

International Criminal Justice in Crisis: South Africa's Constitutional and other Obligations

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Emmanuel Maphosa,

Legal Advisor for an International Humanitarian Organisation,

writing in his personal capacity

Email: emmarava@yahoo.com

Abstract

After over a century of near-misses, the Rome Statute, a global instrument to establish a permanent international criminal court was adopted on 17 July 1998. The establishment of the International Criminal Court (ICC) has been hailed as a landmark development in the global politico-legal landscape. At the heart of the ICC is the principle of complementarity that relegates the Court to a mechanism of last resort. Accordingly, states are expected to prosecute international crimes on behalf of the international community, and only if they are unable or unwilling to do so will the ICC intervene. The Court's judicial activity has been mired by challenges brought about by the "African question". Africa, once a devout supporter of the Court has developed some phobia against the Court, leaving it with the task of revisiting its working framework. The Court and Africa are interdependent in pushing the international criminal justice agenda. This paper starts by looking at the tension between the ICC and Africa before delving into the role of South Africa in the present dilemma. The paper points out that the country should be at the forefront in encouraging African states to maintain membership at the ICC. The author contends that the country is indebted to international criminal justice owing to its history, role in shaping international criminal justice to what it is today, constitutional obligations, and as one of the countries with a strong political and economic voice in the continent. The author also suggests that until a sustainable and credible regional or sub-regional mechanism is in place, it will be tragic for victims of African countries to withdraw from an existing, functioning check and balance mechanism in the form of the ICC.

Introduction

A history of colonial atrocities and post-independence civil wars left Africa in dire need of justice.¹ The establishment of the ICC was a welcome development and a buttress of the international criminal justice chain.² The ICC reinforced the international justice wheel that was already in motion. The early 1990s began an era for the administration of international criminal justice for and in Africa with the establishment of the International Criminal Tribunal for Rwanda (ICTR). This was followed in the turn of the century by the Special Court of Sierra Leone (SCSL). The ICTR and SCSL were established by the United Nations (UN) at the request of the Rwanda and Sierra Leone governments.³ The momentum created by the ICTR and the International Criminal Tribunal for the Former Yugoslavia (ICTY) stimulated the international community to expedite the formation of a permanent international criminal court.⁴ As the calls for a permanent international criminal court grew, African states organized themselves into regional and sub-regional groupings to advance common positions. These positions guided African countries during the Rome Conference for the Establishment of the ICC.⁵ Africa rode on the partnership of non-African states and Non-Governmental Organisations (NGOs) who also desired a permanent international court with certain characteristics.⁶ This alliance was called the 'Like-Minded Group (LMG)'⁷ and sought for a court that gave the Prosecutor more independence rather than one controlled by the United Nations Security Council.⁸ The ICC is therefore, partly, a product of Africa and reflective of the desires of Africa in Rome.⁹

¹ T Maluwa 'OAU Secretariat Statement at the 6th Plenary, 17 June 1998; Official records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, UN Doc A/CONF 183/13 (Vol II) 104, 115-118 para 116.

² Kofi Annan's Press conference in Rome, Italy, following the 60th ratification of the Rome Statute on 11 April 2002, <http://www.iccnw.org/documents/KofiAnnanPressConf11April02.pdf> (accessed 13 April 2017).

³ SC Resolution 955 of 8 November 1994. For detail see C Scheltema and W van der Wolf (eds) *The International Tribunal for Rwanda: Facts, Cases, Documents* (1999); See also Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Freetown, 16 January 2002.

⁴ V Morris & MP Scharf 'An insider's guide to the International Criminal Tribunal for the Former Yugoslavia' (1995); J O'Brien 'The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia (1993) 87 *American Journal of International Law* 639; A Cassese et al *From Nuremberg to Rome: International Military Tribunals to the International Criminal Court. The Rome Statute of the International Criminal Court: A Commentary* (2002) 18.

⁵ M du Plessis 'A critical appraisal to Africa's response to the world's first permanent international criminal court: PhD thesis' (2011) 79.

⁶ J Washburn 'The Negotiation of the Rome Statute for the International Criminal Court and the International Lawmaking in the 21st Century' (1999) 11 *Pace International Law Review* 367.

⁷ Washburn *supra* note 6, 367.

⁸ Washburn *supra* note 6, 367.

⁹ H Jallow and F Bensouda 'International criminal law in an African Context' in M Du Plessis (ed) *African guide to international criminal justice* (2008) 41; P Mochochoko 'Africa and the International Criminal Court' in E Ankumah and E Kwakwa (eds) *African perspectives on international criminal justice* (2005) and S Maqungo 'The establishment of the International Criminal Court: SADC's participation in the negotiations' (2009) 9 *African Security Review* 42.

Notwithstanding the above, a gloomy picture on the future of the ICC's work in Africa is painted in most parts of the continent today. A decade and a half after the ICC started its work, all its situations and cases are in African countries. This has led to mixed reactions on the work of the court in Africa. To some the court is an oppressive, neo-colonialist Western tool¹⁰ while to others it is a supporting mechanism in Africa's quest to address impunity.¹¹

At the heart of the ICC is the principle of complementarity that gives primacy to states in the adjudication of international crimes.¹² Under this principle, the ICC is a court of last resort and its intervention is guided by the inability or unwillingness of states to carry out their primary obligation. The principle of complementarity is described in detail in Part 2 of the Statute. Part 2 was the most contentious at the Rome negotiations and forms the core of the Rome Statute of the ICC.¹³ This Part includes, *inter alia*, the definition of crimes, the Court's jurisdiction and triggering mechanisms, complementarity, and the roles of the Prosecutor and United Nations Security Council. (UNSC)¹⁴ Related to complementarity is Part 9 on cooperation. Africa contributed to this Part as Lesotho coordinated its formulation.¹⁵ The enforcement of the cooperation provision is a further bone of contention between the ICC and Africa on the arrest of al-Bashir.

Africa also took the lead in the coordinating of Part 4 of the Statute on procedure through South Africa which sat in the drafting committee.¹⁶ South Africa may have been chosen because of its leadership in the political, economic and judicial issues both in the continent and globally. On several occasions, the international community has entrusted South Africa with international criminal justice as demonstrated by the appointment of South Africans to prominent positions in international criminal tribunals and the ICC. In 1993 the international community established the International Criminal Tribunal for the Former Yugoslavia (ICTY) to prosecute persons responsible for serious violations of international humanitarian law (IHL) in the former Yugoslavia since 1991.¹⁷ In 1994 the international community responded to the

¹⁰ D Kezio-Muzoke 'Kagame tells why he is against ICC charging Bashir' Daily Nation 3 August 2008, <http://allafrica.com/stories/200808120157.html> (accessed 13 April 2017); M Mamdani *Saviours and Survivors: Darfur, politics, and the war on terror* (2009) 284.

¹¹ M du Plessis 'Africa and the International Criminal Court' (2005) 11, available at <http://www.csvr.org.za/wits/confpaps/duplessis.htm> (accessed 18 April 2017)

¹² Rome Statute of the International Criminal Court, 1998, preamble, articles 1 and 17.

¹³ MC Bassiouni 'Negotiating the Treaty of Rome on the Establishment of an International Criminal Court' (1999) 32 *Cornell International Law Journal* 452-58.

¹⁴ Bassiouni *supra* note 13, 458.

¹⁵ S Maqungo, "The establishment of the International Criminal Court: SADC's participation in the negotiations" (2009) 9(1) *African Security Review* available at <http://www.iss.co.za/pubs/asr/9No1/InCriminalCourt.html> (accessed 16 April 2017).

¹⁶ Maqungo *supra* note 15.

