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A SHREWD AWAKENING: THE MOBILISATION OF SOUTH AFRICAN CIVIL SOCIETY IN THE *AL BASHIR* MATTER

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1 Introduction

John Dugard famously wrote that, through the policy of apartheid, South Africa made an enormous, but unintended, contribution to international law.[1] It is ironic that South Africa not only inspired global contempt for apartheid, but that its unique policy of racial segregation inspired the drafting of the Apartheid Convention,[2] numerous resolutions of the Security Council and General Assembly[3] and that the crime of apartheid ultimately found its way into the Statute of the International Criminal Court (ICC).[4] For many decades, South Africa was an example of how *not* to behave in the international arena.

This paper will focus on the unintended consequences of the non-arrest of Sudanese President Omar Al Bashir. When Al Bashir attended an AU summit in South Africa during June 2015, his visit attracted more attention than that of other heads of state with unsavoury human-rights records, such as Robert Mugabe. The reason for this spotlight on Al Bashir was the warrant for his arrest, issued by the ICC in 2009. Regardless of Al Bashir escaping arrest when visiting South Africa in June 2015 and irrespective of whether the South African government eventually agrees to comply with its international obligations and arrest Al Bashir on his next visit to South Africa, the presence of Al Bashir on South African soil undeniably had unintended consequences — not only for the recognition of international criminal law in South Africa, but also for local civil-society activity. The Al Bashir debacle not only alerted and awakened civil society to the possibilities of litigation on the basis of international law, but the

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1 J Dugard *International Law: A South African Perspective* 4 ed (2011) 19.

2 The 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid (Apartheid Convention).

3 GA/RES/5/395 (V) (2 December 1950); SC/RES/181 (1963); GA/RES/1899 (XVIII) (11 November 1963); S/RES/554 (1984); GA/RES/S-16/1 (14 December 1989).

4 Art 7 of the 1998 Rome Statute of the International Criminal Court (Rome Statute).

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wide publication of the case disseminated information on international criminal law and, in so doing, spread awareness of international criminal law.[5]

The tendency of civil society, until fairly recently, to ignore or neglect international law, can be largely attributed to the constitutional law-centered thinking of South African lawyers since 1994. It can also be attributed to civil-society priorities and strategies during the struggle against apartheid. The euphoria of the political and legal transition of the mid 1990s, coupled with the understanding that the transition was driven by and based on constitutional law, led to a fairly insular mentality on the part of civil society. In contrast with international civil-society organisations that made a significant contribution to the resistance and abolition of apartheid,[6] local NGOs have not been as active in promoting the principles of international law or in using international law as a foundation for human-rights litigation. This paper will briefly consider the reasons for this approach by NGOs in the pre- and post-democratic eras.

Much has been written on the Al Bashir incident.[7] Much of the existing literature and journalistic commentary focuses on the question of immunity of heads of states, which was the state's main argument for not arresting Al Bashir. So far, the involvement and impact of South African civil-society organisations in the litigation process to get the South African government to recognise its obligations in the Al Bashir matter, have been neglected in the literature.[8] This paper will not repeat the history of the case or the debate on immunity, which is so central to the Al Bashir saga. Instead, its focus is on the involvement of civil society. The paper begins by examining the increasingly important role of civil society and thereafter considers, the role of civil society in the Kenyan context, as well as the context of the Central African Republic. The focus will then shift to the way South African civil-society organisations, and particularly the Helen Suzman Foundation, became involved in the *Al Bashir* case and how local civil society has devised advocacy strategies

5 *Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre and Others* 2016 (3) SA 317 (SCA).

6 Prominent examples are Amnesty International and Human Rights Watch.

7 For a good selection, see D Akande 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities' (2009) 7 *Journal of International Criminal Justice* 333; D Tladi 'The Duty on South Africa to Arrest and Surrender Al-Bashir under South African and International Law: A Perspective from International Law' (2015) 13 *Journal of International Criminal Justice* 1027; R Cryer 'The Definitions of International Crimes in the *Al Bashir* Arrest Warrant Decision' (2009) 7 *Journal of International Criminal Justice* 283.

8 For a notable exception, see S Williams & H Woolaver (eds) *Civil Society and International Criminal Justice in Africa: Challenges and Opportunities* (2016).

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relating to the ICC — both in isolation and collectively. Finally, the paper will briefly consider the question of South Africa's attempt to withdraw from the ICC.

Whereas the Southern Africa Litigation Centre was particularly prominent in initiating proceedings to arrest Al Bashir, other civil-society organisations played an important role in challenging not only the government's decision not to arrest Al Bashir, but also the more recent decision to withdraw from the ICC by prematurely depositing instruments of withdrawal with the UN.[9] This paper therefore also look at the role and work of one such civil-society organisation, namely the Helen Suzman Foundation. Finally, the paper mentions the ways in which NGOs continue to play a role. The possible impact of South African NGO activism on other jurisdictions (particularly in Africa), where visiting senior state officials were similarly not arrested, is also considered. It is argued that South African civil-society mobilisation played a vital role in alerting the South African government to its duties as a member state to the Rome Statute.

The paper places the civil-society activism around the Al Bashir matter in the broader context of civil-society activity before the ICC, specifically in Kenya and the Central African Republic. The history of the Al Bashir saga, the history of civil-society involvement in the case and the strategies employed by NGOs will then be discussed.

2 The Increasingly Important Role of Civil Society

In what Ruti Teitel describes as the 'global phase' of transitional justice,[10] there has been an increased involvement of transnational non-governmental organisations and global civil society that has generated 'a shift from a focus on state-centric obligations to a focus upon the far broader array of interests in non-state actors associated with globalization'.[11]

There is ongoing controversy on the definitions of both 'civil society' and 'NGOs'. Both terms will be used in this paper.

Broadly understood, civil-society groups are political movements that respond to specific political and cultural issues. The claims of these groups are often stated in the language of universal values, such as

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9 H Woolaver 'International and Domestic Implications of South Africa's Withdrawal from the ICC' *EJIL: Talk!* 24 October 2016 available at http://www.ejiltalk.org/international-and-domestic-implications-of-south-africas-withdrawal-from-the-icc/ (accessed 2 February 2017).

10 RG Teitel *Globalizing Transitional Justice* (2014) 4–5.

11 Ibid.

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fundamental human rights.[12] Their work can be described as a new source of change that reflects the huge growth in civil-society political activism.[13]

Kamminga writes that defining the NGO concept is difficult, but that NGOs tend to be private citizens' groups established to further the common objectives of their members.[14] An important question is whether NGOs enjoy legal status and, if they do, whether it is only on the national or also on the international plane.[15] Currently, NGOs do not have the capacity to perform international acts on an international plane. Significantly, NGOs therefore do not have the capacity to enter into treaties.[16]

Nevertheless, NGOs have the capacity to bring international claims. In some instances, states accepted their international obligations towards NGOs.[17] Article 34 of the European Convention on Human Rights determines that NGOs claiming to be victims of violations of rights set forth in the Convention have a right to lodge petitions to the European Court of Human Rights (ECHR).[18] Under some international mechanisms NGOs enjoy the possibility of third-party intervention in courts.[19] Under article 36(2) of the ECHR a third party is permitted to participate at the oral and written stages of proceedings without formally becoming a party to a case.[20]

As Stacy observes, evidence that international legal standards and human-rights declarations cause governments to change their behaviour, is hotly disputed.[21] Civil-society organisations can, however, still have a significant impact on government behaviour by resorting to a range of

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12 HM Stacy *Human Rights for the 21st Century: Sovereignty, Civil Society, Culture* (2009) 113.
13 Id 13.
14 MT Kamminga 'The Evolving Status of NGOs Under International Law: A Threat to the Inter-state System?' in P Alston (ed) *Non-state Actors and Human Rights* (2005) 96.
15 Id 98.
16 Ibid.
17 The possibility of amicus submissions has been included in art 36(2) of the European Convention of Human Rights. The President of the European Court of Human Rights has the discretion to determine whether such amicus intervention is 'in the interest of justice' and should be permitted. See PM Dupuy 'Article 34' in A Zimmermann, C Tomuschat & K Oellers-Frahms (eds) *The Statute of the International Court of Justice: A Commentary* (2006) 545 548.
18 Ibid.
19 Ibid.
20 N O'Meara '"A More Secure Europe of Rights?" The European Court of Human Rights, the Court of Justice of the European Union and EU Accession to the ECHR' (2011) 12 *German Law Journal* 1813 1821.
21 Stacy (note 12 above) 10.

