

# **Crisis of Diplomatic Etiquette and the 2015 African Union Summit in South Africa: Is the International Criminal Court at Crossroads on Omar-Bashir's arrest?**

**Daniel Taye Medoye • Mark I. Rieker**

**Abstract** The role of the International Criminal Court (ICC) became a subject of intense debate during the African Union Summit held in June 2015 and hosted by South Africa. Opinions varied among scholars and experts, as well as commentators on whether the Treaty-based international organisation located in the Hague, Netherlands, had the enforceable rights to subject African leaders to trials arising from accusations of genocide, crime against humanity and war crimes and related issues. Against this background, this paper set out to examine the implications of the unsettling diplomatic imbroglio between South Africa and the ICC on the non-compliance of the country with the Court's request for the arrest of President Omar Bashir of Sudan on charges of genocide and crimes against humanity. Having examined the legal and diplomatic relationship between the ICC and member states in terms of duties and obligations respectively, this paper submits that Court has both enforceable and moral rights to subject any African leader to trials if and when formal accusations of the crimes as mentioned earlier, are established against them. This position is without prejudice to the issue of immunity enjoyed by African leaders in their respective countries. It is a norm and widely acknowledged though, that membership of any multilateral organisation in the contemporary international system requires the giving up of some sovereign right to effective policy implementation for the benefit of members.

**Keywords** Diplomatic Etiquette - International Criminal Court - Genocide  
Immunity - Jurisdiction

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## **Introduction**

The warrant of arrest on the President of Sudan, Omar Hassan Ahmad Al Bashir by the International Criminal Court (ICC) on charges of genocide once again attracted mixed reactions during the African Union Summit held in June 2015 in South Africa. Being the

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host, South Africa was expected to execute the arrest warrant on President Bashir and be handed to the ICC for prosecution, being a member of the Court, but was not to be. The intervention by a South African court which issued a warrant for the arrest consequent on the weight of calls by the community of human rights advocates, on its own introduced what could be described as some theatrics as the president was reported to have fled the country before the order of the court was handed out. The phrase, Bashir saga in South Africa has triggered a need to undertake an inquiry into the place of diplomatic etiquette and the privileges enjoyed by African leaders and the limits or lack of it, of the ICC in its aim to get leaders to face prosecution on charges of genocide and related crimes against humanity.

It is against this background that this paper attempted to interrogate the role of South Africa as a host of the African Summit in the context of the admissibility or lack of it to have arrested President Bashir on behalf of the ICC; and the influence of public opinion on the volatility of the issue. This exercise became unavoidable in view of the reactions which arose bordering on whether South Africa acted in good faith by not effecting the arrest of President Bashir or not, and to examine the extent to which Presidential immunity can fly in the face of allegations of crimes against humanity.

### **Methodical approach**

This paper shall proceed with a rehash of the mandate of the ICC in relation to the charges of genocide and related crimes against humanity. Intra-state conflict in Africa and its nexus with genocide and crime against humanity will be examined and, in addition, the Darfurian crisis, and the role of the Sudanese government in the escalation of the crisis. The paper shall further examine the expected level of commitment by member states of the ICC to its mandate, and to what extent this has been demonstrated or complied with. The ICC's expectation of the role of South Africa on the Omar Bashir arrest saga during the Africa Union Summit, as well as the place of diplomatic etiquette and immunity on the part of African leaders in relation to their obligations to the ICC Statute, shall be put in perspective. In doing this, the author considered a literature survey method to establish the relevant issues at stake in the context of this paper, and has accordingly done so as will be seen in the course of the write-up. The paper shall conclude by placing in context the need for good governance as a prerequisite to avoid the incidences of accusations of genocide on leaders especially in Africa. It is worthy of mention that this paper is strictly from the perspective of international relations/politics.

