STRATHMORE LAW JOURNAL

VOLUME 2, NUMBER 1, AUGUST 2016

Strathmore University Press

Strathmore Law School
Madaraka Estate, Ole Sangale Road
P.O. Box 59857 00200
Nairobi - KENYA
Tel. +254-703-034601
editor.sup@strathmore.edu
www.press.strathmore.edu
www.law.strathmore.edu
Twitter: @strathmorelaw

The 'great escape'[1]: In pursuit of President Al Bashir in South Africa

*Jerusha Asin**

> I told him that it would be a bad idea – that an arrest warrant would not be productive. I told him not to go after the top. It limits the options of how we can move forward. He said: "my job's easier than yours. I'm like a train moving down the track and I just follow the evidence." That's how he characterized it. I said "I'm afraid you might hurt the institution you are trying to build." We agreed to disagree.[2]

Introduction

The above excerpt is reportedly an exchange between the first Chief Prosecutor of the International Criminal Court('the Court' or 'ICC') Luis Moreno Ocampo, and a US special envoy to Sudan, Richard Williamson, which occurred at some indeterminate time in 2008.[3] By this time, the Prosecutor had shifted his prosecutorial strategy with regard to the situation in Sudan by deciding to pursue the serving President of Sudan, Omar al Bashir, whereas before, his strategy had been to request the Pre-Trial Chamber to issue summons for persons deemed to be mid-level individuals in the Khartoum government.[4] Briefly, to contextualise this exchange, on 31 March 2005, the United Nations Security Council (UNSC) referred the situation in Darfur to the Prosecutor of the Court.[5] Acting on that referral, the Prosecutor initiated investigations into the situation in Darfur beginning June 2005. On 14 July 2008, the Prosecutor filed an application requesting the Pre-Trial Chamber to issue a warrant of arrest against President Bashir, which

1 Greef P, 'Anatomy of Al-Bashir's great escape, (*Daily Maverick*, 29 June 2015) <http://www.dailymaverick.co.za/opinionista/2015-06-29-anatomy-of-al-bashirs-great-escape/#.VexpqBHBzGc>last accessed on 20 August 2016.

2 Bosco D, *Rough justice: The International Criminal Court in a world of power politics*, Oxford University Press, 2014, 143.

3 Bosco, *Rough justice*, 143.

4 Schiff B, *Building the International Criminal Court*, Cambridge University Press, 2008, 241.

5 UNSC S/RES/1593(2005).

* LLB (Moi) LLM (Exeter) Advocate of the High Court of Kenya, Assistant Lecturer at Strathmore Law School.

was granted on 4 March 2009.[6] Subsequently, warrants of arrest were issued for Al Bashir on 4 March 2009 and on 12 July 2010,[7] with the second warrant being issued to reflect the inclusion of the charge of genocide in the indictment.[8]

It is doubtful whether either the Prosecution or the Court for that matter could have foreseen, six years later, the virulence of the diplomatic firestorm that would be unleashed by the issuance of the said arrest warrants. The warrants would go on to trigger a ferocious fallout between the African Union (AU) and some member states against the Court with regard to requests for cooperation in executing the warrants[9] and the same hostilities being replicated between the AU and the UNSC.[10] Elsewhere, I have argued that the current state of affairs witnessed when analysing state cooperation with the Court, or non-cooperation for that matter, shows that the Rome Statute[11] does not itself supply the motivation for states to cooperate with the Court because not only does the 'Court operate in a world in which power matters'[12] but that unlike Frankenstein's monster, the Court was neither crafted nor designed to escape its creators.[13]

---

6 *Prosecutor v Omar Hassan Ahmad Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-3 (4 March 2009).

7 *Prosecutor v Bashir* (Warrant of Arrest for Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09 (4 March 2009).

8 *Prosecutor v Bashir* (Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09 91 (2 July 2010).

9 *Prosecutor v. Al Bashir*, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir (including Corrigendum and the Annex to the Corrigendum), Case No. ICC-02/05-01/09-139 (ICC PTC I, 12 December 2011); *Prosecutor v. Al Bashir*, Order requesting submissions from the Republic of South Africa for purposes of proceedings under Article 87(7) of the Rome Statute, ICC-02/05-01/09-247(ICC PTC II, 4 September 2015); *Prosecutor v. Al Bashir*, Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's presence in the territory of the Republic of Kenya, Case No. ICC-02/05-01/09-107 (ICC PTC I, 27 August 2010); *Prosecutor v. Al Bashir, Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad, ICC-02/05-01/09-109 (ICC PTC I, 27 August 2010)*: *Prosecutor v. Al Bashir*, Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to Djibouti, ICC-02/05-01/09-129 (ICC PTC I, 12 May 2011). See also ICC-ASP, 'Report of the Bureau on non-cooperation' (7 November 2013) ICC-ASP/12/34, para 22-24 <http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-34-ENG.pdf> on 1 January 2014.

