IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NO: 867/2015

In the matter between:

THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND 11 OTHERS Applicants

and

THE SOUTHERN AFRICAN LITIGATION CENTRE Respondent

and

HELEN SUZMAN FOUNDATION Amicus curiae

***AMICUS CURIAE*'S HEADS OF ARGUMENT**

A. INTRODUCTION

1. The central issue in this appeal is whether the State had a duty to arrest President Al-Bashir when he visited South Africa in June 2015. The Helen Suzman Foundation submits that, in addition to and independent of the State's duty to arrest President Al-Bashir in terms of the Rome Statute and the Implementation Act[1], South Africa's Constitution obliged the State to make the arrest.

[1] The Rome Statute of the International Criminal Court; Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.

2. The Applicants argue that the State granted President Al-Bashir immunity in terms of section 4(1)(a) of the DIPA[2], which codifies the doctrine of immunity in customary international law in respect of any and all crimes that he committed as a head of state.[3] The Helen Suzman Foundation submits that in the first instance the plain meaning of the section does not support the Applicants' interpretation. Even if it did, however, we submit that to the extent that s 4(1)(a) of the DIPA purports to afford immunity to heads of state who *prima facie* appear to have committed crimes against humanity, war crimes or genocide, it must be read consistently with the Constitution (and read down to the extent necessary). Indeed, the significance of international crimes is underscored by the Republic of the Sudan's own accession to the Genocide Convention in October 2003. That act by Sudan also has the effect that any immunity which President Al-Bashir may otherwise have had, has been waived and this is a further reason why section 4(1)(a) of DIPA does not afford immunity to President Al-Bashir in this case.

B. SECTION 4(1)(a) OF THE DIPA

3. The Applicants rely on section 4(1) of the DIPA to argue that the State could not as a matter of law arrest President Al-Bashir when he visited. Section 4(1) provides:

> "A head of state is immune from the criminal and civil jurisdiction of the courts of the Republic, and enjoys such privileges as—
> (a) heads of state enjoy in accordance with the rules of customary international law;
> (b) are provided for in any agreement entered into with a state or government whereby immunities and privileges are conferred upon such a head of state; or

[2] Diplomatic Immunities and Privileges Act 37 of 2001.
[3] Applicants' heads of argument at paras [43]-[45] and [60].

(c) may be conferred on such head of state by virtue of section 7(2)."

4. According to the Applicants, section 4(1) codifies customary international law as part of our domestic statutory law[4] and confers on heads of state absolute immunity from criminal and civil jurisdiction of the courts of the Republic.

5. This interpretation, however, cannot be sustained for two reasons.

5.1 First, on a plain reading, section 4(1) does not provide heads of state absolute immunity. The introductory language of Section 4(1) merely defines the privileges afforded by the provision, while paragraphs (a)-(c) set out the requirements to enjoy these privileges. If heads of state have absolute immunity by virtue of the first clause of section 4(1), without more,the paragraphs that follow would be redundant. Interpretation by recourse to redundancy is generally repugnant to coherent interpretation.[5]

5.2 Secondly, section 4(1)(a), which refers specifically to privileges heads of state enjoy in accordance with the rules of customary international law, must necessarily be read together with section 232 of the Constitution.

6. Section 232 provides that '[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament'.[6] The requirement of consistency under section 232, properly interpreted, must be met both as to the Constitution *and* Acts of Parliament. Any reading of section 4(1)(a) must imply this limitation to the privileges conferred by customary international law. We submit that

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[4] Applicants' heads of argument at para [60].
[5] *Wellworths Bazaars Ltd v Chandlers Ltd* 1947 (2) SA 37 (A), 43.
[6] Emphasis added.

there is no other constitutionally consistent way to read the provision. To the extent necessary, this means that, section 4(1)(a) must be read down .Sitting heads of state enjoy immunity " in accordance with the rules of customary international law [insofar as these rules are consistent with the Constitution.".

7. This reading down would be in keeping with the rule of statutory interpretation requiring courts, where the wording of a statute permits it, to prefer a constitutionally compliant interpretation of legislation over ones that would render the legislation invalid.[7]

8. When section 4(1)(a) of the DIPA is read together with section 232 of the Constitution, even if the Applicants are correct that President Al-Bashir has immunity under customary international law, this is not the end of the matter. The State can only rely on the statute to afford President Al-Bashir immunity if the statute, properly interpreted, is consistent with the Constitution.

