IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NO: 867/2015

In the matter between:

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	First Applicant
DIRECTOR GENERAL OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second Applicant
MINISTER OF POLICE	Third Applicant
COMMISSIONER OF POLICE	Fourth Applicant
MINISTER OF INTERNATIONAL RELATIONS AND CO-OPERATION	Fifth Applicant
DIRECTOR-GENERAL OF INTERNATIONAL RELATIONS AND CO-OPERATION	Sixth Applicant
MINISTER OF HOME AFFAIRS	Seventh Applicant
DIRECTOR-GENERAL OF HOME AFFAIRS	Eighth Applicant
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	Ninth Applicant
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Tenth Applicant
HEAD OF THE DIRECTORATE FOR PRIORITY CRIME INVESTIGATION UNIT	Eleventh Applicant

DIRECTOR OF THE PRIORITY CRIMES INVESTIGATION UNIT Twelfth Applicant

and

SOUTHERN AFRICAN LITIGATION CENTRE First Respondent

FILING NOTICE

RESPONDENT'S PRACTICE NOTE, CERTIFICATE and HEADS OF ARGUMENT SERVED AND LODGED HEREWITH:

DATED at **BLOEMFONTEIN** on this **29th** day of **JANUARY 2016**.

ATTORNEY FOR RESPONDENT
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c/o WEBBERS
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BLOEMFONTEIN
Ref: D G Roberts/B Strydom

TO:
THE REGISTRAR
SUPREME COURT OF APPEAL
BLOEMFONTEIN

AND TO:
ATTORNEY FOR APPLICANTS
STATE ATTORNEY
c/o STATE ATTORNEY BLOEMFONTEIN
11th FLOOR, FEDSURE HOUSE
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For: ATTORNEY FOR APPLICANTS

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VAN REGTE

SYMINGTON & DE KOK

AND TO:
ATTORNEY FOR 1st AMICUS CURIAE
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14:50

For: ATTORNEY FOR 1st AMICUS

AND TO:
ATTORNEY FOR AMICUS CURIAE
(PEACE AND JUSTICE INITIATIVE & CENTRE FOR HUMAN RIGHTS)
LEGAL RESOURCES CENTRE
c/o HONEY ATTORNEYS
HONEY CHAMBERS
NORTHRIDGE MALL
KENNETH KAUNDA ROAD
BLOEMFONTEIN

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For: ATTORNEY FOR AMICUS

AND TO:
ATTORNEY FOR AMICUS CURIAE
(AFRICAN CENTRE FOR JUSTICE & PEACE STUDIES and INTERNATIONAL REFUGEE RIGHTS INITIATIVE)
LAWYERS FOR HUMAN RIGHTS
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THE SUPREME COURT OF APPEAL

SCA case number: 867/2015

NGHC case number: 27740/2015

In the matter between:

THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	First Applicant
AND ELEVEN OTHERS	Second to Twelfth Applicants

and

THE SOUTHERN AFRICA LITIGATION CENTRE	Respondent

RESPONDENT'S PRACTICE NOTE

NAME AND NUMBER OF THE MATTER

The name and number of the case appears from the heading above.

NATURE OF APPEAL

The applicants (respondents a quo) seek leave to appeal against the whole of the order and judgment granted by the full bench of the High Court (Gauteng Division, Pretoria) in *The Minister of Justice and Constitutional Development and others v Southern African Litigation Centre* (27740/2015), on 16 June 2015 and 24 June 2015 respectively. The High Court's order provides:

"(1) *THAT the conduct of the Respondents, to the extent that they have failed to take steps to arrest and/or detain the President of the Republic of Sudan Omar Hassan Ahmad Al Bashir ("President Bashir"), is inconsistent with the Constitution of the Republic of South Africa, 1996, and invalid;*

(2) *THAT the Respondents are forthwith compelled to take all reasonable steps to prepare to arrest 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;*

(3) *THAT the Applicant is entitled to the costs of the application on a pro-bono basis."*

THE JURISDICTION OF THIS COURT

The High Court refused an application for leave to appeal on 15 September 2015.

The applicants apply for leave to appeal from this Court, in terms of section 17(2)(b) of the Superior Courts Act 10 of 2013.

CONSTITUTIONAL ISSUES

This case raises the following constitutional issues:

(a) The proper interpretation and application of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, and the Diplomatic Immunities and Privileges Act 37 of 2001;

(b) South Africa's obligations under the Rome Statute of the International Criminal Court, 1998, in light of ss 231 and 233 of the Constitution.

THE ISSUES ON APPEAL

(a) Whether leave to appeal should be granted;

(b) Whether the government authorities were obliged, under South African law, to arrest and surrender President Bashir to the International Criminal Court.

DURATION OF ORAL ARGUMENT

One day.

PORTIONS OF RECORD IN A LANGUANGE OTHER THAN ENGLISH

None.

PARTS OF RECORD NECESSARY FOR THE DETERMINATION OF THE APPEAL

The respondent submits that the entire record before this Court is relevant. The following portions, in particular, require to be read:

<u>High Court record:</u>

- Notice of motion: pp 1 – 8
- Founding affidavit: pp 9 – 28

- Supplementary founding affidavit: pp 29 – 34
- Judgment of the ICC, KRK16 pp 43 – 48
- Answering affidavit: pp 49 – 72
- Agreement between South Africa and the Commission of the African Union: annexure A: pp 73, 83-84;
- Government notice 470 of 5 June 2015, annexure D: pp 99 - 102
- Supporting affidavit: pp 103 – 108
- Order and judgment of the High Court: pp 114 – 146
- Leave to appeal judgment: pp 188 – 200

Leave to appeal record

- Notice of motion: pp 1 – 3
- Founding affidavit: pp 4 – 36
- Answering affidavit: pp 112 – 141
- Arrest warrant, KRK3: pp 176 – 183
- Endorsement of arrest warrant, KRK4: p 184
- Second arrest warrant, KRK5: pp 185 – 193
- Replying affidavit: pp 227 - 238

SUMMARY OF RESPONDENT'S ARGUMENT

(a) The main question in this case is whether President al-Bashir was immune from arrest in South Africa for surrender to the International Criminal Court in terms of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002. We submit that, on a proper interpretation of the ICC Act, and particularly ss 4(2) and 10(9), President al-Bashir did not enjoy any such immunity.

