

**A critical appraisal of the legal implications of South Africa's withdrawal from
the ICC in the context of its international and regional human rights obligations**

by

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ABSTRACT

This study involves a critical appraisal of the legal implications of South Africa's withdrawal from the International Criminal Court (ICC) in the context of its international and regional human rights obligations.

The dissertation also investigates the history and formation of the ICC, South Africa's involvement and its role as a guardian of international and regional human rights obligations in Africa.

The study reviews the circumstances leading to South Africa's notice of withdrawal from the ICC, including the legal implications and international human rights obligations.

This inquiry considers South Africa's proposed withdrawal from the ICC which is supported by points of departure and a comprehensive literature review.

The decision to withdraw from the ICC is considered to be a political one. However, this study raises questions about the executive's withdrawal in regard to its domestic, regional and international human rights obligations, irrespective of whether it is a member of the ICC.

The study surveys the background to South Africa's participation in the ICC, its membership of the African Union and the implications of ICC membership including the obligations imposed on member states.

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LIST OF ABBREVIATIONS

ALFA	African Legal Aid
AU	African Union
ACC	African Criminal Court
PSC	African Union Peace and Security Council
CAR	Central African Republic
DCPI	Directorate for Priority Crimes Investigation
SS	German Secret Police
PTC	ICC Pre-trial Chamber
ICJ	International Court of Justice
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICTR	International Criminal Tribunal Rwanda
ICC	International Criminal Court
ILO	International Labour Organisation
ILC	International Law Commission
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
ICJ	International Court of Justice
ICTY	International Criminal Tribunal Yugoslavia
LRA	Lord's Resistance Army
NA	National Assembly
NCOP	National Council of Provinces
NPA	National Prosecuting Authority

NDPP	National Director of Public Prosecutions
PFR	Patriotic Front Resistance
PCLU	Priority Crimes Litigation Unit
SADC	Southern African Development Community
SALC	South African Litigation Centre
SCA	Supreme Court of Appeal
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHRC	United Nations Human Rights Committee
UNSC	United Nations Security Council
USA	United States of America
USSR	Union of Soviet Socialist Republics
VCLT	Vienna Convention on the Law of Treaties

KEYWORDS AND PHRASES

The International Criminal Court

The Constitution of the Republic of South Africa

The Rome Statute

The Sirte Resolution

The Malabo Court Protocol

The European Commission on Human Rights

The Vienna Convention on the Law of Treaties

ILLUSTRATIONS

- 1 Gustav Moynier stamp; Founder Member of the International Red Cross
- 2 World countries participating in the 1948 Genocide Convention
- 3 Parties and Signatories to the *Rome Statute*.

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CHAPTER 1 Orientation to the study

1.1 Introduction

This study is a critical appraisal of the legal implications of South Africa's withdrawal from the International Criminal Court, (ICC)¹ in the context of its international and regional human rights obligations.

The history, formation, jurisdiction and composition of the ICC is examined, where the long and contentious "road to Rome" is explored.

South Africa's role as a leader in African is considered vital to the ICC's work and credibility on the continent.² This particular role developed because President Nelson Mandela supported the movement to join the ICC. As a result, South Africa became an active participant in the negotiations leading to the implementation of the *Rome Statute* in 1998.³

The influence of apartheid,⁴ the development of the new democratic dispensation and the role played by President Mandela is considered as South Africa moved towards ICC membership.

South Africa's role as an ICC member was tested with the al-Bashir affair. When President Omar al-Bashir of Sudan landed in South Africa in June 2015, he was sought by the ICC for war crimes and crimes against humanity. Two separate warrants had been issued for his arrest in March 2009 and July 2010.⁵ South Africa, as a participating party to the *Rome Statute* and having passed The Rome Statute of the International Criminal Court Act 27 of 2002, was obliged to arrest and detain President al-Bashir as soon as he set foot on South African territory. However, in contravention of the *Rome Statute*, as well as a court interdict compelling the government to take all necessary steps to prevent President al-Bashir from leaving the Republic of South

¹ Dugard J, *International Law: A South African Perspective* 174.

² Wheeler T, *Africa and the International Criminal Court* 3.

³ Du Plessis M, "South Africa's International Criminal Court Act" *Institute for Security Studies*, Paper 172, November 2008.

⁴ Dugard J, *International Law: A South African Perspective* 18-23.

⁵ ICC-02/05-01/09-1 Warrant of Arrest for Omar Hassan Ahmad Al Bashir, 4 March 2009.

Africa, he was allowed to leave the country on Monday, 15 June 2015, flying from the South African Air Force Waterkloof Air Base near Pretoria.⁶

The al-Bashir affair has subsequently been influenced by Supreme Court of Appeal, (SCA) decisions⁷ and internal constitutional considerations in the National Assembly.⁸

The motivation to give notice of withdrawal from the ICC is investigated and the legal implications of South Africa's withdrawal considered in the context of its international and human rights obligations. South Africa's proposed withdrawal from the ICC⁹ has implications for the protection of human rights by virtue of the contents of the Preamble of the Constitution.

The Preamble clearly states that via our freely elected representatives, we must promote an open democratic society based on the will of the people and build a unified South Africa to establish its rightful place as a sovereign state in the family of nations. In addition, the Bill of Rights¹⁰ enshrines the rights of all people in South Africa and promotes the democratic values of human dignity, equality and freedom. By meeting its constitutional obligations to respect and promote rights contained in section 7 of the Bill of Rights, the new democracy may be achieved. The rule of law dictates that everyone is subject to the Constitution,¹¹ including the executive. Thus, the executive's failure to comply with a High Court order that sought to arrest President Omar al-Bashir, is considered a breach of the rule of law.

The important relationships between the African countries and the ICC, including the African situations before the ICC are analysed. South Africa's global reputation as a proponent of human rights is considered against its African Union (AU) membership and continental influence. An aspect that is investigated is whether South Africa's global reputation as a powerful human rights proponent would have a persuasive influence in the rest of Africa, in the absence of ICC membership.

⁶ *South African Litigation Centre v Minister of Justice and Constitutional Development and Others* (27740/20159[2015] ZAGPPHC 402; 2016 (1) SACR 161 (GP); 2015 (5) SA 1 (GP); [2015] 3 All SA 505 (GP); 2015 (9) BCLR 1108 (GP) (24 June 2015) at 2.

⁷ *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* (867/15)[2016] ZASCA 17; 2016(4) BCLR 487 (SCA); [2016]2.

⁸ Sect 55(2)(a) of the Constitution of South Africa, 1996 (hereinafter referred to as the Constitution).

⁹ Part 13, Article 127(1) of the Rome Statute of the International Criminal Court Act 27 of 2002.

¹⁰ Sect 7(1) of the Bill of Rights of the Constitution of South Africa.

¹¹ Sect 8(1) of the Bill of Rights of the Constitution of South Africa.

The dissertation is conducted against the backdrop of international and constitutional law, providing a greater appreciation of the functions of the ICC. In addition, the constitutional values that underpin South African society are carefully examined, considering the country's international and human rights obligations.

It is important to recall at this stage of this research document that the Constitutional Court in *Glenister v President of the Republic of South Africa* (“*Glenister II*”)¹² reiterated the importance of international law to the South African constitutional order and interpretation of law. The Constitution, utilising sections 231-232, clearly describes the recognition and status of international law. The Implementation of the Rome Statute of the International Criminal Court Act (The ICC Act)¹³ was an essential human rights based policy document which contained significant legal implications and responsibility for South Africa. Any future withdrawal from the ICC would have significant legal implications which are further analysed in section 6.5 below.

