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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA

CASE NO: 27740/2015

In the matter between:

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	1st Applicant
DIRECTOR GENERAL OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	2nd Applicant
MINISTER OF POLICE	3rd Applicant
COMMISSIONER OF POLICE	4th Applicant
MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION	5th Applicant
DIRECTOR GENERAL OF INTERNATIONAL RELATIONS AND CO-OPERATION	6th Applicant
MINISTER OF HOME AFFAIRS	7th Applicant
DIRECTOR GENERAL OF HOME AFFAIRS	8th Applicant
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	9th Applicant
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	10th Applicant
HEAD OF THE DIRECTORATE FOR PRIORITY CRIMES INVESTIGATION	11th Applicant
DIRECTOR OF THE PRIORITY CRIMES INVESTIGATION UNIT	12th Applicant

and

SOUTHERN AFRICAN LITIGATION CENTRE	Respondent

FILING SHEET

DOCUMENT: GOVERNMENT'S HEADS OF ARGUMENT ON LEAVE TO APPEAL

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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case no 27740/2015

In the matter between:

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

and

SOUTHERN AFRICAN LITIGATION CENTRE	Respondent

GOVERNMENT'S HEADS OF ARGUMENT ON LEAVE TO APPEAL

(Enrolled for hearing on 14 August 2015)

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A. Introduction

1. These short heads of argument are filed on behalf of all the applicants for leave to appeal, the Minister of Justice and Constitutional Development and other State respondents *a quo* (collectively, "Government"). It concerns a decision by this Court to order the arrest of a serving foreign head of State. There can be no sensible debate that it is of national and international legal significance:[1] the international criminal accountability of a sitting head of State, his susceptibility to arrest in a foreign state, and South Africa's legal duties under national and international law. Is South Africa under a legal duty to arrest a sitting president of a sovereign state, or to respect his immunity as head of State? This question has never before been considered by any South African court.

2. A full bench of this Court handed down an urgent, final order answering this question by imposing a duty on the South African Government to arrest a sitting head of State. The judgment subsequently delivered, in which reasons are provided for the order, confirms that this Court answered the question categorically: the judgment is not restricted to the particular president in question. The question now arising, and addressed in these heads of argument, is not whether the Full Bench was right or wrong. The correct test as regards leave to appeal is whether the extraordinarily important legal question answered by this Court – as a court of first instance, sitting

[1] Indeed, the judgment itself (correctly, with respect) records in para 7 "the importance of the matter especially having regard to South Africa's constitutional and international legal obligations". Para 34 in turn reflects the Court's concern that the ICC take cognisance of the matter, and (what the Court found to be) the "conflict between South Africa's regional affiliation on the one hand and its broader international obligations on the other."

under extremely urgent and also otherwise invidious circumstances[2] – should be considered by another court, pursuant to the ordinary appeal hierarchy established by the Constitution (which itself contemplates an in-principle right of appeal from a court of first instance).

3. It is to assist the Court in answering this *latter* question that these heads of argument have been prepared. They are filed in advance of the hearing to afford not only the Court but also the respondent an opportunity to consider Government's core submissions on whether leave to appeal should be granted. Their purpose is to facilitate the hearing of the application for leave to appeal, and to truncate the hearing to the extent possible.

4. These heads of argument are structured as follows.

   (a) First we address the test for leave to appeal and incidental procedural matters.

   (b) Thereafter we deal separately with each of the grounds of appeal, demonstrating that the applicable test is met.

   (c) We conclude, for the reasons set out below, by submitting that

      (i) there are reasonable prospects that another court may come to a different conclusion;

      (ii) it is in the interests of justice that leave to appeal be granted; and

      (iii) leave to appeal should be granted to the Supreme Court of Appeal.

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[2] For instance, the extreme urgency of the matter meant that the Court was not assisted by having heads of argument on both sides. Nor can either side claim to have had, in the unavoidably pressing time available, an adequate opportunity to research and develop argument.

B. Principles governing applications for leave to appeal

5. The principles governing the question in this application (i.e. whether leave to appeal should be granted) are well-established. We nonetheless summarise them for convenience.

(1) Circumstances in which leave to appeal may be granted

6. The Superior Courts Act 10 of 2013 is the Act which now provides the statutory matrix. It preserves the primary basis for granting leave to appeal. This is whether "a reasonable prospect of success" exists.[3] The Act does not, we submit,[4] affect the established test for determining whether reasonable prospects of success exist. The

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[3] Section 17(1)(a)(i).

[4] There is a presumption that the legislature does not intend to amend the common law more than necessary (Steyn *Uitleg van Wette* 5th ed (Juta, 1981) at 97-100). Under the common law the operative "question [is] whether the applicant would have a reasonable prospect of success on appeal" (*Geayiya v Minister of Police* 1973 (1) SA 130 (A) at 135H; *Mokoena v Minister of Justice* 1968 (4) SA 708 (A) at 711A, emphasis added). This is the well-known test laid down in *R v Ngubane* 1945 AD 185 at 187. This test was confirmed in *Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) at 564C-E (for appeals not requiring special leave), and applied in *inter alia S v Rens* 1996 (1) SA 1218 (CC) at para 7. Section 17(1)(a)(i) adopts these identical words. Under the common law the question has never been whether "the applicant *could* have a reasonable prospect of success on appeal": this phrase is entirely absent from the law reports, an electronic search establishes. It has nonetheless been observed that the use of the word "would" in section 17(1)(a)(i) affects the test for leave to appeal. But this word qualifies only the clause "have a reasonable prospect of success": it does not deal with *how* to establish where there are prospects of success. Thus the use of the word "would" in section 17(1)(a)(i) does *not*, with respect, indicate a legislative intent to "raise the bar". We nonetheless draw to the Court's attention the application of an unreported judgment (*Mont Chevaux Trust v Tina Goosen* LCC 14R/2014) in a subsequent unreported judgment, *Daantjie Community v Crocodile Valley Citrus Company (Pty) Ltd* (75/2008) [2015] ZALCC 7 (28 July 2015) at para 3. Both are by single judges sitting in the Land Claims Court. Although Van Loggerenberg *Superior Court Practice* (Juta, 2015) Vol 1 at A2–55 considers what was said in *Mont Chevaux* as only an *obiter* observation, in *Daantjie Community* it was considered that *Mont Chevaux* has held

> "that the threshold for granting leave to appeal had been raised in the new Act. Bertelsmann J found that the use of the word 'would' in the new Act indicated a measure of certainty that another Court will differ from the Court whose judgment is sought to be appealed against. Consequently, the bar set in the previous test, which required 'a reasonable prospect that another Court might come to a different conclusion', has been raised by the new Act and this then, is the test to be applied in this matter".

