CHAPTER 16

The Omar Al-Bashir Case: Exploring Efforts to Resolve the Tension between the African Union and the International Criminal Court

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1 Introduction

John Dugard inspired generations of South African lawyers by combining his academic research and teaching with practice as an advocate – appearing regularly in the courts either as an expert witness, or as counsel, particularly in cases dealing with international law and human rights. I was first introduced to John’s work as a young student in South Africa, reading his articles and books on international law, jurisprudence, and human rights, and marvelling at his ability to combine deep theoretical research with an application of his theories to answer the hard practical questions of law and life that arose before the courts. His example was a centrally important motivation for me personally – I wanted to be both an academic and an advocate: researching, teaching, and practising. To this day I struggle to achieve what John seemed so effortlessly to perfect. An instance of that struggle is exemplified in this chapter. Having written academically for many years about international criminal justice, and South Africa’s role in helping to achieve accountability for the world’s worst crimes, I found myself briefed as counsel in cases involving South Africa and the International Criminal Court (ICC). One such set of cases revolved around President Omar Al-Bashir of Sudan. Wanted by the ICC for genocide, crimes against humanity and war crimes, I was asked to advise urgently on Al-Bashir’s possible arrival in South Africa to attend President Zuma’s inauguration as President in 2009. On that occasion, and having drafted a set of urgent court papers to ensure his arrest if he arrived for the presidential festivities, I was relieved to learn that no judge in the Urgent Court needed to be bothered.

1 I am very grateful to John Dugard for comments on an earlier draft of this chapter (intended for another publication), as well as the views of Christopher Gevers, Anton du Plessis and Guenael Mettraux. I am also deeply indebted to Dire Tladi for engaged and constructive criticism – particularly since we have been on opposite sides of the debate, yet have remained friends and respectful ones at that, throughout. All remaining errors and stubbornly-held views are my own.
after all. Al-Bashir had apparently decided to play it safe by staying at home in Sudan.

Fast forward six years. I remember it clearly. After a long hard run of cases and a busy term, and on the cusp of a promised family mini-break to Simon’s Town, a small coastal enclave near Cape Town on the eastern side of the Cape Peninsula, I received a fateful phone call. My instructing attorney exclaimed disbelievingly that newspaper reports were suggesting that Al-Bashir was apparently invited to attend the African Union (AU) Summit in South Africa, and that this time he “was coming.” Again, urgent court papers were to be prepared, but as is now well-known, Al-Bashir attended the summit, which took place in June 2015, and left without being arrested. The litigation that ensued came to dominate discussions within international criminal justice circles during this period, as between international law academics, and between government officials within and outside Africa. The core issue was South Africa’s decision not to arrest President Al-Bashir during his attendance of the AU Summit. It continues to this day, because although the government’s arguments were rejected by both the High Court and the Supreme Court of Appeal, the government applied for leave to appeal to the Constitutional Court. The matter was to be heard on 22 November 2016, but on 19 October 2016 the government notified the UN Secretariat of its withdrawal from the ICC and withdrew its appeal.

As one of the counsel in the matter on behalf of the Southern Africa Litigation Centre (SALC), the NGO that litigated the matter against the government, it would be inappropriate for me to engage in a critical discussion of the various arguments raised by the Government and dealt with by the Courts, and certainly before the Constitutional Court has ruled finally. I accordingly do no more than provide a snapshot of the different arguments, but only so that I might highlight that they simultaneously are predicated upon and give rise to a higher-level norm conflict. That norm conflict is between the AU’s claims that Al-Bashir should not be arrested since he is entitled to immunity under international law, and the ICC’s demand that he be arrested because he is responsible for despicable crimes and such immunities do not protect him before the Court. My focus in this chapter is to think about ways of moving beyond the norm gridlock. I do so in a manner that is intended to honour John, by appreciating that international law is about power relations, and that one has a choice between continuing to defend the powerful or challenge the shibboleth of their power. One way in which that might be done is through important strategic litigation, which John expertly engaged in during the apartheid years and thereafter. At the same time, John’s tireless work, whether it was against a stubborn Apartheid government, or against the decades long oppression of the Palestinians, reminds us that elites and governments do not lightly let