THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 867/15

In the matter between:

THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	**First Applicant**
THE DIRECTOR-GENERAL OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	**Second Applicant**
THE MINISTER OF POLICE	**Third Applicant**
THE COMMISSIONER OF POLICE	**Fourth Applicant**
THE MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION	**Fifth Applicant**
THE DIRECTOR-GENERAL OF INTERNATIONAL RELATIONS AND COOPERATION	**Sixth Applicant**
THE MINISTER OF HOME AFFAIRS	**Seventh Applicant**
THE DIRECTOR-GENERAL HOME AFFAIRS	**Eighth Applicant**
THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	**Ninth Applicant**
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	**Tenth Applicant**
THE HEAD OF THE DIRECTORATE FOR	

PRIORITY CRIMES INVESTIGATION **Eleventh Applicant**

THE DIRECTOR OF THE PRIORITY CRIMES LITIGATION UNIT **Twelfth Applicant**

and

THE SOUTHERN AFRICA LITIGATION CENTRE **Respondent**

HELEN SUZMAN FOUNDATION **Amicus curiae**

THE AFRICAN CENTRE FOR JUSTICE AND PEACE STUDIES **Applicant for admission as second amicus curiae**

THE INTERNATIONAL REFUGEE RIGHTS INITIATIVE **Applicant for admission as third amicus curiae**

PEACE AND JUSTICE INITIATIVE **Applicant for admission as fourth amicus curiae**

CENTRE FOR HUMAN RIGHTS **Applicant for admission as fifth amicus curiae**

Neutral citation: *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016)

Coram: LEWIS, PONNAN, SHONGWE, MAJIEDT and WALLIS JJA

Heard: 12 February 2016

Delivered: 15 March 2016

Summary: International law - International Criminal Court (ICC) – South Africa's obligations to arrest and surrender person against whom the ICC has issued an arrest warrant – Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 – provisions of sections 4(2) and 10(9) – whether head of state enjoys immunity from

arrest in terms of customary international law – provisions of section 4(1) of the Diplomatic Immunities and Privileges Act 37 of 2001 (DIPA) – whether immunity exists by virtue of hosting agreement concluded with African Union and ministerial proclamation under section 5(3) of DIPA. Practice and procedure – application for admission as amicus curiae – rule 16 of rules of Supreme Court of Appeal – process to be followed – admission as amicus does not give rise to a right to make oral submissions – whether entitled to do so determined by Court hearing the appeal – party may only be admitted as amicus if it has new contentions to advance – what constitutes new contentions.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mlambo JP, with Ledwaba DJP and Fabricius J concurring, sitting as court of first instance): judgment reported as *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development & others* 2015 (5) SA 1 (GP).

1 The application for leave to appeal is granted.

2 The applicants are to pay the costs of that application such costs to include those consequent upon the employment of two counsel.

3 The applications by the African Centre for Justice and Peace Studies, the International Refugee Rights Initiative, the Peace and Justice Initiative and the Centre for Human Rights for admission as amici curiae are dismissed with no order for costs.

4 The order of the High Court is varied to read as follows:

'1 The conduct of the Respondents in failing to take steps to arrest and detain, for surrender to the International Criminal Court, the President of Sudan, Omar Hassan Ahmad Al Bashir, after his arrival in South Africa on 13 June 2015 to attend the 25th Assembly of the African Union, was inconsistent with South Africa's obligations in terms of the Rome Statute and section 10 of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, and unlawful.

2 The applicant is entitled to the costs of the application on a pro bono basis.'

5 The appeal is otherwise dismissed.

6 The applicants are to pay the respondent's costs of appeal and the costs of the Helen Suzman Foundation, including the costs of its application for admission as an amicus, such costs to include in both instances the costs consequent upon the employment of two counsel.

JUDGMENT

Wallis JA (Majiedt and Shongwe JJA concurring; Lewis JA and Ponnan JA concurring for separate reasons)

Introduction

[1] The International Criminal Court (ICC) was established by the Rome Statute of the International Criminal Court (the Rome Statute) to exercise jurisdiction over the most serious crimes of concern to the international community as a whole. Article V identifies them as genocide, crimes against humanity and war crimes – collectively international crimes – and defines them in Articles VI, VII and VIII respectively. Article V also foreshadows the crime of aggression, which remains to be defined. The Rome Statute affirms that these crimes must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international co-operation.[1] In addition to the jurisdiction of national courts to prosecute

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[1] Preamble to the Rome Statute. The Statute operates in terms of the principle of complementarity under which international crimes should in the first instance be prosecuted in national Courts and before the ICC if national Courts are unable or unwilling to do so. *National Commissioner of Police v South African Human Rights Litigation Centre & another* (CCT 02/14) [2014] ZACC 30*;* 2015 (1) SA 315 (CC) para 30. Dapo Akande 'The Effect of Security Council Resolutions and Domestic

these crimes the Rome Statute confers jurisdiction on the ICC to try such crimes and convict and sentence those who commit such crimes. It is a matter of pride to citizens of this country that South Africa was the first African state to sign the Rome Statute. It did this on 17 July 1998 and ratified it on 27 November 2000. It incorporated it into the domestic law of South Africa in terms of s 231(4) of the Constitution by enacting the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (the Implementation Act). The Rome Statute is annexed to the Implementation Act as a matter of information.

[2] Chapter 4 of the Implementation Act provides the mechanism whereby South Africa co-operates with the ICC in regard to the arrest and surrender of persons accused of international crimes. The failure by the applicants, to whom I will, in accordance with the terminology of their counsel, refer collectively as the Government, to pursue those mechanisms to arrest the president of Sudan, Omar Hassan Ahmad Al Bashir (President Al Bashir), when he was in Johannesburg on 14 and 15 June 2015 to attend the 25th ordinary session of the Assembly of the Africa Union (AU), gave rise to the present litigation.

[3] President Al Bashir is a controversial figure as a result of the actions of his government and their supporters, such as the Janjaweed Militia, principally in Darfur, but also elsewhere in Sudan. On 31 March 2005 the Security Council of the United Nations adopted Resolution 1593 (2005). It noted the report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in

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Proceedings on State Obligations to Cooperate with the ICC' (2012) 10 *Journal of International Criminal Justice* 299 at 302.

Darfur, and decided to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the ICC. As a result of the investigations by the ICC, President Al Bashir stands accused of serious international crimes. The Pre-Trial Chamber of the ICC has issued two warrants for his arrest. The first warrant was issued on 4 March 2009 and related to charges of war crimes and crimes against humanity. The second warrant was issued on 12 July 2010 and related to charges of genocide. The warrants have been forwarded to all countries that are parties to the Rome Statute, including South Africa, with a request that they co-operate under the Rome Statute and cause President Al Bashir to be arrested and surrendered to the ICC. Sudan is not a party to the Rome Statute.

[4] When President Al Bashir arrived in South Africa to attend the AU assembly in June 2015 the Government took no steps to arrest him. Indeed it adopted, and continues to adopt, the stance that it was obliged not to do so as President Al Bashir enjoyed immunity from such arrest. I will revert to the grounds for it taking this stance in due course. Its failure to do so resulted in the respondent, the South African Litigation Centre (SALC), bringing an urgent application on Sunday 14 June 2015, in the Gauteng Division of the High Court, Pretoria (to which I shall refer as the High Court), seeking orders declaring the failure to take steps to arrest President Al Bashir to be in breach of the Constitution and to compel the Government to cause President Al Bashir to be arrested and surrendered to the ICC to stand trial pursuant to the two warrants.

[5] The Government opposed the urgent application and sought and obtained a postponement until 11.30 am on Monday, 15 June 2015 to enable affidavits to be prepared. But there was an obvious concern that President Al Bashir might leave the country in the interim in order to

escape arrest. Accordingly, in granting the postponement, the High Court made the following order:

'1. President Omar Al Bashir of Sudan is prohibited from leaving the Republic of South Africa until a final order is made in this application, and the respondents are directed to take all necessary steps to prevent him from doing so;

2. The eighth respondent, the Director-General of Home Affairs is ordered:

2.1 to effect service of this order on the official in charge of each and every point of entry into, and exit from, the Republic; and

2.2 once he has done so to provide the applicant with proof of such service, identifying the name of the person on whom the order was served at each point of entry and exit.'

[6] At the hearing the following day before a specially constituted full court of three judges presided over by Judge President Mlambo, it stood down further because the affidavits were not yet ready. The hearing commenced at about 1.00 pm and the Court sought the assurance from counsel then leading for the Government, Mr W Mokhari SC, that President Al Bashir was still in the country. He informed the Court that according to his instructions President Al Bashir was still in the country and this was repeated during the course of the argument. At about 3.00pm the Court made the following order:

'1. That the conduct of the Respondents to the extent that they have failed to take steps to arrest and/or detain the President of the Republic of Sudan Omar Hassan Ahmad Al Bashir (President Bashir), is inconsistent with the Constitution of the Republic of South Africa, 1996, and invalid;

2. That the respondents are forthwith compelled to take all reasonable steps to prepare to arrest President Bashir without a warrant in terms of section 40(1)(k) of the Criminal Procedure Act 51 of 1977 and detain him, pending a formal request for his surrender from the International Criminal Court;

3. That the applicant is entitled to the cost of the application on a pro-bono basis.'

[7] Immediately after this order was made counsel for the Government told the Court that President Al Bashir had left the country earlier that day. According to an affidavit later filed by the Director-General: Home Affairs, the eighth applicant, he appears to have left on a flight from Waterkloof Air Base at about 11.30 am that morning. The affidavit failed to explain how a head of state, using a military air base reserved for the use of dignitaries, could possibly have left the country unobserved. The Director-General said that President Al Bashir's passport was not among those shown to officials of his department, but as an explanation that is simply risible. Senior officials representing Government must have been aware of President Al Bashir's movements and his departure, the possibility of which had been mooted in the press. In those circumstances the assurances that he was still in the country given to the Court at the commencement and during the course of argument were false. There seem to be only two possibilities. Either the representatives of Government set out to mislead the Court and misled counsel in giving instructions, or the representatives and counsel misled the Court. Whichever is the true explanation, a matter no doubt being investigated by the appropriate authorities, it was disgraceful conduct.

[8] Largely because of President Al Bashir's departure the High Court refused leave to appeal, saying that the litigation had become moot. On petition to this Court it ordered that the application for leave to appeal be set down for argument in terms of the provisions of s 17(2)*(d)* of the Superior Courts Act 10 of 2013. The President of this Court directed that it be set down as an urgent matter before the commencement of the Court's term. The parties were directed to deliver a full record and to be prepared to address full argument to us on the merits of the case. It is on that basis that the case is before us.

Litigation history

[9] The foundation for SALC's argument before the High Court was the obligations undertaken by South Africa in terms of the Rome Statute and the Implementation Act. It contended that, by virtue of these, South Africa was obliged to give effect to the request of the ICC to enforce the two warrants for President Al Bashir's arrest and surrender to the ICC for prosecution in respect of the charges of war crimes, genocide and crimes against humanity. Perhaps anticipating resistance by the Government, it annexed to its founding affidavit a judgment delivered by the Pre-Trial Chamber of the ICC on 13 June 2015 declaring that South Africa was obliged to arrest and surrender President Al Bashir.[2]

[10] The Government did not make any attempt to challenge these propositions. Instead it founded its defence to the application on certain special arrangements that it had made with the AU for the holding of the Assembly in Johannesburg. These were explained in detail in affidavits by Ms Sindane, the second applicant and the Director-General of Justice and Constitutional Development, and Dr Lubisi, the Director-General of the Presidency and the Secretary of Cabinet.

[11] Ms Sindane said that after South Africa agreed to host the AU Summit in June 2015 it entered into an agreement (the hosting agreement) with the Commission of the AU relating to the material and

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[2] Decision following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir ICC-02/05-01/09 Date 13 June 2015. In argument counsel for the Government suggested that this judgment was given summarily and late at night, likening it to an unopposed application in a motion Court. That characterization was unjustified. A reading of the judgment shows that it was only delivered after a consultation between the ICC and the Government of South Africa under article 97 of the Rome Statute.

technical organisation of the various meetings that were to take place at the Summit including the 25th Assembly of the AU. Based on this agreement she said that President Al Bashir had been invited to attend by the AU and not by the South African Government. She then referred to Article VIII of the hosting agreement, which was headed 'Privileges and Immunities', and read:

'The Government shall afford the members of the Commission and Staff Members, delegates and other representatives of Inter-Governmental Organisations attending the Meetings the privileges and immunities set forth in Sections C and D, Article V and VI of the General Convention on the Privileges and Immunities of the OAU.'

[12] On 5 June 2015, and pursuant to s 5(3) of the Diplomatic Immunities and Privileges Act 37 of 2001 (DIPA), the Minister of International Relations and Cooperation, the fifth applicant, published GN 470 in the Government Gazette[3] recognising the hosting agreement for the purposes of granting the immunities and privileges as provided for in Article VIII, which was annexed to the notice. Dr Lubisi testified that the matter was discussed at a Cabinet meeting where it was decided, after seeking the advice of the Chief State Law Adviser, that 'the South African government as the hosting country is first and foremost obliged to uphold and protect the inviolability of President Bashir *in accordance with the AU terms and conditions*'.[4] He added that 'Cabinet collectively appreciated and acknowledged that the aforesaid decision can only apply for the duration of the AU Summit.'

[13] On this basis, and this basis alone, Ms Sindane claimed that the immunities and privileges referred to in Article VIII of the hosting

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[3] GN 470, GG 38860, 5 June 2015.
[4] Emphasis added.

agreement prevented the Government from arresting President Al Bashir 'during the duration of the Summit and an additional two days after the conclusion of the Summit'. The application was argued on this basis and the High Court quite correctly summarised the issue before it as being 'whether a Cabinet resolution coupled with a Ministerial Notice are capable of suspending this country's duty to arrest a head of state against whom the International Criminal Court (ICC) has issued arrest warrants for war crimes, crimes against humanity and genocide'.

