

Recent developments

The Al Bashir debacle

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Summary

This article deals with the failure of states to comply with their obligation to execute the warrant issued by the International Criminal Court for the arrest of President Omar Hassan Ahmed Al Bashir of Sudan. President Al Bashir is to stand trial on serious charges, including acts of genocide, based on action taken on instructions of President Al Bashir to eliminate nationals of Sudan who are not of Arab extraction. President Al Bashir may be depicted as the Adolph Hitler of Africa by virtue of his efforts to create a Sudanese Herrenvolk and, in the process, causing the death of between 200 000 and 400 000 members of African tribes in the Sudanese province of Darfur and the displacement of approximately 2,5 million people. A special focus of the article is the hosting of President Al Bashir by the South African government in June 2015 at a summit of the African Union in Johannesburg, in blatant defiance of the rule of law, and escorting him out of the country in contempt of an order of the High Court, Gauteng Division. South Africa claimed that its obligations as a member state of the African Union prevented it from executing the warrant of arrest. However, South Africa was compelled to execute the warrant of arrest (a) as a state party to the ICC Statute; (b) because the Security Council had instructed all member states of the United Nations to do so, and (c) because South Africa's own Rome Statute Implementation Act, 2002 requires it of South African authorities. Claiming that President Al Bashir as a head of state enjoyed sovereign immunity is also based on a

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false premise, since sovereign immunity does not apply to prosecutions in international tribunals. Maintaining that President Al Bashir is immune from prosecution in the ICC is criticised in the article.

Key words: *Al Bashir; African Union; genocide; International Criminal Court (co-operation with); rule of law; sovereign immunity; warrant of arrest (duty to execute)*

1 Introduction

The International Criminal Court (ICC) was founded for the purpose of bringing to justice perpetrators of 'the most serious crimes of concern to the international community as a whole'.¹ President Omar Hassan Ahmed Al Bashir of Sudan was indicted to stand trial in the ICC on charges of an impressive list of crimes against humanity and war crimes,² and of genocide.³ The warrant for the arrest of President Al Bashir was based on 'reasonable grounds to believe' that he had committed the crimes with which he was charged, taking into account 'the evidence or other information submitted by the Prosecutor'.⁴ The situation in Darfur was referred to the ICC by the Security Council of the United Nations (UN).⁵ On 6 March 2009, Pre-Trial Chamber I of the ICC requested all state parties to the ICC Statute to arrest and surrender the Sudanese President for trial by the ICC.⁶

South Africa participated actively in the founding of the ICC. For example, the Working Group on Composition and Administration of the Court was chaired by Mr Medard R Rwelamira of South Africa; a resolution initiated by South Africa was adopted to include the crime of apartheid as a particular instance of crimes against humanity;⁷ the principle of criminal justice that an accused shall 'not have imposed on him or her any reversal of the burden of proof or any onus of

1 Rome Statute of the International Criminal Court, Preamble para 4, UN Doc A/CONF183/9 (17 July 1998), reprinted in (1998) 37 *International Legal Materials* 1002 (ICC Statute).

2 *Prosecutor v Omar Hassan Ahmad Al Bashir (Warrant of Arrest for Omar Hassan Ahmad Al Bashir)* Case ICC-02/05-01/09-1 (4 March 2009).

3 *Prosecutor v Omar Hassan Ahmad Al Bashir (Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir)* Case ICC-02/05-01/09-95 (12 July 2010).

4 Art 58(1)(a) ICC Statute (n 1 above).

5 SC Res 1593 (2005) of 31 March 2005, SCOR (Res & Dec) 131, UN Doc S/RES/1593 (2005).

6 *Prosecutor v Omar Hassan Ahmed al Bashir (Request to All States Parties to the Rome Statute for the Arrest and Surrender of Omar Al Bashir)* Case ICC-02/05-01/09-7 (6 March 2009); see also *Prosecutor v Omar Hassan Ahmed al Bashir (Supplementary Request to All States Parties to the Rome Statute for the Arrest and Surrender of Omar Hassan Ahmad Al Bashir)* Case ICC-02/05-01/09-96 (21 July 2010).

7 'Proposal for Article 5 Submitted by Lesotho, Malawi, Namibia, South Africa, Swaziland, and United Republic of Tanzania' UN Doc A/CONF183/C1/L13 (22 June 1998); also see arts 7(1)(j) and 7(2)(h) of the ICC Statute (n 1 above).

rebuttal⁸ was also introduced by the South African delegation;⁹ at the Review Conference held in Kampala, Uganda, in 2010, Denmark and South Africa acted as focal points for stocktaking on complementarity; and Ms Yolanda Dwalia of South Africa occupied centre stage in the development and marketing of the important principle of positive complementarity.¹⁰ Judge Navanethem Pillay of South Africa was elected in 2002 for a period of six years as one of the first body of judges in the ICC.¹¹ South Africa ratified the ICC Statute on 27 November 2000 and in 2002 enacted the Implementation of the Rome Statute of the International Criminal Court Act (Implementation Act) to bring the country's municipal law into conformity with its international obligations as a state party to the ICC Statute.¹²

2 Omar Hassan Ahmed Al Bashir

In 1989 Omar Hassan Ahmed Al Bashir (1944-), a brigadier in the Sudanese army, led a military *coup* that ousted the democratically-elected Prime Minister Sadiq al-Mahdi.¹³ He became President of Sudan in 1993.

The charges against Al Bashir before the ICC included acts of genocide of which the selected victims were members of (black) African tribes in the province of Darfur. Al Bashir allegedly was the Adolf Hitler of Africa who wanted to establish *ein Herrenvolk* in Sudan and, in the process of doing this, he sought the extinction and expulsion from the country of all peoples in Darfur who were not of Arab extraction. According to the Sudanese government, the violence in Darfur resulted in the deaths of about 10 000 people, but other estimates set the death toll at between 200 000 and 400 000. It caused the displacement of approximately 2,5 million of the total population of Darfur of 6,2 million people.

President Al Bashir, probably for the same reason, not so long ago orchestrated the secession of Southern Sudan with its predominantly Christian population. Under the rules of international law, he could have granted the right to vote in the referendum that preceded the

8 Art 67(1)(i) ICC Statute (n 1 above).

9 H Friman 'Procedural law of the Criminal Court - An introduction' in F Lattanzi & WA Schabas (eds) *Essays on the Rome Statute of the International Criminal Court* (2004) 201-228.

10 As to the principle of positive complementarity, see JD van der Vyver 'The principle of complementarity' in M Novaković (ed) *Basic concepts of public international law: Monism and dualism* (2013) 373-376-383.

