

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: CCT 75/16

In the matter between

**MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT & OTHERS**

Applicants

and

SOUTHERN AFRICAN LITIGATION CENTRE

Respondent

and

**JOHN DUGARD AND
GUÉNAËL METTRAUX**

First Amici Curiae

**WRITTEN SUBMISSIONS OF THE FIRST AMICI CURIAE:
JOHN DUGARD AND GUÉNAËL METTRAUX**

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INTRODUCTION

- 1 Professor John Dugard and Professor Guénaél Mettraux have been admitted as amici curiae by this Court. They are both respected professors of international law. Their qualifications and expertise are set out in detail in their application and are not repeated here.
- 2 In these written submissions filed on their behalf, Professors Dugard and Mettraux offer an independent assessment of the international law issues raised in this case. They submit the following:
 - 2.1 At present, customary international law does not provide for a blanket international crimes exception to head of state immunities in all contexts.
 - 2.1 There is indeed a tension in this case between South Africa's customary international law obligation to respect sovereign immunities and its obligations to cooperate with the International Criminal Court (ICC) under the Rome Statute of the ICC.
 - 2.2 The Supreme Court of Appeal (SCA) was correct to find that the solution to this tension is to be found in South Africa's domestic law, interpreted in accordance with South Africa's international obligations.

IMMUNITIES AND INTERNATIONAL CRIMES – A BRIEF HISTORICAL OVERVIEW

The slow erosion of state immunities

- 3 Traditional international law granted absolute immunity to heads of state in respect of all acts, commercial and criminal, before foreign national courts.¹ Over time, international law carved out a number of exceptions to that general and absolutist position.²
- 4 One such exception is that immunities are not legally available as a defence or jurisdictional bar to criminal charges involving international crimes.³ This exception can be traced as far as far back as the discussions pertaining to the planned prosecution of Kaiser Wilhelm II following the First World War.
 - 4.1 A Commission was established to look into the responsibility of the “*authors of the war*” and report on breaches of the laws of war. The Commission formally rejected the application of sovereign immunities as bar to prosecution outside the realm of an official’s own domestic

¹ See, e.g., H. Fox, *The Law of State Immunity* (2nd Edition), p. 686; R. Pedretti, *Immunity of Heads of State and State Officials for International Crimes* (Brill Nijhoff, 2013), at 13.

² See, e.g. J. Foakes, *The Position of Heads of State and Senior Officials in International Law* (OUP, 2014), p. 83, pp. 89-96 and references; R. Van Alebeek, *The Immunity of States and their Officials in International Criminal Law and International Human Rights Law* (OUP, 2008).

³ See below. See also *Blaskic* Appeals Chamber Subpoena Decision, par 41 (<http://www.icty.org/x/cases/blaskic/acdec/en/71029JT3.html>).

laws and domestic courts.⁴ It held that no immunity would stand in the way of holding the Kaiser responsible.⁵

4.2 At the Peace Conference, the Allied Powers effectively adopted the views of the majority of the Commission and laid down a jurisdictional framework for the trial of the Kaiser.⁶ Immunities ceased to be conceived as a valid objection to the prosecution of a (former) head of state.⁷

5 This view gained further recognition in the aftermath of the Second World War.

5.1 The United Nations War Crimes Commission (UNWCC) held that “*the principle that officials, including heads of states and members of governments, could not shelter under the cloak of immunity, was clearly established by the majority of the Commission’s members*”.⁸

That view was later affirmed in a number of surrender documents.⁹

⁴ Available at: <http://www.jstor.org/stable/pdf/2187841.pdf?acceptTC=true>. *American Journal of International Law (AJIL)*, Vol. 14, No. 1/2 (Jan. - Apr., 1920), pp. 95-154, at 116. See, also, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, compiled by the United Nations War Crimes Commission, (London) (“*History of UNWCC*”), at 263-265.

