

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 75/16

In the matter between:

THE 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 Eleventh Applicant

DIRECTOR OF PRIORITY CRIMES INVESTIGATION UNIT Twelfth Applicant

and

THE SOUTHERN AFRICAN LITIGATION CENTRE Respondent

and

**PROFESSOR JOHN DUGARD AND PROFESSOR
GUÈNAËL 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*

FOURTH AMICUS CURIAE'S HEADS OF ARGUMENT

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INTRODUCTION

1. The central issue in this appeal is whether the State had a duty to arrest President Al-Bashir of the Republic of Sudan ("**Sudan**") when he visited South Africa in June 2015. While the Helen Suzman Foundation ("**the HSF**") agrees that the State had a duty to arrest President Al-Bashir in terms of the Rome Statute (to which South Africa is a signatory) and the Implementation Act (which domesticates our Statute obligations);¹ the HSF submits that the Constitution, as the source of legitimacy for State conduct, created an independent obligation on the State to make the arrest, which is relevant to a proper interpretation of the DIPA.²
2. The Government argues that the State granted President Al-Bashir immunity in terms of section 4(1)(a) of the DIPA, which codifies customary international law as part of our domestic statutory law and confers on heads of state absolute immunity from the criminal and civil jurisdiction of the courts of the Republic.³
3. Consistent with the norms of constitutional supremacy, the HSF submits:
 - 3.1 The plain meaning of the section does not support the Government's interpretation. The regime underscores, rather than detracts from, the obligation to arrest;
 - 3.2 In any event, to the extent that section 4(1)(a) of the DIPA purports to afford absolute immunity to heads of state who *prima facie* appear to have committed crimes against humanity, war crimes or genocide, it must be read consistently with and to give best effect to the Constitution. The Constitution cannot be read to legitimise such serious and abhorrent crimes, by providing blanket immunity from prosecution or immunity from surrender to the International Criminal Court ("**ICC**");
 - 3.3 The fundamental nature of these crimes is recognised in numerous international conventions. It is pertinent that Sudan has itself recognised this fact by acceding to the Genocide Convention⁴ in October 2003. Sudan's accession thereto has the effect, in terms of section 8 of the DIPA, of waiving any immunity that President Al-Bashir may otherwise

¹ The Rome Statute of the International Criminal Court; Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.

² Diplomatic Immunities and Privileges Act 37 of 2001.

³ Applicants' submissions at para [63].

⁴ Convention on the Prevention and Punishment of the Crime of Genocide.

have had by virtue of section 4(1)(a) or any other provision of the DIPA;

- 3.4 Section 7(1) of the Implementation Act affords the ICC the "*rights and privileges of a South African court of law in the Republic as may be necessary to enable it to perform its functions*". Therefore, the two arrest warrants for President Al-Bashir issued by the ICC, and its decision in which it found that South Africa had an obligation to arrest President Al-Bashir and that his immunity had been removed by the Security Council's referral,⁵ cannot be ignored by the State. Section 165(4) enjoins "*[o]rgans of state ... must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of courts*". For this reason, section 165(5) provides that "*[a]n order or decision issued by a court binds all persons to whom and organs of state to which it applies*". By virtue of its special status conferred by section 7(1), this applies *a fortiori* with respect to a decision of the ICC.
4. Ultimately, the HSF will demonstrate that the obligation to arrest President Al-Bashir is grounded primarily in, *inter alia*, the State's constitutional and domestic obligations.

SECTION 4(1)(a) OF THE DIPA

5. The Government relies on section 4(1) of the DIPA to argue that the State could not arrest President Al-Bashir. Section 4(1) provides:

"A head of state is immune from the criminal and civil jurisdiction of the courts of the Republic, and enjoys such privileges as:

- (a) heads of state enjoy in accordance with the rules of customary international law;*
- (b) are provided for in any agreement entered into with a state or government whereby immunities and privileges are conferred upon such a head of state; or*
- (c) may be conferred on such head of state by virtue of section 7(2)."*

6. The interpretation that section 4(1)(a) of the DIPA codifies absolute immunity cannot be sustained.

- 6.1 First, on a plain reading, section 4(1) does not provide heads of state absolute immunity. The introductory language of section 4(1) merely defines the immunities and privileges

⁵ 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 President al-Bashir, of 13 June 2015. Record Vol 1 pgs 43-48.

afforded by the provision, while paragraphs (a)-(c) set out the jurisdictional requirements to enjoy these immunities and privileges. Heads of state cannot have absolute immunity by virtue of the introductory language of the first clause of section 4(1), as the paragraphs that follow would be redundant. Interpretation by recourse to redundancy is generally repugnant to coherent interpretation.⁶