¹⁷ SC Resolution 808 of 22 February 1993 and SC Resolution 827 of 25 May 1993. For detailed accounts of the creation of the ICTY see M Cherif Bassiouni and P Manikas *The Law of the International Criminal Tribunal for the Former Yugoslavia* (1996) Chapters I-III. See too V Morris and M Scharf *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis* (1995).

genocide in Rwanda by establishing the International Criminal Tribunal for Rwanda (ICTR).¹⁸ The international community turned to South Africa to provide the first Prosecutor to oversee prosecution in both tribunals - Richard Goldstone served from 1994 to 1996.¹⁹ Another South African, Navi Pillay, assumed the presidency of the Appeals Chamber of the ICTR and later served as a judge in the ICC Appeals Chamber.²⁰ Navi Pillay went on to be appointed as the United Nations High Commissioner for Human Rights in 2008. The ICC also appointed a South African citizen, Medard Rwelamira, as the first Director of the Secretariat of the Assembly of States Parties.²¹

This paper discusses Africa's current opposition against the ICC and South Africa's role as a defender of international criminal justice. The paper begins by discussing Africa's current discontent with the ICC and plans to withdraw from the court. Thereafter, the paper argues that South Africa is indebted to international criminal law as the criminalization of apartheid by the international community stimulated the fight for justice and equality. Further, constitutional obligations and inadequate domestic and regional legal frameworks makes it undesirable for the country to abandon the ICC. Finally, the paper addresses Africa's major concern with the court by recommending how African states can use the 'isolationist' policy as an alternative in cases where political considerations make it difficult to arrest and surrender persons with official status. The paper suggests that cooperation with the ICC should be broadly interpreted to include indirect means that incapacitate the alleged perpetrators and eventually make their arrest and surrender possible.

Africa and ICC: Challenges

Africa played an anchor role in the adoption of the Rome Statute.²² The continent made thorough and careful considerations in preparation for the Rome Conference and accordingly went to Rome with clearly defined common positions. The SADC region convened a conference of experts in Pretoria, South Africa in 1997 to deliberate on strategies and desired outcomes in Rome.²³ The subsequent SADC Principles became a pillar and primary basis for SADC's negotiations at Rome.²⁴ Apart from the SADC Principles, the African Group relied on the Dakar Principles at Rome to coordinate African efforts and ensure the adoption of the Rome Statute.²⁵ The Dakar Principles encouraged all African countries to support the creation of the ICC and underlined Africa's longing for a mechanism to address atrocities in the continent. To

¹⁸ SC Resolution 955 of 8 November 1994. For detail see C Scheltema and W van der Wolf (eds) *The International Tribunal for Rwanda: Facts, Cases, Documents* (1999).

¹⁹ Du Plessis *supra* note 5,13.

²⁰ Du Plessis *supra* note 5,13.

²¹ Du Plessis *supra* note 5,77.

²² J Dugard 'Africa and international criminal law: Progress or marginalisation?' (2000) 94 *American Society of International Law Proceedings* 229-230.

²³ Du Plessis *supra* note 5, 78.

²⁴ Maqungo *supra* note 15.

²⁵ P Mochochoko, "Africa and the International Criminal Court" in E Ankumah and E Kwakwa (eds) *African Perspectives on International Criminal Justice* (2005) 248-249.

enhance capacity at the Rome Conference, many African countries also joined an alliance of the LMG that vocally supported the adoption of the Statute.²⁶ South Africa alongside Germany, The Netherlands, Australia, Canada, and Argentina were the leaders of the LMG.²⁷ Schabas notes that post-apartheid South Africa influenced a strong force from SADC that took important human rights positions at the Rome Conference.²⁸ Further, during the Rome negotiations countries such as Sierra Leone recalled their countries' historical association with genocide, war crimes and crimes against humanity.²⁹ Post-Rome, Africa's intervention extends to the administration of the ICC. For instance, the appointment of the current ICC chief prosecutor, Fatou Bensouda, was due to the heavy lobby of African delegations in the Assembly of State Parties.³⁰

In the last decade, Africa Union (AU)'s support to the ICC has dwindled. To date, only situations and cases from Africa are before the court. The ICC Office of the Prosecutor at best has only done preliminary examination in other contexts such as Afghanistan, Colombia and Georgia.³¹ African states are envisaging the prosecution of international crimes using a mechanism in the continent. For example, African heads of state adopted an amended protocol on the Statute of the African Court of Justice and Human Rights in 2014 with expanded jurisdiction over international crimes.³² The protocol is indicative of Africa's growing impatience over the geographical focus of the ICC's prosecutions.³³ Among other provisions, the protocol grants heads of state and other senior officials' immunity from prosecution.³⁴

In 2016 alone, South Africa, The Gambia and Burundi served notices of withdrawal from the court.³⁵ South Africa's withdrawal has been derailed by legal irregularities³⁶ while a change in political leadership in The Gambia appeared to reverse the withdrawal decision.³⁷ These two developments put a question on whether the discontent is confined to a few political leaders for political ends or the generality of Africa prefers withdrawal from the Court. The legal, public and victims positions on the significance of the ICC is yet to be fully tested. Widespread sensitisation and consultations with the public and civil society organisations is therefore

²⁶ Coalition for the International Criminal Court 'Africa and the International Criminal Court', <http://www.coalitionfortheicc.org/documents/AfricaandtheICC.pdf> (accessed 13 April 2017).

²⁷ Washburn *supra* note 6, 368.

²⁸ W Schabas *An Introduction to the International Criminal Court*, 3rd ed (2007) 19.

²⁹ Washburn *supra* note 6, 365.

³⁰ A Novak 'The International Criminal Court: An Introduction' (2015) 101.

³¹ M Ssenyonjo 'The International Criminal Court arrest warrant decision for President al-Bashir of Sudan' (2010) 59 *International and Comparative Law Quarterly* 205.

³² Max du Plessis 'Shambolic, shameful and symbolic: Implications of the African Union's immunity for African leaders' (2014) 278 *Institute for Security Studies Paper* 1.

³³ Du Plessis *supra* note 32, 3.

³⁴ Du Plessis *supra* note 32, 1.

³⁵ UNSF Statement on 28 October 2016 on the withdrawal of the three countries, available, <http://www.un.org/apps/news/story.asp?NEWSID=54> (accessed 20 April 2017).

³⁶ See *Democratic Alliance v Minister of International Relations and Cooperation & Others* (22 February 2017), Case No. HC 83145/2016.

³⁷ Report on Gambia's intention to reverse its withdrawal from the ICC (9 February 2017), available at <http://www.thestar.com/news/world/2017/02/09> (accessed 20 April 2017).

paramount before a decision on the ICC is taken. The main concerns of the AU are as follows: *politicisation of the ICC; unfair and biased selection of cases*³⁸; *impunity and immunity discourse; the unresolved immunity question; and peace obligations of the AU*. These concerns are discussed below.

Politicisation of the ICC

The establishment of a permanent international criminal court was held back for many years because of political factors.³⁹ It took states many years to compromise on the Westphalian system of sovereignty.⁴⁰ Once that was overcome, the Cold War politics pitting the Eastern and Western blocs against each other emerged to make progress on the establishment of a permanent international criminal court difficult.⁴¹ Political considerations regarding the extent of the Court's jurisdiction and the powers of the ICC Prosecutor influenced and continue to influence states such as the United States of America (US) not to ratify the Rome Statute.⁴² On the other hand, the Court appears to experience challenges in keeping politics out of its radar. The Prosecutor has found it difficult to pursue 'hard cases' in some parts of the world and the ICC is often criticized for resorting to soft targets in Africa.⁴³ This will be discussed in depth below.

