

South Africa Litigation Centre v. Minister of Justice & Constitutional Development: Balancing Conflicting Obligations—Prosecuting al-Bashir in South Africa

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I. OVERVIEW

Sudanese president, Omar al-Bashir, is the only sitting head of state wanted for genocide, war crimes, and crimes against humanity by the International Criminal Court (ICC).¹ In 2009, the ICC issued a warrant for the arrest of al-Bashir for war crimes and crimes against humanity in response to his involvement in Darfur.² A second warrant was issued in 2010 for the crime of genocide arising from the same events.³ His position as both war criminal and regional leader has created a legal and political quagmire for the ICC and its member states, and particularly for those also in the continent of Africa.⁴ As a party to the ICC and with national legislation in direct support of the ICC in the form of the Implementation Act, South Africa announced in response that if al-Bashir came within South African jurisdiction national officials would

1. Norimitsu Onishi, *Bid by Omar al-Bashir of Sudan To Avoid Arrest Is Tested in South Africa*, N.Y. TIMES (June 14, 2015), <http://www.nytimes.com/2015/06/15/world/africa/bashir-sudan-international-criminal-court-south-africa.html>.

2. S. Afr. Litig. Ctr. v. Minister of Justice & Constitutional Dev. 2015 (1) SA 1 (GP) para. 12 (S. Afr.).

3. *Id.*

4. *Id.* paras. 3-9.

assist in his arrest and detention.⁵ In June 2015, South Africa confronted the impact of this declaration when they agreed to host the African Union (AU) Summit, to which al-Bashir was invited by the AU Committee, along with African leaders from across the continent.⁶ As host of the summit, South Africa was required to enter into an AU “Host Agreement,” which included a provision providing privileges and immunities to attendees in accordance with principles of international law, including immunity from prosecutorial intervention during their attendance.⁷

Bound by its commitment to the ICC and customary international law, South African officials considered whether they would be required to arrest and prosecute al-Bashir upon his arrival, or whether they would comply with the AU Host Agreement, which they interpreted to provide al-Bashir with immunity from arrest.⁸ On June 13, 2015, the evening of al-Bashir’s arrival in South Africa, the Southern Africa Litigation Center made an urgent application to the High Court in Pretoria, requesting that the court order South African authorities to arrest and surrender al-Bashir upon his arrival.⁹ The government countered that their primary obligation was to the AU, and thus they would defy the ICC’s decree, if necessary.¹⁰ After hearing arguments from both sides, Judge Hans Fabricus of the High Court in Pretoria ordered national authorities to prevent President al-Bashir from leaving the country during the summit and to reasonably facilitate his arrest.¹¹ During the course of these proceedings, South African government officials assisted al-Bashir out of the country, thus defying court orders to the contrary.¹² The court

5. *Id.* para. 12.

6. *Id.* para. 13. South Africa was not responsible for inviting representatives. *Id.* para. 14.

7. *Id.* paras. 13-15.

8. *Id.* paras. 13-22.

9. *Id.* para. 4. The South African Litigation Centre is an independent regional human rights organization based in Johannesburg. The High Court is a superior court in South Africa, with general jurisdiction over the defined geographical area in which it is situated. Its decisions are binding on magistrates’ courts within its area of jurisdiction. There are fourteen provincial divisions of the High Court including the North Gauteng High Court, located in Pretoria. Cases heard by any High Court can be appealed to the Supreme Court of Appeal, which is the final court of appeal for all except constitutional matters, and the Constitutional Court above that, which is the final court of appeal for constitutional matters. *Courts in South Africa*, DEP’T: JUST. & CONST. DEV., REPUBLIC OF S. AFR. (Jan. 29, 2016, 12:18 PM), <http://www.justice.gov.za/about/sa-courts.html>.

10. *S. Afr. Litig. Ctr.*, (1) SA 1 (GP) paras. 5-6.

11. *Id.* paras. 9, 36.

12. *Id.* para. 36.

released an official decision the same day.¹³ The High Court of South Africa, Gauteng Division, *held* that South Africa's commitment to the ICC through the Rome Statute, an international treaty, trumped the importance of the AU Host Agreement, and that this agreement did not provide al-Bashir immunity from South Africa's prosecutorial power; therefore the government had acted against the court's authority and may be subject to criminal penalties as a result.¹⁴ *Southern Africa Litigation Centre v. Minister of Justice and Constitutional Development* 2015 (27740/2015) GNP 402 (S. Afr.).

II. BACKGROUND

A. *Setting Up an International Criminal Court: The Rome Statute*

In the decades following World War II, increasing global concern for human rights violations led to a growing consensus about the need for an international court to address these issues globally and comprehensively.¹⁵ The momentum eventually crystalized into the creation of the ICC in 1998 at a meeting of the United Nations (U.N.) General Assembly in Rome.¹⁶ The Rome Statute of the International Criminal Court (Rome Statute) was adopted by a vote of 120 to 7, with 21 countries abstaining.¹⁷ Of the 120 supporters, 31 were African.¹⁸ Following 60 ratifications, the Rome Statute entered into force on July 1, 2001, and the ICC was formally established.¹⁹ South Africa was a vocal campaigner for the ICC, signing the Rome Statute on July 17, 1998, and ratifying it on September 27, 2000, thereby becoming the twenty-third state party.²⁰ Sudan has never signed the Statute.²¹ This treaty secured the existence of what was expected to be the first permanent international criminal tribunal.²²

13. *Id.* para. 9.

