***Al Bashir* and the Great Unsaid: The non-resolution of norm conflict and *ius cogens***

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1. **Introduction**

When Sudanese President Omar Al Bashir set foot on South African soil in June 2015, few could predict the ongoing legal controversy his presence in South Africa would trigger. Al Bashir, indicted by the International Criminal Court (ICC) for war crimes and crimes against humanity in 2009[[1]](#footnote-1) and for genocide in 2010[[2]](#footnote-2), was no stranger to controversy. Whereas his visits on the continent[[3]](#footnote-3) and beyond[[4]](#footnote-4) have stirred debate and a small body of jurisprudence[[5]](#footnote-5), his visit to South Africa caused a stream of litigation starting in the High Court then proceeding to the Supreme Court of Appeal 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.[[6]](#footnote-6)

The South African part of the litigation path of the *Al Bashir* case ended at the Supreme Court of Appeal.[[7]](#footnote-7) 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 international crimes are protected by immunity.

This paper will examine the flaws in the SCA case and consider the arguments the Constitutional Court *could have made* in this regard. In highlighting the flaws in the SCA case, the paper will focus on the SCA’s thin and inadequate treatment of the norm of *ius cogens*.

Tladi[[8]](#footnote-8) and De Wet,[[9]](#footnote-9) two academics holding different positions on the Bashir case, have both commented on the complex web of obligations exposed by the Al Bashir case: the tension between domestic and international law, between the Implementation Act and the hosting agreement etc. I am arguing that the complexity of this web of obligations is overstated by Tladi and that the fact that the crimes with which the ICC charged Al Bashir are international crimes and moreover, ius cogens crimes. I argue that, so far in its jurisprudence, the Constitutional Court has severely neglected the norm of *ius cogens*.[[10]](#footnote-10) To illustrate this neglect, the cases of *Azapo*, *Wouter Basson* and the so-called *Zimbabwe Torture docket* case will be analysed.

It will be argued here that the *Al Bashir* case should have proceeded to the Constitutional Court. By making this argument I am not arguing that the state’s decision to appeal the decision of the Supreme Court of Appeal was correct. Rather I am arguing that it would have been appropriate for a court of the seniority of the Constitutional Court to determine the main legal questions raised by the *Al Bashir* case, particularly the question of immunity and the relationship between customary international law and the relationship and hierarchy between international and domestic and regional instruments. Since the Constitutional Court is the supreme and most authoritative court, a decision by this court would have settled the question of the relationship between customary international law and the duty to prosecute international crimes. In discussing South Africa’s obligations Tladi writes of ‘a network of conflicting rules‘[[11]](#footnote-11) If the case proceeded to the Constitutional Court and the Court highlighted the *ius cogens* nature of the crimes, this would have set a correct and important precedent for future cases of this kind**.** It would have been the appropriate body to reprimand the state for its bad faith behaviour in the lead-up to Bashir’s hasty departure from South Africa on 15 June 2015. It would also have set an important precedent for future cases involving the question whether head of state enjoy immunity for international crimes.

The SCA’s emphasis on section 232 of the Constitution will briefly be considered, particularly the question of whether it is desirable that an Act of Parliament should always trump customary international law.

1. **The *Al Bashir* Cases**

Much has been written on the Al Bashir case.*[[12]](#footnote-12)* 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.

1. ***High Court Case***

Upon received confirmation of Al Bashir’s arrival, the Southern African Litigation Centre (SALC) approached the North Gauteng 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 following morning) the government opposed the urgent application and requested a postponement. SALC requested an interim order mandating the government to ensure that Al Bashir does not leave the country.[[13]](#footnote-13) On 15 June the court ruled that AL Bashir should be arrested and detained until he is transferred to The Hague.[[14]](#footnote-14) At this point the counsel for the state told the court that he believed that Al Bashir already left the country. The Court also requested the State produce an explanatory affidavit detailing how President Bashir was allowed to leave the country despite a court order explicitly calling for such to be prevented.

It was of course 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.

The Court found that the Implementation Act removes head of state immunity for the crimes contained in the Rome Statute. The ICC 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’.[[15]](#footnote-15) 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’[[16]](#footnote-16)

The State proceeded to seek leave to appeal to the Supreme Court of Appeal (SCA).

1. ***SCA Case***

The jurisdictional issue in Al-Bashir related to the reach of South Africa’s enforcement jurisdiction. As the accused was present in South Africa after the commission of the alleged offences, it fits within s 4(3)(c) of the ICC Implementation Act.

The SCA dealt with the relationship between sections 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.[[17]](#footnote-17)

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 commission of the AU relating to organisation of the various meetings that were to take place at the summit including the 25th Assembly of the AU. Based on this agreement, President Al-Bashir had been invited to attend the summit by the AU and not by the government. She then referred to art VIII of the hosting agreement, headed ‘Privileges and Immunities’: ‘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.’

