

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 10 March 2017

PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Presiding Judge
Judge Marc Pierre PERRIN DE BRICHAMBAUT, Judge
Judge Chang-Ho CHUNG, Judge

SITUATION IN DARFUR, SUDAN

**IN THE CASE OF
THE PROSECUTOR *v.* OMAR HASSAN AHMAD AL BASHIR**

Public Document

**Amicus Curiae Observations by the Southern Africa Litigation Centre (SALC)
submitted Pursuant to Rule 103 (1) of the Rules of Procedure and Evidence**

Source: Southern Africa Litigation Centre (SALC)

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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KAAJAL RAMJATHAN-KEOGH
EXECUTIVE DIRECTOR

on behalf of
SOUTHERN AFRICA LITIGATION CENTRE

Dated this 10 March 2017

At Johannesburg, South Africa

At [place, country]

I. INTRODUCTION

1. On 27 January 2017, the Southern Africa Litigation Centre ("SALC") sought leave in terms of Rule 103(1) of the Rules of Procedure and Evidence ("the Rules"), to submit written and oral observations, in fact and in law, as *amicus curiae* regarding the Republic of South Africa's legal obligations in the case of *The Prosecutor v Omar Hassan Ahmad Al Bashir*.
2. In support of its application and in order to assist the International Criminal Court ("the ICC"), SALC also submitted the court record of the proceedings before the domestic courts. By its decision of 28 February 2017 the Pre-Trial Chamber granted SALC leave to provide written submissions, in fact and in law, relevant to the Chamber's determination in this matter.
3. In these submissions, SALC will demonstrate that South Africa had clear domestic (as well as international) legal obligations to arrest and surrender President Al Bashir to the ICC. These domestic obligations reinforce South Africa's international obligations, such that South Africa cannot credibly claim that its international duties were unclear or open to doubt. As demonstrated in the application for leave, the evidence confirms that South Africa flouted its obligations by actively facilitating President Al Bashir's escape or, at minimum, by failing to comply with its duty to surrender President Al Bashir to the Court by acquiescing in President Al Bashir's departure from South Africa. SALC submits that this is relevant to determining the appropriate compliance steps to be taken.
4. SALC's observations are structured as follows: -
 - 4.1. First, submissions on the relevant South African legal framework;
 - 4.2. Second, what transpired in the days leading up to, and on the day of, President Al Bashir's escape from South Africa. At paragraphs 24 – 49 of the application for leave, SALC sets out detailed factual submissions on this matter (and to the extent possible, SALC will not repeat them herein);
 - 4.3. Third, an identification of documents that record what occurred during President Al Bashir's visit and escape; and



4.4. Fourth, SALC's submissions on the importance of the Chamber making a formal finding on non-compliance.

5. Before June 2015, there had been seven cases of non-cooperation with the duty to arrest and surrender President Al Bashir – Kenya, Djibouti, Chad (twice), Malawi, Nigeria and the Democratic Republic of Congo.¹ As has been observed, *“the arrest process lies at the very heart of the criminal justice process; unless the accused are taken to custody, we will have no trials, no development of the law by the courts; and ultimately, no international justice.”*² When a state fails to adhere to its international obligations to arrest a person subject to an ICC arrest warrant, it undermines the fight against impunity. Therefore, a finding of non-compliance against South Africa would serve as an important accountability mechanism and possible deterrence against future state non-compliance.

II. APPLICABLE DOMESTIC LEGAL FRAMEWORK

6. International law occupies a special place within South Africa's legal framework. The South African Constitution, its governing law, provides that *“Any international agreement becomes law in the Republic when it is enacted into law by national legislation.”*³ Section 232 further affirms that customary international law is law in South Africa unless it is inconsistent with the South African Constitution or an Act of Parliament, while section 232 enjoins every court, when interpreting any

¹ See Decision pursuant to article 87(7) of the Rome Statute on the failure by the Republic of Malawi to comply with the co-operation requests issued by the court with respect to the arrest and surrender of Omar Hassan Ahmad al-Bashir 12 December 2011; Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the co-operation request issued by the court with respect to the arrest and surrender of Omar Hassan Ahmad Al-Bashir 13 December 2011; Decision on the non-compliance of the Republic of Chad with the co-operation requests issued by the court regarding the arrest and surrender of Omar Hassan Ahmad Al-Bashir 26 March 2013; Decision on the co-operation of the Democratic Republic of the Congo regarding Omar al-Bashir's arrest and surrender to the court 9 April 2014; 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 13 June 2015. See also Dire Tladi “The Duty on South Africa to Arrest and Surrender Al-Bashir Under South African and International Law: Attempting to Make a Collage from an Incoherent Framework” (2015) 13 *Journal of International Criminal Justice* 1027 at 1029.

