The Theory of Implicit Waiver of Personal Immunity: Commentary on the Decision on the Obligation for South Africa to Arrest and Surrender President Omar al-Bashir of Sudan to the International Criminal Court

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Abstract

This commentary examines the meaning of the International Criminal Court's (ICC) Decision of 13 June 2015 on the particular point of the theory of implicit waiver by the Security Council of personal immunity of a sitting head of state not party to the Court's Statute. It is argued that this theory is inherently illegal and yet another error in the ICC's judicial findings in *Omar al-Bashir* case. To demonstrate this assertion, the study suggests that the theory of implicit waiver of personal immunity is defective in the present case on two principal points. First, it contradicts with previous ICC's judicial findings on the same matter; secondly, it creates a serious misunderstanding on the intent and the power of the Security Council when it decided to refer the situation in Darfur to the Court.

Introduction

The 25th summit of the African Union (AU) was overshadowed by the judicial saga surrounding the arrival of President *Omar al-Bashir* of Sudan in South Africa,[1] the host country, while being under two arrest warrants issued by the ICC on 4 March 2009 and 12 July 2010. At the request of the ICC Prosecutor, the Pre-Trial Chamber II rendered an urgent decision on 13 June 2015 to recall that "South Africa is under the duty under the Rome Statute to immediately arrest *Omar al-Bashir* and surrender him to the Court, as the existence of this duty is already clear and needs not be further reiterated".[2]

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1 It was the 25th ordinary session of the Assembly of the African Union, held in Johannesburg from 14 to 15 June 2015.

2 Decision Following the Prosecutor's Request for an Order Further Clarifying that the Republic of South Africa is under the Obligation to Immediately Arrest and Surrender Omar al-Bashir, *Prosecutor v. Omar Hassan Ahmad al-Bashir* (ICC-02/05-01/09), Pre-Trial Chamber II, 13 June 2015, para. 10.

The ICC's proceedings relate to an armed conflict which broke out in February 2003 in the west of Sudan, Darfur region, where hundreds of thousands of innocent civilians are reportedly said to have been killed. Sudan not being a state party to the ICC Statute, the situation in Darfur was referred to the Prosecutor, out of recommendation made by an international commission of inquiry,[3] by virtue of resolution 1953 of the Security Council in March 2005.[4] President *Omar al-Bashir* is indicted, as an indirect perpetrator or an indirect co-perpetrator, for genocide,[5] as well as war crimes and crimes against humanity.[6]

However, South Africa raised the problem of a lack of clarity in law. It claimed to be under valid competing obligations, as it had happened before in many other African states parties to the ICC Statute, which *Omar al-Bashir* had already visited, namely Kenya, Chad, Malawi, Djibouti, the Democratic Republic of Congo (RDC), *et cetera*. The so-called competing obligations arise from the duty to respect, both vertically (*Omar al- Bashir's* immunity from prosecutions before the ICC) and horizontally (*Omar al-Bashir's* inviolability and freedom from arrest by a state party), personal immunity of an incumbent head of state not party under customary international law, as well as the decisions of the AU Assembly which required all member states, with a general threat of sanctions in case of non-compliance,[7] not to cooperate with the ICC for the arrest and surrender of President *Omar al-Bashir*.[8] The Pre-Trial Chamber II totally refuted these arguments. On the one hand, being

3 See Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, pursuant to Security Council Resolution 1564 of 18 September 2004 (25 January 2005), para. 647.

4 SC Res. 593 (2005), 31 March 2005, para. 1. This was a historic resolution, since it was the first referral of a situation to the ICC by the Security Council. See also *Florian Aumond*, 'La situation au Darfour déférée à la CPI: retour sur une résolution historique du Conseil de sécurité', *Revue générale de droit international public (RGDIP)* CXII (2008), 113-114.

5 Second Warrant of Arrest for Omar Hassan Ahmad al-Bashir, *Prosecutor v. Omar Hassan Ahmad al-Bashir* (ICC-02/05-01/09), Pre-Trial Chamber I, 12 July 2010.

6 Warrant of Arrest for Omar Hassan Ahmad al-Bashir, *Prosecutor v. Omar Hassan Ahmad al-Bashir* (ICC-02/05-01/09), Pre-Trial Chamber I, 4 March 2009.

7 See Constitutive Act of the African Union of 11 July 2000, Article 23 (2). This article stipulates: '[…] any member state that fails to comply with the decisions and policies of the Union may be subjected to […] sanctions, such as the denial of transport and communications links with other member states, and other measures of a political and economic nature to be determined by the Assembly'.

8 See Decision Assembly/AU/Dec.245 (XIII) Rev. 1 on the meeting of African states parties to the Rome Statute of the International Criminal Court, Doc. Assembly/AU/13 (XIII), adopted by the Assembly of the Union, at its 13th ordinary session, held in Sirte (Libya), 1-3 July 2009, para. 10; Decision Assembly/AU/Dec. 397 (XVIII) on the progress report of the Commission on the implementation of Assembly decisions on the International Criminal Court (ICC), Doc. EX.CL/710 (XX), adopted by the Assembly of the Union, at its 18th ordinary session, held in Addis-Ababa (Ethiopia), 29-30 January 2012, para. 7; Decision Ext/Assembly/AU/Dec. 1 (Oct.2013) on Africa's relationship with the International Criminal Court (ICC), adopted by the Assembly of the Union, at its extraordinary session, held in Addis-Ababa (Ethiopia), 12 October 2013, para. 10 (i); Decision Assembly/AU/Dec.547 (XXIV) on the progress report of the Commission on the implementation of previous decisions on the International Criminal Court (ICC), Doc. Assembly/AU/18 (XIV), adopted by

aware of the textual silence on the issue, it held that *Omar al-Bashir* did no longer enjoy any personal immunity, inasmuch as the Security Council had already *implicitly* waived it by virtue of resolution 1593 (2005).[9] On the other hand, this resolution having been adopted under chapter VII, it prevailed over any other obligation, including the decisions of the AU Assembly, pursuant to articles 25 and 103 of the United Nations Charter.[10] A local court sitting in Pretoria also endorsed the reasoning to compel the Government of South Africa to respect its obligations towards the ICC.[11]

The current commentary examines the meaning of this Decision on the particular point of the so-called theory of implicit waiver by the Security Council of personal immunity of a sitting head of state not party to the Court's Statute. It is argued that this theory is inherently illegal and yet another error in the ICC's judicial findings in *Omar al-Bashir* case. To demonstrate this assertion, the study suggests that the theory of implicit waiver of personal immunity is defective in the present case on two principal points. First, it contradicts with prior ICC's judicial findings on the same matter (I); second, it creates a serious misunderstanding on the intent and the power of the Security Council when it decided to refer the situation in Darfur to the Court (II).