14. *Id.* paras. 36-39. At the time of writing, proceedings to this effect are still underway.

15. Rowland J.V. Cole, *Africa's Relationship with the International Criminal Court: More Political Than Legal*, 14 MELBOURNE J. INT'L L. 670, 670 (2013).

16. Nat'l Comm'r of the S. Afr. Police Serv. v. S. Afr. Human Rights Litig. Ctr. 2013 (2) SA 42 (SCA) para. 40 (S. Afr.).

17. *Id.*

18. *Id.*

19. *Id.*

20. Max du Plessis, *Recent Cases and Developments: South Africa and the International Criminal Court*, 22 S. AFR. J. CRIM. JUST. 441, 441 (2009).

21. *Id.* at 443. The United States is also a notable absentee.

22. *Id.*

The Rome Statute mandates all signatory nations to aid in the prosecution of those responsible for crimes of genocide, crimes against humanity, war crimes, and crimes of aggression.²³ Further, the Statute lays out the ICC's jurisdiction as well as methods for effective implementation based on the principles of complementarity, a concept wherein the primary responsibility for the investigation and prosecution of those responsible for serious violations of international law rests with national domestic jurisdictions.²⁴ Article 12(2) of the Rome Statute provides that the ICC may exercise its jurisdiction if such crimes are committed either within the territory of the state parties or by a national of one of the state parties.²⁵ A matter is only admissible before the ICC where the state party concerned is either unwilling or unable to investigate and prosecute in local tribunals, in respect of state sovereignty.²⁶ Thus, the ICC acts as a backup if national judicial systems fail under circumstances where a country has insufficient infrastructure or is acting to protect one of its own citizens.²⁷

In the event of an egregious violation of human rights by a non-state party perpetrator in a non-state party territory, the U.N. Security Council, pursuant to Chapter VII of the U.N. Charter, can refer the matter to the ICC.²⁸ With such a referral, the ICC will initiate proceedings irrespective of the fact that the state involved is not a state party and has not accepted the jurisdiction of the court.²⁹ In such circumstances, a duty will arise for all state signatories to cooperate with the ICC, including in the arrest and surrender of the accused if they come into jurisdiction of that nation.³⁰

Part IX of the Statute contains protocols and mechanisms for international cooperation and judicial assistance, including a general obligation for state parties to "cooperate fully" with the ICC.³¹ Without

23. Rome Statute of the International Criminal Court art. 5, July 17, 1998, 2187 U.N.T.S. 90. Articles 6-8 define these crimes in precise terms. *Id.* arts. 6-8.

24. *Id.* arts. 11-13; see also Max du Plessis, *Bringing the International Criminal Court Home—the Implementation of the Rome Statute of the International Criminal Court Act 2002*, 16 S. AFR. J. CRIM. JUST. 1, 2 (2003).

25. Rome Statute of the International Criminal Court, *supra* note 23, art. 11-13.

26. du Plessis, *supra* note 24, at 2.

27. *Id.*

28. Rome Statute of the International Criminal Court, *supra* note 23, art. 13; see also Cole, *supra* note 15, at 677 (explaining that this form of referral is highly criticized, as the Security Council is heavily influenced by its permanent members, several of whom are not parties to the Rome Statute).

29. Rome Statute of the International Criminal Court, *supra* note 23, art. 12; see also Cole, *supra* note 15, at 677.

30. Cole, *supra* note 15, at 677.

31. Rome Statute of the International Criminal Court, *supra* note 23, art. 86-102.

such prosecutorial cooperation, the ICC would not have the means or legal right to enter into the sovereign territory of a state to gather evidence or to secure the attendance of the accused or witnesses.³² This Part sets out the rules and procedures for cooperation for investigating, collecting evidence, serving documents, transferring people, providing records, and seizing property.³³ By far the most important form of cooperation is the obligation to arrest and surrender a person sought by the ICC, in accordance with the provisions of each state's national law as well as with the Statute.³⁴ Finally, the end of this Part contains a catchall provision for any remaining forms of possible cooperation, mandating that the state signatories must assist by any means not prohibited by the law of those individual nations.³⁵

B. Giving Domestic Effect to the Rome Statute in South Africa

Just after the Rome Statute was passed and ratified in 2002, South Africa passed the Implementation of the Rome Statute of the International Criminal Court Act (the Implementation Act) to incorporate the Rome Statute into domestic law.³⁶ The Implementation Act's preamble contains an explicit reference to the country's own struggle with human rights and its recent movement away from Apartheid in 1994, which emphasizes the importance to South Africa of committing to the ICC's goals.³⁷ The Implementation Act itself enables the criminalization and prosecution of Rome Statute crimes and emphasizes cooperation with the ICC, its precise language following Rome Statute provisions closely.³⁸ Specifically, the Implementation Act outlines various modalities to ensure effective implementation of the Statute on a national level.³⁹ This includes the facilitation of the arrest and surrender of perpetrators of ICC crimes who are located within national

32. Andreas O'Shea, *The Statute of the International Criminal Court*, 116 S. AFRICAN L.J. 243, 257 (1999).

33. Rome Statute of the International Criminal Court, *supra* note 23, art. 93.

34. *Id.* art. 89.

35. *Id.* art. 93(1)(l).

36. Dire Tladi, *The Duty on South Africa To Arrest and Surrender al-Bashir Under South African and International Law: Attempting To Make a Collage from an Incoherent Framework*, 13(4) J. INT'L CRIM. JUST. 3, 5 (2015).

37. Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 pmbl. (S. Afr), ("Mindful that . . . the Republic of South Africa, with its own history of atrocities, has, since 1994, become an integral and accepted member of the community of nations . . .").

38. Tladi, *supra* note 36, at 10.

39. Rome Statute of the International Criminal Court, *supra* note 23, art. 37, § 4.

jurisdictions.⁴⁰ In effect, the Implementation Act gives South Africa jurisdiction for the arrest of individuals suspected of war crimes, genocide, and crimes against humanity, even when the alleged offense was committed outside of South Africa by a nonnational.⁴¹

In *National Commissioner of the South African Police Service v. Southern African Litigation Center*, the South African Constitutional Court broadened the requirement on state actors when it held that not only did South Africa have a duty to arrest and prosecute ICC crimes, but it had an additional duty to investigate such crimes, even where the alleged offender was not within the territory of South Africa.⁴² In that case, the court specifically held that the South African police had a duty to investigate human rights violations committed in neighboring country Zimbabwe surrounding the country's 2008 elections.⁴³ The court cited both the Implementation Act and section 231(4) of the South African Constitution to assert the strong duties and obligations South Africa has under international law, even when an alleged offender is not in the territory of South Africa.⁴⁴

Similarly, in *State v. Okah*, the High Court of South Africa in Johannesburg convicted a Nigerian national resident in South Africa of thirteen counts of terrorist acts committed in Warri and Abuja, Nigeria.⁴⁵ The court relied on national legislation, which implemented a number of international treaties and resolutions aimed at combatting, prosecuting, and punishing acts of international terrorism in order to establish jurisdiction.⁴⁶ Through such prosecution, the South African courts demonstrated belief in the nation's duty to act in furtherance of the international instruments to which it was a party.⁴⁷

40. *Id.*

41. Tladi, *supra* note 36, at 9.

42. Nat'l Comm'r of the S. Afr. Police Serv. v. S. Afr. Human Rights Litig. Ctr. 2013 (2) SA 42 (SCA) para. 62 (S. Afr.).

43. *Id.* paras. 9, 55.

44. *Id.* para. 2. The 1996 Constitution states: "[W]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law." S. AFR. CONST., 1996, § 231(4).

45. *State v. Okah* 2013 ZAGPJHC 75 para. 1 (S. Afr.).

46. *Id.* para. 2. Related to the Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004 (S. Afr.).

47. *Id.*

C. Africa's Relationship to the Court—Early Support and Eventual Criticism

Africa, as a continent, has played an integral role in the creation, implementation, and preservation of the ICC. During initial negotiations of the ICC, many African nations were vocal in their support of the creation of the ICC.⁴⁸ In September 1998, fourteen states in the Southern African Development Community met to outline principles they wanted included in the formation of the ICC.⁴⁹ In February 1988, as the Rome Conference grew closer, twenty-five African states met in Dakar, Senegal, where they established the Dakar Declaration for the Establishment of the International Criminal Court, which discussed the historical failure of regional national legal systems in holding perpetrators accountable for gross human rights violations.⁵⁰ This meeting affirmed the continent's commitment to the ICC and the importance to regional leaders of finalizing the ICC at the upcoming Rome Conference.⁵¹ Further, various African countries played a prominent role in drafting the language of the Rome Statute by attending presentations of the statute's drafting at the U.N. General Assembly in 1993.⁵² At the time of the Rome Statute's adoption, at the Rome Conference in July 1998, forty-seven African countries were present.⁵³ Further still, after the Statute was implemented, the African Commission on Human and Peoples' Rights, at their conference in October 1998, passed a resolution calling on African states to take legislative and administrative steps to bring their national justice systems in conformity with the ICC's goals and policies.⁵⁴

Although African states were actively involved and perhaps vital to the actualization of the ICC, the ICC has since been accused of being too Afro-focused.⁵⁵ This criticism stems from the fact that in the years since the ICC's enactment, only Africans and situations in Africa have been referred to and brought before the ICC.⁵⁶ Every single person brought before the ICC has been African, coming from the Central African Republic, the Ivory Coast, the Democratic Republic of Congo, Kenya,

48. Cole, *supra* note 15, at 673.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 673-74.

53. *Id.* at 674.

54. *Id.*

55. *Id.* at 679.

56. *Id.*

Libya, Uganda, and Sudan.⁵⁷ Although there was worldwide consensus for the pursuit of an international body to combat human rights violations, some critics consider the ICC a conspiracy against Africa, fostering a new wave of Western colonialism, with Africa once again a target.⁵⁸

Additional criticism of the ICC has focused on the conflict between pursuing the ICC's objectives successfully and ongoing peace processes that are often external to international systems of justice, especially in Africa.⁵⁹ Members of the AU have postured that by prosecuting actors in recently ended conflicts, ICC intervention risks prolonging or reigniting further conflict.⁶⁰ It is hypothesized that criminal indictments could complicate the possibility and success of extrajudicial peace negotiations.⁶¹ These fears were intensified in 2003 when the Special Court for Sierra Leone attempted to execute a warrant for warlord and then-president of Liberia, Charles Taylor, in support of the ICC.⁶² This warrant was executed while Taylor was in the midst of active peace negotiations in Ghana.⁶³ The Ghanaian government refused to comply and assisted Taylor back to Liberia.⁶⁴ Similar frustrations arose in 2011 after the issuing of a warrant and trial against then sitting president of Kenya, Uhuru Kenyatta, on the fear that such judicial intervention would interfere with the Kenyan peace process.⁶⁵ The AU pointed to the fact that the 2007 post-election violence, which led to the charges from the ICC, was followed by successful extrajudicial mediation that resulted in a coalition government.⁶⁶ The AU argued that a subsequent trial would threaten the peace agreement that flowed from this mediation.⁶⁷

57. *Id.* at 679-80.

