



Balancing competing obligations

The Rome Statute and AU decisions

EXECUTIVE SUMMARY

The African Union's (AU) concerns with the International Criminal Court (ICC) peaked in respect of the court's decision to seek an arrest warrant for President Omar al-Bashir of Sudan. These concerns have been expressed in a number of ways, the most controversial of which to date is the decision of the AU Assembly that African states will not cooperate with the ICC in the arrest and surrender of Bashir.

Decisions of the AU Assembly are potentially binding on member states. Although there is no express provision in the AU's Constitutive Act conferring this power, it is clear from article 23 – which sets out the consequences for failing to abide by such decisions – as well as a thorough contextual reading of the Constitutive Act, that the AU Assembly is empowered in this regard. Even if the text of the AU Constitutive Act is considered insufficient or equivocal in this regard, given the considerable mandate the body has been given by its member states, those advocating for the binding nature of AU Assembly decisions could rely on the doctrine of implied powers to support their position. Further, the AU Commission clearly views the AU's Bashir decision as binding on its members.

As far as the July 2010 AU decision is concerned, using the UN Security Council as an analogue, various interpretive techniques can be employed with the view to ascertaining the 'intention' of the AU Assembly. First, the plain language (the primary indicator) of paragraph 5 of that decision – whereby the AU '[r]eiterates its decision that AU Member States shall not cooperate with the ICC in the arrest and surrender of President El-Bashir of The Sudan' – clearly suggests it was intended to be binding and not merely exhortatory. Moreover, a consideration of the practice of the AU Assembly reveals that the word 'decision' and its variations are used sparingly and deliberately. Unfortunately, due to the controversy that surrounded its adoption, and the complex three-tiered decision making structure

of the AU Assembly, the discussions leading up to the Bashir decision are of little assistance in this regard. Nevertheless, the decision that AU states 'shall not cooperate' clearly creates a *prima facie* obligation on such states not to do so.

As Bill Schabas rightly notes, the upshot of this is 'with respect to Member States of the African Union that are also States Parties to the Rome Statute, there would appear to be a conflict between the binding obligations imposed by the Rome Statute and the binding obligations imposed by the Decisions of the African Union'. This norm conflict can be resolved in one of two ways: with reference to hierarchy (such as a *jus cogens* norm or per article 103 of the UN Charter) or through 'techniques of interpretation'.

As far as the use of hierarchy is concerned, there is little to be gained from article 103 of the UN Charter in this regard. Although it might have done so, by its terms UN Security Council Resolution 1593 does not bind states (other than Sudan) under chapter VII to cooperate with the ICC in respect of the Sudan situation. As for *jus cogens* obligations in respect of genocide, leaving aside debates over when these are engaged, their scope cannot (perhaps yet) be said to extend to the execution of an arrest warrant.

Some have argued that the two obligations cannot be reconciled through interpretive means and, in the absence of any apparent rule or formula establishing a hierarchy by which one prevails over the other, the conflict of legal norms requires a political solution. However, there is an interpretive means to avoid this conflict of legal norms, and that solution lies within the AU decision itself.

While the controversial paragraph in the AU decision demanding non-cooperation has attracted much attention, one must also consider the paragraph that follows immediately after, which '[r]equests Member States to balance, where applicable, their obligations to the AU with their obligations to the ICC'. This balancing paragraph – included at the insistence of states such as

South Africa whose implementing legislation obliges them, under domestic law, to cooperate with the ICC – makes a straightforward textual interpretation of the decision as a whole difficult. It suggests a decision that drives at a categorical imperative yet at the same time provides allowance for a measure of discretion. On their face, these two commands appear irreconcilable by simultaneously commanding member states not to cooperate in the arrest of Bashir and requesting them to balance this edict with their obligations under the Rome Statute. In such circumstances it becomes necessary to look beyond the text in order to give meaning to these two paragraphs.

Here there is unfortunately little guidance provided by the discussion in the AU Assembly. Indeed, at the time the decision was adopted there was concern among some states that the AU Commission – responsible for drafting the decisions of the AU Assembly as they pass through the various stages of the decision making process – had on more than one occasion altered the text reflecting decisions taken during the preparatory stages in order to push a particular line on the question of the Bashir arrest warrant. The difficulty then is that reference to the discussions leading up to the decision is not a reliable means of infusing plainly contradictory language with any singularity or clarity of purpose.

The AU's decision not to cooperate with the ICC stems from the UN Security Council's refusal to defer proceedings in Darfur for the period of one year

Arguably there is only one tool remaining by which to avoid the norm conflict. In this regard the internal contradiction in the AU decision suggested by the inclusion of this balancing paragraph should be resolved by employing the doctrine of effective construction.¹

This doctrine takes on different forms but has been held to require that one 'avoid interpretations which would leave any part of the provision to be interpreted without effect', and that 'an interpretation which would make the text ineffective to achieve the object in view is *prima facie* suspect'.

INTRODUCTION

The relationship between African states and the ICC is both complex and contested. The participation of African states in negotiations at Rome in 1998 was crucial to both the ICC's inception and its relative independence. Since then, 33 African countries have signed up to the ICC, making it one of the largest signatory blocs. After the court came into being in 2002, African states continued to play a key role in operationalising and strengthening the ICC, most recently through their participation in the first Review Conference where the crime of aggression was defined, against expectations.²

However, the ICC has been criticised for unfairly focussing on African states in its first ten years of operation, with all of the situations currently being investigated or prosecuted by the court coming from Africa (with Libya and Côte d'Ivoire being the most recent additions).³ In truth this focus is a reflection of other realities, including the sad preponderance of conflicts in Africa, the hostile political conditions and jurisdictional limitations that prevent the ICC from pursuing more deserving cases from other parts of the world (viz. Gaza), and the fact that four of the court's situations were self-referrals by the African states concerned.⁴ However, those who oppose the ICC generally, or the situations under consideration in particular, have not wasted the opportunity to allege an anti-African bias on the part of the court. Unfortunately this view has gained traction over the past few years and, through concerted and self-interested political machinations by the ICC's opponents on the continent, has been marshalled into an institutional position against the court at the level of the AU.⁵

To date, the fulcrum of African states' discontent has been the arrest warrant issued by the ICC for President al-Bashir of Sudan in 2009,⁶ with the court's investigations and prosecutions in respect of Kenya and more recently Libya aggravating the situation. Be that as it may, Sudan remains the focal point of the institutional response from the AU. That response has taken a number of forms, however the most controversial measures to date are the decisions of the AU Assembly of Heads of State and Governments that African states will not cooperate in the arrest and surrender of Bashir.⁷ The AU decisions were purportedly in response to the refusal by the UN Security Council to accede to the AU's request for a deferral of ICC proceedings in Darfur for a period of one year under article 16 of the Rome Statute.⁸ In February 2011 the AU made a similar request in respect of the court's investigation into the 2008 post-electoral violence in Kenya.⁹

This fracas between the ICC and the AU has put African states – and ICC signatories in particular – in

an invidious position. On the one hand states parties are obliged under the Rome Statute to cooperate fully with the ICC in its investigation and prosecution of crimes within the court's jurisdiction. On the other, the AU's Constitutive Act warns that the failure of a member state to comply with decisions of the AU may result in sanctions being imposed on the defaulting state. This is best exemplified by the difficult position Kenya found itself in when Bashir attended the celebrations for the country's new constitution in August 2010. After some initial political handwringing, the Kenyan government responded that it was balancing its obligations to the ICC with those to the AU.¹⁰ In an apparent endorsement of Kenya's decision to allow Bashir to attend the celebrations, the AU Assembly adopted a decision in January 2011 stating that 'by receiving President Bashir ... the Republic of Kenya [was] implementing various AU Assembly Decisions on the warrant of arrest issued by ICC against President Bashir as well as acting in pursuit of peace and stability ...'.¹¹

Allegations of an anti-African bias have been marshalled into an institutional position against the ICC at the AU

This paper will not attempt to untangle the broader political standoff between the AU and the ICC. Rather it will interrogate the legal aspects thereof. First, the paper seeks to delineate the various obligations on African states in respect of Bashir, under the Rome Statute and the Genocide Convention. Second, it considers the nature of the obligations on African states parties such as Kenya in respect of the AU decisions, and in particular the demand for non-cooperation in respect of Bashir. Third, it presents two possible means of resolving the apparent conflict between the first (ICC) and second (AU) set of obligations: namely article 103 of the UN Charter and the doctrine of effective construction. Finally, it concludes with a discussion of the national legal dimensions of these competing obligations, focussing on South Africa and Kenya.

THE PAPER'S BROADER SIGNIFICANCE

Although the immediate focus of this paper is on the AU decisions in respect of Bashir, it would be a mistake to limit their significance to these proceedings alone.

For one, it is possible that a similar decision will emerge in respect of the ICC prosecutor's investigations in Kenya and Libya given that the AU has requested a deferral in regard to these cases too. In any event, as the situations in Kenya and Libya unfold at the ICC, one cannot see a detente between the AU and ICC in the near future. To the extent that the issue of African states' competing obligations in the context of Bashir raises more fundamental legal questions about the relationship between states obligations under regional arrangements and those to the ICC, attempting to answer those questions correctly is crucial to normalising this relationship in the long term.

It is also important to stress that whatever the political basis of the AU decisions, it does not follow that their political nature somehow denudes them of legal value (if that were the case, then the UN Security Council's resolutions would similarly be at risk). Peculiarly the legal basis of the AU decisions has been largely ignored in the voluminous writings on the subject.¹² As discussed below, their legal force under international law lies in the AU's Constitutive Act. As in any law-making body, there are political motivations that influence this process, none more so than in the decisions by plenary bodies made up of states. The only legally relevant question is whether these decisions were intended to be binding and what they intended to enjoin states to do.

Some have argued that for the AU decisions to have any legal effect they must have a legal justification beyond the AU Constitutive Act – perhaps in some other more clearly 'legal' instrument such as the Rome Statute.¹³ However, this too is besides the point. The decisions are binding on AU member states by virtue of the AU Constitutive Act, irrespective of their interpretation of, or compliance with, the Rome Statute.

In a community of sovereign and equal states (as the international order purports to be) the decisions of the plenary organ of a regional body such as the AU comprised of 53 sovereign states – unique insofar as such plenary bodies are concerned in that it is almost universally ratified within the region – is legally binding on its member states in the same way as decisions of other regional organisations. The AU is, in legal terms, no more or less capable of creating legal obligations for its member states than the European Union is for its members.

In this regard it is worth noting that the difficulty of competing obligations faced by African states in respect of Bashir is not an aberration unique to Africa and its regional politics. In fact, the conflict between regional and general international law is something that the European Community itself has been grappling with of late. This is most recently apparent from the decision of

the European Court of Justice (ECJ) in *Kadi*,¹⁴ which also involves a clash between legal norms of a regional body and those of general international law.

In *Kadi I* the ECJ was faced with the question of whether it could in effect ‘review’ the UN Security Council sanctions regime for compatibility with the fundamental rights guaranteed in the European Community Treaty.¹⁵ The primary obstacle for doing so stems from articles 25 and 103 of the UN Charter, the former of which makes UN Security Council resolutions of this nature binding on all UN members, while the latter states that the obligations they create shall prevail over any other international agreement in the event of a clash. The ECJ ultimately concluded that it could undertake such a review in respect of fundamental rights – articles 25 and 103 of the UN Charter notwithstanding.

This review, according to the ECJ, was ‘the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which was not to be prejudiced by an international agreement – namely, in the case in question, the Charter of the United Nations’.¹⁶ The General Court of the EU (formerly the Court of First Instance) ‘begrudgingly’ followed *Kadi I* in a follow-up decision on the same subject-matter: *Kadi II*.¹⁷ There the General Court explicitly employed the ‘Solange argument’¹⁸ – implicit in *Kadi I* – in terms of which the court accepts the primacy of international law *so long as* (solange) it offers ‘equivalent protection’ to that enjoyed under the fundamental rights regime of the European Community.¹⁹

The AU would argue that its position is not aimed at allowing impunity but rather ensuring peace

For some, any comparison between the *Kadi I* and the AU decisions may be disquieting, principally because the two are seen as meeting different (and opposite) ends: the former being the protection of ‘fundamental rights’ in the context of a draconian sanctions regime, the latter the violation of victims’ rights by not supporting the prosecution of Bashir. However, the following general principles are similarly at play. First, this perceived conception of the AU’s motive for its non-cooperation decisions is not uncontested – the AU itself would argue that it is not aiming at allowing impunity but rather

ensuring peace, an equally valuable end as that of the ECJ in *Kadi*.

In any event, while it is true that the ECJ’s decision was in service of fundamental rights, it is the means by which it did so that are determinative. In this regard, although *Kadi* involved a clash between a UN Security Council resolution and fundamental rights guaranteed in the European Charter, the norm clash was not resolved on the basis of the norms involved (i.e. by declaring that the more ‘fundamental’ human rights norms prevailed), but rather on the autonomy of the European Legal Order, as separate from the general international legal order. In *Kadi I* the ECJ held that ‘an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system, observance of which is ensured by the Court by virtue of the exclusive jurisdiction conferred on it by Article 220 EC, jurisdiction that the Court has, moreover, already held to form part of the very foundations of the Community’.²⁰

In so doing, the ECJ in *Kadi* relied on a dualist conception of international law, which effectively displaced the conflict by positing that the conflict norms are part of two separate, autonomous legal orders between which no system of hierarchy can exist. As Lavronos puts it, ‘the Court of Justice views the Community legal order and the international legal order as two distinct planets in the same universe of law’,²¹ the European legal order being a ‘separate and distinct legal order coexisting next to the international legal order and having established internally its own hierarchy of norms’.²² In effect, the decision confirmed the EC legal order as ‘not just autonomous, but also domestic, municipal, and, most importantly, constitutional’.²³ This dualist approach was continued in *Kadi II*, as Tzanocoupons notes: ‘[T]he Solange argument presumes autonomous (if only so self-proclaimed) legal orders’.²⁴

This dualist conception of the relation between regional and general international law developed with the European legal order is not uncontroversial.²⁵ Its proponents – including the ECJ – have been criticised for failing to adequately ‘explain what exactly in their view makes the EU legal order distinct and independent from international law’.²⁶ In fact, the ECJ’s assertion of legal autonomy vis-a-vis general international law lacks a solid textual, let alone legal, basis.²⁷ As Milanovic notes, ‘their argument is conclusory, even solipsistic – we say EU law is constitutional, therefore it is constitutional, and therefore it is not international’.²⁸

In the final analysis, the ECJ’s decision in *Kadi* means many things to many people and the aim is not to tie the fortunes of the AU decisions to those of *Kadi*, politically or legally. Rather, three fairly trite but important observations about the relevance of *Kadi* for

the current debate over the AU decisions can be made. The first is that both implicate the relationship between regional international law (as the product of regional international organisations) and general international law through apparent conflicts between them. Second, although the norm conflict in *Kadi* involved values (fundamental rights), it was ultimately addressed with reference to the relationship between these legal orders and not the values involved. Third, in negotiating that relationship the ECJ in *Kadi* relied on the 'autonomy of the European legal order' to reach an outcome which happily gave pride of place to fundamental human rights over obligations on its member states under general international law (in that case obligations that flowed from a resolution of the UN Security Council made under chapter VII of the UN Charter).²⁹

By parity of reasoning, the AU could claim that – through its Constitutive Act – it has created an autonomous legal system which is not to be prejudiced by international agreements: whether they be the Rome Statute, the Genocide Convention or chapter VII of the UN Charter. Therefore, taken to its extreme this approach would allow the AU decisions to stand even if UN Security Council Resolution 1593 is interpreted as creating a chapter VII obligation under its terms on Kenya to arrest Bashir. Many would find the comparison unfortunate, but such is the law of unintended consequences.