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formal and informal tactics to influence policy responses — tactics that are not available to more formal or official actors. Despite the fact that they are not democratically elected bodies and are frequently under-resourced, such organisations mostly derive their integrity from their independent, so-called moral voice.[22]

Some scholars argue that globalisation has reduced the role of the state, has placed the achievement of social change in the hands of civil society and has increased the influence of non-state actors, including NGOs.[23] However, with regard to the prosecution of international crimes, there are, of course, many functions that only the state can accomplish or provide. Since states constitute the membership of the ICC, there is a duty on states to co-operate with the ICC. The role of civil society in this context is to scrutinise whether the state's behaviour complies with international law and to pressurise the state to act lawfully.

3 South African Civil Society and International Law

Until 1994, all progressive South African civil-society organisations shared an overarching goal, namely working to help end apartheid and, to some extent, promote democratisation. Appropriately, under apartheid, many civil-society organisations were called anti-government organisations. Most civil-society organisations were aligned with the anti-apartheid movement and supported the struggle in one form or another.[24] This singularity of purpose means that there was not a great deal of diversification in the activities and priorities of civil-society organisations. A common focus was needed to create unity against the

22 M Fischer 'Civil Society in Conflict Transformation: Strengths and Limitations' (2011) 288 available at http://www.berghof-foundation.org/fileadmin/redaktion/Publications/Handbook/Articles/fischer_cso_handbookII.pdf (accessed 10 February 2017) 289. See, also, C Barnes 'Weaving the Web: Civil Society Roles in Working with Conflict and Building Peace' in P van Tongeren et al (eds) *People Building Peace II: Successful Stories of Civil Society* (2005) 7–24.

23 See, eg, N Nasiritousi, M Hjerpe & B Linnér 'The Roles of Non-state Actors in Climate Change Governance: Understanding Agency through Climate Change Processes' (2016) 16 *International Environmental Agreement: Politics, Law and Economics* 109 TG Weiss, DC Seyle & K Coolidge 'The Rise of Non-state Actors in Global Governance' (2013) One Earth Future Discussion Paper available at http://acuns.org/wp-content/uploads/2013/11/gg-weiss.pdf (accessed 24 August 2017).

24 Habib and Taylor divide pre-1994 civil-society organisations into three different categories, depending on where it measures on the scale reflecting the ideological extremes from Afrikaner to African nationalism. See A Habib & R Taylor 'South Africa: Anti-apartheid NGOs and Transition' (1999) 10 *International Journal of Voluntary and Non-profit Organizations* 73 75.

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common enemy.[25] The local social-protest movements during apartheid did not typically rely on international law as a source of inspiration. Indeed, international law generally did not enjoy significant status during apartheid. To an extent, South African lawyers are still under-schooled in international law and uncomfortable with the use of international law.[26]

After the shift in the configuration of power in South Africa in 1994, the ongoing standoff and animosity between the government and the people was laid to rest. Greenstein observes that after 1994, the 'conflict between two mutually exclusive and internally homogeneous camps has given way to the interpenetration of partially opposing and partially collaborating forces, which are internally heterogeneous'.[27] This shift affected NGOs in the sense that they no longer saw themselves as diametrically opposed to the state.[28] The conflicting relationship was replaced by a much more collaborative one.[29] However, the increasing insensitivity of the government over the past decade to human rights, and particularly socio-economic rights, meant that many progressive NGOs once again assumed an antagonistic position vis-à-vis the state and no longer supported it.

One good example of an NGO that has shown an awareness of the importance and usefulness of international law in litigation, is the health-rights NGO, Section 27. This NGO has shown an acute awareness that section 27 of the Constitution, which includes the right to health care, was informed by the interpretation of the International Covenant on Economic Social and Cultural Rights.[30] Some cases refer to the prevailing international opinion on the interpretation of international agreements. In the *TAC* case, the Constitutional Court referred to the approval by the World Health Organization (WHO) of the use of Nevirapine to prevent mother-to-child transmission of HIV.[31]

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[25] R Greenstein 'Civil Society, Social Movements and Power in South Africa' (2003) 12 available at http://ccs.ukzn.ac.za/files/Greenstein.pdf (accessed 23 August 2017).

[26] In 2006, Wim Trengove remarked that South African lawyers still consider international law as 'exotic'. See W Trengove 'The Wouter Basson Case' paper presented at a workshop entitled 'A Tribute of Power to Reason: The Impact of the ICC on South Africa', held at the University of the Witwatersrand in 2006. See, also, D Tladi 'Interpretation of Treaties in an International Law-friendly Framework: The Case of South Africa' in HP Aust & G Nolte (eds) *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (2016) 135.

[27] Greenstein (note 25 above) 10.

[28] See Habib & Taylor (note 24 above).

[29] Id 79.

[30] 1966 International Covenant on Economic, Social and Cultural Rights.

[31] *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 703 (CC).

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Section 27 also recognised the possibility of raising health-related rights violations — including issues of access to medication — with the UN Special Rapporteur on Health, who has input into any international instrument that may be developed on the topic.[32]

4 Civil Society before the ICC

Hansen and Sriram consider civil society to be a 'recipient and transmitter of norms of accountability and as transformer and user of such norms'.[33] The engagement of civil society with the ICC encourages what Kendall has described as 'the spread of international criminal law'.[34] Civil society has played a significant role in increasing not only awareness of international criminal law, but also the increasing application and impact of international criminal law.

It is well-known that civil society has been actively involved in the processes of the ICC since the inception of the court. Civil society was involved in the debating and ultimate drafting of the Rome Statute — what has been called a 'constitutional moment'.[35] Civil-society organisations from across the world have shown strong support for the ICC. The Coalition for the ICC (CICC), for example, which played a significant role in the creation of the court, has approximately 2 500 members from 150 countries. Since the drafting of the Rome Statute, civil-society organisations globally, and particularly those in Africa, have become increasingly involved in nudging and pushing states to comply with their responsibilities under the Statute.

5 Civil-Society Activity in Kenya

Kenya is known for having a vibrant civil society. Kenyan civil society has, however, also been described as competitive, even fractious.[36] Before, during and after the Kenyan 2007 to 2008 post-election violence, which left more than 1 100 people dead, Kenyan NGOs played a leading role in facilitating justice for the atrocities committed during that time and in facilitating justice with regard to the ICC's intervention in Kenya. When Kenyan authorities showed little inclination of taking action against the

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32 Id para 160.