- 6.2 Secondly, section 4(1)(a), which refers specifically to immunities and privileges heads of state enjoy in accordance with the rules of customary international law, must necessarily be read together with section 232 of the Constitution.
7. Section 232 provides that '*[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament*'.⁷ Accordingly, only constitutionally compliant customary international law can be law in the Republic, whether domesticated or not. Importantly, if domesticated, such customary international law would be liable to a further test for constitutionality like any other legislation with a domestic genesis. Thus, the requirement of consistency under section 232 must be met both as to the Constitution *and* Acts of Parliament. Any reading of section 4(1)(a) must, therefore, limit the immunities and privileges conferred by customary international law so as to be consistent with our Constitution. Therefore, the only constitutionally compliant interpretation of section 4(1)(a), which is reasonable, is that, consistent with section 232, section 4 incorporates and domesticates the rules of customary international in respect of immunities and privileges only insofar as these rules are consistent with the Constitution.
8. Any immunities or privileges thus imported as part of customary international law, through section 4(1) of the DIPA, must be immunities or privileges consistent with our Constitution. This reading down would be in keeping with the rule of statutory interpretation requiring courts, where the wording of a statute permits it, to prefer a constitutionally compliant interpretation of

⁶ *Wellworths Bazaars Ltd v Chandlers Ltd* 1947 (2) SA 37 (A), 43.

⁷ Emphasis added.

legislation over ones that would render the legislation invalid.⁸

9. When section 4(1)(a) of the DIPA is read together with section 232 of the Constitution, even if the Government is correct that President Al-Bashir has immunity under customary international law, this is not the end of the matter. The State can only rely on the statute to afford President Al-Bashir immunity if the immunity is consistent with the Constitution (and there has been no waiver of immunity).
10. The HSF's case is that no rule may consistently with our Constitution afford any person, including heads of state, absolute immunity from criminal prosecution when that person appears *prima facie* to be guilty of crimes against humanity, war crimes or genocide.
11. Our Constitution views such conduct, and the consequent lack of accountability for such conduct, as repugnant to our underlying constitutional values. It specifically obliges the State, as the primary agent of ensuring that the Constitution remains the supreme law of the Republic, to act where necessary. Any other interpretation would do violence to our constitutional values.
12. In consequence, section 4(1)(a) should be interpreted to limit the rules of customary international law, to the extent that such rules are inconsistent with the Constitution.

CUSTOMARY INTERNATIONAL LAW AND SECTION 232

13. Two areas of customary international law are implicated when a government purports to afford immunity to a head of state who, *prima facie*, appears to have committed crimes against humanity, war crimes, and genocide (as, for instance, is the case when the ICC, on consideration of the evidence, issues an arrest warrant in respect of that head of state). The first is the concept of international crimes. We submit that these crimes are crimes in South Africa by virtue of section 232 of the Constitution;⁹ fundamental values in the Constitution support this conclusion.

⁸ See *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO 2001 (1) SA 545 (CC)* at paras [21]-[25].

⁹ *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre 2015 (1) SA 315 (CC) ("SALC")* at paras [33] and [37].

The second is the doctrine of immunity. If any doctrine of absolute immunity exists, it does not withstand constitutional scrutiny.

i. *International crimes against humanity, genocide and war crimes*

14. The Constitution imposes special obligations on the State in respect of international crimes. This is particularly the case having regard to the nature of crimes against humanity, genocide and war crimes. Crimes of this type violate the Constitution and the State has the power and duty to detain, arrest and, in appropriate circumstances, prosecute perpetrators of these crimes.
15. International crimes are crimes under customary international law and are thus crimes in South Africa. Indeed, the recognition of, and protection against, international crimes lies at the very core of our constitutional project, which is built on respect for human rights and a culture of justification and accountability. The Constitution is the embodiment of the desire of all South Africans to move away from a past characterised by authoritarianism and systematic subjugation of the majority of South Africa's population as a result of apartheid, which is an international crime.¹⁰

ii. *The doctrine of immunity*

16. Heads of state are afforded immunity under customary international law in order to facilitate efficient cooperation, communication, and dealings between states, for the sake of promoting various economic, social, cultural and political interests.¹¹

¹⁰ In *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another* 2002 (3) SA 265 (CC), this Court held (in a minority judgment) that the overall intention of the Constitution to foster a culture of justification. As stated in Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 31 at 32:

'If the new Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification — a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion.'

This Court quoted this passage with approval in *South African Police Service v Solidarity OBO Barnard* 2014 (6) SA 123 (CC) at fn 220.

¹¹ See James Crawford (ed), *Brownlie's Principles of Public International Law* (8ed, 2012) 488-9; Chanka Wickremasinghe, 'Immunities Enjoyed by Officials of States and International Organizations', in M. Evans (ed.), *International Law* (4ed, 2014) at 379-383, 392-394; D Akande and S Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' *Eur J Int Law* (2010) 21(4) 815-52, 818; and Michael Tunks, 'Diplomats or

