

# Relevance of the law of international organisations in resolving international disputes: A review of the AU/ICC impasse

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## **Abstract**

The paper examines the legal nature of the dispute between the International Criminal Court (ICC) and the African Union (AU), and observes that the core issue revolves around the arrest warrant issued by the Court for Al-Bashir. Therefore, it locates this to be within a legal rather than political impasse. The paper argues that the general rules of the law of international organisations may provide the key to resolving the impasse. And that accordingly, the general principles of the regime of international law point to the interpretation of the provisions of the constitutions of the two international organisations to identify the extent to which they were empowered to make the decisions that resulted in the dispute. The provisions of the Rome Statute on immunity are identified as providing the key to the resolution. Therefore the interpretation of the Statute on the immunity of certain state officials is important. The paper argues that accordingly the ICC should change its approach to the arrest of

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certain officials in order to prevent facilitating the violation of the customary principles of diplomatic immunity in international law – which should have also been codified in treaties. Such an interpretation of the Rome Statute would indicate that states should exercise caution in arresting a sitting Head of State such as Sudanese President Al-Bashir until such a time that he leaves office or that Sudan waives his immunity.

## **1. Introduction**

The African Union (AU) has in recent times shown increasing opposition to the work of the International Criminal Court (ICC). This has led to tensions between the two international organisations and to questions arising from this increasing confrontation. It is clear that the international legal order has the structures to resolve disputes between states. Uncertainty remains, however, on the availability of effective structures within the system to resolve disputes between international organisations. It is important to note that international organisations were, prior to 1945, not considered subjects of international law so as to be recipients of rights and those responsibilities to undertake duties.

Generally, disputes between states are resolved in several ways in the international legal order, but it is unclear how disputes between international organisations are to be resolved. The International Court of Justice (ICJ), as one of the key mechanisms set up to resolve disputes between states, does not provide an automatic platform for resolving disputes between international organisations. It is recalled that according to its statute, only states shall be parties in a dispute before the ICJ (Statute of the ICJ 2006: Art. 34(1)).<sup>1</sup> International organisations may only appear before the ICJ if the ICJ so requests for an information from the organisation on a matter before it (Statute of the ICJ 2006: Art. 34(2)). Furthermore, the ICJ may notify the organisation or communicate to it any written submissions before it whenever the construction of the constituent instrument of that international organisation or of an international convention adopted thereunder is in question in a case before the ICJ (Statute of the ICJ

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<sup>1</sup> The Statute of the International Court of Justice is annexed to the Charter of the United Nations, of which it forms an integral part. The main object of the Statute is to organise the composition and the functioning of the ICJ.

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2006: Art. 34(3)). As such, an organisation may choose to try to resolve any dispute between it and other organisations or states through negotiations. Notwithstanding, this approach has so far failed in the current impasse between the AU and the ICC. This paper therefore proposes another approach – a wholly legal approach whereby the general principles guiding international organisations may lead to resolution. The importance of such an approach goes towards influencing policy makers in both organisations to acknowledge and act in compliance with these general principles. In this way, the essence of the principles are emphasised in their practicality and effectiveness – rather than merely considering them as theoretical notions underlying the legal fiction that birthed international organisations.

The basis of this paper is the assertion that ‘law serves two purposes: fairness and efficiency. On the one hand, it tries to achieve the goal that every human being is equitably treated. It aims at justice for all and protection of the weak. But, on the other hand, the law regulates society. It must provide rules which are workable and which lead to a well-functioning society’ (Schermers 1988:4). The question here is whether there are tools within the international legal structure to resolve this confrontation that threatens the whole regime of International Criminal Law (ICL), if not the whole international legal system. The identification of the tools, if any, applicable in international law is important to regulate differences in approach and ensure fairness within the legal order. Following that, it is queried whether these tools serve the twin purposes identified (fairness in its implementation to both weak and strong as well as regulation of the international society so that every state and international organisation must comply).

The ICC (henceforth, the Court) and the AU share common features: to the extent that both are international organisations whose goals include curbing impunity.<sup>2</sup> At the same time, there are differences between the two. It appears that the differences between them may threaten to fracture their relations. It is our argument that legal issues are at the core of the dispute despite the political issues (the arrest warrant issued by the Court for Al-Bashir). This is not unusual due to the political nature of the international system (Akanke 1998).

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<sup>2</sup> See Rome Statute of the ICC 1988: Preamble, and African Union 2000.

As such, the ICJ has held that the fact that a dispute has political overtones does not diminish the legal nature at the core of it.<sup>3</sup> This paper argues that the general rules of the law of international organisations may provide the key to resolving the impasse. And that accordingly, the general principles of the regime of international law point to the interpretation of the provisions of the constitutions of the two international organisations to identify the extent to which they were empowered to make the decisions that resulted in the dispute. The first part of the paper therefore investigates the background to the impasse to understand the extent to which the disputes relate to legal rather than political differences.

Following that, the next section reviews international legal provisions on resolving such conflicts and in so doing, it advances approaches to resolving such disputes. It reviews the legal principles that regulate international organisations (particularly in relation to both the ICC and the AU); and goes on to identify the provisions of the Rome Statute on immunity as providing the key to the resolution. Therefore the interpretation of the relevant portions of the enabling instruments of the two organisations is important. Further to that, the question of the international responsibility of states is explored after the capacity of the two organisations to undertake the actions which contributed to or exacerbated the impasse have been reviewed. In sum, this paper concludes that on the one hand, the ICC should change its approach to the arrest of certain officials to prevent facilitating the violation of the customary principles of diplomatic immunity in international law (which are also mostly codified in treaties). Such that states may exercise caution in arresting a sitting Head of State or a similarly important foreign official. The AU, on the other hand should desist from its recent shift toward attempts to resolve the conflict through non-legal means. In addition, it should neither over-politicise the issue nor encourage its state parties to violate their treaty obligations to the Rome Statute.

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<sup>3</sup> ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, General Assembly Opinion, I.C.J. Reports (1996), pp. 233–234, para. 13. See also *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, WHO Opinion I.C.J. Reports (1996), pp. 73–74, paras. 16–17.

## **2. Brief overview of the AU/ICC impasse**

It is important to lay out the underlying factors that led to the ongoing impasse between the AU and ICC. The AU appears to have been unhappy about the increasing role of Africa as the key and perhaps only focus of the Court's judicial efforts since its inception (Du Plessis and Gevers 2011:4). The arrest warrant issued by the Court over the Sudanese President was the focal point of the AU's concerns with the approach of both the United Nations Security Council (UNSC) and the ICC to international criminal justice issues in Africa. The regional organisation had, at various times, supported efforts to deflect the influence of superpower states in such matters. For instance, it supported Senegal's decision to refuse Belgium's extradition request for Hissene Habré. The AU declared that Habré should be tried in Africa 'for the benefit of Africa.'<sup>4</sup> This section briefly examines how the AU's concerns gradually shifted into an institutional position against the Court's judicial efforts in Africa. It also locates the issues within the scope of a legal frame of reference.

