

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

Case number: CCT 75/16

In the matter between:

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

Applicants

and

**SOUTHERN AFRICA LITIGATION
CENTRE**

Respondent

and

**PROFESSOR JOHN DUGARD AND
PROFESSOR GUÉNAËL METTRAUX**

First Amici Curiae

AMNESTY INTERNATIONAL LIMITED

Second Amici Curiae

**PEACE AND JUSTICE INITIATIVE AND
CENTRE FOR HUMAN RIGHTS**

Third Amici Curiae

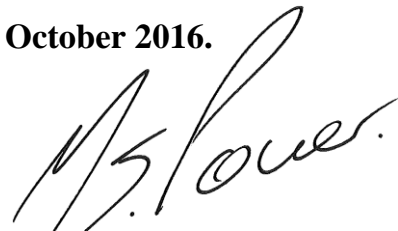
HELEN SUZMAN FOUNDATION

Fourth Amicus Curiae

FILING SHEET

KINDLY TAKE NOTICE THAT in terms of the Directions issued by the Chief Justice dated 28 September 2016, a *practice note* and *written submissions* are herewith presented for filing on behalf of the Third Amici Curiae.

Dated at JOHANNESBURG on this the 13th day of October 2016.



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Third *Amicus Curiae*

THIRD *AMICUS CURIAE'S* PRACTICE NOTE

I NATURE OF PROCEEDINGS

1. This is an appeal against the decision of the Supreme Court of Appeal in *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* [2016] ZASCA 17; 2016 (3) SA 317 (SCA).
2. The *amicus curiae* was admitted by the Court on 28 September 2016.

II ISSUES TO BE ARGUED

3. The appeal concerns whether the Appellants were obliged under international and/or domestic law to arrest President Al-Bashir of Sudan when he was present in the Republic and surrender him to the International Criminal Court. That question turns on whether or not President Al-Bashir had immunity as a sitting Head of State under international law.

III RELEVANT PORTIONS OF THE RECORD

4. For the purposes of the *amicus curiae*'s argument, no parts of the record are relevant as the argument relates to general legal principle.

IV DURATION OF ORAL ARGUMENT

5. If permitted to make oral submissions, the Third *Amicus Curiae* will require 15 minutes for oral argument.

V SUMMARY OF ARGUMENT

6. The Third *Amicus Curiae* will advance the following arguments:
 - 6.1. It is preferable for this Court to avoid creating unnecessary conflicts between international and domestic law. As President Al-Bashir does not enjoy immunity under international law, this Court should not decide whether, if he did enjoy immunity, that immunity would be removed by the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.
 - 6.2. President Al-Bashir does not have immunity in international law because:
 - 6.2.1. The United Nations Security Council (**UNSC**) Resolution 1593 made the Rome Statute applicable to Sudan as if it was a state party. The power to make treaties applicable to non-state parties is consistent with UNSC and state practice. Any

immunity President Al-Bashir would ordinarily enjoy was excluded by art 27 of the Rome Statute;

6.2.2. President Al-Bashir has been charged with genocide. Article 6 of the Genocide Convention removes his immunity before the ICC because the UNSC has accepted its jurisdiction on behalf of all UN member states (including Sudan and South Africa).

6.2.3. When they act to enforce an ICC arrest warrant, South African courts act with the character and authority of the ICC. The question of immunity before national tribunals does not, therefore, arise.

6.3. In addition to its obligations under the ICC Act, South Africa was obliged to prosecute President Al-Bashir or surrender him to the ICC by:

6.3.1. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**Torture Convention**); and

6.3.2. The international and constitutional obligation to ensure access to justice.

VI AUTHORITIES

7. The Third *Amicus Curiae* will place particular reliance on the following authorities:

7.1. The Rome Statute;

7.2. United Nations Charter;

7.3. Convention on the Prevention and Punishment of the Crime of Genocide;

7.4. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

7.5. *Government of the Republic of Zimbabwe v Fick and Others* [2013] ZACC 22; 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC); and

7.6. *National Commissioner of the South African Police Service v. Southern African Human Rights Litigation Centre* [2014] ZACC 30; 2015 (1) SA 315 (CC); 2015 (1) SACR 255 (CC); 2014 (12) BCLR 1428 (CC)



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13 October 2016

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THIRD *AMICUS CURIAE*'S WRITTEN SUBMISSIONS

I INTRODUCTION

1. President Al-Bashir does not enjoy immunity under international law. Indeed, South Africa is obliged by its international commitments to arrest him and either prosecute him, or surrender him to the International Criminal Court (**ICC**) for prosecution.
2. The Peace and Justice Initiative (**PJI**) and the Centre for Human Rights (**CHR**) support the outcome of the Supreme Court of Appeal (**SCA**) Judgment, and much of the argument advanced by the Respondent (**SALC**). However, their submissions are novel in two crucial respects:
 - 2.1. They submit that this Court can and should decide this case without creating a conflict between South Africa's national and domestic obligations; and

- 2.2. They advance additional reasons why President Al-Bashir has no immunity under international law a result of:
 - 2.2.1. The United Nations Security Council (**UNSC**) Resuloution 1593;
 - 2.2.2. The Genocide Convention; and
 - 2.2.3. The proper understanding of the relationship between the ICC and South African courts;
- 2.3. They argue that South Africa was obliged by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**Torture Convention**) and the *jus cogens* norm of access to justice to arrest President Al-Bashir and surrender him to the ICC.