17. According to the International Court of Justice in the *Arrest Warrant Case*,¹² immunity is not granted for the "*personal benefit*" of heads of state. Rather, it is granted "*to ensure the effective performance of their functions on behalf of their respective States*". These immunity rules exist, therefore, to allow the head of state to act as a representative of the state "*in international negotiations and intergovernmental meetings*".
18. However, the essence of this pragmatic¹³ justification is to cultivate the cooperation and communication that fosters the community of nations, not the protection of the individual. A head of state charged with international crimes is charged with undermining the very fabric of the community of nations. Therefore, particularly where the ICC has issued an arrest warrant for a head of state so that he can stand trial for the commission of international crimes, the pragmatic justification for immunity no longer applies in these circumstances. Thus, to the extent it were to be found that the doctrine under customary international law provides for immunity for crimes against humanity, war crimes and genocide, the recognition of that immunity to preclude arrest and surrender of a head of state to stand trial before the ICC, goes beyond the bounds of what the Constitution recognises. This is so because the interests underpinning the doctrine are not permissibly served by immunising actors against whom there is a *prima facie* case that they are perpetrators of international crimes from trial before the ICC – especially when it is exercising jurisdiction in terms of a Security Council resolution referring the situation to the Court in order to ensure international peace and security. In any event, the pragmatic justification can never operate so as to extinguish the legal obligations to which the State is subject.
19. Acts of the legislature and the national executive are not immunised from the discipline and control of the Constitution. Even matters such as foreign policy and foreign relations are subject to constitutional control. In *Kaunda* Chaskalson CJ for the majority held that:

Defendants? Defining the Future of Head-of-State Immunity' (2002) 52 *Duke LJ* 651-82, 654-7.

¹² *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (2002) ICJ Rep 3.

¹³ Crawford *ibid* at 488.

*"Decisions made by the government in these matters are subject to constitutional control. Courts required to deal with such matters will, however, give particular weight to the government's special responsibility for and particular expertise in foreign affairs, and the wide discretion that it must have in determining how best to deal with such matters."*¹⁴

20. O'Regan J held¹⁵ that *"the executive is bound by the four corners of the Constitution"* and is obliged to act consistently with the obligations imposed upon it by the Bill of Rights *"whenever it may act."*¹⁶ In the same vein, Ngcobo J held¹⁷ that where the government has a constitutional duty to consider a request for diplomatic protection and failed to do so, *"it would be appropriate for a Court to make a mandatory order directing the government to give due consideration to the request. If this amounts to an intrusion into the conduct of foreign policy, it is an intrusion mandated by the Constitution itself."*¹⁸
21. Any law, policy or administrative action that recognises President Al-Bashir's immunity must therefore be subject to the Constitution. The separation of powers doctrine mandates, rather than prohibits, limited intrusion by the judiciary into the executive branch of government in these circumstances,¹⁹ even if it is merely to mark the outer boundaries of the executive's exercise of public power. The Constitution is the source of authority for all State conduct, including in relation to matters which have some foreign policy elements.
22. The nub of the HSF's submissions is that a rule that affords heads of state absolute immunity from criminal prosecution when they *prima facie* appear to have committed crimes against humanity, war crimes or genocide (as is the case when the ICC seeks their arrest and surrender to stand trial) transgresses the limits the Constitution places on legislation and customary international law.

¹⁴ *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC) ("*Kaunda*") at para [144].

¹⁵ In a separate judgment.

¹⁶ *Ibid* at para [228].

¹⁷ In a separate judgment.

¹⁸ *Ibid* at para [193].

¹⁹ See *Glenister v President of the Republic of South Africa and others* 2009 (2) BCLR 136 (CC) at para [33].

THE LIMITS OF THE DOCTRINE OF IMMUNITY AND THE ENORMOUS SIGNIFICANCE OF CRIMES AGAINST HUMANITY

23. In *Kaunda O'Regan J* held²⁰ that:

*"[O]ur Constitution recognises and asserts that, after decades of isolation, South Africa is now a member of the community of nations, and a bearer of obligations and responsibilities in terms of international law. The Preamble of our Constitution states that the Constitution is adopted as the supreme law of the Republic so as to, amongst other things, 'build a united and democratic South Africa able to take its rightful place as a sovereign State in the family of nations.'"*²¹

24. In order for the rules pertaining to immunity to be consistent with the Constitution, it must affirm our national identity and membership within the community of nations as envisaged by the Preamble to the Constitution.

25. Crimes against humanity, war crimes and genocide, and failing to arrest a person charged with such crimes, violate not only the norms and rules of international law, but also the Constitution:

25.1 The South African constitutional democratic state was born out of negotiations that brought to an end a crime against humanity: apartheid. Its existence is essentially bound up with its rejection of international crimes of this nature that undermine our existence as a community that is "*founded on [the value of] human dignity*" and is "*united in [the] diversity*" of its people;²²

25.2 It follows, then, that failing to take action with respect to these crimes is an affront to the dignity or humanity of South Africans. They entail a violation of section 10 of the Constitution;

25.3 The presence of President Al-Bashir in South Africa violates sections 12(1)(c), 12(1)(d) and 12(2) of the Constitution, for it constitutes a threat to the physical and/or psychological integrity of all persons living or residing in South Africa.²³ This threat is heightened in respect of every person who was subjected to and/or escaped persecution by the person

²⁰ In her separate judgment.

²¹ *Kaunda supra* note at para [222].

²² Sections (1)(a) and the Preamble of the Constitution.

