**IN THE CONSTITUTIONAL COURT**

CASE NO: CCT 75/2016

In the matter between:

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

and

| | |
|---|---|
| **SOUTHERN AFRICAN LITIGATION CENTRE** | Respondent |

and

| | |
|---|---|
| **PROFESSOR JOHN DUGARD AND PROFESSOR GUÉNAËL METTRAUX** | First *Amicus* Curiae |

**AMNESTY INTERNATIONAL LIMITED** Second *Amicus* Curiae

**PEACE AND JUSTICE INITIATIVE AND CENTRE FOR HUMAN RIGHTS** Third *Amicus* Curiae

**HELEN SUZMAN FOUNDATION** Fourth *Amicus* Curiae

---

## WRITTEN SUBMISSIONS OF AMNESTY INTERNATIONAL

---

Table of Contents

## A. INTRODUCTION[1]

1 In February 2005, an International Commission of Inquiry ("Commission"), established pursuant to Security Council Resolution 1564 (2004) and chaired by former President of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), Judge Cassese, issued its report on violations of international humanitarian law and human rights law in Darfur. Following an extensive investigation, the Commission concluded that:

> "*[T]he Government of Sudan…are responsible for serious violations of international human rights and humanitarian law amounting to crimes under international law. In particular…Government forces and militias conducted indiscriminate attacks, including killing of civilians, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement, throughout Darfur. These acts were conducted on a widespread and systematic basis, and therefore may amount to crimes against humanity*."[2]

2 The Commission "*strongly recommend[ed]*"[3] that the UN Security Council immediately refer the situation in Sudan to the ICC so as to end the "*rampant impunity*"[4] of Sudanese State officials. Annexed to the Commission's report was a sealed file listing individuals suspected of responsibility for international crimes, including 10 high-ranking central Government officials, which was to be provided to the UN Secretary-General and the ICC Prosecutor.[5]

---

[1] These submissions have been prepared with the assistance of Sudhanshu Swaroop QC, Sean Aughey and Dr Philippa Webb (Members of the Bar of England and Wales) as well as Dr Tawanda Hondora (Solicitor, England and Wales - Head of Strategic Litigation, Amnesty International).

[2] Report of the International Commission of Inquiry on Darfur to the Secretary-General, attached to letter dated 31 January 2005 from the Secretary-General addressed to the President of the Security Council, S/2005/60 (1 February 2005) ("Commission of Inquiry report") at p.3.

[3] Commission of Inquiry report at p.5.

[4] Commission of Inquiry report at para 569.

[5] The Commission concluded that high-ranking members of the central Government of Sudan were suspected of having: (a) engaged in a joint criminal enterprise for the commission of international crimes (para 542); and (b) failed to prevent or repress the perpetration of international crimes (para 563).

3 In Security Council Resolution 1593 (2005) ("SCR 1593"), taking note of the Commission's report, the Security Council determined that "*the situation in Sudan continues to constitute a threat to international peace and security*". Furthermore, the Security Council, "*acting under Chapter VII of the United Nations Charter*" ("UN Charter") decided:

> "... *to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court*" (under Article 13b of the Rome Statute); and
>
> "... *that the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution, and while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully*".

4 On 4 March 2009, the International Criminal Court ("ICC") issued an arrest warrant for President al-Bashir, finding that there were reasonable grounds to believe that he is criminally responsible, as an indirect perpetrator or co-perpetrator, for the following war crimes: (a) intentionally directing attacks against civilians; (b) pillage; (c) murder; (d) extermination; (e) forcible transfer; (f) torture; and (g) rape. On 12 July 2010, the ICC issued a second arrest warrant, finding that it was satisfied that there were "*reasonable grounds to believe that Omar Al Bashir was criminally responsible under article 25(3)(a) of the Statute as an indirect perpetrator, or as an indirect co-perpetrator, for the charges of genocide … and that his arrest appeared to be necessary*".[6] In particular, it considered that "*there are reasonable grounds to believe that Omar Al Bashir acted with dolus specialis/specific intent to destroy in part the Fur, Masalit and Zaghawa ethnic groups*".