58. *Id.* at 684; *see also* Dire Tladi, *The African Union and the International Criminal Court: The Battle for the Soul of International Law*, 34 S. AFR. Y.B. INT'L L. 57, 58 (2009).

59. Cole, *supra* note 15, at 682; *see also* Tladi, *supra* note 58, at 58.

60. Cole, *supra* note 15, at 671.

61. *Id.* at 681-82.

62. *Id.* at 681.

63. *Id.*

64. *Id.* at 682-83.

65. *Id.*

66. *Id.* at 683.

67. *Id.*

D. ICC Warrant for al-Bashir

President al-Bashir is suspected of five counts of crimes against humanity, two counts of war crimes, and three counts of genocide.⁶⁸ These charges stem from the conflict in Darfur, in Western Sudan, which flared in 2003 when rebel groups took up arms against the government.⁶⁹ The conflict resulted in a counterinsurgency by government forces and pro-government militia, controlled by al-Bashir.⁷⁰ The U.N. estimates that the conflict in Darfur resulted in the deaths of 300,000 people and forced over 2.7 million people to flee their homes.⁷¹ Civilians were targeted throughout this conflict, and villages were looted and destroyed.⁷² Civilians who were able to escape their villages were later targeted in refugee camps and subjected to conditions calculated to bring about their destruction.⁷³ The ICC's evidence indicates that throughout this, al-Bashir created and implemented a plan to destroy substantial parts of three ethnic groups, leading to charges of genocide.⁷⁴

While Sudan is not party to the Rome Statute, the Security Council, acting under Chapter VII of the U.N. Charter and pursuant to article 13(b) of the Rome Statute, referred the situation in the Darfur region of Sudan to the ICC in 2005, thereby bringing the crimes committed in Darfur within the jurisdiction of the court.⁷⁵ After an initial investigation, in 2009, the ICC issued a warrant for the arrest of President al-Bashir for war crimes and crimes against humanity.⁷⁶ In 2010, the ICC issued a second warrant for the crime of genocide.⁷⁷ In the wake of these warrants, the ICC requested its state signatories cooperate and actively facilitate the arrest and surrender of al-Bashir in the event that he came into their jurisdiction.⁷⁸

68. Prosecutor v. al Bashir, Warrant of Arrest, ICC-02/05-01/09 (Mar. 4, 2009), <https://www.icc-cpi.int/iccdocs/doc/doc639078.pdf>; Prosecutor v. al Bashir, Second Warrant of Arrest, ICC-02/05-01/09 (July 12, 2010), <https://www.icc-cpi.int/iccdocs/doc/doc907140.pdf>.

69. *Id.*

70. *Id.*

71. *Darfur: UN-African Union Peacekeeping Force Extended as Tensions Rise*, UN NEWS CTR. (Jul. 20, 2010), <http://www.un.org/apps/news/story.asp?NewsID=35493&Cr=darfur#Vtj2hJMrIch>.

72. *Id.*

73. *Id.*

74. *Id.*

75. Rome Statute of the International Criminal Court, *supra* note 23, art. 13; Tladi, *supra* note 36, at 8.

76. Tladi, *supra* note 36, at 8.

77. *Id.*

78. *Id.*

Africa's response to the warrant in its immediate aftermath has been far less than supportive. Immediately after the warrant was issued, the African Peace and Security Council (Africa's U.N. regional body) requested that the ICC proceedings in regards to al-Bashir be suspended under article 16 of the Rome Statute, which allows deferral of an ICC investigation by request of the U.N. Security Council.⁷⁹ In attempts to determine a regional perspective on this issue, the First Meeting of African States Parties to the Rome Statute on the International Criminal Court took place in June 2009 in Addis Ababa, Ethiopia.⁸⁰ At this meeting, African regional leaders reconfirmed their commitment to the ICC, but determined that they needed to establish a common position on the goals of the ICC with respect to the warrant against al-Bashir.⁸¹

The AU request for Security Council deferral arose from a hope of a negotiated peace settlement that might end the Darfur conflict.⁸² For many years, the international community and the AU have encouraged al-Bashir to take steps to improve human rights conditions in Darfur.⁸³ Critics have noted that al-Bashir has significant support in Sudan and had already signed the Darfur Peace Agreement with the Sudan Liberation Movement, one of the rebel forces at the heart of the conflict.⁸⁴ It is argued that, though al-Bashir was part of the problem, he is also an integral part of the solution, and that international justice cannot operate outside political realities.⁸⁵

The Security Council did not respond to the request for deferral, and thus several African states faced an impasse regarding the arrest of al-Bashir and the conflicting duties that could arise from simultaneously pursuing the prosecution of international human rights violations and maintaining African support and autonomy.⁸⁶ Before June 2015, there had been seven cases of noncooperation by African states to arrest and surrender al-Bashir in Kenya, Djibouti, Chad, Malawi, Nigeria, and the

79. Max du Plessis, *Making Amend(ment)s: South Africa and the International Criminal Court from 2009 to 2010*, 34 S. AFR. Y.B. INT'L L. 1, 3 (2009). With such a request, no investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months. In this circumstance, it is the Security Council who is responsible for referring the situation in Darfur to the ICC in the first place, thus increasing their discretion in this particular matter. *Id.*

80. *Id.*

81. *Id.*

82. Cole, *supra* note 15, at 682.

83. *Id.* at 682-83.

