IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA CASE NO: 867/2015
CASE NO: 27740/2015

In the matter between:

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

and

SOUTHERN AFRICAN LITIGATION CENTRE	Respondent

GOVERNMENT'S FILING SHEET

DOCUMENT:

1. **GOVERNMENT'S PRACTICE NOTE**
2. **GOVERNMENT'S HEADS OF ARGUMENT**
3. **GOVERNMENT'S LIST OF AUTHORITIES**
4. **GOVERNMENT'S CHRONOLOGY**
5. **GOVERNMENT'S RULE 10 CERTIFICATE**

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IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA case no. 867/2015
HC case no. 27740/2015

In the matter between:

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	First applicant
DIRECTOR-GENERAL OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second applicant
MINISTER OF POLICE	Third applicant
COMMISSIONER OF POLICE	Fourth applicant
MINISTER OF INTERNATIONAL RELATIONS AND 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 PRACTICE NOTE

(i) Name and number of the matter

1. This is reflected in the above heading.

(ii) Nature of the matter

2. This is an application for leave to appeal against a High Court judgment declaring that Government has failed to comply with the Constitution by not arresting a serving foreign head of State, and ordering Government to arrest him. The application for leave to appeal has been referred for oral argument, directing the parties to address the merits of the appeal if called upon to do so. The merits of this matter concern the question whether customary international law has developed to exclude personal immunity from arrests of a serving head of State subject to an arrest warrant on account of allegedly committing crimes against humanity; and whether any such immunity exists under national law.

(iii) Jurisdiction

3. This Court has jurisdiction in terms of section 17(2)(b) of the Superior Courts Act 10 of 2013.

4. The application was lodged timeously on 30 September 2015, well within the permitted one-month period since the refusal of the application for leave to appeal by the High Court on 15 September 2015.

(iv) Constitutional question

5. The High Court granted a declaratory order to the effect that Government's conduct was "inconsistent with the Constitution" "to the extent that" the current applicants/appellants "have failed to take steps to arrest and/or detain the President of the Republic of Sudan". Thereupon the High Court issued a mandamus that the then "respondents are forthwith compelled to take all reasonable steps to prepare to arrest President Bashir". The constitutional question is whether these orders are correct, or whether they violate national legislation and customary international law – thereby exposing South Africa to adverse international legal and diplomatic consequences.

(v) Issues for determination in this matter

6. Whether the declaratory order and the mandamus issued by the High Court are moot.

7. Whether a serving head of a foreign State enjoys immunity against arrest in South Africa despite a warrant for his arrest and a request for co-operation by the International Criminal Court.

(vi) Estimate of the duration of argument

8. One day.

(vii) Portions of the record that require to be read for purposes of the appeal

9. Particularly the following portions of the *petition record* require to be read

(a)	Notice of motion	pp 1-3
(b)	Founding affidavit	pp 4-36
(c)	Judgment on the merits	pp 48-78
(d)	Judgment on leave to appeal	pp 93-105
(e)	Answering affidavit	pp 112-141
(f)	Replying affidavit	pp 227-238

10. Particularly the following portions of the *appeal record* require to be read

(a)	Notice of motion	pp 1-8
(b)	Founding affidavit	pp 9-28
(c)	Supplementary affidavit	pp 29-34
(d)	Answering affidavit	pp 49-72

(viii) <u>Portions of record in language other than English</u>

11. None.

(ix) <u>Summary of the applicants/appellants' argument</u>

12. Immunity is a fundamental principle of international law. There has been no development of customary international law which abolishes personal immunity of a serving head of State. It continues to operate even in the context of international crimes. South African national legislation gives effect to this immunity. Neither the Rome Statute nor domestic legislation implementing it in South Africa alters this legal position. Accordingly South Africa is under a legal duty to respect the personal immunity of a serving head of a foreign State. The Security Council

resolution referring the situation in Darfur to the Prosecutor of the ICC does not place a contradictory obligation on South Africa. Nor is South Africa under a legal duty to comply with the ICC's request for co-operation which contradicts South Africa's international and national legal duty to respect the personal immunity of a serving head of State.

(x) Core bundle

13. A core bundle is not appropriate for purposes of the appeal, because the petition and appeal records are concise – comprising only one volume each.

(xii) Compliance with rules 8(8) and 8(9)

14. The applicants/appellants' letter of 1 October 2015 sought the respondent's co-operation regarding compliance with rule 8, but only received a response on 9 November 2015 – agreeing to the exclusion of only four of the intended sixteen items from the High Court record. Accordingly the applicants/appellants have complied with rules 8(8) and 8(9).

J.J. GAUNTLETT SC
F.B. PELSER
L. DZAI
Counsel for Government

Chambers
Cape Town

14 January 2016

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA case no. 867/2015
HC case no. 27740/2015

In the matter between:

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	First applicant
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SOUTHERN AFRICAN LITIGATION CENTRE	Respondent

GOVERNMENT'S HEADS OF ARGUMENT

(Enrolled for hearing on 12 February 2016)

INDEX

A. Introduction

1. Does a sitting head of State enjoy immunity *ratione personae* before a South African court, more particularly in relation to an arrest warrant issued by the International Criminal Court[1] – or is he subject to arrest as ordered by the court *a quo*? This is the first of two substantive questions at the heart of this matter. The second is whether immunity was in any event in the present instance conferred by executive act or administrative action by the Minister of International Relations and Co-operation which was – despite explicit reliance by Government on it in its papers – left unreviewed.

2. The court *a quo* (a Full Bench of the Gauteng High Court, comprising Mlambo JP, Ledwaba DJP and Fabricius J – the latter had made provisional orders in the matter) answered both questions against Government. The court *a quo* – having directed that it only wished to be addressed on mootness and, expressly, *not* on prospects of success or the interests of justice – thereafter dismissed the application for leave to appeal. It did so despite it being common cause that no court in the world has to date, so far as is

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[1] Immunity *ratione personae* is personal immunity attaching to a head of State – and only 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/369659082.pdf (accessed on 6 January 2016). [In what follows references to this publications are to the online format, referring to the pages of the typescript format. The current reference is to pp 2-3 of the electronic version of the publication.] 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."

known, ordered the arrest of a sitting head of state. The High Court dismissed the application for leave to appeal both on the ground on which it had asked to be addressed (mootness) and on the grounds on which it had enjoined counsel *not* to address it (prospects of success and interests of justice).

3. While the first substantive question identified in paragraph 1 is a pure question of law, it arises of course in a context. This is the most recent visit of President al Bashir of Sudan ("President Bashir") to South Africa in June last year. President Bashir continues to be a head of State – not the only head of State who visits or may well visit South Africa and be liable to arrest on the approach adopted by the High Court.[2] The mandamus issued remains extant; it requires the arrest of President Bashir whenever he returns to South Africa. The declaratory order – holding that Government has acted in breach of the law by not arresting Sudan's head of state – is also in final terms. Thus the legal question for determination has concrete practical consequences. For as long as the High Court's judgment and orders stand, President Bashir is prevented from attending important international events like those held in South Africa in December, and all subsequent events; and he is also prevented from travelling to or through South Africa, whether on private or official business.

4. The practical consequences of the High Court's judgment and orders aside, they also have profound legal consequences extending far beyond President Bashir and the June 2015 events. As an important judgment by the International Criminal Court demonstrates (and international law experts confirm), the High Court's order exposes

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[2] Dugard *International Law: A South African Perspective* 4th ed (Juta, Cape Town 2011) at 196-197 and 253 gives examples of State 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 – by extension now, Presidents Obama and Putin.

South Africa to liability under international law. Thus, whether the High Court orders are correct is a question of national and international legal and diplomatic importance. It is for this reason that the ICC itself has stayed taking further action against South Africa until the conclusion of the appeal process before South African courts.

5. The High Court's judgment, which precipitates these practical and legal consequences, is supported by not a single precedent. The leading South African text puts it starkly: "*Judicial 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*".[3] (While SALC in its argument below has never squarely addressed this proposition thus accepted by Professor Dugard, it has equally never denied it.)

6. The judgment is, instead, contradicted by many international and comparative authorities. There are accordingly good prospects that this Court may hold that the judgment (which refers to none of these authorities) is wrong and that its orders require to be set aside.

7. In these heads of argument, filed on behalf of Government, we collect some of the most important authorities explaining the correct legal position. In doing so we shall show that the High Court with respect erred.[4] Our submissions follow the scheme set out in the above index.

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[3] Dugard *op cit* at 253, quoting Akande with approval.

[4] Pursuant to an order of this Court by Ponnan and Bosielo JJA (referring the application for leave to appeal for oral argument) and a subsequent letter by the Registrar of this Court dated 23 December 2015, we shall address both the application for leave to appeal and the merits of the appeal itself. The order requires the parties to address the Court on the merits if called upon to do so (Appeal Record p 202 para 2). The letter states that "[t]he

B. Overview of this application

8. This case essentially turns on five key propositions. Each is supported by international and foreign courts and academic commentators. They can be summarised as follows

   (i) Under international law immunity *ratione personae* before a national court is absolute. It operates even in the context of international crimes.

   (ii) Under South African national law there is no exception to this fundamental principle of international law. Instead, South African national law gives explicit statutory effect to sovereign immunity through national legislation.

   (iii) South Africa is under an international law duty to respect the immunity of a serving head of a foreign State. Under South African national law it is moreover a crime to violate this immunity.

   (iv) South Africa is not under a legal duty to arrest President Bashir for purposes of his prosecution by the ICC. South Africa is, instead, under a legal duty to respect President Bashir's immunity while he continues to serve as Sudan's President.