### **ICC and its mandate**

Article 1 of the Rome Statute describes the ICC as an independent international organisation established to adjudicate on the most serious crimes of concern to the international community with the view to ending impunity. It is governed by the Rome Statute, treaty-based and sits at The Hague in the Netherlands. The ICC came into being on 17th July 1998, when a total of one hundred and twenty (120) states adopted the Rome Statute that serves as the legal basis for establishing the permanent international criminal court. The Rome Statute, however, entered into force on 1st July 2002 after ratification by 60 countries. The Rome Statute reveals that the ICC is intended to complement existing national judicial systems, and only exercises its jurisdiction on two dimensions, including when national courts are unwilling or unable to prosecute any accused personality of criminal misconduct, or when the a combination of states or individual states refer investigations to the court. The evolution of the ICC can be traced to the aftermath of the 1st World War in 1919. This was inevitable following attendant concerns raised supposedly by the victorious Allied powers, which felt that the devastating impact of

the war was avoidable, leading to the emergence of the concept of crimes against humanity, and that there was the need to investigate the role of political leaders with the view to bringing convicted leaders to book and guard against a repeat of the holocaust.

Between 1919 and 1990 (a period covering over 70 years), every effort made, especially at the level of the General Assembly of the United Nations towards establishing a permanent international court did not yield any positive results. Perhaps the creation by the UN Security Council of two ad hoc tribunals in 1993 and 1994 namely, the International Criminal Tribunal for the former Yugoslavia (in response to the large scale atrocities attributed to the country's armed forces involved in the Yugoslav war), and the International Criminal Tribunal for Rwanda (in connection with the Rwanda Genocide), could be the eventual triggers for the establishment of the permanent international criminal court.

The Rome Statute requires that several criteria exist in a particular case before an individual can be prosecuted by the court. In essence, there are three jurisdictional requirements in the statute that must be met before a case may begin against an individual, and these include the following – subject-matter jurisdiction (relating to what constitutes a crime); territorial or personal jurisdiction (relating to where the crimes were committed or who committed them); and temporal jurisdiction (relating to when the crimes were committed). In addition, Art 4 (1) of the Court states the legal status and powers of the Court as follows – the Court shall have international legal personality, and shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purpose. Sub-section 2 of same article states that the Court may exercise its functions and powers as provided in this statute, on the territory of any state party and by special agreement on the territory of any other state.

Article 5 (1) states that the jurisdiction of the Court shall be limited to the serious crimes of concern to the international community as a whole, and comprise the following – the Crime of genocide; Crimes against humanity; War crimes; and the Crime of aggression. The Court shall hereafter exercise jurisdiction over the crime of aggression once a provision is adopted and consistent with articles 121 and 123 which stipulate the process of amendments and the timing of such exercise.

While Article 6 of the ICC statutes defines genocide as any act committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group; Article 7 defines Crimes against humanity as acts committed as part of a widespread or systemic attack directed against any civilian population with knowledge of the attack. Such acts as persecution against any identifiable group on political, racial, ethnic-religious and cultural grounds, etc; Article 8 defines war crimes depending on whether an armed conflict is either international (which generally means it is fought between states) or non-international (which generally means that it is fought between non-state actors, such as rebel groups, or between a state and such non-state actors). These articles provide the basis for the arrest warrant placed on President Bashir having being accused of the material elements of the crimes as contained in articles 6, 7 and 8 of the Court. But whether or not the ICC has the authority to undertake the legal action it has manifestly set out to do in this regard, will be tested in the course of this paper.

### **Literature on conceptual nature of intra-state conflict in Africa and related crimes**

As noted by Owwoeye and Amusan (2000), out of the ninety six (96) armed conflicts which occurred between 1989 and 1996, only five (5) were inter-states while the rest were intra-states. In the contemporary times, the figure for intra-state crises is estimated to be around one hundred and fifty (150, and still counting) with many African countries enmeshed in violent conflict, resulting in most cases, from dissensions and discontentment among nationals and

leaders of the countries involved. For examples, countries such as Rwanda, Burundi, Central African Republic, Mali, Libya, Tunisia, Cote d'Ivoire, Burkina Faso, have had one form of internal upheaval or another, which has brought about hundreds of losses of lives, destruction of property and refugee challenges as a result of displacement of victims of such intra-state crises. In all of these, the role of the leaders in the affected countries leaves much to be desired. Rather than engage in a democratic and persuasive approach in resolving issues on which citizens have resorted to violence, leaders seem to prefer the use of repression, oppression and denigration of dissent and opposition without minding the tendency to escalation. This invariably results in continuous insurrections by nationals and counter-insurrections by government through extreme crackdown on dissent. The question that inevitably arises in this situation is what are the causes of intra-state crisis in Africa? While scholars have offered perspectives in explaining the endemic nature of the African crisis, the follow-up question is why have measures not been taken by leaders to address the causes, and ensure continent-wide peace at least for a considerable length of time.