33 TO Hansen & CL Sriram 'Fighting for Justice (and Survival): Kenyan Civil Society Accountability Strategies and their Enemies' (2015) 9 *International Journal of Transitional Justice* 407 408.

34 S Kendall '"UhuRuto" and Other Leviathans: The International Criminal Court and the Kenyan Political Order' (2014) 7 *African Journal of Legal Studies* 399 400.

35 L Sadat *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (2002) 103.

36 Hansen & Sriram (note 33 above) 14.

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perpetrators, it was Kenyan NGOs that called most loudly for the matter to be referred to the ICC.[37] These NGOs have subsequently been vocal in demanding that Kenya co-operate and fulfil its legal obligations to the court.

In Kenya, it was civil society that introduced the international criminal-justice option into public discourse.[38] Civil-society organisations (CSOs), most prominently Kenyans for Peace with Truth and Justice (KPTJ), were involved in the accountability process from the outset. Human-rights organisations reacted to the post-election violence by convening stakeholder forums in which the various options for justice were discussed. KPTJ placed observers in the field to document the violence.

Civil society even became involved in witness protection. In light of the failure of the Witness Protection Unit (WPU) to offer adequate protection to witnesses who had information on perpetrators, civil society stepped in and provided temporary shelter to victims and potential witnesses.[39] This was a brave action, since it placed individual staff members of these organisations in danger.

CSOs also acted as intermediaries during the pre-trial stage of various Kenyan cases before the ICC. The work of civil-society intermediaries have further assisted in guiding the work of the Office of the Prosecutor (OTP), which relied heavily on the work of intermediaries in its application to open investigations in Kenya.[40]

CSOs also became involved in reparations efforts. Groups that were particularly active in this regard include the Coalition on Violence against Women, Independent Medico-legal Unit (IMLU), ICJ-Kenya and Physicians for Human Rights (PHR). These groups also initiated litigation in the interest of internally displaced persons.[41] In addition, civil society was involved in the court's outreach activities. Under the umbrella of the influential KPTJ, civil-society organisations undertook to educate the general public on the process.[42]

Of critical relevance for the South African Al Bashir incident, Kenyan CSOs became involved in the litigation regarding the non-arrest of

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[37] S Allison 'Kenyan Civil Society: Down but not out' *Daily Maverick* 15 January 2016.

[38] N Mue & J Gitau 'The Justice Vanguard: The Role of Civil Society in Seeking Accountability for Kenya's Post-election Violence' in C De Vos, S Kendall & C Stahn (eds) *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (2015) 198 205.

[39] Id 206.

[40] Ibid.

[41] *Federation of Women Lawyers Kenya* (*FIDA-Kenya*) *& 5 Others v Attorney General & Another* [2011] eKlr.

[42] Id para 208.

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Al Bashir when Kenya hosted the Sudanese president in August 2010.[43] Despite the Kenyan government's assurances that it would co-operate with the ICC, there were several incidents of non-cooperation, of which some prominently obstructed the work of the OPT. Similarly, when Kenya expected Al Bashir for a second visit, ICJ-Kenya filed an application before the Kenyan High Court, seeking enforcement of the arrest warrant; their application was successful.[44] As a result, Al Bashir was prohibited from visiting Kenya.[45]

Whereas Kenya has long been known for having one of Africa's bravest and most vocal civil-society sectors, Kenyan NGOs currently face a deeply uncertain future as the Kenyan government is increasingly cracking down on civil society.[46] This is largely the result of the CSO activism shown in the context of the ICC intervention in Kenya. In the view of Mue and Gitau, the government's attempts to stifle the activities of CSOs is a measure of its success in Kenya.[47] However, it is also highly unfortunate that Kenyan civil society is no longer free — it is clear that the influence of civil society has waned as a result of government intimidation.

6 Civil-society Activity in the Central African Republic

What was unusual about the situation in the Central African Republic (CAR), was that, unlike any of the other ICC situations, the ICC's involvement in CAR[48] was largely instigated by local civil-society figures. According to Glasius, the state referral was largely inspired by the actions of local civil-society actors.[49]

The fairly positive reception of the ICC in CAR can largely be attributed to the action on the part of (predominantly) local civil-society

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43 Id para 212.

44 *Kenya Section of the International Commission of Jurists v Attorney General & Another* [2011] eKlr.

45 For a case study of developments surrounding Al Bashir's travel to Kenya, see Southern Africa Litigation Centre *Positive Reinforcement: Advocating for International Criminal Justice in Africa* (2013) available at http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2013/05/Positive-Reinforcement-Advocating-for-International-Criminal-Justice-in-Africa-SALC.pdf (accessed 2 February 2017) 68–73.

46 Ibid. The crackdown by the Kenyan government is taking place in three ways: (1) government has threatened to deregister NGOs; (2) government has undermined proposed new legislation that regulates the operation and funding of NGOs; and (3) government attempts to turn the public against civil-society organisations by linking them with terrorist activity.

47 Mue & Gitau (note 38 above) 217.

48 M Glasius 'Global Justice Meets Local Civil Society: The International Criminal Court's Investigation in the Central African Republic' (2008) 33 *Alternatives* 413.

49 Ibid.

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organisations to demand an ICC investigation in the DRC. Civil-society organisations continued to not only apply pressure on the ICC to open outreach offices in that state, but also to advocate the idea that peace and justice are not mutually exclusive.[50] As a result of this civil-society activism, the self-esteem of victims was boosted.[51]

After the Rome Statute came into force, two local civil-society organisations concerned with human rights, namely the Observatoire Centrafricain des droits de l'Homme (OCDH) and Ligue Centrafricain des Droits de l'Homme (LCDH),[52] recognised the opportunity and potential for bringing perpetrators to justice under article 12 of the Rome Statute.

There can be no doubt that the initial involvement of civil society was a catalyst for the decision of the ICC to become involved in the situation in CAR. Davenport writes that by beginning the documentation of international-law violations at the onset of the Rome Statute's entering into force, the testimonies collected by the LCDH and the OCDH proved to be important records that aided the OTP as it moved forward with the investigation.[53]

Civil-society organisations in CAR have taken a degree of ownership of the process.[54] In terms of undertaking outreach programmes and collecting evidence, the court relied on a small alliance of civil-society groups.[55] These groups in turn relied heavily on the ICC for prosecutions that were, almost certainly, not going to be forthcoming at national level.[56] Certain civil-society groups in CAR have even been criticised for being too close to the ICC.[57] Glasius writes that the relationship between civil society and the court in the CAR situation was far removed from the classic understanding of civil society as being an independent voice that is free to be critical.[58]

However, Davenport argues that the work of the International Federation for Human Rights (FIDH) provides excellent examples of how civil society and the ICC can form a symbiotic relationship that can

50 K Davenport 'The Role of Civil Society in International Law: The Relationship between Civil Society Organizations and the International Criminal Court in the Central African Republic' *Beyond Intractability* available at http://www.beyondintractability.org/casestudy/davenport-role (accessed 2 February 2017).
51 Glasius (note 48 above) 426.
52 Ibid.
53 Davenport (n 50 above).
54 Glasius (note 48 above) 426.
55 Id.
56 Id 416.
57 M Glasius '"We Ourselves, We are Part of the Functioning": The ICC, Victims, and Civil Society in the Central African Republic' (2009) 108 *African Affairs* 49 67.
58 Ibid.

