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**Evaluating South Africa's Proposed Withdrawal from the ICC: A Way Forward?**



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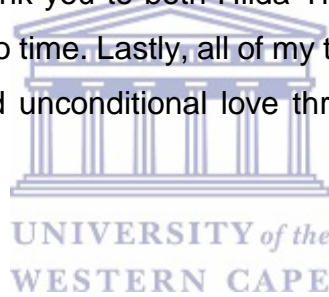
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## ABBREVIATIONS

ACJHPR: African Court of Justice and Human and People's Rights

ANC: African National Congress

AU: African Union

ASP: Assembly of States Parties

CASAC: Council for the Advancement of the South African Constitution

DA: Democratic Alliance

ICC: International Criminal Court

IOM: Independent Oversight Mechanism

OTP: Office of the Prosecutor

PTC: Pre-Trial Chamber

SALC: South African Litigation Centre

SADC: South African Development Community

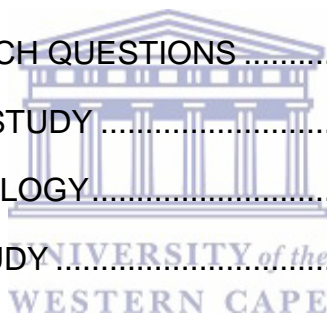
TC: Trial Chamber

UNSC: United Nations Security Council



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## CHAPTER ONE: INTRODUCTION

### 1.1 TITLE

Evaluating South Africa's Proposed Withdrawal from the ICC: A Way Forward?

### 1.2 ABSTRACT

Since 2009, the first permanent international criminal court's operation is known to be marked by diplomatic tension between the African Union (AU) and the ICC. A host of African member states have called for African states parties to withdraw *en masse* from the International Criminal Court (ICC). On the 19<sup>th</sup> October 2016, South Africa's Minister of International Relations and Cooperation, without prior parliamentary approval, deposited an official notice of withdrawal from the ICC in terms of Article 127(1) of the Rome Statute. The Pretoria High Court, however, in *Democratic Alliance v Minister of International Relations* ruled the notice instrument to be "unconstitutional and invalid." This research paper evaluates South Africa's unsuccessful proposed withdrawal, against the backdrop of AU and ICC tensions. Accordingly, the paper critically evaluates South Africa's reasons for a proposed ICC withdrawal, its subsequent failure and the domestic and international implications of either a future successful withdrawal or South Africa's continued membership. The paper's findings conclude that South Africa's attempted withdrawal was primarily based on the diplomatic breakdown between South Africa and the ICC which arose out of the states party's non-cooperation with an arrest warrant for Sudan's sitting head of state, President Omar Al-Bashir, at the 25<sup>th</sup> Ordinary Session of the African Union Assembly in Johannesburg, June 2015. It is presented, that South Africa's proposed withdrawal was premature and that any future withdrawal from the ICC will have far-reaching legal and political ramifications. Further, this study reaffirms the need for the country's continued contribution to building a stronger, effective and more universal framework of international criminal justice, domestically and from within the ICC.



### 1.3 KEYWORDS

African Union

Assembly of States Parties

States parties

International Criminal Court

International criminal justice

Immunity

South Africa

Rome Statute of the International Criminal Court

United Nations Security Council

Withdrawal



## 1.4 BACKGROUND TO THE STUDY

In response to the egregious crimes committed through post-colonial civil conflict, violence in the Great Lakes Region, the Rwandan genocide and Apartheid South Africa, African states initially supported the establishment of the first permanent international criminal court (ICC).<sup>1</sup> South Africa was the first states party to fully domesticate the Rome Statute of the International Criminal Court's provisions, an act reflecting the constitutional tenet,

“We the people of South Africa, Recognize the injustice of our past .... Build a united democratic South Africa able to take its rightful place as a sovereign state amongst the family of nations.”<sup>2</sup>

The forerunners of the ICC – The Nuremberg and Tokyo Tribunals, the International Criminal Tribunals of former Yugoslavia (ICTY) and Rwanda (ICTR), established that the principle of individual accountability for the most egregious crimes could be achieved through the forfeiture of sovereignty and a multilateral commitment to uphold the fight against impunity.<sup>3</sup>

During several regional conferences, including SADC's and a West Africa's Conference on the Establishment of the International Criminal Court, many African countries adopted common declarations to cooperate and assist the ICC in fulfillment of its role within the continent.<sup>4</sup> <sup>5</sup> Senegal was the first States Party to lead the signing of the Statute and later 34 African states out of 124 State Parties joined their

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<sup>1</sup> Dugard J (ed) *International Law a South African Perspective* 4 ed (2013) 172.

<sup>2</sup> The Preamble of the Constitution of the Republic of South Africa Act 108 of 1996 [Hereinafter The Constitution].

<sup>3</sup> Bahtohi S 'Africa and the International Criminal Court: A Prosecutor's Perspective' in Werle *et al.* (ed) *Africa and the International Criminal Court* (2014) 49-57.

<sup>4</sup> Van der Merwe H & Kemp G (ed) *International Criminal Justice in Africa Issues, Challenges and Prospects* (2016) 2. Dakar Declaration for the establishment of the International Criminal Court in 1998 available at <http://www.iccnw.org/documents/DakarDeclarationFeb98Eng.pdf> (accessed 3 August 2017).

<sup>5</sup> Mongageng S 'Africa and the International Criminal Court: Then and Now' in Werle G *et al.* (ed) *Africa and the International Criminal Court* (2014) 13-20.

signatures, forming the largest regional bloc in the Assembly of States Parties (ASP).<sup>6</sup> In addition, the Office of the Prosecutor is directed by the Gambian Prosecutor Fatou Bensouda and 25 per cent of the Court's bench is African.<sup>7</sup> The continent is therefore, well-represented within the Court's operational and oversight bodies.

Although initially well-supported by the continent, the ICC-Africa relations have in the last decade been described by international criminal justice scholarship as "strained."<sup>8</sup> The Court has been accused of exercising an "African-bias" in prosecution selectivity, culminating to the point of an African Union (AU) led, "ICC mass withdrawal strategy."<sup>9</sup> The indictments of African sitting heads of state namely: President Al Bashir of Sudan in 2009, Muammer Gadaffi the late President of Libya in 2011 and in 2013, President Uhuru Kenyatta of Kenya, caused diplomatic tension between the African Union (AU) and the ICC.<sup>10</sup> The African Union (AU), asserted that these indictments would collapse the peace-brokerage in Africa. However, were refused a deferral of proceedings by the United Nations Security Council – which holds the veto power of permanent members, most of which are non-state parties to the Statute.<sup>11</sup> On 3 July 2009, at the

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<sup>6</sup> Regional Groupings: 34 African States (now 33 after Burundi's withdrawal became effective); 18 Asia-Pacific States; 18 Easter Europe States; 27 Latin American and Caribbean States; and 25 Western European and other States. Assembly of States Parties, 'States Parties to the Rome Statute' available at [https://asp.iccpi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://asp.iccpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx) (accessed 5 August 2017).

<sup>7</sup> Batoji S 'A Prosecutor's Perspective' in Werle *et al.* (ed) *Africa and the International Court* (2014) 50.

<sup>8</sup> Materu S 'A Strained Relationship: Reflections on the African Union's Stand Towards the International Criminal Court from the Kenyan Experience' in Werle G *et al.* (ed) *Africa and the International Court* (2014) 211-226.

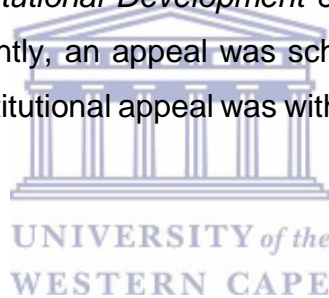
<sup>9</sup> Keppler E 'AU-ICC Withdrawal Strategy Less than Meets the Eye' available at <https://www.hrw.org/news/2017/02/01/aus-icc-withdrawal-strategy-less-meets-eye> (accessed 5 August 2017).

<sup>5</sup> On the 5 April 2016, the ICC withdrew its charges of crimes against humanity against former Vice President Ruto on the grounds of witness interference of seventeen witnesses. Allison S 'Kenyatta escapes the ICC, and shows others how' 6 February 2014 available at <http://www.dailymaverick.co.za/article/2014-02-06-analysis-kenyatta-escapes-the-icc-and-shows-others-how-its-done/#.VmB9ZdJ97Mx> (accessed 29 October 2017).

<sup>11</sup> Okoth J 'Kenya and Sudan: The Two Cases That Shaped Africa's Criticism Towards the ICC' 28 March

fourth Extraordinary Session of the Organisation of African Unity (OAU) Assembly of African Heads of State and Government the Sirte Resolution purported that the AU member states would adopt a resolution of non-compliance in the arrest and surrender of President Al-Bashir.<sup>12</sup> The ever-changing political motives of an evolving African power has resulted in an “unwieldy collision,”<sup>13</sup> which threatens to weaken the normative objectives of the International Criminal Court and the fight against impunity within the auspices of the ICC.

The South African executive failed to arrest Al-Bashir, at the 25<sup>th</sup> Ordinary Session of the Assembly of the African Union in June 2015, hosted in Johannesburg.<sup>14</sup> The Pretoria High Court in *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and others*, declared the executive had failed in its duty to arrest Al-Bashir.<sup>15</sup> The Supreme Court of Appeal (SCA) confirmed this decision in *Minister of Justice and Constitutional Development & others v The Southern Africa Litigation Centre*.<sup>16</sup> Consequently, an appeal was scheduled to be heard before the Constitutional Court. The constitutional appeal was withdrawn in favour of a withdrawal notice from the ICC.



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2017, available at <http://www.ispionline.it/it/publicazione/kenya-and-sudan-two-cases-shaped-africas-criticism-towards-icc-16508> (accessed 12 June 2017).

<sup>12</sup> African Union Assembly, Decision on Africa’s relationship with the International Criminal Court (ICC), Ext/Assembly/AU/Dec. 1, October 2013, para 4. “concern on the politicization and misuse of indictments against African Union leaders.”

<sup>13</sup> Schwartz R ‘*South Africa Litigation Centre v Minister of Justice & Constitutional Development*. Balancing Conflicting Obligations-Prosecuting al-Bashir in South Africa’ (2016) 24 *Tulane Journal of International & Comparative Law* 420-425.

<sup>14</sup> *The Prosecutor V. Omar Hassan Ahmad Al Bashir* (8 December 2016) ‘Decision convening a public hearing for the purposes of a determination under article 87(7) of the Statute with respect to the Republic of South Africa’ ICC-02/05-01/09.

<sup>15</sup> *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development & others* [2015] 3 All SA 505 (GP) [Hereafter *High Court case*].

<sup>16</sup> *Minister of Justice and Constitutional Development & others v The Southern Africa Litigation Centre* [2016] 2 All SA 365 (SCA) [Hereafter *Al-Bashir case*].

Prior to the notice's deposit, South Africa's International Relations Minister, Maite Nkoana-Mashabane, openly questioned the impartiality of the ICC before the Assembly of States Parties (ASP) submitting that the Rome Statute, "hinders the country's foreign policy objectives to establish "peace and security on the African Continent."<sup>17</sup> Notably, in January 2016 the Open Ended Committee of Ministers of Foreign Affairs on the International Criminal Court, (The Open Ended Ministerial Committee), presented a comprehensive AU-ICC strategy which included reform and the proposition of a "collective withdrawal from the ICC."<sup>18</sup> The African States Parties, Burundi and Gambia similarly deposited withdrawals with the UN Secretary-General.<sup>19</sup>

## 1.5 PROBLEM STATEMENT

On the 19th October 2016, South Africa deposited its official notice of withdrawal from the International Criminal Court (ICC), without prior parliamentary approval, in terms of Article 127 (1) of the Rome Statute.<sup>20</sup> The Minister of Justice and Constitutional Services tabled the Implementation of the Rome Statute of the International Criminal Court Act Repeal Bill on 9 November 2016.<sup>21</sup> The Repeal Bill sought to abrogate from the entirety of the ICC Implementation Act. In the decision of *Democratic Alliance v Minister of International Relations and Others* the Pretoria High Court heard the matter of constitutionality of the notice instrument and the Repeal Bill introduced to the National Assembly on 9 November 2016.<sup>22</sup> The withdrawal was subsequently declared

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<sup>17</sup> UN, South Africa: Withdrawal, C.N. 786.2016. TREATIES-XVIII.10 Minister of Justice and Correctional Services Michael Masutha, 'Why we're withdrawing from the ICC' <http://www.politicsweb.co.za/news-and-analysis/why-were-withdrawing-from-the-icc--mike-masutha> (accessed on 10 April 2017).

<sup>18</sup> The Open Ended Ministerial Committee was established in pursuant to Decision Assembly/AU/Dec. 586 (XXV) Assembly/AU/Dec.590(XXVI).

<sup>9</sup> Du Plessis M 'The International Criminal Court that Africa Wants' Monograph 172 (2010)14-15.

<sup>20</sup> Woolaver H 'International and Domestic Implications of South Africa's Withdrawal from the ICC' available at <https://www.ejiltalk.org/international-and-domestic-implications-of-south-africas-withdrawal-from-the-icc/> (accessed on 10 March 2017).

<sup>21</sup> Implementation of the Rome Statute of the International Criminal Court Act Repeal Bill (B23-2016).

<sup>12</sup> *Democratic Alliance v Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening)* [2017] ZAGPPHC 53. [Hereinafter

procedurally, “unconstitutional and invalid”.<sup>23</sup> Despite the withdrawal instrument’s revocation on 7 March 2017 and the retraction of the Repeal Bill, contentions remain over the prospect of a future withdrawal. According to the Rome Statute, withdrawal does not absolve South Africa from its obligations to prosecute gross human rights violations in respect of crimes against humanity, genocide and crimes against peace.<sup>24</sup> Academic discourse has yet to settle how a founding member of the ICC, forerunner of its domestication, and ostensive advocate for global human rights policy, could reject an institution that seeks to end impunity for the most egregious crimes.<sup>25</sup> Considering both diplomatic and legal complexities of the relationship between the ICC and its African States and evaluating the causalities and implications of South Africa’s unsuccessful proposed or future withdrawal from the ICC, remains central to forging a way forward for the functioning of international criminal justice through the enforcement of the Rome Statute in Africa.

## 1.6 RESEARCH QUESTIONS

### 1.6.1 General research question.

The general research question in this paper is to evaluate the background, factors and circumstances which led to South Africa’s unsuccessful proposed withdrawal and to consider the possible outcomes.

### 1.6.2 Specific research questions.

- 1) What are the factors that triggered South Africa’s withdrawal notice from the ICC?

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*Democratic Alliance v Minister of International Relations*].

<sup>13</sup> Goss C ‘Analysis: Constitutional aspects of treaty withdrawal – South Africa and the Rome Statute’ available from <https://iacl-aidc-blog.org/2017/03/21/analysis-constitutional-aspects-of-treaty-withdrawal-south-africa-and-the-rome-statute/> (accessed 17 April 2017).

<sup>24</sup> *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* [2014] ZACC 30 and Article 127 of the ICC Statute ‘a withdrawing state is not absolved from the obligations arising from this Statute while it was a Party to the Statute’

<sup>25</sup> Viljoen F ‘Five reasons why South Africa should not withdraw from the ICC Statute’ available from <https://www.dailymaverick.co.za/opinionista/2015-06-23-five-reasons-why-south-africa-should-not-withdraw-from-the-icc-statute/> (accessed 10 March 2017).

- 2) What is the principle justification for the executive's deposit of the notice instrument?
- 3) What are the possible outcomes of the unsuccessful proposed withdrawal, where to for South Africa; what are the domestic and international implications of a future successful withdrawal?

## 1.7 OBJECTIVES OF THE STUDY

The main purpose of this paper is to pursue an institutional evaluation of the process and impact of South Africa's proposed or future withdrawal from the ICC Statute. This study has the following specific objectives:

- 1) To assess the factors and events that triggered South Africa's withdrawal from the ICC;
- 2) To identify the principle justification of South Africa's unsuccessful proposed withdrawal.
- 3) To identify the possible outcomes of the unsuccessful proposed withdrawal and the domestic and legal implications of a future withdrawal, from the ICC.

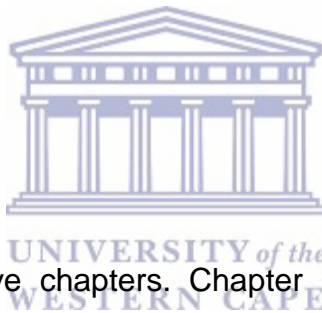


## 1.8 RESEARCH METHODOLOGY

This research will employ a qualitative desktop research method. Primary and secondary sources will be consulted alike with the view to evaluate the legal impact of South Africa's unsuccessful withdrawal from the ICC. The study will employ primary sources such as relevant case law of the ICC, domestic cases heard in the South African courts and other relevant international criminal law cases, the official record of the Assembly of States Parties, treaties, conventions and legislation. The secondary sources include: published academic journal articles, books and various legal opinions and media releases from internet sources.

## 1.9 SIGNIFICANCE OF STUDY

This study attempts to contribute beyond the existing peace v justice debate, by examining the aforementioned research questions.<sup>26</sup> The 2016 withdrawal notifications from the ICC has presented a contemporary issue to international criminal justice. Subsequently, this study seeks to broaden the jurisprudential discussion on the recent African withdrawals from the ICC, through a South African context. There exists a relatively low volume of case law concerning the application of this area of law. Therefore, this research contributes to a meagre body of literature regarding the withdrawal issue. Siwingwa asserts that “political calculations” are not divorced from the pursuit of international criminal justice.<sup>27</sup> International law is said to not exist in a “vacuum,” it is informed by politics. This study considers both political and legal factors with regard to South Africa’s withdrawal, “sifting the legal wheat from the political chaff,” according to Tladi.<sup>28</sup>



## 1.10 CHAPTER OUTLINE

This paper is divided into five chapters. Chapter One provides the background information, the respective research problem, the statement of research, a delineation of the research questions, the significance of the research and a chapter outline. Chapter Two describes South Africa’s role in the establishment of the ICC, the implementation of the Statute’s provisions into domestic legislation, an overview of the ICC Implementation Act and the importance of its enforcement. Chapter Three

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<sup>26</sup> Viljoen F ‘Five reasons why South Africa should not withdraw from the ICC Statute’ available from <<https://www.dailymaverick.co.za/opinionista/2015-06-23-five-reasons-why-south-africa-should-not-withdraw-from-the-icc-statute/>> (accessed on 10 March 2017). Van Heerden O ‘South Africa’s exit from the ICC: Justice cannot trump peace’ available from <https://www.dailymaverick.co.za/opinionista/2016-10-24-south-africas-exit-from-the-icc-justice-cannot-trump-peace/> (accessed on 10 March 2017) Tladi D (2009) 34 *SAYIL*. 59.

