Chapter 6

Horizontal and Vertical International Co-operation in Criminal Matters: An African Regional and Sub-regional Perspective

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Abstract This chapter deals with the topic of mutual legal assistance as a means to combat international crime (including the core atrocity crimes) in Africa. It can be argued that effective mutual legal assistance modalities are imperatives of true Pan-Africanism. Caveats will be noted and explored: For instance, for Pan-Africanism to be a useful and effective driver of the international criminal justice project on the Continent, it should neither be promoted as an amorphous expression of African solidarity, devoid of critical reflection and normative aspiration, nor as a cynical shield for elite interests or as a bulwark against democratic aspirations. Mutual legal assistance will thus be explored as a modality of horizontal Pan-Africanism fit for purpose and with normative content. There are, apart from bilateral and even some multilateral extradition treaties (for instance in the SADC sub-region), also a few AU instruments dealing with topics such as terrorism, cybercrime, and transnational organised crime. These instruments contain various mutual legal assistance and enforcement modalities. There is at least one AU instrument that specifically deals with continental police cooperation. With the exception of the anti-terrorism treaty, none of the other major international and transnational instruments are in operation yet (the latter category includes the Malabo Protocol, the Continent's only prospective vertical enforcement mechanism). The aim of this chapter is thus to critically explore the *potential* of mutual legal assistance modalities as manifestations of horizontal Pan-Africanism; a normative, yet realistic paradigm to combat international and transnational crime in Africa.

Keywords Mutual legal assistance • Pan-Africanism • international crime • transnational crime • extradition • international co-operation in criminal matters

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6.1 Introduction

International criminal justice in Africa is often discussed and analysed through the prism of Africa's relationship with the International Criminal Court ('ICC'). This is a relationship that covers the full spectrum of interactions between African states and the ICC as an international actor. It can be traced back to the role that African states played during the drafting of the Rome Statute of the ICC (and here one can note the prominent role that African states such as South Africa has played as a member of the group of 'Like Minded States').[2] The first referrals of situations to the ICC pointed to a promising continued relationship,[3] and the first decisions and judgments concerning African cases[4] signalled a maturing if at times irritable symbiosis.[5] But then, in a rather dramatic turn, the slow simmering tensions caused by several African states' failure to arrest incumbent[6] President Omar Al-Bashir of Sudan, and, subsequently, the politics

[2] The 'Like Minded Group' included South Africa, Germany, the Netherlands, Australia, Canada, and Argentina. For more on the significant contribution of this group of states to the drafting of the Rome Statute, see Washburn 1999, p. 368.

[3] In 2003, Uganda became the first state party in the history of the ICC to refer a situation to the Court, pursuant to Articles 13 and 14 of the Rome Statute. For commentary, see: Akhavan 2005, pp. 403-421.

[4] On 14 March 2012, the ICC delivered its first verdict in *The Prosecutor v. Lubanga*. Various procedural and preliminary decisions were delivered prior to the verdict in Lubanga's case, but the first (and long awaited) verdict on the merits in a case constituted an important milestone for the ICC. For commentary on the *Lubanga* verdict, see: Ambos 2012, pp. 115-153.

[5] For a collection of papers that reflect this period, see Werle et al. 2014.

[6] Omar Al-Bashir was ousted as leader of Sudan on 11 April 2019. For a report and timeline, see: https://www.bbc.co.uk/news/world-africa-47892742. Accessed 5 March 2021.

of withdrawal and attempted withdrawal from the Rome Statute (Burundi,[7] South Africa,[8] and The Gambia[9]), warned of a full-scale rupture.[10]

There is no denying that the complex relationship between Africa (as a political collective) and the ICC, is one of the most talked about and published themes in international criminal justice. There is always room for more perspectives, but this chapter will not focus on the relationship between Africa and the ICC generally. Rather, this chapter aims to look at international criminal justice in Africa in vertical and horizontal ways; focussing on modalities of co-operation and with selected national, sub-regional, regional, and international examples to illustrate the various issues at stake.

The reality on the ground as well as the full spectrum of material, procedural, institutional, policy, and political dimensions of international criminal justice in the broad sense of the word, demand engagement with the subject in diverse and diversifying ways. An emerging alternative, perhaps complementary (if not competing), frame is that of international criminal justice through the lens of Pan-Africanism. The Malabo Protocol[11] (on the establishment of an African criminal jurisdiction) is an obvious, if somewhat underwhelming, and perhaps unpromising, example of the assertion that 'African solutions for African problems' is the best way forward, not only as a pragmatic way out of a contentious AU-ICC relationship, but also, and more fundamentally, as a concretisation of the post-colonial ideal of Pan-Africanism.[12] It

[7] The UN Secretary General received Burundi's official notification of withdrawal on 27 October 2016. Secretary-General, 2016 C.N.805. 2016. TREATIES-XVIII. 10.

[8] The UN Secretary General received South Africa's official notification of withdrawal on 19 October 2016. Secretary-General, 2016 C.N.786. 2016. TREATIES-XVIII. 10. This notification was later withdrawn. For more background, see: Kemp 2017, pp. 411-438.

[9] The UN Secretary General received The Gambia's official notification of withdrawal on 10 November 2016. Secretary-General, 2016 C.N.862. 2016. TREATIES-XVIII. 10. This notice of withdrawal was subsequently withdrawn.

[10] For more on the period of the increasingly acrimonious relationship between Africa and the ICC, see: Okurut 2018, pp. 19-31; Jalloh and Bantekas 2017; Ankumah 2016; Dancy et al. 2020, pp. 1443-1469.

[11] Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 27 June 2014.

[12] For critical perspectives, see: Werle and Vormbaum 2017; Martini 2021, pp. 1-21.

is within the latter framework and worldview that I want to address the topic of mutual legal assistance as a means to combat international and transnational crime in Africa. Indeed, it can be argued that effective mutual legal assistance modalities are imperatives of true Pan-Africanism. Caveats will be noted and explored: For instance, Pan-Africanism, to be a useful and effective driver of the international criminal justice project on the Continent, should neither be promoted as an amorphous expression of African solidarity, devoid of critical reflection and normative aspiration, nor as a cynical shield for elite interests or as a bulwark against democratic aspirations. Mutual legal assistance will thus be explored as a modality of horizontal and vertical Pan-Africanism fit for purpose and with normative content.

There are, apart from bilateral and even some multilateral extradition treaties (for instance in the SADC sub-region), also a few AU instruments dealing with topics such as terrorism[13]and transnational organised crime. These instruments contain various mutual legal assistance and enforcement modalities. There is at least one AU instrument that specifically deals with continental police cooperation.[14] With the exception of the anti-terrorism treaty, none of the other major international and transnational instruments are in operation yet (the latter category includes the Malabo Protocol, the Continent's only prospective vertical enforcement mechanism). This chapter is, however, not intended to be a comprehensive discussion or even survey of all the relevant legal and policy instruments. Selected national, sub-regional, regional, and international examples and case studies will illustrate the possibilities and pitfalls presented by international co-operation modalities. The chapter is, for the most part, written from a South African vantage point. This is by no means to suggest that South Africa has some or other special place or status in Africa. It is simply because my own background is South African, and because many of the international co-operation in criminal matters issues discussed represent a kind of microcosm of issues faced not only by South Africa, but also by countries across the African region.

6.2 Mutual Legal Assistance in Criminal Matters: A Sub-regional Example

[13] OAU Convention on the Prevention and Combating of Terrorism, 14 July 1999.

[14] Statute of the African Union Mechanism for Police Cooperation (AFRIPOL), 30 January 2017.

South Africa's International Co-operation in Criminal Matters Act[15] provides that the President may enter into agreements with foreign States for the provision of mutual assistance in criminal matters. These agreements can either be bilateral or multilateral and may contain specific conditions negotiated between the state parties. The ad hoc nature of these agreements is not ideal from a regional or international criminal justice point of view. It therefore makes sense that South Africa (and other states in the Southern Africa Development Community, SADC) committed to a regional approach to mutual legal assistance in criminal matters. South Africa's parliament gave effect to the political commitment. The International Co-operation in Criminal Matters Act therefore incorporates the Southern African Development Community Protocol on Mutual Legal Assistance in Criminal Matters, which is a regional framework for mutual legal assistance, into South African domestic law.[16] The Protocol is aimed at better co-operation in criminal matters between the member states of SADC. It provides for relatively broad measures of mutual legal assistance. While the Protocol is aimed at effective mutual legal assistance, it clearly cannot be described as an all-encompassing code of possible measures of mutual assistance in criminal matters between the state parties. Notably, it does not apply to extradition, the enforcement of foreign criminal judgments (unless domestic law provides for this modality of co-operation) or the transfer of persons in custody to serve sentences.

In the absence of specific treaties governing bilateral or multilateral co-operation in criminal matters, states can, of course, still rely on comity between the requesting and the requested states. The SADC Protocol was adopted to change the regional dynamic and to plug significant holes.[17] By ratifying and incorporating the Protocol, states in the Southern region of Africa accepted certain legal obligations and commitments. Requests for mutual legal assistance from states party to the Protocol must, in principle, be complied with. There are of course certain

[15] International Co-operation in Criminal Matters Act 75 of 1996 (South Africa).

[16] In terms of section 27(2) of the International Co-operation in Criminal Matters Act the SADC Protocol (which entered into force on 1 March 2007) became law in South Africa by notice in the *Government Gazette* 35368 of 25 May 2012.

[17] The SADC Protocol can be compared with efforts in East Africa to enhance co-operation in the fight against transnational organised crime, including human trafficking. See report available at: https://www.unodc.org/easternafrica/en/Stories/countering-trafficking-in-persons-and-smuggling-of-migrants-in-ethiopia-through-international-cooperation-in-criminal-matters.html. Accessed 1 March 2021.

grounds for refusal (article 6 of the Protocol). The obligations in terms of the Protocol are, as a result, not absolute. A few important issues are considered, below:

6.2.1 Double Criminality

Article 2(4) of the SADC Protocol provides that mutual legal assistance shall be provided 'without regard to whether the conduct which is the subject of investigation, prosecution, or proceedings in the Requesting State would constitute an offence under the laws of the Requested State'. Double criminality is thus not a requirement for mutual assistance. This is a significant departure from comparable international practice where 'double criminality is often required with regard to requests for mutual assistance, for which coercive powers must be used, such as searches, seizures and cross-border pursuit'.[18] Is this departure from the double criminality requirement a weakness or flaw in the SADC Protocol? It can be argued that the rationale for the requirement of double criminality is the protection of individuals against the coercive powers of the state. Indeed, the SADC Protocol provides for certain coercive powers (like search and seizure) to be used in terms of the laws of the requested state. In this sense it goes further than mutual assistance modalities that do not affect individual rights, for instance the mere service of summons or interrogation of persons with their consent. One will therefore have to consider the SADC Protocol as a holistic whole, and with reference to the varying degrees of due process and human rights protections in the SADC region. As such, the absence of a double criminality requirement could be construed as a weakness in the Protocol, albeit not a fatal one.