   (v) The United Nations Security Council elected not to impose any such obligation on United Nations member-states like South Africa. It has only imposed duties on certain states, but has specifically only urged ICC member-states to co-operate with the ICC.

9. In addressing the merits we elaborate on the above summary of the applicable principles, citing relevant authorities. Before the merits arise, however, it is necessary first to address the only issue as regards leave to appeal requiring to be deal with separately from the merits: mootness.

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appellant is directed to file his heads of argument on or before 15 January 2016 and the respondent on or before 29 January 2016." The letter is not included in either the appeal record or the petition record.

10. The enquiry relating to mootness rests primarily on three questions. If any of them is disposed of against SALC, its argument on mootness must fail. These questions are

    (i) whether the court *a quo*'s declaration that Government acted in breach of the Constitution is rendered academic by President Bashir's departure from South Africa;

    (ii) whether the court *a quo*'s mandamus directing the arrest of President Bashir is rendered academic by his departure from South Africa before the order could be enforced; and

    (iii) whether, even in the event that both (i) and (ii) were to be answered in the affirmative, this Court should – in the interests of justice – reconsider the fundamental issues of general national and international importance arising in this litigation, taking into consideration authorities not brought to the High Court's attention by SALC in the main hearing and not addressed by the High Court in its judgment on leave to appeal (despite most having been brought to the Court's attention by Government at the latter hearing).

11. Some of these questions are disposed of by the factual and procedural background to the litigation, which we briefly summarise.

C. Factual and procedural background

12. The procedural context in which this litigation arises is not contested.[5] From it four consequences arise bearing on the contended mootness of the judgment and orders, and the prospects of success (in other words, the merits).

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[5] It is set out at Petition Record pp 9-15 paras 17-35. SALC's answering affidavit does not traverse these paragraphs, which are, of course, matters of public record. SALC nonetheless resorts to the device of seeking to

13. First, the court *a quo* – encouraged by the argument for SALC – consistently confused the separate questions of jurisdiction and mootness.[6] Its preoccupation was that it had lost jurisdiction because President Bashir was gone – this although Government expressly disavowed any such contention. This is firstly self-destructive reasoning. Were it to be true, the court's final orders were nullities, because they were made without jurisdiction. That however was not what the Court thought, or what SALC contends. The preoccupation is however also simply wrong: the *causa continentia* principle (as was argued before the Full Bench on leave to appeal, to no avail) has as a consequence that jurisdiction once established, is not lost.[7] And that is tested as at service of the application, not delivery of judgment, or even *litis contestatio*.[8] The case has never been about lack of jurisdiction; it is about whether, in that jurisdiction, there is a current immunity.

14. In the application for leave to appeal, SALC was invited in oral argument to abandon the orders it had procured, if its case truly was that the court could not grant leave to appeal because it had lost jurisdiction. Of course its counsel did not do so. As the affidavits record, SALC has publicly stated its intention to enforce both the arrest order and the declarator, not only against President Bashir should he return but by way of criminal contempt orders against Government. SALC seeks the best of all worlds: a claim to standing based on the undeniably enormous public interest of the matter; an order to arrest and declaration of unconstitutional conduct by Government standing *in*

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assert that "[a]ny allegation that I do not dealt with directly must be taken to be denied" (Petition Record p 115 para 8). This is not a legally competent approach (*Minister of Land Affairs and Agriculture v D & F Wevell Trust* 2008 (2) SA 184 (SCA) para 56, most recently applied in *Wright v Wright* 2015 (1) SA 262 (SCA) at paras 15-16). It follows that no dispute of fact is raised by SALC.

[6] See e.g. the judgment at Appeal Record p 119 line 9 and p 122 line 13, still supported by SALC's answering affidavit in the application for leave to appeal (Petition Record p 139 para 77).

[7] *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (A) at 301 and 310.

[8] *Mills v Starwell Finance (Pty) Ltd* 1981 (3) SA 84 (N): Thirion J here analyses the common law authorities *Huber* and *Merula*.

rem; yet an inability on the part of Government to take on appeal the only orders of this kind made (so far as is known) in legal history.

15. The second consequence goes to the prospects of success. As stated, it has been common cause throughout that "*no case can be found*"[9] to support the arrest of a serving head of state on the basis of an alleged international crime. It is beyond contestation that SALC initiated extremely urgent High Court proceedings on a few hours' notice over a weekend.[10] It appears that even SALC itself had no time – despite the fact that it had prepared just such an application in 2009 – to disclose to the High Court the most important judgment by the International Court of Justice (or, for that matter, many other authorities) bearing directly on the question for determination and the legal competence of the orders sought.[11] Had it been otherwise, either the High Court's judgments or SALC's answering affidavit would have so stated in response to Government's recordal that this judgment and the other authorities cited in the application for leave to appeal were not previously considered by the High Court. What this demonstrates is that there are good prospects that if the legal question for consideration is informed by highly relevant legal analysis, precedent and commentary entirely absent from the High Court's judgments, a different conclusion may be reached.

16. Third, the High Court's main judgment itself asserts its own importance, despite the departure of President Bahir.[12] (Consistent moreover with this finding the judgment

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[9] Dugard *op cit* 253.
[10] Petition Record p 10 para 19.
[11] While SALC attached Government's heads of argument on leave to appeal – evidently to assert that because the High Court had received written submissions on prospects of success from Government it was fair for the Court to say that it wished to hear no oral argument on the topic – it did not attach its own heads of argument in the main proceedings.
[12] The main 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" (Appeal Record p 119 para 3, emphasis added). As Government's founding affidavit in support of its petition to this Court recounts, the High Court's prediction was correct. Its judgment already resulted in significant political consequences. It resulted in an

was marked "reportable" and "of interest to other judges".[13] It has indeed been subsequently reported.)[14] It was, after all (as the main judgment records), because of the importance of the matter that a full bench was composed to sit as court of first (and, on its approach, final) instance.[15] Even if the matter had somehow become moot – despite the order for arrest and the declarator being undischarged and extant – it can hardly be said that its importance had disappeared with Sudan flight 01 last year.

17. Fourth, the proceedings *a quo* entailed what has to be described as a compromised hearing which precluded a fair hearing for Government.[16] What this demonstrates is that the refusal of leave by the court *a quo* is itself vitiated.[17] This is especially the position in circumstances where the resulting judgment on leave to appeal incorrectly[18]

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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).

[13] Appeal Record p 116. The judgment on leave to appeal is also marked "reportable" and "of interest to other judges" (Appeal Record p 188).

[14] 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)).

[15] Appeal Record p 121 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".

[16] Petition Record p 13 para 28: It is not disputed that in chambers, before the hearing, and during the hearing itself the presiding judge specifically directed counsel for both parties *not* to address the High Court on the merits. Thus the court *a quo* directed counsel to approach the hearing not on the basis of the prospects of success, but to limit legal argument to the question whether an appeal would have any practical effect. This, it is likewise not disputed, was a significant direction, because in the urgent circumstances of the main hearing Government had not been able to file heads of argument. Full heads of argument were, however, filed in anticipation of the hearing on leave to appeal. In them Government cited important authorities. These authorities contradict the court *a quo*'s understanding of international law (as it finds reflection in the main judgment). As mentioned, because these authorities were not cited until then, they could not and were not considered by the court *a quo* in its main judgment; and the judgment indeed does not reflect any consideration of these authorities. The normal opportunity for brief oral argument would have enabled counsel to show how SALC's written argument provided no acceptable answer on the merits.

[17] See e.g. Petition Record p 9 para 16 and Petition Record p 15 para 35, explaining that while the High Court was not prepared to hear Government's argument on the merits, the High Court sought to bolster its judgment on leave to appeal by invoking the merits. But even in doing that, the High Court ignored Government's heads of argument on the merits. This means that SALC's only defence – which is that the High Court did receive Government's "lengthy" written submissions (comprising 31 pages), *ergo* it fully considered them and the fairness of the hearing was thus salvaged (Petition Record p 116 para 11.3) – is not sustainable.

[18] This is because the main judgment itself records that at the main hearing on 15 June 2015 Government's "argument was solely founded on the relevant Statutes and legislative documents" (Appeal Record p 141

conveys that the main judgment has "fully" dealt with "all relevant issues",[19] when important authorities had not even been advanced previously before the High Court (far from being considered by it in either of its two judgments), and when even the *Oudekraal* principle (which was expressly invoked already in Government's answering affidavit)[20] was itself not considered at all.

18. What the main judgment did do, however, was to make adverse findings and comments against Government *unsupported by evidence*.[21] Some of these demonstrate that the High Court was prepared to take "judicial notice" of some media reports (against Government)[22] but not of others (especially those by SALC itself asserting that it intended to act on the orders).[23] What the latter evidence does demonstrate is that SALC's stance on mootness has been wholly inconsistent, as it has sought to sustain enforceable orders but at any cost avoid appellate scrutiny and reflection.

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para 33). Nonetheless, the main judgment also – inconsistently – records that the court *a quo*'s appreciation of the "essence" of Government's oral argument as being the contents of the affidavit deposed to by Dr Lubisi (Appeal Record p 130 para 22). Whatever the court *a quo* actually considered Government's argument to be, it clearly did not recognise that Government's position is supported by authoritative pronouncements on international law.

[19] Appeal Record p 191 para 3.

[20] Appeal Record p 70 para 38.3.

