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The Registrar
Supreme Court of Appeal
BLOEMFONTEIN

Your Ref

Our Ref WEB6/0030/Mr DG Roberts/Miss B Strydom

29 October 2015

Sir

CASE: 867/2015
APPLICATION LEAVE TO APPEAL: THE MINISTER OF JUSTICE AND CONSTITUIONAL DEVELOPMENT & OTHERS vs THE SOUTHERN AFRICAN LITIGATION CENTRE

We hand you herewith the original and 2 copies of the Respondent's duly served Answering Affidavit.

Yours faithfully

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THE SUPREME COURT OF APPEAL

SCA CASE NO:

HC CASE NO: 27740/15

In the matter between:

THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	First Applicant
THE DIRECTOR-GENERAL OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second Applicant
THE MINISTER OF POLICE	Third Applicant
THE COMMISSIONER OF POLICE	Fourth Applicant
THE MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION	Fifth Applicant
THE DIRECTOR-GENERAL OF INTERNATIONAL RELATIONS AND COOPERATION	Sixth Applicant
THE MINISTER OF HOME AFFAIRS	Seventh Applicant
THE DIRECTOR-GENERAL OF HOME AFFAIRS	Eighth Applicant
THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	Ninth Applicant
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Tenth Applicant
THE HEAD OF THE DIRECTORATE FOR PRIORITY CRIMES INVESTIGATION	Eleventh Applicant
THE DIRECTOR OF THE PRIORITY CRIMES LITIGATION UNIT	Twelfth Applicant

and

THE SOUTHERN AFRICA LITIGATION CENTRE Respondent

FILING SHEET

BE PLEASED TO TAKE NOTICE THAT the Respondent hereby delivers its Answering Affidavit to the Applicants petition for leave to appeal.

Dated at Johannesburg this 28th day of OCTOBER 2015

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_____ 2015

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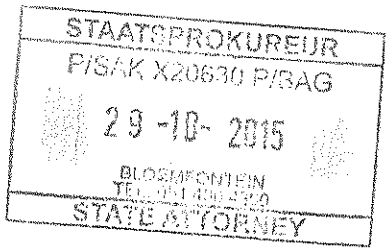
For: Applicants attorneys



JM37

THE SUPREME COURT OF APPEAL

SCA case number:

NGHC case number: 27740/2015

In the matter between:

THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	First Applicant
THE DIRECTOR-GENERAL OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second Applicant
THE MINISTER OF POLICE	Third Applicant
COMMISSIONER OF POLICE	Fourth Applicant
THE MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION	Fifth Applicant
THE DIRECTOR-GENERAL OF INTERNATIONAL RELATIONS AND COOPERATION	Sixth Applicant
THE MINISTER OF HOME AFFAIRS	Seventh Applicant
THE DIRECTOR-GENERAL OF HOME AFFAIRS	Eighth Applicant
THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	Ninth Applicant
THE NATIONAL DIRECTOR OF PUBLIC PROSECTIONS	Tenth Applicant
THE HEAD OF THE DIRECTORATE FOR PRIORITY CRIMES INVESTIGATION	Eleventh Applicant
THE DIRECTOR OF THE PRIORITY CRIMES LITIGATION UNIT	Twelfth Applicant

and

THE SOUTHERN AFRICA LITIGATION CENTRE	Respondent

RESPONDENT'S ANSWERING AFFIDAVIT ON LEAVE TO APPEAL

I, the undersigned

KAAJAL RAMJATHAN-KEOGH

do hereby make oath and say that:

1. I am the Executive Director of the Southern Africa Litigation Centre (*"SALC"*), the respondent in this matter. SALC is a non-governmental organisation based in Johannesburg. It provides support, both technical and financial, to human rights and public interest initiatives undertaken by domestic lawyers within the Southern Africa region. SALC's International Criminal Justice Programme monitors international criminal justice and its development in the Southern Africa region, and on the continent more generally. Its objective is to encourage African states, and particularly those in Southern Africa, to comply with their international and domestic criminal justice obligations.

2. I am duly authorised to oppose this application on its behalf. I attach the resolution empowering me to do so as **"KRK1"**. Unless the context indicates otherwise, the contents of this affidavit are within my personal knowledge and are, to the best of my belief, true and correct.

INTRODUCTION

3. The applicants in this matter are the various State parties that were joined in the High Court proceedings in which SALC sought to procure the arrest of President Al-Bashir of Sudan, with a few exceptions. The Minister of Police has joined in applying for leave to appeal to this court, although he was not cited as a respondent in the High Court. Conversely, the Minister and the Director General of Safety and Security were joined as respondents in the

court a quo (as the third and fourth respondents respectively), but they are not cited as applicants in these proceedings. I assume that they accept the High Court's judgment and order.

4. The applicants apply for leave to appeal to this court against the order of the full bench of the North Gauteng High Court, granted on 15 June 2015, as follows:

> "1. THAT the conduct of the Respondents, to the extent that they have failed to take steps to arrest and/or detain the President of the Republic of Sudan, Omar Hassan Ahmad Al Bashir ("President Bashir"), is inconsistent with the Constitution of the Republic of South Africa, 1996, and invalid;
>
> 2. THAT the Respondents are forthwith compelled to take all reasonable steps to prepare to arrest President Bashir without a warrant in terms of section 40(1)(k) of the Criminal Procedure Act, 51 of 1977 and detain him, pending a formal request for his surrender from the International Criminal Court;
>
> 3. THAT the Applicant is entitled to the costs of the application on a pro-bono basis."

(It is also recorded on page 3 of the judgment, which is annexure E to the applicants' founding papers.)

5. The Full Bench of the High Court refused the applicants leave to appeal on 15 September 2015 (as appears from annexure H to the founding affidavit). It found that an appeal would have no practical effect or result and that it was consequently precluded from granting leave, by s 17(1)(b) read with s 16(2)(a) of the Superior Courts Act 10 of 2013.[1] It also found, in paragraph 9 of the

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1 Leave to appeal judgment, paras 6-7 (annexure H to the FA)

leave to appeal judgment, that the appeal has no reasonable prospects of success.

6. The applicants apply to this court for leave in terms of s 17(2)(b) of the Superior Courts Act. They do so on the grounds that:

   6.1. the procedural background to the case purportedly justifies an appeal;

   6.2. the appeal allegedly has good prospects of success;

   6.3. the matter is not moot; and

   6.4. in any event, the case raises issues of public importance that warrant an appeal.

7. SALC contends that each proposed ground of appeal is without merit and that the applicants have no prospects of success on appeal.

8. In this affidavit, I deal with the grounds of appeal in turn. To avoid prolixity, I do not address each paragraph of the founding affidavit *seriatim*. Any allegation that I do not deal with directly must be taken to be denied.

THE ALLEGED PROCEDURAL DEFECTS

9. There are certain preliminary points raised by the applicants that need to be put to one side.

10. The first is that the applicants allege that the procedural context in which the High Court granted the impugned order constitutes a valid basis for appeal. That, they say, is because they were not afforded sufficient time in the hearing before the High Court to put up heads of argument or to source relevant

foreign authorities. In addition, they complain that the High Court took very little time to consider the matter before granting the order that it did.

11. These complaints do not constitute a valid basis for granting leave to appeal since:

11.1. First, counsel for the applicants did not request additional time, in the High Court, to file heads or to prepare further for the matter. Nor do the applicants appeal the finding that the matter was urgent. In those circumstances, it is not open to them to complain that they were afforded insufficient time to prepare.

11.2. Second, the High Court has never suggested that it had insufficient time to consider and properly determine the matter.

11.3. Third, all parties were given an additional opportunity to address the High Court in the hearing for leave to appeal. The applicants had ample time, in the lead up to the hearing of the application for leave, to develop their legal arguments and they filed lengthy heads of argument (a copy of which are attached as **"KRK2"**). As the applicants note,[2] the High Court took a month to deliver its leave to appeal judgment. That shows that it properly considered all the legal arguments placed before it.

12. The applicants further complain that the High Court did not give them an opportunity to address it on prospects of success during the leave to appeal hearing.[3] While it is correct that no oral argument was heard in this regard,

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2 FA para 32
3 FA para 16

the Court had been provided with comprehensive heads of argument on the issue and plainly considered them. Moreover, its finding on prospects of success was a secondary basis for refusing leave to appeal. Its primary reason for doing so was that the appeal would have no practical effect.

13. Finally, the applicants imply that the High Court's order was affected by its *prima facie* view that the applicants had breached its interim order.[4] It could not have been. The Court had not yet been informed that President Bashir had left the country when it granted its final order in the matter. That information was furnished in open court, immediately after the order had been handed down. The judgment does comment that President Bashir's departure prior to the finalisation of proceedings indicated that the interim order granted by Fabricius J had been breached.[5] But the High Court did not make any findings in this regard, expressly to avoid "*pre-empt[ing] the proceedings that may follow once the affidavit that this court has ordered is received*".[6] I submit that there was nothing irregular about its approach.

14. I therefore submit that none of the procedural issues raised by the applicants justifies the grant of leave to appeal.

PROSPECTS OF SUCCESS

15. In addition, I submit that the applicants have no prospect of success on appeal. Their interpretation of the legislative regime is, with respect, wrong.

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4 See FA paras 24-25
5 Leave to appeal judgment, paras 37-39
6 Leave to appeal judgment, para 37

The constitutional significance of international law

16. In their application for leave to appeal, the applicants seek to contend that the High Court's order was erroneously granted because it misconstrued the requirements of customary international law. I will explain below that their interpretation of the prescripts of customary international law is incorrect. But they also misunderstand the role that customary international law plays in our legal regime.

17. International law enjoys protected status in our law.[7] As the majority of the Constitutional Court recognised in **Glenister 2**,[8] the Constitution provides for international law to play a role in South African law in four distinct ways. First, it requires courts interpreting the Bill of Rights to consider international law in doing so.[9] Second, it provides for international agreements to bind the Republic if they are approved by Parliament, and to become law in the Republic if they are enacted into law by national legislation.[10] Third, it provides that customary international law is *"law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament"*.[11] Finally, it provides that when interpreting legislation, every court must prefer a reasonable interpretation that is consistent with international law over any alternative interpretation that is not.[12]

18. Our law is right to accord it such a special status. South Africa is under an international law duty to perform its treaty obligations in good faith. This

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7 The majority in *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) (*"Glenister 2"*), paras 178-179

8 *Glenister* para 179.

9 Section 39(1)(b) of the Constitution

10 Section 231 of the Constitution

11 Section 232 of the Constitution

12 Section 233

obligation has been enunciated on numerous occasions under international law.[13]

19. This prescript is now considered to be part of customary international law. As Malcolm Shaw, a leading international lawyer, puts it:

> "The fundamental principle of treaty law is undoubtedly the proposition that treaties are binding upon the parties to them and must be performed in good faith. This rule is known in legal terms as pacta sunt servanda and is arguably the oldest principle of international law. It was reaffirmed in article 26 of the 1969 Convention [on the Law of Treaties], and underlies every international agreement. It is not hard to see why this is so. In the absence of a certain minimum belief that states will perform their treaty obligations in good faith, there is no reason for countries to enter into such obligations with each other."[14]

20. One of the consequences of this duty to act in good faith is that there is a general obligation for states to bring national law into conformity with obligations under international law.[15]

21. However, the State's obligations must be sourced primarily in domestic legislation, not through direct reliance on the (purported) requirements of customary international law.

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13 See, for example, article 13 of Draft Declaration on Rights and Duties of States, 1949, which provides:

> "Every state has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions of its constitution or its laws as an excuse for failure to perform its duty."

See also Article 26 of the Vienna Convention on the Law of Treaties, 1969, which provides:

> "Every treaty in force is binding upon the parties to it and must be performed by them in good faith".

14 Malcolm Shaw, *International Law*, 4th Ed, 1997, at 633.

15 Ian Brownlie, *Principles of International Law*, 6th Ed, 2003, at 35

The ICC Act

22. South Africa is a signatory to and has ratified the Rome Statute of the International Criminal Court (*the Rome Statute*). Its obligations under that Treaty are given effect to by the provisions of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (*the ICC Act*). This is clear from the following provisions:

22.1. The long title of the ICC Act states unequivocally that it is designed to implement the Rome Statute in South Africa.

22.2. The preamble to the Act describes the purpose of the ICC Act as being:

> "To provide for a framework to ensure the effective implementation of the Rome Statute of the International Criminal Court in South Africa; to ensure that South Africa conforms with its obligations set out in the Statute; to provide for the crime of genocide, crimes against humanity and war crimes; to provide for the prosecution in South African courts of persons accused of having committed the said crimes in South Africa and beyond the borders of South Africa in certain circumstances; to provide for the arrest of persons accused of having committed the said crimes and their surrender to the said Court in certain circumstances; to provide for cooperation by South Africa with the said Court; and to provide for matters connected therewith.

22.3. It also provides that:

> "the Republic of South Africa, with its own history of atrocities, has, since 1994, become an integral and accepted member of the community of nations;
>
> the Republic is committed to –
>
> bringing persons who commit such atrocities to justice, either in a court of law of the Republic in terms of its domestic laws where possible, pursuant to its

> international obligations to do so when the Republic became party to the Rome Statute of the International Criminal Court, or in the event of the national prosecuting authority of the Republic declining or being unable to do so, in line with the principle of complementarity as contemplated in the Statute, in the International Criminal Court, created by and functioning in terms of the said Statute".

22.4. Section 3 of the ICC Act sets out its objects. They include creating a framework to ensure that the Rome Statute is effectively implemented in South Africa,[16] ensuring that anything done in terms of the ICC Act conforms with South Africa's obligations under the Rome Statute,[17] and enabling South Africa to cooperate with the ICC in the investigation and prosecution of people accused of committing international crimes in the event that the national prosecuting authority declines or is unable to contemplate such accused persons itself.[18] Section 3(e) expressly anticipates that such assistance may include enabling the ICC to make requests for assistance[19] and providing mechanisms, in South Africa, for the surrender to the ICC of persons within South Africa accused of having committed an international crime.[20]

22.5. Section 2(a) enjoins any South African court hearing a matter arising from the application of the ICC Act to consider and, where appropriate, apply conventional international law, particularly the Rome Statute.

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16 Section 3(a)
17 Section 3(b)
18 Section 3(e)
19 Section 3(3)(i)
20 Section 3(e)(ii).

23. It is clear that the ICC Act was enacted to give effect domestically to what the Rome Statute requires of South Africa as a State party and as a member of the community of nations, having particular regard to its own history of atrocities.

24. The question is then what obligations the Rome Statute itself imposes.

South Africa's obligations under the Rome Statute

25. With respect, the applicants misconstrue the requirements of the Rome Statue and thus of international law. They contend that it does not provide for the domestic arrest of a sitting head of state. That, with respect, is incorrect.

26. The Rome Statute established the ICC, and conferred jurisdiction on it to investigate and prosecute war crimes, crimes against humanity and genocide.[21] Various provisions of the Rome Statute are designed to ensure that the ICC can effectively fulfil that role.

27. Article 27 of the Rome Statute provides for the prosecution by the ICC of state officials, including serving heads of state, by excluding any immunity from jurisdiction and criminal prosecution that they might otherwise have enjoyed. It provides:

> 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.
>
> 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its

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21 Article 1 of the Rome Statute

jurisdiction over such a person."

28. The Pre-Trial Chamber of the ICC may, on the request of the prosecutor, issue an arrest warrant against any person who it determines there are reasonable grounds to believe has committed a crime within the jurisdiction of the ICC and whose arrest is necessary, among others, to ensure his appearance at trial.[22] Once an arrest warrant has been issued, the ICC may request the provisional arrest or the arrest and surrender of that person to the ICC by State parties.[23] A State party that receives a request for provisional arrest or arrest and surrender is obliged immediately to take steps to arrest the person in question, in accordance with its own laws and the procedures laid down in Part 9 of the Rome Statute.[24]

29. Similarly, the ICC is empowered to make requests to State parties for cooperation.[25] State parties are enjoined to comply with any request for cooperation made by the ICC. Where a State Party fails to do so and thereby prevents the ICC from exercising the functions and powers conferred on it by the Rome Statue, the ICC may make a finding against it and refer the matter to the assembly of state parties or the Security Council (where the matter in question was referred to the ICC by the Security Council).[26]

30. The ICC may also request the arrest and surrender of any person by any State Party on whose territory that person is to be found, and request the cooperation by the State Party in the arrest and surrender of that person.

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22 Article 58(1)
23 Article 58(5)
24 Article 59(1)
25 Article 87(1)
26 Article 87(7)

State Parties have a duty to comply with requests for arrest and surrender in accordance with procedures provided under their national law.[27]

31. State Parties are obliged to cooperate fully with the ICC in its investigation and prosecution of international crimes,[28] and to ensure that there are procedures available under their national law for all forms of cooperation specified by the Rome Statute.[29]

32. In the present case, the ICC issued two warrants for President Bashir's arrest. The first, issued in 2009, charged President Bashir with seven counts of war crimes and crimes against humanity. A copy is attached as **"KRK3"**. The then-Director General of Justice and Constitutional Development procured the endorsement of that warrant by a magistrate, as appears **"KRK4"**. The second ICC warrant, issued in July 2010, accuses President Bashir of three counts of genocide. A copy is attached as **"KRK5"**. The ICC also transmitted a request for the cooperation and for the arrest and surrender of President Bashir to all State parties, including South Africa. Under international law, South Africa was bound to comply with, and give effect to, that request.

33. The ICC has no police force of its own and thus relies on state parties to co-operate and assist it. That includes giving effect to arrest warrants.

The ICC Act gives effect to these international obligations

34. The ICC Act gives domestic effect to each of the obligations imposed by the Rome Statute, and renders them domestically enforceable.

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27 Article 89(1)
28 Article 86
29 Article 88

35. Section 2(a) of the ICC Act provides that any competent South African court hearing a matter arising out of the application of that Act must consider and, where appropriate apply, the Rome Statute.

36. Section 4(2)(a) of the ICC Act provides that serving heads of State, among others, have no immunity domestically from criminal prosecution, "*despite any other law to the contrary, including customary and conventional international law*". On its own terms, the provision prevails over any provision that may otherwise confer immunity on heads of State. It is clearly designed to align with the requirements of article 27 of the Rome Statute. What is more, it appears in a section of the ICC Act headed: "*Jurisdiction of South Africa courts in respect of crimes*". When read with other provisions of the ICC (particularly s 10(9)), the Act bestows jurisdiction on our courts to give effect to arrest warrants issued by the ICC notwithstanding any other conferral of immunity.

37. Once a head of State lacks immunity from criminal prosecution for international crimes in South Africa, it must follow that he also enjoys no immunity from the jurisdiction of domestic courts – including the jurisdiction of our courts when giving effect to ICC arrest warrants. In any event, s 4(3) expressly provides for South African courts to have jurisdiction over any person accused of an international crime if that person "*after the commission of the crime, is present in the territory of the Republic*".[30]

38. As required by the Rome Statute, the ICC Act enacts a series of procedures to give effect to requests for cooperation by the ICC:

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30 Section 4(3)(c)

38.1. Section 7(1) of the ICC Act states that the ICC "*has such rights and privileges of a South African Court*". Its order must therefore be treated as binding in South Africa. (This would include the order issued by the Pre-Trial Chamber obliging the arrest of President Bashir.)

38.2. Section 8(1) requires that any request for arrest and surrender of a particular person received from the ICC must be referred to the Central Authority (that is, the Director General of the Justice and Constitutional Development) who must immediately on receipt, forward the request and accompanying documents to a magistrate.[31] In turn, the magistrate must endorse the warrant of arrest for execution in any part of the Republic.[32] The endorsed warrant must be in the form and executed in a manner as near as possible to that prescribed for arrest warrants under the national laws relating to criminal procedure.[33]

38.3. In terms of s 10, a person who is detained under a warrant of arrest with a view to surrender to the ICC must be brought before a magistrate within 48 hours.[34] The magistrate must hold an inquiry to ensure that the arrest warrant applies to the person in question,[35] that he was arrested in accordance with the procedures imposed by domestic law[36] and that his constitutional rights have been respected

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31 Section 8(1) of the ICC Act
32 Section 8(2)
33 Section 9(3)
34 Section 10(1)
35 Section 10(1)(a)
36 Section 10(1)(b)

if and to the extent applicable.[37] If the magistrate is satisfied that each of these requirements has been met and that the person is liable for surrender to the ICC for prosecution, then she is obliged to order that he be surrendered to the ICC and committed to prison pending such surrender.[38]

39. Each of these provisions is framed in mandatory terms. The Director General may not refuse to apply for the endorsement of the arrest warrant and a magistrate has only a very limited discretion to refuse to endorse a warrant or to order the surrender of an accused person, on the grounds enumerated in the ICC Act.