Nonetheless, whatever the correct test, this application for leave to appeal passes it comfortably, we respectfully submit.

test remains whether or not there is a reasonable prospect that another court *may* come to a different conclusion.[5]

7. The innovation introduced by the Superior Courts Act is that leave to appeal may be granted also when "there is some other compelling reason why the appeal should be heard".[6] Accordingly the scope for granting leave to appeal has been widened by the 2013 Act.

8. We would point out, however, that section 17(1)(b) restricts this extended approach to granting leave to appeal to decisions which do "not fall within the ambit of section 16(2)(a)." Section 16(2)(a) is the functional equivalent of section 21(A) of the Supreme Court Act 59 of 1959. It provides for the dismissal of an appeal on the basis that "the decision sought will have no practical effect or result".[7] There are two reasons why this provision does not apply to this application.

9. The first is that the decision sought will indeed have "practical effect or result".[8] This is because whether or not a sitting head of State enjoys immunity under international law and South African law, or whether a sitting head of State is subject to arrest in South Africa will practically affect every future event of international significance to be held in South Africa. It will affect the conduct of its international relations. South Africa has mediated, and mediates, many disputes in relation to which serving heads of State from time to time are present in this country: the Great Lakes Region, Côte

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[5] This is indeed the test applied by a distinguished full bench of this Court in *Commissioner of Inland Revenue v Tuck* 1989 (4) SA 888 (T) at 890B, per Eloff DJP (Goldstone and Kriegler JJ concurring).
[6] Section 17(1)(a)(ii).
[7] Section 16(2)(a)(i), emphasis added. Section 21(A)(1) of the 1959 Supreme Court Act provided, however, that the judgment or order sought will have no practical effect or result", emphasis added.
[8] Notice of application for leave to appeal p 9 para (b).

d'Ivoire, Central African Republic and Sudan itself are a few examples. Serving heads of State visit for other reasons too: State visits, funerals, medical visits. Accordingly the question is far from academic, as the judgment itself correctly, with respect, held.[9] In particular, whether South Africa is in a position to host African events without arresting invitees is of pressing practical relevance to Government.

10. The second is that a court of appeal retains a discretion to hear a matter despite the operation of the principle now codified in section 16(1)(b), and previously embodied in section 21A(1) of the 1959 Act. In *ABSA Bank Limited v Van Rensburg*[10] the Supreme Court of Appeal applied section 21A(1) of the 1959 Supreme Court Act. Maya JA reiterated that section 21A(1) confers a discretion to determine matters which would have no practical effect and result between the parties.[11] The concurring minority judgment significantly quotes the unanimous Supreme Court of Appeal judgment in *Port Elizabeth Municipality v Smit*.[12] *PE Municipality*, in turn, quotes the following passage in *R v Secretary of State for the Home Department, Ex parte Salem*[13]

> "...I accept ... that in a cause where there is an issue involving a public authority as to a question of public law, your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a *lis* to be decided which will directly affect the rights and obligations of the parties *inter se*."

11. This matter raises important questions of public law arising from the interpretation and application of the Implementation of the Rome Statute of the International

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[9] In para 3 this Court held that "this judgment remains relevant in view of the important constitutional and international principles at stake".
[10] 2014 (4) SA 626 (SCA).
[11] *Id* at para 8, citing Constitutional Court and Supreme Court of Appeal judgments confirming this principle.
[12] 2002 (4) SA 241 (SCA) para 11.
[13] [1999] 2 WLR 483 (HL) at 487H.

Criminal Court Act 27 of 2002 (the Implementation Act) and the Diplomatic Immunities and Privileges Act 37 of 2001 (the Immunities Act). The single previous occasion when this Court was seized with the application of the Implementation Act, in *National Commissioner, South African Police Service v Southern African Human Rights Litigation Centre*, it granted leave to appeal to the Supreme Court of Appeal. The subsequent judgment by the Supreme Court of Appeal upheld this Court's judgment, but without any adverse comment on granting leave to appeal to it.[14] Subsequently, in granting leave to appeal to itself from the Supreme Court of Appeal, the Constitutional Court confirmed that the application of the Implementation Act in South Africa has far-reaching consequences for South African authorities in the execution of their constitutional, international and domestic law obligations.[15] This further confirms the importance of the issues arising under that Act. But the previous litigation did not consider any of the important issues arising in the judgment forming the subject-matter of this application. They, too, warrant the Supreme Court of Appeal's attention.

12. Accordingly, both grounds on which leave to appeal may be granted are available, and section 17(1)(b) does not operate against granting leave to appeal.

(2) Court to which leave to appeal may be granted

13. Such is the importance of this matter that the Judge President constituted a full bench to hear it as a court of first instance.[16] In a similar situation a full bench of the Cape

[14] 2014 (2) SA 42 (SCA) at para 5.
[15] *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* 2015 (1) SA 315 (CC) at para 83.
[16] Para 7 of the judgment indeed records this.

Provincial Division had to consider whether an application for leave to appeal to the Supreme Court of Appeal was competent. In *Derby-Lewis v Chairman of the Committee on Amnesty of the Truth & Reconciliation Commission*,[17] which was determined under the 1959 Act, Comrie J (with whom Hlophe JP and Van Heerden J concurred) held that it was competent for the full bench to grant an application for leave to appeal.[18] Comrie J further confirmed that the standard "reasonable prospect of success" test remains applicable in such circumstances (in other words, the test governing special leave does not apply in such circumstances).[19] The only court to which leave to appeal could be granted, the Court held, was the Supreme Court of Appeal.[20]

14. Similarly, in *Rail Commuter Action Group v Transnet Ltd t/a Metrorail (No 2)* leave to appeal was granted by a full bench to the Supreme Court of Appeal.[21] The judgment on leave to appeal describes the issues involved in the main judgment in terms applicable to the judgment forming the subject-matter of this application

> "extremely difficult issues relating to duties that have been imposed by this Court upon [organs of State, including the Minister of Transport]. Although, in my view, this Court has sought to impose those duties on the narrowest possible basis, it is possible that another Court could well decide that this judgment has in effect constructed a legal bridge which is too wide insofar as the legal obligations imposed upon State institutions are concerned."[22]

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[17] 2001 (3) SA 1033 (C).
[18] *Id* at 488A/B.
[19] *Id* at 488 A/B-B.
[20] *Id* at 488B-C, citing *inter alia S v McMillan* 2001 (1) SACR 148 (W), itself a Full Bench decision.
[21] 2003 (5) SA 593 (C).
[22] *Id* at 595H-I.