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benefit victims without sacrificing justice or peace.[59]

7 South African Civil Society and the *Al Bashir* Case

7.1 Background

The Southern Africa Litigation Centre (SALC) describes itself as being an organisation that 'promotes and advances human rights and the rule of law in Southern Africa'[60] and states that one of its key thematic areas or programmes is international criminal justice.[61] This programme requires the SALC to monitor 'international criminal justice and its development and application in Southern Africa and on the continent'.[62] It was through this monitoring that the SALC became aware that one of the guests invited to attend the AU Summit was the Sudanese President, Omar Al Bashir. The ICC had previously communicated two arrest warrants[63] for Al Bashir to the South African government, calling for his arrest and surrender on multiple charges of crimes against humanity, genocide and war crimes.

In May 2015, the SALC sent a letter to the various relevant South African government departments[64] responsible for implementing international and domestic law, informing and reminding them of their obligations to arrest Al Bashir should he set foot on South African soil.[65] Prior to Al Bashir's arrival in South Africa, the SALC became aware of Al Bashir's departure from Sudan and again sent a letter to the same government departments reminding them of their duty and obligation to

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59 Davenport (n 50 above).

60 SALC 'About' available at http://www.southernafricalitigationcentre.org/about/ (accessed 13 February 2017).

61 SALC 'Our Programmes' available at http://www.southernafricalitigationcentre.org/our-programmes/ (accessed 13 February 2017).

62 SALC 'International Criminal Justice' available at http://www.southernafricalitigationcentre.org/our-programmes/international-criminal-justice/ (accessed 13 February 2017).

63 'Warrant of Arrest for Omar Hassan Al-Bashir' (Pre-trial Chamber I 4 March 2009) ICC-02/05–01/09 available at https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/05-01/09-1 (accessed 10 February 2017); 'Second Warrant of Arrest for Omar Hassan Ahmad Al-Bashir' (Pre-trial Chamber I 12 July 2010) ICC-02/05-01/09-95 available at https://www.icc-cpi.int/pages/record.aspx?uri=907140 (accessed 10 February 2017).

64 These are the Department of International Relations and Cooperation; the Department of Justice and Constitutional Development; and the Ministry of Police.

65 SALC '*SALC v the Minister of Justice and Constitutional Development and Others: The Bashir Case* Q and A' available at http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2015/06/Bashir-QA-Final1.pdf (accessed 13 February 2017).

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arrest Al Bashir if he were to enter South Africa.[66] In this second letter, the South African government was warned that failure to execute their duties under 'international and domestic law' would result in the SALC seeking an urgent order from the high court compelling them to do so.[67] It is clear that both the ICC's warrant of arrest and the SALC's formal reminders were ignored, as Al Bashir entered South Africa unhindered on 13 June 2015 in order to attend the summit.

7.2 The High Court Proceedings

The SALC received confirmation of Al Bashir's official arrival late on 13 June and immediately began preparing the necessary court papers.[68] True to their promise, the SALC approached the North Gauteng High Court on 14 June for an order, first, declaring the government's failure to arrest and detain Al Bashir to be inconsistent with the Constitution and, secondly, compelling the government respondents 'to take all reasonable steps to prepare to arrest the 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'.[69] The matter was postponed until 15 June in order to allow the respondents to file papers in response. However, an interim order was granted, prohibiting the government from allowing Al Bashir to leave the country until a final order was made.[70]

Due to its importance and complexity, a full bench of the court was convened to hear the matter.[71] The government argued that it was not under a duty to arrest Al Bashir as he 'was entitled to diplomatic immunity as a visiting head of state at the AU Summit' and there was an agreement granting immunity to members of the AU who attended the summit between 'the Minister of Foreign Affairs and the AU'.[72]

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66 Ibid.

67 Ibid.

68 Ibid.

69 SALC 'Notice of Motion' (14 June 2015) available at http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2015/06/Notice-of-Motion-and-Founding-Affidavit.pdf (accessed 2 February 2017).

70 SALC '*The Southern Africa Litigation Centre v The Minister of Justice and Constitutional Development & Others* (Case 27740/15) Fabricius J Order' (14 June 2015) available at http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2015/06/Interim-interdict.pdf (accessed 2 February 2017).

71 *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others* 2015 (5) SA 1 (GP) para 7.

72 '*Bashir* Case Q and A' (note 65 above). See, also, the Minister of Justice and Constitutional Development's Answering Affidavit (15 June 2015) available at http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2015/06/Respondents-joined-into-one-pdf.pdf (accessed 2 February 2017) para 3.

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The SALC countered this argument by asserting that Al Bashir was not covered by immunity through the agreement; furthermore, even if it did convey immunity, the notice was unlawful as it 'contravened South African and international law' and was not *ex lege* valid as it was merely a proclamation of the executive 'without any Parliamentary input'.[73] The SALC further relied not only on ICC jurisprudence to argue that Al Bashir's head-of-state immunity had been waived by the ICC's arrest warrants as he was charged with crimes against humanity, but also on Constitutional Court jurisprudence[74] to argue that 'South Africa must uphold and maintain obligations pursuant to the South African ICC Act'.[75]

The court handed down judgement in favour of the SALC and ordered that the government's failure to arrest Al Bashir was inconsistent with the Constitution and therefore invalid. The court then compelled the government to take all reasonable steps to arrest and detain Al Bashir 'pending a formal request for his surrender from the International Criminal Court'.[76]

Throughout the entire proceedings, the advocate for the government repeatedly assured the court that Al Bashir was still present in South Africa, despite reports by the media stating the contrary. However, when handing down its order, the court was informed that Al Bashir had already left the country, most probably before the court had even heard the arguments.[77] Surprisingly, this is not the first incident where a head of state has left South Africa in violation of an express court order.

In 2012, the then president of Madagascar, President Marc Ravalomanana, was living in exile as a permanent resident in South Africa, when the Association of Martyrs of Antananarivo Merino Square presented the South African National Prosecuting Authority (NPA) with a docket to investigate Ravalomanana in connection with crimes against humanity.[78] The NPA agreed to investigate. However, after reports of Ravalomanana 'planning to return to Madagascar' had surfaced, the high court was approached to restrict his travels.[79] The court granted the

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73 '*Bashir Case* Q and A' (note 65 above).

74 Ibid. See *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* 2015 (1) SA 315 (CC) para 77.

75 '*Bashir* Case Q and A' (note 65 above).

76 *SALC v Minister of Justice* (note 71 above) para 2.

77 Id para 8.

78 H Woolaver 'Partners in Complementarity: The Role of Civil Society in the Investigation and Prosecution of International Crimes in South Africa' 2016 *Acta Juridica* 129 142.

79 Id 143. *Rakoto and Others v Ravalomanana and Others* (GP) 19 September 2012 (case 52268/12).

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order and restricted his travels to within South Africa; also, his passport was surrendered to the NPA.[80] However, he returned to Madagascar. It is unclear how he managed to return to Madagascar, as he was 'supposed to be under surveillance by South African intelligence' and 'under the political — and also, presumably, the military — radar'.[81] This implies that Ravalomanana left South Africa without passing through any immigration and/or passport controls; for obvious reasons, these circumstances 'aroused some suspicion of complicity by the authorities'.[82]

The government's behaviour in both the Ravalomana and Al Bashir incidents raises the question whether it is genuinely committed to the fight against impunity for those who have committed international crimes. Behaviour of this kind shows a certain amount of disregard, not only for international criminal-law justice, but also for South African court orders.