10 See, AU, Decision on Africa's Relationship with the International Criminal Court (12 October 2013) Ext/Assembly/AU/Dec. 1 (October 2013) <http://www.iccnow.org/documents/Ext_Assembly_AU_Dec_Decl_12 Oct 2013.pdf> on 19 August 2014; Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) of 1-3 July 2009, Doc. Assembly/AU/13 (XIII).

11 Rome Statute of the International Criminal Court, concluded 17 July 1998, 2187 UNTS 90 (hereinafter 'Rome Statute').

12 Bosco, *Rough justice,* 1, 189.

13 See , Asin J, 'Pursuing Al Bashir in South Africa: Between 'apology and utopia' in Van der Merwe J,

For present purposes, this brief aims to parse what has been described as 'post apartheid South Africa's most contentious and polarising diplomatic incident'[14] the visit by President Bashir to the 24th Summit of the AU in Johannesburg, South Africa in June 2015 against the subsequent judgments by the High Court and the Supreme Court of Appeal of South Africa that the South African authorities breached domestic legislation and international law by failing to arrest and surrender President Bashir to the ICC.[15]

This brief eventually draws from an 'instrumentalist optic' that views international law as a tool designed by and reproducing state interests[16] in contrast to the linear legalist methodology of maintaining a rigid distinction between law and politics and insisting that state behaviour will conform to legal rules even when this is nakedly contrary to state interests.[17] In this manner, the brief hopes to highlight the blind-spots caused in our understanding and analysis of state cooperation or otherwise with the Court when we fail to give proper premium to the political provenance of the law.[18] This is particularly the case when we consider that the Court, by reference to an image invoked by Antonio Cassese, is a giant without limbs, meaning that the Court is entirely dependent on state cooperation in order to execute its mandate. In turn, this dependence on state cooperation without any form of enforcement mechanism in the Rome Statute means that state cooperation with the Court is contingent on the prerogatives of those states called upon to assist the Court.[19]

---

and Kemp G(eds), *International criminal justice in Africa: Issues, challenges and prospects*, Strathmore University Press, 2016, 6.

14 Mogotsi I, "Sudanese President Omar al Bashir, the Sandton African Union (AU) summit and the International Criminal Court: Diplomacy and international legality- The blessings and burdens of South Africa's leadership of Africa" Centre for Economic Diplomacy in Africa, 19 June 2015<https://centreforeconomicdiplomacy.wordpress.com/2015/06/19/president-omar-al-bashir-the-sandton-african-union-au-summit-and-the-international-criminal-court-icc-diplomacy-internationality-legality-and-the-burdens-of-south-africas-leadership-of-africa/> on 20 August 2016.

15 *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre*(867/15)[2016] ZASCA (15 March 2016) (hereinafter Supreme Court decision).

16 Keohane R, 'International relations and international law: Two optics' (1997) 38 *Harvard International Law Journal,* 487. See also, Schiff, *Building the International Criminal Court,* 3 on the 'diplomatic bargains, political interests and compromises enacted into the Rome Statue during the Rome Conference.'

17 Compare, Koskenniemi M, *From apology to utopia: The structure of international legal argument- Reissue with new epilogue,* Cambridge University Press, 2005, 17-18. See also, Shklar J, *Legalism: law, morals and political trials,* Harvard University Press, 1986, 123.

18 See, Shklar, *Legalism*; Schabas W, *Unimaginable atrocities: Justice, politics and rights at the war crimes tribunals*, OUP 2012, 91; Jorgensen M, 'American foreign policy ideology and the rule of international law: Contesting power through the International Criminal Court' (DPhil thesis, University of Sydney 2015).

