**OUTLINE**

**A response to:**

* **Swart’s :“Al Bashir and the great unsaid: the non-resolution of the norm conflict and jus cogens”**

South Africa’s Bashir saga had wide ranging legal and political implications. It tested the government’s adherence to the rule of law in South Africa, the separation of powers doctrine and most importantly international criminal law’s place in the Republic. Swart indicates that the jus cogens was not, in this instance, given its due regard by the Supreme Court of Appeal (SCA) nor has it ever, in her opinion been given due regard by the South African courts including the Constitutional Court.[[1]](#footnote-1) From the onset it is important to state that the author is in full agreement with SCA’s order, in particular that the failure to arrest Bashir was inconsistent with South Africa’s obligations in terms of the Rome Statute and the Implementation of the Rome Statute Act, and therefore unlawful. However, there is room for further exploration of the international criminal law.

Whilst the author does not necessarily disagree with Swart’s assertions, the focus of this responding paper will be twofold. Firstly, it will posit understanding domestic legislation (in particular the Implementation Act) as a manifestation of the importance of jus cogens. Without taking anything away from the value and importance of jus cogens, this paper will espouse what was aptly stated by Bassiouni, “*jus cogens leaves open differences of values, philosophies, goals, and strategies of those who claim the existence of the norm in a given situation and its applicability to a given legal issue. Thus, jus cogens poses two essential problems for ICL; one relates to legal certainty and the other to a norm’s conformity to the requirements of the principles of legality...thus, the only practical solution is the codification of ICL*”[[2]](#footnote-2)

Therefore, this paper argues that the SCA was correct in relying on the Implementation Act, understanding it to, in terms of domestic law, give due credence to the wrongs jus cogens norms seek to right. Presumably, the Constitutional Court may have done the same given its previous handling of international criminal law matters, in particular the case of the *National Director of Public Prosecutions and others vs the Southern Africa Litigation Centre and Another*, otherwise known as the Zimbabwe Torture Case.

Secondly, like Swart, the author acknowledges that the SCA’s treatment of international criminal law could have been more comprehensive but (in diverging from Swart) only insofar as the SCA declined to further explore the so called “state of flux”[[3]](#footnote-3) of customary international law immunities. This includes exploring the Genocide Convention, which the author will treat as another example of the codification of jus cogens, and further addressing the suggested evolution of customary international law immunities with regard to crimes that shock the conscience of humanity as presented by SALC (a team which included the author) before the SCA.

It is clear that Wallis, JA purposefully narrowed down the judgment and he clearly stated that he meant “no disrespect to the efforts of counsel to provide us with a comprehensive body of authority dealing with the issue of immunity in relations to persons charged with international crimes in not engaging in comprehensive consideration of the material placed before us”[[4]](#footnote-4) He decided that “the content of customary international law” was not for him “to determine, ”[[5]](#footnote-5) a position which is understandable but therein lies the allure of exploring how international criminal law could have been further explored.

1. [↑](#footnote-ref-1)
2. International Crimes: Jus Cogens and Obligatio erga omnes Bassiouni 1997 available at <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1016&context=lcp> pg.72 [↑](#footnote-ref-2)
3. John Dugard International Law: A South African Perspective 4 ed (2011) pg.258. [↑](#footnote-ref-3)
4. SCA judgement para 69 [↑](#footnote-ref-4)
5. SCA Judgement para 84 [↑](#footnote-ref-5)