

THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case 75/2016

In the matter between:

THE MINISTER OF JUSTICE AND OTHERS

Applicants

and

THE SOUTHERN AFRICA LITIGATION CENTRE

Respondent

RESPONDENT'S SUBMISSIONS

CONTENTS

| | |
|--|----|
| INTRODUCTION | 3 |
| CUSTOMARY INTERNATIONAL LAW | 3 |
| THE ROME STATUTE | 12 |
| THE ICC ACT | 15 |
| THE SECURITY COUNCIL RESOLUTION | 29 |
| THE GENOCIDE CONVENTION | 34 |
| THE IMMUNITIES ACT | 35 |
| Introduction | 35 |
| Section 4(1)(a) of the Immunities Act | 35 |
| The promulgation of the host agreement | 36 |
| The ICC Act trumps the Immunities Act | 38 |
| CONCLUSION | 39 |
| LEAVE TO APPEAL | 40 |
| PRAAYER | 40 |
| AUTHORITIES | 41 |

INTRODUCTION

1. The main question in this case is whether President al-Bashir of Sudan 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 (“the ICC Act”). 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 (“the Immunities Act”). We submit that no such immunity was conferred on him but, even if it were, the immunity would be trumped by the ICC Act.
3. The government’s heads of argument are replete with derisive criticisms of SALC, the High Court and the Supreme Court of Appeal. Their incessant sniping clouds the issues in the case. We shall therefore not respond to them and will deal only with the issues before this court.

CUSTOMARY INTERNATIONAL LAW

4. The government focuses its argument on the claim that “[j]udicial opinion and state practice are unanimous and no case can be found in which it was held that a state official possessing immunity *ratione personae* is subject to the criminal jurisdiction of a foreign state when it is alleged that he or she has

committed an international crime".¹ It means, they say, that immunity precludes a South African court from ordering President al-Bashir's arrest and surrender to the ICC.

5. In fact, as the SCA noted, customary international law is in a state of flux.² It permits domestic jurisdictions to decide whether or not to maintain immunity from the domestic prosecution of international crimes.³ South Africa has opted to strip this immunity by conferring jurisdiction on the South African courts to try suspects prosecuted for genocide, crimes against humanity and war crimes⁴ regardless of the status of the accused.⁵ A head of state consequently does not enjoy immunity from prosecution for international crimes under our domestic law.

¹ Government's heads of argument p 3 para 5, quoting Dugard *International Law: A South African Perspective* 4th ed (2011) at 253

² SCA judgment, vol 3 p 265 para 84. SCA judgment, vol 3 p 265 para 84. Several judges, and leading academics have acknowledged this state of flux with regard to traditional customary international law immunities. Professor Dugard 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" See Dugard, *International Law: A South African Perspective*, 4th Edition (2011) at 250-251. See also Michael A. Tunks "Diplomats or Defendants? Defining the future of head-of-state immunity" 52 *Duke L.J* (2002) at 660-662.

This development was already foreshadowed in the **Arrest Warrant** case, in the Joint Separate Opinion of Judges Higgins, Kooijmas and Burgenthal, who state, in para 75: "Moreover, a trend is discernable that in a world which increasingly rejects impunity for the most repugnant offences, the attribution of responsibility and accountability is becoming firmer, the possibility for the assertion of jurisdiction wider and the availability of immunity as shield more limited".

³ See Article 27 of the Rome Statute; answering affidavit in application for leave to this court, vol 4 pp 358-359 paras 39-41; p 361 para 44

⁴ Section 4(3) of the ICC Act, read with the definition of "crime"

⁵ Section 4(2)

6. But the question in this case is not whether President al-Bashir can be arrested for trial before a South African court. It is whether a South African court may order his arrest and surrender for prosecution before an international court, the ICC.⁶ The government consequently misses the central question in this case.
7. Customary international law has, since the **Arrest Warrant** case,⁷ recognised an exception to the rules of immunity. It permits the prosecution of sitting state officials before an international criminal court. The ICJ recognised this exception in the Arrest Warrant case:

*“an 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’”*⁸

8. The exception recognised by the ICJ had already been endorsed by the House

⁶ The majority of the SCA recognised as much in judgment, vol 3 p 261 para 77

⁷ Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgian) (2002) ICJ Rep 3.