The AU's July 2010 decision requested member states to 'balance, where applicable, their obligations to the AU with their obligations to the ICC'

This paper does not advocate a *Kadi*-type solution to the current norm conflict. However, the *Kadi* case is a worthy reminder that the issue of competing obligations faced by African states in respect of Bashir is not peculiar to the AU in its relationship with the UN Security Council. It involves broader and generally important questions about the relationship between regional and international norms when those norms are in apparent conflict. And these questions – as the ICC's heavy focus on Africa has pre-determined – are likely to recur as the situations in Kenya, Libya and Sudan unfold.

BACKGROUND: THE ICC, BASHIR AND THE AU

The ICC issued an arrest warrant for Bashir on 4 March 2009, four years after the UN Security Council referred the situation in Darfur to the court under article 13(b) of the Rome Statute.³⁰ The original Bashir arrest warrant contained two counts of war crimes and five of crimes against humanity.³¹ However, the ICC prosecutor successfully appealed the ICC pre-trial chamber's decision not to include genocide charges in the 2009 Bashir warrant.³² The appeals chamber found that the pre-trial chamber had applied the wrong standard of proof for the arrest warrant stage of proceedings and directed the pre-trial chamber to reconsider the counts of genocide alleged by the prosecutor *de novo*, this time applying the correct standard of proof. On that basis on 12 July 2010 the pre-trial chamber issued an amended arrest warrant (the final Bashir warrant), which added three counts of genocide to the list of crimes alleged.³³

The AU's response to the ICC's efforts to obtain Bashir's arrest was immediate. Only one week after the prosecutor requested that the pre-trial chamber issue an arrest warrant for Bashir in July 2008, the AU's Peace and UN Security Council (PSC) requested that the ICC's proceedings in respect of Bashir be suspended under article 16 of the Rome Statute.³⁴ Then, at its February 2009 summit, the AU Assembly adopted a decision expressing its 'deep concern' regarding the indictment (sic) of Bashir, and mandating the AU Commission to dispatch a high-level delegation to the UN Security Council to advocate for the deferral of proceedings under article 16.³⁵ Furthermore, the AU Assembly also called on the AU Commission to:

Convene as early as possible, a meeting of the African countries that are parties to the Rome Statute on the establishment of the ICC to exchange views on the work of the ICC in relation to Africa, in particular in the light of the processes initiated against African personalities, and to submit recommendations thereon taking into account all relevant elements.³⁶

Then in July 2009 the AU Assembly adopted a resolution at a meeting in Sirte (driven by Libyan leader at the time, Muammar Gaddafi) calling on its members to defy the international arrest warrant issued by the ICC for Bashir.³⁷ In its press release following the 3 July 2009 decision, the AU explained that its decision 'bears testimony to the glaring reality that the situation in Darfur is too serious and complex an issue to be resolved without recourse to a harmonized approach to justice and peace, neither of which should be pursued at the expense of the other'. The AU stated further that: '[i]t

is now incumbent upon the United Nations Security Council to seriously consider the request by the AU for the deferral of the process initiated by the ICC, in accordance with Article 16 of the Rome Statute'. Earlier the press release stressed the 'unflinching commitment of AU member states to combating impunity and promoting democracy', and that the 3 July decision 'underlines the need to empower the African Court on Human and Peoples' Rights to deal with serious crimes of international concern in a manner complementary to national jurisdiction'.³⁸

Despite the Sirte decision being roundly condemned, the AU Assembly once again called on its members not to cooperate with ICC proceedings in respect of Bashir at its 15th Ordinary Session in Kampala in July 2010. Although the essence remained the same, the second decision on non-cooperation was slightly modified in that there was no reference to article 98 of the Rome Statute, nor immunity.³⁹ At the insistence of ICC states parties, the July 2010 decision included a paragraph requesting member states to 'balance, where applicable, their obligations to the AU with their obligations to the ICC'.⁴⁰

The Kenyan government justified the invitation to Bashir on the basis of the AU's non-cooperation decision

At its January 2011 session the AU Assembly did not repeat its call for non-cooperation with the ICC, but reiterated its request that the UN Security Council defer proceedings against Bashir under article 16 of the Rome Statute and asked the current African members of the UN Security Council (Gabon, Nigeria and South Africa) to place the matter on its agenda for consideration.⁴¹ More controversially, the AU Assembly endorsed Kenya's request for a deferral of the proceedings initiated by the ICC prosecutor in respect of post-electoral violence in Kenya in order to 'allow for a National Mechanism to investigate and prosecute the cases under a reformed Judiciary provided for in the new constitutional dispensation, in line with the principle of complementarity' (Kenya's position will be discussed later in this paper).⁴²

In addition to the non-cooperation decisions and the article 16 deferral request, a further and more systematic AU position emerged out of the Bashir controversy and

the subsequent ministerial meetings of African ICC states parties that took place in June and November 2009:⁴³ the proposal to amend article 16. At the second such meeting, ministers from African countries – both states parties and non-states parties to the ICC – adopted seven recommendations to guide their position. The third recommendation, in a direct challenge to the role of the UN Security Council vis-à-vis the ICC, proposes that the Rome Statute be amended to diffuse the power of the UN Security Council to defer proceedings and divest authority in this regard to the UN General Assembly.⁴⁴ Although the AU recommendations were presented to the 8th ICC Assembly of States Parties (ASP) meeting in November 2009, disagreement among African delegates regarding the procedure to be followed in this regard prevented them from being fully explored.⁴⁵ At its July 2010 summit in Kampala, the AU Assembly once again endorsed the proposed amendment to article 16.⁴⁶

Although the amendment was placed on the agenda for consideration at the 9th ASP in New York in 2010, in the end it was consigned to a working group on amendments that will undertake 'informal consultations' before the 10th ASP session scheduled for December 2011.⁴⁷ At its January 2011 summit, the AU Assembly reiterated its support for the article 16 amendment and called on all African ICC states parties that have not yet done so to 'co-sponsor the proposal for the amendment to Article 16 of the Rome Statute and indicate such willingness to the UN Secretary General, the Depositary of the Rome Statute, with copy to the AU Commission'.⁴⁸ Further, it requested 'the Group of African States Parties in New York to ensure that the proposal for amendment to Article 16 of the Rome Statute is properly addressed during the forthcoming negotiations and to report to the Assembly through the Commission'.⁴⁹

The AU's decision not to assist in the arrest of Bashir must be considered in light of the fact that the Sudanese government has not cooperated with the UN Security Council-mandated ICC investigation. Moreover, despite the ICC prosecutor informing the UN Security Council on more than one occasion of this non-cooperation, there appears to be little chance that the UN Security Council will take any more concrete action against Sudan in this respect (nor is it clear what form such action might take). Therefore, at least for the foreseeable future, it seems that Bashir will only appear before the ICC if he is surrendered by a state that chooses to detain him after his presence on its territory.

As a result, the visit by Bashir to Kenya to join in the launch of Kenya's constitution presented a unique opportunity. This was not the first time Bashir visited a state party to the Rome Statute: he attended a summit of Sahel-Saharan States in Chad on 21–23 July 2010.⁵⁰ Nor was it the last time.⁵¹ However, Bashir's visit to

Kenya was significant. Up until recently the east African country was a model ICC state, one of the few of the 33 African ICC states parties to have adopted domestic implementation legislation for the Rome Statute.⁵² That legislation – the 2008 International Crimes Act – is impressive both in its detail and progressive nature. Notwithstanding this, and undeterred by the ICC’s indictment of Bashir for genocide, war crimes and crimes against humanity, it appears that Kenya intentionally sparked controversy by inviting Bashir to its territory.⁵³

An arrest warrant alone appears to be insufficient to place an obligation on states in respect of arrest and surrender

Subsequently, on 27 August 2010 the ICC’s Pre-Trial Chamber I, on the basis of representations made by the prosecutor, informed the UN Security Council and the ASP of Bashir’s expected presence in the territory of Kenya.⁵⁴ In that decision, the ICC cited ‘public information available to the Chamber’ that Bashir had been invited to Kenya and noted Kenya’s ‘clear obligation to cooperate with the Court in relation to the enforcement of such warrants of arrest, which stems both from the United Nations Security Council Resolution 1593 (2005), ... and from article 87 of the Statute of the Court, to which the Republic of Kenya is a State Party’.⁵⁵ The pre-trial chamber informed the UN Security Council and the ASP so that they could ‘take any measure they may deem appropriate’.⁵⁶

For its part, the Kenyan government justified the invitation to Bashir on the basis of the AU’s non-cooperation decision. Government spokesperson Alfred Matua reportedly stated:

In the context of Omar al-Bashir’s case, Kenya’s obligations are first to the AU and then to ICC. If Sudan (is) destabilized it is us who would suffer, not the West.⁵⁷

Notably, the AU Commission defended Kenya’s decision to invite Bashir,⁵⁸ as did the AU Assembly (albeit belatedly).⁵⁹

Again, in October 2010 reports emerged that Bashir would be attending the Intergovernmental Authority on Development (IGAD) meeting in Kenya. In response, on 25 October Pre-Trial Chamber I requested Kenya to bring to its attention any problem which would impede

or prevent Kenya from arresting Bashir, and surrendering him to the ICC, should he visit the country as planned.⁶⁰ That pressure, together with civil society action similar to that which preceded and helped to prevent Bashir’s attendance at South African President Jacob Zuma’s inauguration in May 2009, resulted in the IGAD meeting being moved to Addis Ababa at a later date.⁶¹

Ultimately, Bashir’s presence at the launch of Kenya’s new constitution in August of last year highlighted, with dramatic symbolism, the conflicting positions certain African states find themselves in: choosing between the integrity of their domestic legal order and apparently competing international and regional legal obligations.

AFRICAN STATES’ INTERNATIONAL OBLIGATIONS IN RESPECT OF BASHIR

The clearest obligations to arrest Bashir lie on those 33 African countries that are parties to the Rome Statute. In addition, there are also grounds to argue that because the arrest warrant for Bashir includes charges of genocide, African states that are signatories to the Genocide Convention are also obliged under that instrument to cooperate with the ICC’s proceedings against him. Finally, there is the question of whether UN Security Council Resolution 1593 – by which the situation in Darfur was referred to the ICC – creates obligations on UN member states under article 25 of the UN Charter. This final aspect, relating to Resolution 1593, is particularly important as it impacts on the ‘norm conflict’ between ICC and AU obligations. It will thus be discussed further below in the section addressing this norm conflict. In this section only the first two sets of obligations are considered: those stemming from the Rome Statute and the Genocide Convention.

ICC states parties’ obligations

Duty to cooperate

In order to assess the nature of the legal obligation placed on ICC states parties it is necessary to provide a brief overview of the ICC’s cooperation regime. The issue of state cooperation was a controversial one when the court’s statute was drafted in Rome in 1998. The final text struck a delicate balance that both recognises the constraints of the ICC as a treaty-based mechanism (in contrast to the ad hoc International Criminal Tribunals of Rwanda and the former Yugoslavia)⁶² but also creates a progressive cooperation regime designed to enable the ICC to operate effectively.

The resultant cooperation regime, contained in part 9 of the Rome Statute, is a hybrid between a horizontal and a vertical model of cooperation: the former involving the relatively weaker form of inter-state cooperation,

the latter used to describe the more robust system of cooperation between the ad hoc tribunals and states – the ‘supra-state model’.⁶³ As a result, aside from the general obligation created by article 86 of the Rome Statute on states to ‘cooperate fully with the Court’, the question of whether or not the ICC can compel cooperation cannot be answered generally, but rather must be determined with reference to the specific form of cooperation involved and its corresponding provision.

According to article 87 of the Rome Statute, the ICC may ‘make requests to States Parties for cooperation’. This implies that states’ obligations to cooperate are ‘generally to be discharged upon a request by the Court’.⁶⁴ To this end, Pre-Trial Chamber I issued an arrest warrant for Bashir on 4 March 2009. However, the issuance of an arrest warrant alone appears to be insufficient to place an obligation on states in respect of arrest and surrender. Rather, on a literal interpretation, the Rome Statute appears to require a further request for cooperation by the ICC under articles 89 and 91, in addition to the warrant.⁶⁵ It is not immediately clear why this is required by the Rome Statute, nor is it clear what the status of a warrant is in the absence of such an additional request.

The ICC ‘informed’ the UN Security Council that Kenya and Chad failed to comply with their Rome Statute obligations to arrest Bashir

Nevertheless, the ICC appears to have glossed over this anomaly in practice by treating it as a mere formality and ordering the registrar of the court to communicate such requests to all states parties, as well as certain other states, without further consideration. To this end, when it issued both arrest warrants for Bashir, the pre-trial chamber directed the registrar to transmit such article 89 requests to ‘competent Sudanese authorities ..., to all States Parties to the Statute and all the United Nations Security Council members that are not States Parties to the Statute’.⁶⁶ The registrar promptly did so on both occasions.⁶⁷

While this approach eliminates the clumsy two-stage process in the Rome Statute in substance, its legality is not unassailable. Although rule 176(2) of the ICC’s Rules of Procedure and Evidence authorises the registrar to ‘transmit the requests for cooperation made by the

Chambers and ... receive the responses, information and documents from requested States’, it is not clear that such requests can be made en masse as they were in the case of Bashir. On the contrary, the wording of article 89 – ‘The Court may transmit a request for the arrest and surrender of a person ... to any State on the territory of which that person may be found’ – suggests that such request should be made in respect of specific states where the presence of an accused is proved or anticipated. Notably, Pre-Trial Chamber I in its decision of 25 August 2010 only mentioned article 87 in its discussion of Kenya’s obligation to cooperate in respect of Bashir, and not articles 89 or 91.⁶⁸

Be that as it may, on the ICC’s own formulation Kenya is (and other similarly situated states are) under the following obligations in respect of Bashir. Aside from the general obligation to cooperate fully with the court contained in article 86, article 59(1) enjoins ‘[a] State Party which has received a request for provisional arrest or for arrest and surrender [to] ... immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9’. Further, article 89(1) states that ‘States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender’.⁶⁹ Further, in terms of rule 184 of the ICC’s Rules of Procedure and Evidence, Kenya is under a positive obligation to ‘immediately inform the Registrar when the person sought by the Court is available for surrender’.

