

INTERNATIONAL CRIMINAL COURT**Original: English****No: ICC-02/05-01/09****Date: 23 February 2017****PRE-TRIAL CHAMBER II****Before: Judge Cuno Tarfusser, Presiding Judge****Judge Marc Perrin de Brichambau****Judge Chang-ho Chung**

SITUATION IN DARFUR, SUDAN***THE PROSECUTOR V OMAR HASSAN AHMAD AL BASHIR***

Public Document**Request for leave to submit *Amicus Curiae* Observations by the Helen Suzman****Foundation (HSF)**

Source: Francis Antonie

**Document to be notified in accordance with regulation 31 of the Regulations of the
Court to:**

The Office of the Prosecutor:	Counsel for the Defendants
Fatou Bensouda, Prosecutor	
James Stewart, Deputy Prosecutor	

pc



Legal Representatives of Victim	Legal Representatives of Applicants
Unrepresented Victims	Unrepresented Applicants for Participation/Reparation
The Office of the Public Counsel for Victims	The Office of Public Counsel for the Defence
State Representatives Competent Authorities of the Republic of South Africa	Others United Nations Secretariat of the Assembly of State Parti
REGISTRY Registrar Herman von Hebel	Deputy Registrar
Victims and Witnesses Unit	Detention Section
Victims Participation and Reparations Section	Others




Introduction

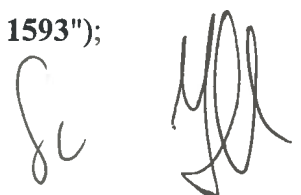
1. The Helen Suzman Foundation ("**the HSF**") seeks leave in terms of Rule 103 of the Rules of Procedure and Evidence of this Honourable Court ("**the Rules**") to make written and oral observations to this Honourable Court ("**the ICC**"), as *amicus curiae*, regarding the domestic and international obligations of the Republic of South Africa ("**RSA**") in international and South African law in this case of *The Prosecutor v Omar Hassan Ahmad Al Bashir*. We believe that these observations will be useful to the ICC in determining whether RSA has failed to comply with its obligations under the Statute of this Court ("**the Statute**") by not arresting and surrendering President Omar Hassan Ahmed Al Bashir ("**President Al Bashir**") to the ICC while on RSA territory.
2. The observations will be confined to legal argument relating to whether President Al Bashir, as a head of state who has been charged by the ICC with crimes against humanity, genocide and war crimes, is afforded immunity by virtue of South African and international law. It will be the HSF's submission that, in the context of this case, any argument that President Al Bashir was immune from arrest and surrender to the ICC and that RSA did not breach its obligations under the Statute by virtue of affording him such immunity is baseless.

The HSF and the basis for this application

3. The HSF is a non-governmental, public interest organisation which has as its purpose the promotion of South African democracy and constitutionalism. Its objectives are "*to defend the values that underpin [South Africa's] liberal constitutional democracy and to promote respect for human rights*".
4. As an organisation concerned with the principles of democracy and constitutionalism, as well as the rule of law, the HSF is concerned with the lawfulness, at both a domestic and international law level, of the decision of the government of the RSA not to arrest and detain President Al Bashir during his visit to South Africa between 13 and 15 July 2015.
5. The HSF has particular experience in bringing cases before South African courts pertaining to unlawful actions on the part of officials of the government of the RSA in the exercise of their official duties. Of particular significance to this application, the HSF was an *amicus curiae* before the South African Courts in applications brought by the Southern African Litigation Centre ("**SALC**") relating to the government of the RSA's failure to arrest President Al Bashir. These matters were eventually heard by the Supreme Court of Appeal ("**SCA**"),

which handed down judgment on 15 March 2016 (*Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* 2016 (3) SA 317 (SCA)) ("**the SCA judgment**").

6. The government of the RSA initially sought to appeal the SCA judgment to the Constitutional Court of South Africa, RSA's apex court. The government of RSA has since withdrawn the appeal. The SCA judgment is, thus, the final decision on this issue. In brief, the SCA judgment found that the failure of the government of the RSA to arrest and surrender President Al Bashir was unlawful and inconsistent with RSA's obligations under the Statute and its domestic legislation.
7. On 27 January 2017, SALC submitted an application to be admitted as *amicus curiae* in this matter to the ICC ("**the SALC amicus application**"). The SALC amicus application and the process pursued against the RSA under article 87(7) of the Statute only came to HSF's attention on 2 February 2017. The HSF intends to address legal issues that SALC has not. These submissions are based on HSF's submissions to the SCA and the Constitutional Court of South Africa, and were prepared with the assistance of leading counsel in South Africa (the team being led by David Unterhalter SC) and with reliance on arguments advanced by Professor Max du Plessis before the SCA and the Constitutional Court (Professor Du Plessis has extensive experience in South African and international law as an academic and legal practitioner and was involved in the proceedings before the SCA and the Constitutional Court).
8. Once the HSF learnt of the article 87(7) process and the SALC amicus application, it had to obtain approval to make the submissions from its trustees, who are situated in various parts of South Africa and the world, which took time. This application was made as soon as possible and is not in breach of any time periods prescribed by the Rules.
9. At a high level, the HSF intends to make written and oral submissions on the following discrete legal issues:
 - 9.1 customary international law has developed to a stage where it no longer supports an absolute right to immunity for heads of state charged with crimes against humanity and genocide;
 - 9.2 there has been an implicit waiver of immunity by the Republic of Sudan ("**Sudan**") by virtue of Security Council Resolution 1593 (2005) ("**Resolution 1593**");