11 Justice Pillay resigned from the ICC shortly before her term of office came to an end in order to become the United Nations High Commissioner for Human Rights.

12 Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.

13 It is perhaps worth noting that the Constitutive Act of the African Union which entered into force on 26 May 2001 included amongst its basic principles 'condemnation and rejection of unconstitutional changes of government'. Art 4(p) Constitutive Act of the African Union, AU Doc CAB/LEG/23.15 (2000).

secession of Southern Sudan to all the citizens of Sudan, because Southern Sudan was also part of the national territory of the Sudanese population of the north.¹⁴ However, the right to vote in the referendum was by law confined to the residents of Southern Sudan, probably to ensure a positive outcome.

3 Violation by the South African authorities of its obligation to arrest and surrender the Sudanese President

The government of the Republic of South Africa hosted the 25th Summit of the African Union (AU) in Johannesburg from 7 to 15 June 2015. The government had to provide guarantees to the AU that President Al Bashir would not be arrested while attending the Summit as representative of Sudan as an AU member state.

On 13 June 2015, after it had become known that the South African government permitted the President of Sudan to attend the meeting of the AU, a pre-trial chamber of the ICC confirmed that South Africa was under a legal obligation to arrest President Al Bashir and to surrender him for prosecution in The Hague.¹⁵ On the previous day, at the request of South Africa, a meeting was scheduled with the presiding judge of the pre-trial chamber, Justice Cuno Tarfusser of Italy. The meeting was attended by the South African ambassador to the Netherlands, a South African legal representative, and representatives of the office of the registrar and of the prosecutor of the ICC. The South African delegation alleged that there was an anomaly in the ICC Statute between article 27(2), proclaiming that '[i]mmunities ... 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 person', and article 98(1), which prohibits the Court

to proceed with a request for surrender or assistance which would require the requested state to act inconsistently with an obligation under international law with respect to the state or diplomatic immunity of a person or property of a third state, unless the Court can first obtain the cooperation of that third state for the waiver of the immunity.

It was further noted that South Africa was under competing obligations towards the ICC and the AU. Referring to previous decisions of the ICC, the pre-trial chamber explained that there were no anomalies since the Security Council had impliedly waived the

14 See the Canadian case *Reference re Secession of Quebec* [1998] 2 SCR 217; see also JD van der Vyver 'Self-determination of the peoples of Quebec under international law' (2000) 10 *Journal of Transnational Law and Policy* 1-37.

15 *Prosecutor v Omar Hassan Ahmed Al Bashir (Decision following the Prosecutor's Request for an Order Further Clarifying that the Republic of South Africa is Under the Obligation to Immediately Arrest and Surrender Omar Al Bashir)* Case ICC-02/05-01/09-242 (13 June 2015).

sovereign immunity of the Sudanese President when it referred the situation in Darfur to the ICC, and that South Africa was under a legal obligation to arrest President Al Bashir and to surrender him to the seat of the Court.¹⁶

In South Africa, the Southern Africa Litigation Centre brought suit against the Minister of Justice and Constitutional Development and nine other state officials in the High Court (Gauteng Division) in Pretoria, for an order compelling the respondents to prevent President Omar Al Bashir from leaving the country until an order was made by the Court relating to his arrest and surrender for trial by the ICC. On 14 June 2015, Fabricius J granted an interim order to that effect.¹⁷ On the following day, three judges of the High Court unanimously confirmed this and made the following order:¹⁸

- (1) that the conduct of the respondents, to the extent that they have failed to take steps to arrest and/or detain the President of Sudan Omar Hassan Ahmed Al Bashir ... is inconsistent with the Constitution of the Republic of South Africa, 1996, and invalid;
- (2) that the respondents are forthwith compelled to take all reasonable steps to prepare to arrest President Bashir without a warrant ... and detain him, pending a formal request for his surrender from the International Criminal Court;
- (3) that the applicant is entitled to the costs of the application on a *pro bono* basis.

In blatant defiance of this court order, South African authorities escorted President Al Bashir to the airport and secured his safe departure from the country.

The High Court of South Africa (Gauteng Division) subsequently gave reasons for its ruling.¹⁹ It noted, among other things, a constitutional determination that South African law is to be interpreted to comply with international law;²⁰ that the ICC Statute 'expressly provides that heads of state do not enjoy immunity under its terms', and that similar provisions are included in the South African Implementation Act;²¹ that decisions of the AU cannot trump South Africa's obligations under the ICC Statute;²² and that the integrity of the rule of law must prevail.²³

16 *Prosecutor v Omar Hassan Ahmed Al Bashir* (n 15 above) para 5-9, with reference to *Prosecutor v Omar Hassan Ahmed Al Bashir (Decision on the Co-operation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court)* Case ICC-02/05-01/09-195 para 28-31 (9 April 2014).

17 *The Southern Africa Litigation Centre v The Minister of Justice and Constitutional Development & Others* Case 27740/2016 (14 June 2015).

18 *The Southern Africa Litigation Centre v The Minister of Justice and Constitutional Development & Others* Case 27740/2015 (24 June 2015).

19 As above.

20 *The Southern Africa Litigation Centre* (n 18 above) para 24, with reference to *Glenister v The President of the Republic of South Africa & Others* 2011 (3) SA 347 para 97.

21 *The Southern Africa Litigation Centre* (n 18 above) para 28.8.

22 *The Southern Africa Litigation Centre* para 28.13.3.

23 *The Southern Africa Litigation Centre* para 33.

There are indeed three reasons why South Africa was under a legal obligation to execute the warrant of arrest.

(i) As a member state of the ICC South Africa was compelled to do so

The duty of member states to co-operate with the ICC falls into two categories. Some co-operation obligations are subject to prescribed conditions; others are unconditional and absolute. The duty to execute warrants of arrest belongs to the latter category. A member state of the ICC cannot under any circumstances whatsoever decline to execute this latter obligation.²⁴

(ii) Acting under its chapter VII powers, the Security Council gave instructions to Sudan and all states involved in the situation in Darfur to fully co-operate in bringing Al Bashir to justice²⁵

All member states of the UN are compelled to execute chapter VII decisions of the Security Council.²⁶ If a conflict were to exist between the obligations of a member state of the UN under the UN Charter and any other international agreement (for example, the Constitutive Act of the AU), the obligations under the UN Charter must prevail.²⁷

(iii) South African law requires it of the South African authorities

The Implementation Act of 2002 was enacted by the South African Parliament 'to create a framework to ensure that the [ICC] Statute is effectively implemented in the Republic',²⁸ and 'to ensure that anything done in terms of this Act conforms to the obligations of the Republic in terms of the Statute'.²⁹ The formalities to be complied with in executing a warrant of arrest and the duty to surrender a suspect to the Court are specified in great detail in chapter 4 of the Implementation Act.

