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Article 46A *Bis*

Beyond the Rhetoric

DIRE TLADI

1. INTRODUCTION

Article 46A *bis* of the Malabo Protocol has, without a doubt, attracted more attention than any other provision in the protocol. For many, Article 46A *bis* is the defining feature of the Malabo Protocol. The debates around Article 46A *bis* have centred on both legal and policy issues. In particular, the debates have focused on the consistency of Article 46A *bis* with customary international law and the fight against impunity.

Much of the debate has tended to reflect the hero-villain trend that has been so characteristic of International Criminal Court (ICC)–African Union (AU) debates relating to immunities of heads of state in recent years.[1] As with other debates in which the self is portrayed as a hero and the other as a villain, much of the positions on both sides of the divide ignore the nuances of what is a complex area of law. In the jockeying for positions, the line between doctrinal positions and normative policy assertions become blurred. Sometimes they disappear altogether. The doctrinal question whether the recognition and application of immunities of certain officials before international courts is consistent with modern international law is very often answered by the normative policy postulation that AU should not have included the immunities provision in the Amendment Protocol. Conversely, the normative

This chapter is an updated version of an article that appeared as 'The Immunity Provision in the AU Amendment Protocol: Separating the (Doctrinal) Wheat from the (Normative) Chaff' (2015) 13 *Journal of International Criminal Justice* 3.

[1] See D. Tladi, 'When Elephants Collide It Is the Grass That Suffers: Cooperation and the Security Council in the Context of the AU/ICC Dynamic' 7 *African Journal of Legal Studies* (2014) 381, at 381 where the author described debates on the ICC as being 'characterised by an ideological chasm that has pitted villains against protagonists – with both sides casting the other villains intent on wanton destruction and themselves as protagonists fighting the good fight'.

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postulation questioning the wisdom of prosecuting heads of state is met by a reference to a provision in the Rome Statute, namely Article 27. Added to the mix is very often an empirical assertion, either that a position will result in impunity or will lead to the destabilisation of a country or region. Further complicating the discourse is the resort by commentators to the political rationale or objective behind the Amendment Protocol (Malabo Protocol) i.e. some commentators have asserted that the Amendment Protocol, and the immunity provision in particular, was a response to the prosecutions by the ICC of African heads of state.

In this chapter, I assess the merits of some of the arguments that have been advanced both in support of and against Article 46A *bis*. I begin, in the next section, by providing the context for the debate, namely the importance of the immunities question in the AU and ICC tension. The following section will then identify the various propositions underlying the arguments for and against Article 46A *bis*. I then evaluate these propositions on the basis of the rules of international law before offering some concluding remarks.

2. SETTING THE CONTEXT: ICC–AU TENSION AND THE CENTRALITY OF IMMUNITIES

Central to the ICC–AU tension has been the issue of 'targeting' of Africans, i.e. the fact that all the cases currently before the ICC are against Africans. In truth, however, the tension between the ICC and AU arises not because only Africans have been indicted but because African heads of State have been indicted. All the decisions against ICC-related decisions by the AU have concerned situations in which an African head of State has been indicted – Darfur, Libya and Kenya.[2] The real complaint of the AU against ICC is therefore, the indictment of African heads of State. In legal language, this complaint finds expression in the debate on immunities.

[2] See, e.g., Decision on the Progress Report of the Commission on the Implementation of the Previous Decisions on the International Criminal Court, Assembly/AU/Dec.547 (XXIV), January 2015, Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), (Assembly/AU/Dec.245(XIII)) July 2009; 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 (ICC) (Assembly/AU/Dec.296)(XV), July 2010; Decision on the Implementation of the Decisions on the International Criminal Court, (Assembly/AU/Dec/334(XVI), January 2011; Decision on the Implementation of the Assembly Decisions on the International Criminal Court, (Assembly/AU/Dec.366 (XVII), July 2011.

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Discussions on immunities in international law are dominated by two central themes. The first theme relates to the importance of immunity for international law and international relations.[3] The International Court of Justice (hereinafter the 'ICJ') has, for example, declared that the rule of international law relating to immunities 'derives from the principle of sovereign equality of States, which . . . is one of the fundamental principles of the international legal order'.[4] The second theme concerns a gradual shift in paradigm and the emergence of a new vision of international law challenging the dominant state-centred and sovereignty based paradigm. This competing vision of international law is characterised by an emphasis on values, where sovereignty no longer trumps other values.[5] This shift in paradigm is consistent with a restricted view of immunities and an emphasis on accountability.[6] This shift which has been recognised in the literature is also reflected in judicial practice.[7] Explaining the expansion of grounds of jurisdiction, Judges Buergenthal, Higgins and Kooijmans referred to 'the emergence of values which enjoy an ever-increasing recognition in international society'.[8] However, it is

[3] See *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)*, International Court of Justice, 3 February 2012, ICJ Reports 2012, 99 at para 56 where the Court states that 'the rule of State immunity occupies an important place in international law and international relations'. See also separate opinion of Judge *ad hoc* Bula Bula in the *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, International Court of Justice, 14 February 2002, 2002 ICJ Reports 3 at paras 31 and 41.