On the causes of intra-state conflict in Africa, Bowd and Chikwanha (2010) note that there are several prominent characteristics that are common to the triggers of intra-state conflict. These include, among others, ethnic groups seeking greater autonomy or striving to create an independent state for themselves (as in Burundi); Failed states where the authority of a national government has collapsed and armed struggle has broken out between the competing ethnic militias, warlords, or criminal organisations seeking to obtain power and establish control of state (as in Libya); impoverished states where there exists a situation of individual hardship or severe dissatisfaction with one's situation and the absence of any non-violent means for change (as in Zimbabwe). In a more differentiated pattern, Zeleza (2008) typified African conflict as follows – imperial wars (colonialism); anti-colonial wars; intra-state wars; and international wars. In the context of intra-state wars in the view of Zeleza, comprises of secessionist wars, irredentist wars, wars of devolution, wars of regime change, wars of social banditry, and armed inter-communal insurrections.

In all of these, it is arguable that virtually all African countries have experienced a combination of the aforementioned forms of conflict one way or the other, with the result that the entire continent is plagued with a spectre of mis-governance, oppression, repression and bad leadership. An emerging trend in governance in Africa is the disposition of leaders to violate the constitutional provision of tenure of office. This in itself has tended to spark violent protests and demonstrations in some African countries where the leaders have put up extreme resistance. Burundi and the Central African Republic are clear examples in this regard. This is apart from countries like Libya and of recent Burkina Faso where state authority has broken down with its attendant consequences of refugee crisis in their neighbouring countries. It is within this purview that the genocide accusations in Sudan against President Bashir will be located for analysis.

### **Omar Hassan Ahmad Al Bashir and the accusation of genocide**

This section provides a brief profile of President Bashir, as a military officer and upon becoming the head of government following a coup, but will be preceded by an insight into the geopolitical and socio-economic conditions in Sudan. This is necessary to contextualise the discussion on accusation of genocide against President Bashir. According to Sikainga (2009), the current Darfur conflict is a product of an explosive combination of environmental, political, and economic factors. Sikainga emphasised that environmental degradation and competition over shrinking resources have played, and continue to play, a critical role in communal conflicts in the Sahelian countries such as Mali, Niger, and Chad. In this regard, Darfur is no exception.

Geographically, Sudan is situated in Northern Africa, with its coastline bordering the Red Sea, and has land borders with Egypt, Eritrea, the Central African Republic, Chad, Libya, and more recently, South Sudan (having achieved nationhood after a referendum in 2011). Sudan is reputed the largest country on the African continent. It is estimated to be about a quarter of the size of the United States of America, covering an area of 1,861,484 sq km.

The Darfur region is the epicentre of the Sudanese crisis is in the Western part of the country, and is estimated to be about the size of France. It is home to about six million people from nearly 100 tribes, (United Human Rights Council: 2015). The population consists of blacks – who are predominantly farmers, and Nomad Arabs tribes.

Darfurians, in a paper written by Sikainga (2009), represent a multitude of ethnic and linguistic groups. They include non-Arabic speaking groups such as the Fur, Masalit, Zaghawa, Tunjur, and Daju as well as Arabic-speaking such as Rizaiqat, Missairiyya, Ta'isha, Beni Helba, and Mahamid, among others. There is also a large number of West Africans, such as Hausa, Fulani, and Borno. These diverse groups are dispersed among each other and share similar physical and cultural characteristics. Pastoral nomadism is the main means of livelihood for many Darfurians. One of the most prominent cattle-herding groups in this region is the Arabic-speaking Baqqara, who are scattered between Kordofan and Darfur provinces. The Baqqara consist of several ethnic groups such as the Ta'isha, Rizaiqat, Beni Helba, Misairiyya, and others.

