IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO 22157/19

In the matter between:

MANUEL CHANG	Applicant
and	
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	First Respondent
FORUM DE MONITORIA DO ORCAMENTO	Second Respondent
THE REPUBLIC OF MOZAMBIQUE	Third Respondent
HELEN SUZMAN FOUNDATION	*Amicus curiae*

AND

CASE NO 24217/19

In the matter between:

FORUM DE MONITORIA DO ORCAMENTO	Applicant
and	
MANUEL CHANG	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
DIRECTOR OF PUBLIC PROSECUTIONS, GAUTENG LOCAL DIVISION, JOHANNESBURG	Third Respondent
ADDITIONAL MAGISTRATE, EKURHULENI NORTH: KEMPTON PARK	Fourth Respondent
THE REPUBLIC OF MOZAMBIQUE	Fifth Respondent
HELEN SUZMAN FOUNDATION	*Amicus curiae*

HEADS OF ARGUMENT OF THE HELEN SUZMAN FOUNDATION AS *AMICUS CURIAE*

INTRODUCTION

1. The HSF has been admitted as *amicus curiae* in the above matters under case numbers 22157/19 and 24217/19 ("**the proceedings**"). The HSF is a 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 our liberal constitutional democracy and to promote respect for human rights*".

2. In the proceedings:

2.1 the Minister of Justice and Correctional Services ("**the Minister**") seeks to:

2.1.1 review and set aside the decision of the former Minister of Justice and Correctional Services ("**the Former Minister**") to extradite Mr Manuel Chang ("**Mr Chang**") and cause him to be surrendered to the authorities of the Government of the Republic of Mozambique ("**Mozambique**"); and

2.1.2 remit the Former Minister's decision regarding the extradition and surrender of Mr Chang under section 11(a) of the Extradition Act 67 of 1962 ("**the Extradition Act**") to the Minister for reconsideration and determination within a period of

10 days after the judgment and order of this Court, or such other period as may be imposed by the Court.

2.2 the Forum de Monitoria do Orcamento ("**the Forum**") seeks to:

2.2.1 review both the decision of the Former Minister and the decision of the Additional Magistrate: Ekurhuleni North: Kempton Park ("**the Magistrate**") that Chang was extraditable to Mozambique.

2.3 Mr Chang seeks to enforce the decision of the Former Minister, and to direct that he be surrendered to the authorities of the Government of Mozambique.

3. The Minister and the Forum seek the review relief on the basis that the decision of the Former Minister is irrational and inconsistent with the Constitution, and the domestic, regional and international treaties to which the government of the Republic of South Africa is a party and bound.

4. The issues raised by the Minister and the Forum in the review applications deal with South Africa's obligations under the Constitution as well as international law (including both the United Nations ("**the UN**"), African Union ("**AU**") and the Southern African Development Community ("**SADC**") conventions, and under the Extradition Treaty between South Africa and the United States of America ("**the USA**")).

5. The HSF supports the review relief and provides additional argument regarding the constitutional and international law obligations of the Minister when dealing with competing extradition requests, and the

obligation on the Minister to take steps to set aside decisions of the Former Minister that are inconsistent with South Africa's constitutional obligations.

BACKGROUND TO THE APPLICATION

6. This application is the first time, as far as the HSF is aware, that there has been a legal challenge to the exercise of the Minister's power to extradite an individual to one of two "claiming" countries.

7. The USA and Mozambique have filed competing extradition requests in South Africa seeking the extradition of Mr Chang. The USA did so first under an existing US-South Africa extradition treaty, whereafter Mr Chang was arrested at OR Tambo International Airport on 29 December 2018.

8. Following Mr Chang's arrest, the Mozambique Government filed its request for extradition under the SADC Protocol on Extradition.

9. Both requests served before the Magistrate, who found, under section 10 of the Extradition Act that there was sufficient evidence to warrant the prosecution of Mr Chang under both the US and Mozambique requests, and committed Mr Chang to the Modderbee Correctional Facility, pending the decision of the Former Minister with regard to his surrender in terms of section 11 of the Act read with Article 11 of the SADC Protocol on Extradition.

10. The Former Minister was thus faced with a decision as to which request should be honoured: that of the USA or that of Mozambique.

11. The Former Minister favoured the request by Mozambique, and ordered the surrender of Mr Chang to the authorities of the Government of Mozambique on 21 May 2019 – a decision which is now challenged by both the Forum and the Minister in the proceedings, and which challenge is supported by the HSF.