A. A Contradiction with Previous ICC's Judicial Findings on the Same Matter

There are three different categories of ICC's Decisions on the matter of *Omar al-Bashir's* immunity: i) the Decision of 4 March 2009;[12] ii) the ones of 12 and 13 December 2011;[13]

the Assembly of the Union, at its 24th ordinary session, held in Addis-Ababa (Ethiopia), 30-31 January 2015, para. 18-19.

9 Decision following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar al-Bashir, note 2, para. 6.

10 Article 25 of the United Nations Charter states: 'The members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'. Its article 103 prescribes: 'In the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.

11 Southern Africa Litigation Centre v. Minister of Justice and Constitutional Development and Others (27740/2015) [2015] ZAGPPHC 402 (24 June 2015), http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2015/06/Judgement-2.pdf (accessed on 22 September 2015).

12 Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad al-Bashir, *Prosecutor v.Omar Hassan Ahmad al-Bashir* (ICC-02/05-01/09), Pre-Trial Chamber I, 4 March 2009.

13 Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, *Prosecutor v. Omar Hassan Ahmed Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber I, 12 December 2011; Decision Pursuant to Article 87(7) of the Rome Statute on the Refusal of the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al

and iii) the Decisions of 9 April 2014[14] and 13 June 2015.[15] Only have the latter clarified the legal issue at stake. But, and more importantly, they share similar legal defects, which place them in contradiction with prior ICC's judicial findings on the same matter.

I. The Clarification of the Legal Issue at Stake

In its Decision of 13 June 2015, the Pre-Trial Chamber II of the ICC enlightened the central legal problem to be settled in *Omar al-Bashir* case when it said that it was deciding on the issue of personal immunity (immunity *ratione personae*) rather than functional immunity (immunity *ratione materiae*) before the Court.[16] These immunities are different from those to which states' officials may be entitled before foreign domestic tribunals.

By definition, functional immunity precludes criminal prosecutions against the beneficiary for official acts performed as a representative of a state (or even an intergovernmental organization).[17] It is normally a definitive immunity (relevant even after cessation of public functions) based on the idea that legal persons are responsible for the consequences of acts performed by their representatives (or organs) in an official capacity.[18] The purpose of this kind of immunity is to protect any of these legal persons, and especially the state itself,[19] against a foreign judicial control over its actions through criminal prosecutions against its current or former official. However, in case of commission of serious international crimes, there is already an international customary rule which provides for an exception before international tribunals.[20] In general, this rule may be written as follows: any official position of an individual shall in no case exempt him from criminal responsibility, even if he acted as head of state or government, nor shall it, in and of itself, constitute a ground for reduc-

Bashir, *Prosecutor v.Omar Hassan Ahmed Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber I, 13 December 2011.

14 Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar al-Bashir's Arrest and Surrender to the Court, *Prosecutor v. Omar Hassan Ahmad al-Bashir* (ICC-02/05-01/09), Pre-Trial Chamber II, 9 April 2014.

15 Decision Following the Prosecutor's Request for an Order Further Clarifying that the Republic of South Africa is under the Obligation to Immediately Arrest and Surrender Omar al-Bashir, note 2.

16 *Ibid.*, para. 25.

17 See *Roman Anatolevich Kolodkin*, Second report on immunity of State officials from foreign criminal jurisdiction (International Law Commission), Sixthly-second session (3 May-4 June and 5 July-6 August 2010), General Assembly (A/CN.4/631), 10 June 2010, 12-13.

18 This is also the conception of the International Court of Justice. See *Certain Questions of Mutual Assistance in Criminal Matter (Djibouti v. France)*, Judgment of 4 June 2008, I.C.J. Reports 2008, para. 187-188.

19 See *Ingrid B. Wuerth*, 'Foreign Official Immunity: Invocation, Purpose, and Exceptions', *Vanderbilt Public Law Research Paper Number 13-22* (2013), 13.

20 *Dapo Akande*, 'International Law Immunities and the International Criminal Court', *American Journal of International Law (AJIL)* 98 (2004), 415.

tion of sentence under international law.[21] Therefore, with respect to prosecutions of state officials before international tribunals, article 27 (1) of the ICC Statute restating the same rule is declarative of customary international law.

With respect to prosecutions before national courts, the same emerging customary rule may be applicable.[22] The inconsistent character of functional immunity with the prohibitions of breaches of peremptory norms of international law (*jus cogens*) or other gross violations of human rights is also often invoked.[23] The argument seems to be a heritage of the Pinochet trial (1998-2000).[24] But, it is highly contested because of the confusion it makes between violated primary rules of human rights or *jus cogens* and the secondary rule of functional immunity which, due to its different nature, could not be regarded as standing in conflict with the former and then irrelevant.[25] The viewpoint has been approved by the International Court of Justice (ICJ) in its judgement of 3 February 2012 in the case concerning the *jurisdictional immunities of the state*[26]. *Ingrid Wuerth* has even argued that there is indeed no exception to the rule of functional immunity under customary international law.[27] However, in any case, one may agree that the best rationale for any exceptional waiver of

21 See the restatement of this rule in the following legal instruments: ICC Statute (Article 27(1)); ICTY Statute (Article 7 (2)); ICTR Statute (Article 6 (2)); Statute of the Special Criminal Court for Sierra Leone (Article 6 (2)), etc. See also legal instruments drafted by the International Law Commission (ILC): Draft Code of Crimes against the Peace and Security of the Mankind of 1996 (Article 7); Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, with Commentaries of 1950 (Principle III).