² Quoting Gavin Ruxton in ch 7 Cooperation with the ICC <http://www.southernafricallitigationcentre.org/1/wp-content/uploads/2013/05/Cooperation-with-the-ICC.pdf>.

³ Section 231(4) of the Constitution.

legislation to “prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”

7. Domestic courts have recognised the vital role played by international law in South African constitutional democracy. In *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others*⁴ (“The Bashir arrest case”) the Supreme Court of Appeal (“SCA”) stated that:

The Constitution makes international customary law part of the law of South Africa, but it may be amended by legislation. It provides a specific mechanism whereby obligations assumed under international agreements become a part of the law of South Africa. And it decrees that, when interpreting any legislation, the Courts must prefer a reasonable interpretation that is consistent with international law over any alternative interpretation that is inconsistent with international law. As Ngcobo CJ said in Glenister (II):

*‘Our Constitution reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law, in particular international human-rights law ... These provisions of our Constitution demonstrate that international law has a special place in our law which is carefully defined by the Constitution.*⁵

8. The South African Constitutional Court in *National Commissioner of Police v Southern Africa Litigation Centre* (the “Torture Docket” case)⁶ emphasised the gravity of South Africa’s international law commitments when it stated that:

*Our country’s international and domestic law commitments must be honoured. We cannot be seen to be tolerant of impunity for alleged torturers. We must take up our rightful place in the community of nations with its concomitant obligations. We dare not be a safe haven for those who commit crimes against humanity.*⁷

The Implementation Act

9. South Africa enacted the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (“Implementation Act”) to give effect to the Rome Statute. The preamble refers to atrocities committed throughout history and in

⁴ *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* [2016] ZASCA 17; 2016 (3) SA 317 (SCA).

⁵ Id at para 62.

⁶ 2015 (1) SA 315 (CC) at para 80.

⁷ Id at para 80.

South Africa, and commits South Africa to *"bringing persons who commit such atrocities to justice"* either in domestic courts or, in accordance with the principle of complementarity, in the ICC.

10. The objects of the Implementation Act include ensuring that the Statute *"is effectively implemented"* in South Africa and that South Africa conforms with its obligations under the Statute.⁸ Chapter 4 of the Implementation Act deals with cooperation and assistance with domestic or ICC-led prosecutions. Of note are the following provisions:

10.1. Section 4(1) provides that anybody who commits any of the international crimes is guilty of an offence and liable to conviction and punishment.

10.2. Section 4(2) negates any head of state immunity despite any other law to the contrary. It provides:

"Despite any other law to the contrary, including customary and conventional international law, the fact that a person—

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

(b)

is neither—

(i) a defence to a crime; nor

(ii) a ground for any possible reduction of sentence once a person has been convicted of a crime."

10.3. Section 4(3) vests South African courts with universal jurisdiction over the prosecution of all international crimes, wherever they may be committed, provided only that the accused is present in South Africa. The effect of these provisions is to confer jurisdiction on South African courts to prosecute international crimes and in particular, to preclude a person who would otherwise enjoy immunity from raising it as a defence or mitigating factor in those proceedings.

⁸ Section 3(a) and (b) of the Implementation Act.

11. The Implementation Act is equally clear in respect of cooperation with ICC-led prosecutions. Sections 8, 9 and 10 of the Rome Statute use mandatory language and state unequivocally that:

11.1. Where there is an ICC request for the arrest and surrender of a suspect, that request “must” be referred to the Central Authority⁹ (section 8(1)). The Central Authority “must” immediately on receipt of that request forward it to a magistrate who “must” endorse the warrant of execution (section 8(2)).