[21] For instance, the main judgment criticises Government for a delay of two and a half hours in filing a 24-page affidavit, which the High Court thought could have been prepared "easily" in but "a few hours" on a Sunday night (Appeal Record p 121 para 7). The main judgment furthermore makes severe findings of "a clear violation of the order handed down by Fabricius J" (Appeal Record p 122 para 8); and the existence of "clear indications that the order of Sunday 14 June 2015 was not complied with" (Appeal Record 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" (Appeal Record p 145 para 30). 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, of course, handed down after a period of deliberation of not more than 30 minutes (Petition Record p 11 para 22).

[22] Appeal Record p 122 para 8.

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

19. It is to mootness itself that we now turn, demonstrating further that the High Court's embracing of SALC's argument of mootness was misplaced.

D. Mootness

20. The issue of mootness is fully addressed in the petition[24] and in Government's short heads of argument *a quo* (which SALC incorporated in its papers filed in opposition to the petition).[25] In short, the order in its own terms imposes an extant obligation to arrest President Bahir. It is self-evident that "such and similar coercive acts put the inviolability of those senior State representatives at risk, thus hampering their freedom to travel abroad in order to discharge their official functions".[26] Accordingly, at the very least, the mandamus is demonstrably not academic. As Cassese (on whom SALC itself relies) observes, "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"..[27]

21. Moreover, even were the matter to be "moot", as SALC argues, that is not the end of the matter. SALC's assertion, and the court *a quo*'s conclusion, are directly at odds with the most recent application by this Court of its established approach in such situations.

22. In *City of Tshwane v Nambiti Technologies (Pty) Ltd*[28] this Court was seized with "a classic" case of mootness.[29] Wallis JA disposed of the question why the appeal should "not be dismissed in terms of section 16(2)(a)(i) of the Superior Courts Act 10

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[24] See in particular Petition Record pp 7-8 paras 12-14, recording that neither the High Court nor SALC addressed the self-evident lack of mootness of the first order; and that the second order is itself not moot, because SALC expressed the clear intention to use it to prevent what Government intends to do: receive President Bashir in South Africa on State business.
[25] Petition Record pp 145*ff*.
[26] Gaeta "Does President Al Bashir Enjoy Immunity from Arrest?" (2009) 7 *JICJ* 315 at 320.
[27] Cassese "When may senior state officials be tried for international crimes? Some comments on the Congo v Belgium case" (2002) *EJIL* 855,
[28] (20580/2014) 2015 ZASCA 167 (26 November 2015) at paras 6-8.
[29] *Id* at para 5.

of 2013"[30] by recording that "[t]here is no need to rehearse the jurisprudence that developed around section 21A(1) of the Supreme Court Act 59 of 1959, which jurisprudence is equally applicable under section 16(2)(a)(i) of the Superior Courts Act." This is because it is well-established that this Court

> "has a discretion notwithstanding that an appeal has become moot, to hear and dispose of it on its merits. The usual ground for exercising that discretion in favour of dealing with it on the merits is that the case raises a discrete issue of public importance that will have an effect on future matters."[31]

23. The Court held that *City of Tshwane v Nambiti Technologies* was such a case, because (a) it raised *res nova*; (b) the review succeeded *a quo*; (c) this resulted in "a far-reaching order impinging" on another arm of government's exercise of a constitutional competence; and (d) the High Court's order "had the potential to infringe upon the constitutional powers and obligations" of, in that case, a municipal council.[32] Accordingly, the Court held, "the mootness of the appeal should not bar the court from addressing the merits."[33]

24. It is clear that each of the four considerations identified in *Nambiti Technologies* applies equally – if not *a fortiori* – to this case.[34] Accordingly, mootness should also in this case not bar this Court's consideration of important questions of law.

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[30] *Ibid.*
[31] *Id* at para 6, citing *Qoboshiyane NO v Avusa Publishing Eastern Cape (Pty) Ltd* 2013 (3) SA 315 (SCA) para 5 (which Government's petition invokes: Petition Record p 31 para 80).
[32] *Id* at para 7.
[33] *Ibid.*
[34] See e.g. Petition Record pp 32-34 paras 82-88, referring to the impediment that the High Court's judgment places on South Africa's international relations; the importance of legal certainty as regards the interrelationship between Government's national and international legal obligations; Government's compliance with or defiance of the rule of law; and the Constitutional Court's confirmation of the far-reaching issues arising in interpreting and applying the ICC Act.

25. This Court's analysis has previously been crucial to the Constitutional Court's subsequent determination of the only other South African case dealing with the ICC Act.[35] In that case a petition was also necessary to gain an appeal from Fabricius J. In that case SALC eventually abandoned its opposition to the petition.[36]

26. It is revealing that SALC makes much of mootness,[37] despite its clear lack of merit – and despite SALC's own spokesperson publicly recording SALC's true position: intending to exact compliance with those self-same orders it now argues have no practical effect. SALC's contradictory reliance on mootness (and persisting in it before this Court) hardly accords with the public interest in which it litigates. It resulted in a contested hearing on leave to appeal; it imposed an unnecessary and extra burden both on this Court and Government (in preparing and determining the petition); it led to a delay in enrolling this case; and it required that limited space in written argument be taken up by an issue which should neither have been raised nor persisted in by SALC (and which SALC was invited to abandon).[38] The point is frivolous.

E. Prospects of success / Merits of the appeal

27. In the circumstances explained above, and in the light of the ventilation of some of the legal issues in the petition, we shall in what follows only deal shortly with submissions already previously advanced. The petition and Government's heads of argument filed *a quo* (which SALC chose to make part of the petition record) address the matter more fully.

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[35] *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* 2015 (1) SA 315 (CC), on appeal from this Court in *National Commissioner, South African Police Service v Southern African Human Rights Litigation Centre* 2014 (2) SA 42 (SCA).

[36] Petition Record p 34 para 88, inviting SALC to do the same in this case in the light of its public statement repudiating its counsel's argument on mootness earlier on the same day. SALC did not accept this invitation.

[37] Petition Record pp 139-141 paras 77-82.

[38] See, again, Petition Record p 34 para 88.

28. Therefore Government's previous analysis of the High Court's main judgment and its judgment on leave to appeal are not repeated here. Where necessary we shall nonetheless refer to key errors in these judgments in addressing the relevant principles, authorities and contentions: (i) the ICJ's judgment in the *Arrest Warrant* case; (ii) SALC's attempt simultaneously to apply, distinguish and repudiate the ICJ's judgment; (iii) SALC's assertion that customary international law has developed to extinguish immunity *ratione personae* before a domestic court; (iv) the Rome Statute; (v) the Implementation Act; (vi) the Immunities Act; (vii) the Security Council Resolution; and (viii) the *Oudekraal* principle.

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

29. The most important principles articulated in the *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*[39] have already been summarised in Government's petition[40] and its heads of argument *a quo*.[41] In short, the judgment confirms that (i) international law recognises as an important principle the immunity of a head of State before a national court;[42] (ii) immunity applies even in circumstances of crimes against humanity;[43] (iii) no exception exists to this rule of "full immunity from criminal jurisdiction and inviolability" of a serving head of State;[44] (iv) only the sending State itself can waive such immunity;[45] (v) it is wrong to equate

[39] (2002) ICJ Rep 3; reaffirmed in *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* (2008) ICJ Rep 177.
[40] Petition Record pp 16-19 paras 38-44.
[41] Petition Record pp 165-167 para 38.
[42] *Supra* at para 51.
[43] *Id* at para 58.
[44] *Id* at para 54.
[45] *Id* at para 52.

jurisdiction and the absence of immunity,[46] or the presence of immunity with impunity;[47] (vi) international conventions contemplating the extension of criminal jurisdiction "in no way affects immunities under customary international law";[48] and (vii) immunity subsists before a national court, even if the national court exercises jurisdiction under a core crime convention.[49]

30. It follows that the High Court erred in (i) holding that President Bashir "does not enjoy immunity in accordance with the rules of customary international law";[50] (ii) attaching any weight to the notion that immunity was waived "implicitly" – and this purportedly not even by Sudan itself (*qua* sending State) but by the Security Council;[51] (iii) imposing an order which impinges on the freedom of movement of a serving head of a foreign State;[52] (iv) construing an exception in the case of "international human rights law";[53] (v) confusing jurisdiction for the absence of immunity, and equating the presence of the former with the absence of the latter;[54] (vi) holding that the Rome Statute (or the Implementation Act, implementing it) abrogated immunity *ratione personae*;[55] and (vii) in construing a legal duty to arrest a serving head of State,[56] and ordering the arrest of a serving head of State.[57]

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[46] *Id* at para 59.
[47] *Ibid.*
[48] *Ibid.*
[49] *Ibid.*
[50] Para 30 of the main judgment (at Appeal Record p 72).
[51] Para 28.9 of the main judgment (at Appeal Record pp 76-67). The correct position is that section 8(3) of the Immunities Act (which gives domestic effect to the Vienna Convention on Diplomatic Relations, 1961) requires that any such waiver always be explicit and in writing. This has not occurred in respect of Sudan. Accordingly there exists no waiver to which any legal effect may be given under South African law. This is further reinforced by Article 98 of the Rome Statute itself. It requires that waiver be effected "by the third State", thus by "the sending State" (namely Sudan).
[52] As the second order does. It is contrary to the principle that absolute immunity inheres in a head of State "throughout the duration of his or her office" (*Arrest Warrant* case at para 54).
[53] Para 28.13.1 of the main judgment (at Appeal Record p 21).
[54] Para 28.11 of the main judgment (at Appeal Record p 67).
[55] Paras 28.8 and 28.13.1 of the main judgment (at Appeal Record pp 66 and 68).
[56] As the first order (the declaration) does.
[57] As the second order (the mandamus) does.