40. The applicants have previously publicly confirmed South Africa's obligations under the ICC Act. In 2009, various newspaper reports recorded that President Bashir would attend President Zuma's inauguration. In response, on 31 July 2009, Dr Ayanda Ntsaluba (then of Foreign Affairs) explained as follows at a Press Conference (a copy of which is attached marked "**KRK6**"):

> "South Africa is the (sic) State Party of the Rome Statute of the International Criminal Court and is therefore obliged to cooperate with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court (Article 86), and hence also in the execution of arrest warrants. It is worth noting that Article 87(7) of the Statute provides that, when a State Party fails to comply with a request to cooperate, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties, or in the case of a United Nations Security Council (UNSC) referral to the UNSC.
>
> Article 27 of the Rome Statute provides that the official capacity as Head of State or Government of an accused provides no exemption from criminal responsibility. Furthermore, Section 4(1) of the South African Implementation of the Rome Statute of the International Criminal Court Act also ousts the applicability of other domestic laws in respect of an accused, with the result that the immunity from prosecution that President El Bashir (sic)

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37 Section 10(1)(c)
38 Section 10(5)

> would normally have enjoyed in terms of the Diplomatic Immunities and Privileges Act, 2001 (Act No. 37 of 2001), is not be (sic) applicable."

41. At that press conference, it was disclosed that an international arrest warrant for Al-Bashir '*has been received*' (from the ICC) and '*endorsed by a [South African] magistrate*'. Dr Ntsaluba explained that '*[t]his means that if President El Bashir (sic) arrives on South African territory, he will be liable for arrest*'.

42. Dr Ntsaluba is correct about the legal position. Crucially, s 10(9) unequivocally provides that a person cannot escape arrest and surrender on the basis that he is a serving head of State. It states:

> (9) 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).

43. In light of that provision, there can be no suggestion of any discretion on the part of the applicants to refuse to arrest and surrender an accused person merely on account of his status as a serving head of State.

44. Whatever the position may be under customary international law regarding head of state immunity (an issue I will address below), our legislature has chosen, through the ICC Act, to accord South African courts the same power to trump the immunities which might otherwise attach to officials of government, as the ICC enjoys by virtue of article 27 of the Rome Statute.

45. It follows that the South African authorities were under a duty to procure the arrest and surrender President Bashir as soon as he entered South Africa. That obligation flows both from the requirements of the ICC Act, from South Africa's international obligations under the Rome Statute and the 2009 domestically endorsed arrest warrant for President Bashir. The High Court

was correct to find that their failure to do so violated the rule of law. There is, with respect, no prospect of another court overturning that finding on appeal.

The Immunities Act does not detract from the obligation to arrest

46. The applicants also incorrectly contend that President Bashir enjoyed immunity from arrest under s 4 and s 5(3) of the Diplomatic Immunities and Privileges Act 37 of 2001 (*the Immunities Act*), read with the Notice published in Government Gazette 38860 on 5 June 2015, a copy of which is attached as **"KRK7"**. I am advised that the applicants stand no reasonable prospects of success in this claim.

47. I submit that the provisions of the ICC Act that exclude immunity prevail over those of the Immunities Act that might otherwise provide for it. That is so for three reasons. First, as outlined above, s 4(2) of the ICC Act expressly excludes immunity for serving heads of State "*despite any other law to the contrary*". On its terms, it trumps any contrary enactment. Second, the ICC Act is the more specific legislation. It was also passed after the Immunities Act[39] and accordingly its drafters must be presumed to have been aware of the provisions of the earlier Immunities Act. On either basis, the provisions of the ICC Act supersede those of the Immunities Act.[40] Finally, if the Immunities Act were allowed to prevail over the ICC Act, South Africa would be allowed to breach its obligations under the Rome Statute. Such interpretation would

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39 The Immunities Act 37 of 2001 was assented to on 22 November 2001 and commenced on 28 February 2002. The ICC Act was assented to on 12 July 2002 and commenced on 16 August 2002.

40 It is a general principle of interpretation that a general provision must yield to a more specific provision. See, for example, *Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Certification of the Constitution of the Province of KwaZulu-Natal*, 1996, 1996 (4) SA 1098 (CC) para 28. In general, a later enactment will apply in preference to the earlier one. See *Mankayi v Anglogold Ashanti Ltd* 2010 (2) SA 137 (SCA) paras 39-40.

be inconsistent with the constitutional requirement to prefer a legislative interpretation that gives effect to international obligations over one that does not.[41] In this regard the Rome Statute's obligations are clear and binding on South Africa, whatever may be the state of customary international law. And, as far as customary international law is invoked by the applicants, it would be incumbent on this Court to approach immunity in such cases with due regard for the emergence of restrictive rules in favour of human rights – a topic I return to below when discussing customary international law.

48. I therefore submit that resort to the Immunities Act cannot assist the applicants. It does not apply in the context of this case.

49. However even if the Immunities Act could competently be invoked (which is denied), neither s 4 nor s 5(3) afforded President Bashir any immunity. I address why that is so by examining each of the sections relied on by the applicants. I point out that each section relates to immunities that arise in different circumstances. Section 4 deals with the immunity enjoyed by heads of state. Section 5 deals with the conferral of immunity on organisations. The provisions and the immunities they confer are distinct from one another.

Section 4

50. Section 4 provides:

> **Immunities and privileges of heads of state, special envoys and certain representatives.**—(1) A head of state is immune from the criminal and civil jurisdiction of the courts of the Republic, and enjoys such privileges as—
> (*a*) heads of state enjoy in accordance with the rules of customary international law;
> (*b*) are provided for in any agreement entered into with a state or government whereby immunities and privileges

41 Section 233 of the Constitution

are conferred upon such a head of state; or

(c) may be conferred on such head of state by virtue of section 7 (2).

51. Section 7(2) provides:

> "The Minister may in any particular case if it is not expedient to enter into an agreement as contemplated in subsection (1) and if the conferment of immunities and privileges is in the interest of the Republic, confer such immunities and privileges on a person or organisation as may be specified by notice in the *Gazette*."

52. Section 4 thus confers immunity on heads of state to the extent provided under customary international law, by agreement between States, or by notice in the Gazette.

No agreement or notice

53. The High Court papers do not suggest that South Africa concluded an agreement with Sudan to confer immunity on President Bashir. Before this Honourable Court, the applicants now state that Sudan requested that President Bashir be accorded all privileges and immunities. [42] This cannot be as s 7(1) of the Immunity Act states that, any agreement to confer immunity must be recorded in writing and published in the Gazette. The only Notice conferring immunity was published in terms of s 5(3) (as appears from **KRK7**). No immunity been granted and no notice published in terms of s 4(1)(c) of the Immunities Act.

54. It means that only s 4(1)(a) – the grant of immunity under customary international law – could possibly apply.

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42 FA para 64

Immunity under customary international law

55. Historically, under customary international law, serving heads of state enjoy immunity from the jurisdiction of domestic courts and immunity from arrest and prosecution in foreign States. That protection flows from the act of state doctrine, which demands that States respect one another's sovereignty and allow their representatives to carry out their functions without fear of arrest or embarrassment.[43]

56. However, customary international law has developed and does not preclude the arrest, by South African authorities, of a serving head of state indicted for prosecution by the ICC. That is so for a number of reasons:

56.1. First, the immunity conferred by customary international law applies only to the extent that it is not excluded by statute. The ICC Act provides both that a domestic court has jurisdiction over a person accused of international crimes whilst they are in the Republic, and that their status as head of state will afford them no immunity from prosecution nor immunity from arrest and surrender to the ICC. Those provisions prevail over the rules of customary international law imported by the Immunities Act (which was enacted before the ICC Act and is thus subservient to it).

56.2. Similarly, a rule of customary international law may be overridden by the provision of a treaty. Article 27 of the Rome Statute, which

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43 See, for example, Case concerning the arrest warrant of 11 April 2000: *Democratic Republic of Congo v Belgium*, judgment of International Court of Justice, 14 February 2002 (Arrest Warrant case), paras 51, 54.

expressly excludes head of state immunity from jurisdiction and from prosecution, thus applies.

56.3. It means that the prevailing statutory and treaty regime removes any immunity from jurisdiction and from prosecution that President Bashir might have enjoyed under customary international law (and consequently under s 4(1)(a) of the Immunities Act).

57. The applicants are misguided in their suggestion that the **Arrest Warrant case** judgment is the dispositive source of authority with regard to immunity for heads of state in international law. The prevalent position in international law is that immunity for heads of state for grave international crimes is not absolute.

58. Firstly, I am advised that the Arrest Warrant case is distinguishable. It relates to immunity for a foreign minister and with regard to the application of universal jurisdiction by a Belgian court seeking to arrest and prosecute a Democratic Republic of Congo national. These facts are very different from the present matter where a state party to the International Criminal Court is required to comply with its Rome Statute duty (incorporated under its own domestic law) to arrest a suspected perpetrator of international crimes.

59. Secondly, the Arrest Warrant case has eight dissenting or separate judgments contesting the main judgment relied upon by the applicants. It has also been severely criticised by leading international criminal law academics and

practitioners[44] for alleging that immunity is inviolable[45] and for failing to establish that state practice and *opinio juris* (which are essential when one claims that something constitutes a principle of customary international law) exist. [46]

60. Thirdly, immunity for the core international crimes has been denounced by a host of international treaties and statutes including: Article 7 of the 1996 Draft Code of Offences against Peace and Security of Mankind[47]; Article 7 of the Statute of the International Criminal Tribunal for the former Yugoslavia ("ICTY"); Article 6 of the Statute of the International Criminal Tribunal for Rwanda ("ICTR"); Article 4 of the Genocide Convention and the Article 27 of the Rome Statute; Article 6(2) of the Statute of the Special Court for Sierra Leone; Article 29 of the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for Prosecution of Crimes Committed during the Period of Democratic Kampuchea.

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44 *Arrest Warrant Case, Dissenting Opinion Judge Van den Wyngaert,* at para 27;*Arrest Warrant Joint Separate Opinion of Judges Higgins, Kooijmas and Burgenthal* at para 78. A Cassese 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v Belgium Case' (2002) 13 EJIL 853–75; John Dugard *International Law: A South African Perspective* (2011) 4th edition pages 251 to 253.

45 *Arrest Warrant Joint Separate Opinion of Judges Higgins, Kooijmas and Burgenthal:* "Now it is generally recognized that in the case of such crimes which are often committed by high officials who make use of the power invested in the State, immunity is never substantive and thus cannot exculpate the offender from personal criminal responsibility" para 74; " Moreover, a trend is discernable that in a world which increasingly rejects impunity for the most repugnant offences, the attribution of responsibility and accountability is becoming firmer, the possibility for the assertion of jurisdiction wider and the availability of immunity as shield more limited" para 75. Available at http://www.icj-cij.org/docket/files/121/8136.pdf

46 "In the brevity of its reasoning, the Court disregards its own case law on the subject on the formation of customary international law. In order to constitute a rule of customary international law, there must be evidence of State practice (usus) and opinio juris to the effect that this rule exists." para 12 *Dissenting Opinion of Wyngaert* available at http://www.icj-cij.org/docket/files/121/8144.pdf

47 Available at http://legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1996.pdf

61. Fourthly, jurisprudence from the Special Court for Sierra Leone (the court that indicted former President Charles Taylor for serious crimes whilst he was still in office) reveals that heads of state are not immune under international law.[48] The same can be said about the jurisprudence from the ICTY, which indicted former President Milosevic[49] for international crimes. In the case of *Prosecutor v Furundzija* [50] the ICTY states that "Individuals are personally responsible, whatever their official position, even if they are heads of State or government ministers"[51] and that "Article 7(2) of the Statute [of the ICTY] and article 6(2) of the Statute of the International Criminal Tribunal for Rwanda, hereafter "ICTR" are indisputably declaratory of customary international law."[52]

62. Fifthly, the **Arrest Warrant case** noted an exception that would apply as far as the ICC was concerned:

> "an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include . . . the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 27, paragraph 2, that '[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such person".[53]

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48 *Prosecutor v Charles Ghankay Taylor*, Case Number SCSL-2003-01-I, Decision on Immunity from Jurisdiction, 31 May 2004. Para 33 available at http://www.haguejusticeportal.net/Docs/Court%20Documents/SCSL/Taylor_Decision%20on%20Immunity.pdf

49 *Decision on Preliminary Motions* para 26-28;30-31 available at http://www.icty.org/x/cases/slobodan_milosevic/tdec/en/1110873516829.htm

50 Case No. ICTY-95-17/1, 10 December 1998 available at http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf

51 *Ibid* at para 140

52 This was further confirmed case of *Prosecutor v Slobodan Milosevic Decision on Preliminary Motion* para 27 where the court states "Article 7, paragraph 2, of the Statute provides that the official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment" the Court goes on to say in para 28 that "there is absolutely no basis for challenging the validity of Article 7, paragraph 2, which at this time reflects a rule of customary international law." Available at http://www.icty.org/x/cases/slobodan_milosevic/tdec/en/1110873516829.htm

53 Arrest Warrant case, para 61

63. There is thus no rule of customary international law that affords serving heads of state immunity from surrender to, and prosecution by, an international tribunal for the commission of international crimes.[54] The ICC has expressly endorsed that finding.[55] Its findings on the scope of its jurisdiction are binding on State parties, including South Africa.[56]

64. But even if one alleged that immunity for grave crimes for heads of state was absolute, which SALC denies, the Security Council's referral of the Darfur conflict to the ICC for investigation included, in paragraph 2, a binding call on State parties to the Rome Statute to cooperate fully with the ICC and to provide any necessary assistance to it and its prosecutor. A copy of the Security Council resolution is attached as **"KRK8"**. It amounted to a waiver, under international law, of any immunity that an official might otherwise have enjoyed in relation to that conflict.[57]

65. Thus President Bashir enjoys no immunity from prosecution before the ICC, under customary international law, as a serving head of state – and South Africa has aligned itself with that position under the Rome Statute both by its membership of the ICC and through the provisions of its ICC Act. He consequently does not have immunity under s 4(1)(a) of the Immunities Act either.

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54 See also *Prosecutor v Omar Hassan Ahmad Al Bashir*, judgment of the Pre-Trial Chamber I of the ICC, 13 December 2011 (the Malawi case), paras 33-36

55 Ibid.

56 Article 119(2) of the Rome Statute and *Arrest Warrant Joint Separate Opinion of Judges Higgins, Kooijmas and Burgenthal* "We reject the suggestion that the battle against impunity is made over to international treaties and tribunals, with national courts having no competence in such matters..." para 51.

57 *Prosecutor v Omar Hassan Ahmad Al Bashir*, judgment of the Pre-Trial Chamber II of the ICC, 13 June 2015, para 9. See also *Prosecutor v Omar Hassan Ahmad Al Bashir*, judgment of the Pre-Trial Chamber II of the ICC, 9 April 2014 (the Congo case), para 29.

Section 5(3) and the Notice

66. The applicants also rely on the Notice as the source of the immunity purportedly granted to President Bashir. The Notice was published in terms of s 5(3) of the Immunities Act. That appears both from the face of the Notice – in which the Minister of International Relations and Cooperation states that the Notice was published *"in accordance with the powers vested in [her] by section 5(3) of the Diplomatic Immunities and Privileges Act, 2001"* – and from the applicants' answering affidavit filed in the High Court.

67. Section 5(3) of the Immunities Act deals with the conferral of immunities only on organizations and their officials. It provides:

> "Any organisation recognised by the Minister for the purposes of this section and any official of such organisation enjoy such privileges and immunities as may be provided for in any agreement entered into with such organisation or as may be conferred on them by virtue of section 7(2)."

68. An "*organisation*" is defined in s 1 as "*an intergovernmental organisation of which two or more states or governments are members and which the Minister has recognised for the purposes of this Act*".

69. Section 5(3) thus provides for the conferral of immunities on organizations and their officials. It does not provide for immunity to be granted to heads of state (which is dealt with in s 4 of the Immunities Act) or state representatives attending an international conference or meeting (which is dealt with in s 6).

70. Congruent with that, an agreement in the present case was concluded between South Africa and the Commission of the African Union, which specifically provided for immunity from jurisdiction and arrest for the officials

and staff of the AU and other organisations. A copy of the Agreement is attached as **"KRK9"**. Article VIII of that Agreement afforded:

> "the Members of the Commission and Staff Members, the delegates and other representatives of Inter-Governmental Organisations attending the Meetings [of 7 to 15 June 2015] the privileges and immunities set forth in Sections C and D, Articles V and VI of the General Convention on the Privileges and Immunities of the OAU".

71. Paragraph 1 of the Notice published in the Government Gazette is in the same terms.

72. On a plain reading of article VII of the Agreement and paragraph 1 of the Notice, immunity was granted to:

72.1. members of the Commission of the African Union;

72.2. staff members of the Commission of the African Union;

72.3. delegates of Inter-Governmental Organisations; and

72.4. other representatives of Inter-Governmental Organisations.

73. Neither the Agreement nor the Notice conferred immunity on State delegates or State representatives. It means that the Agreement and the Notice do not confer immunity on heads of States. They did not need to because heads of state attending the AU meetings would ordinarily enjoy immunity from jurisdiction and prosecution under customary international law, and consequently under s 4(1)(a) of the Immunities Act. But as already discussed, those immunities do not avail President Bashir in light of his alleged commission of international crimes and his indictment before the ICC pursuant to the Security Council's Resolution 1593.

74. It follows that President Bashir did not enjoy immunity under s 5(3) of the Immunities Act or in terms of the Notice.

75. Contrary to the applicants' suggestion,[58] there is no violation of the *Oudekraal* Principle as alleged by the applicants. It was not necessary for the High Court to set aside the Notice because it found that the Notice did not confer any privileges and immunities on President Bashir.

Summation

76. For the reasons set out above, President Bashir did not enjoy any immunity from jurisdiction or from arrest. The High Court's findings to this effect, and the order it consequently granted, were correct. There is, with respect, no reasonable prospect that they will be overturned on appeal.

MOOTNESS

77. The order under appeal directed the applicants to arrest and surrender President Bashir to the ICC for prosecution for various alleged international crimes because he was in South Africa at the time, and consequently subject to the jurisdiction of the South African courts and capable of arrest by South African authorities. However, President Bashir left South Africa before the High Court's order could be given effect to. The facts that gave rise the application no longer pertain. The application is consequently moot.

78. The High Court confirmed as much. In paragraph 7 of the leave to appeal judgment, it confirmed that "*the facts before us are clear that there is no longer any live controversy between the parties. We are further of the opinion that*

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58 FA para 66

the appeal will therefore have no practical effect between the parties". I respectfully endorse that view.

79. In the application for leave to appeal to this court, the applicants record that President Zuma wishes to invite President Bashir to return to South Africa.[59] In fact, such invitation may already been issued. On or around 12 October 2015, the press reported that Sudan (among others) had been invited to attend a forum to be hosted in South Africa in December 2015. I attach articles to this effect as **"KRK10".** Other news reports, attached as **"KRK11"** suggest that he has been asked not to attend. That is likely because there is – and has always been – an endorsed warrant for his arrest that requires the South African authorities to arrest him on entry into South Africa.

