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South Africa, the Rome Statute and the International Criminal Court Implications for President Omar al Bashir's May 2015 Visit

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Abstract: **The May 2015 pulsating development in South Africa's international legal history has shown the world that for almost all African states, signing and ratifying statutes is one thing, and implementation is another. South Africa was the last state standing, all international hopes being on South Africa that the government would arrest Omar al Bashir if he sets foot in that country. Other African states that are signatories and ratifiers of the Rome Statute had flinched from arresting and surrendering Bashir to the International Criminal Court, such as Chad, Nigeria, Ethiopia, Eritrea, Djibouti, Malawi and Kenya. South Africa, which is regarded as a mature and stable democracy in Africa, astonishingly followed the African Union's unity in defiance action by surreptitiously letting Omar al Bashir off the legal apocalyptic hook, violating its municipal and international legal provisions. Considering that the African Union had openly disassociated itself from the International Criminal Court, and South Africa speaking louder with actions rather than words, this paper moves that South Africa's defiant action finally exposed Africa's legal decadence and constituted a dreadful miscarriage of international justice. Politically, what the South African government did was commendable, but legally the government violated its municipal and international law provisions. This action has also finally led to the death of the International Criminal Court in Africa.**

Keywords: **South Africa, International Criminal Court, African Union's unity, politically, international justice.**

I. OVERVIEW

"There is nothing new about President al-Bashir attending African Union Summits ... the African Union does things according to its own rules, not according to the rules of the International Criminal Court" – Doctor Nkosazana Dhlamini Zuma – The African Union Commission Chairperson.

Sudan is not a signatory of the Rome State that created the international Criminal Court. The United Nations Security Council (UNSC) whose powers were conferred to it by the Statute of Rome, referred the situation in Darfur (Resolution 1593), under chapter VII of the United Nations Charter leading to the indictment of Sudanese President Omar Hassan Ahmad al Bashir on charges of war crimes and crimes against humanity. The Statute of Rome nullifies any form of immunities for sitting and former state officials such as heads of states and government, whilst the Diplomatic Immunities and Privileges Act of 2001, Section 5 (3) grants such immunities. The UNSC Darfur referral and the sending of arrest warrants to President Bashir has caused a legal quagmire which has fermented up to the severance of relations between the International Criminal Court (ICC) and Africa, reaching its political and legal apogee. South Africa, which signed and ratified the Rome Statute, was legally supposed to abide by its municipal and international law regulations by arresting, indicting or surrendering Omar al Bashir to the ICC upon his arrival in Johannesburg. The triumphant entry and exeunt of President Bashir in and out of South Africa with impunity was a slap in the face and a stab at the back for the ICC, a court that was already experiencing extensive legal polarization between itself and the African Union. The Darfur referral by the UNSC thus brought matters to a tragic head as the legal impasse between Africa and the ICC has taken a nose dive.

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II. SOUTH AFRICA AND THE ROME STATUTE

On 17 July 1998 South Africa signed and ratified the Statute of Rome, becoming the first African state to incorporate the International Criminal Court (ICC) statute into its domestic law. Du Plessis notes that, "On 17 July 1998 South Africa signed and ratified the Rome Statute of the International Criminal Court, thereby becoming the 25th State Party. To domesticate the obligations in the Rome Statute, South Africa's parliament drafted The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, which became law on 16 August 2002. The passing of the ICC Act was momentous: prior to the Act, South Africa has no domestic legislation on the subject of war crimes or crimes against humanity and no domestic prosecutions of international crimes had taken place in this country. The ICC Act is the means by which to remedy that failure, and is in any event the domestic legislation that South Africa (as a State Party to the Rome Statute) was legally obliged to pass in order to comply with its duties under the Statute's complementarity scheme".[1] The Rome Statute's jurisdiction is embedded in both territorial and nationality principles. This means that perpetrators of non-states parties to the Statute of Rome may be liable to arrest and prosecution if they commit crimes within the jurisdiction of the ICC in the territories of states parties (territorial). On the other hand, nationals of states parties may also be prosecuted if they commit crimes within the jurisdiction of the ICC in other states parties to the Rome Treaty (nationality).

South Africa was the first state in Africa to incorporate the ICC Statute into its domestic law, and the ICC Act is a very progressive example of implementing legislation – allowing for the potential prosecution of international crimes, wherever and by whoever they may be committed (Section 4 (3) © of the ICC Act which extends jurisdiction to a person who, "after the commission of the crime, is present in the territory of the Republic and which thus provides South African courts with universal jurisdiction).[2] In this case, Sudanese President Omar Al Bashir was present in the Republic of South Africa in his May 2015 visit to attend the 25th African Union Summit. The failure to arrest and indict Bashir was tantamount to breaching its municipal and international legal obligations. This action may also be construed as unsigning and unratifying the statute of Rome, which the African Union has seemingly adopted in unison.

International criminal law is no longer something 'out there'. It has been brought home by the ICC Act, and has the potential to be increasingly used before South Africa's courts.[3] The Bashir legal debacle however proved that for South Africa, International Criminal Law remains practically an 'out there' phenomenon, and a theoretically 'in here' phenomenon. It is still a mirage in South Africa. South Africa proved to be a theoretical state that lacks pragmatism. By signing and ratifying the Rome Statute, South Africa domesticated the Statute of Rome into its municipal law so as to be able to prosecute ICC crimes of genocide, war crimes, and crimes against humanity, crimes of aggression and the crimes against the administration of justice, before a South African court. Under the Rome Statute's complementarity regime, the preamble, for example, notes of South Africa's commitment to bring persons who commit such atrocities to justice in a court of law of the Republic in terms of its domestic law where possible. Omar al Bashir could however not be brought to a court of law, allegedly tainted with illegality concerning the situation in Darfur, facing charges of war crimes as well as crimes against humanity.

Section 3 of the Act defines as one of its objects the enabling:

"… as far as possible and in accordance with the principle of complementarity …, the national prosecuting authority of the Republic to prosecute and the High Courts of the Republic to adjudicate in cases brought against any person accused of having committed a crime in the Republic and beyond the borders of the Republic in certain circumstances".[4] The Preamble provides the paradigm to the enactment of the ICC Act. It states that the Republic of South Africa is committed to: "bringing persons who commit such atrocities to justice, either in a court of law of the Republic in terms of its domestic laws where possible, pursuant to its international obligations to do so when the Republic became party to the Rome Statute of the International Criminal Court, or in the event of the national prosecuting authority of the Republic

[1] Du Plessis, M. 2008. "South Africa's International Criminal Court Act. Countering Genocide, War Crimes and Crimes against Humanity". *Institute for Security Studies paper 172*.
[2] Ibid, 1
[3] Ibid, 1
[4] Cited in Ibid, 1

declining or being unable to do so, in line with the principle of complementarily as contemplated in the Statute, in the International Criminal Court, created and functioning in terms of the said statute, and carrying out its other obligations in terms of the said Statute …"[5]

Regrettably, the South African government in this case neither brought President Bashir to a court of law in South Africa nor was committed to its obligations to bring such a perpetrator to book in its municipal courts as stipulated by the Rome Statute's complementarity principle. The Republic of South Africa's National Prosecuting Authority (NPA) was also impotent to expedite the indictment of President Bashir. It can thus be asserted that South Africa's action constituted unwillingness to arrest and prosecute Omar al Bashir. Since this was South Africa's first acid test to arrest and prosecute a perpetrator of international crimes of an egregious nature, the government can no longer be trusted in future and reliance can therefore not be placed upon South Africa to prosecute heinous international crimes.

