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**South Africa and the Great Escape:  
Regional Politics and Compliance with the Rome Statute**

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*Abstract: This paper examines state cooperation with the International Criminal Court (ICC) through a case study of South Africa's non-arrest of ICC suspect at large, Sudanese President Omar Al Bashir. Analyzing South Africa's non-arrest expands our understanding of compliance with the Rome Statute. While South Africa featured all domestic components hitherto associated with compliance in International Relations scholarship, the South African executive did not execute the arrest warrant against Bashir. I argue that the government's actions were partly impacted by its efforts to prioritize regional over global aspirations. Drawing from existing arguments questioning the ICC's work, the South African executive aligned its position more squarely with the African Union's non-cooperation policy. Moreover, the study introduces 'critical compliance incidents' as a unit of analysis that sheds light on compliance actions years or decades after initial commitment to an international treaty. The paper thus advocates for expanding the units of analysis for compliance studies beyond ratification, domestic implementation, and treaty effects.*

*Key words: International Criminal Court, Rome Statute, compliance, South Africa, African Union*

**a) Introduction**

Twice a year, African heads of state meet as part of the African Union (AU), the continental organization of 54 African states. From 7-15 June 2015, South Africa hosted the summit in the posh Johannesburg neighborhood of Sandton. This summit draws its significance from the fact that it was the closest a country and especially a state party of the International Criminal Court (ICC, the Court) has come to arrest Sudanese President Omar Al Bashir, indicted for war crimes, crimes against humanity, and genocide. The episode of his presence in Sandton, lasting less than 48 hours, featured all ingredients of a Hollywood thriller, hence dubbed ‘great escape’: The drama featured, among others, a branded fugitive, contradictory reports about his whereabouts, a last-minute court hearing, and an alleged government conspiracy to let the fugitive escape.

In the aftermath, some deemed the ‘escape’ to be the beginning of the end of South Africa’s constitutional democracy, given that the executive ignored a domestic court order and its international obligation to arrest an ICC suspect.<sup>1</sup> From the perspective of the ICC, this episode was yet another example where a state party to the Court failed to execute the arrest warrant against Bashir, indicted by the Court since 2009/2010 for war crimes, crimes against humanity, and genocide. Per the Rome Statute, all ICC member states are legally obliged to cooperate with the Court. However, while the Court has the *legal* power to demand a state’s cooperation, it is less powerful politically. The Court lacks its own police force, and so, in order to put suspects on trial, it depends on the cooperation and assistance of state parties, non-member states, and international governmental organizations (IGOs). State cooperation is *the* pre-condition for the achievement of the Court’s mission to end impunity for the perpetrators of the most heinous crimes. In contrast, the *absence* of cooperation leaves suspects at large, makes evidence unattainable, and obstructs the Prosecutor’s efforts to build a successful case. Thus, compliance lies at the heart of the state-ICC nexus.

I argue that the episode of Bashir’s brief visit to South Africa and his non-arrest expand our understanding of compliance: Theoretically, it contributes to scholarship looking into the explanatory factors for compliance. In contrast to recent literature

convincingly revealing the power of domestic explanations for compliance, these domestic factors were all present in South Africa, including a strong pro-compliance judiciary that decided on litigation pushed by domestic pro-compliance groups. However, this was not enough to compel South Africa to arrest Bashir. Based on the trajectory of South Africa's post-apartheid foreign policy and public officials' statements from June 2015, I argue that we have to consider South Africa's regional and international ambitions and foreign policies to comprehend its actions. South Africa failed to arrest Bashir trying to cement its leading position in the African Union—long critical of the ICC—and for this, was willing to flout its obligations to the ICC.

Second, this paper shows the methodological utility of studying specific compliance incidents *years after* a state's initial commitment, ratification, and domestic implementation. The ICC represents a futile institution to study when we are interested in the temporal dimension of compliance as states are called on to perform specific compliance actions, such as executing an arrest warrant, after years or decades have passed and different administrations lead the country. This unit of analysis then extends on compliance studies that look at treaty ratification as *the* signature moment. What creates compliance or non-compliance years after commitment has unique theoretical value and points us to potentially new ways of explaining compliance.

To further these arguments, the paper starts with delineating conventional wisdoms about the nature and causes of compliance. I propose to add a regional explanation to existing theories situated at the international level of analysis. Then I proceed to a discussion of South Africa's post-1994 foreign policy with a focus on international organizations and the African continent to show how the country has tried to balance between these audiences. Next, I present the cooperation trajectory between South Africa and the ICC over time to argue that South Africa was a long-standing supporter of the Court but that its engagement with the Court mirrors its broader foreign policy efforts to balance between regional and international ambitions. These first parts show that South Africa's non-arrest surprised many who regarded South Africa as an easy case for compliance—combining willingness and ability to execute the arrest warrant against Bashir. In the last empirical section I show how South Africa's non-arrest

of Bashir can be partly attributed to its regional ambitions. Capitalizing on three regional arguments drawn from the existing ICC-critical discourse placed South Africa more squarely within the African ‘consensus’ on the Court’s role in Africa. The final section lays out what we can learn from the episode about compliance more generally and the non-arrest of Bashir in particular.

## **2) *Conventional Wisdoms about Compliance***

### **a) *Definition and Units of Analysis***

The study of compliance with international law (IL) and human rights treaties more specifically has gained increasing attention in International Relations (IR) since the early 2000s. Ever since Hathaway argued that compliance with human rights treaties is not very common and that some treaties lead to worse human rights practices on the ground,<sup>2</sup> scholars have extended on this research program. Since 2002, a myriad of studies have been published on when and why states comply with treaties.<sup>3</sup> Much research affirms that “compliance is not an all-or-nothing affair and that the effects of human rights regimes, when and where they exist, are conditional on other institutions and actors.”<sup>4</sup>

When studying compliance—a state of conformity between a state’s actual practice or written domestic law to treaty stipulations<sup>5</sup>—international lawyers and IR scholars tend to focus on different things. Lawyers often see compliance in binary terms (compliance or non-compliance) based on whether a state adheres to the terms of the treaty. In contrast, IR scholars have mostly examined the *effects* of treaties as an indicator for a state’s substantive compliance with a treaty, measuring *inter alia* the development of human rights practices post-ratification.<sup>6</sup> For instance, in his critique of Simmons, Posner argues that her measure of compliance—decline in human rights abuses—does not measure compliance but rather causal effects.<sup>7</sup> However, some IR scholars are also studying indicators of procedural compliance, such as states’ compliance with a treaty’s reporting mechanism. According to Hathaway, compliance has several dimensions: compliance with procedural obligations, compliance with substantive obligations outlined in the treaty, and compliance with the spirit of the treaty.<sup>8</sup> Thus, compliance is not binary

but rather a continuum “based on the degree to which behavior deviates from the legal requirements of the treaties.”<sup>9</sup>

In these various senses, South Africa’s actions in June 2015 become more difficult to categorize. At first sight, the country’s non-arrest can be categorized as non-compliance given the Rome Statute’s clear cooperation obligations in Article 86 and 89, and the irrelevance of official capacity for ICC jurisdiction. Indeed, the ICC has labeled similar previous non-arrests by member states as non-compliance and has issued findings to that end.<sup>10</sup> The ICC did not accept the argument, brought forth by South Africa but also the Democratic Republic of the Congo (DRC), that non-arrest was justified because Bashir visited the country on the occasion of an *international* summit rather than a national event. However, legal scholars disagree whether or not sitting heads of state from third parties enjoy immunity.<sup>11</sup> In fact, the Rome Statute itself contains contradictory provisions to that effect. While this paper does not provide the space to delve more deeply into this legal debate, I aim to highlight that even distinguishing compliance from non-compliance is not as straightforward as one would think (or hope).