80. I also submit that the appeal would not raise questions of public importance that would affect matters in future. There are currently no other serving heads of State against whom the ICC has pending arrest warrants or requests for surrender.[60] Even if there were, there is no reason to believe that South Africa will invite or receive them into the Republic, or that they would come even if South Africa were willing to do so. Any claim that similar legal questions might arise in the future is speculative and unlikely to materialise.[61]

81. The High Court found that even if the matter raised issues of public importance, it was precluded by s 17(1) of the Superior Courts Act from

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59 FA para 13

60 President Uhuru Kenyatta and Deputy President William Ruto were indicted by the ICC but appeared before the Court voluntarily.

61 A speculative claim that a legal question will arise again is not sufficient to warrant an appeal being heard in the public interest: see, for example, *Ethekwini Municipality and Others v Combined Transport Services (Pty) Ltd and Others* [2010] ZASCA 158 (1 December 2010) paras 11-18.

granting leave to appeal because the proposed appeal has no prospects of success.[62] I respectfully endorse that finding.

82. The matter is therefore moot and an appeal would be of academic interest only. Leave to appeal should therefore be refused.[63]

CONCLUSION AND REQUESTED ORDER

83. For all these reasons, SALC submits that the application for leave to appeal should be dismissed with costs, including the costs of three counsel (given the complexity, novelty of issues, and importance of the matter).

KAAJAL RAMJATHAN-KEOGH

I certify that:

I. the Deponent acknowledged to me that:
A. She knows and understands the contents of this declaration;
B. She has no objection to taking the prescribed oath;
C. She considers the prescribed oath to be binding on her conscience.
II. The Deponent thereafter uttered the words, "I swear that the contents of this declaration are true, so help me God".
III. The Deponent signed this declaration in my presence at the address and on the date set out hereunder.

COMMISSIONER OF OATHS

Prasothmen Vennagopal Naiker
Commissioner of Oaths
Practising Attorney R.S.A
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2 Hood Avenue Rosebank
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62 Leave to appeal judgment, paras 9-11

63 *Geldenhuys and Neethling v Beuthin* 1918 AD 426 at 441, quoted with approval in, for example, *Qoboshiyane NO and Others v Avusa Publishing Eastern Cape (Pty) Ltd and Others* 2013 (3) SA 315 (SCA) para 5 and *Deutsches Altersheim Zu Pretoria v Dohmen and Others* [2015] ZASCA (5 March 2015) para 4. The same principle has been endorsed by the Constitutional Court in, for example, *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) fn 18; *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa, and Another* 2005 (4) SA 319 (CC) para 41.

KRK1

SOUTHERN AFRICA LITIGATION CENTRE

RESOLUTION OF THE BOARD OF TRUSTEES OF THE SOUTHERN AFRICA LITIGATION CENTRE

TRUST NAME: SOUTHERN AFRICAN HUMAN RIGHTS LITIGATION CENTRE TRUST
Operating as THE SOUTHERN AFRICA LITIGATION CENTRE (SALC)

TRUST NO: IT 3935/05

Date of Resolution: 26 October 2015

It was resolved as follows:

The Board of Trustees have agreed that SALC is permitted to litigate in its own name and to continue in the case of *Minister of Justice and Others vs the Southern Africa Litigation Centre*. This case began when SALC brought an urgent application before the appropriate court to compel the South African authorities to arrest and detain Sudanese President Omar Al Bashir on account of the arrest warrant issued by the International Criminal Court for genocide, war crimes and crimes against humanity committed in Dafur, Sudan.

Signatures:

..... ZOHRA DAWOOD
TRUSTEE

Signed by the above Trustee on behalf of the SALC Board of Trustees:

Zohra Dawood
Rahim Khan
Keith Baker
Beatrice Mtetwa
Sternford Moyo
Phillip Tahmindjis

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KRK 2

STATE ATTORNEY
DX 298 PRETORIA

78

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA

CASE NO: 27740/2015

In the matter between:

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	1st Applicant
DIRECTOR GENERAL OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	2nd Applicant
MINISTER OF POLICE	3rd Applicant
COMMISSIONER OF POLICE	4th Applicant
MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION	5th Applicant
DIRECTOR GENERAL OF INTERNATIONAL RELATIONS AND CO-OPERATION	6th Applicant
MINISTER OF HOME AFFAIRS	7th Applicant
DIRECTOR GENERAL OF HOME AFFAIRS	8th Applicant
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	9th Applicant
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	10th Applicant
HEAD OF THE DIRECTORATE FOR PRIORITY CRIMES INVESTIGATION	11th Applicant
DIRECTOR OF THE PRIORITY CRIMES INVESTIGATION UNIT	12th Applicant
and	
SOUTHERN AFRICAN LITIGATION CENTRE	Respondent

FILING SHEET

DOCUMENT:	GOVERNMENT'S HEADS OF ARGUMENT ON LEAVE TO APPEAL
ON ROLL :	14 AUGUST 2015
FILED BY:	**APPLICANTS' ATTORNEY** STATE ATTORNEY PRETORIA SALU BUILDING 316 THABO SEHUME STREET CNR THABO SEHUME (ANDRIES) AND FRANCIS BAARD (SCHOEMAN) STREETS PRIVATE BAG X91 PRETORIA, 0001 **Ref: 3604/2015/Z49** **Tel:** 012 – 309 1563 **Fax:** 086 507 0909 **Enq:** J Meier **E-mail:** eturner@justice.gov.za
TO:	THE REGISTRAR OF THE HIGH COURT, GAUTENG DIVISOIN **PRETORIA**
AND TO: :	**RESPONDENT'S ATTORNEYS** WEBBER WENTZEL 10 FRICKER ROAD ILLOVO BOULEVARD JOHANNESBURG, 2196 **Per:** Maxine Gunsenhauser **Tel:** 076 402 4556 / 063 003 0640 **Ref:** M Hathorn / 3001742 **C/O BERNHARD VAN DER HOVEN ATTORNEYS** 2ND FLOOR, PARC NOUVEAU BUILDING 225 VEALE STREET, BROOKLYN PRETORIA **Tel:** 076 402 4556 / 063 003 0640 **E-mail:** Maxine.Gunzenhauser@webberwentzel.com **Ref: M Hathorn / 3001742**

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TIME:

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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case no 27740/2015

In the matter between:

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	First applicant
DIRECTOR-GENERAL OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second applicant
MINISTER OF POLICE	Third applicant
COMMISSIONER OF POLICE	Fourth applicant
MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION	Fifth applicant
DIRECTOR-GENERAL OF INTERNATIONAL RELATIONS AND CO-OPERATION	Sixth applicant
MINISTER OF HOME AFFAIRS	Seventh applicant
DIRECTOR-GENERAL OF HOME AFFAIRS	Eighth applicant
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	Ninth applicant
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Tenth applicant
HEAD OF THE DIRECTORATE FOR PRIORITY CRIMES INVESTIGATION	Eleventh applicant
DIRECTOR OF THE PRIORITY CRIMES INVESTIGATION UNIT	Twelfth applicant

and

SOUTHERN AFRICAN LITIGATION CENTRE	Respondent

GOVERNMENT'S HEADS OF ARGUMENT ON LEAVE TO APPEAL
(Enrolled for hearing on 14 August 2015)

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A. Introduction

1. These short heads of argument are filed on behalf of all the applicants for leave to appeal, the Minister of Justice and Constitutional Development and other State respondents *a quo* (collectively, "Government"). It concerns a decision by this Court to order the arrest of a serving foreign head of State. There can be no sensible debate that it is of national and international legal significance:[1] the international criminal accountability of a sitting head of State, his susceptibility to arrest in a foreign state, and South Africa's legal duties under national and international law. Is South Africa under a legal duty to arrest a sitting president of a sovereign state, or to respect his immunity as head of State? This question has never before been considered by any South African court.

2. A full bench of this Court handed down an urgent, final order answering this question by imposing a duty on the South African Government to arrest a sitting head of State. The judgment subsequently delivered, in which reasons are provided for the order, confirms that this Court answered the question categorically: the judgment is not restricted to the particular president in question. The question now arising, and addressed in these heads of argument, is not whether the Full Bench was right or wrong. The correct test as regards leave to appeal is whether the extraordinarily important legal question answered by this Court – as a court of first instance, sitting

[1] Indeed, the judgment itself (correctly, with respect) records in para 7 "the importance of the matter especially having regard to South Africa's constitutional and international legal obligations". Para 34 in turn reflects the Court's concern that the ICC take cognisance of the matter, and (what the Court found to be) the "conflict between South Africa's regional affiliation on the one hand and its broader international obligations on the other."

under extremely urgent and also otherwise invidious circumstances[2] – should be considered by another court, pursuant to the ordinary appeal hierarchy established by the Constitution (which itself contemplates an in-principle right of appeal from a court of first instance).

3. It is to assist the Court in answering this *latter* question that these heads of argument have been prepared. They are filed in advance of the hearing to afford not only the Court but also the respondent an opportunity to consider Government's core submissions on whether leave to appeal should be granted. Their purpose is to facilitate the hearing of the application for leave to appeal, and to truncate the hearing to the extent possible.

4. These heads of argument are structured as follows.

   (a) First we address the test for leave to appeal and incidental procedural matters.

   (b) Thereafter we deal separately with each of the grounds of appeal, demonstrating that the applicable test is met.

   (c) We conclude, for the reasons set out below, by submitting that

      (i) there are reasonable prospects that another court may come to a different conclusion;

      (ii) it is in the interests of justice that leave to appeal be granted; and

      (iii) leave to appeal should be granted to the Supreme Court of Appeal.

[2] For instance, the extreme urgency of the matter meant that the Court was not assisted by having heads of argument on both sides. Nor can either side claim to have had, in the unavoidably pressing time available, an adequate opportunity to research and develop argument.

B. Principles governing applications for leave to appeal

5. The principles governing the question in this application (i.e. whether leave to appeal should be granted) are well-established. We nonetheless summarise them for convenience.

(1) Circumstances in which leave to appeal may be granted

6. The Superior Courts Act 10 of 2013 is the Act which now provides the statutory matrix. It preserves the primary basis for granting leave to appeal. This is whether "a reasonable prospect of success" exists.[3] The Act does not, we submit,[4] affect the established test for determining whether reasonable prospects of success exist. The

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[3] Section 17(1)(a)(i).

[4] There is a presumption that the legislature does not intend to amend the common law more than necessary (Steyn *Uitleg van Wette* 5th ed (Juta, 1981) at 97-100). Under the common law the operative "question [is] whether the applicant would have a reasonable prospect of success on appeal" (*Gcaylya v Minister of Police* 1973 (1) SA 130 (A) at 135H; *Mokoena v Minister of Justice* 1968 (4) SA 708 (A) at 711A, emphasis added). This is the well-known test laid down in *R v Ngubane* 1945 AD 185 at 187. This test was confirmed in *Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) at 564C-E (for appeals not requiring special leave), and applied in *inter alia S v Rens* 1996 (1) SA 1218 (CC) at para 7. Section 17(1)(a)(i) adopts these identical words. Under the common law the question has never been whether "the applicant *could* have a reasonable prospect of success on appeal": this phrase is entirely absent from the law reports, an electronic search establishes. It has nonetheless been observed that the use of the word "would" in section 17(1)(a)(i) affects the test for leave to appeal. But this word qualifies only the clause "have a reasonable prospect of success": it does not deal with *how* to establish where there are prospects of success. Thus the use of the word "would" in section 17(1)(a)(i) does *not*, with respect, indicate a legislative intent to "raise the bar". We nonetheless draw to the Court's attention the application of an unreported judgment (*Mont Chevaux Trust v Tina Goosen* LCC 14R/2014) in a subsequent unreported judgment, *Daantjie Community v Crocodile Valley Citrus Company (Pty) Ltd* (75/2008) [2015] ZALCC 7 (28 July 2015) at para 3. Both are by single judges sitting in the Land Claims Court. Although Van Loggerenberg *Superior Court Practice* (Juta, 2015) Vol 1 at A2–55 considers what was said in *Mont Chevaux* as only an *obiter* observation, in *Daantjie Community* it was considered that *Mont Chevaux* has held

> "that the threshold for granting leave to appeal had been raised in the new Act. Bertelsmann J found that the use of the word 'would' in the new Act indicated a measure of certainty that another Court will differ from the Court whose judgment is sought to be appealed against. Consequently, the bar set in the previous test, which required 'a reasonable prospect that another Court might come to a different conclusion', has been raised by the new Act and this then, is the test to be applied in this matter".

Nonetheless, whatever the correct test, this application for leave to appeal passes it comfortably, we respectfully submit.

test remains whether or not there is a reasonable prospect that another court *may* come to a different conclusion.[5]

7. The innovation introduced by the Superior Courts Act is that leave to appeal may be granted also when "there is some other compelling reason why the appeal should be heard".[6] Accordingly the scope for granting leave to appeal has been widened by the 2013 Act.

8. We would point out, however, that section 17(1)(b) restricts this extended approach to granting leave to appeal to decisions which do "not fall within the ambit of section 16(2)(a)." Section 16(2)(a) is the functional equivalent of section 21(A) of the Supreme Court Act 59 of 1959. It provides for the dismissal of an appeal on the basis that "the decision sought will have no practical effect or result".[7] There are two reasons why this provision does not apply to this application.

9. The first is that the decision sought will indeed have "practical effect or result".[8] This is because whether or not a sitting head of State enjoys immunity under international law and South African law, or whether a sitting head of State is subject to arrest in South Africa will practically affect every future event of international significance to be held in South Africa. It will affect the conduct of its international relations. South Africa has mediated, and mediates, many disputes in relation to which serving heads of State from time to time are present in this country: the Great Lakes Region, Côte

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[5] This is indeed the test applied by a distinguished full bench of this Court in *Commissioner of Inland Revenue v Tuck* 1989 (4) SA 888 (T) at 890B, per Eloff DJP (Goldstone and Kriegler JJ concurring).
[6] Section 17(1)(a)(ii).
[7] Section 16(2)(a)(i), emphasis added. Section 21(A)(1) of the 1959 Supreme Court Act provided, however, that the judgment or order sought will have no practical effect or result", emphasis added.
[8] Notice of application for leave to appeal p 9 para (b).

d'Ivoire, Central African Republic and Sudan itself are a few examples. Serving heads of State visit for other reasons too: State visits, funerals, medical visits. Accordingly the question is far from academic, as the judgment itself correctly, with respect, held.[9] In particular, whether South Africa is in a position to host African events without arresting invitees is of pressing practical relevance to Government.

10. The second is that a court of appeal retains a discretion to hear a matter despite the operation of the principle now codified in section 16(1)(b), and previously embodied in section 21A(1) of the 1959 Act. In *ABSA Bank Limited v Van Rensburg*[10] the Supreme Court of Appeal applied section 21A(1) of the 1959 Supreme Court Act. Maya JA reiterated that section 21A(1) confers a discretion to determine matters which would have no practical effect and result between the parties.[11] The concurring minority judgment significantly quotes the unanimous Supreme Court of Appeal judgment in *Port Elizabeth Municipality v Smit*.[12] *PE Municipality*, in turn, quotes the following passage in *R v Secretary of State for the Home Department, Ex parte Salem*[13]

> "...I accept ... that in a cause where there is an issue involving a public authority as to a question of public law, your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a *lis* to be decided which will directly affect the rights and obligations of the parties *inter se*."

11. This matter raises important questions of public law arising from the interpretation and application of the Implementation of the Rome Statute of the International

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[9] In para 3 this Court held that "this judgment remains relevant in view of the important constitutional and international principles at stake".
[10] 2014 (4) SA 626 (SCA).
[11] *Id* at para 8, citing Constitutional Court and Supreme Court of Appeal judgments confirming this principle.
[12] 2002 (4) SA 241 (SCA) para 11.
[13] [1999] 2 WLR 483 (HL) at 487H.

Criminal Court Act 27 of 2002 (the Implementation Act) and the Diplomatic Immunities and Privileges Act 37 of 2001 (the Immunities Act). The single previous occasion when this Court was seized with the application of the Implementation Act, in *National Commissioner, South African Police Service v Southern African Human Rights Litigation Centre*, it granted leave to appeal to the Supreme Court of Appeal. The subsequent judgment by the Supreme Court of Appeal upheld this Court's judgment, but without any adverse comment on granting leave to appeal to it.[14] Subsequently, in granting leave to appeal to itself from the Supreme Court of Appeal, the Constitutional Court confirmed that the application of the Implementation Act in South Africa has far-reaching consequences for South African authorities in the execution of their constitutional, international and domestic law obligations.[15] This further confirms the importance of the issues arising under that Act. But the previous litigation did not consider any of the important issues arising in the judgment forming the subject-matter of this application. They, too, warrant the Supreme Court of Appeal's attention.

12. Accordingly, both grounds on which leave to appeal may be granted are available, and section 17(1)(b) does not operate against granting leave to appeal.

(2) Court to which leave to appeal may be granted

13. Such is the importance of this matter that the Judge President constituted a full bench to hear it as a court of first instance.[16] In a similar situation a full bench of the Cape

[14] 2014 (2) SA 42 (SCA) at para 5.
[15] *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* 2015 (1) SA 315 (CC) at para 83.
[16] Para 7 of the judgment indeed records this.

Provincial Division had to consider whether an application for leave to appeal to the Supreme Court of Appeal was competent. In *Derby-Lewis v Chairman of the Committee on Amnesty of the Truth & Reconciliation Commission*,[17] which was determined under the 1959 Act, Comrie J (with whom Hlophe JP and Van Heerden J concurred) held that it was competent for the full bench to grant an application for leave to appeal.[18] Comrie J further confirmed that the standard "reasonable prospect of success" test remains applicable in such circumstances (in other words, the test governing special leave does not apply in such circumstances).[19] The only court to which leave to appeal could be granted, the Court held, was the Supreme Court of Appeal.[20]

14. Similarly, in *Rail Commuter Action Group v Transnet Ltd t/a Metrorail (No 2)* leave to appeal was granted by a full bench to the Supreme Court of Appeal.[21] The judgment on leave to appeal describes the issues involved in the main judgment in terms applicable to the judgment forming the subject-matter of this application

> "extremely difficult issues relating to duties that have been imposed by this Court upon [organs of State, including the Minister of Transport]. Although, in my view, this Court has sought to impose those duties on the narrowest possible basis, it is possible that another Court could well decide that this judgment has in effect constructed a legal bridge which is too wide insofar as the legal obligations imposed upon State institutions are concerned."[22]

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[17] 2001 (3) SA 1033 (C).
[18] *Id* at 488A/B.
[19] *Id* at 488 A/B-B.
[20] *Id* at 488B-C, citing *inter alia S v McMillan* 2001 (1) SACR 148 (W), itself a Full Bench decision.
[21] 2003 (5) SA 593 (C).
[22] *Id* at 595H-I.

15. The Court considered that it would be "arrogant to assume that this Court has spoken the last word" on the issue, and that "[t]hat in itself is justification sufficient to uphold the application for leave to appeal".[23]

16. Under the Superior Courts Act the legal position articulated and applied in the above cases has now been codified. Section 16(1)(a)(ii) provides that an appeal from a court consisting of more than one judge lies to the Supreme Court of Appeal. Accordingly it is competent for a full bench to grant leave to appeal, and any leave to appeal must be granted to the Supreme Court of Appeal.

17. In what follows we apply the above principles to the present application, demonstrating that there are reasonable prospects of another court coming to a different conclusion. In such circumstances a court is "bound, as a matter of duty, to grant leave to appeal."[24] No discretion to refuse leave then exists,[25] and leave must be granted to the Supreme Court of Appeal.[26]

C. Grounds of appeal

18. The notice of application for leave to appeal identifies sixteen respects in which the judgment is reasonably liable to a different conclusion by another court. These conclusions underlie the orders against which this application is directed.[27] The orders rest on the legal premise that a legal duty exists under the Constitution to arrest

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[23] *Id* at 596G.
[24] Van Loggerenberg *Superior Court Practice* (Juta, 2015) Vol 1 at A2–55.
[25] *Ibid.*
[26] Section 16(1)(a)(ii) of the Supreme Court Act.
[27] Only three orders were made. The first two are substantive and the third relates purely to costs.

a sitting head of State who is similarly circumstanced to President Bahir of Sudan;[28] and that section 40(1)(k) of the Criminal Procedure Act 51 of 1977 authorises this.[29] In demonstrating that a reasonable prospect exists that another court may reach a different conclusion on these orders, we address the fundamental suppositions underlying them. In doing so we follow the sequence adopted in the notice of leave to appeal, which itself follows the sequence of the judgment. In the interests of concission, we deal collectively with related grounds of appeal where appropriate.