1.2 Methodology of this study

This study will implement desktop research based on judicial decisions, academic authorities and government published data. The research may be defined as “external desktop research,” as data will be collected from sources external to the research centre, using online data information from international agencies.

A qualitative research¹⁴ method will be implemented, using both primary and secondary sources of data. The reason that this particular research method is used, is to provide insight into listed research objectives and uncover trends in thought and opinion.

Primary data will be sourced from the common law, legislation, case law, international law and indigenous law. Secondary data will be sourced from academic opinion, journal articles and foreign law.

An important methodological tool has been the comparative assessment of the jurisprudence contained within the *Rome Statute* of the ICC regarding human rights, and the corresponding interpretation in the Constitution of South Africa.

¹² *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA347 (CC)

¹³ The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.

¹⁴ Sharp A, Howard K, *The Management of a Student Research Project* 107

1.3 Problem statement

“What are the effects of South Africa’s possible withdrawal from the ICC in terms of international law and its regional human rights obligations?”

This problem will be systematically investigated in chapter one and two by placing the development of international law and human rights law in context with the development of the South African Constitution. The history and development of the ICC is traced in chapter three followed by a discussion of the ratification and domestication of the *Rome Statute* in chapter four. South Africa’s relationship with the AU regarding its ICC membership is probed in chapter five followed by the developments regarding the visit of President Omar al Bashir to South Africa in chapter six.

1.4 Hypotheses

The hypotheses that have been developed are:

1. International law is mainly directed at states and not in the promotion of the welfare of individuals.
2. Membership of the ICC cemented South Africa’s national commitment to human rights
3. The ICC Act and South Africa’s continued membership of the ICC underpin the new constitutional values that supports South African society.
4. The inconsistency of the South African Government’s actions regarding our membership of the ICC has diminished the character and credibility of our nation.
5. Senior government officials fear future prosecution for human rights abuse by the ICC, and are keen to exit the ICC, moving behind the cover potentially offered by an African Criminal Court. (ACC)

The supporting issues that this dissertation aims to prove are that human rights are a key consideration of the International Criminal Court, and that human rights violations that occurred during both World Wars and subsequent regional conflicts, contributed significantly towards the urgency of creating the ICC.

In addition, the dissertation will show that the relationship between South Africa and the African Union contributed towards the decision not to arrest President Omar al-Bashir when he visited South Africa in June 2015.

1.5 Points of departure

The study has identified the following points of departure:

1. To date, legal analysts and commentators have pointed to the careless and inefficient government officials that allowed President Omar al-Bashir to evade arrest in South Africa. This study suggests that the entire visit of President Omar al-Bashir was orchestrated. His arrival, tenure and departure was aided and abetted by state officials, diplomatic leaders and defence force personnel.¹⁵ When it seemed likely that an arrest warrant would be executed for al-Bashir, his hasty exit was facilitated by moving his executive jet aircraft from OR Tambo International Airport to Waterkloof Air Force Base in Pretoria. Here his hasty departure was ensured within a security cordon, hours before the High Court ruling of his arrest.¹⁶
2. The statement made by the South African Minister of International Relations, Mrs Maite Nkoana-Mashebane, regarding the reasons for South Africa's withdrawal from the ICC, indicated that South Africa had found its obligations with regard to the peaceful resolution of conflict, are at times incompatible with the interpretation given by the ICC.¹⁷ This study suggests that South Africa's ability to effectively resolve conflict in Africa is limited, and is using ICC membership as an excuse for ineffective human rights protection on the continent.
3. In the context of existing ICC membership, South Africa's role as a champion of human rights, and a leader on the continent is considered a vital component of the success of the ICC. This study suggests that South Africa has demonstrated, by intending to leave the ICC, that it is not the champion of international human rights on the African continent and has not fully considered the legal implications following such withdrawal. Recent events within the country suggest an abuse of executive power, neglect of human rights and disregard for parliamentary process.

¹⁵ This matter will be fully discussed below in Chapter 6.

¹⁶ See note 6 above.

¹⁷ Notification given to the United Nations by South African Minister of International Relations, Mrs Maite Nkoana-Mashebane, October 19, 2016.

1.6 Critical events that promoted the development of International human rights within the context of International Criminal law.

The atrocities committed by Germany and Japan¹⁸ during the Second World War, led to the institution of *ad hoc* tribunals¹⁹ to punish perpetrators for violations of crimes against humanity, among others. These atrocities contributed significantly to the recognition of international human rights law and the introduction of international criminal law.

International human rights law represents the universal recognition that basic rights and fundamental freedoms are inherent to all human beings.²⁰ The international human rights movement was initiated when the United Nations General Assembly adopted the Universal Declaration of Human Rights (UDHR) on 10 December 1948.²¹ The UDHR, including the International Covenant on Civil and Political rights, its two Optional Protocols, the International Covenant on Economic, Social and Cultural Rights, collectively form the International Bill of Human Rights.²²

1.6.1 The Second World War and the atrocities

The Second World War commenced on 1 September 1939 with Germany's invasion of Poland.²³ Any war could be categorised as an "atrocious" but the war started by Hitler brought on a scale of atrocity never previously experienced. Atrocities were committed across Western and Eastern Europe, the Axis countries and in the Pacific region.

The atrocities of the Second World War are sadly only remembered in terms of the Concentration Camps, Extermination Centres and Labour Camps situated in Germany and Poland.²⁴ The extermination camps of Belzec, Sobibor and Treblinka served as "death factories" in which the German Secret Service (SS) and police murdered nearly 2,7 million Jews.²⁵

¹⁸ Brackman AC, *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials* (1989) 36.

¹⁹ Taylor T, *The Anatomy of the Nuremberg Trials*, Knopf Publishing Group New York (1992) 62.

²⁰ As adopted in section 7(1) in the Constitution of South Africa.

²¹ www.un.org/en/universal-declaration-human-rights/ accessed 6 March 2017.

²² Universal Declaration of Human Rights (art.1) adopted by the UN General Assembly Resolution 217A (III) of 10 December 1948.

²³ Churchill W, *The Second World War: The Gathering Storm* 15.

²⁴ Vogelsang P, Larson B, (2002) *The Difference between Concentration Camps and Extermination Camps*. 12.

²⁵ Holocaust Encyclopaedia, *Killing Centres: An Overview*. United States Holocaust Museum.

The atrocities led to the establishment of two *ad hoc* international tribunals to investigate and punish perpetrators.

1.6.2 Tribunals: Nuremberg and the Far East

Following the Second World War, the victorious Allied governments established the first international criminal tribunals. They intended to prosecute high-level political officials and military authorities for war crimes and other wartime atrocities.²⁶ The four major Allied powers, France, the Soviet Union, the United Kingdom and the United States of America, (USA) set up the International Military Tribunal (IMT) in Nuremberg, Germany.²⁷

The lesser-known International Military Tribunal for the Far East (IMTFE) was created in Tokyo, Japan, pursuant to a 1946 proclamation by the United States Army General, Douglas MacArthur. He was the Supreme Commander for the Allied Powers in occupied Japan.²⁸

These trials constituted a new radical approach to international law, which imposed considerable influence on the post-war international community searching for a similar international court system on a permanent basis.²⁹

Initial plans to prosecute German political and military leaders were announced at the 1941 St. James Declaration in London. This was attended by all the Commonwealth members including those from the Union of South Africa, Allied Powers and the Soviet Union.³⁰ The St. James Declaration stated that its aim was the punishment, via channels of organised justice, those guilty of perpetrating war crimes.³¹

The Nuremberg trials lasted from November 1945 until October 1946. The IMT prosecutors indicted 22 senior German political and military leaders. The Tribunal

²⁶ Ball H, *Prosecuting War Crimes and Genocide; The Twentieth Century Experience* 5.