The Preamble stipulates that South Africa has an international obligation under the Statute of Rome to bring the perpetrators of nefarious crimes to book in a South African court under municipal law where possible. The provision makes it clear that it favours the prosecution of international crimes, if needs be domestic prosecution in South Africa. The Act seeks to achieve, inter alia, the following aims:

- The first object of the Act recorded in section 3 (a) is to create a framework to ensure that the Rome Statute is effectively implemented in South Africa.
- The second object of the Act recorded in section 3 (b) is to ensure that anything done in terms of the ICC Act conforms to South Africa's obligations under the Rome Statute, including its obligation to prosecute the perpetrators of crimes against humanity referred to above.
- Another object of the Act recorded in section 3 (d), is to enable South Africa's NPA to prosecute and the higher courts to adjudicate in cases against people accused by having committed crimes against humanity, both inside South Africa and beyond its borders.[6]

All these above provisions were violated by the government of South Africa when President Bashir visited the country, allegedly tainted with illegality of egregious crimes against humanity and war crimes. South Africa's quest to effectively implement the Rome Statute under these circumstances therefore naturally falls away. Although any prosecution under the ICC Act may only be brought with the consent of the National Director of Public Prosecutions (NDPP), he is obliged in terms of Section 5 (3), when he considers whether to institute such a prosecution, to: give recognition to the obligation that the Republic, in the first instance and in line with the principle of complementarity as contemplated in article 1 of the Statute, has jurisdiction and the responsibility to prosecute persons accused of having committed a crime.[7] Section 4 (1) of the ICC Act creates jurisdiction for a South African court over ICC crimes by postulating that, "[d]espite anything to the contrary in any other law of the Republic, any person who commits (an ICC) crime, is guilty of an offence and liable on conviction to a fine or imprisonment".[8] The South African government however legally misfired by shielding President Bashir. The government neither fined him nor imprisoned him, making a mockery of the Rome Statute that the government had promised to abide by.

Section 4 (3) of the Act provides for extra-territorial jurisdiction, which is also embedded in both territorial and national. That section stipulates South African courts will exercise their jurisdiction if a person commits an ICC crime outside the territory of the Republic of South Africa (nationality principle), and:

a) That person is a South African citizen (nationality); or

b) That person is not a South African citizen but is ordinarily resident in the Republic (national and territorial principles)

What the ICC Act does is to provide South Africa an opportunity – on the established basis of universal jurisdiction – to prosecute ICC crimes by its courts acting as an international surrogate for the ICC. It will be recalled that the ICC Act secures for a South African court jurisdiction over ICC crimes committed by a person outside South Africa where, in the

[5] Cited in Ibid, 1
[6] Ibid, 1
[7] Ibid, 1
[8] Ibid, 1

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wording of the section, "that person, after the commission of the crime, is present in the territory of the Republic". (ICC Act 2002: Section 4 (3) (c).[9] Regrettably, this is the complete opposite of what the South African government did by ignoring the arrest and trial of President Bashir who was actually present in the territory of the Republic. The South African government thus declined to make its municipal judicial institutions to act as surrogate courts of the ICC and hence breached the complementarity principle.

The concept of universal jurisdiction is well elucidated by Abi-Saab (2003), an international lawyer, who explains the concept of universal jurisdiction in relation to the international crime of piracy. Saab notes that Piracy is a criminal act that takes place in a space where there is no overall territorial sovereign. A state captures the pirate on the high seas or in its national waters. It may have no other connecting factor with the act of piracy or the pirate (not being a state of nationality of the pirate or of the flag of attacked ships or of the victims) except for being the place of capture, the forum deprehensionis. But the criminal acts are considered as injurious to the community at large, in view of the paramountcy of the perceived common interest in the security of maritime communications since the age of discoveries. In these circumstances, the state of capture is authorised, in spite of the absence of any of the traditional connecting factors, to prosecute the pirate, because it would not be acting in its own name uti singulus (which requires a special interest), but in the name of the community". (Abi-Saab, 2003: 599-600).[10] It is thus the act of capture, in the forum deprehensionis, that provides the state with the competence under international criminal law to prosecute the offender.[11]

The South African government also breached the public interest international legal norm by its failure to arrest and prosecute President Bashir. The fact that ICC crimes are the most egregious of all worldwide and the mother of all crimes, and given their devastating and destructive effect on peace and security, it appears that an investigation or prosecution of ICC crimes under the ICC Act should ordinarily follow and there must be convincing reasons of public interest to thwart such action by the prosecuting arm of government. It appears that in the South African situation there was no such compelling reason(s) to prevent such prosecutorial action. In deciding on what is in the public interest an overriding consideration ought to be the gravity of crimes such as genocide, crimes against humanity and war crimes, their universal condemnation and the international community's commitment to repressing them ...Similarly, south Africa's interest in not becoming a 'safe haven' for perpetrators of such crimes should form part of the overall 'public interest' in prosecuting such crimes.[12]

Therefore, South Africa can be justifiably said to have violated the public interest international legal norm because the world in general and South Africa in particular, there was public outcry and anticipation that President Bashir would meet justice upon his arrival at Oliver Tambo International Airport. By ignoring the arrest of Bashir, this decision was ultra-vires South Africa's municipal and international legal provisions and also a grave violation of the public interest norm.

III. COOPERATION WITH THE INTERNATIONAL CRIMINAL COURT

Under Part IX of the ICC Statute, States parties are obliged to cooperate fully with the court and to ensure that there are procedures available under their national law for all the forms of cooperation which are specified in part IX. Broadly speaking the South African ICC Bill aims at setting out the required national procedures for facilitating cooperation with the ICC in the two specified categories of judicial assistance with the arrest and surrender of persons in terms of article 89 and the areas of assistance in relation to investigations or prosecution covered by article 93 of the ICC statute[13] For the Republic of South Africa, this mandatory provision was again breached by the failure to arrest President Bashir. The Republic thus failed to cooperate with the court. The government neither provided any judicial assistance with the arrest and surrender of President Bashir, nor the provision of assistance in relation to investigations or prosecution covered by Article 93 of the Statute of the ICC.