²³ *Law Society of South Africa v Minister for Transport* 2011 (1) SA 400 (CC) at paras [57]-[67].

accused of international crimes, as well as all relatives and friends of a persecuted person, many of whom would have fled to South Africa as a human rights haven.

25.4 Allowing President Al-Bashir to escape arrest and detention also increases the risk of further international crimes being committed (all of which would also be recognised as crimes in South Africa). The State has a duty to prevent crimes from being perpetrated and has a positive duty to take all steps necessary to prevent this.²⁴ It is noteworthy in this regard that the ICC held, in the Second (Genocide) Arrest Warrant in respect of President Al-Bashir that, "*the arrest of Omar Al Bashir appears necessary at this stage to ensure ... (iii) that he will not continue with the commission of the above-mentioned crimes [being crimes of genocide]*"²⁵ (emphasis added);

25.5 Perpetrators threaten international peace and security, and they violate the shared norms on which we interact with other nations of the world. Upholding these shared norms are foundational to the South African State. This is especially the case where its fulfilment of these obligations act as a deterrent to the person to be arrested and other alleged international crimes perpetrators. Importantly, in the present matter, as set out in the Security Council resolution (1593) referring the situation in Sudan to the Prosecutor of the ICC, and requiring the full cooperation of Sudan, the Security Council, as it was required to under Article 39 of the UN Charter, made the following determination: "*that the situation in Sudan continues to constitute a threat to international peace and security.*" Investigation and prosecution by the ICC of the international crimes being committed in Sudan is the manner that the Security Council, acting on behalf of all UN member states,²⁶ determined that this threat to international peace and security should be addressed.

²⁴ *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC); *Minister of Safety & Security v Carmichele* 2004 (3) SA 305 (SCA).

²⁵ Available at https://www.icc-cpi.int/CourtRecords/CR2010_04825.PDF. Article 58(1)(b) makes clear that the ICC may only issue an arrest warrant on the ground that it is necessary "*to prevent the person from continuing with the commission of that crime*", "*where applicable*" – in other words, when the ICC makes a positive finding that this ground applies in the particular case.

²⁶ Article 24(1) of the UN Charter provides that "*In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.*"

- 25.6 Failing to arrest a person wanted for committing genocide, crimes against humanity and war crimes, such as President Al-Bashir, in the face of two arrest warrants issued by the ICC (not to mention a binding decision²⁷ by the ICC that South Africa is under an obligation to arrest President Al-Bashir) violates the rule of law, which in terms of section 1(c) is one of the founding values of the Constitution. Ensuring that perpetrators of international crimes are brought to justice is a recognised incidence of the rule of law.²⁸
26. Crimes against humanity, genocide and war crimes are unique.²⁹ Unlike ordinary crimes, crimes against humanity, genocide and war crimes do not only harm the immediate victims. They are collective crimes that harm us all. The nature of the 'us' that they harm is what distinguishes them from ordinary crimes. Whereas most crimes harm a particular polity, crimes against humanity, war crimes and genocide harm the dignity of the international community as a whole, South Africa as a nation, and each and every South African. Thus, regardless of who commits a crime of this nature, where they commit it, or against whom they commit it, the crime harms all of us. The harm is not dependent on particular political ties, or community affiliation. They harm all people, everywhere.
27. The exceptionality of these crimes is obvious and imposes especial obligations on the State. As this Court stated recently: "*Along with torture, the international crimes of piracy, slave-trading, war crimes, crimes against humanity, genocide and apartheid **require states, even in the absence of binding international-treaty law, to suppress such conduct because 'all states have an interest as they violate values that constitute the foundation of the world public order'***".³⁰
28. When perpetrators of these crimes are granted immunity, and not held to account, they escape arrest and prosecution (and, in the case of President Al-Bashir, continue heading a nation-state). This will not deter further international crimes of this nature, including by the same perpetrator.

²⁷ As recognised *inter alia* by section 7(1) of the Implementation Act, read with section 165 of the Constitution.

²⁸ See Declaration of the High-level Meeting of the UN General Assembly on the Rule of Law at the National and International Levels on September 2012, para 22, quoted below.

²⁹ Much of what follows in this section is drawn from David Luban, 'A Theory of Crimes Against Humanity' (2004) 29 *Yale International Law Journal* 85-167.

³⁰ *SALC* at para [37], emphasis added.

The failure to detain, arrest and prosecute, therefore, aggravates the threat to the existence of the family of nations and to South Africa as a member of this family.³¹

29. In terms of the Declaration of the High-level Meeting of the UN General Assembly on the Rule of Law at the National and International Levels on September 2012,³² adopted by General Assembly, all member states "*commit to ensuring that impunity is not tolerated for genocide, war crimes and crimes against humanity...and that such violations are properly investigated and appropriately sanctioned, including by bringing the perpetrators of any crimes to justice, through national mechanisms or, where appropriate, regional or international mechanisms, in accordance with international law, and for this purpose ... encourage States to strengthen national judicial systems and institutions*" and "*recognize the role of the ICC in a multilateral system that aims to end impunity and establish the rule of law...and emphasize the importance of cooperation with the Court.*"
30. In light of the above:
- 30.1 international crimes are crimes in South Africa;³³
- 30.2 they are of such an egregious nature that their commission and allowing alleged perpetrators of such crimes, *a fortiori* those in respect of whom there is an arrest warrant issued by the ICC, to avoid capture and prosecution constitute an affront to our constitutional framework; and
- 30.3 since the values underpinning the above conclusions are strongly supported by the history and the text of the Constitution, their force would not easily be displaced by any concepts (such as absolute immunity advanced by the Government) undermining the efficacy of that recognition.