22 See *Akande*, note 20, 415.

23 See *Carlo Focarelli*, 'Immunité des Etats et jus cogens: la dynamique du droit international et la fonction du jus cogens dans le processus de changement de la règle sur l'immunité juridictionnelle des Etats étrangers', *Revue générale de droit international public (RGDIP)* CXII (2008), 761-794; *Andrea Bianchi*, 'L'immunité des Etats et les violations graves des droits de l'homme : la fonction de l'interprète dans la détermination du droit international', *Revue générale de droit international public (RGDIP)* CVII (2004), 90-95; *Jean-François Flaus*, 'Droit des immunités et protection internationale des droits de l'homme', *Revue suisse de droit international et de droit européen* (2000), 299-324.

24 *Andrea Bianchi*, 'Immunity versus Human Rights: the Pinochet Case', *European Journal of International Law* (EJIL) 10 (2) (1999), 237-277; *Wuerth*, note 19, 15.

25 *Christian Tomuschat*, 'L'immunité des Etats en cas de violations graves des droits de l'homme', *Revue générale de droit international public (RGDIP)* CIX (2005), 73; see also *Sevrine Knuchel*, 'State Immunity and the Promise of Jus Cogens', *Northwestern Journal of International Human Rights* 9 (2) (2011), 181-182.

26 *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment of 3 February 2012, I.C.J. Reports 2012, para.107-108. See also *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda),* Jurisdiction and Admissibility, Judgment of 2 February 2006, I.C.J. Reports 2006, para.64. In this case, the ICJ had adopted a similar view of the relationship between *jus cogens* and procedural rules and found that the fact that a matter related to a *jus cogens* norm (in this case the prohibition on genocide) could not of itself provide a basis for the jurisdiction of the Court to entertain the dispute.

27 *Ingrid Wuerth*, 'Pinochet's Legacy Reassessed', *American Journal of International Law (AJIL)* 106 (4) (2012), 731-768.

functional immunity before foreign national courts derives from the obligation for a state to prosecute the crime concerned.[28] It means that the accused should not enjoy functional immunity where a foreign state is bound by such obligation because "it would be contradictory to require prosecutions and at the same time to confer immunity from criminal prosecution".[29] Otherwise, the duty on the forum state to prosecute would remain meaningless and ineffective. That is particularly the case of the obligation enshrined in the Convention against torture and other cruel, inhuman or degrading treatment or punishment of 10 December 1984.[30] The matter should be therefore decided on a case-by-case basis.

In contrast, personal immunity is a procedural bar to the exercise of criminal jurisdiction, but only a temporal one. It precludes criminal prosecutions against a small number of representatives of a state (notably heads of state, heads of government and ministers of foreign affairs) as long as they remain in office.[31] This type of immunity helps protect the free and effective exercise of public functions of the beneficiary as a matter of state sovereignty, without any impediment and interference of a foreign court.[32] It is a matter of customary international law as the ICJ held in the *Arrest Warrant Case* in February 2002.[33] But, the question whether such immunity also applies before international tribunals remains very controversial. Concerning the ICC Statute, its article 27 (2) provides for a conventional exceptional waiver of personal immunity of officials of states parties.[34] The Pre-Trial Chamber II discussed the issue concerning a national of a state not party (Sudan) and the effects of article 98 (1) on the inviolability and freedom from arrest or surrender of the accused person who would potentially enjoy personal immunity in the territory of a state party.[35]

The Pre-Trial Chamber I failed to make this distinction between immunity *ratione materiae* and immunity *ratione personae* in its Decision of 12 December 2011 regarding the

28 *Heike Krieger*, 'Between Evolution and Stagnation –Immunities in a Globalized World', *Goettingen Journal of International Law* (GoJIL) 6(2) (2014), 20-21.

29 *Pierre d'Argent*, 'Immunity of State Officials and Obligation to Prosecute', *Cahiers du CeDIE Working Paper 2013/04*, 11, http://www.uclouvain.be/cedie (accessed on 18 March 2013).

30 Articles 4 and 5.

31 *Akande*, note 20, 409; *Dapo Akande* and *Sangeeta Shah*, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts', *European Journal of International Law (EJIL)* 21 (4) (2010), 818; *Kolodkin*, note 17, 20-21.

32 *D'Argent*, note 29, 6; *Akande* and *Shah*, note 31, 818-819; *Michael A. Tunks*, 'Diplomats or Defendants? Defining the Future of Head-of-State Immunity', *Duke Law Journal* 52 (2002), 654-655.

33 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, I.C.J. Reports 2002, para. 53.

34 This Article stipulates that 'Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person'.

35 This Article prescribes that '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'.

failure of the Republic of Malawi to comply with the cooperation request to arrest and surrender *Omar al-Bashir*.[36] The confusion was even reiterated a day later in the decision on the refusal of the Republic of Chad to cooperate with the Court.[37] Anyway, the Decision of 13 June 2015 has brought in *Omar al-Bashir's* judicial saga some new legal defects and problems.

II. The Scope of Legal Defects

The Decision of 13 June 2015 is crippled by two preliminary legal defects. One relates to the applicability of the Charter of the United Nations, which had never been clearly discussed before the Court, to reject *Omar al-Bashir's* personal immunity. The issue explicitly arises for the first time in the Decision of 9 April 2014. Anyway, the most serious legal defect is the judicial contradiction in the same Court, on the same issue about immunity and in the same case.