12. The importance of this case in the international sphere is strengthened by an analysis of the serious charges which Chang is facing in the USA in relation to the alleged unlawful syphoning of donor funding meant for development projects in Mozambique – which is widely reported as amounting to some US$2 billion.[1] It is alleged that Mr Chang personally received millions of dollars in kickbacks for abetting the massive scheme that defrauded international aid investors of some $2 billion in loans purportedly for the purchase of fishing and military patrol vessels by the Mozambique government.[2]

13. Mr Chang was indicted by a Grand Jury in the United States District Court, Eastern District of New York, USA on 19 December 2018.[3] The indictment accuses Mr Chang of conspiring to defraud foreign investors to the tune of USD 2 billion during his tenure as Minister of Finance in Mozambique, and receiving kickbacks for his role in the scheme.[4]

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1 See for example the article "The Mozambican Debt Heist and its Conmen" which appears at Indexed papers, p. 871

2 USA Indictment documentation, Record 1750 at p. 1781

3 USA Indictment documentation, Record 1750 at p. 1781

4 The USA Indictment appears at Record, p. 1570

14. Several of his co-accused are facing prosecution in the USA for related crimes.[5]

15. Mr Chang does not currently face any indictment in Mozambique,[6] although the Mozambique government indicates that he is being "*investigated*".[7] There are also material limitations to Chang's successful prosecution in Mozambique.

OVERVIEW OF THE HSF's CONTENTIONS

16. The HSF contends that the exercise of public power by the Former Minister in this case falls short of the requirements of the Constitution and international law; and that the rule of law requires the decision to be reviewed and set aside.

17. The scourge of corruption and organised crime undermines the rights enshrined in the Bill of Rights, endangers the stability and security of society and jeopardises sustainable development, the institutions and values of democracy and ethical values, morality, the rule of law, and the credibility of government.[8] This is true both in South Africa and in our neighbouring countries, including Mozambique, which is also a developing country.

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5 Letter from the USA DOJ, 22 April 2019, Record p. 867 (Annexure VM20 to the Minister's Consolidated Answering Affidavit)

6 Minister's Consolidated Answering Affidavit, para 50.6.2, Record p. 723

7 Mozambique's extradition request appears at Record p. 1970

8 *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC) ; 2011 (7) BCLR 651 (CC) (17 March 2011) at para 57

18. In what follows the HSF addresses the legislative framework of the extradition process, the breadth and importance of South Africa's obligations under constitutional and international law to prevent and combat corruption, which are relevant to the proceedings, and other constitutional and international law considerations. These heads of argument deal with the following topics:

18.1 *First*, the necessary understanding of the interplay between the Constitution and international law, which provides the relevant framework to assess the extent of South Africa's duties regarding decisions to extradite, given the overlap between domestic and international law in extradition proceedings.

18.2 *Second*, South Africa's particularised duties in relation to corruption and how these fit into the constitutional framework.

18.3 *Third*, we deal with South Africa's extraterritorial obligations in relation to corruption.

18.4 *Fourth*, the impact of Mozambique's inability to give an undertaking to charge and prosecute Chang will be discussed.

18.5 *Lastly*, we deal with the importance of the Minister being permitted to review the decision of his predecessor.

19. In conclusion, we demonstrate that it was unlawful, irrational and unconstitutional for the former Minister to make the decision to extradite Chang to Mozambique taking into account South Africa’s constitutional and international law obligations.

THE DYNAMIC INTERPLAY BETWEEN THE CONSTITUTION AND INTERNATIONAL LAW IN EXTRADITION PROCEEDING AND THE CONSTITUTIONAL RESPONSIBILITIES OF OFFICIALS ON THE INTERNATIONAL PLANE

20. Extradition law is *sui generis*.[9] It relates to the delivery of an accused or a convicted individual to the state where he is accused, or has been convicted, of a crime, by the state on whose territory he happens for the time to be.

21. There is no general obligation under international law to surrender accused or convicted persons, and, in practice, international obligations to return criminals are sourced in bilateral or multilateral agreements between states.

22. South Africa has extradition agreements with both the US and Mozambique:

22.1 The Extradition Treaty between South Africa and the United States, signed on 16 September 1999 and which entered into force on 25 June 2001; and

22.2 The SADC Protocol on Extradition, which governs extradition between South Africa and Mozambique.

23. These extradition agreements create binding international obligations on South Africa.

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9 *Tucker v S* 2018 (1) SACR 616 (WCC) at para 18

24. In addition, extradition in South Africa is governed by the Extradition Act, 1962, which domesticates and operationalises extradition agreements ratified by South Africa.

25. The domestic law and international law dimensions of extradition law are thus inextricably linked. Extradition law "*straddles the divide between state sovereignty and comity between states and functions at the intersection of domestic law and international law*." [10]

26. The Extradition Act regulates the process for extradition from South Africa to another state. The process is divided into three phases:

26.1 The administrative phase (in which a formal diplomatic request is made from one state to another, and the suspect is arrested);

26.2 The judicial phase (in which a magistrate conducts an extradition enquiry to determine whether the minimum legal requirements for extradition of the suspect are fulfilled); and

26.3 The executive phase (where the Justice Minister makes a determination under section 11 of the Act whether or not to surrender the person for extradition).

27. In assessing the review applications brought by the Minister and the Forum, which are primarily aimed at the executive phase of the decision-

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[10] *President of the Republic of South Africa and Others v Quagliani, President of the Republic of South Africa and Others v Van Rooyen and Another; Goodwin v Director-General, Department of Justice and Constitutional Development and Others* (CCT24/08, CCT52/08) [2009] ZACC 1; 2009 (4) BCLR 345 (CC); 2009 (2) SA 466 (CC) (21 January 2009) at para 1

making process,[11] the HSF wishes to highlight that even so-called "*executive decisions*" involving the field of international relations are subject to the Constitution and the rule of law.

