IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 75/16

In the matter between:

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	First applicant
DIRECTOR-GENERAL OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second applicant
MINISTER OF POLICE	Third applicant
COMMISSIONER OF POLICE	Fourth applicant
MINISTER OF INTERNATIONAL RELATIONS AND CO-OPERATION	Fifth applicant
DIRECTOR-GENERAL OF INTERNATIONAL RELATIONS AND CO-OPERATION	Sixth applicant
MINISTER OF HOME AFFAIRS	Seventh applicant
DIRECTOR-GENERAL OF HOME AFFAIRS	Eighth applicant
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	Ninth applicant
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Tenth applicant
HEAD OF 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 WRITTEN SUBMISSIONS

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A. Introduction

1. This matter raises two substantive questions. First, does a sitting head of state enjoy immunity *ratione personae* before a South African court in relation to an arrest warrant issued by the International Criminal Court ("the ICC")?[1] Conversely, is the South African Government under a legal duty to respect the temporary personal immunity of such head of state; or is Government obliged to arrest him? Second (in the event that no inherent legal duty exists to honour the temporary personal immunity of a sitting head of state), is Government precluded from honouring the extant conferral of such immunity extended on an *ad hoc* basis by the Minister of International Relations and Co-operation ("the Minister") pursuant to the Diplomatic Immunities and Privileges Act 37 of 2001 ("the Immunities Act" or "DIPA")?

2. These legal questions were precipitated by extremely urgent litigation instituted by the current respondent, the Southern African Litigation Centre ("SALC").[2] Within hours of the High Court application being lodged, the High Court made two interim orders.[3] Thereafter, on the next day, the High Court imposed a duty on Government to arrest a head of state, President Bashir of Sudan.[4]

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[1] See fn 123 *infra* for the distinction between immunity *ratione personae* (personal immunity) and immunity *ratione materiae* (functional immunity). In short, the first attaches to a head of state – and only during his term of office. It is absolute. By contrast, immunity *ratione materiae* applies to all official conduct, and vests in all state officials. It is not absolute.

[2] Record vol 4 pp 298-299 para 7.

[3] Record vol 4 p 299 para 9.

[4] Although the case arose as a result of President Bahir's visit to South Africa, the precedent established by the SCA has far wider implications. For instance, Dugard *International Law: A South African Perspective* 4th ed (Juta, Cape Town 2011) at 196-197 and 253 gives the following examples of state

Subsequently, in an urgent appeal to it, the Supreme Court of Appeal substituted the High Court's orders and rejected the crucial *substantive* premise on which the High Court's judgment and orders were sought to be defended.[5] The premise was SALC's erroneous assertion that customary international law now no longer recognises one of its fundamental principles (*viz* immunity *ratione personae* of sitting heads of state). The SCA also rejected SALC's other mainstay: a plainly meritless *procedural* defence – mootness. SALC has now correctly abandoned its reliance on mootness. It wrongly now asserts that it had done so earlier.[6]

3. The SCA correctly rejected these two cardinal struts of SALC's case. But after openly declaring its "regret" to have to find in favour of Government on the correct position under customary international law,[7] the SCA found an interpretative basis (which countermands customary international law) for upholding the High Court's judgment. Even this new basis could not sustain either of the High Court's substantive orders. The SCA therefore had to set aside the one and dramatically recast the other.

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leaders alleged to have committed international crimes: Presidents Ghaddafi and Sharon (now deceased), and currently Castro and Mugabe. To these Philippe Sands QC *Torture Team* (Allen Lane, London 2006) *passim* adds President George W. Bush and Prime Minister Blair. The same applies now to Presidents Obama and Putin.

[5] Record vol 4 record p 300 para 11.

[6] Record vol 4 record p 344 fn 4, where SALC avers that it jettisoned its reliance on mootness after Government's founding affidavit was filed in its SCA petition. The truth is that SALC persisted in its answering affidavit with its mootness point (Petition Record p 8 para 13; p 139 para 77), despite Government inviting SALC to abandon the point (Petition Record p 34 para 88). Even in oral argument before the SCA the point was not abandoned. This is why the SCA judgment had to deal with it as the first of nine "issues … to be determined" (Record vol 3 pp 223-224 para 18 of the SCA judgment; addressed under the heading "Is the appeal moot?" at paras 19-21 of the SCA judgment).

[7] Record vol 3 pp 265-266 para 84 of the SCA judgment.

4. The result is a judgment by the SCA criticised by a leading academic, Prof Akande (although he is sympathetic to SALC's stance), for being "rather surprising".[8] Prof Akande describes the conclusion as "particularly odd",[9] and observes that "it is not clear why section 4(2) of the Implementation Act [wa]s not given a meaning which aligns more closely with the words used and with customary international law."[10] Prof Akande further cautions that "if it [the SCA judgment] stands, it means South Africa would be a very rare example of a State" occupying the same legal position as Belgium prior to the leading judgment by the International Court of Justice on the issue of immunity *ratione personae*.[11] In that judgment the ICJ held that Belgium had violated personal immunity.[12]

5. It is, moreover, not only *international* academic commentators who have *subsequently* identified the rarity of the result at which the SCA arrived. Already before the High Court litigation started the leading South African text (cited prominently in Government's heads of argument *a quo*) made the position quite clear. It is that "[j]udicial opinion and state practice on this point are unanimous and no case can be found in which it was held that a state official possessing immunity *ratione personae* is subject to the criminal jurisdiction of a foreign state when it is alleged that he or she has committed an international crime".[13]

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[8] Record vol 4 p 297 fn 4.
[9] Record vol 4 p 326 para 70.
[10] Record vol 4 p 327 para 70.
[11] Record vol 4 p 302 para 16.
[12] *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (2002) ICJ Rep 3, to which we refer further below.
[13] Dugard *op cit* at 253, quoting Akande with approval.

6. The SCA judgment does not refer to this recordal of the legal position, although cited to it.[14] The judgment does, however, correctly accept that the position under international and comparative law is contrary to the SCA's interpretation of the South African legislation in question. It is this legislation, the Rome Statute of the International Criminal Court Act 27 of 2002 ("the ICC Act" or "the Implementation Act"), which intends to give effect to the position under international law. The Constitution requires that the ICC Act be interpreted consistently with international law.[15]

7. The SCA's resulting precedent is not only inconsistent with international and comparative law, and not only bears adversely on South Africa's foreign legal position. It also has other far-reaching consequences.[16] It adversely affects South Africa's foreign political and diplomatic position.[17] It impedes Government's continued engagement in (especially African) foreign relations and its peace-building role in the continent and elsewhere.[18] Despite these issues being raised and debated before the SCA, the judgment does not properly account for them. What the judgment does explicitly record, however, is Wallis JA's views on the

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[14] It does, however, cite different passages from Dugard (or, as the judgment records, the chapters written by junior counsel for SALC; not Prof Dugard himself).
[15] Section 233 of the Constitution.
[16] Record vol 4 p 302 para 16; Record vol 4 pp 331-332 para 84.
[17] The SCA judgment itself acknowledges that the High Court's judgment and orders impacted on Government's "future conduct of its diplomatic relations" (Record vol 3 p 225 para 20 of the SCA judgment). The same applies to the SCA judgment, which upholds the High Court judgment.
[18] Cassese "When may senior state officials be tried for international crimes? Some comments on the Congo v Belgium case" (2002) *EJIL* 855: "not only the arrest and prosecution of such a minister while on a private visit abroad, but also the mere issuance of an arrest warrant, may seriously hamper or jeopardise the conduct of international affairs".

Executive's sustained commitment to the Rome Statute.[19] This treaty is the subject-matter of intense controversy in Africa and elsewhere. The African Union and many of its members (South Africa included) have officially expressed fundamental concerns regarding the ICC's institutional integrity, and the resulting need to review continued commitments to the treaty.[20] It is therefore, with respect, wrong for Wallis JA to have implicitly criticised Government's argument as "echoe[ing]" the African Union's position,[21] and thereafter to label Governments argument as "unfortunate" and "a pity".[22]

8. That approach (and the outcome to which it led) is, with respect, misdirected. It violates the doctrine of separation of powers; fails to give effect to the correct principles of statutory construction; is inconsistent with international law; departs from the text of the operative provisions; rests on flawed logic; and culminates in an order which is not supported by the provision invoked in the declarator. In short, the judgment and order require this Court's correction. It is correctly not contested by SALC that the matter indeed raises constitutional issues and points of law of general importance which ought to be considered by this Court.[23] That

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[19] Record vol 3 p 279 para 105 of the SCA judgment.
[20] Record vol 4 p 299 para 8. Important permanent members of the United Nations Security Council (the United States of America, China and Russia) have veto powers in respect of conferring jurisdiction on the ICC to prosecute non-members to the Rome Statute, and each of these UN SC members is a non-party to the Rome Statute. Yet the Rome Statute confer on them the power to subject other non-members, like Sudan, to the Rome Statute and the jurisdiction of its treaty-based court (the ICC).
[21] Record vol 3 pp 251-252 para 65 fn 39 of the SCA judgment.
[22] Record vol 3 pp 279-280 para 105 of the SCA judgment.
[23] Record vol 4 p 302 para 17; pp 331-332 paras 83-85. SALC has nowhere traversed or denied these paragraphs. It simply advanced an ineffectual residual denial of the contents of Government's founding affidavit "[t]o the extent that any averments in the founding affidavit are inconsistent with [SALC's answering] affidavit" (Record vol 4 p 345 para 8). But there is no such "extent".

these issues are indeed "arguable"[24] – as the SCA itself accepted[25] – is also not denied.[26]

9. For the reasons set out below we shall ask that the application for leave to appeal be granted and the appeal upheld. Our submissions follow the scheme set out in the above index.

B. Procedural background

10. The procedural context in which this litigation arises is shortly summarised in the application to this Court.[27] It is not contested, nor was it at any time contested by SALC.[28] What it shows is a highly compressed and contentious hearing before the High Court. Evidently not only Government but SALC itself was able to cite the relevant authorities. Although Government attempted in the short period available to explain the legal position through an expert in international law, the High Court refused this.[29] The High Court also recorded in its judgment its "judicial notice" of news reports, and its own conclusion (without hearing

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[24] Section 167(3)(b)(ii) of the Constitution.
[25] Record vol 3 p 227 para 25 of the SCA judgment.
[26] See again fn 17 above. SALC simply asserts a lack of prospects of success, which is, firstly, not the same as not arguable; and, secondly, not borne out by SALC's arguments.
[27] Record vol 4 pp 298-300 paras 6-10.
[28] Before the SCA the procedural background was set out at Petition Record pp 9-15 paras 17-35. As in this Court, SALC's answering affidavit before the SCA did not traverse these paragraphs. They are, moreover, matters of public record. In the SCA answering affidavit SALC resorted to a blanket denial (Petition Record p 115 para 8). After Government pointed out that this approach is legally incompetent (citing *Minister of Land Affairs and Agriculture v D & F Wevell Trust* 2008 (2) SA 184 (SCA) para 56; *Wright v Wright* 2015 (1) SA 262 (SCA) at paras 15-16), SALC has now reverted to the ineffectual *pro tem* denial to which reference has already been made in fn 17 above.
[29] Record vol 2 record p 120 para 5.