(b) There is a subsidiary question whether such immunity was conferred on President al-Bashir by or under the Diplomatic Immunities and Privileges Act 37 of 2001. We submit that no such immunity was

conferred on him but, even if it were, the immunity would be trumped by its negation under the ICC Act.

(c) There is, moreover, no basis in customary international law on which the government could rely in these proceedings to escape its obligation to arrest and surrender President al-Bashir to the ICC.

COMPLIANCE WITH RULES 8(8) AND 8(9)

The parties have complied with the requirements of Rules 8(8) and (9)

CERTIFICATE

We certify that this practice note complies with Rule 10A.

pp

WIM TRENGOVE SC

pp

MAX DU PLESSIS

ISABEL GOODMAN

pp

HEPHZIBAH RAJAH

Chambers, Sandton and Durban

29 January 2016

THE SUPREME COURT OF APPEAL

Case 867/2015

In the matter between:

THE MINISTER OF JUSTICE AND OTHERS Applicants

and

THE SOUTHERN AFRICA LITIGATION CENTRE Respondent

RESPONDENT'S HEADS OF ARGUMENT

CONTENTS

INTRODUCTION

1. The main question in this case is whether President al-Bashir was immune from arrest in South Africa for surrender to the International Criminal Court in terms of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002. We submit that, on a proper interpretation of the ICC Act, and particularly ss 4(2) and 10(9), President al-Bashir did not enjoy any such immunity.

2. There is a subsidiary question whether such immunity was conferred on President al-Bashir by or under the Diplomatic Immunities and Privileges Act 37 of 2001. We submit that no such immunity was conferred on him but, even if it were, the immunity would be trumped by its negation under the ICC Act.

THE FACTS

3. President al-Bashir stands accused of the *"unholy trinity"* of international crimes of genocide, war crimes and crimes against humanity. He is alleged to have been the mastermind behind widespread attacks by the Sudanese government on the people of Darfur in Sudan from 2003 to 2008. The attacks are alleged to have included large-scale extermination, murder, rape, torture, forcible transfer and pillaging of civilians.

4. On 31 March 2005 the United Nation's Security Council adopted Resolution 1593 referring the situation in Darfur to the prosecutor of the

International Criminal Court.[1] It added that the government of Sudan and all other parties to the conflict in Darfur "*shall co-operate fully with and provide any necessary assistance*" to the ICC and its prosecutor. It urged all other states to "*co-operate fully*".[2]

5. The Security Council adopted the resolution in terms of Chapter VII of the UN Charter. It allows the Security Council to determine measures to be taken by members of the UN to maintain or restore international peace and security.[3] Article 48 obliges members of the UN to give effect to the Security Council's determination. Article 49 adds that all members of the UN "*shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council*".

6. The referral by the Security Council vested the ICC with jurisdiction over the situation in Darfur in terms of article 13(b) of the Rome Statute.

7. The ICC issued two warrants for the arrest of President al-Bashir. It issued the first on 4 March 2009.[4] It sought President al-Bashir's arrest on seven counts comprising attacks against a civilian population as a war crime; pillage as a war crime; murder as a crime against humanity; extermination as a crime against

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1 SC Resolution 1593 31 March 2005 Petition p 201

2 Para 2

3 Articles 39 and 41

4 First Warrant 4 March 2009 Petition p 176

humanity; forcible transfer as a crime against humanity; torture as a crime against humanity; and rape as a crime against humanity.[5]

8. In terms of article 58(5) of the Rome Statute, the ICC requested its members including South Africa to give effect to the first warrant. The South African government referred the request to the Magistrate of Pretoria who endorsed the warrant for execution on 9 May 2009 in terms of s 8 of the ICC Act.[6]

9. The ICC issued a second warrant for President al-Bashir's arrest on 12 July 2010.[7] It accused him of genocide by killing; genocide by causing serious bodily or mental harm; and genocide by deliberately inflicting conditions of life calculated to bring about physical destruction.[8]

10. The ICC again requested its members to give effect to the second warrant. It is not clear how the request was processed in South Africa.

11. The ICC made its request for the execution of the two warrants to all the members of the ICC. The question whether they were entitled and obliged to arrest and surrender President al-Bashir to the ICC, or were precluded from doing so by an immunity vested in him as sitting head of state under customary international law, arose again and again and was conclusively determined by the ICC. It did so by its rulings in,

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5 First Warrant 4 March 2009 Petition pp 182 - 183

6 Endorsement 9 May 2009 Petition p 184

7 Second Warrant 12 July 2010 Petition p 185

8 P 192

- the Malawi case of 12 December 2011;[9]
- the first Chad case of 13 December 2011;[10]
- the second Chad case of 26 March 2013;[11]
- the Congo case of 9 April 2014;[12] and
- the SA case of 13 June 2015.[13]

12. The ICC held in the Congo case in April 2014 that it was a necessary implication of Security Council Resolution 1593 that Sudan could not invoke any immunity that insulated President al-Bashir from arrest under the ICC warrants:

> *"(B)y issuing Resolution 1593 (2005) the SC decided that the 'Government of Sudan ... shall co-operate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution'. Since immunities attached to Omar al-Bashir are a procedural bar from prosecution before the Court, the co-operation envisaged in said resolution was meant to eliminate any impediment to the proceedings before the Court, including the lifting of immunities. Any other interpretation would render the SC decision requiring that*

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9 ICC decision pursuant to article 87(7) of the Rome Statute on the failure by the Republic of Malawi to comply with the co-operation requests issued by the court with respect to the arrest and surrender of Omar Hassan Ahmad al-Bashir 12 December 2011

10 ICC decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the co-operation request issued by the court with respect to the arrest and surrender of Omar Hassan Ahmad al-Bashir 13 December 2011

11 ICC decision on the non-compliance of the Republic of Chad with the co-operation requests issued by the court regarding the arrest and surrender of Omar Hassan Ahmad al-Bashir 26 March 2013

12 ICC decision on the co-operation of the Democratic Republic of the Congo regarding Omar al-Bashir's arrest and surrender to the court 9 April 2014

13 ICC 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 High Court p 43

Sudan 'co-operate fully' and 'provide any necessary assistance to the Court' senseless."[14]

13. In the SA case, the ICC held in June 2015 that it was clear that South Africa was obliged to arrest and surrender President al-Bashir pursuant to the ICC warrants.