28. In a number of cases, the courts have considered such decisions, and have indicated that even the most political are not immune from legal challenge. Nor does the field of international relations provide a cloak which shields such decisions from judicial scrutiny.

29. In ***DA v Minister of International Relations and Co-operation*** ("***the Grace Mugabe matter***"),[12] the Democratic Alliance launched a judicial review of the Minister of International Relations' granting of immunity to Ms Mugabe, wife of the then President of Zimbabwe, Robert Mugabe. The immunity had been granted to shield Ms Mugabe from prosecution for the alleged assault of a South African women, Mr Engle, in Johannesburg.

30. The North Gauteng High Court (per Vally J) upheld the DA's challenge, holding that the Minister's decision to grant immunity to Ms Mugabe was contrary to customary international law and domestic legislation and finding that the Minister had "*committed an error of law*" which was "*fundamental and fatal*".[13] The decision was reviewed and set aside under both the common law and PAJA.[14]

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11 As set out above, the Forum also challenges the decision of the Magistrate

12 *Democratic Alliance v Minister of International Relations and Co-operation and Others* 2018 (6) SA 109 (GP)

13 The *Grace Mugabe matter* at para 42

14 The *Grace Mugabe matter* at para 42

31. In ***Minister of Justice and Constitutional Development v Southern Africa Litigation Centre*** ("***the Al Bashir matter***"),[15] the Southern Africa Litigation Centre challenged the failure of the South African Government to take steps to cause President Al Bashir of Sudan to be arrested when he attended the African Union (AU) Summit in June 2015 as unlawful and unconstitutional. The Government opposed the application on the basis that President Al Bashir enjoyed immunity from arrest as head of state and (before the High Court) because he had been granted "*temporary immunity*" under the hosting agreement for the AU Summit.

32. The Supreme Court of Appeal rejected the government's argument and held the government firmly to the Rome Statute, issuing a declaratory order that: "*the conduct of [the government] in failing to take steps to arrest and detain, for surrender to the International Criminal Court, the President of Sudan, Omar Hassan Ahmad Al Bashir… was inconsistent with South Africa's obligations in terms of the Rome Statute… and unlawful*".

33. In ***Law Society of South Africa and Others v President of the Republic of South Africa and Others*** ("**the *SADC Tribunal* matter**"),[16] the Constitutional Court found that the President's participation and the decision-making process and his decision to suspend the operations of the SADC Tribunal to be unconstitutional, unlawful and irrational. The

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15 *Minister of Justice and Constitutional Development v Southern Africa Litigation Centre* 2016 (3) SA 317 (SCA)

16 *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CCT67/18) [2018] ZACC 51; 2019 (3) BCLR 329 (CC); 2019 (3) SA 30 (CC) (11 December 2018)

relevant treaty had as one of its objectives the obligation to promote access to justice, democracy, human rights and the rule of law.[17] The relevant Protocol signed by the President took away a pre-existing right to access to the SADC Tribunal. The power to negotiate and sign the Protocol derived from section 231(1) of the Constitution. The question was thus whether section 231(1) read with the Bill of Rights and duly guided by a proper appreciation of the Constitution and binding international law, allowed the President to make the decision. The Court reiterated that the Constitution is our supreme law and any conduct inconsistent with it is invalid and falls to be set aside.[18] The President was ordered to withdraw his signature from the Protocol in question.

34. In terms of the ***SADC Tribunal*** matter, decisions made in the international sphere by South African officials remain subject to and must be consistent with the Constitution. Such conduct is also subject to review on the grounds of legality and rationality for the same reason.

35. In ***Commissioner of Police v Southern African Human Rights Litigation Centre*** ("**the *Torture Docket* decision**"),[19] the South African authorities had taken a decision not to investigate serious allegations of torture committed by Zimbabwean officials in Zimbabwe. Civil society groups successfully challenged the constitutionality of the South African Police Service's decision not to investigate the allegations of torture. In its

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17 *Law Society* para [67]

18 *Law Society* para [72]

19 *Commissioner of Police v Southern African Human Rights Litigation Centre* 2015 (1) SA 315 (CC)

judgment, the Constitutional Court dismissed the defence that "*any investigation would be potentially harmful to South Africa – Zimbabwe relations on a political front*" arguing that these considerations were outweighed by the international law obligations upon South Africa.[20]

36. Similarly, in ***DA v the Minister of International Relations***, the DA and various civil society organisations relied on both procedural and substantive grounds to argue that the government's depositing of an instrument of withdrawal from the International Criminal Court, with the UN Secretary General, was unconstitutional and invalid. A Full Court of this Honourable Court upheld the applicants' argument that the absence of parliamentary involvement and approval in the executive act of withdrawal rendered the act unlawful. The Court ordered the government to revoke the notice of withdrawal that South African had deposited with the UN.[21]

37. Finally, in ***Earthlife***[22] the Court was called upon to determine whether the Minister of Energy's tabling of an intergovernmental agreement with Russia (the Russian IGA) before Parliament in terms of s 231(3) of the Constitution (which did not require Parliamentary approval), instead of s 231(2) (which did require such approval), was unconstitutional. The Russian IGA concerned the entering into of a cooperation treaty with Russia for the supply of nuclear energy, and involved the conduct of foreign sovereign states.

