

THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT 75/16

CC Case No. /2016  
SCA Case No. 867/2015  
HC Case No. 27740/2015

In the matter between:

THE 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 CO-OPERATION 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

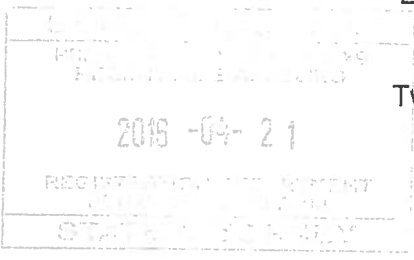
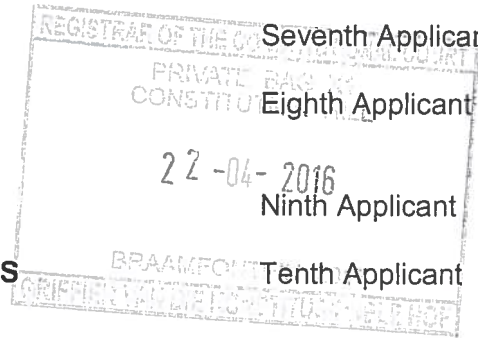
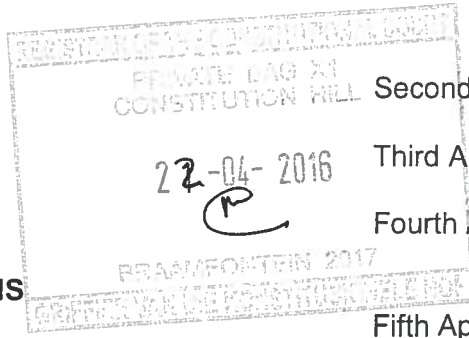
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Tenth Applicant

HEAD OF THE DIRECTORATE FOR PRIORITY CRIMES INVESTIGATION Eleventh Applicant

DIRECTOR OF THE PRIORITY CRIMES INVESTIGATION UNIT Twelfth Applicant

and

THE SOUTHERN AFRICA LITIGATION CENTRE Respondent



**BE PLEASED TO TAKE NOTICE THAT** the Respondent hereby delivers its Index of the Respondent's Affidavit opposing leave to appeal and Respondent's Affidavit opposing leave to appeal.

**Dated at Johannesburg this 21<sup>st</sup> day of APRIL 2016**

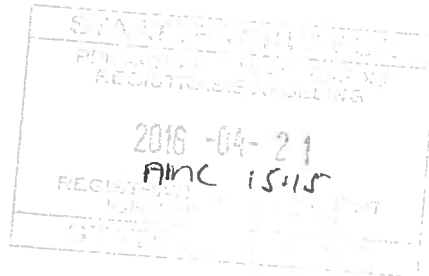


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\_\_\_\_\_ 2016

For: Applicants attorneys

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<b>DIRECTOR-GENERAL OF HOME AFFAIRS</b>	Eighth Applicant
<b>NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE</b>	Ninth Applicant
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and	
<b>THE SOUTHERN AFRICA LITIGATION CENTRE</b>	Respondent

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**RESPONDENT'S AFFIDAVIT OPPOSING LEAVE TO APPEAL**

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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 Southern Africa, 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 international criminal justice obligations. I am duly authorised to oppose this application on SALC's behalf. I attach the resolution empowering me to do so as "KRK1".
2. 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.

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## INTRODUCTION

3. In these proceedings, the applicants ("the government authorities")<sup>1</sup> apply for leave to appeal against the whole judgment and order handed down by the SCA on 15 March 2016 (attached as annexure A to the government authorities' founding affidavit).
4. The SCA unanimously found that President al-Bashir of Sudan enjoys no immunity from arrest in South Africa and surrender to the International Criminal Court ("the ICC"). It held that the government authorities' failure to take steps to arrest and detain him for surrender to the ICC was inconsistent with South Africa's obligations in terms of the Rome Statute and with section 10 of the Implementation of the Rome Statute of the International Criminal Court 27 of 2002 ("the ICC Act"), and was consequently unlawful.
5. The government authorities' grounds of appeal are the following:<sup>2</sup>
  - 5.1. First, they contend that the SCA misapplied the principle articulated and applied in cases like *Kirland*, *AAA* and *Oudekraal*;

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<sup>1</sup> Although the deponent to the founding affidavit claims, in para 82, that the parties are "cited as SALC *did in the High Court*", that is not correct. The Minister of Police has been cited correctly in the stead of the Minister of Safety and Security (due to the name of the department being changed). However, the Director General of Safety and Security was joined as the fourth respondent in the High Court but has not been cited either in the SCA or this Court. I am again left to assume that he accepted the High Court's judgment and order.