6.2.2 Search and Seizure

Article 17 of the Protocol provides for the search and seizure of property and items. The request must include information justifying such action under the laws of the requested state. Strong reliance on detailed domestic laws on search and seizure is implied.

6.2.3 Proceeds of Crime

[18] Klip 2012, p 345.

The SADC Protocol provides for the securing, confiscation and forfeiture of proceeds of crime.[19] The basic structure of this modality (focusing on the proceeds of crime) is that the relevant laws of the requested state shall apply with respect to the confiscation and forfeiture of proceeds of crime. However, judicial processes in the requesting state are relevant as well, as illustrated by Article 20(2) of the Protocol which provides that where 'suspected proceeds of crime are found, the Requested State shall take such measures as are permitted by its laws to prevent any dealing in, transfer or disposal of, those suspected proceeds of crime, pending a final determination in respect of those proceeds by a court of the Requesting State'. The domestic criminalisation of crimes like money laundering, as well as relevant regulatory and enforcement frameworks, are important prerequisites for this aspect of the SADC Protocol to be effective.

6.2.4 Grounds for Refusal of Assistance

The SADC Protocol, which is based on the request model of international co-operation, provides for certain grounds for refusal of assistance. This is in line with comparable international practice in terms of which requested states are normally left with a relatively wide margin of appreciation to refuse assistance.[20] Compare it, for instance, with Article 2 of the European Convention on Mutual Assistance in Criminal Matters 1959. Grounds like 'sovereignty' and 'public interest' are of course potentially very wide in scope and open for abuse. It is submitted that states must always provide assistance in a bona fide manner and with due regard to the purpose of the SADC Protocol. States must always provide reasons for any refusal of mutual assistance.

6.2.5 Authentication of Documents

The SADC Protocol provides that where 'the laws of the Requested State require authentication, documents shall be authenticated in accordance with the domestic laws of the Requesting State'. In order to facilitate this, the Protocol provides that authentication

[19] SADC Protocol on Mutual Legal Assistance, articles 19-22.

[20] Van Hoek and Luchtman 2005, pp. 13-14.

procedures must be communicated to the SADC Secretariat so that all state parties know what to expect.[21]

6.2.6 Settlement of Disputes

Article 24 of the Protocol provides that disputes (arising from the interpretation or application of the Protocol and which cannot be settled amicably) shall be referred to the SADC Tribunal for determination. The Tribunal is provided for in the SADC Treaty and functions (since 2005) in terms of its own Protocol. The functioning and recent history of the Tribunal is unfortunately not proof of an effective regional body.

The SADC Tribunal is one of the three sub-regional tribunals in Africa, the other being the Economic Community of West African States Community Court of Justice (the ECOWAS Court) and the East African Court of Justice (EACJ). The sub-regional tribunals are primarily aimed at facilitating regional integration and for the interpretation and application of treaty provisions (such as the sub-regional protocols). While economic integration and trade policies are the main focus of their mandates, the sub-regional tribunals are by necessity if not by design also tasked to consider human rights issues. It is on this front that the SADC Tribunal disappoints. In formal terms, the SADC Tribunal functions as the judicial organ of the SADC. Its mandate, as noted above with reference to the SADC Protocol on Mutual Assistance in Criminal Matters, includes adherence to and proper interpretation of the SADC Treaty (establishing the sub-regional organisation), and all subsidiary instruments (such as the Mutual Assistance Protocol).[22] Sadly, it is precisely because of the SADC Tribunal's ruling that it had the power to adjudicate on human rights matters, that the Tribunal was for all intents and purposes abolished by the SADC sub-region's political leaders.[23]

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[21] Article 9(2) of the SADC Protocol.

[22] Phooko 2015, p 532.

[23] The case that triggered the political backlash was the SADC Tribunal decision in *Mike Campbell (Pvt) Ltd v Republic of Zimbabwe* 2008 SADCT 2 (28 November 2008). The applicant took the Zimbabwe Government to the SADC Tribunal on allegations of human rights violations. The Tribunal ruled that it had the necessary powers and competency to adjudicate on human rights matters.

Is the SADC Tribunal the only sub-regional tribunal that ventured into the area of human rights? A cursory look at the other sub-regional tribunals suggest that they are able to adjudicate on human rights matters, at least because of the construction of implied powers in their founding instruments. Indeed, both the EACJ[24] and the ECOWAS Court[25] have delivered opinions that suggest a willingness to exercise jurisdiction over matters concerning human rights. The ECOWAS Court has, in terms of the Supplementary Protocol of 19 January 2005, jurisdiction 'to determine cases of violations of human rights that occur in any Member State'.[26]

6.2.7 Differences between States: Judicial and Executive Roles

Intra-state human rights concerns, including those relating to criminal justice issues, are ideally addressed by domestic courts in a thorough and credible way. International, regional, and sub-regional tribunals often act as checks on and complementary to domestic legal systems. In addition, human rights and rule of law concerns can also be a function of inter-state relations and co-operation in criminal matters. Disputes regarding the interpretation and application of regional and sub-regional instruments can be dealt with directly by the regional and sub-regional tribunals concerned. There is also an indirect (horizontal) modality to realise human rights in the context of international co-operation in criminal matters, and that is through the executive and judicial branches of the requesting and requested states. For this modality to be effective and credible, there should be a great degree of compatibility and normative coherence.

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[24] See, for instance: *Katabazi v Secretary General of the East African Community* (Ref No 1 of 2007) 2007 EACJ 3 (1 November 2007). The case concerned the due process rights of accused persons who were out on bail, but who were re-arrested by the security forces of Uganda under circumstances that violated the accused persons' due process rights and the rule of law in Uganda. In their application before the EACJ, the applicants relied on the overarching goals of the Treaty Establishing the East African Community (which includes adherence to the principles of democracy, the rule of law, and the promotion of human rights as provided for in the African Charter on Human and Peoples' Rights).

[25] See the ground-breaking decision in: *Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria and Universal Education Commission* ECW/CCJ/APP/0808. This case concerned education as a fundamental human right.

[26] Text of the Supplementary Protocol available at: http://prod.courtecowas.org/wp-content/uploads/2018/11/Supplementary_Protocol_ASP.10105_ENG.pdf. Accessed 1 March 2021.

I will explain this proposition with reference to two examples from the SADC region: Namibia and South Africa.

The two countries share a lot of history, not all of it happy. For much of the twentieth century Namibia was effectively a colony of South Africa.[27] As a result, the two countries still share a common legal tradition, that is, a mix of Roman-Dutch and English common law, and customary/indigenous law. Both nations have adopted laudable democratic, progressive, and human rights-informed post-apartheid, post-independent constitutional dispensations. Having said that, it is also the case that there are significant constitutional and legal differences that are relevant for the present discussion. Notably, there are similarities, but also key differences between South Africa's International Co-operation in Criminal Matters Act and Namibia's International Co-operation in Criminal Matters Act.[28] Section 7 of the Namibian Co-operation Act provides as follows:

> (1) A request by a court or tribunal of competent jurisdiction in a foreign State, or by an appropriate government body in a foreign State, for assistance in obtaining evidence in Namibia for use in that State shall be submitted to the Permanent Secretary or, in a case of urgency, directly to the magistrate's court within whose area of jurisdiction the person whose evidence is required resides or is.
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> (2) When a request from a foreign State for assistance in obtaining evidence in Namibia is in terms of subsection (1) received – (a) by the Permanent Secretary shall forward such request to the magistrate's court within whose area of jurisdiction the person whose evidence is required resides or is; (b) by such a magistrate's court, the Permanent Secretary shall without delay be notified thereof in writing by the clerk of the court and be furnished with a certified copy of such a request.
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> (3) Upon receipt by a magistrate's court of a request contemplated in subsection (1), that court shall satisfy itself – (a) that the proceedings have been instituted in a criminal court or tribunal of competent jurisdiction in the requesting state concerned; or (b) that – (i) there are reasonable grounds for believing that an offence has been committed in that requesting state or that it is necessary to determine whether an offence has been committed; and (ii) an investigation in respect of thereof is being conducted in that requesting State.

[27] For a comprehensive historical overview, see: Wallace 2011. The book covers Namibian history until independence from South Africa in 1990.

[28] Act 9 of 2000.

(4) For the purposes of subsection (3), a court may rely on a certificate purporting to be issued by any competent authority of the requesting State concerned, stating the facts contemplated in paragraph (a) or (b) of that subsection.

Some commentators suggest that section 7 of the Namibian Co-operation Act provides for a more flexible co-operation regime in urgent matters, compared to the South African model, in that in urgent matters a co-operation request may be sent directly to the magistrate's court within whose area of jurisdiction the person, whose evidence is required, resides or is.[29]. There is also a more prominent judicial role in the Namibian legislation. Section 7(3) of the Namibian legislation provides that the *magistrate* must be satisfied that certain conditions have been met, as opposed to the South African section 7(3), which provides that the *Director-General of Justice and Constitutional Development* must be satisfied that certain conditions have been met in the context of requests for the provision of evidence. The more prominent role of the judiciary in Namibia is, according to Mujuzi,[30] something that the South African legislature should emulate. I would go further, and suggest that the Namibian approach should be followed by states across the SADC-region, and beyond. A more prominent judicial role serves as a protective layer against political convenience in matters of mutual legal assistance in criminal matters between states. It also has the potential to bring in considerations like human rights and due process in situations often dominated by extra-legal considerations, especially when bilateral diplomatic concerns, rather than the protection of individual rights, are the dominant considerations at play.