(2) SALC's stance on the ICJ's judgment

31. It became clear in SALC's heads of argument prepared for the application for leave to appeal 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.[58] As has been shown, this is an error both in law and logic:[59] immunity in fact *presupposes* jurisdiction; thus the presence of jurisdiction is not the absence of immunity.

32. SALC also misconstrued the ICJ's judgment as authority for the proposition that no immunity exists.[60] The ICJ's judgment confirms the precise opposite.[61] 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 (and which does not appear to have been brought to the High Court's attention until Government's notice of application for leave to appeal was filed in the High Court).[62]

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[58] 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.

[59] 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".

[60] 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.

[61] 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).

[62] The first reference to any judgment by the International Court of Justice appeared in Government's notice of application for leave to appeal (at Petition Record pp 85-87 paras 8 and 12).

33. The authority to be accorded to the ICJ's judgment cannot be gainsaid. It was confirmed and applied in a subsequent judgment by the ICJ itself,[63] is supported by many national courts,[64] and was followed by the ICC itself in the judgment by the ICC Pre-Trial Chamber II,[65] 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]".[66] What this demonstrates is that the High Court's second order – for which SALC has asked on a mistaken understanding of international law – is inconsistent not only with ICJ caselaw, but also against ICC authority.

34. Despite the ICC itself applying the ICJ's judgment, SALC was driven in its answering affidavit in this Court to seek to avoid it as authoritative statement on international law. It does so by advancing five arguments. Each is flawed.

35. The first is an attempt to distinguish the *Arrest Warrant* case on the factual basis that it relates to (i) immunity of a foreign minister; (ii) the exercise of universal jurisdiction by a domestic court; and (iii) the arrest and prosecution of a national of the Democratic Republic of the Congo.[67] What this makes clear is that there is no factual point of

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

[64] 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).

[65] *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.

[66] *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).

[67] Petition Record p 133 para 58.

distinction. First, the immunity of a foreign head of State as opposed to a foreign minister is not a point of distinction, because the same principles apply equally to both. Second, *in casu* it is indeed a form of universal jurisdiction purportedly exercised by a domestic court which is at issue. Third, it was the arrest of a foreign national which was ordered. There can only be a potential legal point of distinction if it were to be the position that the Rome Statute imposes the duty for which SALC contends. But it does not. This is addressed in dealing separately with the Rome Statute.

36. The second argument has already been addressed in Government's replying affidavit.[68] The postulate is that the ICJ's judgment can be repudiated as *lex non grata* or something approaching it. SALC cites only two sources for this extraordinary proposition. The first source is Dugard.[69] Contrary to what SALC's deponent presents to this Court, Dugard in fact confirms (in the passage already cited)[70] that no case can be found in which it was held that immunity *ratione personae* is lost before a foreign State – not even when it is alleged that an international crime was committed.

37. The second source is Cassese.[71] He similarly confirms the principle articulated by the ICJ in its *Arrest Warrant* judgment. It is that "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".[72] Far from criticising the *Arrest Warrant* case, Cassese concludes that the ICJ

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[68] Petition Record pp 234-236 paras 21-25.
[69] Dugard *op cit* at 253.
[70] *Ibid* quoting Akande "International law immunities and the International Criminal Court" (2004) 98 *AJIL* 407 at 411 and citing authorities from national courts in Belgium, Spain and the United Kingdom involving Castro, Ghaddafi, Mofaz, Mugabe and Sharon. As we shall show, many more examples exist.
[71] Cassese *op cit*.
[72] *Id* at 874-875, describing "the legal regulation that can be deduced from current international law" as "manag[ing] to protect both sets of requirements in a balanced way." These "requirements" are the need to ensure "smooth and unimpaired conduct of foreign relations, a traditional concern of sovereign states, on the one side, and the need to safeguard new community values, in particular the need to prosecute and punish the

> "must be commended for elucidating and spelling out an obscure issue of existing law. In doing so it has considerably expanded the protection afforded by international law to foreign ministers. It has thus given priority to the need for foreign relations to be conducted unimpaired."[73]

38. Cassese also confirms an uncontroversial proposition. It is that – contrary to SALC's suggestion[74] – the existence of dissenting judgments in the *Arrest Warrant* case does not detract from the majority judgment's authority.[75] Like Cassese many other commentators confirm that the ICJ's majority judgment indeed "authoritatively confirmed" the rule that immunity *ratione personae* protects serving heads of State from arrests even if charged with international crimes.[76]

39. SALC's third argument against the ICJ's judgment is that "immunity for the core international crimes has been denounced by a host of international treaties".[77] The correct position is, firstly, that each of the treaties cited by SALC deals with immunity *ratione materiae* before an international court. This case concerns immunity *ratione personae* before a national court. Secondly, the special Tribunals thus created in any event stand on an important different legal footing.[78] Because the ICC is a treaty-based court (as opposed to one set up by a resolution of the United Nations Security Council, like the ICTY and the ICTR),[79] the Rome Statute's "derogation from the international system of personal immunities for charges of international crimes ... only [operates]

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perpetrators of grave crimes seriously infringing fundamental rights of human beings, on the other side" (*id* at 874).
[73] *Id* at 855.
[74] Petition Record p 133 para 59.
[75] Cassese *op cit* at 855: "By and large, this conclusion is convincing, despite the powerful objections raised by Judge Al-Khasawneh in his important Dissenting Opinion."
[76] See e.g. Gaeta *op cit* 315 at 317-318.
[77] Petition Record p 134 para 60.
[78] Gevers *op cit* at 5, noting that this has important consequences in determining whether any absence of immunity before an international court extends also to the co-operation of States in arresting and surrendering individuals to such courts.
[79] Gaeta *op cit* 315 at 319.

among state parties to the Statute."[80] Thirdly, the treaties invoked by SALC "all remove the substantive defences of official capacity", not "procedural constraints such as immunities".[81]

40. SALC's fourth argument is a repeat of its third argument. It is flawed for the reasons already mentioned. That, for instance, the Special Court for Sierra Leone "indicted former President Charles Taylor"[82] and that the ICTY "indicted former President Milosevic",[83] and that these international courts have confirmed that those former heads of State do not have any diminished criminal responsibility under customary international law,[84] only serves to confirm what is well understood.[85] It is that under customary international law heads of State enjoy no immunity *ratione materiae* before international courts.[86] This does not depart from the position under customary international law that even in cases of crimes against humanity immunity *ratione*

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[80] *Id* at 328.

[81] *Arrest Warrant* case *supra* at para 60. This is supported by many commentators, *inter alios* Blommestijn and Ryngaert *op cit* 428 at 431; Kiyani "Al-Bashir & the ICC: The Problem of Head of State Immunity" (2013) 12 *CJIL* 467 at para 33; and Cassese *op cit* at 867, who states "[t]his proposition is indisputably sound and must be subscribed to" but nonetheless have earlier in the same article conceived of functional immunity as relating to substantive law and personal immunity as relating to procedural law (*id* at 863). Even if this approach is adopted, the same conclusion applies in respect of the type of immunity in issue in this case: immunity *ratione personae* relates to procedural law, and accordingly does not constitute a substantive defence; hence treaties referring to the inapplicability of status as a substantive defence does not exclude immunity *ratione personae*.

[82] Petition Record p 135 para 61, emphasis added. SALC's petition is correct in stating that the indictment occurred while Charles Taylor was still in office (*id*). What SALC does not state is that Taylor "had been out of office for nearly three years at the time of his arrest and transfer to the [Special Court for Sierra Leone]" (Kiyani *op cit* at para 31).

[83] Petition Record p 135 para 61, emphasis added. The same applies to *Prosecutor v Furundzija* ICTY-95-17/1 (10 December 1998), which SALC cites in the same paragraph for the proposition that individuals are personally responsible, whatever their official position and even if they are heads of State or government ministers. This equally applies to *Prosecutor v Slobodan Milosevic*, which SALC cites in a footnote of the same paragraph for the same proposition: the official position of a person is not a basis for excluding criminal responsibility or reducing punishment. As in *Prosecutor v Furundzija*, what the *Decision on Preliminary Motions* (8 November 2001) held was simply that a head of State cannot plead before an international court his official position as a bar to criminal liability in respect of crimes over which that international court has jurisdiction.

[84] It is important to reiterate that "[i]mmunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts", as the ICJ confirmed in the *Arrest Warrant* case *supra* at para 60.

[85] Gaeta *op cit* 315 at 324-325.

[86] As observed by Murphy "Current Development: Immunity Ratione Personae of Foreign Government Officials and Other Topics – The Sixty-fifth Session of the International Law Commission" (2014) 108 *AJIL* 41 at 47-48, the Appeals Chamber of the Special Court of Sierra Leone has itself been careful to distinguish between the absence of any immunity from prosecution before international courts and immunity with respect to prosecution before national courts.

personae continues to inhere in heads of States before national courts. In fact, these examples confirm the rule.[87]

41. SALC's fifth argument has already been disposed of. The argument is that the ICJ noted an exception to immunity applicable "as far as the ICC was concerned".[88] If this were correct, SALC would of course not have sought to distinguish and diminish the *Arrest Warrant* judgment. But it is not. What the ICJ made clear was that it was referring (albeit *obiter*)[89] to proceedings before the ICC itself, and a head of State (otherwise subject to the ICC's jurisdiction) being precluded from invoking immunity against the ICC itself.[90] The *Arrest Warrant* judgment stands for the proposition that before a national court immunity *ratione personae* subsists in all circumstances.