The government, aggrieved by the outcome of the Al Bashir debacle, applied for leave to appeal to the Supreme Court of Appeal against the judgement of the full bench.[83] The high court considered the various grounds of appeal argued by the government and dismissed the application. The court found that the issue was now moot, would 'have no practical effect between the parties'[84] and that the appeal had no reasonable prospects of success at all.[85] The government, once again aggrieved by the outcome, petitioned to the Supreme Court of Appeal.

7.3 *The Supreme Court of Appeal Proceedings*

The Supreme Court of Appeal granted the government leave to appeal. The court found that the high court had erred: the issue was not moot since the SALC would seek enforcement of its order if Al Bashir ever tried to return to South Africa.[86] The Supreme Court of Appeal also gave another reason, namely that the government had advanced a

80 Woolaver (note 78 above) 143.

81 P Fabricius 'Ravalomanana Gatecrashes the Party' (16 October 2014) *Institute for Security Studies* available at https://issafrica.org/iss-today/ravalomanana-gatecrashes-the-party (accessed 2 February 2017).

82 Ibid.

83 See the government's 'Leave to Appeal Heads of Argument' (12 August 2015) available at http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2015/06/Applicants-Heads-of-Argument-12.8.2015-In-Re-Application-for-Leave-to-Appeal-14.8.2015.pdf (accessed 2 February 2017) para 4.

84 *Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre and Others* (GP) 15 September 2015 (case 27740/15) available at http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2015/06/Bashir-leave-to-appeal-judgement.pdf (accessed 2 February 2017) para 7.

85 Id para 8.

86 *Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre and Others* 2016 (3) SA 317 (SCA) para 20.

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new argument based on the Diplomatic Immunities and Privileges Act (DIPA),[87] which, in the court's view, did not lack reasonable prospects of success and raised 'a point of substantial public interest'.[88]

This was the beginning of a movement — a movement that began with the SALC, and which spread to other NGOs to recognise and utilise international law within the South Africa context. The SALC approached the Helen Suzman Foundation (HSF) to represent the victims in Sudan at the Supreme Court of Appeal proceedings. The HSF had been following the proceedings with curiosity.[89] However, the HSF was concerned that the court would not allow such an intervention. This concern was based on the uncertainty of their *locus standi* and their ability to represent such victims without a mandate. Ultimately, the HSF decided it would not represent the victims. Nonetheless, this was not the end of the HSF's involvement in this matter.

The HSF, unlike SALC, does not have an international criminal-justice programme or, for that matter, any mandate outside of South African borders. Its focus is on promoting a 'liberal constitutional democracy' by supporting 'good governance, transparency and accountability'[90] and by 'broadening public debate and research'.[91] However, when the opportunity presented itself, the HSF saw a chance to go beyond its usual work and to utilise international law in order to hold the government accountable at both domestic and international levels. It requested consent from all parties involved to be admitted as *amicus curiae* in these proceedings. The respondents (SALC) gave their consent, but the appellants refused. The HSF then launched an application to be admitted as amicus in terms of rule 16(4) of the Supreme Court of Appeal Rules.[92] The HSF applied to be admitted as amicus on the basis that the 'HSF has a history of promoting South Africa's domestic and international law commitments to uphold democracy and the rule of law, constitutionalism and human rights'.[93] The main thrust of its argument was that the government had a duty to arrest Al Bashir; that this was

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87 Diplomatic Immunities and Privileges Act 37 of 2001.

88 *Minister of Justice v SALC* (note 86 above) para 25.

89 HSF 'Heads of Argument in the Supreme Court of Appeal Proceedings' para 49 (on file with authors).

90 HSF 'Mission' available at http://hsf.org.za/about-us/mission (accessed 6 February 2017).

91 HSF 'What We Do' available at http://hsf.org.za/what-we-do/copy_of_what-we-do (accessed 6 February 2017).

92 'Rules Regulating the Conduct of the Proceedings of the Supreme Court of Appeal of South Africa' (Supreme Court of Appeal Rules) available at http://www.justice.gov.za/sca/rules.html (accessed 6 February 2017).

93 HSF 'Founding Affidavit in the Supreme Court of Appeal Proceedings' para 29 (on file with authors).

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in addition to and independent of their duty to arrest him in terms of the 'Rome Statute and the Implementation Act'[94] as the 'Constitution obliged the State to make the arrest'.[95] The Supreme Court of Appeal admitted the HSF as amicus on 21 January 2016[96] and opined that the HSF's 'approach to the dispute was wholly distinct from that of SALC' and their 'contentions were clearly new and of assistance to the Court in dealing with the merits of the appeal'.[97]

In its appeal, the government argued that section 4(1) of DIPA represents a codification of the customary international-law rule that confers immunity on heads of state from criminal and civil jurisdiction of South African courts.[98] In response, the HSF countered this argument in two respects. First, a plain reading of section 4(1) 'does not provide heads of state with absolute immunity', as granting absolute immunity would make the sub-paragraphs in that section redundant, being in conflict with coherent interpretation.[99] Secondly, as section 4(1) purports to codify customary international law, it is subject to section 232 of the Constitution, which provides that 'customary law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament'.[100] Therefore, sitting heads of state can only enjoy absolute immunity in terms of customary international law insofar as that is consistent with the Constitution.

The HSF bolstered their submission by arguing that 'international crimes are crimes under customary international law'.[101] Therefore, by virtue of section 232 of the Constitution, these are crimes under South African law.[102] A rule that grants absolute immunity to heads of state that are '*prima facie* guilty of crimes against humanity, war crimes or genocide'[103] is inconsistent with the Constitution and goes beyond the limits that the 'Constitution places on legislation and customary international law'.[104] For this reason, any interpretation of section 4(1)

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94 Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.

95 HSF 'Heads of Argument' (note 89 above) para 1.

96 *Minister of Justice v SALC* (note 86 above) para 113.

97 Id para 33.

98 See the government's 'Heads of Argument in the Supreme Court of Appeal Proceedings' available at http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2015/06/Govs-Heads-of-Argument.pdf (accessed 3 February 2017) para 71.

99 HSF 'Heads of Argument' (note 89 above) para 5.1.

100 Id para 5.2.

101 Id para 12.

102 Id paras 10 and 29.

103 Id para 9.

104 Id para 18.

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must be read as 'limiting the rules of customary international law' to exclude absolute immunity in such instances.[105] Finally, 'as these crimes violate the Constitution' and no absolute immunity exists, the state, in terms of sections 179 and 205 of the Constitution, 'has a constitutional power and duty to detain and/or arrest perpetrators of these crimes'.[106]

By relying on domestic law, and specifically the Constitution, the HSF advanced that international law had been imported into the South African domestic-law system through the Constitution. The HSF's arguments illustrate how the NGOs' approach, centred around the Constitution, has developed to include the use of international criminal law.

The HSF was not alone in this fight — as can be seen by the other NGOs who also joined the fray. The SALC's success in both the high court judgements was encouraging to other NGOs who had not yet strayed into the international-law realm to hold government accountable for its actions. The African Centre for Justice and Peace Studies; the International Refugee Rights Initiative; the Peace and Justice Initiative; and the University of Pretoria's Centre for Human Rights all applied to the Supreme Court of Appeal to be admitted as *amicus curiae*. Unfortunately, with the exception of the HSF, the court dismissed all these NGOs' applications and held that they did not 'define with any clarity the new contentions that the prospective *amici* wanted to raise or why they would be of assistance to the Court',[107] nor did their applications 'spell out the terms on which the prospective *amici* sought admission'.[108]

The court found that the government had acted inconsistently with 'South Africa's obligations in terms of the Rome Statute and section 10 of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2007'.[109] Importantly, the court found that the government had acted unlawfully by 'failing to take steps to arrest and detain, for surrender to the International Criminal Court, the President of Sudan, Omar Hassan Ahmad Al Bashir'.[110] Even though the court's finding may not have been based directly on the HSF's submissions, the court mentioned that the HSF's 'arguments were of great value in dealing with this case and [that] the emphasis they rightly placed on the importance of the Constitution in construing the statutes under consideration was a valuable insight'.[111] The government, once again dissatisfied with the decision of the court, then appealed to the Constitutional Court.