<sup>27</sup> Sinwingwa E ‘Wither the International Criminal Justice in Africa’ in Van der Merwe HJ and Kemp G (ed) *International Criminal Justice in Africa Issues, Challenges and Prospects* 140.

<sup>28</sup> Van der Merwe HJ ‘The influence of politics in international criminal law: A primer (for lawyers) (2014) *African Yearbook of International Humanitarian Law* 111-132.



contextualizes the events culminating in South Africa's notice to withdraw and analyses the litigation before both the South African courts and ICC Chambers leading up to the initiation and failure of the notice. Chapter Four evaluates the possible outcomes of South Africa's unsuccessful withdrawal. The final chapter provides a summation of the research's findings and concludes with recommendations.



## CHAPTER TWO: SOUTH AFRICA'S DOMESTICATION OF THE ROME STATUTE, AN OVERVIEW.

### 2.1 INTRODUCTION

The Rome Statute of the International Criminal Court obligates signatory states to prosecute war crimes, genocide, crimes against humanity and the crime of aggression at an international and national level.<sup>29</sup> The Statute provides a system of complementarity and cooperation, founded on a States Party's willingness to implement its provisions.<sup>30</sup> On 17 July 1998, South Africa became the 23<sup>rd</sup> State Party to the Statute.<sup>31</sup> The following chapter provides an overview of South Africa's role in the establishment of the ICC, the domestication of the Rome Statute's provisions through the enactment of the Implementation of the Rome Statute of the International Criminal Court Act and the significance thereof.<sup>32</sup>

### 2.2 SOUTH AFRICA AND THE ESTABLISHMENT OF THE ICC

The United Nations Conference of Plenipotentiaries in Rome 16 June 1998, convened more than 160 states to reach an agreement on the establishment of the first permanent International Criminal Court. The Statute came into force on 1 July 2002, prevailing twenty-one abstentions, through sixty ratifications.<sup>33</sup> From as early as 1993, South Africa, Lesotho, Malawi, Tanzania and Swaziland participated in the draft

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<sup>29</sup> (A definition for the crime of aggression was only agreed upon at the Kampala Review Conference in 2010) Werle G & Jessberger F *Principles of International Criminal Law* 3 ed (2014) 17-27 Preamble, Para 6 and Art 1, 5 of the Rome Statute of the International Criminal Court (2002) [Hereinafter the Rome Statute].

<sup>30</sup> Kemp G 'The Implementation of the Rome Statute in Africa' in Werle G *et al.* (ed) *Africa and the International Criminal Court* (2014) 62. Article 1, Preamble of the Rome Statute "...it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."

<sup>31</sup> Du Plessis M 'South Africa's Implementation of the ICC Statute – An African Example' (2007) 5 *Journal of International Criminal Justice* 460.

<sup>32</sup> Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 [Hereinafter ICC Act 27 of 2002].

<sup>33</sup> Werle G & Jessberger F (2014) 26.

statute of the International Law Commission (ILC) presented to the General Assembly Sixth Committee for the establishment of the first permanent international criminal court.<sup>34</sup> The Southern African Development Community (SADC) held consultative meetings including the 1999 “Conference on the Common Understanding on the ICC,” and the “Windhoek Plan of Action,” to expedite ratification and address the need for implementation at a domestic and regional level.<sup>35</sup> South Africa, made a significant contribution of human rights directives to the ICC Draft.<sup>36</sup> During one such SADC convening, South African Minister of Justice at the time, Abdula Mohamed Omar, declared that the ICC, “should send a clear message that...the perpetrators of such gross human rights violations would not go unpunished.” Under its new democratic dispensation, South Africa led the inclusion of “apartheid” as a crime against humanity. Consequently, it was the first African state to fully implement the Statute’s provisions into domestic legislation.<sup>37</sup>

## 2.3 AN ACT OF TRANSFORMATION: SOUTH AFRICA’S DOMESTICATION OF THE ROME STATUTE



### 2.3.1 Modes of domestication.

States Parties are not obligated to incorporate the Statute’s substantive provisions into their domestic legal system.<sup>38</sup> Only seventeen African states, of the 34 that are signatories (33 since the effective date of Burundi’s withdrawal), have implemented

<sup>34</sup> Olugbuo B ‘Implementation of the Rome Statute of the ICC in Africa: An Analysis of the South African Legislation’ (2004) 1 *Eyes on the ICC* 193.

<sup>35</sup> Murungi B ‘Implementing the International Criminal Court Statute in Africa’ 26 *International Legal Practice* (2001) 87.

<sup>36</sup> Schabas W (ed) *An Introduction to the International Criminal Court* 4 ed (2011) 16-18. Khiphusizi J ‘...The permanent representative of South Africa on behalf of member states of the SADC before the 6<sup>th</sup> Committee of the 52<sup>nd</sup> GA’ available from <http://www.iccnw.org/documents/SouthAfricaSADC6Comm21Oct97.pdf> (accessed 11 June 2017).

<sup>37</sup> Werle G & Jessberger F (2014) 144-145.

<sup>38</sup> Bekou O ‘Crimes at Crossroads Incorporating International Crimes at the National Level’ (2012) 10 *Journal of International Criminal Justice* 678.

ICC provisions, either in full or part.<sup>39</sup> However, states such as the US, along with Israel and China, expressed reservations and presently remain unsigned altogether.<sup>40</sup> There are no prescriptions for the Statute's domestication therefore states parties have full-discretion in the manner of implementation. Werle defines the manner in which states parties have implemented the Statute as the following acts: non-incorporation or the application of "ordinary" criminal law, modified incorporation, complete incorporation or acts of transformation.<sup>41</sup> Non-incorporation is the least effective method of implementation. Modified incorporation is where domestic criminal law is amended to incorporate the substantive provisions of the Statute, such as Cote d'Ivoire's amendment of its Penal Code to include the crime of genocide. States may extend the meaning of a crime beyond the scope of the Statute.<sup>42</sup> States Parties which completely incorporate the Statute's provisions either make direct reference to the Statute's provisions by copying or transforming the relevant provisions into domestic law.<sup>43</sup>



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<sup>39</sup> Olugbuo B 'Implementation of the Rome Statute of the International Criminal Court in Africa: An Analysis of the South African Legislation' (2004) 1 *Eyes on the ICC* 193.

<sup>40</sup> UN Assembly Resolution 44/39 of 4 December 1989, ILC 1994 Report on the Draft Statute for an ICC, 49th Session of General Assembly. Cassese A 'The Drafting and Adoption of the Statute of the ICC' *International Criminal Law* (3 ed) Cassese et al (1998). The UN Assembly Resolution 44/39 of 4 December 1989, ILC 1994 Report on the Draft Statute for an ICC, 49th Session of General Assembly United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June -17 July 1998 Official Records, Volume I, Volume II and Volume III available at [http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings\\_v1\\_e.pdf](http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v1_e.pdf) (accessed 11 June 2017).

<sup>41</sup> Werle G & Jessberger F (2014) 144-150.

<sup>42</sup> Bekou O (2017) 277.

<sup>43</sup> Other examples of implementation by reference are UK, Germany and Canada. 'The United Kingdom International Criminal Court Act of 2001, the German 'International Crimes Code' or *Volkerstrafgesetzbuch*' Jessberger F & Powel C 'Prosecuting Pinochets in South Africa Implementing the Rome Statute of the International Criminal Court' (2001) 14 *South African Criminal Law Journal* 353.

### 2.3.2 South Africa's implementation of the Rome Statute

The South African ICC Act was the first international treaty implemented into legislation by the democratic executive, the African National Congress.<sup>44</sup> Few prosecutions successfully took place in post-Apartheid South Africa due to the amnesty process of the Truth and Reconciliation Commission (TRC). Others, such as the prosecution of Dr. Wouter Basson for crimes against humanity, failed in the absence of an appropriate legal framework for international criminal law.<sup>45</sup> The promulgation of the ICC Act, therefore sought to confront South Africa's, "history of atrocities" and the practice of impunity under the previous dispensation.<sup>46</sup>

South Africa ratified the Statute on 27 November 2000 by enacting the Implementation of the Rome Statute International Criminal Court Act 27 of 2002 (ICC Act), which came into effect on 16 August 2002.<sup>47</sup> South Africa follows a dualistic approach, where the enactment of municipal law is required to bind the nation and its citizens to an international treaty's obligations according to section 231 of the Constitution of the Republic of South Africa.<sup>48</sup> The transformation of the Rome Statute into municipal law, resulted from directly transferring all of its provisions into the text of the ICC Act. Scheduled to the Act are the definitions of the international crimes of genocide, crimes against humanity and war crimes, South Africa's amended legislation and the Rome Statute's provisions in full.<sup>49</sup>

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<sup>44</sup> SA had ratified but not domesticated the four 1949 Geneva Conventions and Add Protocols, Strydom H 'South Africa and the ICC' (2002) 6 *Max Planck Yearbook of United Nations Law* 345-346. *S v Petane* 1988 (3) SASL (C).

<sup>45</sup> The Geneva Conventions of 1949 had not been enacted until the ICC Act came into force Strydom H (2002) 347. *S v Basson* 2005 (12) BCLR 1192 (CC) Judgement of 9 September 2005. Swart M 'The Wouter Basson Prosecution: The Closest South Africa Came to Nuremberg' *ZaöRV* 68 (2008) 224-226. Jessberger F & Powel C (2001) 345-360.

<sup>46</sup> ICC Act 27 of 2002.

<sup>47</sup> Du Plessis M (2007) 460.

<sup>48</sup> Katz A 'An Act of Transformation. The incorporation of the Rome Statute of the ICC into national law in South Africa,' (2003) 12 *African Security Review* 27. Sections 231, 232, 233 and 39 (1)(b) of the Constitution Act 108 of 1996 [Hereinafter the Constitution].

<sup>49</sup> Preamble of the ICC Act 27 of 2002. See Bubenzer O *Post-TRC Prosecutions in South Africa*

## 2.4 A GLIMPSE AT SOUTH AFRICA'S ICC ACT

### 2.4.1 General overview.

Comprised of five chapters and two schedules, the ICC Act provides comprehensive domestic legal framework for the effective implementation of the Statute's provisions in South Africa.<sup>50</sup> Chapters one to three provide the procedural framework for domestic prosecutions and investigations. Chapters four to five enumerate the procedural provisions of cooperation and mutual legal assistance in the arrest and surrender of an accused person with the Court. There is, no prerequisite for a States Party to include the substantive provisions of the Statute. The South African drafters nevertheless included the definitions of each crime in Schedule One which transposes the provisions of the Statute's Articles six, seven and eight into the Schedule's Parts One, Two and Three respectively.<sup>51</sup>

Chapter one of the ICC Implementation Act primarily sets out the Act's objectives and reinforces the principle of complementarity. The principle of complementarity is understood to establish a shared responsibility between the ICC and its states parties, to prosecute the core international crimes.<sup>52</sup> States Parties have jurisdiction where there is an ongoing investigation or prosecution by a State which has jurisdiction, where prosecution does not follow an investigation, the case does not merit sufficient gravity.<sup>53</sup> States Parties must be *willing* and *able* to carry out prosecutions or investigations of the core crimes of which the ICC has jurisdiction.<sup>54</sup> The ICC's purpose

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*Accountability for Political Crimes after Truth and Reconciliation Commission's Amnesty Process* (2009).

<sup>50</sup> Du Plessis M (2007) 463.

<sup>51</sup> Schedule 1: Part 1, Part 2 and Part 3 of the ICC Act 27 of 2002.

<sup>52</sup> Kleffner JK *Complementarity in the Rome Statute and National Criminal Jurisdictions* (2008) 99. Article 1, Preamble of the Rome Statute "...it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."

<sup>53</sup> Article 17 of the Rome Statute.

<sup>54</sup> Kleffner JK (2008) 99.

is to prosecute where a States Party either lacks the political will to do so or is unable.<sup>55</sup> A State Party is unwilling if the object of the proceedings are to shield the person from criminal responsibility, the proceedings are unjustifiably delayed or not conducted impartially.<sup>56</sup> Inability is determined where the national judicial system has been compromised.<sup>57</sup> National jurisdiction trumps ICC jurisdiction if the Court is satisfied that these requirements are met.

The Act aims to create a domestic frame to ensure the Statute's provisions are effectively implemented, to ensure that the Act is enforced in conformity with all provisions of the Statute and to enable the National Prosecuting Authority (NPA) to prosecute "as far as possible" the three crimes, the crimes of genocide, crimes against humanity and war crimes (excluding the crime of aggression), committed within and outside of South Africa's borders, under the national jurisdiction of the High Courts.<sup>58</sup> Section three reinforces the principle of complementarity by stipulating that where the NPA is "unable or unwilling" to prosecute South Africa has an obligation to cooperate in the arrest and surrender of accused persons to the Court.<sup>59</sup>

#### 2.4.2 Jurisdiction and immunities.

Chapter two of the Act provides for domestic jurisdiction, prohibits immunity and outlines the procedure for instituting prosecutions. Central to this chapter is Section four.<sup>60</sup> Section 4(1) provides for individual criminal responsibility for a core crime notwithstanding any other domestic law.<sup>61</sup> Domestic prosecution takes place within the ambit of South African High Court's exercise of jurisdiction over the three core

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<sup>55</sup> Chenwi L 'Universal Jurisdiction and South Africa's Perspective on the Investigation of International Crimes' 131 *South African Law Journal* (2014) 33.

<sup>56</sup> Art 17 (2)(a)-(c) of the Rome Statute.

<sup>57</sup> Art 17(3).

<sup>58</sup> Preamble, Section 1 and Sec 3(a)-(d) of the ICC Act 27 of 2002.

<sup>59</sup> Sec 3(e)(i)-(iv) of Act 27 of 2002.

<sup>60</sup> Sec 4 of Act 27 of 2002.

<sup>61</sup> Sec 4(1) "Despite anything to the contrary in any other law of the Republic, any person who commits a crime, is guilty of an offence and is liable for conviction..."

crimes accordingly providing for territorial jurisdiction.<sup>62</sup> Section 4(3) provides that South African courts have jurisdiction over the core crimes defined in the Act, outside of South Africa's borders. This extra-territorial jurisdiction is triggered by the following: nationality, active personality and universal jurisdiction.<sup>63</sup> In principle universality provides jurisdiction regardless of the nationality of the offender or territoriality of the offence.<sup>64</sup> Although not provided for in the Rome Statute, Section 4(3)(c) enables South Africa under its special provision for universal jurisdiction, if the accused after the commission of one of the three core crimes defined in the Act, "is present in the territory of the Republic."<sup>65</sup> The presence requirement however, may be inferred from "certain circumstances."<sup>66</sup> Cassese posits that South Africa's extension of universal jurisdiction reflects the domestication of a broader international concern – to prosecute crimes adverse to the international community's peace, stability and humanity.<sup>67</sup> In the course of transporting the Statute into domestic law, states parties have introduced international crimes and consequently adopted the concept of universal jurisdiction.<sup>68</sup>

Section 4(2) of the ICC Implementation Act prevents personal immunities from being invoked as a defence or mitigation of sentencing.<sup>69</sup> Personal immunities or *ratione personae* are the immunities and diplomatic privileges, which heads of states, government officials and elected representatives and member of a security service or armed force otherwise enjoy.<sup>70</sup> South African legislatures intended this section to

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<sup>62</sup> Sec 3(d) of the ICC Act 27 of 2002.

<sup>63</sup> Sec 4 (3) Kemp (2014) 66. Jessberger F & Powel C (2001) 346.

<sup>64</sup> Cassese A *et al.* (ed) *The Rome Statute of the International Criminal Court: A Commentary* (2002) vol II 1862.

<sup>65</sup> Sec 4(3)(c).

<sup>66</sup> Nakitto S 'South Africa's Exercise of Universal Jurisdiction' *International Human Rights Law Review* (2013) 156.

<sup>67</sup> Cassese A *et al.* (2002) 1862.

<sup>68</sup> Schabas W 'An Introduction to the International Criminal Court' 4 ed (2011) 64. Chenwi L (2014) 30.

<sup>69</sup> Sec 4(2) of Act 27 of 2002 "bars the defence or mitigation of sentence on the basis of *ratione personae*..."

<sup>70</sup> The difference between *ratione personae* (personal) and *ratione materiae* (functioning)



transpose Article 27 directly which provides that official capacity does not create a bar to prosecution under the Statute.<sup>71</sup> Olugbuo notes the trend of lifting head of state immunity to prosecute war crimes, genocide and crimes against humanity before the establishment of the ICC was replicated in most international instruments dealing with these core crimes.<sup>72</sup>

Section 5 of the Act demarcates national prosecution powers to the National Director of Public Prosecutions (NDPP).<sup>73</sup> The Act does not specifically include the general principles of the Rome Statute as set out in Articles 22 and 23, it does however, provide for non-retroactivity under this section of the ICC Act.<sup>74</sup> As a general rule, Prosecution cannot be instituted without the NDPP's consent but this does not create an absolute bar to prosecution in the Court.<sup>75</sup> A decision to prosecute must not be made without the NDPP considering South Africa's obligations to the Rome Statute and the application of the principle of complementarity.<sup>76</sup>

### 2.4.3 Cooperation in arrest and surrender to the ICC.

The Statute mandates that States Parties' national law provide for procedural measures to ensure all forms of cooperation and mutual legal assistance with the Court, according to Article 88 and to develop the capacity and infrastructure to facilitate co-operation with the Office of the Prosecutor (OTP).<sup>77</sup> Countries such as Mauritius, Kenya, Senegal and Uganda have incorporated procedural provisions of cooperation and domestic legal procedure for arrests and surrender of perpetrators to

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see *R v Bow Metropolitan Stipendiary Magistrate Ex parte Pinoche Ugarte* [1999] 2 All ER 97.

Art 27 of the Rome Statute.