11.2. A magistrate is in section 9(1) and 9(2) empowered to issue a warrant of arrest.

11.3. Section 10 applies in respect of a warrant of arrest endorsed in terms of section 8 or issued in terms of section 9(2). Section 10(5) provides for the suspect to be brought before a competent court within 48 hours where the court will hold an enquiry. The enquiry is limited to three issues, namely 1) whether the warrant applies to the suspect; 2) whether the suspect has been arrested in accordance with domestic law; 3) and whether suspect’s constitutional rights have been respected. Once satisfied that the three requirements have been met, the magistrate “must” order that the suspect is surrendered to the ICC.

11.4. Section 10(9) underlines that:

“the fact that the person to be surrendered is a person contemplated in section 4(2)(a) or (b) does not constitute a ground for refusing to issue an order contemplated in subsection (5).”

11.5. The effect of sections 4(2)(a) or (b) and 10(9) of the Implementation Act is that:

11.5.1. A head of state may be prosecuted before South Africa’s domestic courts; and

⁹ The Central Authority is the Director-General of Justice.

11.5.2. Head of state immunity does not negate South Africa's duty to cooperate with the ICC and to surrender a suspect.

12. This clear and unambiguous interpretation of the Implementation Act has been reaffirmed by the SCA in the Bashir arrest case which held that:

*"when South Africa decided to implement its obligations under the Rome Statute by passing the Implementation Act it did so on the basis that all forms of immunity, including head of state immunity, would not constitute a bar to the prosecution of international crimes in this country or to South Africa cooperating with the ICC by way of the arrest and surrender of persons charged with such crimes before the ICC, where an arrest warrant had been issued and a request for cooperation made.... It is wholly consistent with our commitment to human rights both at a national and an international level. And it does not undermine customary international law, which as a country we are entitled to depart from by statute as stated in s 232 of the Constitution. What is commendable is that it is a departure in a progressive direction."*¹⁰ (Emphasis added)

13. Though this judgment was handed down after the escape of President Al Bashir, it is significant to note that the SCA confirms that its judgment accords with what has always been the understanding of the South African government of its obligation in terms of the Rome Statute and the Implementation Act. Save for this instance under consideration by the ICC, South Africa has previously complied with its obligation under the Rome Statute in respect of President Al Bashir. This will be discussed further below.

14. This was moreover not the first judgment by a South African court that resoundingly upheld international accountability over impunity:

14.1. The South African Constitutional Court affirmed the seriousness of the obligation in the *Torture Docket* case,¹¹ decided prior to President Al Bashir's visit. That judgment found that South Africa has a duty to investigate certain international human rights violations, even when an alleged offender is not in South African territory.

14.2. In *S v Okah* (which was also decided prior to the High Court order directing the arrest of President Al Bashir), the Johannesburg High Court convicted a

¹⁰ The Bashir arrest case (above note 4) at para 103.

¹¹ Above note 6.

Nigerian national resident in South Africa of various counts of terrorist acts committed in Nigeria.¹² To establish its jurisdiction to do so, that court relied on domestic legislation that implemented international treaties on the obligations to combat international terrorism. As Schwartz points out, *“through such prosecution, the South African courts demonstrated belief in the nation’s duty to act in furtherance of the international instruments to which it was a party”*.¹³ The judgment was largely confirmed on appeal, with the SCA confirming that a domestic statute promulgated to give effect to international obligations may confer extra-territorial jurisdiction.¹⁴

15. South Africa’s domestic obligation to promote prosecution for international crimes over impunity is thus well established.

Customary international Law

16. The relationship between the Implementation Act and customary international law is also clear and unambiguous. Section 232 of the Constitution of the Republic of South Africa (“the Constitution”) provides that customary international law *“is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.”* Thus, where there is a conflict between the provisions of the Implementation Act and customary international law, the Implementation Act prevails.
17. It has however always been SALC’s submission in domestic courts that there was no conflict between South Africa’s obligations in terms of the Statute and the Implementation Act on the one hand, and customary international law on the other. This is because:
 - 17.1. State parties to the ICC have, by virtue of article 27 of the Rome Statute, expressly waived the immunity of heads of state from State parties to the

¹² *State v Okah* 2013 ZAGPJHC 75.