As far as foreign heads of states and other dignitaries are concerned, immunity for official acts is regulated by the Foreign States Immunities Act 87 of 1981. However the immunity envisaged by this Act is unlikely to find application in cases

[9] Ibid, 1
[10] Cited in Ibid, 1
[11] Ibid, 1
[12] Ibid, 1
[13] Strydom, H. 2002. "South Africa and the International Criminal Court". *Max Planck Yearbook of United Nations Law*, Volume 6, 345-366

involving crimes under international law and committed by foreign government officials with the result that an amendment to the Immunities Act to reflect current developments in international criminal law is something the South African authorities ought to consider.[14] In this case, the South African government has already granted immunity in advance to all heads of state and government attending the 25th AU Summit, including President Bashir who was facing charges for international crimes.

Cooperation with the ICC in Enforcing Sentences:

The Rome Statute stresses that, "States Parties should share the responsibility for enforcing sentences of imprisonment, in accordance with principles of equitable distribution".[15] The ICC will have no prison, and states are therefore expected to volunteer their services, indicating their willingness to allow convicted persons to serve the sentence within their domestic penal institutions.[16] However, if no state offers or is ready to offer prison services to a convicted and sentenced perpetrator, the host state of the ICC (The Netherlands) will offer the prison services as according to Article 103 (4) of the Statute of Rome. South Africa does not have prisons that meet international recommended standards. Its prisons are squalid and overcrowded. If Bashir was arrested and convicted in South Africa, he was possibly going to serve his prison term elsewhere. The ICC Act of 2002 Section 31 provides that the Ministry of Correctional Services must consult with the cabinet and seek the approval of parliament with the aim of informing the ICC whether south Africa can be placed on the list of states willing to accept sentenced persons.

If the Republic of South Africa is thus placed on the list of states and is designated as a state in which an offender is to serve a prison sentence, then such a person must be committed to prison in South Africa. The provisions of the Correctional Services Act III of 1998 and South African Municipal law then apply to that individual. South Africa could thus have opted to institute litigation for President Bashir in its municipal courts. Because its prisons do not match the required international standards, it could have made Bashir serve his prison term in The Hague or elsewhere, if convicted. All these options were systematically evaded by the South African government when it ignored the arrest of President Bashir, letting the cat out of the bag.

IV. THE ROME STATUTE'S STANCE ON IMMUNITIES

The Rome Statute does not regard any form of immunities for anyone be it a sitting or former state official. Article 27 of the Statute of Rome stipulates that, "official capacity as a head of state or government, a member of a government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute". South African municipal law has also got into this international law groove by adopting the Rome Statute's tough stance by stipulating in Section 4 (2) (a) of the ICC Act that, "notwithstanding ... any other law to the contrary, including customary and conventional international aw, the fact that a person ... is or was a head of state or government, a member of a government or parliament, an elected representative or a government official ... is neither – (i) a defence to a crime, nor (ii) a ground for any possible reduction of sentence once a person has been convicted of a crime".

Basing on this Act therefore, the South African courts are thus conferred with the same power under the Rome Statute's complementarity principle to trump the immunities which usually are conferred to government officials by virtue of Article 27. President Bashir, as a sitting head of state, thus had no immunity basing on Article 27 of the Statute of Rome which nullifies any form of immunities for state officials or government representatives. He was this liable to arrest upon arrival at Oliver Tambo International Airport, and this is a legal obligation that the South African government ignored wantonly. Article 27 of the Statute of Rome seems to be scrapping off customary international law which traditionally grants immunity to current and former state officials. This therefore gives problems as to which legal course to pursue, implementing the Rome Statute (Article 27) on one side, whilst nullifying customary international law provisions on immunities in municipal jurisdictions, or nullifying Article 27 of the Rome Statute whilst upholding customary international law which upholds immunity to current and former state officials. States may thus be caught in a legal limbo as to which legal course to pursue.

[14] Ibid, 13
[15] See Article 103 (3)(a) of the Rome Statute as well as Rule 201 of the Rules of Procedure and Evidence
[16] Schabas, W.A 2007. *An introduction to the International Criminal Court (3rd Ed)*. Cambridge: University Press.

Dugard and Abraham have pointed out that Section 4 (2) (a) of the ICC Act represents a choice by the legislative to wisely not follow the 'unfortunate' Arrest Warrant decision, 'of which it must have been aware'. Support for an argument that Section 4 (2) (a) of the ICC Act does indeed scrap immunity, notwithstanding the contrary position under customary international law, comes from the constitution itself. Section 232 provides that '[c]ustomary international law is law in the Republic unless it is inconsistent with the constitution or an Act of Parliament.[17] South Africa therefore by ignoring the arrest of President Bashir seemed to regard customary international law which affords immunities to state officials rather than the Statute of Rome which scraps such immunities. The action may also be construed as consolidating the view that customary international law is really law in the Republic and is not inconsistent with the Republic's constitution or an act of parliament. It cannot thus be supplanted, overridden or nullified by Article 27 of the Statute of Rome.

V. THE INTERNATIONAL CRIMINAL COURT AND SUDAN

In 2005, the UNSC passed Resolution 1593 which referred the Sudanese situation to the ICC. Top of the list was the Sudanese President Omar Hassan Ahmad al Bashir. Firstly, it is the first time a sitting president has been investigated for international crimes before the ICC – an investigation made possible because Article 27 (1) of the Statute of Rome provides that functional immunity does not apply to any individual before the ICC, and this is specifically directed to heads of states and governments. Functional immunity denotes the acts of officials whilst they are still occupying the highest offices, and this may be upheld even if they leave office. It will thus survive cessation of office.[18] Other Sudanese government officials who are in the ICC indictment encourage are Bahr Abu Garda, Abdallah Banda, Ahmed Haroun, Saleh Jerbo and Ali Kushayb.

President Bashir, who is on the indictment vanguard, was indicted on five counts of crimes against humanity and two counts or war crimes in regard to the situation in Darfur. He was further charged with three counts of genocide on 12 July 2010. He is accused of intending to partially destroy the Fur, Masalit and Zaghawa ethnic groups by killings, 'causing serious bodily or mental harm, and deliberately inflicting conditions of life calculated to bring about physical destruction.[19] Article 27 (2) of the Statute of Rome, as earlier noted, stipulates that the traditional doctrine of personal immunity for sitting executives does not apply. There is a strong intellectual view that all states, whether parties or non-parties to the Rome Treaty but bound by the UN Charter, are mandated to accept the jurisdiction of the ICC if conferred by the UNSC. Therefore, the UNSC's decision to confer jurisdiction to the ICC is in consonant with the Rome Statute.

Another perspective on how Article 27 can be interpreted is to view it as offering waiver of immunity to officials of non-states parties such as Sudan and USA. The head of state of a non-state party such as Sudan or Israel thus might be entitled to such immunity under customary international law. On the contrary, heads of states which are states parties to the Statute of Rome such as Uganda or the Central African Republic cannot claim such immunity. It has led to the debates over the correct interpretation of the relationship between Article 27 and Article 98 of the Rome Statute. It appears the debate is far from over, and will continue until the ICC or the International Court of Justice (ICJ) gives a definite ruling.[20] Article 98 further stipulates that a state is not obliged to hand an individual over to the court if doing so would be inconsistent with its obligations under international law with respect to the state or diplomatic immunity of a person ... of a third state, unless the court can first obtain the cooperation of that third state for the waiver of the immunity. In this regard, Sudan can never surrender President Bashir to the ICC since he is the head of state and government and performs sovereign functions of the state. Arresting and surrendering him to the ICC will negatively affect the state's sovereign functions since the president and the state are inseparable in this regard.