²⁷ Taylor T, *The Anatomy of the Nuremberg Trials* Knopf Publishing Group, New York (1992) Judgement published at (1947) 41 *AJIL* 172.

²⁸ Brackman A C, *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials* (1989).

²⁹ Sands P, *From Nuremberg to The Hague; The Failure of International Criminal Justice* 84.

³⁰ Inter-Allied Declaration signed on 12 June 1941 at St. James Palace, London.

³¹ Declaration by the United Nations, Washington, January 1 1942, developing the Atlantic Charter which was built on the principles dictated by the St. James Declaration of 12 June 1941.

found nineteen individual defendants guilty and sentenced them to punishment that ranged from death by hanging to fifteen years imprisonment.³²

Unlike the IMT, the IMTFE was not created by international agreement, but emerged from international agreements to try Japanese war criminals.³³ The IMTFE had jurisdiction to try individuals for crimes against peace, war crimes and crimes against humanity. The IMTFE also had jurisdiction over crimes that occurred over a greater period of time, from the 1931 Japanese invasion of Manchuria to Japan's surrender in 1945.³⁴

Inevitably there was criticism that these tribunals were established by the victors to try the defeated and were a form of retribution.³⁵

As a result of the IMT and IMTFE tribunals, the United Nations (UN) was energised to adapt a resolution on 9 December 1948, calling on the International Law Commission (ILC) to start work on a draft statute for the establishment of the international criminal court.³⁶

It is considered that the establishment of the ICC should be regarded as a major development in human rights law, and that the international regulation of human rights is considered mainly a post Second World War phenomenon.³⁷

While the development of the ICC statute had recommenced following the termination of the Cold War in 1989,³⁸ the early 1990s witnessed two landmark events that strengthened the momentum for the development of the Court. These were the atrocities that occurred in the former Yugoslavia and Rwanda, causing a threat to international peace.³⁹ The tribunals that were created by the UN Security Council were

³² Trials of War Criminals before the Nuremberg Military Tribunal under Control Council Law No. 10 Vol XV Procedure, Practice and Administration, Washington DC.

³³ Brackman A C, *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials* (1987) 23.

³⁴ The Potsdam Declaration. Proclamation defining terms for the Japanese Surrender issued at Potsdam, Germany, 26 July, 1945.

³⁵ *Rethinking Justice? Decolonisation, Cold War and Asian War Crimes Trials after 1945*. Cluster of Excellence, "Asia and Europe in a Global Context." Heidelberg University, 26.10.2014-29.10.2014.

³⁶ Schabas W, *An Introduction to the International Criminal Court*, 3rd ed(2007) 167.

³⁷ Dixon M, McCorquodale R, *Cases and Materials on International Law* 175.

³⁸ Merkl P, *The Rift Between America and Old Europe; The Distracted Eagle* (2005).

³⁹ Blumenthal D, McCormack T, *The Legacy of Nuremberg; Civilising Influence or Institutional Vengeance?* (2008).

a response to these concerns, and seen as a necessary measure to enforce Chapter VII of the UN Charter.⁴⁰

1.6.3 Other tribunals

Chapter VI of the UN Charter explicitly states that the UN Security Council must determine and make decisions in order to, “maintain or restore international peace and security.”⁴¹ This provision should be considered against further atrocities that were committed during the period of the international codification of human rights, which demonstrated the need for a permanent tribunal.

The ILC prepared a draft Statute for an International Criminal Tribunal in the early 1990s which was forwarded to the UN General Assembly for consideration.⁴² During the time that the commission was preparing the Draft Statute, deteriorating events compelled the creation of a court on an *ad hoc* basis to respond to the numerous atrocities that were being committed in the former Yugoslavia.⁴³ That tribunal, the International Criminal Tribunal for the Former Yugoslavia (ICTY) was established by the UN Security Council in 1993. Its mandate was to prosecute persons responsible for serious violations of international humanitarian law committed in the former Yugoslavia since 1991.⁴⁴ The first prosecutor of the Tribunals from 1994 to 1996 was Richard Goldstone of the South African Constitutional Court.⁴⁵

In November 1994, acting on an urgent request from Rwanda, the UN Security Council voted to create a second *ad hoc* tribunal, the International Criminal Tribunal for Rwanda, (ICTR).⁴⁶ The ICTR was charged with the prosecution of genocide and other serious violations of international humanitarian law committed in Rwanda and neighbouring countries in 1994. The President of the Appeals Chamber of the ICTR, prior to her appointment as a judge of the ICC, was Judge Navi Pillay, another prominent South African jurist.⁴⁷

⁴⁰ Allison G, Powers S, *Realising Human Rights; Moving from Inspiration to Impact* (2000) 42.

⁴¹ United Nations Security Council Charter, Chapter VI Art. 39.

⁴² Crawford J, The ILC adopts a Statute for an International Criminal Court (1995) 89 *AJIL* 404.

⁴³ Dugard J, *International Law; A South African Perspective* 172.

⁴⁴ UN Security Council Resolution 808 of 22 February 1993 and UN Security Council Resolution 827 of 25 May 1993.

⁴⁵ Goldstone R, *Journal of International Criminal Justice* 2 (2004) 380-384.

⁴⁶ Security Council Resolution 955 of 8 November 1994.

⁴⁷ Dugard J, *International Law; A South African Perspective* 172.

The appointment of two prominent members of the South African judiciary to positions on the ICTY and ICTR, occurred at virtually the same time that the first democratic elections were held in South Africa. The prominence and recognition afforded to the new South African Constitution,⁴⁸ the election of President Nelson Mandela and a comprehensive Bill of Rights,⁴⁹ propelled South Africa's legal expertise regarding human rights issues, onto the world stage.

The activities of the ICTY and ICTR tribunals promoted the concept of a permanent international criminal court that was both practical and desirable.⁵⁰ The legal principles developed during the operation of the ICTY and ICTR tribunals contributed to the debates at Rome and gradually became reflected in the *Rome Statute*.⁵¹

1.7 The influence of international human rights law on South Africa

International human rights law refers to that body of international law created to protect human rights at the international, regional and domestic levels.⁵² They are mainly obligations which states are bound to obey and are primarily made up of treaties, agreements between states and customary international law.

Section 39 of the Bill of Rights indicates that the Constitution must always be considered in the interpretation of human rights law. This promotes the State's responsibility to promote the rights contained in section 7(2) of the Bill of Rights, which reflects aspects of the Universal Declaration of Human Rights adopted in 1948.⁵³

The link between Human Rights Law and International Criminal Law was developed following the acknowledgement that international law, up until 1945, was largely directed at states, and did not consider the interests of the individual, who were often caught up in international conflict and related criminal activities.⁵⁴

⁴⁸ The Constitution of the Republic of South Africa, 1996, commencement 4 February 1997.

⁴⁹ Bill of Rights, Chapter 2 of the Constitution of South Africa sections 7-39.

⁵⁰ Dugard J, *International Law; A South African Perspective*, 172-173.

⁵¹ Schabas W, *An Introduction to the International Criminal Court* (2004) 12.

⁵² definitions.uslegal.com/i/international-human-rights-law/ accessed 17 March 2017.

⁵³ The Universal Declaration of Human Rights adopted by the United Nations General Assembly in 1948.

⁵⁴ Dugard J, *International Law: A South African Perspective*, 321.