Government) that these reports confirm that Government had defied Fabricius J's orders of the previous day.[30]

11. Such pleaded defence as the High Court and the urgent circumstances permitted be adduced in the very short period allowed was thereafter construed by the SCA as Government's whole case before the High Court. The SCA criticised Government for relying in the subsequent appeal also on issues of law and judgments by *inter alia* the ICJ.[31] The criticism was, with respect, unfair,[32] particularly in the extremely urgent circumstances in which Government was required to defend SALC's application.[33] As mentioned, SALC itself cited none of the crucial authorities before the High Court and therefore did not bring the High Court's attention to precedents and principles operating against the relief SALC sought. The relief SALC sought, the SCA subsequently confirmed, was legally incompetent and could not stand. So too the principal basis for it.

12. Thus the SCA had to determine the matter without any substantial benefit from the High Court's judgment. The latter did not engage with any of the relevant authorities or principles. The High Court judgment does, however, confirm is its own enduring importance.[34] The High Court judgment was not only marked

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[30] Record vol 2 record p 122 para 8.
[31] Record vol 3 pp 219-222 paras 10-16, 14 and pp 279-280 para 105 of the SCA judgment.
[32] The SCA held that the reliance on the Host Agreement was "relegated to a backseat" and pursued in a different "form" (para 15 of the SCA judgment). The correct position is that Government's answering affidavit in the High Court already invoked the fact that the ministerial conferral of *ad hoc* immunity was extant (Record vol 1 p 70 para 38.3). Front seat or back seat, the point was argued.
[33] Record vol 4 p 308 para 32.
[34] The High Court judgment held that "the order we handed down, as well as this judgment *remain relevant* in view of the important constitutional and international law principles at stake" (Record vol 2 p 119 para 3,

"reportable" and "of interest to other judges",[35] but has also been reported in all three major law reports.[36] The importance of the matter was indeed the basis on which a full bench was composed to sit as court of first instance.[37]

13. The result was a High Court judgment which made adverse findings and comments against Government, but absent any supporting evidence.[38] Some of these demonstrate that the High Court was prepared to take "judicial notice" of some media reports (against Government)[39] but not of others (especially those by SALC itself asserting that it intended to act on the orders).[40] What the latter

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emphasis added). The High Court judgment already generated significant political and separation-of-powers consequences. It resulted in an attempt in Parliament to impeach President Zuma; precipitated an unprecedented meeting between the Executive and the Judiciary; and led to SALC's threat to instituted contempt of court proceedings (Petition Record p 14 para 31).

[35] Record vol 2 p 116. Even the subsequent judgment on leave to appeal was also marked "reportable" and "of interest to other judges" (Record vol 2 p 188).

[36] It has been reported in *inter alia* the South African Law Reports (*s.v. Southern Africa Litigation Centre v Minister of Justice and Constitutional Development* 2015 (5) SA 1 (GP)); the All South African Law Reports (*s.v. Southern Africa Litigation Centre v Minister of Justice and Constitutional Development* [2015] 3 All SA 505 (GP); and the Butterworths Constitutional Law Reports (*s.v. Southern Africa Litigation Centre v Minister of Justice and Constitutional Development* 2015 (9) BCLR 1108 (GP)). The subsequent SCA judgment is also reported in the same publications *s.v. Minister of Justice and Constitutional Development v Southern Africa Litigation Centre* 2016 (3) SA 317 (SCA); [2016] 2 All SA 365 (SCA); 2016 (4) BCLR 487 (SCA).

[37] Record vol 2 pp 121-122 para 7: "Due to the importance of the matter especially having regard to South Africa's constitutional and international legal obligations in respect of international crimes that are at issue, the Judge President of this Division took a decision that the application would continue before a Full Court on Monday".

[38] The High Court judgment *inter alia* criticise Government its "clear violation of the order handed down by Fabricius J" (Record vol 2 p 122 para 8), and referred to "clear indications that the order of Sunday 14 June 2015 was not complied with" (Record vol 2 p 144 para 37.2). On this basis the main judgment makes scathing observations regarding "the democratic edifice … crumbl[ing] stone-by-stone until it collapses and chaos ensues" "if the government ignores its constitutional obligations and fails to abide by Court orders" (*ibid*). The main judgment concludes that President Bashir's departure from South Africa "demonstrates non-compliance with [the Fabricius J] order" (Record vol 2 pp 144-145 para 39). All of these findings were made without giving Government a hearing on its compliance with the Fabricius J order: judgment was handed down on the morning on which government's explanatory affidavit became due, and the judgment did not consider it (Petition Record p 12 para 25). The order itself was handed down after a period of deliberation of not more than 30 minutes (Petition Record p 11 para 22).

[39] Record vol 2 p 122 para 8.

[40] Petition Record p 13 para 30: during the 17h00 SAFM news broadcast a spokesperson for SALC was reported as stating that the main judgment would ensure that President Bashir is never again able to visit

evidence does demonstrate is that SALC's stance on mootness has been wholly inconsistent, as it sought to sustain enforceable orders but avoid appellate scrutiny and reflection.

14. The SCA has however confirmed that the orders SALC sought and the High Court granted were unsustainable. The issue before the SCA was simply whether the High Court orders were sustainable. It was not whether the High Court's adverse findings on whether or not Government, or its then counsel, misled the High Court were correct. Such findings are not appealable. They are the subject of separate proceedings. They were therefore not canvassed in argument before the SCA.

15. Yet the SCA repeated and embroidered on the High Court's observations. As in this Court, the issues before the SCA were limited to the correct answers to the purely legal questions arising from SALC's application.[41] It was therefore, with respect, a misdirection for the SCA to engage in extraneous issues on which it heard and invited no argument, and substantially on the basis of media reports.[42]

16. SALC defends these observations on a twofold basis. First, SALC contends that these "observations" by the High Court were not impugned (*ergo*, so the reasoning appears to proceed, the SCA was quite justified in "stridently [sic] criticis[ing] the government authorities").[43] This reasoning is flawed; it is

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South Africa, and that the judgment established a "binding precedent". This, too, is not denied by SALC in any legally cognisible form.

[41] Record vol 4 pp 307-308 para 30.

[42] *Kauesa v Minister of Home Affairs* 1996 (4) SA 965 (NmS) at 973I-974E.

[43] Record vol 4 p 365 para 53.3.

inconsistent with the facts;[44] and it concedes, as it must, that the SCA indeed harshly criticised Government when the questions before court were pure issues of law and the suggestion of improper conduct was the subject of separate pending proceedings. Second, SALC contends, it is for the Judiciary, not the Executive, to "decide the law".[45] Government's conduct and its commitment to the Rome Statute is not a question of law. What the SCA did was to speculate as regards the *factual* position (a *mero motu* assumption that Government misled the High Court),[46] and to express itself on foreign relations or (as the High Court put it)[47] matters of "regional and international policy" (Government's continued commitment to the Rome Statute).[48] This did not involve "decid[ing] the law", least of all in circumstances where the factual position regarding compliance with the High Court's interim orders not arising in the proceedings before the SCA;

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[44] As the Petition record reflects (at pp 88-89 para 16), already Government's notice of application for leave to appeal in the High Court took issue with the High Court's

> "... permitting its impression that the applicants [Government] had failed to comply with the interim order to enter its judgment and affect its orders. The Court misdirected itself by making factual assumptions based on media reports of which the Court purportedly took judicial notice (para 8 of the judgment). The Court erred by failing to ensure that it did not 'pre-empt' any enquiry as regards the applicants' compliance with the interim order – despite having identified the risk of pre-emption (para 37 of the judgment). Instead, the Court proceeded to find 'clear indications that the order of Sunday 14 June 2015 was not complied with' (para 37.2 of the judgment) and that the departure of President Bashir 'objectively viewed, demonstrates non-compliance with that order' (para 39 of the judgment). The Court should have awaited the filing of the explanatory affidavit before making any such finding. Furthermore, these findings fail to consider that the respondent itself recognised that 'the [applicants] will, as a practical reality, need a number of hours or perhaps even days to carry out the arrest' (para 50 of the founding affidavit)."

And, contrary to SALC's contention to the contrary, Government's petition to the SCA itself challenged the High Court's "observations" (Petition record pp 88-89 para 16; p 11 para 24; p 12 para 25; p 27 para 71).

[45] Record vol 4 pp 363-364 para 52.

[46] Record vol 3 p 218 para 7 of the SCA judgment.

[47] Record vol 2 p 142 para 34, recording that there "were not ventilated before [the High Court]". Nor, unsurprisingly, was it ventilated in the ensuing appeal before the SCA.

[48] Record vol 3 pp 279-280 para 105 of the SCA judgment.

and where South Africa's continued commitment to the Rome Statute is a matter within the heartland of the Executive, not the Judiciary.[49]

17. Accordingly the SCA indeed exceeded the scope of the appeal, engaged in extraneous issues, and erroneously criticised Government "stridently", as SALC concedes while asserting an essentially political view as to what was a "pity".

C. The SCA's judgment and order

18. The SCA's judgment is analysed more fully in Government's founding affidavit filed in this Court.[50] Space limitations do not permit a full analysis here. We therefore ask that Government's founding affidavit be considered in conjunction with these heads of argument. SALC's answering affidavit, significantly, simply did not engage with Government's founding affidavit. Instead, it substantially replicates SALC's heads of argument before the SCA. To the extent that space permits (and to the limited extent necessary), we shall deal with SALC's arguments in addressing the SCA judgment and the correct principles of law. (The SCA judgment itself demonstrates the defects in many of SALC's arguments,[51] and SALC's answering affidavit in this Court does not take issue with those parts of the judgment other than simply to "deny" the conclusion on customary international law.)

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[49] *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC) at paras 77 and 81
[50] Record vol 4 pp 306-329 paras 28-77.
[51] See e.g. Record vol 3 pp 270-271 para 93 of the SCA's judgment.

19. The SCA was presented with a substantially new case advanced by SALC on appeal. SALC invoked a statutory provision (section 10 of the ICC Act) entirely absent from its papers and argument before the High Court, and from the High Court's judgment itself. It is therefore unsurprising that the SCA could not uphold the relief sought by SALC and granted by the High Court: it was premised on a different case advanced before the High Court.[52] Yet the SCA criticised Government for relying on an additional – purely legal – basis for attacking the High Court's judgment, apart from the pleaded defence which the SCA described as taking the "backseat".

20. As a result the SCA pronounced as court of first instance on a statutory provision never before interpreted or applied by any court. Whether this interpretation (which, as Prof Akande observed, has "very far-reaching" consequences)[53] is correct is therefore self-evidently a matter which warrants this Court's consideration.