---

[6] *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* ICC Case No. ICC-02/05-01/09, Second Warrant of Arrest, 12 July 2010, pp. 4 and 8.

5 The main question which this Court is called upon to determine is whether President al-Bashir enjoyed immunity *ratione personae* from arrest while on the territory of South Africa consequent to the issuance by the ICC of the two arrest warrants.

6 The Government contends that it could not arrest President al-Bashir as he enjoyed immunity *ratione personae* under customary international law.[7] The primary purpose of Amnesty International's ("Amnesty's") participation in these proceedings is to demonstrate that this is incorrect.

7 Amnesty is an international human rights organisation with a long history of advocating for justice for victims of serious human rights abuses, including through litigation initiatives in domestic and international Courts.

8 In summary, Amnesty contends that any immunities to which President al-Bashir may have been entitled under customary international law have been removed for two reasons:

8.1 First, any such immunities have been removed as a result of the combined effect of SCR 1593 and the Rome Statute of the International Criminal Court ("Rome Statute"); and/or

8.2 Second, South Africa has an overriding obligation under the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention") not to recognise President al-Bashir's alleged immunity.

[7] Government's written submissions paragraphs 31 and following.

## B. SCR 1593 AND THE ROME STATUTE REMOVE IMMUNITIES TO WHICH PRESIDENT AL-BASHIR MAY HAVE BEEN ENTITLED UNDER CUSTOMARY INTERNATIONAL LAW

9 SCR 1593 does not only confer jurisdiction upon the ICC in accordance with Article 13(b) of the Rome Statute. It also imposes upon Sudan an obligation to "*cooperate fully with and provide any necessary assistance*" to the ICC. Properly interpreted, this provision in SCR 1593 necessarily entails that Sudan is bound by the provisions of the Rome Statute, including Article 27(2), and is obliged to comply with the same, thereby removing any immunity to which President al-Bashir may have been entitled under customary international law.

10 *First*, as a UN member state and a party to the UN Charter, Sudan is bound by the decision of the Security Council in SCR 1593 (regardless of whether Sudan voted for SCR 1593). Pursuant to Article 25 of the UN Charter, Sudan has agreed and is under an obligation to "*accept and carry out*" the decisions of the Security Council.[8] More generally, pursuant to Article 2(5), Sudan is under an obligation to give the UN "*every assistance in any action*" it takes in accordance with the UN Charter.

11 In light of its UN membership, these obligations apply equally to South Africa. Additionally, pursuant to Article 2(5), South Africa is under an obligation to "*refrain from giving assistance"* to Sudan as a State against which the Security Council has taken enforcement action pursuant to SCR

[8] Security Council decisions are binding on all members of the UN as a result of Article 25. The overarching regime of the UN Charter emphasises the duty of member states to comply with decisions taken by the Security Council and to act in accordance therewith. Article 41 of the UN Charter provides that the Security Council "*may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures*." Article 49 provides that members "*shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council*." Article 103, as will be discussed in more detail below, provides that obligations under the UN Charter, including the binding force of Security Council decisions, prevail in the event of conflict with other international law obligations.

1593.[9] Assistance takes many forms. It includes the entering by South Africa into agreements or arrangements with Sudan, which have as their objective the insulation from criminal jurisdiction of individuals against whom the ICC has issued warrants of arrest.

12 In its advisory opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Rep 1971, 16 ("*Namibia* Opinion"), at para 116, the ICJ established that a decision of the Security Council is binding on <u>all</u> UN member states, including member states which voted against the decision in question:

> "*when the Security Council adopts a decision under Article 25 in accordance with the Charter, it is for member States to comply with that decision, including those members of the Security Council which voted against it and those Members of the United Nations who are not members of the Council. To hold otherwise would be to deprive this principal organ of its essential functions and powers under the Charter.*"

13 Pursuant to Article 103 of the UN Charter, the obligations binding on Sudan and South Africa to accept and carry out the decisions of the Security Council contained in SCR 1593 prevail over any conflicting obligations:

> "*In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail*."