The High Court in its unqualified condemnation of the government's disregard of the rule of law and contempt of court sounded a compelling warning for the future:³⁰

A democratic state based on the rule of law cannot exist or function if the government ignores its constitutional obligations and fails to abide by court orders. A court is the guardian of justice, the corner-stone of a democratic system based on the rule of law. If the state, an organ of state

24 Art 89(1) ICC Statute (n 1 above).

25 SC Res 1593 (2005) (n 5 above).

26 Charter of the United Nations art 25, TS No 993; 3 Bevans 1153; 59 Stat 1031; 1976 YBUN 1043 (UN Charter).

27 Art 103 UN Charter.

28 Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 sec 3(a).

29 Implementation of the Rome Statute of the International Criminal Court (n 28 above) sec 3(b).

30 *The Southern Africa Litigation Centre* (n 18 above) para 37.2.

or state official does not abide by court orders, the democratic edifice will crumble stone-by-stone until it collapses and chaos ensues.

Earlier, the Constitutional Court proclaimed that '[t]he principle of the rule of law, the separation of powers and judicial independence, underscored by international law, are indispensable cornerstones of our constitutional democracy'.³¹ Commenting on this passage, the High Court observed:³²

The emphasis must be on 'indispensable'. Where the rule of law is undermined by government, it is often done gradually and surreptitiously. Where this occurs in court proceedings, the court must fearlessly address this through its judgments, and not hesitate to keep the executive within the law, failing which it would not have complied with its constitutional obligations to administer justice to all persons alike without fear, favour or prejudice.

The Minister of Justice and Constitutional Development and his co-respondents applied for leave to appeal against the judgment of 23 June,³³ but leave to appeal was dismissed with costs by the High Court, because the appeal had no reasonable prospect of success.³⁴

South Africa was severely criticised by members of the international community of states for its failure to comply with its international commitments and obligations in the Al Bashir debacle. This included – to mention but one example – the government of Botswana. On 14 August 2015, the office of the President of Botswana, Ian Khama, called on all member states of the ICC to co-operate with the Court and proclaimed: 'We therefore find it disappointing that President Al Bashir avoided arrest when he cut short his visit and fled, in fear of arrest, to his country.'³⁵

4 Violation of the duty to execute a warrant of arrest by states other than South Africa

In 2010 the Republic of Chad became the first state party to the ICC Statute to host a fugitive from justice wanted by the Court without arresting him. President Al Bashir was permitted to attend a meeting of heads of state of the AU which was held on 22 July 2010 in that

31 *Justice Alliance of South Africa v The President of the Republic of South Africa; Freedom under the Law v The President of South Africa* 2011 (5) SA 388 (CC) para 40.

32 *The Southern Africa Litigation Centre* (n 18 above) para 38.

33 n 19 above.

34 *Minister of Justice and Constitutional Development & Others v The Southern Africa Litigation Centre*, Case 27740/2015 (16 September 2015).

35 Z Mogopodi 'Botswana critical of SA over Bashir' *IOL News* 17 June 2015, <http://www.iol.co.za/news/africa/botswana-critical-of-sa-over-bashir-1.1872656> (accessed 31 October 2015).

country. For this, Chad was severely criticised by legal counsel of No Peace Without Justice³⁶ and, following subsequent visits by President Al Bashir to Chad, also by the European Union.³⁷ The pre-trial chamber of the ICC from the outset proceeded on the assumption 'that the current position of Omar Al Bashir as head of a state which is not a party to the [ICC] Statute, has no effect on the Court's jurisdiction over the present case'.³⁸ President Al Bashir was nevertheless hosted by Chad on several subsequent occasions: from 7 to 8 August 2011 to attend the inauguration of that country's President Idriss Deby Itno; during the weekend of 16 to 17 February 2013 to participate in a meeting of Sahel and Saharan African leaders; on 10 May 2013 to attend the Great Green Wall summit; and, most recently, on 29 March 2014 to attend the closing session of the second forum on peace and security in Darfur.

President Al Bashir was also hosted by the Republic of Kenya, another state party to the ICC Statute. On 27 August 2010 he was a guest of the Kenyan government at a function arranged for the signing of Kenya's new Constitution. President Al Bashir was thereafter again invited to participate in an Inter-Governmental Authority for Development summit, to be held in Nairobi on 30 October 2010, to discuss the forthcoming referendum for the secession from Sudan of the southern region of that country. Because of widespread criticism of his visiting Kenya, the summit was moved to Addis Ababa in Ethiopia. On 28 November 2011, a judge of the High Court of Kenya in Nairobi, the Honorable Nicholas RO Ombija, authorised the issuing of a provisional warrant for the arrest of President Al Bashir,³⁹ and on 25 January 2012 a provisional arrest warrant was actually issued by

36 No Peace Without Justice 'International Criminal Justice Programme, NPWJ calls on ICC and states parties to respond strongly to Chad's failure to arrest President Bashir of Sudan' <http://www.npwj.org/ICC/NPWJ-calls-ICC-and-States-Parties-respond-strongly-Chad's-failure-arrest-President-Bashir-Sudan> (accessed 31 October 2015).

37 See 'Statement by the spokesperson of European Union High Representative Catherine Ashton on the visit of Sudanese President Al Bashir to Chad' Doc 160513/3 (16 May 2015) (proclaiming that 'Chad, like all parties to the Rome Statute, is under the legal obligation to co-operate with the Court and indeed to arrest and surrender anyone sought by the Court').

38 *Prosecutor v Omar Al Bashir (Decision on the Prosecutor's Application for a Warrant of Arrest against Omar Hassan Ahmed Al Bashir)* Case ICC-02/05-01/09-3 para 41 (4 March 2009).

39 *The Kenya Section of the International Commission of Jurists v Attorney-General & Minister of State for Provincial Administration and Internal Security*, Miscellaneous Criminal Application 685 of 2010, [2011] KeLR (28 November 2011) http://www.kanyalaw.org/CaseSearch/view_preview1.php?link=74146956184203788646854 (accessed 31 October 2015).

the same judge to be executed if President Al Bashir were to set foot in Kenya.⁴⁰

On 14 October 2011, President Al Bashir attended a summit of the Common Market for Eastern and Southern Africa held in Lilongwe, the capital of Malawi. However, after Ms Joyce Banda became President of Malawi on 7 April 2012, that country was no longer prepared to host a meeting of the AU if President Al Bashir would not be arrested. The summit for the election of a new president of the AU that was to take place in Malawi (where Ms Nkosazana Dlamini-Zuma of South Africa was elected president of the AU on 15 July 2012 to become the very first female president of the organisation) consequently was moved to Addis Ababa in Ethiopia.