In contrast to many studies that analyze compliance through statistical analysis of post-ratification human rights records or comparative case studies, this paper zooms in on one particular ‘compliance incident,’ the decision by South Africa’s executive to not arrest Bashir during his visit to South Africa in June 2015. I argue that this unit of analysis provides purchase on several aspects compliance and ICC scholars are interested in. First, it contributes to research on state compliance *after* ratification. It takes seriously that compliance does not end with ratification or even the passage of domestic implementation legislation. Compliance actions encompass a range of actions: signing, ratification, passing domestic legislation. But in the case of the ICC compliance actions also include complying with court requests, such as requests for arrest and surrender, that a country is demanded to execute years or even decades after joining the Court. Hence, we need to study compliance actions beyond the initial moment of ratification.

Second, if we are interested in how a country adheres to treaty principles, a focus on concrete compliance behavior down the road adds not only data points to our understandings but also sheds light on whether other considerations by the current

government might impact compliance. Studying compliance actions, in the case of South Africa 16 years after ratification of the Rome Statute, casts doubts on assuming that what explained ratification then also explains compliance actions today. Thus, studying compliance incidents after ratification might illuminate further causes for compliance and non-compliance. Other governments might calculate costs and benefits differently, might be differently influenced by international peers or regional organizations, and might be differently subject to civil society groups and litigation. For instance, Grugel and Perruzotti's research on compliance with the UN Children's Rights Convention in three Latin American countries suggests that it can take a long time to see actual compliance happen and that a country's history might influence compliance more than initially thought.<sup>12</sup>

***b) Why do states comply?***

Both IL and IR scholars have studied the contributing factors of compliance and non-compliance, focusing on different levels of analysis and underlying decision-making logics (logic of consequences and logic of appropriateness). While these theories' main concepts are presented as distinct factors below, I expect these factors to interact and to work simultaneously. While this complicates the assessment of which causal factor is driving the outcome, detailed case studies help to assess the explanatory power of each factor.

Most scholarship assumes that the absence of compliance factors leads to non-compliance. For instance, the absence of domestic pro-compliance groups makes a country less likely to comply with treaty obligations. Berlin recently suggested that compliance and non-compliance should be considered separately since the causal pathways to each may differ, and non-compliance "is attributable to its own positive causes."<sup>13</sup> Hence, we cannot assume that the absence of compliance factors necessarily leads to non-compliance and that non-compliance, as was the case with South Africa's non-arrest, stemmed from hitherto neglected causes that interact with other factors. I group the factors according to their outcome—compliance and non-compliance—as well

as by level of analysis. Without access to the decision-makers heads and their underlying rationale, we can rely on public statements and logic to make our arguments.

***i) Explaining Compliance***

Three sets of compliance theories reside on the international level. One prominent explanation based on pressure and coercion is material pressure, whereby states respond to outside pressure, especially from powerful states or ‘dependency networks.’<sup>14</sup> For instance, powerful states can use their foreign aid strategically and demand compliance of aid recipients under the threat of withholding further financial support. Hafner-Burton found that trade agreements with strong human rights provisions tend to be associated with better human rights practices. Serbia’s and Croatia’s compliance with the International Criminal Tribunal for the Former Yugoslavia (ICTY) also relied partially on threats of withholding aid and EU membership.<sup>15</sup>

Second, IL scholarship has often traced compliance with international treaties to effective sanctioning and monitoring mechanisms. This enforcement school argues that states do not comply with treaties when the benefits of non-compliance outweigh its costs. Thus, by increasing the costs of non-compliance, such as strong enforcement measures, states can be induced into obeying.<sup>16</sup> Research on the apprehension of ICTY indictees indicates that raising the likelihood of detection of the suspect’s whereabouts increases the likelihood of their arrest.<sup>17</sup>

Third, scholars suggest that states comply with obligations when these are perceived to have been created and are applied in a legitimate fashion.<sup>18</sup> Franck argued that compliance hinges on the perceived legitimacy and fairness of a rule, the rule-making process, and the rule’s application. Once perceived as legitimate, a rule or institution exerts a pull toward compliance.

Two additional sets of explanations for compliance reside on the domestic level of analysis, which includes the state and sub-state levels. Scholars increasingly highlight the important role of domestic politics.<sup>19</sup> Rather than choosing compliance over the loss of foreign aid, governments may be ‘coerced’ or ‘convinced’ into compliance by domestic actors. Simmons argued that international treaties impact domestic agendas, litigation,

and mobilization. These venues then enable domestic actors, compliance constituencies, to capitalize on treaty ratification and either bring suits demanding the government's compliance with the treaty or mobilize support among the population.

Another set of explanations focus on regime type. For instance, scholarship has consistently highlighted the importance of a democratic form of government for compliance.<sup>20</sup> One line of research suggests that democracies are more likely to comply with international treaties due to 'value congruence,' which means that they hold values dear—such as the rule of law and civil rights—that make them more inclined to obey international law even in the absence of strong enforcement.<sup>21</sup> Institutionally, democracies also feature strong respect for domestic courts, the rule of law, and *pacta sunt servanda*, hence making them more likely to obey the orders of similar international courts,<sup>22</sup> and public support for compliance is expected to compel leaders to oblige in light of the next elections.<sup>23</sup>

### *ii) Explaining Non-Compliance*

In addition to the mere absence of the compliance factors presented above, non-compliance may be caused by additional factors. Lack of capacity features as a powerful domestic-level explanation for non-compliance. Chayes and Chayes argued that non-compliance stems from capacity constraints and unclear rules.<sup>24</sup> While many human rights provisions do not involve capacity concerns as governments are often asked to merely refrain from certain actions, capacity constraints come into play with the Rome Statute because court requests ask ICC state parties to provide records or arrest suspects. These concrete domestic actions require some level of technical expertise or law enforcement capacity,<sup>25</sup> and thus, state fragility can impede human rights development in a state.<sup>26</sup> It has been shown that limited state capacity has contributed to slow implementation progress in Botswana, Ghana, Kenya, Tanzania, and Uganda, where over-stretched and thinly-staffed justice systems find it hard to devote resources and attention to the implementation of the Rome Statute.<sup>27</sup>

In addition, non-compliance may result from domestic actors that wish to prevent compliance, so-called pro-violation constituencies or non-compliance constituencies.<sup>28</sup>

In his study of arrest warrant compliance with the International Criminal Tribunal for Rwanda (ICTR), Berlin found that the Catholic Church played a pivotal role preventing Italy’s compliance when the tribunal sought to arrest a Rwandan Catholic priest for his alleged involvement in the 1994 genocide.<sup>29</sup>

Table 1 presents these explanations according to level of analysis. These approaches merit much attention but fail to explain South Africa’s non-arrest convincingly. In many ways, South Africa was seen as a poster child for compliance before 2015, making its non-arrest of Bashir both surprising and troubling to many.<sup>30</sup> South Africa invested heavily in the Court in the years following its establishment and, even after the AU and several African countries became more vocal in their criticism, South Africa still took actions supportive of the Court. It featured most of the assets we associate with compliance, including a strong, independent judiciary, democratic institutions, domestic capacity, strong pro-compliance civil society, domestic implementation legislation, and more importantly, a strong pro-ICC public stance by the government before the episode.

**Table 1: Overview of Explanatory Factors for Compliance and Non-Compliance**

	<b>Compliance</b>	<b>Non-compliance</b>
<b>International level</b>	International pressures Enforcement Legitimacy of rule and institution	(lack of compliance factors) <b>Regional non-compliance norm</b>
<b>Domestic level</b>	Compliance constituencies Democratic values and institutions	(lack of compliance factors) Non-compliance constituencies Lack of state capacity

I argue that the non-arrest can be explained by disaggregating the *international environment*: not all international pressures are created equal; some matter more than others. While the assumption in scholarship is often that international forces pressure states to conform to human rights norms, the same international environment might also nudge states into non-compliance. I argue that we can explain Bashir’s non-arrest through

the lens of South Africa's foreign policy and its interests and ambitions in Africa and the world and the emergence of a regional non-compliance norm, that has made it appropriate to host Bashir. Since 1994, the country has tried to solidify leadership in the AU as well as bolster its position as 'Africa's leading nation' in global institutions. The arrest of Bashir would likely have resulted in praise from the Court and many of the ICC's Western member states. However, the arrest of an African president would likely also have resulted in harsh opprobrium from other African states and fellow emerging countries, many of them non-ICC member states. Confronted with these options, the South African executive chose non-arrest.