15. The Court considered that it would be "arrogant to assume that this Court has spoken the last word" on the issue, and that "[t]hat in itself is justification sufficient to uphold the application for leave to appeal".[23]

16. Under the Superior Courts Act the legal position articulated and applied in the above cases has now been codified. Section 16(1)(a)(ii) provides that an appeal from a court consisting of more than one judge lies to the Supreme Court of Appeal. Accordingly it is competent for a full bench to grant leave to appeal, and any leave to appeal must be granted to the Supreme Court of Appeal.

17. In what follows we apply the above principles to the present application, demonstrating that there are reasonable prospects of another court coming to a different conclusion. In such circumstances a court is "bound, as a matter of duty, to grant leave to appeal."[24] No discretion to refuse leave then exists,[25] and leave must be granted to the Supreme Court of Appeal.[26]

C. Grounds of appeal

18. The notice of application for leave to appeal identifies sixteen respects in which the judgment is reasonably liable to a different conclusion by another court. These conclusions underlie the orders against which this application is directed.[27] The orders rest on the legal premise that a legal duty exists under the Constitution to arrest

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[23] *Id* at 596G.
[24] Van Loggerenberg *Superior Court Practice* (Juta, 2015) Vol 1 at A2–55.
[25] *Ibid.*
[26] Section 16(1)(a)(ii) of the Supreme Court Act.
[27] Only three orders were made. The first two are substantive and the third relates purely to costs.

a sitting head of State who is similarly circumstanced to President Bahir of Sudan;[28] and that section 40(1)(k) of the Criminal Procedure Act 51 of 1977 authorises this.[29] In demonstrating that a reasonable prospect exists that another court may reach a different conclusion on these orders, we address the fundamental suppositions underlying them. In doing so we follow the sequence adopted in the notice of leave to appeal, which itself follows the sequence of the judgment. In the interests of concision, we deal collectively with related grounds of appeal where appropriate.

(1) First and fifth grounds of appeal: The formulation of the question for consideration

19. The Court formulated the question for consideration as follows: "whether a Cabinet Resolution coupled with a Ministerial Notice are capable of suspending this country's duty to arrest a head of State".[30] This, with respect, begs the question.

20. The question is whether there is a legal duty to arrest a serving head of State under South African law. The answer, in short, is that

- section 4(1) of the Immunities Act imposes an absolute duty not to arrest a serving head of State;
- section 15 of the Immunities Act (which was not impugned) in fact criminalises the conduct expected by this Court of Government;
- neither the Implementation Act nor the Rome Statute imposes the duty presumed *a priori* by the Court to exist on Government.

We explain why this is so in dealing with the further grounds of appeal.

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[28] First order (reproduced in para 2 of the judgment).
[29] Second order (reproduced in para 2 of the judgment).
[30] Para 1 of the judgment.

(2) Second and third grounds of appeal: The orders are contrary to Government's statutory duties; *not* consistent with the Constitution; and *inconsistent* with Constitutional Court authority

21. The relevant part of section 4(1) of the Immunities Act provides that "[a] head of state is immune from the criminal and civil jurisdiction of the courts of the Republic".[31] It confers an absolute immunity on a serving head of State. It is not subject to or dependent on any immunities or privileges related to "the United Nations, specialised agencies or other international organisations".[32] Nor is it subject to or dependent on any ministerial conferral or agreement pursuant to section 7 of the Act. Section 15 of that Act, in turn, imposes a criminal penalty for violating this absolute immunity.

22. This notwithstanding, this Court subjected a serving head of State to its jurisdiction and process by issuing an order for President Bashir's arrest.[33] This, with respect, is itself a violation of section 15, and of customary international law (which is a further compelling reason to subject the judgment to appeal scrutiny – the only available remedy to Government to protect South Africa from a breach of international law, should the judgment be inconsistent with international law, as Government submits it is for the reasons set out below).[34]

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[31] The full text of section 4(1) reads

"[a] head of state is immune from the criminal and civil jurisdiction of the courts of the Republic, and enjoys such privileges as

(a) head of state enjoy in accordance with the rules of customary international law;

(b) are provided for in any agreement entered into with a state or government whereby immunities and privileges are conferred upon such a head of state; or

(c) may be conferred on such head of state by virtue of section 7(2)."

[32] As section 5 of the Act contemplates.

[33] Order 2, reproduced in para 2 of the judgment.

[34] International law does not distinguish between different arms of government for purposes of South Africa's conduct on the international-law level.

23. The Court also held that to the extent that Government has not taken steps to arrest President Bashir (in other words, to the extent that Government complied with section 4(1) and 15 of the Act, and with customary international law), Government's conduct was inconsistent with the Constitution and invalid.[35] But the Constitution provides that "[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."[36] The relevant Act of Parliament, which is the *lex specialis* on the immunity of serving heads of foreign States, is of course the Immunities Act. As we shall show, it gives effect to the customary international law immunity applicable *ratio personae* in respect of a serving head of State.

24. Neither section 4(1) nor section 15 of the Immunities Act was under constitutional attack in the proceedings leading to the impugned orders. Naturally, neither of them was declared unconstitutional. Accordingly, they could not, in the words of the Constitutional Court, be "bypassed".[37] The orders could only have been granted if a proper constitutional challenge was instituted,[38] and if sections 4(1) and 15 of the Immunities Act had been set aside pursuant to such challenge.[39] In that event the order was subject to confirmation by the Constitutional Court,[40] and did not take any

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[35] Order 1, reproduced in para 2 of the judgment.
[36] Section 232 of the Constitution.
[37] *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) at para 437.
[38] *Minister of Home Affairs v Eisenberg & Associates* 2003 (5) SA 281 (CC) at para 68
"Section 172(1) of the Constitution empowers a Court when deciding a constitutional matter to make 'any order that is just and equitable'. Section 172(1) does not, however, empower it to suspend the provisions of an Act of Parliament or a proclamation which have not been the subject of a proper challenge before it, and it is open to doubt whether a Court has the power to do so. But even if such a power exists (and I express no opinion on that issue) it would have to be exercised most sparingly and only in the most exceptional circumstances."
[39] *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) at para 29
"The difficulty in this case, however, is that, as already indicated, the applicant did not impugn the constitutionality of s 12(1) or any provision of the Act. ... In these circumstances, and in the circumstances of this case, the Act cannot be bypassed."
[40] Section 172(2)(a) of the Constitution.