- 9.3 any claim to immunity of President Al Bashir from arrest and surrender to the ICC has been waived by Sudan by virtue of its accession to the Genocide Convention; and
- 9.4 properly interpreted, the Constitution of the Republic of South Africa ("**the RSA Constitution**"), together with relevant domestic RSA legislation, regards international crimes as crimes in the RSA and does not afford absolute immunity to heads of state who *prima facie* appear to have committed crimes against humanity, war crimes or genocide. Instead, the RSA Constitution imposes obligations on the Government of RSA to arrest, detain, surrender and/or prosecute any person charged with such crimes.
10. Rule 103(1) of the Rules states that "*At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organisation or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate*".
11. The HSF has extensively considered the applicable issues, and ventilated them in the Supreme Court of Appeal. The HSF is thus well placed to bring these arguments to the ICC's attention.

Immunity for heads of state under customary international law

12. To the extent that the government of the RSA claims that it was not obligated to arrest President Al Bashir on the basis of norms of customary international law regarding immunity, the HSF submits the following arguments.
13. In our view, customary international law permits states to discount traditional head-of-state immunity in order to cooperate with the prosecution of international crimes in international tribunals.
14. The government of the RSA has previously relied on the *Arrest Warrant* case to contradict this.¹ It has been argued that *dicta* of the *Arrest Warrant* case exclude the possibility of any exception to the rule of full immunity from criminal jurisdiction and inviolability.
15. But that is not so. The *Arrest Warrant* case noted an exception that would apply as far as the ICC was concerned:

¹ Case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* (2002) ICJ Rep 3.

"(A)n incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include ... the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 27, paragraph 2, that '[i]mmunities 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 person'".² (our emphasis)

16. Professor Dugard, a preeminent international law expert, notes that the *Arrest Warrant* case *"has been strongly criticised as a setback for the movement against impunity for the commission of international crimes"*.³ He notes that a distinction must be drawn between international and national courts for purposes of immunity:

"At the outset, a distinction must be drawn between international and national courts for the purpose of immunity. The Nuremburg Charter, the Statutes of the ad hoc tribunals for the former Yugoslavia and Rwanda, and the Rome Statute of the International Criminal Court make it clear that no immunity shall attach to heads of state or government or to senior government officials. The Statute of the Special Court for Sierra Leone similarly denies immunity to heads of state, and the Special Court held that, as it is an international, and not a national court, the head of state of Liberia, Charles Taylor, was not entitled to succeed in a plea of immunity. The principle of non-immunity for international crimes applies equally to incumbent heads of state (as Charles Taylor was at the time of the Special Court's decision) and former heads of state (as with Slobodan Milosevich, former President of Yugoslavia)." ⁴

17. The government of the RSA has previously argued that no court has to date ordered the arrest of a sitting head of state. But that is not so. In 2011, the Kenyan High Court ordered the arrest of President Al Bashir should he enter Kenyan territory.⁵

² *Arrest Warrant* case at para 61.

³ Dugard et al *International Law: A South African Perspective* 4th ed (2011) at 252.

⁴ *Supra* (note 3) at 251.

⁵ *Kenyan Section of the International Commission of Jurists v Attorney General and Minister of State for Provincial Administration and Internal Security* Mis. Criminal Application no.685 of 2010 available at b.1111ri/kenyaiaw.org/Downloads_FreeCases/84203.pdf

18. There is a developing norm in state practice to cooperate with international tribunals and to give effect to their arrest warrants. International law scholars are recognising this emerging trend – including some of the very academics that the government of the RSA cited in support of their contentions before the South African courts.
19. The government of the RSA repeatedly invoked Professor Dugard in support of its claim. But Professor Dugard expressly recognises the emergence of a new customary international law trend:

*"Contemporary international law no longer accepts that a state may treat its nationals as it pleases. Conventions and custom prescribe a wide range of human rights obligations with which states must comply. Moreover some human rights norms enjoy such a high status that their violation, even by state officials, constitutes an international crime. The doctrine of immunity cannot stand aloof from these developments. International commerce has destroyed the absoluteness of state immunity in respect of commercial transactions. International human rights and international criminal law are now poised to weaken it still further."*⁶

*"As has been shown customary international law is in a state of flux in respect of immunity, both criminal and civil, for acts in violation of norms of jus cogens. South African courts will therefore be required to approach immunity in such cases with caution, and with due regard for the emergence of restrictive rules in favour of human rights".*⁷ (our emphasis)

20. The immunity rules under customary international law are neither a blunt instrument⁸ nor a straightjacket, despite the government of the RSA's efforts to hold them to that effect. As Judge James Crawford explains: *"When applying international law rules, municipal courts may find it necessary to develop the law, notably where it is unclear or uncertain. This will include consideration of how the international rule is applicable in a domestic context, a process which has been notable, for example, in the field of state immunity"*.⁹

⁶ See John Dugard, *International Law: A South African Perspective*, 4th Edition (2011) at 250 to 251; see also Michael A. Tunks "Diplomats or Defendants? Defining the future of head-of-state immunity" 52 Duke L.J (2002) at 660-662.

