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Breaking the Silence: The Treatment of *Ius Cogens* in *Zimbabwe Torture Docket* and *Al Bashir*

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ABSTRACT: The South African trajectory of the litigation in the *Al Bashir* case ended at the Supreme Court of Appeal (SCA). The fact that the case never reached the Constitutional Court (CC) has significant implications. It means that the apex court did not have the opportunity to make authoritative pronouncements on South Africa's obligations under the Rome Statute of the International Criminal Court, and that the it did not resolve the question whether sitting heads of state charged with *ius cogens* crimes – that is, crimes prohibited under peremptory norms of public international law – are protected by immunity before national courts. Had the case proceeded to the Constitutional Court and had it highlighted the *ius cogens* nature of the crimes with which Al Bashir is charged, this would have set a correct and important precedent for future cases of this kind. This article examines the flaws in the reasoning of the SCA in the *Al Bashir* case, focusing on the SCA's thin and inadequate treatment of the relevant norm of *ius cogens*. The recourse to and application of *ius cogens* norms has been under explored in the South African context. Before the CC, the concept has been neglected, despite the imperative of section 232 of the Constitution. To illustrate this neglect, the cases of *Azapo, Wouter Basson* and the so-called *Zimbabwe Torture Docket* case will be analysed. These three cases all concerned the adjudication of international crimes. The *Azapo* and *Wouter Basson* cases can further be described as 'transitional justice cases' since they dealt with the prosecution of state-sponsored crime during apartheid. The nexus of these cases with *ius cogens* norms is inescapable; and the silence of the CC especially stark.

KEYWORDS: *ius cogens,* norm conflict, immunity, Al Bashir, transitional justice

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> The acceptance therefore of the *jus cogens* nature of the prohibition of torture entails that a state allegedly violating it cannot invoke hierarchically lower rules (in this case, those on state immunity) to avoid the consequences of the illegality of its actions. — *Al-Adsani v United Kingdom*[1]

I INTRODUCTION

When former Sudanese President Omar Al Bashir set foot on South African soil in June 2015, few could predict the legal controversy his presence in South Africa would trigger. Al Bashir, charged by the International Criminal Court (ICC) for war crimes and crimes against humanity in 2009[2] and for genocide in 2010[3], was President of Sudan at the time and no stranger to controversy. Whereas his visits on the continent[4] and beyond[5] have stirred debate and a substantial body of jurisprudence[6], his visit to South Africa prompted litigation starting in the High Court,[7] proceeding to the Supreme Court of Appeal[8] (SCA) and (almost) ending in the Constitutional Court. Ultimately, the ICC also pronounced on South Africa's non-compliance with its obligations under the Rome Statute.[9]

The South African trajectory of this litigation ended at the SCA.[10] The fact that the case never reached the Constitutional Court has important implications. It means that the Constitutional Court never had the opportunity to make authoritative pronouncements on South Africa's obligations under the Rome Statute and meant that the Court could not resolve the question of whether sitting heads of state charged with *ius cogens* crimes – crimes under peremptory norms of public international law – are protected by immunity before national courts.

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1 *Al-Adsani v United Kingdom* (2002) 34 EHRR 11 ('*Al-Adsani*') (Joint Dissenting Opinion of Rozakis J and Caflisch J joined by Wildhaber J, Costa J, Cabral Barreto J and Vajic J) at para 3.

2 *Warrant of Arrest for Omar Hassan Ahmad Al-Bashir, Al Bashir* (ICC-02/05-01/09) (On 4 March 2009, the Pre-Trial Chamber I issued a warrant of arrest against President Al Bashir for crimes against humanity).

3 *Second Warrant of Arrest for Omar Hassan Ahmad Al-Bashir, Al Bashir* (ICC-02/05-01/09) (On 12 July 2010, the Pre-Trial Chamber I issued a second warrant of arrest against Al Bashir).

4 'Sudan's President has made 74 trips across the world in the seven years he's been wanted for war crimes' (4 March 2016) *Quartz Africa,* available at https://qz.com/630571/sudans-president-has-made-74-trips-across-the-world-in-the-seven-years-hes-been-wanted-for-war-crimes/ (Subsequent to 2009, Al Bashir visited Malawi, Egypt, Ethiopia, Kenya, Libya, South Sudan and South Africa).

5 Al Bashir visited China, India, Iran, Kuwait, Saudi Arabia and Qatar (ibid).

6 See the following non-cooperation decisions: Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, 13 December 2011 (ICC-02/05-01/09-140); Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir, 26 March 2013 (ICC-02/05-01/09-151); Decision on the Cooperation of the Federal Republic of Nigeria Regarding Omar Al-Bashir's Arrest and Surrender to the Court, 5 September 2013 (ICC-02/05-01/09-159); Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute, 11 July 2016 (ICC-02/05-01/09).

7 *Southern African Litigation Centre v Minister of Justice and Constitutional Development and Others* [2015] ZAGPPHC 402, 2015 (5) SA 1 (GP)('*High Court judgment*').

8 *Minister of Justice and Constitutional Development v Southern African Litigation Centre* [2016] ZASCA 17, 2016 (3) SA 317 (SCA)('*SCA judgment*').

9 Decision pursuant to article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, 6 July 2017 (ICC-02/05-01/09-302).

10 *SCA judgment* (note 8 above).

This article turns, first, to the flaws in the SCA's reasoning in the *Al Bashir* case, focusing on the SCA's thin and inadequate treatment of the norm of *ius cogens*. As will be discussed thereafter, the recourse to and application of *ius cogens* norms has been underexplored in the South African context, particularly by the Constitutional Court.

I argue that Constitutional Court jurisprudence to date has neglected the applicability of *ius cogens* norms, despite the imperative of section 232 of the Constitution.[11] To illustrate this neglect, the cases of *Azapo,*[12] *Wouter Basson*[13] and the so-called *Zimbabwe Torture Docket* case[14] will be analysed. These three Constitutional Court cases all involve the adjudication of international crimes. The *Azapo* and *Wouter Basson* cases can further be described as 'transitional justice cases' since they dealt with the prosecution of state-sponsored crime during apartheid. One might blithely distinguish the *Al Bashir* case on the basis that it did not primarily involve the adjudication of the substance of international crimes, but rather the obligation on the state to cooperate with the ICC. I suggest here that *Al Bashir* is properly situated along this line of cases, precisely because the cooperation obligation is particularly compelling in the context of international crimes.

I argue that the *Al Bashir* case should have proceeded to the Constitutional Court. I do not suggest that the state's decision to note an appeal to the Constitutional Court was correct. Rather, I am arguing that it would have been appropriate for our apex court to determine the main legal questions raised by the *Al Bashir* case, particularly the question of whether there is an *ius cogens* exception to the customary international law rule of immunity and the hierarchy between international and domestic and regional instruments.

A judgment from the Constitutional Court would have shed light on the question of the relationship between customary international law and the duty to cooperate in the prosecution of international crimes. If the case had proceeded to the Constitutional Court and the Court highlighted the *ius cogens* nature of the crimes with which Al Bashir was charged, this would have set a correct and important precedent for future cases of this kind. Such a judgment, I suggest, should have reprimanded the state for its bad faith conduct in enabling Al Bashir's hasty departure from South Africa on 15 June 2015. Although the SCA did reprimand the state for its conduct in the 2015 Al Bashir matter, describing the conduct of government as 'disgraceful',[15] a pronouncement by the Constitutional Court would have been particularly powerful and symbolic. It would also have set a more compelling precedent for future cases involving the question of whether heads of state enjoy immunity for international crimes within South Africa.

[11] It is interesting to note that the even the Truth and Reconciliation Commission (TRC), a non-judicial body, referred to *ius cogens* norms in some of the hearings before the TRC (See legal hearing of 27–29 October 1997 on the responsibility of the judiciary, available at http://www.justice.gov.za/Trc/special/legal/legal.htm).