In order to harmonize between Article 98 in order to give some life to Article 27, domestic courts have to strike a balance between the needs of international justice and the need to maintain stable international relations. In order to strike this

[17] Dugard, J and Abraham, G. 2002. Public International Law annual Survey of South African Law, in du Plessis, M. 2008. "South Africa's International Criminal Court Act. Countering Genocide, War Crimes and Crimes against Humanity". *Institute for Security Studies Paper 172*.

[18] Williams, S. and Sherif, L. 2009. "The Arrest Warrant for President al-Bashir: Immunities of Incumbent heads of State in the ICC" *The Journal of Conflict and security Law, 3 (5), 61-84.*

[19] Ibid, 18

[20] Du Plessis, M. 2010. "International Criminal Courts, the International Criminal Court, and South Africa's Implementation of the Rome Statute", in Dugard, J. 2010. *International Law: a South African Perspective*. Cape Town: Juta and Company.

balance, Simbeye suggests that, "Domestic systems will have to review the situation in three stages. The first stage involves a look at international crimes and the second, an analysis of immunities. The third and last stage involves determining which takes precedence: immunities or international crimes. In doing so it is proposed that a foreign domestic court with the temporal custodial enforcement jurisdiction will conclude that it does not have the jurisdiction to arrest and surrender a sitting head of state or government or foreign minister nor will the courts of a receiving state".[21] For the African member states in general and South Africa in particular, it can be pellucidly asserted that they have taken this stance proposed by Simbeye. Immunities have taken precedence rather than international crimes. The South African government, in light of this immunity for officials, had actually granted immunity in advance to all heads of states and government who were attending the 25th AU Summit in South Africa. During and after the Summit, AU member states in general and South Africa in particular did not arrest, let alone surrender President Bashir to the ICC. For Africa, this therefore means that solidarity and immunities are more preferable than justice.

VI. THE INDICTMENT OF PRESIDENT OMAR AL BASHIR: BACKGROUND

The United Nations Security Council Darfur Referral: Resolution 1593:

The UNSC referred the situation in Darfur, Sudan, to the ICC on 31 March 2005. The United States did not exercise its veto power as many expected, but simply abstained from voting. This gave the ICC the jurisdiction to intervene and prosecute crimes allegedly perpetrated in Darfur. With the United States not pushing their opposition to the Court to the point of blocking the Security Council's referral of the Darfur case, the ICC made an important move from academic exercise to legal reality.[22] It is important to note that an abstention is not tantamount to a veto. An abstention simply means that a state does not cast its vote and refrains from voting. This is different from a veto whereby a state blocks a decision by its veto power so that a resolution is barred from being implemented. In a veto, the decision does not go forward as it is blocked, but in an abstention the decision moves forward. The decision by the US State Department to abstain rather than to veto marked a great milestone towards the furtherance of the ICC's work, although it did not mean a change of US policy towards the court.

Crimes Perpetrated in Darfur:

By virtue of being a member of the United Nations (Sudan), the ICC has jurisdiction to prosecute crimes perpetrated in Darfur concerning a debilitating ethnic violence that enveloped the country, leading to the deaths of at least 300 000 people. Sudan is not a signatory to the Statute of Rome but is a member of the United Nations. This means that the UNSC can refer situations to the ICC over breaches of international peace and security anchored on Chapter VII of the UN Charter. Article 13 (b) of the Statute of Rome states that, "The ICC may exercise jurisdiction in a situation in which one more of such crimes appears to have been committed is referred to the prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations".[23] Where the ICC obtains jurisdiction over a case by virtue of such a Security Council referral, its jurisdiction is considered much stronger and truly universal, rendering irrelevant the consent of the state where the crime occurred.[24]

The Sudanese atrocities have been described as one of the greatest humanitarian disasters on earth. Ethnic violence erupted in Darfur, claiming more than 700 000 civilian lives and displacing about 1.8 million people in catastrophic proportions. However, some scholars and researchers say that these statistical figures are exaggerated just to make the issue more scaring and savage. The perpetrators of the murderous acts are allegedly government – backed militias of Arab origin whilst the victims of the gruesome experiences were back African tribes. The report of the International Commission to the UNSC in January 2005 concluded that although it did not ascertain or validate that genocide had been perpetrated in Darfur, there were however serious crimes of international concern that have been perpetrated in Darfur such as crimes against humanity and war crimes. This led the International Commission to recommend that the UNSC refer the Darfur situation to the ICC.

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[21] Simbeye, Y. 2004. *Immunity and International Criminal Law*. California: Ashgate Publishing Company.

[22] Fletcher, G. and Olin, D. 2005. "Reclaiming Fundamental Principles of Criminal Law in the Darfur Case". *The Journal of International Law*, 531, 561.

[23] All states that are members of the United Nations are bound by the UN Charter, whether states parties or not to the Rome Statute. Therefore they indirectly become states parties to the Rome Statute. This is because of the Rome Statute's attachment and conferment of some of its powers to the UN Security Council.

[24] Heyder, C. 2006. "The NSC Referral of the Crimes in Darfur to the international Criminal Court in Light of US Opposition to the Court: Implications for the ICC's Functions and status". *Berkeley Journal of International Law*, 24 (2), 650-673.

The UNSC on March 31, 2005, passed the Darfur referral unanimously with eleven votes in favour of the referral and none against it. However, there were four abstentions (United States, China, Brazil and Algeria). Instead of referring the Darfur situation to the ICC, the United States preferred the establishment of an ad hoc criminal tribunal. This US perception, which conflicted with other states' perceptions, seemed to pose a behemoth hindrance to the on-going negotiations to bring the perpetrators to justice. The Darfur situation is the third case on the docket of the ICC, but the first in which the Court's jurisdiction is premised on a Security Council referral pursuant to Article 13 (b) of the Statute of Rome.[25] Considering the fact that the ICC is a very young, still untested, and controversial court, the referral of jurisdiction from the Security Council was crucial for the court as an institution in order to prove its ability to prosecute the most serious crimes. A failure to refer this case would consequently have prompted the question of whether the ICC could ever exercise universal jurisdiction in any case other than those in which State Parties had consented to jurisdiction. While such a failure might have left the institution's legitimacy intact, it nonetheless would have marginalised the Court and cast doubt on any hopes of its becoming an important instrument for ensuring global accountability for the most serious crimes.[26]

VII. COOPERATION OF NON-STATES PARTIES TO THE STATUTE OF ROME

The Resolution conferring jurisdiction to the ICC was made by the UNSC acting under Chapter VII and on behalf of the global community of states. However, paragraph 2 of Resolution 1593 states explicitly that, "Only the government of Sudan and other parties to the conflict have to 'cooperate' fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution".[27] This means that only the government of Sudan and the other parties to the conflict are under the obligation to cooperate with the ICC. In contrast, the provision stipulates that all other states are merely urged to cooperate. This means that, on one hand, the intentional community has mandated that the ICC to exercise jurisdiction; but that, on the other hand, states that are not party to the Statute of Rome, except for Sudan have no obligation to cooperate or support the ICC in fulfilling this task. This contradiction, inherent in the Security Council's logic, is hardly understandable.[28] The best alternative that the UNSC could have done is to impose obligations on all states such that they would be obliged to cooperate and feel involved as well as having a sense of legal belonging to the Court's Darfur referral.