³¹ The Preamble to the Constitution states as one of the purposes of the drafting and adoption of the Constitution the following: to "[b]uild a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations."

³² Available at <https://www.un.org/ruleoflaw/files/A-RES-67-1.pdf>, paras 22 and 23, emphasis added.

³³ SALC at paras [33] and [37].

THE DUTY TO DETAIN AND ARREST

31. International crimes are crimes in international customary law and, by virtue of section 232 of the Constitution, crimes in South African law. Those listed in schedule 1 of the Implementation Act are also statutory crimes in our national law through domestication of the Rome Statute.³⁴ They violate the Constitution and accordingly the State has a constitutional power and duty to detain and/or arrest perpetrators of these crimes.³⁵
32. Where the ICC, acting with jurisdiction conferred on it by the Security Council, exercises its powers to ensure international peace and security, has issued an arrest warrant (as in the present case), any '*pragmatic*'³⁶ justification for immunity (as described in paragraphs 16 - 17 above) will not negate the constitutional imperative that the State take reasonable steps to detain and arrest perpetrators of crimes against humanity, war crimes and genocide. The essence of the pragmatic justification for immunity is the facilitation of the free movement of heads of state in order to cultivate the cooperation and communication that fosters the community of nations, not the protection of the individual. A head of state charged by the ICC with international crimes is charged with undermining the very fabric of the community of nations. The justification for his immunity therefore no longer applies in these circumstances.
33. Unlike in *Kaunda*,³⁷ the State's exercise of its power to detain and arrest President Al-Bashir does not entail an extra-territorial application of the Constitution. The detention or arrest of perpetrators of international crimes who are in South Africa does not require the Constitution to reach "*beyond our borders*" and violate the principle of State sovereignty.³⁸
34. As international crimes are crimes in South Africa, every person accused of these crimes is a suspect in the Republic. In recognition of the status of international crimes, the State has a constitutionally-sourced power and duty to detain and/or arrest alleged perpetrators of these

³⁴ *SALC supra* note 14 at para [33].

³⁵ Sections 179 and 205 of the Constitution.

³⁶ Crawford see note 15 at 488.

³⁷ *Kaunda supra*.

³⁸ *Ibid* at para [36].

crimes who come within the territory of South Africa.

35. This is consistent with this Court's findings in *National Commission of The South African Police Service v Southern African Human Rights Litigation Centre*,³⁹ where a unanimous court held that the Constitution imposed a duty on the South African Police Service ("SAPS") to investigate the international crime of torture committed in Zimbabwe by Zimbabweans,⁴⁰ subject to whether it was reasonable on the facts of the case for the police to decline to investigate.⁴¹ The source of the duty was s 205(3),⁴² read with s 4(1) of the ICC Act and s 17D(1)(a) of the South African Police Service Act, 1995.
36. It follows that the SAPS has, in terms of s 205(3) of the Constitution, a duty to initiate an investigation when South Africa has ordinary nation-based jurisdiction or another forum that has jurisdiction is unable or unwilling to investigate and prosecute these crimes. It must undertake such an investigation when it is reasonable and practicable in the circumstances.⁴³ In *SALC* the court held that SAPS has this duty even when these crimes were committed outside of the territory of South Africa, by a foreign national and/or against foreign nationals.⁴⁴ For the purposes of the Constitution, these crimes are committed against South Africa.
37. If its investigation - or the investigation of an authority that the State recognises as having investigative powers relating to these types of crime⁴⁵ - reveals *prima facie* evidence that someone has committed crimes against humanity, genocide or war crimes, the SAPS has a duty

³⁹ *SALC supra*.

⁴⁰ *Ibid* at paras [55] – [56].

⁴¹ *Ibid* at paras [61] – [64].

⁴² Section 205(3) provides that "The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law."

⁴³ *SALC supra* at para [61].

⁴⁴ At para [74] of *SALC*, this Court states as follows: "[a] second reason given was that any investigation [by the SAPS] would be potentially harmful to South Africa – Zimbabwe relations on a political front. The cornerstone of the universality principle, in general, and the Rome Statute, in particular, is to hold torturers, genocidaires, pirates and their ilk, the so-called *hostis humani generis*, the enemy of all humankind, accountable for their crimes, wherever they may have committed them or wherever they may be domiciled. An approach like the one adopted by the SAPS in the present case undermines that very cornerstone. Political inter-state tensions are in most instances virtually unavoidable as far as the application of universality, the Rome Statute and, in the present instance, the ICC Act is concerned."