The AU had been involved in some mediation to resolve the crisis in Darfur, Sudan, prior to the UNSC referral. Therefore it was concerned that involving the ICC would derail its peace efforts.<sup>5</sup> In order to preserve the peace process, the AU consequently tabled a request to the UNSC to delay referring the situation to the ICC.<sup>6</sup> It must be noted that the AU deferral request to the UNSC was based on Article 16 of the Rome Statute (1998) (henceforth, Rome Statute). This was a logical approach, considering it was the first time that the UNSC was utilising its mandate under Article 13 of the Rome Statute to trigger the Court's jurisdiction to investigate a situation within the territory of a non-party.

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<sup>4</sup> Assembly of the African Union, Seventh Ordinary Session, 1–2 July 2006, Banjul, The Gambia 'Decision on the Hissene Habré case and the African Union' DOC. ASSEMBLY/AU/3 (VII); Assembly/AU/ Dec.127(VII), para. 5(ii). Available from: <<http://www.africa-union.org//au//summit/doc/Decisions/Assembly-AU-Dec.pdf>> [Accessed 16 December 2012].

<sup>5</sup> See Akande et al. 2010:6.

<sup>6</sup> Decision of the Meeting of African State Parties to the Rome Statute of the International Criminal Court, Doc Assembly/AU/13 (XIII), Addis Ababa, 1–3 July 2009, p. 8; Communiqué of the 207<sup>th</sup> Meeting of the Peace and Security Council at the Level of Heads of State and Government, Doc. PSC/AHG/COMM.1 (CCVII), 29 October 2009, p.5.

Nonetheless, the AU request, which was a wholly legal approach, was ignored by the UNSC (Du Plessis and Gevers 2011). The AU considered this as a slight by the UNSC.<sup>7</sup> Furthermore, the regional organisation's unsuccessful attempt to amend Article 16 of the Rome Statute was in order to curb, or at the least balance, the powers of the UNSC to refer matters to the Court. To a certain extent this seemed to complicate the growing problem, which was further compounded by the subsequent referral of Libya to the Court (in which case again the UNSC ignored the regional organisation's plea).<sup>8</sup> The AU was justifiably disappointed with the politics of the referrals (Akande et al. 2010:10–11). It felt the UNSC had referred the situations involving African states to the ICC in a selective manner (Du Plessis and Gevers 2011:3). This was not made better by the fact that the powers of deferral provided in the Rome Statute<sup>9</sup> were used in the same Resolution (1593) to protect peace keepers serving in Sudan from prosecution for any breach of international norms. What was once an uneasy relationship with the ICC had, by this time, become toxic to the extent that the AU began a non-cooperation policy towards the Court.

The amplification of the problem as a result of the above is unhelpful to the organisations involved, especially the ICC and the AU. Furthermore, it is also detrimental to the international legal order. There are clearly attendant risks to the possible escalation of the dispute. It is important to note that it is already moving to that level as the AU has since 2009 begun making anti-ICC

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<sup>7</sup> Press Release, Decision on the Meeting of African State Parties to the Rome Statute of the International Criminal Court (ICC), Commission of the African Union, 14 July 2009.

<sup>8</sup> The UNSC referred the situation in Libya to the ICC by passing Resolution 1970, 26 February 2011.

<sup>9</sup> Rome Statute 1998: Art. 16 provides that 'No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the 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.'

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decisions.<sup>10</sup> It has recently increased the tempo by quickly releasing a press statement in response to the ICC ruling on the failure of two African states to arrest Al-Bashir.<sup>11</sup> Furthermore, at the last AU conference in January 2013, it made unsubstantiated allegations that the ICC was focusing on Africa on the basis of racial prejudice.<sup>12</sup> The ICC President noted that one of the challenges facing the Court is the battle for its credibility in Africa (Song 2010:4). The struggle took a different turn following a change of leadership in Malawi. The new President reversed the country's earlier position by refusing to permit Al-Bashir to attend the AU summit in that country. Malawi went on to forfeit hosting the AU Heads of State summit rather than disregard its obligation to the ICC (BBC News 2012). But in doing so, it effectively violated its obligation to the AU (BBC News 2012). Such actions lead to states backing one international organisation against another. It may also lead to a complex scenario involving breaches and counter breaches of different international obligations by states. Resolving the impasse will prevent possible disputes between states (especially between those who are willing and those who are unwilling to arrest Al-Bashir). If not resolved, a weakened international legal system would result.

The above paragraphs indicate that the threat of competing obligations is one that must be taken seriously. It may unhinge the legitimacy of the system, especially one as fragile as the special regime of international criminal justice. In this instance, the relations between the ICC and African states may deteriorate.

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<sup>10</sup> See for instance: Doc Assembly/AU/13 (XIII) 2009, note 6 above; Communiqué of the 207<sup>th</sup> PSC Meeting, 29 October 2009, note 6 above; African Union Press Release No. 119/2010, 'On the Decision of The Pre-Trial Chamber of the ICC informing the UN Security Council and the Assembly of the 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' 29 August 2010. Available from: <<http://www.au.int/en/sites/default/files/PR-%20002-%20ICC%20English.pdf>> [Accessed 1 January 2013]. African Union Press Release No. 002/2012 'On the Decisions of Pre-Trial Chamber I of the International Criminal Court (ICC) pursuant to Article 87(7) of the Rome Statute on the alleged failure by the Republic of Chad and the Republic of Malawi to comply with the Cooperation Requests issued by the Court with respect to the arrest and surrender of President Omar Hassan Al Bashir of the Republic of the Sudan' 9 January 2012. Available from: <[www.au.int/en/sites/default/files/PR-%20ICC%20English.pdf](http://www.au.int/en/sites/default/files/PR-%20ICC%20English.pdf)> [Accessed 3 June 2012].

<sup>11</sup> AU Press Release N° 002/2012 'On the Decisions of Pre-Trial Chamber I of the ICC.

<sup>12</sup> See Davison 2013.

Moreover, the confusion on priority of legal obligations may, as in the case of Malawi, lead to states pitting one organisation against another. The fear here is that it may create a smoke screen that could be exploited by despotic leaders to confuse and/or evade justice. In essence, if African states were to doubt the credibility of the ICC it may negate the Court's positive image. It may also make it difficult for the Court to carry on its work in the continent. In addition, the confusion over the competing obligations might scupper the continent's rich history of supporting international criminal justice. This emerging field has found Africa to be a melting pot in its development. Therefore, it must be ensured that the impasse is resolved using the mechanisms set out in international law. Such mechanisms cannot be utilised without the political will of the bigger states in the UNSC who, it must be noted, have contributed to deepening this dispute.