14 While Article 103 refers to obligations under any other "*international agreement"*, leading commentary[10] recognises that "*the prevailing view*

---

[9] Article 2(5) of the UN Charter provides that UN member States "*shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventative or enforcement action"*.

[10] Pursuant to Article 38(1)(d) of the Statute of the ICJ, only the writings of the "*most highly qualified publicists*" may be taken into account as a "*subsidiary means for the determination of rules of law"*. For the sake of clarity: this is not to contend that the UNSC has power to order or authorise Member States to engage in acts that violates *jus cogens* norms, such as the laws prohibiting torture or acts of genocide.

*supports a broad interpretation of Art. 103 covering other sources, such as customary international law*".[11] Thus, non-compliance with the decisions of the Security Council in SCR 1593 constitutes a violation of the UN Charter.

15 *Second*, the Security Council is empowered under Chapter VII of the UN Charter,[12] acting in the interests of "*international peace and security*",[13] to impose upon Sudan (with or without its consent) an obligation to comply with the provisions of treaties to which it is not party, such as the Rome Statute.[14]

16 The Security Council has previously exercised its enforcement powers under Chapter VII to impose obligations to comply with treaty provisions upon States which are not party to the relevant treaty.[15] For example, in Resolution 1718 (2006), the Security Council decided that North Korea was required to comply with the provisions of the Treaty on the Non-Proliferation of Nuclear Weapons, notwithstanding North Korea's withdrawal from that treaty.[16]

17 *Third*, on its proper interpretation, the Chapter VII decision of the Security Council in SCR 1593 that "*the Government of Sudan ... shall cooperate*

---

[11] J. Ruben Leiæ and A. Paulus, 'Article 103' in B. Simma et al (eds), *The Charter of the United Nations: A Commentary* (Oxford University Press, 2012), Vol II at p.2133, para 68 and the authorities cited in fn.152.

[12] Article 39 of the UN Charter provides: "*The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."*

[13] Pursuant to Article 1 of the UN Charter, the purposes of the UN include taking: "*effective collective measures for the prevention and removal of threats to the peace … and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of … situations which might lead to a breach of the peace*."

[14] Pursuant to Article 48(1) of the UN Charter, "*[t]he action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine."*

[15] See M. Wood, 'The Law of Treaties and the UN Security Council: Some Reflections' in E. Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press, 2011) 244 at pp.248-250.

[16] Security Council Resolution 1718 (2006), 14 October 2006 at operative para 6.

*fully with and provide any necessary assistance to the Court and the Prosecutor*" imposes upon Sudan an obligation to comply with, and be bound by, the Rome Statute.

18 In its *Namibia* Opinion, at para 114, as well as in its advisory opinion on the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Rep 2010, 403 ("*Kosovo* Opinion"), at para 117, the ICJ determined that Security Council resolutions must be interpreted on a case-by-case basis "*having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked, and, in general, all circumstances that might assist in determining the legal consequences of the resolution*."

19 In the *Kosovo* Opinion, the ICJ clarified that "*guidance"* may be found in the rules on treaty interpretation embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("the Vienna Convention"), which provide:

> *"Article 31, GENERAL RULE OF INTERPRETATION*
>
> *1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*
>
> *2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*
>
> *(a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;*
>
> *(b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*
>
> *3. There shall be taken into account, together with the context:*
>
> *(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*
>
> *(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*
>
> *(c) Any relevant rules of international law applicable in the relations between the parties. […]*

*Article 32. SUPPLEMENTARY MEANS OF INTERPRETATION*

*Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:*

*(a) Leaves the meaning ambiguous or obscure; or*

*(b) Leads to a result which is manifestly absurd or unreasonable."*

20 Although South Africa is not a party to the Vienna Convention, it is well-established that the rules of treaty interpretation contained in Articles 31 and 32 reflect customary international law,[17] and consequently South Africa is still bound by Articles 31 and 32.[18]

