

## South Africa's Refusal to Arrest Omar Al-Bashir

By Windell Nortje

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### 1. South Africa's Challenge to the ICC

The International Criminal Court ('ICC') finds itself in a precarious situation having to rub shoulders with international political actors when ensuring that international justice is served.<sup>1</sup> Although the Omar Al-Bashir debacle has mainly focused on States Parties that have failed to arrest him, it is encouraging that the ICC has not lost hope in his prosecution. Most recently, on 11 December 2017, the ICC referred Jordan's failure to arrest Al-Bashir to the ICC Assembly of States Parties ('ASP') and the UN Security Council, again confirming the ICC's role in fostering and protecting international criminal justice.

South Africa's interaction with Al-Bashir deserves special mention because of her judicial involvement in the case and the implications for her status as an ICC State Party. In July 2017, the ICC decided that South Africa had a duty under the ICC Statute to arrest Sudan's President, Al-Bashir, during his visit to South Africa in 2015. After its failure to arrest Al Bashir, South Africa initiated the process to withdraw from the ICC. Even before the Government hinted at withdrawing, Tadesse and Vesper-Gräske anticipated a withdrawal in *FICHL Policy Brief Series* No. 56, because of the tension caused by this failure.<sup>2</sup> The Government had to revoke the withdrawal following a South African court declaring it un-

constitutional.<sup>3</sup> However, in December 2017, the Government announced to the ASP that it will again attempt to withdraw from the ICC.<sup>4</sup>

Will the legal responses to South Africa's refusal to arrest Al-Bashir motivate other States Parties to adhere to their legal obligations under the ICC Statute? Should the immunity of a Head of State prevent the ICC from prosecuting these individuals for the commission of crimes under international law? Such questions have been at the forefront of the ongoing discourse about Africa and the ICC.<sup>5</sup> South Africa's recent stance against the ICC could be detrimental to the future of the Court.

### 2. The Al-Bashir Arrest Warrant and the Claim of Immunity

The case of Al-Bashir presents a unique situation of an incumbent leader who has used his immunity as Head of State to its fullest extent. Al-Bashir has been a target of the ICC for almost a decade now. The first arrest warrant against Al-Bashir was issued in 2009 for the alleged commission of war crimes and crimes against humanity,<sup>6</sup> and was followed by a second warrant for genocide issued in 2010.<sup>7</sup> Sudan, unlike South Af-

<sup>1</sup> See, generally, ZHU Dan, "Who Politicizes the International Criminal Court?", *FICHL Policy Brief Series* No. 28, Torkel Opsahl Academic EPublisher, Brussels, 2014 (<http://www.legal-tools.org/doc/d133ca/>).

<sup>2</sup> See Marshet Tadesse Tessema and Marlen Vesper-Gräske, "Africa and the African Union and the International Criminal Court: Irreparable Fissures?", *FICHL Policy Brief Series* No. 56, Torkel Opsahl Academic EPublisher, Brussels, 2016, p. 4 (<http://www.legal-tools.org/doc/17de1f/>). See also Mutoy Mubiala, "Regional v. Universal Jurisdiction in Africa: The Habré Case", *FICHL Policy Brief Series* No. 74, Torkel Opsahl Academic EPublisher, Brussels, 2016, p. 4 (<http://www.legal-tools.org/doc/b478aa/>). Of the many voices advising against withdrawal by African States, Christopher B. Mahony's may be the more incisive in his argument that African governments are better served by wielding influence over case selection as States Parties, see "If you're not at the table, you're on the menu: Complementarity and Self-Interest in Domestic Processes for Core International Crimes", in Morten Bergsmo and SONG Tianying (eds.): *Military Self-Interest in Accountability for Core International Crimes*, Torkel Opsahl Academic EPublisher, Brussels, 2015 (<http://www.legal-tools.org/doc/0b06df/>).

<sup>3</sup> See *Democratic Alliance v Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening)*, 2017 (1) SACR 623 (GP), 22 February 2017 (<http://www.legal-tools.org/doc/6353b7/>).

<sup>4</sup> Max du Plessis, "South Africa's latest threat to withdraw from the ICC, or, How to Squander Leadership", in *Daily Maverick*, 11 December 2017 (<http://www.legal-tools.org/doc/1ba5e8/>).