(1) Section 10 of the ICC Act

21. The SCA reached the interpretative issue after first accepting numerous important aspects of constitutional and international law. One is the need to interpret domestic legislation to accord with international law.[54] Another is that immunity is a fundamental principle of international law, that it subsists even in the context

[52] Record vol 4 pp 304-306 paras 22-27 describes the mutation of SALC's case *a quo*.
[53] Record vol 4 p 302 para 16.
[54] Record vol 3 pp 249-250 para 62.

of the most serious international crimes,[55] and that therefore "ordinarily … President Bashir was entitled to inviolability while in South Africa".[56] A third is that the legal position regarding immunity *ratione personae* in the context of serious international crimes has been confirmed repeatedly by the International Court of Justice, the European Court of Human Rights and the ICC itself.[57] Thus international law does not – the SCA concluded – provide what SALC insisted it did (an exception to immunity in the context of international crimes), and on which it built its case. Having expressed its "regret" that this is the position under international law, the SCA then embarked on interpreting the ICC Act. Unsurprisingly the SCA did not prefer a reasonable interpretation of the Act which is congruent with customary international law. Instead of embracing international law, the SCA regretted international law and adopted a departing interpretation.[58] This is contrary to section 233 of the Constitution.[59]

22. The correct approach is to interpret the text of section 10(9) of the ICC Act as it stands within its statutory context, congruent with international law and harmonious with other legislation.[60] Unless the text of section 10(9) so provides,

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[55] Record vol 3 pp 253-254 para 67.
[56] Record vol 3 p 266 para 85.
[57] Record vol 3 pp 256-260 paras 70-75.
[58] As fn 90 of the SCA judgment itself accepts.
[59] It also fails to give effect to *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) at para 97. International human rights law itself accepts that immunity *ratione personae* subsists even in the context of international crimes, and this has been confirmed by the ICJ, the ECHR and the ICC.
[60] Section 39(2) of the Constitution further provides that "[w]hen interpreting any legislation … every court … must promote the spirit, purport and objects of the Bill of Rights". The Bill of Rights itself, of course, entrenches everyone's "right to freedom of movement" (section 21(1)), which includes a foreign head of state's right to "leave the Republic" (section 21(2)). Whether immunity for international crimes violates victims' human rights has been analysed by the Supreme Court of Canada in a judgment to which we refer below. The SCC held that no Charter infringement exists in such circumstances.

it is not permissible to read into it (whether by design or result or accident) an ouster of international law or trumping of other legislation. Especially not in circumstances where the context of section 10(9) makes it clear that where the legislature intended any trumping this is expressly provided for.[61] Reading into section 10(9) an ouster of other legislation or international law is, as this Court held, a "more invasive" remedy to be applied in the event of a finding of unconstitutionality.[62] It is not a free-floating device to be deployed to make Parliament's intention yield to the personal preference of a particular judge.

23. Nor can the word "arrest" be read into section 10(9) to create the same result. This notwithstanding, SALC argued before the SCA that section 10(9) "says expressly" that President Bashir "does not" "enjoy immunity from arrest and surrender to the ICC".[63] SALC misstated the text. Section 10(9) does not deal with arrest at all.[64] As the heading to section 10 spells out, and the provisions of section 10 confirm, it deals with proceedings "after *arrest*".

24. It is section 9 which deals with arrests. Significantly section 9 contains no provision similar to section 10(9). In short, section 9 – which is (within the ICC

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[61] This is demonstrated by section 4(2) of the ICC Act, which expressly provides "Despite any other law to the contrary, including customary and conventional international law, …". Nothing in section 10 or the other provisions of the chapter in which section is contained includes any similar terms. Section 10(9) explicitly restricts its reference to "a person contemplated in section 4(2)(a) or (b)". It does not contain or incorporate the qualification with which section 4(2) commences.

[62] *Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal* 2016 (3) SA 160 (CC) at para 38.

[63] Para 35.4 of SALC's heads of argument filed in the SCA (emphasis added).

[64] Section 10(9) 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)."

Act) the *lex specialis* on arrests – is silent on heads of State.[65] Therefore, for purposes of arrest the fundamental principle of international law (*viz* absolute inviolability as a consequence of immunity *ratione personae*) remains preserved. This accords with the Rome Statute which itself not only preserves immunity of third States,[66] but explicitly qualifies any duty to arrest with reference to member States' national law.[67] In turn, the ICC Act itself requires that an arrest be compliant with "domestic law".[68] It does not provide that arrest pursuant to the ICC Act is absolved from domestic law, or that any arrest provision in the ICC Act trumps any other law. This is quite clear from the text of the relevant provisions. Yet from section 10's silence on immunity, the SCA construed a legislative intention to abolish it. This despite the very recent previous enactment of the Immunities Act which codifies immunity and criminalises its infringement.

25. That silence does not oust immunity is yet further reinforced by the context of sections 9 and 10 of the ICC Act. Section 7 itself recognises the importance of immunity and refers to it in terms. Had the ICC Act intended to abrogate immunity in the context of arrests, it would and should have done so by using the

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[65] See, again, Gevers *op cit* at 17, confirming that the Implementation Act is indeed, in its entirety, "silent on the relevance of immunity in relation to co-operation requests". In contrast, implementation legislation in e.g. England, Kenya and Uganda provide for this. The UK International Criminal Court Act, 2001 specifically retains immunity against arrest for non-parties to the Rome Statute (*id* at 19). The Kenyan International Crimes Act, 2008 explicitly excludes immunity against arrest (*id* at 18). So does the Ugandan ICC Act, 2010 (*id* at 20). In the latter two jurisdictions the legislature accordingly adopted a different position to the one in England and other countries, like South Africa.

[66] Gaeta *op cit* 315 at 318, pointing out that this rule "indubitably prevents a domestic judicial authority from issuing an arrest warrant against … individuals" to whom immunity *ratione personae* applies.

[67] Article 89(1) of the Rome Statute.

[68] Section 10(1)(b) of the ICC Act.

recognised terminology (which section 7 of the Act itself employs). Because immunity is such a fundamental principle of international law (and because section 2 provides that the Act "must" be interpreted and applied with reference to international law),[69] implying or reading in a word which neither section 9 nor section 10 contains (but which the immediate context of these provisions does contain) is not a permissible construction.

26. On its clear terms, there is no abolition of immunity against arrests to be found in section 10(9). But more importantly, section 10(9) finds no application in the current circumstances. This is perhaps why SALC did not plead any reliance on it. Subsection (9) refers to "an order contemplated in subsection (5)". Subsection (5) in turn contemplates an order by a magistrate for the surrender of a person to the ICC.[70] This is not the order sought from or granted by the High Court. At the request of SALC, the High Court ordered an arrest without a warrant. The High Court demonstrably did not grant a section 10(5) order. Its judgment did not purport to invoke any part of section 10. Nor did it consider the jurisdictional facts for a section 10(5) order. Section 10(1) inquiry itself requires that a person be detained under a warrant of arrest, and an arrest must itself have been lawful.[71] There was no arrest, there was no inquiry, and the arrest

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[69] Thus the Implementation Act itself gives effect to section 233 of the Constitution and the presumption against an interpretation of national legislation which contradicts international law (see e.g. *Azanian Peoples Organization (AZAPO) v President of the Republic of South Africa* 1996 (4) SA 672 (CC) at para 26).

[70] As para 100 of the SCA's judgment correctly accepts.

[71] Section 10(1)(b) requires a magistrate to inquire whether an arrest was in accordance with South African domestic law; otherwise the arrestee "must" be released (section 10(8)(e)(i)). Section 10(8)(e)(i), which deals with an appeal, requires that in the event that an appeal based on the requirement that domestic law be complied with succeeds, release of the detainee "must" follow.

purportedly ordered was one without a warrant. Thus there could not, and have not been, a section 10(5) order.

27. Not even the SCA made any section 10(5) order. What it did was to declare that Government has failed to comply with section 10 – apparently *in toto*, because the SCA's order does not identify any particular subsection.[72] The problem with this broad-brush approach is that it departs yet further from the text of section 10. Section 10 imposes no duty on Government or anyone else to arrest. What it imposes is a duty on "[a]ny person who detains a person under a warrant of arrest or a warrant for his or her further detention".[73] Government is not such a person, because President Bashir is not under its detention. Section 10 does not impose a duty to arrest and detain.[74] It imposes a duty to bring a person who had been arrested and who is being detained before court within 48 hours.[75] Government did not breach this. It accordingly could not and did not fail to comply with any section 10 duty.

28. It follows that, having held that the High Court's orders (granted at the instance of SALC) were incompetent, the single substantive order substituted by the SCA

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[72] This applies *a fortiori* to the first part of the declarator, which merely states that the conduct of the respondents was inconsistent with South Africa's obligations in terms of the Rome Statute – without referring to any of the provisions of this voluminous treaty.
[73] Section 10(1) of the ICC Act.
[74] SALC itself reiterates what section 10 requires (Record vol 4 pp 353-354 paras 27.4-27.5). It is that a magistrate "must" hold an inquiry; and a magistrate "must" order the surrender of a person to the ICC if the arrest was compliant with domestic law (which includes the Immunities Act).
[75] Section 10(1) of the ICC Act.

(at its own motion, but for which no analysis is provided in the judgment)[76] is itself defective. Therefore, at the very least, the order requires correction by this Court. But it is the entire interpretative approach underling it which is erroneous, as Government's founding affidavit in this Court demonstrates.

29. SALC's answering affidavit does not address Government's analysis. It does, however, asserts that the SCA also erred in its approach to international law.[77] But SALC does not state in what respect. SALC thus appears to imply that it might yet seek to defend the SCA's order by relying on customary international law (despite the SCA's own judgment recognising that the order is not based on customary international law and cannot be defended on that basis). There was, of course, no order in respect of customary international law. Nor could there have been any. National courts do not declare or develop customary international law, as the SCA held and SALC does not contest.[78] SALC therefore correctly sought no such order. There is not even now any purported cross-appeal for such order.

30. Nor is there any merit in SALC's assertions regarding customary international law, as we shall show with reference to the ICJ's judgment in the *Arrest Warrant*

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[76] The judgment simply identifies the flaws in the High Court's orders, records SALC's concession that the orders it sought were not appropriate, and then simply states that Wallis JA's view is that his own formulation is "appropriate" (Record vol 3 pp 280-281 para 107).
[77] Record vol 4 p 356 para 35, which "disputes" "their" (i.e. Government's and the majority of the SCA's) "interpretation of international law" (the minority provided no interpretation of international law). See, too, Record vol 4 p 345 para 9, simply stating that further argument will be addressed in due course.
[78] Record vol 3 p 259 para 74.

case; and SALC's attempt simultaneously to repudiate, distinguish and (belatedly) apply the judgment in the *Arrest Warrant* case.

(2) The ICJ's *Arrest Warrant* judgment

31. It fell to Government to bring to the courts' attention the most important judgment by the most important international court on the most pertinent issue raised by SALC's case.[79] It is the *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium).*[80] SALC did not refer to this case in the urgent proceedings before the High Court, and its approach prior to Government's notice of application for leave to appeal filed in the High Court reflects no knowledge of this judgment or other judgments applying it.

