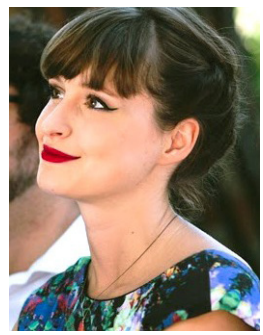
PULLING THE WOOL OVER EVERYONE'S EYES: Reflections on South Africa and the International Criminal Court (ICC)

My jaw dropped lower and lower as I witnessed each bizarre new argument unfold. The International Criminal Court (ICC) had convened a hearing on South Africa's failure to arrest Sudanese President Omar Al Bashir. In 2015, he had attended an African Union (AU) Summit in South Africa. Instead of complying with its obligation to arrest him, our government allowed him safe passage in and out of the country.



Cecelia Kok is Head of Research and Advocacy Projects at the Friedrich Naumann Foundation for Freedom. In this role, Cecelia heads up the organisation's civil society and environmental projects in South Africa. Cecelia holds a BA LLB and has just completed a Master's Degree in Applied Ethics. She writes in her personal capacity.

I was present throughout the court hearing in The Hague. The following is a reflection on South Africa's relationship with international justice and the ICC. In particular, I will discuss South Africa's submissions to the ICC, which are baffling in light of the Al Bashir cases that were heard in our domestic courts.

Unfortunately, legal matters can acquire a kind of clinical character due to their technical and occasionally abstract nature. In the matter of Al Bashir, the heinous nature of the crimes of which he is accused cannot be overstated. The ICC has issued two arrest warrants for him – one in 2009 and the other in 2010. He is charged with

> five counts of crimes against humanity: murder, extermination, forcible transfer, torture, and rape; two counts of war crimes: intentionally directing attacks against a civilian population as such or against individual civilians not taking part in hostilities, and pillaging; three counts of genocide: by killing, by causing serious bodily or mental harm, and by deliberately inflicting on each target group conditions of life calculated to bring about the group's physical destruction. [1]

Behind these horrific charges lie hundreds of thousands of stories of devastating human suffering.

The ICC is tasked with investigating and trying perpetrators with the gravest crimes known to humanity in order to bring about a more just and peaceful world. Of course, even if Al Bashir is tried, convicted and sentenced, this cannot undo the gruesome deaths suffered and atrocious harms caused to his victims. It would, however, go some way in combatting impunity and in this way instantiate an important aspect of justice. It would also prevent the man from carrying out such violence again and serve to hold him accountable for his gross human rights violations.

Many commentators quickly end up shifting focus to lofty discussions around alleged questions of principle such as 'How legitimate is the ICC?' or 'Is the ICC biased against Africa?' when discussing South Africa's position in respect of the ICC. These are questions that surely would perplex victims of the grave crimes with which the ICC deals. The hearing I attended in The Hague could not have made South Africa's unprincipled stance clearer. Indeed, the aspects I outline below point to a deeply disappointing picture of South Africa's commitment to international justice and to the rule of law. Whilst there are many strange features of South Africa's position as it was outlined at the ICC, I focus here only on a few.

Upfront, it is important to note that South Africa is a State Party to the ICC, having ratified the Rome Statute (the treaty establishing and governing the ICC) and domesticated the latter through the Implementation of the Rome Statute of the International Criminal Court ('the Implementation Act') in 2002.

It is also useful to outline the domestic litigation that took place before I turn my attention to the ICC hearing:

Domestic litigation around Al Bashir

Sunday, 14 June 2015: Urgent Application brought by the Southern Africa Litigation Centre (SALC) at the North Gauteng High Court to arrest Al Bashir after it had become clear the latter was on South African territory:

In the morning, Advocate Ellis, appearing for the South African government, explains that the defence will be based on a Cabinet decision to grant Al Bashir immunity. Government alleges this immunity trumps South Africa's duty to arrest Al Bashir in light of the ICC warrants and South Africa's Implementation Act. Advocate Ellis then requests a three hour adjournment to draft a complete argument on this basis.