6.3 Mutual Legal Assistance, Extradition, and Death Penalty Concerns

Few international co-operation in criminal matters entail stakes higher than that of the modality of extradition. This is a modality that concerns the personal liberty and bodily integrity of the subject of the extradition request. And when the extradition could lead to a trial involving capital punishment, the stakes could not be higher. Death penalty concerns constitute a serious obstacle to a smooth extradition regime, and is briefly discussed here in the context of the broader human rights dimension of international co-operation in criminal matters in Africa, a

[29] See comments by Mujuzi 2015, p 386.

[30] Mujuzi 2015, p 387.

region where there is a vast divide between abolitionist and retentionist states.[31] Despite a ruling by the African Court on Human and Peoples' Rights[32] that mandatory imposition of capital punishment was unfair and an affront to due process, and regardless of the fact that the African Commission on Human and Peoples' Rights has adopted a Draft Protocol on the Abolition of the Death Penalty in Africa,[33] there still seems to be little political appetite within the African Union to make the continent an abolitionist region.

In South Africa, an abolitionist country,[34] it was judicially determined that in extradition matters, authorities have a constitutional obligation to seek assurances from any requesting state which might impose the death penalty that such state will not impose the sentence with respect to the extradited person.[35] While the constitutional standard is clear, there are some practical, legal and political questions that need to be addressed when the relevant provisions of the Extradition Act (South Africa) are applied.

A provincial high court in South Africa[36] heard an appeal against an order by a lower court magistrate, granting a request by the Ministry of Foreign Affairs and International Co-operation of the Republic of Malawi for the extradition of the appellant in the matter. The request referred to an extradition agreement between South Africa and Malawi. The appellant was accused of murder in terms of the Penal Code of Malawi. The Penal Code provides for the death penalty

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31 For an overview, see: 'Abolitionist and Retentionist Countries', information based on analysis by Amnesty International, available at, https://deathpenaltyinfo.org/policy-issues/international/abolitionist-and-retentionist-countries. Accessed 1 March 2021. See also: 'Abolition of the death penalty in Africa', Amnesty International (2019), available at https://www.amnesty.org/download/Documents/ACT5011622019ENGLISH.PDF. Accessed 1 March 2021. See also: Anyangwe 2015, pp. 1-28.

32 http://www.cemas.org.uk/index.php/africa/6730-africa-positive-death-penalty-decision-undermined-by-continued-executions.

33 The Protocol to the African Charter on Human and Peoples' Rights on the Abolition of the Death Penalty (2015) was adopted at the 56th ordinary session of the African Commission on Human and Peoples' Rights. For more information, see: https://fiacat.org/images/pdf/leaflet-uk-simple.pdf. Accessed 1 March 2021.

34 The death penalty was abolished in South Africa following the decision by the Constitutional Court in *S v Makwanyane* 1995 (3) SA 391 (CC).

35 See decision by the Constitutional Court of South Africa: *Minister of Home Affairs & others v Tsebe & others* 2012 (5) SA 467 (CC).

36 North-West High Court, South Africa: *S v Misozi Chanthunya* (unreported, NWHC case no 4/2013, 30 May 2013).

or life imprisonment in murder cases. The high court in South Africa noted that the charges against the accused were very serious (pre-meditated murder). The court further noted that, upon conviction of the appellant, the imposition of the death penalty was inevitable. The former Malawian President (now deceased) gave an undertaking in this particular case that the death penalty would not be imposed upon the appellant if he would be extradited from South Africa to Malawi. The question was whether the President's successor in title could be bound to undertakings given by the deceased President. It was submitted by the appellant that the deceased Malawian President's undertaking should not be considered a sufficient assurance that the death penalty shall not be imposed, or if imposed shall not be executed.

The South African Extradition Act provides for a division of labour between the judiciary and the executive in extradition requests. The judicial role is important, but, according to the South African legislative scheme, it is the executive (the relevant Minister) that must take ultimate responsibility for the extradition decision, including human rights concerns surrounding extradition requests. The court noted as follows: '[The] fact that a sufficient assurance that the death sentence will not be imposed on the appellant or not, is one of the grounds that the Minister is empowered by the [Extradition] Act to consider when granting or refusing the order of surrender'.[37] The court therefore set aside the finding by the magistrate that the assurance given by the Malawian Government (with respect to the death penalty) was sufficient, and substituted that finding with the following: 'The constitutional issue raised by the appellant (whether the assurance given by the Malawian Government is sufficient or not) is to be considered by the Minister in terms of section 11 of the [Extradition] Act'. The meaning of 'sufficient assurance' might not always be straightforward or uncomplicated. The constitutional standard is clear. The judicial role in the extradition process as set out in the Extradition Act is important, but also limited. The South African high court correctly held that the ultimate responsibility to determine whether human rights assurances given by a requesting state is sufficient, rests with the Minister of Justice. It is submitted that the Minister should not take any assurance at face value. The Minister can make use of political and diplomatic channels of communication to make sure that any assurance is indeed sufficient. Where there is doubt, the Minister can communicate with his or her counterpart and can be advised by experts in the relevant government departments such as Justice and Foreign Affairs. In this

[37] *S v Misozi Chanthunya* at para 42.

sense the Minister is better placed than a magistrate who would not be able to go beyond the evidence put before him or her. But this means that a Minister in such cases must apply his or her mind to the question of 'sufficient assurance' and should also not take it at face value.

The matter is further compounded by the seemingly intractable position of states like Botswana. One can note the case of Edwin Samotse,[38] a Botswana national and suspect in a murder case, who was wrongly deported from South Africa to Botswana. This was done contrary to the South African government policy, which, of course, is informed by the constitutional jurisprudence discussed above. The conundrum was that Botswana refused to send Samotse back to South Africa in order for proper extradition or deportation procedures to be followed. Furthermore, the authorities in Botswana gave a clear indication that the prosecution would seek the death penalty in this matter. Stories like these underscore the reality of South Africa becoming a safe haven for murder suspects – especially from the neighbouring jurisdictions that share borders with South Africa and that retain the death penalty, namely Botswana, Zimbabwe, and Lesotho. It should be pointed out that in the case of Samotse, Botswana initially did apply for extradition, upon which South Africa did seek assurances that Botswana would not apply the death penalty if Samotse were found guilty. The problem arose when Samotse was wrongly deported. In reality, all indications are that people can move with relative ease across the borders that South Africa shares with the three retentionist states mentioned above. Given Botswana's hard-line insistence that it will not give assurances that the death penalty will not be imposed and carried out in, for instance, murder cases, the problem is clear: in the absence of legislation that would provide South Africa with the necessary extraterritorial jurisdiction over crimes like murder, South Africa does, in fact, become a safe haven for murder suspects from elsewhere in the region. Problems like these also underscore the importance of a regional approach to international co-operation in criminal matters that is informed not by transactional regionalism, but normative Pan-Africanism that respects human rights in all spheres, including international co-operation and mutual legal assistance in criminal matters. That, in turn, will lead to more trust, and, ultimately, more effective co-operation in states' efforts to address issues like crime and security. The death penalty is perhaps the most drastic example, but it is not the only normative factor impacting on

[38] See report by International Federation for Human Rights, available at *https://www.fidh.org/en/region/Africa/botswana/16141-botswana-south-africa-edwin-samotse-faces-possible-execution-in-secrecy*. Accessed 1 March 2021.

extradition, mutual legal assistance, and other forms of co-operation in criminal matters. The risk of torture, and other egregious human rights violations, present challenges to the Pan-African ideal of optimal integration and co-operation.

6.4 General Human Rights Concerns (Including the Risk of Torture)

The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 provides for a normative framework that obliges states to adopt measures to prevent torture and other cruel, inhuman or degrading treatment or punishment. Many states have adopted domestic laws to give effect to these obligations. For instance, South Africa has adopted the Prevention and Combating of Torture of Persons Act,[39] which provides for the offence of torture of persons and other offences associated with the torture of persons. It also provides for an enforcement framework to prevent and combat the torture of persons within or across the borders of South Africa. The enforcement regime via this piece of domestic legislation also has implications for international co-operation in criminal matters. Section 8 of the South African Prevention of Torture Act provides as follows:

> **'**(1) No person shall be expelled, returned or extradited to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.
>
> (2) For the purpose of determining whether there are such grounds, all relevant considerations must be taken into account, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.'

As we have seen, one of the important exceptions to extradition is the death penalty exception, which is now well-established in extradition jurisprudence, albeit not universally and certainly not in all parts of Africa. In countries like South Africa, authorities are now obligated, in principle, not to extradite an individual to a requesting state in the absence of an assurance that the death penalty will not be imposed by such requesting state. Section 8 of the South African Prevention of Torture Act provides for a similar obligation with respect to torture. The obligation is couched in mandatory terms. The principle is clear – no extradition to a state where there are substantial grounds for believing that the relevant individual would be in danger of being subjected to torture. Death penalty matters are perhaps easier in this respect. Either there is an assurance that the death penalty will not be imposed, or there is no such assurance. But in the context of the risk of torture in the requesting state, it will first be

[39] Act 13 of 2013.

necessary to determine whether there are substantial grounds for believing that there is a danger that the individual will be tortured. The South African Prevention of Torture Act attempts to make it easier to determine these matters. A liberal reading of section 8(2) of the Act cast the net wide to include states where there are consistent patterns of gross, flagrant or mass violations of human rights. However, this might not be easy to prove. Courts will inevitably have to pronounce on the conduct and practices of foreign states. But courts should not avoid these delicate issues.

From the perspective of a requested state, there is the risk that unwanted or even dangerous individuals (who, for whatever reason, cannot be tried in the requested state due to jurisdictional limitations or evidentiary or other weaknesses in the criminal case) will find a safe haven in the requested state because of the fact that extradition or deportation is barred by domestic legal frameworks such as the South African example, the Prevention of Torture Act. In other regions of the world, for instance in Europe, courts have identified the circumstances in which it may be permissible under human rights instruments (notably the European Convention on Human Rights) to expel an individual to a state (where there is evidently widespread torture practices) on the basis of diplomatic assurances that torture will not be inflicted.[40] According to European case law, consistent reports of the existence of widespread and routine torture practices in requesting states don't preclude requested states from seeking to rely on assurances as to the individual's treatment while in custody or on trial in requesting states for purposes of favourable consideration of extradition requests.[41] Should African human rights and international co-operation in criminal matters case law follow this pragmatic approach?