There are a number of other provisions that create less direct but no less important obligations on Kenya in this regard. More generally, as a party to the Rome Statute, Kenya would be obliged under international law – and in particular the Vienna Convention on the Law of Treaties 1969 – to perform its obligations under the treaty in good faith.⁷⁰ More importantly, the obligation on states parties to cooperate in respect of arrest and surrender is not subject to the same exceptions as other forms of cooperation.⁷¹ The provisions on surrender are unique in this regard.⁷²

Therefore, the provisions of the Rome Statute concerning surrender of persons differ from those governing other forms of cooperation which contain grounds for the denial of a request. The fact that such exceptions were not made applicable to the surrender of persons is indicative of the drafters’ approach to this important aspect of the ICC’s functioning.

Further, to the extent that African ICC states parties cite a conflict between their obligations under the Rome Statute and those stemming from the AU Constitutive Act, or any other legal rule, article 97 of the Rome Statute posits a general duty on states parties to act in good faith in attempting to address it. That article states,

inter alia: 'Where a State Party receives a request under this Part in relation to which it identifies problems which may impede or prevent the execution of the request, that State shall consult with the Court without delay in order to resolve the matter.' Notably, it goes on to list as a possible problem '[t]he fact that execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State'. There is no apparent reason why the same would not apply to obligations taken in respect of a group of states within a multilateral framework such as the AU.

Immunity as a trump to the cooperation obligation?

There is of course the well-known general exception to the state cooperation regime contained in part 9, the exact nature of which has become a controversial aspect of the Rome Statute: that is article 98, which deals with immunities.⁷³ Further, the issue of immunity cannot be entirely separated from the question of the AU decisions and their implications for African ICC states parties. This is not least of all because Bashir, as a sitting head of state, has a good basis for claiming immunity under customary international law. In addition, the first AU decision on non-cooperation specifically mentions the question of immunity and article 98.⁷⁴ What is more, how one answers the question of immunity might well render debates on the current norm conflict redundant.⁷⁵

Shifting the burden of arresting Bashir under the Genocide Convention has a number of political advantages

There is ongoing debate regarding both the relationship between articles 27 and 98 of the Rome Statute generally, as well as the effect of UN Security Council Resolution 1593 on Bashir's putative immunity specifically.⁷⁶

There is also further disagreement on the effect, if any, of the Genocide Convention on this debate. While consideration of this issue is beyond the scope of this paper, an approach that uses immunity to break the deadlock between the AU decisions and the arrest warrant begs the question, for two reasons. First, the ICC appears to have taken the position that Bashir does not enjoy such immunity.⁷⁷ Therefore, should African states parties adopt this position as a basis for non-cooperation it would leave them, at least on the ICC's formulation,

still in breach of their obligations under the Rome Statute. Second, although the first AU non-cooperation decision cited article 98 of the Rome Statute, the obligation on member states of the AU not to cooperate is not contingent on its interpretation of that provision being 'correct', rather it depends on powers conferred upon the AU Assembly by its statute.

Enforcing compliance

The last aspect of African ICC states parties' obligations under the Rome Statute that must be considered briefly is the question of action available to the court for non-compliance. In this regard, article 87(7) of the Rome Statute states:

Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.

Although the pre-trial chamber has 'informed' the UN Security Council and the ASP of the failure of Kenya and Chad to comply with their obligations under the Rome Statute to arrest Bashir, and referenced article 87 generally in those decisions,⁷⁸ until recently it had not formally undertaken article 87(7) proceedings in this regard. However, following Bashir's visit to Chad on 7 and 8 August 2011, this time to attend the inauguration of Idriss Déby Itno, notwithstanding a communication from the ICC registry on 5 August reminding Chad of its obligation to arrest Bashir,⁷⁹ Pre-Trial Chamber I decided to initiate official non-cooperation proceedings under article 87(7) on 18 August 2011.⁸⁰ In terms of that decision, Chad is invited to submit any observations on the report, in particular with regard to its alleged failure to comply with the cooperation requests issued by the court. On the basis of this information the chamber will decide what steps to be adopted, which will presumably include referring Chad to the UN Security Council for further action to be taken.

Obligations under the Genocide Convention

As a result of the ICC pre-trial chamber's decision to supplement the original warrant for Bashir with three counts of genocide, there is arguably an additional obligation on states parties to the Geneva Convention to arrest Bashir and surrender him to the ICC.⁸¹ In general terms, locating an obligation to arrest Bashir within the framework of the Genocide Convention potentially

expands the scope of arresting states. This is because a number of states who are not party to the Rome Statute are parties to the Genocide Convention (notably Sudan). This means that establishing an obligation to arrest Bashir under the Genocide Convention is significant.

Further, although establishing this additional obligation does little to resolve the apparently conflicting legal obligations on Kenya in respect of Bashir – norm hierarchy (fortunately) not being a game of numbers – it does potentially resolve the difficulties that emerge from the ICC’s cooperation regime, most importantly that of immunity. Finally, shifting the burden of arresting Bashir under the Genocide Convention has a number of political advantages and could potentially bring some welcome relief to the ICC insofar as its relations with the AU are concerned.

That being said, the first task of establishing that article IV of the Genocide Convention creates additional obligations for states parties to that convention in respect of Bashir is not a simple one, just as determining the nature and scope of those obligations is no mean feat either. Nevertheless, the starting point for such an exercise is article VI of the Genocide Convention which states:

Persons charged with genocide or any of the other acts enumerated in article III shall 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 with respect to those Contracting Parties which shall have accepted its jurisdiction.

According to the International Court of Justice (ICJ), this article demands that contracting parties must ‘co-operate with [the Court], 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’.⁸² The question of whether such an obligation exists in a given situation turns on two preliminary inquiries. First, does the tribunal in question (i.e. the ICC) constitute an ‘international penal tribunal’ within the meaning of article VI? Second, can the state concerned be regarded as having ‘accepted the jurisdiction’ of the tribunal within the meaning of that provision?⁸³

The first question poses little problem for the ICC, which neatly fits the description of an ‘international penal tribunal’ set out by the ICJ.⁸⁴ As Sluiter notes: ‘There can be no doubt that the ICC, although not mentioned explicitly in this interpretation, equally qualifies as an international penal tribunal.’ This is not

surprising as the ICC itself was, to a large extent, the product of a process that began 60 years ago when the Genocide Convention was being negotiated.⁸⁵ Moreover, even if the ICC did not meet the requirements of an ‘international penal tribunal’ generally, the ICJ in the *Genocide Case* stated that ‘it would be contrary to the object of the provision to interpret the notion of “international penal tribunal” restrictively in order to exclude from it a court which, as in the case of the ICTY, was created pursuant to a United Nations Security Council resolution adopted under Chapter VII of the Charter’.⁸⁶ Arguably, under Resolution 1598 the ICC is in an analogous position to the ICTY.

So far so good. However, it is in answering the second question that the ICJ adopted a notoriously circular line of reasoning, noting:

The question whether the [state] must be regarded as having ‘accepted the jurisdiction’ of the ICTY within the meaning of Article VI must consequently be formulated as follows: is the Respondent obliged to accept the jurisdiction of the ICTY, and to co-operate with the Tribunal by virtue of the Security Council resolution which established it, or of some other rule of international law? If so, it would have to be concluded that, for the Respondent, co-operation with the ICTY constitutes both an obligation stemming from the resolution concerned and from the United Nations Charter, or from another norm of international law obliging the Respondent to co-operate, and an obligation arising from its status as a party to the Genocide Convention, this last clearly being the only one of direct relevance in the present case.⁸⁷

For many this is the low-water mark of the ICJ’s landmark judgment.⁸⁸ In effect, the court’s interpretation of this second question makes ‘the existence of a duty to cooperate issuing from another source of international law a precondition for the acceptance of jurisdiction of an international penal tribunal’.⁸⁹ In the case of the Genocide Convention, for parties who are also ICC states parties (such as Kenya) this additional duty of cooperation can be found in the Rome Statute; and therefore by the ICJ’s reasoning in the *Genocide Case* they would have accepted the ICC’s jurisdiction and be under an additional cooperation obligation stemming from article VI of the Genocide Convention. However, according to the ICJ’s formulation, Genocide Convention signatories who are not party to the Rome Statute (with the exception of Sudan which is under an additional international law rule in the form of UN Security Council Resolution 1598) have not accepted the ICC’s jurisdiction and therefore would not be under

any additional obligation stemming from the Genocide Convention in respect of the genocide counts.

This is of course based on the ICJ's much-criticised formulation in the *Genocide Case* which, according to Sluiter 'confuses the requirement of acceptance of jurisdiction ... with the existence of a duty to cooperate', and adopts a 'restrictive interpretation [which] is inconsistent with the Convention's object and purpose'.⁹⁰ According to Sluiter, once the UN Security Council refers a matter to the ICC under article 13(b) of the Rome Statute, all UN states are deemed to have accepted the jurisdiction of the ICC by virtue of article 25 of the UN Charter. Therefore, all Genocide Convention signatories would be under an article VI obligation in respect of genocide charges pursuant to that referral.⁹¹

Expanding the debate to include the Genocide Convention would take the wind out of the sails of many of the ICC's opponents

The merits of the ICJ's reasoning in the *Genocide Case* are ultimately academic insofar as ICC states parties such as Kenya are concerned. That is because even if one accepts that an additional obligation is required, such an obligation in any event exists in respect of the Rome Statute. That being said, there are a number of advantages for the ICC's proponents in arguing that ICC states parties are under a dual obligation in respect of the genocide counts against Bashir.

The clearest advantage concerns the heated question of immunity which is all but obviated as a result of this dual obligation: both in terms of the Genocide Convention and the Rome Statute. With regard to the Genocide Convention – which treaty Sudan is a party to – article IV states 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 individuals'. Therefore, even assuming that Bashir was entitled to immunity under the Rome Statute – and therefore ICC states parties are allowed not to cooperate under article 98 – this immunity would arguably not relieve Genocide Convention signatories (such as Kenya) of their concomitant obligation under the Genocide Convention to arrest Bashir and surrender him to the ICC. What is more, with regard to article 98 of the Rome Statute, surrendering states would not be acting contrary to

their obligations to another state in surrendering Bashir as Sudan could be said to have effectively waived his immunity in respect of genocide charges by signing the Genocide Convention.⁹²

On a political level, expanding the debate to include the Genocide Convention would take the wind out of the sails of many of the ICC's opponents.⁹³ For one, it would weaken if not destroy the refrain that Sudan's leader is being unfairly prosecuted by a court that Sudan is not party to, having been referred to that court by members of the UN Security Council who are themselves not party to it. It also raises the possibility of a referral to the ICJ under article IX of the Genocide Convention.

None of these complexities were canvassed by the AU in its non-cooperation decision in respect of Bashir, which made no mention of the Genocide Convention. Nor, as noted above, does the establishment of this dual obligation assist us in addressing the central pre-occupation of this paper: the *prima facie* conflict between Kenya's obligations to arrest Bashir and the AU decisions. However, what can be said at the very least is that when Bashir attended constitutional celebrations in 2010, Kenya was under a direct obligation to cooperate with the ICC in respect of Bashir under the Rome Statute, as well as an additional obligation under the Genocide Convention.

AFRICAN STATES' OBLIGATIONS UNDER THE AU CONSTITUTIVE ACT

Turning now to the legal status of the AU decisions, the discussion is complicated by the fact that the nature and effect of such decisions have been all but ignored in academic literature. Therefore, some general observations are necessary.

First, the AU is an international organisation of limited membership, with a regional scope.⁹⁴ It was inaugurated in 2002 to replace the Organisation of African Unity, whose function and structure has been rendered largely obsolete by the attainment of independence of all African states.⁹⁵ It is accordingly governed by the 'common law of international organisations' which has developed largely through the practice of the UN and its organs but has not been unaffected by the rise to prominence of regional bodies in recent times.⁹⁶

The proliferation of international organisations over the past 50 years, which perform a number of different functions in international society, has led to attempts to systematise them.⁹⁷ However, the exercise has been undertaken for the purpose of analysing them and the differences between different types of international organisations (i.e. regional and global, open and closed)

are nominal and not legal.⁹⁸ Rather, all such inter-governmental bodies are subject to the same legal regime – or the ‘common law of international organisations’⁹⁹ – save that the nature of a particular such organisation may inform the interpretation of its internal acts and functions.¹⁰⁰ Therefore, the classification of the AU as a regional (international) organisation is not dispositive at this stage of the enquiry.

Second, the law relating to international organisations is unsettled in many respects: there is disagreement among academics regarding the nature of international organisations and their position vis-a-vis the rest of the international legal order.¹⁰¹ This disagreement is no stronger than in relation to the subset of international organisations that are ‘constitutive’ in nature, of some political, economic or perhaps legal order/system (such as the AU). While there is general support for the fact that international organisations generally are different, the contentious question is how are they different? More importantly, do their provisions trump standard treaty obligations? Do they create separate, autonomous legal orders? These questions are addressed below.

Article 23 of the AU’s Constitutive Act clearly intends that AU decisions are capable of binding member states

A related but more immediate controversy concerns the status of the constituent documents of such organisations themselves, which also has important consequences for how they are interpreted. While almost all such organisations are established by treaties and are therefore subject to the general rules of interpretation set out in the 1969 Vienna Convention on the Law of Treaties,¹⁰² the ICJ pointed out in the *Certain Expenses Case* that the UN Charter – the most prominent ‘constituent instrument’ – does have ‘certain special characteristics’.¹⁰³ Further, article 5 of the Vienna Convention on the Law of Treaties implies some difference when it states: ‘The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization.’¹⁰⁴

The question can therefore be asked: do the ‘constituent documents’¹⁰⁵ of such organisations occupy a higher status within the international legal order, or are

they merely treaties subject to different internal rules but of no greater legal worth than their contemporaries?

These questions are often answered politically or ideologically, rather than legally. Klabbers thus notes that ‘[a]s a theoretical matter, the claim that constituent documents are somehow different from other treaties has yet to find serious elaboration and substantiation; authors usually limit themselves to sketching in what respects organisational charters differ in practice from other treaties’.¹⁰⁶

For our purposes these interpretive nuances can most accurately be captured as differences of emphasis.¹⁰⁷ The general rules of treaty interpretation are found in the Vienna Convention on the Law of Treaties and to a lesser extent judicial and state practice. According to article 31(1) of the Vienna Convention, the general rule of interpretation is that ‘[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’: a sometimes uncomfortable balance between the textual and teleological approach.¹⁰⁸ However, this balance is tipped in favour of the latter when it comes to the interpretation of the constituent instruments of international organisations.¹⁰⁹ In its *Nuclear Weapons Advisory Opinion* the ICJ stated:

[T]he constituent instruments of international organizations are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals. Such treaties can raise specific problems of interpretation owing, inter alia, to their character which is conventional and at the same time institutional; the very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret these constituent treaties.¹¹⁰

Furthermore, in its *Reparations for Injuries Suffered Opinion* the ICJ stated:

Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice.¹¹¹

Another interpretive approach that receives greater emphasis insofar as international organisations are concerned is that of subsequent practice, which is used

not only in a situation where the text is unclear but, more controversially, in reading in a new rule or provision or amending an existing one.