[12] *Azanian Peoples Organisation (AZAPO) & Others v President of the Republic of South Africa & Others* [1996] ZACC 16, 1996 (4) SA 672 (CC)('*Azapo*').

[13] *S v Basson* [2005] ZACC 10, 2007 (3) SA 582 (CC)('*Wouter Basson*').

[14] *National Commissioner of the South African Police Services v Southern African Human Rights Litigation Centre & Another* [2014] ZACC 30, 2015 (1) SA 315 (CC)('*Zimbabwe Torture Docket*') at para 48.

[15] *SCA judgment* (note 8 above) at para 7.

II THE *AL BASHIR* CASES

Much has been written on the *Al Bashir* case.[16] The factual and litigation background to the SCA case will not be discussed at length. The most important questions dealt with by the High Court and SCA will be summarised.

A High Court case

Upon receiving confirmation of Al Bashir's arrival on 13 June 2015, the Southern African Litigation Centre (SALC) approached the Gauteng Division of the High Court seeking the implementation of the ICC arrest warrant by means of an urgent application. When the matter was heard on 14 June the government opposed the urgent application and requested a postponement. SALC requested, and was granted, an interim order mandating the government to ensure that Al Bashir does not leave the country.[17] On 15 June the court ruled that Al Bashir should be arrested and detained in South African pending his transfer to The Hague.[18] At this point the counsel for the state told the court that he believed that Al Bashir had already left the country. The court then requested the state to produce an explanatory affidavit detailing how Al Bashir was allowed to leave the country despite a court order explicitly calling on government to prevent his departure.

It was clearly unlawful for government to have ignored a High Court interdict that ruled Al Bashir should not be let out of the country pending the conclusion of the application to compel government to arrest him. Section 165(5) of the Constitution states that an order or decision issued by a court binds all persons to whom and organs of state to which it applies.[19]

The court found that the Implementation Act removes head of state immunity for the crimes contained in the Rome Statute.[20] The Rome Statute provisions on immunity, the court held, 'means that the immunity that might otherwise have attached to President Bashir as Head of State is excluded or waived in respect of crimes and obligations under the Rome Statute'.[21] The court further referred to a decision of the Pre-Trial Chamber of the ICC in which the Court stated that the immunities of Al Bashir 'have been implicitly waived by the Security Council'.[22] The State proceeded to seek leave to appeal to the SCA.

[16] D Akande 'The Bashir Case: Has the South African Supreme Court Abolished Immunity for All Heads of States?' (29 March 2016) *EJIL: Talk,* available at https://www.ejiltalk.org/the-bashir-case-has-the-south-african-supreme-court-abolished-immunity-for-all-heads-of-states/; M Ventura 'Escape from Johannesburg?' (2015) 13(5) *Journal of International Criminal Justice* 995; M du Plessis 'The Omar Al-Bashir Case: Exploring Efforts to Resolve the Tension between the African Union and the International Criminal Court' in M du Plessis, D Tladi & T Maluwa (eds) *The Pursuit of a Brave New World in International Law* (2017) 431.

[17] 'Interim Court Order' Case No 27740/15 (14 June 2015) at para 1, available at http://www.southernafricalitigationcentre.org/1/ wp-content/uploads/2015/06/Interim-interdict.pdf.

[18] *High Court judgment* (note 7 above) at para 2.

[19] *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11, 2016 (3) SA 580 (CC) at para 1 and *Department of Transport and Others v Tasima (Pty) Limited* [2016] ZACC 39, 2017 (2) SA 622 (CC) at paras 179–183.

[20] *High Court judgment* (note 7 above) at para 28.8.

[21] Ibid. See also D Tladi 'The Duty on South Africa to Arrest and Surrender President Al-Bashir under South African and International law' (2015) 13(5) *Journal of International Criminal Justice* 1027, 1032.

[22] *High Court judgment* (note 7 above) at paras 28.9 and 30.

B SCA case

The jurisdictional issue in the *Al Bashir* case related to the reach of South Africa's enforcement jurisdiction.[23] Enforcement jurisdiction refers to a state's authority under international law to actually apply its criminal law through police and other executive action and through the courts.[24] As the accused was present in South Africa after the commission of the alleged offences, the jurisdictional pre-conditions/nexus requirements in s 4(3)(c) of the Implementation Act were satisfied.

The SCA dealt with the relationship between articles 27 and 98 of the Rome Statute in relation to the immunity of Al Bashir. The court acknowledged that the tension between the two articles has not been authoritatively resolved.[25] In essence, article 27 sets out the irrelevance of official capacity before the ICC.[26] Article 98 states that the ICC shall not proceed with a request for surrender which would require the requested state to act inconsistently with its obligations under international law with regard to the state or diplomatic immunity of a person.

The SCA stated that the former Director-General at the Department of Justice and Constitutional Development, Nonkululeko Sindane, said that after South Africa agreed to host the AU Summit in June 2015 it entered into an agreement ('the hosting agreement') with the AU Commission relating to the organisation of the various meetings that were to take place at the summit including the 25th Assembly of the AU.[27] Based on this agreement, Al Bashir was invited to attend the summit by the AU, and not by the government. Sindane then referred to article VIII of the hosting agreement, headed 'Privileges and Immunities' which states: 'The Government shall afford the members of the Commission and Staff Members, delegates and other representatives of Inter-Governmental Organisations attending the Meetings the privileges and immunities set forth in Sections C and D, Article V and VI of the General Convention on the Privileges and Immunities of the OAU.'[28]

The SCA held that 'the hosting agreement did not confer any immunity on President Al Bashir and its proclamation by the Minister of International Relations and Cooperation did not serve to confer any immunity on him'.[29] Firstly, the proclamation under s 5(3) of DIPA – the provision the government invoked – applies to organisations and their representatives. According to s 1(iv) of DIPA, '"organisation" means an intergovernmental organisation of which two or more states or governments are members and which the Minister has recognised for the purposes of this Act'.[30] The SCA held that the hosting agreement provides immunity only for representatives and officials of the AU and organisations and not for those of states.[31]

[23] R O'Keefe 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2(3) *Journal of International Criminal Justice* 735 (For an explanation on the difference between prescriptive and enforcement jurisdiction),

[24] *SCA judgment* (note 8 above).

[25] Ibid at para 60.

[26] Article 27(2) (Sovereign immunity shall not bar the ICC from exercising jurisdiction over persons enjoying such immunity).

[27] *SCA judgment* (note 8 above) at paras 10–11.

[28] Ibid at para 11.

[29] Ibid at para 47.

[30] This refers to organisations such as the African Union or African Commission on Human and Peoples' Rights and does not include member states or their representatives, such as heads of states.

[31] *SCA judgment* (note 8 above) at para 42. See Tladi's criticism of this argument (note 21 above).

It does not, therefore, provide immunity for heads of states and state delegates.[32] Secondly, even though additional immunity can be granted to heads of states through s 7 of DIPA – also recognised in s 4(1)(a) of the Act – it would be problematic to do so in Al Bashir's case, as it would be in contravention of the Implementation Act, which explicitly prohibits head of state immunity for Rome Statute crimes.