The lack of attention to the role of regional factors in compliance is surprising given that regional explanations have figured prominently in diffusion and commitment research, with Simmons suggesting that regional norms or contagion explain state commitment to international treaties. Similarly, Creamer and Simmons find that regional imitation leads states to comply with the reporting obligation under the Convention against Torture.<sup>31</sup> I do not wish to suggest that it is *only* regional considerations that drove South Africa's behavior and decision to not arrest. I merely highlight the role of regional considerations.

In the following sections I present a regional argument for South Africa's non-arrest. To make this argument, I first present a brief account of South Africa's foreign policy toward the African continent as well as global institutions since the end of apartheid in 1994. While this section cannot do justice to the past 20 years and necessarily glances over many nuances, it is meant to highlight the balance South Africa has been and is walking with regard to its regional and global ambitions, between being a regional powerhouse and thus advancing itself as the leading African nation while simultaneously stressing its African roots and not alienating its neighbors.

### ***3) South Africa's Regional and International Ambitions post-1994***

The regional and international influence of post-apartheid South Africa has been complicated by its apartheid legacy as well as its economic weight and middle power status. Under apartheid, the country pursued destabilization policies in other African

states, formed institutions to cement its own disproportionate economic power, and supported ‘albinocracies’ in the region under the Pax Pretoriana.<sup>32</sup> In other words, South Africa saw itself and was seen by other African states as a European outpost on the continent, which has “left profound scars on its neighbours and a distrust even of a black-led government that will take decades to overcome.”<sup>33</sup> According to Borer and Mills, the country’s historical and contemporary role on the continent is one reason why South Africa “has generally been unable to overcome the continental constraint of African unity, even if it wished to.” In light of its apartheid foreign policy legacy, the South African government has been wary of being seen as assertive and dominant by other African states.<sup>34</sup>

On the one hand, the country boasts all ingredients of a middle power. It is an economic giant in southern Africa, boasting a 9:1 trade balance with its neighbors and accounting for 80% of the regional economy, as well as providing high foreign direct investment into other African countries. Acting like an emerging regional hegemon and middle power that uses institution-building to cement its preferred policy beliefs,<sup>35</sup> post-apartheid South Africa has stirred continental debates about the proper role of Africa in international organizations, via the African Renaissance, the formulation of NEPAD (New Partnership for African Development), the construction of the AU, and efforts to expand the trade and security portfolio of the Southern African Development Community (SADC). According to Alden and Le Pere, these actions “all speak to South Africa’s ambitions to realise a hegemonic presence on the continent.”<sup>36</sup>

On the other hand, however, all these initiatives have not created a strong following among other African states.<sup>37</sup> The first years of post-apartheid South Africa were marked by what some call ‘inconsistent’ foreign policy, characterized by ad hoc and unpredictable reaction to crises and a high degree of personalization under Mandela; all of this met with critique from African states. One early foreign policy crisis that tarnished the newly democratic country’s image in Africa was Mandela’s unsuccessful attempt to rally African support against the Abacha regime in Nigeria.<sup>38</sup> After Ogoni campaigners had been hanged in Nigeria in November 1995, Mandela called for the imposition of oil sanctions, collective action by SADC against Nigeria, and argued for Nigeria’s expulsion

from the Commonwealth. However, not a single southern African state supported South Africa's endeavor. Instead, South Africa "was accused by many African leaders of sowing seeds of division in Africa and undermining African solidarity."<sup>39</sup> Adebajo argues that this episode impacted Mbeki's later policy of 'quiet diplomacy' toward Zimbabwe and that "Africa's depiction of South Africa as a western stooge over Nigeria was a traumatic experience that the country's leaders were determined never to repeat."<sup>40</sup>

Moreover, South Africa's first peacekeeping mission (or intervention) in Lesotho in September 1998 stirred opposition from neighboring and other African states. Lesotho's Prime Minister Pakalitha Mosisili had asked the governments heads of Botswana, Mozambique, South Africa, and Zimbabwe to send troops into Lesotho to restore peace after a contested election that resulted in widespread rioting and mutiny in the Lesotho Defence Force. Together with Botswana, South Africa sent 700 soldiers. While SADC depicted the mission as a peacekeeping mission, its legality remains controversial, as does the 'humanitarian' motive behind South Africa's action.<sup>41</sup> Likoti argues that intervention was more in line with realist imperative—South Africa seeking to secure water access in Lesotho, including a joint dam—as well as lacking authorization from the UNSC. The intervention lasted until May 1999, resulting in the destruction of the capital city Maseru. Its legitimacy remains "widely questioned"<sup>42</sup> and revived fears of South African domination in the region.<sup>43</sup>

Of regional importance is also South Africa's role in the AU, which former South African President Thabo Mbeki helped to create and in which South Africa sought leadership during the past decade. Mbeki espoused the concept of African Renaissance, signaling a deeper commitment to Africa after Mandela—widely loved by the West—had been perceived by some as less committed to Africa.<sup>44</sup> Mbeki thus introduced "a more Africanist hue to South African politics" which has "helped facilitate South Africa's integration in Africa after a period in which, fairly or unfairly, it was perceived by important sectors of continental opinion as essentially as Western state in its political and economic outlook and a proxy for Western interests."<sup>45</sup> When the OAU was transformed into the AU in the early 2000s, shifting from the principle of non-interference to a new focus on non-indifference, Mbeki played a key role alongside Libya's Gaddafi,

“spearheading the continental integration process on various levels.”<sup>46</sup> Mbeki became the AU’s first chairperson, the leading advocate for NEPAD and the African Peer Review Mechanism, he pushed for the Pan-African Parliament to be located in South Africa and the NEPAD Secretariat can be found in Midrand, South Africa.<sup>47</sup> This push for the AU and integration initiatives was, according to Welz, “watched like a hawk by fellow African leaders: he was perceived as a bully, a head of state who stubbornly wanted to push his conceptions through.”<sup>48</sup>

Under Zuma, while the country remains committed to the AU, it does so with less vigor than under Mbeki. Since 2009, the Zuma administration has been continuing the strong focus on Africa, but has shown an increasing affinity for BRICS diplomacy and anti-global North rhetoric.<sup>49</sup> Zuma places much more emphasis on South-South cooperation, especially under the auspices of BRICS, which he fought hard to join and succeeded in joining in 2010. South Africa also stirred resentment from other African states in 2008 and just months before the Bashir episode in 2015, when widespread attacks occurred against African migrants in South Africa. The Zuma administration’s response to the xenophobic violence was widely perceived as delayed and incomplete, thus drawing the ire of African nations whose citizens were subjected to attacks. For instance, the violence caused another rift in relations with Nigeria that decided to withdraw its envoys from the country. John Mahama, ECOWAS Chairman and Ghana President, is quoted as saying that “it was so unfortunate that the very people, whose nations sacrificed to help South Africans fight, repel and defeat apartheid, were now today considered aliens and hacked to death in such a barbaric manner.”<sup>50</sup>

In addition to these regional interests, South Africa has also sought to assume a leading role as an African representative in global institutions. Its effort to gain a permanent seat on the UNSC was seen critically in Africa, as a break from the Ezulwini Consensus, that showed South Africa’s ambitions as a nation, rather than unity for the continent.<sup>51</sup> In 2010, South Africa was invited to join the BRICS of emerging economies, even though its relative lack of economic prowess compared to Brazil, Russia, India, and China. It is also the only African country to be a member of the G20, the twenty major economies. In the UN, the country held a seat as non-permanent member on the Security

Council twice and campaigned for a permanent seat. During its tenures on the UNSC, South Africa worked to expand the cooperation between the UN and the AU in the regional organization's efforts to deal with regional threats to peace and security.<sup>52</sup> While it voted mostly in conformity with the Council, South Africa often worked to water down resolutions that insisted on human rights or toward resolving critical issues in forums other than the UNSC, including the often-lamented opposition to resolutions condemning neighboring Zimbabwe and Myanmar.<sup>53</sup> These positions surprised many Westerners who associated the country with its 1994 promise of a human rights based foreign policy. However, it is important to note that "Pretoria's dominant geopolitical and ideological reference group resides in the non-West amongst emerging powers and the global South, including AU member states."<sup>54</sup>

While South Africa's position has been described as that of a 'regional hegemon' in southern Africa, the lack of a continental hegemon in Africa means that even wealthy states, such as Nigeria and South Africa, "encounter great difficulties much of the time in turning their size and wealth into effective diplomatic influence."<sup>55</sup> One legacy of colonialism and the Cold War has been a deep resentment against powerful states. Consequently, wealthy African states often struggle to get support for their positions and African states often mobilize against potential hegemony seekers.<sup>56</sup>

The paragraphs above show that South Africa has taken on prominent tasks in Africa as a middle power. However, these actions have not always resulted in praise by fellow African states. South Africa's foreign policy has been characterized by a delicate balance between its powerful status on the African continent and a deep suspicion from that same region.