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’.[[18]](#footnote-18) Firstly, the proclamation under s 5(3) of the Diplomatic Immunities and Privileges Act[[19]](#footnote-19) (DIPA) – the provision the government invoked – applies to organisations and their representatives. According to s 1(iv) of the 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’.[[20]](#footnote-20) The SCA therefore held that the hosting agreement provides immunity only for representatives and officials of the AU and organisations and not for those of states.[[21]](#footnote-21) It does not, therefore, provide immunity for heads of states and state delegates.[[22]](#footnote-22)Secondly, even though additional immunity can be granted to heads of states through s 7 of the 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 immunity even in the even of a violation of a *ius cogens* norm.[[23]](#footnote-23) But the SCA decided to apply and prioritise South African domestic law (as stated in the Implementation Act) and that South African domestic law was contrary to customary international law on personal immunity of Heads of State. 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 of the Rome Statute Act[[24]](#footnote-24) which was enacted to domesticate South Africa’s obligations under the Rome Statute. The Court stated: ‘The 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’.[[25]](#footnote-25)

The Court further relied on s 232 of the Constitution in justifying why customary international law 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 ICC Act: the rule that head of the states do not enjoy personal immunity for international crimes.

The Implementation Act removes the bar of immunity to the prosecution of international crimes in South Africa where an arrest warrant has been issued and a request for cooperation has been made.[[26]](#footnote-26) The SCA held that the conduct of the South African government in failing to take steps to arrest Al Bashir for surrender to the ICC was inconsistent with South Africa’s obligations under the Rome Statute and therefore unlawful.[[27]](#footnote-27)

The SCA declined to express a view on the argument that the UN Security Council Resolution (which referred the case) implicitly waived Al Bashir’s immunity.[[28]](#footnote-28)

1. **The Treatment of *Ius Cogens* in the SCA case**

The judgment briefly refers to *ius cogens* and translates *ius cogens* as ‘immutable norms’. The SCA first mentions ‘peremptory norms’ in paragraph 37 of the judgment when it states:[[29]](#footnote-29)

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 torture as an example of a peremptory norms which has also been domesticated in South African legislation.[[30]](#footnote-30)

Later in the judgment, rather obscurely, the judge refers to Dr Weatherall[[31]](#footnote-31):

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*’. [[32]](#footnote-32)

The SCA fails to situate the notion of *ius cogens* in the correct legal framework. By failing to situate *ius cogens* within the framework of treaty law and by failing to mention the Vienna Convention on the Law of Treaties, the court does not position the norm correctly. The Court’s treatment *of ius cogens* can be described as awkward and eccentric.

It is unfortunate that the court did not engage with customary international law in more depth. This leaves open the possibility that government could again in future rely on customary international law as a defence in favour of upholding immunity for prosecuting those who commit international crimes. Indeed there are parts of the judgment which could even assist those who argue that customary international law upholds immunity.[[33]](#footnote-33) The court essentially argued that South African domestic law trumps customary international law which upholds immunity (a carelessly and unnecessary acknowledgment that custom protects immunity).

The SCA treated the matter as if it involved a straightforward matter of domestic law.[[34]](#footnote-34) The SCA did not sufficiently elaborate on the nature of international crimes and what distinguishes international crimes from domestic crimes. The Heads of Arguments for the Helen Suzman Foundation (in its capacity as amicus curiae) did explain the relationship between the Constitutional Court and international crimes: [[35]](#footnote-35)

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.[[36]](#footnote-36)

The Heads of Arguments further stated that allowing alleged perpetrators of such crimes to avoid capture and prosecution constitute an affront to our constitutional framework.[[37]](#footnote-37)

**4.Withdrawing the Appeal**

The state then proceeded to appeal the decision of the SCA. The case was set down to be heard in the Constitutional Court on 22 November 2016. On 16 October Minister of Justice and Correctional Services Michael Masutha announced that in essence the Supreme Court of Appeal ‘identified the problem which needed to be addressed’ and that government will be withdrawing its appeal to the Constitutional Court.[[38]](#footnote-38)

It was clear that the Minister’s decision was strongly motivated by the state’s strong 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 thus completes the removal of all legal impediments inhibiting South Africa's ability to honour its obligations relating to the granting of diplomatic immunity under the international law as provided for under our domestic legislation.[[39]](#footnote-39) The state’s intention was illustrated by the tabling of the International Crimes Bill[[40]](#footnote-40) In June 2018 however the Minister of International Relations, Lindiwe Sisulu, stated that government will reconsider its decision to withdraw from the ICC.[[41]](#footnote-41)

**5. Resolving Conflicting Obligations?**

At issue in both the High Court and the SCA cases were the interpretation and identification of rules of international law in a complex network involving various inconsistent treaty, customary and other obligations.[[42]](#footnote-42) Tladi sets out the ‘conflict of obligations as follows: ’whereas South Africa has a duty to arrest under customary international law, it is obliged to respect his immunities and inviolability’.[[43]](#footnote-43) In Tladi’s view the potential conflict is dealt with under Art 98 of the Rome Statute which states that the IC/C may not request cooperation if cooperation would require a State to act inconsistently with its duties under international law on immunities.’[[44]](#footnote-44)

The multi-layered conflict described above, i.e. the conflict between the Implementation Act and customary international law as one layer; and conflict between customary international law and the Rome Statute as another layer; is further exacerbated by the fact that there appears to also be a conflict in the domestic laws. The Diplomatic Immunities and Privileges Act (hereinafter the “DIPA”) has provisions that require the respect of Al-Bashir’s immunities.34 The law, as it pertains to the duty to arrest and surrender of Al-Bashir, is therefore complex as it consists of various rules that are both mutually reinforcing and conflicting.[[45]](#footnote-45)