32. The *Arrest Warrant* judgment confirms the following principles: (i) international law recognises as an important principle the immunity of a head of State before a national court;[81] (ii) immunity applies even in circumstances of crimes against humanity;[82] (iii) the rule of "full immunity from criminal jurisdiction and inviolability" of a serving head of State recognises no exception;[83] (iv) only the sending State itself can waive such immunity;[84] (v) it is wrong to equate

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[79] The first reference to any judgment by the International Court of Justice appeared in Government's notice of application for leave to appeal (Petition Record pp 85-87 paras 8 and 12).
[80] (2002) ICJ Rep 3; reaffirmed in *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* (2008) ICJ Rep 177.
[81] *Supra* at para 51.
[82] *Id* at para 58.
[83] *Id* at para 54.
[84] *Id* at para 52.

jurisdiction and the absence of immunity,[85] or to conflate the presence of immunity with impunity;[86] (vi) international conventions contemplating the extension of criminal jurisdiction "in no way affects immunities under customary international law";[87] and (vii) immunity subsists before a national court, even if the national court exercises jurisdiction under a core crime convention.[88]

33. From this it follows that (i) immunity under customary international law indeed inheres in President Bashir; (ii) immunity cannot "implicitly" be waived, least of all by a third party; (iii) none of the branches of Government may impinge on the freedom of movement of a serving head of a foreign State, because absolute immunity inheres in a head of State "throughout the duration of his or her office";[89] (iv) no exception exists in respect of "international human rights law", as SALC contended and the High Court held[90] (but the SCA corrected);[91] (v) it is misguided to premise an argument in favour of the absence of immunity on the abhorrence of impunity,[92] because the former does not imply the latter; (vi) it is misconceived to extrapolate from the presence of jurisdiction the absence of immunity; (vii) it is incorrect to contend that the Rome Statute (or the Implementation Act, implementing it) abrogated immunity *ratione personae*

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[85] *Id* at para 59.
[86] *Ibid.*
[87] *Ibid.*
[88] *Ibid.*
[89] *Arrest Warrant* case at para 54.
[90] Record vol 2 p 136 para 28.13.1.
[91] Record vol 3 pp 265-266 paras 82 and 85.
[92] As SALC has done throughout the proceedings and still does in this Court (Record vol 4 pp 350-351 para 20).

against arrest;[93] and (viii) it is inconsistent with international law to construe a legal duty to arrest a serving head of State.[94]

34. It became clear in SALC's heads of argument prepared for the application for leave to appeal before the High Court that SALC's case was not compatible with the ICJ's judgment. For instance, SALC contended that "it must follow" that once the South African court has criminal jurisdiction, no immunity exists.[95] As has been shown, this is an error both in law and logic:[96] immunity in fact *presupposes* jurisdiction; thus the presence of jurisdiction is not the absence of immunity.

35. SALC also misconstrued the ICJ's judgment as authority for the proposition that no immunity exists.[97] The ICJ's judgment confirms the precise opposite.[98] It is therefore unsurprising that SALC's real argument since has sought to diminish the ICJ judgment, which clearly contradicts the case SALC has advanced before the High Court in the main application.

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[93] Record vol 2 pp 134 and 136 paras 28.8 and 28.13.1.
[94] As the SCA's substituted order does, and the High Court's second order (the mandamus) did.
[95] Para 27 of SALC's heads of argument. The premise for the proposition is wrong, because neither Article 27 of the Rome Statute nor section 4(2) of the Implementation Act abolishes immunity *ratione personae*. Both provisions quite clearly provide that official capacity is neither a defence nor attenuating for *purposes of sentencing*. They do not deal with immunity. Section 4 deals with jurisdiction.
[96] It fails in logic by simple analogy: just as the jurisdiction of a court does not confer *locus standi* on a litigant, so too the absence of a jurisdictional immunity does not confer jurisdiction. It fails in law because, as Shaw *International Law* 623, explains "the principle of jurisdictional immunity asserts that in the particular situations a court is prevented from exercising the jurisdiction that it possesses".
[97] Para 44.4 of SALC's heads of argument filed in the application for leave to appeal, citing para 61 of the ICJ judgment in the *Arrest Warrant* case.
[98] SALC's argument invokes para 61 of the ICJ's judgment, but ignores the previous three paragraphs of that judgment (paras 58-60, which *inter alia* confirm that immunity *ratione personae* continue to exist even in the case of crimes against humanity; and caution against the conceptual error of conflating jurisdiction of national courts with the absence of jurisdictional immunities).

36. The status to be accorded to the ICJ's judgment cannot be gainsaid. It is commended by *inter alios* Prof Cassese (on whom SALC relied to suggest that the judgment has received academic criticism),[99] was confirmed and applied in a subsequent judgment by the ICJ itself,[100] is supported by many national courts,[101] and was followed by the ICC itself in the judgment by the ICC Pre-Trial Chamber II,[102] which

> "ma[d]e 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 within the jurisdiction of the [ICC]".[103]

37. It is for this reason that SALC must contend for a change in the law. It of course cannot ask this Court to develop customary international law. That is not only impermissible, but also impossible.[104] While the majority of the SCA

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[99] Cassese *op cit* at 874-875.

[100] *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* (2008) ICJ Rep 177.

[101] As is confirmed by 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, a very large number of national courts have on many occasions cited the immunity *ratione personae* from foreign criminal jurisdiction of the head of State as precluding the exercise of criminal jurisdiction against an incumbent head of State in a national court. Many commentators have indicated the same (see e.g. Gevers *op cit* at 5, citing in particular American, Belgian, English, French and Spanish judgments by these countries' highest courts).

[102] *Decision on the Co-operation of the Democratic Republic of Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court* 9 April 2014 ICC-02/05-01/09.

[103] *Id* at para 25. The judgment thus accepts the correctness of the ICJ's decision that immunity *ratione personae* persists, and makes it clear that what Article 27 does is to create an exception when the ICC exercises "its jurisdiction" over such a person (emphasis added).

[104] Not only does a domestic court not have any jurisdiction to develop customary *international* law (*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) at para 63). The Constitution of course, dealing elsewhere with international law, confines courts' power to develop the law to the South African common law and (domestic) customary law (section 39(2) of the Constitution). This is for an obvious reason. Any development of customary international law also depends not on what one national court opines, but on both *usus* and *opinio iuris*. *Usus* is the practice of states, a factual issue on which no evidence in favour of a development has been led. This is unsurprising,

demonstrated its willingness to entertain this proposition, it could find no basis for upholding SALC's arguments regarding customary international law. In this respect the SCA was correct. SALC's answering affidavit reveals no basis on which this finding by the SCA is liable to any attack by it. As we shall show, there is none.

(3) SALC's assertions before the SCA regarding the state of development of customary international law

38. SALC contended before the SCA that "customary law has developed and does not preclude the arrest, by South African authorities, of a serving head of State".[105] Government demonstrated before the SCA that this was not so, and that even some secondary sources on which SALC sought to place reliance contradict

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because commentators confirm that "State practice has consistently supported the traditional interpretations of head of State immunity" (Kiyani *op cit* at para 35). See, too, *id* at para 28, stating that "[t]here is little evidence of State practice or *opinio iuris* that sitting heads of State can be arrested and tried for international crimes." See similarly Bantekas *International Criminal Law* 4th ed (Hart Publishing, Oxford 2010) at 129-130: *"The few prosecutions that have taken place before national courts do not in my view support a proposition that the community of nations has decided to altogether abandon immunity (both functional and personal) in respect of serious international crimes. Interestingly, a very split European Court of Human Rights in the Al-Adsani case [Al-Adsani v UK (2002) 34 EHRR 11 at paras 55-66] took the view that even* jus cogens *norms such as the prohibition against torture must be construed as existing in harmony with other recognised principles of international law with which they may at first sight seem to conflict, namely State immunity. ... In respect of personal immunity case law and State practice continue unabated in favour of the absolute rule"* (footnotes omitted). Cryer *op cit* at 425 similarly records that "while inroads have been made into functional immunity, State practice and jurisprudence have consistently upheld personal immunity, *regardless of the nature of the charges*".

[105] Petition Record p 132 para 56.

SALC's contention.[106] So do many other authorities,[107] some of which cited in the SCA judgment.[108] Many of these authorities are recent, peer-reviewed and perfectly in point. They state, for instance, that "[a]s a sitting head of State, al-Bashir is immune from all foreign processes",[109] and "[i]t can safely be assumed that at present, as the incumbent President of Sudan, Al-Bashir holds absolute personal immunity, which protects him from *any* possible domestic proceedings by foreign authorities, irrespective of his conduct or whereabouts".[110]

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[106] E.g. Cassese *op cit*, at 864, identifying clearly the extent of the development of customary international law: *"While [a foreign minister; or, this case, a head of State] is discharging his official functions, he always enjoys functional immunity, subject to one exception that we shall soon see, namely in the case of perpetration of international crimes. Nevertheless, even when one is faced with that exception, the foreign minister is inviolable and immune from prosecution on the strength of the international rules on personal immunities. This proposition is supported by some case law (for instance, Pinochet and Fidel Castro, which relate respectively to a former and an incumbent head of state), and is authoritatively borne out by the Court's judgment under discussion. In contrast, as soon as the foreign minister leaves office, he may no longer enjoy personal immunities and, in addition, he becomes liable to prosecution for any international crime he may have perpetrated while in office. This is rendered possible by a customary international rule on international crimes that has evolved in the international community."* In other words, the scope of the development of customary international law is limited to immunity *ratione materiae*. Immunity *ratione personae* remains intact. Cassese (*id* at 865) thus asks and answers the very question SALC affects has been answered in its favour by a development of customary international law: *"Should one consequently conclude that under customary international law the lifting of functional immunities in case of international crimes, brought about by this rule, entails that an incumbent foreign minister may be brought to trial before a national court for such alleged crimes? The answer is no. However, this is so only because that minister is protected by the general rules on* personal *immunities, as long as he is in office of course."* Cassese concludes (*id* at 874-875): *"current international law manages to protect both sets of requirements in a balanced way. As stated above, as long as a foreign minister is in office, he enjoys full immunity from foreign jurisdiction and inviolability, for whatever act he may perform."*

[107] See e.g. Weatherall "Jus Cogens and Sovereign Immunity: Reconciling Divergence in Contemporary Jurisprudence" (2015) 46 *Geo J Int'l L* 1151 at 1210; Murphy *op cit* (2014); Kiyani *op cit* (2013) at para 62; Kasaija *op cit* (2012) at 632; Dłubak "Problems Surrounding Arrest Warrants Issued by the International Criminal Court: A Decade of Judicial Practice" (2012) 32 *Polish Yearbook of International Law* 209 at 225; Jia "The Immunity of State Officials for International Crimes Revisited" (2012) 10(5) *JICJ* 1303 at 1945; Gevers *op cit* (2011) at 2; Bantekas *op cit* (2010) at 129-130; Blommestijn and Ryngaert *op cit* (2010) at 431; Gaeta *op cit* (2009) at 317.

[108] E.g. O'Keefe "An 'International Crime' Exception to the Immunity of State Officials from Foreign Criminal Jurisdiction: Not Currently, Not Likely" (2015) 109 *AJIL* 167.

[109] Kiyani *op cit* at para 61. See also *id* at para 62, confirming that no customary law currently exists which provides an exception permitting the arrest of President Bashir.

[110] Blommestijn and Ryngaert *op cit* at 431, emphasis in the original.