42. 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 impossible.[91] It asks this

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[87] Kiyani *op cit* at para 27, pointing out that

> "Statutes and prior cases that supposedly demonstrate the exception do not in fact deviate from the basic rules of head of State immunity … . Previous examples of heads of State being prosecuted either concern former heads of State or incumbents whose immunity was waived, and the statutes of pervious tribunals actually provide evidence of a separate rule that affects substantive defences, not personal immunities."

[88] Petition Record p 135 para 62.

[89] Cassese *op cit*.

[90] This is made clear in the fourth subparagraph of para 61 of the *Arrest Warrant* judgment, which refers to "an incumbent or former Minister of Foreign Affairs [who] may be subject to criminal proceedings before certain international criminal tribunals, where they have jurisdiction" (emphasis added).

[91] Not only does a domestic court not have any jurisdiction to develop customary *international* law. The Constitution of course, dealing elsewhere with international law, confines this power to the common law or customary (national) law: section 39(2). This 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, 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. …

Court to find that customary international law has already been developed. As we not turn to show, customary international law has not been developed in the sense for which SALC contends.

(3) The state of development of customary international law

43. SALC asserts that "customary law has developed and does not preclude the arrest, by South African authorities, of a serving head of State".[92] Despite citing extensive authorities in its answering affidavit for some propositions which are not in issue,[93] SALC cites no authority in support of this radical allegation. For that matter, we too could find no academic commentary which supports the proposition. The authorities SALC cites for other propositions themselves contradict this contention.[94] So do many

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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*".

[92] Petition Record p 132 para 56.

[93] Petition Record p 141 para 82 fn 63, citing five authorities for refusing leave to appeal in academic cases.

[94] 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."

other authorities, none of which is cited by SALC.[95] Many of these authorities are recent, peer-reviewed and perfectly in point: "[a]s a sitting head of State, al-Bashir is immune from all foreign processes",[96] 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".[97]

44. 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*, and recognised the important principles warranting preserving them in respect of serving heads of State.[98] 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.[99] Criminal jurisdiction specifically includes (as it is generally understood to mean) "coercive acts that can be carried out

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[95] 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.

[96] 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.

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

[98] *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."

[99] Murphy *op cit* at 41.

against persons enjoying immunity in this context."[100] It accordingly includes also arrests.

45. Thus SALC's unsubstantiated contention of a development of customary international law is clearly insupportable.[101] It is an argument *de lege ferenda* (how the law in its view *should* be, not what it *is*) – of a piece with the rather wistful analysis in Dugard[102] as to what the law might have been had the two dissenting judges commanded a majority. It also rests on a *non sequitur*. SALC's deponent reasons that "customary international law has developed and does not preclude the arrest ... for a number of reasons".[103] Two, to be precise.[104] The first reason is that the customary international law rule has been "excluded" by the ICC Act.[105] The second is that the customary international law rule has been "overridden" by Article 27 of the Rome Statute.[106] On this SALC seeks to conclude that "the prevailing statutory and treaty regime removes any immunity. In dealing separately below with the two reasons advanced we show that neither of them is correct. But the reasoning is wrong in its own terms, because if the customary international law rule has only been "excluded" or "overridden", then customary law has not been "developed" but only trumped. It follows that there is no coherent argument or authority for the proposition to which SALC was driven.

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[100] *Id* at 42.

[101] 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."

[102] Dugard *op cit* 252-253. The contention is that the ICJ has been *"strongly criticized"* (sic) for the *Arrest Warrant Case*. But all that is then cited for this proposition is the dissent of Judge Al-Khasawneh – and "see too" the dissent of Judge *ad hoc* Van den Wyngaert. The antipathy of the text to the *Arrest Warrant* judgment draws on nothing else.

[103] Petition Record p 132 para 56.

[104] Although para 56 of SALC's opposing affidavit has three subparagraphs, the third is a conclusion based on the first two (Petition Record p 133 para 56.3).

[105] Petition Record p 132 para 56.1.

[106] Petition Record p 132 para 56.2.

(4) The Rome Statute

46. Despite having sought simultaneously (and inconsistently) to criticise, distinguish and invoke the *Arrest Warrant* case, 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.[107] SALC thus correctly accepts that Article 27 deals exclusively with immunity in proceedings before the ICC itself.[108] It does not govern domestic proceedings.

47. 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*.[109] 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".[110] Article 27(2), the ICC confirmed, applies to "proceedings before the Court".[111] And the reference to "the Court" connotes the ICC, not a national court.[112]

48. But even were Article 27 to be applied out of its field of application, it still cannot operate against a non-party.[113] Accordingly it cannot defeat the immunity of a head of a

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[107] Nowhere in the papers or in either of SALC's previous sets of heads of argument has any such contention been advanced.
[108] Cassese *op cit* at 875 himself likewise supports this. So does many other commentators.
[109] ICC-02/05-01/09 (9 April 2014).
[110] *Id* at para 29.
[111] *Id* at para 30.
[112] Article 27 applies only to the ICC as an international court (Dłubak *op cit* at 227).
[113] 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 Bahsir of Sudan: An opportunity missed" (2013) 28 *SAPL* 106 at 115.

State which is not a Rome Statute signatory.[114] Thus President Bashir's immunity cannot be "overridden" by Article 27 of the Rome Statute.[115] Even if a so-called custom-based theory is adopted the result is the same.[116] 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."[117]

49. It is accordingly wrong, on any approach, to construe the Rome Statute (as the High Court did) as excluding the customary international law immunity of the head of State of a non-party.[118] In doing so, the court *a quo* also misconstrued Articles 86 and 89 of the Rome Statute. Both these provisions are internally qualified. Article 86 is subject to all other provisions of the Statute, and Article 89 is specifically subject to Part 9 of the Statute.[119] Thus both Article 86 and 89 are expressly subject to Article 98(1) of the Statute.[120]

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[114] *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.

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

[116] In the literature a distinction exists between a "treaty-based theory" (premised on direct consent of State parties, of which Sudan is not one) 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.

[117] Blommestijn and Ryngaert *op cit* 428 at 433. See, too, Gaeta *op cit* 315 at 316, explaining that

> "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."

[118] 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).

[119] Accordingly "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" (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).

[120] 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

50. 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).[121] 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".[122] It was 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.[123] The effect of complying with the former has severe legal and political consequences.[124] Article 98(1) resolves the conflict between competing legal duties in favour of immunity.[125] It is "precisely because the drafters 'deemed it necessary ... that

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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."

[121] 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).

[122] Article 98(1) of the Rome Statute, the full text of which reads
"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".

[123] Prost and Schlunck *op cit* at 1131. See, too, Blommestijn and Ryngaert *op cit* 428 at 439.

[124] Blommestijn and Ryngaert *op cit* at 442 (footnotes omitted), explaining that
"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. 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".

[125] 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."

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.[126] Accordingly "article 98(1) preserves [officials'] immunity."[127] Unless a non-party like Sudan itself waives its immunity,[128] a State party like South Africa should respect the former's immunity.[129] 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."[130]

51. Therefore, contrary to the court *a quo*'s construction, the Rome Statute does not expressly abolish the immunity.[131] Nor does it do so by implication. Instead, the Rome Statute expressly preserves the immunity of serving heads of third-party States.[132]

(5) The Implementation Act

52. The Implementation Act, in turn, "is silent on the relevance of immunity in relation to co-operation requests".[133] It, too, clearly does not purport to repudiate an important

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[126] 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 Dlubak *op cit* at 226 (adding emphasis).

[127] Gevers *op cit* at 8.

[128] 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-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."

[129] Dlubak *op cit* at 225.

[130] Gaeta *op cit* 315 at 316.

[131] Para 28.8 (at Petition Record p 66).

[132] As Blommestijn and Ryngaert *op cit* 428 at 439 explains

> "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."

principle of international law: the inviolability of sitting heads of State. Instead, section 2 of the Act records its governing interpretative principles: a court interpreting this Act "must also consider" conventional international law; customary international law; and comparable foreign law.[134] All of these sources support immunity *ratione personae* of a serving head of State.

53. The domestic equivalent of Article 27 of the Rome Statute is section 4 of the Implementation Act. Whereas Article 27 deals with member States' immunity *before the ICC*,[135] section 4 deals with immunity *before a South African court.*[136]

54. Section 4 is clear.[137] It provides expressly that being (*inter alios*) "a head of State"[138] "is neither a defence to a crime; nor a ground for any possible reduction of sentence".[139] Section 4 does not render a serving head of State liable to arrest, and it does not

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[133] Gevers *op cit* at 17.
[134] *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* 2015 (1) SA 315 (CC) at para 23.
[135] Gevers *op cit* at 7.
[136] As will be seen, the type of immunity with which section 4 of the Act deals is functional immunity (in other words, immunity *ratione materiae*): Cassese *op cit* at 874; Gevers *op cit* at 17.
[137] 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.
(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."
[138] Section 4(2)(a), emphasis added.
[139] Section 4(2)(b)(i) and (ii), emphasis added.

abrogate a fundamental principle of international law: inviolability from arrest.[140] It deals with the jurisdiction of South African courts.[141] Crucially, section 4 removes functional immunity before a South African court.[142] It does not remove *personal* immunity.[143]

55. When this became evident at the leave to appeal stage before the High Court, SALC significantly shifted its case. Now its reliance was on section 10(9).[144] In doing so SALC misstated the law. SALC asserted that "s 10(9) unequivocally provides that a person cannot escape arrest and surrender on the basis that he is a serving head of State."[145] The correct position is clear if section 10(9) is read: *it does not deal with arrest at all.*[146] As the heading to section 10 spells out, and the provisions of section 10 confirm, it deals with proceedings "after *arrest*".