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20 *Torture Docket* decision at para 74

21 *DA v Minister of International Relations* 2018 (6) SA 109 (GP)

22 *EarthLife Johannesburg & Another v Minister of Energy & Others* 2017 (5) SA 227 (WCC)

38. The challenge brought by the applicants in ***Earthlife*** was against a domestic government respondent (the Minister of Energy) who had failed to comply with a domestic constitutional requirement (to table the Russian IGA before the South African Parliament under a specific section, which would have required Parliament's approval to make the agreement binding). If the Russian IGA had been tabled under the incorrect provision of the Constitution, s 172(1)*(a)* of the Constitution required the court to declare this unconstitutional. In ***Earthlife***, the High Court set aside the government's tabling of the international agreement between Russia and South Africa in relation to nuclear procurement under section 231(3) of the Constitution (which would make the agreement binding without parliamentary approval), after carefully considering the content of the agreement, and determining that it made substantive commitments that could only be made binding with the approval of Parliament.[23]

39. The government argued that the Russian IGA was non-justiciable as it involved foreign relations and determining the true agreement between two states. The Court accepted the applicants' arguments that the foreign relations concerns did not stand in the way of the Court considering and ruling on the domestic lawfulness of the South Africa Minister's actions in tabling the Russian IGA,[24] and set aside the IGA.

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[23] The Court held that such agreement had to be tabled under section 231(2) since it required parliamentary approval to be made binding

[24] Ibid paras 101–5

40. In sum, the case law shows that our courts will not hesitate to hold the government to account under the Constitution and international law, notwithstanding that the decision which is at stake is one involving the executive sphere of government in its diplomatic relationship with other states, or on the international plane. This is so particularly where the issue is one (as in this case) which relates to the lawfulness of a decision-maker's powers as judged against the standards of legality prescribed under the Constitution and under international law.

41. As set out above, in the assessment of the competing applications for Mr Chang's extradition, the Former Minister's conduct has both domestic and international components. The decision encompasses duties domestically in terms of the Extradition Act and internationally in terms of the SADC Protocol on Extradition and the bilateral treaty between South Africa and the US. Likewise, the reason for or the subject matter of the extradition decision involves corruption, in terms of which South Africa has duties domestically and internationally.

42. In addition to the direct legislative and treaty provisions relating to extradition, in making the decision, the Minister was also required to ensure that the state's obligations under the Constitution to ensure effective prosecution of crimes such as corruption were complied with.

43. The approach to assessing official conduct on the international plane in terms of the Constitution was succinctly summed up in the ***SADC Tribunal***

matter[25] as follows: In interpreting the Bill of Rights, courts are required to consider international law (section 39(1)(b) of the Constitution). Our Constitution also insists that the courts prefer a reasonable interpretation of legislation which is consistent with international law over any interpretation which does not accord with international law (section 233 of the Constitution). And unless otherwise inconsistent with our Constitution, customary international law is law in this country (section 232 of the Constitution).

44. The Court went on to state that implicit in this position is that consistency with our Constitution is a critical requirement for the acceptability and applicability of international law to our country. It is this framework that the Court found ineluctably ought to inform any approach to the assessment of official conduct in the international sphere.[26]

45. Referring to *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) ("***Fick***") and *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) ("***Glenister II***") the Court was of the view that a proper determination of the Constitutionality of the President's conduct required that several principles be taken into account.

45.1 *First*, the Bill of Rights is not only the cornerstone of our democracy, but also binds all arms of the State and applies to all law;

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[25] *Law Society of South Africa and Others v President of the Republic of South Africa and Others* 2019 (3) SA 30 (CC)

[26] *Law Society* para [5]; In addition, in *Glenister II* at para 97 the court in outlining these constitutional provisions, emphasised that our Constitution thus reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law

45.2 *Second*, the State has a constitutional obligation to protect, respect, promote and fulfil the Bill of Rights;

45.3 *Third*, the State has a duty to honour its international obligations and act consistently with that commitment and that extends to not undermining or subverting the authority of the Tribunal;

45.4 *Fourth*, international law that is reconcilable with our Constitution is an essential tool in ascertaining whether our constitutional obligations have been discharged and fundamental rights upheld;

45.5 *Fifth*, the Court recognised access to the Tribunal as an important instrument for the reinforcement on the constitutional right to access to justice in South Africa;

45.6 *Sixth*, the exercise of power must promote and seek to fulfil, rather that undermine, the rights in the Bill of Rights.[27]

46. These principles (with necessary alterations for the different context) are equally applicable to the Minister's conduct in this case due to the international nature of any decision to extradite. The Minister's conduct in the international sphere must thus be consistent with the Constitution.