1.7.1 The inclusion of the values of freedom, dignity and equality

Section 12 of the Constitution combines the right to freedom and security of the person with regards to a right to bodily and psychological integrity.⁵⁵ When a person is deprived of physical freedom, the Constitution⁵⁶ guarantees both substantive and procedural protection. The two components of the right were described in *S v Coetzee*⁵⁷ by O'Regan J. She indicated that the first component is concerned with the reasons for which the state may deprive someone of their freedom, and is known as the substantive component. The second is concerned with the manner whereby a person is deprived of their freedom, and is known as the procedural component. The South African Constitution recognises both aspects are important in a democracy and may not deprive the freedom of individuals in a manner which is procedurally unfair.⁵⁸

In *Ferreira v Levin*, Ackerman J, suggested a “broad and generous” interpretation of s 11(1) of the Interim Constitution, and held that the right to freedom amounted to a presumption against the imposition of legal and other restrictions on conduct without sufficient reason.⁵⁹ Writing for the majority in the *Ferreira* case, Chaskalson CJ indicated that s 11(1) of the Constitution was directly comparable to Article 5(1) of the European Convention on Human Rights and to a number of similarly formulated provisions in other international human rights instruments.⁶⁰

In *De Lange v Smuts*⁶¹ Ackerman J, indicated that the cause for deprivation of freedom must be in accordance with the basic tenets of a legal system. This also corresponds with the standards of “fundamental justice” suggested⁶² in section 7 of the Canadian Charter of Rights and Freedoms.

The content of both European and Canadian human rights and freedom charters is clearly evident in the Constitution,⁶³ where persons are not to be deprived of freedom arbitrarily or without just cause.

⁵⁵ Currie I, de Waal J, *The Bill of Rights Handbook* 270.

⁵⁶ Section 12(1) of the Constitution of South Africa.

⁵⁷ *S v Coetzee* 1997(3) SA 527 (CC) [159] quoted in *De Lange v Smuts* NO 1988(3) SA 785 (CC) [18].

⁵⁸ Section 12 and 35 of the Constitution of South Africa.

⁵⁹ *Ferreira v Levin* NO 1996(1) SA 984 (CC) [54].

⁶⁰ *Ferreira v Levin* NO 1996(1) SA984 (CC) [170].

⁶¹ *De Lange v Smuts* NO 1998(3) SA785 (CC) [57].

⁶² Canadian Charter of Rights and Freedoms, section 7.

⁶³ Section 12(1)(a) of the Constitution of South Africa.

The value of freedom is also included in other sections of the Bill of Rights, such as in Freedom of Religion (s 15), Freedom of Expression (s 18), Freedom of Movement and Residence (s 21) and Freedom of Trade (s 22).

The Constitution⁶⁴ indicates that everyone has inherent dignity and the right to have their dignity respected and protected. Chaskalson CJ,⁶⁵ reflecting on the value of human dignity as a founding value said:

“-The affirmation of [inherent] human dignity as a foundational value of the constitutional order places our legal order firmly in line with the development of constitutionalism in the aftermath of the Second World War.-”

The concept of human dignity was codified in international human rights law in the UN Charter and became the foundation of the International Bill of Human Rights. The Preamble to the Constitution of South Africa, champions an open democratic society based on social justice and fundamental human rights.

The influence of international covenants and judicial interpretation have influenced the importance of dignity contained in the Constitution of South Africa.⁶⁶ Currie and De Waal⁶⁷ believe that human dignity is not only a justiciable and enforceable right that must be respected and protected, but is also a value that informs the interpretation of possibly all the other fundamental rights.

It could also be suggested that dignity is a group-based concept involving a collective concern for the well-being of others. In *Makwanyane*,⁶⁸ Langa J, linked the respect for life and dignity with the African cultural concept of *ubuntu*, where the dominant theme is that the life of another person is “at least as valuable as one’s own.”⁶⁹ In the same case, Mokgoro J,⁷⁰ referred to the International Covenant on Civil and Political Rights, where the inherent dignity of all members of the human family are derived from the

⁶⁴ Section 10 of the Constitution of South Africa.

⁶⁵ Chaskalson A, “Human Dignity as a Foundational Value of our Constitutional Order. (2000) 16 *SAJHR* 193,196.

⁶⁶ Section 39(1)(b) and (c) of the Constitution of South Africa.

⁶⁷ Currie I, De Waal J, *The Bill of Rights Handbook* 253.

⁶⁸ *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

⁶⁹ Ubuntu is an ancient African word meaning humanity to others and incorporates a philosophical concept of the universal bond of sharing.

⁷⁰ *S v Makwanyane and Another* 1995 (3) SA 391 (CC) [308].

dignity of the individual human person. This, he said, “is not different from what the spirit of *ubuntu* embraces.”

The values of human dignity, freedom and equality guide the interpretation of all human rights, as contained in section 39(1)(a) of the Constitution.

1.7.2 The obligation of the State to fulfil rights contained in section 7(2) of the Bill of Rights

The Constitution⁷¹ determines that the State must respect, protect, promote and fulfil the rights contained in the Bill of Rights. This section is described by de Vos⁷² as central to the transformative ethos of the Constitution. It conveys the concept that the state must not only refrain from interfering with the enjoyment of rights, but must also protect and fulfil the enjoyment of rights. It is important to note that section 7(2) not only applies to the duties imposed by social and economic rights, but also applies to all rights contained in the Bill of Rights.

The Constitutional Court has recognised in several judgements that section 7(2) places both a negative and positive obligation on the state to uphold civil and political rights. In *August v Electoral Commission and Others*⁷³ the court recognised the positive duties imposed by the right to vote.⁷⁴

In *Glenister v President of the Republic of South Africa*⁷⁵ the court outlined the role and responsibility placed on the state as outlined in section 7(2) of the Constitution.⁷⁶ The court also stated that section 39(1)(b) of the Constitution creates a constitutional obligation to take international law into consideration, in order to promote unity between the Republic’s external obligations under international law and the ensuing impact on domestic legal matters.

The direct application of the duties imposed on the state as contained in section 7(2) of the Constitution, are governed by the application of section 8(1).

⁷¹ Section 7(2) of the Constitution of South Africa.

⁷² De Vos P, *et al*, *South African Constitutional Law in Context*. 671.

⁷³ *August and Another v Electoral commission and Others* (CCT8/99) [1999] ZACC 3; 1993(3) SA 1; 1999 (4) BCLR 363 (1 April 1999).

⁷⁴ Section 19(30)(a) of the Constitution of South Africa.

⁷⁵ *Glenister v President of the Republic of South Africa* 2011(3) SA 347 CC [201].

⁷⁶ The State must respect, protect, promote and fulfil the rights in the Bill of Rights. Section 7(2) of the Constitution of South Africa.

Section 8(1) of the Constitution states that the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of State.⁷⁷ This could be described as direct vertical application,⁷⁸ which outlines the circumstances in which the law and conduct of the State may be challenged as inconsistent with the Bill of Rights.

1.7.3 The incorporation of international law in the Constitution

From 1948 to 1990, South Africa was in conflict with both the international community and international law. During this period international law was perceived as a threat to the state, but is now viewed as one of the pillars of the new democracy.⁷⁹

In terms of section 39(1)(b) of the Constitution, courts must consider international law when interpreting the Bill of Rights. International law had a marked effect on the court's interpretation in the *Governing Body of the Juma Masjid Primary School*⁸⁰ where international sources of law such as the International Covenant on Economic, Social and Cultural Rights, (ICESCR) and the United Nations Human Rights Committee (UNHRC) were referred to and formed part of the judgment.