21 The principle that reason and meaningful effect must be given to every part of the text, which plays an "*important role*" in the general rule of interpretation in Article 31,[19] is also relevant to the interpretation of Security Council resolutions.[20]

22 In the *Kosovo* Opinion, at para 94, the ICJ also explained that the interpretation of Security Council resolutions should take into account: (a) the "*voting process*", and the fact that "*the final text of such resolutions represents the view of the Security Council as a body*"; (b) the fact that "*Security Council resolutions can be binding on all States … irrespective of whether they played any part in their formulation*"; (c) analysis of

---

[17] See e.g. *Kasikili/Sedudu Island (Botswana/Namibia),* Judgment, ICJ Rep 1999, p.1059, para 18. Pursuant to section 232 of the Constitution, "*customary international law is law in the Republic unless it is inconsistent with the constitution or an Act of Parliament*."

[18] The ICJ in the case of *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* stated for instance that 'in accordance with CIL, reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Interpretation must be based above all upon the text of the treaty. As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion." *Territorial Dispute (Libyan Arab Jamahiriya/Chad),* Judgment, ICJ. Reports 1994, pp. 21-22, at para. 41. See also *Maritime Delimitation and Territorial Questions between Qatar and Bahrain case (Jurisdiction and Admissibility No. 2)*, ICJ Rep. 1995, at para. 33.

[19] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation),* Preliminary Objections, Judgment, ICJ Rep 2011, p.70 at paras 133-34.

[20] See e.g. A. Peters, 'Article 25' in B. Simma et al (eds), *The Charter of the United Nations: A Commentary* (Oxford University Press, 2012), Vol I at p.799, para 27.

*"statements by representatives of members of the Security Council made at the time of their adoption"*; (d) "*other resolutions of the Security Council on the same issue"*; and (e) "*subsequent practice of the United Nations organs and of States affected by those given resolutions*".

23 Applying these principles of interpretation to the present case, on its proper construction, the decision in SCR 1593 imposes upon Sudan the obligation to comply with, and be bound by, the Rome Statute.

23.1 The ordinary meaning of the text is that Sudan is under an unqualified obligation to "*cooperate fully with and provide any necessary assistance to the Court and the Prosecutor".* When acting under Chapter VII, the Security Council commonly uses broad phrases (such as "*cooperate fully*" or "*all necessary measures*") without specifying the precise measures authorised or required.

23.2 The obligation binding on Sudan to "*cooperate fully"* is distinguished from all other "*States not party to the Rome Statute*" which are stated to "*have no obligation under the Statute"*.

23.3 The phrase "*cooperate fully*" must be read in the context of (and creates a textual link with) the obligation binding on parties to the Rome Statute to cooperate under Article 86, which provides:

> "*State parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court."*

As explained below, the ICJ has held that a state's obligation to "*cooperate fully"* with an international criminal tribunal necessarily entails that state's acceptance of the jurisdiction of that tribunal.[21]

---

[21] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* ICJ Rep 2007 ("*Bosnia Genocide* Judgment"), at p.43, para 447.

23.4 It is clear from the preamble, which forms an important part of the context and provides evidence of the object and purpose,[22] that the obligation imposed on Sudan should be construed against the background of the Commission's report,[23] including the recommendation that the matter be referred to the ICC under Chapter VII with "*mandatory effect"* such that "*Sudan could not deny the Court's jurisdiction under any circumstances.*"[24] Statements made at the time of the adoption of SCR 1593 confirm that its object and purpose were to put an "*end to impunity*" and ensure that the individuals identified by the Commission, including high-ranking State officials, are "*duly punished*".[25]

23.5 This object and purpose (as well as the achievement of full cooperation) would be defeated if South Africa were to hold – unilaterally – that Sudan was not bound by the terms of the Rome Statute. Notably, Sudan has not contended before Courts in South Africa that it is not bound by the terms of the Rome Statute..

23.6 As to the subsequent practice of the Security Council as a body, it is relevant that the Security Council has chosen not to entertain the African Union's repeated requests that the ICC proceedings against

---

Article X of Annex 1-A to the Dayton Agreement provides: "*The Parties shall cooperate fully with … the International Tribunal for the Former Yugoslavia*"".