II CONFLICT BETWEEN NATIONAL AND INTERNATIONAL LAW

3. PJI and CHR strongly support the conclusion reached by the High Court and the SCA and defended by SALC that President Al-Bashir has no immunity for his crimes and should have been arrested and surrendered to the ICC. However, PJI and CHR submit that conclusion should not be reached in a manner that establishes an unnecessary conflict between South Africa's international and domestic legal obligations.
4. That conflict arises from the manner in which the SCA and SALC have approached this case:
 - 4.1. Most obviously, the minority in the SCA took the view that the matter can be resolved without considering international law, and solely by interpreting the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (**ICC Act**).
 - 4.2. All the judges in the SCA found that even if President Al-Bashir enjoys immunity at international law, that immunity is stripped by the ICC Act.
 - 4.3. Before this Court, SALC advances the same position. While it contends that President

Al-Bashir did not enjoy immunity at international law, it also argues that even if he did, “*the immunity would be trumped by the ICC Act.*”¹ That is so because international law allows states to determine for themselves whether to grant immunity for certain international crimes, and South Africa has elected “*to override any immunity against the prosecution of international crime*”.²

5. This approach requires this Court to hold that President Al-Bashir enjoys immunity *ratione personae* before national courts under international law, but he enjoys no such immunity before the same courts under domestic law.³
6. There is no doubt that South Africa can, under its Constitution, depart from international law via statute.⁴ And it may be that the SCA and SALC are correct that, properly interpreted, the ICC Act “*trumps*” any immunity that exists at international law. But that question does not arise in this case. It does not arise because, contrary to the finding by the majority of the SCA, President Al-Bashir does not enjoy immunity in international law.
7. This Court can and should leave open the question of a conflict between international law and the ICC Act for a future case where that conflict arises. It should decide this case solely on the basis that, because President Al-Bashir does not enjoy immunity in international law, South Africa was obliged both by international law and its domestic law to arrest him and surrender him to the ICC.
8. That is the preferable approach for two reasons.
9. First, it may be that “*international law is in a state of flux*” and does not currently recognize “*an international crimes exception to the immunity and inviolability that heads of state enjoy when visiting foreign countries and before foreign national Courts.*”⁵ But it is not necessary to decide whether or not such a

¹ Respondent’s Heads of Argument, para. 2.

² Respondent’s Heads of Argument, para. 43.

³ SCA Judgment, para. 103, fn. 90.

⁴ Section 232 of the Constitution.

⁵ SCA Judgment, para. 84.

general exception exists in international law in order to determine this case. In this case President Al-Bashir does not enjoy immunity under international law for far narrower reasons: (a) the UNSC has made the Rome Statute applicable to Sudan; and (b) the Genocide Convention excludes immunity. As recognized by section 4(1) of the Diplomatic Immunities and Privileges Act,⁶ Head of State immunity derives its existence directly from international law. Without immunity under international law, it is unnecessary to determine whether the ICC Act removes that immunity.⁷ Since international law has removed President Al-Bashir's immunity, that immunity cannot exist under the Immunities Act and there is no immunity for the ICC Act to remove.

10. Second, creating conflicts between international and domestic law is generally undesirable. It would place the South African Government in a difficult position: following one body of law would necessarily result in the violation of the other. That is recognized by s 233 of the Constitution which requires courts to “*prefer any reasonable interpretation of ... legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.*”⁸ Read together, these provisions require this Court to avoid finding conflicts between domestic and international law unless such a conclusion is unavoidable. As this Court held in *Fick*, these provisions “*facilitate the alignment of our law with ... international law.*”⁹ In this case, it is possible to align international and domestic law, by following the course PJI and CHR advance.
11. The other consequence of s 233 is that the approach of the SCA minority cannot be followed.

⁶ Act 37 of 2001.

⁷ See SCA Judgment, para. 106.

⁸ See also s 232 of the Constitution provides that “[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.” The SCA held that s 233 required an interpretation of the ICC Act that did not create a conflict between South Africa's obligations under the Rome Statute and its domestic obligations. SCA Judgment, para. 86. But it ignored the fact that – if President Al-Bashir enjoys immunity in international law – South Africa also has international law obligations to respect that immunity. Section 233 also requires courts, if possible, to adopt an interpretation that is consistent with that obligation. The argument advanced by PJI and CHR is consistent with both obligations.

⁹ *Government of the Republic of Zimbabwe v Fick and Others* [2013] ZACC 22; 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC), para. 57. This Court went on to note that, in the context of the enforcement of foreign judgments, s 233 “*promotes comity, reciprocity and the orderly conduct of international trade*”.

The Constitution requires a complete analysis of President Al-Bashir’s immunity under international law – including consideration of UNSC Resolution 1593 and the Genocide Convention – in order to determine whether that body of law recognises its existence. If President Al-Bashir’s immunity remained intact after that analysis, only then should the SCA have turned to the question of whether South African domestic law removes it. Because PJI and CHR contend that President Al-Bashir’s incumbent Head of State immunity does not survive such an analysis under international law, there is no need to rely on domestic law to achieve the same result.¹⁰

12. In sum, the correct interpretation of the ICC Act where international immunity exists should be addressed in a case where immunity exists under international law. This is not that case. On the basis of the analysis below, this Court should uphold the SCA’s judgment, but for different reasons that do not result in an unnecessary conflict between South African domestic law and international law on the matter of incumbent Head of State immunity.

III THE UNSC RESOLUTION

13. PJI and CHR make three submissions regarding the effect of UNSC Resolution 1593:

13.1. The UNSC intended to make Sudan a *de facto* State Party to the Rome Statute;

13.2. It had the power to do so; and

13.3. It specifically ensured that art 27 of the Rome Statute – removing head of state immunity – applied to Sudan.

¹⁰ The *amici curiae* further note that, even if the SCA was correct in relying on the relevant provisions of the ICC Act to remove President Al-Bashir’s immunity, section 233 of the Constitution requires that, when interpreting legislation, “every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.” In order to determine whether the SCA’s interpretation of the ICC Act was consistent with international law, section 233 requires a judicial determination as to whether international law recognizes President Al-Bashir’s immunity. In this respect, the SCA’s analysis of international law was incomplete.

Intention

14. The situation in Darfur was referred to the ICC pursuant to UNSC Resolution 1593 (2005)¹¹ and art 13(b) of the Rome Statute. Art 13(b) allows the UNSC, acting under Chapter VII of the Charter of the United Nations (1945) (**UN Charter**), to extend the ICC's jurisdiction to non-State Parties to the Rome Statute. Pursuant to art 25 of the UN Charter, such a decision is binding on all UN member States.¹² In so doing, the UNSC obliged Sudan to be bound by the Rome Statute, in particular art 27, which removes incumbent Head of State immunity.
15. The UNSC was well aware that its referral would likely result in criminal investigations and prosecutions before the ICC,¹³ and intended for the Rome Statute's substantive and procedural law to provide the applicable legal framework.¹⁴ Since Sudan is not a party to the Rome Statute, the UNSC's intention could only be realized if the referral made the Rome Statute as a whole applicable to Sudan. That must be so when one considers the directive that Sudan "*shall cooperate fully with and provide any necessary assistance to the [ICC]*".¹⁵ The effect of Resolution 1593 was to render Sudan a *de facto* state party to the Rome Statute for the purposes of the Darfur situation.