The tension between the two international organisations does not appear to be attritional. The ICC has attempted to set up a liaison office at Addis Ababa (the same city where the AU Headquarters are) in order to maintain dialogue with the AU (Song 2010). The AU on its part has sought to maintain the continent's support of international law by ensuring that its differences with the ICC are resolved through legal structures.<sup>13</sup> The AU's efforts suggest that there may be legal structures, applicable to the impasse, within the international legal order. The regime of the Rome Statute may provide certain structures to resolve aspects of the dispute. However, the ICC, by attempting to resolve the conflict through political negotiations, may have resorted to mechanisms outside its legal instrument.<sup>14</sup> This is not entirely outside the general international legal remits. Such approaches are recognised and encouraged in the UN Charter.<sup>15</sup> Nonetheless, these efforts are clearly not enough to resolve the ongoing dispute. The question that thus arises is whether the international legal system has the appropriate structures to resolve such disputes. If there are indeed some

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<sup>13</sup> These have been through a variety of legal avenues. First, it proposed amendments to Art. 16 of the Rome Statute. Second, it requested its members to comply with the international rule on Immunity (and again under the Rome Statutes' Art. 98) and therefore desist from cooperating with the ICC.

<sup>14</sup> See Song 2010.

<sup>15</sup> See especially Chapter VIII (Arts. 52–54) of the Charter of the United Nations which provides for the pacific settlement of international disputes.

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structures then the task would relate to ascertaining the effectiveness of such a mechanism.

In all, what is at stake here is a dispute over how to address the situation in Sudan (especially the immunity of Al-Bashir). The other issue(s) such as the claim that the ICC unfairly targets African states does not appear to be a genuine complaint by the AU.<sup>16</sup> In fact, the later AU decisions criticising the ICC and urging its members not to cooperate with the Court have mainly focused on the Al-Bashir case. A more recent decision did not mention the Libya and Kenya situations unlike in previous decisions.<sup>17</sup> Kenya led the efforts to change the AU approach which sought to move away from legal efforts to political resistance (Du Plessis et al. 2013:4–5). The organisation had in criticising the ICC about the Kenya cases requested for the cases to be transferred to Kenya. There was no legal basis for this request.

The change of approach to a more political battle may not ultimately benefit the AU. In addition, it is not one likely to yield success to the regional organisation, given that it is weak in the one key area that impacts on political influence. An economically weak state or region does not usually exert any influence, as can be exemplified by the recent disregard of the organisation's views by the UNSC in the debate leading up the Libya intervention. Furthermore, a political confrontation with a legal institution cannot be expected to succeed if the dispute is to a large extent about the interpretation or application of the constitutional basis of that legal institution.

Inasmuch as the dispute cannot be said to be inherently political; it must be recognised that the AU has diverged from its earlier approach. Nonetheless, it can still be concluded that the real underlying concern of the AU relates to the immunity of Al-Bashir as a legal issue, around which the political issues revolve. As a result, this paper focuses on the legal impasse in the hope that its resolution will ultimately reduce the political tensions.

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<sup>16</sup> Four of the ICC investigations in Africa were referred by the African states themselves, two by the UNSC – to which the AU contention appears to be on questions of procedure rather than substance. The other two investigations (Kenya and Côte d'Ivoire) were initiated by the Prosecutor *suo moto*.

<sup>17</sup> AU Decision on the Pre-Trial Chamber, see note 11 above.

### **3. A review of international legal prescriptions on resolving disputes between international organisations**

This section explores the norms of international law that are relevant in resolving the impasse between the two international organisations. The treaties governing the two bodies are therefore to be applied and interpreted within the framework of international law.

A case has been made that the conflict between the two organisations is a matter of competing obligations of their state parties. It has been further argued that such competing obligations would be resolved by the provisions of the national laws of the concerned states (Du Plessis and Gevers 2011). The proposed solution was premised on the argument that a balance must be reached by states between their competing obligations to the AU and the ICC (Du Plessis and Gevers 2011). In making the above argument, Du Plessis and Gevers assert that each state may exercise its discretion in complying with the competing obligations. They went on to concede that such a requirement to balance the competing obligations may be doomed to fail as the AU decision appears to ‘drive a categorical imperative yet at the same time provides allowance for a measure of discretion’ (Du Plessis and Gevers 2011). As such, the two commands in the AU decision are not reconcilable, i.e., the prescription not to cooperate with the ICC and the one which urges those states to balance this non-cooperation with their obligations to the Rome Statute.<sup>18</sup> They further concluded that ‘how the competing obligations play out at national levels depend on the particular domestic framework of each country’ (Du Plessis and Gevers 2011), and so the states concerned should be guided by the provisions of their national laws about how to interpret the Rome Statute.

The view set out above goes against the general rule in international law that a domestic law cannot be a basis for a state to derogate from its international legal

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<sup>18</sup> See AU 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, 15<sup>th</sup> Ordinary session of the Assembly of the Union, Kampala 27<sup>th</sup> July 2010 Doc Assembly AU/DEC296(XV), paras. 5 and 6.

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obligation.<sup>19</sup> In addition, their study does not address the issue of non-parties, because it was solely focused on competing obligations of states which are parties to both treaties. However, the matter must also concern non-ICC parties whether or not they are African states. Therefore, a better approach may be to explore the international legal structures that address this problem. An argument that requires states to rely on their national law as a guide to how they should comply with their international obligations would not absolve such states from liability for wrongful acts against another state or for failing to comply with their obligation to one of the treaties. The dispute resolution mechanisms available within the international legal order should be applied in resolving international disputes despite the increasing complexity of the system.