<sup>2</sup> They are set out in their FA pp 38-39 paras 78(i) to (iv)

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- 5.2. Second, they claim that the SCA misconstrued and misapplied the Host Agreement concluded in anticipation of the AU Summit;
- 5.3. Third, they say that the SCA misconstrued the ICC Act and the Immunities Act,<sup>3</sup> thereby failing to give proper effect to international law and the fundamental principle of immunity *ratione personae* of head of state of a foreign state; and
- 5.4. Finally, they contend that the SCA's judgment improperly impinges on the separation of powers, by expressing itself on "*matters within the heartland of the Executive*".
6. SALC opposes the grant of leave to appeal to the Constitutional Court because it is not in the interests of justice. It submits that the grounds of appeal are without merit and the government authorities have no prospects of success.<sup>4</sup> The High Court and the Supreme Court of Appeal each found that neither the Host Agreement nor the ICC Act, read with the Immunities Act, afforded President al-Bashir immunity from arrest and surrender. Their judgments provide clear guidance and legal certainty on the Government's obligations under domestic

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<sup>3</sup> The Diplomatic Immunities and Privileges Act 37 of 2001

<sup>4</sup> In the High Court, SALC also opposed the grant of leave to appeal on the basis that the matter was moot. It advanced that argument because, in the High Court, the government authorities contended that President al-Bashir would only be allowed into South Africa for the duration of the AU Summit, and not ordinarily. (The SCA refers to these allegations in the main judgment p 53 para 12 and p 112 para 105.) When the government authorities indicated, in their affidavits in the application for leave to appeal from the SCA, that they intended to invite President al-Bashir to South Africa again in the future, SALC did not persist with the mootness point.

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law. There is, with respect, no plausible prospect that this Court will find otherwise.

7. In this affidavit, I will address each of the government authorities' grounds of appeal to show that an appeal would have no prospects of success.
8. To avoid burdening the papers, I do not respond to each allegation made in the government authorities' founding affidavit. To the extent that any averments in the founding affidavit are inconsistent with the contents of this affidavit, they are denied as if specifically traversed.
9. The government authorities have tried to bolster their claim to reasonable prospects of success before this Court, by pointing out that the SCA split and rendered two separate judgments on the appeal before it. But the judgments of Wallis JA and Ponnann JA reached the same conclusion on the lack of immunity under the domestic law. They diverged only on whether it was necessary to determine if immunity attached under customary international law. The majority's findings on customary international law (which SALC respectfully disputes) did not affect the order ultimately granted, and are irrelevant to assessing prospects of success on appeal. I accordingly address international law only to show that the domestic regime is not inconsistent with it. SALC will address further argument on international law in due course, if leave to appeal is ultimately granted.

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## NO PROSPECTS OF SUCCESS

### The Host Agreement

10. South Africa entered into a host agreement with the AU Commission on 5 June 2015. Article VIII of the Host Agreement conferred immunity on certain officials.<sup>5</sup> The Minister of International Relations published a minute in the Government Gazette on 5 June 2015, recording the terms of the Host Agreement and the immunities it conferred on various officials.
11. In the High Court, the government authorities relied solely on Article VIII of the Host Agreement, read with the Minister's notice, to contend that President al-Bashir was immune from arrest and surrender.<sup>6</sup> In the SCA, they persisted in contending that the Host Agreement and the ministerial notice conferred immunity on President al-Bashir and claimed that because they had not been set aside, they remained binding. They relied, in this regard, on the cases of *Oudekraal*,<sup>7</sup> *Kirland*<sup>8</sup> and *AAA*.<sup>9</sup>
12. The SCA dealt with Article VIII of the Host Agreement in paragraphs 40 to 48 of the main judgment. It held that:

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<sup>5</sup> Petition p 213 Article VIII

<sup>6</sup> SCA Judgment: pp 52-54 paras 11-15

<sup>7</sup> *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA)