Du Plessis for states unequivocally that under the Implementation Act, the jurisdiction of South African courts ‘trump immunities which usually attach to officials of governments.’ [[46]](#footnote-46)This assertion is based on sec. 4 (2) of the Implementation which provides that notwithstanding any other law to the contrary, including customary international law or treaty law, the fact that a person was a head of state or government or state official is neither a ‘defence to a crime’ or ‘ground for possible reduction of a sentence’.[[47]](#footnote-47)

De Wet agrees that the *Al Bashir* case involves a conflict of norms. However, she considers this norm conflict a self-created conflict of norms.[[48]](#footnote-48) She points to the fact that South Africa only took up these consultations on 12 June 2015 – more than two weeks after this reminder by the Registry and only when Al Bashir was already on his way to South Africa.[[49]](#footnote-49) Meanwhile, it had entered the host-state agreement with the AU on 4 June 2015 and implemented it through subordinate legislation on 5 June 2015. One is therefore tempted to conclude that the government deliberately attempted to create a norm conflict which could be used as pretext during consultations with the ICC for not giving effect to its obligations under the ICC Statute. But the South African government would probably have invoked the immunity defense regardless of the host state agreement since the defense of immunity is the obvious and well-worn defence in this case.

De Wet writes of two ways in which international courts avoid dealing with norm conflicts. First, international courts typically resolve or avoid such conflicts by means of the interpretative technique of interpreting the norm in the most restrictive manner.[[50]](#footnote-50) By limiting the scope of the *ius cogens* obligation, the court reduces the possibility of a norm conflict. A second and formalistic way of conflict avoidance is to make a distinction between substantive and procedural law – this often occurs with regard to the law of immunites.[[51]](#footnote-51) Courts would state that obligations pertaining to immunities cannot conflict with the *ius cogens* norm encompassed in the prohibition of torture for example, as the former is a matter of procedural law while the latter constitutes substantive law.[[52]](#footnote-52) By stating that procedural and substantive norms cannot conflict, the court would avoid having to solve the norm conflict and would avoid giving *ius cogens* rightful recognition. By using this manoeuvre, the court is essentially making an artificial distinction between the procedural and the substantive.

In resolving norm conflicts, 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.[[53]](#footnote-53) 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*. [[54]](#footnote-54)

**6.The Nature and Status of *Ius Cogens* Norms**

It is difficult to trace the origins of ius cogens. According to Bianchi, 'Before its sanctioning by judicial decisions in the 1990s, ius cogens had been largely developed by international legal scholarship.'[[55]](#footnote-55)

*Ius cogens* was codified and recognised in the Vienna Convention on the Law of Treaties (VCLT).[[56]](#footnote-56) It was defined in article 53 as ‘a norm accepted and recognized 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’[[57]](#footnote-57).The Vienna Convention specifies the effect of a *ius cogens* norm on a treaty: *ius cogens* norms void treaties in case of conflict.[[58]](#footnote-58) This includes retroactive invalidation. Ius cogens implies a hierarchy of crimes and international crimes lie at the top of this pyramid of crimes. [[59]](#footnote-59) Consequently, all rules conflicting with peremptory norms are deemed to be void and only other peremptory norms can modify the specific peremptory norm.[[60]](#footnote-60)

*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.[[61]](#footnote-61)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 VCLT. Art. 53 VCLT leaves it to the ‘international community as a whole’ to identify those international law norms belonging to jus cogens. According to de Wet this means that a particular norm is first recognized as customary international law, whereafter the international community of states as a whole further agrees that it is a norm from which no derogation is permitted.[[62]](#footnote-62)A peremptory norm would therefore be subject to ‘double acceptance’ by the international community of states as a whole.[[63]](#footnote-63)

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-defense; (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.[[64]](#footnote-64)

At its root *ius cogens* also draws upon elements of natural law[[65]](#footnote-65) and the two do share some overt similarities, notably as being ostensibly 'moral' doctrines. Like natural law, *ius cogens* is binding regardless of consent. The similarities between natural law and *ius cogens* were noticed even during the drafting of the Vienna Convention (at times the delegates used the terms interchangeably). [[66]](#footnote-66) But not all scholars tie the origin of *ius cogens* to natural law. Some argue that *ius cogens* emanated from the will of states as expressed in treaties or in custom.’[[67]](#footnote-67)

*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’.[[68]](#footnote-68) Tied to the difficulty of definition is the thorny issue of determining the content of *ius cogens*. There are two dominant views on the content: some scholars hold the view that the content is fairly clear in 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

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*, the uncertainty has been overemphasised.

The Vienna Convention 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.’[[69]](#footnote-69) One scholar has claimed that in determining when a norm reaches the status of *ius cogens*, 'it appears that judges and scholars simply consult their own consciences’.[[70]](#footnote-70) Whereas the point at which a norm attains the status of *ius cogens* does remain unclear, there is a substantial measure of consensus on a number of *ius cogens* norms.

Whereas the content of *erga omnes* is fairly well established in the case law of the International Court of Justice[[71]](#footnote-71), the notion of *ius cogens* has not received the same attention by the ICJ and has been cited relatively rarely.