39. Furthermore, as recently as 2009 a major engine for law reform, the *Institut de droit international* affirmed the continued protection of personal immunities *even in the context of international crimes.* The *Institut* recognised the important principles warranting preserving personal immunities in respect of serving heads of State.[111]

40. Yet more recently, in 2013, the International Law Commission provisionally adopted three draft articles and commentaries identifying three categories of senior government officials (heads of state, heads of government, and foreign ministers) who are entitled to immunity *ratione personae* from foreign criminal jurisdiction.[112] Criminal jurisdiction specifically includes (as it is generally understood to mean) "coercive acts that can be carried out against persons enjoying immunity in this context."[113] It accordingly includes also arrests.

41. It was again confirmed as recently as December 2015 that there is currently no "international crime" exception to the immunity from foreign criminal jurisdiction, and that it is "not likely" that there will imminently be any such development.[114]

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[111] *Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes* (2009). Article III(1) specifically preserves personal immunity in the context of international crimes. Article II(1) recognises the continued importance of immunities, whose purpose it is "to ensure an orderly allocation and exercise of jurisdiction in accordance with international law in proceedings concerning States, to respect the sovereign equality of States and to permit the effective performance of the functions of persons who act on behalf of States."

[112] Murphy *op cit* at 41.

[113] *Id* at 42.

[114] O'Keefe "An 'International Crime' Exception to the Immunity of State Officials from Foreign Criminal Jurisdiction: Not Currently, Not Likely" (2015) 109 *AJIL* 167.

42. At best for it, SALC's assertion confuses immunity *ratione personae* and immunity *ratione materiae*.[115] The correct position is that immunity *ratione personae* subsists even in the case of international crimes, and that there has been no development of customary international law in this respect.[116] The development for which SALC contends applies at most to immunity *ratione materiae*.

43. Thus customary international law does not support SALC, as the SCA correctly held. Hence the SCA's declarator which refers not to international law more generally, but to the Rome Statute and the South African Implementation Act domesticating it.

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[115] Immunity *ratione personae* (personal immunity) attaches to a head of State, but only subsists during his term of office. It is absolute: since it attaches to the person, it is an immunity in *all* respects – official or personal. It is to be contrasted with immunity *ratione materiae*, which is functional immunity applying to all official conduct. Hence the latter does not apply to conduct which is not properly official conduct (Lord Phillips MR in *Jones v Ministry of the Interior Al-Mamlaka Al Arabiya as Saudiya* [2004] EWCA Civ 1394 at paras 123-124). Immunity *ratione materiae* attaches also to a former head of State in respect of official conduct performed while still in office. See e.g. Gevers "Immunity and Implementation Legislation in South Africa, Kenya and Uganda" in Ambos and Maunganidze (eds) *Power and Prosecution: Challenges and Opportunities for International Criminal Justice in Sub-Saharan Africa* (Universitätverslag, Göttingen 2012), available at http://www.peacepalacelibrary.nl/ ebooks/ files/ 3696 59082.pdf (accessed on 6 January 2016). See also Blommestijn and 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 430, distinguishing the two types of immunity and explaining that *"personal immunity, or immunity* ratione personae, *is set in place to protect principal officials on account of their office, so as to guarantee their proper functioning within international affairs, without the danger of their being subject to (abuse at the hands of) a foreign jurisdiction. Because of its aim of preventing any undue impairment or interference by foreign authorities of the functioning of certain officials on behalf of the State, immunity* ratione personae *is absolute in nature, not restricted to specific conduct. This immunity is, however, restricted in a temporal sense, considering that it is lifted once the individual no longer holds his position in office."*

[116] The correct position is stated by Gevers *op cit* at 6: *"In summary, the state of development of international law regarding the application of immunities to international criminal law is as follows: Immunity* ratione materiae *(or functional immunity) does not apply to such prosecutions [i.e. prosecutions for international crimes], regardless of the forum (i.e. international or domestic). Immunity* ratione personae *(or personal immunity) arguably does not apply before most (if not all) international courts but continues to apply before domestic courts unless a waiver from the state concerned can be obtained."*

(4) The Rome Statute

44. The short point is that the Rome Statute itself does not purport to "negate" immunity *ratione personae* of a non-member state before the domestic court of a member state. It deals with proceedings before the ICC itself.

45. This has been confirmed already by the ICJ in its *Arrest Warrant* judgment. SALC has not sought to contest that the ICJ judgment indeed correctly articulates the scope of application of Article 27 of the Rome Statute, restricting it to the exercise of "its jurisdiction" by the ICC itself.[117] SALC thus correctly accepts that Article 27 deals exclusively with immunity in proceedings before the ICC itself.[118] It does not govern domestic proceedings.

46. This is confirmed by the ICC Pre-Trial Chamber itself in its *Decision on the Co-operation of the Democratic Republic of Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court*.[119] It held that "under international law a sitting head of State enjoys personal immunities from criminal jurisdiction and inviolability before national courts of foreign States".[120] Article 27(2), the ICC confirmed, applies to "proceedings before the Court".[121] And the reference to "the Court" connotes the ICC, not a national court.[122]

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[117] Nowhere in the papers or in either of SALC's previous sets of heads of argument has any such contention been advanced.
[118] Cassese *op cit* at 875 himself likewise supports this. So do many other commentators.
[119] ICC-02/05-01/09 (9 April 2014).
[120] *Id* at para 29.
[121] *Id* at para 30.
[122] Article 27 applies only to the ICC as an international court (Dłubak *op cit* at 227).

47. But even were Article 27 to be applied out of its field of application, it still cannot operate against a non-party.[123] Accordingly it cannot defeat the immunity of a head of a State which is not a Rome Statute signatory.[124] Thus President Bashir's immunity cannot be "overridden" or "negated" by Article 27 of the Rome Statute.[125] Even if a so-called custom-based theory is adopted the result is the same.[126] This is because "immunity continues to subsist with regard to inter-state relations, in proceedings before domestic courts, but it becomes extinguished before certain international courts."[127]

48. It is accordingly wrong, on any approach, to construe the Rome Statute – as the High Court did, and the SCA's order (which declares a general failure to comply with this treaty) presupposes – as excluding the customary international law

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[123] Broomhall *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford University Press, Oxford 2003) at 141; Kasaija "Kenya's provisional warrant of arrest for President Omar al Bashir of the Republic of Sudan" (2012) 12 *African Human Rights Law Journal* 623 at 634; Dyani-Mhango "The ICC Pre-Trial Chamber's decision on Malawi regarding the failure to arrest and surrender President Al Bashir of Sudan: An opportunity missed" (2013) 28 *SAPL* 106 at 115.

[124] *Pacta tertiis nec nocent nec prosunt* is a foundational principle of treaty law (codified in Article 34 of the Vienna Convention on the Law of Treaties, 1969), and the Rome Statute is a treaty.

[125] Blommestijn and Ryngaert *op cit* 428 at 432; Kiyani *op cit* at para 21.

[126] In the literature a distinction exists between a "treaty-based theory" (premised on direct consent of State parties, of which Sudan is none) and a so-called "custom-based theory" (premised on the notion that Article 27 reflects a broader exception – applicable *before international criminal tribunals* – to immunity rules): Blommestijn and Ryngaert *op cit* 428 at 433 and 437.

[127] Blommestijn and Ryngaert *op cit* 428 at 433. See, too, Gaeta *op cit* 315 at 316: *"It is one thing to say that an international criminal court is not duty bound to respect international immunities accruing to some individuals, and therefore that the court enjoys 'full' jurisdiction over those individuals (including the power to issue arrest warrants and other coercive acts against them). It is quite another thing to assert that on the basis of an arrest warrant issued by an international court, a state which is expressly requested by that court to arrest and surrender an individual protected by personal immunities can* lawfully *disregard these immunities, simply because it complies with a request for arrest and surrender of an international court."*

immunity of the head of State of a non-party.[128] This is further confirmed by Articles 86 and 89 of the Rome Statute. Article 86 is subject to all other provisions of the Statute, and Article 89 is specifically subject to Part 9 of the Statute.[129] Thus both Article 86 and 89 are expressly subject to Article 98(1) of the Statute.[130]

49. The co-operation provisions in the Rome Statute (of which Article 98 is of primary importance) are conceptually separate from jurisdictional provisions (which include Article 27).[131] In terms of Article 98(1) a request by the ICC which would require South Africa to act inconsistently with the immunity of Sudan's President may not be made by the ICC "unless the [ICC] can first obtain the co-operation of [Sudan] for the waiver of the immunity".[132] It was

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[128] The correct position is that even such "derogation from the international system of personal immunities for charges of international crimes" as "the ICC Statute contains" applies "only among States parties to the Statute" (Gaeta *op cit* at 328).

[129] Nmaju "Relevance of the Law of International Organisations in Resolving International Disputes: A Review of the AU/ICC Impasse" (2014) 14(1) *African Journal on Conflict Resolution* 155 at 179: "Article 89 recognises that the co-operation expected from a state party must not be without consideration to the provisions on waiver of immunity and consent to surrender".

[130] Prost and Schlunck "Article 98" in Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Nomos Verlagsgesellschaft, Baden-Baden 1999) at 1131, cited by Gaeta *op cit* 315 at 327 for "aptly not[ing]" that the provisions of Chapter 9 of the Rome Statute *"reflect the will of the drafters to avoid, to the greatest extent possible, the obligations of contracting states to co-operate with the Court from becoming incompatible with international obligations binding a state party vis-a-vis a state not party to the ICC Statute. In other words, the drafters of the Statute were simply not ready to accept that compliance with their obligation to co-operate with the ICC, set out in general terms in Article 86 of the ICC Statute and articulated in detail in the subsequent provisions, might result in the violation of an international obligation towards a non-state party. Article 98(1) of the ICC Statute is a clear example of this state of affairs."*

[131] Gevers *op cit* 12. Gevers notes further that the separation of the exercise of its own jurisdiction by the ICC "and the creation (and qualification) of co-operation obligations, is recognised in other parts of the Rome Statute and has been upheld by the Court itself in the form of arrest warrant proceedings" (*id* at 13).

[132] Article 98(1) of the Rome Statute: *"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 co-operation of that third State for the waiver of the immunity".*

intentionally inserted to prevent exposing a Rome Statute member State to a conflict of legal obligations under the ICC regime and the extant (and undisturbed) customary international law governing immunities.[133] The effect of complying with the former has severe legal and political consequences.[134] Article 98(1) resolves the conflict between competing legal duties in favour of immunity.[135] It is "precisely because the drafters 'deemed it necessary … that customary and treaty rules concerning respect for State and diplomatic immunity *are to prevail over* the duty of State Parties to implement the Court's request for co-operation and judicial assistance" that Article 98(1) exists.[136] Accordingly "article 98(1) preserves [officials'] immunity."[137] Unless a non-party like Sudan itself waives its immunity,[138] a State party like South Africa should respect the

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[133] Prost and Schlunck *op cit* at 1131. See, too, Blommestijn and Ryngaert *op cit* at 439.