#### ***4) South Africa, the African Union, and the International Criminal Court***

South Africa's relationships with the AU and the ICC respectively illustrate the country's broader engagement with the region and global institutions. Trying to speak to two audiences and securing leadership in both arenas became impossible in June 2015 when the country had to choose between the two. Despite its long-standing public support for the Court, South Africa tried to negotiate carefully its relationship with the AU and

decided in June that bearing the costs of non-arrest—public criticism from the West and domestic pro-compliance constituencies—was preferable to arresting Bashir. The latter would have gone against prior assurances of immunity during the AU summit and under the eyes of all African leaders and would have likely resulted in severe diplomatic costs from some of the continent’s ICC-critical nations, such as Kenya, Uganda, and Sudan.

The years before the ICC’s creation were characterized by strong support for the idea of an independent court, both in South Africa, within SADC, and from most African countries. Since 1993, South Africa had been active in the International Law Commission, charged with drafting a treaty for an international criminal court. South Africa also participated in the UN Preparatory Committee for the court’s founding treaty, and from 1995 to 1997 was active in SADC consultative meetings, hosting, for instance, conferences to adopt negotiating principles for the Rome Conference where the treaty was finalized.<sup>57</sup> Having signed the Rome Statute in July 1998, South Africa took proactive steps to implement the treaty domestically and sway other African countries to do so as well. In 2002, South Africa became the first African ICC state party to pass domestic implementation legislation, and it established the Priority Crimes Litigation Unit to ensure the legislation’s effectiveness.<sup>58</sup> Since its passage, the law has been widely used by domestic groups to bring suits in South African courts, and South African courts have emphasized the country’s legal obligations under international law.<sup>59</sup> Another strong sign of support for the Court was South Africa’s refusal to sign a Bilateral Immunity Agreement (BIA) with the USA. In the years after the Court’s establishment, the USA pressured states to sign BIAs to give US nationals immunity from ICC prosecution against the threat that all US military aid to these countries would be cut.<sup>60</sup> This decision created a net loss of \$8.1 million over the 2004 and 2005 fiscal years, amounting to “the most significant loss in military aid funding among African ‘refusers.’”<sup>61</sup> A Cabinet statement clarified the government’s firm position against a BIA in July 2003, due to South Africa’s “commitment to the humanitarian objectives of the ICC and the country’s international obligation.”<sup>62</sup>

South Africa’s relationship with the ICC has become slightly more ambivalent since 2009 when the ICC issued its first arrest warrant against a sitting head of state,

Omar Bashir. Bashir was indicted first for crimes against humanity and war crimes in Darfur and again in 2010 on charges of genocide against the Fur, Masalit, and Zaghawa tribes. From 2009 on, South Africa at least tacitly approved AU Assembly decisions that called on the UN Security Council (UNSC) to delay the cases for one year and consider heads of state immune from prosecution. In July 2009, the AU issued the Sirte Declaration, stipulating that “AU Member States shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar Al-Bashir of The Sudan.”<sup>63</sup> This non-cooperation policy by the AU remains the cornerstone of the AU-ICC relationship to today. After civil society organizations (CSOs) criticized the South African government for their support for the Sirte Declaration, the Department of International Relations and Cooperation felt obliged to publicly reconfirm the government’s commitment to the rule of law.<sup>64</sup>

Statements from the AU and some African countries have become increasingly critical of the Court. While the AU’s critiques relate only to the cases against sitting heads of state, several African countries have been vocal in their disdain for the ICC. These states, often non-member states or states under ICC investigation against their will, admonish that all ICC cases so far originate in African countries,<sup>65</sup> whereas similar crimes in other parts of the world or perpetrated by nationals of other state parties remain unprosecuted. A common critique of the Court has been its decision to not investigate the actions of UK troops in Iraq, over which the Court has jurisdiction.<sup>66</sup> This inconsistent application of legal standards, i.e. selective prosecution, has cost the Court dearly in the public perception of its legitimacy. Many argue that the ICC’s case focus on Africa amounts to racism and is evidence that the Court, largely funded by Western nations, has become a neo-imperialist tool by the West. For instance, Ethiopian foreign minister Tedros Adhanom Ghebreyesus is quoted as saying at an AU summit in 2013 that “[t]he Court has transformed itself into a political instrument targeting Africa and Africans”<sup>67</sup> and that it was “condescending” toward Africa.<sup>68</sup> Other leaders who often engage in this rhetoric are Uganda’s Museveni and Zimbabwe’s Mugabe as well as the leaders indicted by the Court, Kenyan President Kenyatta and Bashir. Often this has been depicted as the

common African position against the Court: “Unfortunately this view has gained traction over the past few years and, through concerted and self-interested political machinations by the ICC’s opponents on the continent, has been marshalled into an institutional position against the court at the level of the AU.”<sup>69</sup>

Despite the AU’s consensus decision making in the Assembly—decisions that have become increasingly critical of the ICC—they often mask disagreements between African states behind the scenes. On the one hand, South Africa’s continuous support for the AU’s ICC-critical positions suggests that the country has long been critical of the Court. However, the AU’s attention has focused exclusively on the ICC cases against sitting heads of state. In no decision does the AU admonish the Court for indicting the people it indicted. Rather it is only the cases against Bashir, Kenyatta and Ruto that draw the ire of the AU and result in critique of the Court. Moreover, and in line with official statements at UN meetings, African states’ criticism of the Court’s prosecution focus also draws from the actions of the UNSC and its failure to defer these African cases while failing to refer other critical situations to the Court, including Syria. Thus, the often-lamented hostility of African states toward the Court mainly stems from 3 of its current docket of 23 cases in nine situations and the ICC’s relationship to the UNSC as a political actor.

While supporting the AU Assembly decision on non-cooperation, South Africa fell short of inviting Bashir to its territory and continued to support the Court. On the occasion of President Zuma’s inauguration in 2009, Bashir was not invited, and South Africa clarified that he risked arrest should he enter the country.<sup>70</sup> In 2010, Bashir was invited to the opening ceremony of the soccer World Cup in South Africa along with other African leaders, but he declined the invitation.<sup>71</sup> At the AU summit meeting in October 2013, the South African government helped Nigeria and others to thwart Kenya’s motion to have African countries withdraw en masse from the ICC.<sup>72</sup> This support came despite the African National Congress’s (ANC) position against the Court. The ANC, South Africa’s main post-Apartheid political party, had strongly advised the government to side with Kenya *against* the Court, arguing that “the ICC is representing inequality before the world justice where the weak is always wrong and the strong is

always right.”<sup>73</sup> The ANC issued a first critical statement about the ‘selective prosecution’ of the Court during its 53<sup>rd</sup> National Conference in December 2012, urging the Court “to also pursue cases of impunity elsewhere, while engaging in serious dialogue with the AU and African countries in order to review their relationship” as well as calling on UNSC to recognize African institutions’ work in conflict management.<sup>74</sup>