[4] See *Jurisdictional Immunities of the State case*, supra note 3 at para. 56. See also separate opinion of Judge Bennouna in *Jurisdictional Immunities of the State case* who, at para 4, describes the theme as follows: 'starting from an absolute concept of sovereignty, States had inferred an equally absolute concept of immunity, which allowed one State to claim immunity from the jurisdiction of another's courts under all circumstances.'

[5] See generally J. Dugard 'The Future of International Law: A Human Rights Perspective – With Some Comments on the Leiden School of International Law' 20 *Leiden Journal of International of International Law* 4 (2007) 729, at 731. See also E. Jouannet 'Universalism and Imperialism: The True-False Paradox of International Law' 18 *European Journal of International Law* 3 (2007) 379 at 379; P.M. Dupuy 'Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martti Koskenniemi', 16 *European Journal of International Law* 1, (2005) 131, at 135. See for discussion D. Tladi 'South African Lawyers, Values and New International Law: The Road to Perdition is Paved with the Pursuit of Laudable Goals' 33 *South African Yearbook of International Law* (2008) 167, at 169–72.

[6] See, e.g., dissenting opinion of Judge Yusuf in the *Jurisdictional Immunities of the State case*, supra note 3, who states, at para 21, that the scope of immunity 'has been contracting over the past century, in light of the evolution of international law from a State-centred legal system to one which also protects the rights of human beings vis-à-vis the State'.

[7] See especially the dissenting opinion of van den Wyngaert in the *Arrest Warrant case*, supra note note 4, at paras 23–8.

[8] See Ibid. at para 73 Joint Separate opinion of Higgins, Kooijmans and Buergenthal.

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important to understand that while there is a gradual shift, it cannot be said that international law has lost its state-centric nature. Jouannet describes the current state of the law as, 'a more multiform and complex law, characterised by greater solidarity, which still flirts with this idea of sovereignty while at the same time seeking to surpass it in favour of a common good'.[9]

In the context of immunities, these sentiments about the current state of international law are echoed by the joint separate opinion of Judges Buergenthal, Higgins and Kooijmans:

> These trends reflect a balancing of interests. On the one scale, we find the interest of the community of mankind ... on the other, there is the interest of the community of States to allow them to act freely on the inter-State level ... Reflecting these concerns, what is regarded as permissible jurisdiction and what is regarded as the law on immunity are in constant evolution.[10]

This tussle between the traditional and emerging international law and their respective influence on the law of immunities is central also to the understanding of the debate surrounding Article 46A *bis*. Thus, some see Article 46A *bis* as antithetical to the modern vision of international law while others see it as reflecting existing rules of international law.

3. IMMUNITY BEFORE THE AFRICAN COURT: UNPACKING THE CASE FOR AND AGAINST

A. *Scope of Immunity in the Amendment Protocol*

Before addressing some of the issues that have been raised concerning the immunity provision in the Amendment Protocol, it is useful to set out the provision and attempt to identify its scope. Article 46A *bis* of the Amendment Protocol provides as follows: 'No charges shall be commenced or continued against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office'.

As a preliminary point, and irrespective of doctrinal and normative issues, the text of Article 46A *bis* is ambiguous and not well drafted. Firstly, what is meant by 'or anybody ... entitled to act in such capacity', a phrase which first appeared in the decisions of the AU Extraordinary Summit of October

[9] Jouannet, supra note 5 at 387.
[10] See *Arrest Warrant case*, supra note 4 at para 75 of the joint separate opinion of Judges Buergenthal, Higgins and Kooijmans.

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2014,[11] is not at all clear. One possible reading is that phrase refers to any number of persons including potentially all ministers and even all members of parliament in some states.[12] This very broad interpretation is inherently relative and would result in different rules being applicable to officials from different states since whether a person enjoyed immunity before the African Court would depend on the constitutional system of each State. At its narrowest, however, the provision could be limited to the deputy Head of State or Government.[13] This latter, more narrow interpretation, is more objective and is more consistent with the objective of the decision in which the phrase first appeared i.e. to prevent the prosecution of Kenya's head of State and his deputy. For the purpose of the analysis below, the more narrow meaning of the phrase is assumed although the broader interpretation cannot be ruled out.

