the UN Security Council in others. However, the concern has remained that due to international power dynamics, the ICC does not open possible investigations elsewhere as this would displease Western powers such as the United States.⁸⁵

The relationship between the two organisations only broke down, however, with the issuing of the arrest warrant for Al-Bashir, resulting in outrage from the African Union. As mentioned before, in its *Decision of Non-compliance*, the AU Assembly stated that in accordance with Article 98 of the Rome Statute, Al-Bashir enjoyed immunity and, on this basis, instructed its member states not to comply with the arrest warrant. It also ‘note[d] with grave concern the unfortunate consequences that the indictment has had on the delicate peace processes underway in The Sudan and the fact that it continued to undermine the ongoing efforts aimed at facilitating the early resolution of the conflict in Darfur.’⁸⁶ This indicates that the African Union did not appreciate the ICC impeding it in its own mandate of furthering peace on the continent.

While this may to an extent be true, there have been suggestions that there were far more deeply rooted ideological beliefs involved in the Union’s decision. Tladi suggests that the underlying reasons for the Union’s objection is really ‘the notion that the ICC, as a western institution, should not exercise jurisdiction over African leaders—the idea that

83 *ibid* Art 4(o).

84 Tim Murithi, ‘The African Union and the International Criminal Court: An Embattled Relationship?’ 8 IJR Policy Brief (Institute for Justice and Reconciliation, 2013) 2.

85 John Dugard, ‘Palestine and the International Criminal Court. Institutional Failure or Bias?’ (2013) 11 *Journal of International Criminal Justice* 563; Tladi (n 44) 10–12; Mia Swart and Karin Krisch, ‘Irreconcilable Differences? An Analysis of the Standoff Between the African Union and the International Criminal Court’ (2014) 1(1) *African Journal of International Criminal Justice* 38, 41.

86 AU Decision of Non-compliance, para 3.

the arrest warrant smacks of imperialist arrogance.’⁸⁷ The *Decision of Non-compliance* also intimates that the arrest warrants were an attack on African sovereignty, as it states that ‘the African Union and its Member States reserve the right to take any further decisions or measures that may be deemed necessary in order to preserve and safeguard the dignity, sovereignty and integrity of the continent.’⁸⁸ This suggests that the African Union sees the ICC as a neo-colonialist power, intent on meddling with its states’ internal affairs, thereby infringing upon the sovereignty of African states.

The relationship between the arrest warrant and the ideological beliefs of the Union are well illustrated by a statement of the then-Chairperson of the African Union and Malawian President, Bingu wa Mutharika, at the AU Summit in July 2010:

To subject a sovereign head of state to a warrant of arrest is undermining African solidarity and African peace and security that we fought for so many years [...] There is a general concern in Africa that the issuance of a warrant of arrest for [...] al-Bashir, a duly elected president, is a violation of the principles of sovereignty guaranteed under the United Nations and under the African Union Charter.⁸⁹

Mutharika’s statement suggests that the arrest warrant attacks the central principles of the OAU taken up by the African Union (unity and the protection of sovereignty), as well as the African Union’s aim of ensuring peace and security on the continent. From this historical and ideological perspective, we can see how the ‘immunity interpretation’ might appear better or more ‘correct’ than the other interpretations open to the African Union. Furthermore, the *Decision of Non-compliance* was issued by the AU Assembly, which is made up of all the African heads of state (previously including Al-Bashir). It might therefore also be suggested that the members of the Assembly would prefer an interpretation which would protect one of their own, and perhaps even themselves if they were to become the subject of an ICC indictment in the future. Within the context of the organisation’s ideological beliefs, and possibly the desire to protect its own members, the creative arguments produced by the ICC in order to find that Al-Bashir no longer enjoys immunity would seem wholly incorrect to the Assembly, and a brazen attempt at undermining the hard-won sovereignty of African states.

Conclusion

According to Koskeniemi, the structural analysis which he advocates provides a description of how a professional field works, improving our understanding of that field.⁹⁰ This understanding ‘describes what people do, how they choose, and on what

87 Dire Tladi, ‘The African Union and the International Criminal Court: The Battle for the Soul of International Law’ (2009) 34 *African Yearbook of International Law* 57, 61.

