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CORRESPONDENTS' REPORTS

SOUTH AFRICA[1]

Contents

Cases – Enforcement of International Criminal Court Warrants

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

On 15 March 2016, the Supreme Court of South Africa held that the South African Government was under a duty to take steps to arrest the President of Sudan when he was present in the territory of South Africa in June 2015, and surrender him to the International Criminal Court.

Factual Background

The *Rome Statute of the International Criminal Court* ('Rome Statute') was incorporated into South African law via the *Implementation of the Rome Statute of the International Criminal Court Act* (2002) ('Implementation Act'). The legislation contains South Africa's obligations in respect of its relationship with the International Criminal Court ('ICC').

In March 2005, the UN Security Council referred the situation in Darfur, from 1 July 2002, to the Prosecutor of the ICC for investigation.[2] Two arrest warrants were subsequently issued by Pre-Trial Chamber I of the ICC for alleged international crimes committed by President Omar Hassan Ahmad Al Bashir.[3] The two arrest warrants were circulated to all States Parties to the Rome Statute, including South Africa. All States Parties are required to co-operate with the ICC in relation to the arrest and surrender of the accused, particularly in the event of his presence in their jurisdiction. President Al-Bashir visited Johannesburg from 14-15 June 2015 to attend the 25th Ordinary Session of the Assembly of the African Union. During this period, the South African Government failed to take any measures to arrest him in accordance with the warrants.

On 14 June 2015, the Southern Africa Litigation Centre ('SALC'), a prominent public interest NGO, brought an urgent application to the Gauteng Division High Court in Pretoria ('High Court'). It argued that the Government's failure to arrest Al-Bashir was unconstitutional, and sought an order compelling the Government to arrest and surrender him to the ICC.[4] At the request of the Government, the matter was postponed until 15 June.[5] Pending a decision, the High Court issued an order prohibiting Al-Bashir from leaving the jurisdiction.[6]

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[2] SC Res 1593, UN SCOR, 5158th mtg, UN Doc S/Res/1593 (31 March 2005).

[3] The first arrest warrant concerned crimes against humanity and war crimes, see Pre-Trial Chamber I, *Warrant of Arrest for Omar Hassan Ahmad Al Bashir* (ICC-02/05-01/09-1, 4 March 2009). The second arrest warrant concerned the crime of genocide, see Pre-Trial Chamber I, *Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir* (ICC-02/05-01/09-95, 12 July 2010).

[4] As cited in *Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016) [4].

[5] Ibid [5].

[6] Ibid.The order read:

High Court proceedings and findings[7]

During the hearing on the afternoon of 15 June 2015, the High Court was assured by counsel for the Government that Al-Bashir was still in the State. On that basis, an order was made obligating the Government to arrest and detain the President of Sudan.[8] Immediately afterwards, the Court was informed that Al-Bashir had left South Africa that morning.[9] A subsequent affidavit from one of the respondents, the Director-General for Home Affairs, provided further details of the departure.[10] (Commenting on this event later, the Supreme Court declared that the Government's conduct was 'disgraceful', and refuted the idea that the Government could have been unaware of the whereabouts of Al-Bashir in South Africa.)[11] Given that Al-Bashir was no longer present in South Africa, the High Court refused the motion requesting leave to appeal because it believed that the issue was moot.[12] However, it referred the matter to the Supreme Court.

The findings of the Supreme Court[13]

> 1. President Omar Al Bashir of Sudan is prohibited from leaving the Republic of South Africa until a final order is made in this application, and the respondents are directed to take all necessary steps to prevent him from doing so;
> 2. The eighth respondent, the Director-General of Home Affairs is ordered:
> 2.1 to effect service of this order on the official in charge of each and every point of entry into, and exit from, the Republic; and
> 2.2 once he has done so to provide the applicant with proof of such service, identifying the name of the person on whom the order was served at each point of entry and exit.

[7] *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development & others* 2015 (5) SA 1 (GP) (24 June 2015).

[8] Ibid [6]. This order stated:

> 1. That the conduct of the Respondents to the extent that they have failed to take steps to arrest and/or detain the President of the Republic of Sudan Omar Hassan Ahmad Al Bashir (President Bashir), is inconsistent with the Constitution of the Republic of South Africa, 1996, and invalid;
> 2. That the respondents are forthwith compelled to take all reasonable steps to prepare to arrest President Bashir without a warrant in terms of section 40(1)(k) of the Criminal Procedure Act 51 of 1977 and detain him, pending a formal request for his surrender from the International Criminal Court;
> 3. That the applicant is entitled to the cost of the application on a pro-bono basis.