⁵ *AJIL*, Vol. 14, No. 1/2 (Jan. - Apr., 1920), pp. 95-154, at 116. The United States and Japanese representatives to the Commission dissented and took the view that heads of state, members of government and other high officials could not be held legally responsible before a judicial authority.

⁶ Article 227 of the Versailles Treaty provided for the arraignment and prosecution of Wilhelm II before a special tribunal where he would be tried for violating “the solemn obligations of international undertakings and [...] international morality”.

⁷ “I do not know why we should prescribe limits of punishment at the present stage.... Kings have been tried and executed for offences which are not comparable. [...] we are making international law’.” (J.F. Willis, *Prologue to Nuremberg – The Politics and Diplomacy of Punishing War Criminals of the First World War* (“Willis”), p 57, footnote omitted). See also *History of UNWCC*, at 38.

⁸ *History of UNWCC*, 268. And *ibid*, 268-269.

⁹ For instance, the 5 June 1945 “Declaration regarding the Defeat of Germany and the Assumption of Supreme Authority with respect to Germany” issued by Great Britain, the US, the USSR and France, which set out the unconditional surrender of Nazi Germany.

Similarly unqualified statements were made in instruments calling for the arrest, transfer and prosecution of state officials.¹⁰

5.2 This exception was also reflected in Article 7 of the Charter of the Nuremberg Tribunal. This provision – and one to the same effect in the Charter of the Tokyo Tribunal¹¹ – meant that “*within the sphere of crimes covered by the two Charters [Nuremberg and Tokyo], the doctrines of acts of State and of immunity of heads of State and State administrators were no longer relevant or operative as a basis for freeing the individuals concerned from penal responsibility*”.¹²

5.3 At the trial of Nazi war criminals at Nuremberg, the International Tribunal unambiguously rejected the suggestion that defendants would be entitled to any immunities as a defence or bar to jurisdiction.¹³

6 On 12 December 1950, the UN General Assembly adopted the “Nuremberg Principles”.¹⁴ Principle III encapsulates a general exclusion of immunities as a defence and jurisdictional bar for crimes under international law.¹⁵ Like the

¹⁰ See, for example, “Protocol of the Proceedings of the Berlin Conference” (2 August 1946) (“War criminals and those who have participated in planning or carrying out Nazi enterprises involving or resulting in atrocities or war crimes shall be arrested and brought to judgment. Nazi leaders, influential Nazi supporters and high officials of Nazi organisations and institutions, and any other person dangerous to the occupation or its objectors, shall be arrested and interned.”); Potsdam Declaration (26 July 1945) and Instruments of surrender (regarding Japan’s surrender) (2 September 1945).

¹¹ Charter of the Tokyo Tribunal (Article 6).

¹² *History of UNWCC*, 271.

¹³ Nuremberg Judgment, at 223, in particular: “The principle of International Law, which under certain circumstances protects the representatives of a State, cannot be applied to acts which are condemned as criminal by International Law.”

¹⁴ Resolution 488(V) (<https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/060/86/IMG/NR006086.pdf?OpenElement>).

¹⁵ “The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible government official does not relieve him from responsibility under international law.”

Judgment and Charter of Nuremberg, the principle is general in scope and *jurisdiction-neutral*. It makes it clear that the loss of an immunity defence is caused by the fact that charges pertain to international crimes, rather than by the nature –domestic or international – of the tribunal hearing the case.

- 7 This jurisdiction-neutrality is also apparent from, inter alia, Article IV of the Genocide Convention,¹⁶ Article II(4)(a) of Control Council Law No 10 (which regulated post-Nuremberg, domestic, war crimes prosecutions)¹⁷ and Article 7 and 8 of the International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind,¹⁸ applicable to both domestic and international courts.
- 8 The statutes of international criminal tribunals dealing with international crimes reflect the same principle in that they expressly exclude immunities as a defence and as a bar to jurisdiction.¹⁹

¹⁶ Paris, 9 Dec. 1948, 78 U.N.T.S. 277. In Resolution No. 96(i) of 11 December 1946, the UN General Assembly affirmed that 'genocide' is a 'crime under international law' and specified that that "principal offenders and associates, whether private individuals, public officials or statesmen" must be punished for the commission of this crime. Article 4 of the Genocide Convention is to the same effect. See also Eichmann District Court Judgment (http://www.trial-ch.org/fileadmin/user_upload/documents/trialwatch/eichmann_district.pdf).