"*Indeed, it is plain from the following that there exists no ambiguity or uncertainty with respect to the obligation of the Republic of South Africa to immediately arrest and surrender Omar al-Bashir to the court, and that the competent authorities (of) the Republic of South Africa are already aware of this obligation."*[15]

"*In conclusion, the Republic of South Africa is already aware of its obligation under the Rome Statute to immediately arrest Omar al-Bashir and surrender him to the court, as it is aware of the court's explicit position (as publicly expressed, most recently, on 9 April 2014*[16] *and reiterated during the consultations with the South African delegation on 12 June 2015) that the immunities granted to Omar al-Bashir under international law and attached to his position as a head of state have been impliedly waived by the Security Council of the United Nations by Resolution 1593 (2005) referring the situation in Darfur, Sudan to the prosecutor of the Court, and that the Republic of South*

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14 Para 29

15 SA case 13 June 2015 High Court p 45 para 1

16 In the Congo case

Africa cannot invoke any other decision, including that of the African Union, providing for any obligation to the contrary".[17]

14. President al-Bashir attended an African Union summit in Johannesburg from 14 June 2015. The South African government however failed to arrest him, despite its clear duty to do so under the Rome State, the ICC Act and the pending warrant of arrest duly endorsed by the Magistrate of Pretoria.

15. SALC applied urgently to the High Court for orders compelling the government to arrest President al-Bashir. The state opposed the application. The High Court issued successive orders requiring the government to ensure that President al-Bashir did not leave the country pending its determination of the application.[18] Despite repeated assurances that President al-Bashir was still in the country and would not be allowed to leave, the High Court was informed, by the time it made its final order on 15 June 2015, that President al-Bashir had left. The High Court's final judgment tells this story.[19]

THE ROME STATUTE

16. This case turns on the proper interpretation of the ICC Act. Its avowed purpose is to give domestic effect to the Rome Statute and South Africa's obligations under it. It is thus fitting first to mention the provisions of the Rome Statute relevant to the enquiry in this case.

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17 High Court p 48 para 9

18 High Court Order 14 June 2015 Petition p 43; High Court Order 14 June 2015 Petition p 46; High Court Order 15 June 2015 Petition p 79

19 High Court Judgment 24 June 2015 Petition p 48

17. Article 86 obliges all state parties to "*co-operate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court*". Article 87(1) entitles the court to request state parties for co-operation. Article 88 says that they must ensure that there are procedures available under their national law for all the forms of co-operation the court may seek. Article 87(7) says that,

> "*Where a state party fails to comply with a request to co-operate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.*"

18. Under articles 58(5), 89(1) and 92 the court may request state parties to arrest and surrender a suspect or, in urgent cases, to arrest the suspect provisionally pending further proceedings.

19. Article 27 negates any immunity vesting in heads of state and other officials:

> "*(1) This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt the person from*

criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

(2) Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."

20. We point to the following features of this provision:

20.1. The primary provision of article 27(1) makes the Rome Statute "*equally applicable to all persons without any distinction based on official capacity*" in unqualified terms. It does not brook any distinction of any kind based on official capacity.

20.2. Article 27(1) is not confined to prosecutions in the ICC. It applies to all prosecutions including those in the national courts of the state parties to the Rome Statute.

20.3. Article 27(2) complements the general provisions of article 27(1) by providing specifically that the ICC shall not be barred from exercising its jurisdiction by any immunities or special procedural rules that may attach to the official capacity of a suspect.

21. Article 98(1) says that,

> *"The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the court can first obtain the co-operation of that third State for the waiver of the immunity."*

22. Much has been said about the apparent inconsistency between this provision and article 27. We shall later demonstrate that the apparent inconsistency does not affect us because the ICC Act has emulated article 27 but not article 98.

23. Article 119(1) lastly vests the ICC with jurisdiction to determine all disputes concerning its judicial functions.

THE ICC ACT

24. The following provisions of the ICC Act negate any head of state immunity, whether from prosecution in our domestic courts or from arrest and surrender for prosecution before the ICC.

25. The preamble refers to atrocities committed throughout the history of humankind and in South Africa in particular and commits South Africa to *"bringing persons who commit such atrocities to justice"* either in our own courts or, in accordance with the principle of complementarity, in the ICC. This is a

serious commitment. The Constitutional Court emphasized in the Torture Docket case that,

> *"Our country's international and domestic law commitments must be honoured. We cannot be seen to be tolerant of impunity for alleged torturers. We must take up our rightful place in the community of nations with its concomitant obligations. We dare not be a safe haven for those who commit crimes against humanity."*[20]

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

> *"A state's duty to prevent impunity, which can be defined as the exemption from punishment, is particularly pronounced with respect to those norms, such as the prohibition of torture, that are widely considered peremptory and therefore non-derogable --- even in times of war or national emergency --- and which, if unpunished, engender feelings of lawlessness, disempower ordinary citizens and offend against the human conscience."*[21]

26. Section 3 lists the objects of the ICC Act. The first is to create a framework to ensure that the Rome Statute *"is effectively implemented"* in South Africa.[22] The second is to ensure that South Africa conforms with its obligations under the Rome Statute.[23] The fifth is to enable the state to co-operate with the ICC

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20 National Commissioner of Police v SALC 2015 (1) SA 315 (CC) para 80

21 National Commissioner of Police para 4 footnote 2

22 Section 3(a)

23 Section 3(b)

in its investigations and prosecutions *inter alia* by the surrender of suspects for prosecution before the ICC.[24]

27. Section 4(1) provides that anybody who commits any of the international crimes is guilty of an offence and liable to conviction and punishment. It makes war crimes, genocide and crimes against humanity punishable under South African law, wherever they may be committed.

28. Section 4(3) vests our courts with universal jurisdiction over the prosecution of all international crimes, wherever they may have been committed, provided only that the accused is present in South Africa.

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

> *"Despite any other law to the contrary, including customary and conventional international law, the fact that a person –*
>
> *(a) is or was a head of State or government, a member of a government or parliament, an elected representative or a government official; or*
>
> *(b) ....*
>
> *is neither –*
>
> *(i) a defence to a crime; nor*
>
> *(ii) a ground for any possible reduction of sentence once a person has been convicted of a crime."*

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[24] Section 3(e)

30. The government authorities accept that these provisions confer jurisdiction on South African courts to prosecute international crimes,[25] and preclude a person who otherwise enjoys immunity from raising it as a defence or a mitigating factor in those proceedings.[26] But they contend, relying on Mr Gevers,[27] that the ICC Act does not remove a head of state's personal immunity and does not allow for his arrest. His "*absolute inviolability*" as a sitting head of state has purportedly been preserved.[28] This argument is with respect unfounded for the following reasons.