19 Asin, 'Pursuing Al Bashir in South Africa,' 18.

Because the dramatic events of the Bashir visit to South Africa in 2015 are reminiscent of a play unfolding across the South African stage with a global audience, I will employ the literary device of a play structured into acts as a framework for my consideration of the different phases of South African interaction with the Court. The prologue therefore outlines the supportive phase of South African interaction with the Court. The first act discusses growing disenchantment with the Court as illustrated by the debacle of President's Bashir's hasty departure from South Africa in June 2015 and the epilogue contemplates the future of international criminal law in light of threats by former staunch supporters of the Court such as South Africa to withdraw from the Rome Statute.[20]

Prologue – Innocence

By all accounts, South Africa was a model and 'well-respected global citizen' whose Judiciary has a reputable track record for upholding human rights and the rule of law. With regard to the ICC and the heady, early days before the Rome Conference, South Africa's commitment to the process coalesced in the form of the South African Development Community(SADC) which met in September 1997 to discuss negotiation strategies at the Rome Conference and to agree on a common position.[21] The participants at this meeting agreed on a set of principles that was subsequently sent to their respective ministers of justice and attorneys-general for endorsement.[22] It is well worth noting that a key element of these principles was that there should be the full cooperation of all states with the Court at all stages of the proceedings.[23] On the basis of these principles, SADC ministers of justice and attorneys-general issued a common statement that formed the basis of their negotiations at Rome. The SADC common position mirrored that of the 'like-minded caucus' in Rome that canvassed for an independent prosecutor unshackled from the control of the UNSC.[24] Therefore, continentally and beyond, South Africa was a strong driver for an independent Court. Accordingly, it was no surprise that it ratified the Rome Statute on 27 November 2000.[25] Thereafter, through an interdepartmental committee established under the auspices of the Department of Justice and Constitutional Develop-

[20] England A, "SA reviews ICC membership in the wake of Bashir storm" *Financial Times,* 25 June 2016.

[21] Du Plessis M, *The International Criminal Court that Africa wants*, Institute for Security Studies, 2010, 6.

[22] Du Plessis, *The International Criminal Court that Africa wants*, 7.

[23] Du Plessis, *The International Criminal Court that Africa wants*, 7.

[24] Du Plessis, *The International Criminal Court that Africa wants*, 7.

[25] Coalition for the International Criminal Court, '2013 status of the Rome Statute around the world' 25 <http://www.iccnow.org/documents/RomeStatuteUpdate_2013_web.pdf>on 14 July 2015.

ment, South Africa drafted and enacted the Implementation of the Rome Statute of the International Criminal Court Act No. 27 of 2002 (Implementation Act) to which the Rome Statute was annexed.

The supportive relationship between South Africa and the Court continued even at the height of an aggressive US diplomatic campaign against the Court, in which Court officials feared that 'this baby was about to be born but Mr Bolton and his friends are on the warpath to kill it.'[26] US opposition to the Court reached its zenith under the Bush Administration when the perception of a loophole in the Statute prohibiting the surrender of a person to the Court in contravention of international agreements[27] led to the US concluding bilateral immunity or 'non-surrender agreements' prohibiting the transfer of US citizens and soldiers to the Court.[28] In the case of South Africa, the US imposed a deadline of 30 June 2003 by which the immunity agreement was to be concluded, failure to which US military aid to South Africa was to be suspended.[29] On 1 July 2003, South Africa was one of 35 states blacklisted by the US as had been promised and had to forfeit USD7.2 million in military aid, because of South Africa's 'commitment to the humanitarian objectives of the ICC and to its international obligations.'[30]

Even in the face of the implosion of the relationship between AU member states and the Court precipitated by the in(famous) AU resolution passed in Sirte in 2009 asking states not to cooperate with the Court with regard to arrest warrants issued for serving heads of state,[31] South Africa's voice was urging reason. Dire Tladi has observed that it was due to the South African position that obligations under the Rome Statute could not simply be ignored that a caveat was issued to the general call for non-cooperation of African states urging them to balance, where applicable, their obligations to the AU with their obligations to the ICC.[32] Though South Africa has neither been coy nor shy about questioning some of the practices of the Court, on the whole, it has been instrumental in lowering anti-ICC rhetoric on the continent.[33]

---

26 Bosco, *Rough justice*, 81.

27 Article 98(2), Rome Statute.

28 Kelley J, 'Who keeps international commitments and why? The International Criminal Court and bilateral non-surrender agreements' *APSR* (2007) 101(3) 573, 580.

29 Du Plessis, *The International Criminal Court that Africa wants*, 7.

30 Du Plessis, *The International Criminal Court that Africa wants*.

31 Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) of 1-3 July 2009, Doc. Assembly/AU/13(XIII).

32 Tladi D, 'The duty on South Africa to arrest and surrender President Al-Bashir under South African and international Law' *Journal of International Criminal Justice*(2015), 4.

33 Tladi, 'South Africa's duty to arrest and surrender Al Bashir,' 4.

In that regard, up until June 2015, the method employed by South Africa to avoid a conflict between its AU obligations and as a state party to the Rome Statute in relation to the arrest warrant issued by the Court against President Bashir had been rather ingenious. For the inauguration of President Zuma of South Africa in 2010,[34] the World Cup in 2010 as well as the funeral of the late President Mandela, President Bashir was invited but notified that he would be arrested pursuant to the warrants if he attended,[35] which was in effect an invitation to desist from honouring the formal invitation to attend these important events.