It is submitted that African jurisdictions (as requesting and requested states) will have to find the same defensible balance between the norms protected by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, on the one hand, and on the other hand, the realities of transnational and international crime afflicting the African

[40] For instance, the European Court of Human Rights, in *Othman (Abu Qataba) v The United Kingdom* [2012] ECHR (unreported, ECHR case no 8139/09, 17 January 2012).

[41] *Othman (Abu Qataba) v The United Kingdom*.

Continent. The point of departure should be that individuals should not be extradited to requesting states where there is a substantial risk of torture practices. Where there is doubt, domestic law should be amended to make it clear that if conditional extradition is allowed, it should not be based on *pro forma* assurances, but rather be based on verifiable assurances; something that should come naturally in a truly Pan-African spirit of solidarity and trust.

6.5 Transfer of Prisoners

The prevention, suppression and prosecution of transnational and international crime require all kinds of co-operation and mutual legal assistance. The international transfer of prisoners is one of the modalities that 'facilitates the fair treatment and social rehabilitation of prisoners, but is also a tool of international cooperation'.[42] The United Nations Congress on the Prevention of Crime and the Treatment of Offenders (1985) has adopted the UN Model Agreement on the Transfer of Foreign Prisoners and Recommendations on the Treatment of Foreign Prisoners.[43] Although there is not at present a comprehensive African instrument dealing with the transfer of prisoners, there are indications that states are willing to adopt domestic legal frameworks for the transfer of prisoners between states and between states and international courts and tribunals. For instance, South Africa has (via statutory frameworks, including the Extradition Act, the International Co-operation in Criminal Matters Act, and the Implementation of the Rome Statute of the International Criminal Court Act) most of the important co-operation modalities in place, and these modalities are supplemented by the framework that provides for transfer of prisoners between South Africa and the International Criminal Court.[44] However, a similar *horizontal* instrumentality is still lacking.

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[42] United Nations Office on Drugs and Crime, International Transfer of Sentenced Persons, https://www.unodc.org/unodc/en/organized-crime/transfer-of-sentenced-persons.html. Accessed 1 March 2021.

[43] Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1985: Report prepared by the Secretariat (United nations publication, Sales No E.86.IV.1), chap. I, sect. D.1, Annex I & Annex II, available at https://www.unodc.org/pdf/compendium/compendium_2006_part_02_01.pdf. Accessed 1 March 2021.

[44] Section 20 of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (South Africa).

The lack of a formal legislative framework for purposes of transfer of prisoners between South Africa and foreign states (including other states in Africa) is unsatisfactory. It leads to legal uncertainty, and there is also the potential for injustice. South Africa can on an *ad hoc* basis enter into bilateral agreements in terms of which transfer of prisoners can occur. Government seems to realise that at the regional level, at least, there should be a formal protocol to give some clarity and structure to the issue of transfer of prisoners.[45] South Africa's lack of a formal (and comprehensive) legal framework dealing with the transfer of prisoners is emblematic of the lack of a regional African approach to this particular international co-operation modality. Any regional transfer of prisoner dispensation should also be coupled with prison reform and concerted efforts to improve the conditions in Africa's penal institutions.[46]

6.6 Africa and the ICC: Of Promises, Principles, and Presidents

6.6.1 Assistance by States Parties

Article 93 of the Rome Statute of the International Criminal Court provides for a non-exhaustive list of forms of assistance by states party to the Rome Statute, as long as the forms of assistance are not prohibited by the law of the requested state. In *Prosecutor v William Samoei Ruto & Joshua Arap Sang*[47] the Appeals Chamber of the ICC confirmed a decision of the Trial Chamber that a Chamber of the ICC has the power to compel witnesses, and that a state party (in this instance Kenya) was obliged to serve summonses and to compel unwilling witnesses to give evidence when a Chamber sits *in situ* in the state concerned or when the witness gives testimony via video link from such a state. In the absence of a direct co-operation request, states should nevertheless strive to provide optimal assistance and support to the ICC, where appropriate. Passive non-cooperation should therefore be addressed with the same attention as is the case with active non-cooperation. But passive non-cooperation (for example where a state allows evidence to get tampered with or destroyed even before the ICC could formally request the preservation of said evidence) may be difficult to detect and sanction. To

[45] For critical comments, and useful suggestions, see Mujuzi 2013, pp. 151-186.

[46] For more on this, see reporting by *Penal Reform International*, available at https://www.penalreform.org/where-we-work/africa/. Accessed 1 March 2021.

[47] *Prosecutor v William Samoei Ruto & Joshua Arap Sang* case no ICC-01/09-01/11 OA 7 OA 8, 9 October 2014.

make the co-operation regime of the Rome Statute system more effective, there is a strong argument to be made for the *criminalisation* of at least *active non-cooperation*.[48]

There are, of course, the possibility of sanctions (whether effective or symbolic) in cases of non-cooperation. One of the most prominent examples was that of South Africa's failure to arrest and transfer (now, former) President Al-Bashir of Sudan to the ICC in The Hague. I will discuss the saga in some detail to illustrate the temporal, logistical, diplomatic and policy issues that comprised the fateful standoff between South Africa and the ICC. South Africa is not the only African state party with a history of non-compliance with co-operation requests. Other African state parties with a history of non-compliance with ICC co-operation requests include Malawi, Chad, the Democratic Republic of Congo, Djibouti, and Kenya. Most of these relate to the non-compliance with requests by the ICC for states to arrest former President Al-Bashir on indictments and an arrest warrant relating to charges of genocide, crimes against humanity, and war crimes.

6.6.2 The Duty to Arrest and Surrender, and the Impact of Immunities

Immunities (head of state immunity and diplomatic immunity) are well-established features of international law and international relations between states. As such, immunities are manifestations of state sovereignty, which is still a fundamental element of the international legal and political system. The advent of international criminal law brought about a paradigm shift: the quest to end impunity for the most serious crimes under international law. The establishment of the ICC represents a key development in this quest to end impunity, by providing for the possibility to hold individuals (including serving heads of state and government) criminally liable for the crimes of genocide, crimes against humanity, war crimes, and the crime of aggression.[49]

Article 27(2) of the Rome Statute of the ICC provides as follows:

> 'Immunities 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.'

[48] Van der Merwe and Kemp 2019, pp. 21-49.

[49] Kemp et al. 2015, pp. 586-588; Fisher 2013, pp. 8-29.

The above provision thus makes it clear that for purposes of proceedings before the ICC, immunities will not apply. The Assembly of States Parties which adopted the Rome Statute clearly adopted this exception to the general recognition of immunities under international law.[50]

There appears to be a contradiction in the Rome Statute in the context of requests by the ICC to states for the arrest and surrender of individuals who may be protected by immunities under general international law. Article 98(1) of the Rome Statute of the ICC provides as follows:

> 'The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court first obtain the cooperation of that third State for the waiver of the immunity.'

This apparent contradiction in the Rome Statute is the topic of on-going academic debate.

There are several different interpretations that attempt to reconcile articles 27(2) and 98(1). For present purposes it is sufficient to refer to the most commonly held interpretation (although it is prudent to point out that it is by no means a unanimous position among international criminal law scholars). This basic approach is to interpret article 27 as a waiver by a state party of any immunity that might otherwise apply to their officials before the ICC. Article 98(1) is thus limited to cases where officials from non-party states are concerned. The underlying rationale is that states parties accepted, via the Rome Statute, the exception to immunities not only in terms of the proceedings before the ICC itself, but also in terms of their co-operation with the ICC (which includes arrest and surrender of individuals). Of course, states parties must still respect immunities flowing from general international law obligations to states that are not party to the Rome Statute and who have not acceded to this immunity exception. The indictment by the ICC of heads of state of non-state parties, which is a possibility based on Security Council referral of cases to the ICC, presents a predicament.

There are some conflicting views emanating from the ICC itself on this point. In *Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, Al Bashir*,[51] the position as set out by the ICC can be summarised

[50] Kemp et al. 2015, p 588.

[51] ICC-02/05-01/09, Pre-Trial Chamber II, 9 April 2014, 'DRC Decision'.

as follows: in principle, heads of state of non-party states are immune from the jurisdiction of the ICC. The legal rationale for this is clear: the Rome Statute, as a multilateral treaty, does not bind non-party states. The implication is that state parties (such as the DRC) cannot be forced to arrest and surrender to the ICC a head of state of a non-party state, such as Sudan. However, the position changes when a matter was referred to the ICC by the Security Council of the United Nations. Where there is such a referral, as we will see below in the case of President Al Bashir of Sudan, it essentially serves as a waiver of the immunity of the relevant official, including a head of state. The underlying rationale is that all member states of the UN (which includes Sudan) are bound by Security Council decisions, and all members of the UN are expected to give effect to Security Council Resolutions.[52] This brings us to the matter of President Omar Al-Bashir, the former president of Sudan. Sudan, as noted above, is not a party to the Rome Statute of the ICC.

In 2005, due to the gross human rights violations in the Darfur region of Sudan, the Security Council of the United Nations, acting under Chapter VII of the Charter of the United Nations and in accordance with the relevant provisions of the Rome Statute of the ICC, referred the matter to the ICC for investigation and possible prosecution of individuals for crimes within the jurisdiction of the ICC. In 2009 and 2010 the ICC issued arrest warrants for President Al-Bashir for war crimes, crimes against humanity, and genocide.[53]

In light of the warrants for the arrest of the (at the time still sitting) president of Sudan, the apparent contradiction between articles 27 and 98 of the Rome Statute suddenly gained practical significance. For present purposes one can point to the decision by the Pre-Trial Chamber of the ICC in the above-mentioned case of the DRC's failure to arrest and surrender Al Bashir to the ICC. The interpretation of articles 27 and 98 by the Pre-Trial Chamber seemed to be clear enough, but, as we shall see with reference to the *South Africa* and *Kingdom of Jordan* decisions, the issue turned out to be more complex and contentious. Decisions handed down by courts in South Africa and Kenya contributed to the debate and confusion. I will comment on these in some detail in order to illustrate the problem from a domestic (African) perspective.

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[52] For further commentary on this point, see Tladi 2015, pp. 1042-1043.

[53] Warrant of Arrest for Omar Al Bashir, *Al Bashir*, ICC-02/05-01/09-1, Pre-Trial Chamber I, 4 March 2009; Second Warrant of Arrest for Omar Al Bashir, *Al Bashir*, ICC-02/05-01/09-95, Pre-Trial Chamber I, 12 July 2010.