<sup>8</sup> *MEC for Health, Eastern Cape & another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC)

<sup>9</sup> *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* 2007 (1) SA 343 (CC)

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- 12.1. Section 5 of the Immunities Act deals with '*Immunities and privileges of United Nations, specialised agencies and other international organisations*' and does not apply to other persons.<sup>10</sup> It provides for immunity to be conferred on representatives and officials of the African Union and of inter-governmental organisations. It does not deal with immunity for heads of state and state delegations.<sup>11</sup>
- 12.2. Congruent with that, the Host Agreement was concluded between South Africa, as the host nation, and the African Union.<sup>12</sup>
- 12.3. A head of state attending an AU Assembly attends as the embodiment of the member state, not as a delegate to the AU.<sup>13</sup> It meant that neither the Host Agreement nor the ministerial notice that gave effect to it, conferred immunity on President al-Bashir.<sup>14</sup>
- 12.4. It followed that neither the Host Agreement nor the notice required to be set aside in order for SALC to succeed in its application.<sup>15</sup>
13. The SCA's findings are, with respect, beyond reproach and I submit there is no reasonable prospect of this Court reaching a different conclusion to it.

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<sup>10</sup> SCA Judgment: p. 70, para 42

<sup>11</sup> SCA Judgment: p. 71, para 42

<sup>12</sup> SCA Judgment: p. 70, para 42

<sup>13</sup> SCA Judgment: p. 71, para 44

<sup>14</sup> SCA Judgment: p. 73, para 47

<sup>15</sup> SCA Judgment: p. 73, para 47

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14. The Host Agreement did not confer any immunity on heads of state attending the AU Summit:

14.1. Article VIII only conferred immunity on:

- *"the Members of the Commission and Staff Members"*;
- *"the delegates and other representatives of Inter-Governmental Organisations attending the Meetings"*;
- *"the representatives of the Inter-Governmental Organisations"*; and
- *"the Observers accredited to the African Union"*.<sup>16</sup>

14.2. The Minister promulgated the Host Agreement in terms of s 5(3) of the Immunities Act. It only allows the Minister to confer privileges on certain international organisations and their officials.

14.3. Sections 6(1)(b) and (c) of the Immunities Act specifically cater for the conferral of immunity on the representatives of other states who attend international conferences in South Africa. The Minister would have acted under this provision if her intention was to confer immunity on heads of state attending the AU Summit.

14.4. In other words, both the text of the host agreement and the provision

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<sup>16</sup> Host Agreement 5 June 2015 Petition p 203 at p 213 Article VIII

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under which the Minister promulgated it, make it clear that the immunity was conferred on the AU and its officials and not on any of the heads of state attending the conference.

15. It follows that the Host Agreement and the notice imposed no barrier to the arrest and surrender of President al-Bashir. They only conferred immunity on the AU and its officials, and not on any of the heads of state attending the summit. They consequently did not need to be set aside in order for the relief SALC sought to be granted. The principles laid down in *Oudekraal*; *Kirland* and *AAA* do not find application in this case.
16. I accordingly submit that there is no merit to the government authorities' attempts to impugn the SCA's findings concerning the application of the Host Agreement and notice. Their first two grounds of appeal have no prospects of success.

#### **The ICC Act and the Immunities Act**

17. The government authorities' third ground of appeal is that the SCA misinterpreted the ICC Act and the Immunities Act, and thus wrongly deprived President al-Bashir of immunity *ratione personae*.
18. I submit, to the contrary, that the requirements of the domestic legislation are clear and uncontroversial on the question of immunity.

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The ICC Act

19. The following provisions of the ICC Act negate any head of state immunity, whether from prosecution in our domestic courts or from arrest and surrender for prosecution before the ICC.
20. The preamble refers to atrocities committed throughout the history of humankind and in South Africa in particular and commits South Africa to "*bringing persons who commit such atrocities to justice*" either in our own courts or, in accordance with the principle of complementarity, in the ICC. This is a serious commitment. This Court emphasized in the **Torture Docket** case that,

*"Our country's international and domestic law commitments must be honoured. We cannot be seen to be tolerant of impunity for alleged torturers. We must take up our rightful place in the community of nations with its concomitant obligations. We dare not be a safe haven for those who commit crimes against humanity."<sup>17</sup>*