effect until then[41] (unless interim relief was granted pending a declaration of constitutional invalidity of the Immunities Act).[42] The final orders granted were accordingly

(i) inconsistent with an Act of Parliament giving effect to customary international law, which has domestic legal status under the Constitution;

(ii) as a consequence, inconsistent with the Constitution itself; and

(iii) inconsistent with Constitutional Court caselaw.[43]

25. However, even if it were so that section 4(1) of the Immunities Act does not avail Government (despite our submissions to the contrary),[44] for reasons similar to those identified above section 5 and section 7 of the Immunities Act do. Just as legislation stands until set aside, so too does an exercise of public power pursuant to an empowering provision. Protection had been accorded *by extant executive or administrative action under sections 5 and 7*. The Constitutional Court has confirmed that, likewise, conduct by the Executive "continues to exist until, in due process, it is properly considered and set aside".[45] Even if it is considered unlawful, it may not be

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[41] *Ibid.*
[42] *Ibid.*
[43] Apart from the authorities cited above, see also *Minister of Home Affairs v Eisenberg & Associates* 2003 (5) SA 281 (CC) at paras 62-71 (holding that the order in question in that case was not authorised by section 172 of the Constitution) and *Von Abo v President of the Republic of South Africa* 2009 (5) SA 345 (CC) at para 50, holding that

> "The Constitution carefully apportions powers, duties and obligations to organs of State and its functionaries. It imposes a duty on all who exercise public power to be responsive and accountable and to act in accordance with the law. This implies that a claimant who seeks to vindicate a constitutional right by impugning the conduct of a State functionary must identify the functionary and its impugned conduct with reasonable precision. Courts too, in making orders, have to formulate orders with appropriate precision."

[44] The approach adopted in the judgment (at para 50), holding that Government invoked the wrong provision of the Immunities Act (namely section 5, instead of section 4), itself is at odds with *Yannakou v Apollo Club* 1974 (1) SA 614 (A) at 619B-C. Where possible criminality is involved (in this case as a result of section 15 of the Immunities Act) a court should not adopt a blinkered approach to the particular statutory provision invoked.
[45] *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC) at para 66.

disregarded.[46] This indeed applies with special force to the notice published in the Government Gazette by the Minister pursuant to section 5(3) of the Immunities Act.[47] Yet, despite the notice not being impugned, the Court's order has swept it aside. This is contrary to the constitutional duty resting on courts, as articulated by the Constitutional Court in the context of legislative administrative action.[48]

26. The facts regarding this notice are shortly as follows. On 5 June 2015 the Minister of International Relations and Co-operation (the sixth applicant) published a notice under section 5(3) of the Immunities Act[49] in terms of which she recognised the host agreement entered into between Government and the African Union.[50] The notice stated that its purpose was the granting of immunities and privileges as provided for in the agreement.[51]

27. The effect of section 5(3) as read with section 7(2) is that the Minister is empowered to either

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[46] *Id* at para 105: "a decision taken by the incumbent of the office empowered to take it … remain[s] effectual until properly set aside. It could not be ignored or withdrawn by internal administrative fiat".

[47] *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) at para 146:

> "Legislative administrative action is a special category of administrative action. It involves the making of laws and the taking of policy decisions for that purpose. Under our Constitution these are decisions which are within the domain of the Executive, to whom Parliament has delegated its law-making power. Whilst the exercise of this power is subject to constitutional control, it is important that the special role of the executive in exercising this power be acknowledged, and that courts 'take care not to usurp' it."

[48] *Ibid.*

[49] Section 5(3) of the Immunities Act provides

> "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)."

Section 7(2), in turn, provides

> "The Minister may in any particular case if it is not expedient to enter into an agreement as contemplated in subsection (1) and if the conferment of immunities and privileges is in the interest of the Republic, confer such immunities and privileges on a person or organisation as may be specified by notice in the Gazette."

[50] Para 3.11 of Government's answering affidavit.

[51] Annexure D to Government's answering affidavit.

(a) recognise any organisation and thereby confer privileges and immunities as provided for in an agreement entered into with that organisation; or

(b) confer such immunities and privileges on a person or organisation as may be specified by notice in the Government Gazette.

28. In the present case, Government's conduct in publishing the notice in the Government Gazette could fall into either of the above categories. This is because an agreement was entered into with the AU which conferred specific privileges and immunities on officials of the AU as well as representatives of member states. Nonetheless, the Court upheld the argument against Government that section 5(3)

> "only deals with the conferral of immunity and privileges on an organisation, which is defined in s. 1 of the Immunities Act as 'an intergovernmental organisation of which two or more states or governments are members and which the Minister has recognised for the purposes of this Act'".[52]

29. There is a reasonable prospect that another court may hold that this is an incorrect interpretation of section 5(3). This is *inter alia* because this interpretation overlooks the latter portion of section 5(3), which adds "or as may be conferred on them by virtue of section 7(2)". (It may also hold that the result at which the Court arrived was with respect markedly anomalous: how, by restricting immunities and privileges to an "organisation" in the sense suggested by the Court, could the organisation function when attendees (on the Court's construction) had none?)

30. The effect of the Minister's conduct in invoking section 5(3) of the Immunities Act was that a decision was taken which was executive or administrative in nature. The

[52] Para 28.10.3 of the judgment.

effect of that decision (whether executive or administrative in nature) is that once it was taken, defined legal consequences flowed from it. These consequences are spelt out in section 5(3) of the Immunities Act: privileges and immunities as provided for in the agreement are conferred.

31. On the well-established principle articulated by the Supreme Court of Appeal in *Oudekraal*,[53] and confirmed by the Constitutional Court in *Kirland*,[54] the Minister's decision, and the legal consequences flowing from it, are valid until set aside by a court of law on review. The effect of this principle is that the decision by the Minister conferring privileges and immunities in accordance with the notice and the agreement exists in fact and continues to have legal effect until set aside by a Court on review.