¹⁷ <http://avalon.law.yale.edu/imt/imt10.asp>,

¹⁸ International Law Commission, text adopted by the Commission at its forty-eighth session, from 6 May to 26 July 1996, G.A.O.R., 51st Sess., Supp. No. 10, U.N. Doc. A/51/10 ("Report of the International Law Commission").

¹⁹ See, in particular, Article 7(2) ICTY Statute; Article 6(2) ICTR Statute; Article 27 Rome Statute; Article 6(2) SCSL Statute. These provisions were intended to reflect customary international law as existed at the time of their adoption.

CUSTOMARY INTERNATIONAL LAW EXCLUDES IMMUNITIES AS A DEFENCE AND JURISDICTIONAL BAR

Relevant state practice

9 Since at least the end of the Second World War, state practice consistently excluded immunities as a defence or jurisdictional bar to charges of war crimes, crimes against humanity or genocide.²⁰ For example:

9.1 The Appeals Chamber of the Special Court for Sierra Leone (SCSL) determined that since Nuremberg, the principle that sovereign immunities are not available as a defence to international crimes “*became firmly established*”.²¹

9.2 In *Eichmann*, the Supreme Court of Israel took the view that the Nuremberg principles, which contain the same exclusionary rule, “*have become part of the law of nations and must be regarded as having been rooted in it also in the past*”.²²

²⁰ See, generally, Cassese, *International Criminal Law* (1st ed) at 306. International Law Commission, Fifth report on immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur, 14 June 2016, A/CN.4/701 (<http://legal.un.org/docs/?symbol=A/CN.4/701>), para 221. It would seem reasonable to suggest that the crime of torture would also come within the list (as a self-standing international crime or as an underlying war crime or crime against humanity). See, *ibid*, para 224. It is more questionable whether this principle would apply to other categories of international crimes (e.g., piracy) or would-be international crimes (e.g., international terrorism; aggression). *Ibid*, paras 222-224.

²¹ *Prosecutor v Taylor*, Decision on Immunity from Jurisdiction, 31 May 2004, par 47. See also, *ibid*, paras 52-53.

²² http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Israel/Eichmann_Appeals_Judgement_29-5-1962.pdf (at 31). The Nuremberg Principles were affirmed and adopted by the United Nations Assembly in resolution 95(i) (11 Dec 1946) (<https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/033/46/IMG/NR003346.pdf?OpenElement>). See also *Eichmann District Court Judgment* (http://www.trial-ch.org/fileadmin/user_upload/documents/trialwatch/eichmann_district.pdf), (on the rejection of the “Act of State” doctrine).

9.3 In *Karadzic*, a UN Tribunal noted that “*the official capacity of an individual even de facto in a position of authority - whether as military commander, leader, or as one in government - does not exempt him from criminal responsibility and would tend to aggravate it*”.²³

9.4 In *Furundzija*, the ICTY said that “*Article 7(2) of the Statute and Article 6(2) of the Statute of the International Criminal Tribunal for Rwanda [...] are indisputably declaratory of customary international law*”.²⁴

10 Article 27 of the Rome Statute recognizes and gives effect to this general principle. As a jurisdictional provision (dealing with the Court’s jurisdiction *ratione personae*), Article 27 only deals with the effect (or, rather, the *absence* of effect) of an official position and related immunities on the jurisdiction of the Court *itself*. It does not regulate, nor does it purport to regulate, the effect of immunities on the jurisdiction of any other court.