The second ambiguity relates to whether Article 46A *bis* aims at providing two different regimes of immunity i.e. immunity *ratione personae* and immunity *ratione materiae*, or only one.[14] Moreover, if the aim is to establish only one regime, it would be unclear whether the regime would be immunity *ratione materiae* or immunity *ratione personae*. An ordinary meaning of Article 46A *bis* appears to support two separate categories.[15] The first category, approximating immunity *ratione personae*, would be applicable to 'Heads of State or Government' and 'anybody acting or entitled to act in such capacity.' The

[11] Para 10 (j) AU Decision on Africa's Relationship with the International Criminal Court (ICC), Ext/Assembly/AU/Dec.1 (October 2013).

[12] Section 90 of the Constitution of the Republic of South Africa, 1996, provides that the Deputy President, a Minister designated by the President, a Minister designated by other members of the cabinet, the Speaker of Parliament until the parliament designates one of its members, may act as head of state.

[13] Under section 147(3) of the Constitution of Kenya, only the Deputy President may hold the office of the acting President in the absence of the President. See also Article II section 6 of the Constitution of the United States.

[14] At its 65th Session, in the context of its work on Immunity of State Officials from Foreign Criminal Jurisdiction, the International Law Commission (ILC) adopted Draft Articles 3 and 4 on immunity *ratione personae* as covering all acts, whether in private or official capacity, performed by Heads of State, Heads of Government and Ministers for Foreign Affairs. See chapter 5 of the *Report of the International Law Commission on the Work of Its Sixty-Fifth Session (6 May to 7 June and 8 July to 9 August 2013) General Assembly Official Records Sixty-Eighth Session, Supplement 10* UN Doc. A/68/10. At its 66th Session, in the context of its work on Immunity of State Officials from Foreign Criminal Jurisdiction, the ILC adopted Draft Article 5 on immunity *ratione materiae* as applicable to state officials acting as such. See chapter 9 of the *Report of the International Law Commission on the Work of its Sixty-Sixth Session (5 May to 6 June and 7 July to 8 August 2014), General Assembly Official Records Sixty-Ninth Session, Supplement 10* UN Doc. A/69/10.

[15] The general rule on interpretation of treaties, in Article 31(1) of the Vienna Convention on the Law of Treaties, requires the terms of a treaty to be given their ordinary meaning in context and in the light of the treaty's object and purpose.

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second category, approximating immunity *ratione materiae*, applies to 'other senior officials based on their functions'. The phrase, 'based on their functions' in Article 46A *bis*, appears to only qualify 'other senior officials' and not 'Heads of State or Government, or anybody acting or entitled to act in such capacity.' An interpretation of Article 46A *bis* as establishing two categories of immunities would also be consistent with applicable principles of international law.[16] Assuming this interpretation were the more correct interpretation, it would mean that, contrary to the conclusions of the ILC and the decision of the International Court of Justice in the *Arrest Warrant case*, immunity *ratione personae* under the Statute of the African Court would not be extended to Ministers for Foreign Affairs.[17] Other senior officials, including Ministers for Foreign Affairs, would then be entitled to immunity *ratione materiae* for functions performed in their official capacity.

An alternative interpretation of Article 46A *bis* is that it establishes only immunity *ratione personae*. Under such an interpretation, 'based on their functions' does not qualify the extent of immunity but rather forms part of the description of the senior officials. In other words, senior officials, defined in terms of their functions, enjoy the immunity of Heads of State or Governments and other anyone acting or entitled in that capacity. Indeed the phrase 'based on their functions' appears to have been drawn from the ICJ's reasoning for extending immunity *ratione personae* to Ministers for Foreign Affairs in the *Arrest Warrant case*.[18] This interpretation is supported mainly by the fact that

[16] Under the Vienna rules of interpretation, in particular Article 31(3)(c) of the Vienna Convention on the Law of Treaties, 'relevant rules of international law applicable in the relations between the parties' are to be taken into account in the interpretation of treaties. On the notion of two categories of immunities under international law, see the work of the ILC cited, supra note 14.