As indicated by Sikainga (2009), a long history of internal migration, mixing, and intermarriage in Darfur have created remarkable ethnic fluidity: ethnic labels are often used only as a matter of convenience. For instance, in the Darfur context, for the most part the term "Arab" is used as an occupational rather than an ethnic label, for the majority of the Arabic speaking groups are pastoralists. On the other hand, most of the non-Arab groups are sedentary farmers. However, even these occupational boundaries are often crossed. Conflict between pastoralists and sedentary farmers, caused in part by environmental pressures and changing land ownership patterns, was an important cause of the Darfur violence. Sikainga (2009) notes that the desert region of northern Darfur is inhabited by camel-owning nomads who were known locally as *abbala* (camel owners). The nomads were not part of the *hakura* system. Hence, the nomads had to rely on customary rights to migrate and pasture their animals in areas dominated by farmers. As the nomads moved between the northern and the southern part of the region, specific arrangements for animal routes were made by their leaders and those of the farming communities, and these arrangements were sanctioned by the government.

While factors such as environmental degradation and competition over resources can be understood as principal causes of communal conflict in Darfur, it is arguable that the persistent carnage in the area is also a product of a long history of ethnic marginalization and manipulation by Sudan's ruling elites. In specific terms, the Darfurian crisis can be seen as part of the larger Sudanese conflicts attributable to the deeply rooted regional, political, and economic inequalities that have persisted throughout Sudan's colonial and post-colonial history. These inequalities are exemplified by the political, economic, and cultural hegemony of a small group of Arabic-speaking Sudanese elites who have held power and systematically marginalized the non-Arab and non-Muslim groups in the country's peripheries.

As a response to the foregoing, two Darfuri rebel movements- the Sudan Liberation Army (SLA) and the Justice and Equality Movement (JEM)- in 2003 took up arms against the Sudanese government, complaining about the marginalization of the area and the failure to protect sedentary people from attacks by nomads, (United Human Rights Council: 2015). To ward off the insurgency, the government of Sudan responded by unleashing Arab militias known as *Janjaweed*, or "devils on horseback". Sudanese forces and *Janjaweed* militia attacked

hundreds of villages throughout Darfur, thus leading to over 400 villages being completely destroyed and millions of civilians forced to flee their homes.

In the ongoing genocide, African farmers and others in Darfur are being systematically displaced and murdered at the hands of the Janjaweed. The genocide in Darfur has claimed 400,000 lives and displaced over 2,500,000 people. More than one hundred people continue to die each day; five thousand die every month. However, the Sudanese government had consistently disputed these estimates and denied any connection with the Janjaweed. Rather, the government appears unwilling to address the human rights crisis in the region and has not taken the necessary steps to restrict the activities of the Janjaweed. Hence, the intervention of the International Criminal Court in the Darfur crisis with the view to bringing the Sudanese government to book.

### **Ascension to power by Omar Al-Bashir and the introduction of Sharia Code**

Omar Al-Bashir was reportedly born in 1944 into a farming family, and joined the army as a young man and rose through the ranks. He fought in the Egyptian army in the 1973 war against Israel. According to BBC News (2015), before taking the helm, Omar Bashir was a commander in the army - responsible for leading operations in the south against the late rebel leader John Garang.

Sudanese President Omar al-Bashir's career has been defined by war. He came to power in a coup in 1989 as a Colonel and has ruled what was until 2011 Africa's largest country with an iron fist. When he seized power, Sudan was in the midst of a 21-year civil war between north and south, that was reputed to have deepened the existing racial/religious divide between the African farmers and the Nomadic Arabs, Infoplease (2007). Furthermore, the government immediately introduced an Islamic Code as the basis of governance all over the country. Resistance and insurgency by opposition elements, including the SPLA and the JEM groups, were met with extreme repression and subjugation. A rebellion in Western Darfur in 2004 provoked the emergence of the pro-government militias notoriously described as the Janjaweed to carry out massacres against black villagers and rebel groups in the region.

### **ICC Arrest Warrant on President Bashir**

The arrest warrant on President Omar AL-Bashir in March 2009 was the international response to the unmitigated massacre and carnage in Darfur. The warrant would seem the last resort by the Court, due to the continued recalcitrance of President Bashir to heed the instruction of the United Nations Security Council as contained in its earlier resolution to that effect. Specifically, the ICC arrest warrant against President Bashir was anchored on the charges of genocide, crimes against humanity and war crimes. All these crimes are detailed in the Court's Statutes in articles 6, 7 and 8, mentioned earlier in this paper.