(1) First and fifth grounds of appeal: The formulation of the question for consideration

19. The Court formulated the question for consideration as follows: "whether a Cabinet Resolution coupled with a Ministerial Notice are capable of suspending this country's duty to arrest a head of State".[30] This, with respect, begs the question.

20. The question is whether there is a legal duty to arrest a serving head of State under South African law. The answer, in short, is that

- section 4(1) of the Immunities Act imposes an absolute duty not to arrest a serving head of State;
- section 15 of the Immunities Act (which was not impugned) in fact criminalises the conduct expected by this Court of Government;
- neither the Implementation Act nor the Rome Statute imposes the duty presumed *a priori* by the Court to exist on Government.

We explain why this is so in dealing with the further grounds of appeal.

[28] First order (reproduced in para 2 of the judgment).
[29] Second order (reproduced in para 2 of the judgment).
[30] Para 1 of the judgment.

(2) Second and third grounds of appeal: The orders are contrary to Government's statutory duties: *not* consistent with the Constitution: and *inconsistent* with Constitutional Court authority

21. The relevant part of section 4(1) of the Immunities Act provides that "[a] head of state is immune from the criminal and civil jurisdiction of the courts of the Republic".[31] It confers an absolute immunity on a serving head of State. It is not subject to or dependent on any immunities or privileges related to "the United Nations, specialised agencies or other international organisations".[32] Nor is it subject to or dependent on any ministerial conferral or agreement pursuant to section 7 of the Act. Section 15 of that Act, in turn, imposes a criminal penalty for violating this absolute immunity.

22. This notwithstanding, this Court subjected a serving head of State to its jurisdiction and process by issuing an order for President Bashir's arrest.[33] This, with respect, is itself a violation of section 15, and of customary international law (which is a further compelling reason to subject the judgment to appeal scrutiny – the only available remedy to Government to protect South Africa from a breach of international law, should the judgment be inconsistent with international law, as Government submits it is for the reasons set out below).[34]

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[31] The full text of section 4(1) reads

"[a] head of state is immune from the criminal and civil jurisdiction of the courts of the Republic, and enjoys such privileges as

(a) head of state enjoy in accordance with the rules of customary international law;
(b) are provided for in any agreement entered into with a state or government whereby immunities and privileges are conferred upon such a head of state; or
(c) may be conferred on such head of state by virtue of section 7(2)."

[32] As section 5 of the Act contemplates.

[33] Order 2, reproduced in para 2 of the judgment.

[34] International law does not distinguish between different arms of government for purposes of South Africa's conduct on the international-law level.

23. The Court also held that to the extent that Government has not taken steps to arrest President Bashir (in other words, to the extent that Government complied with section 4(1) and 15 of the Act, and with customary international law), Government's conduct was inconsistent with the Constitution and invalid.[35] But the Constitution provides that "[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."[36] The relevant Act of Parliament, which is the *lex specialis* on the immunity of serving heads of foreign States, is of course the Immunities Act. As we shall show, it gives effect to the customary international law immunity applicable *ratio personae* in respect of a serving head of State.

24. Neither section 4(1) nor section 15 of the Immunities Act was under constitutional attack in the proceedings leading to the impugned orders. Naturally, neither of them was declared unconstitutional. Accordingly, they could not, in the words of the Constitutional Court, be "bypassed".[37] The orders could only have been granted if a proper constitutional challenge was instituted,[38] and if sections 4(1) and 15 of the Immunities Act had been set aside pursuant to such challenge.[39] In that event the order was subject to confirmation by the Constitutional Court,[40] and did not take any

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[35] Order 1, reproduced in para 2 of the judgment.
[36] Section 232 of the Constitution.
[37] *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) at para 437.
[38] *Minister of Home Affairs v Eisenberg & Associates* 2003 (5) SA 281 (CC) at para 68
"Section 172(1) of the Constitution empowers a Court when deciding a constitutional matter to make 'any order that is just and equitable'. Section 172(1) does not, however, empower it to suspend the provisions of an Act of Parliament or a proclamation which have not been the subject of a proper challenge before it, and it is open to doubt whether a Court has the power to do so. But even if such a power exists (and I express no opinion on that issue) it would have to be exercised most sparingly and only in the most exceptional circumstances."
[39] *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) at para 29
"The difficulty in this case, however, is that, as already indicated, the applicant did not impugn the constitutionality of s 12(1) or any provision of the Act. ... In these circumstances, and in the circumstances of this case, the Act cannot be bypassed."
[40] Section 172(2)(a) of the Constitution.

effect until then[41] (unless interim relief was granted pending a declaration of constitutional invalidity of the Immunities Act).[42] The final orders granted were accordingly

(i) inconsistent with an Act of Parliament giving effect to customary international law, which has domestic legal status under the Constitution;

(ii) as a consequence, inconsistent with the Constitution itself; and

(iii) inconsistent with Constitutional Court caselaw.[43]

25. However, even if it were so that section 4(1) of the Immunities Act does not avail Government (despite our submissions to the contrary),[44] for reasons similar to those identified above section 5 and section 7 of the Immunities Act do. Just as legislation stands until set aside, so too does an exercise of public power pursuant to an empowering provision. Protection had been accorded *by extant executive or administrative action under sections 5 and 7*. The Constitutional Court has confirmed that, likewise, conduct by the Executive "continues to exist until, in due process, it is properly considered and set aside".[45] Even if it is considered unlawful, it may not be

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[41] *Ibid.*

[42] *Ibid.*

[43] Apart from the authorities cited above, see also *Minister of Home Affairs v Eisenberg & Associates* 2003 (5) SA 281 (CC) at paras 62-71 (holding that the order in question in that case was not authorised by section 172 of the Constitution) and *Von Abo v President of the Republic of South Africa* 2009 (5) SA 345 (CC) at para 50, holding that

> "The Constitution carefully apportions powers, duties and obligations to organs of State and its functionaries. It imposes a duty on all who exercise public power to be responsive and accountable and to act in accordance with the law. This implies that a claimant who seeks to vindicate a constitutional right by impugning the conduct of a State functionary must identify the functionary and its impugned conduct with reasonable precision. Courts too, in making orders, have to formulate orders with appropriate precision."

[44] The approach adopted in the judgment (at para 50), holding that Government invoked the wrong provision of the Immunities Act (namely section 5, instead of section 4), itself is at odds with *Yannakou v Apollo Club* 1974 (1) SA 614 (A) at 619B-C. Where possible criminality is involved (in this case as a result of section 15 of the Immunities Act) a court should not adopt a blinkered approach to the particular statutory provision invoked.

[45] *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC) at para 66.

disregarded.[46] This indeed applies with special force to the notice published in the Government Gazette by the Minister pursuant to section 5(3) of the Immunities Act.[47] Yet, despite the notice not being impugned, the Court's order has swept it aside. This is contrary to the constitutional duty resting on courts, as articulated by the Constitutional Court in the context of legislative administrative action.[48]

26. The facts regarding this notice are shortly as follows. On 5 June 2015 the Minister of International Relations and Co-operation (the sixth applicant) published a notice under section 5(3) of the Immunities Act[49] in terms of which she recognised the host agreement entered into between Government and the African Union.[50] The notice stated that its purpose was the granting of immunities and privileges as provided for in the agreement.[51]

27. The effect of section 5(3) as read with section 7(2) is that the Minister is empowered to either

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[46] *Id* at para 105: "a decision taken by the incumbent of the office empowered to take it ... remain[s] effectual until properly set aside. It could not be ignored or withdrawn by internal administrative fiat".

[47] *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) at para 146:

> "Legislative administrative action is a special category of administrative action. It involves the making of laws and the taking of policy decisions for that purpose. Under our Constitution these are decisions which are within the domain of the Executive, to whom Parliament has delegated its law-making power. Whilst the exercise of this power is subject to constitutional control, it is important that the special role of the executive in exercising this power be acknowledged, and that courts 'take care not to usurp' it."

[48] *Ibid.*

[49] Section 5(3) of the Immunities Act provides

> "Any organisation recognised by the Minister for the purposes of this section and any official of such organisation enjoy such privileges and immunities as may be provided for in any agreement entered into with such organisation or as may be conferred on them by virtue of section 7(2)."

Section 7(2), in turn, provides

> "The Minister may in any particular case if it is not expedient to enter into an agreement as contemplated in subsection (1) and if the conferment of immunities and privileges is in the interest of the Republic, confer such immunities and privileges on a person or organisation as may be specified by notice in the Gazette."

[50] Para 3.11 of Government's answering affidavit.

[51] Annexure D to Government's answering affidavit.

(a) recognise any organisation and thereby confer privileges and immunities as provided for in an agreement entered into with that organisation; or

(b) confer such immunities and privileges on a person or organisation as may be specified by notice in the Government Gazette.

28. In the present case, Government's conduct in publishing the notice in the Government Gazette could fall into either of the above categories. This is because an agreement was entered into with the AU which conferred specific privileges and immunities on officials of the AU as well as representatives of member states. Nonetheless, the Court upheld the argument against Government that section 5(3)

> "only deals with the conferral of immunity and privileges on an organisation, which is defined in s. 1 of the Immunities Act as 'an intergovernmental organisation of which two or more states or governments are members and which the Minister has recognised for the purposes of this Act'".[52]

29. There is a reasonable prospect that another court may hold that this is an incorrect interpretation of section 5(3). This is *inter alia* because this interpretation overlooks the latter portion of section 5(3), which adds "or as may be conferred on them by virtue of section 7(2)". (It may also hold that the result at which the Court arrived was with respect markedly anomalous: how, by restricting immunities and privileges to an "organisation" in the sense suggested by the Court, could the organisation function when attendees (on the Court's construction) had none?)

30. The effect of the Minister's conduct in invoking section 5(3) of the Immunities Act was that a decision was taken which was executive or administrative in nature. The

[52] Para 28.10.3 of the judgment.

effect of that decision (whether executive or administrative in nature) is that once it was taken, defined legal consequences flowed from it. These consequences are spelt out in section 5(3) of the Immunities Act: privileges and immunities as provided for in the agreement are conferred.

31. On the well-established principle articulated by the Supreme Court of Appeal in *Oudekraal*,[53] and confirmed by the Constitutional Court in *Kirland*,[54] the Minister's decision, and the legal consequences flowing from it, are valid until set aside by a court of law on review. The effect of this principle is that the decision by the Minister conferring privileges and immunities in accordance with the notice and the agreement exists in fact and continues to have legal effect until set aside by a Court on review.

32. Government's answering affidavit not only confirmed that this decision had <u>not</u> been reviewed and set aside.[55] It clearly invoked this fact, and – self-evidently – the *Oudekraal* principle.[56] The judgment does not record any recognition of the principle or its invocation on behalf of Government. Given the (with respect) failure by the Court even to address the issue explicitly raised on the papers, there is, at the very least, a reasonable prospect that another court may reach a different conclusion if regard is had to this important principle.

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[53] *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) at para 26
> "Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside."

[54] *Supra* at para 102, citing *Camps Bay Ratepayers' and Residents' Association v Harrison* 2011 (4) SA 42 (CC) at para 62; *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) at para 85; and *Njongi v MEC, Department of Welfare, Eastern Cape* 2008 (4) SA 237 (CC) at paras 44-45 as examples of prior Constitutional Court judgments recognising and applying the same principle.

[55] Para 38.2 of the answering affidavit.

[56] Para 38.3 of the answering affidavit.

33. It is further to be observed that the negation of the *Oudekraal* principle is not, with respect, sustainable on the basis of the Court's conclusion as regards the interpretation of the notice and the agreement. Article VIII of the Agreement provides that Government shall extend the privileges and immunities set out in sections C and D, Articles V and VI of the OAU Convention to "the Members of the Commission and Staff Members, the delegates and other representatives of Inter-Governmental Organisations". The Court found that heads of state who attended the meeting of the AU were not included in the ambit of the agreement. It concluded that

> "[o]n its terms, that agreement confers immunity on members and staff of the AU Commission, and on delegates and representatives of Inter-Governmental Organisations. It does not confer immunity on Member States or their representatives or delegates."[57]

34. This conclusion does not, however, take into account the full wording of Article VIII of the Agreement. If this is done, there is a reasonable prospect that another court may conclude that the agreement specifically *incorporates a reference* which, with respect, is not addressed by the Court in its judgment, and hence evidently overlooked. This is to the privileges and immunities set out in sections C and D, Articles V and VI of the OAU Convention. Article V of section C of the OAU Convention entrenches the privileges and immunities of *representatives of member states*. Sub-clause 1(a) specifically provides that these representatives shall enjoy immunity from personal arrest. Addressing the explicit incorporation by reference of precisely "representatives of member states" not noted by this Court, another court may hold that it is sufficiently clear from the express reference to sections C and D of

[57] Para 28.10.1 of the judgment.

the OAU Convention that the Agreement is intended to incorporate the immunities and privileges of member states.

35. Moreover, the use of the word "delegate" further reinforces this. The ordinary grammatical meaning of the word "delegate" connotes "[a] person sent or authorised to represent others, in particular an elected representative sent to a conference".[58] Applying the fundamental principle of statutory interpretation that the words in a statute must be given their ordinary grammatical meaning (unless to do so would result in an absurdity),[59] there is a good prospect that another court may come to a different conclusion. There is, indeed, no suggestion in the papers that the AU summit was anything other than a conference or that President Bashir attended it on a frolic of his own.[60] With respect, on a properly contextual and purposive reading, who else would be the contemplated delegates and representatives of the African Union? Just its executive and administrative staff? We submit that another court may reasonably reject that reasoning on its own merits, too.

36. We accordingly submit that for any or all of these separate reasons the second and third grounds of appeal bear good prospects of success, and that each of the three orders is liable to being set aside on appeal.

(3) Fourth ground of appeal: Immunity precludes arrest

37. The position under international law is clear: heads of State enjoy immunity, and this "derives from deeply rooted doctrines of international law aimed at facilitating

[58] Oxford Advanced Learners Dictionary.
[59] *Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC) at para 28.
[60] But even if he did, his personal immunity (*ratione personae*) – which operates *ex lege* – is not affected.

relations between States, in part by preventing the authorities of one jurisdiction from interfering with the sovereignty of another."[61] Thus, under international law, a serving head of State is afforded immunity, which includes inviolability.[62] Inviolability is "the highest and most impervious form of immunity".[63] "Inviolability in modern international law is a status accorded to the premises, persons or property physically present in the territory of a sovereign State but not subject to its jurisdiction in the ordinary way."[64] The latter State "is under a duty to abstain from exercising any sovereign rights, *in particular law enforcement rights*, in respect of inviolable ... persons".[65]

38. Applying this principle, in *Pinochet* the House of Lords held that immunity *ratione personae* continues to apply except only before an international tribunal whose constitutive treaty (to which the sending State is a signatory) abolishes immunity.[66] Thus, immunity *ratione personae* before a domestic court remains intact. The same legal position had been accepted not only by comparable domestic courts,[67] but also

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[61] Broomhall *International Justice & The International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford University Press, 2004) at 129.
[62] *Ibid.*
[63] *Id* at 130.
[64] *Id* at 129, quoting Denza *Diplomatic Law: A commentary on the Vienna Convention on Diplomatic relations* 2nd ed (Clarendon, 1998) at 112.
[65] *Id.*
[66] *R v Bow Metropolitan Stipendary Magistrate, ex parte Pinochet Ugarte (No 3)* [1999] 2 All ER 97 (HL) at 114, 120-121 and 189. For a recent reported judgment applying it, see *Harb v Prince Abdul Aziz Bin Fahd Bin Abdul Aziz* [2015] 1 All ER 77.
[67] As the *Report of the International Law Commission on the work of its sixty-fifth session, 6 May to 7 June and 8 July to 9 August 2013* (available at http://legal.un.org/docs/?path=../ilc/reports/2013/english/chp5.pdf&lang=EFSRAC) at fn 267 reflects

> "National courts have on many occasions cited the immunity *ratione personae* from foreign criminal jurisdiction of the Head of State as grounds for their decisions on substance and their findings that criminal proceedings cannot be brought against an incumbent Head of State. In this regard, see *Re Honecker*, Federal Supreme Court, Second Criminal Chamber (Federal Republic of Germany), Judgment of 14 December 1984 (Case No. 2 ARs 252/84) reproduced in *International Law Reports*, vol. 80, pp. 365–366; *Rey de Marruecos, Audiencia Nacional* (Spain), *Auto de la Sala de lo Penal*, 23 December 1998; *Kadhafi, Cour de cassation (Chambre criminelle)* (France), Judgment No. 1414 of 13 March 2001 reproduced in *Revue générale de droit international public*, vol. 105 (2001), p. 474; English version in *International Law Reports*, vol. 125, p. 508–510; *Fidel Castro, Audiencia Nacional* (Spain), *Auto del Pleno de la Sala de lo Penal*, 13 December 2007 (the tribunal had already made a

by an acclaimed judgment of the International Court of Justice. In its celebrated *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*[68] the ICJ confirmed that

- "it is firmly established that ... certain holders of high-ranking office in a State, such as the head of State ..., enjoy immunities from jurisdiction in other States, both civil and criminal";[69]

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similar ruling in two other cases against Fidel Castro, in 1998 and 2005); and *Case against Paul Kagame, Audiencia Nacional, Juzgado de Instrucción No. 4* (Spain), Judgment of 6 February 2008. Again in the context of criminal proceedings, but this time as *obiter dicta*, various courts have on numerous occasions recognized immunity *ratione personae* from foreign criminal jurisdiction in general. In those cases, the national courts have not referred to the immunity of a specific Head of State, either because the person had completed his or her term of office and was no longer an incumbent Head of State or because the person was not and had never been a Head of State. See: *Pinochet (solicitud de extradición), Audiencia Nacional, Juzgado de Instrucción No. 5* (Spain), request for extradition of 3 November 1998; *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet Ugarte (Pinochet* (No. 3)), House of Lords (United Kingdom), Judgment of 24 March 1999 reproduced in *International Legal Materials*, vol. 38 (1999), pp. 581–663; *H.S.A. et al. v. S.A. et al. (Indictment of Ariel Sharon, Amos Yaron and others)*, Court of Cassation (Belgium), Judgment of 12 February 2003 (P-02-1139) reproduced in ILM, vol. 42, No. 3 (2003), pp. 596–605; *Scilingo, Audiencia Nacional, Sala de lo penal*, third section (Spain), Judgment of 27 June 2003; *Association Fédération nationale des victimes d'accidents collectifs "FONVAC" SOS catastrophe"; Association des familles des victimes du Joola, Cour de cassation, Chambre criminelle* (France), Judgment of 19 January 2010 (09-84818); *Khurts Bat v. Investigating Judge of the German Federal Court*, High Court of Justice, Queen's Bench Division Administrative Court (United Kingdom), Judgment of 29 July 2012 ([2011] EWHC 2020 (Admin)); *Nezzar*, Federal Criminal Tribunal (Switzerland), Judgment of 25 July 2012 (BB.2011-140). It should be emphasized that national courts have never stated that a Head of State does not have immunity from criminal jurisdiction, and that this immunity is *ratione personae*. It must also be kept in mind that civil jurisdiction, under which there is a greater number of judicial decisions, consistently recognizes the immunity *ratione personae* from jurisdiction of Heads of State. For example, see: *Kline v. Kaneko*, Supreme Court of the State of New York, Judgment of 31 October 1988 (141 Misc.2d 787); *Mobutu v. SA Cotoni*, Civil Court of Brussels, Judgment of 29 December 1988; *Ferdinand et Imelda Marcos v. Office fédéral de la police*, Federal Tribunal (Switzerland), Judgment of 2 November 1989; *Lafontant v. Aristide*, United States District Court for the Eastern District of New York (United States), Judgment of 27 January 1994; *W. v. Prince of Liechtenstein*, Supreme Court (Austria), Judgment of 14 February 2001 (7 Ob 316/00x); *Tachiona v. Mugabe ("Tachiona I")*, District Court for the Southern District of New York, Judgment of 30 October 2001 (169 F.Supp.2d 259); *Fotso v. Republic of Cameroon*, District Court of Oregon (United States), Judgment of 22 February 2013 (6:12CV 1415-TC)."