The extent to which the legal structures in public international law are applicable to this dispute will be examined further. The two organisations should be classified as international organisations within the remits of the definitions in international law. In addition, they are both established by multilateral treaties to which states are the only parties. The treaties are also constitutional instruments which imbue the two entities with international legal personalities, and with definite functions and objectives. As international organisations they are subject to international legal prescriptions including customary rules and conventions (Sands and Klein 2009:461). The International Court of Justice (ICJ), in a matter involving an international organisation and a state, held that the three legal obligations binding international organisations evolve from the general rules of

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<sup>19</sup> ICJ, in the *Applicability of the Obligation to Arbitrate case*, I.C.J. Reports, 1988, pp. 12, 34, confirmed 'the fundamental principle of international law that international law prevails over domestic law'. Judge Shahabudeen in his separate opinion on the *Lockerbie case, 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, I.C.J. Reports 1992, p. 114, noted that domestic law cannot act as a defence to non-compliance with an international obligation. See also *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment of 20 July 2012, para. 11. The rule was codified in Article 27 of the Vienna Convention on the Law of Treaties (VCLT) 1969, United Nations, Treaty Series, vol. 1155, p. 331.

international law, their constitutions and the international agreements to which they are parties.<sup>20</sup>

Disputes between the organisation and its members or between members would be resolved using the provisions of the constituent instrument. However, disputes between two international organisations may not be settled using the constituent instrument of one of them; rather it must be resolved by applying the general principles common to international organisations. That said, the general principles may point towards one of the constituent instruments for the solution to the dispute. These general principles of the law guiding international organisations may provide the avenues to resolving the current impasse. In fact, the law of international organisations would be the platform upon which other mechanisms of international law may be applied in this instance and similar cases.

### **3.1 The law of international organisations**

The dispute between the AU and the ICC is a telling indication that, with the continuing expansion of international law, there are some situations which expose the grey areas of the accepted rules. The resultant legal uncertainty is unhelpful to the international legal order. The issue raises conceptual questions, such as to what extent the rules of general international law are capable of evolving to be responsive to the specific problems posed by international organisations such as the case with which we are concerned. There are three main areas of public international law generally applicable to international organisations: the law on immunities, diplomatic relations, and treaties (Morgenstern 1986:4). This paper is concerned with all three, especially the last area. This is because the conflict between the AU and ICC can be traced to diverging interpretations of the Rome Statute, and particularly, as stated earlier, the AU's efforts to amend a key provision of the Statute with regard to the role of the UNSC (treaty law). Yet, the core of the dispute remains the immunity of a head of state and, to a lesser extent, the effect on the responsibility of states (in their diplomatic relations and for international wrongs against other states). This leads us to investigate

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<sup>20</sup> ICJ, Advisory Opinion on the Interpretation of the Agreement between the WHO and Egypt (1980) I.C.J. Reports, p. 73, paras. 89–90.

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whether there are rules guiding international organisations as a special field of international law which may assist us in proposing the way forward in the current tensions between the two organisations.

Whether the emerging field of international organisations could constitute a special regime, following the increasing influence of organisations in the international sphere, was uncertain at one time. However, subsequent increase in their role has led to further studies and convincing formulations of the law. It has now been generally agreed by scholars that there are certain common principles which govern international organisations.<sup>21</sup> International organisations have now come to 'play a significant role in international affairs generally and in the development of international law specifically' (Akande 2006:278). They perform functions in their diverse fields of operations that are crucial to the effective working of the international system. For instance, international organisations often function as a forum to: combat international or transnational problems; develop rules on common issues of concern to the generality of states; provide mechanisms to promote, monitor, and supervise state compliance with agreed rules; and finally, provide a forum for international dispute resolution (Akande 2006). Consequently, these organisations share some general principles in their operations in order to carry out these functions. Such general principles form the legal framework guiding their activities (Akande 2006). Therefore, the general principles of the field (law of international organisations) are important in our study of the current AU/ICC dispute.

On the other hand, it is arguable that the diverse nature of international organisations is an indication of the absence of general principles guiding the regime (Akande 2006:280). Each international organisation derives its basic rules from its constituent instrument. Therefore, its rules are only applicable to other international organisations by analogy. The constituent instruments of each international organisation may provide different regulations on issues of membership, competences and finances (Akande 2006). Despite this, a

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<sup>21</sup> See for instance Akande 2006:277–305; Sands and Klein 2009; Schermers 2013; Klabbers 2005.

better argument is that there is a common law of international organisations that arises from customary international law and to a lesser extent treaties which have generated principles that are generally applicable to the spectrum of international organisations (Akande 2006). As such, certain common principles have developed a framework that addresses general matters peculiar to all international organisations in areas such as legal personality, implied powers/competencies, interpretation of constituent instruments, immunities, privileges and the responsibilities of international organisations and their member states (Akande 2006). It has been strongly argued that 'these common principles apply in the absence of any contrary principle provided for in the law of the particular organisation, and as regards liability and responsibility may even apply despite contrary provisions in the internal law' (Akande 2006). In the instant study, it is apparent that the interpretation of the Rome Statute (an area governed by the common principles on the law of international organisations) remains a core aspect of the disagreement between the two bodies. A related issue (which will not be addressed in this paper) is how this affects the activities of the members of one or both of them. Therefore, the field of international organisations may provide a structure and principles which may be applied to resolve the impasse between the two organisations and which have wider implications for inter-state relations in the international order.

It remains to be seen whether the common principles of the law of international organisations can resolve the dispute. What is clear is that these common principles appear to have some rules that relate to the issues at hand. The subsequent parts of this paper will examine the extent to which it is probable that legal frameworks on international organisations can be successfully applied in resolving the dispute around the divergent interpretations of the Rome Statute concerning the arrest of Al-Bashir and his surrender to the Court. The common principles of the framework that will be investigated relate to the powers of the organisations, and how the inter-organisational problem may provide a blueprint for dispute resolution between international organisations using the common principles of the law. In essence, can the Rome statute be interpreted to say whether it has or does not have powers to require states to arrest Bashir (as a sitting Head of State)?

### **3.2 Constituent instruments as the basis of competence (Rome Statute and AU Constitutive Act)**

International organisations are founded by treaties which also are the constitutions and form the basis of their competence (Shaw 2008:889; Campbell 2005:83; Akande 2006). The constituent instruments will indicate whether the issues relating to the dispute are either provided for by, or within the competence of the organisations. Where there are clear, unambiguous provisions on the relevant issues of concern, the next step is to attempt to interpret the said provisions. On the contrary, where there are no such provisions, we will look to the provisions of the general principles of the law of international organisations to analyse the position. This approach will enhance the development of the law. Furthermore, it has been posited by Professor Shaw that ‘international organisations are grounded upon treaties that are also constituent instruments, but issues relating to the scope of powers and especially implied powers are also of crucial importance. Nevertheless a two-way process of legal development is involved’ (Shaw 2008:908–909). The constituent instruments of both the ICC and the AU have defined their authority and their status. As such, their authority can be principally evolved from the provisions of the Rome Statute and the Constitutive Act of the African Union, respectively (Shaw 2008:914).