The exclusion is jurisdiction-neutral

11 None of the precedents cited above draw a distinction between domestic and international jurisdictions. Instead, several of the authorities make it explicit that the exclusion of sovereign immunities as a defence or bar to jurisdiction are excluded also in the domestic context.²⁵ What determines

²³ In the Matter of a Proposal for a Formal Request for Deferral to the Competence of the Tribunal Addressed to the Republic of Bosnia and Herzegovina in Respect of Radovan Karadzic, Ratko Mladic and Mico Stanisic, Decision, 16 May 1995, para 24.

²⁴ *Furundzija* Trial Judgment, para 140 (<http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>). See also *Milosevic*, Decision on Preliminary Motions, 8 November 2001, para 28 (and, *ibid*, paras 26-34) (http://www.icty.org/x/cases/slobodan_milosevic/tdec/en/1110873516829.htm).

²⁵ See also *Blaskic* Appeals Chamber Subpoena Decision, para 41 (emphasis added) (“These exceptions arise from the norms of international criminal law prohibiting war crimes, crimes against humanity and genocide. Under these norms, those responsible for such crimes cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity.”).

the availability or otherwise of immunities as a defence or bar to jurisdiction is therefore the nature of the crime (i.e., whether the underlying conduct amounts to a war crime, crimes against humanity or genocide) and not the nature of the forum.²⁶ The exclusionary rule thus applies equally to international and domestic courts.

12 The decision of the International Court of Justice (ICJ) in the *Arrest Warrant* case did not alter this position. The ICJ's holding that the Minister of Foreign Affairs of the DRC enjoyed "full immunity from criminal jurisdiction"²⁷ must be read in light of the specific factual scenario that was before the Court.

12.1 The *Arrest Warrant* case concerned the validity of an warrant issued by a Belgian judge for the arrest of a sitting Minister of Foreign Affairs on charges of committing international crimes. The case thus concerned (*horizontal*) judicial assistance between two (or more) states. It did not concern itself with, and provides no precedent for, a (*vertical*) situation involving an international criminal tribunal and a domestic jurisdiction.

12.2 The Court was not asked to pronounce on the issue of the availability of immunities as a defence or as bar to jurisdiction. It held only that the warrant of arrest was invalid.²⁸ That is why, as the Court suggests,

²⁶ See e.g. *Prosecutor v Milošević*, Decision on Preliminary Motions, 8 November 2001, in particular paras 32 ("The principle of international law, which under certain circumstances, protects the representative of a State, cannot be applied to acts which are condemned as criminal by international law.") and para 33. Also Decision of the House of Lords dated 24 March 1999, *R. v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte*, (2000) 1 AC 147, (1999) 2 All ER 97, (1999) 1 LRC at 588 – 89.

²⁷ *Case Concerning the Arrest Warrant of 11 April, 2000 (Democratic Republic of the Congo v Belgium)*, 2002 ICJ Reports 3, para 54.

²⁸ Para 78(C)(2)(3).

immunity is not to be equated with impunity: where an official can be brought before a competent jurisdiction on charges of international crimes, his immunity would provide no bar and no impediment to the exercise of jurisdiction.²⁹

The exclusion is materially and personally unqualified

13 The exclusion of immunities as a defence and jurisdictional bar applies to any person alleged to have committed a war crime, crime against humanity or genocide. It does not distinguish between nor exclude any category of individuals. Nor does it draw any distinction between acts committed in a private or official capacity. In the words of the ICTY, the loss of immunity for that limited purpose is triggered “even if they perpetrated such crimes while acting in their official capacity”.³⁰ None of the precedents listed above draws a distinction in the application of this exclusionary principle between a sitting and a former state official.³¹ Based on the above, relevant precedents draw no distinction for the purpose of this limited exclusion of immunities – as a defence or bar to jurisdiction – between immunities held *ratione personae* or *ratione materiae*.

²⁹ Para 61.

³⁰ *Blaskic* Appeals Chamber Subpoena Decision, para 41. Thus, for instance, Jean Kambanda was convicted by the ICTR for acts committed whilst he was prime minister of Rwanda. Judgment and Sentence, Trial Chamber I, 4 September 1998.

