

Recent Developments

‘South Africa is not an accused’: State (non) co-operation with the ICC and the case of the arrest warrants for President Omar al-Bashir

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In Greek mythology, Antaeus was the Libyan half-giant son of the Earth goddess, Gaea and Poseidon, the god of the sea.¹ Antaeus had the disturbing proclivity to challenge all strangers passing through his country to wrestle with him. It is quite telling that the Greek word underlying his name, Antaios, means to be set against, or to be hostile.² Antaeus’ occupation of wrestling strangers was geared towards the macabre end of slaying his opponents and using their skulls to build a temple to his father Poseidon. His secret superpower was that he drew strength from contact with his mother, Gaea, such that even when thrown to the ground in the midst of wrestling matches, his contact with his mother renewed his strength. In this way, Antaeus proved to be invincible. In that vein, Antaeus challenged Hercules, a demigod of sorts known for his strength, to a wrestling match.³ In this confrontation, no matter how many times Hercules threw Antaeus off and tossed him to the ground, Antaeus would not relent and even appeared reinvigorated from the encounter with the earth.⁴ When Hercules eventually realised that Gaea, the Earth, and Antaeus’ mother, was the source of his strength, he suspended Antaeus aloft until all of Antaeus’ power drained away, and then crushed him.

¹ Gill N, ‘About the giant Antaeus in mythology’, 25 March 2017, <<https://www.thoughtco.com/antaeus-112058>> on 30 June 2017. See also, *Encyclopaedia Britannica, Antaeus, Greek Mythology* <<https://www.britannica.com/topic/Antaeus>> on 30 June 2017.

All references to the tale of Antaeus are drawn from Nassim T, *Skin in the game: The thrills and logic of risk-taking*, <http://www.fooledbyrandomness.com/SITG.html> on 30 June 2017.

² See Antaios, citing *Dictionary of Greek and Roman Biography and Mythology* <<http://www.theoi.com/Gigante/GiganteAntaios.html>> on 1 July 2017.

³ At the time of Antaeus challenging Hercules to a wrestling match, Hercules was on his way to complete one of the 12 labours set for him by Eurystheus.

⁴ Gill N, ‘About the giant Antaeus in mythology’.

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This ancient tale appears to evoke the confrontation between the International Criminal Court (ICC) and state parties, and at this particular point in time, the Republic of South Africa, in connection with the arrest warrants issued by the Court for the President of Sudan in 2009 and 2010. Briefly, between 13 and 15 June 2015, President Omar al-Bashir was present on the territory of South Africa for purposes of attending the 25th Ordinary Session of the Assembly of the African Union. Despite judgments from both the ICC upholding the obligation of South African authorities to arrest and surrender President Bashir and parallel domestic proceedings at the South African High Court in which authorities were ordered to prevent the departure of President Bashir from South African territory pending final judicial decision on whether the Government was required to execute the ICC arrest warrants, President Bashir nevertheless departed from the Waterkloof military air base on 15 June 2015, even as Government lawyers assured the High Court in a hearing on the same date that he was still in the country. Only after his plane had safely landed in Khartoum did the same lawyers then notify the High Court that he had left South Africa.⁵

This single incident sparked a diplomatic as well as judicial firestorm on both the national and international plane of colossal proportions. The robustness of the South African legal system in connection with the Great Escape by President Bashir and the further interaction between South Africa and the ICC is however above reproach. South Africa currently holds the curious distinction of being the only state party to have formally deposited an instrument of withdrawal from the Rome Statute of the International Criminal Court (Rome Statute) with the UN Secretary-General and to subsequently revoke that same instrument following a decision of the High Court that the proper procedures to withdraw South Africa from the Rome Statute were not followed. On 15 March 2016, the Supreme Court of Appeal found that South Africa violated its domestic legal obligations under the Implementation of the Rome Statute of the International Criminal Court Act (Implementation Act)⁶ and its international obligations in failing to arrest and surrender President Bashir of Sudan when he attended an AU Summit in Johannesburg from 13 to 15 June 2015.

This piece is intended to chart the stirring developments in South Africa and at The Hague in connection to President Bashir's 'Great Escape' following the decision of the Supreme Court in March 2016. Because previous sub-

⁵ Asin J, 'The "Great Escape": In pursuit of President Al Bashir in South Africa' 2 *Strathmore Law Journal* 1, 2016, 173.

⁶ *Implementation of the Rome Statute of the International Criminal Court Act* (No 27 of 2002).

missions on the question of the failure of South African authorities to arrest President Bashir have focused on the blind spots caused in our understanding when we completely surrender to the strict legalist ideology and penchant that international criminal law exists in the Dworkian conception of an empire of law with states as its lieges,⁷ this piece proposes to view subsequent developments in South Africa and at The Hague through the analytical lens of critique. This brief proceeds on the Foucauldian definition of critique as:

...not a matter of saying that things are not right as they are. It is a matter of pointing out on what kinds of assumptions, what kinds of familiar, unchallenged, unconsidered modes of thought the practices that we accept rest.⁸

The focus on South African legal and extra-legal arguments in the context of non-cooperation proceedings instituted against South Africa under article 87(7) of the Rome Statute⁹ at The Hague is deliberate to the extent to which they reflect a trenchant critique of the body of international criminal law, and the ICC as the epitome of all the legalistic aspirations of the discipline. These arguments were canvassed by South Africa in the context of proceedings initiated by the ICC against South Africa by which state parties that fail to comply with requests for cooperation with the Court are referred to the Assembly of Parties under the Rome Statute and, where applicable, as is the case in the situation in Darfur, to the United Nations Security Council (UNSC).