[14] With the advent of new counsel, led by Mr J J Gauntlett SC, an entirely different argument emerged in the application for leave to appeal to this Court. It was now based upon what were said to be the provisions of customary international law and the provisions of s 4(1)*(a)* of DIPA, which reads:

'(1) 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 …'

[15] The previous argument about the provisions of the hosting agreement and the ministerial notice under s 5(3) of DIPA was relegated to a backseat. Indeed it was not pursued in that form. Instead it was said that as the ministerial notice had not been set aside on application to a competent court it continued to be effective to confer immunity on President Al Bashir, even if misconceived.[5]

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[5] *Oudekraal Estates (Pty) Ltd v City of Cape Town &* others (41/2003) [2004] ZASCA 48; 2004 (6) SA 222 (SCA) para 26; *MEC for Health, Eastern Cape & another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* [2014] ZACC 6); 2014 (3) SA 481 (CC) paras 65-66 and 88-90.

[16] This change of tack by the Government effectively challenged the foundation of SALC's claim that the Government was under an obligation, by virtue of its accession to the Rome Statute and the enactment of the Implementation Act, to arrest President Al Bashir and surrender him to the ICC. The Government contended that the general immunity that a head of state enjoys under customary international law and s 4(1) of DIPA qualified the obligation of South Africa, that would otherwise exist as a state party to the Rome Statute, to arrest and surrender a head of state for whom the ICC has issued an arrest warrant in respect of the commission of international crimes. The response by SALC was two pronged. It said that the provisions of ss 4(2) and 10(9) of the Implementation Act dealt specifically with these issues and affirmed the obligations of arrest and surrender assumed by South Africa under the Rome Statute. That alone would be decisive, as Mr Trengove SC emphasised in oral argument, but, if not, SALC joined issue with the Government on whether the rules of customary international law relied on by the Government in support of the claim to immunity afforded immunity to a head of state charged with international crimes before the ICC.

[17] Five parties applied to be admitted as amici curiae and permitted to present written and oral submissions to the Court. One, the Helen Suzman Foundation (the Foundation), was granted such leave in advance of the hearing. The applications by the other four[6] were not submitted timeously as required by rule 16 of the rules of this Court. Nor were they dealt with

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[6] The African Centre for Justice and Peace Studies and The International Refugee Rights Initiative applied jointly to be admitted as second and third amici respectively. The Peace and Justice Initiative and the Centre for Human Rights applied jointly to be admitted as fourth and fifth amici respectively.

by the President or Acting President as contemplated by the same rule. As this created uncertainty, the presiding judge, in consultation with the remaining members of the Court, permitted them to deliver written argument and to make oral submissions at the hearing encompassing both whether they should be admitted as amici and the merits. An application by two of them, the African Centre for Justice and Peace Studies and the International Refugee Rights Initiative, to submit extensive evidence of what they alleged were atrocities still being committed by and at the behest of President Al Bashir, was however dismissed.[7] It is not and never has been a function of this litigation to determine whether the allegations made against President Al Bashir are well-founded and, even if admissible, evidence concerning his alleged conduct would not assist the Court to resolve the legal issues that confront it.

The issues

[18] The following issues fall to be determined:

(a) Did the departure of President Al Bashir render the issues moot?

(b) Should leave to appeal be granted?

(c) Should the four amici other than the Foundation, or any of them, be given leave to intervene as amici?

(d) Did Article VIII of the hosting agreement, together with the ministerial proclamation, provide President Al Bashir with such immunity, at least for so long as the proclamation was not set aside?

(e) If not, was President Al Bashir entitled to immunity from arrest and surrender in terms of the arrest warrants issued by the ICC by virtue of customary international law and s 4(1) of DIPA?

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[7] Rule 16(8) provides that an amicus is limited to the record on appeal and may not add thereto.

(f) If President Al Bashir would ordinarily have been entitled to such immunity did the provisions of the Implementation Act remove that immunity?

(g) If not, have Security Council Resolution 1593 (2005) and the Genocide Convention (1948) removed his immunity?

(h) If the appeal does not succeed, should the order stand or should it be varied in certain respects?

(i) What orders should be made in respect of costs?

Is the appeal moot?

[19] The High Court based its refusal of leave to appeal on s 16(2)*(a)*(i) of the Superior Courts Act 10 of 2013 (the Superior Courts Act), which provides that when at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the court may dismiss the appeal on that ground alone. The High Court reasoned that because President Al Bashir had left the country the case no longer presented a live controversy. It cited *Janse van Rensburg NO v Minister of Trade and Industry & another NNO*[8] in support of that proposition. But that case and others like it[9] dealt with situations where the legislation, the constitutional validity of which was the subject of the litigation, had been repealed or replaced by different legislation. That is very different from the present case. Here a declaration had been made that the Government's conduct breached the Constitution and the legislation in point is very much in force. The central issue is what effect it has on the important question whether South Africa is obliged to arrest

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[8] *Janse van Rensburg NO & another v Minister of Trade and Industry & another NNO* (CCT13/99) [2000] ZACC 18; 2001 (1) SA 29 (CC) para 9.

[9] *President, Ordinary Court Martial, & others v Freedom of Expression Institute & others* (CCT5/99) [1999] ZACC 10; 1999 (4) SA 682 (CC) para 8 and *JT Publishing (Pty) Ltd & another v Minister of Safety and Security & others* (CCT49/95) [1996] ZACC 23; 1997 (3) SA 514 (CC) para 15.

and surrender to the ICC the head of state of a foreign nation, who has been charged with international crimes before the ICC.

[20] It is correct that no present effect can be given to the order that the Government take steps to prepare to arrest President Al Bashir, because he is not in South Africa. But the order remains in existence and SALC indicated that any attempt by President Al Bashir to return to this country would prompt it to seek its enforcement. As such the order had a continuing effect that would have to be taken into account by the Government in the future conduct of its diplomatic relations. This was well illustrated by certain newspaper reports that were annexed to the opposing affidavit in the application for leave to appeal. These indicated that the South African government had wanted to invite President Al Bashir to a Forum on China-Africa Co-operation to be held in this country in December 2015, but in view of the High Court's decision had suggested to Sudan that it send someone else to represent it. Any invitation to host future gatherings of AU heads of state, for example, would have to bear the judgment of the High Court in mind and could preclude this country from extending such an invitation.

[21] In those circumstances the High Court erred in holding that there had ceased to be a live and justiciable controversy between the parties.

Leave to appeal

[22] Apart from its finding that the appeal had become moot the High Court also referred to s 17(1)*(a)*(i) of the Superior Courts Act and held that an appeal had no reasonable prospect of success. But in reaching that conclusion it did not consider the new basis upon which the Government

sought to justify its opposition to SALC's claim. So we do not have the benefit of the High Court's view in regard to those contentions.

[23] After expressing its conclusion on prospects of success the High Court also said that it had no discretion once it reached that conclusion to grant leave to appeal. But it failed to consider the provisions of s 17(1)*(a)*(ii) of the Superior Courts Act which provide that leave to appeal may be granted, notwithstanding the Court's view of the prospects of success, where there are nonetheless compelling reasons why an appeal should be heard. This is linked to the question of mootness. In that regard there is established jurisprudence in this Court that holds that even where an appeal has become moot the Court has a discretion to hear and dispose of it on its merits. The usual ground for exercising that discretion in favour of dealing with it on the merits is that the case raises a discrete issue of public importance that will have an effect on future matters.[10] That jurisprudence should have been considered as a guide to whether, notwithstanding the High Court's view of an appeal's prospects of success, leave to appeal should have been granted. In my view it clearly pointed in favour of leave to appeal being granted.

[24] That is not to say that merely because the High Court determines an issue of public importance it must grant leave to appeal. The merits of the appeal remain vitally important and will often be decisive. Furthermore, where the purpose of the appeal is to raise fresh arguments that have not been canvassed before the High Court, consideration must be given to whether the interests of justice favour the grant of leave to

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[10] *Qoboshiyane NO & others v Avusa Publishing Eastern Cape (Pty) Ltd & others* (864/2011) [2012] ZASCA 166; 2013 (3) SA 315 (SCA) para 5; *City of Tshwane Metropolitan Municipality and Others v Nambiti Technologies (Pty) Ltd* (20580/2014) 2015 ZASCA 167: [2016] 1 All SA 332 (SCA) para 6.

appeal. It has frequently been said by the Constitutional Court that it is undesirable for it as the highest court of appeal in South Africa to be asked to decide legal issues as a court of both first and last instance. That is equally true of this Court. But there is another consideration. It is that if a point of law emerges from the undisputed facts before the court it is undesirable that the case be determined without considering that point of law. The reason is that it may lead to the case being decided on the basis of a legal error on the part of one of the parties in failing to identify and raise the point at an appropriate earlier stage.[11] But the court must be satisfied that the point truly emerges on the papers, that the facts relevant to the legal point have been fully canvassed and that no prejudice will be occasioned to the other parties by permitting the point to be raised and argued.[12]

[25] In the present case SALC accepted that the fresh argument advanced by the Government was foreshadowed by the factual material before the Court. No prejudice would be caused by permitting it to be raised at this stage. It is undoubtedly a point of substantial public importance. The new arguments cannot be said to lack reasonable prospects of success and they were forcefully and cogently argued before us. In those circumstances leave to appeal should be granted.

Amici

[26] Applications for admission as amici curiae in this Court have hitherto been dealt with ad hoc and the provisions of the rule governing

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[11] *Van Rensburg v Van Rensburg & andere* 1963 (1) SA 505 (A) at 510 A-C. The approach has been endorsed by the Constitutional Court. *CUSA v Tao Ying Metal Industries & others* (CCT 40/07) [2008] ZACC 15; 2009 (2) SA 204 (CC) para 68.

[12] *Fischer & another v Ramahlele &* others (203/2014) [2014] ZASCA 88; 2014 (4) SA 614 (SCA) paras 13 and 14.

such applications have not yet been the subject of detailed consideration in a judgment. It is as well therefore to deal shortly with this topic. Such applications are made in terms of rule 16 of the rules of this Court.[13] In terms of rule 16(1) if all parties agree to the admission of an amicus they are admitted as such.[14] The rule contemplates that the parties when

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[13] The rule reads as follows:
'Admission as amicus
(1) Subject to this rule, any person interested in any matter before the Court may, with the written consent of all the parties in the matter before the Court given not later than the time specified in subrule (5), be admitted therein as an amicus curiae upon such terms and conditions and with such rights and privileges as may be agreed upon in writing with all the parties before the Court or as may be directed by the President in terms of subrule (3).
Admission by consent
(2) The written consent referred to in subrule (1) shall, within 10 days of it having been obtained, be lodged with the registrar and the amicus curiae shall, in addition to any other provision, comply with the times agreed upon for the lodging of written argument.
Amendment of consent
(3) The President may amend the terms, conditions, rights and privileges agreed upon in terms of subrule (1).
Application to be admitted
(4) If the written consent referred to in subrule (1) has not been secured, any person who has an interest in any matter before the Court may apply to the President to be admitted therein as an amicus curiae, and the President may grant such application upon such terms and conditions and with such rights and privileges as he or she may determine.
Time for application
(5) An application pursuant to the provisions of subrule (4) shall be made within one month after the record has been lodged with the registrar.
Format
(6) An application to be admitted as an amicus curiae shall-
(a) briefly describe the interest of the amicus curiae in the proceedings;
(b) briefly identify the position to be adopted by the amicus curiae in the proceedings;
(c) set out the submissions to be advanced by the amicus curiae, their relevance to the proceedings and his or her reasons for believing that the submissions will be useful to the Court and different from those of the other parties.
Argument
(7)*(a)* An amicus curiae shall have the right to lodge written argument, provided that such written argument does not repeat any matter set forth in the argument of the other parties and raises new contentions which may be useful to the Court.
(b) The heads of argument of an amicus curiae shall not exceed 20 pages unless a judge, on request, otherwise orders.
Limitations
(8) An amicus curiae shall be limited to the record on appeal and may not add thereto and, unless otherwise ordered by the Court, shall not present oral argument.
Filing of heads
(9) An order granting leave to be admitted as an amicus curiae shall specify the date of lodging the written argument of the amicus curiae or any other relevant matter.
Costs
(10) An order of the Court dealing with costs may make provision for the payment of costs incurred by or as a result of the intervention of the amicus curiae.'

[14] The Constitutional Court has held in respect of its similarly worded rules governing admission as an amicus (Rule 10) that consent alone is not sufficient and an application must also be made to the Chief Justice. *Ex parte Institute for Security Studies: In re S v Basson* (CCT30/2003) [2005] ZACC 4; 2006

agreeing to the admission of an amicus will agree on the terms on which the amicus is to be admitted. Under rule 16(2) those are then the terms that govern their admission, subject to the power of the President of the Court to amend or vary those terms under rule 16(3). It is apparent that the terms can relate only to the delivery of written argument, which is limited to 20 pages, because rule 16(8) provides that no amicus has a right to address oral submissions to the Court unless the Court so orders. Given the wording of the rule it is plain that this is a reference to the Court hearing the appeal and not the President when dealing with an application for admission as an amicus. The general experience of the members of this Court is that the President leaves the question of oral argument to the presiding judge or Court hearing the appeal. Accordingly leave to make oral submissions can only be sought after the written submissions have been delivered and the Court has the opportunity of considering whether hearing oral submissions from the amicus will assist in its deliberations. If an amicus seeks leave to make oral submissions it must set out the grounds therefor in its written argument.

[27] Adherence to this procedure will ensure that the written argument of the amicus can be considered along with the reading of the record and the consideration of the heads of argument of the parties when the members of the Court are engaged in preparing the appeal. It is only then that it will be possible to determine whether the amicus can add anything by way of oral submissions. But the Court will nonetheless consider its argument. Whether it will permit the amicus to make oral submissions

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(6) SA 195 (SCA) paras 6 to 8. Although Harms *Civil Procedure in the Supreme Court* (looseleaf) C16-1 (Issue 51) says that this is equally applicable in the SCA that does not accord with the practice in this Court.

will depend upon its assessment of whether those submissions can add anything to an argument already before it in written form.