Generally, the constituent instruments of international organisations serve two purposes, which often make them difficult to interpret (Amerasinghe 1994: 175–209).<sup>22</sup> First, they are multilateral treaties, and secondly they are the means of creating international persons. This is because the norms of treaty interpretation (guided generally by the codified rules found in the Vienna Convention on the Law of Treaties (VCLT)) may in some instances differ from the rules required to interpret agreements which are also the constitutions of international bodies. It follows that the constituent instrument defines the position of the organisation towards its members, to the component organs within it as well as to third parties (Akande 2006:261). All of this illustrates the considerable importance that may be attached to interpreting the constituent

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<sup>22</sup> See also ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, I.C.J. Reports 1996, para. 19.

instruments of an international organisation (Akande 2006:261). It has been asserted that ‘the special nature of the constituent instruments as forming not only multilateral agreements but also constitutional documents subject to constant practice, and thus interpretation, both of the institution itself and of member states and others in relation to it’ (Shaw 2008:914–915), means that a more flexible or purpose oriented method of interpretation must always be considered (Shaw 2008:914–915).

The constituent instruments of the ICC and the AU are therefore crucial in indicating whether they have the powers to take the decisions that have led to the ongoing impasse. To determine this, the extent to which the ICC may take actions or persuade its members to arrest Al-Bashir on the one hand; and on the other hand, the extent to which the AU has the capacity to urge its members to desist from cooperating with the ICC in relation to Al-Bashir must be investigated. The powers of both the ICC and the AU must be explored in terms of the provisions of their constituent instruments.

### **3.3 General principles relating to the powers of international organisations**

The constitution of an international organisation determines the extent of its powers either expressly or impliedly. The Permanent Court of International Justice (PCIJ), in the *Danube case*, held that ‘the European Commission is not a state but an international organisation with a special purpose, it only has the functions bestowed upon it by the definitive statute with a view to the fulfilment of that purpose, but it has power to exercise these functions to their full extent, in so far as the statute does not impose restrictions upon it’.<sup>23</sup> Therefore the constituent instrument is important in determining the powers of an international organisation in three ways. First, it lays down the functions and purposes of the organisation. Secondly, it may clearly provide the extent of that organisation’s powers. Finally, it may place limits to any such power the organisation may exercise to fulfil its purposes. Ultimately, it comes down to the issue of interpreting the constitution.

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<sup>23</sup> Case Relating to the Jurisdiction of the European Commission of the Danube between Galatz and Braila. Advisory *Opinion* (1927) P.C.I.J (Ser B.) No. 14 at p. 64.

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It is generally agreed that the interpretation of an international organisation's statute should not be contrary to the spirit and letter of the instrument; but should be consistent with the purpose of the organisation as expressed therein.<sup>24</sup> While it is in general the interpretation of the constitution that is most important in determining the powers, whether expressly attributed, implied, or inherent in the organisation; it is therefore important to briefly describe these powers and their application in the instant case. It is generally agreed that the powers of an international organisation as evolving from the constitution are classified into three categories of attributed, implied and inherent powers. An understanding of the general notion of these powers will suggest the better approach to take in interpreting the provisions of the constituent instruments that are of concern to us in this paper.

### **3.3.1 Attributed powers of international organisations**

The attributed powers doctrine is the most natural explanation of the powers of the international organisation (Klabbers 2005:160). It provides that the powers should be restricted to those functions the organisation is specifically empowered to do (Klabbers 2009:56). As such, it has been criticised as being limited in that it appears to position an international organisation as a mere mouthpiece of its members rather than as a separate legal entity (Klabbers 2009:58). The doctrine precludes the organisation from acting outside the powers that are expressly provided by its constitution (Klabbers 2009). It restricts the organisation's ability to operate flexibly in order to fulfil its functions and purposes (Klabbers 2009). The other theories on the powers of the international organisation were developed to supplement the supposed weakness of this doctrine.

### **3.3.2 Implied powers of international organisations**

The theoretical underpinnings of the doctrine of implied powers were first set out by the Permanent Court of International Justice (PCIJ) in 1926. In the International Labour Organisation (ILO) case, it held that the implied powers of an international organisation can actually be considered to rest upon the consent

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<sup>24</sup> ICJ, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion* of 18 July 1950, I.C.J. Report (1950) p. 221, para. 229; Article 31(1) Vienna Convention on the Law of Treaties (VCLT) 1969, see note 19 above.

of approving member states.<sup>25</sup> This concept was further established as a general principle by the successor court to the PCIJ. In laying down the requirements for the international legal personality of an international organisation, the ICJ both confirmed the existence of the doctrine and also enhanced it (by similarly linking it to expressly provided powers and the purpose of the international organisation). The ICJ went further to refine the underlying theory of the implied powers doctrine. It held that implied powers are similar to attributed powers because both arise from the consent of members (Klabbers 2005:160–161).<sup>26</sup> The difference is that the consent for implied powers arises through implication, rather than being expressly provided as is the case with attributed powers. The ICJ in a later declaration confirmed that ‘under international law, the organisation must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties’.<sup>27</sup>

The notion of implied powers is merely an interpretation of the statute which assumes the organisation to have those powers which, although they were not stated expressly, are necessary for the fulfilment of its functions and purposes.<sup>28</sup> The doctrine of implied powers does not presuppose that there are no limits as to what the organisation is permitted to do. The powers invested in the organisation must be restricted to its functions, which reflect the common interests entrusted to the organisation by its members.<sup>29</sup> The ICJ formulated the rule that any action taken by the organisation under the implied powers doctrine would be

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<sup>25</sup> Competence of the ILO to regulate incidentally the personal work of the employer (the ILO case) Advisory Opinion of 23 July 1926 (1926) P.C.I.J. (Ser. B) No 13.

<sup>26</sup> See also the Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion of 11 April 1949, I.C.J. Reports 1949, p. 174, paras. 196–8.

<sup>27</sup> Reparation case, see note 26 above, p. 174, paras. 196–8

<sup>28</sup> Effect of awards of compensation made by the United Nations Administrative Tribunal, Advisory Opinion of 13 July 1954, I.C.J. Reports 1954, p. 47; see also Certain expenses of the United Nations (Article 17, para. 2, of the Charter), Advisory Opinion of 20 July 1962, I.C.J. Reports 1962, p. 151a. para. 168.

<sup>29</sup> Legality of the Use by a State of Nuclear Weapons in Armed Conflict (WHO), Advisory Opinion of 8 July 1996, I.C.J. Reports 1996, p. 66, para. 25

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*ultra vires*, unless it is to fulfil one of the organisation's functions or purposes.<sup>30</sup> According to Klabbers, the doctrine 'may lead to more effective international governance, but not necessarily to greater democracy or legitimacy, and may undermine the legal position of individual citizens' (Klabbers 2009:73). It is not to be an open cheque given to an organisation to take any actions it deems necessary.