<sup>71</sup> Art 27 of the Rome Statute and Section 4(2) of the ICC Act 27 of 2002. Olugbuo B (2004) par 4, 197.

<sup>72</sup> Olugbuo B (2004) 194.

<sup>73</sup> Section 179(1) and (2) of The Constitution 108 of 1996, Section 20 of the National Prosecuting Authority Act 32 of 1998 and Section 5(2)(1) of the ICC Act 27 of 2002.

<sup>74</sup> Du Plessis M (2007) 464.

<sup>75</sup> Sec 5(2) and ss(6) of the ICC Act 27 of 2002, Dugard J (2013) 202-203.

<sup>76</sup> Sec 5(3).

<sup>77</sup> Art 70(4) and Art 88 of the Rome Statute.

the Court.<sup>78</sup> In the South African ICC Act, Chapters four and five, sets out three general cooperative measures: arrest and surrender, cooperation regarding investigations and prosecutions initiated by the ICC and cooperation in the imposition of sentences.<sup>79</sup>

ICC Act sections 8 to 32 and Articles 86 and 87(7) of the Rome Statute, obligates South Africa to cooperate in the arrest and surrender of the accused to the ICC.<sup>80</sup> For the surrender of such persons to the Court, their removal from the country is governed by Section eleven of the Act.<sup>81</sup> Likewise, the Criminal Procedure Act, the Constitution and the ICC Act make specific provision to guard against a violation of the accused's rights, at all stages of investigation and prosecution.<sup>82</sup> As required by Article 93, Sections 14 to 32 provide guidelines for the relevant competent authorities to execute judicial assistance and cooperate in prosecutions and investigations.<sup>83</sup> The Rome Statute in its entirety is attached by an annexure at the end of the Act. However, for the purposes of rules of evidence and procedure, nothing precludes a domestic court from invoking the Elements of Crimes of the Statute.<sup>84</sup> Overall these provisions were implemented to ensure prompt domestic arrest and subsequent surrender to the ICC and full mutual-legal assistance in investigations.<sup>85</sup> Should a conflict arise during the process of cooperation in an arrest, surrender or an investigation, in terms of the ICC Act Section 10(2) provides that the magistrate may at any time postpone the inquiry in order to hold consultations between the appropriate branch of the executive and the ICC, as contemplated in Article 97 of the Statute.<sup>86</sup>

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<sup>78</sup> Kemp G (2014) 72-75.

<sup>79</sup> Sections 8-40 of the ICC Act 27 of 2002, Kemp G (2014) 71.

<sup>80</sup> Chenwi L (2014) 32.

<sup>81</sup> Sec 11(1) of the ICC Act 27 of 2002.

<sup>82</sup> Section 35 of The Constitution 108 of 1996, Art 55 of the Rome Statute, Section 5, Sec 10 and Sec 14 of the ICC Act 27 of 2002.

<sup>83</sup> Article 93 of the Rome Statute, Sec 14(a)-(l) of the ICC Act 27 of 2002.

<sup>84</sup> Article 51 Rome Statute of the International Criminal Court. Kemp G (2014) 66.

<sup>85</sup> Murungi B (2001) 89.

<sup>86</sup> Section 10(2) of the ICC Act of 2002.

#### 2.4.4 Enforcing the ICC Implementation Act.

Section 233 of South Africa's Constitution governs the enforcement of international law at domestic level, providing that domestic law be interpreted in accordance with international law as far as reasonably possible.<sup>87</sup> The landmark Constitutional Court decision, *National Commissioner of the South African Police Service v South African Litigation Centre and Another* (the *Torture Docket* case) set the highest domestic judicial precedent on the duty of South Africa to enforce the provisions of the ICC Act.<sup>88</sup> In the *court a quo*, the applicants claimed that the Priority Crimes Litigation Unit (PCLU) along with the South African Police Service (SAPS) and the Directorate for Priority Crimes Litigation (DPCI), failed to investigate and prosecute the forced detention and alleged torture of more than a hundred Movement for Democratic Change (MDC) supporters. The torture was allegedly organized by high-ranking ZANU-PF officials and executed by the Zimbabwean police as part of a widespread systematic attack against the MDC in the run up to the 2008 national elections.<sup>89</sup> The North Gauteng High Court and the Supreme Court of Appeal (SCA) set aside the NDPP's refusal to open an investigation to prosecute the alleged torture (as a crime against humanity).<sup>90</sup> The Constitutional Court confirmed this ruling, emphasized that South Africa has a duty to investigate and prosecute crimes under the ICC Act, while the need to deliver justice in the instance of gross human rights violations outweighs political ramifications.<sup>91</sup> The judgment confirmed that international crimes are

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<sup>87</sup> Sec 233 of the Constitution of the Republic of South Africa.

<sup>88</sup> *Southern Africa Litigation Centre and others v National Commissioner of the South African police and another National Commissioner of the South African police and another v. Southern Africa Litigation Centre and others* [2013] ZASCA 168 (27 November 2013) and *National Commissioner of the South African Police Service v South African Litigation Centre and Another* [2014] ZACC 30 (30 October 2014) [Hereafter the *Torture Docket* case].

<sup>89</sup> Du Plessis M and Glevers C 'Civil society, 'positive complementarity and the *Torture Docket* case in Williams and Woolaver (ed) *Civil Society and International Criminal Justice in Africa, Challenges and Opportunities* (2016) 159.

<sup>90</sup> *Torture Docket case* ZAGPPHC case para 1-9. Chenwi L (2014) 38.

<sup>91</sup> Kemp G (2014) 67-68.

considered to be “national priority offences,” which the PCLU, SAPS and the DPCI are “required” to investigate and prosecute.<sup>92</sup>

The Constitutional Court judgment, explicates the principle of universal jurisdiction enforced by South Africa. The decision confirmed that according to Section 4(3)(c) of the ICC the duty to investigate and prosecute international crimes extends to situations where the accused is not present in the country.<sup>93</sup> The *Torture Docket* decision is often referred to by scholars to describe an interpretation on complementarity namely, “positive complementarity,” which is States Parties fulfilling “that which the ICC is unwilling or unable to do internationally,” on a domestic level.<sup>94</sup> Scholars have argued that “positive complementarity,” is a duty impressed where the offender and the origin of the offence is a non-state party to the Statute, such as Zimbabwe.<sup>95</sup>

## 2.5 INTERIM CONCLUSION

South Africa’s early domestication of the Rome Statute was indicative of the need for a domestic international criminal justice framework and the States Party’s early commitment to the fight against impunity. It is evident that the ICC Act of 2002 provides a comprehensive legal framework for the prosecution of international core crimes in South Africa. The Act reinforces the principle of complementarity and ensures cooperation between the State and the ICC. Moreover, the Act creates a specific duty to prosecute the core international crimes committed in or outside South Africa, excluding immunity. However, along with the withdrawal, the Repeal Bill of 9 November 2016, aimed to abrogate the entirety of the ICC Act’s provisions.

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<sup>92</sup> *Torture Docket case* ZASCA para 5, The Constitution: Section 205, SAPS Act 68 of 1995 the National Prosecuting Authority Act 32 of 1998.

<sup>93</sup> *Torture Docket case* ZACC para 16. Kemp G (2014) 67.

<sup>94</sup> Du Plessis & Gevers C (2016) 159.

<sup>95</sup> *Torture Docket case* ZACC para 30-32. Du Plessis & Gevers C (2016) 176.

## CHAPTER THREE: REASONS FOR SOUTH AFRICA'S WITHDRAWAL NOTIFICATION – BETWEEN CONFLICTING OBLIGATIONS AND POLITICAL MACHINATIONS

### 3.1 INTRODUCTION

Chapter three examines the culminating factors which led to South Africa's withdrawal. In January 2016, Burundi, the Gambia and South Africa, respectively deposited their notice of withdrawals in accordance with Article 127(1) of the Rome Statute.<sup>96</sup> States such as Kenya, Namibia and Uganda have similarly declared their intention to follow suit.<sup>97</sup> Despite the subsequent revocation of the Gambia's and South Africa's withdrawal instruments, their deposit follows an African Union (AU) proposed "Withdrawal Strategy," adopted at the 28<sup>th</sup> session of the Ordinary Assembly of the African Union.<sup>98</sup>



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<sup>96</sup> 'Withdrawal Depository Notifications' South Africa 19 October 2016 C.N. 786.2016.TREATIES-XVIII.10, Burundi 27 October 2016 C.N. 805.2016.TREATIES-XVIII.10, the Gambia C.N.862.2016 10 November 2016 African Union. At the time of writing Burundi's withdrawal took effect on 27 October 2017 available at <https://ewn.co.za/2017/10/27/burundi-withdrawal-from-rome-statue-comes-into-effect>

<sup>97</sup> Bohler-Muller N and Zongwe D 'It is Self-Defeating for Africa (and South Africa) to Withdraw From the International Criminal Court' (2017) 9 *Namibia Law Journal* 2.

<sup>98</sup> Ngari A 'The AU's (other) ICC strategy' 14 Feb 2017 available at <https://issafrica.org/iss-today/the-aus-other-icc-strategy> (accessed 3 August 2017).

## 3.2 THE EMERGENCE OF A “MASS WITHDRAWAL STRATEGY” FROM THE ICC

### 3.2.1 An “African-bias” in prosecution selectivity?

All four convictions, including 28 indictments and nine out of ten situations before the ICC are African.<sup>99</sup> Many non-African situations and cases however, have escaped the Court’s purview.<sup>100</sup> Consequently, the AU alleges an inherent “African bias” in prosecution selectivity, the Withdrawal Strategy’s draft document states that the ICC has a history of “selectivity of African cases.”<sup>101</sup>

State Parties automatically accept territoriality, nationality and personality jurisdiction of the ICC.<sup>102</sup> A non-state party may accept the ICC’s jurisdiction, without the non-state party’s consent no treaty obligations arise.<sup>103</sup> The Statute does not create third party obligations.<sup>104</sup> In addition, the ICC’s jurisdiction is triggered through three different mechanisms: a States Party may refer a situation to the Prosecutor, either a self-referral or referral of a non-state party (with consent). The Prosecutor initiates investigations *propria motu*, where the Prosecutor establishes a reasonable basis to proceed with a preliminary investigation pursuant to Article 15, which the Pre-Trial Chamber authorises.<sup>105</sup> Jurisdiction is triggered by the third mechanism through a United Nations Security Council (UNSC) referral. The UNSC may refer a situation to

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<sup>99</sup> Nyabola N ‘Does the ICC have an Africa problem?’ 28 March 2012 available at <https://www.aljazeera.com/amp/indepth/opinion/> (accessed 3 August 2017).

<sup>100</sup> Tladi D ‘The African Union and the International Criminal Court: The battle for the soul of international law: Africa and the International Criminal Court’ (2009) 34 *SAYIL* 65.

<sup>101</sup> Withdrawal Strategy Draft II available at [https://www.hrw.org/sites/default/files/supportingresources/icc\\_withdrawal\\_strategy\\_jan.\\_2017.pdf](https://www.hrw.org/sites/default/files/supportingresources/icc_withdrawal_strategy_jan._2017.pdf) (accessed 5 August 2017) [Hereinafter Withdrawal Strategy Draft II].

<sup>102</sup> Article 12(1) of the Rome Statute.

<sup>103</sup> Art 12(2) and (3) of the Rome Statute.

<sup>104</sup> Art 34 of the Vienna Convention of the Law of Treaties (1969).

<sup>105</sup> Art 13 and Art 15 of the Rome Statute.

the Prosecutor for preliminary examination, under Chapter VII of the Charter of the United Nations.<sup>106</sup>

The first trial which triggered the court's jurisdiction was a self-referral of the Democratic Republic of the Congo (DRC). After the decision to open the ICC's first investigation, the Prosecutor at the time Luis Moreno Ocampo, filed an application for the indictment of former President of the DRC Thomas Lubanga, senior commanders and chiefs, Germain Katanga, Mathieu Ngudjolo Chui and Bosco Ntaganda.<sup>107</sup> The DRC's self-referral, set a precedent for the ICC's focus on prosecuting the orchestrators of international crimes, heads of state and organisations.<sup>108</sup>

The "African-bias" theory is premised on a normative debate which asserts that the ICC is a Western imperialist power which continues to oppress the continent. Critics of the Court argue that the permanent members of the UN Security Council namely the US, China and Russia, while willingly refer African situations to the Court remain unsigned.<sup>109</sup> The permanent five have been accused of using their UNSC veto power to evade accountability for war crimes allegedly committed in Iraq.<sup>110</sup> It seems superfluous to hold African states accountable to principles of the Rome Statute, which UNSC permanent security council members are not practicing.<sup>111</sup>

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<sup>106</sup> Art 13 and Art 12(2) of the Rome Statute.

<sup>107</sup> *Prosecutor v Thomas Lubanga Dyilo, Judgement on the appeal of Mr. Thomas Lubanga Dyilo against his conviction* (1 December 2014) ICC-01/04-01/12. *Prosecutor v Germain Katanga* ICC-01/04-01/07. *Prosecutor v Katanga and Ngudjolo, Ruling on confirmation of charges*, ICC-01/04-01/07-717. Trial Chamber II acquitted Mathieu Ngudjolo Chui of war crimes and crimes against humanity *Prosecutor v Mathieu Ngudjolo Chui, Judgment pursuant to Article 85(1) and (3)* ICC-01/04-02/12-301.

<sup>108</sup> Swanepoel CF (2015) 1 *Journal for Juridical Science* 56.

<sup>109</sup> Murithi T 'Between Political Justice and Judicial Politics: Charting a Way Forward for the African Union and the International Criminal Court,' in Werle *et al.* (eds) *Africa and the International Criminal Court* (2014) 182-183.

<sup>110</sup> Aayesha S 'The ICC: When law becomes injustice' 14 June 2015 available at <http://www.politicseb.co.za/opinion/why-is-the-icc-not-trying-bush-blair-and-netanyahu> (accessed 20 September 2017).

<sup>111</sup> Asin J 'The great escape in pursuit of President Al-Bashir in South Africa' 2 *Strathmore Law Journal* (2016) 165.

AU member States have mainly taken issue with the indictments of African sitting heads of states, namely late President Muammer Gadaffi (Libya), President Omar Al-Bashir (Sudan) President Uhuru Kenyatta and Deputy-President William Ruto (Kenya). In the first two cases the UNSC referred the situations of Libya and Sudan to the Prosecutor, requiring that the non-states parties cooperate fully with the ICC.<sup>112</sup> One must note that, the PTC-I found that Libya failed to meet the admissibility test in terms of Article 17(3) of the Statute, where the Court found that Libya's national judicial system was compromised.<sup>113</sup> The UNSC did not provide support or funding to the Court in execution of the indictments nor did it aid non-states parties and States Parties alike in the arrest and surrender of the indicted sitting heads of state as per Article 115 of the Statute.<sup>114</sup>

Proponents of the Court argue that the alleged "African bias," is more perceived than actual.<sup>115</sup> Although nine out of ten situations before the Court are African, four were self-referrals (Uganda, DRC, CAR I and II and Mali) and the two preliminary investigations, Kenya and Chad respectively, were self-referred to the Office of the Prosecutor. Some scholars have argued that 34 out of 54 African states have duly accepted the Statute's provisions there is no reason to assume that every African State shares the sentiment that the ICC is a Western imperialist institution.<sup>116</sup> It has been pointed out that the African Constitutive Act supports international criminal justice in Africa and that the frequency in African indictments is indicative of the continent's history of systematic human rights violations<sup>117</sup> AU member States did not take issue with the indictments of rebel leaders, war lords and despots such as Lubango Dyilo,

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<sup>112</sup> SC Resolution 1583, UN Doc S/RES/1593 (31 March 2005) Sudan and SC Resolution 1970, UN Doc. S/RES/1970 (26 February 2011).

<sup>113</sup> Trendafilova E (2014) 'Africa and the International Criminal Court: A Judge's Perspective' in *Werle et al.*(ed) *Africa and the International Criminal Court* 28.

<sup>114</sup> Article 115 of the Rome Statute, Twenty-Fourth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to UNSCR 1593 (2005) para 36.

<sup>115</sup> Monageng S 'Africa and the International Criminal Court: Then and Now' in *Werle et al.* (ed) *Africa and the International Criminal Court* (2014) 14.

<sup>116</sup> Murithi T (2014) 180.

<sup>117</sup> Muruthi T (2014) 181.



Joseph Kony and Laurent Gbagbo Bemba, yet do not wish to cooperate in the arrest and surrender of indicted sitting heads of states.<sup>118</sup>

### 3.2.2 United Nation's Security Council refusal to defer.

The ICC and the UNSC operate as separate entities however, the UNSC is used as an enforcement body to ensure the cooperation of non-state parties, to refer situations in order to enforce peace and to defer ICC proceedings to establish peace.<sup>119</sup> AU member states allege that the UNSC has particularly abused its power defer situations before the ICC.<sup>120</sup> Article 16 of the Rome Statute confers absolute power on the UNSC to suspend or obstruct any investigation or prosecution under the Statute, for a period of twelve months in which the request to defer may be renewed by the Council.<sup>121</sup> There is no indefinite time period set for the renewal of a prosecution or investigation. The UNSC defers a situation after the Council establishes that there exists a threat to or breach of peace or act of aggression.<sup>122</sup> The determination of a deferral requires all permanent members to vote unanimously.<sup>123</sup> The UNSC permanent members thus have the power to prohibit unfavourable prosecutions.<sup>124</sup>

On three occasions UNSC failed to invoke Article 16 at the request of the AU and African States Parties. Through the UNSC referral, the Pre-Trial Chamber issued an arrest warrant in 2009 on charges of war crimes, crimes against humanity and later

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<sup>118</sup> Batohi S (2014) 49-57.

<sup>119</sup> Oburu K 'The Security Council and the International Criminal Court: When can the Security Council Defer a Case?' (2015) *Strathmore Law Journal* 124.

<sup>120</sup> For further discussion on UNSC deferral powers see Akande D *et al.* 'An African expert study on the African Union concerns about article 16 of the Rome Statute of the ICC' ISS Position Paper (2010) 7.

<sup>121</sup> Article 16 of the Rome Statute

<sup>122</sup> Article 39 of the UN Charter

<sup>123</sup> Oburu K (2015) 127.