In a press release by the ICC Report (2009), Prosecutor Luis Moreno-Ocampo reportedly presented evidence showing that Sudanese President, Omar Hassan Ahmad Al-Bashir committed the crimes of genocide, crimes against humanity and war crimes in Darfur. This came on the heels of Bashir's failure and blatant recalcitrance to carry out investigation into the Darfur crisis as requested by the Security Council. The Prosecution evidence shows evidence that Al Bashir clearly masterminded and implemented a plan to destroy in substantial part the Fur, Masalit and Zaghawa groups, on account of their ethnicity. As noted earlier in this paper, the armed movements' rebellion by the insurgent groups against marginalisation of the province sparked government resistance which was characterised by extreme repression and consequently genocidal acts by the government. The Prosecutor notes that the failure by Al Bashir to defeat the armed movements propelled him to go after the people, describing his

motives as largely political. Even though Bashir tried to rationalise government's action as 'counterinsurgency, his intent was genocide. Besides, Al Bashir's intent to commit genocide became clear with the well-coordinated attacks on the 2.450.000 civilians who found a haven in the camps. Further evidence revealed that President AL Bashir organized the destitution, insecurity and harassment of the survivors. He did not need bullets. He used other weapons including rapes, hunger, and fear with the view to completely annihilate the Darfurian peoples. The first warrant of arrest on President Bashir was made on the 4th March 2009, while the second was made on the 12th July 2010.

Particulars of the charges as recorded in the ICC Report (2009) include – that Mr Al Bashir is allegedly criminally responsible for ten counts on the basis of his individual criminal responsibility under Article 25(3)(a) of the Rome Statute as an indirect (co) perpetrator including:

- five counts of crimes against humanity: murder - Article 7(1)(a); extermination - Article 7(1)(b); forcible transfer - Article 7(1)(d); torture - Article 7(1)(f); and rape - Article 7(1)(g);
- two counts of war crimes: intentionally directing attacks against a civilian population as such or against individual civilians not taking part in hostilities -Article 8(2)(e)(i); and pillaging - Article 8(2)(e)(v).
- Three counts of genocide: genocide by killing (article 6-a), genocide by causing serious bodily or mental harm (article 6-b) and genocide by deliberately inflicting on each target group conditions of life calculated to bring about the group's physical destruction (article 6-c).

By the arrest warrants, President Bashir is to be arrested and handed over to the Court for prosecution on the charges levelled against him. The arrest of President Bashir can only be executed when he is out of his country, as the arrest warrant implies that President Bashir has been placed on travel bans. Unfortunately, this arrest order has not seen the light of the day, as no African country appears committed to doing so despite being signatory to the Statute of the Court. Besides, the Bush administration, in a report on Infoplease on Sudan (2007), had also expanded sanctions on Sudan banning 31 Sudanese companies and four individuals from doing business in the United States, signalling the commencement of economic embargo on Sudan with the view to placing some checks on the country's alleged terrorist tendencies.

The latest in this non-committal attitude by African countries is the refusal of South Africa to effect the arrest of President Bashir in compliance with its obligation as a member state of the ICC. As of this write-up, a total of 123 countries have signed on to the Rome Statute as State Parties, HRW (2015), while a few have ratified same. The implication of membership is that each signatory member state has committed itself to complying with the provisions of the Statutes of the Court.

### **The Darfur Crisis and the African Union**

In a publication funded by Fride, a European Think-Tank for Global Action, Bah (2010) notes that as international media began to turn to Darfur, the gravity of the situation, with its scenes of death and destruction, was revealed to the world. By and large, images of violence evoked memories of earlier atrocities, most notably the earlier Rwanda experience, leading to calls for intervention to avert a repeat of that tragedy elsewhere, including Sudan. Bar further claims that the Darfur crisis was internationalised by vocal advocacy by civil Rights and human rights groups, thus warranting international response.

Such intervention included among others, the role of the African Union (AU). It will be recalled that the AU emerged from the defunct Organisation of African Unity (OAU) at the

Durban, South Africa Summit in 2002. While the AU appeared set to improve conditions of human rights and related issues such as the promotion of good governance in Africa and peacekeeping activities, its failure to halt human rights violations in Darfur comes out as a sour point. However, the inability of the Union to record manifest success in the case of Darfur crisis speaks to shortcomings such as lack of military and financial resources, and the requisite political will on the part of Union Members. Backed by its Article 4, *which authorises the Union to intervene in a Member State... in respect of grave circumstances – namely war crimes, genocide and crimes against humanity*, a small-sized military mission was deployed to Darfur to mitigate the prevailing incidences of violence, Bah (2010). The mission subsequently transformed into the African Union Mission in Sudan (AMIS) and remained the only external peacekeeping force providing security in Darfur. Political solution in terms of a negotiated settlement by the AU of the Darfur crisis has also been marred by seemingly divergent positions and policies of some of its members, especially from North Africa and the League of Arab States (LAS).