South Africa's interaction with the ICC reveals a staggering trajectory from a model state party to the Rome Statute and enthusiastic supporter of the international criminal justice project to defender of the ICC at the onset of the tumultuous relationship between the ICC and the African Union (AU) to the current disaffected malcontent compelled to defend her perception of national¹⁰ and continental pride and honour¹¹ before the ICC. This brief seeks to go

⁷ Dworkin R, *Law's empire*, Hart Publishing, 1998, vii.

⁸ Foucault M, 'Practicing criticism,' in Kritzman L (ed) *Politics, philosophy, culture: Interviews and other writings 1977-1984*, Sheridan S (trans) 1988, New York, 154-155. Cited by Schwöbel C, 'Introduction' in Schwöbel C (ed) *Critical approaches to international criminal law*, Routledge, 2014, 1.

⁹ *Prosecutor v Omar Hassan Ahmad Al Bashir*, Decision convening a public hearing for the purposes of a determination under Article 87(7) of the Statute with respect to the Republic of South Africa, ICC-02/05-01/09 (8 December 2016) (Decision convening a public hearing).

¹⁰ *Prosecutor v Omar Hassan Ahmad Al Bashir*, Transcript of hearing on 7 April 2017, ICC-02/05-01/09-T-2-ENG ET WT 07-04-2017 2/92 SZ PT. Page 11 line 18 where the South African representative states that '*South Africa is not an accused*. We are a sovereign state and sovereign states, as you would know, are governed by rules and procedure, and that is what we are looking for. That was not available and it is still not available.' (Emphasis added)

¹¹ *Prosecutor v Omar Hassan Ahmad Al Bashir*, Transcript of hearing on 7 April 2017, ICC-02/05-01/09-

beyond the singularly linear observation that South Africa is intransigent and in active collusion with the world's only leader charged with the triumvirate of genocide, war crimes and crimes against humanity and seeks as part of the critical project to understand why South Africa came to this pass and what this tells us about the contradictory impulses, biases and expectations inbuilt into international criminal law.¹² I suspect that the current South African non-compliance conundrum at the ICC reveals underlying problems whose solutions do not lie within a better-managed adherence to existing rules and regulations.¹³

For that reason, the tale of Antaeus at the outset of this piece is used to frame the relationship between the ICC and states. Antaeus' contact with the Earth, his mother Gaea, gave him his power and made him invincible when challenging strangers. If you will, this is an advancement of the jurist Antonio Cassese's famous simile that international criminal tribunals are 'like giants without arms and legs,' only that in the retelling, the ICC is a giant which derives strength from its contact and support from states.¹⁴ It does not strain the bonds of credulity to extrapolate the ICC as the giant Antaeus, concerned as it is with confronting strangers who are essentially *hostis humanis generis*, that cadre of criminal who violates universal norms and who operates beyond the bonds that hold the international society together and is thus an enemy of mankind.¹⁵ I use the tale of Antaeus to incite deeper and more reflective thought on the logical conclusion of the fact of the ICC's dependence on states and what this bodes for important aspects of its work going forward. Antaeus was vanquished only when he lost contact with the earth. This loss of strength that happened when Hercules discovered the source of his power exposed him to reality, and has been extrapolated to mean 'skin in the game,' in the sense of having exposure to the real world

T-2-ENG ET WT 07-04-2017 2/92 SZ PT. Page 39 line 25 where the South African representative argued as follows: 'For South Africa, the political and diplomatic complexities also arise because of a multiplicity of factors including the leading role of peacemaker that we play on the continent. Our commitment to peacemaking, to peacekeeping is tangible. It's not academic. It's not just about statements we make at the African Union or the United Nations... As a leading player in peace efforts, we cannot disengage from the African Union or adopt a policy that would suggest we are not going to host AU heads of state.'

¹² Compare, Robinson D, 'Inescapable dyads: Why the International Criminal Court cannot win' 28 [2015] *Leiden Journal of International Criminal Law*, 323, 338.

¹³ Mégrét F, 'International criminal justice: A critical research agenda' in Schwöbel C, (ed), *Critical approaches to international criminal law*, Routledge, 2014, 21.

¹⁴ Cassese A, 'On the current trends towards criminal prosecution and punishment of breaches of international humanitarian law,' 9 *European International Law Journal*, 1998, 13.

¹⁵ Nouwen S and Wouter W, 'Doing justice to the political: The International Criminal Court in Uganda and Sudan' 21 *European Journal of International Law* 4, 2011, 942.

or to contact with reality and having to pay a price for its consequences.¹⁶

Accordingly, the brief is structured as follows: The first part outlines the salient developments in South Africa after the pronouncement by the Supreme Court of Appeal in March 2016 that South Africa was in violation of domestic obligations for having failed to arrest and detain President Bashir. The second part then highlights the proceedings at The Hague instituted against South Africa for non-compliance with the requests to cooperate with the ICC by failing to arrest President Bashir. The final part discusses the ramification of the state of affairs obtaining after the decision of the ICC Pre-Trial Chamber (the Chamber) rendered on 6 July 2017 that while South Africa failed to comply with its obligations under the Rome Statute by not arresting and surrendering President Bashir to the ICC, South Africa would nevertheless not be referred to the Assembly of State Parties (ASP) or the UNSC for non-compliance as that would not be 'appropriate'.¹⁷

1. The best laid plans – legal developments in South Africa and at The Hague after the Supreme Court of Appeal Judgment of March 2016

On 15 March 2016, the Supreme Court of Appeal of South Africa rendered a judgment in which it unanimously found the authorities to be in breach of obligations under the Implementation Act by failing to arrest President Bashir. Even as this decision was being hailed as a 'landmark judgment for international criminal justice',¹⁸ on 17 April 2016, the Minister of Justice and Constitutional Development filed an application at the Constitutional Court for leave to appeal the March 2016 decision of the Supreme Court and for the judgments of the Supreme Court and the High Court to be set aside. The application for leave to

¹⁶ Nassim, *Skin in the game*, preface.