[134] Blommestijn and Ryngaert *op cit* at 442 (footnotes omitted): *"Despite their duties under the Statute, States Parties – as affirmed by Art 98(1) and as indicated above – remain fully bound by the rules of customary international law, which require them to respect international immunities of foreign officials. If Al-Bashir were to make a visit to or travel through the territory of a State Party, this State would thus be inconveniently faced with two conflicting legal obligations. Subsequently, a State could decide to nevertheless act upon the arrest warrant and justify this action on the same reasoning that was applied by the PTC [the Pre-Trial Chamber of the ICC]. As has been argued, however, this would amount to a direct violation of the customary international law rules on immunity and, consequently, to a breach of international law. A State Party cannot rely on its duty of arrest to legitimately override the personal immunity that Al-Bashir is entitled to. If a State were to do so, the Republic of Sudan could, as a result, start proceedings against the arresting State before an international judicial body such as the ICJ. On top of this, Al-Bashir would be able to make a claim of unlawful arrest before the Court".*

[135] Schabas "The International Criminal Court and Non-party States" (2010) 28 *Windsor Yearbook of Access to Justice* 1 at 17: *"Article 98(1) deals with diplomatic and analogous immunities. It would apply when, for example, the Court seeks the surrender of the ambassador of a non-party State who is posted to a State Party. In that situation, the requested State would be required to respect the ambassador's immunity, but would also be under a competing duty to comply with the Court's request. Article 98(1) resolves the matter in favour of the ambassador's immunity."*

[136] Palmisano "The ICC and third states" in Lattanzi *et al* (eds) *Essays on the Rome Statute of the International Criminal Court* vol 1 (Il Sirente, Fagnano Alto 1999) at 410, quoted in Dłubak *op cit* at 226.

[137] Gevers *op cit* at 8.

[138] Kasaija *op cit* at 634-635, confirming that this has not occurred and that the need for a waiver cannot be "vitiated". See similarly Blommestijn and Ryngaert *op cit* 428 at 440: *"It is, however, one thing to state that Sudan is required to waive all immunities, but it is another to state that Sudan has already waived those immunities. In fact, until the Government of Sudan has actually officially waived the immunity of Al-*

former's immunity.[139] Because it would constitute an international wrongful act, State parties to the Rome Statute are not obliged to comply with the request by the ICC to arrest President Bashir, "since this request is patently at odds with Article 98(1) of the ICC Statute."[140]

50. Therefore, the Rome Statute does not abolish the immunity – neither expressly nor by implication. To the contrary, the Rome Statute expressly preserves the immunity of serving heads of third-party States.[141]

51. Accordingly the SCA's order incorrectly declares a violation of the Rome Statute. The same applies to the ICC Act, which implements the Rome Statute in South African domestic law.

(5) The ICC Act

52. The ICC Act itself "is silent on the relevance of immunity in relation to co-operation requests".[142] Yet from this silence the SCA construed a legislative

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Bashir, this restriction on the Court remains fully in place. As long as Sudan refuses to act on its obligation to waive Al-Bashir's immunity, the Court is not given the authority to simply ignore the immunity from prosecution that Al-Bashir continues to hold. Instead, the Court will have to call upon the enforcement measure that is laid down in Art. 87 (7) of the Statute, which allows it, after having made a finding of non-cooperation, to refer the matter to the Security Council. In turn, the Council can bring additional pressure to bear on Sudan, pushing for a waiver of immunity. Until now such an application has not been made, arguably leaving Al-Bashir's immunity in full force."

[139] Dłubak *op cit* at 225.

[140] Gaeta *op cit* at 316.

[141] Blommestijn and Ryngaert *op cit* at 439: *"Although both Art 27(2) and Art 98(1) deal explicitly with the concept of immunity, it is important to recognise that the two articles, being part of different sections in the Statute, address two completely separate stages of the ICC's proceedings. Art 27(2) precludes personal immunities from being invoked by a person appearing before the Court as a supranational institution. Art 98(1), in contrast, addresses the situation of a national of one State finding himself in the power of another sovereignty."*

[142] Gevers *op cit* at 17.

intention to depart from customary international law and the codification of it in the Immunities Act.

53. This is contrary to section 2 of the ICC Act. It records its governing interpretative principles. A court interpreting this Act "must also consider" conventional international law; customary international law; and comparable foreign law.[143] All of these sources support immunity *ratione personae* of a serving head of State.

54. As regards the first, conventional international law, the domestic equivalent of Article 27 of the Rome Statute (which is, of course, the convention in point) is section 4 of the ICC Act. Article 27 does not detract from the immunity of non-members to the Rome Statute. Whereas Article 27 deals with member States' immunity *before the ICC*,[144] section 4 deals with immunity *before a South African court*.[145] Section 4 is clear.[146] It provides expressly that being (*inter alios*) "a

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[143] *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* 2015 (1) SA 315 (CC) at para 23.

[144] Gevers *op cit* at 7.

[145] The type of immunity with which section 4 of the ICC Act deals is functional immunity (in other words, immunity *ratione materiae*): Cassese *op cit* at 874; Gevers *op cit* at 17.

[146] Section 4 is headed "Jurisdiction of South African courts in respect of crimes". It provides

"(1) Despite anything to the contrary in any other law of the Republic, any person who commits a crime, is guilty of an offence and is liable on conviction to a fine or imprisonment, including imprisonment for life, or such imprisonment without the option of a fine, or both a fine and such imprisonment.

(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.

head of State"[147] "is neither a defence to a crime; nor a ground for any possible reduction of sentence".[148]

55. Section 4 does not render a serving head of State liable to arrest, and it does not abrogate a fundamental principle of international law: inviolability from arrest.[149] It deals with the jurisdiction of South African courts.[150] At best, section 4 removes functional immunity before a South African court.[151] It does not remove *personal* immunity.[152] And, as the *Arrest Warrant* judgment confirms, the mere fact that section 4 confers jurisdiction does not mean that it abolishes immunity. Accordingly, even the supposed "trumping" or "ousting" by the first words of section 4(2) of the ICC Act of any statutory provision or principle of international

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(3) In order to secure the jurisdiction of a South African court for purposes of this Chapter, any person who commits a crime contemplated in subsection (1) outside the territory of the Republic, is deemed to have committed that crime in the territory of the Republic if –
(a) that person is a South African citizen; or
(b) that person is not a South African citizen but is ordinarily resident in the Republic; or
(c) that person, after the commission of the crime, is present in the territory of the Republic; or
(d) that person has committed the said crime against a South African citizen or against a person who is ordinarily resident in the Republic."

[147] Section 4(2)(a), emphasis added.

[148] Section 4(2)(b)(i) and (ii), emphasis added.

[149] As Blommestijn and Ryngaert *op cit* 428 at 439 notes, "a distinction must be drawn between, on the one hand, *immunity from prosecution* and, on the other, *immunity from arrest*. Because the arrest and surrender of Al-Bashir lie with national authorities and thus possibly impinge on inter-state relations, it will be necessary to readdress the standing of personal immunities within customary international law, this time in relation to the question of *arrest*" (emphasis in the original).

[150] This is made sufficiently clear by the heading of the second chapter of the Act (of which section 4 is one of the only two sections). As the ICJ held, jurisdiction and immunity must not be confused. Thus the presence of jurisdiction does not imply the absence of immunity.

[151] *Cf* Cassese *op cit* at 870, referring to national law precluding any status-based defence before national courts against charges of war crimes, crimes against humanity or genocide. Cassese is clear: this is a manifestation of "the customary rule that removes functional immunity" (*ibid*, emphasis added). To put this beyond doubt, Cassese subsequently adds: "as long as a foreign minister [or head of State] is in office, he enjoys full immunity from foreign jurisdiction and inviolability, for whatever act he may perform" (*id* at 874-875).

[152] Gevers *op cit* at 17.

law which confers immunity on a sitting head of state does not "negate"[153] immunity *ratione personae*.

56. As regards the second source to which section 2 of the ICC Act refers for interpretive purposes, we have already addressed customary international law and judgments by international courts which articulate the relevant principles.

57. As regards the third source (comparable foreign law),[154] there are many examples of national courts in comparable jurisdictions recognising the importance of preserving immunity.[155]

58. For instance, applying the same fundamental principle of international law as the ICJ did, in *Pinochet* the House of Lords held that immunity *ratione personae* continues to apply in absolute terms to a serving head of state – Senator Pinochet himself had ceased to hold office – except only before an international tribunal whose constitutive treaty (to which the sending State is a signatory) abolishes immunity.[156] Thus, immunity *ratione personae* before a domestic court remains intact.[157]

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[153] As SALC contended *a quo* and still contends (Record vol 4 p 354 para 28).
[154] As regards foreign statute law, see again the reference to the English, Kenyan and Ugandan equivalents of the SA ICC Act in fn 65 above. What it shows is that legislatures in two other African countries expressly exclude immunity if their intention is to depart from the fundamental principle of immunity.
[155] See 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 and 279 for a long list of judgments by national courts upholding immunity *ratione personae* of heads of state in criminal proceedings.
[156] *R v Bow Metropolitan Stipendary Magistrate, ex parte Pinochet Ugarte (No 3)* [1999] 2 All ER 97 (HL) at 120-121 and 189, recently applied in *Harb v Prince Abdul Aziz Bin Fahd Bin Abdul Aziz* [2015] 1 All ER 77 (Ch).
[157] *Id* at 111-112, 152 and 189.

59. A yet more recent and more comparable example is a judgment by Canada's highest court.[158] In *Kazemi Estate v Iran* the Supreme Court of Canada interpreted and applied the Canadian State Immunity Act ("the SIA"). the question before the court was "whether the Islamic Republic of Iran, its head of state and the individuals who allegedly detained, tortured and killed a Canadian citizen in Iran are entitled to immunity by operation of the SIA. The court therefore had to determine the scope of the SIA, the impact that the evolution of international law since the SIA's adoption might have had on the SIA's interpretation, and whether the SIA was compliant with the Canadian constitution. The Supreme Court of Canada held that immunity indeed prevailed, that the SIA constituted a complete codification of the Canadian law on immunity from which no rule of *ius cogens* or international law detracted;[159] that no international crime exception to immunity exists;[160] that immunity for international crimes under Canadian law did not infringe the Canadian Bill or Rights or the Charter;[161] and that it is Parliament's function to legislate exceptions to immunity.[162] The court held that

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[158] *Kazemi Estate v Iran* [2014] 3 SCR 176.
[159] *Id* at para 54.
[160] *Id* at para 61.
[161] *Id* at para 171.
[162] *Id* at paras 169-170: *"State immunity is a complex doctrine that is shaped by constantly evolving international relations. Determining the exceptions to immunity requires a thorough knowledge of diplomacy and international politics and a careful weighing of national interests. Since the introduction of the SIA, such a task belongs to Parliament or the government, though decisions and laws pertaining to international affairs may be subject to constitutional scrutiny under the Charter. In this sense, there is no Charter free zone and the courts may have to play a part, as they have done in the past (Operation Dismantle Inc. v. The Queen, [1985] 1 S.C.R. 441; Khadr). It is not, however, this Court's task to intervene in delicate international policy making. Parliament has the power and the capacity to decide whether Canadian courts should exercise civil jurisdiction. Parliament has the ability to change the current state*

> "in drafting the SIA [the State Immunity Act], Canada has made a choice to uphold state immunity as the oil that allows for the smooth functioning of the machinery of international relations. Canada has given priority to a foreign state's immunity over civil redress for citizens who have been tortured abroad. This policy choice is not a comment about the evils of torture, but rather an indication of what principles Parliament has chosen to promote given Canada's role and that of its government in the international community."[163]

60. Accordingly foreign law confirms that there is nothing inherently unconstitutional about domestic legislation giving effect to the fundamental principle of international law: immunity. It follows that neither the ICC Act nor the Immunities Act itself requires an interpretative approach departing from text, context, and ordinary principles of statutory construction. Especially absent a constitutional challenge to the Immunities Act, effect should be given to Parliament's intention.