In *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development*[54] the high court in the Gauteng province considered the apparent failure of the South African authorities to arrest President Al-Bashir and to surrender him to the ICC, on occasion of his visit to South Africa in June 2015. South Africa, as a state party to the Rome Statute of the ICC, has a general obligation in terms of article 86 of Statute, to co-operate fully with the ICC in its investigation and prosecution of crimes within the jurisdiction of the ICC. This general duty includes the duty to arrest and surrender individuals to the ICC. It should be noted that South Africa has a comparatively detailed and elaborate incorporation of the Rome Statute. Indeed, the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 ('Implementation Act') provides for the full incorporation of the substantive part of the Rome Statute, as well as for South Africa's co-operation with the ICC. South Africa thus went further than what the Rome Statute actually requires as a minimum, since the Statute only obliges states parties to provide for the necessary mechanisms in terms of co-operation and legal assistance. The only obligation in terms of the provision of substantive law is provided for in Article 70 of the Rome Statute. Article 70(4) provides that each state party 'shall extend its criminal laws …to offences against the administration of justice referred to in this article'. Such offences include corruption of witnesses, perjury, tampering with evidence, and intimidation of witnesses. It can thus be concluded that South Africa is one of a number of states that opted for the *full incorporation* of the Rome Statute.[55]

On two occasions since the promulgation of the Implementation Act in 2002, South Africa's commitment to the letter and spirit of the Act, as well as the general obligations under the Constitution, 1996 and the Rome Statute were tested. On the first occasion South African authorities failed to investigate allegations of torture as a crime against humanity committed in Zimbabwe.[56] On the second occasion South African authorities failed to arrest President Al-Bashir during his visit to South Africa in June 2015. This is the matter that was ultimately considered by the court in *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development.*

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[54] *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development & others* 2015 (5) SA 1 (GP).

[55] For the modality of 'full incorporation' and related matters, see Werle and Jessberger 2014, pp. 144-147.

[56] Constitutional Court of South Africa, in: *National Commissioner of Police v Southern African Human Rights Litigation Centre & another* 2015 (1) SACR 255 (CC).

President Al-Bashir was attending a high-level summit of the African Union (AU) that was held in Johannesburg. The failure by South African authorities to arrest Al-Bashir, who was indicted by the ICC on charges of war crimes, crimes against humanity, and genocide, elicited a number of legal issues pertaining to South Africa's duties under domestic and international law. These issues are considered below.

As mentioned above, a first warrant of arrest for Al-Bashir, relating to the charges of crimes against humanity and war crimes, was issued by the ICC on 4 March 2009. A second warrant of arrest, for charges of genocide, was issued by the ICC on 12 July 2010. The ICC accordingly requested all state parties to the Rome Statute to arrest Al-Bashir in the event that he would visit their jurisdictions. Subsequent to the issuing of these warrants, Al-Bashir did manage to visit states parties (including Kenya, Djibouti, Democratic Republic of Congo, Malawi, and Chad) without being arrested. It is important to note, however, that these states had to explain themselves before the relevant structures of the ICC. As we have seen above in the matter of the DRC's failure to arrest and surrender Al-Bashir, there is a clear expectation from the ICC that state parties should provide *full and effective* co-operation with the ICC, including the arrest and surrender to the ICC of a sitting president, even where that president is from a non-party state. The latter position is made possible due to the effect of Security Council Resolutions, an aspect that we will return to below.

Before June 2015 there had been a number of occasions where Al-Bashir could have visited South Africa in his capacity as head of state of Sudan, for instance the opening of the FIFA World Cup in 2010, for both inaugurations of President Jacob Zuma, and for the funeral of former President Nelson Mandela. On at least one of these occasions, namely the 2009 inauguration of President Zuma, South African officials warned that they would arrest Al Bashir should he arrive in the country. Al Bashir consequently declined the invitation.[57] Indeed, the record shows that South Africa, as a state party to the Rome Statute, did follow the letter and spirit of its own domestic law – the Implementation of the Rome Statute of the ICC Act – when the Department of Justice decided, subsequent to the issuing by the ICC of the arrest warrant against Al-Bashir in 2009, to transmit this warrant to a magistrate, as per the

[57] *Southern Africa Litigation Centre v Minister of Justice* (supra) at para 12.

requirements of section 8 of the Implementation Act. The arrest warrant was subsequently endorsed by a senior magistrate. The practical legal effect is that since 2009 there has been a South African warrant for the arrest of President Al-Bashir of Sudan.[58] It is because of this fact and considering the delicate diplomatic circumstances that South Africa was at pains to warn President Al-Bashir not to visit the country on the occasions mentioned above.

The visit of Al-Bashir to South Africa in June 2015 turned out to be different. The Director-General: Justice and Constitutional Development, who is the Central Authority as defined in section 1 of the Implementation Act (and thus the point of contact between the ICC and South Africa for purposes of requests for arrest of individuals and other forms of assistance) presented to the high court in her answering affidavit a number of important background facts pertaining to the visit of Al-Bashir to South Africa and the subsequent events surrounding the request for his arrest and transfer to the ICC. She stated the following:

- During January 2015 South Africa agreed to host an AU Summit, to be held during June 2015.
- In order to facilitate the hosting of the summit, South Africa was required to enter into an agreement with the Commission of the AU, specifically relating to the material and technical organisation of the meetings.
- The Director-General emphasised in her affidavit that South Africa was not involved in or responsible for extending invitations to any or all of the delegates or attendees of the AU Summit. That was the sole responsibility of the AU Commission.
- Furthermore, article VIII of the host agreement between South Africa and the AU, specifically provides for privileges and immunities. Members of the Commission, relevant staff members, the delegates as well as representatives of intergovernmental organisations attending the meetings were thus accorded the necessary privileges and immunities. The latter were based on the provisions of the General Convention on the Privileges and Immunities of the Organisation of African Unity ('OAU Convention'). Articles V (1) (a) of the OAU Convention provides for immunity from personal arrest or detention and from any official interrogation.

[58] See also Tladi 2015, p 1037.

- It was also pointed out that the AU provisions on immunities are also contained in the Vienna Convention on Diplomatic Relations, 1961. This Convention was incorporated into South African law via the Diplomatic Immunities and Privileges Act 37 of 2001.
- In order to give effect to the host agreement between South Africa and the AU, article VIII of the agreement was published in the official *Government Gazette* of 5 June 2015. The privileges and immunities were thus incorporated into South African law. These privileges and immunities would only be effective for the duration of the AU Summit.
- It was confirmed through the appropriate diplomatic channels that President Al-Bashir of Sudan would attend the AU Summit. Sudan explicitly requested confirmation that Al-Bashir should be granted the necessary privileges and immunities as provided for in Article VIII of the host agreement.
- It was the view of the relevant authorities in South Africa that article VIII of the host agreement, as incorporated into South African law, prevented South Africa from arresting Al-Bashir during the duration of the AU Summit plus an additional two days after the summit.

The legal position as described by the Director-General: Justice and Constitutional Development was backed by a supporting affidavit by the Director-General of the Presidency, which provided some additional context. It was stated that the Cabinet was aware of the invitation from the AU to Al-Bashir to attend the AU Summit. It was also made clear that Cabinet appreciated the fact that South Africa as a state party to the Rome Statute was obliged to give effect to any request by the ICC pertaining to a warrant of arrest issued by the ICC. In light of the fact that there were warrants issued by the ICC for the arrest of Al-Bashir and the fact that Al-Bashir was invited to attend the AU Summit in South Africa, the Cabinet deemed it prudent to request advice from the Chief State Law Advisor. The conclusion was reached that South Africa, as host country, was first and foremost obliged to uphold and protect the inviolability of President Al-Bashir in accordance with the AU agreement. It was thus decided not to arrest Al-Bashir in terms of the ICC arrest warrants (and indeed the active South African arrest warrant) while he was attending the AU Summit. Cabinet also acknowledged the fact that the decision not to arrest Al-Bashir could only apply for the duration of the summit.

It is necessary to briefly consider some international context. While the South African government was clear in its interpretation of South Africa's obligations toward the ICC, the

African Union, and President Al-Bashir, it also wanted to avoid a showdown with the ICC, and it certainly did not want the kind of censure by the ICC that was meted out to other states party to the Rome Statute that had failed to arrest and surrender Al Bashir – states like Malawi, Chad and the DRC. South Africa thus acted under article 97 of the Rome Statute to initiate consultation with the ICC. The ICC presiding judge in the Al-Bashir matter met with South Africa's ambassador to the Netherlands on Friday 12 June 2015. At this meeting the ambassador communicated to the presiding judge the position of the South African government, which, at least in terms of this communication, seemed not as certain as the position that Cabinet put forward, as explained above. According to the ambassador's *note verbale* to the ICC, South Africa was concerned about the possible competing legal obligations and the lack of clarity in the law with respect to the visit of Al-Bashir to South Africa as host of the AU summit[59] The ICC presiding judge, however, was not convinced that there could be any ambiguities in the law and in South Africa's obligations under the Rome Statute. The judge made clear that South Africa was under the obligation to immediately arrest and surrender Al-Bashir as soon as he would arrive on South African soil. The judge went further to clarify that the consultation between the ICC and South Africa under article 97 of the Rome Statute, or any other further discussions at a later stage, should not be interpreted as triggering any suspension of South Africa's clear obligations under the Rome Statute[60].

Back in South Africa, in the high court, the legal position set out by the respondents was challenged by the applicants, and mainly on the following grounds. First, articles 86, 87(1) and 89 of the Rome Statute bind a state party to adhere to an ICC request for the arrest and surrender of a person within that state's jurisdiction. Second, South Africa, by virtue of the Implementation Act, is bound by the obligations in terms of the Rome Statute as incorporated into domestic law. Third, South Africa became liable to arrest and surrender Al-Bashir from the moment that he entered the country. Fourth, the only basis on which a state party could avoid its obligation to arrest and surrender an individual such as President Al-Bashir, would be if he enjoyed some kind of immunity from arrest or from the jurisdiction of a relevant domestic court.

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[59] See ICC Decision on South Africa's obligation to arrest and surrender Omar Al Bashir, *Al Bashir*, ICC-02/05-01/09-242, para 4.

[60] ICC Decision on South Africa's obligation, para 8.