Considering South Africa’s longstanding support for the Court but its support of AU decisions paints the picture of an ambivalent supporter, a country torn between its proclaimed support for human rights and accountability on the one hand and its obligation and solidarity with fellow African countries on the other hand. Scholars have noted the country’s oscillation—difficult at times—between its guiding principles of human rights on the one hand and its critical role in the African renaissance and the norms of non-interference.<sup>75</sup>

This history suggests that the South African executive was still supportive of the ICC in 2015 despite the ANC’s critique of the Court and pressure to echo the AU’s position. The issue became front and center when African leaders met in Johannesburg in June 2015 to discuss pressing continental concerns. On Saturday, 13 June, rumors emerged that Bashir was seen at Sandton’s International Convention Center (ironically, the abbreviation is ICC), and reports of his presence were later confirmed. Amidst speculation about his presence, the CSO Southern Africa Litigation Center (SALC) filed an urgent application with the North Gauteng High Court to have the government arrest Bashir, in compliance with South Africa’s international obligations under the Rome Statute.<sup>76</sup> On Sunday, Gauteng High Court Judge Fabricius issued an interim order instructing the government to inform all South African ports of entry/exit that Bashir is to be prevented from leaving the country until another court hearing would determine whether he should be detained.<sup>77</sup>

According to the government’s affidavit this court order was partially complied with as Director of Home Affairs confirmed to have informed all ports of exit and received their confirmation.<sup>78</sup> However, after the government filed its response Monday morning (15 June) before the second hearing took place, Bashir’s plane had already left South Africa, with pictures of his plane leaving Waterkloof air force base appearing on

social media. Hours later, the court ultimately ruled in favor of SALC and decided that Bashir should have been arrested. On behalf of the High Court, Judge Mlambo ruled that the government's failure to arrest Bashir had defied the country's Constitution.

The episode had repercussions in the following weeks and months. Afterwards, some deemed the 'escape' to be the beginning of the end of South Africa's constitutional democracy, given that the executive ignored a domestic Court order and its international obligation to arrest an ICC suspect.<sup>79</sup> Some news reports suggested that the government held secret meetings with key ministers to arrange for Bashir's successful 'escape' from the country,<sup>80</sup> which the government denied.<sup>81</sup> In its affidavit, the government explained that the Sudanese presidential plane was moved Sunday night from a commercial airport to Waterkloof air force base without the usual paperwork involved in moving a foreign nation's plane to a military base, and that Bashir's passport was not among the passports presented to immigration officials.<sup>82</sup>

When the judges considered the issue again on 25 June 2015, they invited the head of the National Prosecuting Agency to consider pressing criminal charges for government officials given the disregard of the constitution. According to Judge President Dunstan Mlambo, "[a] court is the guardian of justice, the corner-stone of a democratic system based on the rule of law. If the State, an organ of State or a state official does not abide by court orders, the democratic edifice will crumble stone-by-stone until it collapses and chaos ensues."<sup>83</sup>

While some ANC members openly talked about withdrawing from the Court, the executive walked a more careful path but indicated its wish to revisit and reform the Court. Deputy Minister Obed Bapela said that it is ANC policy "that we remain a member of the ICC [but], given the recent events, we must review our position whether [our] membership is yielding its goals, or has the ICC been sidetracked and hijacked by forces that are anti-progress."<sup>84</sup>

The relationship between the ICC and South Africa as well reactions in South Africa to the non-arrest of Bashir highlight the various domestic actors involved in compliance. Rather than *one* 'state interest,' several interests can be identified: The South African judiciary and human rights groups sided with the ICC's position that South

Africa was primarily bound by its Rome Statute obligation to arrest Bashir, regardless of the AU's non-cooperation policy. In contrast, the executive aligned itself with the AU and ANC position against the Court, which it had still ignored in 2013. The ANC subsequently became much more critical of the Court. In a discussion document after the Bashir visit in 2015, the ANC deplored that since 2012 "the ICC has continued to attack African countries" and "arrogantly insists on African countries to execute ICC warrants of arrests which are not recognised by the African Union. South Africa was not spared by this arrogance when President Al-Bashir visited our country for the June 2015 Summit of the African Union to the point that the ANC decided on reviewing South Africa's membership of this organisation."<sup>85</sup> Noting the divergence of the Court from its original mandate, the ANC highlights the different obligations the country has vis-à-vis the AU and individual African states such as Sudan. In its most critical statement so far, the ANC notes:

There is no national interest value for South Africa to continue being a member of the ICC. The manner that we were treated around the al-Bashir incident is consistent with the cheeky arrogance that Africa has experienced in its interaction with the ICC. Continuing to be in the ICC especially when the big powers who are calling the shots are themselves not members, gives it the legitimacy it does not deserve. The West dominates the ICC through the influence they command within its structures and the huge financial contributions they make to its budget. In return, they use the ICC as their tool for regime change in Africa.<sup>86</sup>

##### ***5) The South African Executive's Arguments for Non-Arrest***

While the government's main public reasons for letting Bashir escape were of a legal nature—immunity for Bashir as sitting head of state of a non-ICC member state, his visit to an AU summit rather than a South African event, and competing legal obligations between the AU decisions advocating for Bashir's non-arrest compliance and the Rome Statute—the South African executive also advanced several political arguments, all of which involve regional politics. Statements by government officials surrounding the Bashir visit show that three regional considerations influenced the South African executive's decision to not arrest Bashir. These arguments were: 1. Arrest would have

negative implications for South Africa's relationship with other African countries, 2. Arrest would have a negative impact on regional peace efforts in Sudan, and 3. Arrest would lend support to a Court that lacks regional legitimacy in Africa due to selective prosecution. Various African countries and the African Union have advanced these arguments before. Thus, the South Africa executive capitalized on an existing discourse that questioned the Court's operation and utility for Africa.

Deputy Minister Obed Bapela, the head of the ANC's international relations sub-committee, is quoted as saying that had Bashir been arrested in South Africa, "[w]e would have been seen as lackeys of the West. We had to choose between the unity of Africa and the ICC and we chose Africa. We said we can deal with the ICC later."<sup>87</sup> Moreover, he is paraphrased as saying that "unity of the continent was hanging in the balance when the Southern Africa Litigation Centre asked the Court to force the government to arrest al-Bashir." John Jeffrey, Deputy Minister for Justice and Constitutional Development, echoed these statements: Had Bashir been arrested during the summit, there would have been "extreme consequences in the region."<sup>88</sup> Drawing an analogy to George W Bush's visit to South Africa and the potential move to not let him leave the country under the UN Convention Against Torture and the South African Prevention of Torture Act, Jeffrey asked "do we think the US would have just stood idly by and waited?" Quoting Prof Steven Friedman, such an act would be tantamount to a declaration of war: "What would our standing have been regarding other countries in the Region?"<sup>89</sup>

A related argument against the ICC emphasizes Africa's development over the pursuit of justice. In this peace v justice debate, the proponents of the peace argument, here brought forth by Bapela, argue that peace agreements should take precedent over seeking accountability. South Africa has long been involved in peace-making efforts in Sudan, using its tenures on the UNSC to pull the conflict away from the UNSC and toward the AU. Jourdaan argues that this behavior "was also intended as a challenge to the West and an effort to keep them at bay."<sup>90</sup> In line with this previous assessment, in 2015, Bapela stressed that since Bashir is a critical figure in settling the Darfur conflict, "[t]he ANC believes that our country should continue to support the African Union's

honest and sustained efforts at finding a peaceful solution to Sudan's conflicts and efforts towards its democratisation. . . . The Sudanese people therefore need him in Khartoum and not The Hague!"<sup>91</sup> Africa, as a continent experiencing much conflict, cannot afford to foreground justice when it needs peace first to develop. This seems to be the argument when he says: "The debate we ought to have in this parliament and every corner of our country is whether the ICC has not become a stumbling block for the achievement of peace and what the continent must do given the imperative for peace and stability which is the basis upon which the continent's renewal is to be built." In addition to being used as a tool by Western powers to keep African marginalized, the ICC's pursuit of justice comes at the expense of peace, needed for the development of states and societies in Africa.