¹³ Rebecca Schwartz *“South Africa Litigation Centre v Minister of Justice & Constitutional Development: Balancing Conflicting Obligations – Prosecuting al-Bashir in South Africa”* (2016) 24 *Tulane Journal for International and Comparative Law* 407 at 412.

¹⁴ *Okah v S and Others* [2016] ZASCA 155; 2017 (1) SACR 1 (SCA) at paras 29, 31.

ICC;¹⁵

- 17.2. Customary international law permits states to negate traditional head of state immunity in favour of co-operation towards the prosecution of international crimes in international criminal tribunals; and in any event;
- 17.3. President Al Bashir had no immunity from arrest and surrender to the ICC, since the Security Council made a binding decision, acting in terms of Chapter VII, which power it exercised on behalf of all member states – including Sudan – that removed any immunity he might otherwise have had.¹⁶ Importantly, the ICC made a binding decision,¹⁷ in respect of South Africa, that this was the effect of the Security Council resolution.¹⁸
18. Thus, reliance on customary international law could not absolve the South African government from its obligation in terms of domestic and international law to arrest President Al Bashir. It has never been open to the South African government to claim that its domestic legal obligations were ambiguous on this matter.
19. Even if there were any ambiguity under customary international law, the South African Constitution makes it clear that customary international law is law in South Africa only to the extent that it is consistent with an Act of Parliament.¹⁹ As the SCA confirmed in the Bashir case, the Implementation Act imposed a clear obligation on South Africa to arrest and surrender President Al Bashir, whatever the position may have been under customary international law.²⁰ The Government ultimately accepted this finding by withdrawing its proposed appeal against the SCA's judgment. It is bound by the SCA's findings.

¹⁵ Article 27 provides, that '(1) 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.

¹⁶ SC Resolution 1593, 31 March 2005; *Prosecutor v Omar Hassan Ahmad Al Bashir*, judgment of the Pre-Trial Chamber II of the ICC, 13 June 2015 (the South African Case).

¹⁷ See section 7 of the Implementation Act, and Article 87 of the Rome Statute.

¹⁸ The South African Case (above note 16)

¹⁹ Section 232.

²⁰ See paras 103 and 122 of Bashir arrest case (above note 4).

Supposed conflict with African Union obligations

20. In the Declaratory Statement issued by the South African government recording its reasons for Withdrawing from the Statute in terms of Article 127(1), government alluded to the alleged conflict between its obligations in terms of the Rome Statute and its obligation in terms of the African Union ("AU") host agreement.

21. The declaratory statement recorded that:

"In 2015, South Africa found itself in the unenviable position where it was faced with conflicting international law obligations which had to be interpreted within the realm of hard diplomatic realities and overlapping mandates when South Africa hosted the 30th Ordinary Session of the Permanent Representatives Committee, the 27th Ordinary Session of the Executive Council and the 25th Ordinary Session of the Assembly of the African Union ("the AU Summit"), from 7 to 15 June 2015. South Africa was faced with the conflicting obligation to arrest President Al Bashir under the Rome Statute, the obligation to the AU to grant immunity in terms of the Host Agreement, and the General Convention on the Privileges and Immunities of the Organization of African Unity of 1965 as well as the obligation under customary international law which recognises the immunity of sitting heads of state."

22. To the extent that the South African government raises a similar argument before the Chamber, SALC stresses that whether the Host Agreement (and its domestic enactment) obligated South Africa to grant President Al Bashir immunity was specifically raised and considered by South Africa's domestic courts in the Bashir arrest case.²¹ Both the High Court and the SCA held that the Host Agreement did not confer immunity on President Al Bashir.²² The Government has accepted this judgment. It cannot at this stage seek to rely on the terms of the Host Agreement to claim that it was precluded from arresting and surrendering President Al Bashir. To do so would be to disregard the findings made against it, and to offend against the dignity of the South African courts – which it is constitutionally precluded from doing.²³

23. Nor can the South African government rely on the General Convention on the Privileges and Immunities of the Organisation of African Unity to advance an

²¹ Id at paras 40 to 48.

²² Id at para 47.