³¹ See also *Prosecutor v Al Bashir*, Decision Pursuant of 12 December 2011, para 36 (at <https://www.icc-cpi.int/iccdocs/doc/doc1287184.pdf>).

THERE IS NO INTERNATIONAL CRIMES EXCEPTION TO IMMUNITIES IN REGARD TO JUDICIAL ASSISTANCE

- 14 There is an important distinction between immunities as a *defence or a bar to jurisdiction* on the one hand and immunities as an exception or objection to *judicial assistance and surrender* on the other. This distinction is fundamental to understanding where and how far international law regulates the relationship between immunities and international crimes.
- 15 The precedents listed above all pertain to the loss of immunities as a *defence and as a bar to jurisdiction*. They do not deal with or suggest a loss of immunity in respect of a request for judicial assistance (e.g., in regard to arrest, surrender, freezing of assets, etc), in relation to a person who enjoys certain immunities, even where that request comes from an international tribunal.
- 16 The decision of the Special Court for Sierra Leone (SCSL) in *Prosecutor v Charles Taylor* does not support the proposition that immunities have no application to requests for assistance issued by international tribunals.³² On 23 July 2003, President Charles Taylor of Liberia filed a motion to the have

³² *Prosecutor v Charles Taylor*, Decision on Immunity from Jurisdiction, 31 May 2004, para 49 (http://www.haguejusticeportal.net/Docs/Court%20Documents/SCSL/Taylor_Decision%20on%20Immunity.pdf).

an indictment and arrest warrant issued against him by the SCSL quashed as invalid and a violation of his head of state immunity.³³

16.1 In resolving Taylor's challenge, the SCSL relied upon the ICJ's holdings in the *Arrest Warrant* case to suggest that "[t]he nature of the Tribunals has always been a relevant consideration in the question whether there is an exception to the principle of immunity".³⁴

16.2 The SCSL considered whether it could be said to be an international tribunal for the purpose of dealing with the matter as, it said, the resolution of the matter "turns to a large extent on the legal status of the Special Court".³⁵

16.3 To explain the importance of distinguishing between domestic and international courts, the Appeals Chamber observed that in the latter case one sovereign state does not adjudicate on the conduct of another state in contradiction to the principle of equality of sovereignties.³⁶

16.4 The Appeals Chamber concluded that "the principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal

³³ At the time of filing his motion, Taylor was still an incumbent and serving head of state. But when the matter was first considered by the Court, he had ceased to be a head of state. *Prosecutor v Taylor*, Applicant's motion made under Protest and Without Waiving of Immunity accorded to a Head of State President Charles Ghankay Taylor [...] 23 July 2003.

³⁴ *Prosecutor v Charles Taylor*, Decision on Immunity from Jurisdiction, 31 May 2004, para 49.

³⁵ The Appeals Chamber listed a number of factors which it said support the view that the Special Court is as an 'international court' for the purpose of dealing with Taylor's challenge, "with all that implies for the question of immunity for a serving Head of State." *ibid*, paras 41-42.

³⁶ *Ibid*, para 51 (footnote omitted).

tribunal or court".³⁷ Accordingly, it declared that Article 6(2) of its Statute did not conflict with any peremptory norm of international law so that Taylor's status as a head of state was no bar to the jurisdiction of the Court.

17 Whilst the ultimate conclusion of the SCSL appears to be correct – it *had* jurisdiction to try Taylor and his immunity as incumbent or former head of state was no bar thereto – its reasoning is much less compelling.

17.1 Taylor's arguments actually went to two different aspects of the court's jurisdiction: the legality of his *transfer* to the court; and the legality of the court's exercise of its jurisdiction over him.

17.2 The *Arrest Warrant* case on which the SCSL relied was relevant *only* to the first, not the second, of these questions as the ICJ only decided the legality of Belgium's issuance and circulation of an arrest warrant, not whether Belgium was jurisdictionally competent to try him.