Bah notes that “although divisions between Arab and sub-Saharan members of the AU would seem to be less evident in the debates and voting patterns in the Peace and Security Council (PSC), they made themselves felt in the UN Security Council (UNSC), where Arab members of the Council –Qatar and Algeria - either voted against actions directed at the Government of Sudan or, at best, abstained”. The voting patterns and policy positions of North African members of the AU in the UNSC failed to complement its peace-making venture. Emboldened by the support of these countries, the government of Sudan failed to cooperate with the AU by obstructing the operations of its peacekeeping mission, the African Union Mission in Sudan (AMIS) despite having consented to its deployment.

Despite the arrest warrant issued by the ICC, President Bashir has won consecutive elections in 2010 and 2015, even though both elections were reportedly boycotted by opposition parties on the basis of allegations of unfair electoral practices. Keith (2007) argues that the Sudanese government’s intransigence and the diplomatic protection it has received from China have blunted the more ambitious steps taken by the United Nations Security Council.

As President Bashir continues in office despite efforts by the ICC to get him to face trial, the Darfur debacle shall remain a matter for concern and subject of analysis among scholars and commentators on governance in Africa and the challenges facing it.

### **ICC and African Member State’s obligation**

Out of the 123 member states that have signed on to the Rome Statute, 34 are African countries. By this figure, African countries account for the largest number in representation in the midst of the other five continents. Membership of the ICC requires unwavering commitment and loyalty to the provisions of the Court in relation to its mandate.

It will be recalled that the ICC is among other things, intended to complement existing national judicial systems, and only exercises its jurisdiction on two dimensions, including when national courts are unwilling or unable to prosecute any accused personality of criminal misconduct, or when the a combination of states or individual states refer investigations to the court. Deducible from this intendment of the ICC is the obvious fact political leaders world over, have tended to act as catalyst to national crisis and attendant violence, essentially as a result of their unrestrained tendency for bad governance. In Africa for instance, bad leadership can be identified to be the bane responsible for the continental woes in every segment of the society. Unfortunately, this has given rise to widespread impunity and recklessness that seem to defy caution. Given the lures of office, African leaders have developed an unbridled mania for remaining in power in perpetuity and are prepared to hold on for as long as they

live. Any form of insurgencies, opposition and calls for reforms are effectively repressed and suppressed. However, the wave of democratic culture blowing world-wide, which permits advocacy for accountability, good governance, respect for human rights and rule of law, seems to be a comforting development for the ordinary people. It is now commonplace to experience mass revolt by the peoples against every unpopular policy and decision by their leaders. This is without minding the consequences of security resistance by government security apparatuses, which in most cases often result into violence, destruction, death and genocide, as the Darfur instance clearly portrays. Unfortunately, while the African Union (AU) intervention and involvement in the resolution in the Darfur crisis is nonetheless commendable, the ineffectual impact of the intervention, presumably hindered by poor resources and weak political will of the leaders remains a matter for concern. The prevailing view seems to suggest that African leaders are not disposed to or willing to let their colleagues face any form of trial, especially outside the continent, and more importantly, in the hands of their former colonial overlords. The question that ineluctably arises from this position will be, who will try any African leader accused of crimes of genocide, crime against humanity, crime against aggression and related issues, and before which court?

### **South Africa failure to arrest President Bashir, diplomatic blunder or immunity?**

South Africa hosted the 25th African Summit between 7th and 15th June 2015 in Johannesburg for the 25th session of the African Union. As a member state of the ICC, South Africa was expected to execute the arrest warrant of President Bashir in accordance with the obligation arising from its membership of the Court and hand him over to the Court for prosecution on charges against him. This was not to be, as the fugitive President was aided to escape arrest. Reacting to the failure of South Africa in this instance, the ICC Chief prosecutor, Bensouda (2015) expressed extreme disappointment on this development. In her statement, .... *I believe that in this particular case, there was no ambiguity. The obligation of South Africa under the Rome Statute... was clear. What they had to do is to arrest and surrender Omar al-Bashir to the ICC.*

Continuing, Bensouda remarked that South Africa did not stop Bashir from leaving and the incident is considered by many as a major setback to the cause of international justice. Khadiagala (2015) on his part, opined that nobody anticipated that the June 15 AU Summit in Sandton, Johannesburg would be gripped by the drama of threats to arrest the Sudanese President. This view is probably against the background of the provisional court order which was issued to prevent President Bashir from leaving South Africa in relation to the diplomatic implications of acting contrariwise.