See also *id* at fn 279 referring further to the following judgments by national courts (recognising the immunity from foreign criminal jurisdiction of heads of Government and Ministers for Foreign Affairs)

"*Ali Ali Reza v. Grimpel*, Court of Appeal of Paris (France), Judgment of 28 April 1961 (implicitly recognizes, *a contrario*, the immunity of a Minister for Foreign Affairs) reproduced in ILR, vol. 47, pp. 275–277 (original French version in RGDIP (1962), p. 418, translated version in ILR, vol. 47, p. 276); *Chong Boon Kim v. Kim Tong Shik and David Kim*, Circuit Court of the First Circuit (State of Hawaii) (United States), Judgment of 9 September 1963, reproduced in *American Journal of International Law*, vol. 58 (1964), pp. 186–187; *Saltany and others v. Reagan and others*, District Court for the District of Columbia (United States), Judgment of 23 December 1988, 702 F.Supp. 319"

[68] (2002) ICJ Rep 3; reaffirmed in *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* (2008) ICJ Rep 177.

[69] *Id* at para 51.

- "article 32 [of the Vienna Convention on Diplomatic Relations (1961) provides] that only the sending State may waive such immunity", and this "reflects customary international law";[70]
- "the functions of a Minister of Foreign Affairs [which is one of the high-ranking officials like a head of State in whom immunity vests][71] are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability";[72]
- "there exists under customary international law [no] form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers of Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity";[73]
- "the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction";[74]
- "although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law";[75] and

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[70] *Id* at para 52.
[71] As Foakes *The Position of Heads of State and Senior Officials in International Law* (Oxford University Press, 2014) at 22 points out, the ICJ's judgment dealt with a Minister of Foreign Affairs, but "appl[ies], *a fortiori*, to heads of Government."
[72] *Id* at para 54.
[73] *Id* at para 58.
[74] *Id* at para 58.
[75] *Id* at para 59.

- immunity is retained "before the courts of a foreign State, even where those courts exercise such jurisdiction under these conventions."[76]

39. The International Court of Justice's judgment further explains that article 27 of the Rome Statute does not affect immunity *ratione personae* before a domestic court.[77] Article 27 deals exclusively with immunity before the ICC itself, and in any event can only operate to defeat the immunity *ratione personae* of a head of a State which is a Rome Statute signatory.[78] This is unsurprising, because privity is a basic principle of treaty law,[79] and the Rome Statute is a treaty. Thus it cannot affect the position of third parties.

40. Consistent with this fundamental principle of treaty law (privity) and customary international law (immunity, itself derivative from one of the essential pillars of international law: sovereignty),[80] the Rome Statute does not require member States to *violate the sovereign immunity of third party States' heads of State*. The Court with respect did not consider this. Articles 86 and 89 of the Rome Statute are internally qualified. Article 86 is subject to other provisions of the Statute, and article 89 is subject to Part 9 of the Statute. Accordingly they are subject to article 98(1) of the Statute. The effect of article 98(1) is that a request by the ICC which would require South Africa to act inconsistently with the immunity of Sudan's President may not be

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[76] *Ibid.*
[77] *Id* at para 61.
[78] Broomhall *op cit* at 141.
[79] Article 34 of the Vienna Convention on the Law of Treaties (1969) codifies the position under customary international law. It provides that "[a] treaty does not create either obligations or rights for a third State without its consent."
[80] In fact, Crawford *Brownlie's Principles of Public International Law* 8th ed (Oxford University Press, 2012) at 447 states that "[t]he sovereignty of states represent the basic constitutional doctrine of the law of nations."

made by the ICC "unless the [ICC] can first obtain the cooperation of [Sudan] for the waiver of the immunity".

41. It is therefore unsurprising that no express provision in the Implementation Act seeks to undo that which the Rome Statute itself preserves: immunity *ratione personae* of third party States' heads of State. When regard is had to the principles set out above, there is a reasonable prospect that another court would not interpret the Implementation Act as having a legal result which is at odds with international law. This is because the Implementation Act itself requires a court to consider and apply conventional international law (in particular the Rome Statute);[81] customary international law;[82] and comparable foreign law.[83] On analysis, another court may readily come to a different conclusion on the basis of each of these components of the "applicable law".[84] Section 4(2) of the Act does not detract from this, because it deals only with criminal responsibility.[85] As the International Court of Justice confirmed, "[i]mmunity from criminal jurisdiction and individual criminal responsibility are quite different concepts."[86]

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[81] Section 2(a) of the Implementation Act.
[82] Section 2(b) of the Implementation Act.
[83] Section 2(c) of the Implementation Act.
[84] Heading to section 2 of the Implementation Act.
[85] Section 4(2) 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) being a member of a security service or armed force, was under a legal obligation to obey a manifestly unlawful order of a government or superior,
> 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."

[86] *Arrest Warrant case supra* at para 60.

(4) Residual grounds of appeal

42. The sixth ground of appeal reinforces the second, third and fourth. This is because once it is accepted that under domestic and international law President Bashir "enjoyed some kind of diplomatic immunity from arrest, or from this Court's jurisdiction" (as the respondent did),[87] a dispositive – and correct – concession is made. This is because if it is conceded that no obligation to arrest existed in such circumstances, then there is no legal basis for any of the orders.

43. The seventh ground of appeal is subsumed by the third. Likewise the eighth ground of appeal is subsumed by the fourth.

44. The ninth and tenth grounds of appeal reinforce the second, third and fourth grounds. To this should be added a further considerations identified in the notice of application for leave to appeal. As mentioned, article 98 of the Rome Statute itself preserves immunity. It is accordingly wrong to construe the Rome Statute as "exclude[ing]" immunity *ratione personae*, which – the International Court of Justice held – is "firmly established" in international law.[88] The same applies to the conclusion on waiver: both as a matter of fact[89] and law[90] there is every prospect that another court may reach a different conclusion.

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[87] Para 23 of the judgment, which accurately records para 11 of the respondent's heads of argument.
[88] *Arrest Warrant case supra* at para 51.
[89] Para 3.26 of Government's answering affidavit and para 3.2 of Government's supporting affidavit confirm that Sudan had in fact actively requested that its President be afforded immunity. In such circumstances waiver cannot be presumed, especially not on the established legal test (*Laws v Rutherford* 1924 AD 261 at 263; *Borstlap v Spangenberg* 1974 (3) SA 695 (A) at 704G).
[90] Section 8(1) of the Immunities Act makes it clear that it is a sending State itself which is the entity capable of waiving immunity. Section 8(3) requires that any waiver "must *always* be express *and* in writing" (emphasis added). No written instrument expressing any intention to waive immunity exists. Naturally none formed part of the motion record. Thus a finding of waiver is precluded under South African law.

45. The eleventh ground of appeal reinforces the second and third grounds. To this may be added the effect of the principle of legality. It is that the Minister has no power in respect of immunities beyond that conferred by the Immunities Act itself.[91] The Minister accordingly has no power, on the one hand, to detract from the immunity *ratione personae* of a serving head of State. Nor did the Minister purport to do so. Nothing that the Minister could or intended to do diluted the immunity existing *ex lege* under section 4(1) of the Immunities Act and customary international law. On the other hand, to the extent that this Court considered the ministerial notice invalid (for seeking to abrogate the law),[92] the notice stood until it was set aside.[93]

46. The twelfth ground of appeal straddles the second, third and fourth. It is fully covered by them. In short, if regard is had to the principles confirmed by the International Court of Justice, there is every prospect that another court may come to a different conclusion. Indeed, more than twenty national courts around the world have applied these principles and have apparently come to a conclusion contrary to this Court's.[94]

47. The thirteenth ground of appeal reinforces the fourth. As the notice of application for leave to appeal reflects, the judgment invoked by this Court for its conclusion on immunity in fact contradicts it in three respects. First, the ICC Pre-Trial Chamber's judgment in *On the Co-operation of the DRC regarding Omar Al Bashir's arrest and*

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[91] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) at paras 40 and 56.

[92] See, however, para 3.6 of Government's supporting affidavit. It reflects that Cabinet was careful to obtain legal advice on the effect of the host agreement and its implications for immunity of a head of State. The facts contradict any impression that Cabinet or the Minister intended to "suspend" the law. Instead, the Minister applied the Immunities Act.

[93] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* (1) SA 343 (CC) at paras 47-49 and 54, holding that in the absence of a challenge to the validity of a ministerial notice it had to be accepted as valid, and that the exercise of public legislative power in terms of the notice was binding, authorised by law, and had the force of law.

[94] See again the examples provided in the International Law Commission's report cited in fn 67 above.

Surrender confirms the conclusion by the International Court of Justice. It is that article 27(2) of the Rome Statute deals with the ICC "exercising its [own] jurisdiction". Article 27(2) does not deal with immunity before a domestic court. Second, the ICC Pre-Trial Chamber's judgment itself reiterates that "under international law a sitting head of State enjoys personal immunities from criminal jurisdiction and inviolability before national courts of foreign States even when suspected of having committed one or more of the crimes that fall within the jurisdiction of the Court".[95] Third, the ICC Pre-Trial Chamber's judgment itself accepted that the application of "article 27(2) of the Statute should, in principle, be confined to those State Parties wh[ich] have accepted it".[96] It is, furthermore, contrary to both international law and comparative law to reason, as the Court did, that "[t]he Rome Statute gives effect to international human rights law and enables the prosecution of customary international law crimes. As such, its provisions enjoy pre-eminence in our constitutional regime."[97] As the International Court of Justice held, sovereign immunity "is one of the fundamental principles of the international legal order."[98] It is so fundamental that "even on the assumption that the proceedings in [domestic] courts involved violations of *jus cogens* rules, the applicability of the customary international law on State immunity was not affected".[99]

48. The fourteenth, like the sixth, ground of appeal flows from the second and fourth. For present purposes it does not require further analysis. We would add, however, that if the mere *issue* of a warrant violates the immunity of a serving head of State (as the

[95] Para 25 of the Pre-Trial Chamber's judgment.
[96] Para 26 of the Pre-Trial Chamber's judgment.
[97] Para 28.13.1 of this Court's judgment.
[98] *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* ICJ Reports 2012 at para 57.
[99] *Id* at para 97. See further paras 93-96 for a collection of previous ICJ authorities and a list of domestic judgments applying the same principle.

ICJ held is the legal position),[100] then *a fortiori* would effecting an arrest. Ordering such an arrest (and this even without a warrant) is constitutionally problematical. It imposes domestic legal obligations under a court order which is inconsistent with domestic legislation and international law; and it ventures into a sensitive area of foreign policy, which is within the heartland of the Executive arm of government.[101] There is, at its lowest, a reasonable prospect that another court may hold that this Court should have exercised its remedial powers under section 172 of the Constitution differently.

49. This forms the subject-matter of the fifteenth ground of appeal, which itself is underscored by the second and third review grounds. In short, to the extent that no legal basis exists for the order, no order should or could have been made at all; but even to the extent that any order was legally tenable, appropriate relief should have been granted suitable to the urgent circumstances of the case and the particularly sensitive field of constitutional law involved.

50. Finally, as regards the sixteenth ground of appeal, it supports the first. No evidential basis existed for the factual issues forming part of the judgment. Whether a valid basis for judicial notice (to which the judgment resorts)[102] existed is itself a matter on which another court may readily reach a different conclusion.[103] Another court may furthermore consider that such facts which are established on the court papers contradict the inference drawn from newspaper reports (as regards which Government

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[100] *Arrest Warrant case supra* at para 60.
[101] *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC) at para 172 (per Ngcobo J, as he then was).
[102] Para 8 of the judgment.
[103] For the relevant principles see *Master Currency (Pty) Ltd v Commissioner, South African Revenue Service* 2014 (6) SA 66 (SCA) at para 8, citing Zeffertt *et al The South African Law of Evidence* 5th ed (2003) at 715*ff*. See, too, Joubert (ed) *The Law of South Africa* 2nd ed (LexisNexis, 2005) vol 9 para 821.

was not afforded an effective opportunity to address the Court).[104] The inference drawn is that President Bashir's having left South Africa proves "a clear violation of the order handed down by Fabricius J".[105] Fabricius J's order was handed down after 15h00 the previous day.[106] The respondent itself conceded that Government "will, as a practical reality, need a number of hours or perhaps even days to carry out the arrest".[107] The judgment states that "President Bahir had most probably left the country ... just before 13h00" on the next day,[108] on other words less than a day after the Fabricius J order was handed down. Thus the Court's inference that Government was able to prevent President Bashir's departure, but deliberately repudiated the order is contrary to the evidence before court. In such circumstances there are good prospects that another court may come to a different conclusion on Government's compliance with the interim order.[109] It is also a very serious conclusion: it is one which the Court itself considered could precipitate a constitutional crisis.[110] It is in the interests of justice and constitutional democracy that it be considered *de novo* by a court of appeal.

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[104] Despite affording government an opportunity to file an explanatory affidavit within seven days after the hearing (which was filed on 25 June 2015), the judgment reflects that it was handed down at 11h30 on 24 June 2015.

[105] Para 7 of the judgment. At para 37.2 the judgment repeats that "there are clear indications that the order of Sunday 14 June 2015 was not complied with". While this is qualified by the introductory words "[a]t this stage", it nonetheless amounts to a conclusion which the Court record it had reached "on a common sense approach". The judgment concludes by repeating (in para 39) that "the departure of President Bashir form [sic] this country before the finalisation of this application and in the full awareness of the explicit order of Sunday 14 June 2015, objectively viewed, demonstrates non-compliance with that order. For this reason we also find it prudent to invite the NDPP to consider whether criminal proceedings are appropriate."

[106] Para 6 of the judgment.

[107] Para 50 of the founding affidavit.

[108] Para 8 of the judgment.

[109] *South African Post Office v De Lacy* 2009 (5) SA 255 (SCA) at para 35

> "The process of inferential reasoning calls for an evaluation of all the evidence and not merely selected parts. The inference that is sought to be drawn must be 'consistent with all the proved facts: If it is not, then the inference cannot be drawn' [fn 14: *R v Blom* 1939 AD 188 at 202-203] and it must be the 'more natural, or plausible, conclusion from amongst several conceivable ones' [fn 15: *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A) at 159B-D, citing Wigmore on Evidence 3 ed para 32] when measured against the probabilities."

[110] Para 37.2 of the judgment.

D. Conclusion

51. This Court's judgment is unprecedented. It stands in isolation from judgments by the International Court of Justice and highest courts in many comparable jurisdictions. For instance, courts of the United States recognised immunity *ratione personae* of the Prince of Wales,[111] the UK House of Lords recognised immunity *ratione personae* of Senator Augusto Pinochet Ugarte, and the French *Cour de Cassation* has done the same in respect of Colonel Muammar Muhammad Abu Minyar al-Gaddafi.[112] In contrast, this Court has imposed a duty on South Africa to arrest a serving head of State of another African country (and presumably all other similarly circumstanced heads of sovereign States).

52. The question in this application is whether this legal terminus should prevail, especially after a judgment rendered under very urgent circumstances which prevented not only the parties but also the Court from a full ventilation of the legal issues involved. We submit that there is every reason to afford both parties an opportunity to ventilate the decision on appeal to the Supreme Court of Appeal. If this is not permitted, the practical legal effect will be that the question will never realistically arise again before a South African court, because no head of State liable to arrest would ever again enter South Africa. The implications for South Africa's conduct of its international relations are both clear and profound.

53. We accordingly ask that leave to appeal be granted to the Supreme Court of Appeal, with the usual order as to costs: that these be costs in the appeal.

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[111] *Kilroy v Windsor* (Civ. No. C-78-291).
[112] Judgment No. 1414 of 13 March 2001.

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12 August 2015

Cour
Pénale
Internationale

International
Criminal
Court

Original: English

No.: ICC-02/05-01/09
Date: 4 March 2009

PRE-TRIAL CHAMBER I

Before: Judge Akua Kuenyehia, Presiding Judge
Judge Anita Ušacka
Judge Sylvia Steiner

SITUATION IN DAFUR, SUDAN

IN THE CASE OF
THE PROSECUTOR v. OMAR HASSAN AHMAD AL BASHIR ("OMAR AL BASHIR")

Public Document

Warrant of Arrest for Omar Hassan Ahmad Al Bashir

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

The Office of the Prosecutor
Mr Luis Moreno Ocampo, Prosecutor
Mr Essa Faal, Senior Trial Lawyer

Counsel for the Defence

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar
Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

PRE-TRIAL CHAMBER I of the International Criminal Court ("the Chamber" and "the Court" respectively);

HAVING EXAMINED the "Prosecution's Application under Article 58" ("the Prosecution Application"), filed by the Prosecution on 14 July 2008 in the record of the situation in Darfur, Sudan ("the Darfur situation") requesting the issuance of a warrant for the arrest of Omar Hassan Ahmad Al Bashir (hereinafter referred to as "Omar Al Bashir") for genocide, crimes against humanity and war crimes;[1]

HAVING EXAMINED the supporting material and other information submitted by the Prosecution;[2]

NOTING the "Decision on the Prosecution's Request for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir"[3] in which the Chamber held that it was satisfied that there are reasonable grounds to believe that Omar Al Bashir is criminally responsible under article 25(3)(a) of the Statute as an indirect perpetrator, or as an indirect co-perpetrator,[4] for war crimes and crimes against humanity and that his arrest appears to be necessary under article 58(1)(b) of the *Rome Statute* ("the Statute");

NOTING articles 19 and 58 of the Statute;

CONSIDERING that, on the basis of the material provided by the Prosecution in support of the Prosecution Application and without prejudice to any subsequent determination that may be made under article 19 of the Statute, the case against Omar Al Bashir falls within the jurisdiction of the Court;

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[1] ICC-02/05-151-US-Exp; ICC-02/05-151-US-Exp-Anxs1-89; Corrigendum ICC-02/05-151-US-Exp-Corr and Corrigendum ICC-02/05-151-US-Exp-Corr-Anxs1 & 2; and Public redacted version ICC-02/05-157 and ICC-02/05-157-AnxA.
[2] ICC-02/05-161 and ICC-02/05-161-Conf-AnxsA-J; ICC-02/05-179 and ICC-02/05-179-Conf-Exp-Anxs1-5; ICC-02/05-183-US-Exp and ICC-02/05-183-Conf-Exp-AnxsA-E.
[3] ICC-02/05-01/09-1.
[4] *See* Partly Dissenting Opinion of Judge Anita Ušacka to the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", Part IV.