[9] As cited in *Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016) [7].

[10] Ibid [7].

[11] Ibid [7]. As noted by the Supreme Court, '[t]he affidavit failed to explain how a head of state, using a military air base reserved for the use of dignitaries, could possibly have left the country unobserved'.

[12] Ibid [8].

[13] The applicants were the Minister of Justice and Constitutional Development, the Director-General of Justice and Constitutional Development, the Minister of Police, the Commissioner of Police, the Minister of International Relations and Cooperation, the Director-General of International Relations and Cooperation, the Minister of Home Affairs, the Director-General of Home Affairs, the National Commissioner of the South African Police Service, the National Director of Public Prosecutions, the Head of the Directorate for Priority Crimes Investigation and the Director of Priority Crimes Investigation Unit. The applicants are collectively referred to as 'the Government'. The presiding Judge was Wallis JA with Majiedt and Shongwe JJA concurring. Lewis and Ponnan JJA concurred with the decision, but for separate reasons.

There were a number of issues before the Supreme Court.[14] On the question of whether the issue was moot, the Court found that the fact that SALC had indicated it would seek enforcement of the High Court order if Al-Bashir returned to South Africa rendered the issue live.[15] Concerning the second issue, it held that leave to appeal should be granted on the ground that the subject was a matter of vital public importance.[16] On the third issue, the Supreme Court rejected requests from four *amici* to intervene in the proceedings because they did not contribute fresh arguments to the Court, as was a qualifying requirement for amici set out in South African law.[17]

Next, the Court examined whether Al-Bashir was immune from arrest and surrender under the terms of a hosting agreement between the Government and the African Union ('AU'), regarding the former's hosting of the 25th Ordinary Session of the Assembly of the African Union ('the hosting agreement').[18] The agreement was formally recognised in a ministerial proclamation issued by the Government. This point was the main argument relied on by the Government before the High Court, but was relegated to a subsidiary issue before the Supreme Court.

The Court held that Article 5 of the *Diplomatic Immunities and Privileges Act* (2001) ('DIPA'), which provided the legal basis on which the hosting agreement was made, specifically referred to the immunities afforded to international organisations and specialised agencies.[19] What is more, the agreement was made between South Africa and the AU, and

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[14] *Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016) [18]. The issues before the Court were:

> (1) Did the departure of President Al Bashir render the issues moot?
> (2) Should leave to appeal be granted?
> (3) Should the four amici other than the [Helen Suzman] Foundation, or any of them, be given leave to intervene as amici?
> (4) Did Article VIII of the hosting agreement, together with the ministerial proclamation, provide President Al Bashir with such immunity, at least for so long as the proclamation was not set aside?
> (5) If not, was President Al Bashir entitled to immunity from arrest and surrender in terms of the arrest warrants issued by the ICC by virtue of customary international law and s 4(1) of DIPA?
> (6) If President Al Bashir would ordinarily have been entitled to such immunity did the provisions of the Implementation Act remove that immunity?
> (7) If not, have Security Council Resolution 1593 (2005) and the Genocide Convention (1948) removed his immunity?
> (8) If the appeal does not succeed, should the order stand or should it be varied in certain respects?
> (9) What orders should be made in respect of costs?

[15] Ibid [20]-[21].

[16] Ibid [22]-[25].

[17] Ibid [26]-[39]. The four other requests came from the African Centre for Justice and Peace Studies, the International Refugee Rights Initiative, the Peace and Justice Initiative and the Centre for Human Rights. The Helen Suzman Foundation ('The Foundation') was granted permission to proceed as *amicus curiae*.

[18] Ibid [43]. Article VIII of the agreement was entitled 'Privileges and Immunities' and read:

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

The Article was formulated following a request from the Sudanese Government.