⁸ Arrest Warrant case, para 61. See also R v Bow Metropolitan Stipendary Magistrate, ex part Pinochet Ugarte (No 3) [1999] 2 All ER 97 (HL) at 120-121 and 189

of Lords in *Pinochet*.⁹ The government concedes that “*in Pinochet the House of Lords held that immunity *ratione personae* continues to apply in absolute terms to a serving head of state – Senator Pinochet himself had ceased to hold office – except only before an international tribunal whose constitutive treaty (to which the sending State is a signatory) abolishes immunity*”.¹⁰ The government thus correctly accepts that immunity “*becomes extinguished before certain international courts*”.¹¹

9. Properly understood, the arrest and surrender of a person pursuant to an ICC warrant are necessary ancillary steps towards their prosecution before the ICC. These ancillary steps necessarily incidental to a prosecution before the ICC also fall within the exception to the general rules of immunity under customary international law.¹²
10. The exception serves a vital purpose in pursuit of international criminal justice. As Professor Akande points out:

⁹ See *R v Bow Metropolitan Stipendiary Magistrate, ex part Pinochet Ugarte (No 3)* [1999] 2 All ER 97 (HL) at 120-121 and 189

¹⁰ Government’s heads of argument p 34 para 58.

¹¹ Government’s heads of argument p 28 para 47, citing Blommestijn and Ryngaert “Exploring the Obligations for States to Act upon the ICC’s Arrest Warrant for Omar Al-Bashir: A Legal Conflict between the Duty to Arrest and the Customary Status of Head of State Immunity” *Zeitschrift für Internationale Strafrechtsdogmatik* ZIS 6/2010 at 433. See also government’s heads of argument p 34 para 58. The majority of the SCA also noted this exception: SCA judgment, vol 3 p 260 para 76

¹² The ICC recognised as much in 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 ICC-02/05-01/09 of 12 December 2011 (*Malawi*) paras 37-43. See also SCA main judgment, vol 3 p 264 para 82

“After all, to allow immunity at the national level to defeat arrest and surrender to the Court [ICC] is to prevent the Court from exercising its jurisdiction.”¹³

11. The government’s position in this court is contrary to the aims of the international criminal justice project.¹⁴ It ignores the vital role of state co-operation in the ICC’s pursuit of accountability for international crimes, including those committed in South Sudan. A leading text on international criminal law puts it thus:

“State co-operation with the Tribunals and the ICC. . . departs in many important ways from State-to-State co-operation in criminal matters. . . . The obligations vis-à-vis the international jurisdictions are more far-reaching since these jurisdictions are created by the international community to investigate and prosecute the most serious crimes of international concern. As regards the Tribunals, and Security Council referrals of situations to the ICC, they also explicitly form part of international efforts to preserve or restore international peace and security. . . .

The successful operation of these institutions is completely dependent

¹³ Akande “The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir’s Immunities” JICJ 2009 pp 336-337

¹⁴ As this Court explained:

“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 on 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”.

National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another 2015 (1) SA 315 (CC) para 1 fn 2

*on international co-operation. They may not and cannot themselves implement their decisions, such as an arrest warrant, on the territory of a State, and they do not have their own police force. . . . Co-operation is therefore at the heart of effective international criminal proceedings”.*¹⁵

12. South Africa in any event does not have a free hand to determine its international obligations under the Rome Statute. As a matter of both international and domestic law, it is bound by the ICC’s determinations of its duties. The ICC’s determinations are binding under international law because South Africa is a party to the Rome Statute. It can be sanctioned for a failure to comply with a request for cooperation issued by the ICC or for preventing the ICC from exercising its powers, under article 87(7) of the Rome Statute.¹⁶
13. The ICC issued two warrants for President al-Bashir’s arrest¹⁷ and requested its members, including South Africa, to give effect to these warrants in terms of

¹⁵ Cryer, Friman, Robinson, Wilmshurst *An Introduction to International Criminal Law and Procedure*, 3rd Edition (2014) at 517. Emphasis added.

¹⁶ Article 87(7) states:

“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.”

Notably, South Africa’s failure to observe its obligations to arrest al-Bashir has already resulted in proceedings against it under the Rome Statute. In this regard Pre-Trial Chamber II of the ICC decided to initiate official non-cooperation proceedings against South Africa under article 87(7) on 4 September 2015 (see ICC – 02/05-01/09 4 September 2015 available at <https://www.icc-cpi.int/iccdocs/doc/doc2044798.pdf>). On South Africa’s request, the ICC proceedings have been pended until the outcome of the government’s efforts to appeal the High Court’s orders (see ICC Pre-trial Chamber decision of 15 October 2015 at <https://www.icc-cpi.int/iccdocs/doc/doc2086145.pdf>.)

¹⁷ SCA judgment, vol 3 p 215 para 3

article 58(5) of the Rome Statute.¹⁸ South Africa is obliged, under article 87(7), to give effect to that request.