Power

16. This was not a first. The UNSC has brought into force obligations arising from treaties and international instruments for numerous States in the absence of their consent, via UNSC resolutions passed under Chapter VII of the UN Charter. Examples include:

¹¹ On the interpretation of UNSC resolutions at international law, see ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 22 July 2010, para. 94.

¹² See ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, para. 116.

¹³ See Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 25 January 2005, para. 664 (this commission was established pursuant to UNSC Resolution 1564 (2004) and identified officials of the Sudanese government as possibly bearing responsibility for events in Darfur, and in particular "senior Government officials and military commanders").

¹⁴ UNSC Resolution 1593 (2005), Preamble (paras 2-4), paras 2, 4, 6-7 (containing explicit references to the Rome Statute); ICC, *Prosecutor v. Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-3, Pre-Trial Chamber I, 4 March 2009, para. 45 (holding that when the UNSC acts pursuant to Article 13(b), it "has [...] accepted that the investigation [...] as well as any prosecution arising therefrom, will take place in accordance with the statutory framework provided for in the Statute, the Elements of Crimes and the Rules *as a whole*" (emphasis added)); ICC, *Situation in Darfur, Sudan*, Decision on Application Under Rule 103, ICC-02/05-185, Pre-Trial Chamber I, 4 February 2009, para. 31.

¹⁵ UNSC Resolution 1593 (2005), para. 2.

16.1. UNSC Resolution 1373 (2001) imposed obligations stemming from the International Convention for the Suppression of the Financing of Terrorism (1999) on all UN Member States, including those that had not ratified it. In particular, the resolution obliged States to:

“Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts”.

16.2. UNSC Resolution 1874 (2009) incorporated various obligations contained in the Treaty on the Non-Proliferation of Nuclear Weapons (1968) (**NPT**) into the text of the resolution and imposed them on the Democratic People’s Republic of Korea (**DPRK**). It did so despite the fact that the DPRK had previously announced its withdrawal from that treaty. In particular, the UNSC decided that *“the DPRK [...] shall act strictly in accordance with the obligations applicable to parties under the NPT and the terms and conditions of the IAEA [International Atomic Energy Agency] Safeguards Agreement”*.

16.3. UNSC Resolution 1757 (2007): The UNSC gave effect to the provisions of the Agreement between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon (2007), after the failure by Lebanon to domestically ratify the treaty. As a result, the Special Tribunal for Lebanon was not established by a treaty between Lebanon and the UN as originally intended, but by UNSC Resolution 1757 (2007).¹⁶ Lebanon was bound by that resolution despite not ratifying the agreement.

16.4. UNSC Resolution 955 (1994): This resolution established the International Criminal

¹⁶ See STL, *Prosecutor v. Ayyash et al.*, Decision on the Defence Appeals Against the Trial Chamber’s “Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal”, STL-11-01/PT/AC/AR90.1, Appeals Chamber, 24 October 2012, paras. 24-31.

Tribunal for Rwanda (**ICTR**) and obliged all UN Member States, including Rwanda, to cooperate fully with it in accordance with, among other things, the ICTR Statute. Despite originally requesting this international tribunal, Rwanda was the sole vote against the resolution and opposed its creation in the proposed form in the resolution.¹⁷

17. The clearest form of state practice establishing the UNSC's power to make the Rome Statute applicable to Sudan comes from the similar referral of the Libya situation to the ICC in UNSC Resolution 1970 (2011).¹⁸ Although Libya is not, to this day, a party to the Rome Statute, Libya challenged the admissibility of two suspects' cases before the ICC pursuant to arts 17 and 19 of the Rome Statute. Libya's standing to file such challenges were never questioned,¹⁹ nor was it denied the ability to rely on other provisions of the Rome Statute including arts 95,²⁰ 82(1)(a)²¹ and 82(3).²² This shows that all parties – Libya, the ICC and the prosecutor – accepted that the legal effect of the UNSC referral was that the Rome Statute as a whole was made applicable to Libya. Within the terms of the referral, Libya was accorded a *de facto* ICC State Party and derived rights and obligations from the Rome Statute. The same rationale should apply to Sudan.
18. Viewed in this light, the notion that the UNSC imposed the entirety of the Rome Statute upon Sudan via UNSC Resolution 1593 (2005) is not novel. State practice confirms that the UNSC has the power to bind Sudan to the Rome Statute.

¹⁷ UNSC, Report of the 3453rd Meeting of the Security Council, 8 November 1994, S/PV.3453, pp. 13-16.

¹⁸ See UNSC Resolution 1970 (2011), paras 4-8.

¹⁹ See ICC, *Prosecutor v. Gaddafi and Al-Senussi*, Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi, ICC-01/11-01/11-344-Red, Pre-Trial Chamber I, 31 May 2013; ICC, *Prosecutor v. Gaddafi and Al-Senussi*, Decision on the Admissibility of the Case Against Abdullah Al-Senussi, ICC-01/11-01/11-466-Red, Pre-Trial Chamber I, 11 October 2013; ICC, *Prosecutor v. Gaddafi and Al-Senussi*, Judgment on the Appeal of Libya Against the Decision of Pre-Trial Chamber I of 31 May 20103 entitled "Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi", ICC-01/11-01/11-547-Red, Appeals Chamber, 21 May 2014; ICC, *Prosecutor v. Gaddafi and Al-Senussi*, Judgment on the Appeal of Mr Abdullah Al-Senussi Against the Decision of Pre-Trial Chamber I of 11 October 2013 entitled "Decision on the Admissibility of the Case Against Abdullah Al-Senussi", ICC-01/11-01/11-565, Appeals Chamber, 24 July 2014.

²⁰ See ICC, *Prosecutor v. Gaddafi and Al-Senussi*, Decision on the Postponement of the Execution of the Request for Surrender of Saif Al-Islam Gaddafi Pursuant to Article 95 of the Rome Statute, ICC-01/11-01/11-163, Pre-Trial Chamber I, 1 June 2012.

