

# “The administration of International Law in National Courts and the Legitimacy of International Law”

Benedict Abrahamson Chigara\*

## Abstract

Increasingly, national courts find themselves called upon to determine matters where UN *lex specialis*; regional supranational law; customary International Law and domestic law all appear relevant. Lower domestic court judges of developing post-colonial States may be challenged significantly because such matters often lie beyond their day-to-day practice of interpreting and applying national law to local legal issues. Such challenges have been rehearsed in a number of recent cases, notably the MOX plant case (2006),<sup>1</sup> Kadi case (2008),<sup>2</sup> and more recently in the Al Bashir case [2015]<sup>3</sup> before the North Gauteng Division of the High Court of South Africa and later the Supreme Court of Appeal [2016].<sup>4</sup> They raise the question of whether academic expert ‘friends of the Court’ should be called upon to illuminate contested International Law when domestic courts - particularly the lower courts; have to determine matters that are predominantly International Law based. The court, the claimants, and the respondents would all have the opportunity to cross-examine this expert friend of the Court. In practice this would not unreasonably lengthen/delay the proceedings. Yet the benefit of adopting this approach would be immeasurable in terms of ensuring both justice and the legitimacy of International Law. In the Al Bashir case [2015] the North Gauteng Division of the High Court of South Africa rejected the Respondent government’s request to introduce a Professor of International Law to clarify the International Law defence it had in mind. However, the decision reached by that court in that particular case shows several defects that most probably would have been ameliorated by use of an expert academician acting as ‘a friend of the Court’. This article recommends that to ensure both justice and legitimacy of International Law, national courts - especially lower courts, should a priori consider whether the matters before them would be best served by appointing an expert academician ‘friend of the court’ to illuminate the contested applicable International Law.

## Introduction

### *Academic experts as Handmaidens of International Law*

There is no other legal order wherein the pedagogical experts have played a greater part than International Law.<sup>5</sup> Academician have been central to the establishment and development of modern International Law and the space for their role in the identification, development and application of International Law appears to be growing and not diminishing. The modern founders of International Law include Franciscus Vitoria - Professor of Theology at the University of Salamanca (1480-1546); Francisco Suarez, a Professor of Theology (1548-1617), Alberico Gentili - Professor at Oxford and whose *De Jure Belli* on the laws of war was published in 1598; Hugo Grotius who is habitually referred to as the father of the law of nations<sup>6</sup> - (1583-1645), a Dutch scholar who is reported to have mastered history, theology, mathematics and law. One of Grotius’ most enduring contributions was his proclamation of the freedom of the seas,

---

\* MCI Arb (London), BA Hons. Keele; LL.M with Distinction (Hull); Ph.D. (Nottingham); Professor of International Laws, Brunel University London, UK. All Internet sources last accessed 26 April 2017.

<sup>1</sup> Commission of the European Communities v Ireland, EU: Case C-459/03, page I-04635

<sup>2</sup> P. Kadi and Al Barakaat International Foundation v. Council and Commission [2008] ECR I-6351; Case C-402/05 P and C-415/05.

<sup>3</sup> Case No. 27740/2015

<sup>4</sup> Case no: 867/15

<sup>5</sup> Harris, D. and Sivakumaran, S. (8<sup>th</sup> ed. 2015) Cases and Materials on International Law, Sweet and Maxwell, London p. 42.

<sup>6</sup> Shaw, M.N (7<sup>th</sup> ed. 2014) International Law, CUP p.17.

namely, that “...the nations could not appropriate to themselves the high seas. They belonged to all”.<sup>7</sup>

Particularly in the formative years, scholars were largely responsible for establishing the idea that inter-State relations should be legally regulated. The idea of a technical expert for the scientific identification of rules and principles that governed inter-State relations and who also contributed to the development of that law through the application of his/her specialist knowledge was formally instituted by the Assembly of the League of Nations’ resolution of 22 September 1924 which envisaged:

... the creation of a standing organ called the Committee of Experts for the Progressive Codification of International Law .... This Committee, consisting of seventeen experts, was to prepare a list of subjects ‘the regulation of which by international agreement’ was most ‘desirable and realizable’ and thereafter to examine the comments of Governments on this list and report on the questions which were ‘sufficiently ripe’, as well as on the procedure to be followed in preparing for conferences for their solution. This was the first attempt on a worldwide basis to codify and develop whole fields of International Law rather than simply regulating individual and specific legal problems.<sup>8</sup>

Additionally, these scholars exercised a much more creative role in the determination of particular rules of law than would be possible today.<sup>9</sup> The Assembly of the League of Nations’ Resolution of 25 September 1931 on the procedure for the codification of International Law appeared to obliterate even the remotest potential of the publicist to engage himself/herself in legislative adventurisms. That resolution strengthened the role and influence of Governments at every stage of the process of transforming international standards from customary law to codified conventions. This approach to the ‘codification project’ was subsequently incorporated into the Statute of the International Law Commission of the United Nations<sup>10</sup> which succeeded the League of Nations, “together with certain other recommendations stated in the Resolution, such as the preparation of draft conventions by an expert committee, and the close collaboration of international and national scientific institutes”.<sup>11</sup>

*Article 13(1) of the UN Charter and the ‘Publicist’s’ role under Article 38(1)(d) of Statute of the ICJ*

More recently, academicians’ pivotal role in the identification and amplification of International Law was institutionalized under Article 13(1) of the UN Charter,<sup>12</sup> which established the International Law Commission.<sup>13</sup> The UN International Law Commission (ILC) is a group of thirty-four expert members elected by the General Assembly from a list of candidates nominated by the Governments of States Members of the United Nations,<sup>14</sup> and tasked with the progressive development and codification of International Law - Article 13(1)(a), Charter of the UN.<sup>15</sup>

---

<sup>7</sup> Ibid. pp. 16-17.

<sup>8</sup> See UN ILC website: <http://legal.un.org/ilc/league.shtml> (Very similar to Article 23 of the Statute of the UN ILC that followed on.)

<sup>9</sup> Harris, D. and Sivakumaran, S. (8<sup>th</sup> ed. 2015) *Cases and Materials on International Law*, Sweet and Maxwell, London p. 42.

<sup>10</sup> Adopted by the General Assembly in Resolution 174 (II) of 21 November 1947, as amended by resolutions 485 (V) of 12 December 1950, 984 (X) of 3 December 1955, 985 (X) of 3 December 1955 and 36/39 of 18 November 1981.

<sup>11</sup> See also UN ILC website: <http://legal.un.org/ilc/league.shtml>

<sup>12</sup> Charter of the United Nations, 1945, 1 UNTS XVI

<sup>13</sup> Adopted by the General Assembly in Resolution 174 (II) of 21 November 1947, as amended by Resolutions 485 (V) of 12 December 1950, 984 (X) of 3 December 1955, 985 (X) of 3 December 1955 and 36/39 of 18 November 1981. See also UN website: <http://legal.un.org/ilc/texts/instruments/english/statute/statute.pdf>

<sup>14</sup> Article 3, Statute of the UN ILC Commission

<sup>15</sup> 26 June 1945, San Francisco, UKTS 67 (1946) Cmd. 7015

Article 2 of the Statute of the UN ILC<sup>16</sup> requires that appointees be persons of recognized competence in International Law.