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

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

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25 Applicants' heads pp 28-29 para 54

26 Applicants' heads pp 28-29 paras 53-54

27 Christopher Gevers "Immunity and Implementation Legislation in South Africa, Kenya and Uganda" in Kai Ambos and Ottilia Maunganidze (eds) *Power and Prosecution: Challenges and Opportunities for International Criminal Justice in Sub-Saharan Africa* (Universitätverslag, Göttingen 2012)

28 Applicants' heads of argument pp 29-30 paras 55-58

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

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

31.4. Section 10 comes into play once a suspect has been arrested under a warrant endorsed in terms of s 8 or issued in terms of s 9(2). Section 10(1) provides that the suspect "*must*" be brought before a magistrate within 48 hours. The magistrate "*must*" hold an enquiry but only to determine three things. The first is whether the warrant applies to the suspect. The second is whether the suspect has been arrested in accordance with our domestic law. The third is whether the suspect's constitutional rights have been respected. Section 10(5) says that, if the magistrate is satisfied that the three requirements have been met and that the suspect may be surrendered to the ICC, she "*must*" order that the suspect be surrendered to the ICC.

31.5. These provisions do not leave room for the suspect to raise any immunity against arrest and surrender to the ICC or for the magistrate to enquire into and determine such a claim. The necessary implication of these provisions is accordingly that any such immunity is negated.

32. The second flaw in the applicants' interpretation is that it is expressly and unambiguously contradicted by s 10(9) as follows:

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

33. The meaning of this provision is clear and unambiguous. It applies to any person contemplated in s 4(2)(a) or (b). They include a sitting or former head of state. The section says, in other words, that the fact that the suspect is a sitting or former head of state does not constitute a ground for refusing an order contemplated in s 10(5), that is, an order that the suspect be surrendered to the ICC.

34. The third flaw in the applicant's interpretation is that it creates an intolerable anomaly. In terms of s 4(2) of the ICC Act, a head of state may be arrested and prosecuted before South Africa's domestic courts. In terms of article 27 of the Rome Statute, the same head of state may be prosecuted before the ICC. But, when the ICC asks South Africa to arrest and surrender the head of state to the ICC for prosecution, South Africa is precluded from doing so by the suspect's immunity under customary international law. The immunity does not protect him against arrest and prosecution in South Africa but inexplicably protects him from arrest in South Africa for surrender to the ICC. Professor Akande points to the incongruity of this outcome:

"After all, to allow immunity at the national level to defeat arrest and surrender to (the ICC) is to prevent (the ICC) from exercising its jurisdiction."[29]

35. The applicants seek to escape the clear meaning of s 10(9) in paragraphs 55 to 58 of their heads of argument, but their attempt is flawed:

35.1. They say that s 10(9) does not deal with arrest but only with proceedings after arrest.[30] But this is a blinkered interpretation. The section postulates a head of state against whom an order may be made in terms of s 10(5), that is, one who has been arrested and brought before a magistrate. It postulates in other words that such a head of state may be arrested and stipulates that he or she does not enjoy any immunity against surrender to the ICC. This provision moreover follows those we have already recited that leave no room for exceptions to be made for heads of state.

35.2. The applicants say that s 9 is *"the lex specialis on arrests"* but is silent on heads of state.[31] But that is not so. Section 8 deals with a request for the arrest and surrender of a suspect. Section 9 deals with a request for the provisional arrest of a suspect. Both these provisions culminate in a warrant. Section 9(3) says that such a warrant, whether

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29 Dapo Akande "The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities" *JICJ* 2009 pp 336-337

30 Applicants' heads p 29 para 55

31 Applicants' heads p 30 para 56

endorsed in terms of s 8 or issued in terms of s 9, must be executed in a manner as near as possible to the manner in which domestic warrants are executed. Section 10 picks up the thread after the execution of the warrant. There is thus no justification for the applicants' attempt to single out and isolate s 9.

35.3. The applicants say that the ICC Act "*did not abrogate immunity in the context of arrests*". But that is only because it abrogated immunity for all purposes, including arrest, in ss 4(2) and 10(9).

35.4. The applicants make the point that, while s 10(9) negates any immunity for purposes of an order in terms of s 10(5), the order sought from the High Court was not such an order.[32] But this argument misses the point. The question before the High Court was whether President al-Bashir enjoyed immunity from arrest and surrender to the ICC. Section 10(9) says expressly that he does not.

35.5. The applicants lastly invoke an article by Mr Gevers that said that the ICC Act is "*silent on the relevance of immunity in relation to co-operation requests.*"[33] But Mr Gevers inexplicably overlooked s 10(9) altogether.[34] He fails to mention s 10(9) and it is clear that his statement, upon which the applicants rely, to the effect that the ICC Act

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32 Applicants' heads p 30 para 58

33 Applicants' heads p 30 footnote 147

34 Gevers "Immunity and the Implementation Legislation in South Africa, Kenya and Uganda" in Ambos and Maunganidze (eds) "*Power and prosecution: challenges and opportunities for international criminal justice in Sub-Sahara Africa*", Göttingen 2012

is entirely "*silent on the relevance of immunity in relation to co-operation requests*", could only have been made in ignorance of s 10(9). His article is accordingly of no assistance on the interpretation of s 10(9).