CONSIDERING that, on the basis of the material provided by the Prosecution in support of the Prosecution Application, there is no ostensible cause or self-evident factor to impel the Chamber to exercise its discretion under article 19(1) of the Statute to determine at this stage the admissibility of the case against Omar Al Bashir;

CONSIDERING that there are reasonable grounds to believe that from March 2003 to at least 14 July 2008, a protracted armed conflict not of an international character within the meaning of article 8(2)(f) of the Statute existed in Darfur between the Government of Sudan ("the GoS") and several organised armed groups, in particular the Sudanese Liberation Movement/Army ("the SLM/A") and the Justice and Equality Movement ("the JEM");

CONSIDERING that there are reasonable grounds to believe: (i) that soon after the attack on El Fasher airport in April 2003, the GoS issued a general call for the mobilisation of the Janjaweed Militia in response to the activities of the SLM/A, the JEM and other armed opposition groups in Darfur, and thereafter conducted, through GoS forces, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Force, the National Intelligence and Security Service ("the NISS") and the Humanitarian Aid Commission ("the HAC"), a counter-insurgency campaign throughout the Darfur region against the said armed opposition groups; and (ii) that the counter-insurgency campaign continued until the date of the filing of the Prosecution Application on 14 July 2008;

CONSIDERING that there are reasonable grounds to believe: (i) that a core component of the GoS counter-insurgency campaign was the unlawful attack on that part of the civilian population of Darfur – belonging largely to the Fur, Masalit and Zaghawa groups[5] – perceived by the GoS as being close to the SLM/A, the JEM and the other armed groups opposing the GoS in the ongoing armed conflict in Darfur; and (ii) that, as part of this core component of the counter-insurgency campaign, GoS

[5] *See* Partly Dissenting Opinion of Judge Anita Ušacka to the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", Part III. B.

forces systematically committed acts of pillaging after the seizure of the towns and villages that were subject to their attacks;[6]

CONSIDERING, therefore, that there are reasonable grounds to believe that from soon after the April 2003 attack in El Fasher airport until 14 July 2008, war crimes within the meaning of articles 8(2)(e)(i) and 8(2)(e)(v) of the Statute were committed by GoS forces, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Force, the NISS and the HAC, as part of the above-mentioned GoS counter-insurgency campaign;

CONSIDERING, further, that there are reasonable grounds to believe that, insofar as it was a core component of the GoS counter-insurgency campaign, there was a GoS policy to unlawfully attack that part of the civilian population of Darfur – belonging largely to the Fur, Masalit and Zaghawa groups – perceived by the GoS as being close to the SLM/A, the JEM and other armed groups opposing the GoS in the ongoing armed conflict in Darfur;

CONSIDERING that there are reasonable grounds to believe that the unlawful attack on the above-mentioned part of the civilian population of Darfur was (i) widespread, as it affected, at least, hundreds of thousands of individuals and took place across large swathes of the territory of the Darfur region; and (ii) systematic, as the acts of violence involved followed, to a considerable extent, a similar pattern;

CONSIDERING that there are reasonable grounds to believe that, as part of the GoS's unlawful attack on the above-mentioned part of the civilian population of Darfur and with knowledge of such attack, GoS forces subjected, throughout the

[6] Including in *inter alia* (i) the first attack on Kodoom on or about 15 August 2003; (ii) the second attack on Kodoom on or about 31 August 2003; (iii) the attack on Bindisi on or about 15 August 2003; (iv) the aerial attack on Mukjar between August and September 2003; (v) the attack on Arawala on or about 10 December 2003; (vi) the attack on Shattaya town and its surrounding villages (including Kailek) in February 2004; (vii) the attack on Muhajeriya on or about 8 October 2007: (viii) the attacks on Saraf Jidad on 7, 12 and 24 January 2008; (ix) the attack on Silea on 8 February 2008; (x) the attack on Sirba on 8 February 2008; and (xi) the attack on Abu Suruj on 8 February 2008; (xii) the attack to Jebel Moon between 18 and 22 February 2008.

Darfur region, thousands of civilians, belonging primarily to the Fur, Masalit and Zaghawa groups, to acts of murder and extermination;[7]

CONSIDERING that there are also reasonable grounds to believe that, as part of the GoS's unlawful attack on the above-mentioned part of the civilian population of Darfur and with knowledge of such attack, GoS forces subjected, throughout the Darfur region, (i) hundreds of thousands of civilians, belonging primarily to the Fur, Masalit and Zaghawa groups, to acts of forcible transfer;[8] (ii) thousands of civilian women, belonging primarily to these groups, to acts of rape;[9] and (iii) civilians, belonging primarily to the same groups, to acts of torture;[10]

CONSIDERING therefore that there are reasonable grounds to believe that, from soon after the April 2003 attack on El Fasher airport until 14 July 2008, GoS forces, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Force, the NISS and the HAC, committed crimes against humanity consisting of murder, extermination, forcible transfer, torture and rape, within the meaning of articles 7(1)(a), (b), (d), (f) and (g) respectively of the Statute, throughout the Darfur region;

CONSIDERING that there are reasonable grounds to believe that Omar Al Bashir has been the *de jure* and *de facto* President of the State of Sudan and Commander-in-

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[7] Including in *inter alia* (i) the towns of Kodoom, Bindisi, Mukjar and Arawala and surrounding villages in Wadi Salih, Mukjar and Garsila-Deleig localities in West Darfur between August and December 2003; (ii) the towns of Shattaya and Kailek in South Darfur in February and March 2004; (iii) between 89 and 92 mainly Zaghawa, Masalit and Misseriya Jebel towns and villages in Buram Locality in South Darfur between November 2005 and September 2006; (iv) the town of Muhajeriya in the Yasin locality in South Darfur on or about 8 October 2007; (v) the towns of Saraf Jidad, Abu Suruj, Sirba, Jebel Moon and Silea towns in Kulbus locality in West Darfur between January and February 2008; and (vi) Shegeg Karo and al-Ain areas in May 2008.

[8] Including in *inter alia* (i) the towns of Kodoom, Bindisi, Mukjar and Arawala and surrounding villages in Wadi Salih, Mukjar and Garsila-Deleig localities in West Darfur between August and December 2003; (ii) the towns of Shattaya and Kailek in South Darfur in February and March 2004; (iii) between 89 and 92 mainly Zaghawa, Masalit and Misseriya Jebel towns and villages in Buram Locality in South Darfur between November 2005 and September 2006; (iv) the town of Muhajeriya in the Yasin locality in South Darfur on or about 8 October 2007; and (v) the towns of Saraf Jidad, Abu Suruj, Sirba, Jebel Moon and Silea towns in Kulbus locality in West Darfur between January and February 2008.

[9] Including in *inter alia* (i) the towns of Bindisi and Arawala in West Darfur between August and December 2003; (ii) the town of Kailek in South Darfur in February and March 2004; and (iii) the towns of Sirba and Silea in Kulbus locality in West Darfur between January and February 2008.

[10] Including in *inter alia*: (i) the town of Mukjar in West Darfur in August 2003; (ii) the town of Kailek in South Darfur in March 2004; and (iii) the town of Jebel Moon in Kulbus locality in West Darfur in February 2008.

Chief of the Sudanese Armed Forces from March 2003 to 14 July 2008, and that, in that position, he played an essential role in coordinating, with other high-ranking Sudanese political and military leaders, the design and implementation of the above-mentioned GoS counter-insurgency campaign;

CONSIDERING, further, that the Chamber finds, in the alternative, that there are reasonable grounds to believe: (i) that the role of Omar Al Bashir went beyond coordinating the design and implementation of the common plan; (ii) that he was in full control of all branches of the "apparatus" of the State of Sudan, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Force, the NISS and the HAC; and (iii) that he used such control to secure the implementation of the common plan;

CONSIDERING that, for the above reasons, there are reasonable grounds to believe that Omar Al Bashir is criminally responsible as an indirect perpetrator, or as an indirect co-perpetrator,[11] under article 25(3)(a) of the Statute, for:

i. intentionally directing attacks against a civilian population as such or against individual civilians not taking direct part in hostilities as a war crime, within the meaning of article 8(2)(e)(i) of the Statute;
ii. pillage as a war crime, within the meaning of article 8(2)(e)(v) of the Statute;
iii. murder as a crime against humanity, within the meaning of article 7(1)(a) of the Statute;
iv. extermination as a crime against humanity, within the meaning of article 7(1)(b) of the Statute;
v. forcible transfer as a crime against humanity, within the meaning of article 7(1)(d) of the Statute;

[11] *See* Partly Dissenting Opinion of Judge Anita Ušacka to the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", Part IV.

vi. torture as a crime against humanity, within the meaning of article 7(1)(f) of the Statute; and

vii. rape as a crime against humanity, within the meaning of article 7(1)(g) of the Statute;

CONSIDERING that, under article 58(1) of the Statute, the arrest of Omar Al Bashir appears necessary at this stage to ensure (i) that he will appear before the Court; (ii) that he will not obstruct or endanger the ongoing investigation into the crimes for which he is allegedly responsible under the Statute; and (iii) that he will not continue with the commission of the above-mentioned crimes;

FOR THESE REASONS,

HEREBY ISSUES:

A WARRANT OF ARREST for **OMAR AL BASHIR**, a male, who is a national of the State of Sudan, born on 1 January 1944 in Hoshe Bannaga, Shendi Governorate, in the Sudan, member of the Jaáli tribe of Northern Sudan, President of the Republic of the Sudan since his appointment by the RCC-NS on 16 October 1993 and elected as such successively since 1 April 1996 and whose name is also spelt Omar al-Bashir, Omer Hassan Ahmed El Bashire, Omar al-Bashir, Omar al-Beshir, Omar el-Bashir, Omer Albasheer, Omar Elbashir and Omar Hassan Ahmad el-Béshir.

Done in English, Arabic and French, the English version being authoritative.

Judge Akua Kuenyehia
Presiding Judge

Judge Anita Ušacka **Judge Sylvia Steiner**

Dated this Wednesday, 4 March 2009
At The Hague, The Netherlands

KRK 4

Cour
Pénale
Internationale

International
Criminal
Court

Original: English

No.: ICC-02/05-01/09
Date: 4 March 2009

PRE-TRIAL CHAMBER I

Before: Judge Akua Kuenyehia, Presiding Judge
Judge Anita Ušacka
Judge Sylvia Steiner

SITUATION IN DAFUR, SUDAN

IN THE CASE OF
THE PROSECUTOR v. OMAR HASSAN AHMAD AL BASHIR ("OMAR AL BASHIR")

Public Document

Warrant of Arrest for Omar Hassan Ahmad Al Bashir

In terms of Section 8(2) of Act 27 of 2002 (Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 r.w. Article 89(1) of the Rome Statute of the International Criminal Court, the warrant of arrest for Omar Hassan Ahmad Al Bashir is hereby endorsed for execution in any part of the Republic of South Africa by the Chief Magistrate: Pretoria.

Desmond Nair.

No. ICC-02/05-01/09

LANDDROS
PRIVAATSAK/PRIVATE BAG X61
2009 -05- 07
PRETORIA 0001
MAGISTRATE

4 March 2009

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12/5/09
DIRECTOR-GENERAL: JUSTICE

KRK 5

Cour
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Internationale

International
Criminal
Court

Original: English

No.: ICC-02/05-01/09
Date: 12 July 2010

PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Presiding Judge
Judge Sanji Mmasenono Monageng
Judge Cuno Tarfusser

SITUATION IN DAFUR, SUDAN

IN THE CASE OF
THE PROSECUTOR v. OMAR HASSAN AHMAD AL BASHIR ("OMAR AL BASHIR")

Public Document

Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir

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

The Office of the Prosecutor
Mr Luis Moreno Ocampo, Prosecutor
Mr Essa Faal, Senior Trial Lawyer

Counsel for the Defence

Legal Representatives of Victims
Mr Nicholas Kaufman
Ms Wanda M. Akin
Mr Raymond M. Brown

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims
Ms Paolina Massidda

The Office of Public Counsel for the Defence
Mr Xavier-Jean Keïta

States' Representatives

Amicus Curiae

REGISTRY

Registrar
Ms Silvana Arbia
Mr Didier Preira

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section
Ms Fiona McKay

Other

PRE-TRIAL CHAMBER I of the International Criminal Court ("Chamber" and "Court" respectively);

HAVING EXAMINED the "Prosecution's Application under Article 58" ("Prosecution's Application"), filed by the Prosecution on 14 July 2008 in the record of the situation in Darfur, Sudan ("Darfur situation") requesting the issuance of a warrant for the arrest of Omar Hassan Ahmad Al Bashir (hereinafter referred to as "Omar Al Bashir") for genocide, crimes against humanity and war crimes;[1]

HAVING EXAMINED the supporting material and other information submitted by the Prosecution;[2]

NOTING the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir" ("First Decision")[3] issued on 4 March 2009, in which the Chamber decided:

(i) to issue a warrant of arrest against Omar Al Bashir for his alleged responsibility under article 25(3)(a) of the Statute for the crimes against humanity and war crimes alleged by the Prosecution;[4] and

(ii) not to include the counts of genocide listed in the Prosecution's Application—genocide by killing (count 1); genocide by causing serious bodily or mental harm (count 2); and genocide by deliberately inflicting conditions of life calculated to bring about the group's physical destruction (count 3)—among the crimes with respect to which the warrant of arrest was issued;[5]

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[1] ICC-02/05-151-US-Exp; ICC-02/05-151-US-Exp-Anxs1-89; Corrigendum ICC-02/05-151-US-Exp-Corr and Corrigendum ICC-02/05-151-US-Exp-Corr-Anxs1 & 2; and Public redacted version ICC-02/05-157 and ICC-02/05-157-AnxA.

[2] ICC-02/05-161 and ICC-02/05-161-Conf-AnxsA-J; ICC-02/05-179 and ICC-02/05-179-Conf-Exp-Anxs1-5; ICC-02/05-183-US-Exp and ICC-02/05-183-Conf-Exp-AnxsA-E.

[3] ICC-02/05-01/09-3.

[4] ICC-02/05-01/09-3, page 92.

[5] Judge Anita Ušacka partly dissenting.

NOTING the "Judgment on the Appeal of the Prosecutor against the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir'" ("Appeals Decision") dated 3 February 2010,[6] in which the Appeals Chamber reversed the First Decision to the extent that the Chamber "decided not to issue a warrant of arrest in respect of the crime of genocide in view of an erroneous standard of proof(...)",[7] and decided not to consider the substance of the matters[8] remanding it to the Pre-Trial Chamber "for a new decision, using the correct standard of proof";[9]

NOTING the "Second Decision on the Prosecution's Application for a Warrant of Arrest",[10] ("Second Decision") in which the Chamber held that it was satisfied that there were reasonable grounds to believe that Omar Al Bashir was criminally responsible under article 25(3)(a) of the Statute as an indirect perpetrator, or as an indirect co-perpetrator, for the charges of genocide under article 6 (a), 6 (b) and 6 (c) of the Statute, which were found in that decision to have been committed by the GoS forces as part of the GoS counter-insurgency campaign, and that his arrest appeared to be necessary under article 58(1)(b) of the *Rome Statute* ("the Statute");

NOTING articles 19 and 58 of the Statute;

CONSIDERING that, on the basis of the material provided by the Prosecution in support of the Prosecution's Application and without prejudice to any subsequent determination that may be made under article 19 of the Statute, the case against Omar Al Bashir falls within the jurisdiction of the Court;[11]

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[6] ICC-02/05-01/09-73.
[7] ICC-02/05-01/09-73, page 3.
[8] ICC-02/05-01/09-73, para. 42.
[9] Ibid.
[10] ICC-02/05-01/09-94.
[11] As found by the Chamber in the First Decision, see ICC-02/05-01/09-3, paras. 35-45, and reiterated in the Second Decision, para. 41.

CONSIDERING that, on the basis of the material provided by the Prosecution in support of the Prosecution's Application, there is no ostensible cause or self-evident factor to impel the Chamber to exercise its discretion under article 19(1) of the Statute to determine at this stage the admissibility of the case against Omar Al Bashir;[12]

CONSIDERING that there are reasonable grounds to believe: (i) that soon after the attack on El Fasher airport in April 2003, the Government of Sudan ("GoS") issued a general call for the mobilisation of the Janjaweed Militia in response to the activities of the SLM/A, the JEM and other armed opposition groups in Darfur, and thereafter conducted, through GoS forces, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Force, the National Intelligence and Security Service ("the NISS") and the Humanitarian Aid Commission ("the HAC"), a counter-insurgency campaign throughout the Darfur region against the said armed opposition groups; and (ii) that the counter-insurgency campaign continued until the date of the filing of the Prosecution Application on 14 July 2008;

CONSIDERING that there are reasonable grounds to believe: (i) that a core component of the GoS counter-insurgency campaign was the unlawful attack on that part of the civilian population of Darfur – belonging largely to the Fur, Masalit and Zaghawa groups – perceived by the GoS as being close to the SLM/A, the JEM and the other armed groups opposing the GoS in the ongoing armed conflict in Darfur; and (ii) that villages and towns targeted as part of the GoS's counter-insurgency campaign were selected on the basis of their ethnic composition and that towns and villages inhabited by other tribes, as well as rebel locations, were bypassed in order to attack towns and villages known to be inhabited by civilians belonging to the Fur, Masalit and Zaghawa ethnic groups;

CONSIDERING that there are reasonable grounds to believe that the attacks and acts of violence committed by GoS against a part of the Fur, Masalit and Zaghawa

[12] As found by the Chamber in the First Decision, see ICC-02/05-01/09-3, para. 51, and reiterated in the Second Decision, para. 41.

groups took place in the context of a manifest pattern of similar conduct directed against the targeted groups as they were large in scale, systematic and followed a similar pattern;

CONSIDERING that there are reasonable grounds to believe that, as part of the GoS's unlawful attack on the above-mentioned part of the civilian population of Darfur and with knowledge of such attack, GoS forces subjected, throughout the Darfur region, thousands of civilians, belonging primarily to the Fur, Masalit and Zaghawa groups, to acts of murder and extermination;[13]

CONSIDERING that there are reasonable grounds to believe, as well, that as part of the GoS's unlawful attack on the above-mentioned part of the civilian population of Darfur and with knowledge of such attack, GoS forces subjected, throughout the Darfur region, (i) thousands of civilian women, belonging primarily to the Fur, Masalit and Zaghawa groups, to acts of rape; [14] (ii) civilians belonging primarily to the Fur, Masalit and Zaghawa groups, to acts of torture; [15] and (iii) hundreds of thousands of civilians, belonging primarily to the Fur, Masalit and Zaghawa groups, to acts of forcible transfer;[16]

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[13] Including in *inter alia* (i) the towns of Kodoom, Bindisi, Mukjar and Arawala and surrounding villages in Wadi Salih, Mukjar and Garsila-Deleig localities in West Darfur between August and December 2003; (ii) the towns of Shattaya and Kailek in South Darfur in February and March 2004; (iii) between 89 and 92 mainly Zaghawa, Masalit and Misseriya Jebel towns and villages in Buram Locality in South Darfur between November 2005 and September 2006; (iv) the town of Muhajeriya in the Yasin locality in South Darfur on or about 8 October 2007; (v) the towns of Saraf Jidad, Abu Suruj, Sirba, Jebel Moon and Silea towns in Kulbus locality in West Darfur between January and February 2008; and (vi) Shegeg Karo and al-Ain areas in May 2008.

[14] Including in *inter alia* (i) the towns of Bindisi and Arawala in West Darfur between August and December 2003; (ii) the town of Kailek in South Darfur in February and March 2004; and (iii) the towns of Sirba and Silea in Kulbus locality in West Darfur between January and February 2008.

[15] Including in *inter alia*: (i) the town of Mukjar in West Darfur in August 2003; (ii) the town of Kailek in South Darfur in March 2004; and (iii) the town of Jebel Moon in Kulbus locality in West Darfur in February 2008.

[16] Including in *inter alia* (i) the towns of Kodoom, Bindisi, Mukjar and Arawala and surrounding villages in Wadi Salih, Mukjar and Garsila-Deleig localities in West Darfur between August and December 2003; (ii) the towns of Shattaya and Kailek in South Darfur in February and March 2004; (iii) between 89 and 92 mainly Zaghawa, Masalit and Misseriya Jebel towns and villages in Buram Locality in South Darfur between November 2005 and September 2006; (iv) the town of Muhajeriya in the Yasin locality in South Darfur on or about 8 October 2007; and (v) the towns of Saraf Jidad, Abu Suruj,

CONSIDERING that that there are also reasonable grounds to believe that in furtherance of the genocidal policy, as part of the GoS's unlawful attack on the above-mentioned part of the civilian population of Darfur and with knowledge of such attack, GoS forces throughout the Darfur region (i) at times, contamined the wells and water pumps of the towns and villages primarily inhabited by members of the Fur, Masalit and Zaghawa groups that they attacked;[17] (ii) subjected hundreds of thousands of civilians belonging primarily to the Fur, Masalit and Zaghawa groups to acts of forcible transfer;[18] and (iii) encouraged members of other tribes, which were allied with the GoS, to resettle in the villages and lands previously mainly inhabited by members of the Fur, Masalit and Zaghawa groups;[19]

CONSIDERING therefore that there are reasonable grounds to believe that, from soon after the April 2003 attack on El Fasher airport at least until the date of the Prosecution's Application, GoS forces, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Force, the NISS and the HAC, committed the crimes of genocide by killing, genocide by causing serious bodily or mental harm and genocide by deliberately inflicting conditions of life calculated to bring about physical destruction, within the meaning of article 6 (a), (b) and (c) respectively of the Statute, against part of the Fur, Masalit and Zaghawa ethnic groups;

Sirba, Jebel Moon and Silea towns in Kulbus locality in West Darfur between January and February 2008.