<sup>5</sup> See, generally, Tessema and Vesper-Gräske, 2016, *supra* note 2; Mubiala, *supra* note 2; Gerhard Werle and Moritz Vormbaum (eds.), *The African Criminal Court: A Commentary on the Malabo Protocol*, T.M.C. Asser Press, The Hague, 2017.

<sup>6</sup> ICC, *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (hereinafter 'Al-Bashir'), Pre-Trial Chamber ('PTC'), Decision on the Prosecution's Application for a Warrant of Arrest, 4 March 2009, ICC-02/05-01/09-3 (<http://www.legal-tools.org/doc/e26cf4/>). This warrant contains two counts of war crimes and four counts of crimes against humanity.

<sup>7</sup> *Al-Bashir*, PTC, Second Warrant of Arrest, 12 July 2010, ICC-02/05-01/09-95 (<http://www.legal-tools.org/doc/307664/>). This warrant contains three counts of genocide. Al-Bashir is the only person who has been charged with war crimes, crimes against humanity as well as genocide before the ICC. See Manuel J. Ventura, "Escape from Jo-

rica, is not an ICC State Party, so the Court's jurisdiction was triggered under Article 13(b) of its Statute:<sup>8</sup> the situation in Darfur in Sudan was referred to the ICC by the UN Security Council. Yet, the issue of co-operation with the ICC has been somewhat blurred by the matter of immunity, especially when raised by an incumbent Head of State.

The ICC arrest warrant against Al-Bashir challenged the perception that Heads of State are immune from prosecution. This marked the first time where the ICC targeted a Head of State for the alleged commission of crimes under international law. Yet, individual criminal responsibility faces a real hurdle when a Head of State thinks that he or she can stay immune from prosecution. While the African Union's ('AU') broad acceptance of the establishment of an African Criminal Court at the 2014 AU Summit in Malabo (Equatorial-Guinea) was encouraging, the mechanism includes a peculiar section concerning immunity for Heads of State. The Malabo Protocol,<sup>9</sup> which provides for the establishment of this jurisdiction, includes immunity for all serving Heads of State, including Al-Bashir.<sup>10</sup>

### 3. South Africa's Failure to Arrest Al-Bashir

Al-Bashir narrowly escaped arrest in June 2015 while he was attending an AU conference in Johannesburg, South Africa. While Al-Bashir was still at the Summit, a South African court decided that he should be arrested pursuant to the ICC's arrest warrant. On 13 June 2015, the South African Litigation Centre applied to the North Gauteng High Court in Pretoria for an order preventing Al-Bashir from leaving the country. It argued that the South African Government had a duty to arrest Al-Bashir pursuant to the ICC arrest warrant and in accordance with the Implementation Act of the ICC Statute.<sup>11</sup> The respondents, the South African Minister of Justice and Constitutional Development and others, argued that the Cabinet granted immunity to Al-Bashir which trumped the ICC arrest warrant and South Africa's duty to fulfil it.<sup>12</sup> The next day, Judge Fabricius issued an interim order compelling the respondents to prevent Al-Bashir from leaving South Africa until the Court made a final order.<sup>13</sup> The Court pointed out that South Africa was a State Party to the ICC and that it had

a duty to follow the ICC Statute.<sup>14</sup> The Court also mentioned that Al-Bashir was invited for President Zuma's presidential inauguration in 2009 but declined to attend since South African officials made it very clear that Al-Bashir would be arrested upon his arrival in South Africa.<sup>15</sup> This indicated that South Africa adhered to its duties as a State Party in the past.

It is encouraging to see an African domestic court challenge the actions of the executive of an African State Party.

### 4. The ICC's Response

On 6 July 2017, Pre-Trial Chamber II of the ICC addressed South Africa's failure to arrest and transfer Al-Bashir to the Court under Article 87(7) of the ICC Statute, which enables the Court to make a finding that a State Party to the ICC has failed to co-operate with the Court. Among other things, South Africa contended that it did not have a duty to arrest Al-Bashir on account of his immunity based on (i) customary international law and (ii) the Host Agreement between South Africa and the AU for the purposes of the 2015 AU Summit, which granted immunity to certain members of the AU Commission.<sup>16</sup>