[105] Id para 9.
[106] Id para 29.
[107] *Minister of Justice v SALC* (note 86 above) para 31.
[108] Id para 32.
[109] Id para 113.
[110] Ibid.
[111] Id para 111.

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7.4 The Constitutional Court Proceedings

The Constitutional Court appeal provided another opportunity for NGOs to enter the battle. Once more, the HSF successfully applied to be admitted as amicus. However, this time it was not the only successful applicant — the Constitutional Court also admitted two well-known experts on international law, namely Professors Johan Dugard and Guénaël Mettraux, as well as Amnesty International Limited; the Peace and Justice Initiative; and the University of Pretoria's Centre for Human Rights.[112]

All submissions and records were filed and the court was ready to hear the matter on 22 November 2016. However, on 21 October 2016, during a media briefing, the Minister of Justice and Constitutional Development, Michael Masutha, announced the government's intention to withdraw its appeal.[113] The official notice of withdrawal of the appeal was sent to the Constitutional Court on 25 October 2016. At first, the SALC indicated that they would not accept such withdrawal of the appeal. Rule 27 of the Constitutional Court Rules prevents a unilateral withdrawal, as it requires all parties to lodge a written agreement of withdrawal with the Registrar of the court, setting out the terms of the withdrawal. Essentially, this prohibited the government from withdrawing the appeal. However, on 11 November 2016, the SALC, the only respondent required to accept the withdrawal, filed a notice accepting the withdrawal. This dealt an unfortunate blow to the *amici* NGO litigation. The Constitutional Court accepted the withdrawal on 18 November 2016.[114]

The reason provided for the government's announcement to withdraw from the Rome Statute, was that it had grown tired of interference by NGOs. According to Minister Masutha's press statement, the government believed that withdrawal from the ICC nullified the necessity for the appeal, as the Supreme Court of Appeal's judgement removed uncertainty regarding immunity for heads of state under customary international law.[115] The Supreme Court of Appeal held that it could not make a finding that an exception exists to the customary international-law rule that offers heads of states absolute immunity; rather, the government

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[112] See the unreported order in *Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre* (CC) 28 September 2016 (case 75/16).

[113] Department of Justice and Constitutional Development 'Media Statements' available at http://www.justice.gov.za/m_statements/2016/20161021-ICC.html (5 February 2017).

[114] See the unreported directions in *Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre* (CC) 18 November 2016 (case 75/16).

[115] Ibid.

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had an obligation to arrest, detain and surrender Al Bashir in terms of South Africa's membership with the ICC and South African legislation domesticating these obligations.[116] The government assumed it had cured its immunity problems by withdrawing from the ICC. However, its decision to withdraw from the ICC only opened the gate for further litigation by NGOs. This is discussed in the next section.

8 South Africa's Possible Withdrawal from the ICC

The Minister of International Relations and Cooperation had deposited South Africa's instrument of withdrawal with the UN Secretary-General on 19 October 2016, two days before the announcement to this effect was made to the press. The reaction of South African NGOs and political parties was immediate and astute. The Democratic Alliance (DA), South Africa's main opposition political party, launched urgent proceedings in both the Constitutional Court and the high court.[117] The DA requested the courts to declare South Africa's notice of withdrawal to be unconstitutional and invalid and further requested an order compelling the government to 'revoke the notice of withdrawal without delay and to take all other reasonable steps to terminate the process of withdrawal initiated under Article 127(1) of the Rome Statute'.[118]

The government was being tested by NGOs at every turn in the Al Bashir matter. Not only did the NGOs ensure that these proceedings remained very much in the public eye, thereby highlighting the lack of respect and disregard that the government had towards the rule of law, the Constitution and international criminal-law justice, but they also provided a good (and certainly encouraging) example of their successful interference with the misguided political will (or ill-will) of the government. The government's response to their backlash was simply to withdraw from the ICC in order to avoid future issues regarding immunity as they believed this response was within their domain and out of reach of the seemingly never-tiring NGOs. However, they were wrong and the NGOs were not deterred.

The HSF was cited as a respondent in this matter due to it close connection, as amicus, to the *Al Bashir* case. The HSF eagerly embraced the opportunity to hold the government accountable. Other NGOs and individuals were also cited as respondents, including the SALC; Professors John Dugard and Guénaël Mettraux; Amnesty International; the Peace and Justice Initiative; and the University of Pretoria's Centre

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116 *Minister of Justice v SALC* (note 86 above) para 87.

117 *Democratic Alliance v Minister of International Relations and Cooperation and Others* 2017 (3) SA 212 (GP).

118 Id DA's 'Notice of Motion' (24 October 2016) (on file with authors).

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for Human Rights. The Council for the Advancement of the South African Constitution (CASAC), another NGO, brought a separate application to the Constitutional Court, seeking an order declaring the government's instrument of withdrawal to be 'inconsistent with the Constitution and invalid'[119] and such similar relief as that of the DA's application.

On 11 November 2016 the Constitutional Court made an order, informing both the DA and the CASAC that this application did not raise a matter which evokes the exclusive jurisdiction of the court, nor did the court find that it was 'in the interests of justice for the Court to hear the matters at this stage'.[120] Upon receiving the Constitutional Court's order, the CASAC brought an application to the North Gauteng High Court to intervene as second applicant in the DA's application before that court. As a result of the Constitutional Court's order and the DA's alternative application, the matter was heard before a full bench of the high court.[121]

This latter case is significant for two reasons. First, it truly showed how NGOs can come together and co-operate, albeit under the initiation of the DA. However, due to the NGOs' participation in the Al Bashir matter, it would not be hard to imagine that, even if the DA had not taken the matter to court, the NGOs would have risen to the occasion to hold the government accountable for its actions in order to prevent South Africa's withdrawal from the ICC.

The various NGOs did not merely repeat, but rather supplemented each other's arguments. This resulted in a single, coherent and detailed argument in favour of preventing the government from withdrawing from the ICC. The SALC argued that the notice of withdrawal was unconstitutional and invalid as it violated section 231 of the Constitution[122] and because the decision to issue the notice of withdrawal was irrational and/or taken in bad faith.[123] The HSF argued that the decision to withdraw breached the separation-of-powers doctrine and was not only procedurally unlawful, but also substantively irrational. The HSF further argued that the decision to withdraw constituted a retrogressive step, as there are no domestic instruments creating similar or comparable rights as those created by the ratification of the Rome Statute.[124] The

[119] See CASAC's 'Notice of Motion' (24 October 2016) in *Council for the Advancement of the South African Constitution v President of the Republic of South Africa* (CC) (case 256/16) (on file with authors).

[120] See the unreported orders in *Democratic Alliance v Minister of International Relations* (CC) 11 November 2016 (case 255/16); and *CASAC* (note 119 above).

[121] The matter was heard on 5 and 6 December 2016.

[122] See the SALC's 'Responding Affidavit' (10 November 2016) paras 34 and 40 in *DA v Minister of International Relations* (note 119 above) (on file with authors).