In the final analysis, there are no hard and fast rules to be applied, as Amerasingh notes: '[I]nterpretation of texts in international law is better described as an art and not as a science, although those who practice the art may often want to disguise the process of interpretation as a science.'¹¹² Nevertheless, there are certain rules of interpretation that are applicable and which provide useful guidance to ascertain the real meaning of a particular decision.

Turning to the AU decisions, it must be noted at the outset that its legal nature and effect must be determined not only with reference to the decision itself alone, but also (as a prior question) by considering the legal nature and effects of AU Assembly decisions generally. As Akande notes:

In determining whether or not a particular decision of an international organisation is legally binding on its addressee one must consider, first, whether that organ or organisation is empowered by its constitution (expressly or impliedly) to take binding decisions and, secondly, whether the language of [the] decision reveals an intention on the part of the organ to issue a binding decision.¹¹³

For this reason, the legal effect of decisions of the AU generally in terms of its Constitutive Act will be considered first in order to determine the nature of such decisions vis-a-vis the obligations of states parties under the Rome Statute. The decision itself will be considered below.

Although there is no express provision in the AU's Constitutive Act conferring on its assembly the power to making binding decisions, it is clear from article 23 – which sets out the consequences for failing to abide by such decisions – as well as a thorough contextual reading of the Constitutive Act, that the AU Assembly is empowered to do so. Article 23 states:

[T]he failure of a Member State to comply with decisions of the AU may result in sanctions being imposed on the defaulting state. These include the denial of transport and communications links with other Member States, as well as other measures of a political and economic nature to be determined by the Assembly.

Bearing in mind the interpretive biases discussed above, article 23 leaves little room for disagreement when considered both textually and teleologically. In terms of its ordinary meaning, article 23 clearly intends that AU decisions are capable of binding member states, and

even contains explicit provisions relating to sanctions for noncompliance. What is more, considering article 23 from the perspective of the treaty's purpose and object yields the same result. If one considers the objectives and principles of the AU, set out in articles 3 and 4 of its Constitutive Act respectively, it seems clear that the organisation cannot fulfil its purpose absent the ability to make binding decisions in respect of its member states. Most clearly, article 4(h) of that act, which sets out '[t]he right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity', would be meaningless were it not possible for the AU to take binding decisions in respect of collective security measures – the most forceful measures available to any institution under international law and hitherto the sole province of the UN Security Council.

According to article 31(2) of the Vienna Convention, 'context for the purpose of the interpretation of a treaty' includes not only the text, preamble and annexes, but also 'any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty'. In the organisation's preamble it records its determination 'to take all necessary measures to strengthen our common institutions and provide them with the necessary powers and resources to enable them to discharge their respective mandates effectively'. Furthermore, the preamble of the Protocol Establishing the Peace and UN Security Council notes the AU's desire to establish:

An operational structure for the effective implementation of the decisions taken in the areas of conflict prevention, peace-making, peace support operations and intervention, as well as peace-building and post-conflict reconstruction, in accordance with the authority conferred in that regard by Article 5(2) of the Constitutive Act of the African Union.

Further, article 7(e) of that protocol gives the PSC the power to 'recommend to the Assembly, pursuant to Article 4(h) of the Constitutive Act, intervention, on behalf of the Union, in a Member State in respect of grave circumstances, namely war crimes, genocide and crimes against humanity, as defined in relevant international conventions and instruments'.

Arguably, even if the text of the AU Constitutive Act is considered insufficient or equivocal in this regard, given the considerable mandate the body has been given by its member states, those advocating for the binding nature of AU Assembly decisions could rely on the doctrine of implied powers to support their position.¹¹⁴ This doctrine – 'by which an organisation is deemed

to have those powers that are necessary for achieving its purposes even in the absence of words in the text which indicate that the organisation is to have such a power’ – could reasonably be used to imbue the AU Assembly with the power to bind its member states by its decisions.¹¹⁵ However, it seems unnecessary to go to such lengths to give the AU Assembly an authority it appears to have from a textual and purposive reading of article 23 of the Constitutive Act.

The ‘balancing paragraph’ in the AU’s 2010 Bashir decision is potentially destructive of the otherwise binding nature of AU decisions

Finally, although obviously not determinative from a legal perspective, it is clear that the AU Commission regards decisions of AU organs as binding under its Constitutive Act. The AU Commission noted as follows in response to the ICC pre-trial chamber’s decision regarding Kenya’s non-cooperation and subsequent statements by members of the UN Security Council:

The African Union Commission expresses its deep regret that both the statements and the decisions grossly ignore and make no reference whatsoever to the obligations of the two countries to the African union, arising from Article 23 (2) of the Constitutive Act of the African Union, to which Chad and Kenya are State Parties, and which obligate all AU Member States ‘to comply with the decisions and policies of the Union’ ... The decisions adopted by the AU policy organs are binding on Chad and Kenya and it will be wrong to coerce them to violate or disregard their obligations to the African Union.¹¹⁶

Having established that the AU Assembly is empowered through the AU Constitutive Act to make decisions that are binding on member states, the focus then turns to the question of the binding nature of the AU’s Bashir decision itself. This question can be further divided into the following two inquiries: first, is the decision – or more specifically operative paragraph 5 thereof – by its terms mandatory (as opposed to exhortatory); and, second, what precisely does the decision bind member states to do?

Under international law, the AU decisions are so-called organisational acts.¹¹⁷ Arguably, the intention of

the drafters – of less relevance in the interpretation of the constitutive document – takes on greater significance in the context of such decisions. In practice, there is a useful but not determinative analogue in a decision of the UN Security Council taken under article 25 of the Charter; the binding nature of such a decision being ‘determined by the language used in it, the discussions leading to it, the Charter provisions invoked, etc., all with the purpose of establishing the intent of the SC.’¹¹⁸

Applying these four criteria to the AU’s Bashir decision, it seems clear that operative paragraph 5 of the 2009 AU decision intended to bind member states to follow its terms, whatever those may be. The phrasing ‘decision’, the peremptory language used (‘shall not cooperate’), and the discussions leading up to it are all indicative of this. We note that, to date, the AU Assembly has used the verb ‘decides’ sparingly – normally in the context of institutional acts relating to budgets and appointments – and its use in the context of states parties reasonably indicates its peremptory nature.

Notably, earlier drafts of the same decision reportedly made specific reference to the measures in article 23 for non-compliance; an interesting interpretive indication had it been included in the final text. Ultimately this reference was excluded as part of the same compromise that led to the inclusion of the passage calling on members to balance their obligations. Its non-inclusion could be used to support both the decision’s peremptory or exhortatory nature. As has been noted in the context of the UN Security Council, finding meaning in what a deliberative organ chooses not to do is a perilous exercise. Nonetheless, on the whole, and upon a reasonable interpretation of the AU decision, it is difficult to argue that the AU did not intend for its decision to be peremptory in nature, binding member states to observe its terms.¹¹⁹

Accepting that the AU decisions were empowered by the AU’s Constitutive Act and *prima facie* intended to be of a binding nature, the more difficult task is deciding what exactly its terms enjoin member states to do. Although the phrase ‘AU Member States shall not cooperate with the ICC in the arrest and surrender of President El-Bashir of The Sudan’ leaves little margin for circumspection, the AU did not stop there. In its 2010 decision the AU followed that directive with inclusion of the request that ‘Member States balance, where applicable, their obligations to the AU with their obligations to the ICC’ (the balancing paragraph). The inclusion of this fuzzy balancing paragraph is fraught with difficulties. While it seems clear that the AU Assembly has the authority to create binding obligation on states by its decisions, and that the AU decisions are an exercise of that authority, what exactly the decisions enjoin member states to do, or not do, is as clear as mud.

The balancing paragraph is potentially destructive of the otherwise binding nature of the AU decisions. The ambiguity created by this balancing paragraph and its consequence for African states parties will be discussed in more detail below.

APPROACHES FOR DEALING WITH COMPETING OBLIGATIONS

Having set out the relevant obligations, it becomes clear that the AU decisions and the ICC arrest warrant for Bashir present an immediate problem for African ICC states parties in the form of a *prima facie* conflict between two obligations under international law. The first is their obligation as signatories to the ICC under, inter alia, article 87 of the Rome Statute to cooperate in the arrest and surrender of Bashir; the second being the obligation under article 23 of the AU Constitutive Act to comply with the decision of the AU Assembly not to cooperate with the ICC. The absence of any notable established hierarchy of norms under international law, and the recent proliferation of international legal rules and rule-making institutions (like the AU), makes norm conflict such as the one in question increasingly inevitable.¹²⁰ That said, such norm conflicts have received little scholarly attention, and a few clarifications are necessary.

The UN Security Council intended
that Sudan and other parties
to the Darfur conflict must
'cooperate fully' with the ICC

First, the term norm conflict in this context is used to describe the position where a state is under two competing obligations under international law: therefore the norms from which those obligations arise are in conflict. This focus on competing obligations is norm conflict in a narrow sense. Strictly speaking, norm conflicts can also arise between competing obligations and permissive rules of international law – when what states are required to do and are allowed to do are in conflict – or even between the latter (i.e. in a broad sense). Although the situation we are considering involves a norm conflict in the narrow sense (i.e. competing obligations), it must be noted that in law there is no difference between these and norm conflicts in this broader sense.¹²¹

Second, the question of resolving norm clashes in international law is a controversial one. While there is widespread agreement regarding the identification of legal obligations – guided in large measure by article 38 of the ICJ Statute – the question of resolving norm conflicts is less settled. As Milanovic notes:

Crucially, international law lacks the key method for resolving genuine norm conflict that is used in domestic law: a centralized system with a developed hierarchy, and at that a hierarchy based on the sources of norms. Thus, in domestic systems a constitutional norm will prevail over a statutory one, while legislation will ordinarily prevail over executive orders or decrees. Not so in international law, where all sources of law are considered equal.¹²²

If there are any exceptions to the 'norm flatness' in international law, they are in respect of obligations of a *jus cogens* nature,¹²³ and a situation involving article 103 of the UN Charter.

According to the Vienna Convention on the Law of Treaties: 'A treaty is void if ... it conflicts with a peremptory norm of general international law.'¹²⁴ The Vienna Convention further defines such norms as those 'accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'¹²⁵ Similarly, article 103 of the UN Charter states: '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.'¹²⁶ The scope of the 'obligations ... under the [Charter]' include both its provisions – such as article 2(4) which outlaws the use of force by states save for the exceptions discussed below – as well as obligations created by UN organs, most notably the UN Security Council.¹²⁷ In terms of article 103, such obligations would prevail over 'obligations under any other international agreement', which includes both bilateral and multilateral treaties, as well as *arrangements* between parties.¹²⁸ Therefore, only a conflict between norms falling within the ambit of article 103, or those of a *jus cogen* character, and another general international law obligation can be resolved with reference to hierarchy.

Third, in cases of irresolvable conflict between two obligations, states are required to follow one and face the consequences for the breach of the other. Therefore in order for the conflict to be truly resolved there must be absolution from responsibility for that breach. Notably,

for some this disqualifies *jus cogens* as a means of resolving norm conflicts in international law.¹²⁹

Against that backdrop it becomes clear that resolving this *prima facie* conflict is no simple task for African ICC states parties such as Kenya, nor is it clear that it is possible to do so in a manner under international law that is acceptable to all, or even most, stakeholders. The confused situation created by the political posturing of the AU has left states – or at least those states that have not already abandoned their fidelity to the Rome Statute in favour of the AU’s decision – with one of two options in law.

The UN Security Council can
compel states to cooperate,
but Resolution 1593 on the
Darfur conflict does not
invoke that authority

The first approach might be for states to address the conflict directly and to seek its resolution by reference to article 103 of the UN Charter as establishing the hierarchically superior norm. The second is for states to avoid the conflict by seeking to construct the norms in a manner that removes the conflict. As discussed below, this approach is increasingly common in modern international law.

Resolving the conflict: Resolution 1593 and article 103 of the UN Charter

Arguably in the context of UN Security Council referrals to the ICC under article 13(b) of the Rome Statute, decisions taken in pursuance of such referrals take on a higher order of legal significance. The reason for this is that the Rome Statute requires such referral decisions to be taken under chapter VII of the UN Charter and, in terms of article 103 of the UN Charter, obligations under chapter VII take precedence over ‘any other obligation’.¹³⁰ This argument is most often raised in the context of immunity but more recently has been used to address the AU decisions.¹³¹ For the purposes of resolving the current conflict, if the obligation to arrest Bashir stems from UN Security Council Resolution 1593 it will, by operation of article 103, override the obligation on Kenya to comply with the AU decisions.

Two schools of thought have emerged regarding the effect of Resolution 1593, and by extension article 13(b) referrals generally, on subsequent cooperation

proceedings in pursuance thereof. The first posits that a referral by the UN Security Council under chapter VII of a situation or case to the ICC automatically means that such proceedings trigger cooperation obligations generally for member states of the UN such that states are bound to cooperate in such circumstances per force of article 103. The second considers that the effect of such a referral on the subsequent proceedings can only be determined with reference to the specific resolution in question.

At first glance the former argument has some purchase. One can certainly see why proponents of the ICC would want to capitalise on the UN Security Council’s chapter VII authority to ensure that the strongest possible cooperation obligation is placed on the broadest number of states.¹³² As noted above, Pre-Trial Chamber I appeared to take on this argument in August 2010 when it stated that Kenya ‘has a clear obligation to cooperate with the Court in relation to the enforcement of such warrants of arrest, which stems both from the United Nations Security Council Resolution 1593 (2005)..., and from article 87 of the Statute of the Court’.¹³³

However, in answering this question it is not the Rome Statute that is determinative, but rather the UN Charter as it is *that* instrument that would create an overriding obligation under article 103 – albeit in relation to an article 13(b) referral by the UN Security Council under the Rome Statute. As noted above, it is trite that UN Security Council resolutions must be interpreted with reference to their terms, with the language they are couched in and the discussions leading to their adoption and the provisions cited all being indicators of the UN Security Council’s intent.¹³⁴ In this regard the ICJ held as follows in the *Namibia Opinion*:

In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.¹³⁵

Therefore, the question whether Resolution 1593 imbues decisions taken by the ICC in furtherance thereof (such as a decision by the court to issue an arrest warrant for Bashir) with a higher normative value than they would otherwise enjoy under the Rome Statute cannot be addressed with regard to article 13(b) referrals generally, but rather must be determined with reference to the specific UN Security Council resolution, and its terms, considered in light of the above interpretive framework. Put simply: if the UN Security Council wishes to oblige

UN member states to cooperate with the ICC in respect of a situation or case brought before the court under article 13(b), the UN Security Council should state so explicitly, and this obligation cannot be inferred or imposed simply by the UN Security Council's invocation of article 13(b) to refer a case to the ICC.