36. Parliament has thus made a clear choice in s 10(9) to negate the head of state immunities that might otherwise have stood in the way of the arrest and surrender of heads of state. As Professor Tladi has explained:

> *"As du Plessis points out, this provision [s 10(9)] is unambiguous in its effect, i.e. the mere fact that a person is entitled to inviolability is in itself not a justification for not ordering surrender. This means that even if a South African court itself cannot exercise jurisdiction over a head of state like al-Bashir, this does not apply to the arrest and surrender processes described above. It is noteworthy that while Article 98 of the Rome Statute provides an exception to the duty to cooperate on the basis of immunity as described above, a similar provision does not exist in the Implementation Act. Indeed section 10(9) of the Implementation Act, stating that the status of a person is not a ground for refusing surrender, suggests that the legislator intended to explicitly exclude the effects of Article 98."*[35]

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35 Tladi "The duty on South Africa to arrest and surrender President Al-Bashir under South African and International Law" *Journal of International Criminal Justice* 13 (2015) 1027 at 1039. See further Max du Plessis, "South Africa's Implementation of the ICC Statute. An African Example", 5 *Journal of International Criminal Justice* (2007) 460 ff, who writes at 473-474:

> "*Second, even if Section 4(2)(a) is made to yield to customary international law upholding immunity for senior officials, it does not mean that the high-ranking individual who has personal immunity by virtue of being an incumbent head of state or foreign minister, and who is arrested whilst in South Africa for an international crime, must necessarily be set free. Under the complementarity scheme, it will be expected of a State Party to the ICC Statute*

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

> *"To avoid these difficulties [regarding immunities for officials], a prudent approach would be to provide that any issue of immunities will not bar arrest or surrender to the ICC. In essence, this approach leaves the issue to be decided by the ICC and not by national courts. In this manner, an implementing State can ensure that it will not find itself stuck with a legislative provision – or a judicial interpretation – on international immunities that hinders compliance with an ICC request".*[36]

38. The same prudent approach has been followed in other jurisdictions. New Zealand's International Crimes and International Criminal Court Act, 2000,[37] provides an example. Writing on the Act's provisions on immunity, Treasa Dunworthy explains as follows:

> *"A second aspect of the legislation dealing with immunity is where there is a request for surrender or assistance by the [ICC] with respect*

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that finds itself unable to exercise jurisdiction (because, for instance, such prosecution is of a foreign state's head of state) to send the accused to the ICC for prosecution. Article 89(1) of the ICC Statute says that States Parties to the Statute have a duty of cooperation with the court, requiring such states to arrest and surrender to the Court persons charged with an ICC crime. And where South Africa chooses to surrender a high- standing official to the ICC, the ICC Act makes clear [the author here references s 10(9) in a footnote] that whatever immunity might have otherwise attached to the official does not constitute a bar to the surrender of the person to the ICC."

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

37 Available http://legislation.co.nz/

to its own prosecutions or investigations. The initial Bill dealt with this issue by giving the Minister of Justice or Attorney-General the discretion to refuse a request from the Court in the event that Article 98 of the Statute was invoked by another State. The Select Committee recommended that the onus of resolving questions about the existence of any immunities be placed with the Court – a recommendation that was subsequently adopted. Accordingly, as the legislation now stands, section 31 provides that the existence of any immunity is not a ground for refusing or postponing a request for surrender or assistance subject to sections 66 and 120. Essentially, these sections place the onus on the ICC to resolve any questions relating to Article 98 and then advise whether or not it intends to proceed with the request. If it does proceed, then the request must be executed; if not, then that is the end of the request." [38]

39. Further examples appear in the government authorities' own heads of argument, which cite the Kenyan and Ugandan implementation statutes as explicitly excluding immunity against arrest – and hence confirming state practice in support of South Africa's position. Indeed, in 2011, the Kenyan High

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[38] "New Zealand", pp 184 to 185, in Ben Brandon and Max du Plessis (eds), *The Prosecution of International Crimes: A Practical Guide to Prosecuting ICC Crimes in Commonwealth States, Commonwealth Secretariat*, 2005, emphasis added. See also Dapo Akande at 422 and 426, citing New Zealand, Canada, Ireland and Malta as States that expressly exclude immunity for arrest and surrender purposes.

Court ruled that President Bashir must be arrested should he be found on Kenyan soil.[39]

40. We submit in conclusion that the ICC Act explicitly and unambiguously negates the applicants' contention that President al-Bashir was immune from arrest in South Africa under the two ICC warrants.

CUSTOMARY INTERNATIONAL LAW

41. Section 232 of the Constitution provides that customary international law *"is law in the Republic"* unless it is inconsistent with the Constitution or an act of parliament. The ICC Act thus trumps customary international law if there is any inconsistency between them. We submit however that there is none because customary international law permits states to negate traditional head of state immunity in favour of co-operation towards the prosecution of international crimes in international tribunals.

42. The applicants' argument to the contrary is based on a one-sided and self-serving account of customary international law. The centrepiece of their argument is their reliance on the Arrest Warrant case.[40] They say that it excludes the possibility of any exception to the rule of *"full immunity from*

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39 Kenyan Section of the International Commission of Jurists v Attorney General and Minister of State for Provincial Administration and Internal Security Mis. Criminal Application no.685 of 2010 available at http://kenyalaw.org/Downloads_FreeCases/84203.pdf

40 Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgian) (2002) ICJ Rep 3

criminal jurisdiction and inviolability".[41] But that is not so. The Arrest Warrant case noted an exception that would apply as far as the ICC was concerned:

> *"(A)n incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include . . . the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 27, paragraph 2, that '[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such person".*[42]

43. Professor Dugard notes that the Arrest Warrant case "*has been strongly criticised as a setback for the movement against impunity for the commission of international crimes*".[43] He notes that a distinction must be drawn between international and national courts for purposes of immunity:

> *"At the outset, a distinction must be drawn between international and national courts for the purpose of immunity. The Nuremburg Charter, the Statutes of the ad hoc tribunals for the former Yugoslavia and Rwanda, and the Rome Statute of the International Criminal Court make it clear that no immunity shall attach to heads of state or government or to senior government officials. The Statute of the Special Court for Sierra Leone similarly denies immunity to heads of state, and the Special Court held that, as it is an international, and not*

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41 See applicants' heads pp 13-14 paras 29-30

42 Arrest Warrant case para 61

43 Dugard et al *International Law: A South African Perspective* 4th ed (2011) 252

a national court, the head of state of Liberia, Charles Taylor, was not entitled to succeed in a plea of immunity. The principle of non-immunity for international crimes applies equally to incumbent heads of state (as Charles Taylor was at the time of the Special Court's decision) and former heads of state (as with Slobodan Milosevich, former President of Yugoslavia)."[44]

44. Aside from the ICC implementation legislation of various countries which permit arrests of heads of state despite their immunity, referred to already, in the intervening years, a number of suspects have been arrested and handed over to International Tribunals (primarily the ICTY and the ICTR), by foreign states.[45] By way of example:

44.1. Slobodan Milosevic, the former President of Yugoslavia, was arrested and handed over to the ICTY by the former Yugoslavia. An arrest warrant was issued against him by the ICTY while he was still in office.