The episode highlights the important role of institutional legitimacy and the need to legitimize politically controversial decisions to various audiences. For the regional audience, the South African executive highlighted competing legal obligations between the ICC and the AU—loyalty to which organization—and utilizing the Court-critical discourse that has become mainstream within the AU and some African countries, fostered by indicted heads of state.<sup>92</sup> Using the AU's arguments of the Court's racial bias against Africans and its instrumental value for regime weakening in Africa through its European funders, the South African executive took advantage of existing ICC-critical discourse and sided with what is widely perceived as the common African position on the Court. While it is incorrect to assert that all African states oppose the ICC, it is a useful rhetorical trope for the AU to depict it this way, suggesting its representation of a common African position. South Africa expressed its solidarity with a position depicted as the continental consensus.

Borrowing from existing arguments about the Court's bias against Africans and its instrumental value for regime weakening in Africa through its European funders, the South African executive took advantage of this existing legitimacy problem. While the argument is not new, what is important in terms of legitimation is that the claim promises to portray the country as norm-abiding. This is so because the country reaffirms its commitment to the underlying norm of the Court—individual criminal accountability—

but what harms the Court's legitimacy as the ultimate actor for this norm is its unfair application. By doing this, South Africa legitimizes its own actions through pointing out the illegitimacy of the ICC.

Several statements by government officials reveal that the South African executive shared in the AU's critique of the Court. John Jeffrey remarked that, while South Africa still believes in the Court's underlying value of prosecuting perpetrators, its current institutional manifestation "is not the Court we signed up for."<sup>93</sup> Over the years, the ICC has "diverted from its mandate" and has come to be "influenced by powerful non-member states," with which he most likely means the USA. Providing a concrete example for the ICC as a tool of Western powers, Jeffrey used the example of Ivorian leader Laurent Gbagbo, indicted by the ICC for crimes related to post-election violence in Cote d'Ivoire in 2011. According to Jeffrey, France used the ICC as a tool to neutralize Gbagbo after his election because he wanted to "break away from the former colonial power's economic stranglehold."<sup>94</sup> Echoing this critique is also Bapela who laments: "the ICC has also fallen victim of the geo-political calculus of the powerful, who demand that it tries some cases while rejecting its involvement in others."<sup>95</sup>

These statements illustrate how members of the executive tapped into existing arguments about the Court's bias. The Court is depicted as an unwelcome outside intruder. While founded on a laudable norm—individual criminal accountability—the current Court has ceased to uphold these values by prosecuting some and not others. This unfair application of the rules threatens the unity of the African continent when an African country would be forced to side with the ICC rather than the continental position as articulated by the AU.

#### **6) *South Africa: One Case among Many?***

As shown above, the Bashir case created a backlash from the African Union, which objected to the prosecution of a sitting head of state, especially from a non-ICC member state. This AU position, enshrined in AU Assembly decisions and public statements, has helped Bashir evade justice over the years as AU member states have relied on AU positions to justify their non-arrests. While the arrest warrants are intended

to try the suspect at the ICC and the enforcement burden lies on ICC member states, Bashir has traveled widely since 2009. Table 1 presents an overview of Bashir's travels since 2009 with the first two rows presenting the behavior of African ICC state parties. The first row contains countries that announced their intent to execute the arrest warrants should he enter their territory. As a result of that, he either canceled trips or never intended to attend summits in that country. The second row contains ICC state parties that he did visit.

**Table 1: Overview of Bashir Visits since 2009<sup>96</sup>**

<b>Category</b>	<b>Countries</b>
African ICC state parties who threatened arrest or where trips were canceled	Botswana (2009), Uganda (2009), Central African Republic (2010), <b>South Africa (2009, 2010)</b> , Zambia (2010), Malawi (2012)
African ICC state parties he visited without arrest	Chad (2010, 2011, 2013, 2014), Kenya (2010), Djibouti (2011), Malawi (2011), Nigeria (2013), DRC (2014), <b>South Africa (2015)</b>
African non-party states he visited	Eritrea (2009, 2013, 2014), Egypt (2009, 2012, 2014, 2015), Ethiopia (16 visits), Zimbabwe (2009), Libya (2009, 2012), Mauretania (2015), Algeria (2015)

In many respects South Africa is not unique among African ICC countries that have hosted Bashir. First, they use the same arguments as South Africa used in 2015. Nigeria, Chad, the DRC, and Malawi submitted observations to the Court following their hosting of Bashir, justifying why they failed to arrest him (Kenya, and Djibouti either did not file observations or these are not publically accessible). These countries explained their actions mostly with Bashir's head of state immunity (Malawi, DRC, Chad) and that the AU's non-cooperation policy prevents them from arresting Bashir (DRC, Chad). Moreover, in striking resemblance to South Africa, they had explained their non-arrest with the fact that he attended an AU event rather than a national event (Nigeria). Nigeria and the DRC also bring forth time constraints as reasons, arguing that his visit was too short to allow the relevant national authorities to become active and act on the arrest warrant.

Second, as in the South Africa case, statements by government officials

surrounding the visit suggest other political reasons behind the non-arrest. In public statements surrounding Bashir's 2011 visit to Malawi, Mutharika's government indicted that Malawi does not "have any business to do with the arrest of President Omar."<sup>97</sup> Other statements by the former President indicate a general opposition to the Court: "Why on earth should your leaders be dragged to the Hague when your judges are right here" and that ICC intervention means that African judges and judicial systems "would be seen to be admitting failure if they continue to allow its own leaders to appear before an international judiciary for offenses committed on the African continent."<sup>98</sup> While Kenya's official replies to the Court remain either absent or classified, official statements by the government suggest opposition to the Court on political grounds. According to news reports, political reasons influenced the country's decision to not arrest the leader of neighboring Sudan. Assistant foreign minister Richard Onyonka said: "Sudan's stability is vitally linked to Kenya's continued peace and well being."<sup>99</sup> Arresting Bashir would have had detrimental effects on regional peace efforts. Moreover, Kenya's transport minister Amos Kimunya clarified that "Kenyan interests must come first, regional interests come second and international interests come third."<sup>100</sup> In terms of legal reasons for the non-arrest, Onyonka is paraphrased as saying that the cooperation obligation to the ICC is "superseded by an African Union decision to not arrest and extradite Bashir." While the country never explained its actions to the Court, officials' statements point to regional political reasons as well as the AU's non-cooperation policy.

Third, all these visits prompt the same responses from the ICC. The Court's pre-trial chamber(s) are alerted by the Registry or OTP that a visit to a state party is imminent or that it happened recently, prompting the Chamber to remind the country of its cooperation obligation and then inviting the country to submit official explanations about why the arrest warrants were not executed. Once a country submits these, the Chamber has mostly found them in non-compliance and refers them to the ASP, the ICC's legislative body, or the UNSC. After Chad failed to file observations with the Court several times and did not consult prior to the visits, the Court's PTC II used starker language to reprimand the country for its "consistent pattern of deliberately disregarding not only the Court's decisions and orders related to its obligation to cooperate in the

arrest and surrender of Omar Al-Bashir” as well as Security Council Resolution 1593(2005).<sup>101</sup> Apart from these judicial findings of non-cooperation, however, the non-arrests have had no legal consequences for the states involved.

Apart from these similarities of judicial and political justifications, the South Africa visit is unique in the repercussions from the visit. The extent to which this visit caused a public outcry and criticism from abroad and domestically makes South Africa stand out. Influential newspapers called the actions “disgraceful”<sup>102</sup> and signaling the end of Mandela’s legacy.<sup>103</sup> Critique also came from neighboring Botswana that found South Africa’s actions “disappointing” and states that the “African Union should lead by example in this regard.”<sup>104</sup> However, there are no reports about other AU countries openly criticizing South Africa. The US expressed deep concern about the events, and the EU expressed its expectation that South Africa would “act in accordance with UN Security Council 1593, in executing the arrest warrant against any ICC indictee present in the country.”<sup>105</sup>

Furthermore, the case is unique for its domestic constitutional repercussions, as the case surrounding the actions of the SA executive to defy a domestic court order has been slowly treading through the South African court system. In March 2016, the Supreme Court of Appeal (SCA) rejected the government’s appeal of a lower court’s decision. Instead, the SCA found the government’s actions to be unlawful in failing to stop Bashir from leaving the country. Seeking appeal, the case now heads to the country’s highest Constitutional Court. The government’s actions were also the subject for an (failed) impeachment motion by the country’s Democratic Alliance.