9. Our case is that no rule affords any person, including heads of state, absolute immunity from criminal prosecution under the Constitution, when that person is *prima facie* guilty of crimes against humanity, war crimes or genocide. In consequence, section 4(1)(a) should be interpreted to limit the rules of customary international law, to the extent that such rules are inconsistent with the Constitution.

C. CUSTOMARY INTERNATIONAL LAW AND SECTION 232

10. Two areas of customary international law are implicated when a government purports to afford immunity to a head of state who, *prima facie*, appears to have committed

[7] See *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO* 2001 (1) SA 545 (CC) at paras [21]-[25].

crimes against humanity, war crimes, and genocide. The first is the concept of international crimes. We submit that these crimes are crimes in South Africa by virtue of section 232 of the Constitution; fundamental values in the Constitution support this conclusion. The second is the doctrine of immunity. If any doctrine of absolute immunity exists, it does not withstand constitutional scrutiny.

i International crimes against humanity, genocide and war crimes

11. The Constitution imposes special obligations on the State in respect of international crimes. This is particularly the case having regard to the nature of crimes against humanity, genocide and war crimes. Crimes of this type violate the Constitution and the State has the power and duty to detain, arrest and, in appropriate circumstances, prosecute perpetrators of these crimes.

12. International crimes are crimes under customary international law and are thus crimes in South Africa. Indeed, the recognition of and protection against international crimes lies at the very core of our constitutional project. The Constitution has a strong emphasis on human rights and empowerment of communities which have been disempowered or abused by tyranny. The Constitution even imposes on the State substantive positive obligations to take steps to fulfil, protect and promote the rights in the Bill of Rights. Importantly, the Constitution was founded and formulated for the very purpose of rejecting crimes against humanity. The Constitution was also the embodiment of the desire of all South Africans to move away from a past characterised

by authoritarianism and systematic subjugation of the majority of South Africa's population as a result of apartheid, which is an international crime.[8]

ii The doctrine of immunity

13. Heads of state are afforded immunity under customary international law in order to facilitate efficient cooperation, communication and dealings between states, for the sake of promoting various economic, social, cultural and political interests.[9]

14. According to the International Court of Justice in the *Arrest Warrant Case*, immunity is not granted for the "personal benefit" of heads of state. Rather, it is granted "to ensure the effective performance of their functions on behalf of their respective States". These immunity rules exist, therefore, to allow the head of state to act as a representative of the state "in international negotiations and intergovernmental meetings". The doctrine of immunity accordingly serves important interests by facilitating efficient dealings between states. However, the essence of this pragmatic[10] justification is to cultivate the cooperation and communication that fosters the community of nations, not the protection of the individual. A head of state charged with international crimes is charged with undermining the very fabric of the community of nations. Therefore, the

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[8] In *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another* 2002 (3) SA 265 (CC), the Constitutional Court held (in a minority judgment) that the overall intention of the Constitution to foster a culture of justification. As stated in Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 31 at 32:

'If the new Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification — a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion.'

The Constitutional Court quoted this passage with approval in *South African Police Services v Solidarity OBO Barnard* 2014 (6) SA 123 (CC) at fn 220.

[9] See James Crawford (ed), *Brownlie's Principles of Public International Law* (8ed, 2012) 488-9; Chanka Wickremasinghe, 'Immunities Enjoyed by Officials of States and International Organizations', in M. Evans (ed.), *International Law* (2003) at 387-411; D Akanda and S Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' *Eur J Int Law* (2010) 21(4) 815-52, 818; and Michael Tunks, 'Diplomats or Defendants? Defining the Future of Head-of-State Immunity' (2002) 52 *Duke LJ* 651-82, 654-7.

[10] Crawford see note 15 at 488.

pragmatic justification for immunity no longer applies in these circumstances. Thus, to the extent it were to be found that the doctrine under customary international law provides for immunity for crimes against humanity, war crimes and genocide it goes beyond the bounds of what the Constitution recognises. This is so because the interests underpinning the doctrine are not permissibly served by actors against whom there is a *prima facie* case that they are perpetrators of international crimes.