<sup>124</sup> Asaala E 'Rule of law or realpolitik? The role of the United Nations Security Council in the International Criminal Court processes in Africa' (2017) 17 *African Human Rights Journal* 266-294.

genocide, allegedly committed by Bashir<sup>125</sup> The AU Peace and Security Council (PSC) requested the UNSC deferral in accordance with Article 16 of the Statute on the grounds that Al-Bashir's arrest warrant would derail peace negotiations already underway.<sup>126</sup> For five years the UNSC had failed to respond to the AU's deferral requests of the Sudan situation.<sup>127</sup>

In the second case, on 16 December 2003 the President of Uganda Yoweri Museveni referred crimes committed by leaders of the Lord's Resistance Army (LRA) to the Prosecutor for investigation. The indictments which ensued were subsequently contested by both the LRA and Ugandan peace negotiation organisations, arguing that the indictments would impede the peace process. The UNSC did invoke Article 16 despite the ongoing conflict.<sup>128</sup> Similarly, the AU requested a deferral for the investigation and prosecution of President Uhuru Kenyatta and Deputy President William Ruto.<sup>129</sup>

Following a *proprio motu* investigation, in 2010 the Pre-Trial Chamber II (PTC-II) summoned five senior government officials (including Kenyatta and Ruto) and one journalist for mass violence committed in the post-2007 elections.<sup>130</sup> The AU assisted Kenya in requesting the UNSC to defer the summons.<sup>131</sup> Kenya argued on

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<sup>125</sup> Chapter VII of the UN Charter and article 13(b) of the Rome Statute of the International Criminal Court. Only in 2010 did the PTC II confirm the charges of genocide.

<sup>126</sup> Murithi T (2014) 182-183.

<sup>127</sup> Assembly/AU/Dec.590(XXVI) at 2. AU Peace and Security Council Communique PSC/Min/Comm(CXLII) (21 July 2008) available at <https://www.peace.org/en/article/communique-of-the-142nd-meeting-of-the-peace-and-security-council> (accessed 2 August 2017).

<sup>128</sup> Obura K (2015) 138.

<sup>129</sup> Okoth J 'Africa, the United Nations Security Council and the International Criminal Court: the Question of Deferrals' in Werle G, Fernandez F and Vormbaum M (ed) *Africa and the International Criminal Court* (2014) 195-209.

<sup>130</sup> *Prosecutor v William Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* ICC-01/09-01/11-01 (8 March 2011) *Prosecutor v Francis Kirimimu Mutharua, Uhuru Muigai Kenyatta and Mohamed Husein Ali* ICC/01/09-02/11-01.

<sup>131</sup> Obura K (2015) 138.

admissibility, Article 17(1)(a) that the States Party should be afforded time to prosecute domestically as the country was in a state of transition undergoing “constitutional and judicial reform” and there were already investigations underway.<sup>132</sup> The UNSC had subsequently refused the deferrals on both accounts. Kenya’s failed deferral requests followed a direct application under Article 19(2)(b) of the Statute.<sup>133</sup> Subsequently, the PTC-II decided that Kenya had not at the time of ICC proceedings undertaken any material domestic investigations<sup>134</sup> The Court found that the national judicial system could was not able to prosecute then sitting head of state Muammer Gadaffi. Consequently, this paper turns to the AU’s response to the outcomes of the UNSC’s referral and deferral process.

### 3.2.3 Africa’s non-cooperation with the arrest of Al-Bashir.

African States Parties alleged that the indictments against sitting head of state Al-Bashir placed states in a conflicting position between their duty to arrest Al-Bashir under the Rome Statute and the AU’s request for non-cooperation.<sup>135</sup> Non-member states are obligated to comply with the statute according to the provisions of Article 13 (c) and 12 (3), through UNSC referrals or acceptance of jurisdiction.<sup>136</sup> This has thrust States Parties who are both signatories to the Statute and members of the AU into an unsettled debate over the application of Article 98(1) which provides as follows:

“The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its

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<sup>132</sup> Trendafilova E (2014) 23.

<sup>133</sup> Art 19 (2)(b) of the Rome Statute “Challenges to the admissibility of a case on the grounds referred to in Article 17...(b) A State which has jurisdiction over a case on the ground that it is investigating or prosecuting the case or has investigated or prosecuted...”

<sup>134</sup> *Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b)* PTC-II ICC-01/09-01/11-101 (30 May 2011). Note that the charges against Kenyatta and Ruto have since been withdrawn.

<sup>135</sup> Tladi D (2009) 57-69.

<sup>136</sup> Materu S (2014) 215. Article 26 of the Vienna Convention on the Law of Treaties (1969).

obligations under international law with respect to State or diplomatic immunity of a person or property of a third state...”<sup>137</sup>

Numerous African States Parties, have hosted Al-Bashir between the years 2009 and 2016, which include: Chad, Djibouti (twice), Malawi, Kenya, Democratic Republic of the Congo (DRC) Uganda and South Africa.<sup>138</sup> None of which complied with the ICC’s arrest warrant. The ICC on all occasions of the cases before it: Malawi, Chad and the DRC acknowledged the tension between Articles 98(1) and 27(2) but did not clearly define the dichotomy in obligations which States Parties are faced when required to cooperate in the arrest and surrender of a sitting head of state.<sup>139</sup> The ICC decided that requested states could not refuse cooperation with arrest and surrender of heads of state on the basis of immunity as this “would disable the Court and the international criminal justice.”<sup>140</sup>

In the cases of non-compliance with Al-Bashir’s arrest before the ICC Chambers the Court decided the following in each respective case: In the Chad and Malawi decision before the ICC in 2011, Al-Bashir did not enjoy immunity under customary international law under provisions of Article 27 of the Statute. In the DRC case, the Chamber revised its position, concluding that the Security Council “implicitly waived his immunity in Resolution 1593,” the UNSC issued a binding decision under Chapter VII of the UN Charter. In its most recent decision of 6 July 2017 against South Africa’s non-compliance with Al-Bashir’s arrest warrant, the Chamber found that al-Bashir does not

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<sup>137</sup> Article 98(1) and Article 86 of the Rome Statute.

<sup>138</sup> Boehme F ‘We Chose Africa’: South Africa and the Regional Politics of Cooperation with the International Criminal Court (2017) 11 *International Journal of Transitional Justice* 51. Countries Al Bashir has visited available at <http://bashirwatch.org> (accessed 2 November 2017).

<sup>139</sup> *Decision Pursuant to Article 87(7) on the Failure of the Republic of Malawi to Comply with the Cooperation Request Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmed Al Bashir* ICC-02/05-01/09-139 Pre-Trial Chamber I, 12 December 2011 [Hereinafter *Malawi Decision*] and ICC-02/05-01/09-140 Pre-Trial Chamber I, 13 December 2011 [Hereinafter *Chad Decision*] *Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court* ICC-02/05-01/09 Pre-Trial Chamber II, 9 April 2014 [Hereinafter *DRC Decision*].

<sup>140</sup> Article 98(1) of the Rome Statute.

enjoy immunity because the Security Council's referral implied that the provisions of the Rome Statute apply to Sudan as if it were a state party.<sup>141</sup> It follows that the "AU-ICC Withdrawal Strategy" emerged from the aforementioned developments.

### 3.3 THE AU-ICC WITHDRAWAL STRATEGY

#### 3.3.1 Objectives of the withdrawal strategy.

The 26<sup>th</sup> African Union Assembly Summit, the AU tasked an Open-Ended Ministerial Committee of Foreign Affairs to develop a collective withdrawal strategy from the ICC.<sup>142</sup> The strategy was presented at the 28<sup>th</sup> AU Summit in January 2017 and a decision adopted a "ICC withdrawal strategy" in which the AU, "calls on member states to consider implementing its recommendations."<sup>143</sup> The four objectives are outlined as follows:

"...that international justice is conducted in a fair and transparent manner devoid of any perception of double standards; institution of legal and administrative reforms of the ICC... enhance the regionalization of international criminal law...encourage the adoption of African Solutions form African problems; Preserve the dignity, sovereignty and integrity of Member States."<sup>144</sup>

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<sup>141</sup> Knottnerus A 'The Immunity of Al-Bashir: The Latest Turn in the Jurisprudence of the ICC' 15 November 2017 available at <https://www.ejiltalk.org/the-immunity-of-al-bashir-the-latest-turn-in-the-jurisprudence-of-the-icc/> (accessed 20 November 2017).

<sup>142</sup> Labuda P 'The African Union's Collective Withdrawal from the ICC: Does Bad Law make for Good Politics?' 15 February 2017 available at <https://www.ejiltalk.org/the-african-unions-collective-withdrawal-from-the-icc-does-bad-law-make-for-good-politics/> (accessed 15 September 2017).

<sup>143</sup> African Union Decision Assembly/AU/Dec.590(XXVI) 12 January 2017 'Withdrawal Strategy Document' 8.

<sup>144</sup> African Union Decision Assembly/AU/Dec.590(XXVI) 12 January 2017 'Withdrawal Strategy Document' 2.

Where the strategy fails to provide the above, the draft document proposes that at the very least it provides AU member States with a “holistic approach, analysis and implications,” of a States Party’s option to withdraw from the Rome Statute through Article 127 on a “state-by-state” basis.<sup>145</sup> The AU strategy however is not to be viewed as a “common position” for all other African States Parties to the Rome Statute, even though 61 percent of AU states are parties to the Statute, 39 percent of the AU members are not. Numerous states such as Nigeria, Senegal, Liberia, Botswana and Cape Verde, have expressed reservations, while other States such as Zambia have requested time to study the draft document.<sup>146</sup>

### **3.3.2 Reform under the AU-ICC withdrawal strategy.**

The withdrawal draft document endorses the withdrawal of African States Parties if the following “preconditions” – either amendments to the Statute or reforms within the ICC have not been met.<sup>147</sup> Only the following are relevant to this paper: i) to include the complementarity of a regional criminal court conducting genuine proceedings, in the Statute’s Preamble, ii) to limit, referral powers of the UNSC permanent members powers under Article 13(2) and its discretionary power to defer situations to the ICC under Article 16 of the Statute; also calling for the UN system to address the inequality in the structuring of the referral system iii) to bring the Independent Oversight Mechanism (IOM) into operation to inspect, evaluate and investigate all organs of the Court v) to amend Article 27 of the Statute by recognising head of state immunity.<sup>148</sup>

An in-depth discussion on whether the “AU-ICC Withdrawal Strategy” is tenable or not, is beyond the ambit of this paper, although some scholars posit that the requested amendments are contradictory and essentially undermine the Court’s purpose. It is

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<sup>145</sup> African Union Decision Assembly/AU/Dec.590(XXVI) 12 January 2017 ‘Withdrawal Strategy Document’ 3.

<sup>146</sup> Materu S (2014) 215.

<sup>147</sup> Withdrawal Strategy Draft 2 at par 29.

<sup>148</sup> Withdrawal Strategy Draft 2 at 10,11.

also argued that the main purpose for the “AU-ICC Withdrawal-Strategy,” aims to leverage the threat of an African mass withdrawal in order to achieve certain amendments which failed to be taken up in the ASP.<sup>149</sup>

South Africa submitted that the UNSC fails to defer cases where the ICC is, “a threat to peace and security,” and that there is a “need to assess whether the ICC is still reflective of the principles and values...of the Rome Statute.”<sup>150</sup> State Party had proposed the following amendments, before the ASP: that the United Nations General Assembly consider a request of deferral in place of the UNSC, in the event that the UNSC does not respond to a deferral request within six months of submitting such request in terms of Article 16.<sup>151</sup> Further, the state has requested clarity on interpreting Article 87(7), the obligation of States Parties to cooperate and assist in arrest warrants and defining the nature and scope of a State’s parties reservation in favour of domestic legislation in terms of Article 98 and the immunity clause under Article 27.<sup>152</sup> One can note that South Africa’s proposed amendments align with the AU’s objectives. The events which particularly lead to South Africa’s own withdrawal, will be discussed in the following section.



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<sup>149</sup> Clarke KM ‘African Withdrawals: Foregrounding Rome Statute Amendments as Critical to Addressing the Structural Inequalities in which the ICC Operates’ *Human Rights and International Criminal Law* available at <https://icc.com/withdrawal> (accessed 10 August 2017).

<sup>150</sup> ‘Official Notice Instrument’ available at <https://www.dirco.gov.za/docs/speeches/2016/> (accessed on 20 October 2017) [Hereinafter *the Official Notice Instrument*].

<sup>151</sup> Withdrawal Strategy Draft 2 at par 32.

<sup>152</sup> Declaratory Statement by the Republic of South Africa on the Decision to Withdraw from the Rome Statute of the International Criminal Court, 3 November 2016 [Hereinafter Declaratory Statement to Withdraw] para 3, 1.

## 3.4 THE AL-BASHIR DEBACLE, AT THE GENESIS OF SOUTH AFRICA'S WITHDRAWAL

### 3.4.1 “An unenviable position” – the duty to arrest Al-Bashir before South African courts.

It is common cause that South Africa's non-compliance with the Al-Bashir arrest warrant is at the heart of the States Party's withdrawal.<sup>153</sup> The executive submitted that its reasons for withdrawal were foremost that the ICC membership and the ICC Act, impedes South Africa's international “role in diplomatic and peace-keeping efforts on the continent.”<sup>154</sup> South Africa's Minister of International Relations argued that the call to arrest Bashir prevented the state's ability to peacefully resolve the conflict in Darfur, which South Africa was obligated to fulfil under the AU.<sup>155</sup> The official declaratory statement states that South Africa was faced with conflicting obligations, to comply with the ICC indictment on the one hand and on the other to uphold AU agreements on diplomatic immunity.<sup>156</sup> Additionally, the notice instrument submits that the arrest of sitting heads of states in accordance with the Rome Statute is contrary to customary international law where they would ordinarily enjoy personal immunity, *ratione personae*.<sup>157</sup> The following section outlines the rulings on South Africa's duty to arrest sitting head of state President Al Bashir, before the domestic courts and the ICC.

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<sup>153</sup> *Democratic Alliance v Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening)*. (1) SACR 623 (GP) [hereafter *DA v Minister of International Relations*].

<sup>154</sup> *DA v Minister of International Relations and others* para 65.

<sup>155</sup> *DA v Minister of International Relations and others* para 45. Explanatory Memorandum-Parliament of South Africa Instrument of Withdrawal available at [https://withdrawal\\_from\\_the\\_Rome\\_Statute\\_of\\_the\\_International\\_Criminal\\_Court\\_tabled\\_Friday\\_4th\\_November\\_2016](https://withdrawal_from_the_Rome_Statute_of_the_International_Criminal_Court_tabled_Friday_4th_November_2016) (accessed on 20 July 2017).

<sup>156</sup> Declaratory Statement by the Republic of South Africa on the Decision to Withdraw from the Rome Statute of the International Criminal Court at 2.

<sup>157</sup> Declaratory Statement at 2.



On 28 May 2015, the ICC requested South Africa to cooperate with Al-Bashir's arrest warrant and surrender him to the court should he enter state party's borders.<sup>158</sup> In June 2015, the South African executive failed to arrest Al-Bashir upon his attendance at the 27<sup>th</sup> Ordinary Session of the Executive Council and the 25<sup>th</sup> Ordinary Session of the Assembly of the African (the AU Summit) Johannesburg, South Africa.<sup>159</sup> On three prior occasions the South African government publicly stated that it would arrest Al-Bashir if he attempted to attend the inaugurations of President Jacob Zuma, the 2010 World Cup and Nelson Mandela's funeral in 2013.<sup>160</sup>

The South African Litigation Centre (SALC) made an urgent application to the High Court of Pretoria on 13 June 2015, requesting a court order for the arrest of Al Bashir upon his arrival for the AU Summit.<sup>161</sup> Notwithstanding, that the High Court had granted the order for the Sudanese President's arrest, the executive failed to comply and instead assisted his departure on the 15 June 2015.<sup>162</sup> The South African government argued that it was primarily obligated to the AU. The executive had entered a Host State Agreement as required by the AU Commission, to accord its member states' government officials, representatives and delegates with diplomatic privileges and immunities during the AU Summit proceedings under provisions of the General Convention on the Privileges and Immunities of the OAU (OAU General Convention on Privileges and Immunities).<sup>163</sup> Diplomatic privileges and immunities are further outlined, specifically in section 4(1) of the South Africa's Diplomatic Immunities and Privileges Act (DIPA).<sup>164</sup>

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<sup>158</sup> ICC-02/05-01/09-239-Conf-Anx1.

<sup>159</sup> Boehme F (2017) 52.

<sup>160</sup> Schwartz R (2016) 217.

<sup>161</sup> *Southern African Litigation Centre v Minister of Justice and Constitutional Development & others* 2015 (5) SA 1 (GP). [Hereafter the *High Court Decision*].

<sup>162</sup> De Wet E 'The Implications of President Al-Bashir's Visit to South Africa for International and Domestic Law' (2015) 13 *Journal of International Criminal Justice* 1051.

<sup>163</sup> Articles V and VI of the General Convention on the Privileges and Immunities of the Organisation of African Unity (OAU) and the Host State Agreement

<sup>164</sup> The Vienna Convention on Diplomatic Relations of 1961, was enacted as Diplomatic Immunities and Privileges Act 37 of 2001 [Hereinafter DIPA].

*Southern Africa Litigation Centre v. Minister of Justice and Constitutional Development and Others*, held that the provisions under the Rome Statute, which South Africa had domesticated through the ICC Implementation Act, superseded the terms of the AU Host Agreement.<sup>165</sup> The court held that the agreement did not confer immunity on sitting head of state Al-Bashir and that *ratione personae* immunity, otherwise enjoyed in terms of customary international, was expressly barred according to Article 27 of the Rome Statute and Section 10(9) which imposes a duty of arrest and surrender excluding immunity as contemplated in Section 4(2) of the Implementation Act.<sup>166</sup>

The High Court reasoned that South Africa had not ratified the OAU General Convention on Privileges and Immunities, which provides that representatives of Member States enjoy diplomatic immunity. Moreover, the Host Agreement, the provisions of the DIPA and the Minute in the Government Gazette conferring immunities on the summit did not trump the Rome Statute nor the ICC Implementation Act.<sup>167</sup> Additionally, the court relied on the decision against the DRC's non-compliance with the Al-Bashir's indictment, the High Court agreed with the ICC decision that immunities which would normally attach to Al-Bashir by virtue of customary international law have been "implicitly waived" by the Security Council's resolution 1593.<sup>168</sup> The court reiterated South Africa's duty to comply with the provisions of the Rome Statute and to ensure national criminal proceedings over international crimes, confirmed in the Constitutional Court decision of the *National Commissioner of the South African Police Service v. Southern African Human Rights Litigation Center*.<sup>169</sup> The executive appealed the matter in the Supreme Court of Appeal in the *Minister of*

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<sup>165</sup> The *High Court Decision* para 28.