Possible reasons for this increased attention on the South Africa visit are that South Africa was more widely perceived as an ICC supporter, making its actions more surprising and news-worthy. More generally, the visit and the inaction of the government seem to go against widespread international perception of South Africa as a human rights-and treaty-respecting country.

## **7) Conclusion**

The paper has advanced two claims. First, when studying compliance and non-compliance with the ICC's arrest warrants, regional politics should be closely examined in addition to domestic factors. South Africa had all the domestic ingredients for compliance, yet its regional ambitions played a role in *not* arresting a fellow African leader. In justifying the non-arrest, South Africa's arguments paralleled ICC-critical discourse that has been advanced by several African countries ever since the Court started issuing arrest warrants for sitting heads of state, including its adverse effects on peace processes and its skewed prosecution record.

Second, concrete compliance incidents after ratification deserve attention as units of analysis. They open a window to study the temporal dimension of compliance that is often missed in quantitative studies or case studies analyzing commitment to a treaty or domestic implementation. Similar to reporting mechanisms, compliance incidents as the ones provided for by the Rome Statute—when states are called on to provide concrete actions years after joining an institution—reveal the extent to which a country remains committed to an institution and what pressures might be operating for comply or not.

From a practical perspective, this analysis casts doubts on whether Bashir will ever be arrested as long as he is in office. While his travels over the past years have been severely curtailed by the arrest warrants and civil society pressure and suits in many countries have led him to cancel trips, his visits to African ICC member states have come with no legal consequence when he attended summits of international organizations. However, the events in South Africa suggest that he will be very careful to travel there again even for international summits given the speed and efficiency of the legal system to demand arrest. The events of June 2015 then added another African country to which Bashir is unlikely to travel to again soon.

Further research is needed to parse out the validity of the regional non-compliance norm beyond the Bashir case and beyond the Rome Statute. Despite many accounts to the contrary, cooperation between the Court and its African state parties has been positive. The case against Bashir represents the bleakest record so far, and maybe there is something unique about this one particular case that explains the non-arrests. Other

African ICC state parties have been subject to court proceedings due to their failure to arrest Bashir. They justify their non-arrest with the AU's non-cooperation policy, Bashir's immunity as head of state of a non-member state, or lack of domestic capacity to act in a timely manner. While these cases should be subjected to further in-depth research, they suggest that a regional non-compliance norm also played a role in these other non-arrests.

**Endnotes**

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- <sup>1</sup> For instance, Simon Tisdall, “Omar al-Bashir case suggests South African foreign policy is going rogue,” *The Guardian*, 15 June 2015; Paul Hoffman, “Zuma administration dismantling SA’s entire constitutional project,” *Rand Daily News*, 18 June 2015; Pikkie Greeff, “Anatomy of Al-Bashir’s Great Escape,” *Daily Maverick*, 29 June 2015.
- <sup>2</sup> Oona A. Hathaway, “Do Human Rights Treaties Make a Difference?,” *The Yale Law Journal* 111, No. 8 (2002): 1935-2042.
- <sup>3</sup> Some scholars find that treaties have little to no influence on human rights practices, especially in hard cases of autocratic regimes, see Hathaway 2002 or Heather Smith-Cannoy, *Insincere Commitments: Human Rights Treaties, Abusive States, and Citizen Activism* (Washington: Georgetown University Press, 2012). Others suggest some positive influence, such as say there is some influence, Todd Landman, “The political science of human rights,” *British Journal of Political Science* 35, no. 3 (2005): 549-72.
- <sup>4</sup> Hafner-Burton, “International Regimes for Human Rights,” *Annual Review of Political Science*, 15 (2012): 275.
- <sup>5</sup> Kal Raustiala and Anne-Marie Slaughter, “International Law, International Relations and Compliance,” in *Handbook of International Relations*, by Walter Carlsnaes, Thomas Risse Kappen and Kathryn Sikkink, London: SAGE, 2002, 538-558.
- <sup>6</sup> E.g. Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge: Cambridge University Press, 2009); but also Hathaway 2002.
- <sup>7</sup> Eric Posner, “Some Skeptical Comments on Beth Simmons’s *Mobilizing for Human Rights*,” *Public Law and Legal Theory Working Papers*, Chicago: University of Chicago Law School (Nov. 2011).
- <sup>8</sup> Hathaway, “Do Human Rights Treaties Make a Difference?,” 1964.
- <sup>9</sup> *Ibid.*, 1965.
- <sup>10</sup> Against Djibouti: Pre-Trial Chamber I, ICC-02/05-01/09, 12 May 2011. Against Malawi: Pre-Trial Chamber I, ICC-02/05-01/09, 13 Dec. 2011. Against the DRC: Pre-Trial Chamber II, ICC-02/05-01/09, 9 Apr. 2014. Against Kenya: Pre-Trial Chamber I, ICC-02/05-01/09, 27 Aug. 2010.
- <sup>11</sup> Cf. the legal debate on this by ICC Forum, “Invited Experts on Darfur Question,” 2011. Web. Schabas argues, for instance, that “African States that are members of the African Union and that are also States Parties to the Rome Statute are confronted with conflicting obligations. These cannot be resolved by principles of interpretation. The impasse requires a political solution.”
- <sup>12</sup> Jean Grugel and Enrique Perruzotti, “The Domestic Politics of International Human Rights Law: Implementing the Convention on the Rights of the Child in Ecuador, Chile, and Argentina,” *Human Rights Quarterly* 34, no. 1 (2012): 178-198.
- <sup>13</sup> Mark S. Berlin, “Why (not) Arrest? Third-Party State Compliance and Noncompliance with International Criminal Tribunals,” forthcoming in *Journal of Human Rights* (2016), 28.
- <sup>14</sup> Emilie Hafner-Burton, “Trading Human Rights: How Preferential Trade Agreements Influence Government Repression,” *International Organization* 59, no. 3 (2005): 593-629; James Meernik, “It’s Time to Stop Running: A Model of the Apprehension of Suspected War Criminals,” *International Studies Perspectives* 9, no. 2 (2008): 165-182; Jay Goodliffe, Darren Hawkins, Christine Horne, and Daniel L. Nielson, “Dependence Networks and the International Criminal Court,” *International Studies Quarterly* 56, no. 1 (2012): 131-147.
- <sup>15</sup> Victor Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation* (Cambridge: Cambridge University Press, 2008); Brian Grodsky, “Exploring the Schelling Conjecture in Reverse: ‘International Constraints’ and Cooperation with the