In practice, the membership of the ILC manifests a broad expertise and practical experience within the field of International Law. “Members are drawn from the various segments of the international legal community, such as academia, the diplomatic corps, government ministries and international organizations. .... (Moreover, ...) the members of the Commission sit in their individual capacity and not as representatives of their Government”.<sup>17</sup> It is fair to say that the composition of the ILC shows reliance on academic experts from diverse geographical regions of the world, and others that doubled up as both diplomats and academics. Generally, they have provided immense leadership in the activities of the UN ILC.

This makes the UN ILC the institutional embodiment of the publicist under Article 38(1) of the Statute of the ICJ, which lists the sources of International Law to include in sub-paragraph (d), the writings of the leading publicists of International Law. Judge Crawford of the ICJ, himself a former member of the UN ILC and also its last Rapporteur on State Responsibility for Internationally Wrongful Acts writes that the UN ILC is *analogous to the publicist*. The work of the ILC, including its articles and commentaries, reports and secretariat memoranda are all as “authoritative as the writings of publicists”.<sup>18</sup>

What this brief historicization of the role played by academic experts in the evolution of International Law shows is that the academic has remained central to the task of identifying, codifying and progressively developing International Law. This influence of the academic expert on International Law is critical to International Law’s own legitimacy particularly in this ‘post-fragmentation era’ of the subject into specific areas of specialization that now each require specialization among international lawyers in both the practice of the law and in its development.

Emergent specialist sub-disciplines include: International Human Rights Law, International Labour Law, International Humanitarian Law, International Economic Law, International Financial Regulation Law, International Trade Law, International Law of the Sea, International Investment Law, International Commercial Arbitration, International Environmental Law, International Criminal Law, International Space Law, International Cyberspace Law, etc.

This fragmentation of International Law into specialist sub-disciplines has correspondingly escalated the challenges that always confronted national courts when they had to decide matters of International Law, including the requirement to demonstrate knowledge of that which they knew very little about, namely the international legal system. Trained for the administration of justice in their own specific territorial jurisdictions, national judges have to learn fast, and often self-train to augment ‘sketchy and patchy judicial training programmes’ on International Law. But International Law itself is fast moving in comparison.

International Law’s response to challenges around sovereign immunity and to individual criminal responsibility in the human rights era; to the promotion and protection of human rights and to diplomatic protection; to outcomes of bilateral, regional and universal law making dynamics and also to their interaction one with another in the construction of international legal obligations; to

---

<sup>16</sup> Adopted by the General Assembly in resolution 174 (II) of 21 November 1947, as amended by resolutions 485 (V) of 12 December 1950, 984 (X) of 3 December 1955, 985 (X) of 3 December 1955 and 36/39 of 18 November 1981. Available at UN website:

<http://legal.un.org/docs/?path=../ilc/texts/instruments/english/statute/statute.pdf&lang=EF>

<sup>17</sup> International Law Commission website: <http://legal.un.org/ilc/ilcmembe.shtml>

<sup>18</sup> (8<sup>th</sup> ed. 2012) Brownlie’s Principles of Public International Law, OUP p.43

individual self-empowerment and the mass migration of asylum seekers across Europe that has raptured the requirement to seek asylum in the first safe country reached by the claimant;<sup>19</sup> etc. etc. capture and portray International Law more as a hive of on-going commotion than a dormant setting of inactivity to be taken for granted. This is also because across many jurisdictions, the study of International Law only recently became a regular feature of law-school offerings - making most appellate judges apprentices of the discipline and not journeymen of it.

However, even if that were not the case, International Law has diversified in the last two decades, establishing specialist areas that require more than careful attention of practitioners, scholars and others involved with those areas of the law. It would be highly presumptuous in most cases for lower court judges in South Africa and other developing post-colonial States to even pretend that they had developed so rapidly in light of their own judicial histories, to be able to determine International Law issues on the rare occasions that they are called upon to adjudicate upon them. Particularly when the issues raised have the added complexity of invoking at once: international treaty law, regional treaties, customary International Law, *jus cogens*, regional constitutional *lex specialis*, and *lex specialis* International Criminal Law; lower court judges in these judicially evolving post-colonial States risk compromising themselves professionally, and polluting the legitimacy of their courts and also that of the international legal system generally if they proceed without taking expert academic advice on the question of applicable law, and then get it so wrong.

Even among scholars, the advent of a Professor of International Law whose expertise embraces and cuts across the entire range of emergent specialist disciplines of private and public International Law has become a rarity. Even judges and practitioners that predominantly operate in the international legal system itself now increasingly show specialization in one or two sub-disciplines of the subject because mastery of the discipline in its entirety has become almost unachievable, even for the most ardent scholars of the system. Each sub-discipline points to an established industry with sizeable numbers of national, regional and international professionals that are daily involved in its practice worldwide. They range from registry bureaucrats to party representatives and arbitrators, prosecutors and enforcers, including ICC jailers at The Hague.

#### *Article structure*

Part I evaluates the underlying assumptions for the proposition that judges of lower national courts of evolving post-colonial States would do well to always consider engaging a specialist academician to illuminate the applicable and often contested principles of International Law and their potential significance to the dispute before the court. This is because national courts habitually preside over domestic issues that are limited to interpretation and application of easily discernible national law. However, when these judges step outside of their usual basket of trade into the business of identifying, interpreting and implementing International Laws in their own courts, any suggestion that they are doing their normal day-to-day business would be misleading. In the *Al Bashir case* [2015] the North Guateng Division of the High Court of South Africa was called upon to engage simultaneously with regional supranational laws of the African Union, *lex specialis* International Criminal Law, customary International Law, and domestic law. Such a call requires great care to ensure that outcomes of the proceedings:

- (i) enhance legal clarity, particularly where constitutional hierarchy of norms is imputed;
- (ii) entrench and not obscure dictates of the rule of law in a democratic society;

---

<sup>19</sup> See The Independent, 24 August 2015 “Germany opens its gates: Berlin says all Syrian asylum-seekers are welcome to remain, as Britain is urged to make a similar statement” at: <http://www.independent.co.uk/news/world/europe/germany-opens-its-gates-berlin-says-all-syrian-asylum-seekers-are-welcome-to-remain-as-britain-is-10470062.html>

- (iii) highlight actual shortcomings of current law in order that necessary developments are introduced to make the law wholesome; and finally,
- (iv) enhance law's legitimacy according to Thomas Franck's<sup>20</sup> theory of legitimacy.

Part II examines the implications of the *Al Bashir case* [2015] for cases where judges of lower national courts of evolving post-colonial States have to determine complex cases that are simultaneously regulated by *lex specialis* International Criminal Law, supranational regional law, and any domestic law provisions. Part III offers concluding remarks and makes suggestions on how practice of national courts could and should work to enhance international law's legitimacy when they consider International Law cases.

#### *Focus*

Throughout this discussion, the work of the UN ILC as the institutional embodiment of the academic expert envisaged under Article 38(1)(d) of the Statute of the ICJ is analysed. The discussion shows a rapid re-invigoration of the academic expert's significance to current International Law making and implementation particularly through the ILC's new practice of merely noting concluded draft articles without recommending the conclusion of a treaty. This practice has transformed the expert's function to quasi-law maker in some instances. Thus, the recommendation for a *de facto* duty to engage expert academicians to illuminate the law when judges of lower national courts of evolving post-colonial States are dealing with complex International Law issues is entirely consistent with the increased prevalence of utilising academic experts in the International Law industry.