The Court also emphasized the state's duty to prevent impunity:

*"A state's duty to prevent impunity, which can be defined as the exemption from punishment, is particularly pronounced with respect to those norms, such as the prohibition of torture, that are widely considered peremptory and therefore non-derogable --- even in times of*

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<sup>17</sup> National Commissioner of Police v SALC 2015 (1) SA 315 (CC) para 80

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*war or national emergency --- and which, if unpunished, engender feelings of lawlessness, disempower ordinary citizens and offend against the human conscience.”<sup>18</sup>*

21. Section 3 lists the objects of the ICC Act. The first is to create a framework to ensure that the Rome Statute “*is effectively implemented*” in South Africa.<sup>19</sup> The second is to ensure that South Africa conforms with its obligations under the Rome Statute.<sup>20</sup> The fifth is to enable the state to co-operate with the ICC in its investigations and prosecutions *inter alia* by the surrender of suspects for prosecution before the ICC.<sup>21</sup>
22. Section 4(1) provides that anybody who commits any of the international crimes is guilty of an offence and liable to conviction and punishment. It makes war crimes, genocide and crimes against humanity punishable under South African law, wherever they may be committed.
23. Section 4(3) vests our courts with universal jurisdiction over the prosecution of all international crimes, wherever they may have been committed, provided only that the accused is present in South Africa.

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<sup>18</sup> National Commissioner of Police para 4 footnote 2

<sup>19</sup> Section 3(a)

<sup>20</sup> Section 3(b)

<sup>21</sup> Section 3(e)

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

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

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

*(b) ....*

*is neither –*

*(i) a defence to a crime; nor*

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

25. The government authorities accept that these provisions confer jurisdiction on South African courts to prosecute international crimes and preclude a person who otherwise enjoys immunity from raising it as a defence or a mitigating factor in those proceedings. But they contend that the ICC Act does not remove a head of state's personal immunity and does not allow for his arrest. His "*absolute inviolability*" as a sitting head of state has purportedly been preserved. This argument is, with respect, unfounded for the following reasons.

26. The ICC Act provides a structure for national prosecution of crimes against humanity, genocide and war crimes provided for in the Rome Statute. The ICC Act also sets out a scheme of cooperation between South Africa and the ICC which facilitates the arrest of suspects for the purpose of surrender to the ICC

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pursuant to an arrest warrant issued by the ICC.


27. Sections 8, 9 and 10 of the ICC Act govern the manner in which an ICC request for the arrest of a suspect must be implemented. They do so in mandatory terms and do not allow any room for exceptions:

27.1. Section 8 caters for an ICC request for the arrest and surrender of a suspect. Section 8(1) says that the request "*must*" be referred to the Central Authority, that is, the Director-General of Justice. Section 8(2) says that the Central Authority "*must*" immediately on receipt of that request forward it to a magistrate who "*must*" endorse the warrant of arrest for execution.

27.2. Sections 9(1) and (2) govern a request by the ICC for the provisional arrest of a suspect. They empower a magistrate to issue a warrant for the arrest.

27.3. Section 9(3) says that a warrant endorsed in terms of s 8 or issued in terms of s 9(2), "*must*" be in the form and be executed in a manner as near as possible to that prescribed for domestic warrants of arrest in South Africa.

27.4. Section 10 comes into play once a suspect has been arrested under a warrant endorsed in terms of s 8 or issued in terms of s 9(2). Section



10(1) provides that the suspect "must" be brought before a magistrate within 48 hours. The magistrate "must" hold an enquiry but only to determine three things, namely

- whether the warrant applies to the suspect;
- whether the suspect has been arrested in accordance with our domestic law; and
- whether the suspect's constitutional rights have been respected.

27.5. In terms of s 10(5), if the magistrate is satisfied that the above three requirements have been met and that the suspect may be surrendered to the ICC, she "must" order that the suspect be surrendered to the ICC.

28. I submit that these provisions leave no room for the suspect to raise any immunity against arrest and surrender to the ICC or for the magistrate to enquire into and determine such a claim. The necessary implication of these provisions is that any such immunity is negated.