[22] In addition to Article 31(2) of the Vienna Convention, which reflects customary international law, see the Declaration of Vice President Tomka in the *Kosovo* Opinion at p.461, para 23.

[23] The preamble to SCR 1593 states: "*Taking note of the report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur (S/2005/60)".*

[24] Commission of Inquiry report at para 588.

[25] UN Security Council, 5158th Meeting, S/PV.5158 (31 March 2005). See especially the statements of the UK at p.7 ("*the most efficient and effective means available to deal with impunity…[and]…bring to justice those responsible for the most serious crimes"*), France at p.8 ("*put an end to impunity…the international community will not allow these crimes to go unpunished")*, Greece at p.9 ("*the issue of impunity, which we must never allow to go unpunished"*), and Russia at p.19 ("*[a]ll those who are guilty of gross violations of human rights in Darfur must be duly punished…to end the reign of impunity…referring the matter to the [ICC] ensures that credible and timely action will be taken against persons charged with atrocities and serious crimes*").

President al-Bashir be deferred under Article 16 of the Rome Statute.[26]

24 Leading commentary confirms that SCR 1593 "*imposed upon [Sudan] obligations to cooperate at least as comprehensive as those it would have had if it had been a party"* to the Rome Statute.[27]

25 *Fourth*, since the effect of SCR 1593 is that Sudan is bound by the Rome Statute, any immunities from the jurisdiction of the South African authorities to which President al-Bashir may have been entitled under customary international law have been removed by operation of Article 27(2).

26 According to the ordinary meaning of the text, Article 27(2) explicitly removes any "*[i]mmunities or special procedural rules which may attach to the official capacity of a person whether under national or international law*".[28] It is clear from the context of Article 27(1) that the official capacity referred to includes that of a "*Head of State or Government*".

27 The reference to the removal of immunities under "*national*" law must be read in the context of the Rome Statute as a whole and must be given

---

[26] See e.g. African Union, Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of the Sudan, Doc No. Assembly/AU/Dec.221(XII), 3 February 2009, paras 3-4; and African Union, Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) Doc. Assembly/AU/13(XIII).

[27] M. Wood, 'The Law of Treaties and the UN Security Council: Some Reflections', at p.250. For the contrary view, in addition to the academic commentary relied on by the Government in the lower courts, see P. Gaeta, 'Head of State Immunity as a Bar to Arrest' in R. Steinberg, *Contemporary Issues Facing the International Criminal Court* (Brill Nijhoff, 2016) 84. However, note that Gaeta does not consider the arguments set out at para 22 above.

[28] This interpretation has been confirmed by the ICC in its various decisions on the obligations of States to arrest and surrender President al-Bashir, where the Pre-Trial Chamber of the ICC concludes that the effect of SCR 1593 is to eliminate any immunities to which President al-Bashir may have been entitled. *ICC decision on the co-operation of the Democratic Republic of Congo regarding Omar al-Bashir's arrest and surrender to the court*, 9 April 2014, at paras 22-23; *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, at para 6.

meaningful effect.[29] The ICC principally applies international law, not national law.[30] Moreover, it is already a well-established principle of international law that a State may not seek to evade its international obligations by relying on national law. Article 27 of the Vienna Convention provides that "*[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty*." Similarly, Article 3 of the International Law Commission's Articles on State Responsibility provides that "*[t]he characterization of an act of a State as internationally wrongful is governed by international law. Such characterisation is not affected by the characterization of the same act as lawful by internal law*."

28 The above interpretation is also supported by reading Article 27(2) in light of two other relevant rules of international law applicable between South Africa and Sudan, as required by Article 31(3)(c) of the Vienna Convention:

28.1 First, Article IV of the Genocide Convention (to which both States are party) provides that "*[p]ersons committing genocide … shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals*." As will be explained below, both Sudan and South Africa are under an obligation to cooperate with the ICC pursuant to Article VI of the Genocide Convention.