At face value, the two commands in the AU's 2010 Bashir decision appear irreconcilable

In this regard, Sluiter sets out three possible models of cooperation available to the UN Security Council insofar as international judicial mechanisms are concerned:

First, the Council could simply refer a situation without any reference to cooperation; this would mean that the 'normal' regime of the Statute applies and that only obligations for states parties can be established. In case the Council opts for the imposition of obligations for states non-parties there would be the choice, as to the substance of the duties, to apply the ICC Statute *mutatis mutandis*, or to develop a separate, possibly more demanding regime.¹³⁶

The problem for those arguing that Resolution 1593 creates cooperation obligations on states (other than Sudan and parties to the conflict in Darfur) in respect of Bashir are the terms of the resolution and the practice of the UN Security Council itself. Resolution 1593 states, in relevant part, that the UN Security Council:

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

The importance of language in determining the UN Security Council's intention cannot be overstated. As the ICJ held in the *Namibia Case*: 'The language of a resolution of the UN Security Council should be carefully analysed before a conclusion can be made as to its binding effect'.¹³⁷ While the UN Security Council clearly intended that Sudan and the other parties to the conflict would be under an obligation under chapter VII to 'cooperate fully', the resolution merely urges all

states and concerned regional and other international organisations to cooperate fully.¹³⁸

The use of 'urges' with regard to the latter in contrast to 'decides' and 'shall' with regard to the former is significant. The use of exhortatory language in the history of the UN Security Council has been interpreted as creating non-binding recommendations.¹³⁹ Although there is no hard and fast means of ascertaining the binding nature of UN Security Council resolutions based on the chosen verb, the juxtaposition of 'urges' and 'shall' is clearly suggestive of an obligation for one set of actors versus an exhortation in relation to others. Further, as far as binding cooperation regimes are concerned a historical comparator can be found in UN Security Council Resolution 827, which established the ICTY, in terms of which the UN Security Council '*decided*' that all States *shall* cooperate fully with the International Tribunal and its organs ...'.¹⁴⁰ This phrase was repeated verbatim in UN Security Council Resolution 995 establishing the ICTR. As Dapo Akande notes in this regard:

[I]n the case of the Sudan referral, the Security Council has only imposed explicit obligations of cooperation on one non-party (Sudan). There is no explicit obligation in Resolution 1593 for other states to cooperate with the Court. All that the Security Council does is that it 'urges all states and concerned regional and international organizations to cooperate fully'. An urging to cooperate is manifestly not intended to create an obligation to do so. The word 'urges' suggests nothing more than a recommendation or exhortation to take certain action.¹⁴¹

Moreover, the resolution explicitly recognises 'that States not party to the Rome Statute have no obligation [sic] under the Statute' before urging states to cooperate. This statement would be superfluous if all states were intended to be bound by the resolution under chapter VII. Undoubtedly, the UN Security Council has the power to compel states to cooperate in respect of an article 13(b) referral as it has done in the past, but Resolution 1593 does not invoke that authority.¹⁴²

Sadly, the ICC pre-trial chamber's position on this issue is not a model of clarity. Despite the 'clear obligation' cited in its August 2010 decision regarding Kenya, in its *Arrest Warrant Decision* it makes reference to chapter VII and article 103 of the UN Charter only in the context of Sudan's obligations, apparently excluding the broader application of these obligations by implication.¹⁴³ In fact, it ends its discussion of cooperation by noting:

Finally, the Chamber highlights that, in relation to States other than Sudan, as well as regional and international organisations, the dispositive part of United Nations

Security Council Resolution 1593 expressly states the following in relation to their cooperation with the Court: ‘While recognizing that States not party to the Rome Statute have no obligation to the Statute, [the United Nations Security Council] urges all States and concerned regional and other international organisations to cooperate fully’.¹⁴⁴

This is hardly suggestive of the clear obligation that stems from Resolution 1593. Moreover, even if the ICC itself were to decide that Resolution 1593 binds all states under chapter VII, and therefore article 103 is in play, it is not clear by any means that the ICC’s determination would be valid – and it certainly would not be binding on non states parties.

How the competing obligations play out at national level depends on the particular domestic framework of each country

What is apparent is that in the absence of another resolution compelling states generally to cooperate in explicit terms, the fact that the matter came before the ICC under chapter VII is of little assistance to its proponents, or of concern to Kenya, in the context of Bashir. And for the purposes of our discussion, the UN Security Council’s referral of the case to the ICC is for Kenya and other states that are not a party to the conflict an insufficient factor to break the apparent deadlock between the two conflicting norms in question.

Avoiding the conflict: Reconsidering the AU’s Bashir decision

The alternative (and preferred) approach available to states does not seek to resolve the conflict proper, but rather allows them to adopt an interpretation of the AU decisions that avoids it. This approach capitalises on the ambiguity in the AU decisions, and relies on the doctrine of effective construction to posit an interpretation of those decisions that allows both norms to co-exist whilst maintaining fidelity to international law. There is much to be said for this approach, particularly because in international law there is an emerging presumption against norm conflict which would be operative for all states.¹⁴⁵

The focus of this interpretation is on the two ostensibly contradictory provisions of the AU’s Bashir decision.

As noted above, operative paragraph 5 of the AU Bashir decision creates a *prima facie* binding obligation on AU member states not to cooperate with the ICC in the arrest and surrender of Bashir. However, little consideration has been paid to the paragraph immediately afterwards which requests member states to balance, where applicable, their obligations to the AU with their obligations to the ICC (the balancing paragraph). This paragraph was included at the insistence of states such as South Africa whose implementing legislation obliges them, under domestic law, to cooperate with the ICC. Therefore, when read as a whole, the decision simultaneously commands AU member states not to cooperate in the arrest of Bashir and requests them to balance this edict with their obligations under the Rome Statute. At face value, these two commands appear irreconcilable by simultaneously commanding member states not to cooperate in the arrest of Bashir and requesting them to balance this edict with their obligations under the Rome Statute.

As noted above, using the UN Security Council as an analogue, in interpreting such decisions various interpretive techniques can be employed with the view to ascertaining the ‘intention’ of the organ concerned. The first, and most important, such technique is to consider the language used in the decision; the second is to focus on the discussions leading up to it; and the third is to consider the provisions invoked by it. Applying this interpretive approach to the AU decisions as a whole yields the following.

First, the textual approach is ambiguous. The AU decisions state emphatically that AU member states shall not cooperate with the ICC in respect of Bashir – a clear and unqualified peremptory command. However, immediately after that (in the more recent decision) comes the balancing paragraph. This paragraph makes a straightforward textual interpretation difficult since it suggests a categorical imperative while at the same time provides allowance for a measure of discretion. This suggests either that despite the fact that it was framed as a decision of the AU Assembly it is not binding, or that somehow it is not an unequivocal command but rather is diluted when states (‘where applicable’) are under another obligation stemming from the Rome Statute.¹⁴⁶

Second, not only is the plain language of the decision conflicted, but the discussions leading up to it are plainly contradictory. At the time the decision was adopted there was concern raised by states that the AU Commission – responsible for drafting the decisions of the AU Assembly as they pass through the various stages of the decision-making process – had on more than one occasion intervened in the discussions and decision-taking during the preparatory stages in order to push a particular line on the question of the Bashir arrest warrant.

In fact, the controversial passage urging non-cooperation, which was dropped from the AU Assembly's corresponding decision in its 14th Ordinary Session in February 2010 (having been introduced at the previous summit in Sirte in July 2009), was resurrected *mero motu* by the AU Commission in Kampala in July 2010. It was then subsequently re-inserted against the wishes of certain states at each stage of the drafting process until finally it was presented to the AU Assembly as a *fait accompli*, at which point diplomatic fatigue and political intransigence made renegotiation effectively impossible. This may just as easily be the case of certain states disowning a politically sensitive decision in order to deflect criticism. Nevertheless, the fact is that reference to the discussions leading up to the AU decision is not a plausible means of infusing plainly contradictory language with any singularity or clarity of purpose.

SA is arguably obliged by its domestic ICC law to arrest Bashir notwithstanding the AU decisions

Third, the provisions invoked by the AU in arriving at the decision are similarly not decisive. As noted above, the omission of an earlier reference to article 23 expressly from the final text of the decision is ambivalent.

In such circumstances it becomes necessary to look beyond the text in order to give meaning to these two paragraphs. Arguably there is only one tool remaining by which to avoid the norm conflict. In this regard, the internal contradiction in the AU decisions exemplified in the 'balancing paragraph' should be resolved by employing the doctrine of effective construction.

This doctrine – based on the maxim *Ut Res Magis Valeat Quam Pereat*¹⁴⁷ – takes on different forms but has been generally understood to require that one 'avoid interpretations which would leave any part of the provision to be interpreted without effect',¹⁴⁸ and that 'an interpretation which would make the text ineffective to achieve the object in view is *prima facie* suspect'.¹⁴⁹ The doctrine has been employed by the ICJ on more than one occasion, beginning with the *First Admissions case*,¹⁵⁰ and has been used on a number of different occasions by different judicial bodies, including the appeals chamber of the ICTY.¹⁵¹ Although those occasions involved the interpretation of treaties, there appears to be no reason why the doctrine is not applicable in the context of organisational acts (as it turns out, strictly speaking

the ICTY in *Krstic*, in interpreting its statute, was considering an organisational act).

Applying the doctrine of effective construction to the AU decisions means that to read it as peremptory would render permissive opt-out meaningless. Therefore, in terms of this doctrine the text of the decision is best rendered exhortatory: that is, it is not an unequivocal command but rather is diluted when states ('where applicable') are under another 'obligation to the ICC'. States parties may thus avoid the apparent conflict of norms represented in the AU decisions by an interpretive turn which takes the text of the decisions seriously and attempts to render it meaningful.¹⁵² A meaningful rendering for those AU member states that are, 'where applicable' under another 'obligation to the ICC', is that such states' obligations to the ICC are not displaced by the AU decisions.

STATES' OBLIGATIONS UNDER THEIR DOMESTIC LAW

As a final point of discussion reference must be made to the domestic obligations on states in respect of Bashir. The first thing to note in this regard is that the way a particular international legal obligation operates domestically is a question of domestic law.¹⁵³ Put differently, international law does not dictate how international obligations are considered under domestic law.¹⁵⁴ The second is that there is no uniformity of practice in this regard. Traditionally scholars have used monism and dualism to describe the relationship between national and international law. However, as Denza notes:

There is no indication that either theory has had a significant input into the development will revision of national constitutions, into the debates in national parliaments about the ratification of international agreements, or into the decisions of national courts on questions of international law. Except as shorthand indications of the general approach within a particular state of implementation or application of international rules, these theories are not useful in examining the relationship between international law and national laws.¹⁵⁵

For these reasons the question of how the competing obligations on African ICC states parties will play out domestically cannot be considered generally, but depends on the particular domestic framework of each country.

Be that as it may, the following general comments are apposite. Insofar as 'pure' monist countries are concerned, both the ICC cooperation obligations and the AU decisions (under article 23 of the AU Constitutive Act) are automatically part of the domestic legal order,

and as such the problem of competing obligations at the international law level are likely to follow such states into their domestic legal order.¹⁵⁶ However, the situation is different with dualist states, as they require that these legal obligations be incorporated into the domestic legal order in order for them to be binding domestically. Therefore, it is possible that if a dualist state has only incorporated one of the obligations – either the Rome Statute or the AU Constitutive Act – then that obligation will prevail domestically.

ICC states parties must guard against the opportunistic reliance on the AU's decisions as a basis to avoid international law obligations

Very few (five to date)¹⁵⁷ African states have adopted such legislation. As illustrations, we focus on South Africa and Kenya. Although other dualist African ICC states parties might rely on the absence of such legislation for not cooperating with the court, as a matter of international law this domestic deficiency does not affect their obligations to cooperate under the Rome Statute, nor can it mitigate the wrongfulness of their non-cooperation under international law.¹⁵⁸

Insofar as South Africa is concerned, as a matter of domestic law the adoption of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (ICC Act)¹⁵⁹ arguably resolves the competing obligations by creating domestic obligations in respect of Bashir only, and not concomitant obligations in respect of the AU decisions.¹⁶⁰ In terms of section 8 of the ICC Act, when South Africa receives a request from the ICC for the arrest and surrender of a person for whom the ICC has issued a warrant of arrest, it must refer the request to the director-general of the Department of Justice and Constitutional Development with the necessary documentation to satisfy a local court that there are sufficient grounds for the surrender of the person to The Hague.¹⁶¹ The director-general must then forward the request (along with the necessary documentation) to a magistrate who must endorse the ICC's warrant of arrest for execution in any part of South Africa.¹⁶²

There is no correlative legislation in respect of the AU Constitutive Act generally, nor decisions of the AU Assembly specifically. Under the South African Constitution the requirements for incorporation are 'waived' in the case of self-executing treaties by

section 231(4) of the Constitution, which provides that 'a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament'. While it might be tempting to argue that the AU decisions are self-executing, this argument is difficult to sustain in light of the fact that UN Security Council resolutions (and 'decisions of international organisations') are not seen as self-executing by states generally,¹⁶³ and particularly under South African law insofar as UN Security Council resolutions are concerned.¹⁶⁴

Therefore, as a matter of domestic law, South Africa is arguably obliged by its implementing legislation to cooperate in the arrest of Bashir notwithstanding the AU decisions, and it might avoid responsibility as a matter of international law for purportedly violating article 23 of the AU Constitutive Act.¹⁶⁵

Until very recently the same argument would have held in the case of Kenya. According to the 1963 Constitution, Kenya was a dualist state. To this end it adopted the International Crimes Act (2008) in order to incorporate the Rome Statute of the ICC into its domestic law and provide for its implementation. That Act – which came into force on 1 January 2009 – states that certain sections of the Rome Statute, including those relating to international cooperation and judicial assistance, shall 'have the force of law in Kenya'. Therefore, under its own law Kenya is under an obligation to arrest and surrender suspects to the ICC in respect of whom the court has issued a warrant of arrest. As with South Africa, no such implementing legislation exists in respect of AU decisions.