The actions of an organisation to fulfil its functions may yet still be outside its powers. There are other restrictions to the application of the implied powers doctrine. First, it would be restricted by a contrary indication in the constituent instrument. Therefore, it must operate within the framework of the statutorily expressed powers (Campbell 2005:283; Shaw 2008:916). Pointedly, in a dissenting judgment, Judge Winiarski noted that there is a need to 'maintain the balance of carefully established fields of competence'<sup>31</sup> in the international legal order. He further argued (speaking of the UN, but applicable to other international organisations) that 'the fact that an organ of the UN is seeking to achieve one of the UN's purposes does not suffice to render its action lawful'.<sup>32</sup> This view seems to have been accepted by some scholars. It has been argued that practice indicates conclusively that the exercise of powers by an organisation must be consistent with its scope of competence 'both in relation to each particular organ and to the overall balance of competence' (Campbell 2005:291–292). In essence, power should not be exercised so as to alter a balance of competence; the distribution of which is a question 'of the highest political sensibility' (Campbell 2005:291–292). This cautionary note, apparent in the UN expenses case,<sup>33</sup> is also applicable in the instant matter. The actions of an organisation may be pursuant to its functions; at the same time, it must not be contrary to any restriction in the constitution.

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<sup>30</sup> ICJ, Certain expenses case, see note 28 above, at para. 168.

<sup>31</sup> Dissenting Opinion of Judge Winiarski, Certain expenses case, see note 28 above, at para. 230.

<sup>32</sup> Dissenting Opinion of Judge Winiarski, Certain expenses case, see note 28 above, at 230.

<sup>33</sup> See note 28 above.

### 3.3.3 Inherent powers

The final doctrine relates to those powers that are inherent in the organisation as a separate legal entity. Inherent powers are similar to the implied power doctrine to the extent that they exclude such powers which are prohibited in the constitutional instruments (Campbell 2005:291–292). The notion of inherent powers is functional, however, to aid the organisation to attain its objectives. It also reduces the number of legal controls on the capacity of the organisation to carry out its functions.

### 3.3.4 Summary of the powers of international organisations: A matter of interpreting constitutional instruments

The above brief overview of the powers of international organisations highlights the importance of interpreting the constituent instruments. Generally it must be observed that since constitutional instruments are treaties, the rules of the VCLT must be considered.<sup>34</sup> Then again, as noted earlier, the instruments are also constitutional documents and as such their special characteristics must be considered.<sup>35</sup> In fact, the constitutional nature of these documents raises special problems of interpretation due to their nature, character, objects, functions and practice (Akande 2006:278).<sup>36</sup> As noted earlier, the special characteristics of the constitutional nature of this kind of treaties means that their interpretation may not follow the general rules as laid down in the VCLT.

On the matter of interpreting the instruments of an international organisation, the case has been made for special emphasis on the object and purpose interpretative approach. Generally, in the case of other treaties, the ICJ has held that this should be subsidiary to the text.<sup>37</sup> However, in another case involving international organisations, the Court noted that ‘the nature of the organisation, the objectives and the imperatives associated with the effective performance

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<sup>34</sup> Articles 31 and 32 VCLT, see note 19 above.

<sup>35</sup> ICJ, Nuclear Weapons Advisory (WHO) case, see note 29 above.

<sup>36</sup> See also *Legality of Nuclear Weapons case*, see note 22 above, para. 19; *Certain expenses case*, see note 28 above, p. 151, para. 157.

<sup>37</sup> ICJ, *Case Concerning the Territorial Dispute (Libyan Arab J'amahiriyai vs. Chad)*, Judgment of 3 February 1994, I.C.J Report 1994, p. 21, para. 41; see also Aust 2007: 235.

of its functions are elements which may deserve special attention when interpreting the constituent instrument of the international organisation.<sup>38</sup> It has been argued that the Court will interpret the contested word or phrase to follow what is most conducive to the attainment of that organisation's objects and purposes.<sup>39</sup> In all, it remains true that where the text of a treaty is sufficiently clear, interpreting bodies do not usually look further.<sup>40</sup>

### 4. The powers of the AU

The relations between the two international organisations deteriorated when the AU publicly opposed Sudan's referral by the UNSC to the ICC. The relations further worsened with the Court's indictment of Al-Bashir.<sup>41</sup> Of concern to us, is the recent decision of the organisation that relied on Article 23 of the AU Constitutive Act (African Union 2000) and Article 98 of the Rome Statute in requiring its members not to comply with the ICC warrant for the arrest of the Sudanese President.<sup>42</sup> The question here is whether the AU has the powers to request the non-cooperation of its members with the ICC.

It appears that the regional organisation has such powers expressly attributed and implied from the Constitutive Act. Article 23 of the Constitutive Act (African Union 2000) provides that member states that fail to comply with the decision and policies of the Union may be subjected to other sanctions. Implicit from that provision is the capacity given to the organisation to make decisions and enact policies which are binding on its members. In addition, the treaty clearly grants the organisation the powers to: (1) determine its common policies, (2) monitor the implementation of its policies and decisions, and (3) ensure compliance by

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<sup>38</sup> *Nuclear Weapons Case (WHO)*, see note 29 above, at p. 75; see Akande 2006:278.

<sup>39</sup> Lauterpacht 1976:420 (cited in Akande 2006:289).

<sup>40</sup> Tetsuo Sato, *Evolving Constitutions of International Organisations: A Critical Analysis of the Interpretative Framework of the Constituent Instruments of International Organisations* (Martinus Nijhoff 1996:153).

<sup>41</sup> *In the Case of the Prosecutor V. Omar Hassan Ahmad Al Bashir* ('Omar Al-Bashir'), Pre-Trial Chamber I, 4 March 2009, Warrant of Arrest for Omar Hassan Ahmad Al Bashir ICC-02/05-01/09-1 04-03-2009 1/8 SL PT

<sup>42</sup> AU Commission Press, see note 11 above.

member states (African Union 2000: Art. 9(1)(a)(e)). Ultimately, the AU has the powers to make decisions on behalf of its members.

The rules of the Constitutive Act deter any member from violating the obligations arising from it (African Union 2000: Art. 23(2)). However, any AU decision that is not properly reached would not be binding on members. Therefore such a decision would have no attendant sanctions. A properly constituted decision must be made by a consensus of the Assembly (of Heads of States and Governments) (African Union 2000: Art. 7(1)). Alternatively, a two-thirds majority of the member states of the organisation shall be adequate to reach an appropriate decision that is binding on all (African Union 2000: Art. 7(1)). In addition, these two-thirds shall also constitute a quorum at any meeting of the Assembly (African Union 2000: Art. 7(2)). These procedures were complied with by the AU in making the ICC decisions.

