

SALC v the Minister of Justice and Constitutional Development and Others: The Bashir Case

Q and A

Who is SALC?

The Southern Africa Litigation Centre (SALC) is an independent regional human rights organisation based in Johannesburg. SALC was established in 2005 and has been promoting human rights and strengthening the rule of law for ten years. SALC operates in ten SADC countries including South Africa. SALC is a small NGO with a committed staff complement that works with regional organisations and lawyers to bring cases of strategic value before domestic courts and the African Commission.

What is this case about?

This case concerns South Africa's place in the international community, respect for international and domestic rule of law, and achieving justice for the victims of genocide in Darfur. In 2009, the International Criminal Court (ICC) issued a warrant for the arrest of President Omar al-Bashir for genocide, crimes against humanity, and war crimes in Darfur. As a signatory to the Rome Statute, South Africa is obligated under international law to comply with the ICC's request for Bashir's arrest and transfer to face the charges against him. Moreover, South Africa domesticated the Rome Statute of the ICC by way of the Implementation of the Rome Statute of the ICC Act (ICC Act) which makes international crimes, including

genocide, crimes under South African law and fully encapsulates South Africa's responsibility to cooperate with the ICC.

Upon confirmation of President Bashir's presence in South Africa, SALC approached the North Gauteng High Court seeking the implementation of the arrest warrant against President Bashir.

What are President Bashir's alleged crimes?

President Bashir is suspected of five counts of crimes against humanity, two counts of war crimes, and three counts of genocide. These charges stem from the conflict in Darfur, in western Sudan. This conflict flared in 2003 when rebel groups in Darfur took up arms against the government, which resulted in a counter-insurgency by government forces and pro-government militia, controlled by Bashir. The United Nations estimates that the conflict in Darfur has resulted in the deaths of 300,000 people and forced over 2.7 million people to flee their homes.

Civilians were targeted throughout this conflict, and villages were looted and destroyed. Civilians who were able to escape their villages were later targeted in refugee camps and subjected to conditions calculated to bring about their destruction. The ICC's evidence indicates that President Bashir masterminded and implemented a

plan to destroy substantial parts of three ethnic groups, leading to the charges of genocide.

What were the events leading up to the case?

In May 2015, upon learning that the African Union had invited President Bashir to attend its upcoming summit in Johannesburg, SALC wrote a letter to the government authorities responsible for implementing international and domestic criminal law, reminding them of their duty to arrest Bashir should he arrive. At the time, SALC was uncertain if Bashir would be entering the country, but it sought to alert the government to the obligations that Bashir's presence would trigger.

On June 13, President Bashir arrived in South Africa to attend the African Union summit in Sandton. As soon as reports emerged that Bashir had left Sudan, SALC sent an urgent letter to the same government departments it had contacted previously. The letter reiterated the respondents' duty to execute international and domestic law and informed them that SALC would file an urgent application in the High Court to ensure Bashir's arrest if they failed to act.

If SALC knew President Bashir was coming, why did it wait so long to take action?

There were conflicting reports as to whether Bashir would come to South Africa or not. Final confirmation of his arrival was only received late on Saturday 13 June. To approach the courts on a legitimate basis SALC had to wait for confirmation that Bashir had indeed arrived and that he had not been arrested. It was hoped that the open letter written to the government authorities, in advance of the AU Summit,

would remind the authorities of their legal obligations under domestic and international law. Unfortunately the authorities only responded to legal action.

Who are the parties to the case?

SALC is the sole applicant in the case. The respondents are the Department of Justice and Constitutional Development, the Secretariat for Safety and Security, the Department of International Relations and Cooperation, the South African Police Service, the National Prosecuting Authority of South Africa, the Department of Home Affairs and the Directorate for Priority Crime Investigation.

Why is SALC involved in matters relating to Sudan?

SALC is a non-governmental organisation that is committed to promoting human rights and the rule of law in Southern Africa primarily through strategic litigation. SALC's international criminal justice programme is designed to ensure that states in the region, including South Africa, maintain their domestic and international law obligations. This is to prevent impunity, promote the rule of law, and protect human rights. The presence of an international fugitive on South African soil warranted serious action from SALC in accordance with its mandate. SALC is primarily concerned for the victims of these heinous ongoing crimes and seeks to ensure that justice is done. SALC also works on a variety of other cases pertaining to international criminal law including unresolved matters from South Africa's Truth and Reconciliation process. We have recently launched a case compelling the state to investigate the disappearance of an anti-apartheid activist. For more

information on SALC's work, please see the SALC website www.southernafricalitigationcentre.org.za.

Is SALC working for the ICC?

No. SALC is an independent organisation and is not working for the ICC. SALC's international criminal justice programme is involved in advocacy related to international criminal justice which includes critically engaging with the ICC as well as supporting it as part of a broader international criminal justice framework.

Who provided funding for this case?