The *Al Bashir case* [2015] before the North Gauteng Division of the High Court of South Africa is analysed for its potential impact on the legitimacy of International Law particularly because it is the most recent case in which the complexity arose before a lower national court of a good example of an evolving post-colonial State, of determining a matter that was simultaneously regulated by *lex specialis* International Criminal Law, emergent regional supranational law, customary International Law and domestic law. This raised directly the question whether such courts should not as a matter of course engage a specialist academician in the capacity of 'friend of the Court' to illuminate the applicable or contested principles of International Law whenever they are handling complex cases that invoke a variety of competing international, regional and domestic sources of law. With varying outcomes, this complexity arose also for the more experienced judges of France - *Siliadin case*,<sup>21</sup> Europe - *MOX plant case (2006)*<sup>22</sup> and *Kadi case (2008)*.<sup>23</sup>

The *Barbie case*<sup>24</sup> (France) shows the link between judicial decisions of national courts and the legitimacy of the international legal system, and in particular, how extremely important to International Law's reputation and development, principles developed in judicial decisions of domestic courts are. The ICTY Trial Chamber's determination of 'which individuals of the targeted population qualify as civilians for purposes of crimes against humanity' in the *Tadic case* relied extensively on the *Barbie*<sup>25</sup> formulation. The elegant *Barbie* formulation came about without any direct assistance of academic experts to illuminate any of the legal complexities.

<sup>20</sup> See Franck, T.M. (1990) *The Power of Legitimacy Among Nations*, OUP.

<sup>21</sup> *Siliadin v. France*, Application no. 73316/01

<sup>22</sup> *Commission of the European Communities v Ireland*, EU: Case C-459/03, page I-04635

<sup>23</sup> P. *Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR I-6351; Case C-402/05 P and C-415/05.

<sup>24</sup> Crim. 6 October, 1983, J.C.P. 1983 II 20107

<sup>25</sup> See *The Prosecutor v Dusko Tadic*, (Trial Chamber Opinion and Judgment) IT-94-1-T (7 May 1997) para. 641. See also Fournet, C. (2013) *Genocide and Crimes Against Humanity: Misconceptions and Confusion in french Law and Practice*, Hart Publishing, Chapter 1.

However, any comparison between France's judiciary with the judiciaries of lower national courts of evolving post-colonial States risks contradicting the 'like with like' principle because the former has been immersed in authentic adjudication of International Law issues for a very long time while the South African judiciary's record of authentic adjudication of International Law issues is relatively new. Nonetheless, its documented apartheid-rule record (which ended only in 1994) on that point is far from flattering.<sup>26</sup>

In the *Al Bashir case* [2015]:

- (i) The Republic of South Africa - a member of the ICC<sup>27</sup> regime under which arrest warrants had been issued against a serving head of State for alleged crimes *jus cogens*<sup>28</sup> had *lex specialis* International Criminal Law obligations to arrest and surrender the fugitive to the ICC once he had landed on its territory.
- (ii) The Republic of South Africa had domesticated the ICC Statute, making it binding on the SA government *qua* national law.<sup>29</sup> Thus, it had domestic law obligations to arrest and surrender the fugitive to the ICC.

However,

- (iii) The African Union (AU) had inaugurated anti-ICC Constitutional Supranational Law and AU Directives<sup>30</sup> that rendered *null and void* any ICC arrest warrants issued against a serving Head of an African State, including President Al Bashir of Sudan.<sup>31</sup> Thus, the Republic of South Africa had emergent regional supranational obligations similar to those Sweden had in the *Kadi case*.
- (iv) The government of the Republic of South Africa was contractually bound under part VIII of its 'host agreement' with the Commission of the AU to ensure that all delegates attending the 25<sup>th</sup> AU Summit scheduled for 7-15 June 2015 were immune "from personal arrest or detention and from any official interrogation as well as from inspection or seizure of their personal baggage." Government Gazette No. 38860<sup>32</sup> had incorporated this agreement into South African Law. Thus, the Republic of South Africa had specific binding treaty obligations with the Commission of the AU. Government Gazette No. 38860 shows that the government was fully aware of its contractual and treaty obligations with the Commission of the AU.
- (v) The outcomes of *lex specialis* of the AU Extraordinary Summit on the Africa-ICC Relationship established by the AU's highest decision making organ – the Assembly, had on 12 October 2013 issued the following directive:

---

<sup>26</sup> See Dyzenhaus, D. (2003) *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order*, Bloomsbury Publishing.

<sup>27</sup> Rome Statute of the International Criminal Court, adopted 17 July 1998, 2187 U.N.T.S 90 (entered into force July 1, 2002).

<sup>28</sup> ICC-02/05-01/09

<sup>29</sup> Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, See Republic of South Africa Government Gazette Vol. 445 Cape Town 18 July 2002 No. 23642 at: [www.saflii.org/za/legis/num\\_act/iotrsoicca2002699.pdf](http://www.saflii.org/za/legis/num_act/iotrsoicca2002699.pdf)

<sup>30</sup> Ext/Assembly/AU/Dec. 1(Oct.2013).

<sup>31</sup> See *Draft Decision of the 24<sup>th</sup> AU Summit on the ICC and the African Court of Justice and Human Rights*, Doc. Assembly/AU/18 (XX14); Ext/Assembly/AU/Dec. 1(Oct.2013). See also Dersso, S.A. (2013) "The AU's Extraordinary Summit decisions on Africa-ICC Relationship" *EJIL: Talk* at: <http://www.ejiltalk.org/the-aus-extraordinary-summit-decisions-on-africa-icc-relationship/>

<sup>32</sup> *The Southern Africa Litigation Centre v The Minister of Justice and Constitutional Development and Others*, Case No. 27740/2015 paras. 14, 16 and 17.

- a) That, no International Court or Tribunal has capacity to commence or to continue charges against any serving AU Head of State or Government or anybody acting or entitled to act in such capacity during their term of office.
- b) That, the trials by the ICC of President Uhuru Kenyatta and Deputy President William Samoei Ruto, who are the current serving leaders of the Republic of Kenya, should be suspended until they complete their terms of office.
- c) To fast track the establishment of the criminal jurisdiction of the African Court on Human and Peoples' Rights and to table for discussion at the Assembly of State Parties of the ICC, amendments to the ICC on immunity of heads of state and government among other matters.<sup>33</sup>

Thus, the Directive completely ruled out cooperation of African States with *lex specialis* International Criminal Law even if they were Member States Parties to the Rome Statute (1998) that established the ICC. The short of it is that this scenario confronted the North Guateng Division of the High Court of South Africa, and later the Supreme Court of Appeal with novel business situated on the casp of these courts' daily business.