1. The Recourse to the Charter of the United Nations to Reject Omar al-Bashir's Immunity

The Pre-Trial Chamber II accorded a prevalence effect to the Security Council resolution 1953 (2005) in order to solve an alleged conflict of obligations binding on South Africa, pursuant to articles 25 and 103 of the Charter of the United Nations. It decided that South Africa was under the duty to arrest and surrender *Omar al-Bashir* to the Court insofar as this resolution which arguably lifted *Omar al-Bashir's* personal immunity overrode any other obligation to the contrary.

This decision is not convincing. In fact, if the Security Council had allegedly lifted the argument of immunity as a bar to the ICC's jurisdiction, the obligation for South Africa to cooperate remained applicable under the ICC Statute rather than under the Charter of the United Nations. The Security Council did not create any obligation to cooperate with the Court under Chapter VII, neither for states parties nor for third ones, except the Republic of Sudan and other parties to the conflict in Darfur.[38] Accordingly, the said resolution could only be capable to prevail over any other contrary obligation about immunity, but not the obligation not to cooperate with the Court, which was not in conflict with any other one

36 Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad al-Bashir, note 13, para. 36-43.

37 Decision Pursuant to Article 87(7) of the Rome Statute on the Refusal of the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad al-Bashir, note 13, para. 13.

38 SC Res. 1593 (2005), note 4, para. 2.

under the Charter of the United Nations. The primary condition of conflict of obligations for the applicability of article 103 of the Charter was not met.[39]

In other words, despite the Security Council resolution, South Africa's duty to cooperate under the ICC Statute continued to compete with the obligation not to cooperate pursuant to the decisions of the AU Assembly. The latter decisions fully remained in effect since their object goes far beyond the immunity claim arguably removed by the Security Council. In this respect, it is worth noting that the AU decisions regarding the obligation for member states not to cooperate with the ICC are based on many other reasons, including the search for peace that should not be jeopardized by expeditious criminal prosecutions,[40] the claim of a positive complementarity for Sudan,[41] the politicization and misuse of indictments against African leaders,[42] the protection of the dignity of the continent,[43] *et cetera*. Therefore, at this specific point of prevalence effect, the Pre-Trial Chamber II exceeded the object of the Security Council resolution 1953 (2005), violated the Charter of the United Nations and nullified the content of the AU decisions binding on South Africa. Worse, it got into contradiction with previous findings on *Omar al-Bashir's* personal immunity.

2. Three Contradictory Findings on Immunity in Omar al-Bashir Case

The Decision of 13 June 2015, based upon the one delivered on 9 April 2014, constitutes an important judicial change (*revirement jurisprudentiel*) in comparison with previous ICC's decisions in *Omar al-Bashir* case. First, in March 2009, the Pre-Trial Chamber I invoked article 27 (2) of the ICC Statute, which provides for the irrelevance of personal immunity before the Court, before applying it to *Omar al-Bashir* as if Sudan was a state party.[44] Sec-

39 See *Robert Kolb*, 'L'article 103 de la Charte des Nations Unies', *Recueil des Cours de l'Académie de Droit International* 367 (2013), 123 and 127.

40 Decision Assembly/AU/Dec.482 (XXI) on international jurisdiction, justice and the International Criminal Court (ICC), Doc. Assembly/AU/13 (XXI), adopted by the Assembly of the Union, at its 21st ordinary session, held in Addis-Ababa (Ethiopia), 26-27 May 2013, para. 4; PSC Communiqué, PSC/MIN/Comm (CXLII), 21 July 2008, para. 3.

41 Decision Assembly/AU/Dec.221 (XII) on the application by the International Criminal Court (ICC) Prosecutor for the indictment of the President of the Republic of the Sudan, adopted by the Assembly of the Union, at its 12th ordinary session, held in Addis-Ababa (Ethiopia), 1-3 February 2009, para. 8.

42 Decision Ext/Assembly/AU/Dec.1 (Oct.2013), note 8, para. 4.

43 Decision Assembly/AU/Dec.547 (XXIV), note 8, para.17 (c). The issue of the dignity of the continent relates to the colonial past of Africa. As a system of domination, economic and human exploitation, colonialism is inherently a shame and a dishonour for the continent, with the dehumanization of its peoples. In fact, it is feared that another kind of domination resurges in Africa by means of international law and criminal justice. Powerful states are suspected to utilize this way in order to get control of African states and their leaders.

44 Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad al-Bashir, note 12, para. 41-45. This finding was part of three reasons why the Pre-Trial Chamber I denied personal immunity to Omar al-Bashir. According to this Chamber: 1) the purpose of the

ond, in December 2011, the Pre-Trial Chamber I changed this reasoning and said that the accused could no longer enjoy personal immunity because there was already an exceptional waiver of such immunity of sitting heads of state before international tribunals under customary international law.[45] Third, and in contrast, the Pre-Trial Chamber II rejected all these findings. In its Decision of 9 April 2014, confirmed by the one of 13 June 2015, it started recalling that the ICC Statute, which is a multilateral convention governed by the law of treaties, could not impose obligations on third states without their consent.[46] As a consequence, article 27 (2) was inapplicable in the present case. According to this Chamber, the removal of immunity was still required to allow the Court to proceed against *Omar al-Bashir*. In other words, such requirement recognised that the theory of exceptional waiver of personal immunity before international tribunals under customary international law was also legally inaccurate. In this regard, the Pre-Trial Chamber II rightly concluded:

> *It follows that when the exercise of jurisdiction by the Court entails the prosecution of a Head of State of a non-State Party, the question of personal immunities might validly arise. The solution provided for in the Statute to resolve such a conflict is found in article 98(1) of the Statute. This provision directs the Court to secure the cooperation of the third State for the waiver or lifting the immunity of its Head of State. This course of action envisaged by article 98(1) of the Statute aims at preventing the requested State from acting inconsistently with its international obligations towards the non-State Party with respect to the immunities attached to the latter's Head of State.*[47]

An abundant literature against the theory of exceptional waiver of personal immunity of sitting heads of state before international tribunals under customary international law already existed.[48] The Pre-Trial Chamber II seems to have paid attention to it, even if the scholar-

establishment of the ICC is to put an end to impunity; 2) the provision of article 27 (2) of the Statute precludes such kind of immunity; 3) there is no lacuna in the ICC Statute, the Elements of Crimes and the Rules of Procedure and Evidence which may allow to refer to other rules of international law. It is obvious that reasons number one and three are beside the point, while number two is irrelevant, since article 27 (2) is a conventional provision which cannot apply to a third state.