It is expected that the AU decisions would be designed to attain the objectives laid down in its Constitutive Act. Therefore, it has the powers to ensure that its member states work toward achieving these common regional objectives. In the instant situation, it can be argued that the actions of the organisation were intended to achieve such objectives as to encourage international cooperation (by preventing inter-state conflict which would arise if an AU state arrests Al-Bashir) and to promote and defend African common positions, peace, security and stability on the continent (African Union 2000: Art. 3). Therefore, the AU Assembly is empowered by Article 7 to make such decisions which in this case are binding on its members.

While the AU may have the powers to make decisions and policies that are binding on its members; it appears that the non-cooperation decision raises the issue of competing obligations for African state parties to the Rome Statute of the ICC. The question is whether the AU decision may result in the violation of another international treaty. To answer this question, the dispute at hand with the ICC must be explored. This is because while the AU may be within its powers to take decisions and make policies for its members it should not encourage treaty violation, except in situations (such as the instant case) where the issue at stake is one that may be questionable or unlawful *ab initio*. In any

case, the powers of the ICC (and the question whether it is acting *ultra vires*) must of necessity be examined to determine whether the AU or the ICC may be treading carelessly on a minefield of international responsibility (both of itself as an international organisation and of its state parties when contravening their obligations to the Rome Statute).

### 5. The powers of the ICC under the Rome Statute

This paper is concerned with the extent to which the ICC could request the arrest and surrender of Al-Bashir or any such indicted person by its member states. First, it will have to be established whether there are express provisions granting the Court such powers. Where this is so, the issue of whether such powers fall within the organisation's express purposes or functions will be moot.

It is important to note that in the case of the ICC, any of the three main organs may exercise its powers. Consequently, the organ may have to interpret the Statute to determine the power or the extent thereof. The ICC, like the other international criminal tribunals before it, is made up of the Office of the Prosecutor (OTP), the Registry, and the Chambers.<sup>43</sup> The OTP investigates the crimes that fall within the jurisdiction of the Court, indicts the suspects and presents evidence against them in Court (Rome Statute 1998: Art. 42). The Trial and Appeal Chambers are made up of judges elected by the Assembly of States for a term of nine years (Rome Statute 1998: Art. 36(9)(a)). They determine the guilt or innocence of those accused of the crimes within the jurisdiction of the Court and the consequent punishment (Rome Statute 1998: Art. 36(9)(a)). The judges also draft the Court's Rules of Procedure and Evidence. The Registry is the administrative and support arm of the Court. It schedules the hearings and the translations and undertakes all the support services of the Court (Rome Statute 1998: Art. 43). The three organs may, in carrying out their functions, interpret the powers of the Court as provided in the Rome Statute or such implied/inherent powers as the organ deems necessary to carry out the general functions of the Court. In the instant case, it is the OTP and, subsequently, the

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<sup>43</sup> Carla Del Ponte, *Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity: A Memoir* (New York, Other Press, 2009), p. 40.

Chambers of the Court that have been involved in the efforts to bring Al-Bashir to justice pursuant to the UNSC referral of the situation in Sudan.

The current impasse arose as a result of the OTP's view that the Court has the powers to urge its state parties to arrest and surrender Al-Bashir, the Sudanese leader. The issue here is whether the Rome Statute provides such powers to the Court, expressly or impliedly. As has been noted earlier, the constituent instrument of an international organisation provides the initial source of determining its powers. It is only where that constituent instrument is silent that the concept of implied or inherent powers would be applied. In this instance, the Rome Statute lays out the purposes, functions and powers of the Court. It has also been established earlier that the powers should be interpreted consistently with the objects and purposes of the organisation. The purposes of the ICC as provided in its Statute must necessarily inform its powers (attributed, implied or inherent) and the limits thereto. In the instant case, our concern would be to interpret the provisions of the Rome Statute that determine the extent to which the ICC may direct its state parties to arrest and surrender Sudan's Al-Bashir.

Art. 98 lays down steps for the ICC to follow in requesting the arrest and surrender of persons enjoying immunity by another state which is not the state of nationality. The provision reads thus:

(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.

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The above provision is a clear limitation to the inherent or implied powers of the ICC to request the arrest and surrender of high state officials set out under Article 89.

The Statute expressly provides that 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 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'. It is worth mentioning that the part of the Statute so referred to in Article 89(1) includes Article 98 (Cooperation with respect to waiver of immunity and consent to surrender). Furthermore, it must be made clear that the applicability of Article 89 hinges on the relationship between the Court and its state parties. It is complementary to states yet operates from a different stratum. Therefore, it has power to expect cooperation from its state parties. Nonetheless, this power is not unlimited. Accordingly Article 89(1) thus provides that the cooperation is limited to the requirement that state parties should act in accordance with the provisions of Part IX (International cooperation and judicial assistance) and their national laws. Therefore Article 89 recognises that the cooperation expected from a state party must not be without consideration to the provisions on waiver of immunity and consent to surrender.

The provision provides that for the ICC to request the arrest and surrender of state officials in another state under the cooperation obligations of Article 89, it has to follow certain conditions. The essence of these conditions is that, so as to properly implement the ICC request that the requested state does not breach its obligations under international law, the Court must first obtain the waiver of immunity of the official by his state of nationality. It is only after such a waiver has been obtained that the Court may proceed with the request to the requested state to arrest and surrender such an individual. A detailed analysis of the proper interpretation of Article 98 by this writer can be found in a forthcoming paper (Nmaju forthcoming). For the purposes of the current paper, it suffices to sum up the argument that the provisions of the Rome Statute do not support the approach of the Office of the Prosecutor (OTP) in the matter of Al-Bashir's immunity.

Ultimately, the approach of the ICC, especially the OTP, to promote the arrest of the Sudanese president appears to be inconsistent with the procedure laid out in the Statute. In addition, the Pre-Trial Chamber did not address this (the relationship of Article 98 with Article 27(2), both of the Rome Statute) in its decision referring Malawi to the UN Security Council for the two states' (Malawi and Chad) supposed breach of their obligations under the Rome Statute to arrest Al-Bashir when he was within their territory.

## **6. International responsibility**

The violation of a duty imposed by international law constitutes an international wrong and has been generally considered as one of the most important and yet intricate aspects of the international legal order (Mann 1976; Matsui 2002; Brownlie 1983; Ragazzi 2010; Provost 2002). More generally accepted is the rule that every internationally wrongful act of a state entails the international responsibility of that state (United Nations 2001).<sup>44</sup> The act of a state is considered to constitute an internationally wrongful act when the conduct or omission constitutes a breach of an international obligation of that state (United Nations 2001: Art. 3), and which is attributable to it (United Nations 2001: Art. 1). Accordingly the origin of the international obligation (whether custom, treaty or other) does not affect whether the act of that state constitutes a breach of an international obligation (United Nations 2001: Art. 3).<sup>45</sup> The notion of state responsibility in international law may be divided into two related sets of norms: the first conceives rules that impose particular obligations on states (primary rules); the second is 'concerned with determining the consequences of failure to fulfill obligations established by the primary rules, and which may hence be termed "secondary" rules' (Matsui 2002:3).