Further, the 13<sup>th</sup> African Union Summit on 6 July 2009 had concluded that AU Member States Parties should "... not co-operate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities for the arrest and surrender of Sudanese President Omar al Bashir to the ICC."<sup>34</sup> President Jacob Zuma was already on record that the emergent counter-ICC law of the AU would bind South Africa. "There is an African stance on this and we are not different from it. ... the United Nations Security Council should have listened to Africa before issuing the interdict"<sup>35</sup> At its 26<sup>th</sup> Ordinary Session of the Assembly of the Union held in Addis Ababa (21-31 January 2016), the AU General Assembly adopted a resolution that signalled possible intention of a mass withdrawal of African States from the Rome Statute establishing the ICC, citing the assault by the ICC on "sovereignty, security and dignity of Africans" as the main reason.<sup>36</sup>

These developments combined to make this a very difficult case to decide without reference to AU supranational constitutional customary International Law provisions and their possible impact on ICC law. However, South African Courts did that exactly, and without a care, it seems.

But the question of applicable law seems to have been probably the single biggest issue in the *Al Bashir* case. Ancillary to that question was the question whether the lower courts of South Africa could have benefited from the engagement of an academic expert in International Law - perhaps as a 'friend of the court' to illuminate the them on the contested sources of applicable law to the questions raised in the matter.

## **PART I: National courts, complex International Law cases that intersect *lex specialis* International Law, opposing supranational regional law, and certain national legislation**

---

<sup>33</sup> Ext/Assembly/AU/Dec. 1(Oct.2013)

<sup>34</sup> South African Government News Agency, "AU leaders will not extradite Al Bashir" at: <http://www.sanews.gov.za/south-africa/au-leaders-will-not-extradite-al-bashir>

<sup>35</sup> South African Government News Agency, "AU leaders will not extradite Al Bashir" at: <http://www.sanews.gov.za/south-africa/au-leaders-will-not-extradite-al-bashir>

<sup>36</sup> See also citizen tv website at: <https://citizentv.co.ke/news/au-adopts-uhurus-proposal-for-withdrawal-from-icc-113241/>

**transforming international treaties into national law – The evident need to consult specialist academicians in order to ensure justice and enhance law’s overall legitimacy?<sup>37</sup>**

Judge Crawford of the International Court of Justice who until his appointment was Professor of International Law at Cambridge University and also a Member of the UN International Law Commission and its fifth Rapporteur on State Responsibility for Internationally Wrongful Acts writes that, “national courts are generally unfamiliar with state practice and are ready to rely on secondary sources as a substitute”.<sup>38</sup> Regardless of any grounds for caution, “the opinions and writings of publicists enjoy wide use. Arbitral tribunals and national courts make sometimes copious reference to jurists’ writings.”<sup>39</sup> The ICJ itself makes use of publicists’ writings as evidenced in “dissenting and separate opinions, in which the ‘workings’ are set out in more detail, and which reflect the Court’s actual methods”.<sup>40</sup> Moreover, there are many references to writers in pleadings before the Court.<sup>41</sup> Counsels routinely invoke the teachings of publicists at the ICJ, particularly in their written and oral pleadings.<sup>42</sup> This of course is consistent with both Article 38(1)(d) of the Statute of the ICJ which refers to academic writings as a subsidiary means for identifying the laws to be applied to a dispute under the Court’s consideration. It is also consistent with Article 13 of the UN Charter that gives publicists/academics a very significant role in both the development and application of International Law than has hitherto been acknowledged in the practice of national courts.

For any court of law whose day-to-day practice is entirely focused on domestic law, and whose bench is trained for domestic law issues, and which perhaps only encounters International Law issues once in a blue moon, to reject the request to introduce an academic expert to illuminate the law around the issues raised must presume certainty of that court in its own knowledge, skill and competence to proceed without such assistance.

In *The Southern Africa Litigation Centre v The Minister of Justice and Constitutional Development and Others* (2015),<sup>43</sup> the South African Government (Respondent) requested at the outset to introduce a Professor of International Law to lead oral evidence in order to ‘clarify the State’s *International Law defence*’.<sup>44</sup> The Court declined. The North Guateng Division of the High Court of South Africa’s reaction to the Government’s request deserves scrutiny particularly as the matter was

---

<sup>37</sup> See also Borda, A.Z. (2013) ‘A Formal Approach to Article 38(1)(d) of the ICJ Statute from the Perspective of the International Criminal Courts and Tribunals’ *European Journal of International Law* Vol. 24 No.2 pp. 649-61; Bordin, F.L. (2014) “Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law” *International and Comparative Law Quarterly* vol. 63 pp. 535-567; Caron, D.D. (2002) “The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority” *American Journal of International Law* vol. 96 pp. 857-73; Peil, M. (2012) “Scholarly Writings as a Source of Law: A Survey of the Use of Doctrine by the International Court of Justice” *Cambridge Journal of International and Comparative Law* vol. 1 Issue 3 pp. 136-161; Boyle, A. and Chinkin, C. (2007) *The Making of International Law*, OUP; O’Keefe, R. and Tams, C.J. (2013) *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary*, Oxford University Press; Dordeska, M. (2015) “The Process of International Law Making: The Relationship Between the International Court of Justice and the International Law Commission” *International and Comparative Law Review*, 12; United Nations, “The International Law Commission Fifty Years After: An Evaluation; Proceedings of the Seminar held to commemorate the fiftieth anniversary of the International Law Commission, 21-22 April 1998 (2000)

<sup>38</sup> (8<sup>th</sup> ed. 2012) *Brownlie’s Principles of Public International Law*, OUP p.43

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

<sup>43</sup> See also Peil, M (2012) “Scholarly writings as a source of law: A survey of the use of doctrine by the International Court of Justice” *Cambridge Journal of International and Comparative Justice* vol.1 No.3 pp.136-161, p.138.

<sup>44</sup> Case Number 27740/2015

<sup>45</sup> *Ibid.* para 5.



substantively premised almost entirely on *international law* - a subject of law that previously escaped study of most current senior judges of lower national courts of evolving post-colonial States when they were in law school. It was fashionable to dismiss International law as not being law until recently.<sup>45</sup>

These senior judges have not had to return to Law School to learn this now overarching subject of their discipline that they most probably had not studied, opting instead for more ‘important’ modules of study. It is needless to exaggerate the benefits of in-service judicial training, which could never comprehensively compensate for proper subject training, especially among the arbiters of justice themselves. To make it worse for the senior judiciary of lower national courts of evolving post-colonial States, International Law has diversified into specialist areas, fragmenting<sup>46</sup> into multiple specialist disciplines that make it difficult even for other international lawyers to casually stride into the practice of areas of specialisation beyond their own.

Examples include International Human Rights Law; International Trade Law; Intellectual Property Law; International Investment Law; Transnational Labour Law; International Environmental Law; International Space Law; International Armed Conflict Law; International Law of the Sea - now administered by the International Tribunal of The Law of the Sea (ITLOS) which is headquartered in Hamburg - Germany; to International Trade Law that is administered by the World Trade Organisation’s (WTO) Dispute Settlement Body (DSB) headquartered in Geneva, Switzerland; with numerous specialised Commercial Arbitration Centres in between. The fact is that the Herculean International Lawyer(s) that could acquit any claims to mastery of all matters in this plethora of specialized topics of International Law is probably difficult to find.