[19] *Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016) [41]-[42]. The Minister for International Relations and Cooperation, the fifth applicant, made the proclamation recognising the hosting agreement under s

thus, the Court reasoned, it related to representatives of the AU. The Court found that there was nothing to suggest that, in entering into the agreement, the AU was representing the heads of states of member States and their delegations, nor was there anything to indicate that the AU was concerned with the immunity of heads of states of member States and their delegations.[20] The Court held that as a head of state, President Al-Bashir, did not come within the meaning of 'delegate', to whom immunity was conferred in Article VIII.1 of the hosting agreement,[21] irrespective of whether the Cabinet was of the belief that the agreement did confer such immunity.[22]

The fifth issue before the Supreme Court concerned whether President Al-Bashir, as an incumbent head of state, enjoyed immunity under customary international law and under Section 4(1) of DIPA. Here, the Supreme Court engaged in a thorough discussion of the treatment of immunity in international law. The Government argued that the immunity *ratione personae*, incorporated into South African law in Section 4(1)(a) of DIPA,[23] entitled heads of state to immunity before foreign courts in respect of civil and criminal matters, as was well established in international law.[24] It followed that the provisions of the Implementation Act could not remove this immunity.[25] The Government argued further that although ss 4(2) and 10(9) of the Implementation Act precluded immunity from being raised before a South African Court with regard to the prosecution of an international crime and in respect of the surrender of a person in South Africa to the ICC, it was silent as to whether the person could be arrested in the first instance prior to these procedures being carried out.[26]

In response, SALC submitted that the purpose of the Implementation Act was to enable

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5(3) of DIPA. The Court noted that agreements made in respect of immunity afforded to state delegations must be made under s 7 of DIPA.

[20] Ibid [46]. It was the opinion of the Supreme Court that, '[this] was a matter for the diplomatic relationship between South Africa and other member states, not the AU'.

[21] Ibid [45]-[47]. The Court stated, '[t]he AU is composed of member states and the Assembly is its governing body composed of the heads of state or heads of government of the member states. They are the embodiment of the member states not delegates from them'.

[22] Ibid [47].

[23] Section 4(1)(a) of DIPA reads:

> A head of state is immune from the criminal and civil jurisdiction of the Courts of the Republic, and enjoys such privileges as –
> (a) heads of state enjoy in accordance with the rules of customary international law .

[24] *Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016) [49].

[25] Ibid [50].

[26] Ibid [50]. Section 4(2) of the Implementation Act reads:

> 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.

Section 10(9) of the Implementation Act reads:

> The fact that the person to be surrendered [to the ICC] 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). (Insertion added).

South Africa to adhere to its obligations under the Rome Statute.[27] It followed that the sub-sections in question prohibited immunity from being raised as a defence in respect of an ICC arrest warrant.[28] SALC also argued that immunity under customary international law could not be raised before an international tribunal.[29] It asserted that Sudan could not invoke the immunity of Al-Bashir as a result of UN Security Council Resolution 1593, which obligated Sudan to cooperate with the ICC.[30] In relation to the second arrest warrant issued by the ICC, SALC argued that Sudan could not raise immunity in respect of the international crime of genocide, as a State Party to the *Genocide Convention*.[31]

For its part, The Foundation argued that ss 231 and 232 of the Constitution provide that customary international law must be interpreted in line with international treaties that are incorporated into domestic law.[32] Thus, s 4 (1)(a) of DIPA must be read in line with these constitutional provisions.[33] The Court acknowledged that the terminology of s 4(1)(a) of DIPA signified that Al-Bashir would have been immune from arrest and surrender to the ICC before the enactment of the Implementation Act.[34] However, as a result of the Implementation Act, '[t]he immunity confirmed in s 4(1)*(a)* of DIPA must … be construed in a way that is consistent with the absence of immunity from prosecution for international crimes provided in the Rome Statute'.[35]

The Rome Statute

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[27] *Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016) [51].
[28] Ibid [51].
[29] Ibid [52].
[30] Ibid [52].
[31] Ibid [52]; *Convention on the Prevention and Punishment of the Crime of Genocide,* opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951).
[32] *Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016) [53]. Section 231 of the South African Constitution, on 'International Agreements', reads:

> 1. The negotiating and signing of all international agreements is the responsibility of the national executive.
> 2. An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
> 3. An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.
> 4. Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
> 5. The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

Section 232, 'On customary international law' reads:

> Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

[33] *Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016) [53].
[34] Ibid [49]. Ponnan JA and Lewis JA also agreed on this point in their separate opinion, see ibid [114]-[124].
[35] Ibid [53].