In light of the position taken by the ICC, as well as the positions of the applicants in the Al-Bashir matter before the high court, and subsequently the respondents before the Supreme Court of Appeal, it is necessary to explore in more detail the impact of immunities on South Africa's international and domestic obligations to adhere to ICC requests for the arrest and surrender of individuals such as (now, former) president Al-Bashir of Sudan. We will first look at the high court decision, and thereafter consider the judgment by the Supreme Court of Appeal that was delivered in March 2016.

The high court in *Southern Africa Litigation Centre v Minister of Justice* (supra) noted that diplomatic immunity is governed by the Diplomatic Immunities and Privileges Act 37 of 2001. Section 4 of the Immunities Act recognises that heads of state are 'immune from civil and criminal jurisdiction to the extent afforded to them under customary international law, or as agreed to between South Africa and the relevant State party, or as are conferred on them by the Minister of International Relations'.[61] The court noted that the agreement between South Africa and the AU Commission grants privileges and immunity to members of the Commission and the delegates and other representatives of intergovernmental organisations attending the AU Summit. The court stated that the 'only grounds on which President Al-Bashir could conceivably be alleged to enjoy immunity would be as a head of state in terms of the host agreement'.[62] According to the court, neither basis conferred immunity on Al-Bashir. The host agreement did not confer immunity on heads of state. The notice that was published by the South African government in the *Government Gazette* also did not mention section 4 of the Immunities Act, which provides for head of state immunity. That leaves only customary international law as a basis for Al-Bashir to claim head of state immunity. It is on this latter point that one needs to point out the paradigm shift that international criminal law, as expressed in the Rome Statute of the ICC, brought to international and domestic law. The Rome Statute provides that heads of state do not enjoy immunity under its terms. South Africa also incorporated this into domestic law. To the extent that the Immunities Act confers a discretion on the Minister to grant immunities and privileges on persons of her choosing, the court noted that the Minister must still do so lawfully, and in accordance with South Africa's domestic and international obligations. Clearly South Africa's obligations flowing from the Constitution, the

61 *Southern Africa Litigation Centre v Minister of Justice*, para 28.

62 Ibid.

Rome Statute of the ICC and the Implementation Act trump any decision by the Minister to effectively prevent the arrest and surrender of a person subject to an ICC warrant and request for surrender. Furthermore, decisions by the AU also cannot trump South Africa's obligations under the Rome Statute and under domestic law. According to the high court in South Africa, the status of AU decisions in domestic law 'is persuasive, at best'.[63]

It is worth referring, again, to the relevance of the ICC decision on the failure by the DRC to arrest and surrender Al-Bashir. The high court in *Southern Africa Litigation Centre v Minister of Justice* took notice of the ICC's views on the failure of the DRC – a state party to the Rome Statute – to arrest Al-Bashir and to surrender him to the ICC. Furthermore, it was noted above that there exists an apparent contradiction in the Rome Statute between articles 27 and 98. The judgment in *Southern Africa Litigation Centre v Minister of Justice* supported the view that in cases of Security Council referrals, states parties to the Rome Statute (like South Africa and the DRC) are, in principle, obliged to adhere to requests from the ICC for the arrest and surrender of individuals, including heads of state, from states that are not party to the Rome Statute. The court noted 'the fact that Members of the UN agree to accept and carry out the decisions of the Security Council'.[64] With reference to the reasoning by the relevant ICC pre-trial chamber in the DRC matter, the court noted that 'in the event of a conflict in the obligations of members of the UN under the UN Charter and their obligations under any other international agreement their obligations under the Charter would prevail'.[65] These observations by the court may not be the most exhaustive of reasoning; some might even say it is rather glib. Nevertheless, the high court in *Southern Africa Litigation Centre v Minister of Justice* interpreted *domestic law* first and foremost, namely the relevant provisions of South Africa's Implementation Act, and also the various executive decisions and agreements between South Africa and the AU. The court gave support to the view that the apparent contradiction between articles 27 and 98 of the Rome Statute has a solution based on the inherent pragmatism of the Rome Statute. This pragmatism is based on a premise: ideally, all states in the world should eventually sign up to the Rome Statute, thus providing for the system of complementarity whereby states accept first responsibility to investigate and prosecute the most serious crimes

[63] *Southern Africa Litigation Centre v Minister of Justice*, para 28.

[64] *Southern Africa Litigation Centre v Minister of Justice,* para 32.

[65] Ibid.

under international law. Where states are unwilling or unable to undertake this duty, the ICC will step in. Of course, there are many states, also in Africa, that are not (yet) states party to the Rome Statute. The Statute thus provides that the Security Council of the UN can refer situations that would fall within the substantive jurisdiction of the ICC to the ICC – even in situations involving states that are not party to the Rome Statute. Since virtually all states in the world are members of the UN, this incorporation of Security Council referrals into the ICC system clearly aims to plug impunity gaps. Of course, there is much to criticise, not least because of the real and perceived political biases of the Security Council. But, imperfect as the Rome Statute system might be, the fact is that South Africa signed up to it. Indeed, South Africa fully incorporated the Rome Statute into domestic law. The high court in *Southern Africa Litigation Centre v Minister of Justice* (supra) was correct to emphasise this point. The high court thus held that the South African government had failed to arrest Al-Bashir. Indeed, the President of Sudan was allowed to leave South Africa unhindered. The court found the government's conduct to have been unconstitutional. The government subsequently appealed the decision.

In *Minister of Justice and Constitutional Development v Southern Africa Litigation Centre* the Supreme Court of Appeal considered the following issues relevant to the present discussion:

(a) Did the relevant stipulations in the hosting agreement between South Africa and the AU, together with certain ministerial proclamations, provide President Al-Bashir with immunity (at least for so long as the proclamation was not set aside)?

(b) If there was no immunity based on the host agreement and the ministerial proclamation, was President Al-Bashir entitled to immunity from arrest and surrender to the ICC by virtue of customary international law and s 4(1) of the Diplomatic Immunities and Privileges Act 37 of 2001?

(c) If President Al-Bashir would ordinarily have been entitled to such immunity did the provisions of the Implementation Act remove that immunity?

(d) If the immunity was not removed by the Implementation Act, have Security Council Resolution 1593 (2005) and the relevant provisions of the Genocide Convention of 1948 removed his immunity?[66]

As far as the hosting agreement between South Africa and the AU is concerned, the Supreme Court of Appeal noted that the effect of article VIII of the agreement was 'not only the

[66] *Minister of Justice and Constitutional Development & others v Southern Africa Litigation Centre & others* 2016 (3) SA 317 (SCA), para 18.

principal, but also the only', an argument advanced by the government before the high court.[67] The Supreme Court of Appeal agreed with the high court's understanding of the issue. By simply looking at the terms of the hosting agreement between South Africa and the AU, the Supreme Court of Appeal agreed with the high court that the agreement conferred 'immunity on members or staff of the AU Commission and on delegates and other representatives of intergovernmental organisations'. The immunity thus conferred clearly did not include AU member states or their representatives or delegates.[68]

More importantly for present purposes, is the next issue that the Supreme Court of Appeal dealt with, namely whether there was immunity under customary international law and section 4(1) of the Diplomatic Immunities and Privileges Act. Section 4 (1)(*a*) of the Immunities Act essentially provides that a head of state enjoys the immunity that 'heads of state enjoy in accordance with the rules of customary international law'. The Supreme Court of Appeal remarked that, when construing section 4(1)(*a*) and its reference to customary international law, it must be read in the light of the Constitution and obligations flowing from the Constitution. The Supreme Court of Appeal referred to the submissions made by the Helen Suzman Foundation (as *amicus curiae*) which were premised on the Constitution in the following terms:

> '[Under] the Constitution the government is required to take steps to ensure that persons accused of international crimes are detained, arrested and prosecuted before an appropriate tribunal. This duty is reinforced by the fact that, under s 232, customary international law is law in South Africa unless it is inconsistent with the Constitution or an Act of Parliament. Section 231 deals with the legal effect of international agreements, such as the Rome Statute [of the ICC], to which South Africa is a party. Under s 231(4) an international agreement becomes law in South Africa when it is enacted into law by national legislation. So customary international law is to be read in the light of legislation under which South Africa has enacted international agreements into law.'[69]

The question of immunity, as per customary international law and the Diplomatic Immunities and Privileges Act, must be analysed with reference to the full constitutional and international criminal justice regime relevant to the fundamental issue at hand, namely the arrest of a sitting

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[67] Ibid., para 40.

[68] *Minister of Justice and Constitutional Development v Southern Africa Litigation Centre*, para 41.

[69] *Minister of Justice and Constitutional Development v Southern Africa Litigation Centre*, para 53.

President of a foreign state to be surrendered to the ICC in order to stand trial on the most serious crimes under international law. As we have seen, South Africa has incorporated the Rome Statute into domestic law.

The Supreme Court of Appeal noted that Part 9 of the Rome Statute 'deals comprehensively' with the obligations of international and judicial assistance to the ICC in the performance of its tasks.[70] Article 86 of the Rome Statute imposes a general obligation to 'cooperate fully' with the ICC in the investigation and prosecution of crimes within the jurisdiction of the ICC. In addition, article 89 deals with the arrest and surrender of persons to the ICC as well as with the fact that the ICC is entitled to request a state party to cooperate in securing such arrest and surrender.

Crimes like genocide, war crimes and crimes against humanity are by their nature and in some instances per definition made possible by state conduct. This does not of course imply that state officials, including heads of state and government, should automatically be targeted for prosecution. The fundamental principle is still that of individual criminal responsibility. But, as the Supreme Court of Appeal also noted, article 27 of the Rome Statute 'deals with the possibility that the crime being prosecuted is likely in many instances to have been perpetrated by a state actor, ranging from a head of state to a humble official or soldier, and therefore the possibility would exist of the accused person raising a claim to immunity in accordance with long-established principles of customary international law'.[71] One of the outstanding features of the international criminal justice system is embodied in article 27(1) of the Rome Statute of the ICC which provides that official capacity (including as head of state) shall in no case exempt a person from criminal responsibility. This provision refers to criminal trials before the ICC. Like the high court, South Africa's Supreme Court of Appeal also recognised the relevance of article 98 for the discussion about the impact of immunities before the ICC. It is not necessary to repeat the debate about the apparent tension between articles 27 and 98 here, suffice to note that the Supreme Court of Appeal also recognised the lack of clarity on the legal obligations of states party to the Rome Statute (such as South Africa) vis-à-vis non-party states like Sudan. Should South Africa adhere to a request for assistance from the ICC, or should

[70] Ibid., para 57.