84. *Id.* at 683.

85. *Id.*

86. *Id.* at 681.

Democratic Republic of Congo (DRC).⁸⁷ Some of these states made appearances before the Bureau of the Assembly of States Parties to the ICC to explain their noncooperation in arresting and detaining al-Bashir.⁸⁸ South Africa itself faced this dilemma prior to 2015, when, for the two inaugurations of South African president, Jacob Zuma, the funeral of Nelson Mandela, and the 2010 World Cup, South African officials requested that al-Bashir not attend the events as they understood such an occurrence would mandate officials to arrest him.⁸⁹

Even the United States has faced this issue when al-Bashir decided to attend the U.N. General Assembly in New York in 2012.⁹⁰ The United States felt bound by principles of customary international law and a host country agreement with the U.N., which encouraged officials not to arrest and surrender al-Bashir.⁹¹ However, the United States is not party to the Rome Statute and thus is under no legal mandate to facilitate such an arrest, despite its political importance.⁹² The question was never fully answered, however, as al-Bashir decided not to attend the gathering.⁹³

E. Diplomatic Immunity

Central to the quagmire surrounding the arrest and prosecution of al-Bashir are multiple conflicting doctrines of international and domestic law regarding the privileges and immunities afforded to heads of state.⁹⁴ Diplomatic immunity in South Africa, nationally, is governed by the Diplomatic Immunities and Privileges Act (the Immunities Act) enacted in 2001.⁹⁵ Section 2 of the Immunities Act ratifies and domesticates diplomatic immunity as set forth in the 1946 and 1947 U.N. Conventions on Privileges and Immunities and the 1951 and 1963 Vienna Conventions on Consular and Diplomatic Immunity.⁹⁶ The former confers immunity broadly on U.N. staff and officials as well as experts or organizations acting on their behalf, while the latter confers immunity on consulates and their staff, as well as on diplomatic missions and their

87. Tladi, *supra* note 36, at 2.

88. *Id.* at 2.

89. *Id.* at 3.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. Cole, *supra* note 15, at 685.

95. Diplomatic Immunities and Privileges Act 37 of 2001 § 2 (S. Afr.).

96. *Id.*

staff.⁹⁷ Section 4 of this same provision recognizes that heads of state are immune from civil and criminal jurisdiction to the extent afforded to them under customary international law or as agreed to between South Africa and a relevant state party, or as conferred on them by the discretion of the Minister of International Relations.⁹⁸

Further, as host to the AU Summit in June 2015, the AU required South Africa to enter into a “Host Agreement” with the Commission of the AU relating to its duties as host country to the summit.⁹⁹ This agreement dictates that South African officials must provide crucial privileges and immunities to “members of the commission and staff members” as well as “delegates and other representatives of inter-governmental organizations attending the meetings” as outlined in the General Convention on the Privileges and Immunities of the Organization of African Unity (OAU Convention).¹⁰⁰ The relevant provisions of the OAU Convention provide that “Representatives of Member States” and the AU Commission shall be afforded immunity from arrest or detention and shall receive any other privileges, immunities, and facilities that a diplomatic envoy would enjoy.¹⁰¹ This Host Agreement was published on June 5, 2015 in the Government Gazette, thereby incorporating the privileges and immunities afforded in this clause into domestic law in South Africa.¹⁰²

Under customary international law, acting heads of state enjoy immunity from the courts of foreign states, even when faced with international crimes.¹⁰³ This legal principle remains generally undisputed.¹⁰⁴ This proposition was confirmed in the well-known International Court of Justice (ICJ) case, *Democratic Republic of Congo (DRC) v. Belgium*, in which the ICJ held that the mere issuance of an arrest warrant for a Minister of Foreign Affairs of the DRC breached

97. *Id.* § 3.

98. *Id.* § 4.

99. Agreement between the Republic of South Africa and the Commission of the African Union on the Material and Technical Organization of the Meetings of the 30th Ordinary Session of the Permanent Representatives Committee from 7 to 9 June 2015; the 27th Ordinary Session of the Executive Council from 10 to 12 June 2015 and the 25th Ordinary Session of the Assembly on 14 to 15 June 2015 in Pretoria (7 and 8 June 2015) and Johannesburg (10 to 15 June 2015), art. VIII (S. Afr.) [hereinafter Host Agreement].

100. *Id.* art. VIII.

101. General Convention on the Privileges and Immunities of the Organization of African Unity arts. 5-6, CAB/LEG/24.2/13 (Nov. 12, 2010).