15. Acts of the legislature and the national executive are not immunised from the discipline and control of the Constitution. Even matters such as foreign policy and foreign relations are nevertheless subject to constitutional control. In *Kaunda* Chaskalson CJ for the majority held that:

> "Decisions made by the government in these matters are subject to constitutional control. Courts required to deal with such matters will, however, give particular weight to the government's special responsibility for and particular expertise in foreign affairs, and the wide discretion that it must have in determining how best to deal with such matters."[11]

16. O'Regan J held[12] that "the executive is bound by the four corners of the Constitution" and is obliged to act consistently with the obligations imposed upon it by the Bill of Rights "whenever it may act."[13] In the same vein, Ngcobo J held[14] that where the government has a constitutional duty to consider a request for diplomatic protection and failed to do so, "it would be appropriate for a Court to make a mandatory order directing the government to give due consideration to the request. If this amounts to an

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[11] *Kaunda v President of the Republic of South* Africa 2005 (4) SA 235 (CC) at para [144].
[12] In a separate judgment.
[13] *Ibid* at para [228].
[14] In a separate judgment.

intrusion into the conduct of foreign policy, it is an intrusion mandated by the Constitution itself."[15]

17. Any law, policy or administrative action that recognises President Al-Bashir's immunity must therefore be subject to the Constitution. The separation of powers doctrine mandates, rather than prohibits, limited intrusion by the judiciary into the executive branch of government in these circumstances[16], even if it is merely to mark the outer boundaries of the executive's exercise of public power.

18. The nub of our submissions is that a rule that affords heads of state absolute immunity from criminal prosecution when they *prima facie* appear to have committed crimes against humanity, war crimes or genocide, transgresses the limits the Constitution places on legislation and customary international law.

D. THE LIMITS OF THE DOCTRINE OF IMMUNITY AND THE ENORMOUS SIGNIFICANCE OF CRIMES AGAINST HUMANITY

19. In *Kaunda* O'Regan J held[17] that:

> "[O]ur Constitution recognises and asserts that, after decades of isolation, South Africa is now a member of the community of nations, and a bearer of obligations and responsibilities in terms of international law. The Preamble of our Constitution states that the Constitution is adopted as the supreme law of the Republic so as to, amongst other things, 'build a united and democratic South Africa able

[15] *Ibid* at para [193].
[16] See *Glenister v President of the Republic of South Africa and others* 2009 (2) BCLR 136 (CC) at para [33].
[17] In a separate judgment.

> to take its rightful place as a sovereign State in the family of nations.'"[18]

20. In order for the rules pertaining to immunity to be consistent with the Constitution, it must affirm our political identity and membership within the community of nations as envisaged by the Preamble to the Constitution.

21. Crimes against humanity, war crimes and genocide violate not only the norms and rules of international law, but also the Constitution:

    21.1 These crimes are an affront to the dignity or humanity of South Africans. Thus, they entail a direct violation of section 10 of the Constitution, which provides that everyone has "the right to have their dignity respected and protected".

    21.2 The presence of President Al-Bashir in South Africa violates sections 12(1)(c), 12(1)(d) and 12(2) of the Constitution, for it constitutes a threat to the physical and/or psychological integrity of all persons living or residing in South Africa.[19] 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 South Africa as a human rights haven.[20]

    21.3 Allowing President Al-Bashir to escape arrest and detention also increases the risk of further international crimes being committed (all of which would also be recognised as crimes in South Africa). The State has a duty to prevent crimes

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[18] *Kaunda supra* note at para [222].
[19] *Law Society of South Africa v Minister for Transport* 2011 (1) SA 400 (CC) at paras [57]-[67].
[20] HSF founding affidavit at para [33.13].

from being perpetrated and has a positive duty to take all steps necessary to prevent this possibility.[21]

21.4 Perpetrators threaten international peace and security, and they violate the shared norms on which we interact with other nations of the world. Upholding these shared norms are foundational to the South African State.