[17] See *Arrest Warrant case*, supra note 4 at para 54 where the International Court of Justice held that Minister for Foreign Affairs, enjoy immunity *ratione personae*. Whether the Ministers for Foreign Affairs should enjoy immunity *ratione personae* was a matter of intense debate during the ILC's consideration of the topic. Although the ILC decided to includes Ministers for Foreign Affairs, at para 5 of the Commentary to Draft Article 3, the ILC states as follows: 'On the one hand, some members of the Commission pointed out that the Court's judgment [in the *Arrest Warrant case* was not sufficient grounds for concluding that a customary rule existed, as it did not contain a thorough analysis of the practice and that several judges expressed opinions that differed from the majority view. One member of the Commission who considered that the Court's judgment does not that there is a customary rule nevertheless said that, in view of the fact that Court's judgement in that case had not been opposed by States, the absence of a customary rule does not prevent the Commission from including [Minister for Foreign] among the persons enjoying immunity *ratione personae*.'

[18] In the *Arrest Warrant case*, supra note 4 at para 53, the Court states that to determine the extent of the immunities of Ministers for Foreign Affairs it 'must first consider the nature of the functions exercised by a Minister for Foreign Affairs.'

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in its earlier decisions leading to the adoption of Article 46A *bis*, the AU has never made a distinction between the immunities of heads of state and those of other senior state officials.[19] Moreover, such an interpretation would resolve the inconsistency between the first interpretation and the decision of the International Court of Justice in *Arrest Warrant case* identified above. Although the Article 46A *bis* could be read as establishing two categories of immunities, namely immunity *ratione materiae* and immunity *ratione personae*, on a balance it appears that this second alternative is likely what was meant by the AU. It is unnecessary to resolve this interpretative ambiguity, save to recognise these two possible readings of the provisions. Under the second interpretation, in which only one type of immunity is recognized, other officials whose functions do not exhibit the characteristics identified by the Court in the *Arrest Warrant case* as indicating immunity *ratione personae* would not have immunity before the African Court's criminal law section.

B. Arguments on the Immunity Provisions in the Amendment Protocol

As a normative proposition, arguments against the immunity provisions in the Amendment Protocol are numerous and include arguments based on the fight against impunity. However, as a doctrinal question, arguments against the immunity provisions in the Amendment Protocol have tended to revolve around its consistency with international law and the Rome Statute in particular. Jemima Njeri Kariri, for example, puts forward primarily normative arguments against the immunity provision. She observes, for example, that the immunity provision is a 'setback to advancing democracy and the rule of law' and provides a 'protective veil that denies justice to victims and is detrimental to accountability'.[20] These are all normative arguments that suggest that the AU *should not* have included the immunity provision. Although not focused on the legal doctrinal question about the place of immunity in international (and domestic) law, Njeri Kariri postulates, as a legal position, that 'the immunity provision flouts international law and is contrary to the national laws of African states like Kenya and South Africa.'[21]

The doctrinal argument, questioning the legal basis of an immunity provision in the Amendment Protocol can be illustrated by a reference to Chacha

[19] See, e.g., Para 9 of the *Decision on Africa's Relationship with the International Criminal Court (ICC)*, Ext/Assembly/AU/Dec.1 (Oct 2013).

[20] J. N. Kariri 'Can the New African Court Truly Deliver Justice for Serious Crimes?' 8 July 2014 *ISS Today*, available at www.issafrica.org (last accessed 19 July 2015).

[21] Ibid.

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Bhoke Murungu's observations on the African Court.[22] Murungu asserts, citing Article 27 of the Rome Statute, that 'immunity of state officials is no longer a valid defence for the commission of international crimes'.[23] This position is also one that appears to have been advanced by the ICC in its decisions in the *Malawi* and *Chad* non-cooperation cases.[24] More to the point, Murungu asks whether extending the jurisdiction of the African Court to cover Rome Statute crimes (along with Article 46A *bis)* 'has a legal basis under the ICC Statute'.[25] The Rome Statute, he asserts, 'does not expressly allow or even imply that regional courts ... be conferred with jurisdiction' over Rome Statute crimes.[26] On the basis of his analysis, he concludes that 'it is difficult to establish a clear legal basis' for extending the jurisdiction of the African court in the Rome Statute.[27] Indeed, Murungu suggests that the very process of establishing the criminal section of the African Court was 'contrary to the provisions of the ICC Statute' in relation to cooperation.[28] Murungu's critique of the extension of the jurisdiction of the African Court is based on the issues of immunity of African Heads of State raised by the AU. He states, for example, that the only purpose behind the expansion of the jurisdiction of the Court is the AU's attempts to 'protect some of its leaders'.[29]

The arguments of Murungu are reflective of the whispers in the corridors of ICC meetings, even if not always captured in the literature. This argument can be reduced to three related propositions. First, customary international law does not provide for immunity of officials before international courts. Second, the provision of immunity in Article 46A *bis* is inconsistent with international law or, at best, goes against the trend of practice. Finally, the argument postulates that Article 46A *bis* undermines the Rome Statute. These legal propositions about immunity for Rome Statute crimes are very often based on normative statements about the effect of immunity on the fight

[22] C. B. Murungu 'Towards a Criminal Chamber in the African Court of Justice and Human Rights' 9 *Journal of International Criminal Justice* (2011) 1067.