Compare also, Sliedregt E, 'International Criminal Law: Over-studied and underachieving?' 29 *Leiden Journal of International Law* 1, March 2016, 1-12, where the scholar suggests that there is need for ICL scholarship to test assumptions underlying the international criminal justice system. Schwöbel had earlier argued quite rightly that there is a difference between a critique that tests the assumptions underlying international criminal justice and a critique that is merely concerned with effectiveness and the strengthening of the existing structures. Needless to say, the critique proffered by South Africa in this brief is one challenging the assumptions underlying international criminal justice.

¹⁷ *Prosecutor v Omar Hassan Ahmad Al-Bashir*, Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir' ICC-02/05-01/09 , 6 July 2017, 53.

¹⁸ Du Plessis C, 'Al Bashir ruling a landmark judgment for international criminal justice' *Mail and Guardian*, 17 March 2016.

appeal the contested judgment was accordingly filed and set down for hearing on 22 November 2016.¹⁹ By all accounts, therefore, any resistance to the adverse findings made against the SA authorities was to be channelled through the courts.

That is why the decision by the South African Cabinet on 19 October 2016 to withdraw South Africa from the Rome Statute by executive decision landed with the impact of a blitzkrieg on a shocked South African and global audience, more so the international community; even the then UN Secretary General was reportedly shocked by South Africa's decision to withdraw.²⁰ In the actual notification of withdrawal titled 'Instrument of Withdrawal' that was submitted to the UN Secretary-General and signed by the Minister for International Relations and Cooperation, Mr Maite Mkoana Mashabane, South Africa stated its belief that in sensitive situations, peace and justice may be viewed as complementary but not mutually exclusive and that its obligations with respect to peaceful resolution of conflicts are incompatible with the interpretation given by the ICC of obligations contained in the Rome Statute. Apparently, on 19 October 2016, the Cabinet met and decided to withdraw South Africa from the Rome Statute.

On 21 October 2016, the Minister for Justice and Constitutional Development, Mr Michael Masutha, called a media conference for a briefing on the withdrawal of South Africa from the ICC and sought to explain that the withdrawal was decided in a Cabinet meeting on 19 October 2016 and that it was precipitated by the finding of the Supreme Court of Appeal in March 2016 that under customary international law, heads of state enjoy immunity against arrest. Under this understanding, because South Africa was party to the Rome Statute, South Africa had waived the immunity of such heads of state. In essence, to remove the legal impediment to hosting future heads of state, South Africa determined to withdraw from the ICC and to repeal domestic legislation implementing the Rome Statute in South Africa. Mr Masutha then explained that written notice to withdraw had been submitted to the Secretary-General of the United Nations according to the terms of the Rome Statute under article 127(1) thereof.²¹ Mr Masutha further noted that the State would withdraw the domestic application it filed to ap-

¹⁹ Department of Justice and Constitutional Affairs of the Republic of South Africa, 'Briefing to the media by Minister Michael Masutha on the matter of International Criminal Court and Sudanese President Omar Al Bashir' (21 October 2016) < http://www.justice.gov.za/m_statements/2016/20161021-ICC.html > on 20 June 2017 (Briefing to the media by Minister Michael Masutha).

²⁰ Tor K, 'Africa in the dock: On ICC bias' *Critical Legal Thinking*, 30 October 2016. See also, Killander M, 'Withdrawal from the ICC: A sad day for South Africa and for Africa' *The Conversation Africa*, 21 October 2016.

²¹ Briefing to the media by Minister Michael Michael Masutha.

peal the contested March 2016 decision of the Supreme Court of Appeal. On the same date, Mr Masutha addressed the Speaker of the National Assembly in South Africa in writing, advising on Cabinet's decision to withdraw South Africa from the ICC and stating the intention to table a Bill in Parliament that would repeal the Implementation Act.²²

Thereafter, on 24 October 2016, the Democratic Alliance (DA), a South African political party and largest minority party in Parliament serving as official opposition to the governing African National Congress (ANC), filed an application for direct access to the Constitutional Court seeking to challenge the decision of the executive to withdraw South Africa from the ICC and to submit a notification on the same to the UN Secretary-General. The same party simultaneously filed an application before the High Court of South Africa in Gauteng in the event that the Constitutional Court declined to grant it direct access to hear the petition. As it happened, the Constitutional Court declined to grant the DA direct access to it and the matter therefore fell for determination by the High Court. It is quite striking to note that the challenger-in-chief of the Government's decision to withdraw from the ICC was the main opposition party in South Africa supported by four non-government civil service organisations.²³

Subsequently, on 25 October 2016, the then UN Secretary-General gave formal communication of the deposit of South Africa's notification of withdrawal from the Rome Statute. The notification was accompanied by a declaratory statement wherein South Africa stated its commitment to the protection of human rights and the fight against impunity and recalled the significant role it played in the negotiation on the ICC and the domestic implementation of the Rome Statute as a reaffirmation of South Africa's commitment to a system of international justice. In the statement, South Africa went on to state its pride at being a member of the AU and made the following astonishing assertions:

South Africa does not view the ICC in isolation but as an important element in a new system of international law and governance and in the context of the need for the fundamental reform of the system of global governance. Questions on the credibility of the ICC will persist so long as three of the five permanent members of the Security Council are not state parties to the Statute. The Security Council has also not played its part in terms of Article 16 of the Rome Statute where the involvement of the ICC will pose a threat to peace and security on the African continent. There are also perceptions of inequality and unfairness in the practice of the ICC that do not only emanate from the

²² *Democratic Alliance v Minister of International Relations and Cooperation and 10 others* (83146/2016) High Court of South Africa, 22 February 2017 (High Court decision).