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[140] 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).

[141] 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.

[142] *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).

[143] Gevers *op cit* at 17.

[144] Para 30 of SALC's heads of argument on leave to appeal (emphasis added).

[145] SALC repeats this formulation from its heads of argument on leave to appeal *verbatim* in its answering affidavit in this Court (Petition Record p 128 para 42). SALC precedes this contention, which it says is "crucial" to its case, by taking the point that Government has "previously publicly confirmed South Africa's obligations under the ICC Act" (Petition Record p 127 para 40, referring to a 2009 statement by the Department of Foreign Affairs, asserting that President Bashir can be arrested in South Africa). SALC's point is misconceived. A question of law cannot be predetermined by Government's 2009 statement *(Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at 22-23, confirmed and applied by the Constitutional Court in *CUSA v Tao Ying Metal Industries* 2009 (2) SA 204 (CC) at para 68). Were statements anything to go by, then the ICC will have to act in accordance with its then Prosecutor's acknowledgement that it could take up to twenty years before suspects like President Bashir can be arrested *(cf* Kiyani *op cit* at para 61 and fn 182).

[146] 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)."

56. It is section 9 which deals with arrests. Significantly section 9 contains no provision similar to section 10(9). In short, section 9, the *lex specialis* on arrests, is silent on heads of State.[147] Thus, for purposes of arrest the fundamental principle of international law – 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,[148] but explicitly qualifies any duty to arrest with reference to member States' national law.[149]

57. While the Implementation Act was careful to deal with immunity (e.g. section 7, dealing with the immunity of the Court itself – thus recognising the importance of immunity) it did not abrogate immunity in the context of arrests. 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),[150] reading in words which section 9 does not contain (but which the immediate context of section 9 does contain) is not a permissible construction.

58. There is thus also no abolition of immunity against arrests to be found in section 10(9).[151] Subsection (9) refers to "an order contemplated in subsection (5)", and

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[147] 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.

[148] 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.

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

[150] 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).

[151] Section 10(9) provides – when it is read with section 10(5), to which it refers – that "[t]he fact that a person to be *surrendered* is a [head of State] does not constitute a ground for [a magistrate to] refus[e] to issue an order that [he] be surrendered to the [ICC] and that he ... be committed to prison *pending such surrender*" (emphasis added).

subsection (5) contemplates an order by a magistrate that a person be "surrendered to the [International Criminal] Court and that he or she be committed to prison pending such surrender." This is not the order sought from or granted by the court *a quo* (which is, of course, not a magistrates' court). The court *a quo* ordered the arrest (without a warrant) and detention of President Bashir pending a formal request for his surrender from the ICC. The Court demonstrably did not grant a section 10(5) order. The judgment did not purport to invoke any part of section 10. Nor did it consider the jurisdictional facts for a section 10(5) order. What is more, a section 10(1) inquiry itself requires that a person be detained under a warrant of arrest. And any arrest must itself have been lawful.[152] There was no arrest, there was no inquiry, and the arrest purportedly ordered was one without a warrant. Thus there could not, and have not been, a section 10(5) order. Thus section 10(9) clearly finds no application.

(6) The Immunities Act

59. South Africa's own Diplomatic Immunities and Privileges Act ("the Immunities Act")[153] gives domestic effect to what has "long been considered a legitimate and necessary feature of international law".[154] Immunities have "ancient roots in international law, extending back not hundreds, but thousands of years."[155] The law of immunities serve the important purpose in stabilising the world order and conducing to peace and security.[156] It does this by maintaining channels of communication to enable

[152] 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.
[153] Act 37 of 2001.
[154] Gevers *op cit* at 2.
[155] Cryer *op cit* at 422, cited by Gevers *op cit* at 2.
[156] 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)

conflicts being prevented or resolved, and by ensuring the safety and freedom of envoys.[157] 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."[158] In South Africa it is the Immunities Act which governs the issue of immunities. It is itself a post-constitutional statute. If it intended a departure from its two recent predecessors it could so easily have so provided. Instead it reiterates – domesticates beyond debate – the clear rule of international customary law.

60. Section 4(1) of the Immunities Act precludes both the first and second orders granted by the court *a quo*. It entrenches immunity *ratione personae* for heads of States and accordingly codifies the customary international law position as part of domestic statutory law. This is reinforced by section 15(1) of the Immunities Act. It criminalises the arrest of a serving head of State. The Immunities Act requires that any waiver be explicit and in writing.[159] It does not recognise any waiver of immunities by implication or by a third party.

61. This legal position operates as a matter of national statute law, but is also further reinforced by international law.[160] 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, the court *a*

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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*).

[157] Gevers *op cit* at 2.

[158] *Ibid.*

[159] Section 8(3) of the Immunities Act.

[160] Vienna Convention on Diplomatic Relations, 1961.

quo would have had to interpret the provisions it perceived to be in conflict by seeking to harmonise them with one another.[161] 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 urged),[162] because section 4(2) does not apply. Nor does section 4(2) have the effect for which SALC contends (were it to apply). 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).

62. In harmonising the applicable statutory matrix, the court *a quo* had to give effect not only to international law (and, most importantly, the ICJ's judgment).[163] It should also have considered foreign law.[164] It referred to none. Had it done so, it would have seen (as Government's heads of argument in the application for leave to appeal demonstrated) that foreign law confirms the position under international law as articulated by the ICJ.[165]

63. 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

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[161] Steyn *Die Uitleg van Wette* 5th ed (Juta, Cape Town 1981) at 188.
[162] Paras 33 and 44.1 of SALC's heads of argument filed in the application for leave to appeal.
[163] As SALC's heads of argument contended by invoking "the constitutional requirement to prefer a legislative interpretation that gives effect to international obligations over one that does not" (para 33).
[164] Section 2(c) of the Implementation Act: a court "must" consider *inter alia* "comparative foreign law".
[165] Petition Record pp 164-165 fn 67.

which the sending State is a signatory) abolishes immunity.[166] Thus, immunity *ratione personae* before a domestic court remains intact.[167]

(7) The Security Council's resolution

64. SALC submits in its opposition to Government's petition that if all else fails then there is "a binding call" by the Security Council on which SALC can fall back.[168] SALC says that this "call" "amounted to a waiver, under international law".[169] Both propositions are incorrect (as we show in relation to each separately), and the argument itself is "without merit".[170]

65. The relevant part of Resolution 1593 (2005) which SALC invokes records that the Security Council

> "*Decides* 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".[171]

66. Many commentators have interpreted this resolution consistently as imposing no general obligation on States other than Sudan and other States which are parties *to the dispute in Darfur*.[172] As Gaeta explains

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[166] *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).
[167] *Id* at 111-112, 152 and 189.
[168] Petition Record p 136 para 64.
[169] *Ibid.*
[170] Gaeta *op cit* at 330.
[171] Petition Record p 201 para 2.
[172] 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; Dyani-Mhango *op cit* at 118

> "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."[173]

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

68. Thus, in its own terms, the Security Council Resolution did not impose a binding duty on South Africa.[174] Furthermore, whatever its own terms, the Resolution does not

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"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.

[173] Gaeta *op cit* at 330.

[174] *Id* 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."

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."[175] Accordingly States are not obliged to comply with a Security Council resolution purporting to violate a fundamental principle of customary international law.[176]

69. As regards the second plank of SALC's argument, it falls short even in its own terms. This is because even were it to be accepted that the Security Council's resolution could conceivably be construed as amounting to a waiver of Sudan's immunity under international law, then it still does not amount to a waiver for purposes of national law. The Immunities Act operates as national law, and there has been no attempt to domesticate any countervailing instrument of international law. South Africa's requirements for a waiver of immunity are spelt out.[177] How reliance on a Security Council[178] resolution could meet the explicit requirements of an express waiver by the state concerned is not evident.

70. In short, then, section 4(1) of the Immunities Act provides the answer to the first substantive issue in this appeal. It could not be clearer. It reiterates the international customary law rule that a head of state is immune *ratione personae*, absolutely, while in office. Its constitutionality is not challenged by SALC. The Treaty of Rome – a *treaty* between states, not intergalactic legislation – does not purport to provide otherwise. Nor does the Implementation Act, which should be construed consistently with the treaty it implements (which does not). *Caedit quaestio.*

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[175] Kiyani *op cit* at 478.
[176] *Id* at 480.
[177] Sections 8(2) and (3) of the Immunities Act.
[178] Several permanent members being fastidious non-members themselves of the ICC.

(8) The *Oudekraal* principle

71. We have so far addressed our primary argument: section 4(1) of the Immunities Act gave President Bashir immunity, and the High Court had no power to order his arrest. But we submit that in any event leave should be granted and the appeal upheld, on a second basis. This is that President Bashir was accorded immunity *ad hoc* pursuant to an executive act or administrative action which SALC did not review.