17.3 Furthermore, the *Arrest Warrant* does not contain the finding that the SCSL seems to imply, namely, that sovereign immunities lose all procedural pertinence if the requesting jurisdiction is "international" in character.

17.4 The SCSL's decision may therefore be criticized for resolving this issue based on an improper and unsupported legal assumptions.³⁸

³⁷ *Ibid*, para 52.

³⁸ See also *Prosecutor v Al Bashir*, Decision of 12 December 2011, paras 34, 36 (at <https://www.icc-cpi.int/iccdocs/doc/doc1287184.pdf>).

18 While immunities remain relevant to requests for assistance from international tribunals, the *Arrest Warrant* case supports the proposition that they may not carry the same weight in this context than they would where such a request comes from a domestic jurisdiction.³⁹

18.1 There are stronger reasons for permitting foreign state officials to raise personal immunity before national courts, such as respect for the equal and mutual sovereignties of states in their horizontal relations and the risk that national authorities might use prosecutions to unduly impede or limit a foreign state's ability to engage in international action.⁴⁰

18.2 By contrast, the fact that international criminal tribunals typically operate on behalf a multitude of sovereign states, not just one, and the interests which they seek to uphold reach well beyond the interests of any single nation.

19 As the SCA correctly noted, this does not entail that states are entitled to ignore immunities of heads of state when they receive a request for surrender or other assistance from an international criminal tribunal.⁴¹ Instead, they must weigh up conflicting international obligations: one to

³⁹ *Arrest Warrant* (above footnote 27), in particular, paras 60-61. See also *Blaskic*, Judgement of 29 October 1997, paras 47, 54 (<http://www.icty.org/x/cases/blaskic/acdec/en/71029JT3.html>). See also A. Cassese, *International Criminal Law* (1st ed, 2008) at 346-347; B. Swart, "International Cooperation and Judicial Assistance", in A. Cassese, *ICC Commentary*, Vol II, 1590-1605.

⁴⁰ See *Blaskic*, Judgement of 29 October 1997, paras 40-42, 47. See also *Prosecutor v Taylor*, Decision on Immunity from Jurisdiction, 31 May 2004, para 51-52; *Prosecutor v Al Bashir*, Decision of 12 December 2011, para 34.

⁴¹ As discussed further below, this is apparent from Article 98 of the Rome Statute.

cooperate with an international criminal tribunal;⁴² another to respect a state's sovereign immunities. It is ultimately left to each state to determine, through its domestic law and in accordance with its domestic constitutional obligations, how it will resolve any tension between conflicting international law obligations.

- 20 Where a state's domestic law determines that its obligation to cooperate with an international tribunal outweighs immunity considerations, the state will not be in breach of international law.

IMMUNITIES AT THE ICC – ARTICLES 27 AND 98 OF THE ROME STATUTE

Conflicting ICC jurisprudence on immunities

- 21 The ICC's position on immunities has been ambiguous and contradictory.

21.1 In two instances, the Court has suggested that customary international law excludes the application of immunities generally in cases involving crimes within the Court's jurisdiction.⁴³ As discussed above, there is little or no support for such an all-encompassing proposition when it comes to issues of judicial assistance.

⁴² For state parties to the ICC, that obligation arises from the terms of the Rome Statute itself. In case of referral by the UN Security Council, a similar obligation arises in relation to the referred State (e.g., Sudan in relation to UNSC Resolution 1593). See, generally, D. Akande, "The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC", *Journal of International Criminal Justice* 10 (2012), 299-324.

⁴³ See *Prosecutor v Al Bashir*, Decision of 12 December 2011, paras 34, 36 et seq (at <https://www.icc-cpi.int/iccdocs/doc/doc1287184.pdf>). See also *Prosecutor v. Al Bashir*, Decision of 13 December 2011, paras 13-14 (<https://www.icc-cpi.int/pages/record.aspx?uri=1287184>).