The common law has been given constitutional endorsement in the Constitution.⁸¹ Section 232 states that customary international law is law in the Republic of South Africa, unless it is inconsistent with the Constitution or an Act of Parliament.

This section illustrates that international law is no longer subject to subordinate legislation.⁸² Courts must interpret legislation that is consistent with international law.

1.7.4 The importance of the *Makwanyane* case in the harmonisation and explanation of international law

It is important to understand the significance of the development and interpretation of section 35 and 39 of the 1993 and 1996 Constitutions respectively. This development is discussed with reference to the landmark case of *S v Makwanyane*.⁸³

⁷⁷ Section 239 of the Constitution of South Africa.

⁷⁸ Currie I, De Waal J, *The Bill of Rights Handbook* 41.

⁷⁹ 1 *EJIL* (1997) 77-92.

⁸⁰ *Governing Body of the Juma Masjid Primary School v Essay NO* 2011 (8) BCLR 761 (CC) [45].

⁸¹ S 232 of the Constitution of South Africa.

⁸² Dugard J, *International Law and the South African Constitution* 79.

⁸³ *S v Makwanyane* 1995 (3) SA 391 (CC) [35].

The key issue that is addressed in *Makwanyane* is the manner whereby the court explained section 35(1)⁸⁴ of the 1993 Constitution.

This case was submitted to the Court assuming that the death penalty contravened section 11(2) of the 1993 Constitution, among others, which extended the right of the individual not to be subjected to such cruel, inhumane and degrading punishment.

Section 35(1) contained in Chapter 3 of the 1993 Constitution states:

“-In interpreting the provisions of this Chapter, a court of law shall promote the values which underlie an open and democratic society based on freedom of equality and shall, where applicable, have regard to public international law applicable to the rights entrenched in this Chapter, and may have regard to comparable foreign case law.-”

Section 39(1) of the 1996 Constitution differs from the content of section 35(1) of the 1993 Constitution with regards to the consideration of international law. Section 39(1) of the 1996 Constitution provides:

“-When interpreting the Bill of Rights, a court, tribunal or forum-

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.
- (b) must consider international law; and
- (c) may consider foreign law.-”

It is important to note the use of the word “must” in the consideration of international law and “may” when considering foreign law. Keightley⁸⁵ makes the point that section 39(1) of the 1996 Constitution extends the interpretational role of international law further than was the position in the 1993 Constitution. In the 1996 Constitution, not only the courts, but also any other tribunal and forum are obliged to consider international law.

Makwanyane dealt with the abolition of the death penalty by considering comparative decisions from other jurisdictions, including international human rights law. These included the Universal Declaration of Human Rights (1948), the European

⁸⁴ Section 35(1) of the 1993 Constitution of South Africa deals with the interpretation of provisions promoting the values that underlie an open democratic society based on freedom and equality regarding arrested and detained persons. Consideration should be given to public international law and may be given to comparable foreign case law.

⁸⁵ Keightley R, “Public International Law and the Final Constitution.” (1996) 12 *SAJHR* 404-418 at 415.

Commission on Human Rights and the United Nations Committee on Human Rights.⁸⁶ The decisions reached by these courts, whilst not binding in South African law, assisted the court in reaching its final decision.

In terms of section 35(1) of the 1993 Constitution, the court in *Makwanyane* concluded that the term “international law” included both binding and non-binding sources of international law.⁸⁷

The *Makwanyane* decision was extremely important in that it provided guidance in the application of international law regarding constitutional interpretation in that one can derive assistance from public international law, but one is not bound by it.⁸⁸

The court in the *Makwanyane* case also recognised that both binding and non-binding international law created the framework for the interpretation of public international law.⁸⁹ Whilst guidance can be found in international law, the courts should be mindful of the fact that the Constitution is the highest law in the Republic, and that any law, including international law, that is inconsistent with it, is invalid.⁹⁰

Whilst considering the impact made by *Makwanyane* in the context of international law, it is important to balance that decision based on the 1993 Constitution with that made in *Government of the Republic of South Africa v Grootboom*,⁹¹ which is based on the 1996 Constitution. In *Grootboom*, the court accepted the position regarding international law for the purposes of section 39(1)(b) of the 1996 Constitution. This included both binding and non-binding sources of international law to provide a framework for constitutional interpretation. However, Yacoob J, stated that while international law might be a guide to interpretation, “the weight to be attached to any particular principle or rule of international law will vary.”⁹²

Following this interpretation of international law, it is appropriate to investigate how international agreements apply in South Africa in a manner that is consistent with the current interpretation of international law

⁸⁶ Du Plessis LM, “Interpretation” in Woolman S, Roux T and Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2008) 32:1-193 at 172. In *S v Makwanyane* 1995 (2) SA 391 (CC) [39].

⁸⁷ *S v Makwanyane* 1995 (2) SA 391 (CC) at [34] and [35].

⁸⁸ *S v Makwanyane* 1995 (2) SA 391 (CC) at [39].

⁸⁹ *S v Makwanyane* 1995 (3) SA 391 (CC) at [35].

⁹⁰ S 2 of the 1996 Constitution; *S v Makwanyane* 1995 (3) SA 391 (CC) [36-39].

⁹¹ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

⁹² *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) at [26].

1.7.5 Section 231 of the Constitution and international agreements

Section 231 of the 1996 Constitution provides guidance on the implementation of international law.⁹³

Dugard⁹⁴ points out that the 1996 Constitution, uses the term “international agreement” instead of the more commonly used term, “treaty.” This has created uncertainty over the meaning of section 231, as there is support for the view that the term “international agreement” is wide enough to include both legally binding agreements (treaties) and non-binding, unenforceable informal agreements.⁹⁵ The Constitutional Court in *Harksen v President of the Republic of South Africa* the court stated that “international agreement” should be interpreted to mean “treaty” as defined in article 2 of the VCLT.⁹⁶

Section 231 (1) and (2) state:

- (1) The negotiating and signing of all international agreements is the responsibility of the national executive.
- (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

In *Glenister v President of the Republic of South Africa*,⁹⁷ the Constitutional Court stated that the national executive is assigned “the authority to negotiate and sign”⁹⁸ international treaties, whereas the ratification falls within the province of parliament. It is important to differentiate between the official external ratification and the subsequent internal approval process. The key issue that must be identified, and highlighted in *S v Harksen*,⁹⁹ is that the agreement between states is in writing and that the State parties intend to be governed by international law.

This process was followed on 17 July 1998, when the South African executive signed and ratified the *Rome Statute*, becoming the 23rd State Party. In order to incorporate

⁹³ Sections 231-233 of the Constitution of South Africa.

⁹⁴ Dugard J, *International Law. A South African Perspective* 60.

⁹⁵ Olivier M, *Informal international agreements under the 1996 Constitution* (1997) 22 *SAYIL* 63.

⁹⁶ *Harksen v The President of the Republic of South Africa and Others* (CCT 41/99) [2000] ZACC 29; 2000(2) SA 825 (CC); 2000(1) SACR 300 (5) BCLR 474 (30 March 2000) [24].

⁹⁷ *Glenister v President of the Republic of South Africa* (2011) ZACC 6, 2011(3) SA 347 (CC).

⁹⁸ Section 2 of the 1996 Constitution; *S v Makwanyane* 1995 (3) SA 391 (CC) [85].