According to the Rome Statute, not all states are obliged to cooperate with the ICC. This provision may weaken the Court's position pertaining compelling the Sudanese government to bring perpetrators of awful crimes to the ICC. In the present situation, the Sudanese government could use the lack of universal cooperation as another argument to challenge the legitimacy of proceedings and as a pretext to refuse to surrender suspects.[29] President Bashir swore thrice in the name of Allah that he will never surrender any Sudanese national to the ICC. Given this vehement Sudanese opposition to the Court, the United States pessimistic stance towards the Court as well as the AU's aversion to the Court, it becomes abundantly clear that only a few perpetrators of heinous crimes from such states will ever appear before the ICC for prosecution.

Immunity for Non-States Parties to the Rome Statute:

A treaty is invalid if it creates an obligation for a third state to which it never consented. By referring the Darfur case to the ICC, the Security Council used its powers to extend the Court's jurisdiction beyond that allowed under a traditional state consent regime and consequently conferred jurisdiction over a non-consenting state.[30] Article 12 of the Rome Statute really presents a violation of international treaty law as set out in Article 34 of the Vienna convention of treaties. Article 34 of the Vienna Convention of treaties stipulates that, "A treaty does not create either obligations or rights for a third state without its consent".[31] Sudan is not a state party to the Statute of Rome and therefore according to the US position, such crimes of genocidal proportions that were perpetrated in Darfur were supposed to be handled by an ad hoc international criminal tribunal rather than an ICC.

[25] Ibid, 24
[26] Ibid, 24
[27] See Resolution 1593, 2005
[28] Ibid, 26
[29] Ibid, 28
[30] Ibid, 29
[31] See the Vienna Convention on the Law of Treaties.

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VIII. OMAR AL BASHIR'S MAY 2015 VISIT TO SOUTH AFRICA

The African Union had abundantly made its position clear regarding the ICC. At an AU meeting in Sirte, Libya, on 3 July 2009, the AU took a resolution popularly known as the Sirte Resolution calling for its members to collectively defy the international arrest warrants issued by the ICC for President Bashir. While Africa had enthusiastically embraced the concept of a universal court that would pursue global justice without fear or favour, its states forming the largest regional block within the new court, the continent had come to realize it had been sold a false bill of goods. Despite having received more than 9 000 complaints of war crimes, and crimes against humanity within 139 countries, the ICC had avoided dealing with any alleged western or European war crimes, preferring instead to focus exclusively on Africa. For many Africans the spectra of a court based in The Hague and largely funded by Africa's five former European colonial powers resembled recolonisation by spurious legal diktat.[32]

South Africa: Not the Odd One Out:

South Africa did not break any new ground by ignoring ICC and NGOs' calls to arrest and indict President Bashir. In fact, South Africa becomes the eighth state party to the Statute of Rome to ignore the arrest and indictment of President Bashir. President Bashir visited states parties to the Statute of Rome such as Kenya, Ethiopia, Eritrea, Chad, Djibouti, Nigeria, Malawi and lately South Africa, with impunity. In almost all the summits President Bashir attended, African heads of states and government had unanimously agreed that African states were not to help, let alone assist or cooperate with the ICC concerning the arrest and surrender of President Bashir. In an abridged version of the AU statement to the ICC, the AU vividly noted that the ICC's request to the AU to arrest and surrender President Bashir to the ICC had neither been heard nor acted upon. The AU had instead requested the UNSC to defer the ICC investigation for a year by invoking Article 16 of the Statute of Rome which allows for a suspension of prosecution or investigation, in a process called deferral.

Article 16 empowers the Security Council to defer an investigation or prosecution for one year if it is necessary for the maintenance of international peace and security under Chapter VII of the UN Charter. The Security Council would need to make a determination that the continued involvement of the ICC is a greater threat to international peace and security than suspending the ICC's work.[33] South Africa, which is regarded as a mature and stable democracy in Africa and one of the African states on the vanguard in supporting the ICC, was legally obliged to lead by example by arresting and indicting President Bashir. Regrettably, the government of South Africa did the exact opposite. South Africa is a regional power within Africa with diplomatic influence well beyond the continent; as such, the South African government's decision to ignore the vehement calls to arrest the Sudanese leader came as a heavy body blow to the ICC.[34] Thus, the ICC was legally pummelled and defeated by South Africa, considering that South Africa was the first African state to ratify the Rome Statute and one of the greatest supporters and funders of the Court. The ICC had regarded South Africa as an ally. The incumbent ICC chief Prosecutor Fatou Bensouda had appraised South African efforts by remarking that, "South Africa was one of the strongest supporters of the court, and a leading funding member.[35]

South Africa: Deeds not Words:

The South African government turned a blind eye to the rambunctious calls to arrest President Bashir as the government walked its talk. The African Union at the Sandton Convention Centre made its position abundantly clear that it does its own things using home-grown solutions and not imported solutions. The African Union Commission chairperson Doctor Nkosazana Dhlamini Zuma noted that, "There is nothing new about President al Bashir attending African Union summits. Sudan is a member of the African Union and has always attended African Union summits ... the African Union does things according to its own rules, not according to the rules of the International Criminal Court".[36]

Unbeknown perhaps to the Southern African Litigation Centre and ICC supporters, the host country South Africa had done its homework and it was perfectly clear. They had ensured al-Bashir's safe trip and passage into the country for the summit. President Mugabe has gone so far as to place on record that President Zuma assured his colleagues prior to the

[32] Hoile, D. 2015. "Al-Bashir, the ICC and "coconut" NGOs". *New African*, July, p34-36.
[33] Ibid, 20
[34] Ibid, 32
[35] Cited in ibid, 32
[36] Cited in ibid, 32

summit that al-Bashir would not be arrested. Ahead of the summit, the South African government had gazetted that all participants at the AU meeting receive immunity in accordance with Section 5 (3) of the Diplomatic Immunities and Privileges Act of 2001, which gave the government the power to gazette any arrangement around diplomatic immunity to delegates to meetings of international bodies in South Africa.[37]