²³ High Court decision, para 7.

Court's relationship with the Security Council, but also by the perceived focus of the ICC on African states, notwithstanding clear evidence of violations by others.

South Africa, from its own experience, has always expressed the view that to keep peace, one must first make peace...

In complex and multi-faceted peace negotiations and sensitive post-conflict situations, peace and justice must be viewed as complementary and not mutually exclusive. The reality is that in an imperfect world we cannot apply international law in an idealistic view that strives for justice and accountability and thus competing with the immediate objectives of peace, security and stability ... [Emphasis added]

On 3 November 2016, the Acting Minister of the Department of International Relations and Cooperation in South Africa tabled the Instrument of Withdrawal from the Rome Statute and the declaratory statement for approval by Parliament with the Speaker of the National Assembly. On the same date, a Bill to repeal the Implementation Act was tabled before the National Assembly.²⁴

Meanwhile, at The Hague, on 21 November 2016, the South African Embassy transmitted a *note verbale* to the Secretariat of the ASP. This note contained South Africa's understanding and argument that the ICC had failed to address South Africa's request for consultations with regard to the legal impediments faced by the Government in implementing the ICC's request to arrest and surrender President Bashir while he was on South African territory in 2015. By the same note, South Africa sought the ICC's guidance on the rules and procedures governing the submission of its views and observations in terms of article 87(7) proceedings under the Rome Statute. It bears noting that the terms of article 87(7) of the Rome Statute provide as follows:

Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.

By means of the same note, South Africa stated that it was considering an appeal against the decision of the Pre-Trial Chamber of the ICC, made on 13 June 2015, in which the ICC held that South Africa was under an obligation to arrest President Bashir, which decision South Africa maintained was arrived at in violation of South Africa's right to be heard.

²⁴ Government Gazette, Department of Justice and Constitutional Development, Notice 747 of 2016, Publication of Explanatory Summary of the Implementation of the International Criminal Court Act Repeal Bill.

It is unclear why South Africa submitted the above information to the Secretariat of the ASP rather than directly to the ICC but, in any event, on 30 November 2016, the Registry of the ICC transmitted the *note verbale* to the ICC Pre-Trial Chamber.²⁵

On 5 and 6 December 2016, a full bench at the North Gauteng High Court sat to hear the challenge by the DA political party to the constitutionality of the decision to withdraw South Africa from the ICC. It is crucial to note that the question framed for determination by the High Court was primarily procedural, namely, whether the Executive's power to conclude international treaties also included the power to unilaterally give notice of withdrawal from international treaties, in this case the Rome Statute, without any parliamentary approval.²⁶ The contention was that the Executive breached separation of powers and acted unconstitutionally by deciding and giving notice of withdrawal in the manner that it had.²⁷

Two days after the oral hearings at the North Gauteng High Court, on 8 December 2016, the Chamber at The Hague issued a decision convening a public hearing for both South Africa and the ICC Prosecutor on 7 April 2017 to be heard on whether South Africa failed to comply with its obligations under the Rome Statute by not arresting and surrendering President Bashir.²⁸ The secondary ground for the hearing was whether in the circumstances of such a failure, a formal finding of non-compliance should be made against South Africa and the matter referred to the ASP and the UNSC. The Chamber also permitted all interested states to provide relevant written submissions if they so wished.²⁹ The same decision also dashed South Africa's ruminations on the possibility of an appeal against the ICC decision of 13 June 2015 (date when President Bashir landed on South African soil) when the Chamber stated that such an appeal was statutorily time barred.

Following the convocation of the article 87(7) hearing on 7 April 2017 at The Hague, on 22 February 2017, the North Gauteng High Court rendered its judgment on the case challenging the constitutionality of South Africa's with-

²⁵ *Prosecutor v Omar Hassan Ahmad Al Bashir*, Transmission of information and requests for guidance by the Republic of South Africa, ICC-02/05-01/09, 30 November 2016.

²⁶ High Court decision, para 1.

²⁷ High Court decision, para 15.

²⁸ *Prosecutor v Omar Hassan Ahmad Al Bashir*, Decision convening a public hearing for purposes of a determination under article 87(7) of the Statute with respect to the Republic of South Africa, ICC-02/05-01/09, 8 December 2016, paras 12-15.(Decision convening a public article 87(7) hearing).

²⁹ Decision convening a public article 87(7) hearing, para 17.

drawal from the ICC. The decision, while not focused on the actual substance of the decision to withdraw from the Rome Statute, established that the notice of South Africa's withdrawal from the Rome Statute without prior parliamentary approval was unconstitutional and invalid. By extension, the unilateral Cabinet decision to deliver the notice of withdrawal to the UN Secretary-General was unconstitutional and invalid. As a result, South African authorities were ordered to revoke the notice of withdrawal.³⁰ Accordingly, on 7 March 2017, South Africa formally withdrew the notification of withdrawal from the Rome Statute.³¹ The stage was thus finally set for confrontation between the ICC and South Africa, scheduled for 7 April 2017.

2. Written submissions filed in advance of the 7 April 2017 hearing

The Kingdom of Belgium was the only state that accepted the Chamber's invitation to submit to it relevant written arguments on the question of South Africa's compliance with the ICC's request for President Bashir's arrest and surrender, doing so by submitting its observations on 23 February 2017.³² The observations made were by the Belgian Central Authority for Judicial Cooperation with the International Criminal Court, and are included here for the perspectives elucidated therein. On Belgium's admission, the quandary faced by South Africa with regard to President Bashir could equally be faced by Brussels, hosting as it does the headquarters of a number of international and regional organisations.