[28] Where there is no agreement among the parties as to the admission of an amicus it is entitled to seek its admission by way of an application to the President of the Court in terms of rule 16(4). The basis upon which such an application shall be made is set out in rules 16(5) and (6). The rule does not make provision for any opposition to such an application, but the general practice is for the President to invite a response from other parties who oppose the admission. The President then determines the application in accordance with rule 16 and, if the amicus is admitted, determine the terms upon which they are admitted and permitted to deliver written argument. The rule's constraints on the length of written argument apply unless relaxed by the President.[15]

[29] An amicus is not entitled to submit further evidence to the Court but is confined to the record. That is expressly provided in rule 16(8). It is unnecessary to consider whether there are exceptional circumstances in which the Court hearing the appeal may relax that rule.[16] In making submissions the amicus is not permitted to traverse ground already

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[15] This is a material difference from the Constitutional Court rule, which does not limit the length of the written submissions of an amicus. Also in that Court it is the Chief Justice who determines whether an amicus is permitted to make oral submissions, although in practice it is understood that the entire Court has input in that decision. Historically the Constitutional Court has been generous in permitting oral representations by amici. Van Loggerenberg and others *Erasmus Superior Court Practice* (2 ed, looseleaf) Vol 1, B1-30 (Original Service, 2015). In this Court it is plain that the Court constituted to hear the appeal decides whether the amicus may make oral submissions.

[16] Compare *Children's Institute v Presiding Officer, Children's Court, Krugersdorp, & others* (CCT 69/12) [2012] ZACC 25; 2013 (2) SA 620 (CC). That dealt with rule 16A in the Uniform Rules of Court, which does not contain a provision that an amicus is confined to the record on appeal. In the Constitutional Court an amicus is confined to the record on appeal (Rule 10(8)) subject to the right in terms of rule 31 to submit additional facts that are common cause or otherwise incontrovertible or are of an official, scientific technical or statistical nature and capable of easy verification. The SCA has a limited power to permit the leading of additional evidence on appeal, but the Court has not had to consider whether that power can be exercised on the application of an amicus.

covered by other parties, but is confined to making submissions on the new contentions that it wishes to place before the Court.[17] In that regard it is apposite to point out that adding additional references, whether to case law or to academic writings, on the matters canvassed in the heads of argument of the litigants, does not amount to advancing new contentions. That obviously does not exclude placing material before the Court to demonstrate that a point of controversy between the parties has been settled by way of an authoritative judgment. It would only be if there had, for example, been an authoritative decision placing a legal issue thought to be controversial beyond dispute that an amicus may include that in its argument. Otherwise it is confined to its new and different contentions and these must be clearly stated.

[30] Finally, new contentions are those that may materially affect the outcome of the case. It is not feasible to be prescriptive in this regard but prospective amici and their advisers must start by considering the nature and scope of the dispute between the parties and, on that basis, determine whether they have distinct submissions to make that may alter the outcome or persuade the Court to adopt a different line of reasoning in determining the outcome of the appeal. Obvious examples would be urging the Court to adopt reasoning based on provisions of the Constitution in construing a statute, where the parties have not taken that course, or a submission that the fundamental legal principles to be applied

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[17] *In Re: Certain Amicus Curiae Applications: Minister of Health & others v Treatment Action Campaign & others* (5) SA 713 (CC) para 5 which reads:
'The role of an amicus is to draw the attention of the Court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, an amicus has a special duty to the Court. That duty is to provide cogent and helpful submissions that assist the Court. The amicus must not repeat arguments already made but must raise new contentions; and generally these new contentions must be raised on the data already before the Court. Ordinarily it is inappropriate for an amicus to try to introduce new contentions based on fresh evidence.'

in determining the dispute are other than those submitted by the parties where their adoption would materially affect the outcome of the case. No doubt others can be imagined.[18]

[31] It is appropriate to comment that the applications appear to have paid little heed to the language of rule 16. In the first place other than that of the Foundation, none of the letters addressed to the Government and SALC sought to define with any clarity the new contentions that the prospective amici wanted to raise or why they would be of assistance to the Court. The complaints concerning this by the Government in its responses to the requests were in my view generally well-founded.

[32] An even clearer difficulty is that, again with the exception of the Foundation, the letters did not spell out the terms on which the prospective amici sought admission as such. Nor in every case did the response from SALC. It merely indicated its willingness to agree to admit the amici without dealing with the terms upon which they should be admitted. When applications were brought they overlooked the fact that an application to the President of the Court is an application for admission as an amicus, but not an application to be permitted to make oral submissions. It is the Court hearing the appeal that makes that decision. If an amicus wishes to make oral submissions it should indicate that when it submits its written submissions.

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[18] See generally *Koyabe and Others v Minister for Home Affairs and Others* (CCT 53/08) [2009] ZACC 23; 2010 (4) SA 327 (CC) para 80 where it is stated that:
'Amici curiae have made and continue to make an invaluable contribution to this Court's jurisprudence. Most, if not all, constitutional matters present issues, the resolution of which will invariably have an impact beyond the parties directly litigating before the Court. Constitutional litigation by its very nature requires the determination of issues squarely in the public interest, and insofar as amici introduce additional, new and relevant perspectives, leading to more nuanced judicial decisions, their participation in litigation is to be welcomed and encouraged.'
The qualification to their usefulness must be observed.

[33] The Deputy President of this Court granted the Foundation leave to intervene as an amicus prior to the hearing. While there was some procedural confusion about that order and the Government indicated that it would have opposed it had it been afforded the opportunity to do so,[19] it was in my judgment an order that was properly made. The Foundation's approach to the dispute was wholly distinct from that of SALC. The latter approached the case on the basis of its view of the content of customary international law and an interpretation of the relevant provisions of the Implementation Act and DIPA. The Foundation's starting point was the constitutional provisions that make international law part of South African law and from that foundation developed submissions as to the proper construction of s 4(1) of DIPA and its relationship to the obligations undertaken by this country under the Rome Statute and the Implementation Act. These contentions were clearly new and of assistance to the Court in dealing with the merits of the appeal.

[34] Notwithstanding the refusal of their application to submit further evidence to the Court, the African Centre for Justice and Peace Studies and the International Refugee Rights Initiative submitted heads of argument in support of the dismissal of the appeal and counsel appeared on their behalf. It was unclear from their application that in addition to the further evidence they had any new contentions to advance, because they said that the legal arguments would be addressed by SALC 'and there is no need for the applicants to address it any further'. The stated purpose of their intervention was to place 'vital evidence' before the

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[19] I have already drawn attention to the fact that rule 16 makes no provision for such opposition so that there was nothing untoward in the Deputy President making an order on the application as it stood.

Court in order 'to make it plain to the Court that the only real hope of justice for the victims of Sudan is for President Al-Bashir and the members of his government who have been indicted by the ICC to be arrested and surrendered to the ICC by a third state'. Nonetheless on 8 February 2016, four days before the hearing they delivered heads of argument and a bundle of authorities running to some 750 pages.

[35] The purpose of this, according to the heads of argument and as explained by counsel, was to stress that, in the absence of a remedy before the ICC, victims of international crimes perpetrated by President Al Bashir and persons for whose actions he might be held responsible, would have no effective remedy. But that added nothing to the resolution of the issues before us. The principle of complementarity that underpins the Rome Statute[20] makes it clear that the ICC exists to provide a forum for prosecution of international crimes where national courts are unable or unwilling to do so. So, it is apparent that where victims are unable to proceed in their own national court the ICC will necessarily be the tribunal to which they will turn for justice and protection,[21] as well as reparations for crimes of which they have been the victims.[22]

[36] Not only were the matters that these parties sought to raise apparent to the Court from the terms of the Rome Statute itself, but no indication was given of how knowledge of them would affect the determination of the issues in the case. Those involved the construction of a South African statute, DIPA, and the question whether it afforded

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[20] The Preamble to the Rome Statute contains the following: 'Emphasising that the International Criminal Court established under this statute shall be complementary to national criminal jurisdictions'.
[21] Article 68 provides for victims and witnesses to be protected and to participate in proceedings before the ICC.
[22] Article 75 provides for the creation of a trust fund for the purpose of making reparations to victims and their families.

President Al Bashir immunity against arrest under the Implementation Act pursuant to the warrants issued by the ICC. For those reasons the application for admission as amici curiae by the African Centre for Justice and Peace Studies and the International Refugee Rights Initiative must be refused. In view of the valuable work that these organisations perform in their field of activities, and their genuine concern in regard to the issues raised in this case and the background facts giving rise to the ICC's decision to charge President Al Bashir with international crimes, it would be inappropriate to order them to pay any costs incurred by other parties arising out of their application.

[37] Then there is the application by the Peace and Justice Initiative and the Centre for Human Rights. Again there is no doubting their legitimate concerns about events in Sudan and the continuing inability of the ICC to bring President Al Bashir to trial in respect of the charges he faces of having committed international crimes. But legitimate concern over issues providing the background to an appeal is not of itself a justification for admission as an amicus curiae. The prospective amicus must either have the agreement of the other parties, which was not forthcoming in this case, or must satisfy the President of the Court that it is entitled to be so admitted in terms of rule 16.

[38] These two bodies sought to advance argument on five matters set out in their heads of argument. These heads were accompanied by a bundle of documents amounting to a little short of 1000 pages delivered on 8 February 2016. The contentions advanced in the heads of argument differed somewhat from the matters described in their application, but the differences did not appear to be significant. The five matters were the international nature of the crimes and the ICC; the import of Security

Council Resolution 1593 (2005); the effect of Sudan and South Africa being a signatory to the Genocide Convention (1948);[23] the interpretation of Articles 27 and 98 of the Rome Statute, especially in the light of the *travaux préparatoires* and 'the original intent of the drafters'; and the unavailability of fora akin to the ICC with international jurisdiction, in Africa or elsewhere, to prosecute the alleged perpetrators in this case.

[39] The last of these overlapped with the contentions by the African Centre for Justice and Peace Studies and the International Refugee Rights Initiative and does not provide a ground for the admission of these parties as amici. Proof of the content of the *travaux préparatoires* and 'the original intent of the drafters' would require evidence, which is impermissible and leave to lead which was neither sought nor granted. As regards the other three matters they were all dealt with in the arguments of the Government and SALC. They were not new contentions. For those reasons the application for their admission as amici curiae must be refused, but again and for similar reasons no adverse order for costs should follow.

Article VIII of the hosting agreement

[40] This was not only the principal, but also the only, argument advanced by Government before the High Court. It assumed secondary importance when the application for leave to appeal was brought. It was pursued in this Court principally on the footing that until the ministerial proclamation was set aside it afforded President Al Bashir immunity from arrest and surrender under the Implementation Act. I deal with it first in

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[23] Convention on the Prevention and Punishment of the Crime of Genocide. Adopted by the General Assembly of the United Nations on 9 December 1948.

order to stress that, contrary to the Government's criticism, the High Court's understanding of the issue argued before it was undoubtedly correct and to affirm the correctness of its conclusions on that issue.

[41] The High Court gave the argument short shrift. It said that on its terms the hosting agreement conferred immunity on members or staff of the AU Commission and on delegates and other representatives of Inter-Governmental Organisations. This did not include member states or their representatives or delegates. Furthermore the section of DIPA relied on by the Minister in making her proclamation was s 5(3). That section empowered the Minister to confer immunity on:

'Any organisation recognised by the Minister for the purposes of this section and any official of such organisation enjoy such privileges and immunities as may be provided for in any agreement entered into with such organisation or as may be conferred on them by virtue of section 7(2).'

Plainly, so the High Court held, the section did not cover heads of state or representatives of states attending meetings of the AU, but only the AU itself and other organisations such as the Inter-Governmental Organisations referred to in Article VIII. The definition of an organisation in s 1 of DIPA demonstrates that it does not apply to member states but to intergovernmental organisations.

[42] There is little that can be added to that reasoning. I mention the following. Section 5 has the heading 'Immunities and privileges of United Nations, specialised agencies and other international organisations'. That fortifies the conclusion that a proclamation under the section does not apply to other persons. Second, the hosting agreement is one between South Africa as the host nation and the AU. It is intended to deal with the representatives and officials of the AU and organisations

with which it has relationships, not with the position of heads of state and state delegations. If there is to be a special agreement for immunity in respect of such persons it must be made under s 7. Otherwise their right to immunity, if any, will arise by virtue of customary international law and, in South Africa, DIPA. Although s 4(1)*(c)* of DIPA contemplates the possibility of a s 7 agreement applying to a head of state a careful reading suggests that this relates only to the conferral of additional privileges that the head of state would not otherwise enjoy by virtue of s 4(1)*(a)*.

[43] Counsel for the Government endeavoured to circumvent these difficulties in the following way. Prior to President Al Bashir coming to South Africa Sudan had requested that he be afforded the privileges and immunities of a delegate attending the AU Summit. The provisions of Article VIII of the hosting agreement were promulgated for this purpose. Even if the Minister exceeded her powers in doing so the proclamation remained in force until set aside in terms of the *Oudekraal* principle.[24] As it had not been set aside it remained effective to confer immunity on President Al Bashir notwithstanding any underlying legal defects in its proclamation.

[44] The difficulty with this contention is that it demands in the first instance that Article VIII of the hosting agreement covered President Al Bashir. If it did not it was irrelevant that the Minister thought, or had been advised, that it did. And that in turn depended in the first instance upon President Al Bashir being a delegate to the AU Assembly. But a head of state attending an AU Assembly does not do so as a delegate but as the

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[24] Footnote 5 supra.

embodiment of the member state itself. That is apparent from the AU's description of the Assembly on its website as:

'The Assembly is the African Union's (AU's) supreme organ and comprises Heads of State and Government from all Member States.'

[45] The Constitutive Act of the AU makes this perfectly clear. In Article 1 it defines 'Member State' as being 'a Member State of the Union' and the 'Assembly' as 'the Assembly of Heads of State and Government of the Union'. The 'Union' is the AU. In terms of Article 6.1 it is composed of Heads of State and Government 'or their duly accredited representatives'. Under Article 7.1 decisions of the Assembly are taken by consensus, or failing that by a two-thirds majority of Member States. The AU is composed of member states and the Assembly is its governing body composed of the heads of state or heads of government of the member states. They are the embodiment of the member states not delegates from them. Without the heads of state and heads of government or their representatives there can be no Assembly.