47. The question is what obligations did the Minister have in terms of the Constitution when making the decision to extradite? These obligations will affect the lawfulness of his decision. For instance, on the authority of ***SADC Tribunal***, if the Minister had an obligation under the Constitution to

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[27] *Law Society* para [75]

ensure effective prosecution by Mr Chang for corruption but took inadequate steps to satisfy himself that effective prosecution would occur in Mozambique, then any decision to extradite would be unlawful, irrational and unconstitutional.

PARTICULARISED OBLIGATIONS UNDER PRECCA AND INTERNATIONAL AND REGIONAL DEVELOPMENTS

48. What then are South Africa's obligations in relation to ensuring effective investigation and prosecution of corruption?

49. Section 39(1) of the Constitution governs the interpretation of the provisions of the Bill of Rights, and provides that a court interpreting a provision of the Bill of Rights *must* consider (both binding and non-binding) international law and may consider foreign law. This is so to ensure that courts have due regard for the careful way in which the Constitution itself creates concordance and unity between South Africa's external obligations under international law, and their domestic legal impact.[28]

50. Section 233 of the Constitution requires the Courts to give effect to international law obligations through their powers of interpretation.

51. Accordingly, for the proper determination of this matter, it is appropriate to consider relevant foreign law, and necessary to consider relevant international law in order to determine the constitutional obligations on the

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[28] *Glenister II* at para 201. See too *National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre and Another* 2015 (1) SA 315 (CC) in which the Constitutional Court held that in light of South Africa's international and domestic law obligations, the South African Police Service has a duty to investigate crimes against humanity committed beyond our borders

Minster to ensure the proper prosecution of corruption. These obligations must then be taken into account in assessing whether the decision to extradite was constitutional.

52. The Prevention and Combating of Corrupt Activities Act, 2004 ("**PRECCA**") provides an indication of the substantial reach of South African government's obligation to fight corruption wherever it may occur.

53. The Preamble to PRECCA states that the Act seeks to provide for the strengthening of measures to prevent and combat corruption and corrupt activities and, specifically, to provide for extraterritorial jurisdiction in respect of the offence of corruption and offences relating to corrupt activities.

54. Section 35 of PRECCA provides that "*[e]ven if the act alleged to constitute an offence under this Act occurred outside the Republic, a court of the Republic shall, regardless of whether or not the act constitutes an offence at the place of its commission, have jurisdiction in respect of that offence if the person to be charged*". This jurisdiction applies, *inter alia*, to persons arrested in the territory of the Republic.

55. The Act thus seeks to place obligations on South Africa for the prosecution of corruption, even where the offence was committed outside the Republic. PRECCA recognises an international component to corruption and seeks to place greater duties on South Africa for its persecution. The

importance of the prevention and combatting of corruption have been recognised in cases such as ***Glenister II***.[29]

56. South Africa's international commitments when it comes to investigating and prosecuting corruption are recognised in a number of international instruments. For ease of reference, the HSF will ensure that a bundle of the relevant extracts of these international instruments is available at the hearing of the application.

57. Important international instruments regarding the international crime of corruption include the following:

57.1 The UN Convention Against Corruption, to which South Africa is a party and which came into force in 2005. Under the UN Convention against Corruption, members are required to take steps to prevent corruption, criminalise corruption[30] and cooperate with other countries in the fight against corruption.[31] The Convention requires state parties to promote active participation of individuals and groups,

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29 See too *S v Shaik and Others* 2008 (5) SA 354 (CC) at para 72 where the Constitutional Court warned that corruption is "*antithetical to the founding values of our constitutional order*." Similarly, in *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC) at para 4 the Constitutional Court held that— *"[c]orruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic State*."

30 Articles 5 and 6 of the UN Convention against Corruption

31 Chapter IV deals with "International Cooperation". See in particular Article 43 and 44 (dealing with extradition)

including civil society and community-based organisations in the prevention of and fight against corruption.[32]

57.2 The AU Convention against Corruption was adopted in 2003 and came into force in 2005. South Africa ratified the Convention in 2004. The AU Convention imposes a number of positive obligations, similar to the provisions in the UN Convention Against Corruption, on its members. The AU Convention requires signatories to establish, maintain and strengthen independent, national anti-corruption authorities or agencies to take effective steps to combat corruption.[33]

57.3 The OECD Anti-Bribery Convention. South Africa is not a member of the OECD, but has adopted the OECD Anti-Bribery Convention to which it became a party in 2007. The Convention establishes legally binding standards to criminalise bribery of foreign public officials in international business transactions. Under the OECD Convention, parties are required to take measures to establish that it is a criminal offence under their own laws for any person to offer a foreign public official any pecuniary or other advantage in order to obtain an improper benefit in international business. Parties to the Convention are required to ensure that bribery of foreign public officials is punishable by effective, proportionate and dissuasive criminal sanctions.