[123] Id para 49.

[124] See the HSF's 'Responding Affidavit' (8 November 2016) para 133 in *DA v*

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University of Pretoria's Centre for Human Rights focused its argument on the African Union and argued that 'the decision to withdraw from the ICC is contrary to South Africa's obligations under the African Charter of Human and People's Rights'.[125] These arguments illustrate how each NGO had a particular input and did not merely repeat the argument of the other parties, but, instead, allowed the argument to flow as one logical and coherent submission.

The second reason why this case is significant, is because NGOs, who had previously been assigned the role of amicus[126] in the *Al Bashir* matter, were now cited as respondents by the DA. The role of the NGOs had essentially changed from 'a friend of the court' to a litigating party. The DA cited the NGOs as respondents as they had all been involved in the *Al Bashir* matter; it was argued that the 'Al Bashir appeal is the proximate cause of the decision to withdraw South Africa from the Rome Statute'.[127] The DA further argued that the NGOs had 'all made extensive submissions on South Africa's international and domestic legal obligations flowing from the Rome Statute' and that 'these submissions also have a bearing on this application'.[128] The government took issue with their citation and argued that it was a misjoinder, because it is for 'the Court to determine whether *amici* should be permitted to participate in separate proceedings, not for a third party to cite them'.[129] All the NGOs were permitted to make oral arguments at the court proceedings.

9 The ICC's Non-compliance Hearing

Pre-trial Chamber II of the ICC has requested South Africa and the OTP to make submissions on the issue of South Africa's non-compliance with the Rome Statute on their failure to arrest and surrender Al Bashir to the ICC.[130] The public hearing was due to take place on 7 April 2017.[131]

Minister of International Relations (note 117 above) (on file with authors).

[125] See the Centre for Human Rights' 'Responding Affidavit' (15 November 2016) para 5 in *DA v Minister of International Relations* (note 117 above) (on file with authors).

[126] With the exception of the SALC being the applicant.

[127] See the DA's 'Founding Affidavit' (24 October 2016) para 21 in *DA v Minister of International Relations* (note 117 above) (on file with authors).

[128] Id para 22.2.

[129] See the government's 'Answering Affidavit' (9 November 2016) paras 107–108 in *DA v Minister of International Relations* (note 117 above).

[130] 'Decision Convening a Public Hearing for the Purposes of a Determination under Article 87(7) of the Statute with Respect to the Republic of South Africa' (8 December 2016) ICC-02/05-01/09 Pre-trial Chamber II available at https://www.icc-cpi.int/CourtRecords/CR2016_25714.PDF (15 February 2017).

[131] Ibid.

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The ICC furthered allowed for written submissions from 'all interested States Parties to the Statute, as it considers the issue to be "of general importance"'.[132] If the ICC makes a finding of non-compliance under article 87(7), it may 'refer the matter to the Assembly of States Parties and/or the Security Council of the United Nations'.[133]

Civil society from South Africa again insisted on the right to be heard. The SALC brought an application to the ICC[134] in terms of rule 103 of the Rules of Procedure and Evidence, to be admitted as amicus in the proceedings. It appears that South African NGOs have woken up to the potential of using international criminal law to litigate and uphold human rights. They have become more ambitious and determined as they are no longer confined to the realm of domestic litigation, but have now also entered the international stage. This is a clear indication that NGOs, conventionally considered to be constitutional-law centric, have realised and indeed embraced international criminal law as a mechanism to ensure that the South African government respects and upholds its obligations in terms of the Constitution and international law.

Nevertheless, the finding of the ICC may be somewhat irrelevant for three reasons. First, the government impliedly admitted to non-compliance with its obligations by accepting the Supreme Court of Appeal judgement, which found it did not comply with its obligations under the Rome Statute.[135] Secondly, South Africa is attempting to withdraw from the ICC. Lastly, if a finding of non-compliance is made and the matter is referred to either the Assembly of States Parties or the Security Council, there may be no real practical effect. Both the Assembly of States Parties and the Security Council have taken little to no action against other states when findings of non-compliance have been referred to them,[136]

[132] 'Request for Leave to Submit *Amicus Curiae* Observations by the Southern African Litigation Centre' (27 January 2017) ICC-02/05-01/09 available at https://www.icc-cpi.int/CourtRecords/CR2017_00479.PDF (accessed 15 February 2017) para 17.

[133] Ibid.

[134] Ibid.

[135] *Minister of Justice v SALC* (note 86 above).

[136] 'Statement of ICC Prosecutor, Fatou Bensouda, before the United Nations Security Council on the Situation in Dafur, pursuant to UNSCR 1593 (2005)' (13 December 2016) available at https://www.icc-cpi.int/Pages/item.aspx?name=161213-otp-stat-unsc-darfur (accessed 10 February 2017) para 20; see, also, paras 11, 14 and 18.

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as is evident in the case of Chad,[137] Malawi[138] and Uganda.[139]

The SALC seeks finding of non-compliance as, to this day, the government has not been held accountable for its actions and a finding of this nature may be used as an important accountability mechanism.[140] Ultimately, the NGOs' participation in this case serves to remind the government that civil society will ensure that it is held accountable for its actions and that its decisions will always be scrutinised for the greater good of not only the South African public, but also the international community as a whole. NGOs have been crucial in the fight against impunity by faithfully and consistently acting as a thorn in government's side by harassing the government, ensuring it adheres to its international obligations.[141]

10 The Role of Amicus Briefs

Traditionally, an *amicus curiae* is 'a friend of the court', a neutral and objective party in the sense that it is not a litigant in the matter with a direct interest in the outcome.[142] Its role has largely been restricted to that of 'an impartial advisor'[143] who 'draw[s] the attention of the court to relevant matters of law and fact to which the attention would not otherwise be drawn'.[144] Its role is not to advocate,[145] but, rather, to

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[137] 'Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir' (13 December 2011) ICC-02/05-01/09 available at https://www.icc-cpi.int/CourtRecords/CR2012_04203.PDF (accessed 10 February 2017).

[138] 'Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir' (12 December 2011) ICC-02/05-01/09 available at https://www.icc-cpi.int/CourtRecords/CR2011_21722.PDF (accessed 10 February 2017)

[139] 'Decision on the Non-compliance by the Republic of Uganda with the Request to Arrest and Surrender of Omar Al-Bashir to the Court and Referring the Matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute' (11 July 2016) ICC-02/05-01/09 available at https://www.icc-cpi.int/CourtRecords/CR2016_04947.PDF (accessed 10 February 2017)

[140] SALC 'Request for Leave' (note 132 above) para 4.4.

[141] See *National Commissioner SAP v SA Human Rights Litigation Centre* (note 74 above).

[142] BV Abbott *Dictionary of Terms and Phrases Used in American or English Jurisprudence* (1879). See, also, BA Garner *'Black's Law Dictionary'* 7 ed (1999) 83.

[143] H Woolaver 'The Role of *Amicus Curiae* Submissions at International Criminal Tribunals' September 2016 *International Judicial Monitor* available at http://www.judicialmonitor.org/spring2016/specialreport2.html (3 February 2017).

[144] *TAC* case (note 31 above) para 5.

[145] SJ Williams & H Woolaver 'The Role of the *Amicus Curiae* before International

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assist the court by providing 'cogent and helpful submissions' without repeating any 'arguments already made'.[146] These submissions may 'raise new contentions' based on evidence already before the court, but it is inappropriate to present 'new contentions based on fresh evidence'.[147] However, this role may be changing.