21.5 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 truly international crimes of this nature. These crimes undermine its existence as a community that is "founded on [the value of] human dignity" and is "united in [the] diversity" of its people.[22]

22. Crimes against humanity, genocide and war crimes are unique.[23] Like ordinary crimes, crimes against humanity, genocide and war crimes do not only harm the immediate victims. They are collective crimes that harm us all. The nature of the 'us' that they harm is what distinguishes them from ordinary crimes. Whereas most crimes harm a particular polity, crimes against humanity, war crimes and genocide harm the dignity of the international community as a whole, South Africa as a nation, and each and every South African.

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[21] *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC); *Minister of Safety & Security v Carmichele* 2004 (3) SA 305 (SCA).

[22] Sections (1)(a) and the Preamble of the Constitution.

[23] Much of what follows in this section is drawn from David Luban, 'A Theory of Crimes Against Humanity' (2004) 29 *Yale International Law Journal* 85-167.

23. Thus, regardless of who commits a crime of this nature, where they commit it, or against whom they commit it, the crime harms all of us. The harm is not dependent on particular political ties, or community affiliation. They harm all people, everywhere.

24. The exceptionality of these crimes is obvious and imposes especial obligations on the State. As the Constitutional Court stated recently: "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'."[24]

25. Holding perpetrators of these crimes to account is essential to affirming and reasserting the existence, status and importance of the international community and of South Africa as a member of this community.

26. When perpetrators of these crimes are granted immunity and thus escape arrest and prosecution (and, in the case of President Al-Bashir, continue heading a nation-state) this will not deter further international crimes of this nature, including by the same perpetrator. The failure to detain, arrest and prosecute, therefore, aggravates the threat to the existence of the family of nations and to South Africa as a member of this family.[25]

27. Since these crimes threaten the existence of the international community as such, allowing the perpetrators of these crimes to act with impunity for so long as they hold

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

[25] The Preamble to the Constitution states as one of the purposes of the drafting and adoption of the Constitution the following: to "*[b]uild a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.*"

office undermines the purpose of granting heads of state immunity and is a threat to international security. It is difficult to conceive how the dealings between states—insofar as such dealings exist in a world where heads of state act with impunity—will achieve their economic, political, social and cultural purposes, and the Applicants do not suggest any.

28. In light of the above:

28.1 international crimes are crimes in South Africa[26];

28.2 they are of such an egregious nature that their commission and allowing alleged perpetrators of such crimes to avoid capture and prosecution constitute an affront to our constitutional framework; and

28.3 since the values underpinning the above conclusions are strongly supported by the history and the text of the Constitution, their force would not easily be displaced by any concepts (such as absolute immunity advanced by the State) undermining the efficacy of that recognition. This is so even if those concepts stem from the same body of law which gave rise to international crimes.

E. THE DUTY TO DETAIN AND ARREST

29. International crimes are crimes in international customary law and, by virtue of section 232 of the Constitution, crimes in South African law. Those listed in schedule 1 of the ICC Act are also statutory crimes in our national law through domestication of the

[26] *SALC* supra at paras [33] and [37].

Rome Statute.[27] They violate the Constitution and accordingly the State has a constitutional power and duty to detain and/or arrest perpetrators of these crimes.[28]

30. Any 'pragmatic'[29] justification for immunity (as described in paragraphs 13 - 14 above) will not in most circumstances negate the constitutional imperative that the State take reasonable steps to detain, arrest and/or prosecute perpetrators of crimes against humanity, war crimes and genocide. The essence of the pragmatic justification for immunity is the facilitation of the free movement of heads of state in order to cultivate the cooperation and communication that fosters the community of nations, not the protection of the individual. A head of state charged with international crimes is charged with undermining the very fabric of the community of nations. The justification for his immunity therefore no longer applies in these circumstances.

31. Unlike in *Kaunda*,[30] the State's exercise of its power to detain and arrest President Al-Bashir does not entail an extra-territorial application of the Constitution. In that case, South African citizens were arrested and detained in Zimbabwe and feared extradition to Equatorial Guinea. The applicants asked the South African courts to order the government to take action at a diplomatic level to ensure that the rights they claimed to have under the South African Constitution were respected by the foreign governments. The Court held that for South Africa to assume an obligation to take action to ensure that laws and conduct of a foreign State and its officials met not only the requirements

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[27] *SALC supra* note 14 at para [33]
[28] Sections 179 and 205 of the Constitution.
[29] Crawford see note 15 at 488.
[30] *Kaunda supra* note **Error! Bookmark not defined.**.

of the foreign State's own laws, but also the rights that South African nationals held under the Constitution, would be inconsistent with the principle of State sovereignty.[31]

32. The detention or arrest of perpetrators of international crimes who are in South Africa does not require the Constitution to reach "beyond our borders" and violate the principle of State sovereignty.[32]

33. As international crimes are crimes in South Africa, every person accused of these crimes is a suspect in the Republic. In recognition of the status of international crimes, the State has a constitutionally-sourced power and duty to detain and/or arrest alleged perpetrators of these crimes who come within the territory of South Africa.