[23] Ibid. at 1077.

[24] See, e.g., paras 18 and 36 of the *Decision Pursuant to Article 87(7) on the Failure of the Republic of Malawi to Comply with the Cooperation Request Issued by the Court with respect to the Arrest and Surrender of Omar Hassan Ahmed Al Bashir, Al Bashir* (ICC-02/05–01/09), Pre-Trial Chamber I, 12 December 2011; *Décision Rendue en Application de l'article 87(7) de la Statut de Rome concernant le refus de la République du Tchad d'accéder aux demandes de cooperation délivrées par la Cour concernant l'arrestation et la remise d'Omar Hassan Ahmed Al Bashir, Al Bashir* (ICC-02/05–01/09), Pre-Trial Chamber I, 12 December 2011.

[25] See Murungu, supra note 22, at 1077.

[26] Ibid.

[27] Ibid.

[28] Ibid.

[29] Ibid.

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against impunity. The granting of immunity is said to be contrary to the AU commitment of protecting the sanctity of life and condemning and rejecting impunity.[30] Steven Lamony of the Coalition for the ICC is quoted as saying 'Africa should be moving forward in the fight against impunity, not regressing'.[31] Similarly Netsanet Belay of Amnesty International has said that the decision 'undermines the integrity of the African Court'.[32]

The AU itself has defended the need for immunities both on normative and doctrinal grounds. According to the AU, under customary international law, 'Heads of State and other senior state officials are granted immunities during their tenure of office'.[33] As a doctrinal proposition, the AU has maintained that 'immunities provided for by international law apply not only to proceedings in foreign domestic courts but also to international tribunals'.[34] Providing for immunities of Heads of State and other officials in the Amendment Protocol is, therefore, from the AU's perspective, acting in furtherance of international law.

The AU does not dispute the legality of arrangements such as those in Article 27 of the Rome Statute, which provides that neither immunity nor other special procedural rules attaching to the official capacity of a person constitute a bar for the ICC exercising jurisdiction of a person.[35] The AU, instead, approaches Article 27 as a treaty rule applicable only to State Parties and that for non-State Parties, the rules of customary international law relating to immunities remain intact. In response to the decisions of the ICC on non-

[30] International Justice Resource Centre 'African Union Approves Immunity for Government Officials in Amendment to African Court of Justice and Human Rights Statute' available at www.ijrcenter.org/2014/07/02/african-union-approves-immunity-for-heads-of-state-in-amendment-to-african-court-of-justice-and-human-rights-statute/ July 2 2014, (accessed 10 August 2014).

[31] Ibid.

[32] Ibid.

[33] See Para 9 of the *Decision on Africa's Relationship with the International Criminal Court (ICC)*, Ext/Assembly/AU/Dec.1, Oct 2013.

[34] See Press Release 02/2012 on the 'Decision of Pre-Trial Chamber 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.

[35] Article 27(1) of the Rome Statute that the 'Statute shall apply equally to all persons without distinction any distinction based on official capacity. In particular, official capacity as a Head of State or Government, member of a Government . . . 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.' Article 27(2) provides that '[I]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising jurisdiction over such a person.'

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cooperation by Malawi and Chad, the AU issued a press release which stated, in part, that, 'immunities of State officials are rights of the State concerned and a treaty only binds parties to the treaty. A treaty may not deprive non-Party States of rights which they ordinarily possess'.[36]

This position essentially presents Article 27 of the Rome Statute, and similar provisions in the statutes of international tribunals, as being exceptions to the rules of customary international law relating to immunities and applying only as between parties to the constitutive treaties. The immunities provision in the Amendment Protocol are, from this perspective, seen not only as acceptable but as reflecting customary international law. This has been the legal basis of the AU's call for non-cooperation with the ICC's request for the arrest and surrender of Al-Bashir.[37] According to the AU, Article 27 leaves intact customary international law on immunities and the waiver of immunities implied by Article 27 applies only between States Parties to the Rome Statute. Thus, while there may be a duty on States Parties to the Rome Statute to cooperate in the arrest and surrender of a head of a State Party, no such a duty exists in relation to the arrest and surrender of a head of non-State Party.[38] To the extent that there is such a duty under the Rome Statute, compliance with it results in a breach of international law obligations under customary international law thus engaging the responsibility of the cooperating State. While this aspect of immunity is not directly relevant to the debate on Article 46A *bis*, it does serve to illustrate the AU's understanding of immunities under customary international law and, more to the point, the perceived exceptionality of Article 27 of the Rome Statute.