The Chamber first rejected the latter argument, since Al-Bashir attended the summit as the Head of State of Sudan, not as a member of the AU Commission.<sup>17</sup> It then considered the arguments by South Africa related to customary international law. Generally, it conceded that there is no rule under customary international law that excludes the immunity of Heads of State when their arrest is sought by another State or by an international court such as the ICC.<sup>18</sup> That said, the Chamber stressed that the main consideration in this case was not whether such immunity would bar the Court from exercising its jurisdiction, but whether South Africa had a duty to arrest Al-Bashir,<sup>19</sup> which would turn on the interpretation of Articles 27(2) and 98(1) of the ICC Statute.<sup>20</sup>

To begin with, whereas South Africa contended that Article 27(2)<sup>21</sup> only excluded the immunity of Heads of State from the Court's jurisdiction but not from arrest by a State Party,<sup>22</sup> the Chamber held that the drafters of the Statute would have

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hannesburg? Sudanese President Al-Bashir Visits South Africa, and the Implicit Removal of Head of State Immunity by the UN Security Council in Light of Al-Jedda", in *Journal of International Criminal Justice*, 2015, vol. 13, p. 996.

<sup>8</sup> See William A. Schabas and Giulia Pecorella, "Article 13: Exercise of jurisdiction", in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd edition, C.H. Beck, Munich, 2016, pp. 696–697.

<sup>9</sup> Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) (<http://www.legal-tools.org/doc/05252d/>).

<sup>10</sup> *Ibid.*, Article 46Abis ("No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office").

<sup>11</sup> *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others*, 2016 (1) SACR 161 (GP), paras. 1–4 (<http://www.legal-tools.org/doc/34b2e9/>).

<sup>12</sup> *Ibid.*, para. 5.

<sup>13</sup> See *ibid.*, para. 2. See also Ventura, see *supra* note 7, pp. 1001–1005.

<sup>14</sup> The 2002 Implementation Act (<http://www.legal-tools.org/doc/116bcd/>) was enacted in accordance with the Constitution of the Republic of South Africa, 1996 (<http://www.legal-tools.org/doc/f71c28/>), Section 231(4) of which provides that: "Any international agreement becomes law in the Republic when it is enacted into national legislation".

<sup>15</sup> See *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others*, see *supra* note 11, para. 12.

<sup>16</sup> *Al-Bashir*, PTC, Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, 6 July 2017, ICC-02/05-01/09-302, para. 65 (hereinafter 'Article 87(7) Decision') (<http://www.legal-tools.org/doc/68ffc1/>).

<sup>17</sup> *Ibid.*, para. 67.

<sup>18</sup> *Ibid.*, para. 68.

<sup>19</sup> *Ibid.*, paras. 69–70.

<sup>20</sup> *Ibid.*, para. 71.

<sup>21</sup> "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", see ICC Statute, 17 July 1998 (<http://www.legal-tools.org/doc/7b9af9/>).

<sup>22</sup> Article 87(7) Decision, para. 73.

done so expressly if this were the case.<sup>23</sup> In fact, the Chamber noted that if the ICC requests the arrest and transfer of a State Party's own Head, such a State should co-operate.<sup>24</sup>

Similarly, the Chamber rejected South Africa's contention that Article 98(1)<sup>25</sup> precluded the ICC from requesting compliance<sup>26</sup> because South Africa would otherwise have acted inconsistently with its obligations under international law, specifically Al-Bashir's immunity.<sup>27</sup> The Chamber first held that although Article 98(1) normally applies in respect of third States like Sudan, in the "*sui generis*" situation where, as here, jurisdiction is triggered upon a Security Council referral, "article 27(2) of the Statute applies equally with respect to Sudan, rendering inapplicable any immunity on the ground of official capacity belonging to Sudan that would otherwise exist under international law".<sup>28</sup> Second, in any event, Article 98(1) did not grant South Africa a right to refuse co-operation,<sup>29</sup> as it only "provides that it is the Court which shall not request co-operation until a waiver of the relevant immunity is obtained from the third State by the Court itself".<sup>30</sup>

The Chamber, in conclusion, held that Articles 27(2) and 98(1) do not exempt States Parties – in this case South Africa – from co-operating with the Court by arresting Al-Bashir.<sup>31</sup> However, the Chamber found that it was not necessary to refer South Africa's non-compliance to the ASP or the Security Council because, among other factors, the South African courts had already decided that South Africa breached its obligation.<sup>32</sup>

In relation to the Chamber's decision, it is submitted that notwithstanding the force of its legal reasoning, it is ultimately *political will* that affects whether a State Party co-operates with the ICC, something that was clearly lacking in the Kenyan and Sudanese situations before the ICC.<sup>33</sup> South Africa's refusal again highlighted the point that Article 27(2) cannot be enforced without the co-operation of States Parties.