In the *Al Bashir* case the Supreme Court of Appeal was reluctant to allow the admission of NGOs as *amicus curiae*,[148] which limited the NGOs' ability to act as efficient and effective bodyguards of international criminal justice. However, the Constitutional Court[149] ultimately accepted and admitted those previously-denied NGOs as amici in the *Al Bashir* matter. Amici provide important legal expertise in judicial proceedings. This expertise 'in relation to international criminal law issues' is essential in domestic proceedings as 'domestic authorities often have a limited understanding' of this branch of law.[150] The jurisprudence of the Constitutional Court should be followed here, not only because it is the highest court and the doctrine of *stare decisis* demands this, but also because this jurisprudence allows for the proper ventilation of issues and participation of all relevant parties.

South African NGOs' role as amici has not only changed with their participation in international criminal-law cases,[151] but also from its position of impartial observer to that of litigating party.[152] The practice of amici assuming an advocacy function has become increasingly acceptable in other domestic jurisdictions, such as the United States,[153] Canada and the United Kingdom.[154] It is through this advocacy function and their persistence and determination that NGOs have had a major impact on South Africa's actions in the sphere of international criminal law[155] as they have 'crucial catalysing functions in relation to the investigation and prosecution of international crimes in South Africa'.[156]

The non-traditional role of NGOs acting as amici should be encouraged as it allows NGOs to effectively ensure compliance with both international and domestic law. As illustrated by the contribution of the HSF in both the

Criminal Tribunals' (2006) 6 *International Criminal Law Review* (2006) 151.

146 *TAC* case (note 31 above) para 5.

147 Ibid.

148 See *SALC v Minister of Justice* (note 71 above) para 31.

149 See note 112 above.

150 Woolaver (note 78 above) 156.

151 *DA v Minister of International Relations* (note 117 above).

152 This is clear from the HSF's participation in the *Al Bashir* matter.

153 Williams & Woolaver (note 145 above) 152.

154 Ibid.

155 Woolaver (note 78 above) 157.

156 Id 130.

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Al Bashir debacle and the ICC withdrawal matter, NGOs have embraced this new role with enthusiasm and optimism. The HSF, which originally based its role as an NGO on raising public awareness and conducting constitutional-based litigation with regard to domestic matters, has now also embraced international criminal law and — advocacy through which it can continue to uphold its public-interest mandate. This new role allows for the development of richer jurisprudence on matters of international criminal law and creates a deeper appreciation by the South African courts of South Africa's international criminal-law obligations.

The preparation of *amicus curiae* briefs is a key way in which civil-society organisations can participate in international proceedings, particularly in the proceedings of the ICC,[157] in light of the fact that NGOs cannot be applicants in international criminal cases, since the key actors are the prosecutor and the defence. The practice of allowing *amicus curiae* to participate in proceedings is included in the rules of procedure and evidence of most international and internationalised criminal tribunals, including the ICC. Practice suggests an increasing reliance by these tribunals on *amicus curiae* submissions to provide information to the court that may be otherwise not be readily available and to advocate certain objectives or views of how international criminal law should develop or be interpreted.[158]

Although the role of NGOs in international tribunals is limited to the submission amicus briefs,[159] international tribunals, similar to domestic jurisdictions, have 'recognised that *amici* are not impartial when presenting their submissions'.[160] This may indicate that the role and scope of NGOs as amicus in international tribunals may be changing to mirror that of the role they now play in domestic jurisdictions. NGOs, both in international and domestic litigation, have 'recognised the potential for advancing their causes through the submission of amicus briefs which allows them to advertise and advance "their particular concern[s]" as well as have a direct influence on jurisprudence and therefore "the formulation of international criminal law"'.[161]

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157 'Introduction' in H Woolaver & S Williams (eds) *Civil Society and International Criminal Justice in Africa* (2016) xviii.

158 Woolaver (note 143 above).

159 The HSF will be submitting an amicus brief to assist the ICC in making its determination on whether South Africa failed to comply with its obligations in terms of the Rome Statute.

160 Williams & Woolaver (note 145 above) 172. See, further, *Prosecutor v Bagosora* ICTR-96-7 (18 December 2008) para 3.

161 Williams & Woolaver (note 145 above) 184–85.

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The use of amicus briefs must be encouraged for several reasons.[162] First, judges and counsel are challenged by the 'increasing volume of relevant jurisprudence, both of national and international tribunals' and by the fact that 'any source can be crucial to the decision in a particular case'.[163] Secondly, it will allow tribunals and courts to 'develop a clearer view of existing jurisprudence' as an evaluation of jurisprudence is made difficult by 'the structure, or lack thereof, in international criminal law'.[164] Thirdly, the number of NGOs increases annually and NGOs are taking advantage of the opportunity to advance their views and causes.[165] Fourthly, 'judges and counsel [may be] unfamiliar with' the provisions of international criminal law as it is a 'rapidly developing area of international law'. Due to the 'lack of resources' faced by the tribunals, important or decisive issues may be overlooked or missed as comprehensive and detailed research on the law and facts is not always possible.[166] Finally, submitting amicus briefs allows for the introduction of perspectives 'beyond those of the accused and the prosecution' and for '[g]reater exposure' to different perspectives and viewpoints, which can only result in 'enhancing the legitimacy of the court's decisions'.[167]

11 Effectiveness of South African NGO Mobilisation

Has South African NGOs' activism in the *Al Bashir* case made a real difference with regard to promoting the enforcement of international criminal law in South Africa and on the continent? The answer to this question is yes.

One reason why South African and international NGOs have been fairly effective is that they still enjoy a large degree of popular legitimacy in South Africa, which they gained through their activism against apartheid. Such legitimacy is important for their credibility. The government is unlikely to respond to demands of NGOs if it does not consider the NGOs to be representing the people.

The forms of activism by civil-society organisations in Kenya and CAR, discussed above, differ from the South African attempts to get government to comply with international-law obligations. In both Kenya and CAR, civil-society organisations were intensely involved with the early attempts to get the ICC to investigate international crimes committed in their respective countries. It can be argued that South African civil

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[162] Id 184.
[163] Ibid.
[164] Ibid.
[165] Ibid.
[166] Id 185.
[167] Ibid.

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society had a more remote interest in such activism. However, in the context of international crimes, it is important to understand that the distinction between local interests and remote or international interests collapse — this is because international crimes should be prosecuted in the interest of the entire international community.

Civil-society activism in South Africa, Kenya and CAR has helped to spread awareness of international criminal law in the respective countries and beyond. This creates a link between domestic activism and activism on the international plane. The activism has further generated social discourse. In the South African case it has stimulated debate on a range of important issues, including South Africa's relationship and loyalty to the AU versus to the international community.

12 Conclusion

It is clear that, as with NGOs in other parts of the world, South African NGOs have assumed an important position in promoting international criminal justice. In South Africa it is true that citizens are disillusioned with the political processes and that they resort to the courts for help in safeguarding and bolstering the integrity of the democratic process. South African NGOs should take advantage of the relatively free climate in which they are allowed to operate. During apartheid, NGOs were described as agents of change. Today, they can fulfil a similar role in the context of international criminal justice. Through pursuing innovative litigation, they have the potential to be norm setters in Africa and beyond.

Whereas it is unlikely that civil-society activism can create the political will on the part of the government to co-operate with the ICC, persistent NGO activism can be powerful in persuading the government to act in a procedurally correct, lawful and transparent manner.

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