29. Section 10(9) of the ICC Act puts it beyond doubt that a claim for immunity is not available to a person whose arrest is sought for the purposes of surrender. It states that:

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

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30. Section 4(2)(a) includes a former or sitting head of state. It means that the suspect's status as a head of state does not constitute a ground for refusing an order contemplated in section 10(5) – that is, an order that the suspect be surrendered to the ICC.
31. The wording of the sections permits of no other interpretation and excludes any immunity that would otherwise attach as a consequence of customary international law.
32. Indeed, as the SCA found, any other interpretation would create an absurd legislative regime. Applying head-of-state immunity to preclude a person who is charged with international crimes from being arrested would mean that such person could, practically speaking, never be surrendered or brought to trial in South Africa. It would wholly negate the purpose of section 4(2) and section 10(9).<sup>22</sup>
33. We therefore submit that the SCA's findings that the ICC Act stripped President al-Bashir of any immunity he might otherwise have enjoyed are correct and unimpeachable.

The ICC Act enjoys priority over the Immunities Act

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<sup>22</sup> SCA Judgment: p. 104, para 94

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34. The government authorities seek to avoid this conclusion by claiming that the Immunities Act prevails over the ICC Act, and that the immunities it confers remain intact (even in the face of section 10(9) of the ICC Act).
35. Section 4(1)(a) of the Immunities Act says that a head of state is immune from the criminal and civil jurisdiction of the South African courts and enjoys such privilege as heads of state enjoy "*in accordance with the rules of customary international law*". The government authorities claim – and a majority of the SCA found – that customary international law confers immunity *rationes personae* on President al-Bashir. SALC disputes their interpretation of international law. Properly interpreted, we submit that international law does not afford him such immunity.
36. But even assuming in the government authorities' favour that it did, such immunity does not apply in this case. Section 4(1)(a) only applies to the extent that it is not excluded by the provisions of the ICC Act. The ICC Act prevails over the Immunities Act for three reasons:
- 36.1. First, the ICC Act was enacted subsequently to the Immunities Act.
- 36.2. Second, the ICC Act is the more specific legislation. It excludes head-of-state (and other) immunity in particular circumscribed circumstances – that is, where a person stands charged of war crimes, genocide and

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crimes against humanity. In contrast, the Immunities Act deals with the general conferral of immunities on state officials. The provisions of the ICC Act prevail over those of the Immunities Act under the *generalia specialibus non derogant* rule.<sup>23</sup> Reading the Immunities Act consistently with the ICC Act means that the Immunities Act generally confers immunities on state officials *except* where those state officials stand charged with genocide, crimes against humanity and war crimes.

36.3. Third, as the SCA recognised,<sup>24</sup> the ICC Act gives effect to South Africa's international treaty obligations – particularly article 27 of the Rome Statute. South Africa is constitutionally enjoined to give effect to those treaty obligations, and has in fact done so. 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 be inconsistent with the constitutional requirement to prefer a legislative interpretation that gives effect to international obligations over one that does not.<sup>25</sup>

37. As I have explained, section 4(2)(a) read with section 10(9) the ICC Act unequivocally removes any immunities from arrest and surrender that may

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<sup>23</sup> Sasol Synthetic Fuels v Lambert 2002 (2) SA 21 (SCA) para 17; Mankayi v AngloGold Ashanti 2010 (5) SA 137 (SCA) paras 39 to 40

<sup>24</sup> SCA Judgment: p. 101, para 90

<sup>25</sup> Section 233 of the Constitution

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otherwise have been available to a sitting head of state. Those provisions prevail over section 4(1)(a) of the Immunities Act.

38. It follows that the government authorities cannot invoke section 4(1)(a) as a basis to claim that President al-Bashir enjoyed immunity from arrest and surrender. I respectfully submit that there is no reasonable prospect that this Court will permit them to do so.

The approach in the ICC Act is permissible under international law

39. SALC submits that international law permits State parties to the Rome Statute of the International Criminal Court to arrest and surrender state officials to facilitate the prosecution of international crimes before international tribunals, despite those state officials ordinarily enjoying immunity *ratione personae*.
40. This is achieved primarily by Article 27 of the Rome Statute, which provides:

*“(A)n 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*

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*Court from exercising its jurisdiction over such person".<sup>26</sup>*

41. Judge James Crawford explains this development:

*"When applying international law rules, municipal courts may find it necessary to develop the law, notably where it is unclear or uncertain. This will include consideration of how the international rule is applicable in a domestic context, a process which has been notable, for example, in the field of state immunity".<sup>27</sup>*