28.2 Secondly, pursuant to the UN Charter, both States are obliged to "*accept and carry out*" the legal situation created by SCR 1593.

---

[29] For a contrary view see P. Gaeta, 'Head of State Immunity as a Bar to Arrest' in R. Steinberg, *Contemporary Issues Facing the International Criminal Court* (Brill Nijhoff, 2016) 84 at p. 96, fn. 19. However, note that Gaeta does not consider the arguments set out at paras 26-27 above.

[30] Pursuant to Article 21(1) of the Rome Statute, it is only in the event of a lacuna that the ICC shall apply "*the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards*."

29 The operation of Article 27(2) in the present case is not affected by Article 98(1) of the Rome Statute, which provides:

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

30 Article 98(1) is expressly limited to the immunities owed to a "*third State*". The ordinary meaning of a "*third State*" is a state which is neither party to the Rome Statute nor placed in the position of being bound by its provisions by a decision of the Security Council acting under Chapter VII of the UN Charter. As is recognised by leading commentary (including analysis of the *travaux préparatoires* of the Rome Statute), interpreting *"third State*" as 'non party to the Rome Statute' is the only way to reconcile the preservation of immunity in Article 98(1) with the removal of immunity under Article 27(2), and which avoids depriving either provision of meaningful effect.[31]

31 Since the effect of SCR 1593 is that Sudan is bound by the Rome Statute, it is not a "*third State*" for the purpose of Article 98(1).[32] The arrest and surrender of President al-Bashir is required by the treaty rule contained in Article 27(2) of the Rome Statute, which prevails over any inconsistent rule of international law. This is entirely consistent with the well-established general principle of international law that treaty obligations

---

[31] See e.g. P. Gaeta, 'Official Capacity and Immunities' in A. Cassese et al (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) at pp.991-1000; D. Akande, 'International Law Immunities and the International Criminal Court' (2004) 98 *American Journal of International Law* 407 at 442; P. Gaeta, 'Head of State Immunity as a Bar to Arrest' in R. Steinberg, *Contemporary Issues Facing the International Criminal Court* (Brill Nijhoff, 2016) 84 at p. 96; and W. Schabas, 'State Obligations in Implementing Arrest Warrants' in R. Steinberg, *Contemporary Issues Facing the International Criminal Court* 112.

[32] *Cf* Gaeta and Schabas, *ibid*, who take a narrower view of the effect of SCR 1593 (without considering the arguments set out at para 22 above) and therefore consider that Sudan is a "*third State"* for the purpose of Article 98(1).

derogate from and prevail over any inconsistent rules of customary international law.[33]

## C. SOUTH AFRICA'S OVERRIDING OBLIGATION UNDER THE GENOCIDE CONVENTION

32 Pursuant to the Genocide Convention, South Africa is obliged not to recognise President al-Bashir's alleged immunity, and to arrest and surrender him to the ICC, if he is on its territory. In turn, and also pursuant to the Genocide Convention, Sudan is obliged not to claim immunity on behalf of President al-Bashir.

33 Both South Africa and Sudan are parties to the Genocide Convention. South Africa acceded to it on 10 December 1998 and Sudan on 13 October 2003. Neither State has lodged any reservations. In any event, the Genocide Convention "*recognizes the existing requirements of customary international law*": see *Bosnia Genocide* Judgment, para 161.

34 Article I of the Genocide Convention states that the Contracting Parties "*undertake to prevent and to punish*" genocide. The preamble recognises that "*in order to liberate mankind from such an odious scourge, international co-operation is required*."

35 Article VI of the Genocide Convention requires that:

> *"Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the state in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction*."

---

[33] See e.g. H. Thirlway, 'The Sources of International Law' in M. Evans (ed), *International Law* (Oxford University Press, 4th ed 2010) 91 at p.109. To clarify, states cannot agree to derogate from *jus cogens* norms of customary international law, such as the absolute prohibition on torture or acts of genocide: see Articles 53 and 64 of the Vienna Convention.