However, Kenya's new Constitution – which came into force on 27 August 2010 – changed all that. In terms of article 2(6) of the new Constitution: 'Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.'¹⁶⁶ In effect, this article converted Kenya into a monist state. The Commission for the Implementation of the Constitution – mandated under section 5(6) of the 6th schedule of the Constitution to *inter alia* 'monitor, facilitate and oversee the development of legislation and administrative procedures required to implement this Constitution' – leaves little room for doubt in this regard, noting:

This provision while recognizing that all international and regional instruments, to which Kenya is party to, form part of the laws of Kenya also has the effect of making Kenya a Monist state, which is a shift from the Dualist state which Kenya was prior to the promulgation of the Constitution 2010 ... Subject to Article 2(6) however, except where a treaty so requires, the ratified treaty does not need to be translated into national laws as the act of ratification renders such

treaties as national laws. This is premised upon the recognition of a unity between international and national laws, among monist states.¹⁶⁷

Further, James Gathii notes:

This clause effectively removes the requirement of enacting domestic implementing legislation pursuant to a treaty unless Parliament and the Executive develop practice to the contrary. This seems to be the intention behind the 2010 Constitution, which omits provisions contained in prior drafts that contemplated that Parliament would have been authorised to consider and approve treaties and international agreements and the President empowered to sign instruments of consent of the Republic to be bound by treaties and international agreements. In my view, the omission of these provisions that were contained in the Harmonised Draft Constitution demonstrates that the drafters thought it unnecessary to mention the power of the President and Parliament with respect to authorising or signing treaties since these were automatically deemed to be a part of the laws of Kenya under Articles 2(5) and 2(6). As a consequence of Article 2(6), a treaty entered into by the Executive may lay the basis for a cause of action or the granting of a remedy without domestic implementing legislation by the National Assembly.¹⁶⁸

Therefore, article 2(6) of the new Constitution has the effect of obliterating the difference between Kenya's obligations as a matter of domestic law under the Rome Statute and the AU Constitutive Act.¹⁶⁹

The discussion of domestic law above highlights the importance of a case-by-case or state-by-state analysis of the effect of the AU's non-cooperation decisions within the continent. It also highlights the importance – yet again – of understanding complementarity through both an international and a domestic lens. While the debate around the norm conflict between the ICC and the AU's decisions implicate international law questions, the answer to the questions – of whether the Rome Statute's obligations prevail over the AU's decisions – are bound up with a close analysis of relevant domestic implementation legislation and constitutional arrangements.

CONCLUSION

The only individual who has benefited from Kenya and Chad's (in)action with regard to arresting Bashir when he was present on their territories is Bashir himself – a leader allegedly responsible for genocide and mass atrocities against his own people and, now increasingly, a symbol of Africa's divided position on international

criminal justice. That his indictment has become a complex international law problem for the continent and the international community at large, it is a continuing shame for the victims of violence in Sudan. What needs to be guarded against is an opportunistic reliance on the AU's decisions as a basis to avoid clear international law obligations voluntarily accepted under the Rome Statute to assist in the arrest and prosecution of international fugitives from justice, whether they are from Sudan, Kenya, Libya, or other sites of mass atrocities on the African continent.

One way in which African states ought to be encouraged to show fidelity to their Rome Statute obligations is by adopting an interpretation of the AU decisions that avoids it. By relying on the doctrine of effective construction it is open to African states parties to the ICC to legitimately invoke the ambiguity in the AU decisions to argue that the injunction not to cooperate with the court is at best hortatory. In that way states committed to the advancement to international criminal justice will be able to avoid the apparent norm conflict that the AU's decision ostensibly presents.

NOTES

- 1 We note that at the time of concluding this paper the most recent AU decision did not include the ‘balancing paragraph’ (whether by design or omission is unclear). It remains to be seen whether those African states that had insisted on its original inclusion will continue to allow its exclusion from future AU non-cooperation decisions.
- 2 For a discussion of the amendment see C Gevers and A du Plessis, Africa and the codification of aggression: a pyrrhic victory, *African Legal Aid Quarterly*, (2010).
- 3 Libya was referred to the ICC by the UN Security Council under Resolution 1970 on 26 February 2011.
- 4 The Central African Republic, the DRC and Uganda all referred themselves to the ICC in terms of article 12 of the Rome Statute. Kenya was brought into the court’s remit by the prosecutor’s exercise of his *proprio motu* powers under article 15 of the Rome Statute. Sudan and Libya came before the ICC by means of an article 13(b) referral by the UN Security Council. See Resolutions 1593 and 1970 respectively. Côte d’Ivoire has made a declaration under article 12(3) accepting the ICC’s jurisdiction and the prosecutor has recently successfully exercised his *proprio motu* powers under article 15 after a request from the government of Côte d’Ivoire to intervene.
- 5 Established in 2001 to replace the Organisation of African Unity. See Constitutive Act of the African Union (2001), http://www.au.int/en/sites/default/files/Constitutive_Act_en_0.htm.
- 6 ICC, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, ICC-02/05-01/09, 4 March 2009 [hereinafter ‘Bashir Arrest Warrant I’]. Bashir thus became the first sitting head of state to be indicted by the ICC. In their original ruling, the judges of the ICC’s pre-trial chamber issued an arrest warrant against Bashir for a total of five counts of war crimes and crimes against humanity, but the panel threw out charges of genocide that had also been requested by prosecutor Luis Moreno-Ocampo. The prosecutor appealed this decision, and on 3 February 2010, the appeals chamber rendered its judgment, reversing, by unanimous decision, Pre-Trial Chamber I’s decision of 4 March 2009, to the extent that Pre-Trial Chamber I decided not to issue a warrant of arrest in respect of the charge of genocide. The appeals chamber directed the pre-trial chamber to decide anew whether or not the arrest warrant should be extended to cover the charge of genocide, which it duly did in July 2010. See ICC, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, ICC-02/05-01/09, 12 July 2010 [hereinafter ‘Bashir Arrest Warrant II’].
- 7 Hereinafter the ‘AU Decisions’. See M du Plessis and C Gevers, Making amend(ment)s: South Africa and the International Criminal Court from 2009 to 2010, *South African Yearbook of International Law*, (2010), 1.
- 8 Article 16 of the Rome Statute states: ‘No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the UN Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions’.
- 9 At its 16th Ordinary Session the AU Assembly of Heads of State and Government passed a decision supporting and endorsing ‘Kenya’s request for a deferral of the ICC investigations and prosecutions in relation to the 2008 post election violence under Article 16 of the Rome Statute to allow for a National Mechanism to investigate and prosecute the cases under a reformed Judiciary provided for in the new constitutional dispensation, in line with the principle of complementarity’ and requested that the UN Security Council ‘accede to this request’. Further, it re-iterated its similar request in respect of President al-Bashir of Sudan. See African Union, Decision on the Implementation of the Decisions on the International Criminal Court, Assembly/AU/Dec.334(XVI), 30–31 January 2011, Addis Ababa [hereinafter the ‘2011 AU Decision’], paras 3 & 6. See also African Union, Decision on the meeting of African states parties to the Rome Statute of the International Criminal Court (ICC), Assembly/AU/Dec.245(XIII), 3 July 2009, Sirte [hereinafter the ‘2009 AU Decision’], para 10.
- 10 The relationship reached a new low in December 2010 when the country’s legislators called for the country to ‘pull out’ of the Rome Statute that created the ICC. See: Kenya MPs agree to pull out of ICC, *News24*, 23 December 2011).
- 11 See 2011 AU Decision, *supra* note 9, para 5.
- 12 For example, although Amnesty International considers the AU decisions in its report on Bashir, it unfortunately adopts a somewhat duplicitous interpretation of them; making their legality contingent on the AU’s ‘provisional interpretation of article 98’ of the Rome Statute rather than its own Constitutive Act. Amnesty International, *Bringing power to justice: absence of immunity for heads of states before the International Criminal Court*, 53/017/2010, 2010.
- 13 This approach can be seen in the Amnesty International report’s discussion of immunity and article 98. *Ibid*.
- 14 European Court of Justice, *Kadi & Al Barakaat International Foundation v Council and Commission*, Joined Cases C-402/05 P & C-415/05 P, Judgment of 3 September 2008, [Hereinafter ‘Kadi I’].
- 15 Although the ECJ in Kadi I was keen to stress it was not reviewing the legality of the UN Security Council resolutions themselves but rather the EC regulations giving effect to them (see Kadi I, para 287), this distinction is spurious. The court itself noted the criticisms levelled at this reasoning in Kadi II (para 116): ‘In that regard, it has in particular been asserted that, even though the Court of Justice stated, at paragraph 287 of Kadi, that it was not for the Community judicature, under the exclusive jurisdiction provided for by Article 220 EC, to review the legality of a resolution adopted by the UN Security Council under Chapter VII of the Charter of the United Nations, the fact remains that a review of the legality of a Community act which merely implements, at Community level, a resolution affording no latitude in that respect necessarily amounts to a review, in the light of the rules and principles of the Community legal order, of the legality of the resolution thereby implemented’.
- 16 Kadi II, para 41.

- 17 A Tzanakopoulos, *Kadi II: The 1267 sanctions regime (back before the general court of the EU, EJILTalk!*, 16 November 2010.
- 18 First introduced by the German Constitutional Court, ironically, asserting ‘the power to review the compatibility of EC acts and legislation with the German Constitution’. M Milanovic, Norm conflict in international law: whither human rights?, *Duke JCIL* 20, (2009), 53. See Judgment of 29 May 1974, 37 BVerfGE 271 and Judgment of 22 October 1986, 73 BVerfGE 339.
- 19 Tzanapoulos notes in this regard: ‘In *Kadi II* the General Court is as explicit as it could be: it states that it must ensure the “full review” of the domestic implementing measure for compliance with fundamental rights (guaranteed under Community law), “without affording [the measure] any immunity from jurisdiction on the ground that it gives effect to resolutions adopted by the UN Security Council under Chapter VII of the Charter of the United Nations” (para 126). “That must remain the case”, the Court continues, “at the very least, so long as (=solange) the re-examination procedure operated by the Sanctions Committee clearly fails to offer guarantees of effective judicial protection” (para 127). *Ibid.*
- 20 See *Kadi I*, para 4. In this regard Lavronos notes: ‘In short, the Court of Justice considers itself competent to “play” with the international law obligations of the EC according to its liking, thereby emphasising the supreme and autonomous nature of the Community legal order vis-à-vis the international legal order. This “flexibility” may not always serve the considerations of legal certainty and predictability, but at the same time it allows the Court of Justice – if it chooses – to ensure that international law obligations that enter the Community legal order meet the rule of law and fundamental rights standards that are normally applicable within the Community’. N Lavranos, Judicial review of UN Sanctions by the European Court of Justice, 78 *Nordic Journal of International Law* (2009), 343, 349. As the General Court of the EU itself noted subsequently in *Kadi II* at 119: ‘[W]hile the Court of Justice normally views relations between Community law and international law in the light of Article 307 EC [i.e. primacy of international law] ... it held in *Kadi* that Article 307 EC does not apply when at issue are “the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as a foundation of the Union” (paragraph 303) or, in other words, “the principles that form part of the very foundations of the Community legal order, one of which is the protection of fundamental rights” (paragraph 304). So far as those principles are concerned, the Court of Justice thus seems to have regarded the constitutional framework created by the EC Treaty as a wholly autonomous legal order, not subject to the higher rules of international law – in this case the law deriving from the Charter of the United Nations’.
- 21 *Ibid.*
- 22 *Ibid.*
- 23 Milanovic, Norm conflict, *supra* note 18, 48–49.
- 24 See Tzanakopoulos, *Kadi II: The 1267 Sanctions Regime*, *supra* note 17.
- 25 The General Court itself noted in *Kadi II* (at 115): ‘More fundamentally, certain doubts may have been voiced in legal circles as to whether the judgment of the Court of Justice in *Kadi* is wholly consistent with, on the one hand, international law and, more particularly, Articles 25 and 103 of the Charter of the United Nations and, on the other hand, the EC and EU Treaties...’.
- 26 Milanovic, Norm conflict, *supra* note 18.
- 27 Milanovic rightly points out ‘just how completely *atextual* the debate is. In reality it has nothing to do with logic, though it is frequently represented as such, nor is it about the interpretation of a particular provision in this treaty or that, but about the basic assumptions that underlie our thinking about the law, and about what constitutes a legal system. It is thus contingent upon perspectives, ideologies and normative agendas. Everybody concerned has their own vision of the international legal order, or their own “constitutional” project, European or global’. Milanovic, Norm conflict, *supra* note 18, 50.
- 28 *Ibid.*
- 29 The ECJ was at pains in *Kadi* to avoid the conclusion that it was doing so. However, the most telling admission of this fact comes from the CFI (now renamed the General Court) in *Kadi II* when it notes: ‘[A]lthough the Court of Justice asserted, at paragraph 288 of its judgment in *Kadi*, that any judgment of the Community judicature holding a Community measure intended to give effect to such a resolution to be contrary to a higher rule of law in the Community legal order would not entail any challenge to the primacy of that resolution in international law, it has been pointed out that the necessary consequence of such a judgment – by virtue of which the Community measure in question is annulled – would be to render that primacy ineffective in the Community legal order’. *Kadi II*, para 118.
- 30 Article 13(b) of the Rome Statute states that the ICC may exercise jurisdiction over a ‘situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the UN Security Council acting under Chapter VII of the Charter of the United Nations’. For an overview of the referral of the situation in Darfur see M du Plessis and C Gevers, Darfur goes to the International Criminal Court, *African Security Review* 14(2), (2005) and M du Plessis and C Gevers, Into the deep end: the International Criminal Court and Sudan, *African Yearbook of International Humanitarian Law*, (2007).
- 31 The war crimes charges relate to the targeting of civilians (article 8(2)(e)(i)) and pillaging (article 7(1)(g)), while the crimes against humanity charges allege that Bashir is guilty of murder (article 7(1)(a)), article 7(1)(f) and rape (article 7(1)(g)). Bashir’s alleged individual criminal responsibility for these crimes is based on article 25(3)(a) of the Rome Statute. See *Bashir Arrest Warrant I (supra* note 6).
- 32 See ICC, Judgment on the appeal of the Prosecutor against the ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’, Appeals Chamber, ICC-02/05-01/09-73, 3 February 2010.
- 33 *Bashir Arrest Warrant II*, *supra* note 6.