***7. 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 *ius cogens* in its judgments. The Court was initially equally reluctant to include *erga omnes* norms but eventually started to refer to *erga omnes* in the 1970 *Barcelona Traction* case.[[72]](#footnote-72) In this case the ICJ distinguished between obligations a state has towards other states and obligations a state has towards the international community.[[73]](#footnote-73)

As Hernandez points out, preremptory norms are not new to the ICJ. As early as 1934, the PCIJ, in the separate opinion of Judge Schücking made reference to the concept of jus cogens in the Oscar Chinn case and linked it expressly to international public morality.[[74]](#footnote-74)

Why has the ICJ been this reluctant? 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.[[75]](#footnote-75) Gleider Hernandez explains why this is the case: ‘To 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.’[[76]](#footnote-76)

The Court has on occasion referred to *ius cogens* without using the term ius cogens. In *Diallo* for example the ICJ refraining from using the terms ‘peremptory’ or jus 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’. [[77]](#footnote-77) In the Nicaragua, Oil Platforms and Armed Activities in the Congo (Congo v Uganda) judgments, the imperative character of the prohibition of the use of force was given no legal effect.[[78]](#footnote-78)

In the *Congo v Rwanda* case,[[79]](#footnote-79) Dugard applauds the decision of the ICJ to explicitly recognise and accept the notion of ius cogens. Dugard writes that such acceptance is long overdue. Whereas ius cogens has long been accepted by international law academics,[[80]](#footnote-80) international courts have been slow to award ius cogens its rightful status. In this separate opinion Dugard 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*. To Dugard, the South West Africa cases presented the perfect opportunity to apply *ius cogens*.[[81]](#footnote-81) The *East Timor* decision[[82]](#footnote-82) and the *Arrest Warrant* (*Congo v Belgium*) [[83]](#footnote-83)case would also have been suitable cases in which to invoke *ius cogens*. 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*.[[84]](#footnote-84) The *Arrest Warrant* case can be described as a low point in the ICJ’s recognition 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.[[85]](#footnote-85) Largely because of the retrogressive decision in *Arrest Warrant*, the law remains unsettled.[[86]](#footnote-86)

Because of his position in *Congo v Rwanda*, Dugard has been credited with championing a doctrinal move towards the recognition of *ius cogens*.[[87]](#footnote-87)

Outside of the confines of ICJ jurisprudence, the position is still not entirely acknowledged. In the ground-breaking *Pinochet* *(No 3)* judgment for example, only Judge Philips and Judge Millet opined that systematic torture was an international crimes for which there could be no immunity.[[88]](#footnote-88) 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.[[89]](#footnote-89)

***8. Ius Cogens* in South African Law and Jurisprudence**

1. ***Azapo* case**

The *Azapo* case[[90]](#footnote-90) was the first Constitutional Court case that involved the question of the status of international crimes. The *Azapo* case involved a challenge to the amnesty provisions in s 20(7) of the Promotion of National Unity and Reconciliation Act, 34 of 1995.88 Steve Biko’s widow and other family members of apartheid victims argued that the amnesty provisions violated their constitutional right to access to justice. The Constitutional Court held that the epilogue to the Constitution trumped s 22 and that s 20 (7) of the Promotion of National Unity and Reconciliation Act authorising criminal and civil amnesty was therefore constitutional.[[91]](#footnote-91) The judgment did not mention *jus 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 seriously.[[92]](#footnote-92)

From an international law perspective Dugard found the judgment 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.[[93]](#footnote-93) He pointed out 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.[[94]](#footnote-94)

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[[95]](#footnote-95)

The Constitutional Court failed to recognise the fact that international crimes are of a fundamentally different nature than domestic crimes. What makes murder as a crime against humanity different from a crime under South African domestic law is the fact that universal jurisdiction would attach to murder as a crime against humanity – murder as a crime against humanity is a crime of a *particular gravity* and the international community as a whole has an interest in punishing this grave crime.

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

1. ***Wouter Basson* case**

The *Wouter Basson* case was first case regarding the prosecution of crimes committed by the Apartheid government to reach the Constitutional Court.[[96]](#footnote-96) Wouter Basson was alleged to have been involved in conduct amounting to war crimes committed outside South African territory during the Namibian border war. The High Court not only failed to mention ius cogens but failed to discuss principles of international law.[[97]](#footnote-97) 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. As I wrote elsewhere, 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.[[98]](#footnote-98) 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’”.[[99]](#footnote-99)

Although *ius cogens* has been underrecognised by the Constitutional Court, the immense gravity and status of genocide as a *i*us cogens norm has been recognised in academic literature on the Basson case.[[100]](#footnote-100) 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.[[101]](#footnote-101) And held that the NPA is under an international obligation to prosecute crimes committed during the apartheid era.[[102]](#footnote-102)[[103]](#footnote-103)

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,”[[104]](#footnote-104) a designation that suggests that such crimes exist as substantively different forms of criminality than ordinary common crimes such as murder and rape.