44.2. Ante Gotovina of Croatia was arrested in Spain in 2005 and was later transferred to the ICTY.

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44 op cit 251

45 Several examples and further details and references on many of these examples are set out in Patricia M. Wald "Apprehending War Criminals: Does International Cooperation Work?" (2012) 27 *American University International Law Review* 229. See also Cryer et al *An introduction to International Criminal Law and Procedure* 3rd ed (2014) 534; Gamara and Vicente "UN Member States' Obligations towards the ICTY: Arresting and Transferring Lukic, Gotovina and Zelenenovic" (2008) 8 *International Criminal Law Review* at 647-650

44.3. Charles Taylor of Liberia was handed over to the Special Court of Sierra Leone by Nigeria in 2006.

44.4. Dragan Zelenović, the former Prime Minister of Serbia, was transferred to the ICTY by Bosnia (after Russia had failed to do so).

44.5. Radovan Karadzić (the former President of the Republika Srpska) was arrested and transferred to the ICTY in 2008 by Serbia.

44.6. Jean-Pierre Bemba of the DRC was arrested and surrendered to the ICC in 2008 by Belgium.

44.7. Callixte Mbarushimana of Rwanda was arrested and surrendered to the ICC by France in 2010.

44.8. Ratko Mladić (the former Bosnian Serb Army Commander) was arrested in Serbia and transferred to the ICTY in 2011.

44.9. Goran Hadžić, the former President of the self-proclaimed Serbian Autonomous District of Slavonia, Baranja and Western Srem, was arrested in Serbia and transferred to the ICTY in 2011.

45. The applicants' heads confidently state that "*no court has to date, so far as is known, ordered the arrest of a sitting head of state*".[46] But that is not so. In 2011, the Kenyan High Court ordered the arrest of President al-Bashir should he enter Kenyan territory.[47]

46. State practice, then, is in flux. There is a developing norm to cooperate with international tribunals and to give effect to their arrest warrants. International law scholars are recognising this emerging trend – including some of the very academics that the applicants cite in support of their case.

47. The applicants quote an earlier 2007 edition of Cryer et al in support of a claim that state practice has consistently upheld personal immunity.[48] But the latest version of Cryer et al (the 2014 edition) is more equivocal. It states:

> *"In recent decades, with the advent of the human rights movement, States have taken stronger and stronger steps to prosecute international criminals. This emboldened State practice has brought to the fore many hidden or unresolved questions as to the boundaries between principles of accountability and immunity."*[49]

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46 Applicants' heads p 1 para 2

47 *Kenyan Section of the International Commission of Jurists v Attorney General and Minister of State for Provincial Administration and Internal Security* Mis. Criminal Application no.685 of 2010 available at http://kenyalaw.org/Downloads_FreeCases/84203.pdf

48 Applicants' heads p 21 fn 91

49 Cryer et al at 540

48. The applicants also repeatedly invoke Professor Dugard in support of their claim. But he expressly recognises the emergence of a new customary international law trend:

> *"Contemporary international law no longer accepts that a state may treat its nationals as it pleases. Conventions and custom prescribe a wide range of human rights obligations with which states must comply. Moreover some human rights norms enjoy such a high status that their violation, even by state officials, constitutes an international crime. The doctrine of immunity cannot stand aloof from these developments. International commerce has destroyed the absoluteness of state immunity in respect of commercial transactions. International human rights and international criminal law are now poised to weaken it still further."*[50]

> *"As has been shown customary international law is in a state of flux in respect of immunity, both criminal and civil, for acts in violation of norms of jus cogens. South African courts will therefore be required to approach immunity in such cases with caution, and with due regard for the emergence of restrictive rules in favour of human rights".*[51]

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50 See John Dugard, *International Law: A South African Perspective*, 4th Edition (2011) at 250 to 251. See also Michael A. Tunks *"Diplomats or Defendants? Defining the future of head-of-state immunity"* 52 Duke L.J (2002) at 660-662

51 Dugard at 258

49. The immunity rules under customary international law are neither a blunt instrument[52] nor a straight-jacket,[53] despite the government's efforts to use them to that effect. As Judge James Crawford explains: "*When applying international law rules, municipal courts may find it necessary to develop the law, notably where it is unclear or uncertain. This will include consideration of how the international rule is applicable in a domestic context, a process which has been notable, for example, in the field of state immunity*".[54] That is why Crawford stresses that "*Immunity exists as a rule of international law, but its application depends substantially on the law and procedural rules of the forum*".[55]

50. It follows that customary international law cannot assist the government authorities in their appeal.

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52 Despite the government's repeated assertion that the High Court's order would expose South Africa to a violation of customary international law, and that the obligation on South Africa under customary international law is clear and absolute, Judge Crawford stresses that *"The scope of immunity from foreign criminal jurisdiction is yet to be conclusively determined"* (James Crawford, *Brownlie's Principles of Public International Law*, 8th ed (2012) p 499).

53 The applicants' heads claim that SALC *"of course cannot ask this Court to develop customary international law"* (p 20 para 42). SALC never asks for that development; it asks for this Court to determine South Africa's international law and domestic law obligations. If the outcome is an example of state practice (through this Court) confirming that South Africa has obligations to arrest Bashir under the ICC Act, the Rome Statute and the ICC orders, then that may aid in the development of customary international law.

54 See Crawford pp 57 to 58, emphasis added

55 Crawford p 488, emphasis added

THE IMPACT OF THE SECURITY COUNCIL RESOLUTION

Introduction

51. The Security Council adopted Resolution 1593 under Chapter VII of the UN Charter. It was thus binding on all members of the UN including Sudan. It provided that the government of Sudan and all other parties to the conflict in Darfur "*shall co-operate fully with and provide any necessary assistance to*" the ICC and its prosecutor.[56] The ICC repeatedly ruled, particularly in the Congo[57] and SA[58] cases, that the effect of the Security Council resolution was to strip Sudan of any privilege that might otherwise have protected President al-Bashir from arrest and surrender to the ICC.

52. We submit in the first place that the ICC rulings are correct. The effect of the Security Council resolution was to strip Sudan of any privilege that might have immunised President al-Bashir against arrest. We submit in the second place that in any event that South Africa is bound by the ICC rulings to that effect.

