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## **Nothing over something: How a non-existing immunity trumped international and constitutional law**

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*A recent trip of Omar al-Bashir to an African Union summit in South Africa could have lead to the arrest of the alleged criminal. However, the South African government choose to ignore its obligations under international and national law. In turn, a domestic court bashes the government's actions.*

### **Introduction**

1 Picture this: An international diplomatic summit, visited by heads of states of over 50 countries. Among them a genocidal criminal, wanted with an international arrest warrant. Outside of the summit, activist groups attempt to get the perpetrator arrested with the help of the domestic judiciary against the passive and allegedly powerless host government. Finally, a judge finds the government obliged to hinder the criminal's departure. Nonetheless, he manages to board an aircraft and leaves the country. Back home, a huge crowd celebrates him.

2 It sounds like a badly written Hollywood-thriller. Yet, this is more or less what has happened during the African Union's June 2015 summit in South Africa. Of course, the alleged criminal is *Omar al-Bashir*, President of Sudan. He is wanted for five counts of crimes against humanity, two counts of war crimes and three counts of genocide, as identified in two arrest warrants by the International Criminal Court in March 2009 and July 2010. The North Gauteng High Court of Pretoria was actively involved in keeping *al-Bashir* in South Africa, while the South African government mimicked the three monkeys: It did not follow the High Court's interim order to take all steps to hinder *al-Bashir* from leaving, nor did it know anything about his plans and, finally, neither does the government sufficiently explain its course of action and it is far from justifying its violation of international law.

### **The African Union summit and parallel court proceedings**

3 The African Union (AU) regularly holds summits during which the heads of states and governments as well as their staff discuss issues concerning the continent. The summit is held in one of the AU's member states. Being a regular event, the AU is used to organize, conduct and manage these summits. Among the tasks habitually fulfilled by the AU are invitations to its members. To simplify the process, the AU provides a host agreement that regulates the material and technical organization of a summit. It is signed by the AU and the respective host country. Included in this host

agreement is a provision dealing with immunities. In detail, the 2015 host agreement between the AU and South Africa provides:

“Representatives of member states (...) shall, while exercising their functions and during their travel to and from the place of meetings, be accorded the following privileges and immunities: (a) immunity from personal arrest of detention (...).”

4 The foregoing is the view of the South African government during the relevant court proceedings. In essence, the government maintains that the president’s immunity trumps any other applicable rule: *Al-Bashir* was invited by the AU, South Africa merely provided the venue. As such, South Africa was first and foremost obliged to uphold and protect the inviolability of *al-Bashir*.

5 The AU summit was still ongoing when an NGO sought relief from the North Gauteng High Court. On 14 June 2015, a Sunday, the Southern Africa Litigation Centre applied to the High Court seeking an arrest of *al-Bashir*. While the respondent government officials and agencies were preparing their brief, the Court released an interim order, which compelled the respondents to prevent *al-Bashir* from leaving the country until a final order was made. Instead of submitting their brief, however, the respondents asked for an extension of the deadline, which was granted until Monday morning. After the extended deadline was missed by the respondents, the High Court issued an order holding that the failure of the respondents to arrest *al-Bashir* was inconsistent with the South African constitution and compelling the respondents to take all reasonable steps to prepare to arrest the suspect. Around the same time the court issued its order, *al-Bashir* left South Africa via plane.

6 The South African proceedings were mirrored in The Hague, where ICC-officials were consulting with the South African Embassy in the Netherlands. Tellingly, in a decision of 13 June 2015, the Pre-Trial Chamber II denied a request by the Prosecutor to clarify the obligations of South Africa as a state party on the ground that it was

“unnecessary to further clarify that the Republic of South Africa is under the duty under the Rome Statute to immediately arrest Omar Al-Bashir and surrender him to the Court, as the existence of this duty is already clear and needs not be further reiterated. The Republic of South Africa is already aware of this statutory duty and a further reminder is unwarranted.” (ICC, Pre-Trial Chamber II, Decision following the Prosecutor’s request for an order further clarifying that the Republic of South Africa is under the obligation to

immediately arrest and surrender Omar Al Bashir, 13 June 2015, ICC-02/05-01/09-242, para. 10)

### **The North Gauteng High Court bashes South Africa's government**

7 A little over a week later the North Gauteng High Court issued its final judgment in the matter *Southern Africa Litigation Centre v Minister of Justice And Constitutional Development and Others* – a very interesting read. Overall, the judgment is based on two major reasons, the first being the South African constitutional framework to include international law in the domestic legal system and the second being the question of immunity for the Sudanese president.

8 But first, the High Court begins its judgment with recalling how the government violated the interim order to take all necessary steps in order to hinder *al-Bashir's* departure. This finding is repeated, in harsher words, towards the end of the judgment as well. Here, the Court urges the government to take domestic jurisprudence to heart.

### **Incorporation of international law into the South African legal system**

9 The first major aspect of the case and the subsequent judgment is the relationship between domestic (constitutional) law and international law. The High Court spends a good deal on how exactly international law, be it treaty or customary law, is incorporated into the South African legal order.