21.2 In other decisions, the Court suggested that immunities are inapplicable in cases of UN Security Council referrals pursuant to Article 13(b) of the Rome Statute by reason of an implicit waiver of immunities.⁴⁴ For reasons we now explain, such an approach is also unconvincing.

No implied waiver of immunities in case of UN Security Council referrals

22 There is no basis to suggest that UN Security Council's referrals render immunities inoperative.

22.1 First, the ICC has made little attempt to substantiate this assumption in its judgments.

22.2 Secondly, there is no clear indication in the UN Security Council's referrals that it intends to waive a state's sovereign immunities⁴⁵

22.3 Third, a UN Security Council referral does not have the effect of amending or adding to the terms of the Statute. To the extent that a referral resolution imposes an obligation to cooperate on a non-state party,⁴⁶ it will bind that state to the same extent as a state party.⁴⁷

State parties do not lose the benefit of immunities by virtue of having

⁴⁴ *Prosecutor v Al Bashir*, Decision of 9 April 2014, para 26 *et seq* (<https://www.icc-cpi.int/iccdocs/doc/doc1759849.pdf>); *Prosecutor v. Al Bashir*, Decision of 13 June 2015, paras 6-9 (<https://www.icc-cpi.int/pages/record.aspx?uri=1995566>).

⁴⁵ *Krstic*, Decision on Application for Subpoenas, Dissenting Opinion of Judge Shahabuddeen, 1 July 2003, para 11, available at <http://www.legal-tools.org/doc/7635c3/> (absent a clear indication to the contrary, it is presumed that a state's sovereign immunities remain intact).

⁴⁶ See, e.g., UNSC resolution 1593, pt. 2.

⁴⁷ *Prosecutor v. Gaddafi and Al-Senussi* Decision of 1 March 2013, paras 25, 27 (<https://www.icc-cpi.int/iccdocs/doc/doc1561084.pdf>). Also D. Akande, "The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC", *Journal of International Criminal Justice* 10 (2012), 299-324.

signed and ratified the Rome Statute. Non-state parties should not be held to a higher standard.

22.4 Finally, the “implicit waiver” line of jurisprudence would effectively result in two distinct regimes of immunities before the ICC: one for referrals (with no immunities) and one for non-referred situations (with immunities). This would constitute a serious breach of the principle of equality before the law that is guaranteed for defendants appearing before the ICC.⁴⁸

23 Therefore, the Security Council’s referral of the Darfur situation to the ICC pursuant to Resolution 1593 did not waive or render Sudan’s immunities inapplicable to proceedings before the ICC.

Articles 27 and 98 of the Rome Statute

24 Article 27 and 98 are not in conflict. They regulate different aspects of the question of immunities.

24.1 Article 27 reflects the customary international law principle that immunities are not a defence or a jurisdictional bar in proceedings before the ICC. Article 27(1) excludes immunities as a defence before the ICC.⁴⁹

⁴⁸ Articles 67 and 27(1) of Rome Statute (“This Statute shall apply *equally* to all persons without any distinction based on official capacity”).

⁴⁹ It also makes it clear that, as has been the case since Nuremberg, an official position offers no ground in mitigation of sentencing.

24.2 Article 27(2), in turn, makes it clear that immunities are not a jurisdictional bar

25 Article 27 only deals with in proceedings before the ICC.⁵⁰ It does not regulate, nor purport to regulate, the effect of these immunities on the jurisdiction of any other court.

26 Moreover, article 27 does not exclude the immunities enjoyed by heads of state in respect of requests for surrender or assistance. This is affirmed by Article 98 of the Rome Statute.

27 Article 98 provides two important safeguards enabling the ICC and the state whose cooperation is sought to arbitrate between various, potentially conflicting, international legal obligations.