⁴⁵ See section 14 of Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002. Part V of the Rome Statute of the International Criminal Court.

to take reasonable steps to detain or arrest this person.

38. This Court affirmed that those who commit crimes against humanity and genocide are "*the enemy of all humankind*" and must be held "*accountable for their crimes, wherever they may have committed them or wherever they may be domiciled.*"⁴⁶ This Court further emphasised that:

*"[t]he preamble to the Rome Statute [to which South Africa is bound] affirms that states parties are determined 'to put an end to impunity for the perpetrators of [grave] crimes and thus to contribute to the prevention of such crimes' and it recalls 'that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'."*⁴⁷

39. Furthermore, this Court held that: "*Our country's international and domestic-law commitments must be honoured. We cannot be seen to be tolerant of impunity for alleged torturers. We must take up our rightful place in the community of nations with its concomitant obligations. We dare not be a safe haven for those who commit crimes against humanity.*"⁴⁸

40. Section 7(2) of the Constitution further places positive obligations on the state to respect, protect, promote, and fulfil the rights in the Bill of Rights. In *Mohamed*,⁴⁹ this Court reiterated the view expressed by Chaskalson P in *Makwanyane*, that: by "*committing ourselves to a society founded on the recognition of human rights we are required to give particular value to the rights to life and dignity, and that 'this must be demonstrated by the state in everything that it does'*".⁵⁰ The Court also affirmed, *inter alia*, "*the positive obligation that [the Constitution] imposes on the state to protect, promote and fulfil the rights in the Bill of Rights*".⁵¹

41. In *Glenister*, this Court held that the Constitution requires effective action against corruption.⁵² The Court held that this duty was sourced in section 7(2) and the positive duty it imposes on the state to "*respect, protect, promote and fulfil the rights in the Bill of Rights.*" The Court found that as corruption infringes and threatens the rights in the Bill of Rights and the rule of law, section

⁴⁶ SALC at para 74.

⁴⁷ SALC at para 31.

⁴⁸ SALC at para 80, emphases added.

⁴⁹ *Mohamed v President of the RSA* 2001 (3) SA 893 (CC).

⁵⁰ *Ibid*, at para [48], our emphasis.

⁵¹ *Supra* at paras [58] and [60].

⁵² *Glenister* at para 175.

7(2) accordingly enjoins the state to prevent and combat corruption in all its forms.⁵³ As corruption was held by our courts to threaten the rights in the Bill of Rights and the rule of law, so too do crimes against humanity and genocide.⁵⁴ Accordingly, section 7(2) enjoins the State to act positively to guard against the various violations arising from the unchecked commission of international crimes, and to ensure that those sought by the ICC to stand trial for the commission of such crimes are arrested and surrendered to that Court.

42. In conclusion, to fail to arrest and surrender President Al-Bashir to an international court that has jurisdiction to try him (which by virtue of the Security Council referral is acting as an instrument of all the members of the UN to ensure international peace and security) when he is charged with committing crimes against humanity, war crimes and genocide, would mean actively enabling his impunity, by allowing South Africa to be a safe haven for an enemy of all mankind. That would do violence to South Africa's Constitution, the obligations of the State thereunder, the rights in the Bill of Rights, and the founding value of the rule of law.
43. Therefore, on a proper constitutional interpretation of section 4(1) of the DIPA, it does not confer immunity on President Al-Bashir from arrest and surrender to the ICC.

THE PROPER APPLICATION OF SECTION 4(1)(a) OF DIPA AND WAIVER

44. In any event, in the circumstances of this case, section 4(1) of DIPA does not afford President Al-Bashir immunity by virtue of the acts of his own government. By virtue of Sudan's accession to the Genocide Convention (on 13 October 2003),⁵⁵ it has, in terms of section 8(1) of the DIPA, waived the immunity of Al-Bashir under the DIPA from arrest and surrender to the ICC. The Genocide Convention and Sudan's accession thereto are both in writing,⁵⁶ and therefore certainly

⁵³ In *Glenister* para 200, the Court held that "*corruption in the polity corrodes the rights to equality, human dignity, freedom, security of the person and various socio-economic rights. That corrosion necessarily triggers the duties s 7(2) imposes on the State*". See also *Glenister* paras 167, 170, 172-5.

⁵⁴ The wide-spread and systematic murder, rape, and torturing, and the intent to destroy whole ethnic groups.

⁵⁵ See https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&clang=_en. South Africa is also party having acceded on 10 Dec 1998.

⁵⁶ In terms of Article XI of the Genocide Convention accession is a formal act requiring the lodging of an instrument of accession with the Secretary General of the UN.

constitute an express waiver in writing of Al-Bashir's immunity for the purposes of section 8(3).

