South Africa's Competing Obligations in Relation to International Crimes

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I Introduction

The need to end impunity for international crimes is largely recognised by the international community.[1] Accordingly, significant obligations have been imposed, by both conventional (treaty) and customary international law, on states to prosecute certain international crimes.[2] In addition to the duty to prosecute, conventional international law also imposes the duty to investigate allegations of international crimes[3] as well as the duty to cooperate in the investigation and prosecution of international crimes.[4] Conventional law has in fact accentuated a duty upon states to exercise jurisdiction over international crimes.[5]

South Africa's domestic legal order, at least in theory, is receptive to these obligations, including having in place a legal framework for the enforcement of international criminal law within the country. This is evidenced from its ratification and implementation of treaties that impose these obligations on South Africa in relation to certain international crimes.[6]

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[1] This is spelt out in various documents. For example, the determination to end impunity for 'the most serious crimes of concern to the international community' is stated in the preamble to the Rome Statute of the International Criminal Court, UN Doc A/CONF183/9 (17 July 1998), reprinted in (1998) 37 *ILM* 1002 ('Rome Statute'). African states have also reiterated their condemnation and rejection of impunity and commitment to fight impunity in the preamble to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (2014). In simple terms, an international crime is 'an offence which is created by international law' (R Cryer, H Friman, D Robinson & E Wilmshurst *An Introduction to International Criminal Law and Procedure* (2nd Edition, 2010) 8) or, put differently, 'any act entailing the criminal liability of the perpetrator and emanating from treaty or custom' (I Bantekas *International Criminal Law* (4th Edition, 2010) 8).

[2] See B van Schaack & RC Slye *International Criminal Law and its Enforcement: Cases and Materials* (2nd Edition, 2010) 21.

[3] See, eg, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) art 11 (Requires states parties to promptly and impartially investigate allegations of torture).

[4] Article 86 of the Rome Statute (Places a general obligation on states parties to 'cooperate fully with the [International Criminal] Court in its investigation and prosecution of crimes within the jurisdiction of the Court').

[5] See, eg, preamble to the Rome Statute (Recalls 'that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes').

[6] The South African government ratified the Rome Statute on 27 November 2000 and implemented it in 2002. Implementation of the Rome Statute Act 27 of 2002 ('ICC Act'). See also the Implementation of the Geneva Conventions Act 8 of 2012 ('GCA') and the Prevention and Combating of Torture of Persons Act 13 of 2013 ('Torture Act').

The country's relationship with international criminal law in practice is, however, controversial and has been described as 'complex' and 'schizophrenic'.[7] South Africa has taken contradictory positions on issues relating to international criminal law and justice. For example, the South African government participated in the drafting of the Rome Statute of the International Criminal Court (Rome Statute)[8] and supported the referral of Libya to the International Criminal Court (ICC). But four months after the referral, it joined other states in requesting the deferral of the case.[9] Also, despite having what has been described as 'the most progressive legislation for the prosecution of international crimes by its courts', the government has been reluctant to effectively implement the legislation.[10] Most controversially, on 19 October 2016, the government submitted an Instrument of Withdrawal from the Rome Statute to the United Nations (UN) Secretary General.[11] Following a High Court decision,[12] it withdrew the Instrument of Withdrawal.[13]

The complex nature of South Africa's relationship with the ICC is compounded by the position of the African Union (AU). The AU has opposed the prosecution of international crimes in the exercise of universal jurisdiction by non-African states, has argued that the ICC is selective or biased, and has decided that AU member states should not cooperate with the ICC in the execution of the arrest warrants issued by the ICC against President Omar al-Bashir of The Sudan (al-Bashir) and the late Colonel Qadhafi of Libya.[14] The AU's position places

[7] See, eg, C Gevers 'International Criminal Law in South Africa' in E de Wet, H Hestermeyer & R Wolfrum (eds) *The Implementation of International Law in Germany and South Africa* (2015) 403–404.

[8] Rome Statute (note 1 above).

[9] See Gevers (note 7 above) at 403.

[10] Ibid at 404.

[11] See 'Declaratory statement by the Republic of South Africa on the Decision to Withdraw from the Rome Statute of the International Criminal Court' quoted in 'Rome Statute of the International Criminal Court Rome, 17 July 1998–South Africa: Withdrawal', C.N.786.2016.TREATIES-XVIII.10 (Depositary Notification)(25 October 2016), available at https://treaties.un.org/doc/Publication/CN/2016/CN.786.2016-Eng.pdf ('Instrument of Withdrawal'). In accordance with art 127(1) of the Rome Statute, South Africa's 'withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date'. On the constitutionality of this controversial action, see part VII.

[12] *Democratic Alliance v Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening)* [2017] ZAGPPHC 53, 2017 (3) SA 212 (GP), [2017] 2 All SA 123 (GP).

[13] See 'South Africa revokes ICC withdrawal', Mail & Guardian (8 March 2017), available at https://mg.co.za/article/2017-03-08-south-africa-revokes-icc-withdrawal.

[14] See *Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)* Doc Assembly/AU/13(XIII) (1–3 July 2009) at para 10 and *Decision on the Implementation of the Assembly Decisions on the International Criminal Court*, Doc Ex.Cl/670(XIX), contained in Assembly/AU/Dec.366(XVII)(30 June–1 July 2011) at para 6. For further reading on the relationship between the ICC and AU/Africa and the AU's decision to not cooperate with the ICC, see, eg, T Murithi 'The African Union and the International Criminal Court: An Embattled Relationship' (2013) 8 *Institute for Justice and Reconciliation Policy Brief* 1–9; M du Plessis, T Maluwa & A O'Reilly *Africa and the International Criminal Court* (2013), available at https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/0713pp_iccafrica.pdf; and International Commisson of Jurists, Kenya *Reflections on the African Union ICC Relationship* (2014), available at http://www.icj-kenya.org/dmdocuments/books/reflections%20on%20the%20african%20union%20icc%20relationship.pdf. It is worth noting that the tension between the African states and the ICC in relation to al-Bashir has resulted in the ICC 'threatening to refer the matter to the UN Security Council'. See 'ICC Threatens

African states that are parties to the Rome Statute in a difficult position. They have obligations towards the AU that they must comply with, or risk sanctions; while at the same time they have obligations under the Rome Statute to cooperate with the ICC in the investigation and prosecution of international crimes.[15]

The Kenyan government, for example, found itself in exactly this position when President al-Bashir, against whom two arrest warrants have been issued by the ICC,[16] visited its country in 2010. The government did not arrest him on the basis that it had to balance its obligations towards the AU with those towards the ICC. Kenya's preference for compliance with its AU obligations resulted in non-compliance with its obligations under the Rome Statute: a position that was endorsed by the AU.[17]

The South African government was in a similar position when al-Bashir visited the country in 2015. The government did not arrest him, primarily on the basis of al-Bashir's incumbent Head of State immunity, and he subsequently left the country.[18] This was done in the face of two interim High Court orders prohibiting al-Bashir from leaving South Africa and directing the government 'to take all necessary steps to prevent him from doing so';[19] and one further High Court order of the Full Bench stating that the government's failure 'to take steps to arrest and/or detain' al-Bashir was in contravention of the Constitution and thus invalid. The second order also required the government forthwith 'to take all reasonable steps'[20] to arrest and detain al-Bashir, pending a formal request from

to Refer al-Bashir case to UN' Legalbrief (22 February 2017), available at http://legalbrief.co.za/diary/legalbrief-africa-new/story/icc-threatens-to-refer-al-bashir-case-to-un/pdf.

[15] These conflicts are discussed in Part C.3. See also M du Plessis & C Gevers 'Balancing Competing Obligations: The Rome Statute and AU Decisions' (2011) *ISS Paper 225*, 2–3.

[16] ICC Pre-Trial Chamber I issued the arrest warrants after it considered that 'there are reasonable grounds to believe that Omar al-Bashir is criminally responsible as an indirect perpetrator, or as an indirect co-perpetrator' for crimes against humanity and war crimes (in relation to the first arrest warrant issued on 4 March 2009) and three counts of genocide (in relation to the second arrest warrant issued on 12 July 2010). See, generally, *Prosecutor v Omar Hassan Ahmad al-Bashir* (*Warrant of Arrest for Omar Hassan Ahmad al-Bashir*) ICC-02/05-01/09-1 (4 March 2009) PT Ch I; and *Prosecutor v Omar Hassan Ahmad al-Bashir* (Second Decision on the Prosecution's Application for a Warrant of Arrest) ICC-02/05-01/09-94 (12 July 2010) PT Ch I.

[17] See du Plessis & Gevers (note 15 above) at 3.

[18] The government has subsequently stated in its Instrument of Withdrawal from the Rome Statute that it 'was faced with the conflicting obligation to arrest President al-Bashir under the Rome Statute, the obligation to the AU to grant immunity in terms of the Host Agreement, and the General Convention on the Privileges and Immunities of the Organization of African Unity of 1965 as well as the obligation under customary international law which recognises the immunity of sitting heads of state'. Instrument of Withdrawal (note 11 above) at 2.

[19] *Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre and Others* [2016] ZASCA 17 (SCA), 2016 (4) BCLR 487 (SCA), [2016] 2 All SA 365 (SCA), 2016 (3) SA 317 (SCA) ('*al-Bashir*') at para 5 (Reproduces the High Court orders).

[20] Ibid at para 6. For further details on this see MJ Ventura 'Escape From Johannesburg? Sudanese President Al-Bashir Visits South Africa, and the Implicit Removal of Head of State Immunity by the UN Security Council in light of *Al-Jedda*' (2016) 13(5) *Journal of International Criminal Justice* 995, esp 1001–1005.

the ICC for his surrender.[21] That decision was subsequently upheld, although for different reasons, by the Supreme Court of Appeal (*al-Bashir*).[22] A previous case – *SALC* – on South Africa's obligations 'to investigate crimes against humanity'[23] also illustrates the complex nature, in practice, of South Africa's relationship with international criminal justice.

SALC and *al-Bashir* concern South Africa's obligations in relation to the investigation and cooperation in the prosecution of international crimes, and in relation to immunity. In the light of these cases, we consider South Africa's competing international and domestic obligations regarding international crimes. We identify the specific obligations that South Africa has under both international and domestic (South African) law, establish the obligations that are in possible conflict from the perspective of international as well as domestic law, and discuss approaches to addressing the possible conflicts.

In Part II, we briefly introduce the issues in *SALC* and *al-Bashir*. We then set out, in Part III, the basis for the South African government's exercise of jurisdiction over international crimes by looking at both international and domestic law. Thereafter, we outline South Africa's obligations in relation to the investigation and prosecution of international crimes as stipulated in both international and domestic law, and elaborate on conflicts between obligations to (not) cooperate stemming from different levels and their potential resolution (in Part IV). After establishing the relevant principles and obligations relating to immunity and international crimes in Part V, we consider the conflict between South Africa's cooperation obligations and obligations relating to immunity and whether and how such a conflict can be resolved (in Part VI).

II Brief Introduction to *Al-Bashir* and *SALC*

A Al-Bashir

Al-Bashir, in the High Court, raised the question of South Africa's obligations in the context of the ICC Act, specifically in relation to the arrest of an incumbent head of state against whom arrest warrants for international crimes had been issued

[21] On 6 March 2009, Pre-Trial Chamber I of the ICC requested all states parties to the ICC Statute to arrest and surrender the Sudanese President for trial by the ICC. See *Prosecutor v Omar Hassan Ahmad 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) PT Ch I; and *Prosecutor v Omar Hassan Ahmad 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) PT Ch I.

[22] *Al-Bashir* (note 19 above).

[23] *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* [2014] ZACC 30, 2015 (1) SA 315 (CC), 2015 (1) SACR 255 (CC), 2014 (12) BCLR 1428 (CC)('*SALC*') at para 3.

by the ICC.[24] The High Court held that immunity, though recognised under customary international law, could not be advanced as a ground for not arresting al-Bashir because that immunity was not applicable in light of the Implementation of the Rome Statute Act 27 of 2002 (ICC Act).[25] It also held that South Africa has domestic and international obligations in relation to the arrest of al-Bashir, which it is 'bound to comply with'.[26] Otherwise, it would result in the collapse of the 'democratic edifice' and the rule of law.[27]

On appeal by the government, the issues before the Supreme Court of Appeal (SCA) included whether al-Bashir enjoyed immunity from arrest and whether such immunity had been waived.[28] We address the SCA's ruling in more detail below. In a nutshell, the SCA held that the government's failure to arrest and surrender al-Bashir was unlawful and contravened South Africa's obligations under the Rome Statute and the ICC Act.[29] The government again appealed to the Constitutional Court (CC)[30] but later announced that the appeal would be withdrawn, following its decision to withdraw from the Rome Statute.[31]

B SALC

The question in *SALC* related to 'the extent to which the South African Police Service (SAPS) has a duty to investigate allegations of torture [which constituted crimes against humanity] committed in Zimbabwe by and against Zimbabwean nationals'.[32] The Court had to determine South Africa's obligations – both international and domestic – 'to prevent impunity' and ensure accountability for international crimes committed beyond its borders and by foreign nationals.[33] Taking into consideration the international and domestic obligations, the Court then had to establish whether 'the SAPS has a duty to investigate crimes against humanity committed beyond [SA] borders' and if it does, 'under which circumstances is this duty triggered'.[34] At first instance, the High Court held that the decision not to initiate an investigation under the ICC Act was unconstitutional and unlawful; and that immunity and other considerations are not relevant at

[24] *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others* [2015] ZAGPPHC 402, 2016 (1) SACR 161 (GP), 2015 (5) SA 1 (GP), [2015] 3 All SA 505 (GP), 2015 (9) BCLR 1108 (GP) at para 1 ('*al-Bashir* HC')(The court stated the question in the case as follows: '[W]hether a cabinet resolution coupled with a ministerial notice are capable of suspending this country's duty to arrest a head of state against whom the International Criminal Court (ICC) has issued arrest warrants for war crimes, crimes against humanity and genocide').

[25] Ibid at paras 28–32.

[26] Ibid at para 37.1.

[27] Ibid at paras 37.2 and 38.

[28] See *al-Bashir* (note 19 above) at para 18.

[29] Ibid at para 113.

[30] *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre* CCT 75/16.

[31] See 'SALC Statement on South Africa's Withdrawal from the ICC and Withdrawal of Bashir Constitutional Court Case' (24 October 2016), available at http://www.southernafricalitigationcentre.org/2016/10/24/salc-statement-on-south-africas-withdrawal-from-the-icc-and-withdrawal-of-bashir-constitutional-court-case-24-october/.

[32] *SALC* (note 23 above) at para 4.

[33] Ibid.

[34] Ibid at para 21.

the investigation stage.[35] On appeal, the SCA upheld the High Court's decision, stating that the SAPS has a duty to 'initiate an investigation into the alleged acts of torture' regardless of 'whether or not the alleged perpetrators are present in South Africa'. That obligation stems from the Constitution, the South African Police Service Act[36] and the ICC Act.[37]

On further appeal, the CC acknowledged that the issue was of 'substantial complexity', but still held that the SAPS 'must investigate the complaint'.[38] This duty, the Court held, arises from both domestic law and international law and 'must be honoured'.[39] The South African government, Majiedt AJ held, 'cannot be seen to be tolerant of impunity for alleged torturers' or 'a safe haven for those who commit crimes against humanity'.[40]

III Jurisdiction over International Crimes

The concept of jurisdiction refers to the power or competence of a state under international law to regulate affairs or the conduct of persons.[41] States can exercise jurisdiction in three ways: prescriptive (legislative), adjudicative (judicial), and enforcement (executive).[42]

There are five points worth highlighting in relation to the forms of jurisdiction. Firstly, as pointed out by the *SALC* Court, adjudicative jurisdiction is not limited to the enforcement of criminalised conduct through prosecutions but includes investigation.[43] Secondly, adjudicative jurisdiction is not limited to the actions of domestic courts but extends to the actions of a state's prosecutorial authorities.[44] Thirdly, enforcement jurisdiction grants states the right, through their law enforcement agencies, to carry out legal processes such as arrest.[45] Fourthly, while the competence of states in the exercise of jurisdiction, under international law, is traditionally dependent on the existence of connections (territoriality, nationality, passive personality, protection of the state),[46] jurisdiction can also be exercised

[35] *Southern African Litigation Centre and Another v National Director of Public Prosecutions and Others* [2012] ZAGPPHC 61; 2012 (10) BCLR 1089 (GNP); [2012] 3 All SA 198 (GNP)('*SALC* HC') at paras 31 and 33. See also *SALC* (note 23 above) at para 16 ('[I]nconsistent with the Constitution and South Africa's international law obligations').

[36] Act 68 of 1995 ('SAPS Act').

[37] *SALC* (note 23 above) at paras 17–18 and 70.

[38] Ibid at paras 83–84.

[39] Ibid at para 80.

[40] Ibid at paras 61 and 80.

[41] See J Crawford *Brownlie's Principles of Public International Law* (8th Edition, 2012) 456; and MN Shaw *International Law* (7th Edition, 2014) 469. See also A Mills 'Rethinking Jurisdiction in International Law' (2014) 84 *British Yearbook of International Law* 187, 194 ('[T]he scope of regulatory authority of states in international law').