⁷ Dugard at 258.

⁸ Despite the government of the RSA's repeated assertion that the High Court's order would expose South Africa to a violation of customary international law, and that the obligation on South Africa under customary international law is clear and absolute, Judge Crawford stresses that *"The scope of immunity from foreign criminal jurisdiction is yet to be conclusively determined"* (James Crawford, *Brownlie's Principles of Public International Law*, 8th ed (2012) p 499).

⁹ See Crawford pp 57 to 58, emphasis added.

That is why Crawford stresses that "*Immunity exists as a rule of international law, but its application depends substantially on the law and procedural rules of the forum*"¹⁰

21. It follows that customary international law cannot assist the government of the RSA in the present matter and, in fact, points in the opposite direction, emphasising the obligation to detain, arrest and surrender President Al Bashir.

Security Council Resolution 1593 (2005)

Introduction

22. The Security Council adopted Resolution 1593 under Chapter VII of the UN Charter in 2005. It was thus binding on all members of the UN, including RSA and Sudan. It provides 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 ICC and its prosecutor.¹¹ The ICC repeatedly ruled, particularly in the Congo¹² and RSA¹³ cases, that the effect of the Resolution 1593 was to strip Sudan of any privilege that might otherwise have protected President Al Bashir from arrest and surrender to the ICC.
23. We submit that the ICC rulings are correct on this score. The effect of Resolution 1593 was to strip Sudan of any privilege that might have afforded President Al Bashir immunity from arrest. In any event, the RSA is bound by the ICC rulings to that effect.

Resolution 1593 stripped Sudan of immunity

24. The ICC rulings, that the effect of Resolution 1593 was to strip Sudan of immunity, enjoy wide support among international law scholars. Their arguments may be summarised as follows:
- 24.1 the Resolution 1593 necessarily implied that the Security Council referred the situation in Darfur to the ICC for investigation, prosecution and adjudication in accordance with the Statute;
- 24.2 the following features of the Statute are salient:

¹⁰ Crawford at p 488, emphasis added.

¹¹ SC Resolution 31 March 2005 Petition p 201 para 2.

¹² ICC decision on the co-operation of the Democratic Republic of the Congo regarding President Al Bashir's arrest and surrender to the court, 9 April 2014 at paras 22 to 32.

¹³ ICC decision following the prosecutor's request for an order further clarifying that the RSA is under an obligation immediately to arrest and surrender President Al Bashir, 13 June 2015 at paras 1 to 9.

- 24.2.1 the primary provision of article 27(1) makes the Statute "*equally applicable to all persons without any distinction based on official capacity*" (our emphasis) in unqualified terms. It does not brook any distinction of any kind based on official capacity, including sitting head of state status;
- 24.2.2 article 27(1) is not confined to prosecutions in the ICC. It applies to all prosecutions including those in the national courts of the state parties to the Statute;
- 24.2.3 article 27(2) complements the general provisions of article 27(1) by providing specifically that the ICC shall not be barred from exercising its jurisdiction by any immunities or special procedural rules that may attach to the official capacity of a suspect; and
- 24.2.4 article 27(2) of the Statute provides that "*Immunities ... 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*". (our emphasis)
25. Under article 25 of the UN Charter, Sudan is bound by Resolution 1593 and by article 27(2) of the Statute. It is thus in a position analogous to a member of the ICC bound by the Statute and, more particularly, by article 27(2), which negates any head-of-state immunity. The only difference between Sudan and any other member of the ICC is that Sudan is bound by the Statute through the Security Council resolution and not because it is a member of the ICC. But, as the legal framework makes clear, Sudan's non-membership of the ICC, in this case, is of no consequence.
26. Professor Tladi notes that,
- "The majority of scholars take the view that because the situation in Sudan was referred to the ICC by the Security Council, by virtue of the priority accorded to Security Council decisions, Sudan becomes like a party to the ICC such that the exception to article 98 does not apply to it".¹⁴*
27. In their leading text on International Criminal Law, Cryer *et al* expressed the same view:

¹⁴ Tladi "The duty on South Africa to arrest and surrender President Al-Bashir under South African and International Law", *Journal of International Criminal Justice* 13 (2015) 1027 at 1041.