This clever circumvention of conflict would however come to a head with the decision by President Bashir to attend the AU Summit in South Africa in June 2015, reportedly against the backdrop of assurances by South African authorities that on the occasion of the AU summit in Johannesburg, he would not be arrested.[36] The decision by the South African government in January 2015[37] to host the AU summit would place South Africa on a collision course with the Court[38] and is important when contrasted with that of Malawi, a state party to the Rome Statute, which declined to host the AU summit in 2012 because the AU insisted on President Bashir attending the Summit irrespective of the arrest warrant.[39] However, Malawi based its decision on economic considerations because the US had undertaken to withhold about USD350 million economic aid to Malawi for a previous decision to host President Bashir in Malawi.[40]

In any event, the invitation to President Bashir to attend the AU summit and his acceptance thereof set the stage for animpasse between the executive authorities and the Judiciary in South Africa.

---

34 *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and others.*

35 (27740/2015) High Court of South Africa, 24 June 2015 (High Court decision). Supreme Court Decision, para 104.

36 See, "Media consider ICC 'dead' after Bashir exit" *BBC*16 June 2015<http://www.bbc.com/news/world-africa-33148906> on 31 August 2016 ; "Zuma assured AU that Al Bashir would not be arrested - Mugabe, *News24* 16 June 2015 <http://www.news24.com/SouthAfrica/News/Zuma-assured-AU-al-Bashir-would-not-be-arrested-Mugabe-20150616> on 31 August 2016.

37 High Court decision, para 13.

38 Tladi, 'South Africa's duty to arrest and surrender Al Bashir,' 3.

39 'Malawi gives up hosting AU summit over pressure to host Sudan's President' *Sudan Tribune*8 June 2012, <http://www.sudantribune.com/spip.php?article42868>; 'Sudan's Omar al Bashir not welcome for Malawi's Banda' *BBC* 8 June 2012<http://www.bbc.com/news/world-africa-17963368> on 31 August 2016.

40 See "Malawi President not to attend AU summit" *The Herald* 16 June 2012 <http://www.herald.co.zw/malawi-president-not-to-attend-au-summit/> on 31 August 2016.

Act I, Scene I–The Fall

A chronology of 'the great escape'

In January 2015, when South Africa decided to host the AU Summit, it was required to enter into a hosting agreement with the AU Commission.[41] Article VIII of this host agreement specifically provided for privileges and immunities, with clause 1 thereof according the members and staff of the Commission as well as delegates and other representatives the privileges and immunities outlined in the General Convention on the Privileges and Immunities of the Organisation of African Unity.[42] The responsible minister therefore issued a government gazette notice number 38860 dated 5 June 2015, publishing Article VIII of the host agreement and incorporating the agreement between South Africa and the Commission of the African Union as domestic law in South Africa.[43]

Thereafter, President Bashir confirmed his attendance at the Summit to the South African government and requested that he be granted the necessary privileges and immunities as provided in Article VIII of the host agreement.[44] Aware of the arrest warrants issued by the ICC, the South African Cabinet collectively decided that as the hosting country, South Africa was first and foremost obliged to uphold and protect the inviolability of President Bashir in accordance with AU terms and conditions and to not arrest him in terms of the ICC arrest warrants while attending the AU Summit.[45] In the estimation of the government, the promulgation of the notice by responsible minister, which provided for the immunity of heads of states of AU member states, granted South Africa reprieve from executing the ICC arrest warrants.[46] No timeline is given for the said Cabinet decisions but as the date of the government notice is 5 June 2015, we may safely suppose that as at date, the Cabinet had made the decision that South Africa had been granted a reprieve from its obligation to execute the ICC arrest warrants.

Therefore, as at 28 May 2015 when the Registrar of the ICC sent a *note verbale* reminding SA to cooperate with the ICC and arrest President Bashir, the Cabinet was in active deliberation over the issue of immunity for President Ba-

41 High Court decision, para 13.
42 High Court decision, para 15.
43 High Court decision, para 17.
44 High Court decision, para 19.
45 High Court decision, para 22.
46 High Court decision, para 22.

shir. The SA government responded to the said *note verbale* by the Registrar in Note Verbale No 039/2015 of 12 June 2015, requesting to consult the Court under Article 97.[47] The argument of the Respondents(SA authorities) at this point was that Cabinet had taken a decision to grant President Bashir immunity from arrest. It is therefore not an absurd extrapolation to argue that by the time the South African government was requesting consultation with the ICC on 12 June 2015, a Cabinet decision had already been reached on or before 5 June 2015 the terms of which were that President Bashir was not to be arrested when he entered South African territory for the summit.