[42] For further reading, see R O'Keefe 'Universal jurisdiction: Clarifying the basic concept' (2004) 2 *Journal of International Criminal Justice* 736–737. See also *SALC* (note 23 above) at para 25; Cryer, Friman, Robinson & Wilmshurst (note 1 above) at 44.

[43] *SALC* (note 23 above) at para 25 (emphasis added).

[44] See C Kreß 'Universal Jurisdiction over International Crimes and the *Institut de Droit international*' (2006) 4(3) *Journal of International Criminal Justice* 564, fn 16.

[45] See Cryer, Friman, Robinson & Wilmshurst (note 1 above) at 44.

[46] For a detailed discussion of these jurisdictional bases, see ibid at 46–50; Shaw (note 41 above) at 474–485; and Bantekas (note 1 above) at 332–344. See also *SALC* (note 23 above) at paras 26–27 (Acknowledged these four bases of jurisdiction).

in some instances without the existence of such jurisdictional links (universal jurisdiction).[47] Lastly, though the jurisdictional bases above are seen as consistent with international law, the specific obligation on states to exercise jurisdiction on one or any of the above grounds is generally provided for in domestic law.[48]

In this Part, we expand on how jurisdictional questions affect South Africa's competing obligations. We begin with a discussion of universal jurisdiction in international law. Next, we consider jurisdiction under the Rome Statute. We then look at jurisdiction in South African law and, lastly, how the courts applied these different jurisdictional regimes in *SALC* and *al-Bashir*.

A Universal Jurisdiction in International Law

The exercise of universal jurisdiction, which was at the core of *SALC*, is justified on 'the severity of the crime and the undesirable consequences of impunity'.[49] However, states' understanding and incorporation of the principle varies, creating uncertainties about its definition and legal status.[50] There have thus been several efforts to define the principle.[51] Based on the lack of traditional jurisdictional connections in its exercise, universal jurisdiction is defined as 'jurisdiction established over a crime without reference to the place of perpetration, the nationality of the suspect or the victim or any other recognized linking point between the crime and the prosecuting State'.[52] In practice, however, states exercise universal jurisdiction subject to certain prerequisites such as 'the existence of a specific ground for universal jurisdiction, a sufficiently clear definition of the offence and its constitutive elements, and national means of enforcement allowing the national judiciary to exercise their jurisdiction over these crimes'.[53]

[47] Discussed in Shaw (note 41 above) at 485–497; Cryer, Friman, Robinson & Wilmshurst (note 1 above) at 50–62; and Bantekas (note 1 above) at 344–349.

[48] See Shaw (note 41 above) at 474. See also Van Schaack & Slye (note 2 above) at 27.

[49] Van Schaack & Slye (note 2 above) at 113. The AU has adopted three resolutions in which it stated the need to close the impunity gap that too often permits perpetrators of grave international crimes to escape justice as the rationale for universal jurisdiction in international law. See Decision on the Abuse of the Principle of Universal Jurisdiction (1–3 July 2009) AU Doc Assembly/AU/11(XIII); Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction (1–3 February 2009) AU Doc Assembly/AU/3(XII); and Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction AU (30 June–1 July 2008) Doc Assembly/AU/14(XI).

[50] See dissenting opinion of Van Den Wyngaert J in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v *Belgium*) (2002) *ICJ Reports* 137 at paras 44–45.

[51] See, eg, the *Princeton Principles on Universal Jurisdiction* (2001) principle 1(1), available at http://hrlibrary.umn.edu/instree/princeton.html (Defines universal jurisdiction as 'criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction'). See also the *Madrid-Buenos Aires Principles on Universal Jurisdiction* (2015), available at http://www.hormantruth.org/ht/sites/default/files/files/universal%20jurisdiction/MADRID%20-%20BUENOS%20AIRES%20PRINCIPLES%20OF%20UNIVERSAL%20JURISDICTION%20%20%20%20-EN.pdf.

[52] Cryer, Friman, Robinson & Wilmshurst (note 1 above) at 50–51.

[53] X Philippe 'The Principles of Universal Jurisdiction and Complementarity: How Do the Two Principles Intermesh' (2006) 88(862) *International Review of the Red Cross* 379 (Outlining necessary steps for its exercise).

The *SALC* Court recognised that international law supports the exercise of universal jurisdiction subject to certain principles.[54] Drawing from legal writing, the court outlined three of such principles:

> (a) 'there should be a substantial and bona fide connection between the subject-matter and the source of the jurisdiction'; (b) 'the principle of non-intervention in the domestic or territorial jurisdiction of other states should be observed'; and (c) 'elements of accommodation, mutuality, and proportionality should be applied'.[55]

States have adopted different approaches to exercising universal jurisdiction. Relying on universal jurisdiction to prosecute or adjudicate is often conditioned on the presence of the accused within the territory of the concerned state, often referred to as conditional universal jurisdiction. Universal jurisdiction can also be exercised *in absentia*, often referred to as absolute universal jurisdiction.[56] Many states, however, restrict the exercise of universal jurisdiction to prosecute to the former.[57] The *SALC* Court was therefore of the view that *investigations* that do not breach the principle of non-intervention are not at odds with the exercise of universal jurisdiction.[58]

The basis for the assertion of universal jurisdiction is found in both customary and conventional international law.[59] Though some treaties contain provisions that allow for its exercise,[60] and despite the wide acceptance of its application for international crimes such as genocide, crimes against humanity and war crimes (which are crimes in the Rome Statute),[61] the Rome Statute itself does not make reference to, or explicitly require states to exercise, universal jurisdiction.

B Jurisdiction in the Rome Statute

The Rome Statute refers to two of the conventional jurisdictional bases for the ICC to exercise jurisdiction: territoriality (jurisdiction *ratione loci*) and nationality

[54] See *SALC* (note 23 above) at para 27.

[55] Ibid at para 28, quoting I Brownlie *Principles of Public International Law* (5th Edition, 1998) 313.

[56] See L Chenwi 'Universal Jurisdiction and South Africa's Perspective on the Investigation of International Crimes (2014) *South African Law Journal* 27, 32–33.

[57] Ibid at 33.

[58] Ibid at 29.

[59] This is relevant to *SALC* since it has been argued, in relation to the exercise of universal jurisdiction over torture, that 'permissive universal jurisdiction' over the crime of torture may be seen to constitute a customary international law norm. See Association for the Prevention of Torture & Centre for Justice and International Law *Torture in International Law: A Guide to Jurisprudence* (2008) 21 (Permissive universal jurisdiction is also explained as 'meaning that all States have the legal capacity, but not the obligation, to exercise universal jurisdiction over torture').

[60] See, eg, Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (1984)(CAT) art 5(2); Hague Convention for the Suppression of Unlawful Seizure of Aircraft (1970) art 4(2); Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949)(Geneva Convention I) art 49; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces (1949)(Geneva Convention II) art 50; Geneva Convention Relative to the Treatment of Prisoners of War (1949)(Geneva Convention III) art 129; Geneva Convention relative to the Protection of Civilian Persons in Time of War (1949)(Geneva Convention IV) art 146; and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (1977)(Additional Protocol I) arts 11 and 85.

[61] See WA Schabas *An Introduction to the International Criminal Court* (4th Edition, 2011) 64.

(jurisdiction r*atione personae*).[62] In addition, ICC jurisdiction is limited in two further ways: temporal (jurisdiction *ratione temporis*) ie 'jurisdiction exists only with respect to crimes committed after the entry into force of [the] Statute';[63] and in relation to the subject matter (jurisdiction *ratione materiae*) ie jurisdiction exists only over the listed crimes – genocide, crimes against humanity, war crimes and, following a 2010 amendment, the crime of aggression.[64]

The ICC's jurisdiction can be triggered through state party referral,[65] UN Security Council (UNSC) referral,[66] the Prosecutor acting *proprio motu*[67] or an ad hoc declaration by a state that is not a party to the Rome Statute.[68] In the case of a UNSC referral, state consent is not required and is, arguably, inferred from UN membership and state obligations under the 1945 Charter of the United Nations (UN Charter).[69] This was the situation in relation to al-Bashir: the UNSC, acting under Chapter VII of the UN Charter, referred the case to the ICC.[70] Its jurisdication is generally narrower than the jurisdiction that individual states are entitled to exercise with respect to these crimes. For example, the ICC is only able to exercise jurisdiction when a state is 'unwilling' or 'unable' to prosecute (principle of complementarity).[71]

C Jurisdiction in Domestic Law

The South African government ratified the Rome Statute on 27 September 2000. Parliament domesticated the Statute in August 2002 through the ICC Act, the country's first domestic legislation on implementation of international crimes.

Temporal jurisdiction under the ICC Act is limited to crimes committed after the Act came into force.[72] Moreover, the Act explicitly identifies the various available jurisdictional bases in relation to crimes against humanity, genocide and war crimes. South African courts can exercise jurisdiction on the basis of nationality (ie the accused or the victim is a South African citizen), ordinary

[62] Rome Statute art 12(2) which reads:
'In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
(b) The State of which the person accused of the crime is a national.'

[63] Rome Statute art 11(1).

[64] See Rome Statute arts 5, 6, 7, 8 and 8*bis*. It should be noted that the crime of aggression before the ICC is subject to a special jurisdictional regime. With regard to a state that is not a party to the Statute, the ICC 'shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory'. Rome Statute art 15 *bis*(5).

[65] Rome Statute art 13(a).

[66] Rome Statute art 13(b).

[67] Rome Statute arts 13(c) and 15.

[68] Rome Statute art 12(3).

[69] Charter of the United Nations (1945)(see TS No 993; 3 Bevans 1153; 59 Stat 1031; (1979) *YBUN* 1043)(UN Charter).

[70] See UN Security Council Resolution 1593 (31 March 2005), SCOR (Res & Dec) 131, UN Doc S/RES/1593 (2005)('Resolution 1593').

[71] See Rome Statute preamble and arts 1 and 17. The *SALC* Court made South Africa's exercise of 'universal jurisdiction' subject to an 'unwilling and unable' test. *SALC* (note 23 above) at para 61.

[72] See ICC Act s 5(2).

residence (ie the accused or the victim is ordinarily resident in South Africa), or the presence of the accused in South Africa after the commission of the crime.[73] A distinctive feature of the Act is its recognition that crimes committed outside of South Africa are deemed to have been committed in South African territory.[74] The Act thus goes beyond the traditional grounds of nationality, territoriality, and passive personality to expressly include universal jurisdiction.[75]

An additional legal basis for South African courts' exercise of universal jurisdiction over certain international crimes,[76] more precisely acts of torture, is found in the Prevention and Combating of Torture of Persons Act (Torture Act).[77] By permitting universal jurisdiction, it gives effect to South Africa's obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 (CAT). The jurisdictional grounds identified in the Torture Act are similar to those in the ICC Act: nationality or ordinary residence of the accused or the victim, and the presence of the accused in South Africa after the commission of the offence.[78] And like the ICC Act, the Torture Act grants universal jurisdiction over offences committed outside of South Africa that would have constituted an offence in the country, 'regardless of whether or not the act constitutes an offence at the place of its commission'.[79]

A key point to note in both the ICC Act and Torture Act is the procedural limitation in the exercise of jurisdiction to prosecute. The 'consent' of the National Director of Public Prosecutions (NDPP) is required before any prosecution can be instituted under either Act.[80] The consent requirement explicitly relates to 'prosecution'; it is not applicable to investigation. This distinction is important as the initiation of an investigation, and not a prosecution, was at issue in *SALC*. Under the ICC Act, a decision by the NDPP on whether or not to prosecute must have due regard to South Africa's international obligations and the principle of complementarity.[81] However, a decision not to prosecute does not bar the

[73] See ICC Act s 4(3).

[74] Ibid.

[75] South African courts have, through the Act, been granted 'relatively expansive jurisdiction' in relation to Rome Statute crimes. See L Stone 'Implementation of the Rome Statute in South Africa' in C Murungu & J Biegon (eds) *Prosecuting International Crimes in Africa* (2011) 311.

[76] Though not of relevance to *SALC* or *al-Bashir*, it is worth noting that the GCA permits the South African government to exercise universal jurisdiction over grave and other breaches of the Geneva Conventions of 1949 and Protocols of 1977, which are treaties that apply in situations of armed conflict. See GCA arts 6(2) and 7.

[77] Act 13 of 2013. The Torture Act incorporates the CAT, which the South African government ratified in 1998.

[78] Torture Act s 6(1). The territory includes the accused's presence in territorial waters or 'on board a ship, vessel, off-shore installation, a fixed platform or aircraft registered or required to be registered' in South Africa.

[79] Ibid.

[80] See ICC Act s 5(1); and Torture Act s 6(2). In terms of the Constitution s 179(1) and (2), and National Prosecuting Authority Act 32 of 1998 s 20, the NDPP is 'the head of the prosecuting authority' with 'the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings'.

[81] See ICC Act s 5(3).

prosecution of the person before South African courts,[82] although the Act is silent on what a court should consider in overruling such a decision. Further, while the ICC Act is also silent on the choice of court for prosecution, the Torture Act gives the NDPP the power to 'designate the court in which the prosecution must be conducted'.[83]

D Jurisdiction in *SALC* and *al-Bashir*

Both the *SALC* and *al-Bashir* cases fell squarely within the subject-matter jurisdiction of the ICC Act, but raised different jurisdictional questions.

The jurisdictional issue in *al-Bashir* related to the reach of South Africa's enforcement jurisdiction. As the accused was present in South Africa after the commission of the alleged offences, it fits within s 4(3)(c) of the ICC Act. Moreover, the SCA in *al-Bashir* confirmed that national courts have jurisdiction to prosecute international crimes.[84] The case also raised the question of immunity, in the context of an arrest, as a procedural limitation to the exercise of enforcement jurisdiction, which we address below in Parts V and VI.

SALC raised the question of the exercise of universal jurisdiction in relation to the investigations of torture as a crime against humanity, a listed crime in the Rome Statute and the ICC Act.[85] Since the alleged crimes were committed outside of South African territory, in the absence of the 'traditional' jurisdictional connections, universal jurisdiction was the only possible basis to found the investigation. As confirmed by the Court, 'all states have an interest [in the crime of torture] under customary international law'.[86] However, for South Africa to exercise her jurisdiction, it must exclude the willingness and ability of Zimbabwe (where the crime occurred and which has primary jurisdiction on the basis of territoriality and nationality) to investigate the case.[87] Hence, as the *SALC* Court correctly observed, 'South African investigating institutions may investigate alleged crimes against humanity committed in another country by and against foreign nationals only if that country is unwilling or unable to do so itself'.[88] The Court noted that 'Zimbabwe was not asked by the alleged victims of torture to investigate the crime' but that 'it was unlikely that the Zimbabwean police would have pursued the investigation with the necessary zeal in view of the high profile personalities to be investigated'.[89] In fact, the lack of evidence pointing to Zimbabwe's courts launching an investigation indicated its unwillingness to do so.[90]

[82] See ICC Act s 5(6).

[83] Torture Act s 6(2).

[84] *Al-Bashir* (note 19 above) at para 1.

[85] See Rome Statute art 7; and ICC Act schedule 1.

[86] *SALC* (note 23 above) at para 49.

[87] This would be in line with Rome Statute arts 17(1)(a) and (b)(Require that, for a case to be admissible, the ICC must establish that the case is not being investigated or prosecuted by a state with jurisdiction over the case and the state is 'unwilling or unable genuinely to carry out the investigation or prosecution', or the case has been investigated by a state with jurisdiction over the case and the state has decided not to prosecute on grounds of inability and unwillingness).

[88] *SALC* (note 23 above) at para 62.

[89] Ibid.

[90] Ibid at para 78.