One of the most controversial and politically sensitive aspects of the Statute is the power given to non-state parties in the UNSC to authorize investigations or prosecutions by the ICC.⁴⁴ Only two of the permanent members of the UNSC are state parties to the Rome Statute but the other three are still capable of triggering the work of the Court.⁴⁵ Sudan and Libya became UNSC victims when the Council made referrals to the ICC while countries such as Syria and Sri Lanka have benefited from UNSC protection due to lack of unanimity among the Council members.⁴⁶ Strategic interests of one or more members with the deciding power have played a role since World War I. The Allies could not prosecute Turkish war criminals for World War I atrocities because they regarded Turkey as a strategic partner in thwarting Soviet Union threats.⁴⁷

³⁸ CS Igwe 'The ICC's favourite customer: Africa and international criminal law' (2008) 40 *Comparative and International Law Journal of South Africa* 294.

³⁹ WA Schabas 'The Banality of International Justice' (2013) 11 *Journal of International Criminal Justice* 547; MC Bassiouni 'From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court' (1997) 10 *Harvard Human Rights Journal* 11.

⁴⁰ LN Sadat 'The International Criminal Court and the Transformation of International Law: Justice for the New Millennium' (2002) 25.

⁴¹ WM Reisman 'The Constitutional Crisis in the United Nations' (1993) 87 *American Journal of International Law* 83, 85; BN Schiff 'Building the International Criminal Court' (2008) 38.

⁴² R Goldstone 'Historical Evolution- From Nuremberg to the International Criminal Court' (2007) 25 *Penn State International Law Review* 769.

⁴³ Schabas *supra* note 39, 550.

⁴⁴ Article 13(b) of the Rome Statute of the International Criminal Court allows the Security Council to refer situations to the Court.

⁴⁵ Schabas *supra* note 39, 547.

⁴⁶ Schabas *supra* note 39, 547.

⁴⁷ Western Europe Cooperation with Turkey was seen as a necessity to prevent Russia from uncontrolled access from the Black Sea to Mediterranean, hence the need for Turkey as a barrier against communist expansionism. Although, the Treaty of Sevres included a provision to prosecute Turk officials, it was replaced by the Treaty of

Africa desired an ICC with three main features: a court independent from UNSC control; led by an independent prosecutor; and with inherent jurisdiction over war crimes, crimes against humanity, and genocide.⁴⁸ The Rome negotiations may not have allowed sufficient time to discuss issues such as the role of the UNSC as the negotiations were characterized by compressing a lot of issues within the allotted five weeks.⁴⁹ Most delegations had little time to scrutinize the draft statute or to take sustainable positions on what they eventually agreed to in Rome.⁵⁰ The final Statute gave the UNSC some measure of control and empowered the organ to be one of three triggering mechanisms for cases to come before the court.⁵¹ Africa feared political interference in the work of the court if the UNSC was allowed to refer situations to the court.⁵² This would in turn adversely affect the judicial independence of the court.⁵³ It is therefore not surprising that today the AU is contesting the interpretation and application of certain articles of the Rome Statute.⁵⁴

Unfair and biased selection of cases

Schabas discusses the decreased enthusiasm for the ICC in Africa and states that “right now international justice needs more Augusto Pinochets and fewer Hisséne Habrés.”⁵⁵ In other words, the ICC needs to demonstrate that it is not anti-African and is prepared to bring perpetrators to justice regardless of nationality. Schabas’ statement is important because he is writing on behalf of leading international law scholars. The statement shows that concerns on the ICC’s bias are not limited to the African continent. The ICC is often accused of being anti-African by solely focusing on crimes committed by Africans.⁵⁶ The selectivity of cases according to critics is evidenced by the targeting of weaker countries while superpowers seem

Lausanne, which did not contain such a clause. Instead a secret protocol which gave Turkish Nationals total amnesty, *Realpolitik* prevailed as Treaty of Sèvres was replaced with the Treaty of Lausanne, which contained no provisions for Turkish Nationals to be tried in Turkey, (the Treaty of Peace between the Allied Power and Turkey) 10 August 1920, available, <http://www.britannica.com> (accessed 20 April 2017).

⁴⁸ Mochochoko *supra* note 25, 250.

⁴⁹ Bassiouni *supra* note 13, 444.

⁵⁰ Bassiouni *supra* note 13, 444.

⁵¹ Bassiouni *supra* note 13, 457.

⁵² P Kirsch and T Holmes ‘The Rome Conference on an International Criminal Court. The Negotiating Process.’ (1999) 2 *American Journal of International Law* 93; WA Schabas ‘United States Hostility to the International Criminal Court: It’s All About the Security Council’ (2004) 15 *European Journal of International Law* 715.

⁵³ Kirsch and Holmes *supra* note 52, 93.

⁵⁴ For example the AU has called for the amendment of article 16 of the Rome Statute to empower the United Nations General Assembly to act in instances where the United Nations Security Council fails to act on a deferral request.

⁵⁵ Schabas *supra* note 39, 551.

⁵⁶ L Feinstein and T Lindberg ‘Means to an end: US interest in the International Criminal Court’ (2009) 80; On 29 March 2009, eg, the Libyan leader, Muammar Gaddafi described the arrest warrant as ‘First World terrorism’, while Libyan African Affairs Minister, Ali Triki, prophesied that the ‘33 African member states of the ICC will meet in the immediate future to consider withdrawing from the ICC’ reported in ‘Darfur, Ghaddafi: ICC are terrorists’ *Africa Times* 29 March 2009 available at <http://www.africa-times-news.com> (accessed 20 April 2017).

to enjoy immunity from investigation or prosecution.⁵⁷

The AU identifies Africa as a being unfairly targeted by the ICC in its investigations.⁵⁸ As a result of this perceived targeting, the institution is encouraging member states to shun cooperation with the ICC.⁵⁹ Global concerns are also raised on the ICC's failure to investigate priority contexts. For instance, a widespread plea for the prosecutor to investigate atrocities in Iraq was met with negative response from the Prosecutor.⁶⁰ The Prosecutor disregarded the fact that one of the parties in Iraq, the UK, is subject to the Court's jurisdiction and sodid not find a reasonable basis to proceed; and held that even if the atrocities occurred they were of insufficient gravity.⁶¹ One of the human rights campaigners in this generation, Archbishop Emeritus Desmond Tutu, demonstrated his disgust on the alleged selective application of the law in August 2012 when he refused to share a public platform with former British Prime Minsiter, Tony Blair. Tutu raised concerns that nothing was being done to punish atrocities in Iraq yet Africans are constantly taken to the ICC.⁶² Therefore, it is recommended that the top occupation of the ICC in the coming years should be the creation of a global culture guided by a balanced enforcement of law.⁶³

Impunity and immunity discourse

Two notable cases that triggered and fueled tensions between the AU and ICC are those of Omar Hassan Al-Bashir⁶⁴ and Uhuru Muigai Kenyatta.⁶⁵ In both cases, the AU initially favoured a deferral approach and only resorted to defiance when the UNSC refused deferral requests.⁶⁶ Put differently, the AU acknowledged the absence of immunity in the Statute regardless of personal status but was uncomfortable with the prosecution of sitting heads of state, and also prioritised peace initiatives in those countries. But why did African states overwhelmingly support the Statute at Rome and post-Rome despite possible prosecutions of their leaders in future? There are many possibilities. Firstly, they may have hoped to use the

⁵⁷ Feinsein and Lindberg *supra* note 56, 81.