As was to be expected the President Bashir saga has generated mixed reactions, not only in the public place, but also among scholars and commentators on national issues. In the opinion of Maru (2015), respecting its responsibilities to the ICC by arresting Bashir would have meant a total violation of AU's repeated decisions of non-cooperation with the ICC on any cases related to Kenya and Sudanese leaders. It will be recalled that the ICC had charged President Uhuru Kenyatta with financing and coordinating post-election violence in 2008 which resulted in the death of about 1,100 people. President Kenyatta subsequently appeared before the Court in Hague, even though the cases against him could not be established for lack of convicting evidence. Maru disclosed that following an extraordinary AU Summit in 2013, member states had agreed to fight the ICC, and its global influence, through diplomatic channels by appealing to the United Nations Security Council. Consequently, member countries were called upon to begin individual withdrawal from the Rome Statute. On the other hand, by honouring the AU's decision, South Africa clearly

showed disregard to its obligation to the ICC and also to its court's ruling that had initially issued an order which restricted Bashir's travelling out of South Africa.

In her contribution, Paulat (2015) argued that "African citizens and leaders have a right to be suspicious of a court which claims to monitor the world, but only goes after specific regions in Africa". Paulat particularly observes that if the ICC actually wants the respect and cooperation of those on the continent, it has a lot of work to do. This includes a situation where the ICC should start turning its focus outwards and go after the war criminals that have been openly operating all over the globe with impunity. In the midst of ongoing suspicions and opinions by commentators and scholars, a South Africa's Cabinet Minister reportedly announced shortly after the Summit, that the South Africa's government will review its membership of the ICC, and that a decision to that effect will be taken only when the country has exhausted all remedies available to it. To achieve an objective assessment of the role expected of South Africa to the ICC in the circumstance of the arrest warrant on President Bashir, extent of diplomatic immunity opened to government leaders, and the jurisdiction of the Court, it will be useful to lay the following basis.

Firstly, in article 4 of the Rome Statute it is established that the Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes. Secondly, the Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State. In article 11(1) relating to jurisdiction, the provision of the Statute states that - the Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute. And article 11(2) provides that "*if a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3*".

Thirdly, Article 12 (1) states the preconditions for ICC's jurisdiction as follows – "*a State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes*" referred to in article 5, while article 12 (2) provides that, in the case of article 13, paragraph (a) or (c), "*the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3: (a) the State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; (b) the State of which the person accused of the crime is a national*".

Given the foregoing provisions, it is incontrovertible therefore that the ICC has jurisdiction to carry out its mandate as provided. Besides, once a state (country) has become a member of the organisation, having appended its signatory, expressing its readiness to comply with the obligation attached to membership, it becomes a mandatory obligation on every member state to so do. Accordingly, it is expected of South Africa to abide by the provision of the Rome Statute with respect to the order of arrest of the President of Sudan having being in the jurisdiction where the arrest warrant can be executed.

On the issue of diplomatic immunity, article 27 (1) and (2) of the Rome Statute makes provisions in respect of the limit to the immunity of any accused official of government, irrespective of their statuses. It states in sub-section (1) that, this "*Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence*".

Sub-section (2) states that immunities or special procedural rules which may attach to

the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person. Taken together, and in all material sense, just as the ICC has the mandate to adjudicate on issues within its purview as enshrined in its Statute, so also is every member state that has signed onto the Rome Statute, including South Africa, required to abide by the terms and conditions therein. However, membership of any international organisation – whether governmental or non-governmental, is voluntary, and to this extent, the threat by South Africa to pull out of the ICC does not diminish the personality status of the organisation. The fact remains that if South Africa pulls out of the ICC as a result of its present diplomatic spat with the ICC, the cost of returning may not be easily imagined. Now that the country has formally applied to quit the organisation, thus triggering a spate of withdrawals by Burundi and Gambia, it remains to be seen what implications the development will have on ICC relations with the countries that have served notice to opt out.