32. Government's answering affidavit not only confirmed that this decision had not been reviewed and set aside.[55] It clearly invoked this fact, and – self-evidently – the *Oudekraal* principle.[56] The judgment does not record any recognition of the principle or its invocation on behalf of Government. Given the (with respect) failure by the Court even to address the issue explicitly raised on the papers, there is, at the very least, a reasonable prospect that another court may reach a different conclusion if regard is had to this important principle.

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[53] *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) at para 26

> "Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside."

[54] *Supra* at para 102, citing *Camps Bay Ratepayers' and Residents' Association v Harrison* 2011 (4) SA 42 (CC) at para 62; *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) at para 85; and *Njongi v MEC, Department of Welfare, Eastern Cape* 2008 (4) SA 237 (CC) at paras 44-45 as examples of prior Constitutional Court judgments recognising and applying the same principle.

[55] Para 38.2 of the answering affidavit.

[56] Para 38.3 of the answering affidavit.

33. It is further to be observed that the negation of the *Oudekraal* principle is not, with respect, sustainable on the basis of the Court's conclusion as regards the interpretation of the notice and the agreement. Article VIII of the Agreement provides that Government shall extend the privileges and immunities set out in sections C and D, Articles V and VI of the OAU Convention to "the Members of the Commission and Staff Members, the delegates and other representatives of Inter-Governmental Organisations". The Court found that heads of state who attended the meeting of the AU were not included in the ambit of the agreement. It concluded that

> "[o]n its terms, that agreement confers immunity on members and staff of the AU Commission, and on delegates and representatives of Inter-Governmental Organisations. It does not confer immunity on Member States or their representatives or delegates."[57]

34. This conclusion does not, however, take into account the full wording of Article VIII of the Agreement. If this is done, there is a reasonable prospect that another court may conclude that the agreement specifically *incorporates a reference* which, with respect, is not addressed by the Court in its judgment, and hence evidently overlooked. This is to the privileges and immunities set out in sections C and D, Articles V and VI of the OAU Convention. Article V of section C of the OAU Convention entrenches the privileges and immunities of *representatives of member states*. Sub-clause 1(a) specifically provides that these representatives shall enjoy immunity from personal arrest. Addressing the explicit incorporation by reference of precisely "representatives of member states" not noted by this Court, another court may hold that it is sufficiently clear from the express reference to sections C and D of

[57] Para 28.10.1 of the judgment.

the OAU Convention that the Agreement is intended to incorporate the immunities and privileges of member states.

35. Moreover, the use of the word "delegate" further reinforces this. The ordinary grammatical meaning of the word "delegate" connotes "[a] person sent or authorised to represent others, in particular an elected representative sent to a conference".[58] Applying the fundamental principle of statutory interpretation that the words in a statute must be given their ordinary grammatical meaning (unless to do so would result in an absurdity),[59] there is a good prospect that another court may come to a different conclusion. There is, indeed, no suggestion in the papers that the AU summit was anything other than a conference or that President Bashir attended it on a frolic of his own.[60] With respect, on a properly contextual and purposive reading, who else would be the contemplated delegates and representatives of the African Union? Just its executive and administrative staff? We submit that another court may reasonably reject that reasoning on its own merits, too.

36. We accordingly submit that for any or all of these separate reasons the second and third grounds of appeal bear good prospects of success, and that each of the three orders is liable to being set aside on appeal.

(3) Fourth ground of appeal: Immunity precludes arrest

37. The position under international law is clear: heads of State enjoy immunity, and this "derives from deeply rooted doctrines of international law aimed at facilitating

[58] Oxford Advanced Learners Dictionary.
[59] *Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC) at para 28.
[60] But even if he did, his personal immunity (*ratione personae*) – which operates *ex lege* – is not affected.

relations between States, in part by preventing the authorities of one jurisdiction from interfering with the sovereignty of another."[61] Thus, under international law, a serving head of State is afforded immunity, which includes inviolability.[62] Inviolability is "the highest and most impervious form of immunity".[63] "Inviolability in modern international law is a status accorded to the premises, persons or property physically present in the territory of a sovereign State but not subject to its jurisdiction in the ordinary way."[64] The latter State "is under a duty to abstain from exercising any sovereign rights, *in particular law enforcement rights*, in respect of inviolable … persons".[65]

38. Applying this principle, in *Pinochet* the House of Lords held that immunity *ratione personae* continues to apply except only before an international tribunal whose constitutive treaty (to which the sending State is a signatory) abolishes immunity.[66] Thus, immunity *ratione personae* before a domestic court remains intact. The same legal position had been accepted not only by comparable domestic courts,[67] but also

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[61] Broomhall *International Justice & The International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford University Press, 2004) at 129.
[62] *Ibid.*
[63] *Id* at 130.
[64] *Id* at 129, quoting Denza *Diplomatic Law: A commentary on the Vienna Convention on Diplomatic relations* 2nd ed (Clarendon, 1998) at 112.
[65] *Id.*
[66] *R v Bow Metropolitan Stipendary Magistrate, ex parte Pinochet Ugarte (No 3)* [1999] 2 All ER 97 (HL) at 114, 120-121 and 189. For a recent reported judgment applying it, see *Harb v Prince Abdul Aziz Bin Fahd Bin Abdul Aziz* [2015] 1 All ER 77.
[67] As the *Report of the International Law Commission on the work of its sixty-fifth session, 6 May to 7 June and 8 July to 9 August 2013* (available at http:// legal. un.org/ docs/? path=../ ilc/ reports/ 2013/ english/ chp5. pdf& lang=EFSRAC) at fn 267 reflects

> "National courts have on many occasions cited the immunity *ratione personae* from foreign criminal jurisdiction of the Head of State as grounds for their decisions on substance and their findings that criminal proceedings cannot be brought against an incumbent Head of State. In this regard, see *Re Honecker*, Federal Supreme Court, Second Criminal Chamber (Federal Republic of Germany), Judgment of 14 December 1984 (Case No. 2 ARs 252/84) reproduced in *International Law Reports*, vol. 80, pp. 365–366; *Rey de Marruecos, Audiencia Nacional* (Spain), *Auto de la Sala de lo Penal*, 23 December 1998; *Kadhafi, Cour de cassation (Chambre criminelle)* (France), Judgment No. 1414 of 13 March 2001 reproduced in *Revue générale de droit international public*, vol. 105 (2001), p. 474; English version in *International Law Reports*, vol. 125, p. 508–510; *Fidel Castro, Audiencia Nacional* (Spain), *Auto del Pleno de la Sala de lo Penal*, 13 December 2007 (the tribunal had already made a

by an acclaimed judgment of the International Court of Justice. In its celebrated *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*[68] the ICJ confirmed that