The SCA concluded that customary international law recognises the immunity of heads of state and other officials entitled to personal immunity from arrest and prosecution. It stated that customary international law does not recognise any exception to personal immunity even in the event of a violation of a *ius cogens* norm.[33] The SCA, however, decided to apply and prioritise South African domestic law (as stated in the Implementation Act). It noted that although section 4 (1) of DIPA embodies the rule of the personal immunity of heads of state, that Act is subject to the Implementation Act which was enacted to domesticate South Africa's obligations under the Rome Statute. The Court stated that '[t]he Implementation Act is a specific Act dealing with South Africa's implementation of the Rome Statute. In that special area the Implementation Act must enjoy priority.'[34]

The court further relied rather heavily on s 232 of the Constitution in justifying why the customary international law rule on personal immunities is not binding in this case. According to s 232, 'customary international law is law in the Republic' if it is consistent with the Constitution and Acts of Parliament. Granting Al Bashir personal immunity before South African courts would conflict with s 4(2) of the Implementation Act – the rule that head of the states do not enjoy personal immunity for international crimes. The fact that the Constitution at s 232 provides that 'customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament' means that *ius cogens*, as a 'class of customary international law' will similarly not be considered applicable law in the Republic if it is in conflict with the Constitution or an Act of Parliament.[35] However, since *ius cogens* norms cannot be overridden by national laws, subjecting *ius cogens* norms to the test of national law is contrary to *ius cogens*.[36] This is a far cry from what is provided for in the Constitution. In addition, requiring a *ius cogens* norm to be in line with national legislation before it can be applied is inconsistent with the fact that the principle of constitutional supremacy means that Constitutional values trump national legislation. *Ius cogens* norms play an imperative role in human rights law and the Constitution, and, as a founding value, requires the promotion of 'human rights and freedoms' and 'the rule of law'.[37]

The Implementation Act removes the bar of immunity to the surrender of an accused to the ICC where the ICC has issued an arrest warrant and made a request for cooperation.[38] The SCA held that the conduct of the South African government in failing to take steps to arrest

[32] Ibid.

[33] Ibid at para 84.

[34] Ibid at para 102.

[35] United Nations 'International Norms and Standards Relating to Disability', available at https://www.un.org/esa/socdev/enable/comp101.htm#1.9.

[36] The Constitutional Court recognised in *Zimbabwe Torture Docket* (note 14 above) at para 77 (Torture is a crime in the Republic as it has the status of a 'peremptory norm of customary international law'. However, this recognition does not apply to all *ius cogens* norms as such norms are still susceptible to exclusion if they are in conflict with the Constitution or an Act of Parliament).

[37] Constitution of the Republic of South Africa, 1996 s 1.

[38] *Zimbabwe Torture Docket* (note 14 above) at para 103.

Al Bashir for surrender to the ICC was inconsistent with South Africa's obligations under the Rome Statute and therefore unlawful.[39]

The SCA declined to express a view on the argument that the UN Security Council Resolution 1593 (2005) (which referred the case) implicitly waived Al Bashir's immunity.[40]

III THE TREATMENT OF *IUS COGENS* IN THE SCA CASE

The judgment briefly refers to *ius cogens* and initially translates *ius cogens* as 'immutable norms'. The SCA first mentions 'peremptory norms' in paragraph 37 when it states:

> 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'. Torture, whether on the scale of crimes against humanity or not, is a crime in South Africa in terms of s 232 of the Constitution because the customary international law prohibition against torture has the status of a peremptory norm.

The Court proceeds to focus on the nature of the prohibition against torture as an example of a peremptory norm which has also been domesticated in South African legislation.[41] Later in the judgment, the Wallis JA refers to Weatherall:[42]

> But the content of customary international law is not for me to determine and, like Dr Weatherall, I must conclude with regret that it would go too far to say that there is no longer any sovereign immunity for *jus cogens* (immutable norm) violations. Consideration of the cases and the literature goes no further than showing that Professor Dugard is correct when he says that 'customary international law is in a state of flux in respect of immunity, both criminal and civil, for acts of violation of norms of *jus cogens*.[43]

The SCA in the *Al Bashir* case[44] fails to situate *ius cogens* in the correct legal framework. By failing to situate *ius cogens* within the framework of treaty law – from which it originates – and by failing to mention the Vienna Convention on the Law of Treaties,[45] the court does not position the norm correctly. The court's treatment *of ius cogens* can therefore be described as insufficiently rigorous.

It is unfortunate that the court did not engage with the question of whether customary international law protects the immunity of heads of state and other high-ranking officials in more depth. This leaves open the possibility that government could again, in the future, rely on customary international law as a defence in favour of upholding immunity for prosecuting those who commit international crimes. Indeed, some of the more doctrinal language in the judgment could even assist those who argue that customary international law upholds immunity.[46] The court essentially argued that South African domestic law trumps customary international law, which upholds immunity (a careless and unnecessary acknowledgment that

[39] Ibid at para 113.

[40] Ibid at para 106.

[41] Ibid at paras 39–40.

[42] Ibid at footnote 46, referring to T Weatherall 'Jus Cogens and Sovereign Immunity: Reconciling Divergence in Contemporary Jurisprudence' (2015) 46 *Georgetown Journal of International Law* 1151, 1175.

[43] *SCA judgment* (note 8 above) at para 84.

[44] *SCA judgment* (ibid).

[45] Articles 53, 64 and 71 refer to *ius cogens*. United Nations, 'Vienna Convention on the Law of Treaties' (23 May 1969) 1155 *UNTS* 331 (VCLT), available at https://www.refworld.org/docid/3ae6b3a10.html.

[46] *SCA judgment* (note 8 above) at paras 66–68.

custom protects immunity). Instead, the SCA could have discussed the unsettled nature of the law concerning immunity for international crimes. This would have been more in line with the current position and developments in international human rights law and international criminal law.[47] Even if the court did not want to make a finding on the exact position with regard to the question whether an exception exists for *ius cogens* crimes, this would have made for better precedent for future cases in which the question of immunity for international crimes might arise.

The SCA did not sufficiently elaborate upon the nature of international crimes and what distinguishes international crimes from domestic crimes.[48] The Heads of Arguments of the *amicus curiae*, the Helen Suzman Foundation, concerned the relationship between the Constitution and the duty to investigate and prosecute international crimes:[49]

> 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. … Indeed, the recognition of and protection against international crimes lies at the very core of our constitutional project.

The Heads of Arguments further stated that allowing alleged perpetrators of such crimes to avoid capture and prosecution constituted an affront to our constitutional framework.[50]

IV WITHDRAWING THE APPEAL

The state proceeded to appeal the decision of the SCA. The case was set down to be heard in the Constitutional Court on 22 November 2016. A month before the hearing, on 21 October 2016, the Minister of Justice and Constitutional Development, Michael Masutha, announced that, in essence, the SCA 'identified the problem which needed to be addressed' (in other words dealt with or resolved the matter) and that government will be withdrawing its appeal to the Constitutional Court.[51]

It was clear to observers at the time that the Minister's decision was strongly motivated by the state's firm intention to withdraw from the ICC. Masutha further stated that the effect of the withdrawal from the Rome Statute as well as the repeal of the Implementation Act would complete the removal of all legal impediments inhibiting South Africa's ability to honour its obligations relating to the granting of diplomatic immunity under customary international law as provided for under South African domestic legislation – DIPA.[52] The state's intention was illustrated by the tabling of the International Crimes Bill a little over a

[47] J Dugard, G Mettraux & M du Plessis 'Heads of State Immunities, International Crimes and President Bashir's Visit to South Africa' (2018) 18(4) *International Criminal Law Review* 577, 593 (Acknowledge the unsettled state of customary international law: 'It cannot therefore be said…that there is a general, all-encompassing, international crimes exception to State immunities under customary international law', speaking later about the 'unsettled relationship' between immunities and international crimes (ibid at 581)).

[48] Akande (note 16 above).

[49] Helen Suzman Foundation 'Heads of Argument' Case No 867/2015, available at https://constitutionallyspeaking.co.za/resources/al-bashir-the-hsfs-heads-of-argument-before-the-sca/.

[50] Ibid at para 28.2.

[51] M Masutha 'Media Briefing on International Criminal Court and Sudanese President Omar Al Bashir' (21 October 2016), available at http://www.justice.gov.za/m_statements/2016/20161021-ICC.html.

[52] Ibid.

year later.[53] Subsequently, during June 2018, the newly-appointed Minister of International Relations, Lindiwe Sisulu, stated that government will reconsider its decision to withdraw from the ICC.[54]

The legal consequences of the *ius cogens* nature of the crimes with which Al Bashir was charged was thus squarely before the SCA, framed as a constitutional question. I have suggested above that the court neglected to adequately engage this question. The meagre treatment of *ius cogens* norms at the SCA is not a regrettable exception, but indicative of a trend in the jurisprudence of the CC itself. I turn now to demonstrate how the Constitutional Court, too, neglected a number of necessary implications of the nature of the crimes charged in its leading cases addressing crimes proscribed by *ius cogens* norms.