**Part II: The requested resort to Article 38(1)(d) guidance in the *Al Bashir case* [2015] – A role for expert academics of International Law when national courts are called upon to determine complex cases involving *lex specialis* International Law; regional supranational law; customary International Law; and certain national legislation?<sup>47</sup>**

In particular, the *Al Bashir case* [2015] before the North Guateng High Court, and later the Supreme Court of Appeal [2016], like the *Sellafield MOX Plant nuclear facility case*<sup>48</sup> raised matters that triggered three different institutional procedures in three different jurisdictions. Litigation over the legality of the construction and operation by the UK of a plant to produce mixed oxide fuels at the Sellafield nuclear complex in the north-west of England occurred in the UK national courts,<sup>49</sup> and in the European Court of Justice,<sup>50</sup> and in the International Tribunal for the Law of

---

<sup>45</sup> See also Harris, D. and Sivakumaran, S. (8<sup>th</sup> ed. 2015) *Cases and Materials on International Law*, Sweet and Maxwell, London p.10

<sup>46</sup> Report of the Study Group of the International Law Commission on Fragmentation of International Law: Difficulties arising from the diversification and expansion of International Law, United Nations Document A/CN.4/L.862, 13 April 2006

<sup>47</sup> See also Peil, M (2012) “Scholarly writings as a source of law: A survey of the use of doctrine by the International Court of Justice” *Cambridge Journal of International and Comparative Justice* Vol.1 No.3 pp.136-161; Pronto, A. (2008) “Some Thoughts on the Making of International Law” *European Journal of International Law* vol. 19 No.3 pp. 601-616.

<sup>48</sup> *Commission of the European Communities (UK intervening) v Ireland (Kingdom of Sweden intervening)* Judgment of Grand Chamber, 30 May 2006 EU: Case C-459/03, CELEX No. 603CJ0459.

<sup>49</sup> [2002] 1 C.M.L.R. 21; [2002] Env. L.R. 24 [2001] EWCA CIV 1847 contesting UK compliance with the requirement that Member States Parties to the EU shall ensure that all new classes or types of practice resulting in exposures to ionising radiation are justified in advance of being first adopted or first approved by their economic, social or other benefits in relation to the health detriment they may cause.’ See new Article 37 Procedure, Revised Commission Recommendation 2010/635/Euratom of 11 October 2010 at: [https://ec.europa.eu/energy/sites/ener/files/documents/2013\\_cswd.pdf](https://ec.europa.eu/energy/sites/ener/files/documents/2013_cswd.pdf)

the Sea.<sup>51</sup> The *Al Bashir case* has triggered the ICC regime; the emergent AU Constitutional *lex specialis* regarding the application of certain doctrines of International Criminal Law - including universal jurisdiction and diplomatic immunity; and also South Africa's own national constitutional law introduced by the 2002 Implementation of the Rome Statute of the ICC Act No. 27.<sup>52</sup>

According to the International Law Commission Study Group on the fragmentation of International Law, the *prima facie* question of which among possible regimes applicable to a dispute should have priority<sup>53</sup> follows from fragmentation's consequent overlaps between specialised areas. This has encouraged the practice of forum shopping, and of the compromise of legal certainty<sup>54</sup> in some cases. Further, the question raises "both institutional and substantive problems. The former have to do with the competence of various institutions applying international legal rules and their hierarchical relations *inter se*."<sup>55</sup> The latter problems arise from fragmentation's "splitting up of the law into highly specialized "boxes" that claim relative autonomy from each other and from the general law".<sup>56</sup>

Hence, the North Guateng High Court's decline of possible expert illumination of applicable International Law on the matter is troubling, unless of course, the decision of the Court would engender compliance. Instead, it provoked the Government of South Africa to seek an immediate withdrawal from the ICC,<sup>57</sup> with the other African Union Member States Parties of the ICC taking their cue from that declaration. Article 38(1) of the Statute of the International Court of Justice recognises in sub-paragraph (d) the specific role of leading publicists/academicians of International Law in the identification of International Law. It is arguable that individual members of the International Law Commission and the International Law Commission (ILC) itself are among the highest publicists of International Law.

Presently, South Africa's Dire Tladi, is a member of the UN International Law Commission and serves in his individual capacity. Dire Tladi is also Professor of International Law at the University of Pretoria. The UN International Law Commission's main role under Article 13 of

---

<sup>50</sup> Regarding the interpretation of Article 292 EC and Article 193 EA see Case C-459/03. The Commission stated by submitting a dispute with another Member State (the UK) to an arbitral tribunal established under the UN Convention on the Law of the Sea (UNCLOS) Ireland had infringed both of those provisions, as well as Article 10 EC and Article 192 EA,

"According to Article 292 EC and its identically worded counterpart, Article 193 EA, 'Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein'. In order to establish whether these provisions were infringed, the Court must determine if the matters brought before the Arbitral Tribunal by Ireland fall within the scope of Community law."

<sup>51</sup> *The Mox Plant Case (Ireland v United Kingdom), Request for Provisional Measures, Order of 3 December 2001*, (2002) 41 ILM 405. The ITLOS had dealt with Ireland's request in an order made on 3 December 2001. Available at: <http://www.itlos.org>&gt;. See also Churchill, R and Scott, J. (2004) 'The Mox Plant litigation: the first half-life' 53 (3) *International and Comparative Law Quarterly*, 643-76.

<sup>52</sup> See Republic of South Africa Government Gazette vol. 445 Cape Town 18 July 2002 No. 23642 at: [www.saflii.org/za/legis/num\\_act/iotrsoticca2002699.pdf](http://www.saflii.org/za/legis/num_act/iotrsoticca2002699.pdf)

<sup>53</sup> Report of the Study Group of the International Law Commission on Fragmentation of International Law: Difficulties arising from the diversification and expansion of International Law, United Nations Document A/CN.4/L.862, 13 April 2006 para 10.

<sup>54</sup> *Ibid.* para. 9.

<sup>55</sup> *Ibid.* para. 13.

<sup>56</sup> *Ibid.* para.13.

<sup>57</sup> *Democratic Alliance v Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening)* (83145/2016) [2017] ZAGPPHC 53 (22 February 2017); Also available at SAFLII website: <http://www.saflii.org/za/cases/ZAGPPHC/2017/53.html> See also "South Africa Announces Withdrawal From International Criminal Court" available at npr website, available at: <http://www.npr.org/sections/thetwo-way/2016/10/21/498817513/south-africa-announces-withdrawal-from-international-criminal-court>

the UN Charter is to study and codify International Law for the progressive development of the discipline.<sup>58</sup> On 27 May 2015 Professor Tladi was appointed Rapporteur on the ILC's study on *jus cogens*.<sup>59</sup> Perhaps the Government of South Africa had in mind just such a decorated expert of International Law in mind when it had made its request in the *Al Bashir case* [2015]. Tladi's competence in this area is clear from his 2015 publication in the Journal of International Criminal Justice, specifically on "The Duty on South Africa to Arrest and Surrender President Al-Bashir under South African and International Law". He concludes that the judgment of the North Gauteng Division of the High Court of South Africa ignored "fundamental rules of International Law".<sup>60</sup>

Professor Christoff Heynes could have been another possibility that the government had in mind. He is Professor of International Human Rights Law at the University of Pretoria, and an internationally recognized and acknowledged International Law expert. More significantly to this discussion, Christoff Heynes is the current UN Special Rapporteur on extrajudicial, summary or arbitrary executions.<sup>61</sup> UN Special Rapporteurs<sup>62</sup> are independent human rights experts with mandates to report and advise on human rights from a thematic or country-specific perspective. They are integral to the UN Human Rights Council's work on the development of international human rights standards, human rights advocacy, education and public awareness activities. They also provide advice for technical cooperation. They report annually to the Human Rights Council.