Both the positions supporting the immunities provision and the position opposing the provision are based on doctrinal assumptions about the rules of general international law relating to immunities. I turn now to evaluate these doctrinal assumptions.

[36] See Press Release 20/2012, supra note 34.

[37] In its first decision on non-cooperation with respect to Omar Al Bashir, for example, the AU Summit requests the Commission and African states to engage in a process to clarify 'the Immunities of officials whose States are not party to the [Rome] Statute.' See para 8 of the *AU Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)*, Assembly/AU/Dec. 245(XIII) Rev. 1. See especially para 6 of the *AU Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court (ICC)*, Assembly/AU/Dec.397 (XVIII) in which the AU Assembly reaffirms 'its understanding that Article 98(1) was included in the Rome Statute . . .out of a recognition that the Statute is not capable of removing an immunity which international law grants to officials of States that are not parties to the Rome Statute.'

[38] See Press Release 20/2012, supra note 34.

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4. EVALUATING THE DOCTRINAL ARGUMENT CONCERNING THE IMMUNITY PROVISION

I begin with an assessment of the AU position. First, it should go without saying that the duty to cooperate under the Rome Statute cannot deprive non-States Parties of their rights on immunities under customary international law. Treaties create rights and obligations only as between parties to the treaty and the rights of non-parties cannot be affected by the treaty.[39] Whether this means, as is argued by the AU, that there is no duty to cooperate in the arrest and surrender of Al-Bashir is dependent on other legal questions, such as the effect of a Security Council referral of a situation to the ICC and the interpretation of Article 98, which fall beyond the scope of the enquiry here.[40]

While the assertion that the rights relating to immunities under customary international law of a non-State Party cannot be affected by the duty to cooperate under the Rome Statute cannot be disputed, what does require closer scrutiny is the assertion that under customary international law heads of State (and other officials entitled to immunity *ratione personae)* enjoy immunity before international courts and tribunals. This assertion seems to ignore the dictum by the International Court of Justice in the *Arrest Warrant case* where the Court stated that, notwithstanding the customary international law rules on immunity of officials from foreign criminal jurisdiction, a state official may still prosecuted before an international court under certain circumstances.[41] But there is another far more fundamental problem with the AU's postulation. The immunity of states officials, whether *ratione personae* or *ratione materiae*, under customary international law means, in essence, the immunity of state officials from the jurisdiction of courts of *foreign states*. This immunity is an

[39] See generally Article 34 of the Vienna Convention on the Law of Treaties.

[40] This aspect of the immunities debate has been considered in various articles. See, e.g. D. Akande 'The Legal Nature of the Security Council Referrals to the ICC and its Impact on Bashir's Immunities' (2009) 7 *Journal of International Criminal Justice* 333; P. Gaeta 'Does President Al Bashir Enjoy Immunity from Arrest?' (2009) 7 *Journal of International Criminal Justice* 315. See also D. Tladi 'The ICC Decisions in Chad and Malawi: On Cooperation, Immunities, and Article 98' 11 *Journal of International Criminal Justice* (2013) 199. See for the author's more recent contributions on the subject: D. Tladi 'The Duty on South Africa to Arrest and Surrender President Al Bashir under South African and International Law: A Perspective from International Law' 13 *Journal of International Criminal Justice* (2015) 1027, especially at 1033–5 and 1043–4; D. Tladi 'Immunity in the Era of 'Criminalisation': The African Union, the ICC and International Law' 58 *Japanese Yearbook of International Law* 2015) 17, especially at 31–9.

[41] *Arrest Warrant case*, supra note 4, at para 61.

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extension of the immunity of the state from the jurisdiction of other states based on the principle of sovereign equality of states.[42] International tribunals, like the ICC and the African Court, are not foreign states. The rationale for immunity of states and its officials, sovereign equality of states, does not apply to the exercise of jurisdiction of international courts and tribunals since, thought created by states, they are not themselves states. Moreover, since the immunity of officials from the jurisdiction of the courts of *foreign states* can be shown to exist in the practice of states accepted as law, to extend this immunity to also international courts and tribunals would require evidence of practice of states accepted as law, which does not exist.[43] Quite the contrary, if anything, given the history of international criminal law described in, for example, the ICC decisions in *Malawi* and *Chad*, there appears to be practice in the other direction.[44] Therefore, the argument from the AU that the insertion of Article 46A *bis* is not only consistent with but is reflective of, customary international law is doctrinally flawed.