⁹⁹ *S v Harksen* 2000 (1) SA 1185 (C) at [85].

the obligations of the *Rome Statute*, South Africa's parliament approved the *Implementation of the Rome Statute of the International Criminal Court Act*¹⁰⁰ (ICC Act). A key provision in the ICC Act extends jurisdiction to include a person, who "after the commission of the crime, is present in the territory of the Republic," which then provides South African courts with universal jurisdiction.¹⁰¹

Section 231(3) contains provisions directly related to the internal constitutional requirements of how South Africa implements ratification or accession.¹⁰² This serves to promote parliamentary participation in the decision making process when considering rights and obligations at the international level. The very nature of parliamentary participation suggests the inclusion of public comment and opinion. This complies with the Bill of Rights, section 15(1) freedom of opinion and section 16(1)(b) freedom to receive or impart information or ideas. These constitutional provisions are key to parliamentary participation in the domestication of international obligations. Section 231(3) provides the basis of a crucial subsequent discussion in this dissertation, where the possible legal implications of rescinding of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 is investigated.

In *Azapo v President of the Republic of South Africa*¹⁰³ it was also confirmed that "international conventions and treaties do not become part of the municipal law in our country, and are not enforceable at the instance of private individuals in our courts, until, and unless, they are incorporated into municipal law by legislative enactment."

Section 231(4) makes it clear that the Constitution does not compel Parliament to introduce approved and ratified international agreements into domestic law. Parliament must determine appropriate domestic measures to comply with international obligations.¹⁰⁴ All will depend on the intention of the parties which must

¹⁰⁰ The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002. (Implemented in terms of Sect 231(4) of the Constitution of South Africa)

¹⁰¹ Section 4(3)(c) of the ICC Act.

¹⁰² The Constitution does not give any indication of which agreements would qualify as technical, administrative or executive as contained in section 231(3) of the Constitution. The internal practice that has developed within the Office of the Chief State Legal Adviser is to consider as "technical" those agreements that do not have major political significance and do not impact domestic law. The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 certainly impacts domestic law and section 231(3) would not be directly applicable for the purposes of this dissertation

¹⁰³ *Azapo v President of the Republic of South Africa* [1996] ZACC 16, 1996 (4) SA 671 (CC) at [688].

¹⁰⁴ Article 12 of the Vienna Convention; *S v Eliasov* 1967(4) SA583(A), discussed by J Dugard in "The Treaty making Process" (1968) 85 *SALJ* 1.

be ascertained from the consideration of surrounding circumstances at the conclusion of an international agreement.

In *Glenister*, it was pointed out that “endemic corruption threatens the injunction that government must be accountable, responsive and open.”¹⁰⁵ In addition article 18 of the Vienna Convention on the Law of Treaties (VCLT)¹⁰⁶ confers a duty on the South African government to act in good faith domestically and to eliminate arbitrary acts which would defeat the purpose of an international treaty.

Having set out the background relating to the importance of international human rights law in South Africa, the next section explains South Africa’s relationship with the International Criminal Court.

1.8 South Africa and the International Criminal Court (ICC)

South Africa has had a long and distinguished association with the development and formation of the ICC. The role played by South Africa is discussed below in section 3.1 but it is essential to recall why the Republic pursued membership of this international body.

The reasons are best embodied by the words of President Nelson Mandela in 1993:

“-South Africa’s future foreign relations will be based on our belief that human rights should be the core concern of international relations, and we are ready to play a role in fostering peace and prosperity in the world we share with the community of nations. The time has come for South Africa to take up its rightful place in the community of nations.”

“South Africa views the ICC not in isolation, but as an important element in a new system of international law and governance. The importance of the ICC needs to be seen in context with the need for the fundamental reform of the system of global governance.”

“Indeed, Africa and the whole world need the ICC yesterday, today and forever.”¹⁰⁷

In the preamble to the ICC Act, South Africa made the solemn commitment to bring to justice persons who commit crimes against humanity and war crimes, in line with its international obligations. By doing so South Africa signalled to the world its intention

¹⁰⁵ *Glenister* (see note 84) at [176].

¹⁰⁶ The Vienna Convention on the Law of Treaties, adopted on 22 May 1969 and entered into force on 27 January 1980.

¹⁰⁷ Bizos G, “Why SA must not withdraw from the ICC”<http://mg.co.za/article/2015-10-16-why-sa-must-not-withdraw-from-the-icc> Accessed 16 October 2016.

to help drive a system of international criminal justice based more on humanity¹⁰⁸ and its duty to its citizens.

1.8.1 The part played by South Africa in the formation of the ICC

Despite the fact that the direct involvement of South Africa in the formation of the ICC occurred during the latter stages of the 20th century, some significant events guided our contribution.

Representatives from the Union of South Africa contributed to the establishment of the League of Nations, established after the First World War on 28 April 1919.¹⁰⁹

The Union of South Africa contributed to the formation of the St. James Declaration in London during January 1942, providing for the punishment, through international channels of organised justice, those guilty of war crimes.¹¹⁰

South Africa contributed to the formation of the United Nations in October 1945, composing the Preamble to the United Nations Charter. This reflected the intention “to establish conditions under which justice and respect for obligations arising from treaties and other sources of international law can be maintained.”¹¹¹

The UN Security Council established the International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993,¹¹² which was formed to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia. This was followed in November 1994,¹¹³ by the second *ad hoc* tribunal (ICTR) to prosecute serious violations of international humanitarian law in Rwanda. The first prosecutor of the Tribunals, from 1994 to 1996, was Richard Goldstone from the South African Constitutional Court. The President of the Appeals Chamber for the Rwanda Tribunal was another South African, Judge Navenethem (Navi) Pillay.¹¹⁴

¹⁰⁸ Sands P, “Lawless World: The Cultures of International Law” (2006) 41 *Texas International Law Journal* 387.

¹⁰⁹ Potgieter D J, et al. (eds) (1970) *Standard Encyclopaedia of Southern Africa* 560.

¹¹⁰ *Punishment of War Crimes. The inter-Allied Declaration signed at St James Palace, London, 13 January 1942.* (Issued by the Inter-Allied Information Committee, London, 1942) pp 2-4.

¹¹¹ Schlesinger S, *Act of Creation: The Founding of the United Nations: A Story of Superpowers, Secret Agents, Wartime Allies and Enemies, and their Quest for a Peaceful World* pp236-237.

¹¹² Security Council Resolution 808 of 22 February 1993.

¹¹³ Security Council Resolution 955 of 8 November 1994.

¹¹⁴ Dugard J, *International Law: A South African Perspective*, 172.

1.8.2 Membership of the ICC cements South Africa's national commitment to human rights

Before 1994, there was little that South African courts could, or would do, about international human rights instruments.

South Africa was party to only one instrument containing human rights clauses, the Charter of the United Nations, which was not incorporated into municipal law.¹¹⁵ Consequently no direct effect could be given to articles 55 and 56 of the Charter. In *S v Werner*,¹¹⁶ the Appellate Division failed to take account international human rights norms.

Since 1994, South Africa is party to major human rights instruments,¹¹⁷ including the African Charter on Human and People's Rights. In addition the 1996 Constitution requires courts to consider international human rights instruments in their application of the Bill of Rights in the Constitution.¹¹⁸

The Constitutional Court explained the inter-relationship between South Africa's obligations under international law and its domestic law in *National Commissioner of Police v Southern African Human Rights Litigation Centre*.¹¹⁹ Torture is criminalised in South Africa through the enactment of the Torture Act¹²⁰ and operation of sections 232 and 233 of the Constitution, providing the application of international law and the ICC Act.