Belgium stated its interpretation that, on the whole, there is a conflict of provisions in the Rome Statute between, on the one hand, the obligation to arrest and surrender, which arises under some provisions of the Rome Statute³³ and, on the other, a pre-existing obligation pertaining to the international immunity. It noted that this immunity must have been grounded in a legal provision that existed when the Rome Statute came into force for the state party, relying upon article 98 when refusing to comply with a request for arrest and surrender. Belgium noted that the purpose of Article 98 of the Rome Statute was to settle the

³⁰ High Court decision, para 2.

³¹ UN, South Africa: Withdrawal of Notification of Withdrawal, Reference C.N.121.2017. TREATIES-XVIII.10 (Depositary Notification) available at <<https://www.youtube.com/watch?v=GKSRYLdjsPA>> on 4 July 2017.

³² *Prosecutor v Omar Hassan Ahmad al Bashir*, Transmission of written observations from the Kingdom of Belgium dated 20 February 2017 submitted pursuant to Pre-Trial Chamber II's Decision ICC-02/05-01/09-27, ICC-02/05-01/09, 23 February 2017.

³³ *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 90, Articles 86, 87, 89 and 92.

potential conflict between the above provisions. Belgium then drew the ICC's attention to the specific terms of the UNSC Resolution 1593 of 2005 by which Darfur was referred to the ICC³⁴ by pointing out that the Democratic Republic of Congo, Uganda and Djibouti relied on the international immunity granted to President Bashir based on his status as Head of State of Sudan in refusing to comply with the ICC arrest warrant.³⁵

Belgium appears to front the position that article 98 was however inapplicable as a basis for South Africa's refusal to comply with the ICC request for arrest and surrender because, by reference to UNSC Resolution 1593, Sudan is bound to cooperate with the ICC as if it were a state party. Article 98 of the Rome Statute only contemplates that there will be a conflict of laws if the State that relies on it owed a duty to a non-state party. However, in this case, South Africa and Sudan were both parties to the Rome Statute, the former by its own volition and the latter involuntarily because of being referred to the ICC by the UNSC. Belgium was also helpful enough to point out to the ICC that with reference to international and regional organisations, all that UNSC Resolution 1593 accomplished was to 'urge' these organisations to fully cooperate with the ICC. Belgium further observed that even the Negotiated Relationship Agreement between the International Criminal Court and the United Nations itself requires that the ICC must first obtain a waiver of immunity from the UN in order to pursue the execution of a warrant of arrest for a person enjoying such international immunity granted for the benefit of the United Nations.³⁶ Belgium ended its observations with the diplomatic nicety that no inference was to be made from its observations what its stance was on the issue of whether South Africa breached its obligation to cooperate with the ICC or not.³⁷

I now turn to the essence of the written submissions filed by South Africa to the ICC on 17 March 2017.³⁸ While South Africa was not coy about making completely legalistic arguments, it is intriguing to note the amount of extra-legal arguments submitted within a space normally considered to be sterile of any critique. After providing the factual basis for its arguments, South Africa canvassed the contextual basis of its submissions, arguing that the matter of whether South

³⁴ UNSC Res 1593 (31 March 2005) UN Doc S/RES/1593, para 2.

³⁵ Transmission of written observations from the Kingdom of Belgium, 6.

³⁶ Transmission of written observations from the Kingdom of Belgium, 4.

³⁷ Transmission of written observations from the Kingdom of Belgium, 7.

³⁸ *Prosecutor v Omar Hassan Ahmad Al Bashir*, Submission from the Government of the Republic of South Africa for the purposes of proceedings under Article 87(7) of the Rome Statute, ICC-02/05-01/09, 17 March 2017 (Submission from the Government of the Republic of South Africa).

Africa failed in its obligations under the Rome Statute should be considered against its commitment to international peace and security. After the reminder of the role played by South Africa in the establishment of the ICC, South Africa expressed its belief with regard to involvement in international peacekeeping missions in Africa that to keep peace, one must first make peace.³⁹

South Africa relied on the non-compliance witnessed in the case of Chad, Djibouti, DRC, Malawi, Nigeria and Uganda with respect to the arrest warrants for President Bashir to make a case for the complexities of hosting international meetings by states and international organisations. South Africa also asserted under this head that international criminal courts and tribunals are created for a specific purpose and *have to operate within the cultural, political and diplomatic realities that confront them when dealing with particular issues and that the ICC risks undermining its effectiveness if it fails to recognise the contextual realities of each case.*⁴⁰ This argument is the closest approximation to the observation made by the political theorist, Judith Shklar that the place of justice is not above the political world, but in its very midst.⁴¹

South Africa then proceeded to make arguments under different limbs as follows. With regard to the provision under Article 97 of the Rome Statute by which a country that faces difficulty with a request from the ICC may approach it for consultations, South Africa averred that the manner in which the ICC dealt with her request for consultations was flawed and in violation of the requirements of due process.⁴² As regards the non-compliance proceedings of which South Africa was now the subject, the counter argument was that customary international law immunities operate between states and that South Africa still bears the obligation to respect head of state immunities. South Africa submitted that there was nothing in the text of Resolution 1593 or in the circumstances following the passing of that resolution to warrant the conclusion that immunities had been impliedly waived. In distinguishing previous instances in which the ICC held that the UNSC had implicitly waived the immunities of President Bashir, South Africa argued that it is doubtful whether the UNSC had the authority to waive the immunities of heads of state when the UNSC has since the referral mysteriously demurred to clarify the matter, even after receiving biannual reports from the ICC Prosecutor dating back to whenever this matter comes up.

³⁹ Submission from the Government of the Republic of South Africa, para 19.