Relying primarily on the host agreement concluded between South Africa and the Commission of the AU, the South African government proceeds to argue that Al Bashir enjoyed immunity from arrest.

However, at 15:00, Advocate Mokhari SC – joining Advocate Ellis – requests more time to draft an answering affidavit instead of arguing the case Advocate Ellis had outlined earlier.

Although Judge Fabricius grants an adjournment till 11:30 the following day, he finds it incumbent – given the seriousness of the crimes alleged - to grant an interim order directing government 'to take all necessary steps' to prevent Al Bashir from exiting South Africa, pending the outcome of the court application the following day.

Monday, 15 June 2015: The North Gauteng High Court grants an order pending the final order for the arrest of Al Bashir and states that a failure to do so would be unconstitutional

The government's answering affidavit, meant to be filed at 09:00, is only filed at 11:25 with no explanation for the delay. This calls for a further adjournment for the applicant to peruse the papers and file a reply. Weary of media reports claiming Al Bashir had left or was in the process of leaving South Africa, the court requests Advocate Mokhari to confirm Al Bashir's whereabouts given how central this information is to the application. Advocate Mokhari repeatedly assures the court that Al Bashir is in South Africa, which subsequently, however, turned out to be untrue.

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Only on concluding the proceedings at 15:00, immediately after issuing the order to arrest and detain Al Bashir, is the court informed by Advocate Mokhari that Al Bashir had left South Africa. This evidently constitutes a blatant violation on the part of government of the interim order made the previous day and the court thus finds it necessary to require the Minister in the Office of the Presidency and the Minister of State Security to file an affidavit within seven days explaining how Al Bashir managed to exit South Africa despite the court order handed down the previous day. [2]

Indeed, much suspicion is roused by the numerous litigation delays which seem to have had the effect of allowing Al Bashir to exit the country.

Possibly the most haunting part of the Court's judgement is the following extract:

- how was it possible that President Bashir would, with his whole entourage, travel from Sandton to Waterkloof Airbase, without any of the Respondents' knowledge?
- how was it possible that the Sudanese plane would take off from the airbase without the Respondents knowing whether the President was on board or not?
- how would that plane be able to land in Sudan by late afternoon if it had not departed at about noon that same day?

The answers suggest themselves.[3]

Palpably concerned about the gravity of the unlawful government action, the Court, in its order confirming the patent unconstitutionality of the government's actions, wrote that:

> A democratic State based on the rule of law cannot exist or function, if the government ignores its constitutional obligations and fails to abide by Court orders. A Court is the guardian of justice, the corner-stone of a democratic system based on the rule of law. If the State, an organ of State or State official does not abide by Court orders, the democratic edifice will crumble stone-by-stone until it collapses and chaos ensues.[4]

In an affidavit filed by the government for these proceedings, it is noted that Al Bashir exited South Africa on a plane from Waterkloof Airbase at around 11.30 am on Monday the 15th of June 2015 without even an attempt to explain how a head of state, making use of a military air base for use of dignitaries, could have left the country without any government official being aware of this.

The Court went on to state:

> Where the rule of law is undermined by Government it is often done gradually and surreptitiously. Where this occurs in Court proceedings, the Court must fearlessly address this through its judgments, and not hesitate to keep the executive within the law, failing which it would not have complied with its constitutional obligations to administer justice to all persons alike without fear, favour or prejudice.
>
> We stated earlier that the departure of President Bashir form 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.[5]

The South African government subsequently decided to appeal the High Court's ruling.

> **Wednesday, 15 March 2016: Appeal brought by the South African government in the Supreme Court of Appeal (SCA) against the above High Court judgement with the Southern Africa Litigation Centre (SALC) as respondent and the Helen Suzman Foundation as *amicus curiae* (friend of the court)**

In an affidavit filed by the government for these proceedings, it is noted that Al Bashir exited South Africa on a plane from Waterkloof Airbase at around 11.30 am on Monday the 15th of June 2015 without even an attempt to explain how a head of state, making use of a military air base for use of dignitaries, could have left the country without any government official being aware of this.