"By requiring a State to co-operate fully, the Security Council creates the same situation as was described in section 21.5.1: the Security Council has subjected the state to a regime which overrides its immunities. The obligation to 'co-operate fully' imposes obligations identical to those of a State Party."¹⁵ (our emphasis)

28. Other scholars who subscribe to the same view include Akande,¹⁶ De Wet¹⁷ and Sluiter.¹⁸
29. The government of the RSA has previously argued that the Resolution 1593 does not impose any binding duties on South Africa because it has consistently been interpreted to impose binding duties only on Sudan and the other state parties to the conflict in Darfur. That misses the point. Resolution 1593 is binding on Sudan and obliges it to *"co-operate fully with and provide any necessary assistance to"* the ICC and its prosecutor. It necessarily strips Sudan of any ability to afford any immunity to President Al Bashir by virtue of his office. Neither Sudan nor President Al Bashir can use Sudan's non-membership of the ICC to resist arrest and prosecution by the ICC.

The ICC rulings are binding on RSA

30. The ICC has repeatedly and emphatically ruled that President Al Bashir does not enjoy any immunity from arrest and surrender to the ICC and that RSA is duty-bound to act in terms of its obligations under the Statute. RSA is bound by these rulings, both under the Statute and its domestic law.
31. RSA's duty to comply with the ICC's warrants for President Al Bashir's arrest and surrender, and subsequent request of its member states to provide it with assistance in giving effect to those warrants, arises, in the first place, under article 87(7) of the Statute.

¹⁵ Cryer et al *An introduction to International Criminal Law and Procedure* 3rd ed 559 to 560.

¹⁶ Akande, "The legal nature of the Security Council referrals to the ICC and its impact on Bashir's immunities" (2009) 7 *Journal of International Criminal Justice* 333, p 17; Akande "The effect of Security Council resolutions and domestic proceedings on state obligations to co-operate with the ICC", *Journal of International Criminal Justice* 10 (2012) 299 at 305 to 311.

¹⁷ De Wet "The implications of President al-Bashir's visit to South Africa for International and Domestic Law", *Journal of International Criminal Justice* 13 (2015) 1049 at 1057 to 1063.

¹⁸ Sluiter "The surrender of war criminals to the International Criminal Court" 15 *Loy.L.A. International and Comparative Law Review* 605 (2003) at 610.

32. A state party that believes that a suspect may be protected by immunity owed to a third state may raise the matter with the ICC under article 98. The article, however, leaves it to the ICC to determine whether there is any immunity standing in the way of compliance with its request; not the state raising the question of immunity. If the matter is in dispute, the ICC is the sole arbiter of the dispute under article 119(1) of the Statute. The ICC put it as follows in the Congo case:

"(T)he DRC disregarded the fact that the Court is the sole authority to decide whether or not the immunities generally attached to Omar al- Bashir as a sitting head of state were applicable in this particular case. This conclusion finds support in article 119(1) of the Statute".¹⁹ (our emphasis)

33. The ICC rulings are also binding on the Government of the RSA under South African domestic law. Section 7(1) of the Implementation of the Rome Statute of the International Criminal Court Act, 2002 ("**the ICC Act**") (which gives effect to the Statute in South African domestic law), states that the ICC "*has such rights and privileges of a South African Court*". An essential right of a South African court is to issue orders that are binding on the state as well as other persons; a right which section 165 of the RSA Constitution fortifies.²⁰ It means that, by virtue of section 7(1) of the ICC Act, the order of the Pre-Trial Chamber obliging the arrest of President Al Bashir is binding on the government of the RSA.
34. The ICC's decisions are also binding under South Africa's common law. In the only instance where South African courts were confronted with the implementation of a binding international judicial decision in South Africa, the Constitutional Court developed the common law to give effect to the decision because there was not yet any adequate statutory framework in place.²¹ While the case was concerned with the recognition of the decisions of the Southern African Development Community Tribunal ("**SADC Tribunal**"), the Constitutional Court, South Africa's highest court, held that the development applies to all international courts to which the RSA is a party by treaty:

"It follows from the requirements listed in Purser v Sales that the South African common law on the enforcement of foreign civil judgments was, thus far, developed

¹⁹ ICC decision on the co-operation of the Democratic Republic of the Congo regarding President Al- Bashir's arrest and surrender to the ICC, 9 April 2014 at para 16.

²⁰ Section 165(5) of the RSA Constitution provides that "*An order or decision issued by a court binds all persons to whom and organs of state to which it applies.*"

²¹ See *Government of the Republic of Zimbabwe v Fick* (657/11) [2012] ZASCA 122; *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) ("**Fick**").

to provide only for the execution of judgments made by domestic courts of a foreign state. It does not apply to the enforcement of judgments of the Tribunal and there is no other legal provision for the enforcement of such decisions in our country, This then gives rise to the need to develop the common law of South Africa in order to pave the way for the enforcement of judgments or orders made by the Tribunal. This development of the common law extends to the enforcement of judgments and orders of international court or tribunals, based on international agreements that are binding on South Africa."²² (our emphasis)

35. It is clear that this development also applies to the orders of the ICC.²³
36. At a minimum, South African courts must interpret existing legislation (the ICC Act) in line with the ICC's binding judicial decisions as far as reasonably possible. The only credible way to do so is to interpret the ICC Act (including section 10(9) and section 4) as obliging cooperation with the ICC in respect of President Al Bashir's arrest and surrender.
37. To the extent that the government of the RSA argues that it was not obliged to arrest and surrender President Al Bashir by virtue of South African domestic law, these arguments fall to be rejected. In fact, as explained further below, the RSA Constitution, properly interpreted, obliged the government of RSA to arrest, detain and surrender President Al Bashir to the ICC. The SCA judgment has, in any event, concluded that the government of the RSA's failure to arrest President Al Bashir was unlawful.