⁵⁸ Former AU Chairman Jean Ping was, for example, quoted in the Parisian newspaper Libération, saying: '*there are two systems of measurement.. the ICC seems to exist solely for judging Africans*', AM Arieff *et al* 'International Criminal Court Cases in Africa: Status and Policy Issues (2011)

⁵⁹ K Mills 'Bashir is dividing us: Africa and the International Criminal Court' (2012) 34 *Human Rights Quarterly* 405; AU Decision on the African Union's relationship with the ICC, Ext/Assembly/AU/Dec. (Oct 2013) (<http://www.legal-tools.org/doc/edad86/>) (accessed 18 April 2017); G Werle *et al* (eds) (2014) 26 'Africa and the International Criminal Court 274.

⁶⁰ Feinsein and Lindberg *supra* note 56, 84.

⁶¹ Letter from the Chief Prosecutor of the International Criminal Court, The Hague, February 9, 2006 (www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-446C-AB77-4CD82FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf) (accessed 18 April 2018)

⁶² See <http://www.guardian.co.uk/commentisfree/2012/sep/02/desmond-tutu-tony-blair-iraq?newsfeed=true> (accessed 18 April 2017).

⁶³ MJ Struett 'The Politics of Constructing the International Criminal Court' (2008) 3.

⁶⁴ The ICC issued an international arrest for President Omar al-Bashir of Sudan on 4 March 2009 for grave crimes committed by his subordinates.

⁶⁵ Uhuru Kenyatta was indicted by the ICC on 8 March 2011.

⁶⁶ Max du Plessis 'Recent cases and developments: South Africa and the International Criminal Court' (2009) 3 *South African Journal of Criminal Justice* 442-43.

deferral system to delay the prosecution of officials until they had left their positions.⁶⁷ This would be in line with most national legislations that guarantee immunity to sitting heads of state and other high ranking officials. Secondly, they may have anticipated the use of African brotherhood to avoid cooperation with the ICC where such non-cooperation suits their political perspectives.⁶⁸ Thirdly, they may have thought of using state referrals to ensure only the investigation of their opponents or non-state actors.⁶⁹

The unresolved immunity question

The immunity of sitting heads of state or other high ranking officials remains contentious under the ICC regime. While article 27 of the Rome Statute expressly state that no immunity should be granted under any circumstance⁷⁰, the provision should be read in line with the current international law position on the application of immunities. International law makes a distinction between functional (conduct carried out within the official capacity) and personal (only applies while the person holds the office in question) immunity. International criminal tribunals have consistently held that personal immunity of heads of states does not bar prosecution of such officials before the tribunals.⁷¹ On the other hand, as a general rule the personal immunity of such officials before domestic prosecutions is supported by customary international law.⁷² The Rome Statute itself makes it difficult to prosecute officials from non-State Parties as long as they are in power. It will be unheard of if such officials voluntarily waive their immunity. Article 98(1) of the Rome Statute provides that:

“The [International Criminal] Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.”

Based on article 98(1) above, only a waiver of immunity by a non-State Party makes arrest and surrender to the ICC possible.⁷³ The ICC and Africa interpret this article differently as seen in the case of *Al Bashir*. The AU member states have refrained from arresting Al Bashir because

⁶⁷ The post-Rome AU approach to article 16 suggests so. For example, the AU presented a proposal for amendment to that provision to the 8th session of the ICC Assembly of States Parties (ASP) in November 2009. Essentially, African states submitted that article 16 should be modified to empower the UN General Assembly to act should the UNSC fail to decide on a deferral request after six months.

⁶⁸ The recent failure to cooperate with the AU on Al-Bashir shows the entrenchment of such brotherhood. AU has also rarely invoked article 4(h) of the Constitutive Act of 2000 to intervene in the affairs of a fellow African country.

⁶⁹ To date, the ICC has not targeted government officials in any of the cases based on self-referral.

⁷⁰ State referrals to the ICC by countries such as Uganda and DRC show one-sidedness as only non-state actors have been brought before the ICC.

⁷¹ See for example, Prosecutor v Charles Taylor, Immunity from jurisdiction, no. SCSL 03-01 (May 31, 2004), para.52; Arrest Warrant case (Democratic Republic of Congo v. Belgium), 2004, para 61.

⁷² Du Plessis *supra* note 32, 7.

⁷³ P Gaeta “Official Capacity and Immunities” (2002) in Cassese et al (eds) *The Rome Statute of the International Criminal Court: A Commentary* (1) 993-994. Gaeta argues that article 98 should be interpreted to mean that a request for the waiver of immunity will only be required if the State (whose national enjoys immunity) is not a party to the Rome Statute.

in their opinions he enjoys immunity as a head of state and their ICC obligations to cooperate with regard to non-State Parties are restricted.⁷⁴ Going forward, the AU and ICC have a shared responsibility to continue engaging through available mechanisms to clarify this aspect of cooperation.⁷⁵

As earlier stated, immunity of sitting heads of state and other high ranking officials also finds strength from national laws and customary international law. The concerns of Africa can be better understood for instance, from the approach of national courts of Belgium and UK, and the International Court of Justice (ICJ). These institutions are perfect examples because in recent years they have made determinations on immunity that can guide the ICC's interpretation of immunity. Belgium and UK have domesticated the Rome Statute.⁷⁶ The previous approach of their courts is reflective of a potential dispute with the ICC should they be asked to cooperate with the Court where immunity is under consideration. In the *Sharon and others* case⁷⁷, the Belgian Court de Cassation held that the customary international rule of absolute immunity for a head of state is binding.⁷⁸ The court explained the application of article 27 of the Rome Statute, national law and this customary international rule.⁷⁹ The underlying principle is that every person should be prosecuted for international crimes and private acts.⁸⁰ However, prosecution of a head of state is suspended while the person is in office.⁸¹ In other words, a head of state enjoys personal immunity until the activation of functional immunity upon vacation of office.⁸² The application of personal and functional immunities was also established by the House of Lords in the *Pinochet* case.⁸³ Pinochet could not have been prosecuted if he was still in office according to the House of Lords. The functional immunity ceased when he left office.⁸⁴ On the other hand, the ICJ has affirmed the customary international law position that serving state officials enjoy immunity from prosecution before foreign national courts.⁸⁵

A striking feature about the above decisions is that they were made at both national and international levels by institutions or countries that have demonstrated interest in the advancement of international criminal justice. Belgium has previously arrested or prosecuted

⁷⁴ See for example, A Ngari 'Clutching at straws: SA's reasons for not arresting al-Bashir' (2016), available at, <http://www.issafrica.org/iss-today/clutching-at-straws-sas-reasons-for-not-arresting-al-bashir> (accessed on 20 April 2017).

⁷⁵ For example, article 112(2)(f) of the Rome Statute deals with questions of non-cooperation by the Assembly of State Parties while under article 123(2) of the Statute, South Africa is empowered to request a meeting to review any issue under the Statute.

⁷⁶ See United Kingdom International Criminal Court Act 2001; Belgium Act of 29 March 2004 on Cooperation with International Criminal Court and International Criminal Tribunals.

⁷⁷ See decision of 26 June 2002, available at, <http://www.sabrashatila.be/documents/arrest020226.pdf>.pp.22 (accessed 16 April 2017).

⁷⁸ A Cassese "The Belgium Court of Cassation v. the International Court of Justice: the *Sharon and others* Case" (2003) 1 *Journal of International Criminal Justice*, 439, and A Cassese "When May Senior State Officials be Tried for International Crimes?" (2002) 13 *European Journal of International Law* 853, 870 *et seq.*

⁷⁹ Cassese (2003) *supra* note 78, 440.

⁸⁰ Cassese (2003) *supra* note 78, 440.

⁸¹ A Cassese *International Criminal Law* (2001) 444.