45 Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, note 13, para.36-43; Decision Pursuant to Article 87(7) of the Rome Statute on the Refusal of the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, note 13, para. 13.

46 Decision on the cooperation of the Democratic Republic of the Congo regarding Omar al-Bashir's arrest and surrender to the court, note 14, para. 26.

47 *Ibid*., para. 27.

48 See *Baptiste Tranchant*, 'Les immunités des Etats tiers devant la Cour pénale internationale', *Revue générale de droit international public (RGDIP)* CXVII (2013), 639-645 and 651-656; *William*

ship in defence of the same exception was also available.[49] A third and neutral position in this debate is supported by *Dire Tladi*, who thinks that customary international law does not require nor forbid (personal) immunity before international courts.[50] The analysis of arguments presented in favour of each position goes beyond the scope of this study. However, it is important to note that this theory was defective in the ICC's Decisions of December 2011 on five principal points.

First, this theory had the effect of nullifying article 98 (1) of the ICC Statute by excluding any kind of immunity for officials of third states in relation to states parties before the Court. Second, to establish that article 27 (2) of the ICC Statute was declarative of a rule of customary international law, the Pre-Trial Chamber I resorted to arguments about functional immunity on the issue of personal immunity. Third, with regards to case-law, it made the ICJ say what does not correspond to the language used in the *Arrest Warrant Case* concerning the potential irrelevance of immunities before international tribunals. In fact, the ICJ never said that personal immunity was inapplicable before the ICC with respect to officials who were nationals of states not parties to its Statute. Rather, the potentiality ascertained by the ICJ requires that the basic condition of state consent is met through state ratification or ad hoc acceptance of the ICC's jurisdiction.[51] Fourth, concerning immunity referred to with regard to the arrest and surrender of the accused (article 98 (1) of the ICC Statute), the Pre-Trial Chamber I invoked a number of international practices about indictments of heads of state which were rather contrary to its own finding on the waiver of that immunity. In particular, it suffices to affirm that neither of these former heads of state were arrested and surrendered to an international tribunal while being still in office: *Charles Taylor*, *Slobodan Milosevic*, *Laurent Gbagbo* and *Muammar Gaddafi*. In addition, some of the examples provided by the Chamber were even beside the point. For example, proceedings against *Laurent Gbagbo* were initiated with the consent of the Republic of Ivory Coast to the ICC jurisdiction, including its Statute.[52] Similarly, *Slobodan Milosevic* was indicted before an ad hoc

A. Schabas, The International Criminal Court: a Commentary on the Rome Statute, Oxford/New York 2010, 449-450.

49 *Claus Kreß*, 'The International Criminal Court and Immunity under International Law for States not Party to the Court's Statute', in: *Morten Bergsmo* and *Ling Yan* (eds), State Sovereignty and International Criminal Law, Beijing: 2012, 243-257; *Ademola Abass*, 'The Competence of the Security Council to Terminate the Jurisdiction of the International Criminal Court', *Texas International Law Journal* 40 (2005), 278-282; *Max Du Plessis*, 'Shambolic, Shameful and Symbolic: Implications of the African Union's Immunity for the African Leaders', *ISS Paper 278* (November 2014), 6.

50 *Dire Tladi*, 'The Immunity Provision of the AU Amendment Protocol: Separating the (Doctrinal) Wheat from the (Normative) Chaff, *Journal of International Criminal Justice (JICJ)* 13 (2015), 12, 15 and 17.

51 See also *Sarah Williams* and *Lena Sherif*, 'The Arrest Warrant for President al-Bashir: Immunities of Incumbent Heads of State and the International Criminal Court', *Journal of Conflict and Security Law* 14 (1) (2009), 77; *Akande*, note 20, 408-409.

52 Concerning Ivory Coast, the Prosecutor initiated investigations in 2011 before this country becomes a state party (15 February 2013). These investigations were commenced on the basis of a

tribunal,[53] created by the Security Council, which could take compulsory measures against him owing to the powers deriving from Chapter VII of the Charter of the United Nations, and which the ICC is deprived of. Fifth, and last, to ascertain a rule of customary international law, the mere establishment of a practice does not suffice. It must be associated with a legal conviction of states (*opinio juris*) that such practice has acquired status of a positive rule under international law. Again, on this point, the Pre-Trial Chamber I unconvincingly advanced arguments relating to the rule of functional immunity to establish a customary rule on personal immunity. It forgot that the ICC Statute was in this respect unique in its kind. It is the first legal instrument to contain provisions which make a clear distinction between functional immunity and personal immunity in international criminal law.[54] Given this innovative dimension, the *opinio juris* of states could not be proved out of reasonable doubt.[55] On the contrary, the objection to the Decisions of 12 and 13 December 2011 by the African Union,[56] with its 54 member states, strongly consolidated the view of a lack of "a general practice accepted as law".[57]

Thus, given that *Omar al-Bashir's* personal immunity is still valid in the present case, the problem which then arises relates to who should remove it. In this regard, the Pre-Trial Chamber II misunderstood the intent and the power of the Security Council.