(6) The Immunities Act

61. Under South African law it is the Immunities Act which gives domestic effect to what has "long been considered a legitimate and necessary feature of international law".[164] Immunities have "ancient roots in international law, extending back not hundreds, but thousands of years."[165] The rationale for them still applies, as leading international and foreign courts have repeatedly and recently

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of the law on exceptions to state immunity, just as it did in the case of terrorism ... . Parliament has simply chosen not to do it yet."

[163] *Id* at para 46.

[164] Gevers *op cit* at 2.

[165] Cryer *op cit* at 422, cited by Gevers *op cit* at 2.

confirmed.[166] The law of immunities serve the important purpose in stabilising the world order and conducing to peace and security.[167] It does this by maintaining channels of communication to enable conflicts being prevented or resolved, and by ensuring the safety and freedom of envoys.[168] For this purpose national and international law provide inviolability of the person representing a foreign State "and immunities from the exercise of jurisdiction over those representatives."[169]

62. As the Canadian SIA codifies immunities of States in Canadian law, the South African Immunities Act codifies immunities of heads of state. In doing so it entrenches customary international law in domestic legislation. It is a post-constitutional statute which precedes the ICC Act by only a few months.

63. Section 4(1) of the Immunities Act entrenches immunity of heads of States. It contains no qualification or exception. It is reinforced by section 15(1) of the Immunities Act, which criminalises the arrest of a serving head of State. The

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[166] See e.g. *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* [2012] ICJ 10; *Jones v The United Kingdom* App nos. 34356/06 and 40528/06 (ECtHR (14 January 2014); *Kazemi Estate v Iran* [2014] 3 SCR 176 at para 46; *R v Bow Metropolitan Stipendary Magistrate, ex parte Pinochet Ugarte (No 3)* [1999] 2 All ER 97 (HL).

[167] The jurist credited above all others as simultaneously the father of modern international law and Roman-Dutch common law, Hugo de Groot (or Grotius), locates what he pertinently terms the "inviolability" of "the right of legation" in a variety of textual sources. Two are the great Roman jurists Pomponius (*Digest* 50.7.18) and Ulpian (*Digest* 48.6.7). Others are Josephus *Antiquities of the Jews* 15.5.3, Varro *Nonius Marcellus* (12.529) and Cicero in his third pleading *Against Verres* (1.33.85). See De Groot *De Iure Belli ac Pacis* (tr. Legal Classics Library, Birmingham Alabama, 1984) chapter XVIII (pp 438-449). He ends: "Profane histories are full of wars undertaken on account of the treatment of ambassadors. Also in the Scriptures [referring to Chrysostom *To Slagirius* 3.8] there is mention of a war which David waged against the Ammonites on that account" (*id* at 449 *ad finem*).

[168] Gevers *op cit* at 2.

[169] *Ibid.*

Immunities Act furthermore requires that any waiver be explicit and in writing.[170] It does not recognise any waiver of immunities by implication, nor any "waiver" other than by the state in question itself.

64. This legal position operates as a matter of national statute law, but is also further reinforced by international law.[171] As has been shown, there is no provision in the Implementation Act which imposes a legal duty to act contrary to the provisions of the Immunities Act or customary international law. But had it been otherwise, a court would have had to interpret the provisions it perceived to be in conflict by seeking to harmonise them with one another.[172] It could not simply construe customary international law or the Immunities Act as being trumped by section 4(2) of the Implementation Act (as SALC insists),[173] because section 4(2) does not apply. Nor does section 4(2) have the effect for which SALC contends (were it to apply).

65. Moreover, section 10(9) does not even purport to trump either the Immunities Act or customary international law. It contains no wording similar to section 4(2). And it is silent on immunities.

66. Accordingly the operation of the Immunities Act is not displaced by the ICC Act. Arresting a sitting head of state remains a crime under national law. It is not for a court to create or abolish statutory crimes, unless of course the criminalising

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[170] Section 8(3) of the Immunities Act.
[171] Vienna Convention on Diplomatic Relations, 1961.
[172] Steyn *Die Uitleg van Wette* 5th ed (Juta, Cape Town 1981) at 188.
[173] See e.g. Record vol 4 p 356 para 36*ff*.

statutory provision is declared unconstitutional. But section 4(1) of the Immunities Act, we stress, stands entirely unimpugned. Not even in this Court has SALC suggested its unconstitutionality, and on the basis of *inter alia* the Supreme Court of Canada's judgment in *Kazemi v Iran* the Immunity Act's constitutionality cannot be doubted.

(7) The Security Council's resolution

67. The final issue addressed in the SCA's judgment concerns waiver. SALC previously adopted the stance (in opposing Government's application for leave to appeal to the SCA) that if all else fails then there is "a binding call" by the Security Council on which SALC can fall back.[174] SALC does not now repeat its previous reliance on this waiver construct.

68. SALC correctly elected not to proceed with the point before this Court. This is because it cannot contend in this Court that the new order granted by the SCA is capable of being defended on the basis of the Security Council's "call".[175] The

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[174] Petition Record p 136 para 64.

[175] Resolution 1593 (2005), which SALC invoked previously, records that what the Security Council decided was

> "that the Government of Sudan and all other parties to the conflict in Darfur, shall co-operate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognising that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organisations to co-operate fully" (Petition Record p 201 para 2).

point in any event is, as a leading international academic commentator puts it, "without merit".[176] Many other academic commentators agree.[177]

69. State practice confirms this conclusion. This is because despite China being a permanent member of the Security Council it has itself recently received President Bashir without arresting him.[178] Many other United Nations members have done likewise. These facts are, in the sense of the law of evidence, notorious.

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[176] Gaeta *op cit* at 330: *"Paragraph 2 of the operative part of the Security Council resolution provides that Sudan and all the other parties to the conflict shall co-operate fully with the Court. As for other states, the resolution simply recognises that states not parties to the ICC Statute have no obligation under the ICC Statute to co-operate, but nonetheless it urges all states and concerned regional and other international organisations to co-operate fully with the ICC. The language of the resolution could not have been clearer: Sudan and the parties to the conflict are obliged to co-operate with the ICC by virtue of a decision of the Security Council, while other states are simply 'urged' to do so."*

[177] E.g. Swanepoel "South Africa's Obligation as Member State of the International Criminal Court: The Al-Bashir Controversy" (2015) 40(1) *Journal for Juridical Science* 50 at 65; Gevers *op cit* at 11; Blommestijn and Ryngaert *op cit* at 443. See, too, Dyani-Mhango *op cit* at 118:

> "while article 25 of the UN Charter provides that UN member states agree to accept and to carry out the decisions of the Security Council in accordance with the UN Charter, not all Security Council resolutions are binding to all UN member states. The ICJ has explained [in its *Namibia Advisory Opinion* ICJ Reports 1971 at para 53] that:
>
> > The language of the Security Council resolution should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.
>
> In other words, while resolutions that merely 'recommend', 'call upon', or 'urge' states to do or to refrain from doing something are not binding on UN member states, 'decisions' taken under Chapter VII of the UN Charter to maintain or to restore international peace and security may be binding. ..." (footnotes omitted).
>
> Thus, if we scrutinize the Security Council resolution on the referral of the situation in Sudan, we would find that it does not use a binding language on all UN member states; instead it employs such a binding language only to Sudan."

Some commentators have, however, reached different interpretations, but on such construction they conclude that the resolution is *ultra vires* and therefore not binding (see e.g. Kiyani *op cit* at 480). On either approach the resolution does not assist SALC, and on the basis of the principle *ut res magis valeat quam pereat* an interpretation in favour of validity should be preferred.

[178] This the SCA judgment acknowledges (Record vol 3 p 281 para 108).

70. Thus, in its own terms, the Security Council Resolution did not impose a binding duty on South Africa.[179] Furthermore, whatever its own terms, the Resolution does not trump South Africa's duties under customary international law, because "the UN Charter only takes precedence over other international treaties, not customary international law rules such as head of State immunity or the laws governing treaties."[180] Accordingly States are not obliged to comply with a Security Council resolution purporting to violate a fundamental principle of customary international law,[181] and such resolution cannot prevail over national legislation which criminalises the infringement of immunity – least of all in domestic proceedings based on national law.

71. Furthermore, neither national law nor international law recognises an "implied" waiver by the Security Council. Under international law the position is articulated in the ICJ's *Arrest Warrant* judgment, to which we have already referred. It requires express waiver by the state concerned. The same applies under national law. The Immunities Act requires waiver by Sudan in writing.[182] There has been no such waiver. Instead Sudan asserted its President's immunity and requested that it be respected.

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[179] Gaeta *op cit* at 331: *"Had the Security Council intended to oblige all states to co-operate with the ICC by in particular executing requests for arrest warrant and other orders, it should have explicitly said so, at a minimum by expressly enjoining all states to co-operate with the Court and complying with its request. Furthermore, the Security Council has refrained from urging all states to disregard the customary international rules on personal immunities for the purpose of co-operating with the ICC."*
[180] Kiyani *op cit* at 478.
[181] *Id* at 480.
[182] Sections 8(2) and (3) of the Immunities Act.

72. Accordingly the SCA correctly did not uphold SALC's fall-back argument, and SALC correctly does not seek to resuscitate it before this Court.

(8) *Ad hoc* immunity pursuant to the extant ministerial proclamation

73. Finally we deal with a separate, dispositive issue. It is this issue which Wallis JA treated as having been relegated to the "backseat".[183] But SALC refers to it as the "first two grounds".[184] However counted or sequenced, the correct position is that Government's heads of argument expressly dealt with this as a self-standing basis for upholding the appeal.[185] It was pleaded already before the High Court, despite the extremely urgent circumstances in which Government was required to prepare its affidavits (and despite the High Court already by that time having refused to receive expert submissions on legal issues).[186] And it was consistently persisted in,[187] as SALC concedes.[188]

74. The SCA accordingly misdirected itself in apparently diminishing the significance of an extant official ministerial act and Government's reliance on it. It is of fundamental importance, both because of the doctrine of separation of powers and because of the immense importance of properly approaching the legal question whether the Minister may confer *ad hoc* immunity on a head of state like

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[183] Record vol 3 p 221 para 15.
[184] Record vol 4 p 349 para 16.
[185] Para 71 of Government's heads of argument filed in the SCA.
[186] Record vol 1 pp 69-70 paras 37-38.
[187] Record vol 4 p 309 para 34.
[188] Record vol 4 p 346 para 11.

President Bashir, and whether Government is duty-bound to honour or dishonour an extant conferral of such immunity.