The Genocide Convention and waiver of immunity

38. The HSF intends to submit, to the extent necessary, that by virtue of Sudan's accession to the Genocide Convention (on 13 October 2003),²⁴ Sudan has waived the immunity of President

²² Fick at para 53, emphasis added.

²³ See Fick at para 54: "The development of the common law revolves around the resolution of the question whether the concept of "foreign judgment or order" ought also to apply to a judgment of the Tribunal. What would help us to solve this issue is the answer to the question, "what was the mischief sought to be addressed by developing the common law to empower our domestic courts to enforce or facilitate the execution of orders made outside the borders of our country?" It appears to me that that development was driven by the need to ensure that lawful judgments are not to be evaded with impunity by any State or person in the global village." And para 55: "This finds support from the two reasons advanced in *Richman v Ben-Tovim* for the existence of the law on the enforcement of judgments of foreign courts. First, enforcement is what is required by the "exigencies of international trade and commerce" and second, because "not to do so might allow certain persons habitually to avoid the jurisdictional nets of the courts and thereby escape legal accountability for their wrongful actions." And para 66: "When courts are required to develop the common law or promote access to courts, they must remember that their "obligation to consider international law when interpreting the Bill of Rights is of pivotal importance." This is an obligation imposed on them by section 39(1)(b) of the Constitution. Measures to be taken by this Court in fulfilling its obligations in terms of sections 34, 8(3) and 39 of the Constitution, in relation to this matter, are to be informed by international law, as set out in the Amended Treaty, which obliges South Africa to facilitate the enforcement of decisions of the Tribunal."

²⁴ See https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&clang=_en. South Africa is

Al Bashir. The Genocide Convention is applicable to this matter as the ICC issued the arrest warrant for President Al Bashir on 12 July 2010 on three counts of genocide.

39. Given the terms of the Genocide Convention and in particular Articles I, III, IV, V and VI, it is clear that Sudan, as a state party to the Convention, has accepted that: (a) any of its officials charged with committing genocide (including its head of state) shall be tried by the ICC and if convicted punished, since the Security Council has referred the situation in Darfur to the ICC in the exercise of its Chapter VII powers;²⁵ and (b) other state parties to the Genocide Convention (such as South Africa) would be obligated to arrest and surrender any person in their territory charged with genocide by the ICC (including any heads of state).²⁶
40. The government of the RSA has previously argued that section 4(1) of Diplomatic Immunities and Privileges Act, 2001 ("**DIPA**") provided and gave effect to immunity for President Al Bashir in South African law and that it was thus obliged to respect this immunity and not to arrest and surrender President Al Bashir. To the extent the government of the RSA argues that section 4(1) of DIPA (which provides immunity to a head of state from criminal and civil jurisdiction of the Courts of South Africa), or any other law, provides immunity to President Al Bashir as a head of state, the HSF submits, quite separately, that by virtue of Sudan's accession to the Genocide Convention it has waived this immunity (including in terms of, *inter alia*, section 8(1) of the DIPA) and President Al Bashir does not enjoy immunity from arrest and surrender to the ICC.
41. This argument is supported by South African constitutional jurisprudence. In *Government of the Republic of Zimbabwe v Fick and Others* ("**Fick**"), the Constitutional Court of South Africa found that Zimbabwe's agreement to be bound by an international agreement (the SADC Tribunal Protocol) that recognised an obligation on Member States (including South Africa) to make the decisions of an international tribunal enforceable in the territories of Member States, constituted an express waiver in terms of section 3(1) of the Foreign States Immunities Act ("**FSIA**") of Zimbabwe's immunity under that Act.²⁷

also a party, having acceded on 10 Dec 1998.

²⁵ Resolution 1593.

²⁶ See D Akande, *The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities*, 7 *JICJ* 333 (2009) at 349-351, referring to and relying on the International Court of Justice decision in *Application of the Convention on the Prevention and Punishment of Genocide (Bosnia Herzegovina v. Serbia & Montenegro)* 2007 ICJ Reports at paras 439-450.

²⁷ *Fick* at paras [32]-[35]. We note, as an aside, that this was in circumstances where the international tribunal was suspended. This Court found that the obligations and duties created at the time the enforceable order was given by the international tribunal continued to exist. Provided that the international tribunal in question was competent to hear the case and grant the order, as a State Party, South Africa was obliged to give effect thereto (see paras 90-92). That reasoning strengthens the duty to arrest with respect to the ICC: South Africa was, and is, obliged to act.