B. A Misunderstanding of the Intent and the Power of the Security Council

There are two different statements in the theory of implicit waiver of immunity. First, the language used in both Decisions of the Pre-Trial Chamber II on 13 June 2015 and 9 April 2014 shows that this waiver, instead of being absolutely explicit, can simply be implicit, in case of textual silence, since it can derive by means of interpretation from the intent of the Security Council. Second, and above all, it also means that the Security Council, which enjoys powers under Chapter VII of the Charter of the United Nations, is in a position to lift immunity of the accused persons who are nationals of states not parties to the ICC Statute.

declaration of acceptance of the ICC jurisdiction under article 12 (3) of the Rome Statute, made on 18 April 2003. This declaration was confirmed by the letter of 10 December 2010.

53 International Criminal Tribunal for the Former Yugoslavia (ICTY).

54 See also *Eric David*, 'La Cour pénale internationale', *Recueil des Cours de l'Académie de Droit International* 313 (2005), 420.

55 See also *James Mouangue Kobila*, 'L'Afrique et les juridictions pénales internationales', *African Yearbook of International Law* 17 (2011), 41; *Tladi*, note 48, at 13-14.

56 Decision Assembly/AU/Dec. 397 (XVIII), note 8, para. 6.

57 ICJ Statute, Article 38 (1) (b).

I. Implicit or Explicit Waiver of Immunity?

In the scholarship, the theory of implicit waiver of immunity was already defended by *E. David* in 2005.[58] He then underlined that a Security Council referral of a situation to the ICC would implicitly signify removal of immunity, unless it was otherwise determined by it.[59] For example, the Security Council may immune nationals of some third states concerned by a situation of a state not party which it has referred to the ICC.[60] Later, the theory was thoroughly developed by *Dapo Akande* in reaction to the Decision of 4 March 2009.[61] This author believes that denying personal immunity to *Omar al-Bashir* was the best argument for the conclusion of the Pre-Trial Chamber I.[62] To justify his position, *Dapo Akande* emphasized that "the very decision to refer a situation to the Court is a decision to bring whatever individuals may be covered by the referral within the jurisdiction of the Court and therefore within the operation of its Statute".[63] This is the scholarly pedigree which presumably influenced the reasoning of the Pre-Trial Chamber II.

However, for the AU, should the Security Council hold the power under Chapter VII to lift *Omar al-Bashir's* personal immunity, this removal must be explicit.[64] This view is also defended by *Dire Tladi*, who writes:

> *For one thing, Resolution 1593 places a duty on Sudan; it does not waive immunities of Sudan. The Security Council does have the power to deviate from the rules of international law, but whenever it does, it does so expressly and not by implications. Linked to this point, as a general rule, immunity is never waived implicitly but explicitly. The notion of an implicit waiver of immunity is, therefore, a fiction.*[65]

58 *David*, note 52, at 424.

59 *Ibid*.

60 This is the practice of the Security Council concerning referrals of situations in Darfur (Sudan) and in Libya. See respectively SC Res.1593 (2005), note 4, para. 6; SC Res. 1970 (2011), 26 February 2011, para. 6. The practice is however criticized to be discriminatory and for exceeding the power of referral of situations to the Court.

61 *Dapo Akande*, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on al-Bashir's Immunity', *Journal of International Criminal Justice (JICJ)* 7 (2009), 340-342.

62 *Ibid.*, 341-342.

63 *Ibid*., 341.

64 African Union Commission Press Release, 'On the Decision 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', n°002/2012 (9 January 2012), http://www.au.int/en/sites/default/files/PR-%20002-%20ICC%20English.pdf (accessed on 17 September 2015).

65 *Dire Tladi*, 'The Duty on South Africa to Arrest and Surrender President Al-Bashir under South African and International Law – A Perspective from International Law', *Journal of International Criminal Justice (JICJ)* (2015), 17.

Claus Kreβ refutes this assertion on the ground that explicit lift of immunity is not required by the Charter of the United Nations nor the ICC Statute.[66] According to him, "whether or not the Security Council has decided that an otherwise existing international law immunity shall not apply with respect to certain proceedings before the ICC, is a matter of construction of the relevant Security Council resolution".[67]

In the *Namibia Advisory Opinion* of 21 June 1971, the ICJ indicated four applicable means of interpretation in order to establish the meaning of a resolution of the Security Council in case of ambiguity.[68] It stated that everything must be determined in each case, with regards to : i) the terms of the resolution to be interpreted; ii) the discussion leading to it; iii) the Charter provisions invoked; iv) and all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.[69] In other words, what a resolution of the Security Council actually provides for may be implied as a result of a sound legal construction, in application of any of these non-cumulative means of interpretation, when nothing enables to solve the matter *prima facie* through the explicit language of the text itself. In the *Tadic Case* of October 1995, the ICTY also resorted to the debates within the Security Council, following the adoption of the resolution establishing the tribunal,[70] in order to clarify the kind of crimes falling under its substantive competence as violations of the "laws or customs of war" under article 3 of its Statute.[71] Moreover, general rules of interpretation provided for by the law of treaties remain relevant.[72]

In light of this jurisprudence, the judicial construction of the Pre-Trial Chamber II is so justified, even though the interpretation of the intent of the Security Council does not appear to be logical.

II. The Lack of Logic in the Judicial Construction of the Pre-Trial Chamber II

The theory of implicit waiver of immunity by the Security Council is not an invention of the Pre-Trial Chamber II in the Decision of 13 June 2015. It was already implicitly mentioned in the Decision of 4 March 2009 in which the Pre-Trial Chamber I said:

66 *Kreβ*, note 47, 241.

67 *Ibid*.

68 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, I.C.J. Reports 1971, 114.

69 *Ibid*.

70 SC Res. 827 (1993), 25 May 1993, para. 2.

71 Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Dusko Tadic* (ICTY, IT-94-1), Appeal Chamber, 2 October 1995, para. 88.

72 Decision on Motion for Judicial Assistance to be provided by SFOR and Others, *Prosecutor v. Blagoje Simic, Milan Simic and Others* (ICTY, IT-95-9), Trial Chamber, 18 October 2000, para. 47-48. See also *Patrick Daillier*, *Mathieu Forteau* and *Alain Pellet*, Droit international public, 8th ed., Paris 2009, 287.