10 The High Court recalls the different treaty obligations of South Africa, namely the Rome Statute, the Vienna Convention on Diplomatic Relations, the General Convention on the Privileges and Immunities of the Organization of African Unity and the host agreement between the AU and South Africa.

11 The Rome Statute was incorporated by the Implementation Act of 2002, much like the Vienna Convention on Diplomatic Relations was incorporated into domestic law. The Convention on the Privileges and Immunities of the Organization of African Unity, however, has not been incorporated into domestic law.

12 *Prima facie*, a conflict between international treaties exists in the domestic legal order. The Rome Statute strips al-Bashir of his immunity while the Vienna Convention confers immunity on him. It all boils down to the question of how that conflict is to be resolved. The North Gauteng High Court opts for a solution according to South African constitutional jurisprudence. In this matter, the courts have identified a constitutional duty of state organs to interpret constitutional law in accordance with international law and especially international human rights law.

13 This approach is similar to the principle of ‘*Völkerrechtsfreundlichkeit*’ in German constitutional law, meaning that the German constitution needs to be interpreted ‘friendly’ to international law.

#### **No immunity for *al-Bashir***

14 In addition to the above relationship, the court addresses the question of a possible immunity for *Omar al-Bashir*. As a head of state, however, he may enjoy an immunity under international treaty law (the Vienna Convention on Diplomatic Relations) or customary law. The Rome Statute cannot, in the correct view of the High Court, strip the head of a non-member state to the Statute, as Sudan, of the immunity. Nevertheless, Security Council Resolution 1593 (2005) effectively achieves this outcome. As a binding resolution under chapter VII of the UN-Charter, Sudan is as a member of the UN bound by the Council’s decision. Here, the High Court explicitly refers to the jurisprudence of the ICC.

15 The Vienna Convention on Diplomatic Relations can not alter this result. Incorporated by the Immunities Act, this act recognizes that heads of states are immune to the extent afforded to them by treaty or customary law – and treaty law strips *al-Bashir* of this immunity.

16 The host agreement, in turn, is not applicable to *al-Bashir*. The Court understands this agreement as to include only AU staff. While this may be debated given the wording of the agreement, there is one further smart and convincing move of the High Court. It held that the purpose of said agreement is to facilitate the organization and conduct of the AU summit. *Al-Bashir*, however, is not tasked with any responsibility regarding organization, conduct or management of the summit. With this twist the court turns the South African government’s position against itself.

17 Moreover, the host agreement was not incorporated into domestic law by an act of parliament. As such, it is inferior to the Rome Statute and the Vienna Convention on Diplomatic Relations, which were both transformed by the legislative.

#### **Foreign policy as an exception?**

18 In an *obiter dictum* the court mentions South African foreign policy. It seems as if the court was prepared to let considerations of South Africa’s diplomatic relations alter the foregoing finding, if this was necessary to protect such interests.

The court maintains:

“Having regard to the principle of separation of powers (...), it is in any event clear that this court would not have concerned itself with policy decisions which in their nature fall outside our ambit. As a court we are concerned with the integrity of the rule of law and the administration of justice.” (para. 33 of the order of 24 June 2015).

19 This could be read as an opportunity to keep the door open for exception due to policy. Given the court’s detailed analysis of constitutional law and the last sentence of the above quote, though, this seems rather unlikely. In the end, the court bases its decision on constitutional law which prevails over political arguments.

20 Surprisingly – and the South African government deserves credit for this approach – policy considerations were not used as an argument in the present case. Maybe the government is angry with itself for forgetting this line of reasoning. In the long run this strategy (or lapse) strengthens the rule of law and the respect for international and constitutional law.

### **What remains?**

21 The High Court closes with alarming words:

“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 a State or State-official does not abide by court orders, the democratic edifice will crumble stone-by-stone until it collapsed and chaos ensues.” (para. 37 of the order of 24 June 2015).

Additionally, the court finds it prudent to invite the competent authorities to consider whether criminal proceedings are appropriate (para. 39 of the order of 24 June 2015).

22 In conclusion, the South African government’s approach is rejected by the High Court for all the right reasons. The High Court’s judgment itself contributes to international law. The court’s order will surely be an important precedent, even if it failed to achieve the ultimate goal. Yet, *Omar al-Bashir* will most likely not travel to South Africa in the near future. After all, this may be a small step in enforcing the ICC’s arrest warrant.

## Documents

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

North Gauteng High Court, Pretoria (South Africa), Southern Africa Litigation Centre v Minister of Justice And Constitutional Development and Others (27740/2015), Interim Order of 14 June 2015, available at <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2015/06/Interim-interdict.pdf>

North Gauteng High Court, Pretoria (South Africa), Southern Africa Litigation Centre v Minister of Justice And Constitutional Development and Others (27740/2015), Judgment of 23 June 2015, (2015) ZAGPPHC 402, available at <http://www.saflii.org/za/cases/ZAGPPHC/2015/402.html>

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