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- International Criminal Tribunal for the Former Yugoslavia,” *European Journal of International Relations* 17, no. 1 (2011): 121-143.
- <sup>16</sup> George W. Downs, David M. Rocke, and Peter N. Barsoom, “Is the Good News About Compliance Good News About Cooperation?,” *International Organization* 50, no. 3 (1996): 379-406; Hathaway 2002, Hafner-Burton 2005.
- <sup>17</sup> James Meernik, “It’s Time to Stop Running: A Model of the Apprehension of Suspected War Criminals,” *International Studies Perspectives* 9, no. 2 (2008): 165-182.
- <sup>18</sup> Thomas Franck, *Fairness in International Law and Institutions* (Oxford: Oxford University Press, 1995).
- <sup>19</sup> E.g. Simmons, *Mobilizing for Human Rights*; Karen Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton: Princeton University Press, 2014); Courtney Hillebrecht, *Domestic Politics and International Human Rights Tribunals: The Problem of Compliance* (New York: Cambridge University Press, 2014).
- <sup>20</sup> Gary J. Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2000); Eric Neumayer, “Do international human rights treaties improve respect for human rights?,” *Journal of Conflict Resolution* 49, no. 6 (2005): 925-953; Judith Kelley, “Who Keeps International Commitments and Why? The International Criminal Court and Bilateral Nonsurrender Agreements,” *American Political Science Review* 101, no. 3 (2007): 573-589; Geoffrey Wallace, “Welcome guests, or inescapable victims? The causes of prisoner of war abuse,” *Journal of Conflict Resolution* 56, no. 6 (2012): 955-981.
- <sup>21</sup> Anne-Marie Slaughter, “International Law in a World of Liberal States,” *European Journal of International Law* 6, no. 1 (1995): 503-538; Jeffrey Checkel, “Norms, Institutions, and National Identity in Contemporary Europe,” *International Studies Quarterly* 43, no. 1 (1999): 84-114; Wayne Sandholtz, “Implementing the International Criminal Court,” *American Political Science Association*. Washington, DC: Social Science Research Network, 2014; Kelley 2007.
- <sup>22</sup> Kelley, “Who Keeps International Commitments and Why?”
- <sup>23</sup> Steven D. Roper and Lilian A Barria, “State Co-operation and International Criminal Court Bargaining Influence in the Arrest and Surrender of Suspects,” *Leiden Journal of International Law* 11 (2008): 457-476.
- <sup>24</sup> Abraham Chayes and Antonia Handler Chayes, “On Compliance,” *International Organization* 47, no. 02 (1993): 175-205.
- <sup>25</sup> Wade Cole, “Mind the Gap: State Capacity and the Implementation of Human Rights Treaties,” *International Organization* 69, no. 2 (2015): 405-441.
- <sup>26</sup> Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink, *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge: Cambridge University Press, 2013).
- <sup>27</sup> Max du Plessis and Jolyon Ford, *Unable or Unwilling? Case studies on domestic implementation of the ICC statute in selected African countries*, ISS Monograph Series, No 141 (Mar. 2008).
- <sup>28</sup> Cardenas (2007) calls them pro-violation constituencies, Berlin (2016) calls them ‘non-compliance constituencies.’ Sonia Cardenas, *Conflict and Compliance: State Responses to International Human Rights Pressure* (Philadelphia: University of Pennsylvania Press, 2007).
- <sup>29</sup> Berlin, “Why (not) Arrest?”
- <sup>30</sup> See for instance, Editorial Board, “South Africa’s Disgraceful Help for President Bashir of Sudan,” *New York Times*, 15 June 2015; “Justice Delayed,” *The Economist*, 20 June 2015; Simon Tisdall, “Omar al-Bashir case suggests South African foreign policy is going rogue,” *The Guardian*, 15 June 2015; Paul Hoffman, “Zuma administration dismantling SA’s entire constitutional project,” *Rand Daily News*, 18 June 2015; Pikkie Greeff, “Anatomy of Al-Bashir’s Great Escape,” *Daily Maverick*, 29 June 2015.

- <sup>31</sup> Cosette D. Creamer and Beth A. Simmons, "Ratification, Reporting, and Rights: Quality of Participation in the Convention against Torture," *Human Rights Quarterly* 37, No. 3 (2015): 579-608.
- <sup>32</sup> Adekeye Adebajo, "South Africa in Africa: Messiah or mercantilist?," *South African Journal of International Affairs* 14, no. 1 (2007): 29-47.
- <sup>33</sup> *Ibid.*, 29.
- <sup>34</sup> Tristan Anne Borer and Kurt Mills, "Explaining Postapartheid South African Human Rights Foreign Policy: Unsettled Identity and Unclear Interests," *Journal of Human Rights* 10, no. 1 (2011): 76-9, 90-91.
- <sup>35</sup> Cf. James Hamill and Donna Lee, "A Middle Power Paradox? South African Diplomacy in the Post-Apartheid Era," *International Relations* 15, no. 4 (2001): 33-59. Cooper, Higgott, and Nossal provided a widely-used treatise on middle powers, describing their role as catalysts, facilitators, and managers: *Relocating Middle Powers: Australia and Canada in a Changing World Order* (Vancouver: University of British Columbia Press, 1993).
- <sup>36</sup> Chris Alden and Garth Le Pere, "South Africa in Africa: Bound To Lead?," *Politikon* 36, no. 1 (2009): 145-169, 149.
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- <sup>42</sup> Adebajo, "South Africa in Africa," 38.
- <sup>43</sup> Hamill and Lee, "A Middle Power Paradox?," 38.
- <sup>44</sup> Cf. Ben Okolo, "African Renaissance, African Conflicts and the Regional Security Complex," in *The State in Africa 2010/2011*, ed. Korwa Adar, Monica Juma, and Katabaro Miti (Pretoria: AISA 2010): 103-117. The concept of African Renaissance stems from the idea that, while not a homogenous whole, African nations share a common history of marginalization due to the slave trade, colonialization, and imperialism.
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- <sup>58</sup> Lee Stone, "Implementation of the Rome Statute in Africa," in *Prosecuting International Crimes in Africa*, ed. Chacha Murungu and Japhet Biegon (Pretoria: Pretoria University Law Press, 2011), 305-330. 308.
- <sup>59</sup> Max Du Plessis and Otilia Anna Maunganidze, "SALC in the News: South Africa's Police Must Investigate Zimbabwe Torture Allegations," Southern Africa Litigation Center (13 Nov. 2014). Web.
- <sup>60</sup> Among the African states, this includes Benin, Botswana, Burkina Faso, Burundi, CAR, Chad, DRC, Congo-Brazzaville, Djibouti, Gabon, Gambia, Ghana, Guinea, Lesotho, Liberia, Malawi, Nigeria, Senegal, Sierra Leone, Uganda, and Zambia. See AMICC, "COUNTRIES CONCLUDING BILATERAL IMMUNITY AGREEMENTS," Web.
- <sup>61</sup> J. Andrew Grant and Spencer Hamilton, "'Norm dynamics and international organisations: South Africa in the African Union and International Criminal Court,'" *Commonwealth & Comparative Politics* 54, No. 2 (2016): 161-185, 172.
- <sup>62</sup> Max du Plessis, "South Africa's Response to American Hostility toward the International Criminal Court," *South African Yearbook of International Law* 30 (2005): 112-127, page 122.
- <sup>63</sup> Assembly/AU/Dec.245(XIII) Rev.1
- <sup>64</sup> Stone, "Implementation of the Rome Statute in Africa," 326.
- <sup>65</sup> This changed in January 2016 when the ICC Pre-Trial Chamber I authorized the Prosecutor's investigation into crimes committed in and around South Ossetia, Georgia, in 2008. This is the first non-African situation, which proceeded from a preliminary investigation to a full investigation.
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- <sup>77</sup> Southern Africa Litigation Centre v Minister of Justice And Constitutional Development and Others (27740/2015), 14 June 2015.
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- <sup>91</sup> Obed Bapela, “Speech by Deputy Minister Bapela on Al-Bashir debate,” National Assembly, 23 June 2015. Web.
- <sup>92</sup> Laolu Akande, “How Nigeria, others averted AU’s withdrawal from ICC.” He reports that the Kenyan delegation had claimed that the ultimate goal of the ICC case was “to effect regime change in Kenya, pure and simple.”

<sup>93</sup> Paraphrased. John Jeffrey, Deputy Minister for Justice and Constitutional Development. Comments at seminar “International Justice at a Crossroads in Africa,” Pretoria: Institute for Security Studies, July 16, 2015.

<sup>94</sup> Ibid.

<sup>95</sup> Obed Bapela, “Speech by Deputy Minister Bapela on Al-Bashir debate.”

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<sup>99</sup> *The Guardian*, “Kenya defends failure to arrest Sudan’s president Omar al-Bashir in Nairobi,” 29 Aug. 2010, Web.

<sup>100</sup> Ibid.

<sup>101</sup> Ibid.

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