Several other African states party to the ICC Statute also permitted President Al Bashir to participate in events held in their countries without securing his arrest. On 8 May 2011, for example, he attended the inauguration of President Ismael Omar Guelleh of Djibouti, and in 2014 he was permitted, without threat of arrest, to attend the Common Market for Eastern and Southern Africa (COMESA) summit that took place on 26 and 27 February 2014 in Kinshasa in the Democratic Republic of the Congo. In August 2013, Al Bashir planned to travel to the Central African Republic to attend the 50th anniversary of the country's independence, but his travel to that country was aborted at the last minute, mainly due to pressure from France.⁴¹

The duty to co-operate with the ICC to bring perpetrators of 'the most serious crimes of concern to the international community as a whole' to justice⁴² is not confined to state parties to the ICC Statute. It can also derive from an agreement of a non-party state to co-operate, or a decision of the Security Council, acting under its chapter

40 *The Kenya Section of the International Commission of Jurists v Attorney General, Minister of State for Provincial Administration and Internal Security & Kenyans for Justice and Development, Miscellaneous Criminal Application 685 of 2010, Provisional Warrant of Arrest under Section 32 of the International Criminal Act, 2008* 23 January 2012, http://www.sudantribune.com/spip.php?iframe&page=imprimable&id_article=41413.htm (accessed 31 October 2015).

41 In its report on non-co-operation of 7 November 2013, the Bureau of the ICC stated that President Al Bashir was 'reported to have visited ... the Central African Republic' (*Report of the Bureau on Non-Co-operation*, Doc ICC-ASP/12/13 para 4 (7 November 2013)); see also *The Kenya Section of the International Commission of Jurists* (n 40 above) para 22 (referring to the 'purported visit of Al Bashir to the Central African Republic'). Pre-Trial Chamber II did subsequently take note of the failure of the authorities of the Central African Republic to arrest and surrender Abdel Raheem Muhammad Hussein, whose indictment also stemmed from the situation in Darfur, but declined to make a finding on non-co-operation due to the situation of unrest in the country that deprived the relevant authorities from taking action. *Prosecutor v Abdel Raheem Muhammad Hussein (Decision on the Co-operation of the Central African Republic Regarding Abdel Raheem Muhammad Hussein's Arrest and Surrender to the Court)* Case ICC-02/05-01/12-21 para 13 (13 November 2013).

42 See ICC Statute (n 1 above) Preamble para 4.

VII powers, instructing states to co-operate in bringing certain perpetrators of such crimes to justice.

This latter basis of the obligation of a non-party state to execute a warrant of arrest and to surrender the suspect for prosecution in the ICC applies in the cases against Sudanese perpetrators,⁴³ including the indictment of President Al Bashir. When the Security Council referred the situation in Darfur to the ICC, it decided 'that the government of the Sudan and all other parties to the conflict in Darfur shall co-operate fully with and provide any necessary assistance to the International Criminal Court and the Prosecutor pursuant to the present resolution'.⁴⁴ The pre-trial chamber, when granting the application for a warrant of arrest against President Al Bashir, decided that Sudan, though not a state party to the ICC Statute, 'has the obligation to fully co-operate with the Court',⁴⁵ and in its final decision ordered that 'a request for co-operation seeking the arrest and surrender of Amar Al Bashir' be transmitted to all state parties to the ICC Statute and to all members of the Security Council.⁴⁶

Sudan was, therefore, duty-bound to co-operate with the Court even though it was not a state party to the ICC Statute.⁴⁷ It has been emphatically decided 'that once there has been a UNSC referral of a situation of a non-state party, the entire legal framework of the Statute, particularly Part IX on co-operation, applies'.⁴⁸ Needless to say, Sudan has persistently refused to co-operate with the ICC in bringing President Al Bashir to justice.⁴⁹

The obligation of Libya, also not a state party to the ICC Statute, to fully co-operate with the Court by virtue of the fact that the situation in that country was referred to the ICC by the Security Council of the

43 The first Sudanese case that was referred to the Security Council based on a lack of co-operation by the home state was *Prosecutor v Ahmad Muhammad Harun & Ali Muhammad Ali Abd-Al-Rahman (Decision Informing the United Nations Security Council about the Lack of Co-operation by the Republic of the Sudan)* Case ICC-02/05-10/07-57 (25 May 2010).

44 SC Res 1593 (n 5 above) para 2.

45 Case ICC-02/05-01/09-3 (n 38 above) para 241.

46 n 38 above, para 93.

47 *Prosecutor v Omar Hassan Ahmed al Bashir (Prosecution Request for a Finding of Non-Compliance Against the Republic of the Sudan in the Case of The Prosecutor v Omar Al Bashir Pursuant to Article 87(7) of the Rome Statute)* Case ICC-02/05-01/09-219 (19 December 2014); see also *Prosecutor v Omar Hassan Ahmed al Bashir (Decision on Prosecutor's Request for a Finding of Non-Compliance against the Republic of the Sudan)* Case ICC-02/05-01/09-227 paras 13-16 (9 March 2015).

48 Case ICC-02/05-01/09-219 (n 47 above) para 27.

49 n 47 above, paras 13-21; see also *Prosecutor v Omar Hassan Ahmed al Bashir (Registrar's Report on the Implementation of the Decision on the Prosecutor's Request for a Finding of Non-Compliance Against the Republic of the Sudan)* Case ICC-02/05-01/09-237 para 3 (23 April 2015) (noting that the Embassy of Sudan to the Kingdom of the Netherlands refused to transmit a letter of the Registrar of the ICC to Sudanese authorities and that non-co-operation of Sudan has been reported to the Security Council).