On 13 June 2015, the Prosecutor of the ICC requested the Court to issue an order clarifying that South Africa was under an obligation to arrest and surrender President Bashir,[48] a request which the Pre-Trial Chamber granted.[49]

On Sunday, 14 June 2015, the Southern Africa Litigation Centre initiated proceedings before the High Court at Gauteng for orders that the failure of South African authorities to take steps to arrest or detain President Bashir was inconsistent with the Constitution and therefore invalid. At 15:00 on 14 June 2015, a Judge issued an adjournment of the proceedings before the High Court to the next day on Monday 15 June 2015 at 11:30 am but issued an order prohibiting President Bashir from leaving South Africa until a final order was issued. The Judge also enjoined South African authorities to take all necessary steps to prevent him from doing so. Further, any Answering Affidavits were to be filed by the Respondents by 9 am on 15 June 2015, with the Applicant replying by 10 am on the same day.[50]

It is imperative at this point to belabour the point that by the evening of 14 June 2015, there were two Court decisions from both the Pre-trial Chamber of the ICC as well as the South African High Court, enjoining South Africa to take all necessary steps to prevent Bashir from leaving the territory and to arrest him and initiate proceedings for his surrender to the ICC. However, on the same evening of 14 June 2015, the Sudanese Presidential Jet was moved from the Oliver Tambo International Airport to the Airforce Base at Waterkloof.[51] On the

47 *Prosecutor v Omar Hassan Ahmad Al Bashir,* Submission from the Republic of South Africa in Response to the Order requesting a submission dated 4 September 2015 for the purposes of proceedings under Article 87(7) of the Rome Statute, ICC-02/05-01/09-248-AnxI (2 October 2015) para 1.2.

48 *Prosecutor v Omar Hassan Ahmad Al Bashir,* Submission from the Republic of South Africa.

49 *Prosecutor v Omar Hassan Ahmad Al Bashir,* Submission from the Republic of South Africa, para 14.

50 High Court decision, para 6.

51 Grieff P 'Anatomy of Al-Bashir's great escape' *Daily Maverick,* 29 June 2015.

same date, President Bashir and his entire entourage moved from the Sandton Conference Centre to the Waterkloof Airbase.[52]

On 15 June 2015, the authorities filed the Answering Affidavit at 11:25 am instead of at 0900 without tendering reasons for the delay. During the entire hearing on 15 June 2015, Counsel for the South African authorities assured the Court that President Bashir was still in the country, which fact the Court considered fundamental to its exercise of jurisdiction, and despite the Court's misgivings on media reports trickling in that President Bashir had already left the country.[53] On the basis of these assurances, on Monday 15 June 2015 at 15:00 hours, the High Court insured interim orders that the South African authorities were compelled to take all reasonable steps to prepare to arrest President Bashir and to detain him.[54] It was only at the point of the Court handing down its interim orders that Counsel for the South African authorities informed the Court that President Bashir had left the country, despite the explicit orders of 14 June 2015.[55] The Court would later determine that for the plane of President Bashir to have landed in Sudan by late afternoon, it had departed the Waterkloof Air Base at around noon on 15 June 2015.[56]

The conceptual narrowness of legalism as an ideology in international criminal law

The above account illustrates the narrowness of legalism as an ideology permeating international criminal law and the frailties of Rome Statute state co-operation regime as nothing else can. Legalism is the rule-centred approach that eschews the role of politics in any legal activity.[57] In the present context, it refers to a conception of global norms that seeks the separation of law from politics for the promotion of human rights.[58] Judith Shklar has taken the view that the pursuit of justice as the highest form of legalism finds expression in specifically legal institutions of which courts like the ICC are the most characteristic.[59] The

52 High Court decision, para 36.
53 High Court decision, para 8.
54 High Court decision, para 2.
55 High Court decision, para 9.
56 High Court decision, para 36.
57 Shklar, *Legalism: Law, morals and political trials*, 1
58 Rodman K, 'Justice as a dialogue between law and politics: embedding the International Criminal Court within conflict management and peace building' *Journal of International Criminal Justice* (2014) 439.
59 Shklar, *Legalism: Law, morals and political trials*,118.