Further, the ICC Act limits prosecution based on universal jurisdiction to an accused who is present in South Africa. But is 'presence' required in the exercise of universal jurisdiction in the context of investigation of international crimes or is it limited to prosecution only? In *SALC*, the SAPS argued that 'it has no duty to investigate the alleged torture in Zimbabwe because the suspects are not present in South Africa'. An investigation can only commence in terms of s 4(3) of the ICC Act, it argued, when an accused is in South Africa.[91] The *SALC* Court held that the presence requirement is *not* applicable in relation to an investigation.[92] This holding was based, first, on the right of an accused person 'to be present when being tried' in s 35(3)(e) of the Constitution which does not require 'presence as a requirement for an investigation'.[93] Secondly, the Court considered s 4 of the ICC Act as well as international law scholarship and standards on the subject. It noted the lack of unanimity in international law scholarship on the issue of presence being a requirement for an investigation,[94] but referred, with approval, to paragraph 3(b) of the Resolution of the Institut de Droit International, which reads:

> *Apart from acts of investigation and requests for extradition*, the exercise of universal jurisdiction requires the presence of the alleged offender in the territory of the prosecuting State or on board a vessel flying its flag or an aircraft which is registered under its laws, or other lawful forms of control over the alleged offender.[95]

Hence, the exercise of universal jurisdiction by states includes investigative acts *in absentia* as well as requests for extradition.[96]

The Court concluded that, while an accused has to be present before trial commences, 'investigations in the absence of a suspect' are permitted.[97] This approach is in line with the Rome Statute which draws a distinction between 'investigation' and 'prosecution' under art 17 and part V (arts 53–61) of the Statute. Put simply, the 'exercise of universal jurisdiction, for purposes of the investigation of an international crime committed outside our territory, may occur in the absence of a suspect without offending our Constitution or international law'.[98] The Court justified its view as follows:

> Requiring presence for an investigation would render nugatory the object of combating crimes against humanity. If a suspect were to enter and remain briefly in the territory of a state party, without a certain level of prior investigation, it would not be practicable to initiate charges and prosecution. … Furthermore, any possible next step that could arise as a result of an investigation, such as a prosecution or an extradition request, requires an assessment of information which can only be attained through an investigation.[99]

[91] Ibid at paras 43–44.
[92] Ibid at paras 43 and 47.
[93] Ibid.
[94] Ibid at para 46.
[95] Institut de Droit International *Universal Criminal Jurisdiction with regard to the Crime of Genocide, Crimes against Humanity and War Crimes* (2005), available at http://www.idi-iil.org/app/uploads/2017/06/2005_kra_03_en.pdf (emphasis in original quotation).
[96] See Kreß (note 44 above) at 576–578.
[97] See *SALC* (note 23 above) at para 46.
[98] Ibid at para 47.
[99] Ibid at para 48.

The Court emphasised that an investigation is important to the subsequent stages of prosecution or extradition. It held that 'South Africa *may*, through universal jurisdiction, assert prescriptive and, to some degree, adjudicative jurisdiction by investigating the allegations of torture as a precursor to taking a possible next step against the alleged perpetrators such as a prosecution or an extradition request'.[100]

IV Obligations in Relation to the Investivation and the Prosecution of International Crimes

South Africa has assumed various obligations in relation to the investigation and the prosecution of international crimes under international and domestic law. Its obligations can be placed into three categories: investigation, prosecution, and cooperation. While the obligation to investigate was at the core of *SALC*,[101] the obligation to cooperate in the prosecution of international crimes was at issue in *al-Bashir*. The obligation to prosecute was not at issue in *SALC* and *al-Bashir* but the courts made reference to it.

In this Part, we discuss all three categories of obligations under both international and domestic law.

A Obligation to Investigate

1 *International Law*

The obligation to investigate international crimes stems from both customary and conventional international law. Under customary international law such an obligation can be derived from a combined reading of a number of sources (relevant treaty provisions, diplomatic practice, customary law on international crimes and the practice of tribunals under the rules of state responsibility).[102] In relation to crimes against humanity, including torture, this obligation is accentuated by its customary law status.[103] More specifically, the ICTY in *Furundžija* noted that, in the context of criminal liability, the obligation on states to investigate acts of torture is a consequence of its customary international law and *jus cogens* status.[104] Similarly, the *SALC* Court held that 'the customary international law nature of the crime of torture underscores the duty to investigate this type of crime'.[105] As noted earlier, the *SALC* Court found that, in the context of the exercise of

[100] Ibid at para 49.

[101] See *SALC* (note 23 above) at para 21.

[102] See N Roht-Arriaza 'Nontreaty Sources of the Obligation to Investigate and Prosecute' in N Roht-Arriaza (ed) *Impunity and Human Rights in International Law and Practice* (1995) 40; and N Roht-Arriaza 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law' (1990) 78 (2) *California Law Review* 449, 489.

[103] *Prosecutor v Tadić,* Case No. IT-94-1-T, ICTY Trial Chamber, Opinion and Judgment (7 May 1997) at paras 618–623 (Customary law status confirmed).

[104] See *Prosecutor v Furundžija*, Case No. IT-95-17/1-T, ICTY Trial Chamber Judgment (10 December 1998) at para 156.

[105] *SALC* (note 23 above) at para 60(b).

universal jurisdiction, the investigation of torture may proceed 'in the absence of a suspect', so long as international law is not breached.[106]

In relation to conventional international law, the duty to investigate torture is, for example, grounded in art 5 of the CAT that require states to exercise jurisdiction over acts of torture. The ICTY has interpreted this provision to include 'jurisdiction to *investigate*, prosecute and punish offenders'.[107] The duty on states parties in art 6(2) of the CAT to institute a preliminary inquiry further fortifies the existence of a legal duty under the CAT to investigate. Though art 5(2) of the CAT includes a presence requirement, Ventura has argued with reference to the *Lotus* case[108] that this does not prevent a state from proceeding with an investigation *in absentia* as long as it does not breach international law or domestic law.[109] In addition, in interpreting the relevant provision prohibiting torture in the International Covenant on Civil and Political Rights of 1966 (ICCPR), the UN Human Rights Committee has recognised the duty to investigate acts of torture as follows: '[c]omplaints must be *investigated promptly and impartially* by competent authorities'.[110] Of course, not all investigations under the ICCPR would result in criminal prosecution.

While the Rome Statute does not contain a legal obligation on states parties to investigate international crimes, it recalls in its preamble 'that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'.[111] Also, if the ICC has concurrent jurisdiction over the offences, then the complementarity principle in the Rome Statute would imply that the primary obligation to investigate the listed international crimes rests on national jurisdictions.[112] In *SALC*, the Court confirmed, with reference to the complementarity principle in the Rome Statute, that '[t]he primary responsibility to investigate … international crimes remains with states parties'.[113] The ICC, however, in the absence of a UNSC referral, did not have jurisdiction in the *SALC* matter as it involved Zimbabwe, a non-state party to the Rome Statute. Despite this, the *SALC* Court emphasised the obligation on states parties to investigate international crimes, through the exercise of universal jurisdiction, committed within the territory, or by citizens, of non-state parties to the Statute.

[106] Ibid at para 47.

[107] *Furundžija* (note 104 above) at para 145 (emphasis added). See also Ventura (note 20 above) at 875–876 (Arguing with reference to art 5(2) of the CAT that 'by necessary implication an *investigation* pursuant to universal jurisdiction is also an *obligation* under the treaty since an investigation must always occur before a prosecution is undertaken').

[108] *S.S. 'Lotus' (France v Turkey)* (1927) PCIJ Series A, No 10 ('*Lotus*').

[109] Ventura (note 20 above) at 876.

[110] Human Rights Committee *General Comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)* (Forty-fourth Session, 1992), UN Doc. HRI/GEN/1/Rev.1 at 30 (1994) at paras 14–15.

[111] See MJ Ventura 'The Duty to Investigate Zimbabwe Crimes against Humanity (Torture) Allegations: The Constitutional Court of South Africa speaks on Universal Jurisdiction' (2015) 13 *Journal of International Criminal Justice* 861, 871–873 (Further discussion on understanding this preambular paragraph in the context of the duty to investigate in the exercise of universal jurisdiction).

[112] See Rome Statute arts 1, 17 and 18 read together.

[113] *SALC* (note 23 above) at para 30.

This, the Court held, was necessary to prevent impunity, particularly where the non-state party has failed to institute an investigation.[114]

2 *Domestic Law*

The obligation to investigate international crimes also stems from domestic law. Under s 205(3) of the Constitution, the SAPS bears a constitutional obligation 'to prevent, combat and investigate crime'.[115] And the ICC Act incorporates South Africa's obligations under the Rome Statute into domestic law. To meet these obligations, the SAPS Act establishes the Directorate for Priority Crime Investigation (the Hawks) as a unit under SAPS, with an obligation 'to prevent, combat and *investigate* national priority offences'.[116] These are offences requiring 'national prevention or investigation' and include offences contained in Schedule 1 of the ICC Act, one of which is crimes against humanity.[117]

It is clear from *SALC* and the relevant domestic law, that the SAPS not only has a duty to investigate the crime of torture as a crime against humanity but also to prioritise it.[118] The SAPS Act read with the NPA Act also envisage a cooperative role between the SAPS and the NPA in the investigation of crimes in the ICC Act.[119]

In *SALC*, the SAPS had advanced four main reasons for not proceeding with an investigation. Firstly, it lacked extraterritorial jurisdiction and the anticipated presence of the alleged perpetrators was not sufficient to trigger the required power and jurisdiction.[120] The Court found this to be a misconception of its duty as presence is not a requirement under international or domestic law.[121] Secondly, a political justification – that an investigation would damage political relations between Zimbabwe and South Africa.[122] The Court reasoned that such a justification undermines the principle of accountability for international crimes, especially as political tensions are often unavoidable.[123] Thirdly, it viewed the complainant as not impartial and that the complainant's assistance in the investigation could be seen as a 'covert agent' of SAPS, which would be at odds with the principle of state sovereignty.[124] The Court pointed out that SAPS's impartiality and not the complainant's is what matters.[125] Finally, investigation would be pointless because, as long as the accused are outside South Africa, South African courts do not have the jurisdiction to adjudicate.[126] Majiedt AJ avoided

[114] Ibid at para 32.
[115] Constitutional jurisprudence has also confirmed SAPS' duty to investigate crime. See the cases cited in *SALC* (note 23 above) at para 51 and fn 56 and 58.
[116] SAPS Act ss 17C(1) and 17D(1)(a) (emphasis added).
[117] Ibid ss 17A, 16(1) and 16(2)(iA), and item 4 of the Schedule.
[118] See *SALC* (note 23 above) at para 57.
[119] Ibid at para 58.
[120] Ibid at para 73.
[121] Ibid.
[122] Ibid at para 74.
[123] Ibid.
[124] Ibid at para 75.
[125] Ibid.
[126] Ibid at para 76.

this difficulty by holding that it fell outside the question in the case as it related to enforcement jurisdiction to prosecute and not investigations.[127]

After rejecting these arguments against an obligation to investigate, the Court weighed several relevant considerations, including the principles of subsidiarity (whether there is 'a substantial and true connection between the subject-matter and the source of the jurisdiction')[128] and practicability (the ability to gather evidence and potentially prosecute) that are limitations to the duty to investigate international crimes. The Court was ultimately of the view that the SAPS did not act *reasonably* in not complying with its obligation to investigate the allegations of torture committed in Zimbabwe, as the threshold required to decline an investigation had not been met;[129] and that non-compliance was tantamount to tolerating impunity and providing a 'safe haven' for offenders.[130]

B Obligation to Prosecute

1 *International Law*

Due to the customary law nature of core international crimes – such as crimes against humanity, genocide and war crimes – the obligation to prosecute constitutes an obligation that is owed to the international community as a whole.[131] The international law principle of *aut dedere aut judicare* (extradite or prosecute) – which has its roots in customary international law and is reproduced in various treaties – reinforces the obligation of states to prosecute, particularly in situations where an accused is found in the territory of a state.[132] This principle also promotes cooperation between states in the prosecution of international crimes.

In terms of treaty law, the obligation of states to prosecute torture is, for example, contained in the four Geneva Conventions, which place an obligation on states to prosecute grave breaches of the conventions.[133] Torture is listed as one of the acts that amount to a grave breach 'if committed against persons or property protected by the Convention'.[134] The CAT, too, places an obligation on states parties to criminalise torture at the domestic level and ensure that acts of

[127] Ibid.

[128] Ibid at para 61.

[129] Ibid at paras 61–64 and 77–79.

[130] Ibid at para 80. See also ibid at paras 63–64 (Whether it is reasonable to proceed with an investigation, the Court held, should be considered on a case-by-case basis, taking into consideration relevant circumstances, such as: 'whether the investigation is likely to lead to a prosecution and accordingly whether the alleged perpetrators are likely to be present in South Africa on their own or through an extradition request; the geographical proximity of South Africa to the place of the crime and the likelihood of the suspects being arrested for the purpose of prosecution; the prospects of gathering evidence which is needed to satisfy the elements of a crime; and the nature and the extent of the resources required for an effective investigation').

[131] Bantekas (note 1 above) at 379. See also R Memari 'The Duty to Prosecute Crimes against Humanity under Universal Jurisdiction, Customary International Law, and Conventional International Law' (2012) 31 *International Proceedings of Economics Development and Research* 131–132.

[132] See Bantekas (note 1 above) at 378.

[133] Geneva Convention I art 49; Geneva Convention II art 50; Geneva Convention III art 129; Geneva Convention IV art 146; Additional Protocol I arts 11 and 85.

[134] Geneva Convention I art 50; Geneva Convention II art 51; Geneva Convention II art 130; Geneva Convention IV art 147.

torture are punished.[135] It also requires them, in the case of an alleged offender being within their jurisdiction, to 'submit the case to its competent authorities for the purpose of prosecution'.[136] Based on these and other provisions, the *SALC* Court[137] concluded that 'there is an international treaty law obligation to prosecute torture'.[138] A similar obligation exists with regard to genocide.[139]

In relation to the Rome Statute, the complementarity principle again places the primary obligation to prosecute on national jurisdictions.[140] In fact, states parties have affirmed 'that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation'.[141]

2 *Domestic Law*

National jurisdictions have a primary obligation to prosecute international crimes, as recognised in *SALC*.[142] One of the objectives of the ICC Act is to enable the prosecution of persons that are accused of committing the recognised international crimes within South Africa, or in certain circumstances, outside South Africa.[143] The obligation to prosecute is however not mandatory, as the Act recognises that South African courts can decline to prosecute or be unable to prosecute.[144] A decision not to prosecute an accused 'does not preclude the prosecution of that person in the [ICC]' nor does it absolve South Africa from its obligation to cooperate with the ICC (discussed below).[145] The presence of an accused in the country in relation to crimes committed outside South Africa's territory is only a requirement for prosecution.[146] The Act further contains provisions on

[135] See CAT art 4.

[136] CAT art 7(1).

[137] Convention on the Prevention and Punishment of the Crime of Genocide (1948)(Genocide Convention).

[138] See *SALC* (note 23 above) at para 38, referring to CAT arts 4, 5 and 7, Geneva Conventions I to IV, and Genocide Convention arts 1, 2, 4 and 6.

[139] The Genocide Convention accentuates an obligation to prosecute the crime of genocide. Pursuant to arts 1 and 5 of the Convention, states parties have an obligation 'to prevent and to punish' genocide (whether committed in peacetime or wartime) and to 'provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III'. Under art IV, persons charged are to 'be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction'. Though the provision refers explicitly to territorial criminal jurisdiction, the application of universal jurisdiction to genocide is not prohibited as long as its application is consistent with (customary) international law. See *Application of the Convention on the Prevention and Punishment of Genocide (Bosnia Herzegovina v Serbia & Montenegro)*(2007) ICJ Reports at paras 442–443 ('*Bosnia Genocide*'); WA Schabas 'Introductory Note to the Convention on the Prevention and Punishment of the Crime of Genocide', available at http://legal.un.org/avl/ha/cppcg/cppcg.html; and ICRC 'Customary IHL Database - Rule 157. Jurisdiction over War Crimes', available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter44_rule157.

[140] See Rome Statute preamble and arts 1, 17–18, read together. See also *SALC* (note 23 above) at para 30.

[141] See Rome Statute preamble.

[142] See also *SALC* (note 23 above) at para 30.

[143] See ICC Act s 3(d).

[144] See ICC Act s 3(e).

[145] ICC Act ss 3(e) and 5(6).

[146] See ICC Act s 4(3)(c). See also *SALC* (note 23 above) at paras 41–49.

the procedure for the institution of prosecutions in South Africa, including the requirement of 'consent' from the NDPP, who in arriving at a decision must 'give recognition to the obligation that the Republic, in the first instance and in line with the principle of complementarity as contemplated in Article 1 of the [Rome] Statute, has jurisdiction and the responsibility to prosecute persons accused of having committed a crime'.[147]

Through the ICC Act, as well as the Constitution and the Torture Act, the South African government has complied with its obligation to criminalise torture.[148] An objective of the Torture Act is to provide for the prosecution of persons who commit torture.[149] The Torture Act, like the ICC Act, includes the 'consent' requirement of the NDPP for the prosecution of anyone who commits torture outside the territory of South Africa.[150]

Lastly, the Geneva Conventions Act (GCA) includes an obligation to prosecute persons in relation to offences under the Act, one of which is torture (a grave breach of the Geneva Conventions). Section 7(1) of the GCA stipulates: 'Any court in the Republic *may* try a person for any offence under this Act in the same manner as if the offence had been committed in the area of jurisdiction of that court, notwithstanding that the act or omission to which the charge relates was committed outside the Republic.'[151] The obligation is, however, couched in discretionary language.