Professor John Dugard is arguably South Africa's foremost international lawyer of the last half century. He presently holds a Chair in International Law at Leiden University and is a practising Barrister in International Law at Doughty Street Chambers, London. For fifteen years he was a member of the UN International Law Commission and was its Special Rapporteur on Diplomatic Protection. In 2001 he was appointed as Chair of the UN Human Rights Inquiry Commission to Investigate Violations of Human Rights and Humanitarian Law in the Occupied Palestinian Territory and from 2001 to 2008 he was UN Special Rapporteur on the Situation of Human Rights in the Occupied Palestinian Territory. Since 2000 he has served intermittently as Judge *ad hoc* of the International Court of Justice.<sup>63</sup>

The essence of this is that South African Courts have at their immediate disposal an illustrious array of experts of the highest international standard to draw upon in consequence of Article 38(1)(d) if they ever so wish to do so. Even more, the North Gauteng Division of the High Court of South Africa, and also on appeal, the Supreme Court of Appeal could have sought the guidance of non-South African International Law Professors to aid clarity and transparency on the applicable International Law as the case clearly lay at the crossroads of first, *lex specialis* ICC Law, and second, South Africa's Act No. 27 of 2002<sup>64</sup> on the Implementation of the Rome Statute of the ICC, and thirdly, the emergent regional African Union *lex specialis* Constitutional Supranational Law on the applicability of ICC Law among African States.<sup>65</sup>

---

<sup>58</sup> Article 13 UN Charter.

<sup>59</sup> See UN International Law Commission website at: <http://legal.un.org/ilc/sessions/67/>

<sup>60</sup> Tladi, D. (2015) "The Duty on South Africa to Arrest and Surrender President Al-Bashir under South African and International Law" Journal of International Criminal Justice p.1.

<sup>61</sup> See UN OHCHR website at: <http://www.ohchr.org/EN/Issues/Executions/Pages/SRExecutionsIndex.aspx>

<sup>62</sup> See UN OHCHR website at: <http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx>

<sup>63</sup> See also Doughty Street Chambers website at: <http://www.doughtystreet.co.uk/barristers/profile/john-dugard-sc>

<sup>64</sup> See Republic of South Africa Government Gazette vol. 445 Cape Town 18 July 2002 No. 23642 at: [www.saflii.org/za/legis/num\\_act/iotrsoticca2002699.pdf](http://www.saflii.org/za/legis/num_act/iotrsoticca2002699.pdf)

<sup>65</sup> See also Chigara, B. and Nwankwo, C.M. (2015) "To be or not to be? The African Union and its Member States Parties' Participation as High Contracting States Parties to the Rome Statute of the International Criminal Court (1998)" Nordic Journal of Human Rights vol. 33 No. 3 pp. 243 - 268.

*The contested applicable current international law – is there a hierarchy?*

Three spheres of law applied in the case that arose when President Al Bashir entered South Africa on Saturday 13 June 2015 to attend the 25<sup>th</sup> African Union Summit meeting of Heads of States and Governments.

Firstly, contractual AU Law applied. In order to host the AU summit, the Republic of South Africa had been required to enter into an agreement with the Commission of the AU on the material and technical organization of the event – ‘the host agreement’.<sup>66</sup> Article VIII of that host agreement required the Republic of South Africa to ensure delegates the usual diplomatic immunities, including the immunity from personal arrest or detention, and from any official interrogation.<sup>67</sup> By Government Gazette No. 38860, the Republic of South Africa sought to incorporate the privileges and immunities spelt out in the host agreement with the Commission of the AU into its domestic law.

Secondly, Regional Constitutional Supranational Law established by the quasi-supranational AU applied in relation to the ICC international arrest warrants against President Al Bashir.<sup>68</sup> Thirdly, ICC Law applied. Fourthly, South African National Law also applied. Assuming that the application of each of these distinct legal spheres might result in completely different outcomes in the *Al Bashir case* [2015], it becomes necessary to determine which law should apply or take priority and why? Would lower court national judges accustomed to handling domestic law issues know how to proceed? Assuming all these spheres of law could and should be reconciled, what principles should guide that amalgamation, interpretation and application of the approach, and how should it apply?

Both the North Gauteng Division of the High Court of South Africa and the Supreme Court of Appeal, focused on South Africa’s duties and obligations arising out of its membership of the ICC regime, and in particular the ICC’s order that member States Parties should arrest and surrender President Omar Hassan Ahmad Al Bashir (President Bashir) to answer charges of war crimes, crimes against humanity, and genocide.<sup>69</sup> The Courts’ approach to the legal question clearly excluded first, South Africa’s obligations arising out of its membership of the African Union.<sup>70</sup> Secondly, it downplayed the special AU Summit host treaty agreement with the AU Commission. Nonetheless, President Al Bashir had arrived in South Africa to attend an African Union Summit Meeting in his capacity as head of the State of Sudan. Therefore, it can be argued that the special terms of the host agreement that had induced the AU to hold its summit in South Africa applied under the international maxim *pacta sunt servanda*. That binding host agreement with the AU Commission had established the terms that had translated into legal obligations upon South Africa. Those obligations had been transformed into South African Law by parliamentary notice.<sup>71</sup>

---

<sup>66</sup> *The Southern Africa Litigation Centre v The Minister of Justice and Constitutional Development and Others*, Case No. 27740/2015 para. 13.

<sup>67</sup> *Ibid.* para. 16.

<sup>68</sup> See Chigara, B. and Nwankwo, C.M. (2015) “‘To be or not to be?’ The African Union and its Member States Parties’ Participation as High Contracting States Parties to the Rome Statute of the International Criminal Court (1998)” *Nordic Journal of Human Rights* vol. 33 No.3. pp. 243 - 268.

<sup>69</sup> *Prosecutor v Omar Al Bashir*, Case No. ICC-02/05-01/09 (4 March 2009), para 41.

<sup>70</sup> Constitutive Act of the African Union, adopted July 11, 2000, OAU Doc. CAB/LEG/23.15 (entered into force May 26, 2001)

<sup>71</sup> *The Southern Africa Litigation Centre v The Minister of Justice and Constitutional Development and Others*, Case No. 27740/2015.

More interesting in the matter was the question of the standing before South African courts of supranational directives of the AU regarding ICC directives.<sup>72</sup> Practice elsewhere recommends that supranational law directives trump even Security Council measures that instituted under Chapter VII of the UN Charter. In the *Kadi Case* (2008) the Grand Chamber of the ECJ ruled that the supranational law of the EU had priority over UN Security Council Measures instituted under Chapter VII of the UN Charter, even when those measures were intended to prevent possible financing of international terrorist offences. In the *Mox plant Case* (2006) the Grand Chamber of the ECJ ruled that the requirement to implement EU legal obligations between EU Member States Parties precluded Member States from seeking justification/restitution in the International Tribunal of the Sea even though both parties were members of the United Nations Convention on the Law of the Sea (1982)<sup>73</sup> (UNCLOS).