²¹ See ICC, *Prosecutor v. Gaddafi and Al-Senussi*, Judgment on the Appeal of Libya Against the Decision of Pre-Trial Chamber I of 31 May 20103 entitled "Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi", ICC-01/11-01/11-547-Red, Appeals Chamber, 21 May 2014.

²² See ICC, *Prosecutor v. Gaddafi and Al-Senussi*, Decision on the Request for Suspensive Effect and Related Issues, ICC-01/11-01/11-387, Appeals Chamber, 18 July 2013.

No Immunity

19. As the Rome Statute contains comprehensive provisions on all aspects of the criminal process, there was no need for the UNSC itself to address such matters in the resolution. It must thus be presumed that art 27, which removes incumbent Head of State immunity before the ICC, was intended to apply to Sudan,²³ unless a contrary intention was expressed in UNSC Resolution 1593 (2005) itself. That is the only sensible manner to approach a referral under art 13(b).
20. In all prior referrals to the ICC where the UNSC intended to derogate from Rome Statute provisions, it did so expressly. Both the Sudan Referral and the Libya Referral provide that nationals of States who contribute personnel to operations in the territories of Sudan and Libya who are non-States Parties to the Rome Statute are subject to the exclusive jurisdiction of their respective States, unless expressly waived. That expressly excludes the application of art 12(2)(a) of the Rome Statute.²⁴ Similarly, both resolutions provide that none of the expenses incurred by the ICC as a result of the referrals shall be borne by the UN. That is contrary to art 115(b) of the Rome Statute.²⁵
21. UNSC Resolution 1593 is silent with respect to art 27 of the Rome Statute. In the absence of language in the resolution that might have excluded or limited the removal of incumbent Head of State immunity before the ICC, it must be presumed that the UNSC did not intend that result. That reading is supported by the fact that the UNSC has never, as a collective body, protested or expressed opposition to the Prosecutor's request for, and the ICC's issuance of, arrest warrants

²³ See D. Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities' (2009) 7(2) *Journal of International Criminal Justice* 333, at 340-342; J. Foakes, *The Position of Heads of State and Senior Officials in International Law* (Oxford, Oxford University Press, 2014), pp. 201-202; R. Pedretti, *Immunity of Heads of State and State Officials for International Crimes* (Leiden/Boston, Brill Nijhoff, 2015) ("**Pedretti**"), pp. 257-259, 288-291.

²⁴ UNSC Resolution 1593 (2005), para. 6; UNSC Resolution 1970 (2011), para. 6. Article 12(2)(a) of the Rome Statute provides that the ICC has jurisdiction over crimes committed on the territory of the State in question – the nationality of the perpetrator is irrelevant.

²⁵ UNSC Resolution 1593 (2005), para. 7; UNSC Resolution 1970 (2011), para. 8. Article 115(b) of the Rome Statute provides that the ICC's budget shall be provided by States Parties and the UN, "subject to the approval of the [UN] General Assembly, in particular in relation to the expenses incurred due to referrals by the [UNSC]."

against President Al-Bashir.²⁶ Indeed, subsequent UNSC practice shows that it has rejected calls to defer the case and has repeatedly emphasized the importance of ending impunity and the need to bring to justice the perpetrators of crimes in Darfur without citing to any exceptions.²⁷ If the UNSC had not intended for art 27 to apply, it could easily have clarified its resolution.

22. Since UNSC Resolution 1593 did not alter the application of art 27, President Al-Bashir does not enjoy incumbent Head of State immunity before the ICC. Article 98, which states that a waiver of immunity may be required from Third Party States or pursuant to international agreements, is not an impediment to the arrest and surrender of President Al-Bashir to the ICC. Since art 27 binds Sudan as a *de facto* State Party, such a waiver was unnecessary.

IV THE GENOCIDE CONVENTION

23. In addition to the above bases for removing President Al-Bashir's immunity, the provisions of the Genocide Convention, which are binding on Sudan and South Africa,²⁸ also remove his immunity. There was no impediment to South Africa's fulfilment of its obligations under the Rome Statute to arrest and surrender him to the ICC to face the allegations of genocide.
24. Pursuant to the Genocide Convention, persons responsible for genocide shall be punished irrespective of the status of the charged person, even if that person is an incumbent Head of State.²⁹ Proceedings for genocide before international courts were expressly envisaged under art 6, which states that:

persons charged with genocide [...] shall be tried by a competent tribunal of the State in the territory

²⁶ See N. Boschiero, 'The ICC Judicial Finding on Non-Cooperation Against the DRC and No Immunity for Al-Bashir Based on UNSC Resolution 1593' (2015) 13(3) *Journal of International Criminal Justice* 625-653, at 651; M. J. Ventura, 'Escape From Johannesburg? Sudanese President Al-Bashir Visits South Africa, and the Implicit Removal of Head of State Immunity by the UN Security Council in Light of *Al-Jedda*' (2015) 13(5) *Journal of International Criminal Justice* 995-1025, at 1021.

²⁷ See UNSC Resolution 1828 (2008), Preamble (paras 8-9) (merely noting African Union concerns surrounding the ICC Prosecutor's request for a warrant of arrest against the incumbent Sudanese Head of State); UNSC Resolution 1881 (2009), Preamble (para. 8); UNSC Resolution 1935 (2010), Preamble (para. 12); UNSC Resolution 2003 (2011), Preamble (para. 4); UNSC Resolution 2035 (2012), Preamble (para. 16); UNSC Resolution 2063 (2012), Preamble (para. 17); UNSC Resolution 2113 (2013), Preamble (paras 5, 21).

²⁸ Sudan acceded to the Genocide Convention on 13 October 2003 and South Africa on 10 December 1998.

²⁹ Article IV, Genocide Convention: "Persons committing genocide or any of other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rules, public officials or private individuals."

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.