VI THE NATURE AND STATUS OF *IUS COGENS* NORMS

Ius cogens was codified and recognised in article 53 of the Vienna Convention on the Law of Treaties (VCLT) where it is defined as 'a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.[55] The VCLT specifies the effect of a *ius cogens* norm on a treaty: *ius cogens* norms void treaties in case of conflict.[56]

This includes retroactive invalidation. *Ius cogens* implies a hierarchy of crimes and international crimes lie at the top of this pyramid of crimes.[57] Consequently, all treaty-based rules conflicting with peremptory norms are deemed to be void and only other peremptory norms can modify the specific peremptory norm.[58]

The International Law Commission (ILC) confirmed the existence, and, to an extent, recognised the importance, of *ius cogens* in its preparation of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts.[59] The ILC, drawing on the definition provided for in, and the support of States of, the VCLT recognises that States have an interest in respecting *ius cogens*.[60] As to the nature of *ius cogens*, the ILC provides that 'the States have a special role' to play in the creation of such norms and that the obligations which

[53] Introduced in the National Assembly on 12 December 2017 (B37-2017). South Africa will however continue to be under a duty to cooperate with the ICC even if it withdraws from the ICC (N Pillay and A Mudukuti 'South Africa and the ICC: Dismantling the International Criminal Justice System to Protect One Individual' (19 June 2018) *Daily Maverick*, available at https://www.dailymaverick.co.za/article/2018-06-19-south-africa-and-the-icc-dismantling-the-international-criminal-justice-system-to-protect-one-individual/#.W0saqtUzbq8)).

[54] C du Plessis 'Lindiwe Sisulu: Debate to Stay in the ICC Reopened' (5 July 2018) *Mail & Guardian*, available at https://mg.co.za/article/2018-07-05-lindiwe-sisulu-debate-to-stay-in-the-icc-reopened.

[55] VCLT, art 53.

[56] VCLT, art 64 (If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates).

[57] On the idea of a hierarchy of international crimes, see *Prosecutor v Tadi*, (Judgment in Sentencing Appeals (IT-94-1-A and IT-94-1-A *bis*) 26 January 2000); *Prosecutor v Krsti*, (Appeal Judgment (IT-98-33-A) 19 April 2004); A Danner 'Constructing a Hierarchy of Crimes in International Criminal Law Sentencing' (2001) 87 *Virginia Law Review* 415; and M Frulli 'Are Crimes against Humanity More Serious than War Crimes?' (2001) 12 *European Journal of International Law* 329.

[58] VCLT, art 53.

[59] These articles were adopted by the ILC in 2001 (see note 61 below).

[60] G Arangio-Ruiz, Special Rapporteur on State Responsibility 'Fourth Report on State Responsibility' (1992) II(1) *Yearbook of International Law Commission* 33.

ius cogens impose upon States 'affect the vital interest of the international community as a whole'.[61] Such obligations may even attract a higher responsibility for States than those 'applied to other internationally wrongful acts'.[62] The notion that *ius cogens* norms are not static and the reason why there is no closed list is bolstered by the fact that article 64 of the VCLT recognises the possibility of the creation of new *ius cogens* norms. However, the ILC goes further than the VCLT by recognising the assertion that non-derogation from *ius cogens* norms includes all legal acts as opposed to only treaty obligations.[63]

Ius cogens norms are closely related to the concept of non-derogability. The Inter-American Court of Human Rights has stated that non-derogable treaty rights constitute an important starting point when identifying *ius cogens* norms.[64] The VCLT does not include examples of norms of *ius cogens*. Instead it allows States, international judicial bodies and scholars to establish which norms meet the requirements of article 53 of the VCLT, which leaves it to the 'international community as a whole' to identify those international law norms belonging to *ius cogens*. According to de Wet this means that a particular norm is first recognised as customary international law, where after the international community of states as a whole further agrees that it is a norm from which no derogation is permitted.[65] A peremptory norm would therefore be subject to 'double acceptance' by the international community of states as a whole.[66]

The ILC has described the following norms as those that are most frequently cited as having *ius cogens* status: (a) the prohibition of aggressive use of force; (b) the right to self-defence; (c) the prohibition of genocide; (d) the prohibition of torture; (e) crimes against humanity; (f) the prohibition of slavery and slave trade; (g) the prohibition of piracy; (h) the prohibition of racial discrimination and apartheid; and (i) the prohibition of hostilities directed at civilian population.[67]

At its root *ius cogens* also draws upon elements of natural law[68] and the two concepts share some overt similarities, notably as being ostensibly 'moral' doctrines. Orakhelashvili is of the

[61] *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001* (text adopted by the International Law Commission at its fifty-third session and submitted to the General Assembly) Doc No A/56/10, 56 and 87, available at http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

[62] Ibid. See also D Tladi, Special Rapporteur 'Third Report on Peremptory Norms of General Law (*jus cogens*)' 2018 *International Law Commission* Doc No A/CN.4/714, 30.

[63] A Pellet Special Rapporteur 'Tenth Report on Reservations to Treaties' 2009 *International Law Commission* Doc No A/CN.4/558 and Add.1-2 174.

[64] *Michael Domingues v United States* Case 12.285, Inter-American Court of Human Rights, OEA/Ser.L/V/II.117, Doc 5, rev 1 para 49; and R Lillich 'Civil Rights' in T Meron (ed) *Human Rights in International Law: Legal and Policy Issues* (1988) 115, 118 and footnote 17.

[65] E de Wet 'Jus Cogens and Obligations Erga Omnes' in D Shelton (ed) *Oxford Handbook of International Human Rights Law* (2013) 542, 543 citing J Videmar 'Norm Conflicts and Hierarchy in International Law: Towards a Vertical International System?' in E de Wet and J Vidmar (eds) *Hierarchy in International Law: The Place of Human Rights* (2012) 25.

[66] Ibid.

[67] 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' 2006 *International Law Commission* Doc No A/CN.4/L.702 at para 33. See also International Law Commission, Draft Articles on State Responsibility, Commentary on Article 40 at paras 4–6 in Official Records of the General Assembly, Fifth-sixth Session Doc No A/56/10, 283–284.

[68] The definition of *ius cogens* in the VCLT was influenced, in particular, by the work of Albert Verdross who was strongly influenced by natural law. A Verdross 'Jus Dispositivum and jus Cogens in International Law' (1966) 60 *American Journal of International Law* 56.

view that '[m]orality can arguably itself explain a norm's peremptory character'.[69] Like natural law, *ius cogens* is binding regardless of consent. The similarities between natural law and *ius cogens* were observed during the drafting of the VCLT (at times the delegates used the terms interchangeably).[70] Although most scholars tie the origin of *ius cogens* to natural law, some scholars of a more positivist inclination argue that *ius cogens* emanated from the will of states as expressed in treaties or in custom.[71]

Ius cogens remains difficult to define. Georges Abi-Saab captured the elusive nature of the concept when he said that even if the normative category of *ius cogens* were to be an 'empty box, the category was still useful; for without the box, it cannot be filled'.[72] Tied to the difficulty of definition is the thorny issue of determining the content of *ius cogens*. There are two dominant views: Some scholars hold the view that there is a large measure of international consensus on the basic norms that qualify as *ius cogens* norms: the prohibition against slavery, torture, racial discrimination, self-determination, piracy and the prohibition of the use of force.[73] The crime of apartheid is also generally included in this category of norms. A second school of thought believes that the content of *ius cogens* is vague and indeterminate.[74] These scholars argue that the uncertain content of *ius cogens* pose a threat to the very viability of *ius cogens*.[75]

It has to be acknowledged that *ius cogens* remains both certain and uncertain. Whereas to claim that the norm is entirely certain would contradict the very nature of *ius cogens*, however the uncertainty has been overemphasised. One scholar went as far as claiming that, in determining when a norm reaches the status of *ius cogens,* 'it appears that judges and scholars simply consult their own consciences'.[76] The VCLT states that in terms of the Convention, *ius cogens* is a 'norm of general international law … accepted and recognized by the international community of States as a whole'.[77] This language makes an explicit link between the nature of the norm (whether peremptory or not) and the question of standing in public international law (whether only one affected state or potentially any state may invoke a breach of a norm; in other words, whether the obligation is owed merely *inter partes* or *erga omnes*). While the point at which a norm attains the status of *ius cogens* does remain unclear, the determination of *ius cogens* is not as subjective as being merely a matter of consulting one's conscience. There is a substantial measure of consensus on a number of *ius cogens* norms.