- "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";[69]

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similar ruling in two other cases against Fidel Castro, in 1998 and 2005); and *Case against Paul Kagame, Audiencia Nacional, Juzgado de Instrucción No. 4* (Spain), Judgment of 6 February 2008. Again in the context of criminal proceedings, but this time as *obiter dicta*, various courts have on numerous occasions recognized immunity *ratione personae* from foreign criminal jurisdiction in general. In those cases, the national courts have not referred to the immunity of a specific Head of State, either because the person had completed his or her term of office and was no longer an incumbent Head of State or because the person was not and had never been a Head of State. See: *Pinochet (solicitud de extradición), Audiencia Nacional, Juzgado de Instrucción No. 5* (Spain), request for extradition of 3 November 1998; *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet Ugarte (Pinochet* (No. 3)), House of Lords (United Kingdom), Judgment of 24 March 1999 reproduced in *International Legal Materials*, vol. 38 (1999), pp. 581–663; *H.S.A. et al. v. S.A. et al. (indictment of Ariel Sharon, Amos Yaron and others)*, Court of Cassation (Belgium), Judgment of 12 February 2003 (P-02-1139) reproduced in ILM, vol. 42, No. 3 (2003), pp. 596–605; *Scilingo, Audiencia Nacional, Sala de lo penal*, third section (Spain), Judgment of 27 June 2003; *Association Fédération nationale des victimes d'accidents collectifs "FONVAC SOS catastrophe", Association des familles des victimes du Joola, Cour de cassation, Chambre criminelle* (France), Judgment of 19 January 2010 (09-84818); *Khurts Bat v. Investigating Judge of the German Federal Court*, High Court of Justice, Queen's Bench Division Administrative Court (United Kingdom), Judgment of 29 July 2012 ([2011] EWHG 2020 (Admin)); *Nezzar*, Federal Criminal Tribunal (Switzerland), Judgment of 25 July 2012 (BB.2011-140). It should be emphasized that national courts have never stated that a Head of State does not have immunity from criminal jurisdiction, and that this immunity is *ratione personae*. It must also be kept in mind that civil jurisdiction, under which there is a greater number of judicial decisions, consistently recognizes the immunity *ratione personae* from jurisdiction of Heads of State. For example, see: *Kline v. Kaneko*, Supreme Court of the State of New York, Judgment of 31 October 1988 (141 Misc.2d 787); *Mobutu v. SA Cotoni*, Civil Court of Brussels, Judgment of 29 December 1988; *Ferdinand et Imelda Marcos v. Office fédéral de la police*, Federal Tribunal (Switzerland), Judgment of 2 November 1989; *Lafontant v. Aristide*, United States District Court for the Eastern District of New York (United States), Judgment of 27 January 1994; *W. v. Prince of Liechtenstein*, Supreme Court (Austria), Judgment of 14 February 2001 (7 Ob 316/00x); *Tachiona v. Mugabe* ("*Tachiona I*"), District Court for the Southern District of New York, Judgment of 30 October 2001 (169 F.Supp.2d 259); *Fotso v. Republic of Cameroon*, District Court of Oregon (United States), Judgment of 22 February 2013 (6:12CV 1415-TC)."

See also *id* at fn 279 referring further to the following judgments by national courts (recognising the immunity from foreign criminal jurisdiction of heads of Government and Ministers for Foreign Affairs)

"*Ali Ali Reza v. Grimpel*, Court of Appeal of Paris (France), Judgment of 28 April 1961 (implicitly recognizes, *a contrario*, the immunity of a Minister for Foreign Affairs) reproduced in ILR, vol. 47, pp. 275–277 (original French version in RGDIP (1962), p. 418, translated version in ILR, vol. 47, p. 276); *Chong Boon Kim v. Kim Tong Shik and David Kim*, Circuit Court of the First Circuit (State of Hawaii) (United States), Judgment of 9 September 1963, reproduced in *American Journal of International Law*, vol. 58 (1964), pp. 186–187; *Saltany and others v. Reagan and others*, District Court for the District of Columbia (United States), Judgment of 23 December 1988, 702 F.Supp. 319"

[68] (2002) ICJ Rep 3; reaffirmed in *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* (2008) ICJ Rep 177.

[69] *Id* at para 51.

- "article 32 [of the Vienna Convention on Diplomatic Relations (1961) provides] that only the sending State may waive such immunity", and this "reflects customary international law";[70]
- "the functions of a Minister of Foreign Affairs [which is one of the high-ranking officials like a head of State in whom immunity vests][71] are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability";[72]
- "there exists under customary international law [no] form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers of Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity";[73]
- "the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction";[74]
- "although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law";[75] and

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[70] *Id* at para 52.
[71] As Foakes *The Position of Heads of State and Senior Officials in International Law* (Oxford University Press, 2014) at 22 points out, the ICJ's judgment dealt with a Minister of Foreign Affairs, but "appl[ies], *a fortiori*, to heads of Government."
[72] *Id* at para 54.
[73] *Id* at para 58.
[74] *Id* at para 58.
[75] *Id* at para 59.

- immunity is retained "before the courts of a foreign State, even where those courts exercise such jurisdiction under these conventions."[76]

39. The International Court of Justice's judgment further explains that article 27 of the Rome Statute does not affect immunity *ratione personae* before a domestic court.[77] Article 27 deals exclusively with immunity before the ICC itself, and in any event can only operate to defeat the immunity *ratione personae* of a head of a State which is a Rome Statute signatory.[78] This is unsurprising, because privity is a basic principle of treaty law,[79] and the Rome Statute is a treaty. Thus it cannot affect the position of third parties.