14. 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:¹⁹

“(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 ...”.*²⁰

15. The ICC has conclusively ruled that the state parties to the Rome Statute are obliged to arrest and surrender President al-Bashir to the ICC notwithstanding any immunity that would ordinarily vest in him. It did so by its rulings in,
- the Malawi case of 12 December 2011;²¹
 - the first Chad case of 13 December 2011;²²

¹⁸ SCA judgment, vol 3 p 216 para 3

¹⁹ 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

²⁰ 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, our emphasis

²¹ 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

²² 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

- the second Chad case of 26 March 2013;²³
- the Congo case of 9 April 2014;²⁴ and
- the SA case of 13 June 2015.²⁵

16. In the SA case, the ICC expressly held that South Africa is obliged to arrest and surrender President al-Bashir under 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.”²⁶

“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 2014²⁷ 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,

²³ 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

²⁴ 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

²⁵ 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, vol 1 pp 43-48

²⁶ SA case, vol 1 p 45 para 1

²⁷ That is, in the Congo case

*Sudan to the prosecutor of the Court, and that the Republic of South Africa cannot invoke any other decision, including that of the African Union, providing for any obligation to the contrary”.*²⁸

17. This determination was made against South Africa and is binding on it.²⁹ It is a binding determination of South Africa’s international obligations under the Rome Statute.

18. The government argues that, under international law, President al-Bashir was immune from prosecution before a South African court. But it misses the point for two reasons:
 - 18.1. The international law question is not whether President al-Bashir is immune from prosecution before a South African court. It is whether he is immune from prosecution before the ICC. He clearly is not. International law permits his prosecution before the ICC. South Africa is entitled and obliged to arrest and surrender him to the ICC for that purpose.

 - 18.2. The ultimate question is in any event whether President al-Bashir was immune from arrest and surrender to the ICC under South African

²⁸ SA case, vol 1 p 47 para 9

²⁹ See Crawford Brownlie’s Principles of Public International Law, 8th Edition (2012) p 60: “... a decision of the International Court, even one concerning substantially the same issues as those before a national court, does not of itself create a res iudicata for the latter”. See also article 49 of the Statute of the International Court of Justice which provides:

“The decision of the Court has no binding force except between the parties and in respect of that particular case”.

domestic law. The ICC Act clearly answers this question. But any discussion of the ICC Act must start with the Rome Statute.

THE ROME STATUTE

19. This case turns on the proper interpretation of the ICC Act. It gives domestic effect to the Rome Statute and South Africa's obligations under it.³⁰ It is thus fitting first to consider the Rome Statute.

20. 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."

³⁰ The SCA correctly found that the ICC Act was enacted to give effect to South Africa's obligations under the Rome Statute: SCA judgment, vol 3 p 249 para 61

21. 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.

22. 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.”

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

23.1. 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.

- 23.2. Nor does it permit the officials of member states to be distinguished from those of non-member states.³¹ Its provisions apply to immunity claimed by “*all persons*”, including the officials of non-member states.
- 23.3. 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. The government is thus mistaken in its contention³² that article 27 removes immunity only in proceedings before the ICC itself.³³
- 23.4. 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.
24. 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

³¹ Contrary to the government authorities’ claim in their heads p 32 para 54, stating that “*Article 27 deals with member States’ immunity before the ICC*” (emphasis in original).

³² Government’s heads p 27 para 45

³³ In any event, article 88 of the Rome Statute requires member states to ensure that there are procedures available under their national laws to enable co-operation with the ICC. South Africa is entitled, under that provision, to empower its domestic courts to order the arrest and surrender to the ICC of officials who would otherwise enjoy immunity. We return to this topic below.

court can first obtain the co-operation of that third State for the waiver of the immunity.”

25. Much has been said about the apparent inconsistency between this provision and article 27. But the apparent inconsistency does not affect South Africa because the ICC Act has emulated article 27 but not article 98.
26. South Africa is thus duty bound to arrest President al-Bashir and surrender him to the ICC. South Africa bears this duty under the Rome Statute regardless of the fact that Sudan is not a signatory to the Rome Statute.³⁴

THE ICC ACT

27. The ICC Act negates any head of state immunity, whether from prosecution in our domestic courts or from arrest and surrender for prosecution before the ICC. It does so by the following provisions.
28. 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

³⁴ See government’s heads of argument pp 28-31 paras 47-49 and p 32 para 54, where it argues that article 27 cannot “override” President al-Bashir’s immunity because Sudan is not a party to the Rome Statute.

is a serious commitment. This 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.”*³⁵

29. 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.”*³⁶

30. 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.³⁷ The second is to ensure that South Africa conforms with its obligations under the Rome Statute.³⁸ The fifth is to enable the state to co-operate with the ICC

³⁵ National Commissioner of Police v SALC 2015 (1) SA 315 (CC) para 80

³⁶ National Commissioner of Police para 4 fn 2

³⁷ Section 3(a)

³⁸ Section 3(b)

in its investigations and prosecutions *inter alia* by the surrender of suspects for prosecution before the ICC.³⁹

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

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

33. 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.”*

³⁹ Section 3(e)

34. The government accepts that these provisions confer jurisdiction on South African courts to prosecute international crimes⁴⁰ and preclude a person, who otherwise enjoys immunity, from raising it as a defence or a mitigating factor in those proceedings.⁴¹ But they contend, relying on a Mr Gevers,⁴² that the ICC Act does not remove a head of state's personal immunity and does not allow for his arrest. His "*inviolability from arrest*" as a sitting head of state has purportedly been preserved.⁴³ This argument is, with respect, unfounded for the following reasons.