Beginning with the preamble, the Court then examined the content of the Rome Statute.[36] The Court explored the relationship between the ICC and States Parties to the Rome Statute and non-party States such as Sudan. In this regard, the Court observed that non-party States may come under ICC jurisdiction via a UN Security Council referral to the Office of the Prosecutor of the ICC, as was the case in the situation concerning Darfur.[37] The Court affirmed the obligations on States Parties to co-operate with the ICC, particularly in respect of the arrest and surrender of suspects to the ICC against whom arrest warrants have been issued.[38]

The Court considered the treatment of immunity in the Rome Statute. It noted that Article 27 prohibits immunity from absolving an individual from criminal responsibility before the ICC.[39] The Court acknowledged that Article 98 of the Rome Statute applies to requests for the surrender of heads of state of non-party States.[40] It also noted the disagreement among scholars as to the application of the Article to nationals of non-party States. On the one hand, there are scholars who reason that Article 98 demands that States Parties abide by their obligations concerning the immunity *ratione personae* afforded to heads of state, and thus, it prohibits them from surrendering non-party nationals who are heads of state to the ICC.[41] On the other hand, there are scholars who argue that Article 98 cannot be relied upon in the case of a UN Security Council referral.[42] The Court recognised that the tension between Articles 27 and 98 had yet to be resolved,[43] and concluded this section of the discussion by stating:

> South Africa is bound by its obligations under the Rome Statute. It is obliged to cooperate with the ICC and to arrest and surrender to the Court persons in respect of whom the ICC has issued an arrest warrant and a request for assistance. To this end it passed the Implementation Act. The relationship between that Act and the head of state

[36] Ibid [54]-[61].
[37] Ibid [56].
[38] Ibid [57]-[58].
[39] Rome Statute, art 27 reads:

> 1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
> 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

[40] *Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016) 60]. Rome Statute, art 98 reads:

> 1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.
> 2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

[41] *Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016) [60]. As noted by the Supreme Court, the AU supports this view.
[42] Ibid [60].
[43] Ibid [60].

> immunity conferred by customary international law and DIPA lies at the heart of this case. But the starting point is not immediately with these, but with the Constitution.[44]

The Constitutional background[45]

The Court explored the position of international law in the South African legal system, as specified in the Constitution. It noted that s 232 of the Constitution incorporates customary international law into the domestic legal system.[46] However, in the case of a conflict between customary international law and domestic law, the latter will prevail.[47] Section 231 of the Constitution asserts that international treaties are binding on South Africa when incorporated into domestic law.[48] Section 233 dictates that South African Courts must interpret cases in line with international law.[49] In describing the relationship between international law and domestic law, the Supreme Court cited at length the decision of the Constitutional Court in *National Commissioner of Police v Southern African Human Rights Litigation Centre*.[50] The Court noted that this legal situation favoured the contention asserted by SALC that the Government was under an obligation to arrest Al-Bashir while he was in South Africa.[51]

Immunity in customary international law

The Court paid extensive attention to the current status of immunity in customary international law, particularly as to whether there is an exception in respect of international crimes.

The Government argued that its conduct, in not arresting Al-Bashir, was justified by immunity *ratione materiae* and immunity *ratione personae*, and to this end it relied on the judgment of the International Court of Justice ('ICJ') in the *Arrest Warrant* case.[52] The Supreme Court acknowledged that, in that decision, the ICJ could find no exception to the rule on immunity in respect of heads of state suspected of having committed war crimes and crimes against humanity.[53] It also noted that this view was supported by reputable academics.[54] However, the Supreme Court noted that the ICJ recognised there were exceptions to immunity in respect of international crimes prosecuted before international

[44] Ibid [60].
[45] Ibid [62]-[65].
[46] Constitution, s 232, above n 35.
[47] Ibid.
[48] Constitution, s 231, above n 35.
[49] Section 233 of the Constitution on 'Application of International Law' reads:

> When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

[50] [2014] ZACC 30, 30 October 2014, Constitutional Court of South Africa. See Correspondents Report – South Africa (2014) YIHL.
[51] *Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016) [65].
[52] *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Judgment)* (2002) ICJ Rep 2002. In this decision, the ICJ found that incumbent heads of state enjoy immunity in respect of civil and criminal matters before foreign courts.
[53] *Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016) [67].
[54] Ibid [67].

tribunals.[55] Thus, the question before the Supreme Court was whether there was 'an international crimes exception to the principle of head of state immunity, enabling a state or national court to disregard such immunity when called upon by the ICC to assist in implementing an arrest warrant'.[56]