45. In *Fick*, this Court found that Zimbabwe's agreement to be bound by an international agreement (the SADC Tribunal Protocol) that recognised an obligation on Member States (including South Africa) to make the decisions of an international tribunal enforceable in the territories of Member States constituted an express waiver in terms of section 3(1) of the Foreign States Immunities Act ("**FSIA**") of Zimbabwe's immunity under that Act.⁵⁷
46. Section 8(1) of the DIPA, which is in similar terms to section 3(1) of the FSIA, provides that "*[a] sending State, the United Nations, any specialised agency or organisation may waive any immunity or privilege which a person enjoys under this Act.*"
47. Given the terms of the Genocide Convention and in particular Articles I, III, IV, V and VI, it is clear that Sudan, as a state party to the Convention, has accepted that (a) any of its officials charged with committing genocide (including its head of state) shall be tried by the ICC and if convicted punished, since the Security Council has referred the situation in Darfur to the ICC in the exercise of its Chapter VII powers,⁵⁸ and (b) other state parties to the Genocide Convention (such as South Africa) would be obligated to arrest and surrender any person in their territory charged with genocide by the ICC (including any heads of state).⁵⁹
48. The ICC has issued an arrest warrant for Sudan's head of state, President Al-Bashir, on three counts of genocide.
49. The obligations of Sudan and South Africa to prevent and punish even heads of state who commit genocide, and to ensure those charged with genocide are tried by an international criminal court

⁵⁷ *Government of the Republic of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC), paras [32]-[35]. We note, as an aside, that this was in circumstances where the international tribunal was suspended. This Court found that the obligations and duties created at the time the enforceable order was given by the international tribunal continued to exist. Provided that the international tribunal in question was competent to hear the case and grant the order, as a State Party, South Africa was obliged to give effect thereto (see paras 90-92). That reasoning strengthens the duty to arrest with respect to the ICC: South Africa was, and is, obliged to act.

⁵⁸ Resolution 1593.

⁵⁹ See D Akande, *The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities*, 7 *JICJ* 333 (2009) at 349-351, referring to an relying on the International Court of Justice decision in *Application of the Convention on the Prevention and Punishment of Genocide (Bosnia Herzegovina v. Serbia & Montenegro)* 2007 ICJ Reports paras 439-450.

having jurisdiction, are framed in stronger and clearer terms than the terms of the SADC Tribunal Protocol found by this Court to constitute an express waiver in *Fick*. Sudan's accession to the Genocide Convention therefore certainly constitutes a waiver, in terms of section 8 of DIPA, of President Al-Bashir immunity from arrest and surrender to the ICC for the commission of genocide.

50. The Government alleges in its answering affidavit in response to the amici's applications for admission that the Genocide Convention removes only immunity *ratione materiae* and not immunity *ratione personae*.⁶⁰ But this is certainly incorrect.
51. First, the ordinary meaning of the relevant provisions of the Genocide Convention, read within their context and in light of the purpose of the Convention, make clear that personal immunity is removed.⁶¹ Article I commits the state parties "to prevent and to punish" genocide. Article IV commits state parties to ensuring the "punishment" of persons who "are" (not "were") "constitutionally responsible rulers" (as opposed to a more limited recordal that their position does not relieve them of responsibility for genocide). The state parties thereby accept that all impediments (including both procedural and substantive immunity) are waived that would prevent the punishment of heads of state for committing genocide (as is also endorsed by Article VI, which makes provision for the trying of persons charged with genocide, regardless of position or status).
52. Further, at least in the case of President Al-Bashir, the effect of Sudan's accession to the Genocide Convention is to remove any immunity that would preclude him from being arrested and surrendered by South Africa (another state party to the Genocide Convention) to the ICC, which is an international penal tribunal that has jurisdiction and which has issued an arrest warrant for his trial for genocide.

⁶⁰ Para 23.

⁶¹ Article 31(1) of the Vienna Convention on the Law of Treaties provides that "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."

53. Second, international law experts support the plain meaning interpretation of the Genocide Convention – that it removes personal (*ratione personae*) immunity. Prof Akande (Professor of Public International Law at University of Oxford, and an expert on issues of immunity and international crimes) states that:

"Since, according to the ICJ's logic,⁶² states parties to the ICC Statute have an obligation to cooperate with the ICC when persons wanted for genocide are on their territory, and since Article IV of the Genocide Convention provides that even heads of state and public officials are to be punished, it could be argued the Genocide Convention imposes an obligation on ICC states to arrest those wanted for genocide, even if they are the head of state. This argument bypasses somewhat the application of Article 27 of the ICC Statute and the question of whether Sudan is to be regarded as in the position of a party to the ICC Statute. Here the obligation of ICC parties to arrest is based on the acceptance of the ICC's jurisdiction by that party and the imposition of ICC jurisdiction on Sudan. Furthermore, the removal of immunity is based on the acceptance of the Genocide Convention by the arresting party and by Sudan."⁶³ [Emphases added]

54. Prof Sluiter (Professor of International Criminal Procedure, University of Amsterdam) opines as follows:

"In my view, the question of head of state immunity for Al-Bashir loses relevance when the arrest is also grounded in treaty relations between the arresting state and Sudan, namely Article VI of the Genocide Convention. That particular provision obliges a contracting party to the Convention to ensure a trial at the ICC of a person charged with genocide. There is no exception of immunity set out in the Genocide Convention; Article VI, it can be said, applies to all persons charged with genocide. This interpretation also follows logically from Article IV of the Genocide Convention:

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.