1. **Zimbabwe Torture Docket case**

The so-called ‘Zimbabwe torture docket case’ involved the duty under domestic and international law to investigate international crimes. The case concerned allegations of widespread torture, amounting to crimes against humanity, committed in Zimbabwe. The court found that the South African security authorities, exercising South Africa’s universal jurisdiction, are obliged Torture Docket 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.[[105]](#footnote-105)

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 universal jurisdiction in absentia under international law; the limits (if any) international law places on states’ investigative powers in UJ cases; the correct interpretation of the Implementation Act’s ‘presence’ requirement and the relevance of the fact that Zimbabwe is not a party to the Rome Statute; and the question of whether there is an obligation to prosecute international crimes under international law or domestic Constitutional law.[[106]](#footnote-106)

The court’s key findings were, firstly, that South Africa can exercise universal jurisdiction over such crimes 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).[[107]](#footnote-107) 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.[[108]](#footnote-108) The court further found that domestic law also does not require such presence in the early stages of an investigation.[[109]](#footnote-109)

After discussing the various ways in which a court can ground jurisdiction for criminal offences (including universal jurisdiction) the court recited the i*us cogens* nature of torture under international law and the universal condemnation it attracts.[[110]](#footnote-110) 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.[[111]](#footnote-111) The court further stated that torture was a crime under section 232 of the Constitution.[[112]](#footnote-112) The Court mentioned that the obligation to prosecute torture was included in the Prevention and Combating of Torture of Persons Act.[[113]](#footnote-113)

The first appearance of *ius cogens* is 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.[[114]](#footnote-114) In paragraph 35 the Court states: Coupled with treaty obligations,[[115]](#footnote-115) the ban on torture has the customary international law status of a peremptory norm from which no derogation is permitted. The court lists the international crimes with *ius cogens* status in para 37.

*Ius cogens* features again in the concluding section of the judgment. Paragraph 77 states: ‘ [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.’

**9. The Validity of Section 232**

The SCA made much of section 232 of the Constitution which provides that:

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

Judge Wallis stated in the SCA judgment:

And [cooperation with the ICC] does not undermine customary international law, which as a country we are entitled to depart from by statute as stated in s 232 of the Constitution.[[116]](#footnote-116)

It can be argued that section 232 of the Constitution which by implication subjects *ius cogens* norms and *erga omnes* obligations to acts of Parliament might amount to a violation of the public international law norm regulating the binding nature of *jus cogens* norms and *erga omnes* obligations.[[117]](#footnote-117)

**10. Conclusion**

Due to South Africa’s isolation during the apartheid-era, the South Africa judiciary has only relatively recently started to seriously engage with international law. [[118]](#footnote-118)As I wrote in 2008, South African lawyers are not well-schooled in the application of international law (especially customary international law) and for a long time international law has been considered too exotic to be relied on.[[119]](#footnote-119)

Gevers has described South Africa’s relationship with international criminal law as ‘complex’ and ‘schizophrenic’.[[120]](#footnote-120) 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 has however engaged more closely with the *ius cogens* than the SCA has. In the *Al Bashir* case the SCA treated *ius cogens* as an afterthought and not as a central part of its decision.

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 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.

If the Constitutional Court highlighted the superior status of *ius cogens*, it would have removed the incorrect perception that, in the absence of the Implementation Act (should the Act get repealed), the customary international law (if interpreted as granting immunities which is debatable) and domestic legislation recognizing immunities[[121]](#footnote-121) would have trumped. It is perhaps ironic that the Constitutional Court which lies at the apex of the South African legal system failed to recognize a norm that lies at the apex of the international legal order and that is hierarchically superior to all domestic and international legal norms. For the Constitutional Court to recognize *ius cogens* would be to follow the lead of many international courts and tribunals which recognize a hierarchy of norms.[[122]](#footnote-122) In spite of the long standing respect for immunity *ratione personae*, respect for *ius cogens* norms should trump any (incorrect) interpretation of customary international law that upholds immunity.