25. The ICC, as a treaty-based international court of potential universal scope, with jurisdiction *ratione materiae* over genocide and created after the Genocide Convention, meets these criteria.³⁰ Furthermore, the ICJ has held in its *Genocide Convention* Judgment that Article VI contains an implicit obligation upon States Parties to cooperate with the international penal tribunal in question, in this case the ICC, including by arresting persons charged with offences enumerated in the Genocide Convention.³¹
26. In relation to the situation in Darfur, an arrest warrant that includes genocide charges has been issued by the ICC against President Al-Bashir.³² The issue in this case turns on whether the ICC's jurisdiction has been accepted in accordance with art 6. In this respect, the acceptance must be based on an instrument, rule, or provision of international law other than the Genocide Convention itself.³³ Here, that instrument is UNSC Resolution 1593, in which the UNSC signaled the acceptance of the ICC's jurisdiction in relation to Darfur on behalf of all UN Member States and obliged Sudan to be bound by its various provisions.³⁴ The consent of all UN Member States to the jurisdiction of the ICC derives from their status as States Parties to the UN Charter, and in particular their acceptance of Article 25, wherein they pledged "*to accept and carry out the decisions of the Security Council*".

³⁰ See also W. A. Schabas, *Genocide in International Law: The Crime of Crimes*, 2nd Edition, (Oxford, Oxford University Press, 2009), p. 455.

³¹ ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007 (**ICJ Genocide Convention Judgment**), para. 443: "For it is certain that once such a court 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." See also D. Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities' (2009) 7(2) *Journal of International Criminal Justice* 333-352, at 349.

³² See ICC, *Prosecutor v. Al Bashir*, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-95, Pre-Trial Chamber I, 12 July 2010 (**ICC Second Genocide Arrest Warrant**), p. 8.

³³ N. Robinson, *The Genocide Convention: A Commentary* (New York, Institute of Jewish Affairs, 1960), pp. 80–82.

³⁴ See also M. Gillett, 'The Call Of Justice: Obligations Under the Genocide Convention to Cooperate with the International Criminal Court' (2012) 23(1) *Criminal Law Forum* 63-96, at 76; Pedretti, p. 203; C. J. Tams, L. Berster and B. Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (Munich/Oxford/Baden-Baden, C.H. Beck/Hart Publishing/Nomos, 2014), pp. 249-251; G. Sluiter, 'Using the Genocide Convention to Strengthen Cooperation with the ICC in the Al Bashir Case' (2010) 8(2) *Journal of International Criminal Justice* 365-382.

27. This line of reasoning is consistent with the ICJ's *Genocide Convention* Judgment. There, the ICJ found that Serbia (Federal Republic of Yugoslavia) had "*accepted the jurisdiction*" of the ICTY on the basis of its membership in the UN.³⁵ This was in addition to, and separate from, Serbia's obligation to cooperate with the ICTY as a condition of the Dayton Peace Accords. Serbia's UN membership was thus held to be a separate way of demonstrating that it had accepted the ICTY's jurisdiction and had the corresponding duty to cooperate with it under art 6 of the Genocide Convention.³⁶
28. The impact of these instruments is that those UN Member States that are parties to the Genocide Convention – including both South Africa and Sudan – are under a positive obligation to arrest persons charged with genocide in connection with events in Darfur and surrender those persons to the ICC. That obligation applies irrespective of whether the detaining State is a State Party to the Rome Statute. These obligations under the Genocide Convention are separate and distinct from obligations under the Rome Statute. While UNSC Resolution 1593 (2005) expressly confirmed that no obligations under the Rome Statute arise for States that are not Parties to that treaty,³⁷ it did not exclude obligations under the Genocide Convention.³⁸ Here, the prosecution of President Al-Bashir derives from ICC warrants, not from South African authorities.³⁹ The Genocide Convention therefore applies.

³⁵ ICJ *Genocide Convention* Judgment, para. 447.

³⁶ ICJ *Genocide Convention* Judgment, para. 447.

³⁷ See UNSC Resolution 1593 (2005), para. 2.

³⁸ Consistent with this position, the Belgian Court of Cassation held that arts 4 and 6 of the Genocide Convention "*establish that jurisdictional immunity is excluded in the case of prosecutions before the tribunals enumerated in Article VI, but is not excluded if the accused is brought before the courts of a third State claiming jurisdiction not provided for by international treaty law.*" Belgium, Court of Cassation (Second Chamber), *Re Sharon and Yaron*, 12 February 2003, 127 ILR 110, at 124. See also ICTY, *Prosecutor v. S. Milošević*, Decision on Preliminary Motions, IT-99-37-PT, Trial Chamber, 8 November 2001, para. 30 (where the ICTY relied on Article IV of the Genocide Convention in rejecting Head of State immunity as a procedural bar to the ICTY's jurisdiction); House of Lords, *Regina v. Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No. 3)*, 24 March 1999, [2000] 1 A.C. 147 at 289 (per Lord Phillips of Worth Matravers) (expressing the view that art 4 constituted an "express agreement or waiver" of immunity *ratione personae*); House of Lords, *R v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (Pinochet No. 1)*, 25 November 1998, [2000] 1 A.C. 61, at 78 (per Lord Slynn of Hadley (dissenting)) (expressing the view that immunity, if it exists, has been removed before an international court on the basis of art 4).

³⁹ See *infra* paras 29-36.

V AUTHORITY AND CHARACTER OF THE ICC

29. The task of arresting ICC suspects cannot be performed by the ICC itself. For ICC arrest warrants to be implemented, the Rome Statute must confer the necessary authority upon ICC States Parties. When state parties act to implement ICC arrest warrants in terms of their treaty obligations, they act not only as state parties, but with the authority and character of the ICC. They act in order to give effect to the joint mandate conferred by all state parties on the ICC, and on one another to give effect to the goals of the Rome Statute – “*to put an end to impunity*” and to ensure that “*the most serious crimes of concern to the international community as a whole must not go unpunished*”.⁴⁰
30. In this case, South Africa was endowed with the ICC’s authority to arrest President Al-Bashir. Since he does not enjoy immunity before the ICC, he also does not enjoy immunity in South Africa when it acts pursuant to ICC arrest warrants. South Africa was not impeded from arresting President Al-Bashir and effecting his surrender to the ICC.
31. The ICC has no police force. To enforce its arrest warrants, it relies, by design, on ICC States Parties to arrest and transfer suspects. Despite using the words “*cooperation*” and “*request*”, the Rome Statute entails positive obligations for ICC State Parties, like South Africa, to cooperate with the ICC to ensure the prosecution of those suspected of international crimes. When South Africa acts in compliance with an international obligation arising from her membership of an international organization, in this case the ICC, it is required to take all appropriate measures to ensure their fulfilment.⁴¹
32. The Rome Statute reflects a clear intention to empower State Parties to effect the arrest and

⁴⁰ Rome Statute, preamble.