## 5. Judge Perrin de Brichambaut's Minority Opinion

Judge Marc Perrin de Brichambaut, one of the three ICC judges hearing the matter, issued a ground-breaking minority opinion on various aspects of the decision. He did so since the majority was of the view that the 1948 Convention on the Prevention and Punishment of the Crime of Genocide does

not deal with Heads of State and is therefore not relevant to the case.<sup>34</sup>

Judge Perrin de Brichambaut held that the States Parties to the Genocide Convention have an obligation in accordance with Article IV to punish all perpetrators of genocide, including "constitutionally responsible rulers" which the judge found to include Heads of State.<sup>35</sup> The judge also stated that Sudan has a responsibility under the Genocide Convention to prosecute Al-Bashir and that immunity should not be a bar to prosecution.<sup>36</sup> The genocide charges instituted against Al-Bashir mean that he is no longer protected by his immunity as Head of State of Sudan, a State Party to the Genocide Convention.<sup>37</sup>

It is submitted that Judge Perrin de Brichambaut correctly concluded that Sudan and South Africa had a duty under the Genocide Convention to arrest and transfer Al-Bashir to the ICC. It is hoped that the ICC will consider the importance of the Genocide Convention in relation to Head of State immunity when it deals with the crime of genocide in future cases. The Court should give proper effect to this foundational instrument of the international legal order.

## 6. The Non-compliance of Jordan Raises the Stakes for the Court

On 11 December 2017, the same ICC Pre-Trial Chamber rendered a decision concerning Jordan's refusal to arrest and transfer Al-Bashir to the ICC after he attended an Arab League Summit in Amman, Jordan in March 2017.<sup>38</sup> Jordan submitted, among other things, that Al-Bashir enjoyed immunity under (i) customary international law and (ii) Article 11 of the 1953 Convention on the Privileges and Immunities of the Arab League ('1953 Convention').<sup>39</sup> Like South Africa, it stated that it would have violated immunity under both if it arrested Al-Bashir.<sup>40</sup> In response, the ICC Prosecutor referred to the previous occasions dealing with the immunity of Al-Bashir and submitted that Jordan should have arrested Al-Bashir under such clear and unambiguous obligation.<sup>41</sup>

The majority of the Chamber (with Judge Perrin de Brichambaut again attaching a minority opinion) held that Al-Bashir could not raise immunity under the 1953 Convention

<sup>23</sup> *Ibid.*, para. 74.

<sup>24</sup> *Ibid.*, para. 77.

<sup>25</sup> "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", see *supra* note 21.

<sup>26</sup> Article 87(7) Decision, para. 32.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*, para. 91, see generally paras. 82–97.

<sup>29</sup> *Ibid.*, para. 104.

<sup>30</sup> *Ibid.*, para. 105.

<sup>31</sup> *Ibid.*, para. 107.

<sup>32</sup> *Ibid.*, para. 139.

<sup>33</sup> See Sosteness Francis Materu, *The Post-Election Violence in Kenya: Domestic and International Legal Responses*, T.M.C. Asser Press, The Hague, 2015, p. 7.

<sup>34</sup> Minority Opinion of Judge Marc Perrin de Brichambaut, in *ibid.*, Annex, para. 1 (<http://www.legal-tools.org/doc/423e80/>), referring to Article 87(7) Decision, para. 109.

<sup>35</sup> *Ibid.*, para. 37.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*, para. 38.

<sup>38</sup> See *Al-Bashir*, PTC, Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender or [sic] Omar Al-Bashir, 11 December 2017, ICC-02/05-01/09-309 (<http://www.legal-tools.org/doc/5bdd7f/>).

<sup>39</sup> *Ibid.*, para. 14. Article 11 of the Convention states that "Representatives of Member States to the principal and subsidiary organs of the League of Arab States and to conferences convened by the League shall, while exercising their functions and during the journey to and from the place of meeting, enjoy the following privileges and immunities: (a) Immunity from personal arrest or detention and from seizure of their personal effects; [...]"