35. 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:

35.1. 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.

⁴⁰ Government's heads p 33 para 55

⁴¹ Government's heads pp 32-33 paras 54-55

⁴² Gevers "Immunity and Implementation Legislation in South Africa, Kenya and Uganda" in Kai Ambos and Otilia Maunganidze (eds) *Power and Prosecution: Challenges and Opportunities for International Criminal Justice in Sub-Saharan Africa* (Universitätverlag, Göttingen 2012)

⁴³ Government's heads pp 33-36 paras 55-59

- 35.2. 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.
- 35.3. 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.
- 35.4. 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.
- 35.5. 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.⁴⁴

36. The second flaw in the government's 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).”

37. The meaning of this provision is clear.⁴⁵ 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.

38. The third flaw in the government's interpretation is that it creates a “*serious anomaly*”.⁴⁶ In terms of s 4(2) of the ICC Act, a head of state may be arrested and prosecuted in 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, the government would have it that South Africa is precluded from doing so by the suspect's immunity under customary

⁴⁴ SCA main judgment vol 3 pp 274-275 para 99

⁴⁵ As both the majority and the concurring judgments of the SCA accepted: see vol 3 p 275 para 100; p 288 para 122

⁴⁶ SCA main judgment vol 3 p 272 para 95

international law. The immunity does not protect him against arrest and prosecution in South Africa or against prosecution before the ICC 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.”⁴⁷

39. The government seeks to escape the clear meaning of s 10(9) in paragraphs 21 to 26 of their heads of argument but their attempt is flawed:

39.1. They say that s 10(9) does not deal with arrest but only with proceedings after arrest.⁴⁸ 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. Section 10 presumes there has been an arrest warrant issued under s 9 or an endorsement of an arrest warrant under s 8. The sections cannot be read in isolation. Section 10(9) moreover follows those we have already recited that leave no room for exceptions for heads of state.

⁴⁷ Akande “The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir’s Immunities” *JICJ* 2009 pp 336-337

⁴⁸ Government’s heads p 14 para 23

39.2. The government says that s 9 is “*the lex specialis on arrests*” but is silent on heads of state.⁴⁹ 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 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 government’s attempt to single out and isolate s 9.⁵⁰

⁴⁹ Government’s heads pp 14-15 para 24

⁵⁰ The SCA concurring judgment accepted that 8, 9 and 10 together govern “*the manner in which an ICC request for the arrest of a suspect must be implemented*”. SCA judgment, vol 3 p 287 para 120. Pre-Trial Chamber II of the ICC further correctly pointed out in its judgment against South Africa in the SA Case of 13 June 2015 (vol 1, p 45) that South Africa’s obligations of arrest and surrender are conjoined. The court describes the duty compositely on seven occasions: “*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*” (para 1); “*Immediately after their issuance, both warrants of arrest, together with co-operation requests for the arrest and surrender to the Court of Omar Al Bashir, have been transmitted, inter alia, to all States Parties to the Rome Statute, including the Republic of South Africa.*” (para 2); “*In response to this, the representatives of South Africa were explained that there is no ambiguity in the law and that the Republic of South Africa is under the obligation to arrest and surrender to the Court Omar Al Bashir*” (para 5); “*In this sense, the Chamber clarified that there also exists no impediment at the horizontal level regarding the arrest and surrender to the Court of Omar Al Bashir*” (para 7); “*to immediately arrest Omar Al-Bashir and surrender him to the Court*” (para 10); “*In particular, the Presiding Judge repeatedly made clear, in unequivocal terms, that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir as soon as on its territory*” (para 8); “*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*” (para 9). Emphasis added.