The Implementation of the ICC Act¹²¹ in August 2002 cemented South Africa's commitment to human rights. Prior to the passing of this Act, South Africa had no domestic legislation relating to war crimes or crimes against humanity, and no domestic prosecutions of recognised international crimes had occurred. The ICC Act ensures that South Africa is aligned with the *Rome Statute* and builds on the concept of complementarity whereby state parties prosecute individuals within their national

¹¹⁵ Dugard J, *International Law: A South African Perspective* 346.

¹¹⁶ *S v Werner* 1981 (1) SA 187 (A).

¹¹⁷ For example The International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination.

¹¹⁸ Section 39(1) of the Constitution of South Africa.

¹¹⁹ *National commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* (CCT 02/14)[2014]ZACC 30; 2015(1) SA 315 (CC) [39].

¹²⁰ Prevention and Combatting of Torture of Persons Act 13 of 2013.

¹²¹ See note 98 above.

jurisdiction for crimes the ICC would otherwise hold jurisdiction. The ICC Act enables South African domestic law to act against crimes against humanity and promotes the sanctity of international human rights.¹²² Any repeal of the ICC Act would severely degrade this capacity.

Since 1994 South Africa has become an integral and accepted member of the community of nations. In the following sections key aspects of the *Rome Statute* are investigated.

1.9 Legal-historic development leading to the formation of the *Rome Statute*

The framework of the literature review is based on a logical sequence of historical events preceding the formation of the *Rome Statute* of the ICC. South Africa's involvement with the implementation of the *Rome Statute* and the resulting Implementation of the *Rome Statute of the International Criminal Court Act*¹²³ are studied. The subsequent interpretation of the Act and the influence of the AU are also considered.

There are examples of international trials during the Middle-Ages,¹²⁴ but only at the Paris Peace Conference of 1919 did International Criminal Justice become recognised.¹²⁵ All efforts to present the German Emperor before an international tribunal¹²⁶ were unsuccessful, yet the concept had been promoted onto the international arena. Following the Second World War and the Nuremberg and Tokyo trials,¹²⁷ the International Law Commission (ILC) made preparations for a permanent court related to the Genocide Convention of 1948.¹²⁸ This Convention, defined in legal terms, the crime of genocide, as conceived by Lemkin.¹²⁹

¹²² Du Plessis M, "Bringing the International Criminal Court home-the implementation of the Rome Statute of the International Criminal Court Act 2002," *SACJ* (2003) 16.

¹²³ *The Implementation of the Rome Statute of the International Criminal Court Act* 27 of 2002.

¹²⁴ Schwarzenberger G, *International Law as applied by International Courts and Tribunals* vol 1, 3 uppl, 1957 s114. The Middle Ages being the period of European history from the fall of the Roman Empire in 1000 to 1453 AD.

¹²⁵ Bassiouni M, *International Criminal Law* 269.

¹²⁶ Dugard J, *International Law* 269.

¹²⁷ Taylor T, *AJIL* 172.

¹²⁸ The Convention on the Prevention and Punishment of the Crime of Genocide. United Nations General Assembly Resolution 260, 12 January 1951.

¹²⁹ Staub E, *The roots of Evil: The Origins of Genocide and other Group Violence*. 8.

In 1954 as the Cold War¹³⁰ raged on, the UN General Assembly suspended the development of a permanent court, which was not seriously revived until the establishment of the *ad hoc* tribunals for the former Yugoslavia and Rwanda.¹³¹ This led to the development of the *Rome Statute* of the International Criminal Court¹³² on 17 July 1998, entering into force on 1 July 2002.

The Preamble to the *Rome Statute*¹³³ states that it is the duty of every state to exercise criminal jurisdiction over those responsible for international crimes. This provides that the jurisdiction of the court shall be complementary to national criminal jurisdiction.¹³⁴ According to the *Vienna Convention on the Law of Treaties*,¹³⁵ a Preamble to a treaty is deemed to be part of its context. Schiff¹³⁶ has described the Preamble to the *Rome Statute* as, “capturing the idealism of the ICC project and mirroring the tensions between a universal image of humanity and a global society riven by national loyalties.”

In 1993 the UN Security Council established the International Criminal Tribunal in the former Yugoslavia, (ICTY)¹³⁷ mandated to prosecute persons responsible for serious violations of international humanitarian law committed within Yugoslavian territory.¹³⁸ In 2009 the ICTY reported that it had concluded proceedings against 120 accused out of the 161 indicted, and expected to conclude its proceedings in 2012.¹³⁹

In another UN Security Council appointed tribunal, Judge Pillay,¹⁴⁰ also a South African, was appointed President of the Appeals Chamber for the Rwanda Tribunal (ICTR), prior to her appointment as a judge of the ICC. Schabas¹⁴¹ has indicated that the findings of these Tribunals contributed to the debates at Rome and eventually were reflected in the *Rome Statute*. He added, “the development and growth of international

¹³⁰ Merkl P, *The Rift between America and Old Europe* 2005.

¹³¹ Dugard J, *International Law: A South African Perspective*, 172.

¹³² Dugard J, *International Law: A South African Perspective*, 173.

¹³³ Para 10 art 1 of The Rome Statute of the International Criminal Court.

¹³⁴ Razesberger F, *The International Criminal Court (The Principle of complementarity)* 19.

¹³⁵ Article 31(2).

¹³⁶ Schiff B, *Building the International Criminal Court* 73.

¹³⁷ See note 42 above.

¹³⁸ Dugard J, *International Law: A South African Perspective* 172.

¹³⁹ ICTY report 31 July 2009.

¹⁴⁰ Dugard J, *International Law: A South African Perspective* 172.

¹⁴¹ Schabas W, *An Introduction to the International Criminal Court* 12.

courts and tribunals in recent times is the inexorable consequence of the progressive development of international law.”¹⁴²

Du Plessis¹⁴³ noted that on 17 July 1998 South Africa signed and ratified the *Rome Statute*, becoming the 23rd State Party. In order to domesticate the obligations in the *Rome Statute*, the South African Parliament drafted the Implementation of the *Rome Statute* of the International Court Act,¹⁴⁴ (ICC Act) which became law on 16 August 2002.

Katz believes that there are two main approaches to the relationship between international law in the form of treaties and international obligations incurred in respect of such treaties.¹⁴⁵ The first approach, the monist school, maintains that international law and municipal law are to be regarded as manifestations of a single conception of law. Monists argue that municipal courts are obliged to apply rules of international law directly. There is no need for any act of transformation of the provisions of the international agreement by the legislature into national or municipal law. Dubay¹⁴⁶ believes that under a monist model, international law serves not merely as a legal framework to guide state-to-state international relations, but as a source of law integrated into domestic law. This builds on Kelsen’s monist theory¹⁴⁷ that was intended to promote international peace by creating binding obligations enforceable against state actors in formal international justice institutions. This approach should be considered with the provisions contained in the South African Constitution,¹⁴⁸ where, when interpreting the Bill of Rights, a court, tribunal or forum must consider international law. De Vos¹⁴⁹ believes that the work of human rights treaty-monitoring bodies have been influential in shaping the socio-economic rights considerations in the South African Constitution.

In the second approach, the dualist school, view international law and municipal law as completely different systems of law. As a result, domestic courts may only apply

¹⁴² Schabas W, *Research Handbook on International Courts and Tribunals*. (Introduction).

¹⁴³ Du Plessis M, *The South African Criminal Court Act 1*.

¹⁴⁴ *The Rome Statute of the International Criminal Court Act 27 of 2002*.

¹⁴⁵ Katz A, *African Security Review* 26.

¹⁴⁶ Dubay C, “General Principles of International Law: Monism and Dualism,” *International Judicial Monitor*, Winter Issue 2014 p14.

¹⁴⁷ Kelsen H, *Peace through Law* 13 and 110.