UN, has been confirmed similarly in a series of cases.⁵⁰ Other instances where non-party states have hosted the Sudanese President included those when President Al Bashir travelled to Kuwait on 18 and 19 November 2013,⁵¹ and on 25 to 26 March 2014;⁵² to Ethiopia on 30 January 2014,⁵³ on 17 February 2014,⁵⁴ on 26 and 27 April 2014,⁵⁵ and on 5 November 2014;⁵⁶ to Qatar on 8 July 2014;⁵⁷ to Saudi Arabia on 1 October 2014;⁵⁸ and to Egypt on 18 and 19 October 2014.⁵⁹

5 Legal framework

Immediately after the indictment of President Al Bashir, the AU, at a meeting held in July 2009, endorsed a decision of the African State Parties to the Rome Statute of the International Criminal Court, proclaiming that⁶⁰

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- 50 See *Prosecutor v Saif Al-Islam Gaddafi & Abdullah Al Senussi (Decision on Libya's Submission Regarding the Arrest of Saif Al-Islam Gaddafi)* Case 01/11-01/11-72 paras 12-13 (7 March 2012); *Prosecutor v Saif Al-Islam Gaddafi & Abdullah Al Senussi (Decision on the Postponement of the Execution of the Request for Surrender of Saif Al-Islam Gaddafi Pursuant to Article 95 of the Rome Statute)* Case 01/11-01/11-163 para 27-30 (1 June 2012); *Prosecutor v Saif Al-Islam Gaddafi & Abdullah Al Senussi (Decision Requesting Libya to Provide Submissions on the Status of Implementation of Its Outstanding Duties to Co-operate with the Court)* Case 01/11-01/11-545 para 2 (15 May 2014); and in the Appeals Chamber, *Prosecutor v Saif Al-Islam Gaddafi & Abdullah Al Senussi (Decision on the Request to File a Consolidated Reply)* Case 01/11-01/11-480 (AC) para 18 (22 November 2013).
- 51 *Prosecutor v Omar Hassan Ahmed Al Bashir (Decision Regarding Omar Al Bashir Potential Travel to the State of Kuwait)* Case ICC-02/05-01/09-169 (18 November 2013).
- 52 *Prosecutor v Omar Hassan Ahmed Al Bashir (Decision Regarding Omar Al Bashir Potential Travel to the State of Kuwait)* Case ICC-02/05-01/09-192 (24 March 2014).
- 53 *Prosecutor v Omar Hassan Ahmed Al Bashir (Decision on the 'Prosecution's Urgent Notification of Travel in the Case of 'The Prosecutor v Omar Al Bashir')* Case ICC-02/05-01/09-180 (30 January 2014).
- 54 *Prosecutor v Omar Hassan Ahmed Al Bashir (Decision on the 'Prosecution's Urgent Notification of Travel in the Case of 'The Prosecutor v Omar Al Bashir')* Case ICC-02/05-01/09-184 (17 February 2014).
- 55 *Prosecutor v Omar Hassan Ahmed Al Bashir (Decision Regarding the Visit of Omar Hasan Ahmed Al Bashir to the Federal Republic of Ethiopia)* Case ICC-02/05-01/09-199 (29 April 2014).
- 56 *Prosecutor v Omar Hassan Ahmed Al Bashir (Decision on the 'Prosecution's Urgent Notification of Travel in the Case of 'The Prosecutor v Omar Al Bashir')* Case ICC-02/05-01/09-215 (4 November 2014).
- 57 *Prosecutor v Omar Hassan Ahmed Al Bashir (Prosecution's Urgent Notification of Travel in the Case of 'The Prosecutor v Omar Al Bashir')* Case ICC-02/05-01/09-203 (7 July 2014).
- 58 *Prosecutor v Omar Hassan Ahmed Al Bashir (Prosecution's Notification of Travel in the Case of 'The Prosecutor v Omar Al Bashir')* Case ICC-02/05-01/09-208 (1 October 2014).
- 59 *Prosecutor v Omar Hassan Ahmed Al Bashir (Prosecution's Notification of Travel of Suspect Omar Al Bashir the Case of 'The Prosecutor v Omar Al Bashir')* Case No ICC-02/05-01/09-210 (14 October 2014).
- 60 *Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)* para 10, Doc Assembly/AU/13(XIII) (3 July 2009).

[t]he AU member states shall not co-operate pursuant to the provisions of article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of The Sudan.

The dispute between the ICC and the AU is centred upon a certain discrepancy between article 98(1) of the ICC Statute, which precludes the ICC from proceeding⁶¹

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 to the Court, unless the Court can first obtain the co-operation of that third state for the waiver of the immunity,

and article 27(2), which provides:⁶²

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.

A simple answer to the problem of reconciling articles 98(1) and 27(2) seems to be that the ICC can prosecute an official that enjoys sovereign immunity from prosecution in a national court if it can obtain custody of the official but cannot call on a state party to surrender that person to the seat of the Court while he or she is protected from prosecution under the rules of international law. However, this interpretation ignores the fact that state or diplomatic immunity is a component of state sovereignty and, therefore, only precludes the prosecution of (among others) heads of state in municipal courts. It does not apply to prosecutions before international tribunals.⁶³

A decision of Pre-Trial Chamber I relating to the failure of the Republic of Malawi to comply with the co-operation request of the ICC to arrest and surrender President Al Bashir outlined in some detail decisions of international organisations and judgments of international tribunals, dating back to the aftermath of World War I, that clearly endorsed the basic rule of international law which excludes the protection afforded to heads of state from prosecution in international tribunals.⁶⁴ It cited the decision of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties that recommended the establishment of a high tribunal to prosecute persons in authority responsible for war crimes committed in the context of World War I, and which rejected arguments founded on 'the alleged immunity, and in particular the alleged inviolability of

61 Art 98(1) ICC Statute (n 1 above).

62 Art 27(2) ICC Statute.

63 See *Prosecutor v Omar Hassan Ahmed al Bashir (Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Co-operation Request Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir)* Case ICC-02/05-01/09-139 para 18 (12 December 2011); Case ICC-02/05-01/11-195 (n 16 above) para 25.

64 Case ICC-02/05-01/09-139 (n 63 above) para 18.

a sovereign of a state', noting that 'this privilege ... is one of practical experience in municipal law' and that 'even if ... a sovereign is exempt from being prosecuted in a national court of his own country, the position from an international point of view is quite different'.⁶⁵

The Charter of the International Military Tribunal under which the major war criminals of World War II were prosecuted provided in similar vein:⁶⁶

The official position of defendants, whether as heads of state, or responsible officials in government departments, shall not be considered as freeing them from responsibility, or mitigating punishment.

The principle was reaffirmed by the International Military Tribunal in Nuremberg in the Trial of the Major War Criminals:⁶⁷

The principle of international law, which under certain circumstances protects the representatives of states, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.

The Charter of the International Military Tribunal for the Far East, under which Japanese war criminals were prosecuted in Tokyo, likewise provided:⁶⁸

Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to an order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the tribunal determines that justice so requires.

When Hiroshi Oshima, the Japanese ambassador to Berlin, was brought to trial, the tribunal rejected his reliance on diplomatic immunity. It decided:⁶⁹

Diplomatic privilege does not import immunity from legal liability, but only exemption from trial by the courts of the state to which an ambassador is accredited. In any event, this immunity has no relation to crimes against international law charged before a tribunal having jurisdiction. The tribunal rejects this special defence.