The South African government had already done its homework with great dexterity and craft well in advance. It sought to implement deeds, not words. President Bashir was surreptitiously let in and out of South Africa without any public or adversary knowledge of his exact whereabouts. The SALC managed to obtain an interim order that President al-Bashir should not leave South Africa until the arrest warrant issue had been tested in a full court hearing. That hearing was set for the afternoon of Monday 15 June. The reality is that Al-Bashir's itinerary had already been set in stone. Al-Bashir arrived as scheduled on the evening of Saturday 13 June for the summit and attended the opening and its closed sessions, and then left on schedule just before midday on Monday 15 June, flying out of Pretoria's Waterkloof Airforce Base. Tellingly, several other heads of state had already left. The South African government very pointedly ignored that court order.[38]

The visit of President Bashir in and out of South Africa with impunity had the support of the ruling ANC government as well as South African religious bigwigs who had also grown a strong aversion to the court. The ruling ANC party had previously declared that the ICC was, "No longer useful to the purposes for which it was intended"[39] and that either every UN member state should join or South Africa would leave. Former Archbishop Desmond Tutu's Tutu Foundation vividly castigated the unwillingness of the Court to prosecute western involvement in heinous crimes against humanity and war crimes. The Tutu Foundation stated that the world "needs a criminal court where all are held equally to account, regardless of their nations' wealth, geographic location or particular history. By refusing to submit to the jurisdiction of the court, some of the most powerful nations in the world have created an environment in which no world leaders feel the need to be held to account".[40]

In the same footing, former Archbishop Desmond Tutu went on to say that, "A court that cannot uphold the principle of all being equal before the law lacks integrity. The reason that the ICC is battling is neither Africa's nor the court's faulty; African nations and lawyers played prominent roles in establishing the court, in 2002. The reason the ICC is battling for integrity is because some of the most powerful nations in the world would rather there was no court than one that might one day hold them to account too".[41] Under these circumstances, the ICC's credibility in Africa is now very dim, casting the court's legitimacy in jeopardy. The international community is faced once again by a simple question. What relevance does the ICC retain in Africa within which so many countries refuse to recognize its authority? It is a question that can no longer be ignored".[42]

South Africa: Caught Between the Lines:

South Africa is caught in a legal quandary between two options; paying allegiance to the ICC on one side and the African Union on the other. South African High Court Judge, Justice Malala notes that, "While this stance may have endeared the country to the rest of the African Union – where it seeks to be a signification player – it reveals a troubling contradiction: signatory to the Statute on one hand, while flirting with those who seek to defy its precepts on the other. This isn't the first time the country has displayed its ambivalence towards the ICC: in 2010 South Africa invited Bashir to the now scandal –mired world cup, attracting plaudits from some on the continent and gaining street cred for shaking its fist at the west".[43] This South African stance is further consolidated by the earlier AU decision which included South Africa as a state party) in the Sirte Resolution of 3 July 2009 whereby AU members unanimously defied the international arrest warrant by the ICC to President Bashir. Tladi notes that, "This AU decision placed African states party to the Rome Statute in the 'unenviable position of having to choose between their obligations as member states of the AU on the one hand, and their obligations as states party to the Rome Statute, on the other".[44]

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[37] Ibid, 32
[38] Ibid, 32
[39] Ibid, 32
[40] Cited in Ibid, 32
[41] Cited in Ibid, 32
[42] Ibid, 32
[43] Malala, J. 2015. "By Letting Omar al-Bashir escape, South Africa has sided with tyrants". *Guardian Africa Network*, pp1-5.
[44] Tladi, D. 2009. "The African Union and the International Criminal Court: the battle for the soul of International Law" *34 SAYIL*.

Omar al-Bashir's May 2015 visit Did South Africa breach its Municipal and International Legal Obligations?

Legally, South Africa really breached its municipal and international legal provisions. The state trampled on what it was supposed to do, that is, to act in accordance with the Rome Statute for which it had signed and ratified, by arresting and indicting Omar al- Bashir. The breach by South Africa was premeditated and deliberate. Justice Malala notes that, "The events unfolded like a John Carre novel: just minutes before South Africa's President Jacob Zuma delivered his opening address on Sunday to the AU summit in the glitzy Sandton Convention Centre in Johannesburg, the Pretoria High court ordered that the government should ensure that Bashir could not leave the country".[45] The government thus knew in advance of the intention of the court to execute its arrest warrant, and this is what it ignored, breaching its own laws.

Justice Malala further consolidates this position by remarking that, "In effect, the South African government has broken its own laws and acted in defiance of a court order".[46] A government lawyer, William Mokhari, told the court that Bashir's departure will be fully investigated. But that is academic. The government did nothing to arrest him. Politically, this much we know: by protecting Bashir and letting him escape, our country has openly taken sides with Africa's tyrants, and not their victims.[47] Kaajal Ramjathan, SALC group director also adds that, "The rule of law, however, is only as strong as the government which enforces it. Home affairs have allowed a fugitive from justice to slip through its fingers, compounding the suffering of the victims of these grave crimes".[48] Similar sentiments of the state's breach of its domestic and international law regulations are echoed by High Court judge Justice Dunstan Mlambo who remarked that the government's reluctance to arrest Omar al Bashir is inconsistent with its constitution. Mlambo noted that, "If the state ... does not abide by court orders, the democratic edifice will crumble stone-by-stone until it collapses".[49]

The director of the Centre for Constitutional Rights, Johan Kruger, suggests that South Africa violated its municipal and international laws because it signed and ratified the Statute of Rome. Kruger notes that, "Even though it's understandable the government needs to maintain diplomatic relations with African countries, the point remains that in our country the constitution is supreme – the government has to act according to the constitution. What is even more concerning is that South Africa tries to argue immunity for crimes against humanity? Regardless of whom the leader may be or what the diplomatic considerations may be, we are talking about heinous crimes committed under the auspices of President Bashir. Given our own history and our own constitutional premise, to argue for immunity for those kinds of crimes is unthinkable".[50]

IX. SOUTH AFRICA AND THE ANTICIPATED PRESENCE PROVISION

SALC, the human rights group that had petitioned the court to order al – Bashir's arrest, reported in a statement that it was disappointed that the government allowed the Sudanese President to leave before the ruling. Judge Fabricious reiterated that he wanted to determine whether it was legally acceptable for the government of South Africa to allow al-Bashir to visit South Africa without arresting him – and key in that decision would be determining if the South African cabinet's decision not to comply with the ICC demand could trump an international treaty. In order to avoid all this legal and judicial bureaucracy and red tape that led to the escape of al-Bashir before the court ruling, the South African government could have adopted the anticipated presence provision if it ever wanted to arrest and indict President Bashir. This involves conducting an investigation, issuing an indictment or requesting extradition when the accused is not present. This is because international law does not require states to ensure that the accused is present in order to institute universal jurisdiction proceedings.