⁴¹ As put by the European Court of Justice, in the context of European Union law, “*the intervention of the Member States constituted no more than the implementation of the general obligation expressed in Article 5 of the Treaty, whereby Member States are required to take all appropriate measures to ensure fulfilment of the obligations resulting from action taken by the institutions of the Community and, in general, to facilitate the achievement of the Community’s tasks.*” ECJ, *Scheer v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Judgement, Case 30/70, 17 December 1970, 1198-1211, at 1206.

surrender of suspects.⁴² This empowerment must confer to ICC States Parties the necessary authority of the ICC in order enable the fulfilment of Rome Statute obligations.⁴³ It is well recognized that “[a]s a rule, international organizations may be considered to be entitled to delegate tasks to all member states, each being obliged to perform them within their own territory.”⁴⁴ The ICC has recognized such delegation, since it has held that “when cooperating with this Court and therefore acting on its behalf, States Parties are instruments for the enforcement of the *jus puniendi* of the international community whose exercise has been entrusted to this Court when States have failed to prosecute those responsible for the crimes within its jurisdiction”⁴⁵

33. A construction of the Rome Statute that would prevent ICC States Parties from arresting ICC suspects by virtue of their position – despite the fact that the suspect enjoys no immunity before the ICC – “would be contrary to one of the fundamental principles of interpretation of treaties, consistently upheld by international jurisprudence, namely that of effectiveness.”⁴⁶ Therefore, Rome Statute must be construed so as to “realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties.”⁴⁷ This means that the ICC’s authority must be

⁴² See Article 89(1), Rome Statute. See also Preamble of the ICC Act, which states that “the Republic of South Africa is committed to bringing person who commit such atrocities to justice [...] pursuant to its international obligations to do so when the Republic became party to the Rome Statute”.

⁴³ See V. Oosterveld, M. Perry and J. McManus, ‘The Cooperation of States with the International Criminal Court’ (2001) 25(3) *Fordham International Law Journal* 767-839, at 770 (noting that “[u]nder Article 89(1), the Court can transmit a request for the arrest and surrender of a person, together with material supporting that request, to a State on the territory of which that person may be found. The Statute is clear as to the obligation of States Parties upon receiving such a request: they must comply.”). See also H. Zhou, ‘The Enforcement of Arrest Warrants by International Forces: From the ICTY to the ICC’ (2006) 4(2) *Journal of International Criminal Justice* 202-218, at 214 (noting that “the provisions in the ICC Statute clearly confer not only the authority but also the obligation upon individual States Parties, and sometimes even non-States Parties to the Rome Treaty, to cooperate with the Court, as well as a judicial power to issue binding requests for cooperation.”).

⁴⁴ H. G. Schermers and N. M. Blokker, *International Institutional Law: Unity within Diversity*, 5th Edition (Leiden/Boston, Martinus Nijhoff Publishers, 2011), p. 179.

⁴⁵ ICC, *Prosecutor v. Al Bashir*, Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-139-Corr, Pre-Trial Chamber I, 13 December 2011 (“**ICC Malawi Cooperation Decision**”), para. 46.

⁴⁶ ICJ, *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgement, 3 February 1994, para. 51(citing various ICJ and Permanent Court of International Justice cases as examples). See also ICJ, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase)*, Advisory Opinion, 18 July 1950, p. 229: (“[t]he principle of interpretation expressed in the maxim: *Ut res magis valeat quam pereat*, often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the Peace Treaties a meaning which[] [...] would be contrary to their letter and spirit.”); Article 31(1) of the Vienna Convention on the Law of Treaties (1969) (which provides that treaties must be interpreted in good faith in the light of their object and purpose).

⁴⁷ ECtHR, *Wemhoff v. Germany*, Judgment, Application No. 2122/64, Court (Chamber), 27 June 1968, p. 19. See also ECtHR, *Mamatkulov and Askarov v. Turkey*, Judgment, Application Nos. 46827/99 and 46951/99, Grand Chamber, 4 February 2005, para 123.

transferred to an ICC State Party in order to allow it to arrest and surrender suspects and to not impede the ICC “*from exercising its functions and powers*”.⁴⁸

34. Consequently, when South African authorities act pursuant to ICC arrest warrants, they are not enforcing the decisions of the State, but those of the ICC. Since the Rome Statute, and the ICC’s will, must be rendered effective, this means that they are endowed not only with the authority to arrest and surrender ICC suspects, but also, in this case, endowed with the authority of the ICC as it concerns the absence of incumbent Head of State immunity for President Al-Bashir.
35. The position is compatible with art 98(1) of the Rome Statute, which recognizes that national courts may be also bound by other international law obligations in respect to diplomatic immunities. This provision acknowledges that ICC States Parties may be subject to conflicting obligations under international law. However, the Rome Statute also provides for a mechanism that: (1) determines whether a conflict exist; and (2) where a conflict exists, explains how to resolve it (i.e. seek a waiver of immunity from the third State).
36. As regards (1), the mechanism established by the Rome Statute is for the ICC to determine whether a conflict exists for the ICC State Party.⁴⁹ This solution allows the ICC to take into consideration the current state and development of international law in the area of immunities and international crimes. It also requires the ICC to consider whether a third State has waived immunity. In the present case, the ICC has clearly determined that no conflict exists for South Africa vis-à-vis President Al-Bashir.⁵⁰ As an ICC State Party, South Africa is bound by those

⁴⁸ ICC *Malawi Cooperation* Decision, para. 47.

⁴⁹ This is further regulated in Rule 195(1) of the ICC Rules of Procedure and Evidence, which requires the State Party concerned to provide the ICC with “any information relevant to assist the [ICC] in the application of article 98.” As put by the ICC, “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 which provides that [a]ny dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.” ICC, *Prosecutor v. Al Bashir*, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court, ICC-02/05-01/09-195, Pre-Trial Chamber II, 9 April 2014 (“**ICC DRC Cooperation Decision**”), para 16. See also ICC, *Prosecutor v. Al Bashir*, Decision Pursuant to Article 87(7) of the Rome Statute on the Refusal of the Republic of Chad to comply with Cooperation Requests issued by the Court with respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-140- tENG, Pre-Trial Chamber I, 13 December 2011 (“**ICC Chad Cooperation Decision**”), para. 10; ICC *Malawi Cooperation* Decision, para. 11.