C Obligation to Cooperate

1 *International Law*

International tribunals are largely dependent on international cooperation in relation to investigation, arrest, prosecution and enforcement of their decisions.[152] In international criminal law, state cooperation in the prosecution of international crimes can occur in two contexts: state-to-state cooperation (horizontal) or state-to-tribunal cooperation (vertical).[153] *Al-Bashir* related to the latter, hence our focus here in terms of obligations to cooperate is limited to vertical cooperation. In this context, the obligation to cooperate generally applies to the investigation and prosecution of international crimes, as well as to the post-prosecution phase (eg to cooperate in the implementation of a sentence through a state's prison system, as international tribunals do not have their own permanent prisons). Furthermore, from an international law perspective, the source of the obligation to cooperate in the investigation and prosecution of international crimes before

[147] ICC Act s 5.
[148] See *SALC* (note 23 above) at paras 38–39.
[149] See Torture Act s 2(1)(b).
[150] See Torture Act s 6(2).
[151] Emphasis added.
[152] See Cryer, Friman, Robinson & Wilmshurst (note 1 above) at 509.
[153] Ibid. It should be noted that the cooperation mechanism of the ICC is also seen by some as arguably horizontal on the basis that the ICC's relationship with the international community is based on an agreement. See Bantekas (note 1 above) at 370.

the ICC could be the Rome Statute, the UN Charter, the Genocide Convention and/or an ad hoc agreement.[154]

a Rome Statute

States parties to the Rome Statute and states that have accepted the ICC's jurisdiction pursuant to art 12(3) of the Statute have a general duty to 'cooperate *fully* with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court'.[155] The obligation to cooperate includes the 'arrest and surrender' of persons against whom a warrant of arrest has been issued.[156] In the case of al-Bashir, two warrants of arrest were issued by the ICC. Following their issuance, the ICC confirmed that 'both warrants of arrest, together with cooperation requests for the arrest and surrender to the Court of Omar al-Bashir, have been transmitted … to all States Parties to the Rome Statute, including the Republic of South Africa'.[157] On 28 May 2015, the South African government was reminded of its obligation to arrest and surrender al-Bashir and to consult the ICC in case of any difficulties in complying with the request.[158] States parties have to apply national procedures in enforcing a request for arrest and surrender[159] and therefore an obligation to 'ensure that there are procedures available under their national law for all of the forms of cooperation' under the Rome Statute.[160] Further, there are minimum requirements in the Rome Statute in relation to national arrest proceedings; and in the arrest process, states parties must act in accordance with both the Rome Statute and their domestic laws.[161]

The duty to cooperate is, however, couched in weak terms, as it is based on a 'request' (with the ICC having the powers to make requests of varying nature) as opposed to an 'order'. It is also subject to exceptions, as states parties have the option to 'deny' or 'postpone' the implementation of the request for cooperation on certain identified grounds. It can be 'denied' if it 'concerns the production of any documents or disclosure of evidence which relates to [a state's] national security'.[162] The implementation of a cooperation request can be 'postponed' for as long as its 'immediate execution … would interfere with an ongoing investigation or prosecution of a case different from that to which the request relates' or while the ICC is considering an admissibility challenge.[163] In addition, if the request 'is prohibited in the requested State on the basis of an existing

[154] As regards ad hoc cooperation agreements, see Rome Statute art 87(5) (Stipulates that, on the invitation of the ICC, non-states parties can sign such agreements with the ICC in relation to their provision of assistance to the ICC).

[155] Rome Statute art 86 (emphasis added).

[156] Rome Statute arts 58(5) and 89(1).

[157] *The Prosecutor v Omar Hassan Ahmad 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) ICC-02/05-01/09-242 (13 June 2015) PT Ch II at para 2.

[158] Ibid at para 3.

[159] See Rome Statute art 89(1).

[160] Rome Statute art 88.

[161] See Rome Statute arts 58, 59(1) and 89(1).

[162] Rome Statute art 93(4).

[163] Rome Statute arts 94–95.

fundamental legal principle of general application'[164] and the matter could not be resolved in consultations, the ICC '*shall modify* the request as necessary'.[165] The above exceptions, as well as the issue of competing requests for surrender,[166] were not at issue in *Bashir*.

Of relevance for our present purposes is the exact meaning of art 98 of the Rome Statute, which stipulates:

> 1. The Court *may not proceed* with a request for surrender or assistance which would require the requested 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 can first obtain the cooperation of that third State for the waiver of the immunity.
> 2. The Court *may not proceed* with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court.[167]

Article 98(1) relates to immunities (diplomatic or other) under customary or conventional international law and applies in the context of a request for 'surrender' or 'assistance', whereas art 98(2) concerns extradition treaties or exclusive jurisdiction agreements and applies only in the context of a request for 'surrender'.[168] In both instances, the requested state is in a conflicting situation.[169] Such conflicts should and could be avoided if the ICC adequately addresses them when issuing a warrant of arrest. This was not done when the warrant of arrest against al-Bashir was issued, resulting in issues of immunity and conflicting obligations subsequently being raised by several states parties, including Kenya and South Africa.

It should first be noted that both subparagraphs are explicitly directed to the ICC ('[t]he Court may not proceed') and not – unlike, for example, arts 93(4) and 95 of the Rome Statute ('a State party may deny' and 'the requested State may postpone') – to states parties. Therefore, art 98 of the Rome Statute does not include a right for the requested state to refuse to execute a request for arrest and surrender once it is made.[170]

Secondly, some scholars assert that art 98 of the Rome Statute is 'formulated in such a way as to limit the power of the Court in the matter of request for surrender and assistance';[171] and argue for an obligation 'not to put a state in

[164] Rome Statute art 93(4).

[165] Ibid (emphasis added).

[166] See Rome Statute art 90. Note that states parties are required to 'promptly consult' with the ICC.

[167] Emphasis added. It should be noted that because the Rome Statute is silent on whether the competing international agreement referred to in art 98(2) should precede the Rome Statute, states have gone further to adopt bilateral impunity agreements. It has, however, been argued that post-impunity agreements entered into by states parties to the Statute would amount to a breach of their obligations under the Statute. See Bantekas (note 1 above) at 439.

[168] See Bantekas (note 1 above) at 439; and Cryer, Friman, Robinson & Wilmshurst (note 1 above) at 512.

[169] This conflict is explored further in the subsequent Sub-Part IV.C.3 and Part VI of this article.

[170] Member states are, however, permitted, as Bantekas argues, to depart from the obligation to assist or surrender to the court, in situations where a multiple, competing request is premised on a treaty or customary obligation with a third party. Bantekas (note 1 above) at 439.

[171] P Gaeta 'Does President al-Bashir Enjoy Immunity from Arrest?' (2009) 7(2) *Journal of International Criminal Justice* 328.

the position of having to violate its international obligations with respect to immunities'.[172] Whilst the phrase 'shall' constitutes an obligation to do something and 'shall not' an obligation to not do something – both denoting 'an imperative command' – 'may' means either '[t]o be permitted to', or '[t]o be a possibility' or '[l]oosely, is required to; shall; must'.[173] Looking at the relevant case law, 'it is only by considering the general provisions of the law in question and the purview of the whole legislation on the subject that we can tell whether "may" confers a discretionary power or imposes an obligatory duty'.[174] Put differently, in statutes, the word 'may' must be read in context to determine if it means an act is optional or mandatory, for it may be an imperative. For our purposes, the problematic question is the exact meaning of the phrase 'may not (proceed)' in the Rome Statute. On the one hand, it could indeed indicate that there is *no permission* (or *no possibility*) to proceed, and on the other hand, it could refer to *a permission (*or *possibility) in terms of a choice* to either proceed or not proceed.

The first approach – *no permission* to proceed – is in line with the relevant provision in the French and Spanish versions of the Rome Statute, which if translated literally, both mean 'not being allowed to'.[175] Moreover, since the ICC is not obligated to request assistance but rather has 'the authority to make requests',[176] ie the permission to do so, the first approach seems legally meaningful. The implication of such an interpretation – *no permission* to proceed – would be that, if the ICC has not obtained a waiver of immunities from the third state, the requested state would not commit an international wrongful act if it refuses to cooperate with the ICC. In the case of al-Bashir, the ICC has not obtained a waiver of immunities from Sudan[177] and would therefore not be allowed to proceed with the request for cooperation. Thus, from an international law perspective, the South African government could have lawfully disregarded the request.[178] Such an understanding would be based on an assumption that the granting of a waiver must be obtained from the third state, in this case Sudan,

[172] K Prost & A Schlunck, 'Article 98' in O Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes. Article by Article* (1999) 1131. See also Gaeta (note 171 above) at 315 (Concluding that states parties are not bound to comply with a request if ultra vires with art 98); and JD van der Vyver 'Al-Bashir Debacle' (2015) 15 *African Human Rights Law Journal* 570 ('precludes the ICC from proceeding').

[173] *Black Law Dictionary* (8th Edition, 2004) 1000. For case law confirming the permissive nature of 'may' and on 'may' being synonymous with 'shall' or 'must' in an effort to effectuate legislative intent, see *South African Legal Dictionary* (3rd Edition, 1951) 482; and JB Saunders *Words and Phrases Legally Defined* (3rd Edition, 1988–1990) 342 et seq.

[174] Saunders (note 173 above) at 482.

[175] Rome Statute art 128 stipulates: 'The original of this Statute, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic ... .' The French text reads: 'La Cour ne peut poursuivre l'exécution d'une demande de remise ou d'assistance'; the Spanish text reads: 'La Corte no dará curso a una solicitud de entrega o de asistencia'; and the German text reads 'Der Gerichtshof darf kein Überstellungs- oder Rechtshilfeersuchen stellen'.

[176] Rome Statute art 87.

[177] See the Part IV.A on immunities below (Only Sudan can grant such a waiver).

[178] See also Gaeta (note 171 above)(Concludes that the request to surrender is not issued in accordance with the Rome Statute and thus not binding on states parties).

and can neither expressly nor implicitly be waived by another actor, such as by the UNSC through a referral.[179]

One could, however, contend that in conformity with the interpretation of the phrase 'shall' (*obligation* to do something) and 'shall not' (*obligation* to not do something), the *permission* or *possibility in terms of a choice* (to do or not do something) is a key element for interpreting 'may' or 'may not', including the effect of leaving the finalisation of such a decision at the judicial discretion of the ICC. This discretion is fortified by art 119(1) of the Rome Statute, requiring that '[a]ny dispute concerning the judicial functions of the Court shall be settled by the direction of the Court'. Let us assume that the drafters of the Rome Statute were aware that the ICC is not obligated to request assistance but has 'the *authority* to make requests to States Parties for cooperation'.[180] And assume that they did not discount this nor want to include legally ineffective wording. Therefore, the fact that art 98 of the Rome Statute reiterates this 'authority' could indicate an obligation on the part of the ICC to seriously consider the conflicting obligations in relation to third countries before exercising its discretion whether to proceed or not to proceed.[181] The implication of this understanding would be that, if the ICC insists on the request after considering the conflict, conflicting obligations cannot be grounds for a refusal to execute a request for arrest and surrender.[182] Thus, if a requested state persists in asserting that a conflict exists amidst the ICC's insistence, the result could be non-compliance proceedings.[183] In relation to al-Bashir, the ICC stated that South Africa had no conflicting obligations due to the implicit waiver of al-Bashir's immunity by UNSC Resolution 1593 (2005), and insisted on its request.[184] Therefore, irrespective of an express waiver of immunities by Sudan, the South African government would have been obligated to execute the ICC's request.

Another consideration is that the drafters of the Rome Statute identified, in art 97, difficulties that would hamper or prevent a state party's implementation of a cooperation request. These are: (a) the information is not sufficient to execute the request; (b) the person against whom a warrant has been issued cannot be located, the person named in the arrest warrant is not the same person that is in the requested state; and (c) its execution 'would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State'. The introductory phrase '*inter alia*' clarifies that this is not an exhaustive list. A state faced with difficulties must consult with the ICC without delay so that the challenge can be resolved.[185] Hence, the South African government consulted

[179] The question of whether the UNSC is permitted to waive immunities, and whether it has, through its referral, waived al-Bashir's immunity is considered in Part IV.A below.

[180] Rome Statute art 87(1)(a)(emphasis added).

[181] This could, for example, include procedural obligations to document its considerations.

[182] See Cryer, Friman, Robinson & Wilmshurst (note 1 above) at 513.

[183] Ibid.

[184] ICC-02/05-01/09-242 (note 157 above) at paras 4–7 (Stating that SA had no conflict/competing obligations due to implicit waiver of immunity by UNSC Resolution 1593), with reference to *Prosecutor v Omar Hassan Ahmed al-Bashir (Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar al-Bashir's Arrest and Surrender to the Court)* ICC-02/05-01/09-195 (9 April 2014) PT Ch II, para 28–31.

[185] See art 97 of the Rome Statute.

with the ICC indicating that it 'was subject to competing obligations' and 'there was a lack of clarity in the law'.[186] To which the ICC indicated that 'there was no ambiguity in the law' and that the South African government had an obligation to immediately arrest and surrender al-Bashir to the ICC as soon as he was, at that time, on South African territory.[187] The ICC added that the consultations did 'not trigger any suspension or stay' of South Africa's obligation to cooperate.[188]

It is worth noting that the government's approach from 2015 – invoking conflicting obligations and a lack of clarity in the law – contradicts its approach in 2009 on the same matter, where it confirmed its obligation to arrest al-Bashir. For example, in its submission to the ICC on the question of non-compliance with its obligation to cooperate in the arrest and surrender of al-Bashir, South Africa cited the 'dilemma' it was placed in relation to the 'peace-justice relationship'. It also argued that it did not fail to comply with its obligations due to the immunity that Al-Bashir enjoyed which had not been expressly waived by Sudan or implicitly waived by the UNSC through its referral resolution, thus precluding the request for cooperation by virtue of article 98 of the Rome Statute.[189] In contrast, in 2009, the country's officials, following the invitation of al-Bashir to attend the South African president's inauguration, confirmed that he would be arrested upon his arrival in the country, in execution of the ICC's warrants of arrest.[190] This resulted in al-Bashir declining the invitation.[191]

b UN Charter

As noted previously, obligations to cooperate in the investigation or prosecution of international crimes under the ICC regime can also stem from the UN Charter through a UNSC referral resolution. The UNSC is empowered, acting under Chapter VII of the UN Charter, to refer a situation to the ICC where the crimes in the Statute appear to have been committed.[192] While acting under Chapter VII, the referral can be made in relation to any UN member state even if the state is not a state party to the Rome Statute. This was the case with Sudan: the situation in Darfur was referred to the ICC by the UNSC.[193]

In making such a referral, the UNSC can impose cooperation obligations that are binding by virtue of art 25 (read with art 24(1)) of the UN Charter.[194] In the case of Sudan, the UNSC decided that 'the Government of Sudan and all other parties to the conflict in Darfur, *shall cooperate fully with and provide any necessary*

[186] ICC-02/05-01/09-242 (note 157 above) at para 4.

[187] Ibid at paras 5, 8, 9 and 10.

[188] Ibid at para 8.

[189] *Prosecutor v Omar Hassan Ahmad Al Bashir* (Submission from the Government of the Republic of South Africa for the purposes of proceedings under Article 87(7) of the Rome Statute) ICC-02/05-01/09-290 (17 March 2017) PT Ch II, paras 20 and 52.

[190] See *al-Bashir* HC (note 24 above) at para 12.

[191] Ibid.

[192] See Rome Statute art 13(b).

[193] UNSC Resolution 1593 (note 70 above) at para 1.

[194] UN Charter art 25 stipulates: 'The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.' Article 24(1) gives the UNSC primary responsibility for the maintenance of international peace and security and for it to act on behalf of UN member states.

assistance to the Court and the Prosecutor'.[195] Irrespective of being a party to the Statute, it further '*urges* all States and concerned regional and other international organizations to cooperate fully', while 'recognising that States not party to the Rome Statute have no obligation under the Statute'.[196] The resolution is, evidently, worded narrowly as the obligation to cooperate fully with the ICC is directed to Sudan[197] and other parties to the conflict, and not to all UN member states. States not party to the conflict, such as South Africa, and international organisations are merely *urged* to cooperate fully. As Akande rightly explains, '[a]n urging to cooperate is manifestly not intended to create an obligation to do so' and '[t]he word "urges" suggests nothing more than a recommendation or exhortation to take certain action'.[198]

c Genocide Convention

In relation to the charge of genocide in al-Bashir's case, it has been argued that an obligation to cooperate also stems from the Genocide Convention.[199] Article VI of the Convention allows for the trial of persons charged with genocide by an international penal tribunal. In *Bosnia Genocide*, the ICJ held that states parties to the Convention have an obligation to cooperate with the international penal tribunal and that art VI of the Convention

> obliges the Contracting Parties 'which shall have accepted its jurisdiction' to co-operate with it, *which implies that they will arrest persons accused of genocide who are in their territory* – even if the crime of which they are accused was committed outside it – and, failing prosecution of them in the parties' own courts, that they will hand them over for trial by the competent international tribunal.[200]

Pursuant to the ICJ's reasoning, in our present case, it is important to first establish if the ICC qualifies as an 'international penal tribunal' within the meaning of art VI of the Convention.[201] According to the ICJ, such tribunal includes all international criminal courts created after the Convention was adopted and 'of potentially universal scope, and competent to try the perpetrators of genocide

[195] UNSC Resolution 1593 (note 70 above) at para 2 (emphasis added).

[196] Ibid (emphasis added).

[197] See *Prosecutor v Omar Hassan Ahmad al-Bashir* (*Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad al-Bashir*), ICC-02/05-01/09-3 (4 March 2009) PT Ch I at paras 240–249 (Referring to Sudan's obligation to fully cooperate with the ICC pursuant to resolution 1593).