1. On 4 March 2009, the Pre-Trial Chamber I issued a warrant of arrest for President Al-Bashir for crimes against humanity, see Warrant of Arrest for Omar Hassan Ahmad Al-Bashir, Al Bashir (ICC-02/05-01/09), Pre-Trial Chamber I, 4 March 2009. [↑](#footnote-ref-1)
2. The ICC issued a second warrant of arrest on 12 July 2010, see Second Warrant of Arrest for Omar Hassan Ahmad Al-Bashir, Al Bashir (ICC-02/05-01/09), Pre-Trial Chamber I, 12 July 2010. [↑](#footnote-ref-2)
3. Subsequent to 2009, Al Bashir visited Malawi, Egypt, Ethiopia, Kenya, Libya, South Sudan and South Africa. [↑](#footnote-ref-3)
4. Al Bashir visited China, India, Iran, Kuwait, Saudi Arabia and Qatar. See Sudan’s President has made 74 trips across the world in the seven years he’s been wanted for war crimes’ *Quartz Africa* 4 March 2016 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/ [↑](#footnote-ref-4)
5. See the non cooperation decisions… [↑](#footnote-ref-5)
6. [Decision under 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](https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/05-01/09-302) ICC-02/05-01/09-302,Pre-Trial Chamber II, 6 July 2017. [↑](#footnote-ref-6)
7. *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre* [2016] ZASCA 17. [↑](#footnote-ref-7)
8. Dire Tladi’Interpretation and International law in South African courts’ *African Human rights Law Journal* (2016) [↑](#footnote-ref-8)
9. E de Wet ‘The Implications of President Al Bashir’s Visit to South Africa for International and Domestic Law’ *Journal of International Criminal Justice*, Volume 13 (2015) [↑](#footnote-ref-9)
10. It is interesting that peremptory norms (ius cogens norms) were referred to in some of the hearings before the Truth and Reconciliation Commission. See 1997 hearing of… [↑](#footnote-ref-10)
11. D Tladi ‘The International Criminal Court and the Duty to Arrest and Surrender: The Case of Omar Al Bashir in South Africa’ *Zeitschrift fur internationale Strafrechtsdogmatik* 10/2015 493.Zeitschrift 500 [↑](#footnote-ref-11)
12. See for example D Akande ‘The Bashir case: Has the South African Supreme Court abolished immunity for all heads of states?’ *EJIL:TALK!* 29 March 2016; MJ Ventura ‘Escape from Johannesburg? Sudanese President Al Bashir visits South Africa, and the implicit removal of head of state immunity by the UN Security Council in light of Al Jedda’ (2015) 13 *Journal of International Criminal Justice* 995. Max du Plessis ‘[The Omar Al-Bashir Case: Exploring Efforts to Resolve the Tension between the African Union and the International Criminal Court](http://catalogue.ppl.nl/xslt/DB=1/FKT=1016/FRM=Bashir/IMPLAND=Y/LNG=EN/LRSET=1/SET=1/SID=8090b4ba-2/SRT=YOP/TTL=1/XSLBASE=http%253A%252F%252Flbs-vrep.oclc.org%253A8282%252Foclc_gui/XSLFILE=%25253Fid%25253D%24c%252526db%25253D%24d/SHW?FRST=5)’ in ; Mia Swart [↑](#footnote-ref-12)
13. “Interim Court Order” Case No. 27740/15 (14 June 2015) para. 1, available at http://www.southernafricalitigationcentre.org/1/ wp-content/uploads/2015/06/Interim-interdict.pdf (last accessed: 30 October 2016) [↑](#footnote-ref-13)
14. *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others* ZAGPPHC 402, Case No. 27740/2015 (2015) para. 2, available at http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2015/06/ Judgement-2.pdf (last accessed: 30 October 2016). [↑](#footnote-ref-14)
15. High Court decision para 2. See Dire Tladi ‘The duty on South Africa to arrest and surrender President Al Bashir under South African and international law’ *Journal of International Criminal Justice* (2015) 1031, 1032. [↑](#footnote-ref-15)
16. High Court decision para 28.8 and para 30. [↑](#footnote-ref-16)
17. Para 60 [↑](#footnote-ref-17)
18. See F Sucker & L Chenwi ‘South Africa’s Competing Obligations in relation to international crimes’ *Constitutional Court Review* [↑](#footnote-ref-18)
19. Act [↑](#footnote-ref-19)
20. This refers to organisations such as the AU or African Commission on Human and Peoples’ Rights and does not include member states or their representatives, such as heads of states [↑](#footnote-ref-20)
21. See the criticism of this argument by Dire Tladi (note 7 above) [↑](#footnote-ref-21)
22. Act 37 of 2001 [↑](#footnote-ref-22)
23. Para 84 of the majority opinion. [↑](#footnote-ref-23)
24. Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 [↑](#footnote-ref-24)
25. Para 102 [↑](#footnote-ref-25)
26. Para 103 [↑](#footnote-ref-26)
27. Para 113. [↑](#footnote-ref-27)
28. Para 106 [↑](#footnote-ref-28)
29. [↑](#footnote-ref-29)
30. See paras 39, 40 [↑](#footnote-ref-30)
31. The court refers to the following article by Dr Weatherall: Thomas Weatherall ‘Jus Cogens and Sovereign Immunity: Reconciling Divergence in Contemporary Jurisprudence’ (2015) 46 *Georgetown Journal of International Law* 1151 at 1171-1173. [↑](#footnote-ref-31)
32. Para 83 [↑](#footnote-ref-32)
33. [↑](#footnote-ref-33)
34. Dapo Akande ‘The Bashir case: Has the South African Supreme Court abolished immunity for all heads of state?’ European University Institute 25 April 2016 available at https://iow.eui.eu/2016/04/25/the-bashir-case-has-the-south-african-supreme-court-abolished-immunity-for-all-heads-of-states/ [↑](#footnote-ref-34)