[46] Over and above that difficulty there is no basis for saying that heads of state attending the Assembly were encompassed by the reference to 'delegates' in Article VIII.1 of the hosting agreement. The agreement was concluded between the AU and the South African government. There is nothing to indicate that the AU was representing the heads of state of member states or their delegations in concluding the agreement or was concerned with their entitlement to immunity when visiting South Africa. That was a matter for the diplomatic relationship between South Africa and other member states, not the AU. It is an agreement relating to the 'material and technical organisation' of various meetings including the Assembly. It makes no reference to heads of state in any of its provisions.

The key words in Article VIII.1 are 'the delegates and other representatives of Inter-Governmental Organizations attending the Meetings'. That relates only to persons who are there because of their entitlement to be there on behalf of one or other inter-governmental organisation, not to those who are there on behalf of a member state.[25]

[47] The necessary conclusion is that President Al Bashir was not a person included in the reference to 'delegates' in Article VIII.1 of the hosting agreement. As such the hosting agreement did not confer any immunity on President Al Bashir and its proclamation by the Minister of International Relations and Cooperation did not serve to confer any immunity on him. The fact that the Cabinet may have thought that it would is neither here nor there. An erroneous belief cannot transform an absence of immunity into immunity. And, that being so, it was unnecessary for SALC to seek to set the proclamation aside before bringing its application.

[48] The High Court was accordingly correct in the conclusion it reached on the arguments placed before it. It cannot be criticised for not dealing with an argument that was never raised or suggested before it. It was proper therefore for it to make an order in favour of SALC on the issues before it. Whether its order was correct in the light of the new arguments now raised is the matter to which I now turn.

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[25] Dire Tladi 'The Duty on South Africa to Arrest and Surrender Al-Bashir under South African and International Law; Attempting to make a Collage from an Incoherent Framework' (2015) 13 *Journal of International Criminal Justice* 1027 at 1046 suggests that the reference in Article VIII.1 to Articles V and VII of the OAU General Convention on the Privileges and Immunities of the AU incorporates the immunities of heads of state and other representatives of states in the hosting agreement and the proclamation. Counsel for the Government did not pursue such an argument, which ignores that these articles are only mentioned in the context of saying that the members of the Commission and Staff Members and delegates and other representatives of Inter-Governmental Organisations are to enjoy those privileges. It clearly goes no further than that.

Was there immunity under customary international law and s 4(1) of DIPA?

[49] The argument on behalf of Government ran as follows. It is a well established principle of customary international law that heads of state enjoy immunity *ratione personae,* that is, by virtue of the office they hold, and are not subject to the criminal or civil jurisdiction of the Courts of other countries or any other form of restraint. In the usual terminology they are regarded as inviolable. This immunity is embodied in s 4(1)*(a)* of DIPA, which 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 …'

It follows that before the enactment of the Implementation Act President Al Bashir would have enjoyed immunity from arrest and surrender to the ICC notwithstanding South Africa's accession to the Rome Statute.

[50] The Government submitted that the Implementation Act does not remove this immunity. On a proper construction of s 4(2) of the Implementation Act it has nothing to do with immunity from arrest in terms of the ICC warrants, but precludes immunity being advanced as a defence or in mitigation of sentence in a prosecution for international crimes before a South African Court. It does not therefore remove the immunity that a head of state enjoys from arrest in South Africa even for international crimes to be prosecuted before the ICC. As to s 10(9) of the Implementation Act it is concerned only with the surrender of a person properly arrested pursuant to an ICC warrant. It precludes such a person from raising immunity to preclude surrender. But it is silent on the

question whether such person may be arrested in the first place. If they were immune from arrest then they should not be arrested and there is no room for an inquiry in terms of s 10(5) of the Implementation Act and therefore no room for applying the exclusion of immunity in s 10(9).

[51] SALC countered this argument in the following way. The Implementation Act was intended to give effect to South Africa's accession to the Rome Statute and South Africa's obligations thereunder. These included the obligation to cooperate with the ICC in causing persons in respect of whom the ICC has issued arrest warrants and requested assistance to be arrested and surrendered. Properly construed, in the light of these obligations, the provisions of ss 4(2) and 10(9) of the Implementation Act preclude anyone, whether in a prosecution before a South African Court, or when arrested pursuant to an ICC warrant, from raising as defence to their prosecution or ground for resisting their arrest and surrender, any form of immunity.

[52] In the alternative SALC joined issue with the Government on the contents of customary international law. It contended that whatever the position may be in relation to a national court, in the case of an international tribunal, such as the ICC, set up to deal with international crimes, there is no immunity from arrest or prosecution. In regard to the specific situation in Sudan SALC contended that the effect of Security Council Resolution 1593 (2005) was to subject Sudan to the provisions of the Rome Statute, notwithstanding the fact that it has not acceded to it and thereby to compel it to cooperate with the ICC. A consequence of that, and the fact that Sudan was obliged to cooperate fully with the ICC, was that it could not invoke immunity to prevent President Al Bashir from being arrested and surrendered to face trial before the ICC. In regard

to the second arrest warrant, which dealt with the crime of genocide, SALC pointed out that Sudan was a party to the Genocide Convention (1948) and as such it contended that it had waived any immunity that its citizens would otherwise have enjoyed for prosecution of crimes falling within the scope of the Convention.

[53] The Foundation's argument took the Constitution as its starting point. It said that under the Constitution the Government is required to take steps to ensure that persons accused of international crimes are detained, arrested and prosecuted before an appropriate tribunal. This duty is reinforced by the fact that under s 232, customary international law is law in South Africa unless it is inconsistent with the Constitution or an Act of Parliament.[26] Section 231 deals with the legal effect of international agreements, such as the Rome Statute, to which South Africa is a party. Under s 231(4) an international agreement becomes law in South Africa when it is enacted into law by national legislation. So customary international law is to be read in the light of legislation under which South Africa has enacted international agreements into law. When construing s 4(1)*(a)* of DIPA and its reference to customary international law, it must be read in the light of these constitutional obligations and provisions. The immunity confirmed in s 4(1)*(a)* of DIPA must therefore be construed in a way that is consistent with the absence of immunity from prosecution for international crimes provided in the Rome Statute.

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[26] This constitutionalised what was in any event the legal position. *South Atlantic Islands Development Corporation Ltd v Buchan* 1971 (1) SA 234 (C) at 238C-F.

The Rome Statute

[54] The Rome Statute is an international agreement between the State Parties thereto, directed at the prosecution and sentencing of those responsible for the international crimes of war crimes, genocide and crimes against humanity. The importance of the international struggle to rid the world of these crimes is resoundingly stated in the Preamble in the following terms:

'*The States Parties to this Statute*,

Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,

Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,

Recognizing that such grave crimes threaten the peace, security and well-being of the world,

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,

...

Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole,

Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,

Resolved to guarantee lasting respect for and the enforcement of international justice,

Have agreed as follows'.

[55] Article 1 creates the ICC and gives it the power 'to exercise its jurisdiction over persons for the most serious crimes of international concern'. Although the Rome Statute was concluded outside the United Nations (UN) the aim under Article 2 is to bring it into relationship with the UN by agreement between the UN and the ICC. The international crimes that are the subject of the ICC's jurisdiction are defined, as is the Court's jurisdiction. In the ordinary course the ICC has jurisdiction over state parties and their nationals and where a non-party state accepts the jurisdiction of the Court.

[56] This jurisdiction is not universal because parties may for various reasons not accede to the Rome Statute.[27] Article 13*(b)* of the Rome Statute endeavours to address this problem by providing that the ICC may exercise jurisdiction if:

'a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.'

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[27] These include three permanent members of the UN Security Council, namely, the United States of America, Russia and China, and the world's largest democracy, India. Sudan is not a member, although 34 African countries are members. South Africa was the first African country to sign the Rome Statute and to accede to it.

The Security Council referred the situation in Darfur to the Prosecutor in terms of this provision. While there is debate among commentators as to the full effect of such a referral, it is accepted by all that it confers jurisdiction upon the ICC in respect of the actions of a non-party state and its citizens.[28] UN member states are obliged to accept the authority of the decision by the Security Council to refer the situation in Darfur to the Prosecutor. [29]

[57] Part 9 of the Rome Statute deals comprehensively with the obligations of international cooperation and judicial assistance to the ICC in the performance of its tasks. Article 86 imposes a general obligation to cooperate fully with the Court in the investigation and prosecution of crimes within its jurisdiction. Under Article 87.1 *(a)* the ICC may address requests for cooperation to States Parties and under Article 88 all States Parties are obliged to have procedures available under national law to enable them to cooperate with the Court.

[58] Article 89 deals with the arrest and surrender of persons to the ICC and its entitlement to request a State to cooperate in securing such arrest and surrender. It is common cause that the ICC has made such a request to South Africa in relation to the arrest warrants issued in respect of President Al Bashir. In urgent cases the ICC may, in terms of Article 92, seek the provisional arrest of a person, but that was not the case here,

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[28] Akande, fn 1, supra, 301; Aleksandra Dubak 'Problems Surrounding Arrest Warrants issued by the International Criminal Court: A Decade of Judicial Practice' (2012) 32 *Polish Yearbook of International Law* 209 at 220.

[29] Article 25 of the UN Charter provides that 'The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.'

although there appears to have been some confusion over the issue in the application papers and the order made by the High Court. I will revert to that later.

[59] Article 27 of the Rome Statute deals with the possibility that the crime being prosecuted is likely in many instances to have been perpetrated by a state actor, ranging from a head of state to a humble official or soldier, and therefore the possibility would exist of the accused person raising a claim to immunity in accordance with long-established principles of customary international law, to be considered later in this judgment. It reads:

'1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.'

The undisputed effect of this provision is that it is not open to a person being prosecuted before the ICC to claim immunity from prosecution or advance a defence of superior orders. It is agreed by all commentators that, because Party States have bound themselves to the Statute including this provision, all Party States have waived any immunity that their nationals would otherwise have enjoyed under customary international law.

[60] One further provision requires discussion. It is Article 98 providing that:

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

2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.'

This provision has occasioned much debate. There is a measure of consensus that it deals with requests for surrender or assistance in relation to the nationals, including heads of state, of non-Party States such as Sudan. Beyond that there appear to be two views. The one, espoused by the AU,[30] is that it operates to protect Party States from the obligation to cooperate with requests from the ICC for arrest and surrender or assistance where that would involve their breaching their obligations to respect personal inviolability under customary international law towards non-Party States.[31] In other words it provides the justification for African states to refuse to arrest and surrender President Al Bashir, because he is entitled as the head of state of Sudan to immunity *ratione personae*.[32] The other view is that, as non-Party States and their nationals are ordinarily

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[30] Akande, fn 1, supra, 301. ICC 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 of 12 December 2011 (*Malawi*) para 15.

[31] Paola Gaeta 'Does President Al Bashir Enjoy Immunity from Arrest?' (2009) 7 *Journal of International Criminal Justice* 315 at 327-329.

[32] Michiel Blommestijn and Cedric Ryngaert 'Exploring the Obligations for States to Act upon the ICC's Arrest Warrant for Omar Al-Bashir: A Legal Conflict between the Duty to Arrest and the Customary Status of Head of State Immunity' (2010) 6 Zeitschrift für Internationale Strafrechtsdogmatik 428 at 438-440.

brought within the jurisdiction of the ICC by way of a Security Council reference under Article 13*(b)*, Article 27 is thereby made applicable to the non-Party State and therefore it is not open to it to rely on Article 98.[33] It is well-recognised that there is a tension between Articles 27 and 98 that has not as yet been authoritatively resolved.

[61] South Africa is bound by its obligations under the Rome Statute. It is obliged to cooperate with the ICC and to arrest and surrender to the Court persons in respect of whom the ICC has issued an arrest warrant and a request for assistance. To this end it passed the Implementation Act. The relationship between that Act and the head of state immunity conferred by customary international law and DIPA lies at the heart of this case. But the starting point is not immediately with these, but with the Constitution.

The Constitutional background

[62] The Constitution makes international customary law part of the law of South Africa, but it may be amended by legislation.[34] It provides a specific mechanism whereby obligations assumed under international agreements become a part of the law of South Africa.[35] And it decrees that, when interpreting any legislation, the Courts must prefer a reasonable interpretation that is consistent with international law over any

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[33] Dabo Akande 'The Legal Nature of Security Council Referrals to the ICC and its impact on Al Bashir's Immunities' (2009) 7 *Journal of International Criminal Justice* 333 at 342.
[34] Section 232 of the Constitution.
[35] Section 231 of the Constitution.

alternative interpretation that is inconsistent with international law.[36] As Ngcobo CJ said in *Glenister (II)*:[37]

'Our Constitution reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law, in particular international human-rights law … These provisions of our Constitution demonstrate that international law has a special place in our law which is carefully defined by the Constitution.'

[63] The Constitution incorporated these provisions pursuant to the goal stated in the Preamble that its purpose is to '[b]uild a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations'. From being an international pariah South Africa has sought in our democratic state to play a full role as an accepted member of the international community. As part of this aim it enacted the Implementation Act, the preamble to which records that South Africa has become 'an integral and accepted member of the community of nations'.

[64] The Constitutional Court explained the inter-relationship between South Africa's obligations under international law and its domestic law in *National Commissioner of Police v Southern African Human Rights Litigation Centre*.[38] The Court was dealing with claims of torture, but its statements also referred to international crimes and are apposite in the context of the present case. Giving the judgment of the Court Majiedt AJ said:

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[36] Section 233 of the Constitution.
[37] *Glenister v President of the Republic of South Africa & others* [2011] ZACC 6; 2011 (3) SA 347 (CC) para 97.
[38] *National Commissioner of Police v Southern African Human Rights Litigation Centre & another* [2014] ZACC 30; 2015 (1) SA 315 (CC) paras 37 to 40.

'[37] 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". Torture, whether on the scale of crimes against humanity or not, is a crime in South Africa in terms of s 232 of the Constitution because the customary international law prohibition against torture has the status of a peremptory norm.

[38] Furthermore, along with genocide and war crimes there is an international treaty law obligation to prosecute torture. The Convention against Torture, an international convention drafted specifically to deal with the crime of torture, obliges states parties to "ensure that all acts of torture are offences under its criminal law", together with an "attempt to commit torture" and "complicity and participation in torture".