²³ By section 165(4) of the South African Constitution.

argument that, under that treaty, it was obliged to refuse to surrender President Al Bashir. This is because, first, South Africa has neither signed nor ratified the OAU Convention;²⁴ and, second, the OAU Convention only has status of secondary legislation and so is superseded should it conflict with the Implementation Act.²⁵

24. The position in domestic law is thus the same as that under the Statute: neither customary international law nor the AU host agreement absolved South Africa from its domestic and/ or international law obligations. The ICC in the South Africa case held that:

"In conclusion, the Republic of South Africa is already aware of its obligation under the Rome Statute to immediately arrest Omar Al-Bashir and surrender him to the Court, as it is aware of the Court's explicit position (as publicly expressed, most recently, on 9 April 2014 and reiterated during the consultations with the South African delegation on 12 June 2015) that 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 that the Republic of South Africa cannot invoke any other decision, including that of the African Union, providing for any obligation to the contrary" (Own emphasis)

III. FACTUAL SUBMISSIONS

South Africa has always been clear about its obligations – until this case

25. The discussion above confirms that South Africa had clear domestic legal obligations to arrest and surrender President Al Bashir to the ICC. It is also important to note that the above conclusion regarding South Africa's domestic legal obligations accords with what has always been the understanding of the South African government as to its obligations in terms of the Rome Statute as domesticated by Implementation Act. In 2009, the Director-General of the Department of International Relations and Co-operation confirmed that South Africa was obliged to arrest President Al Bashir in terms of its international obligations and a failure to do so was against the law and unconstitutional. He

²⁴ See, for example, the status list of agreements signed by South Africa at https://www.au.int/web/en/treaties?field_treaty_signedby_tid=i18n%5B%5D=51.

²⁵ Erika de Wet "The Implications of President Al-Bashir's Visit to South Africa for International and Domestic Law" (2015) 13 *Journal of International Criminal Justice* 1049 at 1068.

stated that:

The International Criminal Court (ICC) has issued a warrant of arrest for President Al-Bashir on seven counts of war crimes and crimes against humanity committed in Sudan's Western region of Darfur.

The arrest warrant places an obligation on all countries, including the 30 African states that have ratified the Rome Statute, to arrest him if he travels from his country into another state. The Rome Statute is the founding text of the ICC.

Earlier this month the African Union (AU) issued a resolution instructing its members not to cooperate with the ICC in executing the warrant. At the time, the AU said that the resolution had been adopted by consensus, although later some countries including Botswana, Chad and Uganda said they were committed to the Rome Statute.

South Africa's position in this regard is that while it respects the ICC's efforts to end impunity for war crimes in Darfur, the ICC has not made enough effort to engage the AU to coordinate efforts to end the fighting in that country.

Dr Ntsaluba explained that while South Africa does not agree with the issuing of the warrant of arrest, there is a legal framework in place that guides government.

"We are signatories of the Rome Statute under which the ICC was established. Because the treaty has been ratified by Parliament, for South Africa to not observe its obligations is arguably unconstitutional and against the law."

"The ICC has issued an arrest warrant for President al- Bashir and this requires signatory states to execute the warrant should he land on their soil.

"We are a member of the ICC, we have got certain obligations, not only that, our Parliament passed a law and that law is extremely explicit about what would happen if a situation like that happens," explained Dr Ntsaluba.

He emphasised that he did not foresee the government acting outside the framework of the law. ²⁶(Emphasis added)

26. This was also noted by the SCA in the Bashir arrest case where it stated that:

"when South Africa received the first arrest warrant and request for assistance from the ICC, the Central Authority acted in terms of s 8(1) of the Implementation Act and forwarded it to the Chief Magistrate, Pretoria, who endorsed it for execution in any part of the Republic. When President Zuma was inaugurated and an invitation was extended to President Al Bashir to attend the inauguration, Sudan enquired whether he would be liable to

²⁶ SA Government News Agency "SA obliged to arrest al Bashir says Ntsaluba" <http://www.sanews.gov.za/south-africa/sa-obliged-arrest-al-bashir-says-ntsaluba>.

arrest if he attended, and the answer was in the affirmative. The then Director-General of the Department of International Relations and Cooperation issued a public statement quoted in the papers, that:

'If today, President al Bashir landed in terms of the provision [of the Rome Statute], he would have to be arrested.'