40. Consistent with this fundamental principle of treaty law (privity) and customary international law (immunity, itself derivative from one of the essential pillars of international law: sovereignty),[80] the Rome Statute does not require member States to *violate the sovereign immunity of third party States' heads of State*. The Court with respect did not consider this. Articles 86 and 89 of the Rome Statute are internally qualified. Article 86 is subject to other provisions of the Statute, and article 89 is subject to Part 9 of the Statute. Accordingly they are subject to article 98(1) of the Statute. The effect of article 98(1) is that a request by the ICC which would require South Africa to act inconsistently with the immunity of Sudan's President may not be

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[76] *Ibid.*
[77] *Id* at para 61.
[78] Broomhall *op cit* at 141.
[79] Article 34 of the Vienna Convention on the Law of Treaties (1969) codifies the position under customary international law. It provides that "[a] treaty does not create either obligations or rights for a third State without its consent."
[80] In fact, Crawford *Brownlie's Principles of Public International Law* 8th ed (Oxford University Press, 2012) at 447 states that "[t]he sovereignty of states represent the basic constitutional doctrine of the law of nations."

made by the ICC "unless the [ICC] can first obtain the cooperation of [Sudan] for the waiver of the immunity".

41. It is therefore unsurprising that no express provision in the Implementation Act seeks to undo that which the Rome Statute itself preserves: immunity *ratione personae* of third party States' heads of State. When regard is had to the principles set out above, there is a reasonable prospect that another court would not interpret the Implementation Act as having a legal result which is at odds with international law. This is because the Implementation Act itself requires a court to consider and apply conventional international law (in particular the Rome Statute);[81] customary international law;[82] and comparable foreign law.[83] On analysis, another court may readily come to a different conclusion on the basis of each of these components of the "applicable law".[84] Section 4(2) of the Act does not detract from this, because it deals only with criminal responsibility.[85] As the International Court of Justice confirmed, "[i]mmunity from criminal jurisdiction and individual criminal responsibility are quite different concepts."[86]

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[81] Section 2(a) of the Implementation Act.
[82] Section 2(b) of the Implementation Act.
[83] Section 2(c) of the Implementation Act.
[84] Heading to section 2 of the Implementation Act.
[85] Section 4(2) provides

> "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."

[86] *Arrest Warrant case supra* at para 60.

(4) Residual grounds of appeal

42. The sixth ground of appeal reinforces the second, third and fourth. This is because once it is accepted that under domestic and international law President Bashir "enjoyed some kind of diplomatic immunity from arrest, or from this Court's jurisdiction" (as the respondent did),[87] a dispositive – and correct – concession is made. This is because if it is conceded that no obligation to arrest existed in such circumstances, then there is no legal basis for any of the orders.

43. The seventh ground of appeal is subsumed by the third. Likewise the eighth ground of appeal is subsumed by the fourth.

44. The ninth and tenth grounds of appeal reinforce the second, third and fourth grounds. To this should be added a further considerations identified in the notice of application for leave to appeal. As mentioned, article 98 of the Rome Statute itself preserves immunity. It is accordingly wrong to construe the Rome Statute as "exclude[ing]" immunity *ratione personae*, which – the International Court of Justice held – is "firmly established" in international law.[88] The same applies to the conclusion on waiver: both as a matter of fact[89] and law[90] there is every prospect that another court may reach a different conclusion.

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[87] Para 23 of the judgment, which accurately records para 11 of the respondent's heads of argument.
[88] *Arrest Warrant case supra* at para 51.
[89] Para 3.26 of Government's answering affidavit and para 3.2 of Government's supporting affidavit confirm that Sudan had in fact actively requested that its President be afforded immunity. In such circumstances waiver cannot be presumed, especially not on the established legal test (*Laws v Rutherford* 1924 AD 261 at 263; *Borstlap v Spangenberg* 1974 (3) SA 695 (A) at 704G).
[90] Section 8(1) of the Immunities Act makes it clear that it is a sending State itself which is the entity capable of waiving immunity. Section 8(3) requires that any waiver "must *always* be express *and* in writing" (emphasis added). No written instrument expressing any intention to waive immunity exists. Naturally none formed part of the motion record. Thus a finding of waiver is precluded under South African law.

45. The eleventh ground of appeal reinforces the second and third grounds. To this may be added the effect of the principle of legality. It is that the Minister has no power in respect of immunities beyond that conferred by the Immunities Act itself.[91] The Minister accordingly has no power, on the one hand, to detract from the immunity *ratione personae* of a serving head of State. Nor did the Minister purport to do so. Nothing that the Minister could or intended to do diluted the immunity existing *ex lege* under section 4(1) of the Immunities Act and customary international law. On the other hand, to the extent that this Court considered the ministerial notice invalid (for seeking to abrogate the law),[92] the notice stood until it was set aside.[93]

46. The twelfth ground of appeal straddles the second, third and fourth. It is fully covered by them. In short, if regard is had to the principles confirmed by the International Court of Justice, there is every prospect that another court may come to a different conclusion. Indeed, more than twenty national courts around the world have applied these principles and have apparently come to a conclusion contrary to this Court's.[94]

47. The thirteenth ground of appeal reinforces the fourth. As the notice of application for leave to appeal reflects, the judgment invoked by this Court for its conclusion on immunity in fact contradicts it in three respects. First, the ICC Pre-Trial Chamber's judgment in *On the Co-operation of the DRC regarding Omar Al Bashir's arrest and*

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[91] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) at paras 40 and 56.

[92] See, however, para 3.6 of Government's supporting affidavit. It reflects that Cabinet was careful to obtain legal advice on the effect of the host agreement and its implications for immunity of a head of State. The facts contradict any impression that Cabinet or the Minister intended to "suspend" the law. Instead, the Minister applied the Immunities Act.

[93] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* (1) SA 343 (CC) at paras 47-49 and 54, holding that in the absence of a challenge to the validity of a ministerial notice it had to be accepted as valid, and that the exercise of public legislative power in terms of the notice was binding, authorised by law, and had the force of law.

[94] See again the examples provided in the International Law Commission's report cited in fn 67 above.