He further stresses that *"Immunity exists as a rule of international law, but its application depends substantially on the law and procedural rules of the forum".<sup>28</sup>*

42. In South Africa, Parliament has made a clear choice in s 10(9) to negate the head-of-state immunities that might otherwise have precluded the arrest and surrender of heads of state. Professor Tladi explains it this way:

*"As du Plessis points out, this provision [s 10(9)] is unambiguous in its effect, i.e. the mere fact that a person is entitled to inviolability is in itself not a justification for not ordering surrender. This means that even if a South African court itself cannot exercise jurisdiction over a head of state*

<sup>26</sup> Arrest Warrant case, para 61

<sup>27</sup> See James Crawford, Brownlie's Principles of Public International Law, 8<sup>th</sup> Edition (2012) pp 57 to 58

<sup>28</sup> Crawford p 488

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*like al-Bashir, this does not apply to the arrest and surrender processes described above. It is noteworthy that while Article 98 of the Rome Statute provides an exception to the duty to cooperate on the basis of immunity as described above, a similar provision does not exist in the Implementation Act. Indeed section 10(9) of the Implementation Act, stating that the status of a person is not a ground for refusing surrender, suggests that the legislator intended to explicitly exclude the effects of Article 98.*"<sup>29</sup>

43. This election by the South African Parliament accords with the "prudent approach" advocated by Cassese *et al* in their leading text on the International Criminal Court:

*"To avoid these difficulties [regarding immunities for officials], a prudent approach would be to provide that any issue of immunities will not bar arrest or surrender to the ICC. In essence, this approach leaves the*

<sup>29</sup> Tladi "The duty on South Africa to arrest and surrender President Al-Bashir under South African and International Law" *Journal of International Criminal Justice* 13 (2015) 1027 at 1039

See further Max du Plessis, 'South Africa's Implementation of the ICC Statute. An African Example', 5 *Journal of International Criminal Justice* (2007) 460 ff, who writes at 473-474:

"Second, even if Section 4(2)(a) is made to yield to customary international law upholding immunity for senior officials, it does not mean that the high-ranking individual who has personal immunity by virtue of being an incumbent head of state or foreign minister, and who is arrested whilst in South Africa for an international crime, must necessarily be set free. Under the complementarity scheme, it will be expected of a State Party to the ICC Statute that finds itself unable to exercise jurisdiction (because, for instance, such prosecution is of a foreign state's head of state) to send the accused to the ICC for prosecution. Article 89(1) of the ICC Statute says that States Parties to the Statute have a duty of cooperation with the court, requiring such states to arrest and surrender to the Court persons charged with an ICC crime. And where South Africa chooses to surrender a high- standing official to the ICC, the ICC Act makes clear [the author here references s 10(9) in a footnote] that whatever immunity might have otherwise attached to the official does not constitute a bar to the surrender of the person to the ICC."

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*issue to be decided by the ICC and not by national courts. In this manner, an implementing State can ensure that it will not find itself stuck with a legislative provision – or a judicial interpretation – on international immunities that hinders compliance with an ICC request<sup>30</sup>.*

44. Put differently, there is no impediment, at international law, to the approach adopted in the ICC Act. The Rome Statute expressly permits member States not to afford the immunities historically allowed under customary international law, to people charged with engaging in war crimes, crimes against humanity and genocide. That much was confirmed for South Africa by Pre-Trial Chamber II of the International Criminal Court. In that decision handed down immediately prior to Bashir's arrival in South Africa, the ICC reaffirmed the position in respect of South Africa, referenced the effect of resolution 1593 as removing Bashir's immunity, and warned South Africa that its actions in failing to arrest Bashir would be contrary to its duties under international law.<sup>31</sup> It concluded as follows:<sup>32</sup>

*"9. In conclusion, the Republic of South Africa is already aware of its obligation under the Rome Statute to immediately arrest Omar Al-Bashir and surrender him to the Court, as it is aware of the Court's explicit position (as publicly expressed, most recently, on 9 April 2014 and reiterated during the*

<sup>30</sup> Antonio Cassese, Paula Gaeta, John Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary, Vol II* (2002), at p 1857

<sup>31</sup> See Decision following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir (ICC-02/05-01/09-242), 13 June 2015 (Pre-Trial Chamber II).