⁸² Du Plessis *supra* note 5,69.

⁸³ *R v Bow St Magistrate, ex parte Pinochet Ugarte*, [1998] 4 All ER (Pinochet 1) at 938 ; *R v Bow St Magistrate, Ex p. Pinochet (No.3)* [1999] 2 WLR 824 at 905 H.

⁸⁴ *Supra* note 83.

⁸⁵ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* 2002 ICJ Reports 3.

international criminals;⁸⁶ the UK is among the first countries to domesticate the Statute;⁸⁷ and the ICJ is a reference point for resolving state disputes.⁸⁸ Importantly, the three scenarios all came after the adoption of the Rome Statute meaning that the courts delivered the decisions alive to the Statute's view on immunity. Using these models, the recommendation is for the ICC to balance the need to prosecute all perpetrators and Africa's concept of delaying some prosecutions until such a time that the customary international rule on immunity is no longer applicable to state officials. In that way, the Court will blend political considerations with the demands of the Rome Statute. While the argument that the ICC is purely legal and should not be influenced by politics is valid to some extent, the role of the UNSC on the functioning of the Court is proof enough that politics cannot be entirely divorced from the Court.

Peace obligations of the AU

Africa and the ICC are often caught in between the two schools of thought on justice and peace. One school of thought prefers restorative justice measures over other international justice institutions,⁸⁹ while the other school prefers legal accountability as a first resort.⁹⁰ The ICC's decisions to pursue cases in countries like Uganda and Sudan have raised concerns on the potential impediment to peace efforts in those countries.⁹¹ On 21 July 2008, the AU Peace and Security Council issued a communiqué reiterating the need to balance the pursuit for justice with efforts for a long-lasting peace in Darfur.⁹² A number of governments in Africa are also promoting the use of Africa solutions to solve African problems.⁹³ Part of the African solutions to African problems is the use of regional peace initiatives to solve conflicts in the continent.⁹⁴ In some instance, such initiatives encourage the suspension of prosecutions or granting of immunity to allow reconciliation between warring parties.⁹⁵ Interestingly, in Uganda, the civil society organizations (CSOs) held the view that the ICC disrupted negotiations and peace efforts.⁹⁶ Related to the ICC's work in Africa, the chief prosecutor of the Special Court of Sierra

⁸⁶ In May 2008, Belgium arrested Jean-Pierre Bemba Gombo and surrendered him to the ICC. Belgium also arrested Rwandese nationals suspected of playing a role during the genocide of 1994.

⁸⁷ In fact the UK domesticated the Statute even before the Court was operational.

⁸⁸ Statute of the International Court of Justice, 1945, article 36.

⁸⁹ R Thakur 'The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect' (2006) 127.

⁹⁰ KC Moghalu 'Prosecute or Pardon? Between Truth Commission and War Crimes Trials' (2009) in CL Siriam and S Pillay (eds) *Peace Versus Justice? The Dilemmas of Transnational Justice in Africa* 70.

⁹¹ Feinstein and Lindberg *supra* note 56, 81.

⁹² AU Peace and Security Council Communiqué PSC/Min/Comm(CXLII) 21 July 2008, para. 10.

⁹³ This was coined by former South African President Thabo Mbeki as he championed his 'African Renaissance' philosophy in which Africa needs to establish its own institutions and mechanisms to solve its problems. These ideals are also reflected in Africa Agenda 2063 adopted in September 2015.

⁹⁴ PS Wegner 'The International Criminal Court in Ongoing Intrastate conflicts: Navigating the Peace-Justice Divide' (2015) 41.

⁹⁵ AU Peace and Security Council Communiqué PSC/Min/Comm(CXLII) 21 July 2008.

⁹⁶ EK Baines 'The Haunting of Alice: Local Approaches to Justice and Reconciliation in Northern Uganda' (2007) 1 *The International Journal of Transnational Justice* 91; C Dolan 'Social Torture: The Case of Northern Uganda, 1986-2006' (2009) 66; M Schomerus 'The Lord's Resistance Army in Sudan: A History and Overview' (2007) 47; PS Wegner 'The International Criminal Court in Ongoing Intrastate conflicts: Navigating the Peace-Justice Divide' (2015) 41.

Leone once noted that the timing of Charles Taylor's arrest should consider peace efforts.⁹⁷

The role of South Africa

South Africa and the development of international criminal justice

From at least the 15th century, the international community began taking strides towards the internationalization of certain crimes.⁹⁸ The efforts involved a myriad of approaches including proposals for a permanent international criminal court, identification of certain crimes as international crimes, adoption of legal instruments, and creation of international criminal tribunals to prosecute international crimes. The 20th century was defining in this regard, with several processes that eventually accelerated the establishment of a permanent international criminal court.⁹⁹ Prior to Rome, South Africa was already a voice and mapped in the international criminal justice agenda. With the brutality of apartheid raging in the country, the international community adopted apartheid as an international crime in 1973. Under the International Convention on the Suppression and Punishment of the Crime of Apartheid¹⁰⁰, the future international penal tribunal was visualized. With the enactment of the Convention, the United Nations *ad hoc* committee for South Africa engaged experts to draft the statute for the establishment of an international criminal jurisdiction in accordance with the Apartheid Convention.¹⁰¹

The memory of apartheid will linger in minds of South Africans for a time to come and the historical background is evidently shaping the country's constitutional and human rights legal framework.¹⁰² Although the crime of apartheid was not included in the Rome Statute of the ICC, South Africa drew from the colonial legacy and existing Apartheid Convention to include the crime when domesticating the Rome Statute.¹⁰³ South Africa serves as a model for many countries through its impressive national legislation that comprehensively domesticate international crimes.¹⁰⁴ To give effect to the said national legislation, South African courts have previously ruled in favour of the justiciability and obligatory nature of international crimes under national legislation.¹⁰⁵ For this reason, the country is admired for its progressive and

⁹⁷ Statement of David M. Crane, Chief Prosecutor, Special Court for Sierra Leone, 4 June 2003, available at http://www.rscsl.org/Documents/Press_OTP/prosecutor-060503.pdf (accessed 20 April 2017).

⁹⁸ MC Bassiouni 'International Criminal Justice in Historical Perspective' in Cassese (eds) (2009) 132.

⁹⁹ MC Bassiouni 'From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court' (1997) 10 *Harvard Human Rights Journal*.

¹⁰⁰ International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973.

¹⁰¹ MC Bassiouni and DH Derby 'Final Report on the Establishment of an International Criminal Court for the Implementation of the Apartheid Convention and other Relevant International Instruments' (1981) 9 *Hofstra Law Review* 523.

¹⁰² The Preamble of the Constitution of the Republic of South Africa of 1996 recognizes the injustices of the past and states the need to build a society based on democratic values, social justice and fundamental human rights.

¹⁰³ Schedule 1 of the ICC Act, 2002 includes the crime of apartheid.

¹⁰⁴ A Katz 'An Act of transformation: The incorporation of the Rome Statute of the International Criminal Court into national law in South Africa' (2003) 12 *African Security Review* 27.

¹⁰⁵ *Azanian Peoples Organization (AZAPO) v President of the Republic of South Africa* 1996 (4) SA 671 (CC) 691; *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre*

human rights oriented approach.¹⁰⁶ In the precursors for the ICC, namely, the ICTY and the ICTR, South Africa assumed a leadership role with the appointment of its citizens to prominent positions.¹⁰⁷ Arguably, South Africa can be seen as the African Headquarters of international criminal and human rights law.