In this regard, South Africa could have therefore initiated judicial proceedings even before Bashir had arrived for the summit. This position was asserted by Judges Higgins, Kooijmans and Buergenthal in their joint supreme opinion in the International Court of Justice decision in Democratic Republic of Congo v Belgium (2002) when they stated that, :[I]f the

[45] Ibid, 43
[46] Ibid, 43
[47] Cited in Ibid, 43
[48] Cited in Melvin, D., and McLaughlin, E.C. 2015. "Sudan's Leader Leaves South Africa before court orders arrest". *Cable News Network*, June 15.
[49] Cited in Onishi, N. 2015. "Omar al-Bashir, Leaving South Africa, Eludes Arrest Again". *Reuters*, 15 June.
[50] Ibid, 49

underlying purpose of designating certain acts as international crimes is to authorise a wide jurisdiction to be asserted over persons committing them, there is no rule of international law ... which makes illegal cooperative overt acts designated to secure their presence within a state wishing to exercise jurisdiction".[51]

In the anticipated presence provision, the due process right to be present during trial is distinct from the law defining the legitimate exercise of jurisdiction, which does not require presence when proceedings first commence. In this regard the Princeton Principles of Universal Jurisdiction state that a judicial body may try accused persons on the basis of universal jurisdiction, 'provided the person is present before such judicial body' (Program in Law and Public Affairs, Princeton University, 2001:32). That language 'does not prevent a state from initiating the criminal process, conducting an investigation, issuing an indictment or requesting extradition, when the accused is not present' (Program in Law and Public Affairs, Princeton University, 2001"32).[52]

There are two fundamental reasons of logic and practice which support and validate that a perpetrator does not have to be physically present in the forum deprehensionis for an investigation to be instituted and for an arrest warrant to be issued in anticipation of a perpetrator's physical arrival. First, if the entire investigation is subject to having established the presence of the accused, then logically there is great risk that no prosecution would ever be undertaken.[53] One commentator noted that, "whether or not expressed, the condition of presence must be presumed for the purpose of the 'search', during the course of which it will be verified. Otherwise it is a vicious circle: in order to know whether X is in hiding on our territory, it is necessary to search for him, but in order to search for him, it is necessary to have already discovered (by enlightenment or intuition) that he is present (Lambois, 1995 cited in FIDH, 2006: 8).[54] Second, because it is based on the location of the suspect and not on other circumstances of the case, a strict presence requirement is a 'blunt instrument', imposing an imperfect limit on the exercise of universal jurisdiction and creating practical disadvantages by restricting the power to open an investigation to the point at which it can be proven that a suspect is within the territory of the state exercising universal jurisdiction.[55]

Human rights Watch gives an illustrative example of the disadvantageous effect of a strict presence requirement as a pre-requisite to investigation, which may allow a suspected perpetrator to escape justice: "... in October 2005, Danish authorities received a complaint concerning a Chinese official who was scheduled to attend a conference in Copenhagen. The complaint was received in advance of the suspect's entry into Denmark, but a strict presence requirement in Danish legislation meant that Danish authorities could not legally open an investigation into the complaint before the suspect arrived. In effect, Danish investigators had only five days – the duration of the conference – to investigate the complaint and apply for an arrest warrant. When the Chinese official left Denmark after five days, the investigation had to be discontinued". (Human rights Watch, 2006: 28).[56] In similar circumstances Omar al basher left South Africa whole legal proceedings were still underway. The SALC was still investigating whether Bashir's arrest warrant can be fully tested in a court of law. SALC later got approval that the warrant of arrest can be tested in South African court of law, but unfortunately Bashir had already left. For these reasons, it is open to and preferable for the NPA, under the ICC Act, to commence proceedings and issue warrants of arrest prior to the presence of the accused in South African territory.[57]

The United Kingdom adopted the 'anticipated presence' provision as a pre-requisite to instituting an investigation against suspected perpetrators of international crimes. In a pulsating famous United Kingdom case, Retired Major General Doron Almog declined to disembark from his flight at London's Heathrow airport after he learnt that he may face arrest and incarceration by the British Metro Police after a decision on September 10, 2005 by Timothy Workman, a Chief London Magistrate, on allegations of committing a grievous breach of the Fourth Geneva Convention (1949) which is a criminal offence in the UK under the Geneva Convention Act of 1957. The alleged offence was committed as part of Israel's occupation of the occupied Palestinian territory. This unprecedented arrest warrant against a senior Israeli soldier was issued after years of failed efforts to obtain justice through the Israeli judicial system. Because of the failure of the Israeli judicial to combat impunity, a non-governmental organisation acting for victims in Gaza, built a file of evidence with the

[51] Cited in ibid, 1
[52] Cited in ibid, 1
[53] Ibid, 1
[54] Cited in ibid, 1
[55] Ibid, 1
[56] Cited in ibid, 1
[57] Ibid, 1

help of Hickman and rose solicitors to pursue a case against him (and others) in the UK in accordance with the legal principle of universal jurisdiction over war crimes.[58] In this case the UK Metro police was unsuccessful. Retired Major General Doron Almog caught his next flight back to Israel and escaped arrest and incarceration.

Other states such as Germany have also incorporated the anticipated presence provision into their new provision of the German code of Criminal procedure, paragraph 153f (cited in Werle, 2005) which makes it mandatory an investigation of a suspected international perpetrator of egregious crimes where the suspect is present in Germany or the suspect's presence in anticipated. The UK police may therefore open an investigation regardless of the whereabouts of the accused. However, for an arrest warrant to be issued and for a suspect to be charged, the accused must either be present or his or her presence anticipated. (Human Rights Watch, 2006).[59]

Do African States Really Adore Impunity?

The current legal gymnastics and polarization between the African Union and the ICC is not really about AU member states adoring impunity, genocide, war crimes, crimes against humanity, crimes of aggression and crimes against the administration of justice, but it is about demonstrating the African Union's present negative stance towards the ICC by ignoring what the AU member states are obliged to do, that is to arrest and indict al-Bashir. Al-Bashir is only acting as a demonstration or sign of Africa's seething spirit towards the ICC. Ignoring the arrest of Omar al-Bashir acts as a sign not of condoning impunity, but to show how the AU abhors the ICC. It is thus not about the arrest of Bashir, but about the AU's demonstration and a sign of its abhorrence towards the ICC. If there were no allegations of ICC selective justice by the AU member states, the AU was not going to stage a demonstration of showing its aversion stance towards the ICC as it is currently doing. Bashir is thus being used as a legal exhibit to show the degree of distastefulness and dissatisfaction AU member states have on the ICC. The AU would rather prefer there is no ICC at all than having one that they abhor. Ignoring the arrest of Omar al-Bashir shows the gravity and severity of Africa's dissatisfaction towards the ICC, rather than the continent's unwillingness or inability to bring perpetrators of egregious crimes to book. The AU member states would rather prefer to ignore the arrest and indictment of perpetrators of heinous crimes as a means of showing the ICC how they now Abhor the court and not because they necessarily tolerate or adore impunity as well as such perpetrators of awful crimes. Thus AU member states unite if they have a common enemy and not a common perpetrator.