35. Heads of Argument Case No: 867/2015 available at https://constitutionallyspeaking.co.za/resources/al-bashir-the-hsfs-heads-of-argument-before-the-sca/ [↑](#footnote-ref-35)
36. [↑](#footnote-ref-36)
37. Para 28.2 [↑](#footnote-ref-37)
38. ‘Al Bashir: Government will no longer go to Con Court’ 21 October 2016 https://www.iol.co.za/news/al-bashir-government-will-no-longer-go-to-concourt-2082424 [↑](#footnote-ref-38)
39. [↑](#footnote-ref-39)
40. South Africa will however continue to be under a duty to cooperate with the ICC even if it withdraws from the ICC. As Navi Pillay and Angela Mudukuti point out, the International Crimes Bill acknowledges in section 36 (2),that “any co-operation” with the ICC related to criminal investigation and proceedings that South Africa had a duty to co-operate prior to withdrawal, must still be handled in terms of the provisions of the existing ICC Act. Pillay & Mudukuti ‘South Africa and the ICC: Dismantling the international criminal justice system to protect one individual’ *Daily Maverick* 19 June 2018 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 [↑](#footnote-ref-40)
41. Carien du Plessis ‘Lindiwe Sisulu: Debate to stay in the ICC reopened’ *Mail & Guardian* 5 July 2018 available at https://mg.co.za/article/2018-07-05-lindiwe-sisulu-debate-to-stay-in-the-icc-reopened [↑](#footnote-ref-41)
42. Tladi [↑](#footnote-ref-42)
43. [↑](#footnote-ref-43)
44. Art 98 states” may not proceed with a request for surrender or assistance which would require the State to act inconsistently with its duties under international law’ with respect to the State or diplomatic immunity…’ [↑](#footnote-ref-44)
45. Tladi (note 21 above) [↑](#footnote-ref-45)
46. M du Plessis, *Journal of International Criminal Justice* 5 (2007), 460 (474). [↑](#footnote-ref-46)
47. Ibid [↑](#footnote-ref-47)
48. E de Wet [↑](#footnote-ref-48)
49. [↑](#footnote-ref-49)
50. E de Wet in Shelton [↑](#footnote-ref-50)
51. Ibid [↑](#footnote-ref-51)
52. Ibid [↑](#footnote-ref-52)
53. Ibid [↑](#footnote-ref-53)
54. The text of the Swiss Federal Constitution is available at http://www.admin.ch/ch/d/sr/101/index.html (accessed 23 March 2012). [↑](#footnote-ref-54)
55. A. Bianchi, 'Human Rights and The Magic of Jus Cogens', (2008), European Journal of International Law, 19(3), 491-508, at 493. [↑](#footnote-ref-55)
56. Article 53, Vienna Convention on the Law of Treaties 1969. [↑](#footnote-ref-56)
57. [↑](#footnote-ref-57)
58. Article 64, Vienna Convention on the Law of Treaties 1969. States: ‘[if] a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.” [↑](#footnote-ref-58)
59. On the idea of a hierarchy of international crimes, see generally Sentencing Judgment,Tadić (IT-94-1-A and IT-94-1-A bis), Appeals Chamber, 26 January 2000, § 69; Judgment, Krstić (IT-98-33-A), Appeals Chamber, 19 April 2004, § 36; A. Danner, ‘Constructing a Hierarchy of Crimes in International Criminal Law Sentencing’, 87 Virginia Law Review (2001) 415; M. Frulli, ‘Are Crimes against Humanity More Serious than War Crimes?’ 12 European Journal of International Law (2001) 329 [↑](#footnote-ref-59)
60. Art 53, VCLT. [↑](#footnote-ref-60)
61. Michael Dominques (United States), Case 12.285, Inter-American Commission of Human Rights, Report No. 62/62, OEA/Ser.L/V/II.117, doc.1, rev.1 para 49 (2003) [↑](#footnote-ref-61)
62. De Wet in Shelton [↑](#footnote-ref-62)
63. Ibid. [↑](#footnote-ref-63)
64. Fragmentation report n 1 para 374. See also International Law Commission, Draft Articles on State Responsibility, Commentary on Article 40, paras. 4-6 in Official Records of the General Assembly, Fifth-sixth Session (A/56/10) 283-284 [↑](#footnote-ref-64)
65. The definition of ius cogens in the Vienna Convention on the Law of Treaties was influenced, in particular, by the work of Albert Verdross who was strongly influenced by natural law. See for example Albert Verdross ‘Jus Dispositivum and jus Cogens in International Law’ 60 *American Journal of International Law* (1966) 56.See also Erika de Wet ‘Jus Cogens and Obligations Erga Omnes’ in Dinah Shelton *Oxford Handbook of International Law* (2013) [↑](#footnote-ref-65)
66. 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, A/CONF.39/11 [↑](#footnote-ref-66)
67. United Nations Conventions on the Law of Treaties, Summary record, at p. 298, at para.53. [↑](#footnote-ref-67)
68. Abi-Saab, ‘The Third World and the Future of the International Legal Order’, 29 Revue Egyptienne de Droit International (1973) 27, at 53. [↑](#footnote-ref-68)
69. Norms', at 11. 58 Art. 53 Vienna Convention on the Law of Treaties (1969). [↑](#footnote-ref-69)
70. .M. O'Connell, 'Jus Cogens: International Law's Higher Ethical Norms', (April 19, 2011). [↑](#footnote-ref-70)
71. *Case concerning the Barcelona Traction, Light and Power Company Ltd*. (Belgium v. Spain), 5 February 1970, International Court of Justice Reports 1970, § 33 See Jan Wouters and Sten Verhoeven. See also the use of *erga omnes* in the *Wall Opinion*  [↑](#footnote-ref-71)