65 Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties 'Report Presented to the Preliminary Peace Conference, March 29, 1919' (1920) 14 *American Journal of International Law* 95 116.

66 Charter of the International Military Tribunal art 7, 82 UNTS 284 288 (1951).

67 *United States & Others v Göring & Others, Trials of the Major War Criminals Before the International Military Tribunal, Nuremberg 14 November 1945 - 1 October 1946*, Judgment, 1: 171 223; see also Charter of the International Military Tribunal (n 66 above) 22: 466.

68 Charter of the International Military Tribunal for the Far East, art 6 <http://www.jus.uio.no/english/services/library/treaties/04/4-06/military-tribunal-far-east.xml> (accessed 31 October 2015).

69 *International Military Tribunal for the Far East Judgment of 4 November 1948* in J Pritchard & SM Zaide (eds) *The Tokyo war crimes trial* 49: 824, http://www.crimeofaggression.info/documents/6/1948_Tokyo_Judgment.pdf (accessed 31 October 2015).

In 1950, the UN General Assembly included in the Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal the following proposition:⁷⁰

The fact that a person who committed an act which constitutes a crime under international law acted as head of state or responsible government official does not relieve him from responsibility under international law.

In essence, the same provision was included in the Statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY),⁷¹ and the International Criminal Tribunal for Rwanda (ICTR).⁷² Judgments of the ICTY and the ICTR were *ad idem* that these provisions 'are indisputably declaratory of customary international law'.⁷³

The principle was also clearly stated by the International Court of Justice (ICJ) in the *Arrest Warrant* case as a norm of customary international law: Immunity from prosecution does not mean impunity in respect of the crime committed:⁷⁴

Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.

The ICJ went on to say that the official who, by virtue of the sovereign immunity doctrine, cannot be prosecuted in state courts, may be subject to criminal prosecution in certain international criminal courts, such as the ICC.⁷⁵ The rule stated tentatively in the *Arrest Warrant* case was subsequently confirmed without reservation by the Appeals Chamber of the Special Court for Sierra Leone in the case against Charles Taylor.⁷⁶ The Court noted that sovereign immunity applied to prosecutions of an official of state A in the courts of state B; that the

70 *Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*, Principle III, GAOR, 5th Session, Supp (No 12), UN Doc A/1316 (1950).

71 Statute of the International Criminal Tribunal, art 7(2), contained in the annex of the *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, reprinted in (1993) 32 *International Legal Materials* 1192 (ICTY Statute).

72 *Statute of the International Tribunal for Rwanda*, art 6(2), contained in the annex of SC Res 955 (1994) 8 November 1994, UN SCOR (Res & Dec) 15, UN Doc S/INF/50, reprinted in (1994) 33 *International Legal Materials* 1602 (ICTR Statute).

73 *Prosecutor v Anton Furundžija (Judgment)* para 140, Case IT-95-17/1-T (10 December 1998); see also *Prosecutor v Slobodan Milošević & Others (Decision on Preliminary Motions)* para 28, Case IT-99-37-PT (8 November 2001).

74 *Democratic Republic of Congo v Belgium*, 2002 ICJ 3 para 60 (14 February 2002).

75 *Democratic Republic of Congo v Belgium* (n 74 above) para 61.

76 *Prosecutor v Taylor* 128 ILR 239 (31 May 2004).

Special Tribunal for Sierra Leone was not a national court of Sierra Leone but an international criminal court;⁷⁷ and that the principle of sovereign immunity 'derives from the equality of sovereign states and therefore has no relevance to international criminal tribunals which are not organs of a state but derive their mandate from the international community'.⁷⁸

Article 27(2) of the ICC Statute is, therefore, a hundred per cent in compliance with a basic norm of customary international law and, if the official concerned does not enjoy sovereign immunity from prosecution before the ICC, then there is no rule of international law that would be violated if he or she is to be surrendered to the Court. If President Al Bashir does not enjoy sovereign immunity for purposes of prosecution before the ICC, there is no immunity that needs to be waived by Sudan.

This interpretation seemingly renders at least part of article 98(1) redundant, but a finding of redundancy would again bring into contention the presumption of statutory interpretation that no provisions in a legal document are to be considered tautological. It should be noted that '[s]tate or diplomatic immunity of ... property of a third state' is not implicated by article 27(2), and as far as 'state or diplomatic immunity of a person' is concerned, if one ignores the fact that under the rules of customary international law such immunity does not bar prosecutions before an international tribunal, state parties must be taken to have waived such immunities by binding themselves to the provisions of article 27(2).

Akanda proposed that the tension between articles 27 and 98 can be resolved by confining article 27 to state party officials and making the provisions of article 98 applicable to state officials of non-party states.⁷⁹ Pre-Trial Chamber II, in an *obiter dictum*, seemed to support this proposition.⁸⁰ Having asserted that 'article 27(2) of the Statute, in principle, should be confined to those states parties who have accepted it',⁸¹ the pre-trial chamber went on to say:⁸²

It follows that when the exercise of jurisdiction by the Court entails prosecutions of a head of state of a non-state party, the question of personal immunities might validly apply. The solution provided for in the Statute to resolve such a conflict is found in article 98(1).

However, since sovereign immunity applies only to prosecutions in domestic courts, this reasoning is without merit. Nor would the fact that a state, be it a state party or non-party state, has legislation in place that extends sovereign immunity to prosecutions in

77 *Prosecutor v Taylor* (n 76 above) para 42.

78 *Prosecutor v Taylor* para 51.

79 D Akanda 'The legal nature of Security Council referrals to the ICC and its impact on Al Bashir's immunities' (2009) 7 *Journal of International Justice* 333-339.

80 Case ICC-02/05-01/11-195 (n 16 above).

81 Case ICC-02/05-01/11-195 para 26.

82 Case ICC-02/05-01/11-195 para 27.

international tribunals be of any consequence, since article 98(1) applies to 'obligations under international law' only.⁸³ It should, therefore, be evident⁸⁴

that the President of Sudan did not benefit from any immunity at international law under the circumstances, that therefore states parties would not find themselves confronted with conflicting obligations, and that consequently article 98(1) found no application.

As far as state parties are concerned, the Vienna Convention on the Law of Treaties furthermore provides that '[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.⁸⁵

The ICC has thus far avoided taking a clear stand on the conflict between articles 27(2) and 98(1) of the ICC Statute along these lines, by holding that the obligation of non-party states to execute the arrest warrant of President Al Bashir derives from the fact that the Security Council, acting under its chapter VII powers, have instructed all states, non-party-states included, to do so.