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

<sup>41</sup> *Ibid.*, para. 20.

as it was not established that Sudan was a party thereto.<sup>42</sup> It then reaffirmed, following similar logic in the South African decision, that States Parties of the ICC are under an obligation to arrest and transfer any person wanted by the Court, and that in any event no immunities perceivably attached to such a person should prevent the State Party from co-operating with the ICC.<sup>43</sup>

What makes the non-compliance case against Jordan noteworthy, however, is that unlike the previous cases, the Chamber did decide to refer the matter to the ASP and the Security Council. This may be a signal from the Court that it will not deal lightly with States Parties that fail to co-operate with the Court. Indeed, the ASP and the Security Council would ideally take the opportunity to address the matter of Head of State immunity and send a clear message to ICC States Parties and other States that individuals who commit crimes under international law should be prosecuted without immunity.

While it remains to be seen whether Jordan will be sanctioned for its non-compliance, this could be a starting point to hold States Parties accountable for their actions. The risk, however, is that the sanctioned States might withdraw from the ICC, as the sanction could be perceived as an affront to sovereignty. It will be interesting to follow the case of Jordan, a country that has consistently punched above its weight in ICC politics. Jordanian Prince Zeid Ra'ad Al Hussein – the UN High Commissioner for Human Rights since September 2014 – played a prominent role during the ICC negotiations and, with the strong support of some countries, became the first President of the ASP. He exercised significant influence during the establishment of the Court. The literature indicates that he was decisive in securing the election of the controversial first Prosecutor.<sup>44</sup> The current tension between his country and the ICC must be of particular interest to him. Given the limited acceptance of the Court in the Middle East and North Africa, the Jordanian government's position holds great importance for the Court. Jordan's appeal filed on 18 December 2017 claims multiple errors, including translation errors by the Court.<sup>45</sup>

<sup>42</sup> *Ibid.*, para. 30.

<sup>43</sup> *Ibid.*, para. 39.

<sup>44</sup> See Christopher B. Mahony, "The Justice Pivot: U.S. International Criminal Law Influence from Outside the Rome Statute", in *Georgetown Journal of International Law*, 2015, vol. 46, no. 4, pp. 1085–1086, 1097 (<http://www.legal-tools.org/doc/4b7144/>).

<sup>45</sup> See *Al-Bashir*, PTC, The Hashemite Kingdom of Jordan's Notice of Appeal of the Decision under Article 87(7) of the Rome Statute on the Non-Compliance by Jordan with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir; or, in the Alternative, Leave to Seek Such an Appeal, 18 December 2017, ICC-02/05-01/09-309 (<https://www.legal-tools.org/doc/c5f6ff/pdf/>).

## 7. South Africa's Withdrawal Would be a Terrible Loss for the ICC

The developments since 2015 have put South Africa's relationship with the ICC under tremendous strain. On 6 December 2017, the Minister of Justice, Michael Masutha, delivered a speech to the ASP signalling South Africa's intention to withdraw from the ICC. He stated that "South Africa's continued membership to the Rome Statute, as it is currently interpreted and applied, carries with it the potential risk of undermining its ability to carry out its peace-making mission efforts in Africa, and elsewhere".<sup>46</sup> What makes this latest threat of withdrawal so real is that it will be tabled at Parliament unlike the previous withdrawal, which was held unconstitutional. This is a serious challenge to the function and future of the ICC, as South Africa has been in the frontline of the advancement of international criminal law since the 1990s, and some of her citizens have played such prominent roles in international criminal justice. A withdrawal could be a final nail in the coffin of the already frail relationship between Africa and the ICC. However, on 18 December 2017, Cyril Ramaphosa was elected new President of the ruling African National Congress Party, a move that could hamper President Zuma's efforts to withdraw from the ICC.

It would be a terrible loss if South Africa were to withdraw from the ICC, not only because of the history of the country, but also due to the contribution of her jurisprudence to the international criminal law discourse and the development of rule of law in Africa. The ICC Prosecutor should carefully consider the overall situation in a State before initiating proceedings that could be seen as an affront to sovereignty, and only proceed when on rock-solid ground. The challenge for the international community is how to balance the requirements of international criminal justice with international politics, a dilemma that will not go away.

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<sup>46</sup> Department of Justice and Constitutional Development of the Republic of South Africa, Opening Statement by Adv. Tshililo Michael Masutha, MP, Minister of Justice and Correctional Services, Republic of South Africa, General Debate: Sixteenth Session of the Assembly of States Parties of the International Criminal Court, New York, 4-14 December 2017 (<http://www.legal-tools.org/doc/067eee/>).