<sup>32</sup> At para 9, emphasis added.

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*consultations with the South African delegation on 12 June 2015) that the immunities granted to Omar Al Bashir under international law and attached to his position as a Head of State have been implicitly waived by the Security Council of the United Nations by resolution 1593(2005) referring the situation in Darfur, Sudan to the Prosecutor of the Court, and that the Republic of South Africa cannot invoke any other decision, including that of the African Union, providing for any obligation to the contrary.*

...

*11. The Registrar is hereby directed to immediately notify the present decision to the competent authorities of the Republic of South Africa."*

45. The ICC has therefore itself determined the international law question at issue in these proceedings against South Africa. Its decision is binding on South Africa as a matter of both international and domestic law.
46. South Africa is permitted to enforce its treaty obligations in preference to the requirements of customary international law.
47. The government authorities' claim that the ICC Act (and the SCA's application of it) is at odds with, or fails to give effect to, international law is thus unfounded.
48. But even if the ICC Act was inconsistent with customary international law (which is denied), that would not render it domestically unlawful or unenforceable.

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Section 232 of 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' (emphasis added). It follows that a legislative provision at variance with customary international law will prevail, and will be enforced in preference to the rule of customary international law.

49. For all of these reasons, I submit that the government authorities' third ground of appeal has no prospects of success.

#### **Separation of powers**

50. Finally, the government authorities contend that the SCA's judgment is liable to appeal because it "*inappropriately imping[ed] on the separation of powers by expressing itself on matters within the heartland of the Executive, and criticis[ed] Government for conduct not properly before court or raised with counsel at the hearing*".
51. Neither of these propositions is correct.
52. The SCA primarily interpreted and gave effect to the legislative regime created by the ICC Act and the Immunities Act. It also interpreted and made determinations regarding immunity *rationes personae* under international law (at the request and invitation of the government authorities). In doing so, the SCA

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fulfilled its constitutional role and mandate. It is for the judiciary – and not the executive – to decide the law. I deny that the SCA usurped the role of the executive or determined matters within its exclusive remit.

53. It is so that the SCA criticised the government authorities' conduct in the High Court and their approach on appeal. I submit, with respect, that it was entitled and justified in doing so, for the following reasons:

53.1. As the SCA records, the government authorities changed their attitude to President al-Bashir's visit and their basis for opposing the SALC application after the High Court proceedings. In the High Court, they alleged that they had allowed President al-Bashir into South Africa solely for the purposes of the AU Summit, and claimed that he enjoyed immunity only in terms of the Host Agreement and the ministerial notice. In applying for leave to appeal, they changed that position. They contended that President al-Bashir enjoyed immunity under the Immunities Act and customary international law, that he could consequently enter and leave South Africa without risk of arrest and surrender and, indeed, that the government authorities anticipated hosting him again in the future.

53.2. Their change of attitude was unfortunate because it meant that new legal issues were raised for determination in the SCA. But it was also regrettable given the serious crimes for which President al-Bashir is

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wanted, and South Africa's constitutional, statutory and treaty obligations to bring people charged with international crimes to book.

53.3. The SCA also stridently criticised the government authorities for allowing President al-Bashir to leave South Africa while the High Court proceedings were underway (and in the teeth of a court order prohibiting his departure), and for providing only a "*risible*" explanation for how his escape was achieved.<sup>33</sup> The High Court made similar observations,<sup>34</sup> which were not challenged on appeal.

53.4. In the face of the government authorities' apparent acceptance of the High Court's criticism (they did not seek to impugn those findings before the SCA), I submit that the SCA's comments were both appropriate and necessary. President al-Bashir stands accused of the "*unholy trinity*" of international crimes of genocide, war crimes and crimes against humanity. He is alleged to have been the mastermind behind widespread attacks by the Sudanese government on the people of Darfur in Sudan from 2003 to 2008. The attacks are alleged to have included large-scale extermination, murder, rape, torture, forcible transfer and pillaging of civilians. Despite that, the government authorities' attitude, every step of the way, has been to undermine the seriousness of these allegations and to ignore South Africa's

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<sup>33</sup> SCA judgment: p. 51 para 7

<sup>34</sup> In paras 37-39

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commitment to ensuring that those who are accused of heinous crimes stand trial. Instead of complying with their obligations under the Constitution, the ICC Act and the Rome Statute, the government authorities have protected President al-Bashir from arrest and surrender to the ICC – and disregarded orders of their own courts in doing so, and the order of the International Criminal Court.