Surrender confirms the conclusion by the International Court of Justice. It is that article 27(2) of the Rome Statute deals with the ICC "exercising its [own] jurisdiction". Article 27(2) does not deal with immunity before a domestic court. Second, the ICC Pre-Trial Chamber's judgment itself reiterates 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".[95] Third, the ICC Pre-Trial Chamber's judgment itself accepted that the application of "article 27(2) of the Statute should, in principle, be confined to those State Parties wh[ich] have accepted it".[96] It is, furthermore, contrary to both international law and comparative law to reason, as the Court did, that "[t]he Rome Statute gives effect to international human rights law and enables the prosecution of customary international law crimes. As such, its provisions enjoy pre-eminence in our constitutional regime."[97] As the International Court of Justice held, sovereign immunity "is one of the fundamental principles of the international legal order."[98] It is so fundamental that "even on the assumption that the proceedings in [domestic] courts involved violations of *jus cogens* rules, the applicability of the customary international law on State immunity was not affected".[99]

48. The fourteenth, like the sixth, ground of appeal flows from the second and fourth. For present purposes it does not require further analysis. We would add, however, that if the mere *issue* of a warrant violates the immunity of a serving head of State (as the

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[95] Para 25 of the Pre-Trial Chamber's judgment.
[96] Para 26 of the Pre-Trial Chamber's judgment.
[97] Para 28.13.1 of this Court's judgment.
[98] *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* ICJ Reports 2012 at para 57.
[99] *Id* at para 97. See further paras 93-96 for a collection of previous ICJ authorities and a list of domestic judgments applying the same principle.

ICJ held is the legal position),[100] then *a fortiori* would effecting an arrest. Ordering such an arrest (and this even without a warrant) is constitutionally problematical. It imposes domestic legal obligations under a court order which is inconsistent with domestic legislation and international law; and it ventures into a sensitive area of foreign policy, which is within the heartland of the Executive arm of government.[101] There is, at its lowest, a reasonable prospect that another court may hold that this Court should have exercised its remedial powers under section 172 of the Constitution differently.

49. This forms the subject-matter of the fifteenth ground of appeal, which itself is underscored by the second and third review grounds. In short, to the extent that no legal basis exists for the order, no order should or could have been made at all; but even to the extent that any order was legally tenable, appropriate relief should have been granted suitable to the urgent circumstances of the case and the particularly sensitive field of constitutional law involved.

50. Finally, as regards the sixteenth ground of appeal, it supports the first. No evidential basis existed for the factual issues forming part of the judgment. Whether a valid basis for judicial notice (to which the judgment resorts)[102] existed is itself a matter on which another court may readily reach a different conclusion.[103] Another court may furthermore consider that such facts which are established on the court papers contradict the inference drawn from newspaper reports (as regards which Government

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[100] *Arrest Warrant case supra* at para 60.
[101] *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC) at para 172 (per Ngcobo J, as he then was).
[102] Para 8 of the judgment.
[103] For the relevant principles see *Master Currency (Pty) Ltd v Commissioner, South African Revenue Service* 2014 (6) SA 66 (SCA) at para 8, citing Zeffertt *et al The South African Law of Evidence* 5th ed (2003) at 715*ff*. See, too, Joubert (ed) *The Law of South Africa* 2nd ed (LexisNexis, 2005) vol 9 para 821.

was not afforded an effective opportunity to address the Court).[104] The inference drawn is that President Bashir's having left South Africa proves "a clear violation of the order handed down by Fabricius J".[105] Fabricius J's order was handed down after 15h00 the previous day.[106] The respondent itself conceded that Government "will, as a practical reality, need a number of hours or perhaps even days to carry out the arrest".[107] The judgment states that "President Bahir had most probably left the country ... just before 13h00" on the next day,[108] on other words less than a day after the Fabricius J order was handed down. Thus the Court's inference that Government was able to prevent President Bashir's departure, but deliberately repudiated the order is contrary to the evidence before court. In such circumstances there are good prospects that another court may come to a different conclusion on Government's compliance with the interim order.[109] It is also a very serious conclusion: it is one which the Court itself considered could precipitate a constitutional crisis.[110] It is in the interests of justice and constitutional democracy that it be considered *de novo* by a court of appeal.

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[104] Despite affording government an opportunity to file an explanatory affidavit within seven days after the hearing (which was filed on 25 June 2015), the judgment reflects that it was handed down at 11h30 on 24 June 2015.

[105] Para 7 of the judgment. At para 37.2 the judgment repeats that "there are clear indications that the order of Sunday 14 June 2015 was not complied with". While this is qualified by the introductory words "[a]t this stage", it nonetheless amounts to a conclusion which the Court record it had reached "on a common sense approach". The judgment concludes by repeating (in para 39) that "the departure of President Bashir form [sic] this country before the finalisation of this application and in the full awareness of the explicit order of Sunday 14 June 2015, objectively viewed, demonstrates non-compliance with that order. For this reason we also find it prudent to invite the NDPP to consider whether criminal proceedings are appropriate."

[106] Para 6 of the judgment.

[107] Para 50 of the founding affidavit.

[108] Para 8 of the judgment.

[109] *South African Post Office v De Lacy* 2009 (5) SA 255 (SCA) at para 35

> "The process of inferential reasoning calls for an evaluation of all the evidence and not merely selected parts. The inference that is sought to be drawn must be 'consistent with all the proved facts: If it is not, then the inference cannot be drawn' [fn 14: *R v Blom* 1939 AD 188 at 202-203] and it must be the 'more natural, or plausible, conclusion from amongst several conceivable ones' [fn 15: *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A) at 159B-D, citing Wigmore on Evidence 3 ed para 32] when measured against the probabilities."

[110] Para 37.2 of the judgment.

D. Conclusion

51. This Court's judgment is unprecedented. It stands in isolation from judgments by the International Court of Justice and highest courts in many comparable jurisdictions. For instance, courts of the United States recognised immunity *ratione personae* of the Prince of Wales,[111] the UK House of Lords recognised immunity *ratione personae* of Senator Augusto Pinochet Ugarte, and the French *Cour de Cassation* has done the same in respect of Colonel Muammar Muhammad Abu Minyar al-Gaddafi.[112] In contrast, this Court has imposed a duty on South Africa to arrest a serving head of State of another African country (and presumably all other similarly circumstanced heads of sovereign States).

52. The question in this application is whether this legal terminus should prevail, especially after a judgment rendered under very urgent circumstances which prevented not only the parties but also the Court from a full ventilation of the legal issues involved. We submit that there is every reason to afford both parties an opportunity to ventilate the decision on appeal to the Supreme Court of Appeal. If this is not permitted, the practical legal effect will be that the question will never realistically arise again before a South African court, because no head of State liable to arrest would ever again enter South Africa. The implications for South Africa's conduct of its international relations are both clear and profound.

53. We accordingly ask that leave to appeal be granted to the Supreme Court of Appeal, with the usual order as to costs: that these be costs in the appeal.

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[111] *Kilroy v Windsor* (Civ. No. C-78-291).
[112] Judgment No. 1414 of 13 March 2001.

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12 August 2015