X. SOME JUSTIFICATION FOR SOUTH AFRICAN ACTION

a) Political problems where neither side is wholly guilty or innocent are not suitable to solve through the courts. The AU can thus negotiate, conciliate, mediate or arbitrate in the Darfur crisis politically and not legally through the ICC.

b) South Africa has to promote Pan Africanism and African solidarity. South Africa is in Africa and not in Europe, and therefore pays allegiance to Africa more than what it does to Europe.

c) Allegations of selective justice which seem to target Africans seem to be true. This is because since its establishment in 2002, the ICC has had 22 cases and indicted 32 individuals. All of them are Africans.

d) All African states do not possess any protection, privilege or shielding mechanism as the veto of prosecution. For Africa therefore, shielding their fellow presidents and comrades in arms from the ICC acts as a 'form of veto' to shield them from indictment.

e) African problems require African solutions because these problems are complicated, inherited from colonialism, slavery and imperialism as well as trans-generational. They therefore need home-grown solutions and not imported justice.

f) The UNSC referrals to the ICC are also selective. The UNSC referred situations in Darfur and Libya, leaving other areas where egregious crimes were being perpetrated, for example, in Myanmar, Iraq, and Afghanistan.

g) The ICC Chief Prosecutor only used his powers 'proprio motu' in Kenya, which is an African state. This made Africans to believe that Africa is serving as a legal punch bag for the ICC.

h) ICC regional bias seems to be true. All the cases that the ICC is handling are all in Africa.

i) ICC indictments and UNSC referrals are only a manifestation of great power politics and national interests.

[58] Ibid, 1
[59] Cited in ibid, 1

What the ICC can do in order to resuscitate and restore legitimacy in Africa:

a) The Rome Treaty should be revisited and some provisions amended, for example, the veto of prosecution of the Permanent Five Members of the UNSC which makes them immune from prosecution.

b) The ICC should cast its legal net wide to all corners of the globe. Currently, the court seems too vindictive and malicious to Africa.

c) No leaders, former leaders or officials should be regarded as 'untouchables' as can be seen in statesmen such as George Bush and Tony Blair, whose careers were obviously tainted with illegality of war crimes and crimes against humanity in Iraq and Afghanistan.

d) The ICC Chief Prosecutor's 'proprio motu' power should spread rather than be regional specific (Africa). The Prosecutor only used such powers in Kenya (Africa) and ignored all other areas that such powers could be used.

e) The ICC should be able to dichotomise between legal and political problems and be able to select which problems to render unjusticeable.

f) The Darfur referral should be reconsidered by the UNSC and the ICC in the sense of African requests, that is, deferral. The Darfur issue is a political issue just like the Palestinian – Israeli issue.

XI. LEGAL IMPLICATIONS

a) South Africa in particular and Africa in general can no longer be trusted in future to prosecute any international crimes or indict perpetrators.

b) The complementarity principle of the Rome Statute in Africa is virtually defunct. This is because the ICC has lost its legal mojo and legitimacy in Africa. The ICC has neither a police force nor a standing army to enforce its rulings or arrest perpetrators, but relies on member states (complementarity) that hand over perpetrators to it. It also relies on diplomatic pressure to ensure that its rulings and indictments are enforced.

c) Absence of Africa as well as the USA as part of the Court will reap sundry and unbearable legal consequences to the ICC such that the court will be like a ladder without perches.

d) For South Africa in particular and Africa in general, signing international treaties and implementing them may be two different things. For Africa, signing and ratifying statutes is one thing, and implementing is another. Reliance cannot therefore be placed on African states that if they sign and ratify statutes, they will implement them.

e) The ICC Statute and Rome Treaty for Africa will remain nominal. They will only remain written commitments in countries' constitutions and on paper but will never be implemented on the ground. They will thus be all petrol but no machine.

f) South Africa, which is a leading state in Africa democratically, economically, politically and militarily, has legally followed a bad precedent that was set by other African states parties to the Rome Statute such as Nigeria, Ethiopia, Eritrea, Malawi, Chad, Kenya and Djibouti. Because president Bashir was not arrested in South Africa, it is likely that he will never be arrested in any African state that he will visit in future.

g) By breaching its municipal and international law provisions, South Africa has also demonstrated to the world that when it comes to national or regional interests, laws can be broken or put aside in order to safeguard national and regional interests. For South Africa therefore, there are no permanent legal interests, but permanent regional interests. In Africa therefore, nothing is cast in stone.

h) For South Africa in particular and Africa in general, solidarity is better than justice.

XII. CONCLUSION

The International Criminal court set a bad precedent in Africa in general and in South Africa in particular. The idea of a court of last instance was a commendable one and one cannot throw away the baby with the dirty bathing water, but the implementation (referrals and indictments) left a lot to be desired. The ICC could have resuscitated and maintain relations with Africa, say after the Muammar Gaddafi and Laurent Gbagbo cases when talks of selective justice were starting to

loom, but like a stubborn fly that is buried by the corpse, the court maintained its stiff-necked stance of an exclusive focus on Africa as if Africa is the only Eldorado of egregious crimes of genocide, war crimes, crimes against humanity the crimes of aggression and crimes against the administration of justice. For the ICC, it is thus not what it did but what it failed to do (to cast its legal net wide) that led to its legal demise in Africa. Politically, South African action in ignoring the arrest of President Bashir was very commendable in showing how Africa is seething and pissed by the ICC. However, legally what the South African government did by this action was ultra-vires its constitutional provisions. Legally therefore, to say the South African government defiant action in ignoring the arrest of President Bashir was unexpected and unwarranted for would be an understatement. It was a maniacal abuse of the ethos of its municipal and international law provisions and legal aberration of monumental proportions that must have sent waves of consternation to the legal fraternity in the entire civilized world. Under these circumstances, it can be asserted that African commitment to statutes should not be taken at face value, but should be treated with a pinch of salt. The South African case has taught the world that states world over need to adopt a realist rather than an idealist perspective because national and regional interests cut across every spectrum of society. This is consolidated by the former United States Secretary of State Dean Acheson who recapitulates by noting that, "The future is unpredictable. Only one thing, the unexpected, can be reasonably anticipated. The part of wisdom is to be prepared for what may happen, rather than to base out course upon faith in what should happen".[60]

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[12] Williams, S., and Sherif, L. 2009. "The Arrest Warrant for President al-Bashir: Immunities of Incumbent heads of State in the ICC." *The Journal of Conflict and Security Law*, 3 (5), 61-84.

[60] The South African government adopted a realist perspective by implementing the 'ought is' rather than the 'ought to be'. Idealistically, Bashir was supposed to be arrested upon his arrival in South Africa by the Rome Statute's complementarity principle. Realistically, South Africa back-staged and flinched because Pan Africanism, solidarity, national and regional interest are more important than justice.

Abbreviations:

ANC	- African National Congress	SALZ	- South African Litigation Centre
AU	- African Union	UK	- United Kingdom
ICC	- International Criminal Court	UN	- United Nations
NDPP	- National Director of Public Prosecutions	UNSC	- United Nations Security Council
NGOs	- Non-Governmental Organizations	USA	- United States of America
NPA	- National Prosecuting Authority	US	- United States

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