- 39.3. The government says that the ICC Act “*did not abrogate immunity in the context of arrests*”.⁵¹ But that is not so. It abrogated immunity for all purposes, including arrest, in ss 4(2) and 10(9).
- 39.4. The government contends 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.⁵² 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.
- 39.5. It is thus not correct – as the government claims – that “*section 10(9) finds no application in the current circumstances*”.⁵³ When President al-Bashir arrived in South Africa, there was an existing ICC arrest warrant that had already been endorsed for execution in South Africa under s 8(2).⁵⁴ The government was aware of the warrant. They ought to have arrested President al-Bashir for surrender to the ICC as soon

⁵¹ Government’s heads p 15 para 25; p 33 para 5

⁵² Government’s heads p 16 para 26

⁵³ Government’s heads p 16 para 26

⁵⁴ As the High Court noted: “*As a result of the 2009 warrant of arrest issued by the ICC and South Africa’s obligation to give effect thereto, South African officials confirmed that they would arrest President Bashir should he arrive in the country. For this reason President Bashir declined South Africa’s invitation to attend the inauguration*” (vol 2 p 125, para 12). The SCA recorded the events as follows: “*Section 8(1) provides that when a request is received from the ICC for the arrest and surrender of a person for whom it has issued a warrant of arrest it must be referred to the Central Authority. This is defined as the Director-General: Justice and Constitutional Development, the present incumbent of which office is Ms Sindane. The Central Authority must immediately on receipt of the request forward the documents to a magistrate who must endorse the warrant for execution in any part of the Republic [under s 8(2) of the ICC Act]. That was what occurred in relation to the first arrest warrant. It was forwarded to the Chief Magistrate, Pretoria, who endorsed it for execution. So far as the record goes that warrant is still extant and operative*” (vol 2 pp 272 to 273 para 96, emphasis added)

as he arrived in the country. They failed to do so. SALC had to bring urgent proceedings only because the government had failed to fulfil its duties under the ICC Act and the Rome Statute.

- 39.6. The government lastly invokes an article by Mr Gevers that says that the ICC Act is “*silent on the relevance of immunity in relation to co-operation requests.*”⁵⁵ But Mr Gevers inexplicably overlooks s 10(9) altogether.⁵⁶ He fails to mention s 10(9) and it is clear that his statement, upon which the government relies, could only have been made in ignorance of s 10(9). His article, evidently written in ignorance of s 10(9), is thus of no assistance in its interpretation.
40. Parliament has 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

⁵⁵ Government’s heads p 15 footnote 65

⁵⁶ 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-Saharan Africa*”, Göttingen 2012

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.”⁵⁷

41. The government’s reliance on **Kazemi Estate v Iran**⁵⁸ is misplaced. The Supreme Court of Canada confirmed that it is parliament’s function to legislate exceptions to immunity⁵⁹ - thus both confirming that such exceptions may be legislated⁶⁰ and highlighting that it is parliament’s role to do so. That is precisely what our parliament has done in the ICC Act.

⁵⁷ 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 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 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 co-operation 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.” (emphasis added).

⁵⁸ See government’s heads p 35 para 59, citing *Kazemi Estate v Iran* [2014] 3 SCR 176

⁵⁹ See government’s heads p 35 para 59, and fn 162, where the Canadian Supreme Court’s dicta is helpfully recorded: “*State immunity is a complex doctrine that is shaped by constantly evolving international relations. ... Parliament has the power and the capacity to decide whether Canadian courts should exercise civil jurisdiction. Parliament has the ability to change the current state of the law on exceptions to state immunity, just as it did in the case of terrorism ... Parliament has simply chosen not to do it yet*” (emphasis added).

⁶⁰ See also the government’s own heads p 15 fn 65 where they cite the Kenyan International Crimes Act, 2008, which “*explicitly excludes immunity against arrest*”; and, so they tell us, “[s]o does the Ugandan ICC Act, 2010”. In the same footnote the government authorities suggest that the UK International Criminal Court Act, 2001, “*specifically retains immunity against arrest for non-parties to the Rome State*”. But that is not so. The UK has specifically brought itself in line with the ICC’s orders to arrest President al-Bashir. Professor Malcolm Shaw notes (*International Law*, 4th Edition, 2002) importantly at p 407 that the effect of Security Council resolution 1593 and the ICC’s rulings thereon arguably means that “*clearly States parties are*

42. We submit that the SCA correctly concluded that South Africa enacted the ICC Act “*on the basis that all forms of immunity, including head of state immunity, would not constitute a bar to the prosecution of international crimes in this country or to South Africa co-operating with the ICC by way of arrest and surrender of persons charged with such crimes before the ICC ...*”⁶¹
43. This election, made by South Africa, to override any immunity against the prosecution of international crime, is not only permissible under international law, but is the “*prudent approach*” advocated by Cassese et al in their leading text on the Rome Statute:

“To avoid these difficulties [regarding immunities for officials], a prudent approach [for the State’s legislature in drafting its ICC implementation legislation] 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

under an obligation to comply with requests for arrest and surrender under Article 89 of the Rome Statute”, and goes on to state in fn 103:

“It might be noted that following the Court’s decision, the UK made an Order in Council based on the enabling powers in both s 23(5) of the International Criminal Court Act 2001 and s 1 of the United Nations Act 1946, providing that State or diplomatic immunities will not prevent proceedings in the UK for the arrest and delivery of persons alleged to have committed an ICC crime as a result of the referral of the situation in Darfur under UNSCR 1593 (see the International Criminal Court (Darfur) Order 2009, SI 699/2009)” (our emphasis).