*There are several statements in the papers and the literature with which we have been furnished that indicate that there have been other occasions, such as the funeral of the late President Mandela, that President Al Bashir did not attend, because he would have been liable to arrest and surrender to the ICC had he done so. It is plain from this that, save for the circumstances of the present case, South Africa has hitherto complied meticulously with its obligations under the Rome Statute in respect of President Al Bashir.'*²⁷

27. There has therefore been no ambiguity, even in the mind of the South African government, as to what its legal obligations are under the Statute and the Implementation Act. Its conduct surrounding President Al Bashir's visit to and escape from South Africa in June 2015 should thus be considered in that light: as conduct by a government that was well aware of its legal obligations but which chose to flout those obligations nonetheless.

What transpired in the days leading up to the escape

28. At paragraphs 25 – 46 of the application for leave to intervene, SALC sets out detailed submissions as to what transpired in the days leading up to the escape of President Al Bashir. SALC does not repeat those submissions here.
29. It is however evident from Government's explanatory affidavit purporting to explain the circumstances that led to President Al Bashir's escape and the detailed evidence included in SALC's application for leave to intervene, that South African officials aided and abetted President Al Bashir's departure. That this is the only reasonable conclusion to be inferred arises from the following:
- 29.1. After the grant of the interim order, President Al Bashir's plane Sudan01 was moved from the OR Tambo Airport to Waterkloof on Sunday 14 June 2015. OR Tambo airport is a commercial airport, not under the direct control of any of the government parties. Waterkloof, on the other hand, is under the direct control of the government parties and the Minister of

²⁷ Al Bashir arrest case (above note 4) para 104.

Defence.

- 29.2. An unnamed DIRCO official was attached to the Sudanese delegation and accompanied them during their visit. This official was informed when the Sudanese delegation requested to be transported from Sandton to Waterkloof and facilitated the security arrangements that had to be made for the delegation. The official also accompanied the Sudanese representatives when their passports were taken to the immigration officials prior to their departure.
- 29.3. SAPS VIP protection services, whose responsibility it is always to know the whereabouts of the dignitary they are protecting, provided the necessary security to ensure the safe transport of the Sudanese delegation from Sandton to Waterkloof. The distance between Sandton and Waterkloof is 50.1 kilometres.
- 29.4. The Venue Operating Centre for Waterkloof was activated and the South African Air Force ("SAAF") ensured the processing of the delegation and the clearing of the aircraft at Waterkloof.²⁸
- 29.5. The Ministers responsible for DIRCO and SAPS were parties in the proceedings in the High Court. Had these Ministers wanted to ensure compliance with the interim order, they could have taken the reasonable step of informing their officials, in whose care the Sudanese delegation was entrusted, that the High Court had granted an order prohibiting President Al Bashir from leaving the country.
30. The facts contained in the explanatory affidavit demonstrate that there were SAPS, DIRCO and SAAF officials who accompanied and assisted the Sudanese delegation – including President Al Bashir – in departing from Waterkloof.
31. The explanatory affidavit also fails to explain how the government parties came to the knowledge that President Al Bashir had indeed departed.
32. The government parties, having been afforded an opportunity to put forward a full

²⁸ Id.

account, failed to give any plausible explanations to account for all the other parties who were involved in the process. The sole reason that the explanatory affidavit puts forward for President Al Bashir's escape is that his passport was not given to the immigration officials on duty. However, this explanation fails to account for the actions of the government officials who accompanied the Sudanese delegation during their stay in South Africa and who were required to know of the whereabouts of President Al Bashir at all times, and so knew or ought to have known that President Al Bashir and his delegation were leaving the country.