42. Section 8(1) of the DIPA, for example, which is in similar terms to section 3(1) of the FSIA, provides that "[a] sending State, the United Nations, any specialised agency or organisation may waive any immunity or privilege which a person enjoys under this Act."
43. The obligations of Sudan and the RSA to punish heads of state who commit genocide, and to ensure those charged with genocide are tried by an international criminal court having jurisdiction, are framed in stronger and clearer terms than the terms of the SADC Tribunal Protocol. The Constitutional Court, however, found the latter to constitute an express waiver of immunity by Zimbabwe in *Fick*. Sudan's accession to the Genocide Convention therefore certainly constitutes a waiver, of President Al Bashir's immunity from arrest and surrender to the ICC for the commission of genocide in terms of section 8 of DIPA.
44. First, the ordinary meaning of the relevant provisions of the Genocide Convention, read within their context and in light of the purpose of the Convention, make clear that personal immunity is removed.²⁸ Article I commits the state parties "to prevent and to punish" genocide. Article IV commits state parties to ensuring the "punishment" of persons who "are" (not "were") "constitutionally responsible rulers" (as opposed to a more limited recordal that their position does not relieve them of responsibility for genocide). The state parties thereby accept that all impediments (including both procedural and substantive immunity) to the punishment of heads of state for committing genocide are waived. This is also endorsed by Article VI, which makes provision for the trying of persons charged with genocide, regardless of position or status.
45. Further, at least in the case of President Al Bashir, the effect of Sudan's accession to the Genocide Convention is to remove any immunity that would preclude him from being arrested and surrendered by the RSA (another state party to the Genocide Convention) to the ICC, which is an international penal tribunal that has jurisdiction and which has issued an arrest warrant for his trial for genocide.
46. Second, international law experts support the plain meaning interpretation of the Genocide Convention – that it removes personal (*ratione personae*) immunity. Prof Akande (Professor of Public International Law at the University of Oxford, and an expert on issues of immunity and international crimes) states that:

²⁸ Article 31(1) of the Vienna Convention on the Law of Treaties provides that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

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"Since, according to the ICJ's logic,²⁹ states parties to the ICC Statute have an obligation to cooperate with the ICC when persons wanted for genocide are on their territory, and since Article IV of the Genocide Convention provides that even heads of state and public officials are to be punished, it could be argued the Genocide Convention imposes an obligation on ICC states to arrest those wanted for genocide, even if they are the head of state. This argument bypasses somewhat the application of Article 27 of the ICC Statute and the question of whether Sudan is to be regarded as in the position of a party to the ICC Statute. Here the obligation of ICC parties to arrest is based on the acceptance of the ICC's jurisdiction by that party and the imposition of ICC jurisdiction on Sudan. Furthermore, the removal of immunity is based on the acceptance of the Genocide Convention by the arresting party and by Sudan." ³⁰ (our emphasis)

47. Prof Sluiter (Professor of International Criminal Procedure, University of Amsterdam) opines as follows:

"In my view, the question of head of state immunity for Al-Bashir loses relevance when the arrest is also grounded in treaty relations between the arresting state and Sudan, namely Article VI of the Genocide Convention. That particular provision obliges a contracting party to the Convention to ensure a trial at the ICC of a person charged with genocide. There is no exception of immunity set out in the Genocide Convention; Article VI, it can be said, applies to all persons charged with genocide. This interpretation also follows logically from Article IV of the Genocide Convention:

Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

It is worth mentioning that in its recent interpretation of Article VI, the ICJ³¹ did not address any issue of immunity as being relevant to the reciprocal obligations parties hold under Article VI. The problem of third-party effect does not arise in the application of Article VI to the Al-Bashir case, because Sudan is a party to the Genocide Convention. Bearing in mind that the Genocide Convention intends punishment of all perpetrators of genocide, no individual is exempt from the scope of application of

²⁹ Referring to *Application of the Convention on the Prevention and Punishment of Genocide* supra.

³⁰ D Akande, *The Legal Nature of Security Council Referrals to the ICC and its Impact on Al-Bashir's Immunities*, 7 *JICJ* 333 (2009) at 351.

³¹ Referring to *Application of the Convention on the Prevention and Punishment of Genocide* supra.