- 34 On 21 July 2008 the Peace and UN Security Council (PSC) of the AU issued a communiqué that requested the UN Security Council, in accordance with the provisions of article 16 of the Rome Statute of the ICC, to defer the process initiated by the ICC. The UN Security Council 'noted' the request.
- 35 Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of The Sudan, Assembly/AU/Dec 21, Addis Ababa, 1–3 February 2009.
- 36 Ibid.
- 37 See Ministerial Meeting of African States Parties to the Rome Statute of the ICC, AU, MinICC/Legal, 8–9 June 2009, Addis Ababa.
- 38 Only Botswana publicly distanced itself from the AU move, and in a letter dated 8 July 2009 to the ICC assured the court that 'as a State Party to the Rome Statute of the ICC, Botswana will fully abide with its treaty obligations and will support the International Criminal Court in its endeavors to implement the provisions of the Rome Statute'. Letter dated 8 July 2009 from the Minister of Foreign Affairs and International Cooperation of the Republic of Botswana to Justice Sany-Hyun Song, President of the ICC.
- 39 The Assembly merely 'Reiterate[d] its Decision that AU Member States shall not cooperate with the ICC in the arrest and surrender of president El-Bashir of The Sudan'. African Union, Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/DEC.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court, 15th Ordinary Session of the Assembly of the Union, Kampala 27 July 2010 Doc Assembly/AU/Dec 296(XV).
- 40 AU Kampala Decision, *ibid*, para 6.
- 41 *Ibid*, para 3.
- 42 *Ibid*, para 6.
- 43 See Ministerial Meeting of African States Parties to the Rome Statute of the ICC, Addis Ababa, MinICC/Legal, 8–9 June 2009.
- 44 The full text of Recommendation 3, entitled 'Deferral of Cases: Article 16 of the Rome Statute', is as follows: 'Article 16 of the Rome Statute granting power to the UN Security Council to defer cases for one (1) year should be amended to allow the General Assembly of the United Nations to exercise such power in cases where the UN Security Council has failed to take a decision within a specified time frame, in conformity with UN General Assembly Resolution 377(v)/1950 known as "Uniting for Peace Resolution", as reflected in Annex A'. *Ibid*. For a discussion of the article 16 amendment see M du Plessis and C Gevers, Making amend(ments), *supra* note 7, 16–21.
- 45 Despite the fact that the ASP meeting had agreed that the recommendations would be submitted to the 8th ASP and African states would lobby other states in their favour, African representatives were unable to agree on a common strategy when they met in The Hague in November 2009. Numerous African states indicated that they had not received instructions from their capitals regarding the recommendations, whilst others tried to distance themselves from them. As a result, South Africa agreed to introduce the proposals in plenary and it was left to the remaining African states to decide on whether or not to support them. In the end very few African states took the floor to support the recommendations. See Report of the Commission on the Outcome and Deliberations of the 8th Session of the Assembly of States Parties to the Rome Statute of the ICC held at The Hague, Netherlands from 16 to 26 November 2009, in Report on the Ministerial Meeting on the Rome Statute of the ICC (Annex. II), Assembly/AU/Dec 245 (XIII), January 2010.
- 46 '[Urging] all Member States to speak with one voice to ensure that the proposed amendment to Article 16 of the Rome Statute which would allow the UN General Assembly to take over the power of the UNSC to defer cases for one (1) year in cases where the UNSC has failed to take a decision within a specified timeframe', para 7.
- 47 At its 8th Session the ICC ASP adopted a resolution establishing a Working Group of the ASP to consider the article 16 proposal and other amendments. See ICC-ASP/8/Res 6 and ICC-ASP/8/L 5/Rev 1 at para 4.
- 48 2011 AU Decision, *supra* note 9.
- 49 *Ibid*, para 9.
- 50 X Rice, Chad refuses to arrest Omar al-Bashir on genocide charges, *The Guardian*, 22 July 2010.
- 51 In response to reports that Bashir was to visit the Central African Republic in December 2010, Pre-Trial Chamber I issued a Kenya-type statement. See ICC, The Prosecutor v. Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, *Demande de coopération et d'informations adressée a la République Centrafricaine*, ICC-02/05-01/09-121, 1 December 2010.
- 52 The others being Senegal, Burkina Faso, South Africa and Uganda.
- 53 X Rice, Omar al-Bashir tarnishes Kenya's landmark day, *The Guardian*, 27 August 2010.
- 54 Decision informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar al-Bashir's presence in the territory of the Republic of Kenya, Pre-Trial Chamber I, ICC-02/05-01/09, 27 August 2010.
- 55 *Ibid*.
- 56 *Ibid*.
- 57 Antigua Observer/CNN, Kenya pushes back over war crimes suspect's visit, 2 September 2010.
- 58 African Union Commission, Press Release N° 119/2010, On the Decision of the Pre-Trial Chamber of the ISS informing the UN Security Council and the Assembly of State Parties to the Rome Statute about the Presence of President Omar Hassan al-Bashir of The Sudan in the Territories of the Republic of Chad and the Republic of Kenya, Addis Ababa, 29 August 2010.
- 59 See 2011 AU Decision, *supra* note 9, para 5.

- 60 ICC, Pre-Trial Chamber I requests observations from Kenya on the enforcement of warrants of arrest against Omar Al Bashir, ICC Press Release, 26 October 2010.
- 61 M Onyiego, IGAD Summit postponed amid controversy surrounding Bashir attendance, *Voice of America News*, 28 October 2010.
- 62 As Swart notes: 'Here lies the most fundamental difference between the duty of States to cooperate under the Statute and the duty to cooperate with the ad hoc tribunals under their Statutes. Since the ad hoc Tribunals have been established pursuant to resolutions of the UN Security Council, decisions by the ICTY and the ICTR come within the provision of Article 103 of the UN Charter'. Swart, General problems, in A Cassese et al (eds), *The Rome Statute of the International Criminal Court: a commentary*, Vol II, (2002).
- 63 This classification was noted by the ICTY Appeals Chamber in *Prosecutor v Blaskic* and further developed by Cassese. It has been generally accepted by other scholars since. See A Cassese, The Statute of the International Criminal Court: some preliminary reflections, *EJIL* 10, (1999), 144, 164–165. See further Swart, General problems, *supra* note 62, 1590 and 1594–1598.
- 64 Ciampi, The obligation to cooperate, in A Cassese et al (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol II, (2002), 1613. (Own emphasis.)
- 65 Article 91(2) sets out modalities for 'a request for the arrest and surrender of a person for whom a warrant of arrest has been issued by the Pre-Trial Chamber under article 58...'. Moreover, under article 58(5): 'On the basis of the warrant of arrest, the Court may request the provisional arrest or the arrest and surrender of the person under Part 9'.
- 66 See 6ICC-02/05-01/09-94, 28.
- 67 See Supplementary Request To All States Parties To The Rome Statute For The Arrest and Surrender of Omar Hassan Ahmad al Bashir, ICC-02/05-01/0, 21 July 2010. International Criminal Court, The Prosecutor v. Omar Hassan Ahmad Al Bashir ("Omar Al Bashir"), Registrar, Request to the Republic of Sudan for the arrest and surrender of Omar Al Bashir, No. ICC-02/05-01/09-5, 5 March 2009; Request to all states parties to the Rome Statute for the arrest and surrender of Omar Al Bashir, No. ICC-02/05-01/09-7, 6 March 2009; Request to all United Nations Security Council members that are not states parties to the Rome Statute for the arrest and surrender of Omar Al Bashir, No. ICC-02/05-01/09-8, 6 March 2009. See also: No. ICC-02/05-01/09-96; No. ICC-02/05-01/09-97; No. ICC-02/05-01/09-98; No. ICC-02/05-01/09-99; No. ICC-02/05-01/09-100; No. ICC-02/05-01/09-101, 21 July 2010.
- 68 That decision noted 'that the Republic of Kenya has a clear obligation to cooperate with the Court in relation to the enforcement of such warrants of arrest, which stems both from the United Nations Security Council Resolution 1593(2005) ..., and from article 87 of the Statute of the Court, to which the Republic of Kenya is a State Party'.
- 69 The full text of this article reads: "The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender'.
- 70 Article 26, Vienna Convention on the Law of Treaties.
- 71 These include article 93(3) (if execution of a cooperation measure clashes with a 'fundamental legal principle of general application'), article 72 read with 93(4) (national security exception in respect of documents) and 'with respect to a request by the Court for a type of assistance which is not specified under Article 93(1)(a)–(k), the obligation is limited to assistance "which is not prohibited by the law of the requested State" (Article 93(1)(l))'. Ciampi, The obligation to cooperate, *supra* note 57, 1630.
- 72 As Swart notes: 'As far as surrender is concerned, the fundamental achievement of the Statute is that the duty of States Parties to comply with requests of the Court is not made subject to a number of exceptions which are normal in extradition law and practice. In this regard, the situation of the Court resembles that of the ad hoc Tribunals'. Swart, General problems, *supra* note 62, 1596.
- 73 The full text of article 98 is as follows: '1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court 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, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender'.
- 74 For the full list of recommendations see: Recommendations of the Ministerial Meeting on the Rome Statute of the International Criminal Court' 6 November 2009, Addis Ababa Min/ICC/Legal/Rpt (II). Recommendations 4 & 5: Immunities of Officials whose states are not parties to the Statute: The Relationship between Articles 27 and 98: Recommendation 4: 'Articles 27 and 98 of the Rome Statute should be discussed by the Assembly of States Parties under the agenda item "stock taking" in order to obtain clarification on the scope and application of these Articles particularly with regard to non-States Parties. In this regard, there is need to clarify whether immunities enjoyed by officials of non states parties under international law have been removed by the Rome Statute or not.' Recommendation 5: 'State Parties should consider having recourse to the provisions of Article 119 of the Statute and Rule 195 of the Rules of Procedure and Evidence of the ICC to settle disputes regarding the implementation of Articles 27 and 98 of the Rome Statute.'
- 75 If, for example, one argues that the effect of UN Security Council Resolution 1593 was to override the customary rule granting Bashir immunity, by operation of article 103 of the UN Charter, then it is difficult to see how the AU Decision could avoid the same fate.

- 76 Article 27 states: '1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person'. For an extensive discussion of the different interpretations of these two provisions, see D Akande, *International law immunities and the International Criminal Court*, *AJIL* 98, (2004), 407, 419–432; D Akande, *The legal nature of UN Security Council referrals to the ICC and its impact on Al Bashir's immunities*, *Journal of International Criminal Justice* 7(2), (2009), 333. See also Gaeta, *Official capacity and immunities*, in A Cassese et al (eds), *The Rome Statute of the International Criminal Court: A commentary vol 1*, 993–4 (adopting a similar interpretation of article 98). Interestingly, it appears that articles 27 and 98 were drafted by different committees, and it is thus not clear how much, if any, thought was given to their potential inconsistency.
- 77 In its first Bashir Arrest Warrant, Pre-Trial Chamber I noted: '[T]he 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', para 41.
- 78 Decision informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar al-Bashir's presence in the territory of the Republic of Kenya, Pre-Trial Chamber I, ICC-02/05-01/09, 27 August 2010. Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad, Pre-Trial Chamber I, ICC-02/05-01/09-109, 27 August 2010.
- 79 Urgent correspondence sent by the Registry to the Republic of Chad Embassy in Belgium, ICC-02/05-01/09-131-Conf, Annex 2, 5 August 2011.
- 80 Decision requesting observations about Omar Al-Bashir's recent visit to the Republic of Chad, ICC-02/05-01/09, 18 August 2011.
- 81 Admittedly the issuance of an arrest warrant for counts of genocide is, strictly speaking, not the equivalent of being 'charged with genocide' as required by article VI of the Genocide Convention. In this regard W Schabas argues: 'Even if such obligations do in fact exist under the Genocide Convention, it cannot be said that a State has violated the provisions of the treaty because it fails to enforce an arrest warrant that charges genocide. There can only be a violation of the Genocide Convention if genocide is actually established. The fact that the Prosecutor of the International Criminal Court has insisted upon charging the President of Sudan with genocide, and the fact that three judges of a Pre-Trial Chamber have agreed that there are "reasonable grounds to believe" that genocide was committed, does not mean that the charge is proven in a satisfactory manner'. See W Schabas, *Obligations of contracting parties to the Genocide Convention to implement arrest warrants issued by the International Criminal Court*, *UCLA Human Rights and International Criminal Law Online Forum*. Sluiter overcomes this foundational challenge to the *dual obligation* by adopting a teleological approach, combined with analogies to the ICTY and ICTR. Concluding that: 'I have no doubt that Al Bashir should be considered, if and when the Pre-Trial Chamber modifies the arrest warrant, as a person charged with genocide in the sense of Article VI of the Genocide Convention'. See G Sluiter, *Using the Genocide Convention to strengthen cooperation with the ICC in the Al Bashir case*, 8(2), (2010). This argument however is more hopeful than legally reasoned and this aspect of article VI's wording might present significant problems for the proponents of this thesis.
- 82 ICJ, *Application of the Convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Yugoslavia [Serbia and Montenegro])*, Judgment, 26 February 2007, para 443. [Hereinafter the Genocide Case].
- 83 ICJ, *Genocide Case*, supra note 82, para 444.
- 84 In the Genocide Case the ICJ noted, at para 445: 'The notion of an "international penal tribunal" within the meaning of Article VI must at least cover all international criminal courts created after the adoption of the Convention (at which date no such court existed) of potentially universal scope, and competent to try the perpetrators of genocide or any of the other acts enumerated in Article III. The nature of the legal instrument by which such a court is established is without importance in this respect. When drafting the Genocide Convention, its authors probably thought that such a court would be created by treaty: a clear pointer to this lies in the reference to "those Contracting Parties which shall have accepted [the] jurisdiction" of the international penal tribunal'.
- 85 Sluiter notes: 'Looking at the drafting history of both the Genocide Convention and the ICC Statute, there is a direct connection: the ICC is the – belated – materialization of the ideal of combining the codification of serious international crimes with the development of mechanisms of penal enforcement, while Article VI is by some regarded as including the mandate to the international community to set up an international criminal tribunal'. Sluiter, *Genocide Convention*, supra note 81.
- 86 ICJ, *Genocide Case*, supra note 82, para 445.
- 87 Ibid.
- 88 As D Akande notes: '[T]he reasoning of the ICJ with regard to this obligation to cooperate arising under the Genocide Convention is circular. Parties to the Genocide Convention are obliged to cooperate with competent international tribunals, and this includes an obligation to arrest suspects. The obligation to cooperate only exists if the parties have accepted the jurisdiction of the international tribunal. But they are only to be deemed to have accepted that jurisdiction where they have an obligation to cooperate with the tribunal. So the obligation to cooperate under the Genocide Convention follows from an obligation to cooperate under another international law rule'.
- 89 Sluiter, *Genocide Convention*, supra note 81.
- 90 Sluiter, *Genocide Convention*, supra note 81.