[198] CD Akande 'The Legal Nature of Security Council Referrals to the ICC and its Impact on al-Bashir's Immunities' (2009) 7 *Journal of International Criminal Justice* 333, 344–345 (Further explains that such a recommendation does not fall within the category of recommendations that would come within the scope of art 103, as it is not an authorisation to states to take action under chapter VII of the UN Charter).

[199] See generally M Gillett 'The Call of Justice: Obligations under the Genocide Convention to Cooperate with the International Criminal Court' (2012) 23(1) *Criminal Law Forum* 63–96 ('[C]oncludes that there is an inherent obligation in the Genocide Convention to cooperate with international proceedings on genocide charges and that this obligation has been activated by Resolution 1593'). See also D Jacobs 'The Frog that Wanted to Be an Ox: The ICC's Approach to Immunities and Cooperation' in C Stahn (ed) *The Law and Practice of the International Criminal Court* (1st Edition, 2015) 296–297; and Akande (note 198 above) at 348–351.

[200] *Bosnia Genocide* (note 139 above) at para 443.

[201] Ibid at para 444.

or any of the other acts enumerated in Article III'.[202] The ICC meets this requirement and has jurisdiction over the crime of genocide as defined in the Genocide Convention.[203]

The second question is whether the state party concerned can be regarded as having 'accepted the jurisdiction' of the ICC within the meaning of art VI, which according to the ICJs reasoning, must consequently be formulated as whether the state party is 'obliged to accept the jurisdiction of the [ICC], and to co-operate with the Tribunal by virtue of the Security Council resolution … or some other rule of international law'.[204] Thus, South Africa, as a state party to the Genocide Convention that has accepted the jurisdiction of the ICC, has an obligation to cooperate under the Convention in the arrest of al-Bashir when he is on South African territory. Sudan, as a state party to the Genocide Convention, that is obliged to accept the jurisdiction of the ICC by virtue of resolution 1593, has an obligation under the Convention to cooperate with the ICC. For other non-state parties to the Rome Statute, who are parties to the Genocide Convention, considering that resolution 1593 merely *urges* them to cooperate, an obligation to cooperate with the ICC cannot be derived from the Convention unless it is established that 'some other rule of international law' obliges them to cooperate. This obligation to cooperate on South Africa and Sudan under the Convention applies irrespective of a person's official capacity since art VI of the Convention requires that even 'constitutionally responsible rulers, public officials or private individuals' who commit genocide or acts listed in art II must be punished.[205]

2 *Domestic Law*

South Africa's cooperation obligation can also stem from domestic law, more precisely the ICC Act. One of the objectives of the ICC Act is to provide for the government's cooperation with the ICC, particularly, amongst other things, in enabling the ICC to make assistance requests and providing mechanisms for the surrender, to the ICC, of persons accused of committing crimes under the Rome Statute.[206] The obligation to cooperate in the ICC Act also includes arrests, and the Act provides a cooperation mechanism on the arrest and surrender of persons to the ICC, including procedures to be followed upon receipt of a warrant of arrest.[207] Leaving aside for now the issue of immunities, South African authorities are thus required, in terms of the Act, to cooperate with the ICC in effecting the arrest of persons suspected of crimes under the Act.

[202] Ibid at para 445.

[203] See also Jacobs (note 199 above) at 297–298 (Further reading, not disputing that the ICC can be seen as an international penal tribunal but also critiquing its application in relation to the ICC).

[204] *Bosnia Genocide* (note 139 above) at paras 444 and 446 (The court referred specifically to UNSC resolution that establishes the tribunal but in applying the reasoning to our present case, one has to consider UNSC referral resolution instead which triggered ICC's jurisdiction over the Darfur situation).

[205] On immunity under the Genocide Convention, see Part V.A.1.

[206] See ICC Act preamble and s 3(e).

[207] See ICC Act ss 10–13. Chapter 4 of the ICC Act generally provides a mechanism for the South African government's cooperation with the ICC.

Overall, provided that one accepts that 'may not proceed' leaves the ICC with the discretion on whether to request assistance or not, South Africa has an obligation to cooperate in the arrest and surrender of al-Bashir under both international and domestic law,[208]according to the ICC Pre-Trial Chamber, without any basis under the Rome Statute for its postponement or refusal.

On 14 and 15 June 2015, al-Bashir was on South African territory for the AU Assembly's 25th ordinary session,[209] thus triggering South Africa's cooperation obligations in relation to his arrest and surrender since the ICC had issued two warrants of arrest against him, including a formal request from the ICC for his arrest and surrender.[210] However, the government did not arrest him, despite a High Court order to this effect, because it contended that al-Bashir enjoys immunity from arrest.[211] Hence, it was not disputed at the SCA that the government had an obligation to cooperate with the ICC but the government was of the view that the obligation is limited by the issue of immunity.[212] The immunity question is discussed in parts V and VI of this article.

3 *AU Decision to not Cooperate*

After the indictment of President al-Bashir, the AU, at a meeting held in July 2009, endorsed a decision of African state parties to the Rome Statute proclaiming that 'the AU member states shall not cooperate 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'.[213] Despite the lack of a provision in the Constitutive Act of the AU on the binding nature of AU decisions, failure to comply would attract sanctions.[214] In order to avoid sanctions, South Africa, as an AU member state, must comply with this decision. But that decision is in direct conflict[215] with South Africa's international and domestic law obligation to cooperate in al-Bashir's arrest and surrender.

a Conflicts between the obligation towards the AU and other international obligations to cooperate

Article 103 of the UN Charter serves to solve issues of conflicting treaty obligations incumbent upon UN members in favour of those stemming from the UN Charter. Cooperation obligations deriving from the UNSC referral would therefore prevail over obligations deriving from the AU Constitutive Act.

[208] See *al-Bashir* (note 19 above) at paras 57, 58, 61, 65 and 113 (South Africa's international law obligations) and at paras 86–105 and 113 (South Africa's domestic law obligations).

[209] Ibid at para 2.

[210] See note 21 above.

[211] See *al-Bashir* (note 19 above) at para 4.

[212] Ibid at para 65.

[213] See note 14 above.

[214] Article 23(2) of the Constitutive Act of the African Union (2000), OAU Doc CAB/LEG/23.15 (Stipulates that 'any Member State that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly'). See also Du Plessis & Gevers (note 15 above) at 1 (Arguing that, based on art 23 and the doctrine of implied powers, AU Assembly decisions 'are potentially binding on member states').

[215] On the notion of a norm conflict, see note 299 below.

In *al-Bashir*, however, South Africa's international cooperation obligations stem from the Rome Statute and/or the Genocide Convention, not from the UNSC referral. The referral merely *urged* the South African government to cooperate fully.[216] Therefore, conflicts between the Rome Statute and Genocide Convention obligations to cooperate on the one hand, and obligations towards the AU to not cooperate on the other hand, cannot be solved by art 103 of the UN Charter. If the UNSC had not *urged* South Africa to cooperate but *obliged* it to do so, then art 103 would have been applicable in solving the conflict.

The relations between rules generated by the two different treaties are governed by the three general principles on conflict resolution 'which in all legal orders regulate the relations between norms deriving from the *same* source':[217] a later law repeals an earlier one (*lex posterior derogat legi priori*); a later law, general in character, does not derogate from an earlier one, which is special in character (*lex posterior generalis non derogat priori speciali*); a special law prevails over a general law (*lex specialis derogat legi generali*).[218]

Neither the obligation to cooperate in relation to the arrest and surrender of al-Bashir nor the obligation to not cooperate with the ICC in this regard is more general or special in character vis-à-vis the other.[219] The generality and speciality of a rule is always relational to some other rule since 'every general rule is particular, too, in the sense that it deals with some particular substance, that is, includes a certain fact-description as a *general* condition of its application'.[220] In *al-Bashir*, none of the obligations in question are general in character. They are rather specific and include directly opposite instructions regarding the same subject matter, the arrest and surrender of al-Bashir, demanding of the South African government on the one hand to arrest and surrender al-Bashir to the ICC and, on the other hand, to set aside this obligation and not cooperate.

Moreover, South Africa's obligation towards the AU existed since July 2009, following the AU Assembly decision. The first formal cooperation request to all states parties by the Pre-Trial Chamber I for the arrest and surrender of al-Bashir to the ICC regarding crimes against humanity and war crimes, triggering the cooperation obligations of South Africa under the Rome Statute, was issued in March 2009.[221] Hence, in relation to the above two crimes, its obligation towards the AU would be the later one. In contrast, in relation to three counts of genocide, the obligation triggered by the second formal request was issued on 21 July

[216] See part IV.C.1.b above. But see Gaeta (note 171 above) at 326 et seq (Argues that the UNSC referral binds all UN member states to fully cooperate).

[217] A Cassese *International Law* (2nd Edition, 2005) ch 8, 154.

[218] For a detailed discussion of the various approaches on the legal nature of these rules, see, eg, E Vranes 'Lex Superior, Lex Specialis, Lex Posterior – Zur Rechtsnatur der "Konfliktlösungsregeln"' (2005) 65 *Heidelberg Journal of International Law* 391. On the legal nature of *lex specialis*, see, eg, S Zorzetto 'The Lex Specialis Principle and its Use in Legal Argumentation. An Analytical Inquire' (Sept 2012–Feb 2013) 3 *Eunomia. Revista en Cultura de la Legalidad* 61.

[219] We of course acknowledge that if the question of speciality relates to the treaty and its subject matter as a whole, as opposed to a particular rule, one could argue that, in contrast to the AU obligation, the obligation in the Rome Statute is more specific because it flows from a treaty dealing specifically with international crimes and its prosecution.

[220] M Koskenniemi *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* ILC Report of the Study Group A/CN.4/L.682 (13 April 2006) 111.

[221] See ICC-02/05-01/09-7 (note 21 above).

2010[222] and would therefore be the later law. Thus, applying the *lex* posterior principle, while in relation to crimes against humanity and war crimes South Africa's obligation towards the AU to not cooperate with the ICC would prevail, with respect to three counts of genocide these obligations would be subordinated.

An absurdity potentially occurs when either no precise date can be assigned to the creation of an obligation, for example, due to their gradual development (eg customary law or general principles)[223] or the precise date is dependent on a further requirement that triggers the creation of the obligation (eg South Africa's cooperation obligation with the ICC in relation to al-Bashir). Such an absurdity also illustrates the limits of the *lex posterior* rule to resolve conflicts. In *Bashir*, the South African government's defiance could result in an even greater absurdity, if, for example, the ICC Pre-Trial Chamber I simply issues a new formal request in relation to crimes against humanity and war crimes, which then would be the later law and prevail. Thus, it is problematic to apply the *lex posterior* rule to solve the conflict between the obligation towards the AU to not cooperate with the ICC and the obligation to cooperate stemming from the Rome Statute (and from the Genocide Convention).

This line of reasoning is consistent with art 30(3) of the Vienna Convention on the Law of Treaties (VCLT), which 'effectively codifies the *lex posterior* rule',[224] requiring that this rule only applies in situations where there are either identical parties in the later treaty or, in addition to all the parties of the earlier treaty, new state parties. Not all AU members are parties to the Rome Statute, nor vice versa. The same applies to the Genocide Convention. In the absence of any other international law rule governing the relation between international and regional obligations, both obligations remain equal in ranking.

b Conflicts between the obligation towards the AU and domestic obligations to cooperate

The conflicting international (at a regional (AU) level) and domestic law principles in relation to South Africa's obligation to cooperate with the ICC operate on different levels. Domestic laws cannot be invoked as justification for a state's failure to comply with its international obligations.[225] International obligations, in turn, are only relevant before domestic courts to the extent provided for by domestic law.

[222] See note 21 above.

[223] See M Akehurst 'Hierarchy of Sources' (1974/75) 47 *British Yearbook for International Law* 273 (Saying that in this situation, it is 'difficult to apply' the *lex posterior* rule). On the application of the *lex posterior* rule between treaties and customs see also Part VI in this article.

[224] CJ Borgen 'Resolving Treaty Conflicts' (2005) 37 *George Washington International Law Review* 573, 603; and JB Mus 'Conflicts between Treaties in International Law' (1998) XLV *Netherlands International Law Review* 219, 220.

[225] While art 27 of the VCLT applies to treaty obligations, art 32 of the Draft Articles of State Responsibility applies to customary international law obligations. This is supported by state practice and international decisions. See, in detail *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001) 94, available at http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf). But see *al-Bashir* (note 19 above) at para 103 (SCA assumes that SA is 'entitled to depart from [customary international law] by statute as stated in s 232 of the Constitution').

V Immunities of Senior State Officials and International Crimes

A International Law

It is an established principle under international law that incumbent heads of state or government and senior government officials enjoy personal immunity from criminal jurisdiction.[226] While this does not include immunity from investigation and is thus not applicable in *SALC*, it comprises immunity from arrest and from the exercise of criminal jurisdiction.[227] What this means is that domestic authorities cannot entertain a particular criminal suit; 'not that the defendant is discharged from criminal liability altogether or that the jurisdiction of the court is extinguished'.[228] It is thus a 'procedural bar' and once removed, 'criminal liability of the accused re-emerges and that person becomes once again susceptible to criminal prosecution'.[229]

While state or sovereign immunity, in the context of criminal law, has been given a broad meaning to include head of state immunity,[230] immunities have progressed in international law from absolute to restrictive. In addition, the doctrine of sovereign immunity has weakened considerably, particularly with respect to acts that constitute international crimes.[231] Further, while there has been a shift in priorities in favour of non-impunity, accountability and justice, and arguments have been advanced against immunity on the basis of the *jus cogens* nature of the prohibition of international crimes, international criminal law has not totally displaced international law relating to immunities, especially not in relation to national criminal proceedings in foreign states.[232] The position in international criminal law proceedings is thus different from that in national criminal proceedings.

1 *International Law in international criminal proceedings at the ICC*

The Rome Statute establishes a two-tier immunity structure for the ICC – one for officials from states parties and the other for officials from non-states parties.

[226] See *Arrest Warrant* (note 50 above) at para 51; recently confirmed in the *Jurisdictional Immunities of the State (Germany v Italy)* (2012) *ICJ Reports* 99 at para 58 (*Jurisdictional Immunities*).

[227] See in detail Gaeta (note 171 above) at 320.

[228] Bantekas (note 1 above) 127, referring to *Dickinson v Del Solar* (1930) 1 KB 376, 380, per Lord Hewart CJ and *Arrest Warrant* (note 50 above) at paras 47–55.

[229] Bantekas (note 1 above) at 127.

[230] See D Tladi 'The Duty on South Africa to Arrest and Surrender President Al-Bashir under South African and International Law: A Perspective from International Law' (2015) 13(5) *Journal of International Criminal Justice* 1027, 1044 (Cites C Kreß, who argues for a broad interpretation of state immunity on the basis that a 'state' cannot be arrested and surrendered. Whether a narrow or broad interpretation of state immunity is applied under the Rome Statute is important, as art 98(1) refers to 'State or diplomatic immunity of a person or property'. As Tladi (at 1043–1044) explains, a narrow interpretation would imply that the exception in art 98(1) does not apply to al-Bashir as he is neither a state nor a diplomat (assuming also that he was not granted diplomatic status during his visit to South Africa) while a broad interpretation would allow for application of the exception).

[231] For a detailed discussion on this, see Bantekas (note 1 above) at 128 et seq. See also, generally, R van Alebeek *Immunities of States and their Officials in International Criminal Law and International Rights Law* (2008); and Y Naqvi *Impediments to Exercising Jurisdiction over International Crimes* (2010).

[232] See Cryer, Friman, Robinson & Wilmshurst (note 1 above) at 531–532.

On the one hand, in terms of art 27 of the Rome Statute, states parties accept that immunities do not bar ICC prosecution.[233] Put differently, states parties cannot raise immunity of their former or their incumbent heads of states in proceedings before the ICC.[234] On the other hand, in terms of art 98(1) of the Rome Statute, as stated above, the ICC 'may not' proceed with a request for surrender if it requires '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 third State waives the immunity. The two tiers are not contradictory since the first tier governs the ICC's exercise of jurisdiction over an accused person before it, while the second tier applies only in the context of states parties' obligations to cooperate with the ICC in the context of a request for surrender of incumbent heads of non-states parties.[235]

Generally, the doctrine of sovereign immunity derives from the equality of sovereign states. Accordingly, customary international law rules on functional and personal immunities (discussed below) 'have developed to ensure reciprocal respect among states for their sovereignty'; more precisely, they 'aim at preventing states from interfering with the fulfilment of' sovereign activities by foreign state representatives in their territories, and at preventing possible abuses by the

[233] Rome Statute art 27 stipulates that the 'Statute shall apply equally to all persons without any distinction based on official capacity', that such capacity cannot 'exempt a person from criminal responsibility' under the Statute or be a basis for mitigation of sentence, and that '[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person'. The Pre-Trial Chamber II, in an obiter dictum, confirmed the scope of art 27(2) of the Statute, stating that 'the Statute cannot impose obligations on third States without their consent' and '[t]hus, the exception to the exercise of the Court's jurisdiction provided in article 27(2) of the Statute should, in principle, be confined to those States Parties who have accepted it'. See ICC-02/05-01/09-195 (note 184 above) at para 26. Also highlighted in *al-Bashir* (note 19 above) at para 49.