Article VI. As a result, a contracting party to the Genocide Convention arresting Al-Bashir and surrendering him to the ICC, in compliance with Article VI, violates no rule of international law in relation to Sudan. On the contrary, that state complies with its obligations under the Genocide Convention."³² (our emphasis)

48. Furthermore, there is direct judicial authority for the proposition that the Genocide Convention constitutes an express waiver of personal immunity (in addition to the indirect authority by the ICJ, referred to by Professors Akande and Sluiter). In *Pinochet 3*, Lord Phillips held that:

"Where states, by convention, agree that their national courts shall have jurisdiction on a universal basis in respect of an international crime, such agreement cannot implicitly remove immunities ratione personae that exist under international law. Such immunities can only be removed by express agreement or waiver. Such an agreement was incorporated in the Convention on the Prevention and Suppression of the Crime of Genocide 1948, which provides: 'Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials, or private individuals.'"³³ (our emphasis)

49. Finally, with regard to RSA domestic law, the Constitution prescribes that all legislation must be interpreted in accordance with the Constitution and to give effect to its fundamental values (including the rule of law). In addition, any interpretation of South African legislation must favour the interpretation that gives best effect to the spirit, purport and objects of the Bill of Rights in the RSA Constitution.³⁴ With regard to section 8 of DIPA, the most constitutionally effective and consistent interpretation is that where officials of countries bound by the Genocide Convention are charged with genocide, those countries expressly waive the personal immunity of their officials (including heads of state) from arrest and surrender to the ICC when it has jurisdiction.

³² G Sluiter, 'Using the Genocide Convention to Strengthen Cooperation with the ICC in the Al-Bashir Case' (2010) 8(2) *Journal of International Criminal Justice* 365, 379-80. See also M Gillett, 'The Call of Justice: Obligations Under the Genocide Convention to Cooperate with the International Criminal Court' (2012) 23(1) *Criminal Law Forum* 63 (Matthew Gillett is a Legal Officer in the Office of the Prosecutor at the International Criminal Tribunal for the Former Yugoslavia (ICTY))' and, more generally, R Van Alebeek, *Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (OUP, Oxford 2007) at 293.

³³ *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte* (No. 3) [2000] 1 AC 147 (*Pinochet No 3*) at 289.

³⁴ See *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) ("*Hyundai*") at para 22; and *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC) at paras 46, 47, 84, and 107; see also *Fraser v Absa Bank Ltd* 2007 (3) SA 484 (CC) at para 47; and *Laugh It Off Promotions CC v SAB International (Finance)* 2006 (1) SA 144 (CC) at para 48.

50. In the circumstances, Sudan's accession to the Genocide Convention constitutes an express waiver in writing of the immunity and privileges of President Al Bashir from arrest and surrender to the ICC on the charge of genocide.

The government of the RSA's obligations under the RSA Constitution, read with domestic legislation

51. The HSF is of the view that, properly interpreted, the RSA Constitution obliged the government of the RSA to arrest, surrender, detain and/or prosecute President Al Bashir. The SCA judgment is consistent with this view.
52. The RSA Constitution is the supreme law of the RSA, and any law or conduct inconsistent with it is invalid.³⁵
53. The RSA Constitution imposes special obligations on the Government of the RSA in respect of international crimes. The RSA Constitution has a strong emphasis on human rights and the empowerment of communities abused by tyranny. Moreover, the government of the RSA has especial constitutional obligation to protect, promote, fulfil and advance each of the rights in the Bill of Rights.³⁶
54. The South African constitutional democratic state was born out of negotiations that brought to an end a crime against humanity: apartheid. Its existence is essentially bound up with its rejection of crimes of this nature. These crimes undermine post-apartheid South Africa's existence as a community that is "*founded on [the value of] human dignity*" and is "*united in [the] diversity*" of its people.³⁷ Permitting persons accused of serious international crimes (whatever their official status) to escape justice with impunity when in South Africa is antithetical to those values and obligations.

³⁵ Section 1(c) of the Constitution

³⁶ See sections 7 and 8 of the RSA Constitution

³⁷ The preamble of the RSA Constitution:

"We, the people of South Africa,

Recognise the injustices of our past;

Honour those who suffered for justice and freedom in our land;

Respect those who have worked to build and develop our country; and

Believe that South Africa belongs to all who live in it, united in our diversity.

We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to-

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;

Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;

Improve the quality of life of all citizens and free the potential of each person; and

Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations."

55. International crimes are an affront to dignity and humanity. Thus, they entail a violation of section 10 of the RSA Constitution, which provides that everyone has "*the right to have their dignity respected and protected*".
56. The presence of President Al Bashir in South Africa violated sections 12(1)(c), 12(1)(d) and 12(2) of the RSA Constitution, for it constituted a threat to the physical and/or psychological integrity of all persons living or residing in the RSA. This threat is heightened in respect of every person who was subjected to and/or escaped persecution by the person accused of international crimes, as well as all relatives and friends of a persecuted person, many of whom would have fled to the RSA as a human rights haven.
57. Moreover, by virtue of section 232 of the Constitution, which provides that "*[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament*", international crimes are crimes in RSA. In our view, every person accused of these crimes is thus a suspect in the RSA. In recognition of the status of international crimes, the government of the RSA has a constitutionally-sourced power and duty to detain and/or arrest alleged perpetrators of these crimes who come within the territory of the RSA.
58. In other words, the HSF submits that the South African government's duty to detain, arrest and/or prosecute persons who have committed heinous international crimes is not created solely by international law (although international law reinforces this duty) or by domestic legislation (although domestication of the Statute through the ICC Act does recognise, concretise and particularise this duty).³⁸ The duty also emanates from the structure, text and values of the RSA Constitution itself.
59. This is consistent with the Constitutional Court of South Africa's findings in *National Commission of The South African Police Service v Southern African Human Rights Litigation Centre*, where a unanimous court held that: "*Along with torture, the international crimes of piracy, slave-trading, war crimes, crimes against humanity, genocide and apartheid require states, even in the absence of binding international-treaty law, to suppress such conduct because 'all states have an interest as they violate values that constitute the foundation of the world public order'*".³⁹ The Court also held that this duty exists even when these crimes are