102. Host Agreement, art. VIII (S. Afr.).

103. Paola Gaeta, *Does President Al Bashir Enjoy Immunity from Arrest?*, 7 J. INT'L CRIM. JUST. 315, 317 (2009).

104. *Id.*

customary international law rules on immunity.¹⁰⁵ The rules of customary international law have developed to ensure reciprocal respect among states for their sovereignty and to avoid state interference with the exercise of foreign state representatives by subjecting them to their criminal and civil jurisdiction while on official duty.¹⁰⁶

The Rome Statute, however, explicitly excludes the application of any immunity to anyone in proceedings before the ICC, even for heads of state.¹⁰⁷ This is governed by article 27(2) of the Rome Statute, which stipulates that provisions of national or international law that may attach to the official capacity of a person do not bar the ICC from exercising its jurisdiction over that person.¹⁰⁸ The Rome Statute recognizes the obligation to prosecute perpetrators of human rights atrocities as having superior status to principles of customary international law.¹⁰⁹ Therefore, this commitment to prosecution overrides principles of sovereign immunity, which may dictate otherwise.¹¹⁰ In summary, Rome Statute immunity principles dictate that while heads of state may otherwise enjoy immunity from prosecution in foreign courts, they may be prosecuted in international tribunals that have the jurisdiction to try them.¹¹¹

III. THE COURT'S DECISION

In the noted case, the High Court of South Africa, Gauteng Division, Pretoria, held that South Africa violated its obligation to arrest and prosecute al-Bashir as a party to the Rome Statute and in pursuance of the Implementation Act.¹¹² The court first noted that in fulfillment of domestic legislation, both in constitutional provisions supporting customary international law and in legislation supporting the ICC, South Africa had an obligation to act in accordance with ICC objectives.¹¹³ Next, the court rejected the notion that al-Bashir could be afforded diplomatic immunity based on international law conventions other than

105. *Id.* at 318. The ICJ is the principle judicial organ of the United Nation whereas the ICC remains technically independent from the ICC, despite its close links. *The Court*, INT'L CT. JUST., <http://www.icj-cij.org/court/index.php?p1=1> (last visited Apr. 19, 2016).

106. Gaeta, *supra* note 103, at 320.

107. Cole, *supra* note 15, at 686.

108. Rome Statute of the International Criminal Court, *supra* note 23, art. 27(2).

109. *Id.*

110. Cole, *supra* note 15, at 686.

111. *Id.*

112. *S. Afr. Litig. Ctr. v. Minister of Justice and Constitutional Dev.* 2015 (1) SA 1 (GP) para. 31 (S. Afr.).

113. *Id.* para. 28.

the Rome Statute.¹¹⁴ As a result, the court held that the South African government acted in explicit defiance to court orders when they assisted al-Bashir out of the country and could face criminal proceedings as a result.¹¹⁵

The court began by outlining the relevant jurisprudence to illustrate that South Africa's commitment to the ICC is firmly established by domestic legislation.¹¹⁶ The court relied on the decision by the Constitutional Court in *National Commissioner of the South African Police Service v. Southern African Human Rights Litigation Center* to demonstrate that the Implementation Act is binding legal precedent and has been used to set guidelines regarding South Africa's duties in international law.¹¹⁷ Based on this precedent, the court in the noted case concluded that the state is bound to comply with its obligations to the Rome Statute and to take national measures to ensure national criminal proceedings over the crimes at issue.¹¹⁸ The court also relied on *State v. Okah* to further exemplify South Africa's duty to act in accordance with international instruments to which it is a signatory, which in that case included steps to combat, prosecute, and punish acts of international terrorism.¹¹⁹

The court next attempted to untangle the various provisions related to al-Bashir's claims of immunity under international, regional, and domestic law.¹²⁰ The government argued that the Host Agreement specifically provides for privileges and immunities for al-Bashir as provided by the OAU Convention, which would give al-Bashir immunity for the duration of the summit and two days after its conclusion.¹²¹ The court rejected this interpretation, and noted that the foremost provision governing privileges and immunities under South African law is the Immunities Act, which does not codify the OAU Convention and therefore the principles held therein are not binding on South Africa.¹²² Further, the court pointed out that, regardless of the OAU Convention, the Host Agreement only grants privileges and immunities to "Members

114. *Id.* para. 36.

115. *Id.* para. 39.

116. *Id.* paras. 24-27.

117. *Id.* para. 26.

118. *Id.*

119. *Id.* para. 27.

120. *Id.* para. 28.

121. *Id.* paras. 15, 20.

122. *Id.* para. 28.4. The court sees this language as a clear choice by the legislature not to confer blanket immunity on AU bodies, meetings and officials that attend them. *Id.* para. 28.13.2.

of the Commission and the Staff Members, [and] delegates and other representatives of Inter-Governmental Organizations” attending the summit.¹²³ Therefore, this provision would not apply to al-Bashir, who, as head of state, does not fit these categories.¹²⁴ The court next posited that the only grounds on which al-Bashir could conceivably be granted immunity is under customary international law.¹²⁵ However, the court noted the Rome Statute specifically contradicts this proposition and provides that heads of state are not granted immunity when facing ICC crimes.¹²⁶ The Implementation Act contains a similar provision.¹²⁷ In conclusion, the court held that neither the Immunities Act nor the Host Agreement could “trump” the Rome Statute or the Implementation Act and, therefore, the Rome Statute removes any possibility for immunity for al-Bashir when facing perpetration of human rights violations.¹²⁸

The court then noted that principles of head of state immunity have already been parsed out in relation to al-Bashir and the ICC.¹²⁹ The court referred to the ICC Pre Trial Chamber decision, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, in which the ICC issued a similar request to arrest and prosecute al-Bashir to the DRC, which was also a signatory to the Rome Statute and a member of the AU.¹³⁰ The ICC in that matter also interpreted article 27(2) of the Rome Statute as providing an exception to giving such diplomatic immunity to heads of state.¹³¹ The court in the noted case interpreted this decision as precedent.¹³²

Lastly, the court dealt with the noncompliance of the government in failing to act in accordance with its legal duty to assist the ICC by

123. *Id.* para. 28.5.