policy of justice is to intensify legalism in political life by promoting the institutionalisation of the administration of justice such that as many social conflicts are resolved by judicial means as is possible.[60] At its most extreme, all political issues are resolved by court-like procedures.[61]

The fallacy of this position however is that justice is not the only social virtue in the continuum of international life, where there is a plurality of actors. Therefore policies of justice are constantly compromised against other social demands, which include considerations of values other than justice. In the present instance, the fact of the formal existence of the Rome Statute would lead a legalist to insist on having attained a global, if not a universal, legal order to oblige states to cooperate with the Court by the rule of law. However, pursuant to Judith Shklar's theory, there is a need for political reality to complete the formal perfection of the law, in relative terms.[62] This is the point at which the 'reality deficit'[63] in terms of the state cooperation regime under the Rome Statute checks in. Because by reference to legalism, we assume that all politics is subordinated to the judicial process. To maintain the distinction between legal order and political chaos, it is necessary to define the law out of politics and create an image of politics as a species of war against the law.[64] Time and again, the choice of state parties in relation to requests for cooperation by the ICC with regard to the arrest warrant against President Bashir shows the privileging of other mores of social morality above the legal obligation to cooperate with the Court. This is why for instance, before the High Court, South Africa argued that the decision of the Cabinet to grant President Bashir immunity from arrest in effect 'trumped' the government's duty to arrest the President on South African soil in terms of the two arrest warrants issued by the ICC and obligations under the Implementation Act.

However, this is not to denigrate the value of legalistic ethics or of institutions with a legalistic underpinning like the ICC. The Rome Statute is after all a *fait accompli*. Shklar profoundly stated that 'to show that justice has its practical and ideological limits is not to slight it.'[65] What this means is that the place of jus-

60 Shklar, 118.
61 Shklar, 118.
62 Shklar, 136.
63 Slaughter A, and others, 'International law and international relations theory and a new generation of interdisciplinary scholarship' *American Journal of International Law* 92 (1998) (3) 367, 371 cited in Asin, 'Pursuing Al Bashir in South Africa,' 9.
64 Shklar, 122.
65 Shklar 122.

tice, in the sense of securing state cooperation with the ICC, will not be secured above the international political universe, but in its very midst,[66] with all the practical challenges denoted by this statement, as is evident in the South African case.

Turning back to the judgment, the High Court went on to find that the reliance by South African authorities on the different agreements touching on immunity was ill-advised and unfounded and could not possibly trump the Rome Statute and the subsequent Implementation Act.[67] The Court was categorical that the Implementation Act had legislative authority having been passed by Parliament and could not be displaced by a notice promulgated by a Minister or by a Cabinet decision.[68] Not surprisingly, the High Court concluded that its order dated 14 June 2015 had not been complied with and noted that when State organs and officials fail to abide by Court orders, 'the democratic edifice crumbles stone-by-stone.'[69] If we are persuaded by Shklar's theory, this statement by the Court would be the apogee of legalism, where all situations of conflict are viewed through the prism of a lawsuit.[70] It is however difficult to argue against legalism as a means of ordering world society, as for instance, through the Rome Statute and its stated intent to ensure that the most serious crimes of concern to the international community as a whole must not go unpunished.[71] Such crimes must be sanctioned through just action and the application of rules impartially to attain a just result without arbitrariness. However, in the context of state cooperation, it becomes apparent that a legal obligation to cooperate does not necessarily equate to a political commitment.[72] This has grave ramifications for the ICC as will be discussed in the next scene.

Act I, Scene II- Disenchantment

Immediately upon the issuance of the judgment by the High Court on 23 June 2015 finding that South African authorities had a positive duty to arrest President Al Bashir, the Respondent authorities sought leave to appeal.

66 Shklar, 123.
67 High Court decision, para 31.
68 High Court decision, para 31.
69 High Court decision , para 37.2
70 Shklar, 136.
71 Rome Statute, preambular para 4.
72 Peskin V, and Boduszynski M, 'The rise and fall of the ICC in Libya and the politics of international surrogate enforcership' *International Journal of Transitional Justice*(2016), 4.