[39] South Africa has fulfilled this international-law obligation through the recent enactment of the Torture Act [Prevention and Combating of Torture of Persons Act 13 of 2013]'. In effect, torture is criminalised in South Africa under s 232 of the Constitution and the Torture Act whilst torture on the scale of crimes against humanity is criminalised under s 232 of the Constitution, the Torture Act and the ICC Act …

[40] Because of the international nature of the crime of torture, South Africa, in terms of ss 231(4), 232 and 233 of the Constitution and various international, regional and subregional instruments, is required, where appropriate, to exercise universal jurisdiction in relation to these crimes as they offend against the human conscience and our international- and domestic-law obligations. The exercise of universal jurisdiction is, however, subject to certain limitations.'

[65] That passage strongly supports SALC's case that the Government was under an obligation to cooperate with the ICC in arresting President Al Bashir. I did not understand Mr Gauntlett SC to challenge it as a general proposition. His contention was that, as foreshadowed in the final

sentence, the principles governing the immunity *ratione personae* of heads of state constituted a limitation on this exercise of universal jurisdiction that precluded the performance of these obligations in relation to current heads of state.[39] This necessitates a consideration of the nature of immunity in customary international law and, more specifically, the nature of head of state immunity.

Immunity in customary international law

[66] Professor Crawford[40] describes the basic principles of the international law of immunity in the following terms:

'State immunity is a rule of international law that facilitates the performance of public functions of the state and its representatives by preventing them from being sued or prosecuted in foreign Courts. Essentially, it precludes the Courts of the forum state from exercising adjudicative and enforcement jurisdiction in certain classes of case in which a foreign state is a party. It is a procedural bar (not a substantive defence) based on the status and functions of the state or official in question. Previously described as a privilege conferred at the behest of the executive, the grant of immunity is now understood as an obligation under customary international law … [T]he existence of this obligation is supported by ample authority … Immunity exists as a rule of international law, but its application depends substantially on the law and procedural rules of the forum.'

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[39] In advancing this contention he echoed the view consistently taken by the states of the AU that a sitting head of state enjoys immunity in the absence of waiver and that President Al Bashir is accordingly for the present immune from proceedings in other countries and before national Courts directed at securing his arrest and surrender under the two ICC arrest warrants. See the various resolutions of the AU referred to in footnote 12 of *Malawi fn* 30 supra. See also Asad G Kiyani 'Al-Bashir & the ICC: The Problem of Head of State Immunity' (2013) 12 *Chinese Journal of International Law* 467 para 41 which deals with the AU's approach and says that it is shared by the Arab League and China.

[40] James Crawford *Brownlie's Principles of Public International Law* 8 ed (2012) (*Brownlie*) at 487-488.

This immunity is available when it is sought to implead a foreign state, whether directly or indirectly,[41] before domestic Courts, and also when action is taken against state officials acting in their capacity as such. They enjoy the same immunity as the state they represent.[42] This is known as immunity *ratione materiae* (immunity attaching to official acts). In addition, heads of state and certain other high officials of state[43] enjoy immunity *ratione personae* (immunity by virtue of status or an office held at any particular time). This form of immunity terminates when the individual demits, or is removed from, office. The country concerned may waive either form of immunity.

[67] The Government called these principles in aid in support of its position that President Al Bashir was immune from arrest and surrender in terms of the Implementation Act. It cited the authoritative statements by the International Court of Justice (ICJ) in the *Arrest Warrant* case[44] that:

'… [I]n international law it is firmly established that … certain holders of High-ranking office in a State, such as the Head of State … enjoy immunities from jurisdiction in other States, both civil and criminal.

… [T]hroughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and inviolability

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[41] An action *in rem* against a ship owned by a foreign sovereign is an example of an indirect impleading of a foreign sovereign. See *Compania Naviera Vascongado v SS Cristina* [1938] AC 485; [1938] 1 All ER 719 (HL). So is a civil action against an individual in respect of actions on behalf of a foreign state, where permitting an action against the individual would circumvent the state's immunity. *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia (Secretary of State for Constitutional Affairs intervening); Mitchell v Al-Dali* [2006] UKHL 26; [2007] 1 AC 270; [2007] 1 All ER 113 (HL).
[42] *Brownlie*, supra, 493-4.
[43] For example the Head of Government or the Minister of Foreign Affairs.
[44] Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) ICJ Reports 2002, p. 3; [2002] ICJ 1 paras 51 and 54 (*Arrest Warrant*).

protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties. '

In regard to a suggestion that, because the case concerned allegations of the commission of international crimes, there was an exception to the principle, the ICJ said (para 58) that it had examined State practice, including national legislation and decisions of higher national courts, but was unable to deduce that there existed under customary international law any exception to this rule where the individual concerned was suspected of having committed war crimes or crimes against humanity. This appears to be accepted by leading commentators such as Professor Akande.[45] It has also been widely accepted by national courts which have rejected attempts to implead sitting heads of state including Prime Minister Sharon of Israel, President Gaddafi of Libya, President Mugabe of Zimbabwe, Prime Minister Thatcher of the United Kingdom, President Castro of Cuba, President Zemin of China, President Kagame of Rwanda and President Aristide of Haiti, while the latter was living in exile in the United States of America.[46]

[68] Dating back to the instrument that established the Nuremberg Trials, it has been a feature of international instruments dealing with the prosecution of international crimes before specially constituted international tribunals, that those tribunals are constituted on the basis of specific provisions excluding claims of immunity as a defence or

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[45] Akande, fn 33 supra at 334.
[46] See the cases cited in Michael A Tunks, 'Diplomats or Defendants? Defining the Future of Head-of-State Immunity' (2002) 52 *Duke Law Journal* 651 at 662-3 and 665-6; Thomas Weatherall 'Jus Cogens and Sovereign Immunity: Reconciling Divergence in Contemporary Jurisprudence' (2015) 46 *Georgetown Journal of International Law* 1151 at 1171-1173.

mitigating circumstance before those tribunals.[47] The ICJ considered these as well (para 58) and found that they likewise did not enable it to conclude that any such exception existed in customary international law in regard to national Courts. But it was urged upon us that customary international law has moved on and at least when it was concerned with international crimes and international tribunals such as the ICC these principles were subject to an exception.

[69] I mean no disrespect to the efforts of counsel to provide us with a comprehensive body of authority dealing with the issue of immunity in relation to persons charged with international crimes, in not engaging in a comprehensive consideration of the material placed before us. The narrow issue is whether there is now an international crimes exception to the principle of head of state immunity, enabling a state or national court to disregard such immunity when called upon by the ICC to assist in implementing an arrest warrant. The argument proceeded, as does this judgment, on the basis that once a head of state has been brought before the ICC no plea of head of state immunity can be invoked.[48] But, as a number of commentators have pointed out, that does not necessarily mean that a state is entitled to ignore head of state immunity when requested to cooperate with the ICC to bring such a person before it. It is in this context that the question of an international crimes exception to head of state immunity arises.

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[47] Charter of the International Military Tribunal of Nuremberg, Article 7; Charter of the International Military Tribunal for the Far East, Article 6; Statute of the International Criminal Tribunal for the former Yugoslavia, Article 7, para 2; Statute of the International Criminal Tribunal for Rwanda, Article 6, para 2; and Rome Statute of the International Criminal Court, Article 27. Most of these provisions are quoted in *Prosecutor v Taylo*r, Decision on Immunity from Jurisdiction (Charles Taylor) of the Special Court for Sierra Leone, Case No SCSL/2003-01-I, Appeals Chamber, 31 May 2004.

[48] As was held in *Prosecutor v Taylor* ibid.

[70] In the absence of a binding treaty or other international instrument creating such an exception, or an established universal practice in the affairs of nations, one looks to the decisions of international courts for guidance as to the existence of such an exception. But we were referred to no decision by the ICJ itself, qualifying or limiting the scope of its decision in the Arrest Warrant case. Instead the ICJ appears to have affirmed the decision in its subsequent judgment in Djibouti v France,[49] where it cited the judgment and explained that 'the determining feature in assessing whether there has been an attack on the immunity of the Head of State lies in the subjection of the latter to a constraining act of authority'. Then in the *Jurisdictional Immunities* case,[50] after a comprehensive review of both national and international jurisprudence on the point, the ICJ rejected a contention that international law does not recognise immunity, or at least restricts it, in cases involving serious violations of the law of armed conflict. No more recent case from the ICJ was drawn to our attention.

[71] The *Jurisdictional Immunities* case involved a civil claim by one state against another state, but I can discern nothing in the underlying treatment of customary international law that would justify admitting an exception to head of state immunity for international crimes in the context of criminal proceedings, but denying it in relation to civil proceedings. I am mindful that in some of the reasoning in both *Pinochet*

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[49] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France), Judgment,* I.C.J. Reports 2008, p. 177; [2008] ICJ 4 para 170.
[50] *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening), Judgment,* I.C.J. Reports 2012, p.99; [2012] ICJ 10 paras 81-97.

(3)[51] and *Jones*[52] there are passages in which a careful distinction is drawn between civil liability, and the case of criminal liability.[53] But *Pinochet (3)* was dealing with the criminal liability of a former head of state, not civil liability, and in *Jones* the House of Lords was concerned with the possible circumvention of state immunity, by permitting personal actions against the officials of the state. Permitting such an action would indirectly infringe the absolute immunity of the foreign state, but indirect infringement does not arise in a criminal case. Of greater relevance in regard to the contention that there is an international crimes exception to head of state immunity is that there are clear statements in *Pinochet (3)* that if Senator Pinochet had still been the Chilean head of state he would have enjoyed immunity *ratione personae*.[54] Apart from the point of circumvention of state immunity, it was not suggested that the principles of immunity are different in respect of criminal prosecution of international crimes as opposed to the adjudication of civil claims arising from the perpetration of international crimes. As pointed out by Professor Crawford the immunity afforded to state officials has always been the same as that of the state they represent.[55] And Dame Hazel Fox QC and Philippa Webb say that 'Civil immunity can in the last resort … be regarded as based on criminal immunity.'[56]

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[51] *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3) (Amnesty International intervening)* [2000] 1 AC 147, [1999] 2 All ER 97 (HL).
[52] *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia (Secretary of State for Constitutional Affairs intervening); Mitchell v Al-Dali* [2006] UKHL 26; [2007] 1 AC 270; [2007] 1 All ER 113 (HL).
[53] Lord Bingham of Cornhill para 32 and Lord Hoffmann para 71.
[54] Lord Goff of Chieveley citing at 116 the opinion of Lord Slynn of Hadley in *Pinochet (1)* [1998] 4 All ER 897 (HL) at 913; Lord Millett at 171; and Lord Phillips of Worth Matravers at 181.
[55] *Brownlie* fn 35 ante.
[56] Hazel Fox QC and Philippa Webb *The Law of State Immunity* 3ed (2014) 85.

[72] In two cases, both relied on by the ICJ in the *Jurisdictional Immunities* decision, the European Court of Human Rights (ECHR) has likewise accepted that customary international law is as stated in the *Arrest Warrant* case insofar as it concerns civil claims. The ICJ cited the following passage from the ECHR decision in *Al Adsani*:[57]

'Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the Courts of another State where acts of torture are alleged.'

Then in *Kalogeropoulou*[58] the EHCR said:

'The Court does not find it established, however, that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages brought against them in another State for crimes against humanity."

[73] I can see the force of an argument that the prosecution of perpetrators of international crimes is of greater importance than permitting civil claims arising from their conduct. On the other hand, however, and having regard to the fact that customary international law is derived from the actions of states in their relations with one another, it may be that states would be more willing to accept immunity being withdrawn or attenuated in relation to claims that sound in monetary terms, than they would to agree to permit their high-ranking office holders and officials to be prosecuted in other national courts. But as I

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[57] *Al Adsani v The United Kingdom* (2002) 34 EHRR 11 para 61.
[58] *Kalogeropoulou and Others v Greece and Germany* (2002) 129 ILR 537.

have said no authority to which we were referred drew any distinction between the two situations or suggested that an international crimes exception was accepted in either situation. Professor O'Keefe argues persuasively that there is little likelihood of the acceptance of such an exception in the foreseeable future.[59]

[74] It may be that these considerations will inform future debate and contribute to the development of customary international law, but our task is to assess the state of customary international law as it stands at the present time and apply it. That is what the Constitution requires us to do. While in other areas of the law the Court's function includes the development of the law, in the area of customary international law its task is one of discerning the existing state of the law, not developing it. As Lord Hoffmann said in *Jones*:[60]

'It is not for a national Court to "develop" international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states.'

Development of customary international law occurs in international courts and tribunals, in the contents of international agreements and treaties and by its general acceptance by the international community of nations in their relations with one another as to the laws that govern that community. However tempting it may be to a domestic court to seek to expand the boundaries of customary international law by domestic judicial decision, it is not in my view permissible for it to do so.

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[59] Roger O'Keefe the Professor of Public International Law at University College London 'Symposium on the Immunity of State Officials. 'An "International Crime" Exception to the Immunity of State Officials from Foreign Criminal Jurisdiction: Not Currently, Not Likely' (2015) 109 AJIL 167.
[60] Para 63.

[75] The ICC itself has affirmed that the *Arrest Warrant* case correctly reflects customary international law in respect of the immunity *ratione personae* of heads of state. In the *DRC* case concerning President Al Bashir[61] it said:

'At the outset, the Chamber wishes to make it clear that it is not disputed that under international law a sitting Head of State enjoys personal immunities from criminal jurisdiction and inviolability before national Courts of foreign States even when suspected of having committed one or more of the crimes that fall within the jurisdiction of the Court.'

In support of this statement the ICC cited the *Arrest Warrant* case.