Absent a definitive answer to this question in an international treaty, the Court looked to the case law of the ICJ. The Court observed that in the *Jurisdictional Immunities* case,[57] the ICJ declared that immunity cannot be restricted in relation to serious violations of the law of armed conflict.[58] The Supreme Court agreed with the preposition that immunity for civil or criminal matters should receive the same treatment.[59] In respect of the *Pinochet* jurisprudence, the Court noted that there were judicial statements supporting the contention that had Pinochet been an incumbent head of state he would have enjoyed immunity *ratione personae*.[60]

The Court was cognisant that its task under the Constitution was to assess the current state of the law, not to develop international law.[61] The Court then examined the opinion of the ICC on the subject of immunity.[62] Here, it noted that the ICC agreed that the *Arrest Warrant* case represents the status of immunity *ratione personae* in customary international law.[63] The Court then looked to the four exceptions to immunity *ratione personae* that were expressed by the ICJ in the *Arrest Warrant* case. These were:

1. When a head of state is before his or her own national court;
2. When the immunity is waived by the home state;
3. When the head of state is no longer in office, and
4. When a head of state is before certain international criminal courts (including the ICC) with jurisdiction over the offence.

However, in this regard, the Supreme Court declared that there was no agreement in customary international law in relation to the fourth exception.[64]

The difference between removing immunity *ratione personae* of a head of state before an international criminal tribunal, and removing the same immunity before a national court asked to provide assistance to the said international tribunal was acknowledged.[65] The Court recognised that States Parties to the Rome Statute had removed immunity of their own nationals by signing up to the Treaty.[66] But, what happened in the case of nationals of non-party States such as Sudan? It was highly unlikely that Sudan would waive the immunity of Al-Bashir at the request of the ICC, given he was the incumbent head of state.[67] Meanwhile, it was the opinion of the ICC that UN Security Council Resolution 1593 removed Al-Bashir's

[55] Ibid [68].
[56] Ibid [69].
[57] *Jurisdictional Immunities of the State (Germany v. Italy) (Judgment)* (2012) ICJ Rep 2012.
[58] *Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016) [70].
[59] Ibid [71]-[73].
[60] Ibid [71].
[61] Ibid [74].
[62] Ibid [75]-[82].
[63] Ibid [75], citing *Prosecutor v Omar Hassan Ahmad Al Bashir (Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al-Bashir's Arrest and Surrender to the Court)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-02/05-01/09, 9 April 2014).
[64] *Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016) [76].
[65] Ibid [77].
[66] Ibid [78].
[67] Ibid [79].

immunity.[68]

The Court noted the lack of agreement among academics on the subject of immunity of heads of state in respect of international crimes.[69] Nevertheless, the presiding judge, Wallis JA, agreed with the opinion of Thomas Weatherall that:

> [T]he State is not an abstract entity but a community of human beings. Protection of international criminals ... from international scrutiny under the guise of State dignity is an affront to the citizens against whom grave violations of human rights are perpetrated. As State sovereignty is increasingly viewed to be contingent upon respect for certain values common to the international community, it is perhaps unsurprising that bare sovereignty is no longer sufficient to absolutely shield High officials from prosecution for *jus cogens* violations.[70]

The Court reiterated that it was not its role to determine 'the content of customary international law'.[71] His Honour continued, 'I must conclude with regret that it would go too far to say that there is no longer any sovereign immunity for *jus cogens* (immutable norm) violations', but noted that customary law on the subject is in a period of transition.[72] The Court concluded that, as a head of state, Al-Bashir was 'ordinarily' entitled to immunity.[73] However, the fact that SALC contended that the Implementation Act altered this scenario meant that the Court had to examine the Act.

The Implementation Act

Here, the Court examined whether or not the Implementation Act could remove the immunity ordinarily enjoyed by Bashir.[74] The Court reiterated s 233 of the Constitution, which affirmed that domestic law should be read in line with international law.[75] Thus, the Implementation Act had to be construed in accordance with South Africa's obligations in the Rome Statute.[76] The Court also noted that it was obligated to interpret domestic law, including the Implementation Act, in light of South Africa's *Bill of Rights*, as per s 39(2) of the Constitution.[77]

The Court then looked at the content of the Implementation Act itself, starting with its preamble, which affirmed that the Implementation Act's function was:

> To provide for a framework to ensure the effective implementation of the Rome Statute of the International Criminal Court […] to provide for the arrest of persons accused of having committed the said crimes and their surrender to the said Court in certain circumstances.[78]

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[68] Ibid [80]-[82]. Previously, the ICC was of the opinion that there was an 'international crimes exception' with regard to the immunity of heads of state.
[69] Ibid [83].
[70] Ibid [83], citing T Weatherall, '*Jus Cogens* and Sovereign Immunity: Reconciling Divergence in Contemporary Jurisprudence' (2015) 46 *Georgetown Journal of International Law* 1151 at 1175.
[71] *Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016) [84].
[72] Ibid [84].
[73] Ibid [85].
[74] Ibid [86]-[105].
[75] See above n 52.
[76] *Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016) [86].
[77] Ibid [87].
[78] Ibid [89].