[234] The position in the ICC has also been the position in other international tribunals. See, eg, Updated Statute of the International Criminal Tribunal for the Former Yugoslavia (2009) art 7(2); Statute of the International Criminal Tribunal for Rwanda (1994) art 6(2); and Statute of the Special Court of Sierra Leone (2000) art 6(2). It has thus allowed for warrant of arrests to be used for sitting heads of states such as al-Bashir. Also, a warrant of arrest was issued against Charles Taylor while he was still President of Liberia with the Special Court of Sierra Leone subsequently confirming that an international court is not barred from prosecuting a head of state. See *Prosecutor v Charles Taylor (Decision on Immunity from Jurisdiction)* SCSL-2003-01-AR72(E) A Ch (31 May 2004) at paras 51–53). Further, Hissène Habré, as a former head of state, could also not rely on immunity. See African Union *Report of the Committee of Eminent African Jurists on the Case of Hissène Habré* (2006) at paras 12–14, available at http://www.peacepalacelibrary.nl/ebooks/files/habreCEJA_Repor0506.pdf; Statute of the Extraordinary African Chambers within the Courts of Senegal created to Prosecute International Crimes committed in Chad between 7 June 1982 and 1 December 1990, at 10(3), available at https://www.hrw.org/news/2013/09/02/statute-extraordinary-african-chambers); and P Gaeta 'Ratione Materiae Immunities of Former Heads of State and International Crimes: The Hissène Habré Case' (2003) 1 *Journal of International Criminal Justice* 186–196. Note that the Extraordinary African Chambers within the courts of Senegal (EAC) is mentioned here because, 'while the EAC has only a few international aspects, it is still properly considered an internationalized criminal tribunal, although it is at the limit of this category'. S Williams 'The Extraordinary African Chambers in the Senegalese Courts: An African Solution to an African Problem? (2013) 11 *Journal of International Criminal Justice* 1139, 1140.

[235] See Schabas (note 61 above) at 247 (Rightly argues that arts 27 and 98(1) of the Rome Statute are not inconsistent or incompatible).

territorial state of its powers and authorities.[236] Criminal jurisdiction exercised by international courts is lacking this 'very *rationale*'.[237] The ICC, for example, is not an organ of a particular state. Its mandate to prosecute the most serious crimes derives from the international community as a whole.[238] Therefore, the ICC's judicial activity is neither 'an expression of the sovereign authority of a state upon that of another state' nor 'a form of "unduly" interfering with the sovereign prerogatives of another state'.[239] As a result, the rules of customary international law on sovereign immunity would not apply when international courts exercise criminal jurisdiction. While this is generally accepted for functional immunity,[240] in relation to personal immunity this is controversial (thus, international tribunals have explicitly excluded its application before them or ruled against its applicability based on the international nature of the tribunals).[241]

Pursuant to art 27 of the Rome Statute, states parties have agreed not to invoke immunities based on official capacity of a person in ICC proceedings.[242] While in relation to *al-Bashir*, Sudan is not a party to the Rome Statute (and the UNSC does not render it a state party),[243] the implication of the UNSC referral is that

[236] See Gaeta (note 172 above) at 320, with reference to personal immunities.

[237] Ibid.

[238] See Rome Statute preamble. See also Gaeta (note 171 above) at 321; and *Taylor* (note 234 above) at para 51.

[239] Gaeta (note 171 above) at 321.

[240] Confirmed in *Arrest Warrant* (note 50 above) at para 61. See also *Blaškić* ICTY Appeals Chamber (24 October 1997) at para 41 (confirming that in international law functional immunity does not apply for crimes against humanity, genocide and war crimes); Cryer, Friman, Robinson & Wilmshurst (note 1 above) at 545.

[241] Against the general applicability of customary international law rules on personal immunity in international courts, see, eg, Van der Vyver (note 172 above) at 559–579 and 570–573; Gaeta (note 171 above) at 320 and 322 (stating that article 27 merely 'restates an already existing principle concerning the exercise of jurisdiction by *any* international criminal court'); P Gaeta 'Official Capacity and Immunities' in A Casesse, P Gaeta & JRWD Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* (2002) 975, 991; *Taylor* (note 234 above). Assuming its general existence in international courts, see, eg, *Arrest Warrant* (note 50 above) at para 61 (stating that an official can be tried when personal immunity falls away or if the statute of a specific tribunal excludes it); ICC-02/05-01/09-242 (note 157 above) at para 43 (calling article 27 'an exception to Head of State immunity when international courts seek a Head of State's arrest for the commission of international crimes'); *al-Bashir* (note 19 above) at paras 59 and 78 (stating that article 27 constitutes a waiver of immunity that 'their nationals would otherwise have enjoyed under customary international law'). For further discussion on this, see CD Akande 'International Law Immunities and the International Criminal Court' (2004) 98 *American Journal of International Law* 415–419; and Bantekas (note 1 above) at 133. See also Cryer, Friman, Robinson & Wilmshurst (note 1 above) at 549–550 (Noting that state consent is required to waive personal immunity).

[242] Acknowledged in *al-Bashir* (note 19 above) at paras 59 and 78 (States parties have waived rights to immunity that their nationals would have enjoyed).

[243] See Tladi (note 234 above) at 1043. But see Akande (note 198 above) at 341–342 (Arguing that the UNSC resolution rendered Sudan akin to an ICC State Party. However, in light of the general principle of international law *pacta tertiis nec nocent nec prosunt*, enshrined in art 34 of the Vienna Convention of the Law of Treaties, this is at the very least problematic).

the investigation and prosecution will take place in accordance with the Statute, Elements of Crime and Rules of Procedure and Evidence.[244]

Hence, the ICC Pre-Trial Chamber I, in justifying its ability to exercise jurisdiction, considered 'that the current position of Omar al-Bashir as Head of a state which is not a party to the Statute, has no effect on the Court's jurisdiction over the present case'.[245] This was based, inter alia, on the following considerations: firstly, the core principles of art 27 (basically a recital of the provision with further explanation) and, secondly, the implication of the referral being that the investigation and prosecution will take place in accordance with the Statute, Elements of Crime and Rules of Procedure and Evidence.[246] These considerations suggest that 'the Security Council has implicitly adopted Article 27 and thus implicitly sanctioned the exercise of jurisdiction by the Court over a serving head of state who would otherwise be immune from jurisdiction'.[247] The ICC Pre-Trial Chamber I has thus subsequently argued that the UNSC implicitly waived al-Bashir's personal immunity *in the ICC proceedings* by referring the situation in Darfur to the ICC while acting under Chapter VII of the UN Charter.[248] This line of reasoning is mainly based on the fact that UN member states, and therefore also Sudan, are required to carry out Chapter VII measures by virtue of art 25 of the UN Charter. That is supported by art 103 of the UN Charter which ensures that, in the event of a conflict, obligations under the UN Charter prevail over *all* obligations 'under any other international agreements'. Further, the ICC's view is that a UNSC referral resolution requiring 'full' cooperation from a UN member state who is a non-state party to the Rome Statute would be rendered meaningless if it had to be interpreted to exclude an implicit waiver of immunities.[249]

A consideration of the Genocide Convention presents an alternative argument in relation to al-Bashir's immunity in the context of an arrest and surrender to the ICC. Pursuant to art IV of the Convention, official capacity cannot be raised as a defence to a prosecution for genocide. It provides that '[p]ersons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private

[244] It is worth noting that the UNSC could indeed seek to impose treaty obligations on non-state parties while acting under Chapter VII. See, eg, UNSC Resolution 1373 (2001)(Imposing obligations on all States arising from the Convention for the Suppression of the Financing of Terrorism (1999)); UNSC Resolution 1874 (2009)(Imposing on North Korea the NPT treaty after it had announced its withdrawal); UNSC Resolution 1757 (2007)(Giving effect to an agreement between Lebanon and the UN to create the Special Tribunal for Lebanon after the Lebanese parliament refused to ratify it).

[245] ICC-02/05-01/09-3 (note 197 above) at para 41.

[246] Ibid at paras 42–45.

[247] Akande (note 198 above) at 336; and Schabas (note 61 above) at 246.

[248] See ICC-02/05-01/09-242 (note 158 above) at para 7, citing ICC-02/05-01/09-195 (note 184 above) at paras 29 and 31. On extending his implicit waiver to the horizontal level, see Part IV.A.2 below.

[249] See ICC-02/05-01/09-195 (note 184 above) at para 29. In relation to states parties to the Rome Statute, the ICC is of the view that '[t]o interpret article 98(1) [of the Statute] in such a way so as to justify not surrendering Omar al-Bashir on immunity grounds would disable the Court and international criminal justice in ways completely contrary to the purpose of the Statute [the concerned state party] has ratified'. *Prosecutor v Omar Hassan Ahmad al-Bashir (Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad al-Bashir)* ICC-02/05-01/09-139 (12 December 2011) PT Ch I ('*Malawi Decision*') at para 41.

individuals'. Akande argues that 'the provision must also be taken as removing any procedural immunities, as the availability of any such immunities would mean that the persons mentioned in Article IV are not punished'.[250] Should this interpretation be accepted, then pursuant to the ICJ's ruling on obligations to cooperate with a competent international tribunal,[251] and considering that Sudan is a party to the Genocide Convention plus al-Bashir is wanted for genocide charges, states parties to the Rome Statute that are also parties to the Convention can arrest al-Bashir without any concerns regarding immunities. '[T]he obligation of ICC parties to arrest is based on the acceptance of the ICC's jurisdiction by that party and the imposition of ICC jurisdiction on Sudan'; and 'the removal of immunity is based on the acceptance of the Genocide Convention by the arresting party and by Sudan'.[252]

In any event, art 27 of the Rome Statute (also art IV read with art VI of the Genocide Convention) refers to the disregard of immunities *when the ICC exercises its jurisdiction*. This does not exhaust the immunity question in *al-Bashir* since al-Bashir is not in the ICC's custody, leading to the question whether or not he is immune from arrest by national authorities cooperating with the ICC.[253] Put differently, *al-Bashir* relates to the *exercise of criminal jurisdiction by domestic authorities* of foreign states, more precisely in our case South African authorities.

2 *International Law in National Criminal Proceedings in Foreign States*

As noted previously, the rules of customary international law on functional and personal immunities involve guarantees for certain government officials vis-à-vis the domestic authorities of the foreign state.[254] They enjoy immunity on the basis of the governmental conduct or functions that they carry out (functional immunity) or on the basis of their status such as head of state and diplomats (personal immunity).[255] The former only covers specific conduct on behalf of a state and therefore does not provide complete immunity, but immunity for that conduct does not fall away when the person's official role comes to an end. The latter provides absolute immunity for all actions, but only for the duration that the person holds their representative status.[256] While there is an exception in relation

[250] Akande (note 198 above) at 350.

[251] See Part IV.C.1.c.

[252] Akande (note 198 above) at 351.

[253] See *al-Bashir* (note 19 above) at paras 76–77. But see Van der Vyver (note 172 above) at 573 (Without distinguishing the question of immunities before international and national courts, states: 'If President al-Bashir does not enjoy sovereign immunity for purposes of the ICC, there is no immunity that needs to be waived.')

[254] This has been confirmed in, eg, *Arrest Warrant* (note 50 above) and *Jurisdictional Immunities* (note 227 above).

[255] See Cryer, Friman, Robinson & Wilmshurst (note 1 above) at 533; and R Slye 'Immunities and Amnesties' in M du Plessis (ed) *African Guide to International Criminal Justice* (2008) 182.

[256] See Cryer, Friman, Robinson & Wilmshurst (note 1 above) at 533–534; and Van Schaack & Slye (note 2 above) at 971.

to functional immunity when it comes to serious international crimes,[257] personal immunity applies absolutely to the government official in question during his/her time in office – no action can be taken by domestic authorities of foreign states and before domestic foreign courts even in relation to serious international crimes. That rule applies (also) when it comes to the arrest and surrender of al-Bashir to the ICC by the competent domestic authorities of a foreign state.[258]

States parties to the Rome Statute arguably have, by virtue of art 98, agreed to derogate from customary international law on immunities in relation to Rome Statute crimes when their domestic authorities exercise jurisdiction regarding the arrest of a person from a state party for surrender to the ICC or to another state party.[259] With regard to the surrender of a person (who ordinarily enjoys immunity) from a non-state party to the ICC, the ICC arguably[260] has no permission to proceed with a request for surrender if it '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 … *of a third State*'.[261] This implies that in national proceedings in foreign states in relation to the surrender of a person representing a state party, there is such permission and thus surrender would be consistent with state obligations under customary international law on immunities. Due to the *pacta tertiis* principle, this (derogation) could only be done among states parties. Therefore, generally speaking, South African domestic authorities continue to be bound by the rules of customary international law on personal immunities when it comes to the arrest and the surrender of individuals from a non-state party to the Rome Statute, such as Sudan. In particular, and as Gaeta puts it,

[257] To commit serious human rights or *jus cogens* violations is not recognised as one of the functions of statehood and can therefore not be attributed to the state, ie lays outside available sovereign prerogatives. See, eg, Bantekas (note 1 above) at 129 et seq; Cryer, Friman, Robinson & Wilmshurst (note 1 above) at 542–545; Van Schaack & Slye (note 2 above) at 968–974 and 976; and *Arrest Warrant* (note 50 above) at paras 47–55. Regarding the example in *R v Bow Street Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No. 3)* [1999] 2 *All E.R.* 97 where torture was not seen as a state function, see R van Alebeek 'The *Pinochet Case*: International Human Rights on Trial (2000) 71 *British Yearbook of International Law* 29; A Bianchi 'Immunity versus Human Rights: *The Pinochet Case*' (1999) 10 *European Journal of International Law* 237; and A Pillay 'Revisiting Pinochet: The Development of Customary International Criminal Law (2001) 17 *South African Journal of Human Rights* 477.

[258] Acknowledged in *al-Bashir* (note 19 above) at paras 67–84, esp 73 and 84; and in *SALC* (note 23 above) at para 46, fn 50. See also ICC-02/05-01/09-195 (note 184 above) at para 25 ('At the outset, the Chamber wishes to make it clear that it is not disputed that under international law a sitting Head of State enjoys personal immunities from criminal jurisdiction and inviolability before national Courts of foreign states even when suspected of having committed one or more of the crimes that fall within the jurisdiction of the Court.')

[259] But see JK Kleffner 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law' (2003) 1 *Journal of International Criminal Justice* 86, 103–106 (Stating that 'article 98(1) only deals with cases related to the exercise of jurisdiction by the ICC in relation to the arrest for surrender. Thus domestic authorities of foreign states *continue to be bound* by the rules of customary international law on personal immunities *when it comes to the need to surrender* those individuals to the ICC' (emphasis added).)

[260] As indicated in Part II.C.1.a above, art 98(1) could be interpreted as a 'discretion' but could also be interpreted as a 'prohibition'.

[261] Rome Statute art 98(1) (emphasis added).

> [t]here is no rule in international law that allows states parties to lawfully disregard those immunities to comply with a request for surrender by an international criminal court. The fact that the ICC … is endowed with jurisdiction over a particular case but is deprived of enforcement powers, does not imply that national judicial authorities are permitted to do whatever an international court asked them to do.[262]

Hence, the ICC Pre-Trial Chamber I has subsequently argued that "'there also exists no impediment at the horizontal level" regarding the arrest and surrender to the Court of Omar al-Bashir'.[263] It extended the assertion of an implicit waiver of his personal immunity in the ICC proceedings by implicitly adopting art 27 of the Rome Statute (also) to national proceedings in foreign states.[264] The main arguments for such an extension are identical to the arguments in support of an implicit waiver mentioned above.[265]

Arguments against a waiver implied by the referral could be found in, firstly, art 98(1) of the Rome Statute and, secondly, in the legal effect of a UNSC referral within the purposes of the Rome Statute. To begin with, art 98(1) of the Rome Statute is the only provision in the treaty which makes provision for the possibility of waiving immunity, and the waiver has to be given by the third state – the non-party state that the person claiming immunity represents.[266] In the case of al-Bashir, the third state is Sudan (which has not waived al-Bashir's immunity). No alternatives are provided for in the Statute. In addition, the legal effect of a UNSC referral is provided for in art 13(b) of the Rome Statute[267] – a referral serves as a trigger for the ICC's jurisdiction and this includes the jurisdiction over crimes committed in the territory or by nationals of a non-state party to the Rome Statute.[268] Had the parties to the Rome Statute intended to confer further legal effects to UNSC referrals (other than triggering jurisdiction), they could and should have explicitly stated so. Thus, within the purposes of the Rome Statute and the UNSC referral provision in the Statute, an implied waiver possibility in national proceedings by virtue of a UNSC referral is, at the very least, problematic.[269]

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[262] Gaeta (note 171 above) at 325 and 328. See also M Blommestijn & C Ryngaert 'Exploring the Obligations for States to Act upon the ICC's Arrest Warrant for Omar Al-Bashir: A Legal Conflict between the Duty to Arrest and the Customary Status of Head of State Immunity' (2010) 6 *Zeitschrift für Internationale Strafrechtsdogmatik* 428, 438–440. See also CD Akande 'The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC' (2012) 10 *Journal of International Criminal Justice* 299, 301; and *Malawi Decision* (note 249 above) at para 15.