124. *Id.*

125. *Id.* para. 28.7.

126. *Id.* para. 28.8.

127. *Id.* para. 28.8.

128. *Id.* para. 31.

129. *Id.*

130. *Id.* The 2014 ICC Pre-Trial Chamber decision regarding the DRC details the complicated dynamic between the ICC and the AU. When President al-Bashir attended the Common Market for Eastern and Southern Africa in the DRC, the ICC issued a request to the DRC to arrest al-Bashir. The DRC did not act in pursuance of the ICC and argued that al-Bashir had immunities as head of state. The ICC argued that heads of state did not enjoy immunity, and pointed to the Security Council Resolution 1593 (2004) as well as article 25 of the U.N. Charter, stating that each member state agrees to carry out the decisions of the Security Council. *Prosecutor v. al Bashir*, ICC-02/05-01/09, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court (Apr. 9, 2014), <http://www.icc-cpi.int/iccdocs/doc/doc1759849.pdf>.

131. *S. Afr. Litig. Ctr.*, (1) SA 1 (GP) para. 32.

132. *Id.*

willingly helping al-Bashir out of the country.¹³³ The court criticized the South African respondents, asserting that they were very aware of every legal principle involved in its decision.¹³⁴ Further, the court pointed to section 165 of the South African Constitution stating: “no person or organ of state may interfere with the functioning of the court.”¹³⁵ To emphasize their discontent in the government’s noncompliance, the court emphatically declared: “a court is the guardian of justice, the cornerstone of a democratic system based on the rule of law. If the State, an organ of State or State official does not abide by court orders, the democratic edifice will crumble stone-by-stone until it collapses and chaos ensues.”¹³⁶ In closing, the court wrote that because of this failure, the Government’s actions must be addressed, and, on a final note, invited the National Director of Public Prosecutions to consider whether criminal proceedings would be appropriate in this matter.¹³⁷

IV. ANALYSIS

In the aftermath of this decision, as of spring 2016, the African National Congress (South Africa’s leading political party), has threatened to withdraw its support from the ICC entirely.¹³⁸ The South African judicial system is also calling on the government to explain itself and is threatening possible conspiracy charges against party leaders for their blatant disobedience of the court orders.¹³⁹ After the initial decision, the government was given time to file an affidavit to explain how al-Bashir was able to leave safely during the summit.¹⁴⁰ On March 15, 2016, the Supreme Court of Appeals rejected the government’s explanation and desire to appeal the High Court’s ruling, and affirmed the lower court’s

133. *Id.* para. 37.2.

134. *Id.* para. 37.1.

135. *Id.* para. 37.1.

136. *Id.* para. 37.2.

137. *Id.* para. 39.

138. Mark Kersten, *Sudan, South Africa and the future of the International Criminal Court in Africa*, WASH. POST: MONKEY CAGE (Oct. 13, 2015), <https://www.washingtonpost.com/blogs/monkey-cage/wp/2015/10/13/sudan-south-africa-and-the-future-of-the-international-criminal-court-in-africa/>.

139. *Id.*

140. Crystal Orderson, *South Africa Asks ICC for More Time To Explain Omar Al-Bashir Issue*, AFR. REP. (Oct. 6, 2015), <http://www.theafricareport.com/North-Africa/south-africa-asks-icc-for-more-time-to-explain-omar-al-bashir-issue.html>.

holding, stating that there will be no more discussion of the relevant legal principles.¹⁴¹

The South African government may still appeal to the Constitutional Court.¹⁴² Some news sources believe that if the Constitutional Court upholds the decisions of the lower courts, an investigation into who, exactly, was responsible for assisting al-Bashir out of the country would follow.¹⁴³ Eventually, the government officials responsible will be asked to go before judges at the ICC to explain their reasoning for their noncompliance.¹⁴⁴

This case reflects the overall weakness of the ICC, as it points out many problems with the Rome Statute and its effective implementation.¹⁴⁵ Without the support of its signatories, the ICC has absolutely no power.¹⁴⁶ The ICC has no police force of its own to conduct arrests and investigations, no agencies to seize documents or freeze assets, and no prisons to hold guilty persons.¹⁴⁷ That is, the ICC is completely subject to the whim of its state parties in facilitating the criminal process.¹⁴⁸ The extent of the court's reliance on the cooperation of its signatory states is reflected in the lengthy provisions outlined in the Rome Statute for the procedural steps the ICC requires state party assistance with.¹⁴⁹ Without state cooperation to accomplish the necessary steps to facilitate an arrest and prosecution, the ICC would be stagnant.¹⁵⁰ This stagnation is becoming more and more apparent as al-Bashir continues to maintain his freedom from arrest. Further, the Rome Statute is largely silent on the repercussions that member states may face if they

141. Minister of Just. & Constitutional Dev. v. S. Afr. Litig. Ctr. 2016 ZASCA 17 para. 113 (S. Afr) (“The conduct of the Respondents in failing to take steps to arrest and detain . . . the President of Sudan . . . was inconsistent with South Africa’s obligations in terms of the Rome Statute and section 10 of the Implementation of the Rome Statute . . .”). In their explanatory affidavit, the government explained that officials were not aware al-Bashir had boarded a plane to leave the country because his passport was not shown to officials. *Id.* para. 7. The appeals court found this explanation implausible. *Id.* para. 7.