Meanwhile in The Hague, on 4 September 2015, the Pre-Trial Chamber of the ICC directed South Africa to submit views on its failure to arrest and surrender President Bashir for purposes of proceedings under Article 87(7) of the Rome Statute by no later than 5 October 2015.[73]

Back in Johannesburg, on 16 September 2015, the High Court refused the application made by the Respondent authorities on 23 June 2015 for leave to appeal. Consequently, on 2 October 2015, the Government filed an application petitioning the Supreme Court of Appeal for leave to appeal. On that basis, before the Pre-Trial Chamber of the ICC, the SA government applied for an extension of the time limit fixed by Chamber so as to allow for the finalisation of the judicial process in domestic courts concerning the legal obligations of the Government of South Africa under both municipal and international law.[74]

The municipal judicial process came to an end effective 15 March 2016 with the publication of the judgment of the Supreme Court of Appeal of South Africa. In summary, the Supreme Court unanimously decided that the Government had breached its obligations under the Implementation Act No 27 of 2002 in failing to arrest President Bashir and detain him for surrender to the ICC. Dapo Akande has also noted the remarkable finding of the Supreme Court that under the Implementation Act, immunities under international law, including the immunities of heads of states for genocide, war crimes and crimes against humanity, would not act as a bar to arrest and prosecution in South Africa in the context of a request by the ICC to SA to cooperate.[75]

With regard to the host agreement between SA and the AU by which the authorities had sought to argue that President Bashir was entitled to immunity, the Supreme Court, whose lead judgment was delivered by Wallis JA, rejected the argument that President Al Bashir was a 'delegate' within the meaning contemplated in Article VIII of the host agreement and such, it could not confer any immunity on President Bashir.[76]

On the matter of Article 27 and Article 98 of the Rome Statute, the Supreme Court readily agreed that there is a tension between these two articles

[73] *Prosecutor v Omar Hassan Ahmad Al Bashir,* Submission from the Republic of South Africa in Response to the Order requesting a submission dated 4 September 2015, para 1.7.

[74] *Prosecutor v Omar Hassan Ahmad Al Bashir,* Submission from the Republic of South Africa in Response to the Order requesting a submission dated 4 September 2015, para 1.9, 1.10.

[75] Akande D, 'The Bashir case: Has the South African Supreme Court abolished immunity for all heads of states?' *EJIL Talk!*, 29 March 2016.

[76] Supreme Court Decision, para 47.

that has not as yet been authoritatively resolved.[77] The lead judgment did not however, pronounce itself on the different strands of debates advanced for the application of these two articles. On the question of whether there is immunity for heads of state under customary international law, the presiding judge stated that he was unable to hold that at this particular stage of customary international law, there is an international crimes exception to the immunity that heads of states enjoy when visiting foreign countries and before foreign national courts.[78]

In an article discussing the ramifications of the judgment by the Supreme Court, Dapo Akande agrees in substance with the finding on the absence of an international crimes exception to head of state immunity but takes issue with the decision of the Court to halt its consideration of customary international law on the immunity of heads of states without referring to the authorities dealing with issues of immunity in relation to persons charged with international crimes.[79] Ultimately, the Court was not persuaded by arguments that the UNSC could have by Resolution 1593 implicitly waived President Bashir's immunity,[80] as the Court considered that this matter was the subject of very sharp controversy amongst commentators. In reading the judgment, one almost gets the sense that the Court considers arguments about implicit waiver of immunity by the UNSC to be irrelevant. The Court's final determination therefore turned on its interpretation of the domestic legislation implementing the Statute, Section 10(9)[81] thereof which provides that the fact that the person to be surrendered is a person contemplated in Section 4(2) (a) or (b)[82] does not constitute a ground for refusal to issue an order contemplated in section 5.[83] The persons referred to in Section 4(2)(a) include a person who 'is or was a head of State."[84] The Court therefore concluded that the fact that President Bashir was such a person was not any

77 Supreme Court Decision, para 60.

78 Supreme Court Decision, para 85.

79 Akande D, 'The Bashir case'. See Supreme Court Decision para 69 and 106.

80 Supreme Court Decision, para 106.

81 The provision (Section 10(9)) reads: 'The fact that the person to be surrendered is a person contemplated in section 4 (2)(a) or (b) does not constitute a ground for refusing to issue an order contemplated in subsection (5).'

82 The provision reads: Despite any other law to the contrary, including customary and conventional international law, the fact a person-

(a) is or was a head of State or government, a member of a government or parliament, an elected representative or a government official: or

(b) being a member of a security service or armed force, was under a legal obligation to obey a manifestly unlawful order of a government or superior, 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.

83 Supreme Court Decision, para 100.

84 Supreme Court Decision, para 100.

grounds for a magistrate to refuse to make an order for his surrender, in effect stating that Section 10(9) of the Implementation Act removes any immunity with regard to proceedings relating to surrender to the ICC.[85] The Court distinguished the application of the Diplomatic Immunities and Privileges Act (DIPA) and effectively held that the Implementation Act was *lex specialis* with regard to matters falling under its ambit, with the corollary that the DIPA was *lex generalis*.[86] For South Africa therefore, immunity is dependent on domestic legislation in the form of the Implementation Act or where applicable, the DIPA.