The Court did not dispute that Al-Bashir was subject to the jurisdiction of the ICC, and that South Africa was obligated to assist in bringing him before the ICC.[79] The Court was of the opinion that according to its preamble, the provisions of the Implementation Act must be read in line with South Africa's commitment to:

> [Bring] persons who commit such atrocities to justice, either in a Court of law of the Republic in terms of its domestic laws where possible, pursuant to its international obligations to do so when the Republic became party to the Rome Statute of the International Criminal Court, or in the event of the national prosecuting authority of the Republic declining or being unable to do so, in line with the principle of complementarity as contemplated in the Statute, in the International Criminal Court, created by and functioning in terms of the said Statute; [80]

The first provision of the Act to be examined was s 4(2), which prohibits the official status of an individual from being utilised as a defence or as a means of mitigating a sentence before a South African Court, in respect of international crimes.[81] Wallis JA disagreed with the argument put forward by John Duggard and others that this provision was an attempt on the part of the Government to 'cut past' immunity *ratione personae*.[82] Instead, he believed that it paraphrased Article 27(1) of the Rome Statute and applied only to the prosecution of international crimes before South African Courts. However, the Court was cognisant that the provision acted as an interpretational guide and stated, '[i]t is a clear indication that South Africa does not support immunities when people are charged with international crimes'.[83]

The Court accepted that a contradiction would exist if, on the one hand, South Africa respected head of state immunity and yet, on the other hand, precluded it from being relied upon before a domestic court.[84] The Court noted that, under s 4(3)(c) of the Implementation Act, any individual could be tried in South Africa in respect of international crimes, so long as they were present in the territory. This situation applied also to heads of state, who could not rely on immunity as per s 4(2). However, applying the Government's argument that immunity in customary international law prohibits the arrest of the accused in the first place meant that s 4(2) could not apply because indicting or arresting the individual would mean subjecting the individual to the criminal jurisdiction of South Africa.[85] In the eyes of the Court, this would create a 'serious anomaly'. Citing a domestic case, the Court considered, '[t]he ordinary principle of interpretation is that the conferral of a power conveys with it all ancillary powers necessary to achieve the purpose of that power'.[86] The Court noted:

> The purpose of the power to prosecute international crimes in South Africa is to ensure that the perpetrators of such crimes do not go unpunished. In order to achieve that purpose it is necessary for the National Director of Public Prosecutions to have the power not only to prosecute perpetrators before our Courts, but, to that end, to bring them before our Courts. This is also consistent with the constitutional requirement that the Implementation Act be construed in a way that gives effect to South Africa's international law obligations and the spirit, purport and objects of the Bill of Rights. The construction proffered on behalf of the Government emasculates the section in relation to

[79] Ibid [90].
[80] Ibid [91].
[81] See above n 29.
[82] *Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016) [93].
[83] Ibid [93].
[84] Ibid [94].
[85] Ibid [94].
[86] Ibid [95], citing *Middelburg Municipality v Gertzen* [1914] AD 544 at 552.

> international crimes that were perpetrated outside the borders of this country by nationals of other states. That is a construction that would defeat the purposes of the Implementation Act. It is not in my view correct.[87]

The Court then examined ss 8 to 10 of the Implementation Act, which relate to the arrest and surrender of suspects to the ICC.[88] Commenting on s 10(9), which provides that immunity shall not prohibit the issuance of an order for surrender, the Supreme Court affirmed that 'the fact that President Al Bashir was such a person would not have provided a ground for a magistrate not to make an order for his surrender'.[89] However, the Government argued that s 9 of the Act, concerning the arrest of persons (before surrender to the ICC), did not mention immunity.[90] In response, the Supreme Court affirmed:

> But that creates an absurdity. If it were correct, then any person entitled on any basis to claim immunity would challenge their arrest by way of an interdict *de libero homine exhibendo* (the equivalent of a habeas corpus application in other jurisdictions) and demand their release. So the only people who could be brought before a magistrate under s 10 would be those who had no grounds for claiming immunity. But then s 10(9) would serve no purpose at all. It would be entirely redundant, because there would be no possible situation in which a person brought before the magistrate under s 10(1) would be a person referred to in ss 4(2)(a) or (b). Needless to say such an interpretation is to be avoided.[91]

The Court then turned to consider the relationship between the Implementation Act and DIPA and their respective immunity provisions.[92] Here, the Court followed the maxim, *generalia specialibus non derogant* – general words and rules do not derogate from special ones.[93] The Court noted that 'DIPA continues to govern the question of head of state immunity, but the Implementation Act excludes such immunity in relation to international crimes and the obligations of South Africa to the ICC'.[94] Significantly, Wallis JA affirmed:

> I conclude therefore that when South Africa decided to implement its obligations under the Rome Statute by passing the Implementation Act it did so on the basis that all forms of immunity, including head of state immunity, would not constitute a bar to the prosecution of international crimes in this country or to South Africa cooperating with the ICC by way of the arrest and surrender of persons charged with such crimes before the ICC, where an arrest warrant had been issued and a request for cooperation made. I accept, in the light of the earlier discussion of head of state immunity, that in doing so South Africa was taking a step that many other nations have not yet taken. If that puts this country in the vanguard of attempts to prevent international crimes and, when they occur, cause the perpetrators to be prosecuted, that seems to me a matter for national pride rather than concern. It is wholly consistent with our commitment to human rights both at a national and an international level. And it does not undermine customary international law, which as a country we are entitled to depart from by statute as stated in

[87] *Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016) [95].
[88] Ibid [96]-[101].
[89] Ibid [100]; see above n 29.
[90] *Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016) [101].
[91] Ibid [101].
[92] Ibid [102].
[93] Ibid [102].
[94] Ibid [102].

> s 232 of the Constitution. What is commendable is that it is a departure in a progressive direction.[95]

The Court noted that aside from the incident that gave rise to the litigation, South Africa, for the most part, complied with its international obligations concerning the Rome Statute with regard to Al-Bashir.[96]

Given the lack of consensus on the subject, the Supreme Court did not see it fit to adjudicate on the seventh issue before it as to whether the effect of UN Security Council resolution 1593 was to remove Al-Bashir's immunity.[97]

The Supreme Court reworded the first paragraph of the High Court order, which it believed to be erroneous, given the urgency with which it was constructed.[98] In respect of the final issue, costs were awarded to SALC and its counsel, and the Foundation had costs awarded in its favour.[99]

Separate opinion of Ponnan JA (with Lewis JA concurring)[100]

Although the two judges agreed with the decision of Wallis JA, they did not agree on all aspects of the reasoning. First, they were of the opinion that a discussion of immunity in customary international law was not warranted due to the fact that it was not the responsibility of the Court to determine the content of customary international law.[101] Instead, they believed that the the main issue centered on the clash between Section 4(1)(a) of DIPA and Section 4(2) of the Implementation Act.[102] After synopsising the rules of statutory construction in South African law, they concluded that the two subsections should be read together, ultimately deciding that the Implementation Act afforded an exception to the general rule on immunities provided in the DIPA.[103]

Commentary on the judgment

This case deals with the controversial issue of the immunity afforded to incumbent heads of state in international law. Nowhere is this issue more important than in respect of ICC jurisdiction over the nationals of non-party States. It is a significant judgment for a number of reasons. First, it deals with the tension between immunity in customary international law and the treatment of immunity in the Rome Statute. The two approaches are at odds with each other, as described in this case note. The Supreme Court of South Africa decided in favour of the latter, however, its decision was based firmly in domestic law and the intentions of the South African legislature in creating the provisions of the Implementation Act.[104]

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[95] Ibid [103] footnotes omitted.
[96] Ibid [104]. There were other occasions where the Government communicated to the Sudanese Government that Al-Bashir would be arrested if he travelled to South Africa, among these, the funeral of former President Nelson Mandela.
[97] *Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016) [106].
[98] Ibid [107].
[99] Ibid [110]-[111].
[100] Ibid [114]-[124].
[101] Ibid [115].
[102] Ibid [116].
[103] Ibid [123].
[104] Ibid [101]-[103].