This approach of the Grand Chamber of the ECJ recommends the view that regional supranational obligations may have begun to reshape International Law with the abstraction of standards occurring suitably and conveniently at the Universal level but their implementation very much regarded as the province of supranational governance. Regardless of the UN Security Council's competence under Chapter VII of the UN Charter to compel States to enforce its measures, or of what Membership of UNCLOS promises, it is EU obligations and not those of the UN Security Council nor those of the ITLOS that prevailed in those cases respectively.

South African courts' downplaying of AU Law in this case appears to be at variance with developments elsewhere, something that the intervention of a Professor of International Law in the matter might have illuminated for the courts to enable them at each stage to take the long view that each of them so badly needed to but in the end, severely failed to take. While the ICC might be characterised as an ideological enterprise that members can abrogate from at any point, the quasi-supranational AU is for any of its member States Parties more than an ideological enterprise. It is also their political, historical and geographical home and habitat of departure for any other enterprises or collaborations elsewhere across the world. None of the African States could ever shake themselves off the African political, social, geographical, historical landscape. Apartheid South Africa learnt this fact in the end.

Therefore, national institutions' adherence to emergent Regional Constitutional Supranational Law should be treated by national courts as a given. Otherwise, the separation of powers between the executive who decide first, on the supranational laws that bind them and second, on the international regimes that they participate in becomes unworkable. This is also because while supranational directives and supranational constitutional laws have direct effect in Member States Parties' territories, ordinary treaties like the Rome Statute establishing the ICC must first be transformed into national law, usually by an Act of Parliament. And even after that, the *Mox plant Case* recommends the view that such regimes as the UNCLOS remain subservient to supranational provisions that regulate the same subject. It can be argued that this approach preserves operation of the doctrine of separation powers in a democratic society. In fact, this approach debar constitutional conflict between the organs of State. It can be argued that the Regional Constitutional Supranational Law that prohibits African Member States Parties of the ICC from cooperating with the arrest warrants against Al Bashir<sup>74</sup> - whatever the allegations

---

<sup>72</sup> Constitutive Act of the African Union, adopted July 11, 2000, OAU Doc. CAB/LEG/23.15 (entered into force May 26, 2001).

<sup>73</sup> 1833 UNTS 3; 21 ILM 1261 (1982).

<sup>74</sup> See Chigara, B. and Nwankwo, C.M. (2015) "‘To be or not to be?’ The African Union and its Member States Parties' Participation as High Contracting States Parties to the Rome Statute of the International Criminal Court (1998)" Nordic Journal of Human Rights vol. 33 No.3 pp. 243 - 268.

against him, should have taken priority, following from the example of the *Mox plant* and the *Kadi cases* impact on International Law of Supranational Law .

South African courts involved with the *Al Bashir case* would have avoided the hazardous route they took of examining implications for immunity claims of the ‘host agreement’ between the Republic of South Africa and the Commission of the AU and its subsequent incorporation into South African Law. This was unnecessary. The more fitting question appears to have been missed, namely, the primacy between *lex specialis* International Law whose constitutive treaty must first be transformed into domestic law in order to have legal effect; and Regional Constitutional Supranational Law regarding ICC instructions to arrest Al Bashir upon arrival on the territory of any Member State Party to the Rome Statute.

Both the *Mox plant case* and the *Kadi Case* recommend the view that Supranational Law takes priority. It appears that the effort to construct a unitary international legal space is slowly but certainly succumbing to the emergence of supranational self-contained EU, AU spaces. The actual practice of these self-contained ‘community interest focused regimes’ favours the privileging of community supranationalism whenever there is conflict with *lex specialis* International Law of any category.

Presently, the AU appears to be focused on ensuring that African States - forever the subjects, and not instigators of Public International Law in any way, should transform the authority of International Law to reflect their own aspirations to self-dignity among other things. Dugard writes that the objectives and purposes of the AU point toward a general theme of self-upgrading on the international plane with a view to enhancing Africa’s role in world affairs and in global negotiations.<sup>75</sup> That is not to say that they will prevail. However, they just might. If this is correct, then South African Courts involved in the *Al Bashir case* had more to learn, and their integrity to preserve by introducing a Professor of International Law to identify and illuminate applicable International Law to the dispute.

### **Part III: Conclusions:**

Until now, scholarship on the sources of International Law has focused on treaties – Article 38(1)(a), customary international law - Article 38(1)(b), *jus cogens*, and lightly on general principles of law recognised by civilized nations, including equity, proportionality, admission of circumstantial evidence - Article 38(1)(c). Commentary on sources has almost ignored Article 38(1)(d) of the Statute of the ICJ, which refers to judicial decisions, and *writings of leading publicists*. It was previously taken for granted Article 38(1)(d) was not itself a source of international law, but only a subsidiary evidentiary aid for identifying substantive norms resulting from the creative Articles listed in Section 38(1)(a-c).<sup>76</sup> However, the role of the publicist/academician in the identification of norms of International Law, particularly thorough the work of the UN ILC which is the institutionalised embodiment of the expert academician of International Law has in recent times transformed the role of the publicist to *quasi law maker*, particularly through the recognition as law by the ICJ, Diplomatic Community and litigants of concluded ILC draft articles that have not yet resulted in a treaty.

In the *Al Bashir cases* before the North Gauteng Division of the High Court of South Africa [2015], and later before the Supreme Court of Appeal [2016] the South African government had

---

<sup>75</sup> Dugard, J. (2011) International Law: A South African Perspective, Juta and Co. Ltd, Lansdowne, p.542-3.

<sup>76</sup> See also Sorenson, M (1968) Manual of Public International Law, St Martin’s Press, New York.

previously requested to introduce an academic expert in International Law to clarify the international law defence that it wished to advance in the matter. This raises the question of whether *lower domestic court judges of developing post-colonial States*, themselves not so experienced in determining complex International Law matters that infuse *lex specialis* International Criminal Law, Regional Constitutional Supranational Law, customary International Law, and conflicting national laws should as a matter of procedure, request or allow for the illumination of applicable law by an expert academician as “ a friend of the court’ if any of the parties requests so. The court and either party would have opportunity to cross-examine the expert academician. That would not unduly prolong the proceedings. However, it would ensure clarity about applicable law for the court to interpret and apply to the dispute, thereby enhancing the chances for better application of appropriate international legal standards by the court.

The expert academician’s role in international legal matters is already provided for in the UN Charter and in the Statute of the ICJ. It would in such cases be limited to illuminating applicable International Law so that judges do not second-guess applicable law. This is because judges presiding in national courts, particularly those from countries that have only recently adopted democratic rule and the rule of law often lack severely, the knowledge of specialized areas of International Law and how they should be applied in complex cases like the *Al Bashir case* that attract several legal spheres. National judges’ own day-to-day work is almost entirely devoted to national law issues. Moreover, most *lower domestic court judges of developing post-colonial States* never took training in International Law, and even if they had done so, the discipline has fragmented into several areas of specialization that, it is very rare nowadays to find one international lawyer with expertise across all the sub-disciplines of discipline. Sketchy and patchy judicial training programmes on International Law cannot compensate for the level of knowledge required to determine the fast changing dynamic of international law.