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[32] Article 13 of the UN Convention Against Corruption

[33] Article 5.3 of the AU Convention

57.4 The SADC Protocol Against Corruption (2001). The SADC Protocol against Corruption provides for the prevention, detection and punishment of corruption;[34] as well as for cooperation between states to deal effectively with corruption.[35] It covers corruption in both the public and private sectors. The Protocol recognises that demonstrable political will and leadership are essential in the fight against corruption. It affirms the need to garner public support for initiatives to combat corruption.[36]

58. Corruption is clearly considered a transnational phenomenon requiring inter-state cooperation and effective eradication through concerted efforts of all actors in the community of nations and particularly those who have adopted (as South Africa has) the UN, AU, OECD and SADC conventions and protocols against corruption. South Africa is thus part of a global effort to eradicate corruption and has bound itself internationally and domestically to taking effective steps to investigate and prosecute corruption wherever it occurs.

59. There are also heightened obligations on state officials in respect of what Transparency International describes as "grand corruption" which occurs when a public official or other person deprives a particular social group or substantial part of the population of a state of a fundamental right or causes the state or any of its people a loss greater than 100 times the

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[34] Article 2 of the SADC Protocol

[35] Article 10 of the SADC Protocol; Article 9 deals with extradition

[36] Preamble to the SADC Protocol

annual minimum subsistence income of its people as a result of bribery, embezzlement or other corruption offence.[37] Transparency International records that grand corruption is a human rights crime and deserves adjudication and punishment accordingly.[38]

60. The offences of which Mr Chang stands accused in the US – the fraudulent syphoning of exorbitant sums of donor money away from the public benefit projects for which it was intended and into the pockets of a few[39] – are serious, and would amount to grand corruption.

61. The extraordinary nature of corruption and its often transnational character has been recognised in authoritative academic literature. For example see Starr S (2007) "Extraordinary crimes at ordinary times: international justice beyond crisis-situations" *Northwest Univ Law J* 101: 1257 to 1314, where high level corruption was described as often "*involv[ing] presidents, prime ministers, governors or high-level politicians who are able to hide their ill-gotten gains in foreign banks or use it to buy real estate in foreign jurisdictions*".[40]

62. Presently, there is no international or regional body that is able to take action against corruption. In an article by Richard Goldstone and Paul Hoffman, the writers refer to a Transparency International survey relating to corruption in Africa. In addition to highlighting the prevalence of

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37 Transparency International, "*Legal definition of Grand Corruption*", 19 Auust 2016, available at https://www.transparency.org/news/feature/what_is_grand_corruption_and_how_can_we_stop_it

38 *Ibid*

39 The US Indictment appears at Record, p. 1570

40 Starr p 1281

corruption in Africa, the article set out that there is currently no political will in African states to set up or support effective regional anti-corruption entities.[41] The types of entities that are required are those encompassing the characteristics and protections set out by the Constitutional Court in ***Glenister II***.

63. Indeed, the Forum has intervened precisely due to the need for corrupt Mozambican officials being effectively prosecuted in *fora* where accountability is likely to occur.[42]

64. The result is that it falls weightily upon a state, like South Africa, to ensure that its obligations to combat corruption are given proper effect.

65. In this context, there is an enhanced duty of the South African authorities to ensure that the scope for immunity is diminished and that no-one accused of serious acts of corruption falls between two stools from a jurisdictional perspective. South Africa's obligations extend beyond its boundaries and must, in its international relations, ensure that it does not act contrary to its duties to ensure effective investigation and prosecution of corruption – including when making decisions to extradite those persons charged with corruption.

66. On application of the principles in ***SADC Tribunal*** (set out in para 45 above):

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41 HSF Amicus Application, "FA3", p1336

42 The Forum's interest in the matter is set out from para 10 of the Forum's Affidavit, Record p. 78

66.1 The State had a duty to honour its international obligations and act consistently with that commitment and that extends to ensuring effective investigation and prosecution of corruption as part of any decision to extradite;

66.2 Ensuring South Africa acts in accordance with its international commitments is an essential tool in ascertaining whether South Africa's constitutional obligations have been discharged and fundamental rights upheld;

66.3 Our courts have held that ensuring effective investigation and prosecution of corruption is a constitutional duty;

66.4 Any exercise of power such as a decision to extradite must promote and seek to fulfil, rather than undermine, these duties. This must include that when any decision to extradite on corruption charges is made, the decision maker must be satisfied (and obtain the requisite undertaking) that there will be effective investigation and prosecution of corruption in the country to which the person is extradited.

67. The HSF thus submits that there was a duty on the Minister to take steps to give effect to South Africa's constitutional obligations to ensure effective investigation and prosecution for corruption in any decision to extradite Chang. This duty was heightened by the seriousness and international nature of the alleged corruption.

68. In terms of appropriate action to satisfy himself of the lawfulness of his decision, the Minister would have been required, for example, to approach

Mozambique to obtain the relevant facts and undertakings relating to effective prosecution. The fact that he did not properly take such steps, as is evident from the record,[43] renders the decision to extradite irrational, unlawful and unconstitutional. It falls to be remitted back to the Minister for reconsideration.