[76] The *Arrest Warrant* case specifically recognised that there are exceptions to this immunity. The decision mentioned four.[62] The first three were that there is no immunity before a domestic Court; no immunity if it is waived by the State they represent; and no immunity after they demit, or are removed from, office. The fourth bears upon the present case. The ICJ recognised that an incumbent of an office entitled to immunity *ratione personae* 'may be subject to criminal proceedings before certain international criminal Courts, where they have jurisdiction'. It mentioned various possible examples of which the ICC was one. The tribunals in question were those the founding statutes of which excluded such immunity as a defence or ground for moderating sentence. Does this provide the exception for which SALC contends? It

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[61] 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 dated 9 April 2014 (*DRC*) para 25.
[62] Para 61.

has the support of at least one of the commentators cited by SALC.[63] But another equally eminent commentator cited by the Government disagrees.[64] No one so far as I can see claims that the matter has been clearly resolved as a matter of customary international law.

[77] There is a difference between saying that an international tribunal, having jurisdiction and constituted on terms that specifically exclude reliance on any principles of immunity, provides an exception to the customary international law rule that heads of state enjoy immunity *ratione personae*, and saying that a national court asked to provide assistance to that international tribunal is likewise not bound by the customary international law rule. It is the latter proposition with which we are concerned. And it is of great importance that in two instances in dealing with the arrest and surrender of President Al Bashir, the ICC did not found its decisions on that proposition. Instead it held that President Al Bashir does not enjoy any such immunity, because the Security Council removed it by way of Resolution 1593 (2005).

[78] Sudan is not a party to the Rome Statute. It has not therefore undertaken any obligations in relation to the ICC. By contrast a state that is a party to the Rome Statute is bound by its terms. As those include, in Article 27, an express provision precluding reliance on immunity it is accepted that party states waive any rights to immunity that their own

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[63] Dr Göran Sluiter 'The Surrender of War Criminals to the International Criminal Court' (2003) 25 *Loyola of Los Angeles International and Comparative Law Review* 605 at 632. The proposition is contained in a single bald sentence reading: 'Also, the recent judgment by the ICJ in the *Congo-Belgium* case acknowledges, in my view, that current international law for state and diplomatic immunities are not applicable to arrests and surrenders at the request of the ICC.'

[64] Gaeta, fn 31, 315 especially at 319.

citizens might otherwise have enjoyed. But the position is different in respect of non-parties. Here the starting point must be that in terms of Article 34 of the Vienna Convention on the Law of Treaties[65] a treaty such as the Rome Statute cannot impose obligations on states that are not parties to the treaty and have not consented to the imposition of such obligations.

[79] The ICC recognised this difficulty in the *DRC* case. It also accepted that in the ordinary course the only means of avoiding the difficulty was by invoking Article 98 of the Rome Statute, which provides for the ICC to secure the cooperation of the third party state (in this case, Sudan) in waiving immunity and giving consent for the surrender of the person concerned. The papers do not reveal whether the ICC has made approaches to Sudan to secure a waiver or consent, but given that President Al Bashir is the head of state in that country it is obvious at a practical level that it would not be forthcoming.

[80] In *DRC* the ICC held that requiring the DRC to arrest and surrender President Al Bashir did not create an inconsistency between its obligations under the Rome Statute and its international obligation to respect the immunities of President Al Bashir as a head of state. But its reasoning was not based on the existence of an international crimes exception to head of state immunity. It was based entirely on Security Council Resolution 1593 (2005). The ICC reasoned as follows:[66]

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[65] Vienna Convention on the Law of Treaties, 1969.
[66] Para 29.

'The Chamber does not consider that such inconsistency arises in this case. *This is so because by issuing Resolution 1593(2005) the SC[Security Council] decided that the "Government of Sudan […] shall cooperate fully with and provide necessary assistance to the Court and the Prosecutor pursuant to this resolution".* Since Immunities attached to Omar Al Bashir are a procedural bar from prosecution before the Court, the cooperation envisaged in said resolution was meant to eliminate any impediment to the proceedings before the Court, including the lifting of immunities. Any other interpretation would render the SC decision requiring that Sudan "cooperate fully" and "provide any necessary assistance to the Court" senseless. Accordingly, the "*cooperation* of that third party State [Sudan] for the waiver of the immunity" as required under the last sentence of article 98(1) of the Statute, was already ensured by the language used in paragraph 2 of the SC Resolution 1593(2005). By virtue of said paragraph, the SC implicitly waived the immunities granted to Omar Al Bashir under international law and attached to his position as a Head of State.' (My emphasis added in italics. Underlined words emphasised in the original.)

[81] In its decision in relation to President Al Bashir's visit to South Africa referred to earlier[67] the ICC repeated this justification for its view that South Africa was not barred by President Al Bashir's status as a head of state from arresting him and causing him to be surrendered to the ICC. It said:[68]

'In conclusion, the Republic of South Africa is already aware of its obligation under the Rome Statute to immediately arrest Omar Al Bashir and surrender him to the Court, *as it is aware of the Court's explicit position … that the immunities granted to Omar Al Bashir under international law and attached to his position as a Head of State have been implicitly waived by the Security Council of the United Nations by resolution 1593(2005) …*'(My emphasis)

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[67] Footnote 2 supra.
[68] Para 9 of the Decision.

[82] These decisions involved a departure by the ICC from its earlier decision holding that there is an international crimes exception to head of state immunity when a person is charged with international crimes under the Rome Statute.[69] In *Malawi*[70] the ICC concluded that:

'… [T]he Chamber finds 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.'

By contrast on the same question Professor Crawford[71] (since 2015 a judge of the ICJ) wrote, in respect of the ICC, that state parties had consented to the waiver of immunity in respect of their nationals by virtue of their agreement to Article 27, but:

'The entitlement of nationals of non-parties to personal immunity is not obviously eroded, particularly in the light of Article 98(1) of the ICC statute.'

He noted that the Pre-Trial Chamber held a firm opinion to the contrary, but that was written before the Chamber gave a different justification for its views in regard to President Al Bashir and immunity. Its current position appears to accept that President Al Bashir would enjoy head of state immunity, were it not, so it believes, for the fact that it has been waived by the Security Council.

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[69] Tladi, footnote 25 supra at 1042. The author regards the earlier decisions as incorrect because they dealt with the issue as if Article 98 formed no part of the Rome Statute. So does Erika De Wet 'The Implications of President Al-Bashir's Visit to South Africa for International and Domestic Law' (2015) 13 *Journal of International Criminal Justice* 1049 at 1057. Professor de Wet regards the reasoning in the later decisions as preferable. In other words she supports the approach of the removal of immunity by the Security Council. We were provided with other material in which the reasoning in the decision was subjected to substantial criticism.

[70] *Malawi* paras 37-43 fn 30 supra.

[71] *Brownlie* supra 501.

[83] It would serve little purpose to trawl through the academic literature on the question as the commentators are divided, although one senses a desire on the part of many of them that the problem should be resolved by recognising an exception to the rule of head of state immunity. Were it simply a matter for me to determine I would be inclined to share the view expressed by Dr Weatherall[72] that:

'…[T]he State is not an abstract entity but a community of human beings. Protection of international criminals … from international scrutiny under the guise of State dignity is an affront to the citizens against whom grave violations of human rights are perpetrated. As State sovereignty is increasingly viewed to be contingent upon respect for certain values common to the international community, it is perhaps unsurprising that bare sovereignty is no longer sufficient to absolutely shield High officials from prosecution for *jus cogens* violations.'

as well as that of the U S District Court[73] he quotes:

'These precedents instruct that resort to head-of-state and diplomatic immunity as a shield for private abuses of the sovereign's office is wearing thinner in the eyes of the world and waning in the cover of the law. The prevailing trend teaches that the day does come to pass when those who violate their public trust are called upon, in this world, to render account for the wrongs they inflict on innocents.'

[84] But the content of customary international law is not for me to determine and, like Dr Weatherall, I must conclude with regret that it would go too far to say that there is no longer any sovereign immunity for *jus cogens* (immutable norm) violations. Consideration of the cases and the literature goes no further than showing that Professor Dugard is correct when he says that 'customary international law is in a state of flux

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[72] Weatherall, fn 41 supra, at 1175.
[73] *Tachiona v Mugabe* 169 F Supp 2d 259, 316-7 (SDNY 2001).

in respect of immunity, both criminal and civil, for acts of violation of norms of *jus cogens*'.[74] In those circumstances I am unable to hold that at this stage of the development of customary international law there is an international crimes exception to the immunity and inviolability that heads of state enjoy when visiting foreign countries and before foreign national Courts.

[85] Ordinarily that would mean that President Al Bashir was entitled to inviolability while in South Africa last June. But SALC argued that the position was different as a result of the enactment of the Implementation Act. I turn to consider that contention.

The Implementation Act

[86] Whether the Implementation Act has the effect of removing the immunity that President Al Bashir would otherwise enjoy is a matter of the proper construction of the Implementation Act. The principles to be followed in that regard are settled.[75] In the present case they are strongly influenced by the fact that we are dealing with a statute that incorporated an international agreement into South African law and are required by s 233 of the Constitution to construe it in a manner consistent with international law. As international law requires state parties to international agreements to comply with the obligations they have assumed under those agreements, an interpretation of the Implementation Act that results in South Africa not complying with its obligations under the Rome Statute is to be avoided if possible.

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[74] John Dugard *International Law: A South African Perspective* 4ed (2011) (Dugard) at 258.
[75] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18; and *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; 2014 (2) SA 494 (SCA) para 12.

[87] We are also obliged by s 39(2) of the Constitution to interpret the Implementation Act in a way that promotes the spirit, purport and objects of the Bill of Rights. There are a number of provisions of the Bill of Rights that inform its spirit, purport and objects in this context. If international crimes were committed in South Africa they would infringe a number of rights guaranteed under the Bill of Rights. Section 11 guarantees the right to life and we are here concerned with an arrest warrant that charges the crime of genocide. The charges of war crimes and crimes against humanity not only infringe that right but they also infringe the right to dignity in s 10 and the right to freedom and security of the person in s 12. Section 12(1) explains that this includes the right not to be deprived of freedom arbitrarily or without just cause; the right not to be detained without trial; the right to be free from all forms of violence from either public or private sources; the right not to be tortured and the right not to be treated in a cruel, inhuman or degrading way. Section 13 guarantees that no one may be subjected to slavery, servitude or forced labour and s14 protects the right to privacy. Then there are the rights to freedom of religion, belief and opinion; freedom of expression and the right to assembly, demonstration and petition.

[88] Reference to the two arrest warrants show that the conduct of which President Al Bashir stands accused, and for which he is said to be responsible, involves acts that would infringe all of these rights. It is of course not for us to form or express a view on whether the conduct charged occurred or, if it did, his responsibility for it. But I mention it because it illustrates the importance in the context of the interpretation of

the Implementation Act of construing it in a way that accords with and gives effect to the spirit, purport and objects of the Bill of Rights.

[89] The starting point in the interpretational exercise is the long title of the Implementation Act, which describes its purposes. It reads that it is an Act:

'To provide for a framework to ensure the effective implementation of the Rome Statute of the International Criminal Court in South Africa; to ensure that South Africa conforms with its obligations set out in the Statute; to provide for the crime of genocide, crimes against humanity and war crimes; to provide for the prosecution in South African Courts of persons accused of having committed the said crimes in South Africa and beyond the borders of South Africa in certain circumstances; to provide for the arrest of persons accused of having committed the said crimes and their surrender to the said Court in certain circumstances; to provide for co-operation by South Africa with the said Court; and to provide for matters connected therewith.'

[90] Some of these features warrant stressing in the light of the fact that there is no dispute that President Al Bashir is subject to the jurisdiction of the ICC and can be prosecuted by it for his alleged crimes. He has been stripped of any immunity when before the ICC. It is therefore important that the purpose of the Implementation Act is to provide a framework to ensure the effective implementation of the Rome Statute. It is to *ensure* that South Africa conforms to its obligations under the Rome Statute. In that regard there is no doubting its obligation to endeavour to bring President Al Bashir before the ICC for trial. The head of state immunity claimed for him is only a procedural bar to the enforcement of that

obligation in this country.[76] It is not an immunity that confers impunity for any wrongdoing on his part.

[91] Lastly the Implementation Act provides for the arrest of persons accused of international crimes and their surrender to the ICC and for cooperation between this country and the ICC. Those are powerful objectives. The reason for them appears from the preamble where the point is made that 'millions of children, women and men have suffered as a result of atrocities which constitute the crimes of genocide, crimes against humanity, war crimes and the crime of aggression in terms of international law'. As a result of this and South Africa's own painful past the Republic of South Africa is committed to:

'* bringing persons who commit such atrocities to justice, either in a Court of law of the Republic in terms of its domestic laws where possible, pursuant to its international obligations to do so when the Republic became party to the Rome Statute of the International Criminal Court, or in the event of the national prosecuting authority of the Republic declining or being unable to do so, in line with the principle of complementarity as contemplated in the Statute, in the International Criminal Court, created by and functioning in terms of the said Statute; and

* carrying out its other obligations in terms of the said Statute'.

[92] The relevant provisions of the Implementation Act must be read and construed in the light of this commitment, which as the Constitutional Court has pointed out, is constitutionally mandated. The first is s 4(2) which provides:

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[76] *Jurisdictional Immunities* para 93; Hazel Fox QC and Philippa Webb, fn 56 supra at 5, 21 and 38-39.

'(2) Despite any other law to the contrary, including customary and conventional international law, the fact that a person—

(a) is or was a head of State or government, a member of a government or parliament, an elected representative or a government official; or

(b) being a member of a security service or armed force, was under a legal obligation to obey a manifestly unlawful order of a government or superior, is neither—

(i) a defence to a crime; nor

(ii) a ground for any possible reduction of sentence once a person has been convicted of a crime.'

[93] In Dugard,[77] it is suggested that this section is an endeavour by the legislature to 'cut past' the controversial issue of immunity *ratione personae*. I confess to being unpersuaded. The section is in a part of the Implementation Act conferring jurisdiction on South African Courts to try international crimes in certain circumstances. It would have been absurd and non-compliant with its international obligations for South Africa in such a case to permit the accused to raise immunity either *ratione personae* or *ratione materiae*, or obedience to orders, to avoid conviction or reduce any sentence. In the circumstances the section paraphrased the provisions of Article 27(1) of the Rome Statute and made them applicable in trials for international crimes in South Africa or, as Professor du Plessis expressed matters, it 'trumps' the immunities that

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[77] Dugard fn 68 ante, at 211. This appears in a chapter written by Professor du Plessis. See also J Dugard and G Abraham 'Public International Law' 2002 *Annual Survey of South African Law* 140 at 165-6; and M du Plessis 'South Africa's Implementation of the ICC Statute: An African Example' (2007) 5 *Journal of International Criminal Justice* 460 at 474.

would otherwise attach to individuals.[78] The difficulty lies in taking it further to create in South Africa an international crimes exception to head of state immunity. Nevertheless, that does not mean that it is irrelevant to the interpretational exercise. It is a clear indication that South Africa does not support immunities when people are charged with international crimes.