⁵⁰ The ICC has determined that “customary international law creates an exception to Head of State immunity when international courts seek a Head of State’s arrest for the commission of international crimes [...] therefore, article 98(1) of the Statute does not apply”: ICC

determinations.

VI THE TORTURE CONVENTION

37. As detailed above, President Al-Bashir does not benefit from Head of State immunity under international law and, consequently, also does not benefit from that immunity under South African law.⁵¹ Further, warrants of arrest have been issued against him by the ICC for torture as a crime against humanity and for serious bodily or mental harm (which includes torture) as an underlying act of genocide.⁵² On these facts, not only was South Africa able to arrest President Al-Bashir, but it was also under a positive obligation, pursuant to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) (**Torture Convention**),⁵³ to do so. As this Court held in the *Zimbabwe Torture Docket* case, South Africa could have fulfilled its Torture Convention obligations by delegating the investigation and prosecution of President Al-Bashir to the ICC.⁵⁴ If South Africa was not going to prosecute President Al-Bashir itself, it should have surrendered him to the ICC for that purpose.

Malawi Cooperation Decision, para. 43; ICC *Chad Cooperation* Decision, paras 13-14. The ICC has also determined that the “cooperation of that third State [Sudan] for the waiver of the immunity”, as required by Article 98(1) of the Rome Statute, had been achieved via the language of paragraph 2 of UNSC Resolution 1593 (2005). By virtue of that paragraph, “the [UN]SC implicitly waived the immunities granted to Omar Al Bashir under international law and attached to his position as a Head of State”: ICC *DRC Cooperation* Decision, para 29; ICC, *Prosecutor v. Al-Bashir*, Decision on the Non-Compliance by the Republic of Djibouti with the Request to Arrest and Surrender Omar Al-Bashir to the Court and Referring the Matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute, ICC-02/05-01/09-266, Pre-Trial Chamber II, 11 July 2016, paras 11-13; ICC, *Prosecutor v. Al-Bashir*, Decision on the Non-Compliance by the Republic of Uganda with the Request to Arrest and Surrender Omar Al-Bashir to the Court and Referring the Matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute, ICC-02/05-01/09-267, Pre-Trial Chamber II, 11 July 2016, paras 11-13.

⁵¹ It should also be noted that section 4(3)(a) of the Prevention and Combating of Torture of Persons Act 13 of 2013 (**Torture Act**) may appear to remove incumbent Head of State immunity under South African law in so far as torture is concerned. The present argument, however, relies on that immunity having been removed by international law.

⁵² See ICC, *Prosecutor v. Al-Bashir*, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-01, Pre-Trial Chamber I, 4 March 2009, p. 8; ICC Second Genocide Arrest Warrant, p. 8; ICC, *Prosecutor v. Al-Bashir*, Second Decision on the Prosecution’s Application for a Warrant of Arrest, ICC-02/05-01/09-94, Pre-Trial Chamber I, 12 July 2010, para. 30. Further, for the crime of genocide under Article 6(b) of the Rome Statute, “serious bodily or mental harm” “may include [...] acts of torture”: ICC, Elements of Crimes, Article 6(b), Element 1 and fn. 3, respectively. This underlying conduct falls within the definition of torture in art 1(1) Torture Convention and, in any event, as art 1(2) states, the definition in art 1(1) is “without prejudice to any international instrument or national legislation which does or may contain provisions of wider application”.

⁵³ South Africa signed and ratified the Torture Convention on 29 January 1993 and 10 December 1998, respectively.

⁵⁴ *National Commissioner of the South African Police Service v. Southern African Human Rights Litigation Centre* [2014] ZACC 30; 2015 (1) SA 315 (CC); 2015 (1) SACR 255 (CC); 2014 (12) BCLR 1428 (CC) (**Zimbabwe Torture Docket Judgment**), para 38.

38. Under the Torture Convention, South Africa had positive obligations to arrest President Al-Bashir (art 6(1)), investigate the allegations of torture made against him (art 6(2)) and consequently submit him for prosecution either in her own courts (art 7(1))⁵⁵ or before the ICC.⁵⁶
39. South Africa has recently domesticated its international obligations under the Torture Convention in the Prevention and Combating of Torture of Persons Act 13 of 2013 (**Torture Act**). Sections 4 and 6 of the Torture Act establish domestic jurisdiction over the crime of torture where the alleged perpetrator is present on South African territory.⁵⁷ However, as the ICJ has stated, “[i]t is not sufficient [...] for a State party to the [Torture] Convention to have adopted all the legislative measures required for its implementation; it must also exercise its jurisdiction over any act of torture which is at issue”.⁵⁸
40. In the absence of incumbent Head of State immunity, and pursuant to art 6 (1) of the Torture Convention, South Africa was under an obligation, as soon as President Al-Bashir was identified as being on South African territory, to take him into custody (or take other legal measures to ensure his presence) and “*immediately make a preliminary enquiry into the facts*” regarding his alleged responsibility for torture. Here, the ICC’s arrest warrants raised reasonable grounds to believe that this was the case.⁵⁹
41. In addition, and in accordance with ICJ jurisprudence,⁶⁰ South Africa was under an obligation to seek the assistance of other entities with its preliminary enquiry into the facts, such as the State on whose territory the alleged crimes were committed or, in this case, the ICC itself (in light of the latter’s investigation and its arrest warrants).

⁵⁵ *Ibid.*

⁵⁶ See ICJ, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, 20 July 2012 (“**ICJ Habré Judgment**”), para. 74.

⁵⁷ See *CC Zimbabwe Torture Docket* Judgment, para. 39.

⁵⁸ ICJ *Habré* Judgment, para. 85.

⁵⁹ See ICJ *Habré* Judgment, paras 86, 88.

⁶⁰ ICJ *Habré* Judgment, para. 83.

