

## VANCE CENTER BULLETIN

### **The Bashir Debacle: How South Africa Betrayed Itself and the World By Justice Richard Goldstone and Marie-Claude Jean-Baptiste<sup>1</sup>**

The South African government of President Jacob Zuma stunned the world on Monday when it allowed Sudanese President Omar Al Bashir to leave its territory in violation of an order from its own High Court. The Sudanese President, under indictment by the International Criminal Court for international crimes committed in his own country, had traveled to Johannesburg to attend an African Union summit, when, the Southern Africa Litigation Center applied to the High Court seeking his arrest and surrender to the ICC.

The ICC issued arrest warrants against Bashir in 2009 and 2010 accusing him of ten counts of war crimes, crimes against humanity, and genocide for ordering the rape, murder, torture, and the destruction of villages of three ethnic groups because of their perceived ties to a rebellion against the central government from 2003 to 2005. The matter came before the ICC based on a 2005 Security Council resolution adopted under Chapter VII of the U.N. Charter and thus binding on the Government of the Sudan and all other parties to the conflict in Darfur.<sup>2</sup>

South Africa, like 123 other nations (though not the United States), is a party to the Rome Statute of the ICC<sup>3</sup>, whose Articles 86 and 89 require State Parties to “cooperate fully with the [ICC] in its investigation and prosecution of crimes within the jurisdiction of the [ICC]” and “comply with requests for arrest and surrender.” On June 13, in a *Decision following the Prosecutor’s request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir*, the ICC Pre-Trial Chamber II specified this obligation stating that “the Republic of South Africa is under the duty under the Rome Statute to immediately arrest Omar Al-Bashir and surrender him to the Court....”<sup>4</sup> The

---

<sup>1</sup> **Richard Goldstone** is a former Justice of the Constitutional Court of South Africa and served as the Chief Prosecutor of the United Nations International Criminal Tribunals for the former Yugoslavia and Rwanda. **Marie-Claude Jean-Baptiste**, Vance Center Programs Director, is co-Chair of the Transitional Justice and Rule of Law Interest Group of the American Society of International Law and represents the Vance Center at the Coalition for the International Criminal Court and the Coalition on the Responsibility to Protect. **Suzanne Knijnenburg**, Vance Center Human Rights Fellow, contributed to this bulletin.

<sup>2</sup> S.C. Res. 1593, U.N. Doc. S/RES/1593 (March 31, 2005).

<sup>3</sup> UN General Assembly, Rome Statute of the International Criminal Court (last amended January 2002), July 17, 1998, A/CONF. 183/9 [hereinafter Rome Statute].

<sup>4</sup> The Prosecutor v. Omar Hassan Ahmad Al Bashir, *Decision following the Prosecutor’s request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender*

South African government in response claimed to be bound by a 2009 AU policy requiring states not to cooperate with the ICC for the arrest and surrender of President Bashir<sup>5</sup> and the general principle under international law that sitting heads of states are immune from prosecution.

Both claims are false. The ICC Pre-Trial Chamber II stated unequivocally:

“... the immunities granted to Omar Al Bashir under international law and attached to his position as a Head of State have been implicitly waived by the Security Council of the United Nations by resolution 1593(2005) referring the situation in Darfur, Sudan to the Prosecutor of the Court, and ... the Republic of South Africa cannot invoke any other decision, including that of the African Union, providing for any obligation to the contrary.”<sup>6</sup>

South Africa’s release of President Bashir also raises concerns under the Genocide Convention to which South-Africa is a party. The International Court of Justice (ICJ) has held that Article VI of the Genocide Convention<sup>7</sup> requires State Parties to cooperate with an international penal tribunal with jurisdiction over persons charged with genocide, including to arrest and deliver them to such tribunal.<sup>8</sup> The ICC is a competent international penal tribunal for purposes of the Genocide Convention under the ICJ’s interpretation. Therefore, separately from its obligations under the Rome Statute, South Africa has an additional obligation under the Genocide Convention to cooperate with the ICC by arresting and surrendering President Bashir to the Court.<sup>9</sup> The Genocide Convention also clearly supersedes any claim of head-of-state immunity. Under Article IV, “[p]ersons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals”.

South Africa’s long struggle against apartheid, leading to its historic Truth and Reconciliation Commission and widely-admired constitution, has earned it respect on the international stage and a leadership role in Africa and beyond. Its complicity in shielding President Bashir from ICC prosecution in blatant disregard of its international obligations and its own court’s decision, not only threatens South Africa’s standing, but raises serious questions as

---

*Omar Al Bashir*, ICC-02/05-01/09, 13 June 2015, <http://www.icc-cpi.int/iccdocs/doc/doc1995566.pdf> (last visited Jun. 16, 2015).

<sup>5</sup> Assembly of the African Union, *Decision on the meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)*, Doc. Assembly/AU/13(XIII), at §10.

<sup>6</sup> *Supra* note 4, at § 9.

<sup>7</sup> Article VI of the Genocide Convention states: “Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the state in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”

<sup>8</sup> Application of the Convention on the Prevention and Punishment of Genocide (*Bosnia Herzegovina v. Serbia & Montenegro*), 2007 I.C.J. No. 91, at § 443.

<sup>9</sup> *Id.*, at § 445, see also Goran Sluiter, *Using the Genocide Convention to Strengthen Cooperation with the ICC in the Al Bashir Case*, 8 J. Int’l Crim. Just. 365 (2010), at 382.

to the rule of law inside South Africa. That the ruling ANC party would choose to deny thousands of victims in Darfur the justice for which it fought so hard during apartheid is perverse, as well as immoral. The undermining of the authority of the International Criminal Court is inexcusable.

**Vance Center International Council Member Richard Goldstone comments:**

"Fifteen years ago, the Constitutional Court held that the rule of law was a fundamental norm of our Constitution. Since the inception of our new democracy, the rule of law has been upheld and the Government has respected orders made by our courts. I am saddened that the South African Government has now apparently flouted an order of the High Court. The Court, through its Judge President, has given the Government seven days to explain its conduct. I would hope that if indeed the order was willfully disregarded, that contempt proceedings will be instituted against those officials responsible for this violation of the law and of the Constitution."