South Africa's interests on the ICC debates started before the country attained independence. In 1993, the country debated the International Law Commission (ILC) draft statute on the ICC when the draft was presented to the United Nations General Assembly's Sixth Committee for consideration.¹⁰⁸ The influential leadership and role of South Africa then transcended into the Rome negotiations through assumption of membership in one of the drafting committees.¹⁰⁹ As Africa finds itself in conflict with the ICC, South Africa can retain its widely recognized and respected leadership to save international criminal justice from collapse or dormancy. In the interim, the country can explore other approaches to cooperation with the ICC that excludes arrest and surrender. In the long run, the country can do the following to maintain its leadership and contribution.

Firstly, the country should encourage other African countries to adhere to common positions that are already defined in the AU legal framework such as the Constitutive Act. Article 4(h) of the Constitutive Act mandates African states to prosecute individuals who commit international crimes in Africa.¹¹⁰ In 2005, the African Commission on Human and Peoples' Rights adopted a resolution on ending impunity in Africa and also encouraged African countries to domesticate the Rome Statute.¹¹¹ These and other common positions give South Africa a backbone to build a human rights culture in Africa.

Secondly, the country should advocate for an alternative mechanism to be in place first and to be properly tested for effectiveness before withdrawal and (un)domestication can be considered. While the Constitutive Act mandates prosecution, it does not provide for a regional mechanism to carry out such prosecutions. This leaves prosecution to individual member states. The ability

and Another (30 October 2014) CCT 02/14 (2014 ZACC; *The Minister of Justice and Constitutional Affairs and Others v The Southern Africa Litigation Centre and Others* (15 March 2016, Case SC 867/15.

¹⁰⁶ L Stone 'Implementation of the Rome Statute in South Africa' in C Murungu and J Biegon (eds) *Prosecuting International Crimes in Africa* (2011) 306.

¹⁰⁷ Notably, Justice Richard Goldstone once served as a prosecutor for the ICTY and ICTR, and Justice Navi Pillay served in the Appeals Chamber of the ICTR.

¹⁰⁸ L Stone 'Implementation of the Rome Statute in South Africa' in C Murungu and J Biegon (eds) *Prosecuting International Crimes in Africa* (2011) 305.

¹⁰⁹ M du Plessis 'International criminal courts, the International Criminal Court, and South Africa's Implementation of the Rome Statute' in J Dugard *International Law: A South African perspective* (2006) 177; C Blair and M du Plessis 'Africa's obstruction of justice', <http://www.guardian.co.uk/commentisfree/2009/jul/18/darfur-bashir-african-union-icc> (accessed 12 April 2017)

¹¹⁰ African Union Constitutive Act of 2000, article 4(h).

¹¹¹ African Commission on Human and Peoples' Rights Resolution on ending impunity in Africa and on the domestication and implementation of the Rome Statute of the ICC, 2005.

or willingness of national courts to prosecute state officials remains questionable.¹¹² Providing immunity for state officials who commit international crimes will be contrary to article 4(o) of the Constitutive Act.¹¹³ Currently, the only express sub-regional treaty that prohibits immunity of any form is the Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination.¹¹⁴ The Protocol strengthens the Pact on Security, Stability and Development in the Great Lakes Region and is a brainchild of the Genocide Convention and the Rome Statute.¹¹⁵ The Protocol does not expressly provide for a sub-regional court to prosecute international crimes but rather leaves the prosecution to competent courts.¹¹⁶ The limited application of the Protocol and the still to be defined relationship between regional mechanisms and the ICC reveal the absence of a regional mechanism to fully adjudicate over international crimes in Africa at the moment. The proposed Chamber for the African Court of Justice and Human Rights with jurisdiction to prosecute international crimes in Africa also appears compromised from the onset. The establishment of the Chamber is mainly motivated by the desire to shield state officials from the jurisdiction of the ICC.¹¹⁷ Further, South Africa should take precedent from other failed or weak sub-regional or regional mechanisms such as the Southern African Development Community Tribunal (SADC Tribunal) before putting trust in Africa's readiness to prosecute international crimes. The human rights jurisdiction of the SADC Tribunal collapsed after failure to implement human rights decisions and the Tribunal has now been reduced to a state dispute mechanism.¹¹⁸ The enforcement of the decisions of the African Commission on Human and Peoples' Rights remains weak.¹¹⁹

Thirdly, the country should maintain support for the ICC and use the strength of other like-minded African states to advocate for the Rome Statute obligations. The voice of South Africa

¹¹² S Katzenstein 'In the Shadow of Crisis: The Creation of International Courts in the Twentieth Century' (2014) 55 *Harvard International Law Journal* 152.

¹¹³ Article 4(o) of the AU Constitutive Act states the Union shall function in accordance with the principle of respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities.

¹¹⁴ The Protocol was signed by the International Conference on the Great Lakes Region on 29 November 2006.

¹¹⁵ C Murungu *Immunity of state officials and the prosecution of international crimes in C Murungu & J Biegon* (eds) 2011 Pretoria University Law Press 53; Article 12 of the Great Lakes Region Protocol.

¹¹⁶ Article 12 of the Great Lakes Region Protocol.

¹¹⁷ J Kariri 'Can the new African Court truly deliver justice for serious crimes?'

http://www.defenceweb.co.za/index.php?option=com_content&view=article&id=35408:iss-can-the-new-african-court-truly-deliver-justice-for-serious-crimes&catid=56:diplomacy-a-peace&Itemid=111 (accessed 20 April 2017).

¹¹⁸ Article 33 of the new SADC Tribunal Protocol limits the jurisdiction of the Tribunal to the interpretation of the SADC Treaty and Protocols relating to disputes between Member States. This is a narrower jurisdiction than the one in the repealed Protocol of 2000. Article 15 of the repealed Protocol was not limited to disputes between States as it also allowed natural or legal persons to bring disputes before the Tribunal.

¹¹⁹ M Hansungule 'African courts and Africa Commission on Human and Peoples' Rights', available at: www.kas.de/upload/auslandshomepages/namibia/Human...Africa/8_Hansungule, 233 (accessed 20 April 2017).

is persuasive in Africa because it is a political, economic and international law powerhouse.¹²⁰ Several African countries, particularly in the SADC region, look unto the country for guidance on international affairs. The former United Nations Secretary General, Ban ki-Moon, identified South Africa as a leader in global issues pertaining to peace and security when he encouraged the country to reconsider its decision to withdraw from the ICC.¹²¹ Previously, South Africa has demonstrated its capacity to respect international obligations related to the ICC. In 2009, South Africa committed to arrest al-Bashir had he attended the inauguration of President Jacob Zuma.¹²² Other African voices exist for the country to forge a formidable alliance and defend international criminal justice. One example is the neighbouring Botswana who has been one of the vociferous supporters of the Court. Botswana has been courageous to adopt a different view from the AU on al-Bashir by supporting the arrest warrant against him.¹²³ The same public stance was taken by Botswana in the case of Muammar Gaddafi.¹²⁴ Probably the defining moment on Botswana's uncompromising commitment to victims of atrocities was a statement made by the country's president, Ian Khama, on 12 December 2011. In his keynote address to the opening plenary of the 10th Session of the Assembly of the State Parties to the Rome Statute of the International Criminal Court (ICC), Ian Khama stated that political leaders should be prosecuted for war crimes and crimes against humanity for the sake of justice to victims.¹²⁵ He emphasized that Africa has experienced brutal slaughtering of innocent civilians and should take courage to prosecute perpetrators including sitting Heads of States.¹²⁶ Ian Khama's statement should augur well with South Africa that houses thousands of African migrants who fled their countries due to war and other forms of persecution. These approaches show Botswana's concerns on the immunity of state officials and the resultant hindrance to ending impunity.¹²⁷ Cooperation with the ICC on the arrest of al-Bashir and international criminal

¹²⁰ A Simon 'At the new African court, will power mean impunity?' available at: <http://www.dailymaverick.co.za/article/2014-06-26-at-the-new-african-court-will-power-mean-impunity/#.U6vq4PmSxqU> (accessed 20 April 2017).