⁴⁰ Submission from the Government of the Republic of South Africa, para 24. (Emphasis added)

⁴¹ Shklar J, *Legalism: Law, morals and political trials*, 1986, Harvard University Press, Boston, 122-123.

⁴² Submission from the Government of the Republic of South Africa, para 46.

The most powerful argument marshalled by South Africa to dispute the implicit waiver of immunities argument is the one arguing that 'the UNSC refers situations, not individuals.'⁴³ The close of written submissions was marked by South Africa's averment that she was obliged to respect the head of state immunities of President Bashir and that he could not be arrested on South African territory without the ICC first obtaining an express waiver to do so from Sudanese authorities. It is striking in the extreme to note South Africa's submission that because it was not possible to arrest President Bashir without the ICC first obtaining a waiver from Sudan to enable South Africa to do so, South Africa should not be held liable for Sudan's non-compliance because '*the dispute exists between the UNSC, the Court and Sudan; it is for these three entities to resolve their disputes amongst one another.*'⁴⁴

3. The battle royale in oral hearings at The Hague on 7 April 2017

It is fitting for purposes of this brief to note that the UN had been invited in the 8 December 2016 decision of the ICC to send a representative to attend the oral hearing as well as to make written submissions for the Chamber's consideration. The UN declined both invitations.⁴⁵

South Africa's oral arguments were presented hammer and tongs, with the Chief State Law Advisor for International Law making one of the most profound statements of the day and from which part of the title of this piece is derived, namely, 'South Africa is not an accused.'⁴⁶ South Africa's representative used the disparity between the two major decisions by the ICC⁴⁷ on the question of President Bashir's immunity vis-à-vis UNSC Resolution 1593 to dispute the Prosecutor's submission that South Africa's legal duty to arrest President Bashir was clear and straightforward.⁴⁸

⁴³ Submission from Government of the Republic of South Africa, para 91.

⁴⁴ Submission from Government of the Republic of South Africa, para 101. Emphasis added.

⁴⁵ *Prosecutor v Omar Hassan Ahmad Al Bashir*, Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al- Bashir, ICC-02/05-01/09, 6 July 2017, para 23.

⁴⁶ Transcript of hearing of 7 April 2017, page 11 line18. See note 11 for full citation of the transcript.

⁴⁷ Transcript of the hearing of 7 April 2017, p 20 line 7, where the South African representative argues that the different lines of reasoning used by the ICC Chambers in the Malawi and Chad non-compliance cases as against the Democratic Republic of Congo non-compliance case were so inconsistent as to be mutually exclusive.

⁴⁸ Transcript of the hearing of 7 April 2017, p 19 line 15.

South Africa then levelled analysis at the provisions of Resolution 1593 of 2005 in disputing the implicit waiver of immunity argument relied on by the ICC in the DRC non-compliance case (hereinafter the ‘DRC case.’)⁴⁹ The primary line of reasoning was that the ICC in reaching the decision that Resolution 1593 contained an implicit waiver of President Bashir’s immunities did not rely on any known canon of interpretation. In South Africa’s view, reaching such a decision in this manner was dangerous and risked turning the interpretation process into a process for the justification of policy preferences.⁵⁰ To illustrate this point, the South African representative for the legal arguments at the hearing, Professor Dire Tladi, argued that a person reviewing para 2 of Resolution 1593 who wants to protect immunities would say it is obvious that the UNSC did not want to touch immunities because the UNSC did not mention any immunities while referring to the situation in Darfur.⁵¹ On that basis, South Africa argued that *‘the approach taken by the ICC Chamber in the DRC case was to thrust what was essentially the responsibility of the UN Security Council for acting against non-compliance with duties on the situation in Sudan onto individual states, which was dangerous and a recipe for anarchy.’*⁵²

South Africa then proceeded to dissect the ways in which Resolution 1593 deviates from international law, which emphasises the point that the UNSC had other policy preferences, which is discernible from the choice of language used in the Resolution.⁵³ South Africa then disputed that being referred to the ASP and the UNSC would provide an incentive for cooperation, and instead suggested that the ICC could direct an unambiguous request to the UNSC to clarify the contents of para 2 of Resolution 1593 so that ‘we are brought into clear daylight.’ If the UNSC responds in the affirmative as having waived President Bashir’s immunity, South Africa argued that would then force cooperation in the future. Tladi then pointed out that since President Bashir’s attendance of the AU Summit in South Africa in 2015, he has visited three other state parties including

⁴⁹ *Prosecutor v Omar Hassan Ahmad Al Bashir*, Decision on the cooperation of the Democratic Republic of the Congo regarding Omar Al Bashir’s arrest and surrender to the Court, ICC-02/05-01/09-195, 9 April 2014.

⁵⁰ Transcript of the hearing of 7 April 2017, p 27 line 8.

⁵¹ Transcript of hearing of 7 April 2017, p 27 line 10. This point underscores the different ideologies at play.

⁵² South Africa was essentially reiterating its written arguments that the failure of Sudan to waive President Bashir’s immunities was a matter between Sudan and the United Nations Security Council, entailing the responsibility of Sudan for violation of that duty and the possibility of the Council to take appropriate measures in response.

⁵³ See, Transcript of hearing of 7 April 2017, p 33 line 11, where is argued that ‘...if you look at the resolution as a whole, you get a sense that jurisdiction is not to be achieved at all costs. It’s not all about jurisdiction. Its not all about judicial processes and remedies.’