[71] *Minister of Justice and Constitutional Development v Southern Africa Litigation Centre*, para 59.

South Africa respect the immunity from arrest afforded to a visiting head of state (for instance President Al-Bashir of Sudan on the occasion of the AU Summit in Johannesburg in 2015)? Importantly, the Supreme Court of Appeal decided to use a constitutional frame as a starting point in the search for a solution to the apparent contradictory legal obligations that South Africa faced, and as presented by the Government as reasons for the non-adherence to the ICC request. The Supreme Court of Appeal stated:

> 'South Africa is bound by its obligations under the Rome Statute. It is obliged to cooperate with the ICC and to arrest and surrender to the court persons in respect of whom the ICC has issued an arrest warrant and a request for assistance. To this end it passed the Implementation Act. The relationship between that Act and the head-of-state immunity conferred by customary international law and [the Diplomatic Immunities and Privileges Act] lies at the heart of this case. But the starting point is not immediately with these, but with the Constitution.'[72]

The Supreme Court of Appeal correctly highlighted the incorporation of customary international law via section 232 of the Constitution. The court further noted the mechanism in terms of which international agreements become part of South African law. With reference to the judgment by the Constitutional Court of South Africa in *Glenister v President of the Republic of South Africa*[73] ('Glenister II'), the court noted with approval the Constitutional Court's description of the 'special place'[74] that international law fulfils in the South African legal and constitutional system. Since head of state immunity forms part of customary international law, which in turn is incorporated into South African law via the Constitution, the Supreme Court of Appeal proceeded to unpack the nature of head-of-state immunity in customary international law.

The Supreme Court of Appeal pointed to the relevance of a possible international-crimes exception to head of state immunity. The crisp issue is that there is no unanimity amongst commentators as to the right of states to ignore head-of-state immunity when requested to cooperate with the ICC to bring an individual before the ICC to stand trial for the most serious crimes under international law. The Supreme Court of Appeal recognised the legitimacy of the proposition that a national court, asked to provide assistance to an international tribunal, is not

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[72] Ibid., para 61.

[73] *Glenister v President of the Republic of South Africa & others* 2011 (3) SA 347 (CC) ('Glenister II').

[74] *Minister of Justice and Constitutional Development v Southern Africa Litigation Centre*, para 62.

necessarily in a position to rely on an international crimes exception to head-of-state immunity.[75] Importantly, the Supreme Court of Appeal noted that the ICC itself (as we have seen earlier in this comment) has articulated the position that South Africa was obliged to arrest and surrender President Al-Bashir, with reference to the effect of a Security Council Resolution, not with reference to the nature of the crimes for which Al-Bashir's arrest warrants were issued. Thus, according to the ICC, and according to how the Supreme Court of Appeal read the ICC decision on South Africa's obligations, it was the Security Council Resolution that provided the exception to the fact that South Africa would otherwise be obliged to respect the immunity from arrest of a visiting President of a state that is not a party to the Rome Statute.

With respect to the role of customary international law, it appears from the judgment that the Supreme Court of Appeal was (reluctantly) unable to conclude that there is under customary international law *as it currently stands* an 'international-crimes exception to the immunity and inviolability that heads of state enjoy when visiting foreign countries and before foreign national courts.'[76] This view of the Supreme Court of Appeal is in line with most authorities on public international law. Professor James Crawford, for instance, states emphatically that it is 'well established' that serving heads of state enjoy *immunity ratione personae* from the jurisdiction of foreign states. This head of state immunity applies to international crimes as well.[77] Incidentally, Crawford also noted that recent developments in international criminal law do not necessarily change the accepted position under general international law. With reference to the impact of the Rome Statute of the ICC, he states: 'The entitlement of nationals of non-parties to personal immunity is not obviously eroded, particularly in the light of Article 98(1) of the ICC Statute.'[78] South Africa's Supreme Court of Appeal's view that there is still no general 'international-crimes exception' to the immunity and inviolability of visiting heads of states, seems therefore to be in the mainstream of international law thinking.

But the analysis does not stop with customary international law (via the Constitution) or with the Rome Statute of the ICC. It must include a proper analysis of the application of South

[75] *Minister of Justice and Constitutional Development v Southern Africa Litigation Centre*, para 77.

[76] Ibid., para 84.

[77] Crawford 2012, pp. 499-500.

[78] Ibid., p 501.

Africa's Implementation of the ICC Act, which serves as a transformation of the Rome Statute into domestic law. The Supreme Court of Appeal acknowledged the nature of the Implementation Act as a legal regime that incorporates an international agreement into South African law. Thus, the court posed the question whether the Implementation Act 'has the effect of removing the immunity that President Al Bashir would otherwise enjoy'.[79]

The Supreme Court of Appeal started to answer the question with the observation that the Implementation Act needs to be interpreted in light of section 39(2) of the Constitution, which obliges the court to interpret the law in a way that 'promotes the spirit, purport and objects of the Bill of Rights'.[80] The Supreme Court of Appeal took a decidedly human rights-centric approach and noted that reference to the two ICC arrest warrants shows that the conduct of which Al-Bashir stands accused (war crimes, crimes against humanity and genocide) involve acts that would infringe also South Africa's Bill of Rights. The court was careful not to conflate its task with that of an adjudicator of the merits of the allegations, but noted that the nature of the allegations 'illustrates the importance, in the context of the interpretation of the Implementation Act, of construing it in a way that accords with and gives effect to the spirit, purport and objects of the Bill of Rights'.[81]

The long title of the Implementation Act clearly describes the purpose of the Act in terms of the broader aims of the international criminal justice system provided for in the Rome Statute. This includes the criminalisation of the most serious crimes under international law, notably genocide, war crimes, crimes against humanity and aggression, as well as for the arrest and surrender to the ICC of persons accused of having committed these serious crimes. Against this background, and with reference to the facts before the Court, the Supreme Court of Appeal stated:

> '[T]here is no dispute that President Al Bashir is subject to the jurisdiction of the ICC and can be prosecuted by it for his alleged crimes. He has been stripped of any immunity before the ICC. It is therefore important that the purpose of the Implementation Act is to provide a framework to ensure the effective implementation of the Rome Statute. It is to *ensure* that South Africa conforms with its obligations under the Rome Statute. In that regard there is no doubting its obligation to endeavour

[79] *Minister of Justice and Constitutional Development v Southern Africa Litigation Centre*, para 86.

[80] Ibid., para 87.

[81] *Minister of Justice and Constitutional Development v Southern Africa Litigation Centre*, para 88.

to bring President Al Bashir before the ICC for trial. The head-of-state immunity claimed for him is only a procedural bar to the enforcement of that obligation in this country. It is not an immunity that confers impunity for any wrongdoing on his part.'[82]

There is, per the objectives of the Implementation Act, indeed a clear statutory (and constitutional) duty on South Africa to bring to justice persons who commit atrocity crimes, either in a court in South Africa under domestic laws, where possible, or in the event of South Africa declining or being unable to go ahead with the prosecution, and in line with the principle of complementarity, in the ICC. The court referenced this general objective of the Implementation Act not because there was any attempt or even suggestion that Al-Bashir should have been prosecuted in South Africa, but rather to underscore the general thrust of the Implementation Act, which is to give the fullest effect possible to the aims of the Rome Statute of the ICC, and, importantly, also the Constitution, via section 231 which provides for the incorporation of international agreements, such as the Rome Statute.[83]

Having considered the general aims and objectives of the Implementation Act, the Supreme Court of Appeal turned to the specific provisions that were really at the heart of the matter before the Court: the provisions of the Implementation Act dealing with the requests for assistance from the ICC, in particular requests for assistance in terms of arrest warrants issued by the ICC for the purpose of securing the presence before the ICC of alleged perpetrators of international crimes.

The Supreme Court of Appeal noted that none of the provisions of the Implementation Act that deal with arrest and surrender mentions the issue of immunity. Indeed, it is not apparent where a claim to immunity could find its place in the inquiry contemplated by section 10(1) of the Implementation Act. The court stated that the inquiry is 'expressly confined to the three matters specified and none of those appear to involve issues of immunity'.[84] The three specified matters in section 10(1) are:

- whether the warrant applies to the person in question;
- whether the person has been arrested in accordance with the procedures laid down by domestic law (meaning, primarily, the Criminal Procedure Act); and

[82] Ibid., para 90.

[83] *Minister of Justice and Constitutional Development v Southern Africa Litigation Centre* (supra) at para 92.

[84] Ibid., para 99.

- whether the rights of the person, as contemplated in the Bill of Rights, have been respected, if, and the extent to which they are or may be applicable.

The only relevance of immunity in the context of section 10 would be if an arrest would be unlawful because of the existence of immunity. But that, according to the Supreme Court of Appeal, begs the very question whether, in relation to an ICC arrest warrant and request for assistance, such immunity exists. It is therefore important to look at section 10(9), which deals specifically with the relevance of claims to immunity to the order of surrender to the ICC. It is worth quoting the text of section 10(9) here:

> 'The fact that the person to be surrendered is a person contemplated in section 4(2)(a) or (b) [of the Implementation Act] does not constitute a ground for refusing to issue an order contemplated in subsection (5).'