<sup>166</sup> The *High Court Decision* para 36-39. *Democratic Republic of the Congo (DRC) v Belgium* [Hereinafter the *Arrest Warrant Case*]. Gaeta P 'Does President Al Bashir Enjoy Immunity from Arrest?' (2009) 7 *Journal of International Criminal Justice* 315. Sec 10(9) ICC Implementation Act, "The fact that a person to be surrendered is a person contemplated in section 4 (2) (a) or (b) does not constitute a ground for refusing to issue an order contemplated in subsection (5).

<sup>167</sup> Tladi D 'The Duty on South Africa to Arrest and Surrender President Al-Bashir under South African and International Law' (2015) 13 *Journal of International Criminal Justice* 1032.

<sup>168</sup> *High Court Decision* para 32.

<sup>169</sup> The *High Court Decision* para 26.

*Justice and Constitutional Development and Others v Southern African Litigation Centre and Others.*<sup>170</sup>

The appeal was dismissed and the High Court's findings confirmed. The majority judgment turned to domestic law for further interpretation agreeing that the ICC Implementation Act excluded *ratione personae* and that Section 4(1) of the Diplomatic Immunities and Privileges Act (DIPA) did not apply to matters covered by the Implementation Act.<sup>171</sup> The majority judgment concluded that, there is no *jus cogens* precedent that contradicts the ruling of the *Arrest Warrant* case in that *ratione personae* is not enjoyed by sitting heads of state under customary international law. Judge Wallis JA opinions that it is not for domestic courts to develop customary international law but rather, that the legislatures envisioned excluding all forms of immunity in the application of the ICC Implementation Act.<sup>172</sup>

Scholars however remain divided on the interpretation of the source of Al Bashir's immunity and the law invoked to remove it.<sup>173</sup> However, an in-depth discussion on the legal position of *ratione personae* is beyond the scope of this paper. appeal of the *Al Bashir* case was set to be heard in the Constitutional Court on 22 November 2016, with the view that the many "legal uncertainties" be clarified.<sup>174</sup> South Africa had since

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<sup>170</sup> *Minister of Justice and Constitutional Development v Southern African Litigation Centre* 2016 (3) SA 317 (SCA) [Hereinafter the Al Bashir Case].

<sup>171</sup> Sec 4(1)(a) of DIPA provides that heads of state enjoy immunity in accordance with customary international law.

<sup>172</sup> Akande D 'The Bashir case has the South African Supreme Court Abolished Immunity for Heads of States' 29 March 2016 available at <https://www.ejiltalk.org/the-bashir-case-has-the-south-african-supreme-court-of-appeal-abolished-immunity-for-all-sitting-heads-of-states/> (accessed 25 October 2017).

<sup>173</sup> Tladi D 'Interpretation and international law in South African courts: The Supreme Court of Appeal and the Al Bashir saga' (2016) 16 *African Human Rights Law Journal* 312.  
Helen Suzman Foundation legal briefs on SCA decision available at <http://hsf.org.za/resource-centre/hsf-briefs/after-al-bashir-part-i>; and <http://hsf.org.za/resource-centre/hsf-briefs/after-al-bashir-part-ii>. (accessed 10 October 2017).

<sup>174</sup> Du Plessis M and Mettraux G 'South Africa's Failed Withdrawal from the Rome Statute' (2017) *Journal of International Criminal Justice* at 361.

requested that the ASP determine the nature and scope of the provisions of head of state immunity and states party's obligation to cooperate under Article 98.<sup>175</sup> Before the ASP had responded to this request, the South African executive withdrew its appeal set to be heard in the Constitutional Court in favour of a notice to withdraw from the ICC.<sup>176</sup>

### **3.4.2 South Africa before the ICC.**

#### **3.4.2.1 The duty to arrest Al-Bashir.**

The following is an account of the events which unfolded between South Africa and the ICC Chambers concerning South Africa's non-compliance with Al-Bashir's ICC indictment. When the ICC requested South Africa to arrest and surrender Al-Bashir, the state party was required to invoke the consultation process "without delay," in case it may have impeded or prevented the execution of Al-Bashir's arrest.<sup>177</sup> On Friday 12 June 2015, the Chamber issued an order stating the following: (i) that South Africa has a clear obligation to arrest Al-Bashir, (ii) domestic law issues did not alter this obligation (iii) the immediate obligation to arrest was not suspended.<sup>178</sup>

South Africa's public hearing before PTC II of the ICC was set to be heard on 7 April 2017 on whether South Africa failed to comply with the Court's request for arrest and surrender of Al Bashir in accordance with Articles 87 and 89 of the Statute and whether to refer the matter to the ASP under Article 87(7).<sup>179</sup> The following submissions were advanced by South Africa in response to the ICC's proceedings, firstly that the consultation process under Article 97 of the Statute had failed, secondly that there were inconsistencies in the decisions of the PTC I on the non-compliance of Malawi

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<sup>175</sup> Du Plessis M & Mettraux G (2017) 362.

<sup>176</sup> The Gambia has since withdrawn its appeal, Tladi D (2016)312.

<sup>177</sup> *Chad, Malawi and the DRC decisions.*

<sup>178</sup> *Decision following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir'* PTC-II ICC-02/05-01/09-242 6 July 2017 at 7.

<sup>179</sup> South Africa had made submissions on 17 March 2017 PTC-II ICC-02/05-01/09-242 at 12-16.

and Chad; further challenging that the UNSC has the authority to waive immunities of heads of state, as decided in the DRC PTC I decision. Thirdly, that Al-Bashir maintains immunity under customary international law which had not been waived by Sudan.<sup>180</sup> Finally, South Africa made a political argument in that as a member of the AU it could not disengage from host State obligations.<sup>181</sup>

PTC II 6 July 2017, hearing, the court found South Africa had breached its duty to Arrest Bashir, did not refer the matter to the Assembly of States Parties nor ordered any relevant action to be taken. The PTC-II emphasised that both the international and domestic courts have decided that Bashir does not enjoy immunity and that South Africa had a duty to comply with the ICC's arrest warrant.<sup>182</sup> The Chamber finally concluded that there should be no ambiguity surrounding South Africa's obligation to have arrested Al Bashir, however did not warrant a referral of South Africa to the ASP to obtain further cooperation.<sup>183</sup>

#### **3.4.2.2 The consultative process between south Africa and the ICC.**

This section will specifically discuss the alleged breakdown in the consultative process under Article 97 of the Statute. South Africa submitted that three fundamental errors had transpired during the consultation process: i) the request for consultations had been incorrectly dealt with, the executive argues that South Africa's first submissions did not equate to a consultation, ii) the proceedings were "quasi-judicial" instead of diplomatic turning "a matter of diplomacy into judicial action," iii) that there were no Rules of Procedure and Evidence governing the process.<sup>184</sup>

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<sup>180</sup> PTC II, 6 July 2017 ICC-02/05-01/09-242 at 11.

<sup>181</sup> PTC II, 6 July 2017 ICC-02/05-01/09-242 at 16.

<sup>182</sup> Du Plessis M 'Shambolic, Shameful and Symbolic, Implications of the African Union's Immunity for African Leaders' November 2014, ISS Paper 278.

<sup>183</sup> PTC II, 6 July 2017 ICC-02/05-01/09-242 para 140 51, 52.

<sup>184</sup> PTC II, 6 July 2017 ICC-02/05-01/09-242 at 11.

At the time of depositing the notice, the executive was involved in an ICC-consultative process over the Al-Bashir incident, in accordance with Article 97.<sup>185</sup> The ASP Bureau subsequently established a working group for the interpretation of Article 97 at The Hague in November 2015. However, Du Plessis notes that South Africa submitted its notice to withdraw, as of 2016 and no longer participated in the working group established by the ASP Bureau, to address the lack of procedural structure in the consultation process.<sup>186</sup> The executive's action to deposit the notice to withdraw appeared to contradict its intention to appeal the PTC II decision to hold a hearing, for the ASP to review the consultation process under Article 97; and to submit arguments for the hearing of April 2017.<sup>187</sup> The Prosecutor submitted that the consultations under Article 97 do not change or suspend the obligation to comply with arrest warrants in terms of the ICC Statute and noted that the consultations should have been initiated once South Africa had confirmed Bashir's attendance at the 25<sup>th</sup> AU Summit.<sup>188</sup>

The Chamber noted that Article 97 does not explicitly refer to conflicts between Article 98(1) and Article 27 of the Statute.<sup>189</sup> In terms of the consultation process aimed at resolving the issues of Article 98(1) of the Rome Statute, the court concluded that the failure of such consultations should not deter states from compliance under Article 87. The Chamber found that South Africa could not unilaterally decide not to comply with the arrest warrant and found that the only manner in which to resolve the matter was through judicial process in the Court and not through a prolonged consultative process.<sup>190</sup>

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<sup>185</sup> Du Plessis M & Mettraux G (2017) 366.

<sup>186</sup> 15<sup>th</sup> Assembly of States Parties available at <https://www.asp.icc-cpi.int/iccdocs/> (accessed on 15 August 2017).

<sup>187</sup> Du Plessis M and Mettraux G (2017) 367.

<sup>188</sup> PTC II, 6 July 2017 ICC-02/05-01/09-6 July 2007 at 16.

<sup>189</sup> PTC II, 6 July 2017 ICC-02/05-01/09-242 para 101.

<sup>190</sup> PTC II, 6 July 2017 ICC-02/05-01/09-242 para 102.

### 3.5 INTERIM CONCLUSION

South Africa's notice to withdraw appears to be contingent on maintaining its diplomatic relationship with the AU. The States Party's reasons for withdrawal are aligned with the AU-ICC Withdrawal Strategy. However, the country's own diplomatic tension surrounding the non-compliance with the Al-Bashir's arrest warrant and the subsequent proceedings before the ICC does indeed confirm that South Africa's primary reason to withdraw is to afford African sitting heads of state immunity from international crimes.



## CHAPTER FOUR: WHICH WAY FORWARD FOR SOUTH AFRICA?

### 4.1 INTRODUCTION

On 22 February 2017, the Pretoria High Court in *DA v Minister of International Relations and Others*, declared that the state's circumvention of proper withdrawal procedure was "irrational," "unconstitutional and invalid."<sup>191</sup> The proposition to withdraw remains on the African National Congress' (ANC) National Agenda as at July 2017 despite the notice instrument's revocation and the retraction of the Repeal Bill.<sup>192</sup> The official withdrawal document states that South Africa continues to be committed to the fight against impunity and to uphold international criminal. The executive proposed greater support for the regionalisation of an "African Criminal Court" as an alternative to the ICC.<sup>193</sup> Accordingly, the following chapter evaluates: the High Court's order to revoke the notice instrument, the outcomes of the unsuccessful withdrawal and the domestic and international implications of a future successful withdrawal.



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<sup>191</sup> *DA v Minister of International Relations* at para 70, 81.

<sup>192</sup> The 5<sup>th</sup> National Policy Conference 30 June-5 July 2017 'International Relations' available at <https://www.anc.org.za/content/5th-national-policy-conference-2017> (accessed 12 September 2017).

<sup>193</sup> 'Explanatory Memorandum on South Africa's Withdrawal' para 5, 'Declaratory Statement of Withdrawal' para 10.



## 4.2 THE REVOCATION OF SOUTH AFRICA'S WITHDRAWAL INSTRUMENT

### 4.2.1 South Africa's withdrawal instrument – "irrational, unconstitutional and invalid."

The deposit of the notice to withdraw on 19 October 2016 subject to take effect after 12 months, followed from the Al-Bashir litigation history.<sup>194</sup> Notably, South Africa was engaged in ongoing Chamber proceedings during and after the SCA *Al Bashir* case, discussed in Chapter 3. The executive's appeal to the SCA was unsuccessful after which it appealed the Constitutional Court, only to withdraw its appeal on 22 November 2016.<sup>195</sup> On 24 November 2016 the major opposition party, the Democratic Alliance adjoined by several civil society organisations, made a direct application to the Constitutional Court, challenging the executive's decision to withdraw.<sup>196 197</sup> The Constitutional Court however, refused the application. The applicants subsequently turned to the Pretoria High Court for orders in the following: a declaration that the notice, its deposit and the decision to withdraw was procedurally and substantively unconstitutional and invalid. An order was sought to have the notice instrument revoked and for the High Court to direct the executive to "take reasonable steps to terminate the process of withdrawal under Article 127(1) of the Rome Statute. The High Court decision declared that it was only necessary to decide on the procedural issues before it. The court decided that the executive's decision to withdraw from the ICC without prior parliamentary approval and the repeal of the ICC Implementation Act, was unconstitutional and invalid.<sup>198</sup> The following is a brief discussion on the merits of the declaration of procedural constitutionality, irrationality and invalidity.

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<sup>194</sup> *DA v Minister of International Relations* paras 1-4.

<sup>195</sup> *DA v Minister of International Relations* para 3.

<sup>196</sup> The DA is a political party registered in terms of s 15 of the Electoral Commission Act 51 of 1996...supported by the intervening applicant Council for the Advancement of the South African Constitution (CASAC); the sixth respondent, South African Litigation Centre (SALC); the joint ninth respondent Centre for Human Rights (CHR) and the tenth respondent the Helen Suzman Foundation' (HSF) paras 6-7.

<sup>197</sup> *DA v Minister of International Relations* para 77.

<sup>198</sup> *DA v Minister of International Relations* para 77, [cont..].

#### 4.2.2 Procedural constitutionality, interpreting Section 231.

The following procedural constitutional issues lay before the court: Whether the national executive possessed the authoritative powers to withdraw from the Rome Statute, without obtaining prior parliamentary approval? Whether the ICC Act should have been repealed before depositing the notice and if the notice instrument could be qualified by parliamentary approval after its deposit with the UN.<sup>199</sup>

The High Court was tasked with interpreting Section 231, which constitutionally governs the South African treaty-making process and domestication of international agreements.<sup>200</sup> The full-bench turned to the interpretation of subsection one, two and four, which strictly empowers the national executive to conclude an international agreement which provisions bind the state only if, “approved by resolution in both the National Assembly and the National Council of Provinces,” barring a self-executing provision.<sup>201</sup> However, section 231 (1) and (2) does not explicitly nor implicitly prescribe executive powers to withdraw from a treaty.<sup>202</sup>

The executive reasoned that since Parliament is not the ‘decision-maker’ in the treaty-making process, the same procedural order for the conclusion of a treaty should be followed for a withdrawal.<sup>203</sup> The executive further contested that nothing precluded the Parliament from approving the notice instrument, after its deposit, as the ‘Withdrawal Bill’ was already tabled before Parliament.<sup>204</sup> In terms of international law,

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<sup>199</sup> *DA v Minister of International Relations* para 1.

<sup>200</sup> Section 231 of the Constitution Act 108 of 1996.

<sup>201</sup> *DA v Minister of International Relations and others* para 57. Section 231(3): “...of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive...”  
Section 231(1), (2) and (4).

<sup>202</sup> Dugard J (2012) 416.

<sup>203</sup> *DA v Minister of International Relations and others* para 38-42.

<sup>204</sup> *DA v Minister of International Relations and others* para 46. Chronological order of ‘Withdrawal Bill’:

the executive argued that the reading-in of parliamentary approval for a withdrawal would be contrary to international law Article 56 of the Vienna Convention on the Law of Treaties.<sup>205</sup>

Article 56 of the Vienna Convention, merely ensures the authenticity of the withdrawal instrument and does not intend to determine how member states execute their own treaty-making process.<sup>206</sup> *DA v Minister of International Relations*, thus confirmed that the unilateral deposit of a notice of withdrawal or the denunciation of a treaty, is “constitutionally untenable,” unlike a treaty-signature which must be ratified thereafter, a withdrawal immediately creates legal consequences.<sup>207</sup> By circumventing prior Parliamentary approval, the executive had violated the principle of separation of powers under section 231(2).<sup>208</sup> This provision ensures that the executive exercises its decision-making power in conformity with legality and constitutionality. Therefore, it cannot make such unilateral decisions which legally bind the state and its people.<sup>209</sup> Considering the executive’s evident violation of the separation of powers principle, the

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On the 20 and 21 October 2016, the Minister of International Relations, notified the Speaker of the National Assembly and the Chairperson of the National Council of Provinces, of the cabinet’s decision to withdraw and their intention to table the Repeal Bill which was introduced to the National Assembly on 9 November 2016. On 31 January 2017, Implementation of Rome Statute of International Criminal Court Act Repeal Bill (B23-2016) briefing with Minister and Deputy Minister, available at <https://pmg.org.za/bill/675/> (accessed 30 July 2017).

<sup>205</sup> Article 56 of the Vienna Convention of the Law of Treaties, 1969 ‘...head of state, head of government, or minister of foreign affairs or other representative of the state concerned...signed by a senior state official who is duly authorised.’ *DA v Minister of International Relations and others* para 48. For full discussion on Art 56 Kolb R ‘Termination’ in Kolb R (ed) *The Law of Treaties an Introduction* (2016) 213-220.

<sup>206</sup> *DA v Minister of International Relations and others* 49-50.

<sup>207</sup> Woolaver H ‘Unconstitutional and Invalid: South Africa’s Withdrawal from the ICC Barred (For Now)’ (27 February 2017) <https://ejiltalk.org/unconstitutional-and-invalid-south-africas-withdrawal-from-the-icc-barred> (accessed 30 July 2017).

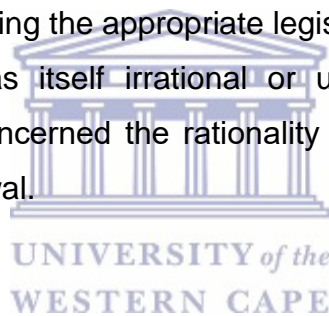
<sup>208</sup> *DA v Minister of International Relations and others* para 52. See *Glenister II* para 96.