[263] See ICC-02/05-01/09-242 (note 157 above) at para 7, citing ICC-02/05-01/09-195 (note 184 above) at paras 29 and 31.

[264] Ibid.

[265] See above Part V.A.1.

[266] Rome Statute art 98(1) stipulates: '… unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.'

[267] The UNSC is mentioned too in Rome Statute art 87(7) ('the ICC may refer a matter to the UNSC if a party fails to cooperate, where the case was referred to the Court by the UNSC').

[268] Rome Statute art 13 reads, in relevant part: 'The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: … (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations'.

[269] See also Gaeta (note 171 above) at 324.

However, the ICC Pre-Trial Chamber II has held that 'the cooperation envisaged … was meant to eliminate any impediment to the proceedings before the Court, including the lifting of immunities'.[270] A different interpretation, it held, would render the UNSC decision 'senseless … since immunities attached to al-Bashir are procedural bars from prosecution before the Court'.[271] Thus, '"cooperation of … [Sudan] for the waiver of the immunity" as required under the last sentence of article 98(1) of the Statute, was already ensured by the language used in paragraph 2 of SC Resolution 1593 (2005)'.[272]

Assuming that the UNSC is permitted to waive al-Bashir's immunity, in Resolution 1593 (2005) the UNSC *merely urges* all states to cooperate, without stating that this cooperation implied waiver of immunity for it to be meaningful, while the obligation to 'fully cooperate' is placed on Sudan and other parties to the conflict.[273] The UNSC's general encouragement neither calls for states parties to disregard customary international law rules on personal immunities for purposes of cooperation with the ICC nor can it be construed as implying that states parties are authorised to violate these rules without bearing any international responsibility.[274] Had the UNSC intended this, it could and should have explicitly said so, especially since Sudan, as a UN Member, would then indeed have to accept such a Chapter VII decision by virtue of art 25 of the UN Charter. It is worth noting that such an interpretation does not, as claimed by the ICC Pre-Trial Chamber I,[275] render the UNSC resolution meaningless (at least in theory) since the resolution requires cooperation from some states, including Sudan, and in the ICC proceeding al-Bashir has no immunity.

In the absence of a waiver, to disregard President al-Bashir's personal immunities in national proceedings in foreign states and surrender him to the ICC would constitute an international wrongful act, even though this wrongful act would not infringe upon the jurisdiction of the ICC over al-Bashir. Whether it would be a wrongful act in terms of domestic law in relation to al-Bashir will depend on the status that a state's constitution accords to customary international law within its domestic legal system. We address that issue in the context of South Africa below.

B Domestic Law

In terms of domestic law, immunities and privileges in the South African context are regulated in the Diplomatic Immunities and Privileges Act (DIPA).[276] Section 4(1) of the DIPA stipulates that a 'head of state is immune from criminal … jurisdiction of the courts of the Republic, and enjoys such privileges as … heads

[270] ICC-02/05-01/09-195 (note 184 above) at para 29.
[271] Ibid.
[272] Ibid.
[273] See Parts III.C.1.b and IV.A.1 above.
[274] See Gaeta (note 171 above) at 332.
[275] See Part V.A.1 above, esp fn 259.
[276] Diplomatic Immunities and Privileges Act 37 of 2001. This Act incorporates several UN conventions on diplomatic and consular privileges and immunities. For a discussion on DIPA, see, eg, H Strydom 'Diplomatic privileges and immunities' in H Strydom (ed) *International Law* (2015) ch 10, 307, 316.

of state enjoy in accordance with the rules of customary international law'. As a result (specifically in terms of the DIPA), customary international law on personal immunities should apply to al-Bashir.

With regards to additional immunity and privileges afforded at the domestic level, South Africa, as the host nation of the AU Summit, entered into a hosting agreement with the AU, in which it committed, under art VIII of the agreement, to grant immunities and privileges contained in

> [s]ections C and D and Article V and VI of the General Convention of the Privileges and Immunities of the OAU [Organisation of African Unity] to the members of the Commission and Staff Members, delegates and other representatives of Inter-Governmental Organisations attending the Meetings.[277]

Pursuant to s 5(3) of the DIPA,[278] the agreement was proclaimed in the *Government Gazette* by the Minister of International Relations and Cooperation[279] – the agreement was thus incorporated into domestic law. On the basis of the hosting agreement and the Ministerial proclamation, the government argued that al-Bashir was entitled to immunities during the AU summit and two days after its conclusion, and could therefore not be arrested.[280]

However, the SCA rightly held that 'the hosting agreement did not confer any immunity on President al-Bashir and its proclamation by the Minister of International Relations and Cooperation did not serve to confer any immunity on him'.[281] Firstly, the proclamation under s 5(3) of the DIPA – the provision the government invoked – applies to organisations and their representatives. According to s 1(iv) of the DIPA, '"organisation" means an intergovernmental organisation of which two or more states or governments are members and which the Minister has recognised for the purposes of this Act'. This refers to organisations such as the AU or African Commission on Human and Peoples' Rights and does not include member states or their representatives, such as heads of states.[282] The SCA therefore held that the hosting agreement provides immunity only for representatives and officials of the AU and organisations and not for those of states. It does not, therefore, provide immunity for heads of states and state delegates.[283] In particular, the SCA held that, based on an analysis of art VIII of the hosting agreement and the description of the AU Assembly, heads of states attend the AU summit as 'the embodiment of the member state not delegates from them'.[284] Secondly, even though additional immunity can be

[277] *Al-Bashir* (note 19 above) at para 11.

[278] DIPA s 5 reads: 'Any organisation recognised by the Minister for the purposes of this section and any official of such organisation enjoy such privileges and immunities as may be provided for any agreement entered into with such organisation or as may be conferred on them by virtue of section 7(2).'

[279] See *al-Bashir* (note 19 above) at para 12.

[280] Ibid at para 13.

[281] Ibid at para 47.

[282] Ibid at paras 41–42.

[283] Ibid at paras 42 and 47.

[284] Ibid at paras 44–46.

granted to heads of states through s 7 of the DIPA[285] – also recognised in s 4(1)(a) of the Act[286] – it would be problematic to do so in al-Bashir's case, as it would be in contravention of the ICC Act which explicitly prohibits head of state immunity for Rome Statute crimes.

The ICC Act follows a similar approach to the Rome Statute on the question of immunities and privileges of government officials. Section 4(2) of the ICC Act diverges from customary international law by excluding them from using immunity as a basis for a defence to a listed crime or for the reduction of their sentence following conviction before South African courts.[287] These persons include head of states or governments.[288] Section 10(9) of the ICC Act extends non-recognition of head of states immunity to an order to surrender them to the ICC. It declares that '[t]he fact that the person to be surrendered is a person contemplated in section 4(2)*(a)* or *(b)* does not constitute a ground for refusing to issue an order', and that a person 'be surrendered to the [ICC] and that he or she be committed to prison pending such surrender'.[289]

The government argued that s 4(2) of the ICC Act does not remove head of state immunity in the context of an arrest, and that s 10(9) applies only in the context of surrender.[290] The SCA disagreed. It held that s 10(9) applies equally to an arrest for purposes of surrendering head of states to trial before the ICC.[291] Even though 's 10 of the ICC Act deals only with the surrender of persons who had already been arrested under s 9 and … the latter section [is] silent on the question of immunity',[292] to interpret this as recognising immunity for arrests would, in Wallis JA's words –

> creat[e] an absurdity. If it were correct, then any person entitled on any basis to claim immunity would challenge their arrest by way of an *interdict de libero homine exhibendo* ... and demand their release. So the only people who could be brought before a magistrate under s 10 would be those who had no grounds for claiming immunity. But then s 10(9) would serve no purpose at all. It would be entirely redundant, because there would be no possible situation in which a person brought before the magistrate under s 10(1) would be a person referred to in ss 4(2)*(a)* or *(b)*. Needless to say such an interpretation is to be avoided.[293]

Moreover, '[t]he ordinary principle of interpretation is that conferral of powers conveys with it all ancillary powers necessary to achieve the purpose of that power'.[294] The purpose of the power to surrender a person charged with international crimes to the ICC is to ensure that perpetrators of such crimes

[285] Ibid at para 42. DIPA s 7 includes the granting of immunities and privileges to 'any person' (in addition to organisations) through notice in the Government Gazette.

[286] DIPA s 4(1)(a) reads: 'A head of state is immune from the criminal and civil jurisdiction of the courts of the Republic, and enjoys such privileges as … heads of state enjoy in accordance with the rules of customary international law.' Note that this is immunity from jurisdiction of South African courts not international courts.

[287] But see Tladi (note 230 above).

[288] See ICC Act s 4(2)(a).

[289] ICC Act s 10(5).

[290] See *al-Bashir* (note 19 above) at paras 50 and 101.

[291] Ibid at para 101.

[292] Ibid.

[293] Ibid. See also Ventura (note 20 above).

[294] *Al-Bashir* (note 19 above) at para 95.

do not go unpunished. In order to achieve that purpose, it is necessary for the magistrate to have the power to issue a warrant of arrest to bring such persons before the ICC. Such an approach, as the SCA points out, 'is consistent with the constitutional requirement that the [ICC Act] be construed in a way that gives effect to South Africa's international law obligations and the spirit, object and purpose of the Bill of Rights'.[295]

Thus, since there is no differentiation in the ICC Act between government officials from states parties and non-states parties to the Rome Statute, al-Bashir does *not* enjoy immunity from jurisdiction before South African courts in relation to the issuing of an arrest warrant and an order to surrender him to the ICC.

The above interpretation of ss 10(9) and 4(2) of the ICC Act is inconsistent with customary international law on personal immunities before foreign domestic courts. But their wording does not allow for an alternative interpretation. Section 233 of the Constitution – which requires legislation to be interpreted consistently with customary international law – is therefore inapplicable. Sections 10(9) and 4(2) expressly exclude immunity for government officials, including heads of state, based on their status before South African courts.

In addition, it is worth noting that while s 4(2) of the ICC Act paraphrased the provisions of art 27 of the Rome Statute, there is an essential difference between the scope of the two provisions. The former applies to immunities before South African courts, and the latter to immunities when the ICC exercises jurisdiction. In other words, the provisions involve different levels of proceedings. More specifically, there is no obligation for states parties to apply the same immunity rules to states not party to the Rome Statute that are applicable among contracting parties.[296] In fact, art 98(1) of the Rome Statute acknowledges that states parties can be in conflict with customary rules on immunity in relation to third states. Why else would it provide for the possibility of waiver? This reflects 'the will of the drafters to avoid, to the greatest extent possible, the obligations of contracting states to cooperate with the Court from becoming incompatible with international obligations binding a state party *vis-à-vis* a state not party to the ICC Statute'.[297]

The conflicting positions on immunities under the DIPA and the ICC Act – on the one hand granting immunity from criminal jurisdiction, and on the other denying immunity for international crimes – can be resolved by two of the general principles on conflict resolution:[298] *lex posterior derogat legi priori* and *lex specialis derogat legi generali*. Firstly, the ICC Act was adopted later (in 2002) than the DIPA (in 2001) and is therefore *lex posterior*. Secondly, international criminal law is a specific part of criminal law and thus *lex specialis* in this regard, as confirmed in *al-Bashir*. Accordingly, 'the DIPA is a general statute dealing with the subject of immunities and privileges enjoyed by various people, including heads of states.

[295] Ibid.

[296] But see *al-Bashir* (note 19 above)(Stating that not granting immunity before South African courts would result in not complying with the obligation to cooperate under the Rome Statute).

[297] Prost & Schlunck (note 172 above).

[298] See Part IV.C.3, esp fn 218 above.

The [ICC] 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'.[299]

Finally, so far as international crimes are concerned, customary international law rules on personal immunities are not directly applicable. According to s 232 of the SA Constitution, 'customary international law is law in the Republic' if it is consistent with the Constitution and Acts of Parliament. Granting al-Bashir personal immunity before South African courts would conflict with s 4(2) of the ICC Act: the rule that head of the states do not enjoy personal immunity for international crimes.

This shows that not granting sovereign immunity in the *al-Bashir* and *SALC* judgments is consistent with South African domestic law. The competing international and domestic law principles and obligations in relation to al-Bashir's personal immunity operate on different levels. As highlighted above, domestic laws cannot be invoked as justification for a state's failure to comply with its international obligations.[300] International obligations, in turn, are no basis to override domestic legal obligations before domestic courts.

VI Conflicts between International Obligations Relating to Immunity and to the Prosecution of International Crimes

Conflicts between international obligations relating to immunity and those relating to prosecution are not a concern in *SALC* since immunity rules are not applicable in relation to the investigation of international crimes. But the situation in *al-Bashir* is different. Provided that there is an obligation to cooperate,[301] this would directly conflict with the customary international law rule on personal immunity, 'the grant of which is now understood as an obligation under customary international law'.[302] South Africa could not simultaneously comply with both obligations. The arrest and surrender of al-Bashir would render the granting of immunity in South African domestic proceedings impossible. And granting him immunity in South African domestic proceedings would preclude the SAPS from cooperating with the ICC by arresting al-Bashir and surrendering him to the ICC.[303]

[299] *Al-Bashir* (note 19 above) at para 102.

[300] See Part V.C.3.b.

[301] On the discussion whether the ICC has discretion in relation to a request of assistance or not and whether the *lex posterior* rule is applicable to the conflict between South Africa's obligation towards the AU to not cooperate with the ICC and the obligation to cooperate (stemming from the Rome Statue) or not, see Parts IV.C.1.a and IV.C.3 above.

[302] Crawford (note 41 above) at 487, esp fn 4 (Including detailed evidence that 'the existence of this obligation is supported by ample authority').

[303] This even constitutes a norm conflict in terms of the strict definition, according to which, a conflict between two rules arises only where a state bound by them 'cannot simultaneously comply with its *obligations*'. W Jenks 'The Conflict of Law-Making Treaties' (1953) 30 *British Yearbook of International Law* 401, 426 (emphasis added). According to a broad approach, '[t]here is a conflict between norms, one of which may be permissive, if in obeying or applying one norm, the other norm is necessarily or potentially violated'. E Vranes 'The Definition of "Norm Conflict" in International Law and Legal Theory' (2006) 2(17) *European Journal for International Law* 395, 418. See also, Koskenniemi (note 220 above) at para 25 (Koskenniemi – on behalf of the ILC – adopts 'a wide notion of conflict as a situation where two rules or principles suggest different ways of dealing with a problem').

Since no explicit provision is made for a hierarchy between treaty and customary law obligations, the question of priority is highly controversial.[304] There are four general approaches. Some scholars argue that 'the arrangement of the sources in paras (1)(a) to (c) [of art 38 of the ICJ Statute] … does reflect a common-sense approach to the ranking of the sources',[305] which must be applied by the courts accordingly (first approach).[306] This approach is (partly) reconcilable with the view that even though there is no formal hierarchy as between treaties, customs and general principles, 'in most instances treaties' are regarded 'as the primary source, while custom is the secondary source' (second approach).[307] This is based on the assertion that treaties are the primary means of norm creating and the most reliable source for determining (a state's) consent; providing predictability and certainty.[308] Other scholars contend that both treaties and customs enjoy the same normative superiority vis-à-vis general principles, judicial decisions and academic writings because both are founded on the consent of states, which emphasises the consensual basis of international law (third approach).[309] Finally, some writers claim (in line with classical international law),[310] that the wording of art 38(1) of the ICJ-Statute does not indicate (the existence of) a hierarchy between treaties, customs and general principles, thus they enjoy equal ranking – unless the general rule in question is one of *jus cogens* or an obligation *erga omnes* (fourth approach).[311] What all four approaches have in common is that general rules of *jus cogens* and obligations *erga omnes* enjoy the highest status.[312]

[304] See A Pellet 'Article 38' in A Zimmermann, C Tomuschat & K Oellers-Frahm (eds) *The International Court of Justice – A Commentary* (2006) 778. See generally H Villager *Customary International Law and Treaties* (1985).

[305] J Stug & TW Bennett *Introduction to International Law* (2013) 12. See also G Fitzmaurice 'Some Problems Regarding the Formal Sources of International Law' (1958) *Symbolae Verzijl* 153; and J Kammerhofer 'Uncertainty in the Formal Sources of International Law: Customary International Law and some of its Problems' (2004) 15 *European Journal of International Law* 523. But see Akehurst (note 223 above) at 274 (Concluding this from the fact that the words *en ordre successif* have been deleted by the Sub-Commission of the third Committee of the First Assembly of the League of Nations from the first draft of art 38).

[306] The ICJ uses treaties, customs and general principles in successive order and 'has organized a kind of complementarity between them'. Pellet (note 304 above) at 773.