[94] Recognition of head of state immunity alongside the provisions of s 4(2) to preclude someone from being brought to trial in South Africa would create an anomaly. Under s 4(3)*(c)* a South African Court has jurisdiction to try someone for an international crime if they are present in the territory of the Republic. In such a trial it would be no answer for the accused to raise immunity either *ratione personae* or *ratione materiae*. But on the argument for the Government this would not matter because it would be impossible for the accused to be brought before the Court in terms of the Criminal Procedure Act 51 of 1977 (CPA). Under the CPA an accused is brought to Court either by arrest or indictment,[79] but either procedure would compel the accused to submit to the criminal jurisdiction of a South African Court, which is inconsistent with immunity.

[95] A construction of s 4(2) that would exclude claims of immunity if a person was being tried before a South African Court, but would not exclude immunity in seeking to bring that person to trial before that Court

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[78] Du Plessis ibid.
[79] In the Magistrates' Courts arrest and summons are used but it is inconceivable that international crimes would be prosecuted anywhere but in the High Court.

would in my view be a serious anomaly. The ordinary principle of interpretation is that the conferral of a power conveys with it all ancillary powers necessary to achieve the purpose of that power.[80] The purpose of the power to prosecute international crimes in South Africa is to ensure that the perpetrators of such crimes do not go unpunished. In order to achieve that purpose it is necessary for the National Director of Public Prosecutions to have the power not only to prosecute perpetrators before our Courts, but, to that end, to bring them before our Courts. This is also consistent with the constitutional requirement that the Implementation Act be construed in a way that gives effect to South Africa's international law obligations and the spirit, purport and objects of the Bill of Rights. The construction proffered on behalf of the Government emasculates the section in relation to international crimes that were perpetrated outside the borders of this country by nationals of other states. That is a construction that would defeat the purposes of the Implementation Act. It is not in my view correct.

[96] I turn then to the provisions of the Implementation Act dealing with requests for assistance from the ICC and, more particularly, requests for assistance in terms of arrest warrants issued by the ICC for the purpose of securing the presence before the Court of alleged perpetrators of international crimes. These are in ss 8 to 10 of the Act. Section 8(1) provides that when a request is received from the ICC for the arrest and surrender of a person for whom it has issued a warrant of arrest it must be referred to the Central Authority. This is defined as the Director-General: Justice and Constitutional Development, the present incumbent of which

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[80] *Middelburg Municipality v Gertzen* 1914 AD 544 at 552.

office is Ms Sindane. The Central Authority must immediately on receipt of the request forward the documents to a magistrate who must endorse the warrant for execution in any part of the Republic.[81] That was what occurred in relation to the request in relation to the first arrest warrant. It was forwarded to the Chief Magistrate, Pretoria, who endorsed it for execution.[82] So far as the record goes that warrant is still extant and operative.

[97] Section 9(3) provides that any warrant endorsed under s 8 must be in the form and executed in a manner as near as possible to that which is prescribed under the laws relating to criminal procedure in South Africa. This is the only part of s 9 that bears upon the two warrants in this case. The balance of the section deals with provisional warrants to be sought pursuant to a request by the ICC in terms of Article 92 of the Rome Statute. That is irrelevant for the purposes of this case, save that in formulating its claim in the founding affidavit SALC sought to rely on ss 9(1) and (2). This misconception appears to some degree to have coloured the relief sought by SALC. It will be dealt with below.

[98] Section 10 deals with the procedures to be followed before a competent court after arrest for the purposes of surrender. Within 48 hours of the person's arrest they must be brought before the magistrate in whose area of jurisdiction the arrest took place. The magistrate then conducts an inquiry in order to establish whether the warrant applies to the person in question; whether the person has been arrested in

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[81] Section 8(2) of the Implementation Act.
[82] Tladi, fn 25 supra, 1037.

accordance with the procedures laid down in domestic law; and whether the person's rights as contemplated in the Bill of Rights have been respected, if, and to the extent which, they are or may be applicable.[83] The inquiry is conducted in the same manner as a preparatory examination under the CPA.[84] If, at the end of the inquiry, the magistrate is satisfied of the three matters specified in ss (1) and that the person may be surrendered to the ICC,[85] then they '*must* order that such person be surrendered to the Court and that he or she be committed to prison pending such surrender.'[86] There is no scope for the exercise of any discretion in that regard. Provided the requirements for surrender are satisfied then the magistrate must order surrender.

[99] These provisions do not mention the issue of immunity. Nor is it apparent where a claim to immunity could find its place in the inquiry contemplated by s 10(1). The inquiry is expressly confined to the three matters specified and none of those appear to involve issues of immunity. Certainly the question whether the person arrested is the person referred to in the warrant does not raise that as an issue. Similarly, whether the person's arrest complied procedurally with the requirements for a valid arrest in South African domestic law would not raise that issue. When this difficulty was raised with counsel he suggested that the inquiry became relevant when considering whether the arrested person's rights in terms of the Bill of Rights had been respected and referred to s 12 of the Constitution guaranteeing the right to freedom and security of the person

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[83] Section 10(1) of the Implementation Act.
[84] Section 10(3) of the Implementation Act.
[85] This is not an additional matter on which the magistrate must be satisfied. If the three requirements are present then the person may be surrendered to the ICC and the magistrate must so order.
[86] Section 10(5) of the Implementation Act.

and s 21 governing freedom of movement. But, if the Implementation Act provides for a person's arrest in those circumstances neither of those rights is infringed, or, if they are, the limitation is justified under s 36 of the Constitution. The argument is dependent on the premise that such an arrest would be unlawful because of the existence of immunity. But that begs the very question in issue in this case, namely, whether in relation to an ICC arrest warrant and request for assistance, such immunity exists.

[100] It is here that s 10(9) assumes crucial importance because it deals with the very question of the relevance of claims to immunity to the order of surrender. It provides that:

'The fact that the person to be surrendered is a person contemplated in section 4(2)*(a)* or *(b)* does not constitute a ground for refusing to issue an order contemplated in subsection (5).'

The persons referred to in s 4(2) include a person who 'is or was a head of State'. In other words it includes any person in the situation of President Al Bashir. So the fact that President Al Bashir was such a person would not have provided a ground for a magistrate not to make an order for his surrender in terms of s 10(5).

[101] In an endeavour to circumvent what appears to be a plain provision the Government argued that s 10 deals only with the surrender of persons who had already been arrested under s 9 and that the latter section was silent on the question of immunity. But that creates an absurdity. If it were correct, then any person entitled on any basis to claim immunity would challenge their arrest by way of an interdict *de libero homine exhibendo* (the equivalent of a *habeas corpus* application in other

jurisdictions) and demand their release. So the only people who could be brought before a magistrate under s 10 would be those who had no grounds for claiming immunity. But then s 10(9) would serve no purpose at all. It would be entirely redundant, because there would be no possible situation in which a person brought before the magistrate under s 10(1) would be a person referred to in ss 4(2)*(a)* or *(b)*. Needless to say such an interpretation is to be avoided.

[102] Counsel contended that to construe the Implementation Act in the manner suggested by SALC involved a tacit repeal or amendment of s 4(2) of DIPA, because that was the prior statute and until the Implementation Act was passed would have served to afford President Al Bashir immunity. He submitted that this is not lightly to be inferred.[87] That is no doubt correct, but there is another principle that emerges from the cases on this point. It was referred to by Marshall J in *Gorham v Luckett*:[88]

'…if this last Act professes, or manifestly intends, to regulate the whole subject to which it relates, it necessarily supersedes and repeals all former acts, so far as it differs from them in its prescriptions.'

This aptly describes the situation with which we are concerned. DIPA is a general statute dealing with the subject of immunities and privileges enjoyed by various people, including heads of state. The Implementation Act is a specific Act dealing with South Africa's implementation of the

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[87] *New Modderfontein Gold Mining Co v Transvaal Provincial Administration* 1919 AD 367 at 400 (*New Modderfontein*); *Kent NO v South African Railways & another* 1946 AD 398 at 405; *Government of the Republic of South Africa & another v Government of KwaZulu & another* 1983 (1) SA 164 (A) at 200 E-F.

[88] *Gorham v Luckett* 6 B Monroe (Ky) 146 at 154 (1845) cited in *New Modderfontein* at 397 and again in *Springs Town Council v Soonah* 1963 (1) SA 659 (A) at 669A-D and quoted in *Mthembu v Letsela & another* [2000] ZASCA 181; 2000 (3) SA 867 (SCA) para 28.

Rome Statute. In that special area the Implementation Act must enjoy priority. I would not, however, use the language of repeal or amendment. It is rather more an example of the application of the related principle in the converse situation embodied in the maxim *generalia specialibus non derogant* (general words and rules do not derogate from special ones).[89] Where there is legislation dealing generally with a topic and, either before or after the enactment of that legislation, the legislature enacts other legislation dealing with a specific area otherwise covered by the general legislation, the two statutes co-exist alongside one another, each dealing with its own subject matter and without conflict. In both instances the general statute's reach is limited by the existence of the specific legislation. So DIPA continues to govern the question of head of state immunity, but the Implementation Act excludes such immunity in relation to international crimes and the obligations of South Africa to the ICC.

[103] I conclude therefore that when South Africa decided to implement its obligations under the Rome Statute by passing the Implementation Act it did so on the basis that all forms of immunity, including head of state immunity, would not constitute a bar to the prosecution of international crimes in this country or to South Africa cooperating with the ICC by way of the arrest and surrender of persons charged with such crimes before the ICC, where an arrest warrant had been issued and a request for cooperation made.[90] I accept, in the light of the earlier discussion of head

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[89] *Minister of Defence and Military Veterans v Motau & others* [2014] ZACC 18; 2014 (5) SA 69 (CC) para 78; *Sasol Synthetic Fuels (Pty) Ltd & others v Lambert & others* [2001] ZASCA 133; 2002 (2) SA 21 (SCA).

[90] My colleague Ponnan JA in his separate judgment says that this conclusion, which he shares, may render the discussion on customary international law unnecessary. With respect I do not agree. Until

of state immunity, that in doing so South Africa was taking a step that many other nations have not yet taken. If that puts this country in the vanguard of attempts to prevent international crimes and, when they occur, cause the perpetrators to be prosecuted, that seems to me a matter for national pride rather than concern. It is wholly consistent with our commitment to human rights both at a national and an international level. And it does not undermine customary international law, which as a country we are entitled to depart from by statute as stated in s 232 of the Constitution. What is commendable is that it is a departure in a progressive direction.

[104] It is also important to note that this conclusion accords with the understanding of Government as to its obligations under and in terms of the Rome Statute and the Implementation Act. As noted above when South Africa received the first arrest warrant and request for assistance from the ICC, the Central Authority acted in terms of s 8(1) of the Implementation Act and forwarded it to the Chief Magistrate, Pretoria, who endorsed it for execution in any part of the Republic. When President Zuma was inaugurated and an invitation was extended to President Al Bashir to attend the inauguration, Sudan enquired whether he would be liable to arrest if he attended, and the answer was in the affirmative. The then Director-General of the Department of International

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one reaches the conclusion that under customary international law President Al Bashir would ordinarily enjoy immunity a discussion of the relevant provisions of the Implementation Act is irrelevant. One cannot construe the provisions of the Implementation Act as removing an immunity that does not exist. If there was no such immunity, because there is an international crimes exception as contended by SALC, then the relevant sections of the Implementation Act merely reflect the provisions of customary international law and do not depart from them. That is an entirely different interpretation from the one in the body of this judgment and would involve a different analysis of the Implementation Act on the footing that it reflected, not overrode, customary international law.

Relations and Cooperation issued a public statement quoted in the papers, that:

'If today, President al Bashir landed in terms of the provision [of the Rome Statute], he would have to be arrested.'

There are several statements in the papers and the literature with which we have been furnished that indicate that there have been other occasions, such as the funeral of the late President Mandela, that President Al Bashir did not attend, because he would have been liable to arrest and surrender to the ICC had he done so. It is plain from this that, save for the circumstances of the present case, South Africa has hitherto complied meticulously with its obligations under the Rome Statute in respect of President Al Bashir.

[105] That brings me back to the point made in paragraphs 11 to 16 and 24 of this judgment that the arguments with which we have been confronted were not those on which the case was conducted in the Court below. Nor, and this is the important point, did they reflect the approach of the Government to the issues. That emerges from the affidavits of Ms Sindane and, in particular, of Dr Lubisi. Ms Sindane explained that the Government's reasons for not seeking to arrest President Al Bashir were based on the terms of the hosting agreement and the ministerial proclamation. And Dr Lubisi explained that 'Cabinet collectively appreciated and acknowledged that the aforesaid decision can only apply for the duration of the AU Summit'. These statements demonstrated that as far as South Africa was concerned this involved a departure from its commitment to its obligations under the Rome Statute. We have not been apprised of the reasons for South Africa departing from those obligations

on this occasion. But, be that as it may, whilst the departure from this country's obligations was unfortunate, according to the affidavits it was only temporary. It is perhaps a pity in those circumstances that the Government chose to pursue the new arguments, thereby possibly giving the impression that our commitment as a nation to the Rome Statute was in question.

Waiver

[106] We received extensive argument on two propositions to the effect that, even if the Implementation Act did not oust President Al Bashir's head of state immunity, it had been waived, either by the Security Council Resolution 1593 (2005) or, in relation to the second arrest warrant, by the Genocide Convention (1948). In view of my conclusion on the effect of the Implementation Act it is unnecessary to address these submissions. The position under the Security Council Resolution is hotly contested by the commentators and the limited argument we received on the Genocide Convention does not give me confidence that we should express a view on it. I pass therefore to a consideration of the relief granted by the High Court and the question of costs.