CORRUPTION, EXTRATERRITORIALITY AND THE DUTY TO ENSURE EFFECTIVE PROSECUTION

69. Both the Forum and the Minister suggest that at heart the matter is about corruption.[44] The corruption is committed against Mozambican citizens; not South Africans. This, however, does not mean that South Africa has no duties in relation to ensuring effective investigation and prosecution of corruption in relation to decisions of South African official. There are indeed constitutional obligations on South African officials to ensure effective combatting of corruption even where such corruption has occurred outside of South Africa and may not affect South African citizens.

70. We have already highlighted the extraterritorial nature of PRECCA and the variety of international instruments which are binding on South Africa. Those obligations take on a special function in a case such as the present. That is because, under the Constitution and supported by relevant case law, South Africa has extraterritorial obligations that it must adhere to when deciding whether or not to extradite a person charged with corruption to a specific country. South Africa's commitments to ensure

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43 The Minister's Decision containing the reasoning through which he came to his decision appears at Record p. 753

44 FMO Review Application FA para 18, p157; Minister's AA para 49, p717

effective prosecution of corruption requires it to ensure that, when making a decision to extradite, the country to which the person charged with corruption will be extradited has the necessary will and ability to prosecute the crime properly and successfully.

71. Although the South African courts have not dealt specifically with this duty in relation to corruption, the Constitutional Court has confirmed the principle in the context of international crimes more generally. The HSF submits that this principle is equally applicable to cases dealing with corruption committed abroad due to the international character of corruption and South Africa's extraterritorial commitments under PRECCA and the international instruments.

72. In ***Torture Docket***, the Constitutional Court had to determine whether, in light of South Africa's international and domestic law obligations, the SAPS has a duty to investigate crimes against humanity committed beyond our borders in Zimbabwe, by Zimbabweans, against Zimbabwean nationals, and if so, under what circumstances is that duty triggered.[45]

73. The Court demanded that South Africa take reasonable steps to ensure that persons accused of having committed crimes are detained, arrested and/or prosecuted in a forum that has jurisdiction over the alleged perpetrator and which has shown itself to be willing and able to prosecute. According to the Court, that duty was always to be considered on the

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[45] *SALC* para [21]

particular facts of a case,[46] and the duty was accentuated for South Africa in circumstances where "*our applicable legislative scheme, understood in the light of international customary law and other international obligations, places an obligation on our country through the SAPS to investigate crimes … committed outside our territory*";[47] and where "*it was very unlikely that the Zimbabwean police would have pursued the investigation with the necessary zeal in view of the high profile personalities to be investigated*".[48]

74. The same principle must be recognised in relation to the crime of corruption, even where that corruption is committed abroad. Thus, one of the relevant considerations which ought to have been taken into account in the Minister's decision in this case is whether Chang is likely to be prosecuted effectively in Mozambique. The Minister's duty to do so was heightened in order to ensure that no safe haven is provided for persons who commit corruption, and his duty was sharpened by the fact that our Constitution requires the Minister to appreciate that his obligations are of an extra-territorial nature, not only because of the nature of the crimes and where they were committed, but also in order to discharge South Africa's international law obligations under its Constitution.

75. In brief, thus just as there is a duty on the SAPS to investigate international crimes, even if they occurred in other states, there was a duty

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46 Para [63]

47 Para [61]

48 Para [62]. In that case it was alleged that six Cabinet Ministers and Directors General and the ruling party itself were implicated as suspects in the commission of these crimes against humanity

on the Former Minister to ensure that high level corruption will be effectively prosecuted, before making a decision to extradite. Both of these duties stem from the requirement of the Constitution, which include international law commitments.

76. The failure by the Former Minister to takes steps to ensure and satisfy himself that Chang's case would be effectively investigated and prosecuted in Mozambique renders the decision to extradite unlawful, irrational and unconstitutional.

THE INABILITY OF MOZAMBIQUE TO GIVE AN UNDERTAKING TO CHARGE AND PROSECUTE

77. There is a further basis for a finding of unlawfulness and irrationality.

78. Mozambique has stated in its papers that it was unable in terms of its law formally to charge Chang or make a decision to lift his parliamentary immunity without his presence in Mozambique.[49] Mozambique thus could not on its version give any written assurance to the Minister that there will be formal charging or effective prosecution of Chang. Without such an undertaking, the Minister could not have been reasonably satisfied that South Africa has complied with its duties under the Constitution and international law in deciding to extradite.

79. This situation is analogous to the obligation not to deport or extradite persons from South Africa to another country to stand trial for murder in

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[49] Mozambique AA paras 69 to 72, pp 984-987

the absence of a written assurance that the death penalty will not be imposed as set out in ***Tsebe***.[50] In that case, Mr Tsebe was deported to Botswana to stand trial for murder, without an undertaking from Botswana that the death penalty would not be imposed.[51]

80. The decision to deport Mr Tsebe was found to be unlawful by the Constitutional Court on the basis of South Africa's commitments in relation to the death penalty, and its failure to obtain an assurance from Botswana that the death penalty would not be imposed if Mr Tsebe were to be extradited.[52]

81. This case is analogous to ***Tsebe***. South Africa has constitutional duties to ensure the effective investigation and prosecution of corruption. In making a decision to extradite or deport, South Africa is bound by these obligations and the Minister taking the decision must be satisfied that the State to which a person charged with corruption is to be extradited will ensure that effective investigation and prosecution of that person will occur (and otherwise satisfy him/herself that effective investigation and prosecution will in fact occur).