¹²¹ See Defence Web report 'UN Secretary General phone call to Zuma', available at: http://www.defenceweb.co.za/index.php?option=com_content&view=article&id=45742:un-secretary-general-phones-zuma-about-icc-withdrawal&catid=56:diplomacy-a-peace&Itemid=111 (accessed 20 April 2017).

¹²² See Sudan Tribune report 'Sudanese President to skip Zuma's inauguration', available at: <http://www.sudantribune.com/spip.php?article31109> (accessed 20 April 2017).

¹²³ See statements by Botswana's Vice President at the 13th Ordinary Session of the Assembly of the African Union 24 June-3 July 2009 Sirte Great Socialist People's Libyan Arab Jamahiriya, available at: <http://www.gov.bw/en/News/Botswana-stands-by-the-International-Criminal-Court> (accessed 15 April 2017).

¹²⁴ See statement in support of Gaddafi arrest warrant from Ministry of Foreign Affairs and International Cooperation dated 5 July 2011, available at: http://mofaic.gov.bw/index.php?option=com_contents&view=article&id=653:botswana-supports-the-warrent-of-arrest-issued-by-icc&catid=8:latest&Itemid=95, accessed (15 April 2017)

¹²⁵ 'Keynote Address by His Excellency Lt General Ian Khama, the President of the Republic of Botswana, during the opening plenary of the 10th Session of the Assembly of the State Parties to the Rome Statute of the International Criminal Court (ICC), New York, 12 December 2011', available at: https://asp.icc-cpi.int/en_menus/asp/sessions/documentation/10th%20session/Pages/tenth%20session%20of%20the%20assembly%20of%20states%20parties.aspx (accessed 20 April 2017).

¹²⁶ *Supra* note 125.

¹²⁷ G Abraham 'Universal Jurisdiction and the African Union (AU)-'...the wrong side of history'? (2011) *African Yearbook on International Humanitarian Law* 129.

justice in general also manifested previously in Malawi and Zambia.¹²⁸ It is recommended that these earlier commitments can be revived to give the ICC a new lease of life.

Finally, the country should incorporate the input of Civil Society Organisations (CSOs) as these play an important role in the development of the ICC regime. Civil Society Organisations were a key component that enhanced the effectiveness of the Rome negotiations.¹²⁹ The CSOs that functioned under the banner of the Coalition of the International Criminal Court (CICC) were particularly valuable to the discussion, even beyond the expectations of the UN.¹³⁰ The UN embraced the partnership and expertise of the CICC.¹³¹ In early years of the ICC, Africa sought strategic partnership to enhance prosecutions of international crimes. Besides the strategic partnership agreement with the European Union signed in Lisbon in 2007¹³², Africa previously acknowledged the role of CSOs in the furtherance of the rule of law. Through the 2005 *Resolution on ending impunity in Africa and on the domestication and implementation of the Rome Statute of the ICC*, the Africa Commission on Human and Peoples' Rights invited CSOs to collaborate with states on issues of international justice and rule of law.¹³³ In South Africa, two cases remind the country of its obligations under the Rome Statute and the ICC Act, namely the *Zimbabwe torture*¹³⁴ and *al Bashir*¹³⁵ cases. In both cases, the CSOs brought the cases to the attention of the government and courts. For this reason, South Africa must embrace CSOs as partners in addressing implementation gaps and dissemination of international obligations to the populace. The partnership will also increase expertise and provide advice in grey areas where the country is caught between its duty to international criminal justice and maintaining good relations with other countries. For instance, the Institute of Security Studies with offices in Pretoria is devoted to increasing the rule of law in Africa and has an existing project (International Crimes in Africa Programme) to build national capacity in this regard.¹³⁶ Through the project, South Africa and indeed other African countries can be empowered on how to balance peace processes with justice.¹³⁷ Max du Plessis asserts that the attainment of the ICC

¹²⁸ In June 2012, the AU moved a regional summit from Malawi after the country refused to host Al Bashir due to his warrant of arrest, report available at: <https://www.theguardian.com/world/2012/jun/08/african-union-malawi-summit-sudan> (accessed 20 April 2017); See also 'Statement by ICC Prosecutor-elect Fatou Bensouda during a Seminar at Open Society Africa Foundation, Cape Town, 23 May 2012' quoting the Zambia Minister of Foreign Affairs that "President Al Bashir will regret the day he was born if he tried to go to Zambia", available at: <https://www.icc-cpi.int/NR/rdonlyres/B016498B.../Prosecutorelectkeynotespeech.pdf> (accessed 20 April 2017).

¹²⁹ Washburn *supra* note 6, 366-367.

¹³⁰ Washburn *supra* note 6, 367.

¹³¹ Washburn *supra* note 6, 366.

¹³² See <http://hrw.org/english/docs/2007/12/04/africa17466.htm>.

¹³³ Africa Commission on Human and Peoples' Rights Resolution on ending impunity in Africa and on the domestication and implementation of the Rome Statute of the ICC, 2005.

¹³⁴ *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* (30 October 2014) CCT 02/14 (2014 ZACC).

¹³⁵ *The Minister of Justice and Constitutional Affairs and Others v The Southern Africa Litigation Centre and Others* (15 March 2016), Case SC 867/15.

¹³⁶ <http://www.issafrica.org/international-crimes-africa-programme> (accessed 20 April 2017).

¹³⁷ Du Plessis *supra* note 5, 42.

objectives on the African continent is dependent on partnerships between relevant stakeholders like CSOs, states and the ICC.¹³⁸

Current international crimes legislation

In early years of constitutional democracy, South African courts dealt with apartheid era cases and in line with national reconciliation initiatives invoked amnesty considerations in dealing with some cases.¹³⁹ As the country integrated into the community of nations, it has exercised its duty to prosecute and punish international crimes through the ratification and domestication of key international humanitarian and human rights law instruments. South Africa has domesticated both the Rome Statute and the Geneva Conventions through the International Criminal Court Act (ICC Act)¹⁴⁰ and the Geneva Conventions Act¹⁴¹ respectively. As a testimony of the country's leadership role in the continent, it was the first country to incorporate the Rome Statute into its national law.¹⁴² The ICC Act allows the domestic prosecution of war crimes, crimes against humanity, and genocide.¹⁴³ The Geneva Conventions Act is limited to the domestic prosecution of war crimes including those committed during the apartheid era.¹⁴⁴ The Preamble of the ICC Act provides in part, that the enactment of the Act is cognizant of the country's own history of atrocities. Prior to the ICC Act, there was no domestic mechanism to prosecute international crimes¹⁴⁵. However, South Africa already undertook to cooperate with foreign states in the confiscation and transfer of proceeds of crime through the South African International Co-operation in Criminal Matters Act of 1996. To date the ICC Act remains the most comprehensive instrument because it incorporates the prosecution of atrocities in both peace and war time.

Should South Africa proceed with the withdrawal from the ICC, one requirement according to the recent decision of the High Court of South Africa is for the country to repeal the ICC Act first.¹⁴⁶ This will leave the country with the Geneva Conventions Act and unable to prosecute important international crimes other than war crimes. Dugard notes that the Constitutional Court in *AZAPO* limited its discussion to war crimes committed during the apartheid era despite the compelling evidence of crimes against humanity committed during the same period.¹⁴⁷ The Court may have been influenced by the understanding that the Geneva Conventions only apply

¹³⁸ Du Plessis *supra* note 5,42.