142. Otilia Anna Maunganidze, *South Africa’s Shapeshifting Position on International Justice?*, THE HUFFINGTON POST (Mar. 18, 2016, 3:31PM), http://www.huffingtonpost.com/otilia-anna-maunganidze-/south-africas-shapeshifti_b_9497706.html.

143. *Id.*

144. *Id.*

145. Gwen P. Barnes, *The International Criminal Court’s Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir*, 34 FORDHAM INT’L L.J. 1584, 1614 (2010-11).

146. *Id.*

147. *Id.*; see Rome Statute of the International Criminal Court, *supra* note 23.

148. Barnes, *supra* note 145, at 1614.

149. *Id.*

150. *Id.*

breach their duties to the court, which reduces the incentive for signatories to comply.¹⁵¹ The Rome Statute merely says that instances of noncompliance will be referred to the U.N. Security Council, but there is no further discussion of sanctions.¹⁵²

The noted case also shines a light on the convoluted legal maze that is created by conflicting legal principles governing international immunity. The consequences of abiding by any one provision may have led to an alternate outcome for al-Bashir, and there can be an argument made for the application of each provision.¹⁵³ Under customary international law, heads of state enjoy immunity from the courts of foreign states.¹⁵⁴ However, under the Rome Statute, which reflects a growing consensus around the need to address human rights violations and global accountability for such crimes, state officials cannot rely on principles of customary international law or sovereign immunity to escape prosecution.¹⁵⁵ Some scholars believe that these provisions do not contradict one another, because the rules of customary international law are aimed at preventing a state from interfering with another state's sovereign activity, except when criminal jurisdiction is being exercised by an international entity.¹⁵⁶ In other words, international criminal courts are not organs of a particular state; they act on behalf of the international community as a whole to protect collective values.¹⁵⁷ Additionally, it is worth noting that al-Bashir has been Sudan's leader since 1989, and there is no suggestion he will step down unless forced to, thus increasing the problems associated with giving automatic head of state immunity.¹⁵⁸

Alternatively, other scholars argue that the Rome Statute itself is inconsistent with the principles of customary international law and has been problematic since its implementation.¹⁵⁹ In the noted case and elsewhere, it has been argued that the obligations under the Rome Statute, to prosecute perpetrators of human rights atrocities, can override principles of customary international law.¹⁶⁰ However, scholar, Dire Tladi, points out that the ICC may exercise jurisdiction over a head of

151. *Id.* at 1616.

152. *Id.*; see Rome Statute of the International Criminal Court, *supra* note 23.

153. Barnes, *supra* note 145, at 161.

154. Gaeta, *supra* note 103, at 317.

155. *Id.*

156. *Id.* at 320.

157. *Id.*

158. David A. Graham, *How a Suspected War Criminal Got Away*, ATLANTIC (June 16, 2015), <http://www.theatlantic.com/international/archive/2015/06/omar-al-bashir-sudan-icc/395930/>.

159. Tladi, *supra* note 36, at 14.

160. *Id.*

state from a nonsignatory state, which places signatory states in breach of international obligations owed to such a nonsignatory state.¹⁶¹ Article 98(1) of the Implementation Act provides that the ICC cannot proceed with a request for assistance which would require the state to act inconsistently with its obligations under international law with respect to diplomatic immunity of a person or property in a third state.¹⁶² This language suggests that not only would the arrest and surrender of a head of state of a nonparty be inconsistent with customary international law, but the ICC should also be prevented from requesting the surrender of that person in the first place.¹⁶³ In the noted case, the only exception to this situation would be by a waiver of immunity by the third state, which did not happen in the case of Sudan.¹⁶⁴

V. CONCLUSION

This event marks a crossroads for the ICC that may lead to its demise. The withdrawal of South Africa could be a catalyst that would end the ICC altogether.¹⁶⁵ As detailed above, without the support of its signatory states, the ICC has no power, and if South Africa leaves, it would be the first state party to actually withdraw.¹⁶⁶ However, withdrawal from the ICC would have serious repercussions for South Africa. The country has already been the target of extensive condemnation from around the globe. South Africa holds a unique place in the tensions between the AU and the ICC as an emerging world power; a power that must balance its potential global leadership with its large regional role.¹⁶⁷ South Africa must simultaneously maintain its unwavering support for international justice and human rights while appearing steadfast in its commitment to strengthening the AU and the African continent.¹⁶⁸ While a withdrawal from the ICC would signal its support to the AU, it would come at the expense of appearing to be a supporter of al-Bashir, and thus condoning the atrocities relating to him in Darfur. South Africa's behavior can be understood as that of a state caught at the epicenter of an

161. *Id.*

162. Rome Statute of the International Criminal Court, *supra* note 23, art. 98(1).

163. Max du Plessis, *South Africa's Implementation of the ICC Statute*, 5 J. INT'L CRIM. JUST. 460, 476 (2007).

164. *Id.*; see Rome Statute of the International Criminal Court, *supra* note 23, art. 98(1).

165. Graham, *supra* note 158.

166. Milton Nkosi, *What South Africa Leaving the International Criminal Court Would Mean*, BBC NEWS, (Oct 14, 2015), <http://www.bbc.com/news/world-africa-34509342>.

167. Kersten, *supra* note 138.

168. Onishi, *supra* note 1.

unwieldy collision between the aspirations of international criminal justice on one hand and the shifting political initiatives of an emerging power on the other.

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