The relief

[107] The relief granted by the High Court is set out in para 6 above. The matter having been brought and dealt with as an urgent application the orders were not as well-tailored to the contentions being advanced by SALC as mature consideration would indicate. A broad statement that conduct was inconsistent with the Constitution did little to define where

the shortcoming lay. Mr Trengove SC accepted that even if the appeal failed it was desirable that the declaratory order be formulated with greater precision. In my view an appropriate order would have been the following:

'The conduct of the Respondents in failing to take steps to arrest and detain, for surrender to the International Criminal Court, the President of Sudan, Omar Hassan Ahmad Al Bashir, after his arrival in South Africa on 13 June 2015 to attend the 25th Assembly of the African Union, was inconsistent with South Africa's obligations in terms of the Rome Statute and section 10 of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, and unlawful.'

[108] The second paragraph of the order directed the applicants to take reasonable steps to arrest President Al Bashir without a warrant in terms of section 40(1)*(k)* of the CPA. I do not think that section has anything to do with a person charged with international crimes under the Rome Statute. It is true that it deals with people who have committed crimes outside South Africa that would have been an offence if committed inside South Africa, which would include international crimes. But it is qualified by the requirement that the person arrested is 'under any law relating to extradition or fugitive offenders' liable to arrest and detention in South Africa. That is not the position with an arrest under s 10 of the Implementation Act. That Act is not concerned with extradition, but with surrender to the ICC. Persons arrested thereunder are not necessarily fugitive offenders. After all President Al Bashir continues to tread the world stage and has made appearances at the UN and visited China, as well as a number of other states, in his official capacity as head of state of Sudan, so he is not a fugitive offender.

[109] I am not sure why it was thought necessary to look to the CPA in regard to the possible arrest of President Al Bashir. After all the power to arrest him existed under the Implementation Act. Furthermore he was not to be arrested without a warrant, but in terms of warrants endorsed by a magistrate, one of which was in existence at the time, although SALC did not know that. As paragraph 2 of the order sought by SALC and granted by the High Court was inappropriate, and there is at present no reason to think that the existing arrest warrants will not be dealt with in terms of the Implementation Act and be available to be enforced if President Al Bashir returns to this country, it should simply be deleted. Subject to those amendments to the order the appeal should be dismissed.

Costs

[110] The amendments to the order do not represent substantial success for the applicants. While their arguments in regard to the content of customary international law as it applies under DIPA were accepted, the key statute is the Implementation Act and their arguments in regard to that were unsuccessful. SALC have succeeded in establishing important points of public importance in regard to the Government's obligations under the Rome Statute and the Implementation Act. They should accordingly have their costs, including the costs of two counsel.

[111] The Foundation's arguments were of great value in dealing with this case and the emphasis they rightly placed on the importance of the Constitution in construing the statutes under consideration was a valuable insight. In my view they should also have their costs including the costs of the application for admission as amicus curiae and the costs of two counsel.

[112] As regards the costs incurred by the amici other than the Foundation and the costs of the Government in opposing their applications for admission as amici I have already expressed the view that the amici should not be penalised for their lack of success in securing their admission as amici. The Government must bear its own costs in relation to these applications, as must the amici.

Result

[113] I make the following order:

1 The application for leave to appeal is granted.

2 The applicants are to pay the costs of that application such costs to include those consequent upon the employment of two counsel.

3 The applications by the African Centre for Justice and Peace Studies, the International Immigration Rights Initiative, the Peace and Justice Initiative and the Centre for Human Rights for admission as amici curiae are dismissed with no order for costs.

4 The order of the High Court is varied to read as follows:

‘1 The conduct of the Respondents in failing to take steps to arrest and detain, for surrender to the International Criminal Court, the President of Sudan, Omar Hassan Ahmad Al Bashir, after his arrival in South Africa on 13 June 2015 to attend the 25th Assembly of the African Union, was inconsistent with South Africa’s obligations in terms of the Rome Statute and section 10 of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, and unlawful.

2 The applicant is entitled to the costs of the application on a pro bono basis.’

5 The appeal is otherwise dismissed.

6 The applicants are to pay the respondent's costs of appeal and the costs of the Helen Suzman Foundation, including the costs of its application for admission as an amicus, such costs to include in both instances the costs consequent upon the employment of two counsel.

M J D WALLIS

JUDGE OF APPEAL

Ponnan JA (Lewis JA concurring)

[114] I have had the privilege of reading the judgment of Wallis JA, which comprehensively sets out the facts and issues that call for adjudication in the appeal. I feel persuaded to write separately in this matter. Both my approach and the line that I take in endeavouring to resolve it are far narrower than and, in their emphasis, different from that preferred by my learned colleague.

[115] I agree with Wallis JA that the content of customary international law is not for us to determine.[91] Nor can I fault his conclusion that:

'when South Africa decided to implement its obligations under the Rome Statute by passing the Implementation Act it did so on the basis that all forms of immunity, including head of State immunity, would not constitute a bar to the prosecution of international crimes in this country or to South Africa cooperating with the ICC by way of the arrest and surrender of persons charged with such crimes before the ICC, where an arrest warrant had been issued and a request for cooperation

[91] Paragraph 84.

made'.[92]

With due deference to my learned colleague, that conclusion, I daresay, renders his discussion on customary international law unnecessary. I am accordingly hesitant to endorse Wallis JA's discussion on customary international law as also his conclusion on the subject, the high water mark of which is:

'In those circumstances I am unable to hold that at this stage of the development of customary international law there is an international crimes exception to the immunity and inviolability that heads of State enjoy when visiting foreign countries and before foreign national courts.'[93]

[116] More narrowly then, at the heart of the appeal lies the supposed clash between s 4(1)*(a)* of the DIPA and s 4(2) of the Implementation Act. The clash is said to arise because the former provision recognises an immunity that the latter purportedly negates. Harmonising that clash – a clash that seems to me to be more apparent than real – necessarily disposes of the primary issue in the appeal.

[117] Section 4(1)*(a)* of the DIPA 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 …'

Supposing there was no further legislation, President Al Bashir would have enjoyed immunity from arrest and surrender to the ICC. But there is further and later legislation in the form of the Implementation Act, s 4(2) of which provides:

'Despite any other law to the contrary, including customary and conventional

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[92] Paragraph 103.
[93] Paragraph 84.

international law, the fact that a person—

(a) is or was a head of State or government, a member of a government or parliament, an elected representative or a government official; or

(b) being a member of a security service or armed force, was under a legal obligation to obey a manifestly unlawful order of a government or superior, is neither—

(i) a defence to a crime; nor

(ii) a ground for any possible reduction of sentence once a person has been convicted of a crime.'

[118] In my view the apparent conflict can reasonably be reconciled when one applies the appropriate rules of statutory construction. Generally speaking, when the repeal of former legislation is intended, specific words to that effect are employed, but this, however desirable, is not always done, nor is it absolutely necessary. For, as Kotze AJA observed in a separate concurring judgment in *New Modderfontein Gold Mining Co v Transvaal Provincial Administration* 1919 AD 367 at 397:

'There are many illustrations in the books of the repeal by implication of earlier statutes by later ones, for subsequent legislation repeals previous inconsistent legislation, whether it expressly declares such repeal or not. Such an implied repeal will arise wherever the contents and operation of a later Act are repugnant to or cannot be harmonized with those of an earlier one . . .'

But repeal by implication is not favoured. An interpretation of apparently conflicting statutory provisions which involve the implied repeal of the earlier by the later ought not to be adopted unless it is inevitable (*Durban Corporation & another v R* 1946 NPD 109 at 115). Any reasonable construction which offers an escape from that is more likely to be in consonance with the real intention of the Legislature (*R v Tucker* 1953 (3) SA 150 (A) at 162). As it was put in *Wendywood Developments (Pty) Ltd v Rieger & another* 1971 (3) SA 28 (A) at 38:

'It is necessary to bear in mind a well-known principle of statutory

construction, namely, that statutes must be read together and the later one must not be so construed as to repeal the provisions of the earlier one, unless the later statute expressly alters the provisions of the earlier one or such alteration is a necessary inference from the terms of the later statute.'

[119] I can draw no such inference in this case particularly when regard is had to the nature, purpose and background of the Implementation Act. The preamble to the Implementation Act records that 'throughout the history of human-kind, millions of children, women and men have suffered as a result of atrocities which constitute the crimes of genocide, crimes against humanity, war crimes and the crime of aggression in terms of international law.' It commits South Africa to 'bringing persons who commit such atrocities to justice' either in our own courts, or, in accordance with the principle of complementarity, in the ICC. Section 3 lists the objects of the Implementation Act as being, amongst others to: ensure that the Rome Statute is effectively implemented in South Africa; ensure that South Africa conforms with its obligations under the Rome Statute; and, enable the Republic to cooperate with the ICC by inter alia the surrender of suspects for prosecution before the ICC. Section 4(1) provides that any person who commits any of the international crimes is guilty of an offence and liable to conviction and punishment. Section 4(3) vests our courts with universal jurisdiction over the prosecution of all international crimes, wherever they may be committed, provided only that the accused is present in the Republic.

[120] Sections 8, 9 and 10 of the Implementation Act govern the manner in which an ICC request for the arrest of a suspect must be implemented. They do so in mandatory terms. Section 8 caters for an ICC request for the arrest and the surrender of a suspect. Section 8(1) says that the request

'must' be referred to the central authority, namely, the Director-General of Justice. Section 8(2) requires the central authority immediately on receipt of that request to forward it to a magistrate who 'must' endorse the warrant of arrest for execution. That has happened here in relation to one of the two warrants. Section 9(3) says that a warrant endorsed in terms of s 8 'must' be in a form and be executed in a manner as near as possible to that prescribed for domestic warrants of arrest in South Africa.

[121] Section 10 then comes into play – subsection 1 provides that the suspect 'must' be brought before a magistrate within 48 hours, who 'must' hold an inquiry to determine: first, whether the warrant applies to the suspect; second, whether the suspect has been arrested in accordance with our domestic law, and third, whether the suspect's constitutional rights have been respected. According to s 10(5), if the magistrate is satisfied that the three requirements have been met and that the suspect may be surrendered to the ICC, he or she 'must' order that the suspect be surrendered to the ICC. Tellingly, these provisions leave no room for the suspect to raise any immunity claim or for the magistrate to inquire into and determine such a claim.

[122] Finally, there is s 10(9) of the Implementation Act, which provides:

> 'The fact that the person to be surrendered is a person contemplated in section 4(2)*(a)* or *(b)* does not constitute a ground for refusing to issue an order contemplated in subsection (5).'

There is no imperfection in the language of this provision. Its meaning is clear and unambiguous. It applies to any person contemplated in s 4(2)*(a)* or *(b)*, which includes a sitting or former head of State. Accordingly, the fact that the suspect is a sitting or former head of State does not constitute

a ground for refusing an order contemplated in s 10(5) – that is an order that the suspect be surrendered to the ICC. Recognition of head of State immunity alongside the provisions of s 4(2) to preclude someone from being brought to trial in South Africa would create an intolerable anomaly. In terms of s 4(2) of the Implementation Act, a head of State may be arrested and prosecuted before South African domestic courts. The same head of State may be prosecuted before the ICC in terms of Article 27 of the Rome Statute. But, when the ICC requests South Africa to arrest and surrender that head of State to the ICC for prosecution, it would be precluded from doing so by virtue of the suspect's immunity. The immunity would not protect him against arrest and prosecution in South Africa but inexplicably protects him from an arrest in South Africa for surrender to the ICC.

[123] The Legislature has thus made a clear choice in s 10(9) to negate the head of State immunity that might otherwise have stood in the way of the arrest and surrender of President Al Bashir. This is not to suggest that s 4(1)*(a)* of the DIPA has in any way become obsolete or redundant by virtue of the enactment of the Implementation Act. Both enactments address the matter in a slightly different manner. In my view, s 4(1)*(a)* of the DIPA falls to be read subject to the provisions of the Implementation Act. Or to put it another way, s 4(1)*(a)* of the DIPA only finds application insofar as the Implementation Act does not. Thus the immunity contemplated by s 4(1)*(a)* the DIPA can only be validly invoked if it is not in conflict with the Implementation Act. The Legislature has shown, through the Implementation Act, in what respects the more general immunity conferred by s 4(1)*(a)* of the DIPA is to be excluded. Any other construction would mean that the provisions of the Implementation Act to which I have referred must simply be ignored. Accordingly, s 4(1)*(a)* of

the DIPA continues to govern head of State immunity unless such immunity is excluded by the operation of the Implementation Act. So construed, s 4(1)*(a)* of the DIPA and s 4(2) of the Implementation Act can stand side by side.

[124] The issues raised are of considerable constitutional and public importance. On any reckoning, even the rather more discrete point of statutory interpretation adopted in this judgment, the matter is appealable.[94] For the rest, I agree with the reasoning and orders proposed by Wallis JA.

V M Ponnan
Judge of Appeal

[94] *Qoboshiyane NO & others v Avusa Publishing Eastern Cape (Pty) Ltd & others* fn 10 supra.

Appearances

For applicants: J J Gauntlett SC (with him F B Pelser and L Dzai)
Instructed by: State Attorney, Pretoria and Bloemfontein.

For respondent: W H Trengove SC (with him M du Plessis, I Goodman and H Rajah)
Instructed by: Webber Wentzel, Johannesburg
Webbers Attorneys, Bloemfontein.

For first amicus curiae: David Unterhalter SC (with him C Steinberg, A Coutsoudis and N Muwangua)
Instructed by: Webber Wentzel, Johannesburg
Symington & De Kok, Bloemfontein

For applicants for admission
as second and third amici curiae: G M Malindi SC (with him Nicole Lewis)
Instructed by: Lawyers for Human Rights Law Clinic, Johannesburg
Webbers Attorneys, Bloemfontein

For applicants for admission
as fourth and fifth amici curiae: Jason Brickhill
Instructed by: Legal Resources Centre, Johannesburg
Honey Attorneys, Bloemfontein