Following that, it is arguable that the nature of the obligation that may be violated as a result of the ICC approach will indicate whether the action of a requested state will constitute an international wrong. It must be noted that the traditional concept of state responsibility was confined to the responsibility

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<sup>44</sup> See also Brownlie 1983, Matsui 2002 and Provost 2002.

<sup>45</sup> See also Matsui 2002:3.

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of a state for damage caused to foreigners in its territory (Matsui 2002:5). The distinction, if any, between the traditional and current notion of the law of responsibility will not be discussed in this paper. What is sufficient here is to focus on the question whether any wrong of the kind we are concerned with will be committed within the territory of the requested state as set out in Article 98 of the Rome Statute.

The core of any problem of the responsibility of the requested state, as a result of effecting an ICC arrest warrant for certain foreign state officials, will be its inconsistency with the norms of diplomatic and consular relations. These rules are customs codified in various treaties such as the Vienna Convention on Diplomatic Relations (VCDR),<sup>46</sup> the Vienna Convention on Consular Relations (VCCR)<sup>47</sup> and the United Nations Convention on Special Missions.<sup>48</sup> In essence, the rules provide that the person of certain high foreign officials – such as heads of state, ambassadors and foreign ministers – enjoy the immunity that flows from their state. These persons are considered important in the state functions such that their person, residence and office in the host state are inviolable.<sup>49</sup> The immunity that accrues to them is distinct from that of their mission (embassy) and includes their personal inviolability, immunity from criminal and civil and even administrative jurisdiction in the host state (Roberts 2009). The VCDR provision for the inviolability of the foreign state officials effectively codifies what is arguably the oldest, established and universally recognised principles of diplomatic practice (Roberts 2009:122).<sup>50</sup> This means that such foreign officials ‘shall not be liable to any form of arrest or detention’.<sup>51</sup> There is a second aspect of this principle of inviolability that places a special duty on the

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<sup>46</sup> Vienna Convention on Diplomatic Relations, 18 April 1961, Arts 29, 31, 23 UST 3227, 500 UNTS 95 (henceforth VCDR)

<sup>47</sup> Vienna Convention on Consular Relations, 1963, Art. 24, Art 43(1), 21 UNTS 261(henceforth VCCR)

<sup>48</sup> United Nations Convention on Special Missions, 8 Dec. 1969, 1400 UNTS 231.

<sup>49</sup> VCDR; VCCR; Denza 1998; Roberts 2009.

<sup>50</sup> The provision is found in VCDR: Art. 29.

<sup>51</sup> VCDR: Art 29.

host state not to merely ensure the inviolability of the official but also to protect him/her.

The special duty of the host state to protect the foreign official is an aspect of the notion of personal inviolability that has been widely debated as to its interpretation. Nonetheless, the failure to protect the foreign official may trigger the responsibility of the host state as an omission to comply with a legal obligation. The norm on inviolability requires the host state to prevent the violation of the person of a state ambassador or head of state.<sup>52</sup> Hence it is a breach for a state, such as Malawi, to declare that it will not protect the person of a head of state on official visit. The convention requires the host state to take appropriate steps to protect the foreign diplomat or head of state. There are limits to the duty to protect as suggested by the inclusion of the word 'appropriate' in Article 29. This was highlighted in a UK case (*Aziz v. Aziz, Sultan of Brunei Intervening*).<sup>53</sup> In that case, the Court of Appeal considered the claim of the Sultan of Brunei that the UK government was under a legal obligation to protect his dignity under the personal inviolability principle by suppressing facts that were contained in a judicial document of another case. The argument was based on the need to prevent him from being identified and thus to protect his dignity. The loss of dignity claim under this principle was correctly held by the UK Court of Appeal to be beyond what is required in international law as he was a third party to the other proceedings.

The customary norms on inter-state relations as codified in VCDR provided for the personal protection of the agent of the sending state in the territory of a host state. Anything that will obstruct the foreign official in the host state is illegal. In fact, the host state as shown above is expected to take positive action to ensure the protection of the foreign official. Therefore, it is clear that the action of a requested state in arresting a foreign official who enjoys diplomatic immunity will constitute an international wrong by violating the above customary and treaty rules on diplomatic immunity.

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<sup>52</sup> VCDR; VCCR; UN Convention on Special Missions, see note 48 above.

<sup>53</sup> Judgement of Collins LJ, 11 July 2007 [2007] EWCA Civ 712.

## **7. Conclusions**

The above argumentation demonstrates that the legal impasse between the AU and the ICC can be resolved by the legal structures provided by the regime of international organisations. The international rules involving immunity (howbeit controversial) must be respected by the ICC as well as the AU outside the limitations to those rules, such as their irrelevance before international tribunals (including the ICC). As a result, what is at stake here is the procedures for bringing indicted persons such as Al-Bashir before the ICC. The argument made in this paper is that the ICC is going beyond its powers to actively urge its state parties to arrest Al-Bashir. Therefore any state acting pursuant to an ICC request to arrest Al-Bashir or similarly placed foreign official would be violating its obligations in international law, such that the injured state can successfully trigger the responsibility of the requested state for remedies. The AU, on the other hand, should maintain the efforts to resolve the dispute through legal structures rather than resorting to political manoeuvring which does not appear to have much chance of success. Nonetheless, the AU's actions (especially the later actions in relation to Kenya) appear to encourage treaty violation by its member states. It risks shooting itself in the foot by such counter-productive measures.

It is accepted that there may be no remedy adequate to rectify the injury to the sending state. The ICC should change its approach in the view that it is unlikely to result in the arrest of Al-Bashir or similarly placed high officials. The reason is that few states will be willing to take the gamble of arresting a foreign official due to the high political and legal risks that it poses. These risks will appear to the states as offering little political capital or, worse, possibly leading to an international dispute or conflict. The resultant outcome may be considered a dispute if the sending state embarks on some form of diplomatic retaliation (*quid pro quo*) or initiates action before the ICJ or other UN organs. On the other hand, it may be considered as a conflict if the sending state embarks on armed conflict against the requested state. The law must therefore be allowed to fulfil its purpose to comprehensively ensure fairness and efficiency in the international legal order.

In conclusion, we argue that these tools identified may serve the twin purposes of fairness (in its implementation to both weak and strong) and regulation of the international society such that every state and international organisation must comply. It can be said that our suggestions above, if adopted by bodies, will ensure that the differences between the ICC and AU on the issue are regulated in a way that is fair and equitable to all.

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