Per Akande, the most striking feature of the judgment is the finding on the immunity of heads of states from prosecution in South Africa for international crimes. Notwithstanding the finding that there is no international crimes exception to immunity for heads of states under customary international law(meaning immunity from arrest and prosecution), the Supreme Court held that Section 4(2) (a) of the Implementation Act removes such immunity because it defines those persons for whom immunity is removed under Section 10(9) of the Implementation Act. This means that under the Implementation Act, in South Africa, heads of state have no immunity for international crimes and can be arrested and prosecuted in the territory of South Africa. It is difficult to understand or reconcile this proposition with the Court's own finding[87] that immunity applies even where heads of states are charged with international crimes when one considers that South Africa's domestic implementing legislation on immunities for heads of state may very well clash with customary international law. It is also not entirely clear whether South African domestic legislation could be interpreted to trump the provisions of international law, on the authority of Article 27 of the Vienna Convention on the Law of Treaties. This last point may however be stretching the point to absurdity but it is hoped that the reader appreciates this curious point in the Supreme Court judgment.

Epilogue

The question may then be asked, what has been the reaction of the South African Government to the Supreme Court judgment? There does not yet seem to be an official statement issued by the authorities after the Supreme Court

85 Akande, 'The Bashir case'.
86 Akande, 'The Bashir case'.
87 Supreme Court decision, para 84.

judgment was handed on 31 March 2016 with its unequivocal finding that the Government violated its own law in failing to arrest and surrender President Bashir to the ICC.

However, prior to the judgment, in October 2015, a deputy government minister reportedly announced the decision by the ruling party, the African National Congress (ANC) to move Parliament to withdraw South Africa from the Rome Statute.[88] This would seem to indicate a groundswell of discontent against the ICC by South Africana authorities on the debacle over the escape by President Bashir from South Africa in June 2015.

Regardless, as at the time of this writing in August 2016, all 34 African states party to the Rome Statute are still state parties, without exception. International law is still based on consent by states, and a state that is completely dissatisfied by its relationship with the ICC is at liberty to terminate the relationship accordingly.

It bears noting that threats by different states to abandon the Court fall within the international relations context of three likely behaviour patterns that states would adopt towards the Court: marginalisation, control and acceptance.[89] Withdrawal would constitute a form of control of the international tribunal and has international precedent in France and the United States withdrawing the broad jurisdiction they had granted the International Court of Justice in the 1970s and 1980s.[90] The state wields withdrawal as an instrument to communicate its displeasure with the activities of an international tribunal but this is an exceptionally blunt instrument as David Bosco observes that may only be wielded once.

That being said, I do not contemplate that there will be a mass withdrawal from the Statute by African countries by reference to the power of ideas at the Rome Conference and the fact that international justice has become too important to the international system for states to suffer its complete collapse, notwithstanding the grandstanding witnessed by different actors to date.[91] However, in the event that one or a few states do withdraw, this will be a shame but nowhere near the cataclysmic disaster we have been made to believe, with reference to the early US opposition to the Court, against which the Rome Statute was hard won. By the same token, with reference to state cooperation, it is also necessary to

88 Reuters, 'African National Congress plans to withdraw South Africa from International Criminal Court', *The Guardian* 11 October 2015.

89 Bosco, *Rough justice*, 11-17.

90 Bosco, *Rough justice,* 14.

91 Schabas W, 'The Banality of International Justice' (2013) *Journal of International Criminal Justice*, 1, 7.

begin to acknowledge the limitations of the legalist role of the Court in a global politic organised around territorial sovereignty.[92] Judging by the blaring headlines whenever both state parties and non-state parties flout the ICC arrest warrant against President Bashir, it would appear that the particular diplomat whose exchange with the Prosecutor at the outset of this brief was reproduced was right and that the damage wrought to the Court and its credibility in every instance of non-compliance has been significant.[93] This is not to presume that if the arrest warrant remains outstanding, President Bashir will not be arrested in the fullness of time. Experience however shows that this will only happen when he loses any and all political capital he holds.[94]

> *...All progress is precarious, and the solution of one problem brings us closer to another…*[95]

[92] Orford A, 'A jurisprudence of the limit' in Orford A (ed) *International law and its others* (CUP 2009), 2.
[93] Asin, 'Pursuing Al Bashir ... between apology and utopia', 25.
[94] Asin, 'Pursuing Al Bashir ... between apology and utopia', 25.
[95] King ML, Jr, *Strength to love*, 1981, 83.