The SCA wrote scathingly that:

> Senior officials representing Government must have been aware of President Al Bashir's movements and his departure, the possibility of which had been mooted in the press. In those circumstances the assurances that he was still in the country given to the Court at the commencement and during the course of argument were false. There seem to be only two possibilities. Either the representatives of Government set out to mislead the Court and misled counsel in giving instructions, or the representatives and counsel misled the Court. Whichever is the true explanation, a matter no doubt being investigated by the appropriate authorities, it was disgraceful conduct.[6]

The SCA also noted that in the High Court, the South African government did not challenge its obligations in terms of the Rome Statute and the Implementation Act but sought to rely on the host agreement concluded between South Africa and the Commission of the African Union.

This drastically different argument meant that now the government was denying that it ever had a duty to arrest Al Bashir to surrender him to the ICC although it previously acknowledged this obligation.

The SCA judgement made reference to Dr Lubisi, the Director-General of the Presidency and the Secretary of Cabinet, who testified that in a Cabinet meeting it was decided 'the South African government as the hosting country is first and foremost obliged to uphold and protect the inviolability of President Bashir in accordance with the AU terms and conditions' and that 'Cabinet collectively appreciated and acknowledged that the aforesaid decision can only apply for the duration of the AU Summit.'[7]

Thereafter, the SCA wrote that 'an entirely different argument emerged in the application for leave to appeal to this Court', namely one grounded in customary international law and the South African Diplomatic Immunities and Privileges Act of 2001.[8] This drastically different argument meant that now the government was denying that it ever had a duty to arrest Al Bashir to surrender him to the ICC although it previously acknowledged this obligation. (At this point it is relevant to note that in 2009, Al Bashir declined to attend Jacob Zuma's inauguration in South Africa in light of the fact that South African officials would arrest him in given the ICC's arrest warrant issued that year.)

Ultimately, the SCA dismissed the South African government's appeal, reaffirming that the country's failure to arrest Al Bashir is unlawful.

2016: South Africa applies for leave to appeal the SCA judgement but then decides to withdraw this application.

South Africa and the ICC: a revealing timeline

While the above litigation was playing out of the local stage, the following engagements were taking place between South Africa and the International Criminal Court:

28 May 2015: The ICC refers to public information around Al Bashir's potential travel to South Africa to attend the African Union Summit (7-15 June, Johannesburg), reminding South Africa of its duty to cooperate in respect of arresting Al Bashir; The ICC also requests South Africa to consult with the ICC without delay should the country foresee any difficulties in fulfilling its obligations.

Thursday, 11 June 2015: The South African Embassy of the Netherlands requests an urgent meeting to pursue consultations as provided for in the Rome Statute.

Friday, 12 June 2015: The ICC obliges South Africa's bold request and consultations are held at 5pm at which South Africa's duty to arrest Al Bashir, should he set foot on South African territory, is reconfirmed.

Saturday, 13 June 2015: In spite of all the above, Al Bashir enters South Africa.

Sunday, 14 June 2015: The North Gauteng High Court grants an interim order for Al Bashir's arrest.

Monday, 15 June 2015: Al Bashir leaves South Africa, despite an interim court order for his arrest issued the previous day and legal proceedings before the court that same day which culminate in a final order for his arrest.

Professor Dire Tladi, Counsel representing South Africa in The Hague 7 April this year, was at great pains to state that 'we should not reduce the criminal justice project to a single individual', but the facts before us seem to indicate South Africa's rather blatant willingness to disregard the criminal justice project for a single individual, namely one Omar Hassan Ahmad Al Bashir.[9]

It ought to strike any reasonable person as strange that South Africa waited until the eleventh hour to approach the ICC even though official documents confirm South Africa's knowledge in early June of Al Bashir's confirmation to attend the AU Summit (accompanied by a request for immunity) from Sudan. To request a meeting for the eve of the arrival of Al Bashir in South Africa cannot but provoke serious misgivings and throw up a plethora of uncomfortable questions.