34. This is consistent with the Constitutional Court's findings in *National Commission of The South African Police Service v Southern African Human Rights Litigation Centre*,[33] where a unanimous court held that the Constitution imposed a duty on the police to investigate the international crime of torture committed in Zimbabwe by Zimbabweans, [34] subject to whether it was reasonable on the facts of the case for the police to decline to investigate.[35] The source of the duty was s 205(3),[36] read with s 4(1) of the ICC Act and s 17D(1)(a) of the South African Police Service Act 68 of 1995.

35. It follows that the South African Police Service ("**SAPS**") has, in terms of s 205(3) of the Constitution, a duty to initiate an investigation when South Africa has ordinary

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[31] *Ibid* at para [44].

[32] *Ibid* at para [36].

[33] *SALC supra* note **Error! Bookmark not defined.**.

[34] *Ibid* at paras [55] – [56].

[35] *Ibid* at paras [61] – [64].

[36] Section 205(3) provides that "The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law."

nation-based jurisdiction or another forum that has jurisdiction is unable or unwilling to investigate and prosecute these crimes. It must undertake such an investigation when it is reasonable and practicable in the circumstances.[37] The *SALC* court held that SAPS has this duty even when these crimes were committed outside of the territory of South Africa, by a foreign national and/or against foreign nationals.[38] For the purposes of the Constitution, these crimes are committed against South Africa.

36. If its investigation—or the investigation of an authority that the State recognises as having investigative powers relating to these types of crime[39]—reveal *prima facie* evidence that someone has committed crimes against humanity, genocide or war crimes, the SAPS has a duty to take reasonable steps to detain or arrest this person.

37. Thus, the only defence available to the State in respect its failure to detain and arrest President Al-Bashir is an immunity which is of such a nature that it trumps the State's otherwise clear obligation to detain and/or arrest President Al-Bashir. This, indeed, is its only argument in this appeal.

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[37] *SALC supra* note **Error! Bookmark not defined.** at para [61].

[38] At para [74] of *SALC*, the Constitutional Court states as follows: "[a] second reason given was that any investigation [by the SAPS] would be potentially harmful to South Africa – Zimbabwe relations on a political front. **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."

[39] See section 14 of Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002. Part V of the Rome Statute of the International Criminal Court.

38. The State has advanced no justification for the claim of immunity in this case, let alone a convincing one. Such immunity is inconsistent with the Constitution and we therefore submit that no defence is available to the State by virtue of the proviso in section 232 of the Constitution.

F. THE PROPER APPLICATION OF SECTION 4(1)(a) OF DIPA AND WAIVER

39. In any event, in the circumstances of this case, section 4(1) of DIPA does not afford President Al-Bashir immunity by virtue of the acts of his own government. By virtue of the Republic of the Sudan's accession to the Genocide Convention[40] (on 13 October 2003),[41] it has in terms of section 8(1) of the DIPA waived the immunity of Al-Bashir under the DIPA from arrest and surrender to the ICC.

40. In *Fick* the Constitutional Court found that Zimbabwe's agreement to be bound by an international agreement that recognised an obligation on Member States 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.[42]

41. Section 8(1) of the DIPA, 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."

42. Given the terms of the Genocide Convention and in particular Articles I, III, IV, and V, it is clear that Sudan as a state party to the Convention, has accepted that any of its officials charged with committing genocide (including its head of state) by the ICC

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[40] Convention on the Prevention and Punishment of the Crime of Genocide.

[41] See https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&lang=en.