Second, in respect of the argument asserted by the Government – that customary international law prohibited it from arresting Al- Bashir – one wonders what is the point of a UN Security Council referral if immunity in customary international law prevents an individual from being arrested in the territory of States Parties. If immunity in customary international law can prohibit the arrest and surrender of an incumbent head of state to the ICC, how will the ICC ever be able to prosecute such persons who are sought as a result of a UN Security Council referral? Let it not be forgotten, the Security Council has the power to remove immunity from heads of state, and it has previously done so in respect of the creation of international criminal tribunals.[105]

Third, this judgment affirms that heads of state may not rely on immunity in respect of international crimes committed outside of South Africa that are being tried in South Africa under its universal jurisdiction laws. Such immunity cannot be relied on as per s 4(2) of the Implementation Act, as reaffirmed by the Supreme Court of South Africa in this judgment. As such, this decision sends a clear message to the six Zimbabwean cabinet members listed in the 'Zimbabwe Torture Docket case' currently being investigated by State authorities.[106]

It is also worth noting that it was known in advance that Al-Bashir would be travelling to the African Union Assembly in South Africa. On 13 June 2015, the ICC Pre-Trial Chamber II issued a decision that the Government was under a duty to arrest President Al-Bashir while in South Africa.[107] It is concerning that the South African Government believed a hosting agreement and ministerial proclamation could suspend its international obligations under the Rome Statute. As was noted by the Supreme Court, the Government had up until that point been an upstanding State Party to the Rome Statute and it had failed to specify its reasons for this detour.[108] Even more concerning is the subsequent African National Congress' indication of its intention to withdraw South Africa from the Rome Statute.[109]

The decision of the Supreme Court on mootness is also important, because it ensures that if ever Al-Bashir returns to South Africa, this decision will be enforced. Since the initiation of this litigation in June 2015, the South African Government has been reluctant to invite Al-Bashir to return.[110] One wonders whether similar litigation will ensue in other African States Al-Bashir visits. Judgments like this one make the world a smaller place for incumbent heads of state avoiding prosecutions for international crimes.

Ultimately, this judgment is further evidence of the chipping away of State immunity for international crimes. There is no doubt that State immunity is in a period of transition, and that new norms are crystallising. It is clear that the nationals of the States Parties to the Rome

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[105] The UN Security Council established the International Criminal Tribunal for the former Yugoslavia under SC Res 827, UN SCOR, 3217th mtg, UN Doc S/Res/827 (25 May 1993). The UN Security Council established the International Criminal Tribunal for Rwanda under SC Res 955, UN SCOR, 3453rd mtg, UN Doc S/Res/955 (8 November 1994).

[106] *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* [2014] ZACC 30, 30 October 2014, Constitutional Court of South Africa - see Correspondents Report – South Africa (2014) YIHL.

[107] *Prosecutor v Omar Al Bashir (Decision following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-02/05-01/09, 13 June 2015).

[108] *Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016) [105].

[109] 'ANC plans to withdraw South Africa from International Criminal Court' (Reuters, 11 October 2015).

[110] The Government wished to invite President Al-Bashir to attend the Forum on China-Africa Co-operation in December 2015, but advised that another Sudanese representative should take his place.

Statute cannot rely on immunity in respect of crimes over which the ICC has jurisdiction. What is more, it is significant that more than half the nations of the world have consented to this rule. There are now 124 States Parties to the Rome Statute, a fact that should not be overlooked.[111] In the long-term, this progression may result in the rule becoming a norm of customary international law. The fact that so many States have agreed to the treatment of immunity in the Rome Statute allows room for the argument that the Treaty is creating new norms with regard to immunity. What is more, the judgment of the South African Supreme Court also reaffirms the status afforded to *jus cogens* crimes in international law.

This is a noteable judgment, not only for South Africa, but also for other States Parties to the Rome Statute in respect of obligations owed to the ICC concerning nationals of non-party States who are sought by the ICC. On 8 April 2016, the South African Government applied for leave to appeal this decision to the Constitutional Court of South Africa, and both sides have since filed affidavits.[112] There is little doubt that many international lawyers will eagerly await the final outcome of this litigation.

AMINA ADANAN

[111] As of 9 May 2016. In addition, there are 139 signatories to the Rome Statute.

[112] For information on this see the website of the Southern Africa Litigation Centre: <www.southernafricalitigationcentre.org/cases/ongoing-cases/south-africasudan-seeking-implementation-of-icc-arrest-warrant-for-president-bashir/>.