6 Remedies for non-co-operation

The ICC is entirely dependent on state parties, and in particular circumstances on non-party states, to execute a warrant of arrest and to surrender the accused for trial before the ICC. The ICC has on several occasions noted that 'unlike domestic courts, the ICC has no direct enforcement mechanisms in the sense that it lacks a police force' and, therefore, 'relies mainly on the state's co-operation, without which it cannot fulfil its mandate'.⁸⁶ This must for the greater part be taken care of by the law enforcement agencies of states.⁸⁷ State co-operation is, therefore, an important component of the

83 Art 98(1) ICC Statute (n 1 above); see also Case ICC-02/05-01/09-139 (n 63 above) para 20.

84 WA Schabas *The International Criminal Court: A commentary on the Rome Statute* (2010) 1042.

85 Vienna Convention on the Law of Treaties 1969, art 27, UN Doc A/Conf 39/27 (1969), 1155 UNTS 331, reprinted in (1969) 8 *International Legal Materials* 679 and in (1969) 63 *American Journal of International Law* 875.

86 Case ICC-02/05-01/09-242 (n 15 above) para 33; see also *Prosecutor v Omar Hassan Ahmed Al Bashir (Decision on the Non-Compliance of Chad with the Co-operation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al Bashir)* Case ICC-02/05-01/09-151 para 22 (26 March 2013); Case ICC-02/05-01/09-219 (n 47 above) para 17.

87 A Ciampi 'The obligation to co-operate' in A Cassese et al (eds) *The Rome Statute of the International Criminal Court: A commentary* (2002) 1607-1608; Friman (n 9 above) 209; E Hunter 'Establishing the legal basis for capacity building by the ICC' in M Bergsmo (ed) *Active complementarity: Legal information transfer* (2011) 67 72.

successful functioning of the ICC.⁸⁸ Cassese captured the gist of the problem confronting international criminal tribunals, with reference to the ICTY, in compelling terms:⁸⁹

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

This applies with equal force to the arrest and surrender for trial before the ICC of President Al Bashir.

This raises the critical question of how to respond to, and what to do about, the failure of states to comply with their obligation to execute an arrest warrant. The Pre-Trial Chamber II's initiative of notifying state parties in advance of President Al Bashir's possible travel arrangements for the foreseeable future⁹⁰ will not bring one closer to a satisfactory answer.

Some analysts have singled out problems attending state co-operation as the main weakness of the ICC regime,⁹¹ while others have noted, perhaps more modestly, that the effective functioning of

88 JN Maogoto *State sovereignty and international criminal law: Versailles to Rome* (2003) 253 277; B Broomhall *International justice and the International Criminal Court: Between sovereignty and the rule of law* (2003) 151 155 157; M Shaw 'The International Criminal Court – Some procedural and evidential issues' (1998) 3 *Journal of Armed Conflict Law* 56 79; B Swart & G Sluiter 'The International Criminal Court and international criminal co-operation' in HAM von Hebel et al (eds) *Reflections on the International Criminal Court: Essays in honour of Adriaan Bos* (1999) 91-92 94; D Rinoldi & N Parisi 'International co-operation and judicial assistance between the International Criminal Court and states parties' in F Lattanzi & WA Schabas (eds) *Essays on the Rome Statute of the International Criminal Court* (1999) 339-340 389; A Cassese 'The Statute of the International Criminal Court: Preliminary reflections' (1999) 10 *European Journal of International Law* 144 164; JK Cogan 'The problem of obtaining evidence for the International Criminal Court' (2000) 22 *Human Rights Quarterly* 404 425; JB Griffin 'A predictive framework for the effectiveness of international criminal tribunals' (2001) 34 *Vanderbilt Journal of Transnational Law* 405 439 449; M Frulli 'Jurisdiction *ratione personae*' in Cassese et al (n 87 above) 527 538-39; P Gaeta 'Official capacity and immunities' in Cassese et al (n 87 above) 975 982 993; F Terrier 'Powers of the trial chamber' in Cassese et al (n 87 above) 1259 1273; Board of Editors 'The Rome Statute: A tentative assessment' in Cassese et al (n 87 above) 1901 1911.

89 A Cassese 'On the current trends towards criminal prosecution of breaches of international humanitarian law' (1998) 9 *European Journal of International Law* 1 13; see also *Prosecutor v Tihomir Blaškić (Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997)* Case IT-95-14-A para 26 (29 October 1997).

90 *Prosecutor v Omar Hassan Ahmed al Bashir (Prosecution Notification of Possible Travel in the Case of The Prosecutor v Omar Al Bashir Pursuant to Article 97 of the Rome Statute)* Case ICC-02/05-01/09-148 (15 March 2013).

91 LN Sadat *The International Criminal Court and the transformation of international law: Justice for the new millennium* (2002) 276; TJ Farer 'Restraining the barbarians: Can international criminal law help?' (2000) 22 *Human Rights Quarterly* 90 107; see also Broomhall (n 88 above) 154-55.

the ICC will depend on the attitude of state parties.⁹² Others, again, have expressed the opinion that the ICC will be dependent on the Security Council for its effective functioning.⁹³ The bottom line, though, is that the ICC can only make a finding of non-compliance, leaving it up to the Assembly of States Parties or the Security Council (in cases of Security Council referrals) to take whatever action might be considered appropriate and feasible against the culprit state.⁹⁴

If the Security Council were to find that the failure of a state to co-operate with the ICC in bringing the perpetrator of the crime of genocide, a crime against humanity or a war crime to justice, constitutes a threat to international peace or security, it can impose punitive sanctions against that state as provided for in chapter VII of the UN Charter.⁹⁵ In *Prosecutor v. Blaškić*, the ICTY decided that the Court could not make recommendations as to the course of action the Security Council may wish to take,⁹⁶ and it stands to reason that the ICC is subject to the same constraint.⁹⁷ It should further be noted that in the case of the ICTY and ICTR, the Security Council 'did not show a particular willingness' to adopt punitive measures against states that failed to co-operate with the *ad hoc* tribunals.⁹⁸ As far as non-co-operation with the ICC in cases emanating from a Security Council referral is concerned, the Council has thus far not imposed any punitive sanctions but has merely on one occasion, in a country-specific context, stressed 'the need for co-operation with the International Criminal Court (ICC)'.⁹⁹

Although it may be legally feasible to expel state parties who violate their co-operation obligations from the ICC, this is not the solution,

92 RS Lee 'An assessment of the ICC Statute' (2002) 26 *Fordham International Law Journal* 750 754; B Swart 'General problems' in Cassese et al (n 87 above) 1589-1590.