[69] A Orakhelashvili *Peremptory Norms in International Law* (2006) 49.

[70] United Nations Conventions on the Law of Treaties, First Session, Vienna, 26/03/1968–24/05/1968, Summary record of the plenary meetings and of the Committee as a Whole, Doc No A/CONF.39/11.

[71] Ibid at para 53.

[72] G Abi-Saab 'The Third World and the Future of the International Legal Order' (1973) 29 *Revue Egyptienne de Droit International* 27, 53.

[73] T Weatherall *Jus Cogens* (2015) 204.

[74] G Schwartzenberger 'International Jus Cogens?' (1965) 43 *Texas Law Review* 469; and A D'Amato 'It's a Bird, It's a Plane, It's *Jus Cogens*' (1990–1991) 61 *Northwestern University School of Law Scholarly Commons: Faculty Working Papers* 6.

[75] L Duhaime '*Jus Cogens* Legal Definition', available at http://www.duhaime.org.

[76] M O'Connell 'Jus Cogens: International Law's Higher Ethical Norms' in D Childress III (ed) *The Role of Ethics in International Law* (2011) 78.

[77] VCLT, art 53.

Whereas the content of *erga omnes* is fairly well established in the case law of the ICJ,[78] the notion of *ius cogens* has not received the same attention by the ICJ and has been cited relatively rarely. It only entered ICJ case law to the extent it deserves relatively recently.

VII EXCEPTION TO IMMUNITY

There is as yet little evidence of state practice or *opinio juris* that sitting heads of State can be tried for international crimes. As Kiyani points out, the cases that establish this rule usually suffer from one or both of the following flaws: the individuals concerned, such as Muammar Gadaffi and Charles Taylor, were no longer sitting heads of State at the relevant time, and therefore lacked personal immunity; or, they had been transferred, with the consent or co-operation of the State, to the court in question, which amounts to a waiver of the immunity by the State concerned.[79] According to Kiyani these reasons fit with ordinary understandings of head of State immunity, and show no evidence of an exception to those rules. Claus Kreß is similarly of the view that a rule of custom is 'admittedly not (yet) firmly entrenched and fortified' in this context.[80]

Whereas there is more *opinio juris* to rely on in support of the exception than state practice, *opinio juris* is still not sufficiently strong and cannot bear the entire burden of proving that the exception had crystallised into custom. Dapo Akande, for example, strongly doubts the existence of sufficient *opinio juris*.[81]

VIII *IUS COGENS* IN INTERNATIONAL JURISPRUDENCE

The ICJ, despite repeated reference to 'general and fundamental principles which lie beyond contractual treaty-relations' in its reasoning, has been reluctant to include the concept of *ius cogens* in its judgments. The court was initially equally reluctant to refer to *erga omnes* norms but eventually started to refer to *erga omnes* in the *Barcelona Traction* case.[82] In this case the ICJ distinguished between obligations a state has towards other states and obligations a state has towards the international community.[83]

As Hernandez points out, peremptory norms are not new to the ICJ.[84] As early as 1934, the Permanent Court of International Justice (PCIJ), in the separate opinion of Schücking J, made reference to the concept of *ius cogens* in the *Oscar Chinn* case and linked it expressly to international public morality.[85] Schücking J stated that the PCIJ would never 'apply a Convention the terms of which were contrary to public morality'.[86] He implied that public

[78] *Case concerning Barcelona Traction, Light and Power Company Ltd* (*Belgium v. Spain*) [1970] International Court of Justice Reports 3 ('*Barcelona Traction*') para 33.

[79] A Kiyani 'Al Bashir and the ICC: The Problem of Head of State Immunity' (2013) 12(3) *Chinese Journal of International Law* 487.

[80] *Prosecutor v Omar Hassan Al Bashir* ICC/02-05-01/09 OA2 (18 June 2018) para 8 (Written observations of amicus curiae, Prof Claus Kress).

[81] Akande (note 16 above).

[82] *Barcelona Traction* (note 78 above).

[83] Ibid at para 33.

[84] G Hernandez 'A Reluctant Guardian: The International Court of Justice and the Concept of "International Community"' (2013) 83(1) *British Yearbook of International Law* 13, 45.

[85] Ibid. *Oscar Chinn case (Britain v Belgium)*(1934) PCIJ Series A/B No 63 ('*Oscar Chinn*')(Separate opinion, Schücking J) 149, 150.

[86] Ibid.

morality might constitute *ius cogens*.[87] By making this link to public morality, Schücking J acknowledges the natural law roots of *ius cogens* discussed above. His statement suggested that every legal system can have a set of norms which are beyond the contractual disposition of the contracting parties.

Why has the ICJ been this reluctant to rely on *ius cogens*? One explanation entails a sources-of-law problem. Applying *ius cogens* norms presents challenges to the international judicial function. It requires judges to address the effects of *ius cogens* norms without being able to test the validity of the norms. Hernandez explains why this is the case: '[t]o do so sets international law decisively on a path away from its classical foundations as a system regulating relations between completely sovereign States and erected purely through their willed consent'.[88]

The court has on occasion referred to *ius cogens* without using the term *ius cogens*. In *Diallo* for example, the ICJ refrained from using the terms 'peremptory' or *ius cogens*, but concluded that the 'prohibition of inhuman and degrading treatment is among the rules of general international law which are binding on States in all circumstances, even apart from any treaty commitments'.[89] In the *Nicaragua,*[90] *Oil Platforms*[91] and *Armed Activities in the Congo*[92] judgments, the imperative character of the prohibition of the use of force was given no legal effect.[93]

In the *Congo v Rwanda* case, Dugard J applauds the decision of the ICJ to explicitly recognise and accept the notion of *ius cogens*.[94] Dugard J writes that such acceptance is long overdue.[95] Whereas *ius cogens* has long been accepted by international law academics,[96] international courts have been slow to award *ius cogens* its rightful status. In his separate opinion Dugard J discusses the role of *ius cogens* in the judicial decision-making process and concludes that, in the exercise of its judicial function, when choosing between competing sources the court should choose *ius cogens*.[97] To Dugard J, the *South West Africa*[98] cases presented the perfect opportunity to apply *ius cogens*.[99] He argues that the *East Timor* decision[100] and the *Arrest*

[87] Ibid. See also B Lepard *Customary International Law: A New Theory with Practical Implications* (2010) 256.

[88] Hernandez (note 84 above) at 40.

[89] *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* Merit Judgment, ICJ Reports (2010) 639 ('*Diallo*') para 87.

[90] *Case Concerning Military and Paramilitary Activities and Against Nicaragua (Nicaragua v United States of America)* Merit Judgment, ICJ Reports (1986) 14 ('*Nicaragua*') para 190.

[91] *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* Judgment ICJ Reports (2003) 161 ('*Oil Platforms*').

[92] *Case Concerning Armed Activities on the Territory of the Congo (Democractic Republic of the Congo v Uganda)* Judgment ICJ Reports (2005) 168 ('*Armed Activities in the Congo*') paras 148–165.

[93] *Nicaragua* (note 90 above) at para 190 (The Court may have mentioned *ius cogens* twice, but only through quoting directly from the United States' Counter-Memorial). The same approach was taken in *Oil Platforms* (note 91 above) at para 81, this time using the United States' Rejoinder.