³⁸ The government of RSA has also promulgated the ICC Act, incorporating the Statute in domestic law 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*"

³⁹ *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* 2015 (1) SA 315 (CC) at para [37].

committed outside of the territory of South Africa, by a foreign national and/or against foreign nationals.⁴⁰ For the purposes of the RSA Constitution, these crimes are committed in South Africa, which, had they been so committed, obligates the government of South Africa to arrest and surrender the accused perpetrators to the relevant authority for prosecution.

60. In the absence of significant constitutionally cognisable reasons justifying non-compliance with this duty, the Government of the RSA must take reasonable steps to detain, arrest and/or prosecute sitting heads of state who have committed war crimes, crimes against humanity and/or genocide where those persons are physically in South Africa or their presence is reasonably apprehended.
61. This duty extends to sitting heads of state.
62. The Government of RSA has argued that section 4(1) of DIPA provided and gave effect to immunity for President Al Bashir in South African law and that RSA was thus obliged to respect this immunity and not to arrest and surrender President Al Bashir. Even if this argument was correct,⁴¹ any international or domestic rule, law, policy or action that establishes a procedural bar to the detention, arrest and/or prosecution of heads of state in cases of alleged crimes against humanity, war crimes and genocide is inconsistent with the RSA Constitution, which is the supreme law of the RSA. All exercise of state power is subject to constitutional control in the RSA, including matters involving foreign policy and foreign relations.⁴²
63. The HSF submits that, properly interpreted, the RSA Constitution condemns international crimes and creates an obligation on the government to arrest, detain, surrender and/or prosecute persons accused of international crimes - even where the accused is a sitting head of state, and regardless of the status they may otherwise have enjoyed under customary international law. There is thus no defence, in international or domestic law which might excuse the actions of the Government of the RSA in allowing President Al Bashir to escape the RSA. This is also the conclusion reached in the SCA judgment, which stated that:

⁴⁰ At para [74] of *SALC*, the Constitutional Court states as follows: "The cornerstone of the universality principle, in general, and the Rome Statute, in particular, is to hold torturers, genocidaires, pirates and their ilk, the so-called hostis humani generis, the enemy of all humankind, accountable for their crimes, wherever they may have committed them or wherever they may be domiciled." An approach like the one adopted by the SAPS in the present case undermines that very cornerstone. Political inter-state tensions are in most instances virtually unavoidable as far as the application of universality, the Rome Statute and, in the present instance, the ICC Act is concerned."

⁴¹ The Supreme Court of Appeal judgment rejected this argument

⁴² *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC).

"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"

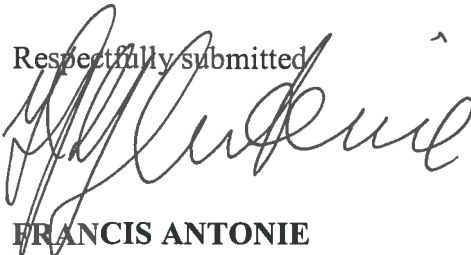
and

*"When South Africa decided to implement its obligations under the Rome Statute ... 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"*⁴³

Relief sought

64. For the above reasons, the HSF respectfully requests that the Chamber grant it leave to submit written and oral *amicus curiae* observations, pursuant to Rule 103, based on the above arguments, within a time limit determined by the Chamber.
65. *Alternatively* to paragraph 64 above, the HSF prays that the Chamber deem these submissions to constitute its written *amicus curiae* observations, pursuant to Rule 103, and that the HSF be permitted to make oral submissions, based on the above arguments, at the hearing of this matter on 7 April 2017.

Respectfully submitted

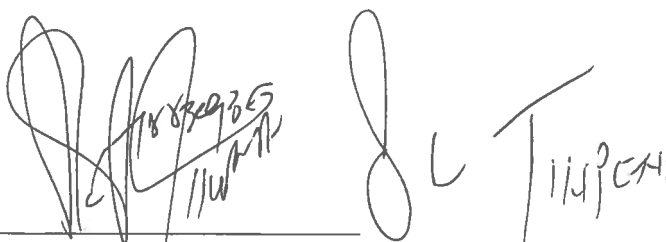


FRANCIS ANTONIE

Director of the Helen Suzman Foundation

Dated this 23rd day of February 2017

At Johannesburg, South Africa

⁴³ SCA judgment at paras 61 and 103.