The 'person' referred to in section 4(2) includes 'a person' who 'is or was a head of state'. The Supreme Court of Appeal noted that this provision is clearly applicable to an individual like President Al-Bashir. And the fact that President Al-Bashir 'was such a person would not have provided a ground for a magistrate not to make an order for his surrender in terms of s 10(5)'.[85]

There is one further matter to be considered, namely the interaction (and apparent tension) between the provisions of the Implementation Act and the Diplomatic Immunities and Privileges Act. Commentators like Tladi noted that there is an apparent conflict between section 10(9) of the Implementation Act 'and the various provisions of the [Diplomatic Immunities and Privileges Act] under which Al-Bashir could claim immunity and inviolability.' He then anticipated the next step, namely that a court will have to address, through ordinary rules of interpretation, in particular the rule that wherever possible 'legislative provisions should be interpreted in such a way so as to promote consistency.' Tladi concluded that the outcome of such a process of interpretation would be difficult to predict. He then offered the following possible solution:

> '[One] possible interpretation would be to require the respect of immunity only for international conferences of international organizations such as the AU or the UN. This would mean that for other visits including state visits and personal visits, Al-Bashir, though still entitled to immunity and inviolability under international law, would not have such protection under South African

[85] *Minister of Justice and Constitutional Development v Southern Africa Litigation Centre*, para 100.

law. The reasoning for the differentiation is that with respect to other visits, South Africa is free not to invite him – or to invite him but require him not to come to South Africa.'[86]

Three months after the publication of Tladi's thoughts on a possible solution for the apparent clash between the provisions of the Implementation Act and the Diplomatic Immunities and Privileges Act, the Supreme Court of Appeal delivered judgment on precisely this issue of interpretation of the contradictory language of the two statutes. The Court held:

'The Implementation Act is a specific Act dealing with South Africa's implementation of the Rome Statute. In that special area the Implementation Act must enjoy priority. I would not, however, use the language of repeal or amendment. It is rather more an example of the application of the related principle in the converse situation embodied in the maxim *generalia specialibus non derogant* (general words and rules do not derogate from special ones). Where there is legislation dealing generally with a topic and, either before or after the enactment of that legislation, the legislature enacts other legislation dealing with a specific area otherwise covered by the general legislation, the two statutes coexist alongside one another, each dealing with its own subject-matter and without conflict. In both instances the general statute's reach is limited by the existence of the specific legislation. So [the Diplomatic Immunities and Privileges Act] continues to govern the question of head-of-state immunity, but the Implementation Act excludes such immunity in relation to international crimes and the obligations of South Africa to the ICC.'[87]

The fundamental effect of the adoption of the Implementation Act by South Africa was to accept one of the aims of the international criminal justice movement (of which the ICC is a key role-player), namely that immunity, in whatever form, should not serve as an obstacle to the prosecution of international crimes. The decision of the Supreme Court of Appeal in the Al-Bashir arrest matter contributes to the above-mentioned movement. Indeed, the conclusion of the majority opinion of the court is as strong a domestic statement in favour of the ideals of international criminal justice as one can get. On the effect of the adoption of the Implementation Act, the court held:

'I conclude therefore 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 the prosecution of international

[86] Tladi 2015, p 1046.

[87] *Minister of Justice and Constitutional Development v Southern Africa Litigation Centre*, para 102.

> crimes in this country or to South Africa cooperating with the ICC by way of the arrest and surrender of persons charged with such crimes before the ICC, where an arrest warrant had been issued and a request for cooperation made. I accept, in the light of the earlier discussion of head-of-state immunity, that in doing so South Africa was taking a step that many other nations have not yet taken. If that puts this country in the vanguard of attempts to prevent international crimes and, when they occur, cause the perpetrators to be prosecuted, that seems to me a matter for national pride rather than concern. It is wholly consistent with our commitment to human rights, both at a national and an international level. And it does not undermine customary international law, which as a country we are entitled to depart from by statute as stated in s 232 of the Constitution. What is commendable is that it is a departure in a progressive direction.'[88]

An important contextual matter is the South African government's understanding of its obligations under the Constitution, the Rome Statute of the ICC, and the Implementation Act. Earlier in this chapter it was noted that when South Africa, as a state party to the Rome Statute, received the first arrest warrant and request for assistance from the ICC in the Al-Bashir matter in 2009, the relevant government organ did act in terms of section 8(1) of the Implementation Act, subsequently securing a warrant for the arrest of Al-Bashir issued by a South African magistrate. The Supreme Court of Appeal took this initial executive action as supportive of the legal conclusion that South Africa had an obligation to arrest President Al-Bashir – an obligation that existed in 2009 and that was still applicable in 2015 when Al Bashir attended the AU summit in Johannesburg.

An aspect of the Al-Bashir matter that received considerable attention in academic commentary as well as in argument before the Supreme Court of Appeal is the proposition that, even if legal mechanisms such as the Implementation Act did not take away Al-Bashir's head-of-state immunity, it had been waived as a consequence of Security Council Resolution 1593 of 2005. The court however did not find it necessary to further pronounce on the legal consequences of Security Council Resolution 1593, since, as per the majority opinion, the Implementation Act does indeed oust head-of-state immunity. This conclusion puts the Supreme Court of Appeal's decision at the forefront of international criminal law jurisprudence. But even if the court were to conclude that the wording of the Implementation Act does not oust South Africa's obligation to respect the personal immunity of a visiting head of state of a country that is not party to the

[88] Ibid., para 103.

Rome Statute of the ICC, the relevant Security Council Resolution, properly construed, may indeed obligate states (whether party to the Rome Statute or not) to fully cooperate with the ICC. Professor Erika de Wet, a renowned expert on the legal nature of Security Council Resolutions, opined that 'there is no requirement under international law that the Security Council should spell out an obligation to lift immunity'. The reference to 'full cooperation' in Resolution 1593 should be taken to denote all required measures under domestic and international law, including lifting immunities.[89] Thus, the obligation on Sudan to lift Al-Bashir's immunity requires all member states of the UN 'to regard his immunity as having been waived'.[90]

The Supreme Court of Appeal judgment on the application of the Constitution and the Implementation Act on the Al Bashir matter is not reliant on Security Council Resolution 1593. The ratio of the decision is built on the text and foundational values of the Constitution, on South Africa's international obligations under the Rome Statute, and on the text and proper interpretation of the Implementation Act. But it is nevertheless important to note the legal effect of yet another layer of international obligations, via the Security Council of the UN, that were ostensibly disregarded by the South African government when it failed to arrest Al-Bashir. The relevant South African authorities, including the police and the central government itself, were wrong to ignore the letter and spirit of the Implementation Act and the Rome Statute of the ICC. Dismissing Government's appeal, the Supreme Court of Appeal thus replaced the high court order with an order that read, in part:

> 'The conduct of the respondents in failing to take steps to arrest and detain, for surrender to the International Criminal Court, the President of Sudan, Omar Hassan Ahmad Al Bashir, after his arrival in South Africa on 13 June 2015 to attend the 25th Assembly of the African Union, was inconsistent with South Africa's obligations in terms of the Rome Statute and s 10 of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, and unlawful.'[91]

It should be noted that South Africa's Supreme Court of Appeal was not the only senior domestic court on the African continent to find that the national government has violated its

[89] De Wet 2015, p 1061.

[90] Ibid., p 1062.

[91] *Minister of Justice and Constitutional Development v Southern Africa Litigation Centre*, para 113.

own laws when it failed to arrest President Al-Bashir of Sudan.[92] In Kenya, a state party to the Rome Statute that has also domesticated the Statute via legislation,[93] the Nairobi Court of Appeal held that the Kenyan Government's failure to arrest Al-Bashir violated relevant international law, the Kenyan Constitution, and national law. The Court of Appeal noted:

> 'Kenya clearly found itself in a rare geopolitical predicament when it was requested by the ICC to effect the arrest and surrender of President Al Bashir. The choice was between cooperating with the ICC and remaining true to the African Union resolution not to cooperate with the ICC. In view of the law that we have set out in this judgment, the former was the only tenable legal choice for Kenya; that is, to demonstrate its commitment to champion the fight on global impunity. But by inviting President Al Bashir to the inauguration of a new Constitution, which ironically has one of the most progressive Bill of Rights in the region, the Government of Kenya itself acted with impunity and joined States like Malawi, Djibouti, Chad, Uganda and the Democratic Republic of Congo … against which the ICC has issued non-cooperation decisions and reported their failures to arrest President Al Bashir to the Security Council as well as the Assembly of States Parties.'[94]

Regarding the question of Head of State immunity, the Nairobi Court of Appeal went further than what the Supreme Court of Appeal in South Africa was prepared to say about the meaning, scope and application of domestic and international law. While it reached essentially the same conclusion as its South African counterpart, the Court of Appeal in Nairobi reasoned as follows:

> 'For Kenya the Rome Statute, which is a higher norm than the [Security Council Resolution], and customary international law imposed an overriding obligation to cooperate. Under customary international law, the UN Charter, the Rome Statute and the International Crimes Act, and as a UN Member State it was legitimate for Kenya to disregard President Al Bashir's immunity and execute the ICC's request for cooperation by arresting him, because under the concept of *pacta sunt servanda* embodied in Article 26 of the Vienna Convention on the Law

[92] Kemp 2019, pp. 61-82.

[93] International Crimes Act 16 of 2008 (Kenya).

[94] Kenya, Court of Appeal at Nairobi, Civil Appeal 105 of 2012 & Criminal Appeal 274 of 2011 (Consolidated), *Attorney General & two others v Kenya Section of International Commission of Jurists*, Judgement, 16 February 2018 [2018] eKLR.

of treaties, '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.'[95]

The above discussed domestic judicial findings against the governments of South Africa and Kenya, both of which failed to provide the required co-operation with the ICC in the form of effecting the arrest of the then sitting President of Sudan, were echoed at the international level in that the ICC Pre-Trial Chamber found against South Africa in the matter concerning that country's non-co-operation with the ICC.[96] The obligation of states parties to the Rome Statute to provide co-operation to the fullest extent was confirmed by the ICC Appeals Chamber in the matter of the non-compliance by the Kingdom of Jordan with the request by the ICC for the arrest and surrender of President Al-Bashir.[97] The ICC Appeals Chamber held that the ICC is not prevented, by virtue of a right to personal immunity of a sitting Head of State, from requesting a state party to the Rome Statute to arrest a Head of State of a non-party state (such as Sudan).[98]

6.7 Final Observations

Internal and external manifestations of the ideal of Pan-Africanism also find expression in modalities of co-operation in criminal matters, whether with regards to international tribunals (vertical co-operation), or between states (horizontal co-operation). While this chapter is not a comprehensive survey of all relevant African laws, instruments and practices in the area of co-operation in criminal matters, the discussion of selected issues points to significant incongruities resulting from differing views on human rights, the death penalty, treaty obligations, incorporation of international law, and so on. International co-operation in criminal matters is a complex subject, and Pan-Africanism, as an ideal and as a practical organising

[95] *Attorney General v Kenya Section of International Commission of Jurists*, pp. 56-57.

[96] 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, 6 July 2017, ICC-02/05-01/09-302.

[97] 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, Appeals Chamber, Judgment in the Jordan Referral re Al-Bashir Appeal, 6 May 2019, ICC-02/05-01/09-397-Corr.

[98] See also: Kress 2019, available at https://www.toaep.org/ops-pdf/8-kress. Accessed 19 December 2021.

principle, can show the way forward, but this will require consistency on human rights, normative clarity, and pragmatism not of the cynical kind.

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