> *(...) by referring the Darfur situation to the Court, pursuant to article 13(b) of the Statute, the Security Council of the United Nations has also accepted that the investigation into the said situation, as well as any prosecution arising therefrom, will take place in accordance with the statutory framework provided for in the Statute, the Elements of Crimes and the Rules as a whole.*[73]

But, the theory clearly appeared for the first time in the Decision of 9 April 2014. In this respect, the Pre-Trial Chamber II settled the same matter of non-cooperation raised by South Africa with regard to the DRC.[74] The Decision of 13 June 2015 is therefore a confirmation of the one of April 2014 in similar terms as follows:

> *[B]y issuing Resolution 1593(2005) the SC decided that the "Government of Sudan […] shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution". Since immunities attached to Omar al-Bashir are a procedural bar from prosecution before the Court, the cooperation envisaged in said resolution was meant to eliminate any impediment to the proceedings before the Court, including the lifting of immunities. Any other interpretation would render the SC decision requiring that Sudan "cooperate fully" and "provide any necessary assistance to the Court" senseless. Accordingly, the "cooperation of that third State [Sudan] for the waiver of the immunity", as required under the last sentence of article 98(1) of the Statute, was already ensured by the language used in paragraph 2 of SC Resolution 1593(2005). By virtue of said paragraph, the SC implicitly waived the immunities granted to Omar Al Bashir under international law and attached to his position as a Head of State.*[75]

There is no controversy about the basis of this resolution in Chapter VII of the Charter of the United Nations. But, the meaning attached to the terms about the duty on Sudan to cooperate with the Court appears unconvincing. The Pre-Trial Chamber II drew therefrom a conclusion which sheds a serious misunderstanding on the intent of the Security Council. To summarize it, the Decision may lead to the statement that the resolution of the Security Council would become senseless on the matter of the obligation for Sudan to cooperate with the Court, should it not be regarded as having implicitly removed *Omar al-Bashir's* personal immunity.

In the merits, such a general statement is completely inaccurate. It may be objected that the obligation to cooperate cannot in itself eliminate the right to enjoy personal immunity.

73 Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad al-Bashir, note 12, para. 45.

74 Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar al-Bashir's Arrest and Surrender to the Court, note 14, para. 29.

75 Decision Following the Prosecutor's Request for an Order Further Clarifying that the Republic of South Africa is under the Obligation to Immediately Arrest and Surrender Omar al-Bashir, note 2, para. 6.

Similarly, the right to enjoy personal immunity does not preclude by itself the duty to cooperate with the Court. Both pieces of law are different and operate independently from each other. There is no contradiction in their coexistence on the part of Sudan. Rather, the problem is that the Pre-Trial Chamber II seems to have polarized its reasoning just on the case of one person. It did not take into account "all circumstances that might assist in determining the legal consequences of the resolution of the Security Council",[76] as advised by the ICJ on 21 June 1971.

In fact, contrary to that Decision, one may argue that the duty to cooperate was meant by the Security Council to ensure that Sudan was obliged to lift personal immunity to which any of its nationals could be internationally entitled, should the Court require it in order to give effects to its decision to prosecute. Moreover, this is not all about the duty to cooperate. Normally, it goes beyond the issue of removal of immunity. It includes other forms of cooperation in support of effective investigations on the ground.[77] In this regard, *Omar al-Bashir* was not the only person who would have been seen through the interpretation of the said resolution of the Security Council. The obligation to cooperate *equally* applies to Sudan with respect to prosecutions against any of its other nationals, including those who are not entitled to the immunity regime under international law, like army military commanders. Accordingly, it is illogical to argue that *Omar al-Bashir's* right to enjoy personal immunity would render senseless the duty of Sudan to cooperate with the Court, whereas this duty remains totally meaningful concerning investigations and prosecutions against other Sudanese nationals. That cannot be the intent of the Security Council. Moreover, this political body does not have that power to remove personal immunity that officials of third states may enjoy before the Court.

III. The Power of the Security Council to Lift Omar al-Bashir's Immunity in Question

The Pre-Trail Chamber II failed to consider the question whether the Security Council was allowed, in the legal framework in which the ICC operates, to remove personal immunity of an incumbent head of a state not party to the Statute. It perhaps took a positive answer for granted. Some scholars often justify this answer by the recourse to exorbitant powers of the Security Council under Chapter VII of the Charter of the United Nations.[78] However, the view is based on an unjustified analogy with the authority of the Security Council upon ad hoc tribunals, which rather correspond to non-conventional legal regimes. It might be an error to pretend that this political body could do whatever it desires under Chapter VII through the mechanism of referral of situations to the Court, unless it is pushed above the law. Indeed, the power to refer a situation to the ICC does not imply the power to modify its

76 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa),* note 66, para. 114.

77 For example, the security guarantee for the ICC's staff and team of investigators.

78 See *David*, note 52, 424; *Akande*, note 59, 341-342; *Kreß*, note 47, 240-242; *Max Du Plessis*, The International Criminal Court that Africa Wants, Pretoria 2010, 79.