72. *Barcelona Traction, Light and Power Company Ltd. (Belgium v Spain)* ICJ Reports 1970 [↑](#footnote-ref-72)
73. [↑](#footnote-ref-73)
74. Oscar Chinn case (1934) PCIJ Series A/B No 63, Separate Opinion of Judge Schücking, 149, 150. [↑](#footnote-ref-74)
75. Gleider Hernandez ‘A Reluctant Guardian: The International Court of Justice and the Concept of International Community’ *British Yearbook of International Law* Vol. 83 1 (2012) [↑](#footnote-ref-75)
76. [↑](#footnote-ref-76)
77. Para 87 [↑](#footnote-ref-77)
78. Nicaragua (Merits), 100-101. The Court may have mentioned jus cogens twice, but only through quoting directly from the United States’ Counter-Memorial. The same approach was taken in Oil Platforms, 82, this time using the United States’ Rejoinder. [↑](#footnote-ref-78)
79. Separate opinion of ad hoc Dugard ‘Armed Activities on the Territory of the Congo’ Democratic Republic of *Congo v Rwanda* (2002) [↑](#footnote-ref-79)
80. 108 J Dugard ‘Reconciliation and Justice: The South African Experience’ (1998) 8 *Transnational Law and Contemporary Problems* 310; A Orakhelashvili Peremptory Norms in International Law (2006) 8. 110 Article 53 of Vienna Convention of Law of Treaties 1969 [↑](#footnote-ref-80)
81. [↑](#footnote-ref-81)
82. [↑](#footnote-ref-82)
83. [↑](#footnote-ref-83)
84. [↑](#footnote-ref-84)
85. See Kriangsak Kittichaisaree *The Obligation to Extradite or Prosecute* (2018) [↑](#footnote-ref-85)
86. [↑](#footnote-ref-86)
87. [↑](#footnote-ref-87)
88. // [↑](#footnote-ref-88)
89. *Al Adsani v The United Kingdom* [GC] no 35763/97, para 101-102, ECHR 2001. [↑](#footnote-ref-89)
90. *Azanian People’s Organisation v President of the Republic of South Africa* (CCT17/96)[1996] [↑](#footnote-ref-90)
91. John Dugard Is the Truth and Reconciliation Commission process compatible with international law – an unanswered question’ *SAJHR* (1997). [↑](#footnote-ref-91)
92. Para 31 [↑](#footnote-ref-92)
93. See also Mia Swart ‘The Warning Voice from Heidelberg: Radbruch, Dugard and the prosecution of state injustice‘ *SAJHR* (2010). [↑](#footnote-ref-93)
94. [↑](#footnote-ref-94)
95. Dugard [↑](#footnote-ref-95)
96. S v. Basson (Constitutional Court of South Africa) [2005] ZACC 10, 10 March 2004. The first case The first case brought against apartheid era violators was the Malan case (*S v Msane and 19 others*) that ended in acquittals in 1996 but that case did not reach the Constitutional Court. [↑](#footnote-ref-96)
97. See Mia Swart ‘The Wouter Basson Prosecution: The Closest South Africa came to Nuremberg?’ 2008 *Zeitschrift fur auslandisches offentliches Recht und Volkerrecht* [↑](#footnote-ref-97)
98. But basing the case on international law would not necessarily have resulted in a conviction. Ibid [↑](#footnote-ref-98)
99. [↑](#footnote-ref-99)
100. Miles Jackson ‘A Conspiracy to Commit Genocide: Anti-Fertility Research in Apartheid’s Chemical and Biological Weapons Programme’ *Journal of International Criminal Justice* (2015) Vol. 13 [↑](#footnote-ref-100)
101. P. 37 [↑](#footnote-ref-101)
102. Para 37 [↑](#footnote-ref-102)
103. Hugo van der Merwe *The Transformative Value of International Criminal Law* (LLD degree) (2012) [↑](#footnote-ref-103)
104. Mark Drumbl *Atrocity, Punishment and International Law* (2007)4. See also Alexandra Raleigh (unpublished PhD dissertation). Raleigh writes that ‘Under an international law frame, it is the ‘radical evil’, to use Kantian terminology, embodied by international crimes that makes the ordinary crimes established under domestic law inappropriate analogues for addressing massive human rights violations.’ [↑](#footnote-ref-104)
105. See the summary by Max du Plessis ‘The Zimbabwe Torture docket decision and proactive complementarity’ ISS Policy Brief, November 2015. [↑](#footnote-ref-105)
106. Gevers *Opinio Juris* available at http://opiniojuris.org/2014/05/20/guest-post-zimbabwe-torture-docket-case/ [↑](#footnote-ref-106)
107. [↑](#footnote-ref-107)
108. Max du Plessis (note 91) [↑](#footnote-ref-108)
109. Southern African Human Rights Litigation Centre (CC), para. 29. [↑](#footnote-ref-109)
110. [↑](#footnote-ref-110)
111. Para/p 37 [↑](#footnote-ref-111)
112. [↑](#footnote-ref-112)
113. [↑](#footnote-ref-113)
114. The court cites Roht-Arriaza *Impunity and Human Rights in International Law and* *Practice* ( [↑](#footnote-ref-114)
115. [↑](#footnote-ref-115)
116. [↑](#footnote-ref-116)
117. G Ferreira & A Ferreira-Snyman ‘The incorporation of public international law into municipal law and regional law’ PER [↑](#footnote-ref-117)
118. Ibid 331. [↑](#footnote-ref-118)
119. Swart (note 91 above) 213. [↑](#footnote-ref-119)
120. F Sucker & L Chenwi ‘South Africa’s Competing Obligations in relation to international crimes’ *Constitutional Court Review* 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. [↑](#footnote-ref-120)
121. such as the Diplomatic Immunities and Privileges Act of 2001) [↑](#footnote-ref-121)
122. See J Vidmar ‘Rethinking *ius cogens* after *Germany v Italy’* *Netherlands International Law Review* 2013 9. [↑](#footnote-ref-122)