82. South Africa is thus under an obligation not to deport or extradite Chang or in any way to transfer him from South Africa to Mozambique without satisfying itself that there is likely to be effective prosecution (including,

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50 *Minister of Home Affairs and Others v Tsebe and Others, Minister of Justice and Constitutional Development and Another v Tsebe and Others* 2012 (5) SA 467 (CC) ("***Tsebe***"). This judgment follows a prior Constitutional Court judgment in *Mohamed and Another v President of the Republic of South Africa and Others* 2001 (3) SA 893 (CC), which confirmed the State's clear constitutional duties.

51 *Tsebe* paras [9] to [14]

52 *Tsebe* para [43]

where appropriate, seeking relevant assurances). Should South Africa deport or extradite Chang without the requisite safeguards, this would be in breach of its obligations under the Constitution and international law.

83. The fact that such undertaking was not sought or given renders the decision to extradite unlawful, irrational and unconstitutional.

THE OBLIGATION ON A MINISTER TO "RIGHT THE WRONGS", AND THE STANDARD TO BE APPLIED

84. While the Forum instituted its own review application, the Minister's case for reviewing his own decision is of paramount constitutional importance.

85. This is the first time (that the HSF is aware of) that a Minister has sought to reverse the decision of his predecessor by way of self-review. It is an important tenet of the rule of law and accountability for such a challenge to be pursued in circumstances where material errors have occurred. As discussed above, the duties on the Minister are heightened in circumstances where allegations, and effective prosecution, of corruption are implicated.

86. The terrain of "self-review", where a body seeks to review its own decision, has been dealt with in the decisions of the Constitutional Court in ***Tasima I***,[53] ***Khumalo***,[54] ***Kirland***,[55] ***Aurecon,***[56] ***Gijima,***[57] and, most recently, ***Asla***.[58]

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[53] *Department of Transport v Tasima (Pty) Limited* 2017 (2) SA 622 (CC) ("***Tasima I***")

[54] *Khumalo v Member of the Executive Council for Education, KwaZulu Natal* 2014 (5) SA 579 (CC)

87. In ***Khumalo***, the Constitutional Court set out the principles underpinning the rule of law and the obligations of organs of state thus:[59]

> *"The rule of law is a founding value of our constitutional democracy. It is the duty of the courts to insist that the state, in all its dealings, operates within the confines of the law and, in so doing, remains accountable to those on whose behalf it exercises power. The supremacy of the Constitution and the guarantees in the Bill of Rights add depth and content to the rule of law. When upholding the rule of law, we are thus required not only to have regard to the strict terms of regulatory provisions but so too to the values underlying the Bill of Rights."*

88. Where an organ of state comes to the conclusion that a decision or action that has been taken fails to comply with these constitutional prescripts, the organ of state is both empowered and obliged to take steps to "*right the wrong*" through the medium of judicial review. In ***Khumalo***, the Constitutional Court held that "*The MEC's actions in seeking to rectify the irregularities that were brought to her attention must be viewed in this light – as a bold effort to fulfil her constitutional and statutory obligations to ensure lawfulness, accountability and transparency in her Department."*

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55 *Member of the Executive Council for Health, Eastern Cape v Kirland Investments (Pty) Limited t/a Eye and Lazer Institute* (3) SA 481 (CC) ("***Kirland***")

56 *City of Cape Town v Aurecon South Africa (Pty) Limited* 2017 (4) SA 223 (CC) ("***Aurecon***")

57 *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* 2018 (2) SA 23 (CC) ("***Gijima***")

58 *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC)

59 *Khumalo* at para 28

89. So too in this instance, the Minister's conduct in bringing this self-review is to be seen as a "*bold effort*" to ensure that the constitutional and international law obligations of the Republic are upheld.

90. The importance of self-review was recently reiterated by the concurring minority judgment of Cameron and Froneman J in ***Asla***,[60] which records that common law judicial review – the predecessor and part-ancestor of constitutional legality review – did not provide for self-review by state organs. The constitutional era claims that capacity for state organs. This is because its commitment to open, responsive and accountable government not only permits state self-review but places a duty on state officials to rectify unlawful decisions.[61]

91. The objective of self-review aligns with the obligations of public administration to promote open, responsive and accountable government.[62]

92. In this context, righting the wrongs of past decisions is not only permissible but essential in fulfilling the State's constitutional and international law obligations.

CONCLUSIONS

93. The HSF submits that the Former Minister had obligations under the Constitution to ensure effective investigation and prosecution of Chang for

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60 *Asla* at para 115

61 *Asla* at para 115

62 *Asla* at para 116

corruption. He was both required to take necessary steps to ensure that there would be effective investigation and prosecution and to obtain a relevant undertaking from Mozambique in relation thereto. The fact that this was not done renders the decision to extradite unlawful, irrational and unconstitutional.

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30 September 2019