72. The Republic of Sudan formally requested that President Bashir be accorded all privileges and immunities of a delegate attending the AU Summit.[179] To give effect to this request the host agreement was promulgated.[180] Its intended effect was to ensure that President Bashir "be accorded", as requested, "all the privileges and immunities of a delegate attending an AU Summit".[181]

73. The judgment on leave to appeal itself accepts this.[182] Nonetheless the High Court held that the agreement and its promulgation do not apply to President Bashir.[183] This is wrong for reasons already provided.[184]

74. Furthermore, the ministerial notice could not simply be ignored. In the event that the Minister misconstrued her powers or acted *ultra vires* the empowering Act in

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[179] Petition Record p 25 para 64.
[180] Petition Record pp 25-26 para 64.
[181] Petition Record p 26 para 64.
[182] Petitition Record p 95 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."
[183] Petition Record pp 70-71 para 30.
[184] Petition Record pp 159-163 paras 26-35. In short, the High Court overlooked the reference in section 5(3) of the Immunities Act to section 7(2) of that Act (Petition Record p 160 para 29); anomalously restricted immunities to organisations (*ibid*), despite the ordinary grammatical meaning of the word "delegate" (Petition Record p 163 para 35); and did not read Article VIII of the host agreement together with provisions it incorporates by reference, especially Article V of section C of the OAU Convention – which specifically gives effect to immunities of representatives of members states (Petition Record p 162 paras 33-34).

promulgating the host agreement (in order to ensure immunity *inter alios* to heads of State and President Bashir in particular), the promulgation had to be impugned, reviewed and set aside. It could not be brushed aside because the court *a quo* disagreed with its validity or effectiveness. The promulgation had legal effect until it was set aside.[185] While SALC recognised the need to do so, the notice was not set aside.[186]

75. Thus, even were SALC's argument on section 4 of the Immunities Act correct, SALC's case still falls foul of the *Oudekraal* principle. Government expressly invoked this principle, and did so already in its answering affidavit.[187]

F. Conclusion

76. The legal position is accordingly that President Bashir's inviolability before a South African court subsists, as long as he remains head of state.[188] This is most simply so

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[185] *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA). The Constitutional Court confirmed and applied the *Oudekraal* principle on numerous occasions (see e.g. *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC)).

[186] Appeal Record p 32 para 9.

[187] Para 38.3 of Government's answering affidavit.

[188] Gaeta *op cit* 315 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 the legal position pertaining to President Bashir and an ICC member State as follows

> "to assert that an international criminal court can 'lawfully' issue and circulate an arrest warrant against individuals entitled to personal immunity before national courts, is not tantamount to saying that states can 'lawfully' arrest those individuals and surrender them to the requesting international court. One thing is the power of an international court to exercise its jurisdiction over an individual, another thing is the powers and obligations of states when requested to carry out coercive acts against individuals protected by personal immunities. In other words, the 'inapplicability' of the rules of customary international law on personal immunities before international criminal courts does not per se imply the 'inapplicability' of said rules when it comes to the arrest and surrender to an international criminal court by the competent national authorities of a given state.
>
> One could be tempted to contend that – since international criminal courts do not have enforcement powers – it would be logical to require that if those courts can exercise their jurisdiction against persons protected by international immunities in a foreign national jurisdiction, states are necessarily allowed to lawfully disregard those immunities to comply with a request for surrender by an international criminal court. However, I do not think that, at present, the logic of international criminal justice works quite this way: 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. Clearly, the constitutive instrument of an international court can derogate from the rules of customary

because section 4(1) of the Immunities Act so provides. Neither the Implementation Act nor the Rome Statute "trumps" this, as the High Court has suggested. SALC's attempt to use the Rome Statute as a *deus ex machina* must fail, also as a matter of international law. Because "an arrest procedure is an exercise in *domestic* jurisdiction"[189] immunities from arrest continue to operate "in keeping with Art 98 of the [Rome] Statute".[190] The ICC has not obtained a waiver by Sudan of its immunity.[191] Accordingly State parties to the Rome Statute are not obliged to execute the ICC's request for the surrender of President Bashir.[192] As a result, States which "may want to arrest Al-Bashir ... have their hands, legally speaking, tied behind their back".[193] On this basis Blommestijn and Ryngaert conclude that

> "The sole avenue for the lawful arrest of Al-Bashir by a third State is the removal of his Head of State immunity. This can be realised in three ways. Firstly, the Sudanese Government could waive Al-Bashir's immunity, as it is arguably required to do under Security Council Resolution 1593. Secondly, a new Security Council Resolution could impose obligations on all or some UN Member States to act upon the arrest warrant. And

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international law on immunities with the respect to the exercise of jurisdiction by national authorities, including the execution of an arrest warrant issues by an international court. This is what the ICC Statute does, but – as I will show below – only with respect to the relationship among contracting states.
One could argue that to recognise that an international criminal court may exercise its jurisdiction over individuals who are entitled to personal immunities before foreign national courts is illogical if domestic authorities continue to be bound by the rules of customary international law on personal immunities when it comes to the need to surrender those individuals to said international court. However, this is not so. Once issued, the arrest warrant produces its autonomous legal effects and constitutes the legal basis upon which a state can surrender a person subject to the jurisdiction of the ICC. Therefore the possibility remains that a state, on the basis of such an arrest warrant, can surrender a person to the ICC once this person is no longer entitled to immunities because he or she has relinquished his or her post, or because the requesting state has managed to obtain a waiver of immunities from the foreign state that the person represents. On the other hand, a state could freely decide to disregard the personal immunities of this same foreign state official and surrender him or her to the Court. However, in this latter case, as I will argue below, the state will commit an international wrongful act ...".

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.

[189] Blommestijn and Ryngaert *op cit* 428 at 444.

[190] *Ibid.*

[191] Gaeta *op cit* at 329.

[192] Gaeta *op cit* at 332; Blommestijn and Ryngaert *op cit* at 444.

[193] Blommestijn and Ryngaert *op cit* at 444.

thirdly, Al-Bashir could be removed from office, stripping him from his personal immunity."[194]

77. The Security Council has not imposed any such duty pursuant to any new resolution.[195] Instead, it demonstrated a considerable reluctance to do so.[196] Resolution 1593 of 2005 "does not trump state obligations to respect head-of-state immunity arising from customary international law".[197] Yet SALC itself significantly relies only on Resolution 1593 of 2005.[198] Although it is an option open to it (and prominently ventilated in academic commentary), and despite having in the ensuing years adopted many resolutions on Sudan, the Security Council has studiously refrained from adopting this course. It is not, with respect, either for the ICC to resort to self-help or for a domestic court to step in. The High Court's order effectively doing just this exposes South Africa to grave consequences and interferes in international relations, an issue in the heartland of the executive authority.[199]

78. We ask that (a) the application for leave be granted; (b) the appeal be upheld; and (c) the judgment and orders by the High Court be set aside.

J.J. GAUNTLETT SC
F.B. PELSER
L. DZAI
Counsel for Government

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[194] *Ibid.*
[195] Gevers *op cit* at 13: "the Security Council has the power to make *all* states co-operate with an investigation and prosecution initiated under article 13(b) by virtue of Article 25 of the UN Charter, thereby expanding the co-operation obligations regime beyond states parties to the Rome Statute. Although the Council has refrained from doing so in respect of the Darfur and Libyan referrals, it has done so in respect of the *ad hoc* Tribunals and there is no obvious reason why it cannot do the same in respect of the ICC" (footnotes omitted).
[196] Dłubak *op cit* at 227.
[197] Swanepoel *op cit* at 62.
[198] Petition Record p 136 para 64, introducing annexure KRK8 (comprising SC Resolution 1593 of 2005).
[199] *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC) at para 77 (in the context of foreign policy, which includes diplomatic protection); *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) at para 44 (in the context of international trade relations).

Chambers
Cape Town

14 January 2016

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA case no. 867/2015
HC case no. 27740/2015

In the matter between:

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	First applicant
DIRECTOR-GENERAL OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second applicant
MINISTER OF POLICE	Third applicant
COMMISSIONER OF POLICE	Fourth applicant
MINISTER OF INTERNATIONAL RELATIONS AND 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 LIST OF AUTHORITIES

A.	**CASES**
1.	Al-Adsani v UK (2002) 34 EHRR 11.
2.	Biowatch Trust v Registrar, Genetic Resources 2009 (6) SA 232 (CC).
3.	City of Tshwane v Nambiti Technologies (Pty) Ltd, (20580/2014) 2015 ZASCA 167 (26 November 2015).
4.	CUSA v Tao Ying Metal Industries 2009 (2) SA 204 (CC).
5.	Democratic Alliance v Acting National Director of Public Prosecutions 2012 (3) SA 486 (SCA).
6.	Democratic Republic of the Congo v Belgium (2002) ICJ Rep 3.
7.	Decision on the Cooperation of the Democratic Republic of Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, ICC-02/05-01/09 (9 April 2014).
8.	Djibouti v France (2008) ICJ Rep 177.
9.	Harb v Prince Abdul Aziz Bin Fahd Bin Abdul Aziz [2015] 1 All ER 77 (Ch).
10.	International Trade Administration Commission v SCAW South Africa (Pty) Ltd 2012 (4) SA 618 (CC).
11.	Kaunda v President of the Republic of South Africa 2005 (4) SA 235 (CC).
12.	MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute 2014 (3) SA 481 (CC).
13.	Minister of Land Affairs and Agriculture v D & F Wevell Trust 2008 (2) SA 184 (SCA).
14.	Namibia Advisory Opinion ICJ Reports 1971.
15.	National Commissioner, South African Police Service v Southern African Human Rights Litigation Centre 2014 (2) SA 42 (SCA).
16.	National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre 2015 (1) SA 315 (CC).
17.	Oudekraal Estates (Pty) Ltd v City of Cape Town 2004 (6) SA 222 (SCA).
18.	Paddock Motors (Pty) Ltd v Igesund 1976 (3) SA 16 (A).
19.	Prosecutor v Furundzija ICTY-95-17/1 (10 December 1998).
20.	Qoboshiyane NO v Avusa Publishing Eastern Cape, (Pty) Ltd 2013 (3) SA 315 (SCA).
21.	R v Bow Metropolitan Stipendary Magistrate, ex parte Pinochet Ugarte (No 3) [1999] 2 All ER 97 (HL).
22.	Southern Africa Litigation Centre v Minister of Justice and Constitutional Development 2015 (5) SA 1 (GP); [2015] 3 All SA 505 (GP); 2015 (9) BCLR 1108 (GP).
23.	Wightman t/a JW Construction v Headfour (Pty) Ltd 2008 (3) SA 371 (SCA)
24.	Wright v Wright 2015 (1) SA 262 (SCA).
B.	**SA LEGISLATION**
1.	Diplomatic Immunities and Privileges Act 37 of 2001.
2.	Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.
C.	**FOREIGN LEGISLATION**
1.	Kenyan International Crimes Act, 2008.