The entire legal team working on this case, including the attorneys and advocates, provided their services on a pro bono basis.

Who funds SALC?

SALC is funded by several donors who are all listed in SALC's annual reports. SALC operates on a modest budget and its staff need to fundraise to support its existence. Donors have no input with regard to case selection or on the issues SALC chooses to work on. SALC does not and has never received any funds from the South African state to support its human rights and public interest work. SALC is governed by an independent board of trustees who also do not have input into the case selection process. SALC is transparent in its operations and its audited financial information including the names of its donors is publicly available.

Why is President Omar al-Bashir subject to a court order in South Africa for crimes he committed in Sudan?

In 2005, the UN Security Council referred the genocide in Sudan to the ICC. In 2009, the ICC issued arrest warrants for President Bashir and several other top members of his government as well as members of the opposing rebel groups involved in the conflict. President Bashir refuses to bring himself before the ICC and as such has become a fugitive of justice. The ICC does not have a police force and so it relies on its member states to cooperate and to assist with the lawful apprehension of those who have been indicted. As a member state, South Africa must arrest individuals who have refused to turn themselves over to the ICC.

What was the South African government's argument for why it could not arrest President Bashir?

The South African government argued that President Bashir was entitled to diplomatic immunity as a visiting head of state at the AU summit. It argued that Bashir could not be arrested in light of an agreement between the Minister of Foreign Affairs and the AU granting immunity to members of the AU attending the meetings in Sandton.

What was SALC's argument for why South Africa is compelled to arrest President Bashir?

SALC argued that the Minister's Notice on immunity at the AU conference did not extend to President Bashir. The ICC's warrant for Bashir's arrest had withdrawn the immunity a leader not charged with crimes against humanity would ordinarily possess. Even in the event the court determined that the Notice applied to Bashir, SALC argued that the Notice was unlawful because it contravened South African and international law. Furthermore,

as a proclamation of the executive alone without any Parliamentary input, it did not have the status of law itself. SALC also relied on jurisprudence from the ICC itself, as the ICC has ruled on this issue before in relation to President Bashir's travel to other Rome Statute signatories. The ICC judges have unequivocally ruled that President Bashir is not protected by the laws that govern immunity. In addition SALC relied on precedent set by the Constitutional Court which ruled in 2014 that South Africa must uphold and maintain obligations pursuant to the South African ICC Act.

How did the court rule?

On June 14, Judge Hans Fabricius of the High Court in Pretoria issued an interim order “compelling Respondents to prevent President Omar Al-Bashir from leaving the country until a [final] order is made in this court.” On June 15, Judge Dunstan Mlambo, ruling on behalf of a full bench of judges that had been convened to hear the matter, ordered the government to arrest Bashir. Judge Mlambo stated that “the government’s failure to arrest Bashir is inconsistent with the Constitution.” Moments after the ruling, when the government informed the court that President Bashir had been allowed to leave the country despite the court’s order to the contrary, Judge Mlambo said “it is of concern to this court that it issues orders and then things just happen in violation of those orders.” He ordered the government to investigate the circumstances of Bashir’s departure and to produce its findings within seven days.

What could the government have done differently?

Having ratified the Rome Statute and having incorporated it into its domestic law, South Africa was legally obligated at multiple levels to execute the ICC’s arrest warrant. Firstly the government could have made it clear that they would not allow President Bashir to come to South Africa, as Malawi did in 2012 when it was supposed to host the AU Summit. Malawi refused to host President Bashir, forcing the AU to move the Summit to Ethiopia.

Secondly, South Africa could have made it explicitly clear to President Bashir that should he set foot on South African soil he would immediately be arrested in accordance with the ICC Act. South Africa previously made this clear when President Bashir was invited to attend the 2009 inauguration of President Jacob Zuma and as a result President Bashir did not attend the inauguration.

Thirdly, the South African authorities should have arrested President Bashir as soon as he landed.

What does it mean for the rule of law in South Africa when government authorities defy court orders?

By allowing President Bashir to fly out of a major military airport, the South African government undermined not only international and domestic law, but the very existence of an independent judiciary charged with upholding the Constitution. This has serious implications for the rule of law as it indicates a lack of respect for judicial authority. There can be no reasonable justifiable explanation for how this was allowed to happen.

This is all worrying—are there any positive aspects to consider?

This matter highlights the strength and independence of the judiciary and the importance of adhering to the separation of powers. Where the government has failed to act, the courts have stood for justice and the rule of law. This is encouraging and reflects a profound appreciation by the judiciary for the values enshrined in the South African Constitution.

What is the current status of the case?

SALC is waiting for the government's affidavit responding to the court's questions about how President Bashir was able to leave the country. After reviewing the government's submission, SALC will determine the appropriate course of action. Contempt of court proceedings are under consideration. SALC is also waiting for the High Court to issue its reasons for its decision. This is also due to be handed down in seven days.