⁶¹ SCA main judgment, vol 3 p 277 para 103; concurring judgment pp 289-290 para 123

international immunities that hinders compliance with an ICC request.⁶²

44. The same approach has been followed in other jurisdictions. Kenya and Uganda are good examples. Their implementation statutes explicitly exclude immunity against arrest.⁶³ In 2011, the Kenyan High Court ruled that President al-Bashir must be arrested should he be found on Kenyan soil.⁶⁴
45. New Zealand's International Crimes and International Criminal Court Act, 2000⁶⁵ is another example. Writing on the act's provisions on immunity, Treasa Dunworthy explains:

*"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."*⁶⁶

⁶² Cassese, Gaeta, Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary, Vol II* (2002), at p 1857, emphasis added

⁶³ Gevers "Immunity and Implementation Legislation in South Africa, Kenya and Uganda" at 18, 20 in K. Ambos and O.A. Maunganidze (eds) *Power and Prosecution: Challenges and Opportunities for International Criminal Justice in Sub-Saharan Africa* (Universitätsverlag, Göttingen 2012), available at <http://www.peacepalacelibrary.nl/ebooks/files/369659082.pdf> (accessed on 22 August 2016).

⁶⁴ 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

⁶⁵ Available <http://legislation.co.nz/>

⁶⁶ "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*,

46. The immunity rules under customary international law are neither a blunt instrument⁶⁷ nor a straight-jacket,⁶⁸ as the government's arguments suggest. 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*".⁶⁹ 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*".⁷⁰
47. The ICC Act thus adopts an approach to immunity that is permitted under customary international law and mirrored in a number of comparative foreign jurisdictions.⁷¹

Commonwealth Secretariat, 2005, emphasis added. See also Akande at 422 and 426, citing New Zealand, Canada, Ireland and Malta as States that expressly exclude immunity for arrest and surrender purposes.

⁶⁷ 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*" (Crawford, *Brownlie's Principles of Public International Law*, 8th ed (2012) p 499).

⁶⁸ 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 President al-Bashir under the ICC Act, the Rome Statute and the ICC orders, then that may aid in the development of customary international law.

⁶⁹ See Crawford pp 57 to 58, emphasis added

⁷⁰ Crawford p 488, emphasis added

⁷¹ See for example 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, at 338, fn 19 where he lists s 10(9) of South Africa's ICC Act amongst a host of other states' ICC implementation statutes to the same effect (including Canada, New Zealand, Switzerland, Malta, Ireland, Samoa). He also notes that section 25 of the Commonwealth Model Law to Implement the Rome Statute of the ICC is to the same effect. Since that article was written in 2009, the Commonwealth has updated its Model Law in 2011. Importantly Akande notes as

48. But even if we are mistaken, s 10(9) of the ICC Act must in any event prevail, whatever the position under customary international law. Section 232 of the Constitution is clear. An act of parliament prevails over customary international law inconsistent with it. Section 10(9) thus prevails even if it is inconsistent with customary international law.

THE SECURITY COUNCIL RESOLUTION

49. On 31 March 2005, the United Nations Security Council adopted Resolution 1593 referring the situation in Darfur to the prosecutor of the ICC.⁷² 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.⁷³

follows in that regard (“Commonwealth Revises its Model Law on the International Criminal Court”, at <http://www.ejiltalk.org/commonwealth-revises-its-model-law-on-the-international-criminal-court/>):

“One area where a change was made to the Model Law was the provision dealing with immunity. The Bashir and Gaddafi cases have highlighted the importance of clarifying the position on immunity in situations referred to the ICC by the Security Council. Section 25 of the previous Commonwealth Model Law stated that any immunity by reason of a connection with a State Party to the Rome Statute does not prevent domestic action taken in support of ICC proceedings (such as arrest and surrender to the ICC). This provision is reflected in the domestic law of a number of commonwealth States (including the UK). However, this provision has now been extended in the revised Commonwealth Model Law, to exclude application of immunity attaching by reason of a State with respect to which the United Nations Security Council has made a referral to the ICC or a State which, whilst not a State Party has accepted the jurisdiction of the ICC. That provision would now explicitly deal with the Bashir and Gaddafi cases.” (emphasis added).

The model law and the expert report thereon are available at https://asp.icc-cpi.int/iccdocs/asp_docs/library/asp/MODEL_LAW-Commonwealth-ICC-ENG.pdf

⁷² SCA judgment, vol 3 p 215 para 3. The Resolution formed part of the leave to appeal record that served before the SCA. For ease of reference, a copy will be filed together with these heads.