2.	Ugandan ICC Act, 2010.
3.	UK International Criminal Court Act, 2001.
D.	**TREATIES/RESOLUTIONS**
1.	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).
2.	Rome Statute of the International Criminal Court.
3.	Security Council Resolution 1593 (2005).
4.	Vienna Convention on Diplomatic Relations, 1961.
5.	Vienna Convention on the Law of Treaties, 1969.
E.	**JOURNAL ARTICLES**
1.	Akande "International law immunities and the International Criminal Court" (2004) 98 AJIL 407.
2.	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.
3.	Cassese "When may senior state officials be tried for international crimes? Some comments on the Congo v Belgium case" (2002) EJIL 855
4.	Dłubak "Problems Surrounding Arrest Warrants Issued by the International Criminal Court: A Decade of Judicial Practice" (2012) 32 Polish Yearbook of International Law 209.
5.	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.
6.	Gaeta "Does President Al Bashir Enjoy Immunity from Arrest?" (2009) 7 JICJ 315 at 320).
7.	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)
8.	Jia "The Immunity of State Officials for International Crimes Revisited" (2012) 10(5) JICJ 1303.
9.	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.
10.	Kiyani "Al-Bashir & the ICC: The Problem of Head of State Immunity" (2013) 12 CJIL 467
11.	Murphy "Current Development: Immunity Ratione Personae of Foreign Government Officials and Other Topics – The Sixty-fifth Session of the International Law Commission" (2014) 108 AJIL 41.
12.	Nmaju "Relevance of the Law of International Organisations in Resolving International Disputes: A Review of the AU/ICC Impasse" 155.
13.	Schabas "The International Criminal Court and Non-party States" (2010) 28 Windsor Yearbook of Access to Justice 1.
14.	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.
15.	Weatherall "Jus Cogens and Sovereign Immunity: Reconciling Divergence in Contemporary Jurisprudence" (2015) 46 Geo J Int'l L 115.
F.	**BOOKS**
1.	Bantekas *International Criminal Law* 4th ed (Hart Publishing, Oxford 2010).
2.	Cryer *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, Cambridge 2007.
3.	Dugard *International Law: A South African Perspective* 4th ed (Juta, Cape Town 2012).
4.	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).
5.	Palmisano "The ICC and third states" in Lattanzi et al (eds) *Essays on the Rome Statute of the International Criminal Court* vol I (Il Sirente, Fagnano Alto 1999).
G.	**REPORTS**
1.	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).

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and

SOUTHERN AFRICAN LITIGATION CENTRE	Respondent

GOVERNMENT'S CHRONOLOGY

DATE	EVENT	REFERENCE
17/07/2000	South Africa signed the Rome Statute.	Appeal Record ("AR") p18 para 25
27/11/2000	South Africa ratified the Rome Statute.	AR p18 para 25
22/11/2001	The Diplomatic Immunities and Privileges Act 37 of 2001 ("Immunities Act") was assented to.	Petition Record ("PR") p129 fn39
28/02/2002	The Immunities Act commenced.	PR p129 fn39
12/07/2002	The Rome Statute of the International Criminal Court ("the Rome Statute/ICC Act") was assented to.	PR p129 fn39
16/08/2002	The ICC Act commenced.	PR p129 fn39
31/03/2005	The United Nations Security Council adopted Resolution number 1593.	PR "KRK8" p201-202
14/07/2008	The Prosecutor of the International Criminal Court ("the ICC") made a formal application to the ICC for the first warrant of arrest for President Omar Hassan Ahmad Al Bashir of Sudan ("President Bashir").	AR p16 para 20
04/03/2009	The ICC issued a first arrest warrant against President Bashir.	AR p12 para 7; p18 para 24
05/2009	President Bashir is invited to attend the inauguration of President Jacob Zuma.	AR p12 para 9.
31/07/2009	SA News.gov.za published a statement by Ntsaluba stating that South Africa was obliged to arrest President Bashir.	PR "KRK6" p194
03/02/2010	ICC's Appeals Chamber decided not to issue a warrant of arrest against President Bashir in respect of the crime of genocide.	PR "KRK4" p188
12/07/2010	Pre-Trial Chamber of the ICC issued a second warrant of arrest against President Bashir.	AR p15 para 16
09/04/2014	Decision on the Co-operation of the Democratic Republic of Congo regarding the arrest and surrender of President Bashir.	AR "KRK16" p46 para 5

01/2015	South Africa agrees to host an AU Summit during June 2015.	AR p51 para 3.1
21/05/2015	South African Litigation Centre ("SALC") addresses a letter to the second and sixth applicant/appellant.	AR p31 para 2 & "KRK11" p35
25/05/2015	SALC receives a response from Chief State Law Advisor.	AR p31 para 3 & "KRK12" p37
28/05/2015	The ICC sends a note verbale to the Embassy of South Africa in the Netherlands regarding the arrest of President Bashir.	AR "KRK16" p45 para 3
06/2015	The Cabinet of South Africa was made aware of the fact that President Bashir was invited by the AU to attend the AU Summit.	AR p105 para 3.1
04/06/2015	Conclusion of the agreement between the AU Commission and the Republic of South Africa ("the host agreement")	AR p51 para 3.2
05/06/2015	The fifth applicant/appellant, the Minister of International Relations and Co-operation, published Government Notice No. 470.	AR p32 para 7 & "KRK15" p42
12/06/2015	ICC's presiding judge in the presence of representatives of the Registrar and of the Office of the Prosecutor met with the Ambassador of South Africa to the Netherlands and an accompanying legal advisor for consultation under article 97 of the Rome Statute.	AR "KRK16" p45-46 para 4
13/06/2015	President Bashir boarded a plane headed for South Africa at 11h30 and arrived in South Africa at about 16h30 and 17h00.	AR p13 para 11.2
13/06/2015	SALC addressed a letter to the first to tenth applicants/appellants noting reports that President Bashir was scheduled to speak at the AU Summit.	AR p31 para 4 & "KRK13" p39
13/06/2015	Pre-Trial Chamber II delivers an urgent decision following the Prosecutor's request for an order that the Republic of South Africa is under an obligation to	AR "KRK16" p43

	arrest President Bashir.	
14/06/2015	Fabricius J's first order issued on Sunday postponing the matter to 11h30 on Monday 15 June 2015.	AR p113 para 3
15/06/2015	Second hearing by a Full Bench (comprising of Judge Mlambo JP, Ledwaba DJP and Fabricius J), resulting in the Court a quo's orders forming the subject of this application/appeal.	PR p11 para 21 & AR p114-115
15/06/2015	The Department of Home Affairs' internal investigation revealed that at approximately 11h50, a Sudanese Aircraft with flight number SUDANO1 departed from Waterkloof Air Force Base.	AR p150 para 8
24/06/2015	Court a quo's main judgment delivered.	AR p116-146
13/07/2015	Application for leave to appeal lodged in the Court a quo.	PR p12 para 26
14/08/2015	Hearing of the application for leave to appeal.	PR p12 para 26
14/07/2015	During SAFM news broadcast at 17h00 a spokesperson for SALC reported that the main judgment would ensure that President Bashir is never again able to visit South Africa, and that the judgment established a "binding precedent".	PR p13 para 30
15/09/2015	Court a quo's judgment on leave to appeal delivered.	PR p93-105
16/09/2015	Moneyweb quoting SALC's Ms Angela Mudukudi stating that SALC was considering criminal contempt proceedings on the basis of the Court a quo's decision.	Petition Record ("PR") p7-8 para 12 & "A" p37
17/09/2015	SALC stated on its website, *inter alia*, that "[t]here's a standing warrant for his arrest and the judges made it clear that South Africa is obliged to arrest him. Those rulings need to be taken seriously and President Omar al-Bashir should understand that should he come to South Africa he's likely to be arrested."	PR p8 fn3 & "B" p40
12/10/2015	The press reported that Sudan (among other states)	PR p140 para 79

	had been invited to attend a forum to be hosted in South Africa in December 2015.	

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SOUTHERN AFRICAN LITIGATION CENTRE	Respondent

GOVERNMENT'S RULE 10 CERTIFICATE

We, the undersigned, certify that the practice note and heads of argument filed on behalf of the applicants/appellants comply in all material respects with Rules 10 and 10A(a) of the Rules Regulating the Conduct of Proceedings of the Supreme Court of Appeal of South Africa.

In so certifying, it is our assessment that our citation of multiple international law authority in answer to the contention that the international customary law rule as to immunity of serving heads of state has "developed" is essential to rebut the argument.

The extensive quotation from *Gaeta* in footnote 191 is in our view warranted: a paraphrase would not be briefer, and might be suggested to be tendentious.

SIGNED AT CAPE TOWN ON THIS 13TH DAY OF JANUARY 2016

J.J GAUNTLETT SC

F.B. PELSER

L. DZAI