To make matters worse, South Africa, before Pre-Trail Chamber II, then proceeded to take issue with the way consultations were conducted, with no good argument to support this claim.[10] Far from failing to hold appropriate negotiations, the ICC must be commended for reacting so quickly and appropriately to what it took to be a serious request in respect of one of the most serious criminal fugitives in the world.

A deliberate omission by South Africa at the ICC: domestic litigation around the arrest of Al Bashir

The most astounding feature of what transpired in The Hague was Professor Tladi's statement that the South African litigation which had taken place around Al Bashir was irrelevant.

In light of the domestic litigation which made world-wide headlines and which was patently relevant to the matter at hand as ought to be clear from my above outline thereof, Tladi's statements strike one not as a negligent or even grossly negligent but rather as a deliberate attempt to conceal material information from the ICC.

Tladi claimed that 'the issue before us today is not whether South Africa violated its legal obligations under South African domestic law. The question squarely before us is whether South Africa was in violation of its duties under the Rome Statute and international law in general' and that he would not 'today be addressing matters that we believe fall squarely within the jurisdiction of the South African courts.'[11]

In light of the domestic litigation which made world-wide headlines and which was patently relevant to the matter at hand as ought to be clear from my above outline thereof, Tladi's statements strike one not as a negligent or even grossly negligent but rather as a *deliberate* attempt to conceal material information from the ICC.

It is a matter of course that the above cases dealt with South Africa's obligations in terms of international law and – given that the relevant international statute is domesticated – South African law.

South Africa is subject to the judgements of its courts. Of course, courts may err and an appeal system seeks to remedy any errors when they occur. Although the government pursued an appeal to the SCA, it withdrew its appeal application from the Constitutional Court, thus effectively accepting the SCA's ruling. And when an appeal court pronounces unequivocally that the country had a duty to arrest Al Bashir and its failure to do so was unlawful (and there is no appeal against this), how can it be South Africa has the audacity to argue before the International Criminal Court the very opposite?

It was left to Prosecutor Julian Nicholls to raise the issue of domestic litigation before the ICC. Nicholls summed up the situation by stating that South Africa had 'accepted that Supreme Court of Appeal's judgment, accepted the law, withdrawn its further appeals, although it now attempts to argue some of the same points before this Court.[12]

It is beyond baffling that Professor Tladi could – without flinching – claim that 'we can't simply assume a legal duty to arrest exists'.[13]

This extraordinary behaviour speaks volumes about South Africa's lack of commitment to international justice and to the rule of law at a fundamental level.

The 'but everyone is doing it' argument

Another perplexing maneuver was Professor Tladi's appeal to the 'practice of State Parties' suggesting that the Court erred in the way it understood the international law at hand, claiming that states such as Kenya, Chad, Malawi, Djibouti, the Democratic Republic of the Congo, Nigeria, Uganda, Jordan and South Africa all shared 'the same interpretation'.[14]

In response, Mr Nicholls had the following to say:

> My friend made reference to several State Parties that have failed to arrest and surrender Mr Al Bashir. That is not a reason to stop referring these cases to the only bodies that they can be referred to. And there is no reason therefore in this case why it should, South Africa should be treated differently than Djibouti, Uganda, DRC and the others which have been found similarly noncompliant.[15]

Peace versus justice – an obviously false dilemma

Astonishingly Professor Tladi uttered the following:

> Our commitment to peacemaking, to peacekeeping, is tangible. It's not academic. It's not just about statements that we make at the African Union or the United Nations. More than 40 South Africans have in recent years lost their lives.[16] As a leading player in peace efforts, we cannot disengage from the African Union or adopt a policy that would suggest we're not going to host AU heads of state. It's just not possible.[17]

One shudders to wonder what the victims of Al Bashir's crimes might feel at such doublespeak.

I suggest that what that shows is that South Africa did not begin this process by identifying a legal impediment to an obligation and seek a way to resolve it. It was actually the reverse. South Africa identified a political and diplomatic problem in the obligation and since then has been searching for a legal impediment to rely on.