Jordan, a known friend of the ICC, which was hosting the Arab League, much like South Africa was hosting the AU Summit. All cases of non-cooperation with the arrest warrant for President Bashir were emphasised as legally relevant and indicative of the danger the ICC was posing to itself by alienating staunch supporters of the ICC in favour of what was referred to as a 'doubtful legal proposition in interpretation.' A recapitulation of South Africa's leading role as peacemaker on the continent was then made in the context of the assertion that South Africa would not disengage from the AU or adopt a policy hostile to AU heads of state.

On 6 July 2017, the Chamber rendered a decision on the submissions made on the non-compliance by South Africa with the ICC request for the arrest and surrender of President Bashir. The ICC found that Resolution 1593 imposed on Sudan the obligation to fully cooperate with the ICC and that for the limited purpose of the situation in Darfur, Sudan has rights and duties analogous to those of states parties to the Rome Statute.⁵⁴ Sudan was therefore precluded from claiming that President Bashir has immunity vis-à-vis the ICC, obliging Sudan to arrest and surrender him. The ICC also concluded that the immunities of President Bashir do not apply as against state parties to the Rome Statute and, accordingly, did not need to be waived by Sudan before state parties to the ICC could execute the ICC arrest warrants.⁵⁵ While the Court eventually determined that South Africa had failed to comply with its obligations under the Rome Statute by not executing the ICC's request to arrest and surrender President Bashir, it ruled that in the circumstances of the case, a referral to the ASP or the UNSC of South Africa's compliance was 'not appropriate.'

4. The ICC and state non-cooperation with the arrest warrants for President Bashir – The mountain that labours and brings forth mice?

The question of state non-cooperation with the ICC's arrest warrants issued for President Bashir forces a confrontation between strict legalism, defined by Shklar as a rule-centred approach that eschews the role of politics in any legal activity and the hard realities of a turbulent world in which power matters,

⁵⁴ *Prosecutor v Omar Hassan Ahmad Al-Bashir*, Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir' ICC-02/05-01/09 , 6 July 2017.

⁵⁵ Decision on non-compliance by South Africa with the request for arrest and surrender of Omar Al Bashir, paras 90-97.

as argued by David Bosco.⁵⁶ A reductionist approach would portray this clash as one between ideology and realism. Ideally, all factors remaining constant, all states should be willing to support the ICC to confront those strangers deemed to be enemies of mankind. However, within the space accorded by a pluralistic international society, there is a multiplicity of actors with varied interests and concerns, who do not all adhere to the legalist model by which law is superior to all other values and where politics is deemed a ‘dirty’ word, and where the law is constantly embattled against politics. This reductionist approach is eminently unsuitable to explain the trajectory witnessed in South African interaction with the ICC in recent times. Why would South Africa, together with Kenya, refuse American advances at the height of the George Bush Administration campaign against the ICC in 2003 to sign Rome Statute Article 98(2) agreements, (ironically the subject of South Africa’s non-compliance proceedings at The Hague in 2017) on the basis of a ‘stated commitment to the humanitarian objectives of the ICC and to its international obligations’?

The two African states took this stand despite, there being an economic loss to this refusal, to the tune of USD 7.2 million in military aid for South Africa and a loss in military aid for Kenya in the amount of USD 9.7 million.⁵⁷ Why would there be a complete *volte-face* in 2017, where South Africa would argue its unwillingness to disengage from the AU or to adopt a policy that would be hostile to AU heads of state? Why specifically would South Africa adopt such a stance in the absence of having direct skin in the game, in the sense of not having a South African national, let alone a President, being tried at the ICC?

This brief had the humble aim of charting the stirring developments in South Africa after the legal and diplomatic fallout of President Bashir’s escape from an AU Summit in June 2015 and the consequent decision of the Supreme Court of Appeal in March 2016 that South Africa violated its domestic obligation in not executing the request by the ICC to arrest and surrender him. However, a secondary purpose was to review these developments, both inside the legal space of courtrooms and outside it, through a critical optic, one, which seeks to understand the true significance underlying actuality.⁵⁸ South Africa’s arguments and position illustrate the fact that ‘international criminal justice is best defined by what it cannot do,

⁵⁶ Bosco D, *Rough justice: The International Criminal Court in a world of power politics*, Oxford University Press, Oxford, 2014, 1.

⁵⁷ Whitaker B, ‘Soft balancing among weak states’ *International Affairs*, 2010, 86-113.

⁵⁸ Tallgren I, ‘Who are ‘we’ in international criminal law? On critics and membership’ in Schwöbel C (ed) *Critical approaches to international criminal law*, Routledge, 2014, 80.

by what it is prevented from doing and by what it refuses to do.⁵⁹ Even as the ICC relied on the terms of Resolution 1593, what does not come through in its decision is the fact that this Resolution is filled with, in the words of Bill Schabas, poisonous provisions. This Resolution was passed in circumstances where the drafters were preoccupied by other policy preferences⁶⁰ and even went so far as to deviate from the express provisions of the Rome Statute⁶¹ and of general international law.⁶² Legalism however demands such an uncompromising approach to following the rules with the result that this Resolution be interpreted in absolute terms.

Several times, South Africa argued that the arrest warrants issued for President Bashir comprised a dispute between the UNSC, the ICC and the Government of Sudan, which should not implicate other bystander states. This is quite a striking submission, as South Africa is aware of the provisions of the Rome Statute under Article 87(7) with regard to non-compliance proceedings, and ratified the Rome Statute with knowledge of this provision. It is easy to dismiss this submission until one recalls the frustrated musings of the Chamber when it stated that following twenty-four meetings of the UNSC after the adoption of Resolution 1593 and the biannual meetings between the UNSC and the ICC Prosecutor, the UNSC has not levelled any measures against state parties that have failed to comply with their obligations to cooperate with the ICC with regard to the President Bashir arrest warrants. The UNSC adopted Resolution 1593 as a policy instrument but has been exceedingly coy when asked to implement the referral and clarify the debates over whether the Resolution waived immunity. Yet, the Rome Statute does not include any proceedings by which the UNSC can be 'encouraged,' if at all, to follow through on its resolutions with regard to the operations of the ICC. It is South Africa that stands accused of non-compliance and yet, an entirely different entity set the cat amongst the pigeons, so to speak. International criminal justice is structured in a way that obscures reality, which in this case is that the impasse faced by the ICC in arresting President Bashir was created by the UNSC's indifference to the ICC's plight. In arguing that it is not the accused, South Africa is pointing an accusatory finger at the UNSC.