Statute and create a special regime (of immunity) for a state not party. As *Paula Gaeta* has rightly underlined it, "a referral by the Security Council is simply a mechanism designed to trigger the jurisdiction of the ICC towards non-contracting states. It is nothing more than that".[79] "It does not and cannot turn a state non-party to the Statute into a state party, and it has not turned Sudan into a state party to the Statute".[80] *William A. Schabas* concludes that:

> *The argument of implied removal of immunity also falters on the fact that as a general rule, the Security Council cannot alter the provisions of the Rome Statute when it makes a referral. Otherwise, the Security Council referral would create a different legal regime than that resulting from state party referral or proprio motu triggering by the Prosecutor. The Security Council cannot add new crimes, or alter the temporal jurisdiction of the Court, for example. Accordingly, its referral should not alter the general rule on immunities set out in paragraph 2 of article 27.*[81]

Under this legal framework, it cannot be presumed that the Security Council intended, by means of a bad interpretation of resolution 1593 (2005), to exercise illegal power towards the state of Sudan, concerning the removal of *Omar al-Bashir's* personal immunity. It is time that the ICC considers that justice and accountability cannot be defended through violation of applicable law. As would say a Congolese francophone lawyer, "*violer ou enfreindre le droit pour défendre le droit ne vaut" (*to violate or infringe law in order to defend the law is irrelevant)![82]

Conclusion

This study should not be perceived as a work in defence of President *Omar al-Bashir*. Whether he should be accountable for alleged committed crimes in Darfur is not a question under dispute. But, what might be the right forum to enforce this accountability or how the rules should be applied in this regard seriously question the impartiality and fairness of international criminal justice. Since 2009, the ICC (Pre-Trial Chamber I and II) has three times changed its decisions, each one getting into contradiction with another. The very last Decision of 13 June 2015 praises the theory of implicit waiver by the Security Council of *Omar al-Bashir's* personal immunity. This theory clearly originates from the Decision of 9 April 2014. It takes the place of the ones of 12 and 13 December 2011 which have ruled upon the basis of exceptional waiver of personal immunity of sitting heads of state before international tribunals under customary international law, while the Decision of 4 March

79 *Paula Gaeta*, 'Does President al-Bashir Enjoy Immunity from Arrest?', *Journal of International Criminal Justice (JICJ)* 7 (2009), 330.

80 *Ibid.*, at 320.

81 *Schabas*, note 46, 452.

82 *Gervais Ntirumenyerwa M. Kimonyo*, 'La crise dans la sous-région des grands lacs : quand les protagonistes tournent le dos au droit', in: *Stefaan Marysse* and *Filip Reyntjens* (eds), *L'Afrique des grands lacs*: *annuaire 2003-2004*, Paris 2004, 259. The translation is mine.

2009 had applied the ICC Statute as if Sudan was a party to it. One may critically wonder what would be the next judicial *innovation* by the Court.

Concerning the theory of implicit waiver of immunity, this study has shown that it is based on a bad interpretation of resolution 1953 (2005) of the Security Council. The polarization of the Pre-Trial Chamber II on the case of one man led it to ignore valuable means of interpretation underlined by the ICJ in the *Namibia Advisory Opinion* of 21 June 1971. In particular, it failed to consider "all circumstances that might assist in determining the legal consequences of the resolution of the Security Council". As a result, the Pre-Trial Chamber II reached an unconvincing conclusion that the obligation for the Republic of Sudan to cooperate with the Court would become senseless if the said resolution was not regarded as having implicitly removed *Omar al-Bashir's* personal immunity. What was forgotten is, however, that this obligation was rather meant to ensure that Sudan should lift immunity to which any of its nationals could be internationally entitled, should the Court require it in order to give effects to its decision to prosecute. Moreover, the same duty equally applies to Sudan with respect to investigations on the ground or prosecutions against other Sudanese nationals, including those who are not entitled to personal immunity under international law. Accordingly, it was not logical to argue, on one side, that *Omar al-Bashir's* right to enjoy personal immunity would render senseless the duty on Sudan to cooperate with the Court, whereas this (duty) remained totally meaningful concerning investigations on the ground, other proceedings and cases, on the other side. More significantly, the Security Council does not have that power to lift immunity of officials of states not parties to the ICC Statute. A conventional regime should not be confused with the authority this body holds upon ad hoc tribunals under Chapter VII of the Charter of the United Nations.

For these reasons, the reluctance of African states to cooperate with the Court in the present case may be understood. After attending the AU summit, *Omar al-Bashir* freely left the territory of South Africa in spite of a contrary order not to leave the country until it was otherwise decided by a local court sitting in Pretoria.[83] He was aware to have made a crucial coup in his battle to defy the ICC in Africa, after his failure to attend President *Jacob Zuma's* inauguration in 2009. Hence, after his return in Sudan, he pointed out that the AU summit was actually "a funeral and burial ceremony for the international tribunal".[84] All in all, the ICC was finished.[85] On its side, the Court lost a great opportunity to finally obtain his arrest in South Africa, a country which is said to possess a good state practice in inter-

83 Southern Africa Litigation Centre v. Minister of Justice and Constitutional Development and Others (27740/2015) [2015] (14 June 2015), http://www.southernafricalitigationcentre.org/cases/ongoing-cases/south-africasudan-seeking-implementation-of-icc-arrest-warrant-for-president-bashir/ (accessed on 22 September 2015).

84 See African Union News, 'S Africa Averted Chaos by not Arresting Sudan's Bashir: Experts', 24 June 2015, http://africanunion.einnews.com/article/272465469/YUW7PdZX_PQpW_w_ (accessed on 15 July 2015.).

85 *Ibid*.

national criminal justice,[86] democracy and the rule of law. Anyway, the attitude of the Government of South Africa to disregard the decision of its own court will continue to nourish legal debate under domestic law.[87]

86 South Africa is on the short list of African states that possess domestic legislations implementing the Rome Statute. See Implementation of the Rome Statute of the International Criminal Court Act 2002 (Act 27 of 2002); Geneva Convention Act 2012 (Act 8 of 2012). See also *Max Du Plessis*, 'The Geneva Conventions and South African Law', *ISS Policy Brief 43* (June 2013), 1-5; *Gerhard Kemp*, 'Taking Stock of International Criminal Justice in Africa: Three Inventories Considered', in: *Beitel van der Merwe* (ed.), International Criminal Justice in Africa: Challenges and Opportunities, Nairobi: 2014, 30-31.

87 See *André Mbata Mangu*, 'The Bashir Case and Backpedalling on Human Rights and the Rule of Law in Post-Mandela South Africa', *African Journal of Democracy and Governance* 2 (1 and 2) (2015), 189-193.