Does the fact that the AU proposition concerning immunity before international courts is incorrect, mean that the counter-proposition, i.e. customary international law rejects immunity, is correct? This was essentially the argument advanced by the ICC in *Malawi* and *Chad*.[45] The experience with the Nuremberg Tribunals, the Tokyo Tribunals, the International Criminal Tribunal for the former Yugoslavia, the International Criminal for Rwanda, the Special Court for Sierra Leone and the Lebanon Tribunals constitutes practice evincing a denial immunity. However, to transform the empirical fact, practice in the language of law, to a rule of customary international law requires that the practice be accompanied by a sense of obligation i.e. the practice is required by law.[46] No evidence of such an acceptance of law is present in relation to immunity of state officials before international courts and tribunals and none is presented by the ICC in *Malawi* and *Chad*. Indeed, in the debate over the arrest and surrender of Al-Bashir, those arguing that there was indeed a duty to arrest have advanced as a legal reason, not the fact

[42] See, e.g., para 6 of the commentary to Draft Article 4 of the ILC's Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction, supra note 14.

[43] In this regard, the ICJ in the *Arrest Warrant Case*, supra note 4 at paras 58 and 59, where the Court makes it clear that the rules relating jurisdiction of national courts, including immunities applicable before them, should be distinguished from the same relating to international courts.

[44] *Malawi Decision*, supra note 24 at para 23 *et seq*.

[45] Ibid.

[46] See generally the Report of the ILC at Sixty-Sixth Session (Chapter 10), supra note 14 at para 169.

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that the court was an international court but rather because the situation was referred to the court by the Security Council, which, the argument goes, has the power to override customary international law.[47]

Proponents of the view that there is a rule under customary international law denying immunity before international courts and tribunals may point to the *Arrest Warrant case*.[48] In the *Arrest Warrant case*, the International Court of Justice famously made the following observations: 'immunities enjoyed under international law by an [official] do not represent a bar to criminal prosecution in certain instances. . . . Fourthly, an [official enjoying immunity in national courts] may be subject to criminal proceedings before certain international criminal courts, [sic] where they have jurisdiction'.[49]

The quoted extract, however, does not suggest anything about the status of immunities before international courts under customary international law. The ICJ was not laying down a rule of international law but referring to *possible* avenues that may be followed for the prosecution of officials with immunity *if certain conditions were met*. The first avenue provided by the ICJ, for example, refers to the possibility of a person being tried before the courts of their own state.[50] Yet this can only happen if the national court in question has jurisdiction and the official in question has no immunity under domestic law. Similarly, an international court or tribunal can only try an individual if there is no jurisdictional bar, including immunity, to trying the individual. Whether or not the international court or tribunal will have jurisdiction and whether or not there is bar to the exercise of such jurisdiction will be dependent on the constitutive instrument establishing such as a court or tribunal.[51] The argument that customary international law denies immunity before international courts is, therefore, unconvincing. At any rate, as a matter of customary international law, it is difficult to see how a rule of customary international law can form when the AU, representing more than a quarter of states, reject the said rule.

That there is no legal rule under customary international law denying immunity to state officials does not, of course, mean that a state official can plead immunity before a tribunal having jurisdiction which, by its constitutive instrument, has removed immunity such as Article 27 of the Rome Statute.[52]

[47] See, e.g., Akande, supra note 40. See contra, Tladi, supra note 40.
[48] *Malawi decision*, supra note 24, at para 34.
[49] *Arrest Warrant case*, supra note 4, at para 61.
[50] Ibid.
[51] See Ibid. where the ICJ refers to the constitutive instruments establishing the ICC, the ICTY and the ICTR.
[52] Ibid.

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By the same token, however, the exclusion of immunity in a treaty establishing an international court or tribunal does not affect the relationship between a non-State party to the treaty and State parties. Thus, the fact that a state is party to the Rome Statute does not imply that such a State is no longer obliged to respect the immunity of an official from a State that is not a Party to the Rome Statute. Indeed, even if the assertion that customary international law excludes immunities in respect of proceedings before international courts were correct – and I have argued that it isn't – this would apply only as between the state officials and the international court or tribunal concerned and would not by itself affect the relationship between states *inter se*.[53]

If neither the AU argument that customary international law requires international courts to respect immunity, nor the argument advanced by, *inter alia*, the ICC that customary international law denies immunity before international courts is correct, then how is Article 46A *bis* of the Amendment Protocol to be understood from the perspective of customary international law? If customary international law neither requires nor rejects immunity before international courts and tribunals, then as a matter of law, the AU is free to include or exclude immunities as a bar to prosecution as it deems fit. Whether this is desirable or not is a different question. Thus, Article 46A *bis* is neither reflective of nor inconsistent with customary international law. The question may well be asked whether, under a treaty that is silent on immunities, state officials are entitled to claim immunities. Subject to the normal rules of interpretation, a court, national or international, having jurisdiction is entitled to exercise that jurisdiction unless there is a rule of international law prohibiting such exercise. This is not the same as saying, however, that there is a rule of international law excluding immunity.