[94] *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda)* Judgment ICJ Reports (2006) 6 ('*Congo v Rwanda*') 86, para 6.

[95] Ibid at 89, para 8.

[96] J Dugard 'Reconciliation and Justice: The South African Experience' (1998) 8(2) *Transnational Law and Contemporary Problems* 277, Orakhelashvili (note 69 above) at 8, and VCLT, art 53.

[97] *Congo v Rwanda* (note 94 above) at 89, para 10.

[98] *South West Africa (Ethiopia v South Africa; Liberia v South Africa)* Judgment ICJ Reports (1966) 6.

[99] *Congo v Rwanda* (note 94 above) at 88, para 4.

[100] *Case Concerning East Timor* (*Portugal v Australia)* Judgment ICJ Reports (1995) 90 ('*East Timor*').

Warrant case[101] would also have been suitable cases in which to invoke *ius cogens*.[102] In these cases the ICJ was faced with competing principles, precedent and state practice and preferred not to choose that solution which gave effect to a norm of *ius cogens*.[103] In contrast to *Congo v Rwanda*, the *Arrest Warrant* case can be described as a low point in the ICJ's treatment of *ius cogens*. The ICJ held, without express reference to *ius cogens*, that the fact that a Minister of Foreign Affairs was accused of a violation of rules which undoubtedly possess the character of *ius cogens* did not remove the immunity he enjoys under customary international law.[104] It is largely because of the retrogressive decision in *Arrest Warrant* that the law remains unsettled.

Because of his position in *Congo v Rwanda*, Dugard has been credited, both as a judge and academic, with championing a doctrinal move towards the recognition of *ius cogens*.[105] But outside the confines of ICJ jurisprudence, the position regarding the relationship between immunity and *ius cogens* is still not entirely acknowledged by international and domestic courts. In the ground-breaking *Pinochet* judgment for example, only a minority of judges, Judge Philips and Judge Millet, opined that systematic torture was an international crime for which there could be no immunity.[106] In the unfortunate *Al-Adsani* case before the European Court of Human Rights, it was held that international law as it stood provided no basis for concluding that a state no longer enjoys immunity for civil suits in the courts of another state where acts of torture had been alleged.[107]

Another example from the International Court of Justice is instructive. The dissenting opinions in the *Jurisdictional Immunities* case by Judges Trindade, Yusuf and Judge *ad hoc* Gaja all present strong arguments in favour of the *ius cogens* trumping the law of immunity. Judge Trindade wrote a powerful dissent in which he argued that the majority decision did not serve justice.[108] He essentially upheld the primacy and hierarchical superiority of *ius cogens*. Trindade J describes the distinction between procedure and substance in the context of the immunity versus *ius cogens* debate as 'formalist'.[109] He writes that this distinction deprives *ius cogens* of its effects and legal consequences.[110] In discussing the question whether an exception exists to the general applicability of immunity in cases of breaches of *ius cogens* norms, Judge Gaja refers to a minority opinion in the European Court of Human Rights in *Al-Adsani*[111] and to a number of judgments by the Italian *Corte di Cassazione*, especially those in *Ferrini*[112]

[101] *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* International Court of Justice (14 February 2002), available at https://www.refworld.org/cases,ICJ,3c6cd39b4.html.

[102] *Congo v Rwanda* (note 94 above) at 89, para 11.

[103] Ibid.

[104] *Arrest Warrant* (note 101 above) at paras 54–58.

[105] A Bianchi 'Human Rights and the Magic of *Jus Cogens*' (2008) 19(3) *European Journal of International Law* 491, 503.

[106] *R v Bow Street Metropolitan Stipendiary Magistrate: Ex Parte Pinochet Ugarte* (No. 3) [1999] 2 All ER 97 (HL) ('*Pinochet*')

[107] *Al-Adsani* (note 1 above) at paras 101–102.

[108] *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* Judgment, ICJ Reports (2012) 99 ('*Jurisdictional Immunities*') at 179, para 1.

[109] Ibid at para 315.

[110] Ibid.

[111] , Ibid at 320, para 11 (Dissenting opinion of Judge *ad hoc* Gaja). See also *Al-Adsani* (note 1 above).

[112] *Ferrini v Federal Republic of Germany* Judgment No 5044, 11 March 2004 ('*Ferrini*'); English translation in (2004) 128 *ILR* 668–669.

and in *Milde*.[113] He also referred to a decision by the French *Cour de cassation* in *La Reunion Aerienne*[114] which pointed to the existence of a restriction of immunity when a claim concerns international crimes of a *ius cogens* nature. The jurisprudence cited by Judge Gaja points to the unsettled nature of the law of immunities. Whereas it cannot be said definitively that a rule has crystallised that immunities do not apply to *ius cogens* crimes, it can also not be said that the law currently supports the position that *ius cogens* norms do not trump immunity.

It is clear that the *Al Bashir* case could have benefitted from a clearer and more nuanced discussion of the current state of international law with regard to the question of immunity for international crimes that rise to the level of *ius cogens*. These legal issues were squarely before the court. But the *Al Bashir* case is not unique in terms of the absence of a principled discussion of *ius cogens*. The South African courts have only rarely discussed *ius cogens*. In cases on international crimes, most notably the *Azapo* case, the *Wouter Basson* case, *ius cogens* was entirely neglected. The *Zimbabwe Torture Docket* case, the most progressive case on international criminal law heard by the Constitutional Court to date, did refer to *ius cogens* extensively.

IV *IUS COGENS* IN SOUTH AFRICAN LAW AND JURISPRUDENCE

A *Azapo* case

The *Azapo* case was the first Constitutional Court case that involved the question of the status of international crimes after the political transition. This case involved a challenge to the amnesty provisions in s 20(7) of the Promotion of National Unity and Reconciliation Act 34 of 1995 (Reconciliation Act). Steve Biko's widow and other family members of apartheid victims argued that the amnesty provisions in the Act violated their constitutional right to access to justice as recognised in s 34 of the Constitution. The Constitutional Court held that the epilogue to the Constitution trumped s 34 of the Constitution and that s 20 (7) of the Reconciliation Act authorising criminal and civil amnesty was therefore constitutional.[115]

It has been argued that laws which give amnesty to alleged perpetrators of international crimes are in violation of *ius cogens*.[116] The *Azapo* judgment however did not mention *ius cogens* norms. The judgment does refer to the tensions between justice for those wronged during conflict, on the one hand, and the consolidation of the transition to a nascent democracy but the judgment failed to take international law, particularly international humanitarian law, seriously.[117]

[113] *Germany v Milde (Max Joseph*) (2009) 92 Riv Dir Int 618, ILDC 1224 (IT 2009)('*Milde*').

[114] *La Reunion Aerienne and Ors v Libya Arab Jamahiriya* ILDC 1770 (FR 2011)('*La Reunion Aerienne*').

[115] *Azapo* (note 12 above) at para 50. See also J Dugard 'Is the Truth and Reconciliation Commission Process Compatible with International Law – An Unanswered Question – Azapo v President of the Republic of South Africa 1996' (1997) 13(2) *South African Journal on Human Rights* 258.

[116] F Muhammadin 'The Legality of Amnesty Laws for Ius Cogens Crimes under the Norms of ius cogens' (10 December 1998) undergraduate thesis, submitted and defended before the Board of Examiners, Department of International Law, Faculty of Law, University Gadjah Mada (Indonesia) as required to obtain the Sarjana Hukum (LLB equivalent) degree, available at https://www.academia.edu/8573163/The_Legality_of_Amnesty_Laws_for_Jus_Cogens_Crimes_under_the_Norms_of_Jus_Cogens, 5. See also *Prosecutor v Furundzija* (Judgment) ICTY Trial Chamber IT-95-17/1.

[117] *Azapo* (note 12 above) at para 31.