[42] *Government of the Republic of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC), paras [32]-[35].

must be tried by the ICC, since the Security Council has referred the situation in Darfur to the ICC in the exercise of its Chapter VII powers,[43] and that other states parties (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).[44]

43. The ICC has issued an arrest warrant for Sudan's head of state, Al-Bashir, including on three counts of genocide.

44. In the circumstances, in terms of section 8(1), read with 8(3), of the DIPA, Sudan's accession to the Genocide Convention constitutes an express waiver in writing of the immunity and privileges of Al-Bashir under the DIPA from arrest and surrender to the ICC on the charge of genocide.

G. COSTS RELATING TO THE *AMICUS* APPLICATION

45. On 24 December 2015, the Helen Suzman Foundation ("HSF") learnt that the record was lodged on 2 December 2015 and that the matter had been set down for hearing on 13 February 2016. The record was lodged almost four months prior to the due date for such lodging. Before 24 December 2015, HSF was unaware that a request was made for the matter to be heard on an expedited basis; it was also unaware that such a request had been granted.

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[43] Resolution 1593.

[44] 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; and 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 paras 439-450.

46. Immediately after it became aware of these facts, HSF wrote to the parties on 24 December 2015 requesting consent to be admitted as *amicus curiae*. HSF undertook to file written submissions simultaneously with the Respondent on 29 January 2016.

47. On 27 December 2015, the Respondent consented to HSF's admission. On 29 December 2015, the Applicants refused consent. They refused for the following reasons: (a) HSF's request was made "*unwarrantably late*"; (b) they would not be able to deal with HSF's submissions, which were not made before the court *a quo*; (c) HSF did not explain how its submissions would be useful to the Court and would be different from those of the Respondent; (d) HSF's submissions would burden the Court with "unnecessary . . . late argument" in an already expedited hearing; and (e) the Respondent is an NGO and had brought its application in this capacity, so there would be no purpose served by having another NGO involved.

48. None of these grounds for refusal is sustainable.

49. Having requested the Respondent to keep it updated on the progress of the matter, and being informed by it on 24 December 2015 that the record had been filed, HSF immediately requested the consent of the parties to be admitted as *amicus curiae*. There was no delay. In any event, under the Rules of this Court, HSF's application was only due by 2 February 2016.

50. HSF undertook to file its written submissions on 29 January 2016, on the same day as the Respondent—some two weeks before the matter was to be heard. There is no basis to contend, as the Applicants did, that this is insufficient time to address HSF's arguments. The Applicants have been aware of the outline of HSF's submissions since 24 December, 7 weeks before the hearing of this matter, 3 weeks before its submissions were due, and 6 weeks before its further written submissions are due.

51. HSF's request to be admitted made clear that its arguments are substantially different to those canvassed by the Applicants or Respondent. The Applicants contend that section 4(1) of the DIPA effectively and completely bars the arrest of President Al-Bashir. The Respondent says the State has the duty to arrest President Al-Bashir because of the provisions of the Implementation Act and the Rome Statute. Neither deals, in the way that HSF does, with the proper interpretation of section 4(1)(a) of the DIPA.

52. The submissions of HSF are directly relevant to the determination of this matter and, we submit, are of assistance to the Court. The importance of this matter—indeed, so important that its hearing has been expedited—for the rule of law, human rights and constitutionalism, clearly requires all relevant arguments to be ventilated before and decided by this Court. This outweighs any perceived prejudice on the part of the Applicants.

53. It was irrelevant to HSF's request for consent that the Respondent is an NGO. HSF is entitled to bring an application in its own interest and in the public interest. The test is whether it can show an interest in the matter, whether the submissions will be useful, and whether they are different from the submissions of the other parties. We submit that these submissions demonstrate that these requirements have been met.

54. HSF made clear the basis for its intervention on 24 December 2015, it has satisfied the test for admission as *amicus curiae*, and the Applicants have suffered no prejudice (nor was any prejudice reasonably likely). Thus, HSF prays for an order that the costs of its application to be admitted as *amicus curiae* be borne by the Applicants, on the scale of attorney and own client, including the costs of two counsel.

H. CONCLUSION

55. We submit that this appeal should be dismissed and the court *a quo's* order should stand.

David Unterhalter SC
Carol Steinberg
Andreas Coutsoudis
Nyoko Muvangua

Chambers

29 January 2016