A related question is whether Article 46A *bis* of the Amendment Protocol undermines the fight against impunity. The argument on which this is based appears to be that the extension of the African Court's jurisdiction to international crimes while also expressly including immunity will shield perpetrators from the reaches of justice. However, this argument does not follow. The effect of the extension of the African Court's jurisdiction is, *potentially*, to expand the reach of international criminal justice. It does not, as the argument may suggest, reduce this reach. Assuming African States that are not party to the Rome Statute become party to the expanded African court, then the reach

[53] In the context of the Rome Statute, this distinction is explained in Tladi, supra note 40, at 211 noting that Article 27 'applies to defences, substantive or jurisdictional, that an individual *may raise before the* ICC. It does not, in any way, address the relationship between states nor does it address the relationship between the ICC and states parties.' (emphasis in the original).

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of international courts to potential situations and perpetrators becomes enlarged. On the other hand, regardless of the number of States that fall within the jurisdiction of the expanded African court, the reach of the ICC will remain unaffected.

The idea that Article 46A *bis* of the Amendment Protocol affects the reach of international criminal justice can only be based on a misconstruction of the relationship between the AU Court and the ICC. Under Article 46A *bis* the African Court will not have the competence to try the persons having immunity, but this will not prevent the ICC from exercising jurisdiction against such persons if it has jurisdiction. Under the principle of complementarity, the ICC is of course barred from proceedings with trials where a court with competence is willing and able to exercise jurisdiction.[54] This procedural bar, however, applies only to State prosecution and/or investigations and does not extend to the exercise of jurisdiction by regional courts. Although an amendment to the Rome Statute, to recognise the competence of regional courts for the purposes of complementarity has been transmitted to the Secretary-General by Kenya,[55] this amendment is unlikely to be adopted by the Assembly of States Parties. At any rate, until such a time as an amendment has been passed, from the perspective of the ICC, Article 46A *bis* should be a non-issue.

5. CONCLUSION

The expansion of the jurisdiction of the AU Court to include also international crimes has raised much controversy in international criminal justice circles – both diplomatic and academic. Even more controversial has been the decision by the AU to make provision for immunities of certain officials before the AU Court in the form Article 46A *bis*. In the back and forth of arguments for and against Article 46A *bis*, normative policy argument, empirical statements and doctrinal arguments have been lumped together in a way that can result in confusion. This confusion has aided in the perpetuation of the hero-villain trend in which supporters of the ICC see themselves as heroes and the AU as villains and the supporters of the AU see themselves as heroes and the ICC as villains.

[54] See Articles 17, 18 and 19 of the Rome St.

[55] See *ICC Working Group on Amendments Informal Compilation of Proposals to Amend the Rome Statute* (on file with the author). It should be noted, that the Kenyan proposal only seeks to amend to the Preambular paragraph relating to complementarity and does not address the substantive provisions in Articles 17, 18 and 19. As currently drafted, it is therefore unlikely to be sufficient to establish a complementarity role for the African Court.

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In the eagerness to put on the white hat and fight the evil 'other', basic principles of international law are conveniently covered in a heap of rhetoric and slightly bent doctrine. Much of the confusion created by the debate arises from the failure by commentators to make a distinction between the law relating to immunity and the wisdom (or desirability) of Article 46A *bis*. Supporters of Article 46A *bis* present it as salvaging international law and reclaiming the foundational international principle of sovereignty by preserving immunity. What is ignored in this narrative is that international law rules on immunity apply to the exercise of jurisdiction by domestic courts over officials of a foreign state and that customary international law neither requires immunity before international courts nor prevents it. Opponents of Article 46A *bis*, on the other hand, present it as doing harm to the fight against impunity by protecting officials from the reach of international courts. What is ignored is that the expansion of the jurisdiction of the African court does not, in any way, affect the jurisdiction of other courts, including the ICC, and can in no way prevent the exercise of jurisdiction by those courts of individuals who may be immune from prosecution before the African Court by virtue of Article 46A *bis*.

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