The judgment, otherwise eloquently pronounced by Mahomed J, not only failed to make any mention of *ius cogens* or of the fact that apartheid constituted a crime against humanity.[118] By limiting its discussion to war crimes, the Court failed to appreciate the fact that apartheid is – and was, at least from 1966 – a crime against humanity.[119] The Court further found that the 1949 Geneva Conventions and the Additional Protocols (in their entirety) did not apply to South Africa.[120] Crucially, the Court did not appreciate that the Second Additional Protocol to the Geneva Conventions (applied to national liberation movements) was drafted specifically with the apartheid regime in mind. In any event, there is considerable academic authority for the proposition that the Geneva Conventions constituted customary international law before 1998 (the date of the signing of the Rome Statute) in large part because of the near-universal ratification of the Conventions.[121] Whereas apartheid crimes cannot be prosecuted under the Rome Statute (because of its limited temporal jurisdiction) it is clear that such crimes can (and indeed *must*) be prosecuted under the Geneva Conventions, or under customary intentional law.

Dugard suggests that AZAPO was disappointing because it failed to address whether conventional and customary international law oblige a successor regime to punish the officials and agents of a prior regime for violations of international law.[122] He wrote that both treaty and customary international law oblige a successor regime to punish members of the prior regime for acts that constitute crimes under international law. Dugard wrote:

> The judgment does not, however, show concern for the international legal order that condemned apartheid as a crime against humanity, that served as a standard by which the laws of apartheid were measured in the years without hope. This was a judgment that called for the broad brush of history, for an exposition of why apartheid was judged by the international community to be a crime against humanity, for an examination of the experience of other societies that have emerged from darkness, for an explanation of the reason why international law does not compel a society bent on reconciliation to prosecute those who have committed the most heinous crimes in the name of the state.[123]

The Constitutional Court failed to recognise the fact that international crimes are of a fundamentally different nature than domestic crimes. What differentiates murder as a crime against humanity from a crime under South African domestic law is both its distinctive contextual element – 'committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'[124] – and the corollary that permissive universal jurisdiction would attach to murder as a crime against humanity.[125]

By ignoring the norm of *ius cogens*, the Court further failed to take account of the normative evolution of international law and failed to integrate this evolution into South African Constitutional law.

[118] UN General Assembly in resolution 2202 A (XXI) of 16 December 1966 and UN Security Council in resolution 556 (1984) of 23 October 1984.

[119] M du Plessis 'The Geneva Conventions and South African Law' (2013) 43 *Institute for Security Studies Policy Brief*, available at https://www.files.ethz.ch/isn/166083/PolBrief43.pdf.

[120] *Azapo* (note 12 above) at para 29.

[121] du Plessis (note 119 above) at 3; and Canada's Crimes Against Humanity and War Crimes Act S.C. 2000, c.24. See also the Final Report of the Truth and Reconciliation Commission.

[122] Dugard (note 115 above) at 262. See also M Swart 'The Warning Voice from Heidelberg: Radbruch, Dugard and the Prosecution of State Injustice' (2010) 26(2) *South African Journal of Human Rights* 272.

[123] Dugard (ibid) at 262.

[124] Rome Statute, art 7.

[125] *Zimbabwe Torture Docket* (note14 above) at para 40.

B *Wouter Basson* case

The *Wouter Basson* case was first case regarding the prosecution of crimes committed by an individual on the instructions of the apartheid government to reach the Constitutional Court.[126] Wouter Basson, a cardiologist colloquially referred to as 'Dr Death,' was indicted in 1999 in the Pretoria High Court on 67 counts, with charges ranging from 229 murders and conspiracy to murder as well as the manufacturing, possessing, and dealing of drugs and fraud for personal enrichment totalling R36 million. As the head of the South African Defence Forces (SANDF) biological and chemical program called 'Project Coast' from 1981 to 1995, Basson oversaw the planning and execution of a number of mass murders committed by clandestine units of the South African National Defence Forces. Basson was alleged to have been involved in conduct amounting to war crimes committed outside South African territory during the Namibian border war. By drafting the conspiracy charges with reference to domestic legislation, the State prosecutors implicitly framed the egregious acts of violence as instances of ordinary criminality.[127] When the case was heard by the High Court, the court not only failed to mention *ius cogens* but failed to discuss certain fundamental principles of international law.[128] When the case was appealed to the SCA, the SCA refused to hear the merit of the legal question of whether the charges were correctly quashed because the application was fundamentally defective in various procedural respects.[129]

The Constitutional Court application concerned the three central issues of (i) bias of the trial judge (ii) admissibility of the bail record and (iii) the quashing of six charges. The Court considered it crucial to consider the seriousness of the charges in light of South Africa's international obligations regarding the maintenance of fundamental principles of international humanitarian law.[130] In light of the gravity of the offences the question arose of whether South Africa had an obligation to prosecute under international law. The Constitutional Court similarly failed to refer to *ius cogens*. This was partly as a result of the Court's insistence to frame the case as a domestic case rather than a case that was based on the principle of universal jurisdiction or flowing from South Africa's obligations at customary or conventional international law. The Constitutional Court justices implicitly framed Basson's conduct as analogous to instances of ordinary criminality such as murder, rape, and assault.[131] Although the Court's judgment alludes briefly to the state's obligations under international law to prosecute international crimes such crimes against humanity and war crimes, these obligations are framed as secondary to those imposed by domestic law. While the state, on appeal, argued that Basson's conduct as crimes against humanity and war crimes were criminalised under

[126] *Wouter Basson* (note 13 above). The first case brought against apartheid era violators and that ended in acquittals in 1996 was *S v Msane and 19 others* (Unreported judgment case no CC1/96 heard in the Durban and Coast Local Division of the Supreme Court of South Africa).

[127] According to Advocates Ackermann and Pretorius, Basson was charged with conspiracy because the actual conspiring took place in Pretoria, thus falling under the jurisdiction of South African courts and the country's domestic law.

[128] M Swart 'The Wouter Basson Prosecution: The Closest South Africa came to Nuremberg?' (2008) 68(1) *Zeitschrift fur ausländisches öffentliches Recht und Völkerrecht* 209.

[129] *S v Basson* [2003] ZASCA 72, 2003 (2) SACR 373 (SCA). See also O Bubenzer *Post-TRC Prosecutions in South Africa* (2009) 38.

[130] *Wouter Basson* (note 13 above) at para 171.

[131] A Raleigh 'Charging decisions, legal framing and transitional justice: the prosecution of Wouter Basson' (2019) 35(2) *SAJHR* 194 (On the reasons why the case was framed in terms of domestic law).

customary international law at the time they were committed, the dominant frame of reference remains that of domestic law.

In view of the seriousness of the charges, it would have been more appropriate and in accordance with the expectations of the international community to apply universal jurisdiction to Basson's alleged conduct committed within the territory of Namibia and outside South African territorial jurisdiction.[132] The existence of jurisdictional links (both territorial and personal) does not exclude the possibility of referring to universal jurisdiction. Applying universal jurisdiction in this case could have lent the appropriate status to the alleged crimes. It can also be asked whether international criminal law will develop as desired if universal jurisdiction is considered as a subsidiary form of jurisdiction: a form of jurisdiction a court will only resort to in the absence of all other jurisdictional links. Such a practice could also lend substance to the fear expressed in *Tadic* that 'human nature being what it is, there would be a perennial danger of international crimes being characterized as "ordinary crimes"'.[133]

Although *ius cogens* has been under-recognised by the Constitutional Court, the gravity and status of genocide as a *ius cogens* norm has been recognised in academic literature on the *Basson* case.[134] Although the Constitutional Court case focused on charges of conspiracy and not on the fertility 'research' conducted by Basson, the Court recognised the existence of a duty to prosecute.[135] The Court held that the National Prosecuting Authority is under an international obligation to prosecute crimes committed during the apartheid era.[136]

Whereas ordinary criminality falls under the domain of the domestic law frame, the international law frame concerns itself with what Drumbl has termed 'extraordinary international criminality,'[137] a designation that suggests that such crimes exist as substantively different forms of criminality than ordinary common crimes such as murder and rape.