42. Moreover, art 7(1) of the Torture Convention imposes on South Africa a positive obligation to submit President Al-Bashir for prosecution if he is found in its territory and he is not extradited to another State.⁶¹ Both the ICJ and the Committee Against Torture have made clear that extradition to another State merely arises as an option in the event that a request for extradition is made by another State; in the absence of such a request, or if such a request is not granted by the arresting State, the latter continues to have a positive obligation to submit the case for prosecution.⁶² In this case, and given that South Africa failed to take the first step of arresting President Al-Bashir, it is unclear whether there would have been any opportunity to extradite him to be tried by another State with jurisdiction over his alleged conduct.⁶³ In any event, the fact remains that no such requests for extradition were made by other States. Consequently, South Africa was under an obligation to submit President Al-Bashir for prosecution.
43. In deciding whether to prosecute, Article 7(2) of the Torture Convention stipulates that such a decision shall be made “*in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.*” Since South Africa would be exercising its universal jurisdiction in such a case, this Court’s *Zimbabwe Torture Docket* judgment must apply and the decision to prosecute should adhere to the principles of subsidiarity and practicability.⁶⁴
44. Pursuant to the principles in the *Zimbabwe Torture Docket* judgment, South Africa could have fulfilled its Torture Convention obligations by delegating the investigation and prosecution of President Al-Bashir to the ICC. While South Africa has a substantial connection to the crimes, in light of their international and heinous nature,⁶⁵ and it is clear that Sudan is not willing to

⁶¹ The *amici curiae* also note that South Africa, pursuant to Article 6(4) of the Torture Convention, is under an obligation, after arresting the person in question, to notify States who may have jurisdiction over the crimes in question under Article 5(1) of the Torture Convention. This would allow these States the opportunity to seek the extradition of that person.

⁶² ICJ *Habré* Judgment, paras. 94-95; Committee Against Torture, *Suleymane Guengueng et al. v. Senegal*, Comm. No. 181/2001, 17 May 2006, para. 9.7.

⁶³ An argument could also be made that President Al-Bashir’s transfer to the ICC, as submitted here, amounted to extradition, or something analogous to it, under the Torture Convention.

⁶⁴ CC *Zimbabwe Torture Docket* Judgment, para. 61.

⁶⁵ CC *Zimbabwe Torture Docket* Judgment, para. 78.

investigate and prosecute the allegations itself, the principle of practicability in particular favours delegation to the ICC. The ICC has the capability and the required expertise to prosecute the crimes, and already possesses the fruits of its investigations. In this case, South Africa need not investigate anew a situation outside of its territory. Consequently, the sub-principle of non-intervention in the affairs of another country would also be observed.⁶⁶ In order for the ICC to exercise its jurisdiction, South Africa should have arrested and surrendered President Al-Bashir.

VII ACCESS TO JUSTICE AND THE LACK OF ALTERNATIVE FORA

45. Both under international law and under the Constitution, South Africa has committed to give effect to the right of access to justice — a *jus cogens* norm⁶⁷ — to “everyone”.⁶⁸ In *Government of the Republic of South Africa v Fick*, this Court held that the right of access to courts would be “hollow” if the orders of the Southern African Development Community Tribunal were not made effective domestically. It reasoned that a generous interpretation of section 34 was called for, in particular in respect of orders “stemming from human rights ... violations provided for in treaties that bind South Africa”.)
46. The right of access to court must be assessed against the unwillingness or inability to try President Al Bashir before Sudanese courts, and the refusal of other states to surrender him to the ICC. It must also be analysed in light of the reality that there are no regional options available. The African Union (AU) Assembly of Heads of State and Government has foreclosed the possibility

⁶⁶ *CC Zimbabwe Torture Docket* Judgment, para. 61.

⁶⁷ See Inter-American Court of Human Rights, *Goiburú et al v Paraguay*, Judgment of 22 September 2006, Series C, No. 153 at para 131 (holding that a State is obliged to adopt all necessary measures to ensure that human rights violations resulting in crimes “do not remain unpunished, either by exercising their jurisdiction to apply their domestic law and international law to prosecute and, when applicable, punish those responsible, or by collaborating with other States that do so or attempt to do so”). See also STL, Order Assigning Matter to Pre-Trial Judge, CH/PRES/2010/01, President, 15 April 2010 at para 29 (per Judge Cassese). While the right is not absolute, and has been held to be subject to personal or functional immunities, any such claim has been waived – as submitted above – in this case.

⁶⁸ Section 34 of the Constitution. See also *Government of the Republic of Zimbabwe v Fick and Others* [2013] ZACC 22; 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC) at para 62 (where the Constitutional Court found that SADC Tribunal orders could be enforced in South Africa on the basis that the right of access to courts under section 34 would be rendered “hollow” if the orders were not made effective, and that a generous interpretation of section 34 was called for, in particular in respect of orders “stemming from human rights ... violations provided for in treaties that bind South Africa”).

of an AU-supported prosecution of any sitting heads of state.⁶⁹ At the institutional level, neither the AU's current highest judicial body, the African Court on Human and Peoples' Rights (which does not have criminal jurisdiction), nor the envisaged African Court of Justice and Human and Peoples' Rights with international criminal jurisdiction (pursuant to a protocol which has yet to enter into force), allows or would allow for the prosecution of President Al Bashir relating to events in Darfur.⁷⁰

47. As a result, the only forum with international criminal jurisdiction where the victims of the atrocities in Darfur may access justice is the ICC. By failing to cooperate with the ICC, South Africa has effectively foreclosed the right to criminal redress of the victims. South Africa has committed a *prima facie* violation of the right of access to justice of victims of crimes allegedly perpetrated by President Al Bashir in Darfur, Sudan. To the extent there could be any doubt about President Al-Bashir's immunity under international law (and we submit there is none), South Africa's obligation to ensure access to justice for the victims requires a finding that South Africa was entitled and required to surrender him to the ICC.



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⁶⁹ See AU Summit Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Assembly/AU/Dec 245(XIII), July 2009; Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court (ICC), Doc Assembly/AU/Dec.397 (29–30 January 2012) (AU Dec. 397) (declaring that it would continue not to co-operate in arresting President Al Bashir).

⁷⁰ See Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (2014) (Malabo Protocol), Article 46A *bis* (providing immunity to incumbent Heads of State); Article 46E (providing for criminal jurisdiction *after* the protocol's entry into force, thereby barring the prosecution of Darfur-related crimes).

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3. ICC, *Prosecutor v. Al Bashir, Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-139-Corr, Pre-Trial Chamber I, 13 December 2011 (“ICC Malawi Cooperation Decision”).
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