- 53.5. The SCA, cognisant of the context (genocide) in which the government flouted court orders (one by the ICC, the other of the High Court), was entitled to comment on this conduct and to express its discomfit at the government authorities' failure to protect the dignity and efficacy of the courts. Its criticism was entirely warranted. It is notable that a Full Bench of the High Court made the same critical comments and considered the failures so lamentable that it considered it "prudent to invite the National Director of Public Prosecutions to consider whether criminal proceedings are appropriate." That conclusion, and the findings leading thereto, were not appealed by the government respondents. Notably, the findings and conclusion by the Supreme Court of Appeal in this regard – while invoked by the government respondents unwarrantedly to suggest that this Court should grant leave because the SCA's criticisms create a reasonable apprehension of bias – are not impugned on appeal. The government respondents accordingly raise the spectre of bias to seek leave to appeal; but without the conviction to simultaneously attack on appeal the findings and conclusions of the SCA (and the High Court before it) about

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the government's contemptuous and misleading conduct. Their failure to do so is telling.

54. In any event, there is nothing in the SCA's judgment to suggest that its disapproval of the government authorities' conduct in the court a quo, coloured its determination of the legal issues before it. To the contrary, it gave no orders consequent on its criticisms, merely highlighting <sup>35</sup> that "*[e]ither the representatives of Government set out to mislead the Court and misled counsel in giving instructions, or the representatives and counsel misled the Court*", and suggesting "[w]hichever is the true explanation", it is "a matter no doubt being investigated by the appropriate authorities".
55. The SCA's findings accordingly afford the government authorities no basis to appeal.
56. The government authorities' final ground of appeal consequently has no prospects of success.

## CONCLUSION

57. For all the reasons set out above, SALC submits that the proposed appeal has

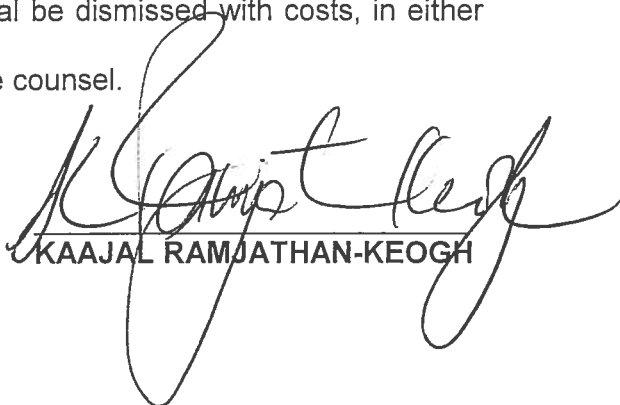
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<sup>35</sup> At para 7.

*Handwritten initials/signature*

no prospects of success and it is consequently not in the interests of justice for leave to appeal to be granted.

58. SALC therefore asks that the application for leave to appeal be dismissed with costs or, if leave is granted, that the appeal be dismissed with costs, in either event with costs including the costs of three counsel.

  
KAAJAL RAMJATHAN-KEOGH

I hereby certify that the deponent knows and understands the contents of this affidavit and that they are to the best of her knowledge both true and correct. This affidavit was signed and sworn to before me at JOHANNESBURG on this the 20 day of APRIL 2016, and that the Regulations contained in Government Notice R.1258 of 21 July 1972 as amended, have been complied with.

  
COMMISSIONER OF OATHS

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Address: 1 HOOD AVE. 5th floor  
Rolebank Jhb  
Capacity: CA(SA)

COMMISSIONER OF OATHS  
WARREN SEGALL  
CA (SA)  
Commissioner of Oaths (R.S.A.)  
P.O. Box 2424  
Parklands  
2121



# 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)

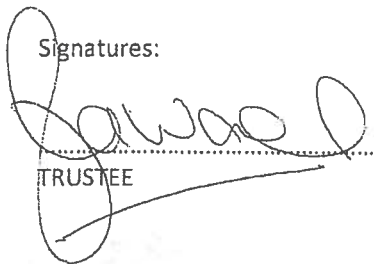
TRUST NO: IT 3935/05

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 Darfur, 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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