C *Zimbabwe Torture Docket* case

The so-called 'Zimbabwe Torture Docket case'[138] involved the duty under domestic and international law to investigate international crimes. The case involved allegations of widespread torture, amounting to crimes against humanity, committed by Zimbabwean officials in Zimbabwe. The case concerned the South African Police Service's (SAPS) responsibilities under international and domestic law to investigate international crimes committed in Zimbabwe, which is not a state party to the ICC.[139]

The case raised a number of interesting international and domestic legal questions regarding the exercise of universal jurisdiction. The main questions include: the legality of

[132] However, basing the case on international law would not necessarily have resulted in a conviction (ibid).

[133] *Prosecutor v Dusko Tadic* Appeals Chamber IT-94-1-AR72 Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction 2/10/1995 para 58.

[134] M Jackson 'A Conspiracy to Commit Genocide: Anti-Fertility Research in Apartheid's Chemical and Biological Weapons Programme' (2015) 13(5) *Journal of International Criminal Justice* 993.

[135] *Wouter Basson* (note 13 above) at paras 31–37.

[136] Ibid at para 37. H van der Merwe *The Transformative Value of International Criminal Law* (2012) 265.(Thesis presented in fulfillment of the requirements for the degree of Legum Doctor (LLD) in the Faculty of Law at Stellenbosch University).

[137] M Drumbl *Atrocity, Punishment and International Law* (2007) 4.

[138] *Zimbabwe Torture Docket* (note 14 above).

[139] M du Plessis 'The Zimbabwe Torture Docket Decision and Proactive Complementarity' (2015) 81 *Institute for Security Studies Policy Brief* 1.

universal jurisdiction in absentia under international law; the correct interpretation of the Implementation Act's 'presence' requirement, the relevance of the fact that Zimbabwe is not a party to the Rome Statute as well as the question of whether there is an obligation to prosecute international crimes under international law or domestic Constitutional law.[140]

The Court's key findings were, firstly, that South Africa can exercise universal jurisdiction over international crimes such as torture under both international and domestic law; secondly, the presence of the suspect in South Africa was not required under international or domestic law in order to begin an investigation; and, thirdly, that South Africa was under an obligation to investigate such crimes under international law – and that, in terms of domestic law, such investigation is to be 'discharged through … law-enforcement agencies' (i.e. the SAPS).[141] According to du Plessis the Court exercised a 'robust' form of universal jurisdiction – in terms of which the presence of the accused on a state's territory is not required.[142] The court further found that domestic law also does not require such presence in the early stages of an investigation.[143]

After discussing the various ways in which a court can ground jurisdiction for criminal offences (including the possibility of exercising universal jurisdiction) the Court recited the *ius cogens* nature of torture under international law and the universal condemnation it attracts.[144] The Court stated that states are obliged to prosecute piracy, slave trading, war crimes and crimes against humanity, genocide and apartheid even in the absence of treaty obligations.[145] The Court further stated that torture was a crime under s 232 of the Constitution.[146] The Court mentioned that the obligation to prosecute torture was included in the Prevention and Combating of Torture of Persons Act.[147]

Ius cogens is first referred to in footnote 2 of the judgment which reads:

> A state's duty to prevent impunity, which can be defined as the exemption from punishment, is particularly pronounced with respect to those norms, such as the prohibition on torture, that are widely considered peremptory and therefore non-derogable – even in times of war or national emergency – and which, if unpunished, engender feelings of lawlessness, disempower ordinary citizens and offend against the human conscience.[148]

Ius cogens features again at paragraph 35 where the Court states: 'Coupled with treaty obligations, the ban on torture has the customary international law status of a peremptory norm from which no derogation is permitted.'

Finally, *ius cogens* appears in the concluding section of the judgment where the Court provides '[the crime of torture] law in the Republic in terms of section 232 of the Constitution due to its status as a peremptory norm of customary international law.'[149] The conclusion of the judgment is particularly sensitive to South Africa's obligations as part of the 'community

[140] C Gevers 'The Zimbabwe Torture Docket Case' (2014) *Opinio Juris*, available at http://opiniojuris.org/2014/05/20/guest-post-zimbabwe-torture-docket-case/.
[141] *Zimbabwe Torture Docket* (note 14 above) at para 50.
[142] Du Plessis (note 139 above).
[143] *Zimbabwe Torture Docket* (note 14 above) at para 49.
[144] Ibid at para 36.
[145] Ibid at para 37.
[146] Ibid.
[147] Ibid at para 38.
[148] Citing N Roht-Arriaza *Impunity and Human Rights in International Law and Practice* (1995).
[149] *Zimbabwe Torture Docket* (note 14 above) at para 77.

of nations'.[150] It is therefore particularly unfortunate that the case failed when it came to implementation – no investigation followed. The *Zimbabwe Torture docket* case nevertheless clearly represents a progression in the Constitutional Court's treatment of international crimes. It can be described as the most progressive domestic case on international criminal law not just in South Africa but also arguably in Africa.

V CONCLUSION

Due to South Africa's isolation during apartheid, the South African judiciary has only relatively recently started to seriously engage with international law. The neglect of international law during the Apartheid era means that South African lawyers were traditionally not well schooled in the application of international law (especially customary international law) and for a long time international law has been considered too unfamiliar and exotic to warrant reliance.[151] Whereas the Constitutional Court initially showed an awkwardness in dealing with this international law doctrine (as evident from the *Azapo* and *Wouter Basson* judgments), the Court showed much greater sensitivity to the principles underlying international crimes in the *Zimbabwe Torture Docket* case. This indicates an important evolution of South African constitutional law which will hopefully continue.

Gevers describes South Africa's relationship with international criminal law as 'complex' and 'schizophrenic'.[152] It is clear that the spectre of state sovereignty still hampers the development of the new international law. It can be argued that the 'spectre of sovereignty' manifests itself in the SCA and the Constitutional Court's reluctance to rely on the *ius cogens* nature of certain international crimes. The Constitutional Court, in the *Zimbabwe Torture Docket* case, has however taken a step forward by engaging more closely with *ius cogens* than the SCA. In the *Al Bashir* case, as I demonstrated above, the SCA treated *ius cogens* as an afterthought and not as a central part of its decision.

In applying *ius cogens*, South African courts would do well to consider comparative jurisprudence. Switzerland, for example, has a commendable way of protecting *ius cogens* norms of international law within the domestic legal order. By providing constitutional recognition of *ius cogens* norms, the revised Swiss Federal Constitution of 1999 ensures the superior status of these norms.[153] The 1999 Constitution explicitly states that no People's Initiative (referendum) aimed at constitutional amendment may be in conflict with the norms of *ius cogens*.[154] If *ius cogens* norms were given constitutional status in South Africa by including these norms in the South African Constitution judges would have to consider *ius cogens* whenever they are confronted with a case involving such norms. It would no longer be possible for judges to ignore or downplay *ius cogens* norms as occurred when the *Al Bashir* case reached the SCA.

The Constitutional Court has yet to address and acknowledge the notion of hierarchically superior norms in international law and affirm the superiority of such norms to domestic

[150] Ibid at para 80.

[151] Swart (note 128 above) at 213.

[152] L Chenwi and F Sucker 'South Africa's Competing Obligations in Relation to International Crimes' (2017) VII *Constitutional Court Review* 200, citing C Gevers 'International Criminal Law in South Africa' in E de Wet, H Hestermeyer and R Wolfrum (eds) *The Implementation of International Law in Germany and South Africa* (2015) 403–404.

[153] Swiss Federal Constitution, available at http://www.admin.ch/ch/d/sr/101/index.html.

[154] Ibid.

norms. It is ironic that the Constitutional Court, itself tasked with upholding a set of superior norms, has not acknowledged the *ius cogens* nature of the core international crimes. The Constitutional Court, which lies at the apex of the South African legal system, failed to appropriately recognise a norm that lies at the apex of the international legal order and that is hierarchically superior to all international legal norms.