

South Africa and the ICC: A Partnership under Pressure

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Dear Editor,

The President of Sudan, Omar Al-Bashir attended the African Union Summit in Johannesburg in June 2015. Al-Bashir is the subject of two arrest warrants issued by the International Criminal Court (the Court) in relation to war crimes, crimes against humanity and genocide allegedly committed during the Darfur conflict.¹ However, despite South Africa's ratification of the Rome Statute,² and its implementation in domestic law,³ the South African authorities failed to detain Al-Bashir. This failure not only epitomises the increasing division between African states and the Court but has once again demonstrated the lack of clarity surrounding the interaction of the Rome Statute and the principle of Head of State immunity in international law.

Prior to the visit of Al-Bashir the Court contacted the Embassy of South Africa in the Netherlands, reminding South Africa of its obligation under the Rome Statute to surrender Al-Bashir to the Court. However, on the eve of Al-Bashir's visit, South Africa sought consultations

¹ The first arrest warrant was issued against President Al-Bashir on 4 March 2009 while the second arrest warrant was issued on 12 July 2010. President Al-Bashir is allegedly criminally responsible for five counts of crimes against humanity, two counts of war crimes and three counts of genocide <https://www.Court-cpi.int/en_menus/Court/situations%20and%20cases/situations/situation%20Court%200205/related%20cases/Court02050109/Pages/Court02050109.aspx> accessed 2 January 2016.

² South Africa deposited its instrument of ratification of the Rome Statute on 27 November 2000 <https://www.Court-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/south%20africa.aspx> accessed 2 January 2016.

³ The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, see Dire Tladi, 'The Duty on South Africa to Arrest and Surrender Al-Bashir under South African and International Law: Attempting to Make a Collage from an Incoherent Framework' (Law Society of South Africa, July 2015) <www.derebus.org.za/wp-content/uploads/2015/07/Dire-Tladi.pdf> accessed 2 January 2016.

under Article 97 of the Rome Statute indicating that they believed there existed ‘problems which may impede’ their ability to fulfil the request of the Court for the surrender and arrest of Al-Bashir.⁴ South Africa contended that tension existed between Head of State immunity under international law and the applicability of Article 98 of the Rome Statute. However, both Pre-Trial Chamber II of the Court⁵ and the North Gauteng High Court of Pretoria confirmed South Africa’s obligation to take immediate steps to arrest and surrender Al-Bashir.⁶ The rejection by the South African authorities of both the international and domestic position has initiated a bitter legal and political dispute between Pretoria and The Hague, culminating in the statement that South Africa intended to ‘review’ its membership of the Court.⁷

In light of high profile arrest warrants issued against sitting African leaders such as Al-Bashir and President Kenyatta of Kenya, Head of State immunity has been a central facet of the increasing tension between the Court and African States.⁸ While Article 27 of the Rome Statute removes the traditional immunities offered to Heads of State under international law, this applies only in relation to State parties to the Rome Statute.⁹ In the case of Sudan, a non-state party, the issue becomes more complex. However while the Court has consistently affirmed that Head of State immunities offer no protection to Al-Bashir from arrest and surrender by

⁴ Article 97 of the Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90.

⁵ ICC-02/05-01/09-242, 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 (13 June 2015).

⁶ *Southern African Litigation Centre v Minister of Justice and Constitutional Development and Others*, Case Number 27740/2015, 23 June 2015. The South African government was recently denied leave to appeal the decision in this case, South African Litigation Centre, ‘News Release: State Denied Leave to Appeal Bashir Case’ (16 September 2015) <<http://www.southernafricalitigationcentre.org/2015/09/16/news-release-state-denied-leave-to-appeal-bashir-case/>> accessed 2 January 2016.

⁷ Bill Corcoran, ‘South Africa to consider withdrawing from the International Criminal Court’ *The Irish Times* (Dublin, 25 June 2015) <<http://www.irishtimes.com/news/world/africa/south-africa-to-consider-withdrawing-from-international-criminal-court-1.2263125>> accessed 2 January 2016.

⁸ For an elaboration on these proceedings see Manisuli Ssenyonjo, ‘The Rise of the African Union Opposition to the International Criminal Court’s Investigations and Prosecutions of African Leaders’ (2013) 13 *International Criminal Law Review* 385. It should be noted that the prosecution of President Kenyatta of Kenya was terminated without prejudice to the possibility of bringing proceedings at a late date, ICC-01/09-02/11-1005, Decision on the withdrawal of charges against Mr Kenyatta (13 March 2015).