⁷³ Resolution para 2

50. The Security Council adopted the resolution under chapter VII of the UN Charter. It allows the Security Council to take action for the maintenance of international peace and security. Its decisions to that end are binding on members of the UN.⁷⁴
51. The ICC has repeatedly held, particularly in the Congo⁷⁵ and SA⁷⁶ 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. Its reasoning may be summarised as follows:
- 51.1. The Security Council referred the situation in Darfur to the ICC for investigation, prosecution and adjudication in accordance with the Rome Statute.
- 51.2. 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*”.
- 51.3. Sudan is bound by the Security Council resolution and thus also by article 27(2) of the Rome Statute. It is in a position analogous to a member of the ICC who is bound by the Rome Statute and, more particularly, by article 27(2) which negates any head of state immunity.

⁷⁴ Articles 25, 48 and 103 of the UN Charter

⁷⁵ Congo case, paras 22-32

⁷⁶ SA case, vol 1 pp 43-48 paras 1-9

The only difference between Sudan and any other member of the ICC is that Sudan is bound by the Rome Statute under the Security Council resolution.

52. We submit that the ICC's rulings are correct. 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.”*⁷⁷

53. In their leading text on International Criminal Law, Cryer et al express 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.”*⁷⁸

54. Other scholars who subscribe to the same view include Akande,⁷⁹ De Wet⁸⁰ and Sluiter.⁸¹ Lady Hazel Fox QC, concludes in the leading text on immunities in international law as follows:

⁷⁷ 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

⁷⁸ Cryer et al *An introduction to International Criminal Law and Procedure* 3rd ed 559 to 560

⁷⁹ 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

*“The fact that the situation in Darfur was referred to the ICC by the Security Council pursuant to a Chapter VII resolution is significant. According to Articles 25 and 103 of the UN Charter, Member States are obliged to carry out Security Council decisions even if they conflict with any ‘other international agreement’. The removal of immunity in this case is thus a function of Charter law operating in a specific situation”.*⁸²

55. The government argues in paragraphs 67 to 72 of its heads of argument that the Security Council resolution does not impose any binding duties on South Africa 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 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 strips Sudan of any immunity that would have entitled President al-Bashir to resist arrest and prosecution by the ICC.
56. That is what the ICC has already made clear for South Africa and in respect of our country’s obligations as a member of the Rome Statute. Rather than acknowledging the authority of the ICC’s judgment, however, the government

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

⁸⁰ 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

⁸¹ Sluiter “*The surrender of war criminals to the International Criminal Court*” 15 *Loy.L.A. International and Comparative Law Review* 605 (2003) at 610

⁸² Fox The Law of State Immunity 3rd Edition (2014) at 558.

seeks refuge in an article by Kiyani.⁸³ But Kiyani's views are overshadowed by the opposite views of the leading international lawyers we have cited. Kiyani's own article concedes that he is in a minority.⁸⁴

57. Even Professor Akande, whom the government frequently cites, agrees that the Security Council resolution stripped President al-Bashir of immunity from arrest:

*"Therefore, it is reasonable to state that under customary international law, a head of state does not possess immunity in cases where that immunity has been waived or removed by treaty. So, if it is correct to conclude that by virtue of the UN Security Council resolution 1593 which referred the Darfur situation to the ICC and/or by virtue of the Genocide Convention, President Bashir does not have immunity from arrest in states cooperating with the ICC (and I have argued here that these arguments are correct), then under customary international law he does not enjoy immunity in such a situation."*⁸⁵

58. South Africa is in any event bound by the ICC rulings and must interpret its legislation in line with them as far as reasonably possible. The only credible way to reconcile the ICC's rulings with the domestic legislative regime is by

⁸³ Kiyani "Al-Bashir & the ICC: The Problem of Head of State Immunity" (2013) 12 *CJIL* 467

⁸⁴ The abstract to the article says this:

*"**Contrary to most commentaries**, this essay argues that al-Bashir remains protected by head of State immunity, and that ICC jurisdiction over him can only be maintained through one of two controversial claims: either that the Security Council can override customary international law rules of treaties and immunities, or that the law of immunities already provides an exception that invalidates al-Bashir's protection"*

See <http://chinesejil.oxfordjournals.org/content/12/3/467.abstract>. Emphasis added.

⁸⁵ See Akande "The Bashir Case: Has the South African Supreme Court Abolished Immunity for all Heads of States?", vol 4 p 337

interpreting the ICC Act (particularly s 10(9)) as obliging cooperation with the ICC in respect of Bashir's arrest and surrender.

THE GENOCIDE CONVENTION

59. The charges against President al-Bashir include charges of genocide.⁸⁶ Those charges are also subject to the Genocide Convention.⁸⁷ 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.
60. 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.
61. 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.