36 In the *Bosnia Genocide* Judgment, the ICJ established that Article VI obliges states to cooperate with any competent "*international penal tribunal*". The Court identified the ICTY as an "*international penal tribunal*" envisaged under Article VI. The ICJ did not mention the ICC expressly, but it is beyond doubt that the treaty-based ICC is also an "*international penal tribunal*" for the purposes of Article VI. The ICJ explained at para 445:

> *"The notion of an 'international penal tribunal' within the meaning of Article VI must at least cover all international criminal courts created after the adoption of the Convention (at which date no such court existed) of potentially universal scope, and competent to try the perpetrators of genocide or any of the other acts enumerated in Article III. The nature of the legal instrument by which such a court is established is without importance in this respect. When drafting the Genocide Convention, its authors probably thought that such a court would be created by treaty: a clear pointer to this lies in the reference to 'those Contracting Parties which shall have accepted [the] jurisdiction' of the international penal tribunal."*

[Emphasis added]

37 The link between the Genocide Convention and the ICC is clear. In General Assembly Resolution 260 (III) (1948) adopting the Genocide Convention, the Assembly invited the International Law Commission ("ILC") "*to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide"* and other international crimes. The ILC completed its work on the draft statute for an international criminal court in 1994. This formed the basis of the 1998 Rome Statute.

38 President al-Bashir is a "*person charged with genocide*" for the purposes of Article VI. The term "*charged*" must be interpreted in the light of the object and purpose of the Convention. It is sufficient that: (a) the ICC Prosecutor has indicated the intended charges and the Pre-Trial Chamber has approved the arrest warrant; and (b) the arrest warrant indicates the crimes that there are "*reasonable grounds to believe*" President al-Bashir

has committed.[34] In the *Bosnia Genocide* Judgment, the ICJ used the phrase "*individuals accused of genocide*",[35] which captures the idea that something less than a formal charge suffices for Article VI.

39 Article VI, interpreted in light of the object and purpose of the Genocide Convention, imposes a strong obligation on parties to that Convention to arrest and surrender President al-Bashir to the ICC, if he is on their territory. In the *Bosnia Genocide* Judgment, at para 443, the ICJ held:

> *"[I]t is certain that once such a court [international penal tribunal] has been established, Article VI obliges the Contracting Parties 'which shall have accepted its jurisdiction' to co-operate with it, which implies that they will arrest persons accused of genocide who are in their territory — even if the crime of which they are accused was committed outside it — and, failing prosecution of them in the parties' own courts, that they will hand them over for trial by the competent international tribunal."*

[Emphasis added]

40 As to the trigger or legal basis for the duty to cooperate with the international penal tribunal, at para 447, the ICJ held that "*the FRY must be regarded as having accepted the jurisdiction of the ICTY"* because it was a party to the Dayton Agreement, which "*provides that they must fully co-operate … with the ICTY*". The Court also stated that "*the FRY['s] [membership of] the United Nations provided a further legal basis for its*

---

[34] See, e.g., G, Sluiter, 'Using the Genocide Convention to Strengthen Cooperation with the ICC in the *Al Bashir* Case' (2010) *Journal of International Criminal Justice* 365 at 373-4.

[35] Para 471(8), which is part of the *dispositif* of the Judgment, reads:

"(*8) by fourteen votes to one,*

*Decides that Serbia shall immediately take effective steps to ensure full compliance with its obligation under the Convention on the Prevention and Punishment of the Crime of Genocide to punish acts of genocide as defined by Article II of the Convention, or any of the other acts proscribed by Article III of the Convention, and to transfer individuals accused of genocide or any of those other acts for trial by the International Criminal Tribunal for the former Yugoslavia, and to co-operate fully with that Tribunal*". (emphasis added)

*obligation to co-operate*". It follows that a State's acceptance of the jurisdiction of an international penal tribunal may be implicit.[36]

41 Applying the Court's reasoning in the context of the present case, and in the light of the object and purpose of the Genocide Convention, the duty to cooperate with the ICC is triggered when:

41.1 President al-Bashir is present on the territory of a party to the Genocide Convention and the national authorities are aware of his presence;