<sup>209</sup> *Glenister v President of the Republic of South Africa and others* 2011 (3) SA 347; 2011 (7) BCLR 651 (CC) [hereafter *Glenister II*]. See *obiter* Judge Ngcobo CJ *DA v Minister of International Relations and others* para 34-44.

*ex post facto* submission of the 'Repeal Bill' before the Parliament, did not rectify the procedural unconstitutionality.<sup>210</sup>

International treaty law does not preclude the Secretary-General of the UN from recognising South Africa's withdrawal as legitimate. The requirements under treaty withdrawal according to international treaty law does not concern itself with domestic constitutional requirements unless a States Party has substantively or materially breached the agreement.<sup>211</sup> In this case the court decided there was a constitutional breach in the process of withdrawal, however, this did not invalidate the withdrawal instrument from an international perspective.<sup>212</sup>

The court noted that it is the executive's prerogative to draft foreign policy according to its own considerations, hence it only had to determine whether the reasons for withdrawal merited circumventing the appropriate legislative process and not whether the decision to withdraw was itself irrational or unconstitutional<sup>213</sup> The second procedural issue therefore concerned the rationality of the executive's actions and reasoning behind the withdrawal.



#### **4.2.3 Procedural irrationality.**

In the High Court's view, the executive's means to achieve their end was procedurally irrational.<sup>214</sup> The executive alleged that the ICC Act and Statute, inhibits peace-brokerage as it forces South Africa to violate diplomatic immunity which a head of state would enjoy, 'under customary international law but who are wanted by the court.'<sup>215</sup>

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<sup>210</sup> *DA v Minister of International Relations and others* para 59.

<sup>211</sup> Article 46(2) of the Vienna Convention of the Law of Treaties (1969)

<sup>212</sup> *DA v Minister of International Relations and others* para 60.

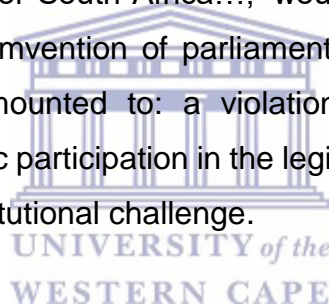
<sup>213</sup> *DA v Minister of International Relations and others* para 64 and 172 also see *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC).

<sup>214</sup> *Democratic Alliance President of the Republic of South Africa and others* 2012 (1) SA 248 (CC) para 37.

<sup>215</sup> 'Statement from the Minister of Justice available at

The executive could not prove that the ICC Act has materially impeded the peace-negotiation process in Sudan.<sup>216</sup> The High Court found no immediate urgency for the executive to deposit the withdrawal instrument without waiting for parliamentary approval and the necessary 'legislative processes.'

Du Plessis and Mettraux suggest that the executive's arguments were 'misguided...blinded by political considerations and legal miscalculations'.<sup>217</sup> The authors note that the executive could have raised their concerns, in South Africa's non-compliance appeal scheduled for April 2017.<sup>218</sup> The executive acted on the assumption that the Parliament would summarily repeal the ICC Act without legislative process. If the notice instrument came into effect before Parliament had approved of the withdrawal, a legal deadlock or a 'clumsy piece-meal,' process with 'undesirable and embarrassing outcomes for South Africa...', would have ensued.<sup>219</sup> Ultimately, the court found that the circumvention of parliamentary approval was procedurally unconstitutional in that it amounted to: a violation of separation of powers, a deprivation of the right to public participation in the legislative process and a disregard for the due process of a constitutional challenge.



Finally, in its most crucial statement towards the withdrawal debate, the court confirmed that South Africa's membership to the ICC is of great importance, 'to bring the perpetrators of serious international crimes to justice in domestic courts or the

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<https://www.sanews.gov.za/south-africa/sa-formally-withdrawing-icc> (accessed on 15 August 2015).

<sup>216</sup> Mendes E 'Is it peace or justice that ends the alleged first genocide of the 21<sup>st</sup> Century?' in Mendes E *Peace and Justice at the International Criminal Court, A Court of Last Resort* (2010) 48. Maunganidze OA 'International Criminal Justice as Integral to Peacebuilding in Africa: Beyond the 'Peace v Justice' Conundrum' in Van der Merwe HJ & Kemp G (ed) *International Criminal Justice in Africa: Issues, Challenges and Prospects* (2016) 47.

<sup>217</sup> Du Plessis M & Mettraux G (2017) 361.

<sup>218</sup> Du Plessis & Mettraux (2017)367.

<sup>219</sup> *DA v Minister of International Relations and others* para 65.

ICC.’<sup>220</sup> However, the court was not concerned with what the executive, ‘might or might not do in future,’ and found nothing ‘patently unconstitutional’ with the decision to withdraw. The decision to deposit the notice without prior parliamentary approval, was unconstitutional, invalid and not recognised domestically.<sup>221</sup> The court failed to deliver any in-depth analysis on the substantive constitutionality of the decision to withdraw and advised the executive to give a ‘final and determinative,’ answer to the international community.<sup>222</sup> The executive revoked the notice of withdrawal on 7 March 2017.

#### 4.3 OUTCOMES OF THE PROPOSED UNSUCCESSFUL WITHDRAWAL – A WAY FORWARD?

There are three possible outcomes for South Africa’s withdrawal dilemma, barring an appeal of the *DA v Minister of International Relations and Others* decision. Firstly, that the executive tables the same Repeal Bill before parliament in accordance with the appropriate procedure outlined in 4.1 of this chapter. Secondly, following the same procedure, the executive could table a new repeal legislation which only repeals the immunity clause of the ICC Act while remaining a States Party to the Statute. Thirdly, South Africa could decide to remain a member of the ICC.<sup>223</sup> The following section evaluates these possible outcomes.

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<sup>220</sup> *DA v Minister of International Relations and Others* at para 9; ‘*Al-Bashir case*.’ para 33 and 34.

<sup>221</sup> *DA v Minister of International Relations and others* para 60.

<sup>222</sup> *DA v Minister of International Relations and Others* at para 72, 81-82.

<sup>223</sup> *DA v Minister of International Relations and Others* par 69.

#### 4.3.1 The general implications of a future withdrawal from the Rome Statute.

Generally a withdrawing states party is bound to the Rome Statute's provisions once the withdrawal is effective after a year.<sup>224</sup> However, Article 127(2) guards against prejudicing any matter before the Court, instituted prior to the date on which the withdrawal's effect takes place.<sup>225</sup> Similarly, withdrawal does not extinguish the Office of the Prosecutor's (OTP's) jurisdiction over preliminary examinations of crimes committed before a withdrawal is effective.<sup>226</sup> It follows that the OTP's investigations into mass atrocities committed in Burundi opened on 25 April 2016, does not extinguish existing obligations to cooperate with ongoing investigations or preliminary examinations initiated prior to the date of withdrawal, which came into effect as of 17 October 2017.<sup>227</sup> Withdrawing States Parties thus remain obligated to enforce cooperation domestically as outlined by the Statute's provisions, even after the withdrawal takes effect.<sup>228</sup>

A successful withdrawal for South Africa will therefore impose the general legal implications under Article 127(2) provisions. In accordance with the Statute's withdrawal provision, a withdrawal does not extinguish South Africa's obligation to arrest or cooperate in the arrest of Al-Bashir or any sitting head of state that has been indicted before its effective date.<sup>229</sup> Nor does it deter South Africa from cooperating

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<sup>224</sup> Article 127 of the Rome Statute.

<sup>225</sup> Art 127(2).

<sup>226</sup> Art 15(1).

<sup>227</sup> Heller K 'A Dissenting Opinion on the ICC and Burundi' 29 October 2017 available at <http://opiniojuris.org/2017/10/29/does-the-icc-still-have-jurisdiction-over-cries-in-burundi/> (accessed 30 October 2017). Amnesty International Justice Team 'Burundi: Cynical ICC withdrawal will not derail wheels of Justice' 27 October 2017 available at <https://hrij.amnesty.nl/Burundi-ic-withdrawal/> (accessed 30 October 2017).

<sup>228</sup> Whiting A 'If Burundi Leaves the International Criminal Court, Can the Court Still Investigate Past Crimes There?' 12 October 2016 available at <https://www.justsecurity.org/33501/Burundi-leaves-icc> (accessed 30 October 2017).

<sup>229</sup> Art 127(1) and ss (2) of the Rome Statute.

and assisting the ICC in preliminary examinations which have arisen prior to the date on which a new withdrawal instrument may come into effect.<sup>230</sup>

#### 4.3.2 International law implications of a future withdrawal.

According to international treaty law, after the effective date of abrogation from the Rome Statute, a withdrawing state remains obligated to provisions in the Statute, “to which it would be subject under international law independent of the treaty.”<sup>231</sup> A withdrawing states party is therefore still obligated to fulfil international criminal justice according to customary international law and international treaties such as the Geneva Conventions, their Additional Protocols or the Convention against Torture (UNCAT).

International and domestic civil society groups have alleged that a States Party withdrawal from the ICC is a retrogressive act which undermines universal human rights.<sup>232</sup> This assertion predominantly focuses on recognising the victim’s rights to reparation. Article 75 of the Rome Statute recognises the role and rights of victims in participation at any stage of ICC proceedings.<sup>233</sup> A States Party’s withdrawal is potential cause for violation of a victim’s right to compensation through the ICC’s Victim’s Trust Fund. limits a victim’s recourse to rehabilitation, compensation, and restitution for state enabled crimes or crimes committed by state officials.<sup>234</sup> Given that

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<sup>230</sup> Woolaver H ‘Unconstitutional and Invalid: South Africa’s Withdrawal from the ICC Barred (For Now)’ (27 February 2017) <https://ejiltalk.org/unconstitutional-and-invalid-south-africas-withdrawal-from-the-icc-barred> (accessed 30 July 2017).

<sup>231</sup> Article 43 of the Vienna Convention on the Law of Treaties (1969).

<sup>232</sup> Human Rights Watch ‘South Africa: Continent Wide Outcry at ICC Withdrawal’ 22 October 2016 available at <https://www.hrw.org/news/2016/10/22/south-africa-continent-wide-outcry-icc-withdrawal> (accessed 12 August 2017).

<sup>233</sup> Art 75 of the Rome Statute. Monageng S (2014): 19.

<sup>234</sup> Bizos G ‘Why South Africa must not withdraw from the ICC’ 16 October 2015 available at <https://lrc.org.za/lrcarchive/other-news/3624-why-sa-must-not-withdraw-from-the-icc-george-bizos> (accessed 24 July 2017).



Burundi is the only states party to successfully withdraw from the Statute, it remains to be seen whether future withdrawals will substantially affect victim's rights.

Scholars have suggested, states may consider withdrawal to evade culpability, whenever state agents are implicated in the commission of international crimes.<sup>235</sup> International criminal law scholarship, however, indicates that State's maintain a duty to prosecute beyond the Rome Statute. Since the Nuremberg Trials, impunity for international crimes is generally not an accepted international practice and state's failure to prosecute, even by non-state parties is a breach of a customary international obligation.<sup>236</sup> When an international crime has customary international law or *jus cogens* status it imposes international obligations or *erga omnes* these obligations encompass the duty to prosecute and punish perpetrators of international crimes.<sup>237</sup>

### 4.3.3 South Africa's domestic implications of a future withdrawal.

#### 4.3.3.1 The procedural effect of repeal legislation.



The executive has not confirmed why the Repeal Bill aims to abrogate the ICC Act in its entirety and not only a selective provision on immunities in Section 4(2) and Section 10(9) of the Act. Consequently, whether prosecutions or investigations will be governed by immunity provisions under other international treaties may only be determined once a situation arises and is brought before the South African Courts in

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<sup>235</sup> SSenyonjo M 'State Withdrawal Notifications from the Rome Statute of the International Criminal Court: South Africa, Burundi and the Gambia' in Jollah C and Bantekas I (ed) *The International Criminal Court and Africa* (2017).

<sup>236</sup> Obura K 'Duty to Prosecute International Crimes under International Law' in Murungu C and Biegon J (ed) *Prosecuting International Crimes in Africa* (2011) 11-31.

<sup>237</sup> Bassiouni M 'International Crimes: *Jus Cogens and Obligatio Erga Omnes*' 59 *Law and Contemporary Problems* (1996) 63.

terms of international treaties, customary international law or ordinary criminal prosecution, after the withdrawal's effect.<sup>238</sup>

Repealing the ICC Implementation Act in full will abrogate a comprehensive procedural and definitional framework which enforces prosecutions, investigations and cooperation with ICC indictments.<sup>239</sup> South Africa is still under an obligation to investigate and prosecute international crimes on the jurisdictional basis of territoriality, personality, nationality or extra-territoriality, either in terms of international treaty law, customary international law or domestic criminal law.<sup>240</sup> The Repeal Bill fails to repeal the Geneva Conventions Act which also domesticates elements of the Rome Statute.<sup>241</sup> The Repeal Bill only refers to Section 13 of the South African Red Cross Society and Legal Protection of Certain Emblems Act 10 of 2007 and Section 20 of the Implementation of the Geneva Conventions Act 8 of 20.<sup>242</sup> Section 18(g) of the Criminal Procedure Act 51 of 1977, continues to enable South Africa to prosecute international crimes.<sup>243</sup> South Africa's obligations under the Genocide Convention, the four Geneva Conventions, the Torture Convention and any other treaties which place



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<sup>238</sup> For example, the General Convention on the Privileges and Immunities of the Organization of African Unity of 1965 or domestic legislation such as DIPA.

<sup>239</sup> SSenyonjo M 'State Withdrawal Notifications from the Rome Statute of the International Criminal Court: South Africa, Burundi and the Gambia' in Jollah C and Bantekas I (ed) *The International Criminal Court and Africa* (2017).

<sup>240</sup> South Africa *National Commissioner of the South African Police Service v Southern Litigation Centre* Viljoen F 'Five reasons why South Africa should not withdraw from the ICC Statute' 13 June 2015 available at <https://www.dailymaverick.co.za/opinionista/2015-06-23-five-reasons-why-south-africa-should-not-withdraw-from-the-icc-statute/> (accessed on 20 September 2017).

<sup>241</sup> Woolaver H 'Unconstitutional and Invalid: South Africa's Withdrawal from the ICC Barred (For Now)' (27 February 2017) <https://ejiltalk.org/unconstitutional-and-invalid-south-africas-withdrawal-from-the-icc-barred> (accessed 30 July 2017).

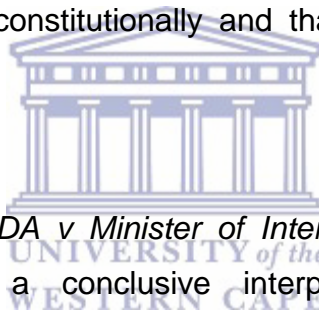
<sup>242</sup> ICC Repeal Bill

<sup>243</sup> Section 18(g) of the Criminal Procedure Act 51 of 1977.

a legal obligation to prosecute international crimes are therefore, not subordinated by the withdrawal.<sup>244</sup>

#### 4.3.3.2 The substantive effect of repeal legislation.

In *DA v Minister of International Relations and Others*, the intervening applicant Council for the Advancement of the South African Constitution (CASAC) and respondents, submitted that South Africa's withdrawal from the Rome Statute is of itself substantively unconstitutional in that it violates the fundamental rights of the victims enshrined in section 7(2) of the Constitution, which are human dignity, equality and freedom.<sup>245</sup> Section 8 of the Constitution requires that the rights contained in the Bill of Rights, are progressively advanced and improved upon.<sup>246</sup> CASAC argues that victims' rights are protected constitutionally and that they apply extra-territorially, according to precedent.



However, the High Court in *DA v Minister of International Relations and Others* decided against delivering a conclusive interpretation on the substantive constitutionality of the withdrawal, in lieu that proper parliamentary process would decide the constitutionality of the Repeal Bill.<sup>247</sup> Consequently, the issue of substantive constitutionality may find its way before the Constitutional Court if either the Repeal Bill or new repeal legislation is tabled before Parliament. One must note as of writing this paper, the Minister of Justice and Correctional Services tabled the International Crimes Bill on 12 December 2017.<sup>248</sup>

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<sup>244</sup> Vienna Convention on the Law of Treaties Article 43.

<sup>245</sup> Section 1 and Sec 7(1) of the Constitution Act 108 of 1998.

<sup>246</sup> Sec 8(1), ss(3).

<sup>247</sup> *DA v Minister of International Relations and Others* par 76.

<sup>248</sup> Fabricus P 'South Africa confirms withdrawal from ICC' 7 December 2017 available at [https://www.dailymaverick.co.za/article/2017-02-12-07-south-africa-confirms-withdrawal-from-icc/#.Wil5fk\\_RbqA](https://www.dailymaverick.co.za/article/2017-02-12-07-south-africa-confirms-withdrawal-from-icc/#.Wil5fk_RbqA) (accessed 7 December 2017).

## 4.4 AN AFRICAN REGIONAL CRIMINAL COURT – AN ALTERNATIVE?

### 4.4.1 The Malabo Protocol.

The South African Minister of International Relations, along with the declaration to withdraw, announced South Africa's strategy to strengthen and expedite the operation of regional bodies that are mandated to prosecute international crimes of genocide, crimes against humanity and war crimes, as an alternative to the ICC.<sup>249</sup> The regionalization of an African international criminal court was proposed by AU member states as early as the 1980s, during the drafting of the African Charter on Human and Peoples' Rights.<sup>250</sup> In 2009, the indictments against African sitting heads of state precipitously galvanized AU discussions on the establishment of an "African Criminal Court."<sup>251</sup> At its Twelfth Ordinary Session in Addis Ababa, of that year, the Assembly of the AU examined the implications endowing the African Court on Human and People's Rights with jurisdiction over the four core crimes.<sup>252</sup>

In June 2014, at the 23<sup>rd</sup> Ordinary Session of the AU Assembly, in Malabo, Equatorial Guinea, Member States adopted the "Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human and People's Rights," otherwise known as the "Malabo Protocol."<sup>253</sup> The African Court of Justice and Human and

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<sup>249</sup> Masutha M 'Minister Michael Masutha on the matter of International Criminal Court and Sudanese President Omar Al Bashir,' 21 October 2016 <http://www.politicsweb.co.za/politics/why-were-withdrawing-from-the-icc-mike-masutha> (accessed 10 August 2017).