⁹ Article 27 of the Rome Statute provides that official capacity cannot exempt a person from criminal responsibility under this Statute.

Member States of the Court, it is unfortunate that two divergent lines of reasoning have developed in an attempt to justify this position.

In proceedings against Malawi and Chad for the failure to arrest Al-Bashir while on their territories, the Court found an exception to Head of State immunities in customary international law where the individual concerned was sought by an international court for the commission of international crimes.¹⁰ However, it is difficult to conclude that this approach withstands scrutiny. Article 98 of the Rome Statute specifically requires a waiver to be sought where the surrender of an individual to the Court would be inconsistent with the diplomatic immunity of a person of the non-state party. Therefore, the Court's approach appears to strip Article 98 of any useful purpose.¹¹ One may question whether this contradiction may have initiated the new line of reasoning developed in proceedings involving the Democratic Republic of the Congo, as reiterated in the South African dispute. Although Sudan is not a State party to the Rome Statute, the situation in Darfur was referred to the Court by the UN Security Council, as is provided for under Article 13 of the Rome Statute. The Court used the nature of the proceedings against Al-Bashir as the basis for the non-applicability of traditional immunities, concluding that Security Council Resolution 1593(2005) had, 'implicitly waived the immunities granted to Omar Al Bashir under international law'.¹² This volte-face by the Court on the rationale for the immateriality of Head of State immunities was reached without any reference to previous decisions. While the Court is not a precedential body, an entirely new legal justification for this

¹⁰ ICC-02/05-01/09-140, 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 (13 December 2011); ICC-02/05-01/09-139 Decision pursuant to article 87(7) of the Rome Statute on the refusal of 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 (12 December 2011).

¹¹ Dapo Akande, 'ICC Issues Detailed Decision on Bashir's Immunity (... At Long Last ...) But Gets the Law Wrong' (European Journal of International Law: Talk!, 5 December 2011) < <http://www.ejiltalk.org/Court-issues-detailed-decision-on-bashir%E2%80%99s-immunity-at-long-last-but-gets-the-law-wrong/> > accessed 2 January 2016.

¹² ICC-02/05-01/09-195, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court (9 April 2014).

controversial conclusion is unwelcome given the precarious nature of the relationship between Africa and the Court.

Therefore, although the Court appeared dismissive of South Africa's arguments, it is impossible to conclude that this saga is likely to be resolved in the near future. Proceedings are continuing within the domestic appellate structure in South Africa and thus proceedings before the Court concerning South Africa's failure to comply with the order to arrest and surrender Al-Bashir have been delayed.¹³ Furthermore, while he ultimately decided not to travel, the holding of the Forum on China-Africa Cooperation in South Africa last December demonstrated that the prospect of Al-Bashir returning to South Africa remained.

However, if one takes a more overarching view of this dispute it once again illustrates the crumbling relationship between Africa and the Court. While the African Union has long opposed cooperation with the Court in relation to the arrest and surrender of Al-Bashir, South Africa initially declined to adopt the African Union's standpoint.¹⁴ Indeed in 2009 the South African government stated, '[i]f today President Bashir landed in the country ... he would have to be arrested'.¹⁵ This change of approach by South Africa heightens concerns surrounding the future of the Court on the African continent. While the work of the Court in seeking to end the impunity enjoyed by those who have committed the most serious of international crimes deserves great praise, the same cannot be said for its conflicting and unconvincing legal reasoning. While it would be disingenuous to reduce African opposition to the Court to concerns over legal reasoning, a more coherent line of jurisprudence could constitute a first

¹³ ICC-02/05-01/09-253, Prosecution request for it to be heard should the domestic legal proceedings in the Republic of South Africa not be finalised by 31 December 2015, and for confirmation of South Africa's continuing obligations to arrest and surrender Omar Al Bashir and for reclassification of filings (26 October 2015).

¹⁴ Assembly/AU/Dec245(XIII) Rev1.

¹⁵ Notes following the Briefing of Department International Relations and Cooperation's Director-General, Ayanda Ntsaluba (2 August 2009) <<http://sanews.gov.za/world/notes-following-briefing-department-international-relations-and-cooperations-director-general>> accessed 2 January 2016.

step in addressing the concerns of African states, providing more solid legal foundation for the difficult political discussions that appear inevitable in the future.

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