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56 SC Resolution 31 March 2005 Petition p 201 para 2

57 ICC decision on the co-operation of the Democratic Republic of the Congo regarding Omar al-Bashir's arrest and surrender to the court 9 April 2014 paras 22 to 32

58 ICC 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 High Court p 43 paras 1 to 9

Resolution 1593 stripped Sudan of immunity

53. The ICC rulings, that the effect of Security Council Resolution 1593 was to strip Sudan of immunity, enjoy wide support among international law scholars. Their argument may be summarised as follows:

53.1. The Security Council resolution necessarily implied that the Security Council referred the situation in Darfur to the ICC for investigation, prosecution and adjudication in accordance with the Rome Statute.

53.2. Article 27(2) of the Rome Statute provides that "*Immunities ... which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person*".

53.3. Under article 25 of the UN Charter, Sudan is bound by the Security Council resolution and by article 27(2) of the Rome Statute. It is thus in a position analogous to a member of the ICC bound by the Rome Statute and more particularly by article 27(2) which negates any head of state immunity. The only difference between Sudan and any other member of the ICC is that Sudan is bound by the Rome Statute through the Security Council resolution and not because it is indeed a member of the ICC.

54. Professor Tladi notes that,

> *"The majority of scholars take the view that because the situation in Sudan was referred to the ICC by the Security Council, by virtue of the priority accorded to Security Council decisions, Sudan becomes like a party to the ICC such that the exception to article 98 does not apply to it".*[59]

55. In their leading text on International Criminal Law, Cryer et al expressed the same view:

> *"By requiring a State to co-operate fully, the Security Council creates the same situation as was described in section 21.5.1: the Security Council has subjected the state to a regime which overrides its immunities. The obligation to 'co-operate fully' imposes obligations identical to those of a State Party."*[60]

56. Other scholars who subscribe to the same view include Akande,[61] De Wet[62] and Sluiter.[63]

57. The applicants argue in paragraphs 66 to 68 of their heads of argument that the Security Council resolution does not impose any binding duties on South Africa

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59 Tladi "The duty on South Africa to arrest and surrender President al-Bashir under South African and International Law", *Journal of International Criminal Justice* 13 (2015) 1027 at 1041

60 Cryer et al *An introduction to International Criminal Law and Procedure* 3rd ed 559 to 560

61 Akande, "The legal nature of the Security Council referrals to the ICC and its impact on Bashir's immunities" (2009) 7 *Journal of International Criminal Justice* 333, p 17; Akande "The effect of Security Council resolutions and domestic proceedings on state obligations to co-operate with the ICC", *Journal of International Criminal Justice* 10 (2012) 299 at 305 to 311

62 De Wet "The implications of President al-Bashir's visit to South Africa for International and Domestic Law", *Journal of International Criminal Justice* 13 (2015) 1049 at 1057 to 1063

63 Sluiter *"The surrender of war criminals to the International Criminal Court"* 15 *Loy.L.A. International and Comparative Law Review* 605 (2003) at 610

because it has consistently been interpreted to impose binding duties only on Sudan and the other state parties to the conflict in Darfur. That is of course so but it misses the point. The point is that the Security Council resolution is binding on Sudan and obliges it to "*co-operate fully with and provide any necessary assistance to*" the ICC and its prosecutor. It necessarily strips Sudan of any immunity that would have entitled President al-Bashir to resist arrest and prosecution by the ICC.

The ICC rulings are binding on South Africa

58. The ICC has repeatedly emphatically ruled that President al-Bashir does not enjoy any immunity from arrest and surrender to the ICC and that South Africa is duty-bound to do so. South Africa is bound by these rulings, both under the Rome Statute and domestic law, on the following grounds.

59. South Africa's duty to comply with the ICC request for President al-Bashir's arrest and surrender arises in the first place under article 87(7) of the Rome Statute.

60. A state party that believes that a suspect may be protected by immunity owed to a third state, may raise the matter with the ICC under article 98. The article however leaves it to the ICC to determine whether there is any immunity standing in the way of compliance with its request. If the matter is in dispute, the ICC is the sole arbiter of the dispute under article 119(1) of the Rome Statute. The ICC put it as follows in the Congo case:

> *"(T)he DRC disregarded the fact that the Court is the sole authority to decide whether or not the immunities generally attached to Omar al-Bashir as a sitting head of state were applicable in this particular case. This conclusion finds support in article 119(1) of the Statute ...".*[64]

61. The ICC rulings are also binding on the government under South African domestic law. Section 7(1) of the ICC Act, states that the ICC *"has such rights and privileges of a South African Court"*. An essential right of a South African court is to issue orders and to have them respected; a right which under our Constitution is backed up by an obligation (entrenched in section 165) that court orders must be respected. It means that the ICC has, by virtue of s 7(1), the same right to have the order issued by the Pre-Trial Chamber obliging the arrest of President Bashir respected.

62. Finally, the ICC's decisions are also binding under our domestic common law. In the only previous instance where our courts were confronted with the implementation of a binding international judicial decision in South Africa, the Constitutional Court developed the common law to give effect to the decision because there was not yet any adequate statutory framework in place.[65] While the case was concerned with the recognition of the decisions of the SADC Tribunal, the court held that the development applies to all international courts to which South Africa is a party by treaty:

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64 ICC decision on the co-operation of the Democratic Republic of the Congo regarding Omar al-Bashir's arrest and surrender to the court 9 April 2014 para 16

65 See Government of the Republic of Zimbabwe v Fick (657/11) [2012] ZASCA 122; Government of the Republic of Zimbabwe v Fick 2013 (5) SA 325 (CC)

> *"It follows from the requirements listed in Purser v Sales that the South African common law on the enforcement of foreign civil judgments was, thus far, developed to provide only for the execution of judgments made by domestic courts of a foreign state. It does not apply to the enforcement of judgments of the Tribunal and there is no other legal provision for the enforcement of such decisions in our country. This then gives rise to the need to develop the common law of South Africa in order to pave the way for the enforcement of judgments or orders made by the Tribunal. This development of the common law extends to the enforcement of judgments and orders of international courts or tribunals, based on international agreements that are binding on South Africa."*[66]

63. It is clear that this development also applies to the orders of the ICC.[67]

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66 Fick para 53, emphasis added