33. The SCA has been highly critical of the explanation put forward by the South African authorities regarding the escape of President Al Bashir. It made trenchant criticisms of the government parties' conduct (which criticisms must now be taken to be accepted by the government, in light of its withdrawal of the appeal to the Constitutional Court), stating that: -

*"The affidavit failed to explain how a head of state, using a military air base reserved for the use of dignitaries, could possibly have left the country unobserved. The Director-General said that President Al Bashir's passport was not among those shown to officials of his department, but as an explanation that is simply risible. Senior officials representing Government must have been aware of President Al Bashir's movements and his departure, the possibility of which had been mooted in the press. In those circumstances the assurances that he was still in the country given to the Court at the commencement and during the course of argument were false. There seem to be only two possibilities. Either the representatives of Government set out to mislead the Court and misled counsel in giving instructions, or the representatives and counsel misled the Court. Whichever is the true explanation, a matter no doubt being investigated by the appropriate authorities, it was disgraceful conduct."*²⁹ (Emphasis added)

34. Commentators have taken a similar view. As Ventura puts it:

"In light of the facts – as described by the government of South Africa to the High Court – 'escape' may not be the right word to describe what took place on 15 June 2015. Rather, it appears that President Al-Bashir, rhetorically speaking, walked out of South Africa – with a police escort. This seems to have taken place, at best, with South Africa's tacit approval, or at worst,

²⁹ Bashir arrest case (above note 4) at para 7.

with its active collusion."³⁰

IV. DOCUMENTARY EVIDENCE

35. SALC thus respectfully contends that there are strong grounds to believe that a number of government agents, including high-ranking officials, were aware of the whereabouts of President Al Bashir at the time of his departure and are implicated in President Al Bashir's escape. SALC assumes that South Africa, in its submissions, will provide the full names and details of these officials that were involved, thereby avoiding the need for the Chamber to compel it to do so.
36. Furthermore, SALC in its application for leave to intervene drew to the Chamber's attention documents which South Africa should produce in discharging its domestic and international obligations of transparency and accountability:
 - 36.1. The report of the Minister of State Security and the Minister in the Presidency in which they fully investigated the circumstances under which President Al Bashir left the Republic.³¹
 - 36.2. The report pursuant to the internal investigation of the Department of Home Affairs, referred to in the explanatory affidavit.³²
 - 36.3. The general protocols used for the departure of delegations in terms of multilateral events such as the African Union Summit referred to in the explanatory affidavit.³³
 - 36.4. The names and details of the protocol officer assigned to the Sudanese delegation as well as the schedule and itinerary of the visiting Sudanese delegation for the AU Summit held between 7–15 June 2015.
 - 36.5. The communication and documents relating to the relocation of the Sudan01 aircraft from OR Tambo to Waterkloof.

³⁰ Manuel J Ventura "Escape from Johannesburg?: Sudanese President Al-Bashir Visits South Africa, and the Implicit Removal of Head of State Immunity by the UN Security Council in light of *Al-Jedda*" (2015) 13 (5) *Journal of International Criminal Justice* 995.

³¹ The explanatory affidavit records, in para 4, that such investigations were to be undertaken. The government parties also made an undertaking to the High Court, though their senior counsel, that such an investigation would be undertaken.

³² Id at para 8.

³³ Id at para 9.

- 36.6. The communication from the Sudanese delegation to the DIRCO protocol officer indicating that there was a need to move the delegation from Sandton to Waterkloof, also referred to in the explanatory memorandum.³⁴
- 36.7. The communication referred to in the explanatory memorandum from the DIRCO protocol officer to the SAPS Protection Services so that the requisite security arrangements for the transport of the Sudanese delegation from Sandton to Waterkloof.³⁵
- 36.8. The communication requesting the Department of Home Affairs to make available immigration officers to process the passports of the visiting delegations.³⁶
- 36.9. A legible copy of the print out of the Enhanced Movement Control System attached as annexure MA2 to the explanatory affidavit.
37. SALC also understands that the conduct of the government parties' counsel has been subjected to scrutiny by the General Council of the Bar and/or the Johannesburg Society of Advocates, pursuant to a recommendation by the Supreme Court of Appeal that his and the government parties' conduct be investigated. The records of that investigation may, SALC submits, shed light on what occurred, and may be of assistance to the Chamber.
38. SALC drew attention to these records and documents in its application to intervene, and assumes that South Africa will assist the ICC in the production thereof to facilitate the Chamber's decision-making and to avoid the drawing of necessary inferences from any failure by South Africa to account for its officials' conduct.