<sup>250</sup> Abass A 'Historical and Political Background to the Malabo Protocol' in Werle G & Vorbaum (ed) *The African Criminal Court. A Commentary on the Malabo Protocol* (2016) 11.

<sup>251</sup> Werle G and Vorbaum M 'The Search for Alternatives the "African Criminal Court"' 28 March 2017 ISPI Commentary available at

<sup>252</sup> Malabo Protocol Legal and Institutional Implications of the Merged and Expanded African Court Amnesty International available at <https://www.amnesty.org/en/documents/afr01/3063/2016/en/> (accessed 2 October 2017).

<sup>253</sup> African Union, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human and People's Rights [hereafter "Malabo Protocol"].

People's Rights (ACJHPR) is a, yet to be ratified merger of the African Court of Justice and the African Court on Human and People's Rights. The amendments to the Malabo Protocol expands the ACJHPR's jurisdiction to prosecute international crimes; crimes of genocide, crimes against humanity and war crimes and the crime of aggression, as well as transnational organized crimes, in its International Criminal Law Section.<sup>254</sup> Fifteen ratifications from AU member states are however required to bring the Malabo Protocol into force. Thus far it has no ratification and only 9 signatories.<sup>255</sup>

#### 4.4.2 An alternative for South Africa?

In January 2015, the AU Assembly proposed the ratification of the Malabo Protocol be fast tracked. Various scholarship however, criticises the Malabo Protocol for the following reasons. Firstly, it bars the prosecution of sitting heads of state and incumbent senior state officials. Article 46A *bis* stipulates that, "no charges shall be commenced before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act..."<sup>256</sup> This provision indicates a deliberate attempt by the AU political leaders to shield themselves from prosecution of international crimes. Secondly, the AU insists on recognising that customary international law grants *ratione personae* immunity over the core international crimes. The international community in turn is concerned that granting immunity to serving heads of state will encourage un-relinquishing despotic power, as incumbent heads of states and government officials attempt to evade culpability of *ratione temporae*.<sup>257</sup> Thirdly,

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<sup>254</sup> Murungu C 'Towards a criminal chamber in the African Court of Justice and Human Rights' 9 *Journal of International Criminal Justice* 1067,1088.

<sup>255</sup> Amnesty International 'Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court' May 2017 available at [http://www.coalitionfortheicc.org/sites/default/files/cicc\\_documents/amnesty\\_international-africa-malabo\\_protocol-2017.pdf](http://www.coalitionfortheicc.org/sites/default/files/cicc_documents/amnesty_international-africa-malabo_protocol-2017.pdf) (accessed 20 October 2017).

<sup>256</sup> Tladi D 'Immunities (Article 46Abis)' in Werle G & Vorbaum M *The African Criminal Court. A Commentary on the Malabo Protocol* (2016) 204.

<sup>257</sup> Ssyenyonjo M (2017).

international human rights organisations argue that the merger of the two courts which the Malabo Protocol will bring, will create a weak human rights court.<sup>258</sup> Finally, AU consensus has not been reached over the criminal chamber's proposed structure, expansive jurisdiction, financial needs and capacity of the ACHPR .<sup>259</sup>

The Malabo Protocol, as Werle explains, is by no means a “retrogressive act,” for the development of international criminal justice in Africa.<sup>260</sup> Eventual ratification of the instrument is possibly vital for both the development and enforcement of international criminal justice mechanisms in Africa. Its jurisdiction expands beyond the scope of the ICC to crimes of an economic nature, such as money-laundering, corruption and corporate liability and includes crimes that are more endemic to Africa such as the unconstitutional change of government.

In terms of withdrawal the following specific issues arise when proposing the ACJHPR as an alternative to the ICC. Where a sitting head of state or incumbent government official is indicted by the ACJHPR the case will remain admissible before the ICC in terms of Article 17 of the Rome Statute. The ACJHPR's immunity clause therefore, effectively triggers the ICC's jurisdiction. The withdrawing states of 2016 namely, South Africa, Burundi and the Gambia, had neither signed nor ratified the Malabo Protocol.

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<sup>258</sup> Abass A 'The proposed international criminal jurisdiction for the African Court, some problematic aspects' (2013) 60 *Netherland International Law Review* 27-50.

<sup>259</sup> Mudukuti A 'The African Union endorses impunity' 2 July 2014 available at <http://www.southernafricalitigationcentre.org/2014/07/02/the-african-union-endorses-impunity/> (accessed 15 October 2017).

<sup>260</sup> Werle G & Vorbaum M (2017)

The Rome Statute however does not preclude the principle of complementarity from applying to regional courts.<sup>261</sup> An African Criminal Court could therefore operate complementary or supplementary instead of as an alternative as the South African executive withdrawal statement and the AU-ICC Withdrawal Strategy suggests.

#### 4.5 INTERIM CONCLUSION

Withdrawal of South Africa and any other African States Parties, for that matter, may incur far-reaching ramifications for the international community. The Constitutional values however maintain South Africa's commitment to prioritizing the enforcement of international criminal justice for victims within and beyond its borders. Under the CPA, the implementation of the Geneva Conventions Act and other legislation, However, enacting the Repeal Bill will potentially provide a safe haven for heads of state and government representatives who seek to evade culpability for genocide, crimes against humanity and war crimes. Failing to adopt new legislation which comprehensively provides for the prosecution and investigation of international crimes, prior to withdrawal, will lead to a weakened system of international criminal justice.

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<sup>261</sup> Van der Wilt H 'Complementarity Jurisdiction (Article 46H) in Werle G & Vorbaum M *The African Criminal Court A Commentary on the Malabo Protocol* (2017) 19.

## CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

### 5.1 SUMMARY AND CONCLUSIONS

South Africa was an early proponent of the ICC, as the first African States Party to fully domesticate its provisions in the comprehensive ICC Implementation Act. The implementation legislation plainly envisioned a domestic legislative framework which empowered South African courts to prosecute the international core crimes of genocide, crimes against humanity and war crimes, committed within and beyond South Africa's borders.

The universal system of human rights reinforced by complementarity, hinges on states' willingness to protect and put an end to impunity. Amidst, the growing need for victim-centred justice African States cannot wholly expunge themselves from principles which are similarly reflected in the AU Constitutive Act. Far from existing in isolation, South Africa, as a member state of both the AU and the ICC, it is obligated to cooperate without prejudice, with both international criminal justice frameworks. Consequently, the strained diplomatic tension between the two institutional bodies has caused South Africa to realign its original supportive role. This research paper accordingly dealt with the factors which triggered South Africa's proposed withdrawal from the ICC, not least of which are the political influences of the AU.

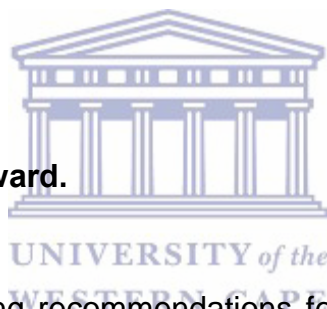
The arguments advanced in favour of South Africa's withdrawal are summarily: that three permanent members of the UNSC are not members of the ICC statute, there is evidence to support a certain degree of African bias, the ICC institutions have failed to support the implementation of domestic and regional institutions, consequently undermining the principle of complementarity and that sitting heads of state should enjoy immunity afforded under customary international law. The core reason for South Africa's withdrawal remains that the executive upholds that *ratio personae* immunity for heads of state, namely Al-Bashir. On the one hand this position is directly reflective of the AU "Withdrawal Strategy" and its call to amend the immunity provision of the Statute. On the other hand, both the ICC and South Africa's domestic courts have



clearly decided that South Africa has a duty to arrest and surrender indicted sitting heads of states.

In conclusion, the executive made an impromptu decision to withdraw which potentially had far-reaching domestic and international implications, as a means of reprisal for South Africa's own diplomatic tension with the ICC. It is evident that the ICC demands the political will of its States Parties to implement and enforce the Rome Statute. The Court, States Parties and academics alike must distinguish between valid concerns of "African-bias," and inconsistency in the interpretation and application of the ICC Statute and political manoeuvres on behalf of certain African states, attempting to evade justice.

## 5.2 RECOMMENDATIONS



### 5.2.1 South Africa's way forward.

This paper makes the following recommendations for the three possible outcomes provided in 4.3 of Chapter Four i) where the State decides to withdraw through proper parliamentary process ii) if the State partially repeals the ICC Implementation Act iii) if the State remains a State Party to the Statute.

i) For as long as the withdrawal issue remains on the ANC's national agenda, the Minister of International Relations should ensure that public consultation remains open and progressive (beyond 8 March 2017, the date already passed). The Repeal Bill may result in a legal caveat if not amended. An appellate decision may however provide clarity the interpretation of section 231 and the requirement of parliamentary approval for treaty withdrawals as well as ruling on the substantive constitution a withdrawal itself.

ii) If the executive decides to institute proper parliamentary process for a withdrawal from the ICC when drafting a new Repeal Bill the executive should consider the following. First, to provide for comprehensive replacement legislation, in order to

maintain the definitional clarity which the ICC Act ensures, provisions for double criminality, mutual legal assistance and provisions which provide for universal jurisdiction. Secondly, the executive could consider instead to repeal only section 4(3)(b) of the ICC Act which excludes immunity for heads of states. Selective abrogation however, may give rise to the piece-meal enforcement of international criminal justice, which is contrary to the full implementation of all the Rome Statute's provisions, including the bar against immunity envisioned by the drafters of the ICC Act. Thirdly, Parliament would need to take into account whether the objective of the Repeal Bill serves a legitimate constitutional purpose or otherwise face a probable constitutional challenge on substantive grounds. In doing so, Parliament should consider the possibility of recommendations outlined in scenario three.

iii) Bearing in mind South Africa's commitment to universal human rights, having ratified numerous international human rights and humanitarian treaties including the Geneva Conventions, the AU Constitutive Act, the African Charter for Human and People's Rights. It would be advisable for South Africa not to withdraw from the ICC. Withdrawal, would be a symbolic failing of South Africa's international commitment to protect against the most egregious human rights violations within and beyond South Africa's borders. The approach to address South Africa's issues regarding the ICC, would be to maintain the ICC Act in full and instead engage with the ASP Bureau's recently established (at South Africa's request) working group to develop consultation mechanisms, Article 97. Further, South Africa should assess whether the ICC hearings findings regarding the relationship between Article 98 and Article 27 were satisfactory.

### **5.2.3 The AU-ICC Withdrawal Strategy recommendations.**

A full evaluation of the AU-ICC Withdrawal Strategy is beyond the scope of this paper. This paper notes that the strategy itself is premature and therefore further study and careful consideration as to its effect on international criminal justice in Africa should be undertaken. African States Parties are recommended to first engage in amendments and reform within the ASP before they initiate withdrawals that have far-reaching domestic and international implications. As for the ICC and its diplomatic

relations with the African Union, the OTP should devote time for outreach to all African States Parties to meet with the judiciary, prosecutors, lawyers and civil society. Constituencies in these countries should be established to enhance support for the ICC and special attention, resources and support should be given to regional tribunals or the setting up of an African Criminal Court. The President of the Court and President of the ASP should plan programmatic activities at the national, regional and international levels for judges, prosecutors and lawyers from state parties to enhance knowledge and understanding of the ICC's work and to enhance complementarity within the States Parties. Further, meaningful engagement between the AU, ICC and the UNSC, is needed for State parties to cooperate, however this will only materialize if equality and fairness in terms of permanent UNSC members and States Parties is ensured. The role of permanent members of the UNSC who have not ratified the Statute should be reviewed.



#### **5.2.4 Additional research on the matter.**

This study predominantly focuses on the effect of South Africa's proposed withdrawal. A broader study could be conducted on the overall effect and implications of the "AU-ICC Withdrawal Strategy" particularly identifying the factors which minimise the influence of African politics on international criminal justice in Africa. As of writing this paper the Minister of Justice and Constitutional Affairs tabled new repeal legislation in the form of a replacement act for the ICC Implementation Act, the International Crimes Bill.<sup>262</sup> The provisions of this Bill aims to provide the following: the repeal of the ICC Implementation Act, recognition of immunity under customary international law the Bill explicitly does not apply to persons who enjoy immunity under the Diplomatic Immunities and Privileges Act 2001 and customary international law; ensures the continuation of investigations into international crimes instituted prior to the Bill's enactment, maintains the provision for universal jurisdiction, to regulate the immunity from prosecution for the crime of torture, provides for co-operation between South Africa and the ICC for matters instituted prior to the effective date of withdrawal,

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<sup>262</sup> The International Crimes Bill, explanatory summary in Government Gazette No. 41309 (8 December 2017) B37-2017.

notwithstanding the ICC Implementation Act's repeal. A further study on the implications of the International Crimes Bill could be conducted.

### 5.3 CONCLUSION

When South Africa promulgated the ICC Act it committed itself to realising extraterritorial jurisdiction in the prosecution of egregious human rights violations. South Africa's ability to fulfil this commitment had caused a legal-diplomatic crisis, when Sudanese President Al-Bashir sought refuge from two outstanding ICC indictments within the state's borders. This paper has established that the Act's provisions, including, inter alia, cooperation, mutual-assistance and barring immunity, ensures that South Africa will act as a States Party. Further, the Act goes beyond what is required by a States Party, under its own Constitutional Law it ensures extraterritorial jurisdiction over war crimes, genocide and crimes against humanity. Withdrawing as a States Party would therefore have far-reaching international and domestic implications. Notwithstanding these implications, indecision on this matter is probable cause for further diplomatic and legal crises. The legislature, parliamentary stakeholders and the ruling executive party should make a conclusive decision on South Africa's position in its commitment to the International Criminal Court.

**Word Count: 18 232**

## 6. LIST OF REFERENCES

### PRIMARY SOURCES

#### I. LEGAL INSTRUMENTS

##### A. International instruments.

- The Charter of the United Nations (1945)
- The Convention on the Prevention and Punishment of the Crime of Genocide (1948)
- The Rome Statute of the International Criminal Court (2002)
- The Vienna Convention on the Law of Treaties (1969)

##### B. Domestic legislation.

- The Diplomatic Immunities and Privileges Act 37 of 2001
- The Constitution of the Republic of South Africa Act 108 of 1996
- The Implementation of the Geneva Conventions Act 8 of 2012
- The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002
- The Implementation of the Rome Statute of the International Criminal Court Act Repeal Bill (B23-2016) The International Crimes Bill, explanatory summary in Government Gazette No. 41309 (8 December 2017) B37-2017.
- The Criminal Procedure Act 51 of 1977

#### II. CASE LAW

##### A. International cases

- *Prosecutor v Thomas Lubanga Dyilo, Judgement on the appeal of Mr. Thomas Lubanga Dyilo against his conviction* (1 December 2014) ICC-01/04-01/12.
- *The Prosecutor V. Omar Hassan Ahmad Al Bashir* 'Decision convening a public hearing for the purposes of a determination under article 87(7) of the Statute

with respect to the Republic of South Africa'(8 December 2016) ICC-02/05-01/09.

- *Prosecutor v Katanga and Ngudjolo, Ruling on confirmation of charges*, ICC-01/04-01/07-717.
- *Prosecutor v Mathieu Ngudjolo Chui, Judgment pursuant to Article 85(1) and (3)* ICC-01/04-02/12-301.
- *Prosecutor v William Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* (8 March 2011) ICC-01/09-01/11-01.
- *Prosecutor v Francis Kirimimu Mutharua, Uhuru Muigai Kenyatta and Mohamed Husein Ali* ICC/01/09-02/11-01.
- *Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b)* (30 May 2011) PTC-II ICC-01/09-01/11-101.
- *Decision Pursuant to Article 87(7) on the Failure of the Republic of Malawi to Comply with the Cooperation Request Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmed Al Bashir* (12 December 2011) PTC-I ICC-02/05-01/09-139.
- *Decision Pursuant to Article 87(7) on the Failure of Chad to Comply with the Cooperation Request Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmed Al Bashir* (13 December 2011) PTC-I ICC-02/05-01/09-140
- *Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court* (9 April 2014) PTC-II ICC-02/05-01/09
- *Decision following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir'* (6 July 2017) PTC-II ICC-02/05-01/09-242.



## **B. Domestic case law.**

- *Democratic Alliance v Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening)* [2017] ZAGPPHC 53
- *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* [2016] ZASCA 17
- *Kaunda and Others v President of the Republic of South Africa* [2004] ZACC 5
- *National Commissioner of the South African Police Service and Another v Southern African Human Rights Litigation Centre and Another* [2014] ZACC 30
- *Southern Africa Litigation Centre and others v National Director of Public Prosecutions and others* [2012] ZAGPPHC 61; [2015] 3 All SA 505 (GP)
- *Von Abo v Government of RSA* [2010] ZAGPPHC 4
- *Glenister v President of the Republic of South Africa and others* 2011 (3) SA 347; 2011 (7) ZACC 19
- *S v Basson* [2005] BCLR 1192 ZACC 12

### III. INTERNATIONAL AGREEMENTS AND RESOLUTIONS

- Decision Assembly/AU/Dec. 586 (XXV) Assembly/AU/Dec.590(XXVI).
- African Union Assembly, Decision on International Jurisdiction, Justice and International Criminal Court, Doc. Assembly/AU/13 (XXI), 26-27 May 2013.
- 15<sup>th</sup> Assembly of States Parties of the Rome Statute of the International Criminal Court, The Hague, 16 November 2016.
- 'Withdrawal Strategy Document' African Union Decision Assembly/AU/Dec.590(XXVI) 12 January 2017.
- Assembly of States Parties, 'States Parties to the Rome Statute' available at [https://asp.iccpi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://asp.iccpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx) (accessed 5 August 2017).
- 'Withdrawal Strategy Draft II' available at [https://www.hrw.org/sites/default/files/supportingresources/icc\\_withdrawal\\_strategy\\_jan\\_2017.pdf](https://www.hrw.org/sites/default/files/supportingresources/icc_withdrawal_strategy_jan_2017.pdf) (accessed 5 August 2017).
- United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June -17 July 1998 Official Records, Volume I, Volume II and Volume III. available at [http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings\\_v1\\_e.pdf](http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v1_e.pdf) (accessed 11 June 2017).
- The 5<sup>th</sup> National Policy Conference 30 June-5 July 2017 'International Relations' available at <https://www.anc.org.za/content/5th-national-policy-conference-2017> (accessed 12 September 2017).