⁸⁶ SCA judgment, vol 3 p 215 para 3

⁸⁷ Convention on the Prevention and Punishment of the Crime of Genocide, 1948

62. 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

63. The government argues 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);⁸⁸ and
- a host agreement with the AU Commission promulgated in terms of s 4(1)(c) read with s 7.⁸⁹

64. We submit with respect that each of these claims is 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

65. 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

⁸⁸ Government's heads p 37 para 63

⁸⁹ Government's heads pp 42-47 paras 73-83

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

66. This provision does not afford President al-Bashir any greater protection than customary international law does. We have already submitted 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

67. South Africa entered into a host agreement with the AU Commission on 5 June 2015.⁹⁰ Article VIII conferred immunity on certain officials.⁹¹ The Minister of International Relations published a minute in the Government Gazette on 5 June 2015 recognising the host agreement and the immunities conferred on the officials.⁹²

68. But the host agreement did not confer any immunity on heads of state attending the AU summit:

68.1. Section 4 of the Immunities Act confers immunity on visiting heads of state.

⁹⁰ Host agreement 5 June 2015, vol 1 pp 73-88 Petition p 203

⁹¹ Article VIII, vol 1 p 83

⁹² Government Notice 470 of 5 June 2015, vol 1 pp 99-102

68.2. Sections 5, 6 and 7 allow the Minister to confer immunity on other dignitaries. Section 5 provides for the immunity of international organisations and their officials. Section 6 provides for the immunity of the participants in international conferences in South Africa. Section 7 requires any agreement by which immunity is conferred to be published in the government gazette.

68.3. Article VIII of the host agreement only conferred immunity on,

- *“the Members of the Commission and Staff Members”*;
- *“the delegates and other representatives of Inter-Governmental Organisations attending the Meetings”*;
- *“The representatives of the Inter-Governmental Organisations”*;

and

- *“the Observers accredited to the African Union”*.⁹³

It clearly conferred immunity only on international organisations and their officials.

68.4. This understanding is borne out by the Minister’s minute of the agreement published in the government gazette.⁹⁴ The Minister conferred the immunity under the host agreement in terms of s 5(3) of the Immunities Act. It only provides for immunity to be conferred on international organisations and their staff and not on visiting heads of state.

⁹³ Host agreement 5 June 2015 Petition p 203 at p 213 Article VIII

⁹⁴ Minute, vol 1 p 101

68.5. The government argues that a head of state is “*self-evidently a delegate (or official or representative) not only of his own government but also of the AU itself*”.⁹⁵ But it is not so. Section 5(3) only caters for international organisations and their officials. The host agreement only conferred immunity on “*the delegates and other representatives*” of international organisations. The suggestion that President al-Bashir attended the summit as a delegate or representative of the AU is groundless and fanciful. He clearly attended as the head of state of Sudan.

68.6. The host agreement is thus clear. It conferred immunity on the AU and other international organisations and their officials. It did not confer immunity on visiting heads of state. That was presumably because they are already protected under s 4(1)(a) of the Immunities Act. It did not protect President al-Bashir only because he is a fugitive from prosecution for international crimes.

The ICC Act trumps the Immunities Act

69. 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

⁹⁵ Government’s heads p 45 para 79; pp 46-47 para 82-83. The proposition that a head of state could not be construed as a delegate of the AU, and the SCA’s reasons for it, was put to the government authorities’ counsel at the SCA hearing.

crimes, genocide and crimes against humanity, is more specific than the provisions of the Immunities Act that govern the immunities of state officials generally. As both the majority and the minority of the SCA accepted,⁹⁶ the provisions of the ICC Act thus prevail over those of the Immunities Act under the *generalia specialibus non derogant* rule.⁹⁷

70. Finally, if the Immunities Act were allowed to prevail over the ICC Act, South Africa would be in breach of 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.⁹⁸

CONCLUSION

71. We submit that the SCA was correct to find that President al-Bashir was not immune from arrest and surrender to the ICC and that government's failure to arrest and surrender him was in breach of s 10 of the ICC Act and its duties under the Rome Statute.⁹⁹ The SCA also correctly held that the arrest warrants against President al-Bashir will, in future, have to be implemented in accordance with the ICC Act.¹⁰⁰

⁹⁶ SCA judgment, vol 3 pp 276-277 para 102; p 298 para 123

⁹⁷ *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

⁹⁸ Section 233 of the Constitution

⁹⁹ SCA judgment, vol 3 p 283 para 113.4

¹⁰⁰ SCA judgment, vol 3 pp 281-282 paras 108-109

LEAVE TO APPEAL

72. SALC submits that leave to appeal should be refused because the government lacks prospects of success in the appeal.

PRAYER

73. 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
26 August 2016

AUTHORITIES

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