67 See Fick para 54: "*The development of the common law revolves around the resolution of the question whether the concept of "foreign judgment or order" ought also to apply to a judgment of the Tribunal. What would help us to solve this issue is the answer to the question, "what was the mischief sought to be addressed by developing the common law to empower our domestic courts to enforce or facilitate the execution of orders made outside the borders of our country?" It appears to me that that development was driven by the need to ensure that lawful judgments are not to be evaded with impunity by any State or person in the global village." And para 55: "This finds support from the two reasons advanced in Richman v Ben-Tovim for the existence of the law on the enforcement of judgments of foreign courts. First, enforcement is what is required by the "exigencies of international trade and commerce" and second, because "not to do so might allow certain persons habitually to avoid the jurisdictional nets of the courts and thereby escape legal accountability for their wrongful actions."* And para 66: "*When courts are required to develop the common law or promote access to courts, they must remember that their "obligation to consider international law when interpreting the Bill of Rights is of pivotal importance." This is an obligation imposed on them by section 39(1)(b) of the Constitution. Measures to be taken by this Court in fulfilling its obligations in terms of sections 34, 8(3) and 39 of the Constitution, in relation to this matter, are to be informed by international law, as set out in the Amended Treaty, which obliges South Africa to facilitate the enforcement of decisions of the Tribunal.*"

64. At a minimum, South African courts must interpret existing legislation (the ICC Act) in line with the ICC's binding judicial decisions as far as reasonably possible. The only way credibly to do so is to interpret the ICC Act (including s 10(9) and s 4) as obliging cooperation with the ICC in respect of Bashir's arrest and surrender.

THE GENOCIDE CONVENTION

65. The charges against President al-Bashir include charges of genocide.[68] Those charges are also subject to the Genocide Convention.[69] Both South Africa and Sudan are parties to the Convention. The effect of its provisions is to negate any international customary law immunity that might otherwise have shielded President al-Bashir from arrest and prosecution in the ICC.

66. Article 4 of the Convention provides that anybody who has committed genocide shall be punished "*whether they are constitutionally responsible rulers, public officials or private individuals*". It in other words negates any head of state immunity.

67. Article 6 goes on to say that anybody charged with genocide may be tried by "*such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction*". The ICC is such an international penal tribunal with jurisdiction in the matter by virtue of the Security Council referral.

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68 Second Warrant 12 July 2010 Petition p 185 at p 192

69 Convention on the Prevention and Punishment of the Crime of Genocide, 1948

68. The Genocide Convention accordingly in any event strips Sudan of any immunity that might have shielded President al-Bashir from arrest and surrender to the ICC.

THE IMMUNITIES ACT

Introduction

69. The applicants argue that President al-Bashir was immune from arrest and surrender to the ICC under the Immunities Act and more particularly under,
    - customary international law in terms of s 4(1)(a);[70] and
    - a host agreement with the AU Commission promulgated in terms of s 4(1)(c) read with s 7.[71]

70. We submit with respect that both these claims are unfounded but that any immunity that might otherwise have arisen under the Immunities Act is in any event overridden and trumped by the more recent and specific provisions of ss 4(2) and 10(9) of the ICC Act.

Section 4(1)(a) of the Immunities Act

71. Section 4(1)(a) of the Immunities Act says that a head of state is immune from the Criminal and Civil Jurisdiction of the South African courts and enjoys such

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70 Applicants heads p 36 para 70

71 Applicants heads p 37 para 72

privilege as heads of state enjoy *"in accordance with the rules of customary international law"*.

72. This provision does not afford President al-Bashir any greater protection than customary international law does. We have already submitted on a number of grounds that he did not enjoy any immunity under customary international law. He accordingly also did not enjoy any immunity under s 4(1)(a) of the Immunities Act.

The promulgation of the host agreement

73. South Africa entered into a host agreement with the AU Commission on 5 June 2015.[72] Article VIII conferred immunity on certain officials.[73] The Minister of International Relations promulgated a minute by publication in the Government Gazette on 5 June 2015 recognising the host agreement and the immunities it conferred on various officials.[74]

74. But the host agreement and its promulgation do not avail the applicants because it did not confer any immunity on heads of state attending the AU Summit:

74.1. Article VIII only conferred immunity on,

- *"the Members of the Commission and Staff Members"*;

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72 Host Agreement 5 June 2015 Petition p 203

73 Petition p 213 Article VIII

74 Government Notice 470 5 June 2015 Petition p 199 and p 200

- *"the delegates and other representatives of Inter-Governmental Organisations attending the Meetiings"*;
- *"The representatives of the Inter-Governmental Organisations"*; and
- *"the Observers accredited to the African Union"*.[75]

74.2. The Minister promulgated the host agreement in terms of s 5(3) of the Immunities Act. It only allows the Minister to confer privilege on certain international organisations and their officials.

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

74.4. In other words, both the text of the host agreement and the provision under which the Minister promulgated it, make it clear that the immunity was conferred on the AU and its officials and not on any of the heads of state attending the conference.

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75 Host Agreement 5 June 2015 Petition p 203 at p 213 Article VIII

The ICC Act in any event trumps the Immunities Act

75. The specific exclusion of immunity by s 4(2) and s 10(9) of the ICC Act in any event trumps any immunity that might otherwise have been conferred on President al-Bashir under the Immunities Act. The ICC Act is the more recent of the two. Its exclusion of immunity of heads of state prosecuted for war crimes, genocide and crimes against humanity, is more specific than the provisions of the Immunities Act that govern the immunities of state officials generally. The provisions of the ICC Act thus prevail over those of the Immunities Act under the *generalia specialibus non derogant* rule.[76]

76. Finally, if the Immunities Act were allowed to prevail over the ICC Act, South Africa would be allowed to breach its obligations under the Rome Statute. Such interpretation would be inconsistent with the constitutional requirement to prefer a legislative interpretation that gives effect to international obligations over one that does not.[77] In this regard the Rome Statute's obligations are clear and binding on South Africa, whatever the status of customary international law may be. It is furthermore a well-established principle of international law that a state cannot rely on the provisions of its domestic law in order to justify the breach of an international obligation.[78]

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76 Sasol Synthetic Fuels v Lambert 2002 (2) SA 21 (SCA) para 17; Mankayi v Anglogold Ashanti 2010 (5) SA 137 (SCA) paras 39 to 40

77 Section 233 of the Constitution

78 See *Advisory Opinion of the Permanent Court of International Justice* of 4 February 1932 in the Case concerning the Treatment of Polish Nationals and other persons of Polish origin or speech in the Danzig Territory, PCIJ, Series A/B, No 44, 24–25

PRAYER

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

Wim Trengove SC

Max du Plessis

Isabel Goodman

Hephzibah Rajah

Chambers
Sandton and Durban
29 January 2015

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