⁵⁹ Simpson G, 'Linear law: The history of international criminal law' in Schwöbel C(ed) *Critical approaches to international criminal law*, 2014, Routledge, 173.

⁶⁰ Cryer R, 'Sudan, Resolution 1593 and international criminal justice' 19 (2006) *Leiden Journal of International Law*, 195.

⁶¹ Compare UNSC Res 1593 (31 March 2005) UN Doc S/RES/1593, para 7 and Rome Statute, Article 115.

⁶² Compare UNSC Res 1593 (31 March 2005) UN Doc S/RES/1593, para 6.

On the specific matter of the arrest warrants issued for President Bashir, I am always amazed to learn that *all permanent UNSC members discouraged the ICC Prosecutor from indicting President Bashir*,⁶³ lending some measure of credence to South Africa's assertion that the UNSC referred a situation and not individuals to the ICC⁶⁴ and that the criminal justice project should not be reduced to a single individual.⁶⁵ Ironically, this is the entire point of the legalistic enterprise underlying the ICC.

The Southern Africa Litigation Centre (SALC) argued that South Africa has always been very clear-headed about her obligations under the Rome Statute to arrest President Bashir and that in 2009, President Bashir was warned by South African authorities that if he landed in South Africa, he would be arrested.⁶⁶ That the position has changed in 2017 is evidence of the fact that in a domestic setting, international criminal law does not enter a vacuum but must interact with conducive domestic political conditions that would frame compliance strategies.⁶⁷ This was certainly the case with the predecessor international criminal tribunals and does not seem to have changed with regard to the ICC.⁶⁸ South Africa in 2009 was very different from South Africa in 2017. In the present instance, South Africa has skin in a different game, as it were, and that is the regional leadership game. The irony is that since the non-compliance ruling of the ICC in July 2017, by which the ICC declined to refer South Africa to the ASP and the UNSC, South Africa insists that it will still withdraw from the ICC. The problem with rainbows is that they do not last.⁶⁹

South Africa's non-compliance conundrum at The Hague also shows state consent to be artificial or, at the most, fluid. As Frederic Megret has observed, notions of state consent are used as the ultimate test of the legitimacy of international criminal law. However, even as states broadly condemned international crimes at the Rome Conference, we are learning from different countries and their interaction with the ICC that there is considerable distance between the

⁶³ Bosco, *Rough justice*, 181.

⁶⁴ Submissions of the Government of the Republic of South Africa, para 91.

⁶⁵ Transcript of the hearing of 7 April 2017, p 31 line 25.

⁶⁶ *Prosecutor v Omar Hassan Ahmad Al Bashir*, Amicus curiae observations by the Southern Africa Litigation Centre (SALC) submitted pursuant to Rule 103(1) of the Rules of Procedure and Evidence, ICC-02/05-01/09, 10 March 2017.

⁶⁷ Subotic J, 'The paradox of international justice compliance', 1 *International Journal of Transitional Justice* 1, 2009, 7.

⁶⁸ 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.

⁶⁹ Phrase attributable to James Nyawo, Personal communication with Nyawo J on 31 October 2016.

general denunciation of crimes and the 'highly connoted work of who will actually stand trial.'⁷⁰

Fatou Bensouda, the Prosecutor of the ICC, has argued that without cooperation from state parties in arrest and surrender, except in very rare cases where the suspect chooses to surrender him or herself, the ICC is going to be unable to carry out its most basic function.⁷¹ At this point, it is important to revert to the tale of Antaeus, introduced at the outset. Antaeus derived his strength from contact with the ground, just as the ICC derives its strength from the cooperation granted by states. In fact, I overstate the case because the ICC cannot function at all without state cooperation. The minute Antaeus lost contact with the ground, he lost his strength and was vanquished. The tussle the ICC is engaged in with President Bashir shows the ICC losing at every significant point and racking up an impressive number of non-compliance judgments. The structural biases and contradictions inbuilt into the international criminal justice framework demand a clear-headed assessment of the actual relationship between strict legalism and political realities. The tremendous value of legalism is inescapable. However, in the international context, does justice lead, or does it follow?⁷² Whom or what does it follow? What does this mean for those on behalf of whom the law should speak, that is, victims of atrocities, in this case.

Both Moreno Ocampo, former Prosecutor of the ICC, and Bensouda have refuted the importance of considerations of state cooperation to the exercise of case selection. Shklar observed that legalism as an ideology is too inflexible to recognise its enormous potential as a creative policy, but exhausts itself intoning traditional pieties and principles which are incapable of realisation.

Barring military intervention, President Bashir will most likely be arrested when he loses all and any political capital he holds and not a moment before. Such is the nature of the giant beast that is international criminal justice.

⁷⁰ Megret F, 'International criminal justice: A critical research agenda' in Schwöbel C (ed) *Critical approaches to international criminal law: An introduction*, Routledge, 2014, 26.

⁷¹ Transcript of hearing of 7 April 2017, p 43 line 23.

⁷² Snyder J and Vinjamuri L, 'Trials and errors: Principle and pragmatism in strategies of international justice' 28 *International Security*, 2003, 5-6.