93 R Wedgwood 'The ICC: An American view' (1999) 10 *European Journal of Human Rights* 93 106; M Bergsmo 'Occasional remarks on certain state concerns about the jurisdictional reach of the International Criminal Court, and their possible implications for the relationship between the Court and the Security Council' (2000) 69 *Nordic Journal of International Law* 87 94 109-110; D Sarooshi 'The peace and justice paradox: The International Criminal Court and the UN Security Council international tribunals' in D McGoldrick et al (eds) *The permanent International Criminal Court: Legal and policy issues* (2004) 95 102-105 n 49.

94 Arts 87(5)(b), 87(7) & 112(2)(f) ICC Statute (n 1 above); see also Cogan (n 88 above) 424 425.

95 Sadat (n 91 above) 259; Ciampi (n 87 above) 1635.

96 *Prosecutor v Tihomir Blaškić (Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997)* para 36, Case IT-95-14-AR 108bis (29 October 1997).

97 Sadat (n 91 above) 259; Ciampi (n 87 above) 1635.

98 P Gargiulo 'The controversial relationship between the International Criminal Court and the Security Council' in F Lattanzi & WA Schabas (eds) *Essays on the Rome Statute of the International Criminal Court* (1999) 102.

99 SC Res 2147 (2014), UN Doc S/RES/2147 (28 March 2014), Preamble para 26; see also operative paragraph 23 (stressing the importance 'to arrest and hold accountable those responsible for war crimes and crimes against humanity' in the Democratic Republic of the Congo to engage in 'both regional co-operation and co-operation with the ICC').

for many reasons. It is perhaps fair to conclude that the procedures that are in place to deal with non-co-operation are not designed to be confrontational or punitive. In its 2014 report on non-co-operation, the Bureau accordingly emphasised the importance of improving 'the diplomatic measures to address instances of non-co-operation',¹⁰⁰ and recommended that 'consultations amongst states parties continue with a view to share best practices in preventing non-co-operation and dealing with instances of non-co-operation'.¹⁰¹

In December 2011, the Assembly of States Parties adopted procedures to be followed by the Assembly of States Parties (not the Court) in cases of non-co-operation by state parties or non-party states that have contracted an obligation to co-operate with the ICC.¹⁰² These procedures distinguish between cases (a) where the Court has referred the matter of non-co-operation to the Assembly of States Parties,¹⁰³ and (b) where the matter has not yet been referred 'but there are reasons to believe that a specific and serious incident of non-co-operation in respect of a request for arrest and surrender of a person ... is about to occur'.¹⁰⁴ In the case of (a), the emphasis is on 'an informal and urgent response as a precursor to a formal response',¹⁰⁵ which could involve an urgent Bureau meeting, an open letter from the President of the Assembly of States Parties, or a public meeting orchestrated at the Bureau's request by the New York Working Group,¹⁰⁶ and, in the case of (b), the proceedings are exclusively confined to 'an urgent, but entirely informal response at the diplomatic level',¹⁰⁷ which could 'build on and institutionalise the good offices of the President of the Assembly'.¹⁰⁸ Provision is also made for the appointment of four focal points 'of equitable geographic representation' to assist the President in the execution of his or her good offices¹⁰⁹ and, perhaps most importantly, that the role of the Assembly of States Parties in trying to resolve instances of non-co-operation should not 'prejudice ... action taken by states at the bilateral or regional levels to promote co-operation'.¹¹⁰

100 *Report of the Bureau on Non-Co-operation* para 34, Doc ICC-ASP13/40 (5 December 2014).

101 *Report of the Bureau on Non-Co-operation* (n 100 above) para 50.

102 *Assembly Procedures Relating to Non-Co-operation*, Resolution ICC-ASP/10/Res5, Annex (21 December 2011).

103 *Assembly Procedures* (n 102 above) para 10, read with para 7(a).

104 *Assembly Procedures* para 11, read with para 7(b).

105 *Assembly Procedures* para 7(a).

106 *Assembly Procedures* para 14.

107 *Assembly Procedures* para 7(a).

108 *Assembly Procedures* para 15.

109 *Assembly Procedures* para 16.

110 *Assembly Procedures* para 12.

7 Final observations

Many successive administrations of the South African government have upheld a policy which has now come to be denounced internationally as a crime against humanity.¹¹¹ However, insofar as undermining the rule of law and the contemptuous disregard of judgments of courts of law are concerned, no government has throughout the history of South Africa stooped as low as the one currently in control.

Earlier, South Africa was committed to complying with its obligation as a state party to the ICC Statute to arrest the Sudanese President and to surrender him for trial in the ICC. For that reason, Al Bashir could not attend the inauguration of Jacob Zuma on 9 May 2009 as President of South Africa, or attend the soccer world championship that was held in the country in 2010. But now, the South African government, for profoundly obscure reasons, decided to change course and decided, in total disregard of the rule of law, not to arrest Al Bashir; and, in fact, in defiance of a court order – that is, in blatant contempt of court – to orchestrate and secure his safe departure from the country.

One is furthermore reminded that a pre-trial chamber of the ICC has established that there is reason to believe that President Al Bashir had orchestrated the killing of thousands, and the displacement of several millions, of inhabitants of Darfur selected by the powers that be because of their racial identity as members of black African tribes. For a predominantly black African government to, in a sense, condone the acts of racist barbarism orchestrated in Darfur through the enforced action of the President of Sudan is disturbing.

8 Postscript

At a recent meeting of the ANC's national executive committee, the party issued a statement proclaiming that '[t]he International Criminal Court is no longer useful for the purpose for which it was intended' and that South Africa will, therefore, withdraw from the ICC. The ANC's concerns were seemingly focused on the fact that only situations in African countries have led to prosecutions in the ICC. It failed to note that all those situations, except for two of them, were investigated by the ICC at the request of the countries concerned. The two exceptions (the situations in Darfur and in Libya) were referred to the ICC by the UN Security Council. It is also worth noting that the prosecuting office of the ICC is currently conducting a preliminary inquiry into the situations in Georgia, Afghanistan and Palestine. As noted in the text, the Assembly of States Parties does not impose punitive measures against states that decline to comply with their

111 See art 7(1)(j) of the ICC Statute (n 1 above).

commitment to co-operate with the Court, but addresses these matters by diplomatic means. The ANC's cause of grievance is, therefore, not the ICC but exposure by a South African court of the government's defiance of the rule of law and disrespect for judgments of a court of law. If South Africa withdraws from the ICC, its duty to arrest President Al Bashir will remain intact, because it has been ordered by the Security Council to execute the warrant of arrest. Is South Africa, therefore, also going to withdraw from the United Nations Organisation?