V. THE APPROPRIATE FINDINGS TO BE MADE REGARDING THE CONDUCT OF THE GOVERNMENT RESPONDENTS

39. SALC agrees with the Prosecutor that South Africa flouted its obligation in terms of the Statute when it failed to arrest President Al Bashir when he visited its territory

³⁴ Id at para 12.1.

³⁵ Id at para 12.1.

³⁶ Id at para 10.

in June 2015. Its domestic obligations leave no room for doubt that it was bound to arrest and surrender him, and that it cannot invoke article 98 to avoid such obligation.

40. It is thus respectfully submitted that the Chamber proceed to determine that South Africa failed in its obligation, as a State Party to the Rome Statute, to arrest and surrender President Al Bashir when he was in South Africa despite having received a request by the Court for his arrest and surrender under articles 87 and 89 of the Statute.
41. The thrust of South Africa's arguments before the domestic courts, *inter alia*, centred on two issues, namely, that "*neither the Rome Statute nor the [domestic] ICC Act remove the personal immunity of a sitting head of state which is not a party to the Rome Statute*" and that "*both the under customary international law and the [domestic] Diplomatic Immunities and Privileges Act 37 of 2001..., which gives effect to immunity of a head of state under international law of a sitting head of state exists under customary international law or domestic law...*".³⁷
42. SALC notes the ICC's jurisprudence on non-cooperation cases, including Malawi, Chad and DRC,³⁸ among others. SALC notes that almost all these states made similar, if not related, arguments citing customary international law and domestic provisions. It is trite that no state can rely on its domestic regulations to exclude the jurisdiction of the ICC. The ICC held in the Malawi case that:

.... article 98(1) of the Statute only refers to international law and thereby excludes any possibility for the requested State to rely on its national law, in order not to comply with a cooperation request sent by the Court. This is furthermore in line with established principles of international law as embodied in article 27 of the 23 May 1969 Vienna Convention on the Law of Treaties which states:

A Party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

Therefore, to the extent the Republic of Malawi refers to its internal law in

³⁷ Id note 3 above.

³⁸ Above note 1



*order to justify its failure to comply with the Cooperation Requests, such an argument is rejected by the Chamber in limine.*³⁹

43. SALC submits that the fact that almost all the above states have relied on the argument that customary international law exempts a sitting head of state should compel this Court to clarify the position of this law in light of articles 27 and 98 of the Statute. Such clarification would be of assistance generally to States Parties to the ICC.
44. The clarification would be separate from the question of whether South Africa has failed to comply with its legal obligations in this matter. For reasons given above around South Africa's clear domestic legal obligations in this case, and its conduct in facilitating President Al Bashir's departure from South Africa and his evasion from arrest and surrender, it falls to the Court to confirm that South Africa failed in its obligations.
45. Article 87(7) invites the Court to refer a non-cooperating State to either the Security Council or the Assembly of State parties. SALC submits that it would be appropriate to refer South Africa to the Security Council given that (a) it was the UN body that referred the situation in Sudan to the Court; (b) the evidence suggests that South Africa actively flouted its obligation and may face no meaningful consequences domestically;⁴⁰ and (c) there is a need for clarity and clear action in relation to non-compliance with the Statute.

VI. CONCLUSION

46. SALC offers the above observations to assist the Chamber in the proper determination of the case.
47. For these reasons, the Chamber should conclude that—
 - (i) South Africa failed to comply with its obligations under the Statute by not arresting and surrendering President Al Bashir to the Court while he was on South Africa's territory despite having received a request by the Court under articles 87 and 89 of the Statute for the arrest and surrender of Omar

³⁹ See Malawi non-cooperation decision, above note 1, para 20-21.

⁴⁰ See paragraphs 50 – 58 of the application for leave.

Al Bashir; and

- (ii) the circumstances warrant a formal finding of non-compliance by South Africa in this respect, and referral of the matter to the Security Council of the United Nations within the meaning of article 87(7).



KAAJAL RAMJATHAN-KEOGH

I certify that the above *amicus* brief was signed and sworn to at **JOHANNESBURG, SOUTH AFRICA** before me on this the 10th day of **MARCH 2017** by the above named after she declared that she knew and understood the contents of this brief *amicus* that she had no objection to taking the prescribed oath which she regarded as binding on her conscience.



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