It is worth mentioning that in its recent interpretation of Article VI, the ICJ⁶⁴ did not address any issue of immunity as being relevant to the reciprocal obligations parties hold under Article VI. The problem of third-party effect does not arise in the application of Article VI to the Al-Bashir case, because Sudan is a party to the Genocide Convention. Bearing in mind that the Genocide Convention intends punishment of all perpetrators of genocide, no individual is exempt from the scope of application of Article VI. As a result, a contracting party to the Genocide Convention arresting Al-Bashir and surrendering him to the ICC, in compliance with Article VI, violates no rule of international law in relation to Sudan. On the contrary, that state complies with its obligations under the Genocide

⁶² Referring to *Application of the Convention on the Prevention and Punishment of Genocide supra*.

⁶³ D Akande, The Legal Nature of Security Council Referrals to the ICC and its Impact on Al-Bashir's Immunities, 7 *JICJ* 333 (2009) at 351.

⁶⁴ Referring to *Application of the Convention on the Prevention and Punishment of Genocide supra*.

Convention."⁶⁵ [Emphases added]

55. Furthermore, there is direct judicial authority for the proposition that the Genocide Convention does indeed constitute an express waiver of personal immunity (in addition to the indirect authority by the ICJ, referred to by Prof Akande and Prof Sluiter). In *Pinochet 3*, Lord Phillips held that:

*"Where states, by convention, agree that their national courts shall have jurisdiction on a universal basis in respect of an international crime, such agreement cannot implicitly remove immunities *ratione personae* that exist under international law. Such immunities can only be removed by express agreement or waiver. Such an agreement was incorporated in the Convention on the Prevention and Suppression of the Crime of Genocide 1948, which 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.'"⁶⁶ [Emphasis added]*

56. Finally, and most importantly, as with section 4, section 8 of the DIPA must be interpreted in accordance with the Constitution and to give effect to its fundamental values (including the rule of law), and this Court must favour the interpretation that gives best effect to the spirit, purport and objects of the Bill of Rights.⁶⁷ For the purposes of section 8, the most constitutionally effective and consistent interpretation is that countries bound by the Genocide Convention have expressly waived the personal immunity of their officials (including heads of state) from arrest and surrender to the ICC when it has jurisdiction, when those officials are charged with genocide.
57. In the circumstances, in terms of section 8(1), read with 8(3), of the DIPA, Sudan's accession to the Genocide Convention constitutes an express waiver in writing of the immunity and privileges of Al-Bashir under the DIPA from arrest and surrender to the ICC on the charge of genocide.

⁶⁵ 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, 379-80. 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 (Matthew Gillett is a Legal Officer in the Office of the Prosecutor at the International Criminal Tribunal for the Former Yugoslavia (ICTY))' and, more generally, R Van Alebeek, *Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (OUP, Oxford 2007) pg 293.

⁶⁶ *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte* (No. 3) [2000] 1 AC 147 (*Pinochet No 3*) at 289.

⁶⁷ See *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) ("*Hyundai*") at para 22; and *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC) at paras 46, 47, 84, and 107; see also *Fraser v Absa Bank Ltd* 2007 (3) SA 484 (CC) at para 47; and *Laugh It Off Promotions CC v SAB International (Finance)* 2006 (1) SA 144 (CC) at para 48.

PRINCIPLE OF SUBSIDIARITY NOT APPLICABLE TO HSF'S ARGUMENT

58. In the Government's affidavit it alleges that the principle of subsidiarity prevented any direct reliance by the HSF on the Constitution.⁶⁸ This attack is baseless.
59. The HSF's argument is an interpretative argument. It argues that, constitutionally interpreted, section 4(1) does not grant President Al-Bashir immunity from arrest and surrender to the ICC where it has charged him with committing international crimes.
60. The principle of subsidiarity, whilst precluding direct reliance on a right where other legislation has been enacted to give exhaustive effect to it,⁶⁹ is of no application to the constitutional obligation on Courts to interpret all legislation in accordance with the Constitution.⁷⁰

CONCLUSION

61. We submit that this appeal should be dismissed and the court *a quo*'s order should stand.

**David Unterhalter SC
Carol Steinberg
Andreas Coutsoudis
Kameel Premhid**

**Chambers
13 October 2016**

⁶⁸ Para 24.

⁶⁹ *My Vote Counts NPC v Speaker of the National Assembly and Others* (CCT121/14) [2015] ZACC 31 (30 September 2015) paras 50-51.

⁷⁰ See *Hyundai* paras 22-23; *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC) at paras 46, 47, 84, and 107; see also *Fraser v Absa Bank Ltd* 2007 (3) SA 484 (CC) at para 47; and *Laugh It Off Promotions CC v SAB International (Finance)* 2006 (1) SA 144 (CC) at para 48