88 AU *Decision of Non-compliance*, para 12.

89 Quoted in, Swart and Krisch(n 85) 43.

90 Koskeniemi (n 5) 732.

bases those choices are made.⁹¹ It enables us to see more clearly that international legal institutions (such as the ICC and African Union) do not simply follow the law but (due to indeterminacy) are presented with a *choice* between a number of possible legal policies and interpretations. How these choices are made reveals the ‘kinds of beliefs that control professional activity’ and explains why institutions routinely choose legal policies and interpretations that are to the advantage of certain actors or interests (itself, in the case of the ICC; and themselves, in the case of the members of the AU Assembly).⁹²

Koskenniemi writes that this kind of structural analysis is not only descriptive of how institutions work, but also inherently critical.⁹³ This is because it reveals a discrepancy between how institutions justify applying a rule or interpretation, and why they actually do so. An institution would say that it is simply ‘apply[ing] rule/policy X.’⁹⁴ A structural analysis allows one to respond that ‘rule/policy X can be applied in many different ways, and you have chosen to apply it in the way Y because you believe that Z.’⁹⁵ Z in this case, is ‘the underlying beliefs that account for the *structural bias* of the institution.’⁹⁶ Koskenniemi writes that,

In other words, research of this type is (immanently) critical because it demonstrates that the official justifications that legal institutions give of their activity (‘oh we just apply rules / policies / interpretations’) are insufficient for understanding those institutions.⁹⁷

In respect of the ICC and African Union, a structural analysis of their decisions regarding the Al-Bashir immunity problem, reveals that there is a discrepancy between their claim that they are just applying the law (X), and the fact that they have chosen a particular interpretation (Y) from a number of possible interpretations, due to their own structural bias (Z).

The ICC, as an international court, purports to apply and interpret the law impartially. Yet it has produced four different (sometimes contradictory) legal interpretations, each of which finds that Al-Bashir does not enjoy immunity and must therefore be arrested and surrendered to the court to stand trial. This is despite the fact that there exists a highly viable and supported fifth interpretation that relies on the Rome Statute itself,⁹⁸ in terms of which Al-Bashir continues to enjoy immunity and cannot be arrested by ICC

91 *ibid.*

92 *ibid* 733.

93 *ibid.*

94 *ibid.*

95 *ibid.*

96 *ibid.*

97 *ibid.*

98 Gaeta (n 3); Tladi (n 44); Dyani-Mhango (n 3).

States Parties. This suggests that the ICC is not—as it portrays itself—simply applying the law, but that its judges are influenced by certain institutional beliefs, which I have suggested could arise from the importance they attach to ending impunity, as well as the effectiveness of the institution to which they are dedicated.

Similarly, the African Union cannot claim to simply be applying the law. In light of the many interpretations open to it, it has *chosen* to find that Al-Bashir enjoys immunity and should not be arrested. I have suggested that this choice is due to the historical and political conditions of the Union which produce certain underlying beliefs about the world. Its history of colonialism and its ideological commitment to protecting sovereignty, and perhaps even protecting other African heads of state, would conceivably contribute to the Union preferring an interpretation which protected the immunity of Al-Bashir. Thus, there is a discrepancy between the African Union claiming that it is simply abiding by the law, and the underlying beliefs and objectives that have influenced the interpretation it has chosen. There is, however, a further discrepancy. Protecting sovereignty and independence is an articulated aim of the African Union, and in pursuing that aim, it is in a sense acting in accordance with its publicised goals. However, the African Union also purports—in its Constitutive Act and various declarations—to reject impunity for international crimes. Its interpretation of the immunity question suggests that despite purporting to abide by both the principles of sovereignty and the rejection of impunity, the former weighs far more heavily in the consciousness of the Union than the latter, and therefore that the interests it will habitually decide in favour of, are those of African heads of state rather than African victims of international crimes.

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