### **Conclusion and Recommendations**

This paper set out to examine the implications of the current diplomatic imbroglio between South Africa and the ICC on the non-compliance of the country with the Court's request for the arrest of President Omar Bashir of Sudan on charges of genocide and crimes against humanity. Having examined the legal basis of the relationship in the body of this paper that exists between South Africa (a member country) and the ICC, and the mixed reactions by African leaders, scholars and commentators, especially on the presumed biases of the ICC, this paper notes as follows –

- That membership of any international organisation, whether governmental or non-governmental ought to be based on clear and strict rules of engagement to avoid situations of biases as is the case in the focus of this paper;
- That, following from above, the implications of threats of withdrawal from any organisation, especially when member states feel their interests are in jeopardy should be spelt out and enforceable; and finally
- That the ability of any international to carry out its mandate without any inhibition or distractions be strengthened.

On the calls by African Heads of State for an Africa-based court system as against the ICC considered anti-Africans, this paper is strongly of the opinion that such calls at this material time are a way to distract from the collective pursuit and demand for good governance and respect for human rights, against which African leaders have to contend. African leaders' desire to remain in power for as long as they can orchestrate, is contrary to the collective aspirations of the African peoples for democratic practice and its inherent attributes, and these opposite positions have remained at the base of the crisis and conflict in which the continent has been engulfed. This paper opines that the counter accusations by some African leaders and commentators alike on the ICC as a weapon by the western world to vilify African leaders, and not beaming searchlight on so-called imperialists' actions in troubled zones, defy all logic. For example, selective reference to the interventions of the western world powers in the Middle East, especially in Iraq, and Libya in Africa, in the view of this author, does not constitute genocide in the real sense of it as is being peddled by some African leaders and elites. African leaders, rather than focus on providing good governance in their respective countries, tend to engage in impunities which provoke insurgency.

This paper further opines that incidence of impunity on the part of African leaders as a result of their penchant to remain in office in perpetuity even when their tenure has constitutionally ended, should be checked by a recognised institution such as the ICC, and not a court set up by the leaders with questionable character. On the issue of integrity, there is an emerging trend

on the continent of Africa where sitting leaders are manipulating state institutions to amend national constitutions to remain in power. This trend if not checked, may plunge the continent into a new wave of insurgency and by that fact, resulting in revolutionary movements as witnessed in 2010 and 2012 in the Arab world. In the light of the forgoing, this paper submits that, in the absence of an Africa-based court system to try allegations of genocide, crime against humanity and repression of human rights and rule of law, the ICC as an international institution should be strengthened and supported to carry out the administration of justice with respect to the purpose for which it was established.

In the present circumstance, and in the near future, it is highly improbable and unlikely that African leaders will be in a position to create a court system that will possess the authority to try any of them in cases of impunity and abuse of power. The recent trial and sentencing attempt on the former Chadian President, Hissene Habre, by the Extraordinary African Chambers can be described as an isolated case, because, its creation was purely on the insistence of some of the victims of the Hissene Habre's administration, and backed by the African Union resolution in 2006. The resolution had mandated the Senegalese government to create the court, and within the confines of its national court system. In one sense, the trial of Hissene Habre by the Senegalese government could be viewed as an act of betrayal having given him the privilege of staying in the country. However, it is arguable that any attempt to create a supra-national court institution that will bring African leaders seen to be dictatorial to account for their deeds or otherwise may not see the light of the day. This is because, leaders in Africa, beginning from independence and hitherto, have continually shown penchant for maladministration, misgovernance and sit-tightism, and have tended to assume dictatorial tendencies characterised by extreme repression of opposing views and opinions. It is interesting to note that notices of withdrawal from the ICC by three African countries including South Africa, Burundi and Gambia (as of writing) are beginning to experience a reversal. The new government in Gambia, for instance, has indicated its decision to stop an earlier notice of withdrawal by the defeated former President, Yahyah Jammeh. While in South Africa, a High Court has ruled against the decision by the Executive arm of government to unilaterally serve a notice to withdraw from the ICC. Perhaps these developments may provoke further scholarly inquiries with a view to advancing and enriching knowledge in the circumstance.

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