- The 15th Assembly of States Parties to the Rome Statute International Criminal Court, The Hague 16 November 2016. Statement by the Honourable Stéphane Dion Minister of Foreign Affairs Global Affairs Canada available from <https://www.icc-cpi.int/Pages/search-results.aspx?k=south%20africa%27s%20withdrawal> (accessed 17 April 2017).

#### IV. REPORTS

- International Commission of Jurists *South Africa should not withdraw from the International Criminal Court – Briefing submitted to the Portfolio Committee on Justice and Correctional Services* (2017) International Commission of Jurists: Pretoria.
- ACCORD The African Centre for Constructive Resolution of Disputes *South Africa's Peacekeeping Role in Burundi: Challenges and Opportunities for Future Peace Missions* (2007) Occasional Paper Series 2: Durban.
- Human Rights Watch 'South Africa: Continent Wide Outcry at ICC Withdrawal' Advocates Urge Reconsideration, Support for Court 22 October 2016' available at <https://www.hrw.org/news/2016/10/22/south-africa-continent-wide-outcry-icc-withdrawal> (accessed 12 August 2017)



## SECONDARY SOURCES

### I. BOOKS

- Bellelli R *International Criminal Justice Law and Practice from the Rome Statute to its Review* (2011) Bellelli R (ed) USA: Ashgate.
- Bubenzer O *Post-TRC Prosecutions in South Africa Accountability for Political Crimes after Truth and Reconciliation Commission's Amnesty Process* (2009) Berlin: Martinus Nijhoff Publishers.
- Cassese A *et al.* (ed) *The Rome Statute of the International Criminal Court: A Commentary* vol II (2002) Oxford: Oxford University Press.
- Dugard J (ed) *International Law A South African Perspective*, 4 ed (2012) Cape Town: Juta (Pty) Ltd.
- Du Plessis M *The International Criminal Court that Africa Wants* Monograph 172 (2010) Pretoria: Institute for Security Studies.
- Kleffner JK *Complementarity in the Rome Statute and National Criminal Jurisdictions* (2008) Oxford: Oxford University Press.
- Mendes EP *Peace and Justice at the International Criminal Court* (2010) UK: Edward Elgar Publishing.
- Roht-Arriaza N and Fernando M 'Universal Jurisdiction' in B Brown (ed) *Research Handbook on International Criminal Law* (2011) UK: Edward Elgar Publishing.
- Kolb R 'Termination' in Kolb R (ed) *The Law of Treaties an Introduction* (2016) UK: Edward Elgar Publishing.

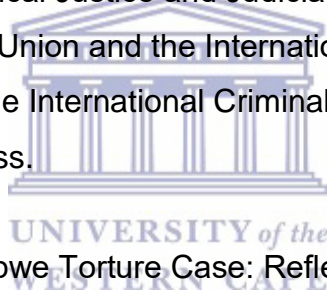
- Schabas WA. *An Introduction to the International Criminal Court* (2011) Schabas WA (ed) (4 ed): Cambridge, UK: Cambridge University Press.
- Van der Merwe H and Kemp G (eds) *International Criminal Justice in Africa Issues, Challenges and Prospects* (2016) Nairobi: Strathmore University Press, Nairobi.
- Werle G, Fernandez L and Vormbaum M (eds) *Africa and the International Criminal Court vol 1 International Criminal Justice Series* (2014) The Hague: Asser Press.

## II. CHAPTERS IN BOOKS

- Abass A 'Historical and Political Background to the Malabo Protocol' in Werle G & Vormbaum (eds) *The African Criminal Court, A Commentary on the Malabo Protocol* (2016) The Hague, The Netherlands: Asser Press.
- Bahtohi S 'Africa and the International Criminal Court: A Prosecutor's Perspective' in Werle G *et al.* (eds) *Africa and the International Criminal Court vol 1 International Criminal Justice Series* (2014) The Hague, The Netherlands: Asser Press.
- Du Plessis M and Glevens C 'Civil society, 'positive complementarity and the *Torture Docket* case' in Williams and Woolaver (eds) *Civil Society and International Criminal Justice in Africa, Challenges and Opportunities* (2017) Claremont: Juta & Company (Pty) Ltd.
- Kemp G 'The Implementation of the Rome Statute in Africa' in Werle G, Fernandez L and Vormbaum M (ed) *Africa and the International Criminal Court vol 1 International Criminal Justice Series* (2014) The Hague, the Netherlands: Asser Press.
- Maunganidze O 'International Criminal Justice as Integral to Peacebuilding in Africa: Beyond the 'Peace v Justice' Conundrum' in Van der Merwe HJ &

Kemp G (ed) *International Criminal Justice in Africa: Issues, Challenges and Prospects* (2016) Nairobi: Strathmore University Press.

- Materu S 'A Strained Relationship: Reflections on the African Union's Stand Towards the International Criminal Court from the Kenyan Experience' in Werle G *et al.* (eds) *Africa and the International Court* (2014) The Hague, the Netherlands: Asser Press.
- Mongageng S 'Africa and the International Criminal Court: Then and Now.' in Werle G *et al.* (eds) *Africa and the International Criminal Court* vol 1 International Criminal Justice Series (2014) The Hague, the Netherlands: Asser Press.
- Murithi T 'Between Political Justice and Judicial Politics: Charting a Way Forward for the African Union and the International Criminal Court,' in Werle *et al.* (eds) *Africa and the International Criminal Court* (2014) The Hague, the Netherlands: Asser Press.
- Mudukuti A 'The Zimbabwe Torture Case: Reflections on domestic litigation for international crimes in Africa', in *Civil Society and International Criminal Justice in Africa. Challenges and Opportunities* Woolaver and Williams (eds) (2016) Claremont: Juta & Company (Pty) Ltd.
- Du Plessis and Gever C 'Civil Society, 'positive complementarity' and the 'Torture Docket' case, in *Civil Society and International Criminal Justice in Africa. Challenges and Opportunities* Woolaver and Williams (eds) (2016) Claremont: Juta & Company (Pty) Ltd.
- Dugard J 'International criminal law, the International Criminal Court and civil society' in Woolaver and Williams (eds) *Civil Society and International Criminal Justice in Africa. Challenges and Opportunities* (2016) Claremont: Juta & Company (Pty) Ltd.



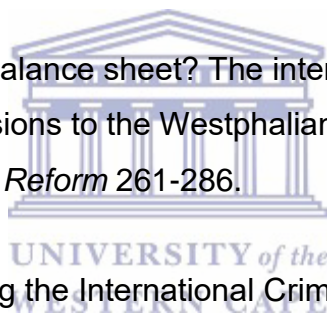
- Obura K 'Duty to Prosecute International Crimes under International Law' in Murungu C and Biegon J (ed) *Prosecuting International Crimes in Africa* (2011) Pretoria: Pretoria University Law Press.
- Okoth J 'Africa, the United Nations Security Council and the International Criminal Court: The Question of Deferrals' in Werle G, Fernandez F and Vormbaum M (ed) *Africa and the International Criminal Court* vol 1 International Criminal Justice Series (2014) The Hague, the Netherlands: Asser Press.
- Sinwingwa E 'Wither the International Criminal Justice in Africa' in Van der Merwe HJ and Kemp G (ed) *International Criminal Justice in Africa Issues, Challenges and Prospects* (2016) Nairobi: Strathmore University Press, Nairobi.
- SSenyonjo M 'State Withdrawal Notifications from the Rome Statute of the International Criminal Court: South Africa, Burundi and the Gambia' in Jollah C and Bantekas I (ed) *The International Criminal Court and Africa* (2017) Oxford: Oxford University Press.
- Van der Wilt H 'Complementarity Jurisdiction (Article 46H) in Werle G & Vorbaum M *The African Criminal Court A Commentary on the Malabo Protocol* (2017) The Hague, the Netherlands: Asser Press.

### III. JOURNALS

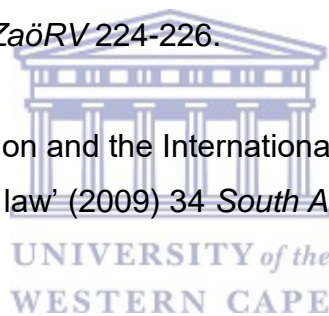
- Abass A 'The proposed international criminal jurisdiction for the African Court, some problematic aspects' (2013) 60 *Netherland International Law Review* 27-50.
- Asaala E 'Rule of law or realpolitik? The role of the United Nations Security Council in the International Criminal Court processes in Africa' (2017) 17 *African Human Rights Journal* 266-294.

- Asin J 'The *great escape*: In pursuit of President Al Bashir in South Africa' (2016) 2 *Strathmore Law Journal* 165-180.
- Bassiouni MC 'International Crimes: *Jus Cogens and Obligatio Erga Omnes*' 59 *Law and Contemporary Problems* (1996) 63-74.
- Bekou O 'Crimes at Crossroads Incorporating International Crimes at the National Level' (2012) 10 *Journal of International Criminal Justice* 677-691.
- Bohler-Muller N & Zongwe D 'It is Self-Defeating for Africa (and South Africa) to Withdraw from the International Criminal Court' (2017) 9 *Namibia Law Journal* 2.
- Chenwi L 'Universal Jurisdiction and South Africa's Perspective on the Investigation of International Crimes' 131 *South African Law Journal* (2014) 27-45.
- De Wet E 'The Implications of President Al-Bashir's Visit to South Africa for International and Domestic Law' (2015) 13 *Journal of International Criminal Justice* 1049-1071.
- Du Plessis M 'South Africa's Implementation of the ICC Statute – An African Example' (2007) 5 *Journal of International Criminal Justice* 460-479.
- Du Plessis M 'The long walk to accountability for international crimes – Reflections from South Africa' (2014) 27 *South African Comparative Law Journal* 404-437.
- Du Plessis M and Mettraux G 'South Africa's Failed Withdrawal from the Rome Statute' (2017) 15 *Journal of International Criminal Justice* 361-369.
- Du Plessis M 'Shambolic, Shameful and Symbolic, Implications of the African Union's Immunity for African Leaders' November 2014, ISS Paper 278.

- Gaeta P 'Does President Al Bashir Enjoy Immunity from Arrest?' (2009) 7 *Journal of International Criminal Justice* 315–332.
- Igwe C 'The ICC's favourite customer: Africa and international criminal law' (2008) 41 *Comparative & International Law Journal of South Africa* 294-323.
- Jessberger F & Powel C 'Prosecuting Pinochets in South Africa Implementing the Rome Statute of the International Criminal Court' (2001) 14 *South African Journal of Criminal Justice* 345-360.
- Katz A 'An Act of Transformation. The incorporation of the Rome Statute of the ICC into national law in South Africa,' (2003) 12 *African Security Review* 25-30.
- Maogoto JN 'The final balance sheet? The international criminal court's challenges and concessions to the Westphalian model' (2003-2004) 7 *Flinders Journal of Law Reform* 261-286.
- Murungi B 'Implementing the International Criminal Court Statute in Africa' 26 *International Legal Practice* (2001) 87.
- Naldi G J. & Maglivera KD 'Human rights and the denunciation of treaties and withdrawal from international organisations' (2013) 33 *Polish Yearbook of International Law* 97-127.
- Nakitto S 'South Africa's Exercise of Universal Jurisdiction' (2013) 3 *International Human Rights Law Review* 146 – 158.
- Olugbuo B 'Implementation of the Rome Statute of the International Criminal Court in Africa: An Analysis of the South African Legislation' (2004) 1 *Eyes on the ICC* 191-203.
- Oburu K 'The Security Council and the International Criminal Court: When can the Security Council Defer a Case?' (2015) *Strathmore Law Journal* 118-140.



- Petrovic J *et al.* 'To Arrest or not to Arrest the Incumbent Head of State: the *Bashir* case and the Interplay between Law and Politics (2016) 4 *Monash University Law Review* 740-784.
- Schwartz R 'South Africa Litigation Centre v Minister of Justice & Constitutional Development. Balancing Conflicting Obligations-Prosecuting al-Bashir in South Africa' (2016) 24 *Tulane J of International & Comparative Law* 407-425.
- Strydom H 'South Africa and the ICC' (2002) 6 *Max Planck Yearbook of United Nations Law* 345-346.
- Swart M 'The Wouter Basson Prosecution: The Closest South Africa Came to Nuremberg' (2008) 68 *ZaöRV* 224-226.
- Tladi D 'The African Union and the International Criminal Court: The battle for the soul of international law' (2009) 34 *South African International Law Journal* 57-69.
- Tladi D 'The Duty on South Africa to Arrest and Surrender Al-Bashir under South African and International Law: Attempting to Make a Collage from an Incoherent Framework' (2015) 5 *Journal of International Criminal Justice* 1027-1047.
- Tladi D 'Interpretation and international law in South African courts: The Supreme Court of Appeal and the Al Bashir saga' (2016) 16 *African Human Rights Law Journal* 310-338.
- Van der Merwe HJ 'The influence of politics in international criminal law: A primer (for lawyers)' (2014) *African Yearbook of International Humanitarian Law* 111-132.
- Swanepoel C (2015) 1 *Journal for Juridical Science* 50-68





#### IV. INTERNET SOURCES

- Aayesha S 'The ICC: When law becomes injustice' 14 June 2015 available at <http://www.politicseb.co.za/opinion/why-is-the-icc-not-trying-bush-blair-and-netanyahu> (accessed 20 September 2017).
- Allison S 'Kenya escapes the ICC, and shows others how' 6 February 2014 available at <http://www.dailymaverick.co.za/article/2014-02-06-analysis-kenya-escapes-the-icc-and-shows-others-how-its-done/#.VmB9ZdJ97Mx> (accessed 29 October 2017).
- Amnesty International Justice Team 'Burundi: Cynical ICC withdrawal will not derail wheels of Justice' 27 October 2017 available at <https://hrij.amnesty.nl/Burundi-ic-withdrawal/> (accessed 30 October 2017).
- Akande D 'The Bashir case has the South African Supreme Court Abolished Immunity for Heads of States' 29 March 2016 available at <https://www.ejiltalk.org/the-bashir-case-has-the-south-african-supreme-court-of-appeal-abolished-immunity-for-all-sitting-heads-of-states/> (accessed 25 October 2017).
- Clarke KM 'African Withdrawals: Foregrounding Rome Statute Amendments as Critical to Addressing the Structural Inequalities in which the ICC Operates' *Human Rights and International Criminal Law* available at <https://icc.com/withdrawal> (accessed 10 August 2017).
- Bizos G 'Why South Africa must not withdraw from the ICC' 16 October 2015 available at <https://lrc.org.za/lrcarchive/other-news/3624-why-sa-must-not-withdraw-from-the-icc-george-bizos> (accessed 24 July 2017).
- Fabricus P 'South Africa confirms withdrawal from ICC' 7 December 2017 available at <https://www.dailymaverick.co.za/article/2017-02-12-07-south->

[africa-confirms-withdrawal-from-icc/#.Wl5fk\\_RbqA](#) (accessed 7 December 2017).

- Goss C 'Analysis: Constitutional aspects of treaty withdrawal – South Africa and the Rome Statute' available at <https://iacl-aidc-blog.org/2017/03/21/analysis-constitutional-aspects-of-treaty-withdrawal-south-africa-and-the-rome-statute/> (accessed 17 April 2017).
- Heller K 'A Dissenting Opinion on the ICC and Burundi' 29 October 2017 available at <http://opiniojuris.org/2017/10/29/does-the-icc-still-have-jurisdiction-over-cries-in-burundi/> (accessed 30 October 2017).
- Keppler E 'AU-ICC Withdrawal Strategy Less than Meets the Eye' available at <https://www.hrw.org/news/2017/02/01/aus-icc-withdrawal-strategy-less-meets-eye> (accessed 5 August 2017).
- Knottnerus A 'The Immunity of Al-Bashir: The Latest Turn in the Jurisprudence of the ICC' 15 November 2017 available at <https://www.ejiltalk.org/the-immunity-of-al-bashir-the-latest-turn-in-the-jurisprudence-of-the-icc/> (accessed 20 November 2017).
- Labuda P 'The African Union's Collective Withdrawal from the ICC: Does Bad Law make for Good Politics?' 15 February 2017 available at <https://www.ejiltalk.org/the-african-unions-collective-withdrawal-from-the-icc-does-bad-law-make-for-good-politics/> (accessed 15 September 2017).
- Masutha M Minister of Justice and Correctional Services, 'Why we're withdrawing from the ICC' available from <http://www.politicsweb.co.za/news-and-analysis/why-were-withdrawing-from-the-icc-mike-masutha> (accessed 10 April 2017).
- Mudukuti A 'The African Union endorses impunity' 2 July 2014 available at <http://www.southernafricalitigationcentre.org/2014/07/02/the-african-union-endorses-impunity/> (accessed 15 October 2017).

- Ngari A 'The AU's (other) ICC strategy' 14 Feb 2017 available at <https://issafrica.org/iss-today/the- aus-other-icc-strategy> (accessed 3 August 2017).
- Nyabola N 'Does the ICC have an Africa problem?' 28 March 2012 available at <https://www.aljazeera.com/amp/indepth/opinion/> (accessed 3 August 2017)
- Okoth J 'Kenya and Sudan: The Two Cases That Shaped Africa's Criticism Towards the ICC' 28 March 2017, available at <http://www.ispionline.it/it/publicazione/kenya-and-sudan-two-cases-shaped-africas-criticism-towards-icc-16508> (accessed 12 June 2017).
- Van Heerden O 'South Africa's exit from the ICC: Justice cannot trump peace' available from <https://www.dailymaverick.co.za/opinionista/2016-10-24-south-africas-exit-from-the-icc-justice-cannot-trump-peace/> (accessed 10 March 2017).
- Viljoen F 'Five reasons why South Africa should not withdraw from the ICC Statute' available at <https://www.dailymaverick.co.za/opinionista/2015-06-23-five-reasons-why-south-africa-should-not-withdraw-from-the-icc-statute/> (accessed 10 March 2017).
- Whiting A 'If Burundi Leaves the International Criminal Court, Can the Court Still Investigate Past Crimes There?' 12 October 2016 available at <https://www.justsecurity.org/33501/Burundi-leaves-icc> (accessed 30 October 2017).
- Woolaver H 'International and Domestic Implications of South Africa's Withdrawal from the ICC' available from <https://www.ejiltalk.org/international-and-domestic-implications-of-south-africas-withdrawal-from-the-icc/> (accessed 10 March 2017)