The outcome in the *Al Bashir case [2015]* suggests that the rejection by South African Courts of the request to introduce a Professor of International Law to illuminate applicable or contested law was matched only by their failure to identify applicable law, resulting in a judgment that may serve to undermine international law’s own legitimacy.

The publicist’s role in the identification of current law is traceable to the beginning of modern international law, where leading scholars helped establish the notion that there was such a thing as International Law for the regulation of inter-State relations. This function of the publicist which in the beginning was occupied by leading Professors, including Franciscus Vitoria - Professor of Theology at the University of Salamanca; Francisco Suarez, a Professor of Theology; Alberico Gentili - Professor at Oxford; and Hugo Grotius was institutionalized by the Assembly of the League of Nations which in 1924 established a standing organ called the Committee of Experts for the Progressive Codification of International Law.

Today that role is played by the UN International Law Commission - a group of thirty-four expert members elected by the General Assembly from a list of candidates nominated by the Governments of States Members of the United Nations,<sup>77</sup> and tasked with the progressive development and codification of international law in accordance with Article 13(1)(a) of the UN Charter.<sup>78</sup> Article 2 of the Statute of the UN ILC<sup>79</sup> requires appointees to be persons of

---

<sup>77</sup> Article 3, Statute of the UN ILC Commission

<sup>78</sup> 26 June 1945, San Francisco, UKTS 67 (1946) Cmd. 7015

<sup>79</sup> Adopted by the General Assembly in resolution 174 (II) of 21 November 1947, as amended by resolutions 485 (V) of 12 December 1950, 984 (X) of 3 December 1955, 985 (X) of 3 December 1955 and 36/39 of 18 November 1981. Available at UN website:

<http://legal.un.org/docs/?path=../ilc/texts/instruments/english/statute/statute.pdf&lang=EF>

recognized competence in International Law. In practice Professors of International Law, experienced diplomats and ex-government experts in International Law fill up this Commission.

Through the UN ILC's work, the academic expert has become pivotal to the identification of the law. ILC practice of studying over several years and sometimes decades, delegated topics chosen by the UN General Assembly, and of concluding draft articles is core to this development. Whereas in the past, the UN General Assembly convened diplomatic conferences to agree a treaty based on submitted ILC draft articles, of late, it has adopted the practice of merely noting the conclusion of the ILC studies and by a Resolution of the Assembly, adopting the draft articles<sup>80</sup> for later consideration. This practice appears to have hastened the reception of ILC draft articles into legal reasoning of governments in the framing of their international relations with other States; and of judicial institutions, and of legal professionals that dispense the business of international legal subjects.

This development may have transformed the codification and progressive development function of the UN ILC into a law-making exercise because without the usual demands of sovereign consent, and without any hesitation, stakeholders invoke into their legal arguments both codification and progressive development codes from the outcomes of ILC studies. Moreover, the tasks of (i) codifying customary international law and (ii) indicating the direction that the law should take (progressive development) cannot entirely be kept apart in the work of the UN ILC. Therefore, the task of identifying current and applicable law on any topic of International Law now appears to have been fully entrusted to the academic expert.

The circumstances when supranational laws override general international law require careful handling which *lower domestic court judges of developing post-colonial States* may do well to get help with from expert academicians.

The recommendation to involve academic experts as friends of the court in similar circumstances is supported by the outcomes in the European Court of Justice Grand Chamber judgments in the *Siliadin* (2005), *MOX plant* (2006) and the *Kadi* (2008) cases. It is also recommended by the confusing decision of South African Courts in the *Al Bashir cases* [2015] and [2016]. The courts struggled to manage the conflicting jurisdictions that all appeared to apply, namely, the UN Security Council backed ICC regime; the AU supranational law Directives and emergent AU counter-ICC Regional Constitutional Supranational Law that the South African government appears to have accepted in accordance with CIL's secondary rules of recognition contained in Article 38(1)(b) of the Statute of the ICJ.

In the end, South Africa's courts completely ignored the law that probably should have influenced their decision the most, namely, AU supranational *lex specialis* on the relationship between the ICC and African States that are also Member States Parties to the Rome Statute establishing the ICC (1998). Current AU supranational law requires African States that are also members of the ICC, including the Republic of South Africa, to not cooperate with ICC demands to arrest fugitives that come onto their territories if they are serving African Heads of States. The unequivocal outcomes of the AU *lex specialis* Extraordinary Summit on Africa-ICC Relationship held by the highest decision making organ of the AU – the Assembly, on 12 October 2013<sup>81</sup> made certain of that.

---

<sup>80</sup> See especially S. Villalpando, 'Codification Light: A New Trend in the Codification of International Law at the United Nations' (2013) VIII Brazilian Yearbook of International Law 117–55; Bordin, F.L. (2014) "Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law" International and Comparative Law Quarterly vol. 63 pp. 535-67.

<sup>81</sup> Ext/Assembly/AU/Dec. 1(Oct.2013)



The AU Assembly has authority to pass binding directives under Article 9(e) and (g) of the Constitutive Act of the African Union (2000).<sup>82</sup> State practice shows beyond any doubt that African States are adhering to regional supranational laws of the AU, which are counter-ICC initiatives in Africa. As judge James Crawford correctly writes, national courts are often oblivious to State practice. However, wiser national courts that find themselves in such situations often copiously reference writings of publicists to find guidance. South Africa's courts could have done better than to ignore counter-ICC practice of the AU of which the Republic of South Africa is a significant instigator. This raises the question of the understanding or misunderstanding by the courts involved in the matter as constituted at the appropriate time, of the application of the doctrine of sources in the international legal system.

The Courts focused instead on the Republic of South Africa's duties as a member of the ICC in accordance to its own legislative Act No. 27 of 2002, which had transformed the Rome Statute of the ICC (1998) into South African Law.<sup>83</sup> But common practice is that supranational Directives of regional institutions trump national law, which must be adjusted to ensure compliance. Once adopted, supranational law applies without the requirement of further transformation into domestic law.

However, ordinary international agreements like the Rome Statute of the ICC (1998) required transformation into South African Law – hence Act 27 of 2002. As the South African government might have initially feared, its courts had immense difficulties navigating the deep and steep complexities of applicable law. This probably confirms the need for *lower domestic court courts of developing post-colonial States* to consider engaging specialist academicians to illuminate the applicable International Law whenever they are called upon to decide complex cases where *lex specialis* International Law; Regional Constitutional Supranational Law; customary International Law and domestic law are all possibly applicable. This is because national courts habitually preside over domestic issues that are limited to interpretation of easily discernible national law - usually parliamentary statutes and common law developed by courts of the same jurisdiction. Courts whose day-to-day practice is entirely focused on domestic law, and whose judiciary has been trained largely for domestic law issues, and only rarely encounter International Law issues would do well to engage academic experts in the relevant discipline of International Law to assist with identifying and illuminating the law on the issues raised. Any other presumption might not serve the legitimacy of International Law that well.

---

<sup>82</sup> Constitutive Act of the African Union, adopted July 11, 2000, OAU Doc. CAB/LEG/23.15 (entered into force May 26, 2001)

<sup>83</sup> *The Southern Africa Litigation Centre v The Minister of Justice and Constitutional Development and Others*, Case No. 27740/2015 para 1.