¹³⁹ *Azania Peoples Organization (AZAPO) v President of the Republic of South Africa* 1996 (4) SA 671 (CC) 691, para. 32.

¹⁴⁰ Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.

¹⁴¹ Implementation of the Geneva Conventions Act 8 of 2012.

¹⁴² Max du Plessis 'South Africa's International Criminal Court Act: Countering genocide, war crimes and crimes against humanity' (2008) 172 *Institute of Security Studies Paper* 1.

¹⁴³ Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, long title.

¹⁴⁴ Implementation of the Geneva Conventions Act 8 of 2012, section 4(1).

¹⁴⁵ L Stone 'Implementation of the Rome Statute in South Africa' in C Murungu and J Biegon (eds) *Prosecuting International Crimes in Africa* (2011) 307.

¹⁴⁶ *Democratic Alliance v Minister of International Relations and Cooperation & Others* (22 February 2017), Case No. HC 83145/2016.

¹⁴⁷ J Dugard 'Is the truth and reconciliation process compatible with international law? An unanswered question' (1997) 13 *South African Journal of Human Rights* 264.

to crimes committed during an armed conflict, whether international or non-international. In the *Basson* case, the Constitutional Court referred to apartheid as both a crime against humanity and war crime.¹⁴⁸ In view of the scope of application of the ICC and Geneva Convention Acts, South Africa would need both Acts (or at least the ICC Act) to be able to prosecute the crime of apartheid on behalf of the international community. This is because the crime can be committed in either peace or war time.

Repealing the ICC Act will also reduce the capacity of South Africa to try violations by its peacekeepers. The country is a major contributor to Peace Support Operations and in its 1999 *White Paper on South African Participation in International Peace Missions*, the government pledged to undertake such missions responsibly and in accordance with international humanitarian law (IHL).¹⁴⁹ South Africa's adherence to IHL in such missions can only be possible through domestication of IHL norms into the national system. It is clear from the 1999 UN Secretary General's *Bulletin on the Observance by the United Nations Forces of International Humanitarian Law* that violations during such operations are to be prosecuted through national legislation.¹⁵⁰ While the Geneva Conventions Act will be helpful particularly in Chapter VII operations¹⁵¹, gaps may appear under Chapter VI operations¹⁵² where IHL is ordinarily not applicable. Therefore, the ICC Act is better placed to close any imminent gaps and ensure that justice is not left with neither legs nor arms to respond to violations.

Constitutional obligations

In South Africa, the Constitution is the supreme law and any law that is inconsistent with the Constitution is invalid.¹⁵³ Immersed in the Constitution is the Bill of Rights which is the cornerstone of South Africa's democracy.¹⁵⁴ The Constitution outlines how the Bill of Rights should be interpreted and applied or enforced by the South African courts.¹⁵⁵

In matter of the *Democratic Alliance v Minister of International Relations and Others*¹⁵⁶, the High Court of South Africa addressed the procedural grounds raised by the parties and opted to refrain from addressing the substantial grounds raised. For the purposes of this paper it is important to revisit one of the substantial grounds raised by the University of Pretoria's Centre for Human Rights in the aftermath of the decision. The ground will augment the assertion by the author on South Africa's constitutional obligation to remain at the ICC. The Centre for Human Rights argued that the withdrawal from the ICC is inconsistent with both the

¹⁴⁸ *S v Basson* 2005 (1) SA 171 (CC) (*Basson 1*).

¹⁴⁹ H Strydom 'South Africa and the International Criminal Court' in JA Frowein and R Wolfrum (eds) (2002) 6 *Max Planck Yearbook of United Nations Law* 349.

¹⁵⁰ Section 2 and 4 of the Bulletin.

¹⁵¹ Under Chapter VII operations, peace is yet to be attained and IHL most likely applies.

¹⁵² Under Chapter VI operations, peace has been attained and IHL will not always apply.

¹⁵³ The Constitution of The Republic of South Africa, 1996, section 2.

¹⁵⁴ *Supra* note 153, section 7(1).

¹⁵⁵ *Supra* note 153, sections 233 and 37.

¹⁵⁶ *Democratic Alliance v Minister of International Relations and Cooperation & Others* (22 February 2017), Case No. HC 83145/2016.

Constitution and international obligations to respect the sanctity of life and to reject and condemn impunity.¹⁵⁷ In the *Zimbabwe torture* case, the High Court of South Africa held that South Africa is obliged under the Constitution and ICC Act to investigate and prosecute international crimes “as far as possible”.¹⁵⁸ South Africa’s approach to international law should be guided by constitutional provisions. The South African Constitution mandates the courts to understand international law in their interpretation of legislation and Bill of Rights.¹⁵⁹ The role of the executive and legislature in providing a conducive platform for the judiciary is to ensure that South Africa stays a State Party to international agreements that promote human rights and justice.

Exploring the concept of cooperation

The Rome Statute allows States to refrain from cooperating with the Court or to devise other approaches to cooperation under certain circumstances. Article 98 of the Statute respects States’ international obligations regarding diplomatic immunity of a person or property of a third State. A requested State is not obliged to execute the request without the waiver of such immunity by the third State. On the other hand, article 97 of the Statute provides for consultation mechanisms in situations where it is difficult for a State to execute a request. Under article 97(c), a State should consult the Court upon receipt of a request if the execution of the request in its current form will breach a pre-existing treaty obligation undertaken with respect to another State. African countries are struggling to execute the Court’s requests in their *current forms* (request for arrest and surrender) with respect to Al Bashir and the challenges of cooperation are bound to manifest in other future cases. The Rome Statute foresaw the challenges States may have in executing some requests. What the Court at times call failure to cooperate is actually inability to cooperate. Where such inability to cooperate exists, the consultations between the Court and States should look at ways to capacitate a State that is required to cooperate. One mechanism is for the Court and requested States to agree on *modified forms* of requests. Such requests should enable State to respect their obligations to the ICC while minimizing diplomatic frictions with other States. For example, suspension of diplomatic immunity, travel restrictions and diplomatic pressure for the accused to cooperate with the Court may be used against sitting of heads of states and other high ranking officials. If many States embrace such approaches it may serve as a disapproval to the actions of the accused and demonstrate sympathy to the victims.

¹⁵⁷ <http://www.chr.up.ac.za/index.php/centre-news-a-events-2017/1765-government-should-pause-to-reconsider-icc-withdrawal-and-parliament-should-suspend-consideration-of-icc-repeal-bill.html> (accessed 21 April 2017).

¹⁵⁸ *Southern Africa Litigation Centre and Another v National Director of Public Prosecutions and Others* 2012 (3) All SA 198 (GNP), paras 21 and 32.

¹⁵⁹ *Supra* note 153, sections 233 and 37.

Conclusion

The future of the ICC's operations in Africa hinge on the extent to which the AU and the Court will bridge the gap on areas of contention. The African opposition to the Court does not rest purely on non-committal to international criminal justice but on the current approach in the selection of cases. The seed of addressing atrocities is entrenched in the continent and through genuine consultations between the ICC and AU can that seed be properly watered. Political considerations will always be at play and the Court needs to appreciate that sooner rather than later. The membership of the ICC has Africa as the largest regional grouping. Strong leadership from the continent on international criminal justice is key to prevent a possible collapse of the ICC. At the heart of that leadership is South Africa because of its status as a political, economic and international law powerhouse in the continent. The continent should partner with the Court, other States, and CSOs to craft mechanisms to strength the work of the Court. Withdrawal from the Court will be a step backward.