[307] J Dugard *International Law: A South African Perspective* (4th Edition, 2011) 27. See also Koskenniemi (note 220 above) at 47 (para 85)('Treaties generally enjoy priority over custom').

[308] See, eg, L Le Fur 'Règles Générales du droit de la Paix' (1935) 54 *Recueil des Cours* 5, 212.

[309] See *Case concerning Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v USA*) *ICJ Reports* (1986) 14 at para 175 (The ICJ confirmed that treaties and customs can be equal in ranking).

[310] See Dugard (note 307 above) at 25.

[311] See, eg, P Dupuy *Droit International Public* (8th Edition, 2006) 370 et seq (Acknowledging that there is a hierarchy between these three sources and 'secondary source-setting processes envisaged in treaty rules'). Judicial decisions and writings (lit d), for example, clearly have a subordinate function within the hierarchy of sources in light of their description as 'subsidiary means for the determination of rules of law'. Cassese (note 217 above) at 154. See also C Thiele 'Fragmentierung des Völkerrechts als Herausforderung für die Staatengemeinschaft' (2008) 46 *Archiv des Völkerrechts* 1, 7 (Noting that the arrangement in art 38 of the ICJ Statute is merely a listing from the generally more specific to the more general rules).

[312] See, eg, Cassese (note 217 above) at 155 and 199 et seq; Shaw (note 41 above) at 123 et seq; and AL Paulus 'Jus Cogens in a Time of Hegemony and Fragmentation' (2005) 3/4 (74) *Nordic Journal of International Law* 297.

If one follows the first or the second approach, ie the text of law has priority over any other source of law, regardless of whether the source is authoritative or substantive, then the treaty obligation to cooperate with the ICC has priority vis-à-vis the customary international law rule on personal immunity in national proceedings (*lex superior derogat legi inferiori* – a law higher in the hierarchy repeals the lower one).

If one follows the third or the fourth approach, ie treaty and customary law obligations are equal in ranking, conflict resolution between the obligation to cooperate with the ICC and to grant immunity in national proceedings is more complex.

To begin with, the conflict clause in art 103 of the UN Charter does not provide a solution. It applies between obligations deriving from the UN Charter and other treaty obligations.[313] Firstly, neither South Africa's obligation to cooperate with the ICC nor its obligation to grant immunity in national proceedings stems from the UN Charter. And, secondly, for the sake of argument, even if one assumes, as some scholars do,[314] that South Africa's obligation to cooperate would also derive from the UNSC referral, and thus the UN Charter, the obligation to grant immunity in national proceedings is not a treaty obligation, as required by art 103 of the UN Charter,[315] but one deriving from customary international law.

A further consideration is that the Rome Statute does not contain a conflict clause for the conflicting obligations in question.[316] That is, a clause that regulates 'the relation between the provisions of the treaty and those of another treaty [or any other international law rule] or of any other treaty relating to the matters with which the treaty deals'[317] and aims to clarify which provision prevails in case of conflict.[318] More precisely, the wording of art 98 of the Rome Statute reflects that

[313] UN Charter art 103 reads: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations *under any other international agreement*, their obligations under the present Charter shall prevail' (emphasis added).

[314] See, eg, Gaeta (note 171 above) at 326 et seq.

[315] The ICJ itself states (in the context of *jus cogens*): '[T]he relief which article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative *treaty obligation*'. (1993) *ICJ Reports* 325, 440; 95 *ILR* 43, 158 (emphasis added). But see Gaeta (note 171 above) at 326 (Seems to extend the wording of art 103, especially the phrase 'other international agreement' to all international obligations of UN members without further substantiation. This understanding is not covered by the explicit wording 'international agreement' which is used interchangeably in international law with the term 'treaty'. In terms of VCLT art 2(1)(a), '"treaty" means an international agreement concluded between States'). See also Koskenniemi (note 220 above) at paras 344–345 (After explaining the arguments for both sides, he suggest that art 103 of the UN Charter 'should be read extensively – so as to affirm that charter obligations prevail also over United Nations Member States' customary law obligations' based on, firstly, customs being usually more general than treaties and, secondly, on the fact that since UNSC decisions supposedly prevailing over customs, all other UN Charter obligations must too. However, customs can be more specific than treaties (see, eg, Akehurst (note 223 above) at 274–278; and Cassese (note 217 above)) and UNSC decisions are binding (UN Charter art 25) but do not automatically prevail over customary customs).

[316] It should be noted that Rome Statute art 21 does not apply in our present context as it is not per se a conflict clause and the hierarchical approach in it is restricted specifically to laws that the ICC has to apply.

[317] Koskenniemi (note 220 above) at 214.

[318] According to Prosper Weil this relative normativity is a 'threat to the integrity of international law'. P Weil 'Towards Relative Normativity in International Law?' (1983) 3(77) *American Journal of International Law* 413.

states parties want to ensure that their cooperation obligations with the ICC do not become incompatible with customary international laws on immunity that bind a state party to a non-state party.[319] But instead of clarifying the relation between the relevant obligations, states parties agreed merely that the ICC shall not proceed with its request for cooperation.[320]

This raises the question of whether the three above mentioned general principles on conflict resolution can be of assistance:[321] (1) *lex posterior derogat legi priori*; (2) *lex posterior generalis non derogat priori speciali;* or (3) *lex specialis derogat legi generali*. 'For the *lex specialis* principle to apply it is not enough that the same subject matter is dealt with by two provisions',[322] the same subject matter being the arrest and surrender of al-Bashir by the South African government.[323] '[T]here must be … a discernible intention that one provision is to exclude the other.'[324] Neither the formal request by the Pre-Trial Chamber I to cooperate with the ICC in relation to al-Bashir's arrest and surrender nor the customary international law obligation to grant him personal immunity in national proceedings is more general vis-à-vis the other. Each obligation protects different legal interests: on the one hand, the prosecution of international crimes and on the other 'preventing states from interfering with the fulfilment of' sovereign activities by foreign state representatives in their territories, and preventing abuses by the territorial state of its powers and authorities. Under such circumstances, the *lex specialis* rule provides no adequate solution[325] since both obligations are, to some extent, *lex specialis*.

Moreover, while South Africa's obligation to cooperate with the ICC in the arrest and surrender of al-Bashir exists since March 2009 and would thus be the later law in relation to the obligation to grant immunity in national proceedings, to apply the *lex posterior* rule between treaties and customs would ignore the fact that '[t]here is a presumption of interpretation … that treaties are not intended to derogate from customary law, just as statutes in English law are presumed not to derogate from the common law'.[326]

VII Conclusion

The South African government has an obligation, both under international and domestic law, to investigate and prosecute international crimes as well as to cooperate in their investigation and prosecution. It has put in place a progressive legal framework for the enforcement of international criminal law within the country, in line with its obligations. In practice, however, the extent of the government's support for ending impunity for international crimes and for international criminal justice remains questionable. In *SALC*, the government was not willing to initiate an investigation into torture as a crime against humanity committed by Zimbabwean officials; while in *al-Bashir*, the government was not

[319] See Prost & Schlunck (note 172 above).
[320] See Part III.C.1.a above.
[321] See note 218 above.
[322] Akehurst (note 223 above).
[323] Otherwise there would be no conflict. See Koskenniemi (note 220 above) at para 21 et seq.
[324] Akehurst (note 223 above).
[325] See Thiele (note 311 above) at 8.
[326] Akehurst (note 223 above) at 275 et seq.

willing to arrest al-Bashir for surrender to the ICC. The courts found the position of the government in both cases to be inconsistent with its international and domestic obligations.

The South African government has thus been severely criticised for its failure to comply with its international and domestic commitments in the *SALC* and *al-Bashir* debacle. For example, in *SALC*, the CC held that 'SAPS's decision not to conduct an investigation was wrong in law' and that South Africa 'cannot be seen to be tolerant of impunity for alleged torturers' and it 'dare not be a safe haven for those who commit crimes against humanity'.[327] In relation to *al-Bashir*, the government of Botswana, for example, on 14 August 2015, while calling on all members of the ICC to cooperate with the court, condemned the South African government's failure to arrest al-Bashir in the following words: '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.'[328]

There is no doubt that justice for the horrendous crimes committed in Zimbabwe and Sudan must be done, and that even those in power should be brought to justice. Nonetheless, in its efforts to ensure the effective prosecution of such crimes, the South African government has to balance competing international and domestic obligations, particularly its obligations to investigate and to cooperate in the investigation and prosecution of international crimes and its obligations in relation to immunity. The question of competing obligations was at issue in *al-Bashir* and could occur in *SALC* at a later stage, as long as the ICC Act is in force.[329]

In relation to *al-Bashir*, the South African government is 'between a rock and a hard place'. On the one hand, and from an international law perspective, the South African government (based on an argument that al-Bashir's immunity had not been waived)[330] would have committed an international wrongful act had its police forces arrested and surrendered al-Bashir. The rules on customary international law on personal immunities apply between non-states parties to the Rome Statute and states parties in relation to national proceedings in foreign states (noting of course that this wrongful act will not infringe upon jurisdiction of the ICC over al-Bashir[331] and, from a South African domestic law perspective,

[327] *SALC* (note 23 above) at paras 80–81.

[328] Z Mogopodi 'Botswana critical of SA and al-Bashir' (17 June 2015) *IOL News*, available at www.iol.co.za/news/africa/botswana-critical-of-sa-over-bashir-1.1872656.

[329] Initially, the government intended to repeal the ICC Act (see Implementation of the Rome Statute of the International Criminal Court Act Repeal Bill, [B 23 – 2016]) but did not follow through. See T Gqirana, 'Rome Statute repeal bill withdrawn from Parliament', *News24* (14 March 2017), available at http://www.news24.com/SouthAfrica/News/rome-statute-repeal-bill-withdrawn-from-parliament-20170314.

[330] It should of course be acknowledged that if Sudan decides to cooperate with the ICC, then it would imply a relinquishment (by Sudan) of immunities that al-Bashir would have been entitled to, as Sudan would not be able to cooperate while asserting immunity at the same time.

[331] At least if one applies the principle *male captus bene detentus,* supported by state practice in 4 cases (*Attorney-General v Eichmann* (1961) 36 *International Law Reports* 5; *Frisbie v Collins* (1952) 342 US 519; *United States ex el Lujan v Gengler* (1975) 510 F.2d 62; *United States v Alvarez-Machain* (1992) 504 US 655) and rejected in 5 cases (*State v Ebrahim* 21 *International Law Materials* 888; *United States v Toscanino* (1974) 500 F.2d 267; *United States v Verdugo-Urquidez* (1990) 939 F.2d 1341; *Connelly v Director of Public Prosecutions* (1964) A.C. 1254; and *Bennett v Horseferry Road Magistrates' Court* (1993) 3 All E.R. 138).

it will not be a wrongful act). On the other hand, the South African government (based on an interpretation that points to non-violation of art 98(1) of the Rome Statute and that disregards the obligation towards the AU) has committed an international wrongful act in not cooperating with the ICC in the arrest of al-Bashir, flouting its cooperation obligations under the Rome Statute as well as domestic law. Thus, and different to the statement in *al-Bashir*, it is not the 'relationship between the [ICC] Act and the head of state immunity conferred by customary international law …[that] lies at the heart of this case'[332] but the hierarchy between an international treaty obligation and an obligation deriving from customary international law.

This unpleasant result remains relevant for two reasons. Firstly, the arrest warrant continues to constitute the legal basis upon which the South African government can surrender al-Bashir once he no longer enjoys immunity, for example, because he has ceased to be president or the South African government has obtained a waiver of immunity from Sudan. Secondly, as the SCA held, despite leaving the country, the order remains in force and can be enforced whenever al-Bashir visits South Africa.[333] This has affected and will continue to affect the conduct of the South African government's diplomatic relations with Sudan.[334]

As *SALC* relates to investigations, the unpleasant result in *al-Bashir* is not at issue. Although, an investigation in itself involving Zimbabwean senior government officials could result in a strain in diplomatic relations between South Africa and Zimbabwe.[335] However, should the investigations lead to the need to prosecute, then the South African government could, should any of the Zimbabwean senior government officials enjoy personal immunity, find itself also in a situation of balancing its obligation to prosecute with international obligations relating to immunities as well as other diplomatic and/or political considerations. In addition, an investigation is possible from within South African territory but it will face real challenges in obtaining information especially if Zimbabwe refuses to cooperate.

Finally, it should be noted that the ICJ has thus far not taken a clear stand on the hierarchy between an international treaty provision and a rule of customary international law, or on the application of conflict resolution principles in case of conflicts between sources of equal ranking. It has also not been asked to clarify the disputed question of whether a UNSC referral can be seen as a waiver of immunity before national courts.[336] Against this background, and taking the *SALC* and *al-Bashir* debacles seriously, it is perhaps time for South Africa, Kenya or other concerned African governments to initiate and seek clarification on these issues at the ICJ, rather than speaking of withdrawal from the ICC. After all, withdrawal would not absolve them of their cooperation obligations in relation to

[332] *Al-Bashir* (note 19 above) at para 61.

[333] Ibid at para 20 ('SALC indicated that any attempt by President al-Bashir to return to this country would prompt it to seek its enforcement').

[334] On examples that the government has taken the order into account, ibid.

[335] See Associated Foreign Press 'SA court ruling may strain Harare relations' (30 October 2014), available at http://www.iol.co.za/news/africa/sa-court-ruling-may-strain-harare-relations-1772886.

[336] The SCA found it unnecessary to deal with the waiver of immunity questions by virtue of the UNSC referral based on conclusion regarding the ICC Act. *Al-Bashir* (note 19 above) at para 106.

al-Bashir.[337] Also, if a withdrawal is not procedurally rational, it could be subject to judicial scrutiny as has been the case with South Africa. The North Gauteng High Court found that South Africa's decision to withdraw was unconstitutional and invalid, mainly because the Minister acted without prior parliamentary approval. The court ordered the government to revoke the notice.[338] The court further clarified that, even if the withdrawal notice is given effect to at the international level (which 'does not take effect until a year'),[339] 'domestically, [the] government would be obliged, among others, to arrest and surrender the indicted leaders, as long as the [ICC Act] is in force'.[340] And, even in the absence of the Rome Statute and the ICC Act, South Africa would still have obligations to investigate and/or prosecute acts of torture under the Torture Act and the GCA.

Postscript

On 6 July 2017, the ICC Pre-Trial Chamber II issued its decision on South Africa's non-compliance with the ICC's request to arrest and surrender al-Bashir.[341] It unanimously found South Africa to have 'failed to comply with its obligations under the Statute by not executing the Court's request … while [al-Bashir] was on South African territory between 13 and 15 June 2015'.[342] This finding was based on a number of considerations, including but not limited to the following: Firstly, by virtue of the UNSC referral, while acting under Chapter VII of the UN Charter, 'the rights and obligations as provided for in the Statute, including article 27(2), are applicable to Sudan'. The Chamber asserts that this renders al-Bashir's immunity under customary international law (ie makes the rule) inapplicable vis-à-vis states parties to the Rome Statute when required to cooperate in his arrest and surrender.[343] Secondly, 'article 98 of the Statute – even if applicable to the present situation – does not foresee the possibility for a requested State Party to unilaterally refuse compliance with a Court's request for arrest and surrender'.[344] Thirdly, the host agreement between South Africa and the AU did not grant immunity to heads of states attending the AU summit.[345] Fourthly, despite South Africa's interactions with the ICC between 11 and 13 June 2015, it was still under

[337] See Rome Statute art 127(2) which reads: 'A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.' Confirmed in Memorandum on the Objects of the Implementation of the Rome Statute of the International Criminal Court Act Repeal Bill 2016 (2016) at para 1.6.

[338] *Democratic Alliance* (note 12 above) at para 84.

[339] Ibid at para 47, referring to Rome Statute art 127(1).

[340] *Democratic Alliance* (note 12 above) at para 66.

[341] *The Prosecutor v Omar Hassan Ahmad Al Bashir (Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar al-Bashir)* ICC-02/05-01/09-302 (6 July 2017) PT Ch II.

[342] Ibid at paras 123 and 140.

[343] Ibid at para 107.

[344] Ibid at para 108.

[345] Ibid at para 133.

a duty to arrest al-Bashir while he was in the country and surrender him to the court.[346] Finally, despite its finding, the Chamber did not deem a referral of the matter to the UNSC or the Assembly of States Parties necessary, considering that this is a discretionary power of the Chamber, in addition to the significance of South Africa being the first state party to seek to consult with the ICC under art 97 of the Statute, including seeking from the ICC a final legal determination of the relevant legal issues.[347]

According to the Chamber, 'it has now been unequivocally established, both domestically and by [the ICC], that South Africa must arrest Omar Al-Bashir and surrender him to the Court … any possible ambiguity as to the law concerning South Africa's obligations has been removed …'.[348] It suggests that 'the present decision comprehensively and conclusively disposes of the matter as concerns South Africa's obligations under the Rome Statute'.[349]

[346] Ibid at paras 127–134.
[347] Ibid at para 139.
[348] Ibid at para 137.
[349] Ibid at para 136.