[17] Physicians for Human Rights, Report, Darfur *Assault on Survival, A call for Security, Justice, and Restitution* (Anx J44) DAR-OTP-0119-0635 at 0679 which mentions three incidents of destruction of water sources.

[18] UN Security Council Press release, 22 April 2008 (Anx J38) DAR-OTP-0147-0859 at 0860; UN Security Council 5872 meeting, 22 April 2008 (Anx J52) DAR-OTP-0147-1057 at 1061; UNCOI Material, (Anx J72) DAR-OTP-0038-0060 at 0065; Commission of Inquiry into allegations surrounding human rights violations committed by armed groups in the States of Darfur, January 2005, Reviewed, Volume 2 (Anx 52) DAR-OTP-0116-0568 at 0604; United Nations Inter-agency Report, 25 April 2004 (Anx J63) DAR-OTP-0030-0066 at 0067; Third periodic report of the United Nations High Commissioner for Human Rights on the human rights situation in the Sudan, April 2006 (Anx J75) DAR-OTP-0108-0562 at 0570-0572, paras. 27, 35, 39, 44; United Nation Human Rights Council, Report on Human Rights Situations that require the Council's attention (A/HRC/6/19) (Anx 78) at D AR-OTP-013 8-0116 at 0145-0146; HRW Report, *They Shot at Us as We Fled*, 18 May 2008, (Anx 80) DAR-OTP-0143-0273 at 0300, 0291-0296; Ninth periodic report of the United Nations High Commissioner for Human Rights. Sudan (Anx J76) DAR-OTP-0136-0369 at 0372-0374.

[19] Witness statement (AnxJ47) DAR-OTP-0125-0665 at 0716, para.255.

CONSIDERING that there are reasonable grounds to believe that Omar Al Bashir has been the *de jure* and *de facto* President of the Republic of the Sudan and Commander-in-Chief of the Sudanese Armed Forces from March 2003 until at least the date of the Prosecution's Application 14 July 2008, and that, in that position, he played an essential role in coordinating, with other high-ranking Sudanese political and military leaders, the design and implementation of the above-mentioned GoS counter-insurgency campaign;

CONSIDERING, further, that the Chamber finds, in the alternative, that there are reasonable grounds to believe: (i) that the role of Omar Al Bashir went beyond coordinating the design and implementation of the common plan; (ii) that he was in full control of all branches of the "apparatus" of the Republic of the Sudan, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Force, the NISS and the HAC; and (iii) that he used such control to secure the implementation of the common plan;

CONSIDERING that, on the basis of the standard of proof as identified by the Appeals Chamber, there are reasonable grounds to believe that Omar Al Bashir acted with *dolus specialis*/specific intent to destroy in part the Fur, Masalit and Zaghawa ethnic groups;

CONSIDERING that, for the above reasons, there are reasonable grounds to believe that Omar Al Bashir is criminally responsible as an indirect perpetrator, or as an indirect co-perpetrator, under article 25(3)(a) of the Statute, for:

i. Genocide by killing, within the meaning of article 6(a) of the Statute;
ii. Genocide by causing serious bodily or mental harm, within the meaning of article 6(b) of the Statute; and
iii. Genocide by deliberately inflicting conditions of life calculated to bring about physical destruction, within the meaning of article 6(c) of the Statute;

CONSIDERING that, under article 58(1) of the Statute, the arrest of Omar Al Bashir appears necessary at this stage to ensure (i) that he will appear before the Court; (ii) that he will not obstruct or endanger the ongoing investigation into the crimes for which he is allegedly responsible under the Statute; and (iii) that he will not continue with the commission of the above-mentioned crimes;

FOR THESE REASONS,

HEREBY ISSUES:

A WARRANT OF ARREST for **OMAR AL BASHIR**, a male, who is a national of the Republic of the Sudan, born on 1 January 1944 in Hoshe Bannaga, Shendi Governorate, in the Sudan, member of the Jaáli tribe of Northern Sudan, President of the Republic of the Sudan since his appointment by the RCC-NS on 16 October 1993 and elected as such successively since 1 April 1996 and whose name is also spelt Omar al-Bashir, Omer Hassan Ahmed El Bashire, Omar al-Bashir, Omar al-Beshir, Omar el-Bashir, Omer Albasheer, Omar Elbashir and Omar Hassan Ahmad el-Béshir.

Done in English, Arabic and French, the English version being authoritative.

Judge Sylvia Steiner

Presiding Judge

Judge Sanji Mmasenono Monageng **Judge Cuno Tarfusser**

Dated this Monday 12 July 2010

At The Hague, The Netherlands

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AUTHOR
Bathandwa

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SA is obliged to arrest Al-Bashir, says Ntsaluba

Pretoria - The South African Government has said it will be obliged to arrest Sudanese President Omar Al-Bashir if he sets foot in the country.

"If today, President Al-Bashir landed in terms of the provision [of the Rome Statute], he would have to be arrested," said the Director General for International Relations and Cooperation Ayanda Ntsaluba on Thursday.

He said he did not foresee the government acting outside the framework of the international laws which South Africa had ratified. "We would not renege on our international legal obligations."

The Director General told the press briefing that he had chosen his words carefully because he did not want to sensationalise an issue that was abstract. "I don't want to create sensationalism out of an imaginary situation."

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 Statue 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.

Dr Ntsaluba said the AU would continue to press the United Nations Security Council (UNSC) to defer President Al-Bashir's indictment within the confines of international commitments and South Africa's own constitutional mandate.

South Africa's position comes as more than 130 civil society and human rights groups across Africa issued a statement today calling on African governments that are signatories to reaffirm

their commitment and obligation to the ICC.

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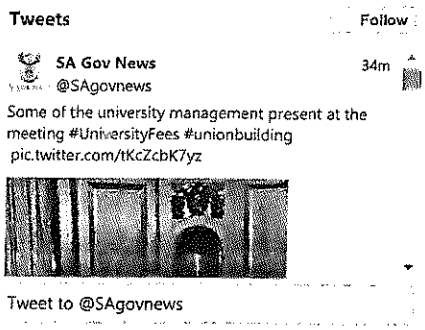

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KRK 7

Government Gazette
Staatskoerant

REPUBLIC OF SOUTH AFRICA
REPUBLIEK VAN SUID-AFRIKA

Vol. 600 Pretoria, 5 June Junie 2015 No. 38860

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CONTENTS • INHOUD

GOVERNMENT NOTICE

DEPARTMENT OF INTERNATIONAL RELATIONS AND COOPERATION

No. 470

5 June 2015

DIPLOMATIC IMMUNITIES AND PRIVILEGES ACT, 2001

MINUTE

In accordance with the powers vested in me by section 5(3) of the Diplomatic Immunities and Privileges Act, 2001 (Act No. 37 of 2001), I hereby recognize the "Agreement between the Republic of South Africa and the Commission of the African Union on the Material and Technical Organization of the Meetings of the 30th Ordinary Session of the Permanent Representatives Committee from 7 to 9 June 2015; the 27th Ordinary Session of the Executive Council from 10 to 12 June 2015 and the 25th Ordinary Session of the Assembly on 14 to 15 June 2015 in Pretoria (7 and 8 June 2015) and Johannesburg (10 to 15 June 2015), Republic of South Africa" for the purposes of granting the immunities and privileges as provided for in the Agreement between the Government of the Republic of South Africa and the Commission of the African Union as set out in the Notice.

Maite Nkoana-Mashabane

Minister of International Relations and Co-operation

SCHEDULE

AGREEMENT BETWEEN THE REPUBLIC OF SOUTH AFRICA AND THE COMMISSION OF THE AFRICAN UNION ON THE MATERIAL AND TECHNICAL ORGANIZATION OF THE MEETINGS OF THE 30TH ORDINARY SESSION OF THE PERMANENT REPRESENTATIVES COMMITTEE FROM 7 TO 9 JUNE 2015, THE 27th ORDINARY SESSION OF THE EXECUTIVE COUNCIL FROM 10 TO 12 JUNE 2015 AND THE 25TH ORDINARY SESSION OF THE ASSEMBLY ON 14 TO 15 JUNE 2015 IN PRETORIA (7 AND 8 JUNE 2015) AND JOHANNESBURG (10 TO 15 JUNE 2015), REPUBLIC OF SOUTH AFRICA

ARTICLE VIII
PRIVILEGES AND IMMUNITIES

1. The Government shall accord the Members of the Commission and Staff Members, the delegates and other representatives of Inter-Governmental Organizations attending the Meetings the privileges and immunities set forth in Sections C and D, Articles V and VI of the General Convention on the Privileges and Immunities of the OAU.

2. Without prejudice to the provisions of the preceding paragraph, all participants and persons performing duties in connection with the Meetings shall enjoy such facilities and courtesies as are necessary for the efficient performance of their duties.

3. The representatives of the Inter-Governmental Organizations and the Observers accredited to the African Union attending the Meetings shall enjoy the necessary immunities and privileges as provided for in the General Convention referred to in paragraph 1 above.

4. The Government shall provide all the necessary facilities for the entry and exit to and from South Africa to all those persons who are mentioned above and/or who are performing duties connected with the Meetings. Entry visas shall be granted to them preferably before the opening of the Meetings in accordance with the laws of South Africa and in accordance with the modalities for issuance of visas as contained in Annex II.

5. Staff members of the Commission and other organs of the AU holding AU Passport or Laissez-Passer shall not be required to obtain entry visa as per Decision AHG/OAU/AEC/Dec.1 (II) adopted by the Assembly of Heads of State and Government in Ouagadougou, Burkina Faso, in June 1998.

Printed by and obtainable from the Government Printer, Bosman Street, Private Bag X85, Pretoria, 0001
Publications: Tel: (012) 748 6052, 748 6053, 748 6058
Advertisements: Tel: (012) 748 6205, 748 6208, 748 6209, 748 6210, 748 6211
Subscriptions: Tel: (012) 748 6054, 748 6055, 748 6057
Gedruk deur en verkrygbaar by die Staatsdrukker, Bosmanstraat, Privaatsak X85, Pretoria, 0001
Publikasies: Tel: (012) 748 6052, 748 6053, 748 6058
Advertensies: Tel: (012) 748 6205, 748 6208, 748 6209, 748 6210, 748 6211
Subskripsies: Tel: (012) 748 6054, 748 6055, 748 6057

KRK 8

United Nations S/RES/1593 (2005)

Security Council

Distr.: General
31 March 2005

Resolution 1593 (2005)

Adopted by the Security Council at its 5158th meeting, on 31 March 2005

The Security Council,

Taking note of the report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur (S/2005/60),

Recalling article 16 of the Rome Statute under which no investigation or prosecution may be commenced or proceeded with by the International Criminal Court for a period of 12 months after a Security Council request to that effect,

Also recalling articles 75 and 79 of the Rome Statute and encouraging States to contribute to the ICC Trust Fund for Victims,

Taking note of the existence of agreements referred to in Article 98-2 of the Rome Statute,

Determining that the situation in Sudan continues to constitute a threat to international peace and security,

Acting under Chapter VII of the Charter of the United Nations,

1. *Decides* to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court;

2. *Decides* that the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully;

3. *Invites* the Court and the African Union to discuss practical arrangements that will facilitate the work of the Prosecutor and of the Court, including the possibility of conducting proceedings in the region, which would contribute to regional efforts in the fight against impunity;

4. *Also encourages* the Court, as appropriate and in accordance with the Rome Statute, to support international cooperation with domestic efforts to promote the rule of law, protect human rights and combat impunity in Darfur;

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5. *Also emphasizes* the need to promote healing and reconciliation and encourages in this respect the creation of institutions, involving all sectors of Sudanese society, such as truth and/or reconciliation commissions, in order to complement judicial processes and thereby reinforce the efforts to restore long-lasting peace, with African Union and international support as necessary;

6. *Decides* that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State;

7. *Recognizes* that none of the expenses incurred in connection with the referral including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily;

8. *Invites* the Prosecutor to address the Council within three months of the date of adoption of this resolution and every six months thereafter on actions taken pursuant to this resolution;

9. *Decides* to remain seized of the matter.

KRK 9

AGREEMENT

BETWEEN

THE REPUBLIC OF SOUTH AFRICA

AND

THE COMMISSION OF THE AFRICAN UNION ON

THE MATERIAL AND TECHNICAL ORGANIZATION OF THE MEETINGS

OF

THE 30TH ORDINARY SESSION OF THE PERMANENT REPRESENTATIVES COMMITTEE FROM 7 TO 9 JUNE 2015

THE 27th ORDINARY SESSION OF THE EXECUTIVE COUNCIL FROM 10 TO 12 JUNE 2015

AND

THE 25TH ORDINARY SESSION OF THE ASSEMBLY ON 14 TO 15 JUNE 2015

IN PRETORIA (7 AND 8 JUNE 2015) AND JOHANNESBURG (10 TO 15 JUNE 2015), REPUBLIC OF SOUTH AFRICA

PREAMBLE

The present Agreement concluded between the Government of the Republic of South Africa, hereinafter referred to as "the Government", and the Commission of the African Union (AU), hereinafter referred to as "the Commission", relates to the material and technical organization of the Meetings of the 30th Ordinary Session of the Permanent Representatives' Committee (PRC), the 27th Ordinary Session of the Executive Council and the 25th Ordinary Session of the Assembly of the Union (Assembly), and any other side Meetings that may be considered necessary by the Commission.

These Meetings which are provided for in the Constitutive Act of the African Union, the Rules of Procedures of the Assembly, the Executive Council and the Permanent Representatives' Committee as well as in decisions of the African Union policy organs will be held in Pretoria, Republic of South Africa, from 7 to 9 June, and from 10 to 13 June and on 14 to 15 June 2015 in Johannesburg, respectively, at the invitation of the Government.

Accordingly, the Commission is charged with the exclusive responsibility of organizing, conducting and managing the Meetings, while the Government will, on its part, provide all the necessary facilities and assistance to ensure the success and smooth running of the Meetings.

Furthermore, in accordance with the relevant provisions of the African Union Financial Rules and Regulations and Rules 6(2) and 5(2) of the Rules of Procedure of the Executive Council and the Assembly, respectively, the Government shall bear the additional expenses incurred by the Commission arising from the holding of the Meetings outside the African Union Headquarters.

For these Meetings to be held under the best possible conditions, the Government and the Commission have agreed as follows:

ARTICLE I
CONFERENCE FACILITIES

A. PREMISES

1. The Government shall, at its expense, make available to the Commission, rooms and offices with the following facilities needed for the Summit meetings and side events:

a) One (1) Plenary Hall containing at least one thousand (1000) seats with corresponding desks, equipped with microphones, earphones, six (6) interpretation booths, one (1) tape recording cabin complete with recording machines;

b) One (1) podium centrally located at the far end of the Hall, facing the delegates' row. The Podium shall be equipped with at least eight (8) armchairs and corresponding microphones and earphones. The podium shall be provided with an African Union desk flag and a gavel;

c) One (1) Speaker's Rostrum complete with microphone and suitable reading lamp. The Rostrum shall be situated on the forward centre portion of the platform below the Podium;

d) Desks to seat at least twelve (12) African Union Officers to be situated near the Rostrum, with individual earphones, serving for the purpose of report writing for the Commission;

e) Seating area equipped with earphones for at least fifty (50) observers in the Plenary Hall;

f) Seating area equipped with earphones for members of the media (at least one hundred (100)) in the Plenary Hall during the Opening Sessions of the Meetings. An overspill area equipped with audiovisual recording facilities, shall also be made available from where journalists can watch live coverage of the open sessions;

g) Space on the floor of the Plenary Hall shall be made available to accommodate camera persons and photographers wishing to take photos during the Open Sessions of the Meetings. Alternatively, a system shall be worked out to ensure that all camera persons get turns to take pictures and video footage of the Open Sessions of the Meetings;

h) Four (4) suitable Rooms for Committee/side/parallel Meetings or events, to accommodate seating for not less than hundred ten (110) delegates each and with corresponding central desk and name plates, as well as microphones, earphones and five (5) interpretation booths each. The Drafting Team shall also use one (1) of these four (4) rooms for its meetings;

i) One (1) Room to seat twenty to twenty-five (20-25) persons for Consultation Meetings. It shall also be used for the daily meetings of the Commission Conference Coordination Committee;

j) Offices for the Chairperson of the Commission, the Deputy Chairperson and the eight (8) Commissioners;

k) Suitable offices/ working space for:

(i) Staff of the Bureau of the Chairperson of the Commission;
(ii) Staff of the Bureau of the Deputy Chairperson of the Commission;
(iii) Secretary General of the Commission;
(iv) Legal Counsel;
(v) Chief of Protocol of the African Union;
(vi) Information and Communication Directorate;
(vii) The Finance and Personnel Services;
(viii) The Conference Coordination Unit, large enough to seat at least eight (8) persons;
(ix) Documents Distribution;
(x) Documents Reproduction;
(xi) Typing Pools for the four (4) working languages;
(xii) Revisers and Translators for four (4) language units;
(xiii) Proof-readers for four (4) language units;
(xiv) The Report-drafting team;
(xv) Protocol Reception and Delegates Registration Desk;
(xvi) Doctor's Consultation Room and Conference Clinic with installed medical emergency facilities;
(xvii) Storage Room for office supplies and materials;

2. In accordance with the established practice, it shall be the exclusive responsibility of the Commission to arrange the seating arrangements of the Meeting Rooms.

3. The Government shall also provide suitable lounges to be used for consultations by the Ministers and the Heads of State and Government.

4. The Government shall, at its expense, furnish and maintain in good condition, all the aforesaid rooms and offices in a manner suitable for the effective conduct of the Meetings.

5. The Government shall provide a Press Centre with multi-media facilities (telephone, fax and e-mail) for use by members of the press and delegations at their expense. The Press Centre shall have at least fifty (50) computers with internet connection out of which five (5) shall be in Portuguese while the rest shall be in Arabic, English and French. Five (5) printers should be networked to the computers in the Press Centre. Wireless network shall also be made available within the Press Centre and its

environs. The Press Centre shall have at least forty (40) free tables and chairs to facilitate the work of those wishing to work from their laptops or to write by hand.

6. Three (3) notice boards shall be placed in the Press Centre to allow the Commission to post notices of press conferences, briefings or special events for the information of the media.

B. EQUIPMENT, OFFICE SUPPLIES AND STATIONERY

a) The Conference Hall for Plenary Meetings shall be equipped for simultaneous interpretation into Arabic, English, French and Portuguese. Two (2) booths for Kiswahili and Spanish shall also be organised for the Meeting of the Assembly. The Government shall also provide, at its expense, a speech time limit, display of speakers' list, and adequate facilities for Press, Radio and Television Services, as well as space for a Media Centre and required facilities.

b) The Government shall, at its expense, provide and maintain in good condition the following other equipment:

(i) Four (4) High-Volume photocopiers with a recto-verso facility, including sorting attachment, capable of producing ninety (90) to hundred twenty (120) copies per minute.

(ii) Four (4) Mid-Volume photocopiers with a recto-verso facility, capable of producing sixty (60) to eighty (80) copies per minute for the following offices:

- Office of the Chairperson of the Union
- Office of the Chairperson of the Commission
- Office of the Deputy Chairperson of the Commission
- Office of the Commissioners
- Office of the Secretary General of the Commission
- Office of the Legal Counsel
- Office of the Protocol Division
- Office of the Conference Coordinating Unit
- Office of the Communication and Information Directorate. An additional computer shall be provided for this office to facilitate press release drafting and processing in all African Union languages

(iii) Six (6) collating tables.