Changing legal arguments

The South African government changed tack, basing its justification for not arresting Al Bashir from one grounded in a host agreement (in the High Court) to one founded on customary international law and the South African Diplomatic Immunities and Privileges Act (in the Supreme Court of Appeal). In the ICC, the bulk of South Africa's defence lay in critiquing the jurisprudence of that court, another curious move indeed.

Prosecutor Nicholls, in respect of the changing legal arguments proffered by South Africa, came to the following damning conclusion:

> I suggest that what that shows is that South Africa did not begin this process by identifying a legal impediment to an obligation and seek a way to resolve it. It was actually the reverse. South Africa identified a political and diplomatic problem in the obligation and since then has been searching for a legal impediment to rely on.[18]

Conclusion

The way South Africa has conducted itself in relation to the matter of Al Bashir before its own courts and before the ICC is nothing short of appalling.

In its decision handed down on the 6 July 2017, the Chamber noted that 'reliance by States Parties to the Rome Statute on immunities …with the Court would create – at least as concerns requests for the arrest and surrender of individuals subject to a

warrant of arrest – an insurmountable obstacle to the Court's ability to exercise its jurisdiction'.[19] In essence, the position South Africa argued for would mean that the court would be emasculated to the extent that it would not be able to carry out one of its core functions in terms of the Rome Statute.

The Chamber confirmed unambiguously that

[t]he irrelevance of immunities based on official capacity with respect to proceedings before the Court is incorporated in the Statute as a basic principle to which States Parties subscribe by having voluntarily ratified the Statute.[20]

It added that 'South Africa was not entitled to rely on its own understanding [of the law]'.[21]

Indeed, the Chamber saw it necessary to emphasise this point by stating that the law concerned

> does not provide that the requested State may refuse cooperation with the Court, or postpone execution of the request for arrest and surrender. Even less does this provision grant discretion to States Parties to choose whether to cooperate with the Court or refuse such cooperation on the ground of a disagreement with the Court's interpretation and application of the Statute. While in particular circumstances certain procedural remedies (such as appeal) may be available, disregarding the determination of a court of law is, manifestly, not one of these legitimate remedies.

Given the gravity of its noncompliance in terms of its duty to arrest Al Bashir, the Chamber's decision – simply restating this failure as unlawful – seems rather short of appropriate when it could have exercised its discretion to refer South Africa to the Assembly of State Parties to the Rome Statute and the Security Council of the United Nations. This was, in fact, what the prosecution advised. In my view, the Chamber was far too charitable toward South Africa on this occasion.

NOTES

1 https://www.icc-cpi.int/darfur/albashir
2 https://constitutionallyspeaking.co.za/complete-high-court-al-bashir-judgment
3 https://constitutionallyspeaking.co.za/complete-high-court-al-bashir-judgment I have removed paragraph numbering for ease of legibility.
4 https://constitutionallyspeaking.co.za/complete-high-court-al-bashir-judgment
5 https://constitutionallyspeaking.co.za/complete-high-court-al-bashir-judgment
6 The Minister of Justice and Constitutional Development v The Southern African Litigation Centre (867/15) [2016] ZASCA 17 (15 March 2016) – 'SCA judgement'
7 SCA judgement
8 SCA judgement
9 ICC-02/05-01/09-T-2-ENG ET WT 07-04-2017 1/92 SZ PT, 'Transcript', p.31
10 On this note, in its decision delivered on the 6th of July 2017, the Chamber wrote that the availability of a channel for dialogue between the Court and a State Party – irrespective of the form that such dialogue may take – cannot be understood as resulting in a (unilateral) suspension of the execution of a request for cooperation. This is particularly important in cases such as the one at hand, where execution of the request for cooperation could succeed only in a narrow window of time.
11 Transcript, p.13
12 Transcript, p59
13 Transcript, p.16
14 Trascript, p.35-36
15 Transcript, p.45
16 Presumably Tladi is alluding to lives lost in military missions.
17 Transcript, p.40
18 Transcript, p.57
19 ICC-02/05-01/09-302 06-07-2017 1/53 RH PT, 'ICC decision'
ICC decision
20 ICC decision
21 ICC decision