28 First, Article 98 provides a *blocking* mechanism (“*The Court may not proceed with a request*”) that limits the ICC’s ability to demand cooperation from a state in relation to the surrender of a suspect or other forms of assistance where such cooperation would affect the sovereign immunities of another state.⁵¹ The Rome Statute does not give state parties express or implied authority to disregard the immunities of a third state.

29 Second, Article 98 provides a means for resolving conflicts of international law duties. In accordance with Article 98(1), where the execution of a

⁵⁰ Article 27(2) Rome Statute.

⁵¹ Immunities that might stand in the way of cooperation under Article 98(1) are not limited to those belonging to a state party, but pertain to immunities of *any* “third States”, i.e., any state that is not the requested State, whether that State is a State Party or not.

Court's request for assistance would involve a violation of the immunities of another state, the state that is requested to cooperate must notify the ICC of this conflict.⁵² It is not for the ICC to determine whether the implementation of its request is consistent with that state's international obligations. In accordance with Article 98(1), that determination is to be made by the requested State according to its own laws and international obligations.⁵³ Where a conflict exists, it is for the ICC to try to resolve it by requesting the third state to waive its immunities.

30 The Rome Statute does not set a hierarchy of norms between the obligation of a state party to cooperate with the ICC and a state's customary international law duties to respect immunities. Nevertheless, international law makes it clear that a state cannot be held responsible for disregarding such immunities when this is done in the fulfillment of an obligation to cooperate with an international criminal tribunal.

31 Being a state party to the ICC does not, therefore, provide general absolution from a state's obligation to respect immunities and to verify its own compliance with those immunities where the citizens of a third party are affected by the implementation of a request for assistance emanating from the ICC. The ICC does not have the power to order or expect of a state party to disregard or ignore immunities attaching to an official of a third state. The Rome Statute leaves that determination to be made by the requested state

⁵² *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016), para 78.

⁵³ See also Article 93(3) of the Statute.

according to its own domestic laws, constitutional obligations and international obligations.

THE REASONING AND CONCLUSIONS OF THE SUPREME COURT OF APPEAL WERE CONSISTENT WITH INTERNATIONAL LAW

32 The SCA's articulation of the relationship between international and domestic law is consistent with the principles laid down above.

33 The SCA was correct in concluding that neither general international law, nor the Rome Statute, provides a ready-made answer to the legal challenge before it. The lawfulness of South Africa's response to the ICC's warrant is to be determined based on domestic, South African law as interpreted in light of South Africa's international law obligations.⁵⁴

34 The SCA rightly rejected any suggestion that international law prohibits South Africa from detaining and transferring President Al-Bashir to an international criminal tribunal such as the ICC.

34.1 Reliance on the ICJ's *Arrest Warrant* case to criticise the SCA's decision is inapposite. The *Arrest Warrant* case pertains to a situation where the arrest warrant comes *from another domestic jurisdiction*,

⁵⁴ See, in particular, para 100.

not from an international tribunal – a factually distinct situation with different legal consequences.⁵⁵

34.2 The ICJ did not suggest that where the request for assistance came from an international criminal tribunal, immunities would always supersede a binding obligation to cooperate with such a tribunal. Instead, the Court strongly hinted at the very opposite conclusion.⁵⁶

35 Furthermore, the SCA was also right to take the view that international law does not support a general suggestion that immunities would necessarily take precedence over South Africa's obligations to the ICC. Instead, in its current stage of development, international law leaves it to a state's domestic law to decide and determine the ordering and hierarchy of that state's international obligations if they conflict.

36 Therefore, the manner in which the SCA assessed the inter-play and weight of South Africa's various international law obligations is consistent with the principles laid down above and its ultimate conclusion does not constitute a breach of international law.

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⁵⁵ *Arrest Warrant* (above footnote 27) in particular paras 51, 58, 61 and 51 ("... [I]n international law it is firmly established that ... certain holders of high-ranking office in a State, such as the Head of State ... enjoy immunities from jurisdiction in other States, both civil and criminal").

⁵⁶ *Arrest Warrant*, *ibid*, in particular, par 61.

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