75. As this Court held, a ministerial notice which is extant and not challenged is to be approached by a court as "lawful, constitutional and acceptable".[189] Accordingly "[a]ny consideration of whether the … notice fell squarely within the terms of [the empowering Act] is superfluous."[190] The same principle has been accepted previously by the SCA itself,[191] and confirmed by this Court on many subsequent occasions.[192] The principle was invoked before the SCA, but it disposed of the issue by interpreting the notice as falling outside of the relevant empowering provision.[193] This is inconsistent with this Court's judgment in *AAA Investments*, which is entirely absent from the SCA judgment (despite SALC itself accepting that Government relied on it before the SCA).[194]

76. The application of the principle articulated in *AAA Investments* to the fact of this case is, with respect, inescapable. The facts are that the Republic of Sudan formally requested that President Bashir be accorded all privileges and

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[189] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* 2007 (1) SA 343 (CC) at paras 48.
[190] *Ibid.*
[191] *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA).
[192] E.g. *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC).
[193] Record vol 3 p 237 para 41, repeating the High Court's conclusion (which the SCA described as "plainly so") that "the section [section 5(3) of the Immunities Act] did not cover heads of state or representatives of state attending the AU summit". The SCA's judgment states that "[t]here is little that can be added to this reasoning" (Record vol 3 p 237 para 42), confirming that this indeed underlies the SCA's own approach, and referring to the heading of section 5 for corroboration.
[194] Record vol 4 p 346 para 11 of SALC's answering affidavit in this Court.

immunities of a delegate attending the AU Summit.[195] Government took legal advice and on the basis of the advice decided that this request could and would be accommodated by the Minister promulgating the host agreement.[196] This was done. The intended effect was to ensure that President Bashir "be accorded", as requested, "all the privileges and immunities of a delegate attending an AU Summit".[197]

77. The High Court's judgment on leave to appeal itself accepts this.[198] Nonetheless the High Court held that the agreement and its promulgation do not apply to President Bashir.[199] This is wrong, as Government explained in its application for leave to appeal to the SCA.[200]

78. This is, firstly, because section 5(3) of the Immunities Act itself refers to section 7(2) of that Act. Section 7(2), in turn, refers to section 7(1). Section 7(1) authorises "[a]ny agreement whereby immunities and privileges are conferred to any person".[201] Thus the empowering provision invoked by the Minister indeed authorises promulgating an agreement whose operation may be unrestricted as regards the category of officials to whom it applies. It is accordingly wrong to

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[195] Petition Record pp 25-26 para 64.
[196] Petition Record pp 25-26 para 64.
[197] Petition Record pp 25-26 para 64.
[198] Petition Record pp 95-96 para 2: "it will be recalled that the notice was issued in terms of the ... Immunities Act and it was sought thereby to immunise any delegate attending the African Union summit in this country from arrest."
[199] Petition Record pp 70-71 para 30.
[200] Petition Record pp 159-163 paras 26-35; paras 73-74 of Government's heads of argument filed in the SCA.
[201] Emphasis added.

infer from the empowering provision that the agreement could not apply to a head of state.

79. Secondly, to restrict immunities to organisations, despite the ordinary grammatical meaning of the word "delegate", is, with respect, not merely anomalous but even absurd. The AU's supreme organ is its assembly, and its assembly comprises heads of state of all member states.[202] Therefore the head of a member state of the AU is self-evidently a delegate (or official, or representative) not only of his own government but also of the AU itself. Otherwise the supreme organ of the AU would be without any delegate, and indeed itself entirely absent from, and wholly unrepresented at its own event, "the 25th ordinary session of the Assembly of the African Union".[203]

80. Third, Article VIII of the host agreement itself expressly incorporates by reference *inter alia* Article V of section C of the OAU Convention. The latter provision specifically gives effect to immunities of representatives of member states. A head of state is axiomatically a representative of his own state, and an African state like Sudan is undeniably a member state of the African Union. Accordingly the ministerial notice could not have been construed as excluding President Bashir.

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[202] As Wallis JA stated in support of the High Court's reasoning, to which he held he could add little (Record vol 3 p 237 para 42).

[203] Which is how para 2 of the SCA's judgment correctly describes the occasion in respect of which it found that the decision-making officials of the AU itself (*viz* the heads of AU member states) are somehow not encompassed by immunity conferred on delegates, representatives or officials of the AU.

81. Yet SALC contended, and still contends, for this construction. It does so on the basis that were the Minister's "intention" to "confer immunity on heads of state attending the AU Summit", then "[t]he Minister would have acted under [section 6]" of the Immunities Act instead of section 5 of the same Act.[204] This is not only inconsistent with the aforegoing. It is also inconsistent with the principle that it is impermissible in motion proceedings to infer an intention on the part of the Minister which is inconsistent with Government's answering papers before the High Court. The High Court did not reject Government's version as far-fetched or factually untenable. It was, to the contrary, quite consistent with Sudan's request, upon which Sudan and South Africa both acted. Accordingly Government's factual position cannot be circumvented by resorting to surmise as regards the Minister's intention. For SALC's surmise is inconsistent with the facts.

82. The SCA therefore correctly did not uphold SALC's attempt to go behind Government's papers. It, too, did not reject them as far-fetched or clearly untenable. Instead, the SCA *mero motu* invoked a new-found proposition. Instead of referring to Government's papers or this Court's judgment in *AAA Investments*, Wallis JA relied on the internet – evidently only *after* the hearing, because what was found on the website cited in the SCA judgment was not put to counsel at the hearing. This website led Wallis JA to a conclusion for which no authority was provided in the judgment. It is that a President of a republic is the

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[204] Record vol 4 p 348 para 14.3, reproducing para 74.3 of SALC's heads of argument filed in the SCA.

"embodiment" of his state and not a delegate of the AU. But the website invoked for this proposition in fact confirms the contrary. It states that the AU Assembly "comprises heads of state and government from all member states".[205] Accordingly a head of state is indeed a delegate or representative of the AU, because he or she is a constitutive member of the AU Assembly. The AU Assembly is not constituted at AU events without the heads of state. Thus they are indeed delegates, officials and representatives of the AU too. Therefore a head of an AU member state is indeed covered by the hosting agreement.

83. Accordingly, even on Wallis JA's *post hoc* resort to the internet, and even had this issue been not only the "front seat" but also sum total of Government's case (as Wallis JA thought it should have been), then the SCA should still have upheld Government's appeal. The issue was and remains dispositive.

D. <u>Residual submissions on leave to appeal</u>

84. It follows that there are indeed good prospects of success, contrary to SALC's contention to the contrary in its answering affidavit filed in opposition to the application for leave to appeal. SALC's only ground of opposition rests on prospects of success. But the SCA judgment itself refutes SALC's assertion as regards prospects of success: it emphatically confirms that Government's

[205] Reproduced in para 44 of the SCA judgment.

application for leave to appeal to the SCA "cannot be said to lack reasonable prospects of success".[206]

85. Strikingly SALC invokes no other basis for contending that it is not in the interests of justice to grant leave to appeal. SALC concedes that the matter raises important questions of law. SALC has consistently acknowledged that the matter indeed involves constitutional issues of considerable substance. They are pure questions of law. To determine them the SCA sat substantially as court of first instance,[207] without the "benefit of the High Court's view".[208] This in respect of an issue which is entirely *res nova*: the interpretation and application of section 10 of the ICC Act.

86. As on the only previous occasion when the SCA was confronted with the ICC Act (and also expressed the lack of assistance provided by the judgment at first instance),[209] it is overwhelmingly in the interests of justice that this Court consider the matter. The present matter is an *a fortiori* case. This is because the SCA's approach and observations have significant consequences for the separation of powers. SALC's attempt to defend what it describes as the SCA's strident criticism of Government is self-defeating.[210]

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[206] Record vol 3 pp 225-226 para 22 of the SCA judgment.
[207] Record vol 3 pp 226-227 para 24.
[208] Record vol 3 pp 225-226 para 22.
[209] *National Commissioner of Police v Southern African Human Rights Litigation Centre* 2015 (1) SA 315 (CC) at para 19; *National Commissioner, South African Police Service v Southern African Human Rights Litigation Centre* 2014 (2) SA 42 (SCA) at para 31.
[210] It is also, as we have shown, incorrect to represent to this Court that Government has accepted the High Court's criticisms (as para 53.3 and 53.4 of SALC's answering affidavit filed in this Court contrives). Government challenged these at Petition Record pp 88-89 para 16; p 11 para 24; p 12 para 25; p 27 para 71.

87. It is precisely because the factual issues surrounding President Bashir's departure from South Africa requires – in the discretion of the National Director of Public Prosecutions (whose senior representative attended the SCA hearing) – investigation that any premature inferences from facts (not properly ventilated, and not addressed in argument) prejudices Government in this and any future litigation. SALC's tactic to cast Government as contemnor already – verdict first, trial later[211] – impacted on the SCA's judgment. SALC's persistence in tarbrushing before this Court is unfortunate. It is the merits of the legal issues, not the highly-charged atmosphere in which the courts below approached the matter, which arise for determination.

E. Conclusion

88. In summary, the legal position is that President Bashir's inviolability before a South African court subsists as long as he remains head of state.[212] This is most simply so because section 4(1) of the Immunities Act so provides. Its rationale is deeply rooted in history and legal principle: great human conflicts must be averted

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[211] *Pace* the Red Queen in Lewis Carroll's *Alice in Wonderland.*

[212] Gaeta *op cit* at 323, explaining that the exigency "to repress crimes of the utmost concern for the international community" does not "in and of itself … derogate from existing and well-established rules of customary international law in inter-state relations." Gaeta goes on to explain that "… the fact that an international criminal court is endowed with jurisdiction over a particular case but is deprived of enforcement powers, does not imply that national judicial authorities are permitted to do whatever an international court asked them to do; and more so if that court has been established by virtue of a treaty, like the ICC, and therefore its authority derives from an instrument based upon consent." While "the constitutive instrument of an international court can derogate from the rules of customary international law on immunities", it may "only [do so] with respect to the relationship among contracting states." Sudan is not a party to the Rome Statute. See also e.g. Gevers *op cit* at 12 and Dyani-Mhango *op cit* at 115 and 119: State parties (and especially AU members) are not bound to comply with the ICC's request for co-operation.

by heads of state or emissaries meeting. Immunity is accorded *pro tempore* the office, not impugnity to the person. Neither the ICC Act nor the Rome Statute changes this. Because "an arrest procedure is an exercise in *domestic* jurisdiction",[213] immunities from arrest continue to operate "in keeping with Art 98 of the [Rome] Statute".[214] The ICC has not obtained a waiver by Sudan of its immunity.[215] Accordingly State parties to the Rome Statute are not obliged to execute the ICC's request for the surrender of President Bashir.[216] Instead, Government was obliged to honour the ministerial notice, which was and remains extant.

89. Both the SCA and the High Court erred in considering otherwise. Their orders are unsustainable, and they impose wide-ranging legal and international consequences. Judgment was required on this, not on what a judge deems a "pity" and an "unfortunate" choice by Government.

90. In order to correct this, we ask that

(a) the application for leave to appeal be granted;

(b) the appeal be upheld; and

(c) the judgment and order by the SCA be set aside and replaced by an order dismissing SALC's High Court application.

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[213] Blommestijn and Ryngaert *op cit* 428 at 444.
[214] *Ibid.*
[215] Gaeta *op cit* at 329.
[216] Gaeta *op cit* at 332; Blommestijn and Ryngaert *op cit* at 444.

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