41.2 The ICC, by one of its organs, has notified that state of the existence of an arrest warrant for genocide against President al-Bashir and has thereby indicated that this makes him a person charged with genocide in the sense of Article VI; and

41.3 That state has accepted the jurisdiction of the ICC, whether by virtue of being a party to the Rome Statute, pursuant to its obligations under the UN Charter, or otherwise.[37]

42 On the facts of the present case, all of these conditions are met both in relation to South Africa and Sudan:

42.1 South Africa's duty to cooperate under the Genocide Convention is triggered by its status as a party to the Rome Statute, as well as its obligation under the UN Charter to "*accept and carry out*" the decision of the Security Council in SCR 1593. By refusing to arrest and surrender President al-Bashir in execution of the 2010 arrest

---

[36] This position derives further support from the fact that three parties to the Genocide Convention (Algeria, Morocco, and Venezuela) entered reservations to Article VI, stating that "*express*" or "*specific*" acceptance of jurisdiction was required: see https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&clang=_en.

[37] See D. Akande, 'The Impact of the Genocide Convention on the Obligation to Implement ICC Arrest Warrants' in R. Steinberg, *Contemporary Issues Facing the International Criminal Court* (Brill Nijhoff, 2016) at p. 77.

warrant, the South African Government breached its duty to cooperate with the ICC.

42.2 The obligation imposed upon Sudan by SCR 1593 to "*cooperate fully*" with the ICC and to be bound by the terms of the Rome Statute entails acceptance by Sudan of the jurisdiction of the ICC, thereby triggering Sudan's additional duty to cooperate under the Genocide Convention.

43 Immunity *ratione personae* (asserted or otherwise) cannot justify failure to comply with the duty to cooperate with the ICC. As explained above, any immunity to which President al-Bashir may have been entitled under customary international law has been removed by operation of SCR 1593 and Article 27(2) of the Rome Statute. In any event, Article IV of the Genocide Convention provides:

> *"Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."*

44 On its proper interpretation, applying Article 31(1) of the Vienna Convention, the immunities removed by operation of Article IV include any immunity from arrest by national authorities:

44.1 The plain, unqualified text of Article IV obliges parties to the Genocide Convention to "*punish*" (including, by implication, the duty to facilitate the punishment of) persons committing genocide, regardless of their official status.

44.2 The obligation to punish and to remove immunities must be read in the context of the reference in Article VI to both an "*international penal tribunal*" and a "*competent tribunal of the state in the territory of which the act was committed*".

44.3 This is entirely consistent with the object and purpose of the Convention. Since the availability of any immunities would necessarily mean that the person charged with genocide would not be "*punished"*, such immunities have been removed or rendered inapplicable by Article IV.[38]

45 Applying the well-established principles of international law referred to above, Sudan and South Africa, as parties to the Genocide Convention, have agreed to be bound by the Convention rule, and to exclude any contrary rules of customary international law on immunity.

46 A failure to arrest and surrender President al-Bashir to the ICC when he is on South African territory would violate Article VI. This is not merely an academic issue. As leading commentators recognise,[39] in principle, South Africa may be brought before the ICJ by any other party to the Genocide Convention pursuant to Article IX, which provides:

> *"Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."*

## D. CONCLUSION

47 For all the reasons set out above, Amnesty respectfully submits that President al-Bashir is not entitled to immunity *ratione personae* from the jurisdiction of the South African courts (as well as inviolability from arrest) - while on the territory of South Africa - in order to surrender him to the ICC in execution of the two arrest warrants issued by the ICC because:

---

[38] Ibid, p. 82.

[39] See e.g. D. Akande, 'The Impact of the Genocide Convention on the Obligation to Implement ICC Arrest Warrants' at p.83.

47.1 The combined operation of SCR 1593 and the Rome Statute removes any immunities; and/or

47.2 South Africa has an overriding obligation under the Genocide Convention not to recognise any such immunities.

**GILBERT MARCUS SC**

**NICK FERREIRA**

**MUSATONDWA MUSANDIWA**

Counsel for the second amicus curiae

Chambers, Sandton

13 October 2016