- 91 Sluiter notes: 'Although individual states may strongly disagree with decisions of the UN Security Council – and do so regularly in practice – the system of the UN is such that by ratifying the UN Charter states have fully consented to accepting and carrying out UN Security Council Resolutions, as provided for in Article 25 of the UN Charter. The word 'accepting' in that provision is identical to the language in Article VI of the Genocide Convention. Therefore, when the UN Security Council, by a binding decision taken under Chapter VII, submits a situation to the ICC, thereby creating jurisdiction for that Court, UN members must be regarded as having accepted the jurisdiction of the ICC in respect of that situation. This brings the ICC, in relation to the situation in Darfur and when an arrest warrant includes accusations of genocide, within the full reach of Article VI of the Genocide Convention. All contracting parties to that Convention are members of the UN and all of them can be said to have accepted the jurisdiction of the Court'. Sluiter, *Genocide Convention*, supra note 81.
- 92 Sluiter notes: 'The problem of third-party effect does not arise in the application of Article VI to the Al Bashir case, because Sudan is a party to the Genocide Convention. Bearing in mind that the Genocide Convention intends punishment of all perpetrators of genocide, no individual is exempt from the scope of application of Article VI. As a result, a contracting party to the Genocide Convention arresting Al Bashir and surrendering him to the ICC, in compliance with Article VI, violates no rule of international law in relation to Sudan. On the contrary, that state complies with its obligations under the Genocide Convention.' Sluiter, *Genocide Convention*, supra note 81.
- 93 Sluiter notes: 'With respect to states which have looked critically at the exercise of jurisdiction of the ICC over Darfur, it is worthwhile – politically – to stress their own commitments under the Genocide Convention'. Sluiter, *Genocide Convention*, supra note 81.
- 94 Although more commonly referred to as a regional organisation. Under international law there is no reason to distinguish between general international organisations and ones with a regional focus insofar as the binding nature of their acts on member states are concerned. Reference to international organisations herein refers to inter-governmental organisations and not other nongovernmental organisations.
- 95 See M du Plessis, *The African Union*, in J Dugard, *International law: A South African perspective*, Cape Town: Juta, 2004.
- 96 D Akande, *International organizations*, in M Evans, *International Law*, Cambridge: Cambridge University Press, 2003.
- 97 They have been categorised by inter alia their function or membership, and can be both universal and closed (limited) in scope. J Klabbers, *An introduction to international institutional law*, Cambridge: Cambridge University Press, 2002, 25.
- 98 Ibid, 23. Klabbers notes further: 'As long as it remains clear that the classification has the function of organizing knowledge, but no greater ambition, classification may be a useful exercise'. Ibid.
- 99 Akande, *International organizations*, supra note 96, 271.
- 100 Akande notes: 'It is true that these "constitutions" regulate manner matters such as membership, competences, and financing, in disparate ways. However, it is equally true that customary international law and, to a much lesser degree, treaties have generated principles of general application. These common principles concern matters such as the legal personality of international organizations, implied competences, interpretations of constituent instruments, employment relations, immunities and privileges, and the liability and responsibility of the organisation and its member States'. Ibid.
- 101 See Klabbers, *International institutional law*, supra note 97, 82.
- 102 See Nuclear Weapons Advisory Opinion where the ICJ stated, at para 19: 'From a formal standpoint, the constituent instruments of international organisations are multilateral treaties, to which the well-established rules of treaty interpretation apply'.
- 103 At 28. See also ICJ, *Nuclear Weapons*, para 280, *ibid*.
- 104 Further, article 20(3) of the same states: 'When a treaty is a constituent instrument of an international organisation and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organisation'.
- 105 Klabbers, *International institutional law*, supra note 97.
- 106 Klabbers, *International institutional law*, supra note 97, 82.
- 107 Klabbers notes: 'It is doubtful ... whether there is a special rule regarding interpretation of constitutional treaties, which is not to deny that often, a more teleologically inspired interpretation takes place when it concerns constituent instruments. Perhaps the better view is not to insist on the existence of any rigid rule, but to allow for changes in emphasis as the case may demand'. See Klabbers, *International institutional law*, supra note 97.
- 108 Ibid, 96.
- 109 Ibid, 97. Akande, *International organizations*, supra note 96, 280.
- 110 At para 19.
- 111 ICJ, *Reparation for Injuries Suffered, Advisory Opinion*, ICJ Reports 1949, 174 at 180.
- 112 C Amerasinghe, *Principles of the institutional law of international organizations*, Cambridge: Cambridge University Press, 2005, 33.
- 113 At 283.
- 114 A corollary of the principle of effectiveness outlined in detail below.
- 115 Akande, *International organizations*, supra note 96, 281.
- 116 African Union Commission, *Press Release N° 119/2010, On the Decision of the Pre-Trial Chamber of the ISS informing the UN Security Council and the Assembly of State Parties to the Rome Statute about the Presence of President Omar Hassan*

- al-Bashir of The Sudan in the Territories of the Republic of Chad and the Republic of Kenya, Addis Ababa, 29 August 2010.
- 117 Amerasinghe, *Institutional law*, supra note 112.
- 118 M Oberg, The legal effects of resolutions of the UN Security Council and General Assembly in the jurisprudence of the ICJ, *European Journal of International Law* 16(5), (2006), 885. See ICJ, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding UN Security Council Resolution 276 [1971] ICJ Rep 16, para 114. (Hereinafter the Namibia Case).
- 119 The only textual difficulty with this interpretation comes from the phrase requesting ‘Member States to balance, where applicable, their obligations to the AU with their obligations to the ICC’. This effect of this on the decision will be discussed infra.
- 120 In this regard Milanovic notes: ‘Two incontestable features of modern international law – the multiplicity of its law-making processes and the ever increasing variety of the subject-matter that it seeks to regulate – have one invariable consequence: the increasing likelihood of norm conflict, part of the phenomenon of fragmentation of international law’. Milanovic, Norm conflict, supra note 18, 1.
- 121 See further E Vranes, The definition of ‘norm conflict’ in international law and legal theory, *European Journal of International Law* 17(2), (2006), 395–418.
- 122 Milanovic, Norm conflict, supra note 18, 7.
- 123 Milanovic notes: ‘In international law, the only true instances of hierarchy are the very limited number of norms of jus cogens, such as the prohibition of genocide or the prohibition of torture. Such norms invalidate any other conflicting norm (though, as we have seen above, such invalidation rarely, if ever, happens in practice), and can only be superseded by a subsequent norm of equal status’. Milanovic, Norm conflict, supra note 18, 8.
- 124 Article 53, 1969 Vienna Convention on the Law of Treaties.
- 125 Ibid.
- 126 In this regard Milanovic notes: ‘Article 103 is not a simple rule of priority – it also precludes or removes any wrongfulness due to the breach of the conflicting norm. In other words, a state cannot be called to account for complying with its obligations under the Charter, even if in doing so it must violate some other rule – any rule, that is, except a rule of *jus cogens*’. Milanovic, Norm conflict, supra note 18, 11.
- 127 See: Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding UN Security Council Resolution 276 (1979), Advisory Opinion, 1971, ICJ Reports 16, Separate Opinion of Vice-President Ammoun, para 18.
- 128 See: Case Concerning Military And Paramilitary Activities In And Against Nicaragua, para 107.
- 129 See Milanovic, Norm conflict, supra note 18.
- 130 Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Provisional Measures, Order of 14 April 1992, ICJ Reports 1992, 114 and para 42.
- 131 See Amnesty International, *Bringing Power to Justice*, supra note 12.
- 132 Article 103 would bind all UN Member states, not merely states parties.
- 133 Decision informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar al-Bashir’s presence in the territory of the Republic of Kenya, Pre-Trial Chamber I, ICC-02/05-01/09, 27 August 2010. The Chamber employed the same formulation in respect of its Decision on Chad. See Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir’s recent visit to the Republic of Chad, ICC-02/05-01/0, 27 August 2010.
- 134 See ICJ, East Timor (Portugal v Australia) [1995], ICJ Rep 90 at para 32.
- 135 Ibid, para 114.
- 136 G Sluiter, Obtaining cooperation from Sudan – where is the law?, *Journal of International Criminal Justice* 6(5), (2008), 871–884.
- 137 ICJ, Namibia Case, para 114.
- 138 As the other parties where non-state actors, how this obligation would be enforced under the Rome Statute raises interesting questions.
- 139 In this regard Amersinghe notes: ‘The SC takes “Decisions” under Chapter VII of the Charter relating to enforcement action (these are binding). The SC may also take other action under Chapter VII of the Charter or under Chapter VI, relating to pacific settlement of disputes, the decision to take such action being couched in different verbal forms. Under Chapter VI the SC has taken action, “deciding”, “calling upon”, “recommending”, “declaring”, “questioning”, “urging”, “demanding”, “condemning”, etc. or finding that a situation exists’. (Own emphasis). Amerasinghe, *Institutional law*, supra note 112, 169.
- 140 UN Security Council Resolution 827 (1993) – which established the ICTY – states that ‘...all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute’, para 4.
- 141 Akande, The legal nature of UN Security Council referrals, supra note 76, 333.
- 142 See *ibid*.
- 143 Bashir Arrest Warrant I, paras 240–249.

- 144 Ibid, para 249.
- 145 See J Pauwelyn, *Conflict of norms in public international law*, Cambridge: Cambridge University Press, 2003, 240–244.
- 146 See Amnesty International, *Bringing power to justice*, supra note 12.
- 147 Trans: ‘That the thing may rather have effect than be destroyed’.
- 148 Maxwell on Statutory Interpretation, 12th edition, London: Sweet & Maxwell, 1969, 45.
- 149 Amerasinghe, *Institutional law*, supra note 112, 46.
- 150 ICJ, Admission of a State to the United Nations (Charter, Art 4), Advisory Opinion, ICJ Reports 1948, 57. See Amerasinghe, *Institutional law*, supra note 112, 108.
- 151 See ICTY, *Prosecutor v Krstic*, Appeals Chamber, IT-98-33-A, (19 April 2004), para 139. See Oppenheim’s International Law, 9th edition, Volume 1, Parts 2 to 4, London: Longman, 2000, 1280. See also the Chorzow Factory Case (1927) PCIJ Series A, Volume 2, No 8, at 2 and the Corfu Channel Case, International Court of Justice Law Reports (ICJ Reports) (1949), at 4. Amerasinghe, *Institutional law*, supra note 112, 35.
- 152 Incidentally, the AI report considers this ‘balancing paragraph’ and concludes that it ‘provides AU member states with a tool to solve any possible conflict between the obligations arising from the 2009 and 2010 Decisions and the obligations towards the ICC’. The problem is that it does not suggest how this tool might work, although it’s clear that on AI’s reading this balancing exercise would inevitably ‘result in the obligations towards the ICC prevailing over the obligations towards the AU’ in respect of all AU member states. We would avoid a reading of this paragraph and the use of balancing as a substitute for subjugating the AU decision to the ICC. The AU’s decision is (textually and contextually) a reflection of internal inconsistencies around deeply-felt concerns about the court’s work in Africa. We suggest that, although the result may be the same, the doctrine of effective construction is a better means of simultaneously recognising that these concerns animate the AU’s decision, whilst addressing the contradictory aspects of a decision by a regional organisation comprising 53 sovereign states.
- 153 As Denza notes, ‘[F]or each national legislature and court, the starting point for any examination of the relationship [between international and domestic law] is its own constitution’. E Denza, The relationship between international and national law, in M Evans, *International Law*, Cambridge: Cambridge University Press, 2003, 420.
- 154 Although it does require states to take such measure to give effect to those obligations in certain instances.
- 155 Denza, International and national law, supra note 153, 421.
- 156 The situation is somewhat complicated in the case of the Rome Statute as, even in monist countries, the obligations contained therein require domestic measures to be adopted in order to facilitate cooperation with the court.
- 157 These are Burkina Faso, Kenya, Senegal, South Africa and Uganda.
- 158 It is a well-established principle of international law that a state cannot rely on the provisions of its domestic law in order to justify the breach of an international obligation. See Advisory Opinion of the Permanent Court of International Justice of 4 February 1932 in the Case concerning the Treatment of Polish Nationals and other persons of Polish origin or speech in the Danzig Territory. PCIJ, Series A/B, No 44, 24–25.
- 159 Hereinafter the ICC Act.
- 160 Section 231(4) of the Constitution states: ‘Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament’.
- 161 Section 8(1) of the ICC Act.
- 162 Section 8(2) of the ICC Act.
- 163 As Gowlland-Debbas and Tehindrazanarivelo note: ‘Even the more recent national constitutions do not single out the decisions of the UN Security Council and when they refer to the decisions of international organisations this is usually for the purpose of transferring competences to supranational institutions. In most of the countries studied, UN Security Council mandatory resolutions are assimilating to non-self-executing conventional obligations and are therefore not treated in a manner distinct from other treaty obligations ... In general, therefore, it might be said that ... they are in general implemented no differently on the internal plane than other non-self-executing treaty obligations’. V Gowlland-Debbas and D Tehindrazanarivelo, *National implementation of United Nations sanctions: a comparative study*, Leiden: Koninklijke Brill, 2004, 644.
- 164 For this reason the Application of Resolutions of the UN Security Council of the United National Act 172 of 1993 was drafted to give effect to UN Security Council resolutions in South African law, although it has not yet come into force. Dugard, *International law*, supra note 95, 64.
- 165 By adopting the interpretation of the AU decisions we proposed above.
- 166 Article 2(5) of the New Constitution goes on to note: ‘The general rules of international law shall form part of the law of Kenya’.
- 167 CIC, Understanding Article 2(6) of the Constitution, <http://cickenya.org/content/understanding-article-26-constitution>, (accessed 12 June 2011). With this in mind, article 94(5) and (6) make parliamentary approval necessary for the ratification process. Article 94(5) states: ‘no person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation’. This, according to the CIC, means that ‘[n]o treaty therefore can be ratified without prior approval by Parliament’. To this end a Bill will soon be presented to parliament that ‘to streamline the process of ratification of treaties in Kenya to ensure that Kenya’s international obligations thereunder are fulfilled’. Section 3 of the Ratification of Treaties Bill 2011.

168 J Gathii, Making global treaties part of the Kenyan Constitution presents a legal quagmire and leaves implementation loopholes, *Nairobi Law Monthly*, March 2011. Gathii notes further: This is notably different from the position under the old constitutional order, which ratified but undomesticated treaties could only be used to inform the manner in which ambiguous provisions of a domestic law should be construed’.

169 This is because the effect of article 2(6) is retrospective. In terms of article 13 of the Ratification of Treaties Bill 2011: ‘Treaties ratified by Kenya before the coming into force of this Act shall be deemed to have been ratified in accordance with the provisions of this Act. See further Gathii, Making global treaties, supra note 168.



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ABOUT THIS PAPER

The fulcrum of African states' discontent with the International Criminal Court (ICC) was the arrest warrant issued for President Omar al-Bashir of Sudan in 2009. In response, the African Union (AU) has taken a number of measures, the most controversial of which are the decisions that African states will not cooperate in the arrest and surrender of Bashir. For African countries that are ICC members, these decisions present particular legal challenges: on the one hand, states parties are obliged under the ICC's Rome Statute to cooperate fully with the court; on the other, the AU's Constitutive Act warns that the failure of a member state to comply with AU decisions may result in sanctions being imposed. After interrogating the legal aspects of these competing obligations, this paper delineates the international obligations on African states in respect of Bashir, considers the obligations on African states parties in respect of AU decisions, and presents two possible means of resolving the apparent conflict between commitments to the ICC and the AU.

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