(iv) Thirty three (33) computers connected to twelve (12) network laser printers as follows:

- Eight (8) English
- Eight (8) French
- Eight (8) Arabic
- Eight (8) Portuguese
- One (1) for the Director of Conferences

The Commission shall provide the necessary software for the Arabic and Portuguese language for installation on the computers in South Africa.

c) The Government shall provide, at its expense, adequate audio recording equipment, together with the required technical personnel, for documentation purposes. The Commission shall provide the recording tapes, which shall remain its property.

d) The Government shall provide, at its expense an electronic notice board, a PA system and a film projector to show African Union films or documentary.

e) The Government shall ensure that the above listed equipment as well as the materials for the reproduction of working documents is ready and installed at least two (2) days before the commencement of the Meetings of the Permanent Representatives' Committee on 7 June 2015.

f) The Government shall also make available, at its own expense, all the office supplies for the Meetings, such as printing and reproduction papers, toner, envelopes, paper-clips, folders, staplers and staples.

C. FLAGS, NAME PLATES, SECURITY AND CONFERENCE BADGES FOR THE MEETINGS

a) The Government shall, at its expense, make available at least three (3) sets of national flags of all Member States and of the African Union for display at the Conference Centre as well as at the premises reserved for Heads of State and Government. Desk flags for the Plenary Hall and Committee Rooms shall also be provided by the Government at its expense.

b) The Government shall provide, at its expense, pins and security badges for the Meetings of the Executive Council and the Assembly, which shall allow entry into the Conference Centre. These badges shall be issued in consultation with the Commission.

c) The Commission, on its part, shall print and issue Conference badges which shall allow entry into the Conference Centre, the Members of the Commission and of the other AU Organs, the delegates, observers, technicians, the press and invited guests.

d) The Commission shall be responsible for providing the nameplates of Member States, the Organs of the Union, the Regional Economic Communities (RECs) as well as the list of observers and invited guests.

D. TELECOMMUNICATION FACILITIES

a) The Government shall install, at its expense, in the Offices of the Chairperson of the African Union, the Chairperson and the Deputy Chairperson of the Commission, international communication facilities (telephone and fax) as well as local communication facilities in all the other offices allocated to the Commission.

b) The Government shall bear the cost of all communications made from the Offices of the Chairperson of the AU, the Chairperson and Deputy Chairperson of the Commission (telephone and fax).

c) The Government shall, at its expense, install terminals for Internet facilities at the Conference Centre for use by the Staff of the Commission and the delegates.

ARTICLE II
HOSPITALITY, TRANSPORTATION AND BANKING FACILITIES

In accordance with Rules 6(2) and 5(2) of the Rules of Procedure of the Executive Council and the Assembly, respectively, the Government shall be responsible for the following:

a) Hospitality and Per diem

(i) The Government shall extend hospitality to the Chairperson, the Deputy Chairperson, the Commissioners and Staff of the Commission which, under the present Agreement, shall mean full board and lodging (accommodation, breakfast, lunch, dinner and non-alcoholic beverages) and local telephone calls. This hospitality shall not cover other expenses made on such items as alcoholic drinks, laundry, dry-cleaning, international telephone calls, and expenses incurred on their guests, from the dates of their arrival to the dates of their departure as stipulated in Articles XIII and XIV of this Agreement. However, the

Government shall bear the cost of all telephone communications made from the suite of the Chairperson.

(ii) In addition, the Government shall pay twenty percent (20%) of per diem in United States Dollars to the Chairperson, the Deputy Chairperson, the Commissioners and to all Staff Members of the **Commission** (see list in the Annex) servicing the Meetings for nights spent in Pretoria and in Johannesburg in accordance with existing UN rates.

Furthermore, the **Government** shall also pay to all the Members of the **Commission** and Staff Members, the required amount of airport tax payable in **South Africa** (if applicable).

(iii) It is understood that the **Government** shall also pay full per diem to the Members of the **Commission** and Staff Members concerned for each full night spent on the way to and from **South Africa** according to the itinerary to be agreed upon between the Parties (if applicable).

b) **Air Transportation**

(i) The **Government** shall provide, at its expense, air tickets for the sector **Addis Ababa – Johannesburg - Addis Ababa**, Business Class for the Chairperson, the Deputy Chairperson and the Commissioners; and Economy class for the Staff Members of the **Commission** as listed in the Annex, provided that in accordance with the existing established practice, not more than sixty (60) Staff Members shall be required to travel in one (1) aircraft.

(ii) The Commission will provide the Government with the schedules of travel of its various teams.

c) **Local Transportation**

(i) The Government shall accord the Chairperson courtesies at the level of a Head of State. The Government shall further provide, at its expense, nine (9) limousines for the Deputy Chairperson and the Commissioners, and thirty-seven (37) cars for the African Union Special Representatives/Envoys and the Heads of other African Union Organs and the Chief Executives of the Regional Economic Communities (RECs).

(ii) The Government shall provide sufficient buses to shuttle the Staff of the Commission from their hotels to the two Conference venues, the Department of International Relations and Cooperation in Pretoria and the Sandton International Convention Centre in Johannesburg.

(iii) If the need arises, the Government shall place additional vehicles/minibuses at the disposal of the Commission.

(iv) A transportation coordinator that will be on 24 hour duty and reachable, shall be assigned by the Government to liaise with the transportation coordinator designated by the Commission on transportation matters.

d) **Transportation of Documents**

The Government shall transport, at its expense, all the working documents from and to Addis Ababa.

e) **Banking Facilities**

The Government shall provide the Commission and delegates with the necessary foreign currency banking facilities at convenient points, preferably at the DIRCO Conference Centre, the Sandton International Convention Centre and/or hotels.

ARTICLE III
HOTEL ACCOMMODATION

a) The Government shall also provide, at its expense, a large suite for the Chairperson and suitable suites for the Deputy Chairperson and the Commissioners. The Government shall also make available, at its expense, adequate single room accommodation for each of the Staff Members of the Commission servicing the Meetings.

b) The Government will advise on appropriate accommodation, at preferential rates, for the freelance Conference Staff preferably in the same hotel where the Staff of the Commission are accommodated or within the vicinity of the Conference Centres, both in Pretoria and in Sandton.

c) The Government shall endeavour to secure adequate and appropriate accommodation, at preferential rates, for delegates from all African Union Member States, African Union Special Representatives/Envoys, Officials of other African Union Organs and the Regional Economic Committees. The Government shall advise on availability of accommodation for Invited Guests.

d) The Government shall not be responsible for the expenses for the accommodation in respect of (b) and (c) above.

ARTICLE IV
MEDICAL FACILITIES

1. The Government shall ensure that adequate medical facilities with qualified staff for first aid and during emergencies for all participants and for the Chairperson, Deputy Chairperson, Commissioners and Staff of the Commission shall be available at the venue of the Conferences in both Pretoria and Sandton.

2. For serious emergencies, the Government shall ensure immediate transportation to and facilitate admission of participants in an appropriate medical facillity.

3. For serious emergencies with respect to the Chairperson, Deputy Chairperson, Commissioners and Staff of the Commission, the Government shall ensure immediate transportation and admission to a hospital designated by the Government, at the Government's expense.

ARTICLE V
PROTECTION AND SECURITY

1. The general security and safety arrangements shall be the exclusive responsibility of the Government. The Government shall provide such protection, as it may deem necessary for the security of the participants and the smooth running of the Meetings. Regarding the internal security of the Conference Centre, the Government security officers shall work in close cooperation with the African Union Head of Security and Safety Division and in accordance with the African Union established security procedure and practice.

2. Staff Members of the Commission, in particular, shall be given freedom of movement within the Conference Centre in the performance of their official duties so as to ensure the success of the Meetings.

ARTICLE VI
LOCAL PERSONNEL

The Government shall employ, at its expense, and place under the supervision of the Commission, a number of clerks, technicians for the reproduction and distribution of documents, ushers, messengers, telephone operators, cleaners and other manpower which may be required for the smooth conduct of the Meetings. Some of these staff are to be available two (2) days before the opening of the Meetings and two (2) days after the closure of the Assembly Session to help pack the documents and equipment. The local personnel mentioned herein should be able to communicate in English or French.

ARTICLE VII
COORDINATION BETWEEN THE GOVERNMENT AND THE COMMISSION

The Government and the Commission shall each appoint a senior official responsible for the various aspects of the Meetings to act as focal points for their respective areas and to coordinate their activities in order to ensure the smooth running of the Meetings.

ARTICLE VIII
PRIVILEGES AND IMMUNITIES

1. The Government shall accord the Members of the Commission and Staff Members, the delegates and other representatives of Inter-Governmental Organizations attending the Meetings the privileges and immunities set forth in Sections C and D, Articles V and VI of the General Convention on the Privileges and Immunities of the OAU.

2. Without prejudice to the provisions of the preceding paragraph, all participants and persons performing duties in connection with the Meetings shall enjoy such facilities and courtesies as are necessary for the efficient performance of their duties.

3. The representatives of the Inter-Governmental Organizations and the Observers accredited to the African Union attending the Meetings shall enjoy the necessary immunities and privileges as provided for in the General Convention referred to in paragraph 1 above.

4. The Government shall provide all the necessary facilities for the entry and exit to and from South Africa to all those persons who are mentioned above and/or who are performing duties connected with the Meetings. Entry visas shall be granted to them preferably before the opening of the Meetings in accordance with the laws of South Africa and in accordance with the modalities for issuance of visas as contained in Annex II.

5. Staff members of the Commission and other organs of the AU holding AU Passport or Laissez-Passer shall not be required to obtain entry visa as per Decision AHG/OAU/AEC/Dec.1 (II) adopted by the Assembly of Heads of State and Government in Ouagadougou, Burkina Faso, in June 1998.

ARTICLE IX
INDEMNITY AND CLAIMS

1. The Government shall be responsible for dealing with any action, claim, or other demands against the Commission and its Officials arising out of:

   (a) Injury or damage to persons or property in the conference or office premises provided by the Government;
   (b) Transportation provided by the Government; and
   (c) Personnel provided or arranged for by the Government for the Conference.

2. However, when the Government and the Commission accept that the damage caused resulted from a deliberate act or serious negligence on the part of the Commission or its Staff, the Government shall decline every responsibility in this respect. The Government and the Commission will assess and determine claims, accordingly.

3. The Government shall assume full responsibility for the repairs arising from any damage to the premises in the conference areas, the Department of International Relations and Cooperation Conference Centre, OR Tambo Building, Soutpansberg Road, Rietondale, Pretoria, and the Sandton International Convention Centre, Sandton, Johannesburg, as well as to furniture or equipment therein.

4. Without prejudice to the confidentiality of documents in the possession of the African Union, the Commission shall render reasonable assistance and shall exert its best efforts to make available to the Government relevant information, evidence and documents which are in possession or under the control of the African Union, to enable the Government to deal with any action, claim or demand contemplated in this Article.

ARTICLE X
RECRUITMENT OF FREELANCE CONFERENCE STAFF

The Commission shall be responsible for the selection, recruitment and payment of per diem and salaries of the entire freelance Conference Staff as well as the cost of their transportation to and from the Republic of South Africa.

ARTICLE XI
MEETINGS WORKING DOCUMENTS

The Commission shall be responsible for the preparation, reproduction and distribution of all the Meetings working documents in the four (4) African Union working languages.

ARTICLE XII
PREPARATION OF THE MEETINGS

The Commission shall send to South Africa, before the opening date of the Meetings, two African Union teams, at the expense of the Government, on an evaluation and advisory mission. The teams shall comprise not more than eight (8) members. The actual dates of this mission shall be agreed upon through consultations.

ARTICLE XIII
ARRIVAL OF THE STAFF OF THE COMMISSION IN SOUTH AFRICA

The Staff of the Commission assigned to service the Meetings shall arrive in Johannesburg and Pretoria, Republic of South Africa, as follows:

- Advance team of not more than eight (8) members shall arrive four (4) days before the opening of the Meetings, excluding the day of travel, i.e. 2 June 2015 in line with the commencement of the Permanent Representatives Committee meetings on 7 June 2015.

- The rest of the Staff Members, travelling in groups of not more than sixty (60) each, shall arrive one (1) day before the commencement of the Meetings, excluding days of travel, i.e. on 5 and 6 June 2015, at the latest.

ARTICLE XIV
DEPARTURE OF THE STAFF OF THE COMMISSION FROM SOUTH AFRICA

Depending on the availability of commercial/charter flights, the Staff of the Commission shall depart from South Africa one (1) or two (2) days after the closure of the Meetings i.e. 16 and 17 June 2015, at the latest.

ARTICLE XV
SETTLEMENT OF DISPUTES

1. The Parties shall endeavour to settle any dispute arising out of the interpretation, application or implementation of the provisions of this Agreement amicably through consultation or negotiations between the Parties.

2. Any dispute that cannot be settled in accordance with paragraph (1) shall be referred to a tribunal for arbitration at the request of a Party.

3. The tribunal shall consist of one (1) arbitrator appointed by each Party and a third person, appointed by both arbitrators shall be the chairperson of the tribunal.

4. If within sixty (60) days of the request for arbitration, a Party has not appointed an arbitrator or if within sixty (60) days of the appointment of the two (2) arbitrators, the third arbitrator has not been appointed; either Party may request the President of the Permanent Court of Arbitration to make the necessary appointment.

5. The decision of the majority of the tribunal shall be binding on the Parties.

6. The tribunal shall fix the procedure of the arbitration and shall give its decision within thirty (30) days following its constitution.

7. The tribunal shall provide for the reimbursements of its members and the distribution of expenses between the Parties.

8. The tribunal's decision on all questions of procedure and substance shall be final and, even if rendered in default of one (1) Party, be binding on both Parties.

ARTICLE XVI
APPLICABLE LAW

The present Agreement shall be construed and interpreted in accordance with International Law.

ARTICLE XVII
AMENDMENTS AND SUPPLEMENTARY ARRANGEMENTS

This Agreement may be amended by mutual consent of the Parties through an Exchange of Notes between the Parties through the Diplomatic Channels.

ARTICLE XVIII
ENTRY INTO FORCE

The present Agreement shall enter into force on the date of signature by the competent authorities of the two Parties, the effective date of signature being the date of the last signature. It will terminate on 18 June 2015, unless otherwise extended by the Parties.

IN WITNESS WHEREOF, the duly authorised representatives of **the Government** and **the Commission** have signed the present Agreement.

Done at.....on this ..... day of .....Two Thousand and Fifteen, for the Government of the Republic of South Africa and at.....on this.....day of .....Two Thousand and Fifteen for the Commission of the African Union.

.....	.....
For the Government of the Republic of South Africa	**For the Commission of the African Union**
Name:	**Name:** .....
Title:	**Title:** .....

ANNEX I

(Host Agreement)

LIST OF STAFF TO SERVICE THE PERMANENT REPRESENTATIVES' COMMITTEE, THE EXECUTIVE COUNCIL AND ASSEMBLY SESSIONS

PRETORIA AND JOHANNESBURG, REPUBLIC OF SOUTH AFRICA
24 MAY TO – 15 JUNE 2015

1. Dr NC Dlamini Zuma, Chairperson of the African Union Commission
2. Deputy Chairperson of the African Union Commission
3. Commissioner
4. Commissioner
5. Commissioner
6. Commissioner
7. Commissioner
8. Commissioner
9. Commissioner
10. Commissioner

Staff of the Chairperson of the African Union Commission

Staff of the Secretariat of the Secretary General

1. Ambassador Jean Mfasoni

African Union Security

African Union Communications and Media Liaision

African Union Translation and Interpretation team

Al-Bashir gets green light for return trip

By Shenaaz Jamal and Neo Goba

2015-10-12

print | e-mail

The ANC has given Sudanese president Omar al-Bashir the green light to return to South Africa to attend the Forum on China-Africa Co-operation in December.

Minster of International Relations and Co-operation Maite Nkoana-Mashabane, speaking yesterday at the party's National General Council meeting in Midrand, said President Jacob Zuma had sent invitations to members of the forum and that no special requirements had been imposed on any member.

Obed Bapela, the Deputy Minister of Co-operative Governance and Traditional Affairs, said there was a need to review South Africa's affiliation to the International Criminal Court.

Said Bapela: "We are of the view that the ICC has lost its direction."

South Africa sparked global condemnation when Bashir, who is accused of committing war crimes in Darfur, was allowed to fly home from an AU summit in South Africa in June.

This was in defiance of a Pretoria High Court order that he be detained while the execution of an ICC warrant for his arrest was being reviewed.

The ANC undertook to submit a written explanation to the ICC for its failure to detain Bashir but has asked for more time to assess whether it breached its international obligations.

Jacob van Garderén, of Lawyers for Human Rights, said the NGO would discuss the matter today.

Additional reporting by Shenaaz Eggington

The Times

South Africa sparked global condemnation when Bashir, who is accused of committing war crimes in Darfur, was allowed to fly home from an AU summit in South Africa in June. File photo

Image by: MOHAMED NURELDIN ABDALLAH / REUTERS

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Additional reporting by Shenaaz Eggington

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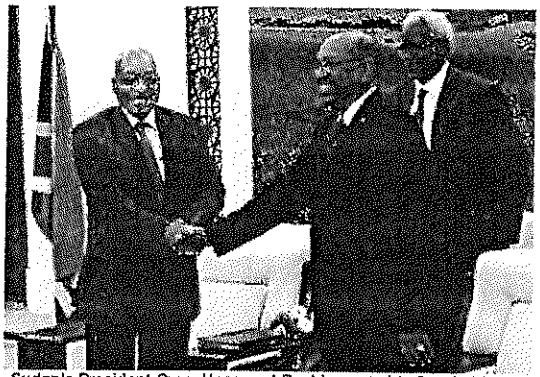
South Africa asks Sudan's Bashir to stay away from China-Africa summit in December: report

Article Comments (3)

October 18, 2015 (WASHINGTON) – The South African government has quietly asked Khartoum to send someone other than president Omer Hassan al-Bashir for the Forum Of China-Africa Cooperation (FOCAC) scheduled for next December in Johannesburg , according to a news report.



Sudan's President Omer Hassan al-Bashir greets his South African counterpart Jacob Zuma (L) at the Palace in Khartoum February 1, 2015 (REUTERS/ Mohamed Nureldin Abdallah)

Bashir's attendance at the African Union (AU) in South Africa last June created a diplomatic and legal mess for the South African government which not only violated the International Criminal Court (ICC) obligations, but also an explicit order by the High Court to prevent the Sudanese leader from departing pending a decision on whether to extradite him to the Hague.

The Sudanese leader fled the country hours before the High Court ordered his arrest and the South African government told the judges that he sneaked out without their knowledge.

The ICC issued two arrest warrants for Bashir in 2009 and 2010 charging him with war crimes, genocide and crimes against humanity in Sudan's western region of Darfur.

Despite losing appeal case at the High Court, South Africa's International Relations minister Maite Nkoana-Mashabane and other members of the ruling African National Congress (ANC) subcommittee on international relations insisted last week that Bashir is free to attend FOCAC if he wished without fearing arrest.

The ANC also announced that it has voted to begin the process of leaving the ICC and unsigning the Rome Statute which is the founding charter of the Hague-based court. It further disclosed that it will push for an African en masse withdrawal from the tribunal in the upcoming summit next January.

However the Pretoria-based Sunday Times newspaper reported today that the ANC and government insiders disclosed that there have been behind-the-scenes talks with Khartoum over Sudan's level of attendance at the December summit.

A senior diplomatic official told the newspaper that Bashir would not attend the December event, to avoid controversy.

"There is an agreement that he won't come and the foreign minister will probably lead their delegation. He also doesn't want to go through that again [the attempt to arrest him in June]," said the government official.

A senior ANC national executive committee member said on Friday there was consensus in the government and the ANC that Bashir should not return to the country until ICC and government processes have been completed.

In a related issue, Ghana president John Mahama defended South Africa's non-arrest of Bashir at the AU summit last June.

"You don't go arresting [leaders] when they have come under the auspices of the African Union,"

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Mahama told 'Conflict Zone' on Germany-based DW TV.

The Ghanaian president said that despite perception of bias by the ICC, it remains an important institutions for Africa.

"The ICC is useful and several African leaders have appeared before them and I think that the ICC is still relevant and still prosecuting cases of human rights abuses. ...The ICC serves a purpose and I guess that we must take the concerns of Africa on board, Africa feels targeted whether rightly or wrongly; it's like African leaders are the only people arraigned before it and I think the African union, ICC and the UN must discuss it".

(ST)

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