¹⁴⁸ Section 39(1)(b) of the Constitution of South Africa.

¹⁴⁹ Liebenberg S, *SAJHR* 11(2) 359-78 at 359.

international law, specifically treaties, if those treaties have been transferred into municipal law by legislation. In *Pan American World Airways*,¹⁵⁰ Steyn CJ stated, “in this country the conclusion of a treaty is an executive and not a legislative act. As a general rule, the provisions of an international instrument so concluded, are not embedded in our municipal law except by legislative process.” It can therefore be reasonably concluded that South Africa is a dualist state, in that once it had formally ratified the *Rome Statute*, was required to enact legislation bringing its provisions within our municipal law.¹⁵¹ Having passed the ICC Act, the entire content of the *Rome Statute* has been attached to the Act as an Annexure and included in definitions of international crimes in Schedule 1. It would appear *prima facie* that the essential elements of the *Rome Statute* have been incorporated into South African law.

Katz¹⁵² believes that states incorporating the dualist approach and including the *Rome Statute* into municipal law, should guard against technical defects in the surrender and extradition of suspects to international authorities. He believes that the scheme of arrest and surrender to the ICC as provided in the South African legislation to give effect to the *Rome Statute*, is somewhat defective.

Dugard¹⁵³ points out that Section 4(1) of the ICC Act creates jurisdiction for a South African court over ICC related crimes. Section 4(3)(c) of the ICC Act goes further and provides for extra-territorial jurisdiction. In terms of this provision, the jurisdiction of a South African court will be triggered when a person commits an ICC defined crime outside South African territory, and that person, after commission of that crime, is present in the Republic. This particular section refers to individuals who commit a core crime and do not have a close and substantial connection with South Africa at the time of the offence.¹⁵⁴ The jurisdiction is grounded on the concept of universal jurisdiction on the basis that these persons are the common enemy of mankind.¹⁵⁵

On 31 March 2005, the UN Security Council passed Resolution 1593, referring the prosecution of those allegedly responsible for atrocities committed in the Darfur region

¹⁵⁰ *Pan American World Airways Incorporated v South African Fire and Accident Insurance Co Ltd* [1965] 3 SA150(A) [28].

¹⁵¹ The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 which came into effect on 16 August 2002.

¹⁵² Katz A, *An Act of Transformation* 29.

¹⁵³ Dugard J, *International Law: A South African Perspective*, 202.

¹⁵⁴ Section 2 of the Rome Statute of the International Criminal Court Act 27 of 2002.

¹⁵⁵ Casese A, *The Rome Statute of the International Criminal Court* 1862.

in Sudan to the ICC. On 4 March 2009, Pre-Trial Chamber 1 issued a warrant of arrest against the Sudanese President Omar al-Bashir for his alleged responsibility under Article 25(3)(a) of the *Rome Statute* for crimes against humanity and war crimes alleged by the prosecution.¹⁵⁶ This was the first time that a sitting president has been investigated for international crimes before the ICC.¹⁵⁷ Mills¹⁵⁸ argues that the UN Security Council's referral power has placed it at odds with the AU, and has facilitated tensions between the AU and the ICC. Article 27(1) of the *Rome Statute* provides that functional immunity does not apply to any individual before the ICC, making specific reference to heads of state and government.¹⁵⁹ Article 27(2) of the *Rome Statute* provides that the traditional doctrine of personal immunity for sitting state officials does not apply. Since Sudan is not a party to the *Rome Statute*, it is questioned whether a head of state immunity would apply to President al-Bashir? This has led to a debate over the correct interpretation between article 27 and article 98 of the *Rome Statute*. Article 98 provides that a state is not obliged to hand over an individual to the ICC, if in doing so, would be "inconsistent with its obligations under international law with respect to the state or diplomatic immunity of a person." Dugard¹⁶⁰ indicates that two schools of thought have emerged regarding the immunity of the head of state of a non-party state. The first school believes that there is strong academic support for the view that all states are bound by the UN Charter.¹⁶¹ This includes non-member parties to the *Rome Statute* who would be bound by a UN Security Council resolution to accept the jurisdiction of the ICC. The second school believes that article 27 amounts to a waiver of the general immunity provided under international law for heads of state, as provided in article 98 of the *Rome Statute*. Using this school of thought, considering President al-Bashir is the head of a non-party state, would be immune under article 98 of the *Rome Statute*.¹⁶²

South Africa's commitment to the provisions of the *Rome Statute* and the ICC Act have been tested in response to the UN Security Council's decision to refer the al-Bashir

¹⁵⁶ Dugard J, *International Law: A South African Perspective*, 197.

¹⁵⁷ Williams S, *et al*, *Journal of Conflict and Security Law*. 71.

¹⁵⁸ Mills K, *HRQ* (34) 404-447.

¹⁵⁹ Du Plessis M, *Making Amendment(s): South Africa and the International Criminal Court*, 22.

¹⁶⁰ Dugard J, *International Law: A South African Perspective*, 198.

¹⁶¹ See article 25 of the UN Charter which provides that the members of the UN agree to accept and carry out the decisions of the Security Council in accordance with the present charter.

¹⁶² Gaeta P, "Does President Al Bashir enjoy immunity from arrest" 2009. *Journal of International Criminal Justice*, 329.

matter to the ICC. The 13th Ordinary Session of the Assembly of the African Union decided that AU Member States should not cooperate with the ICC regarding provisions of Article 98 of the *Rome Statute* of the ICC.¹⁶³ This Declaration effectively provided that AU member states would not cooperate with the arrest warrant issued for President al-Bashir. The Sudan referral has been the subject of considerable debate which has highlighted several contentious issues in international law.¹⁶⁴ Eventually the South African government confirmed that it was committed to the arrest of President al-Bashir in accordance with its international and domestic legal obligations.¹⁶⁵

The interpretation of the South African Constitution¹⁶⁶ which states that when interpreting the Bill of Rights, courts, tribunals and forums must consider international law, could also be interpreted using the approval provided by the Constitutional Court in the *Makwanyane*¹⁶⁷ case. Here it was held that when the Constitutional Court is required to resolve an issue, it must examine the relevant provisions of the Constitution in context. Relevant public international law that impacts the situation must be considered, including the language used, after which a balance must be found. Currie and de Waal¹⁶⁸ believe that many Constitutional Court decisions refer to the legal provisions in internationally recognised open and democratic societies based on freedom and equity.

The *Rome Statute* by its very nature can be classified as an international agreement. It is appropriate in terms of this study to investigate the term, “international agreement” in relation to the Constitution and leading court cases in the Republic. In addition the nature of international agreements and the intended recipients are visited in one of the hypotheses of this dissertation, where the nature of international law is investigated in terms of human rights and its impact on society.

The 1983 South African Constitution referred to “international agreements, treaties and conventions,”¹⁶⁹ whilst both the 1993 and 1996 Constitutions refer only to an

¹⁶³ The 13th Ordinary Session of the African Union (AU) held from 1 to 3 July 2009, Sirte, Libya.

¹⁶⁴ Dugard J, *International Law: A South African Perspective*, 197.

¹⁶⁵ Du Plessis M, *SAJCL* 1.

¹⁶⁶ Section 39(1)(b) of the Constitution of South Africa.

¹⁶⁷ See note 81 above.

¹⁶⁸ Currie I, de Waal J, *The Bill of Rights Handbook*, 148.

¹⁶⁹ Section 8(3)(e) of Act 110 of 1983.

“international agreement” in their respective section 231s. Neither Constitution defined the term “international Agreement,” but it was understood that the definition based on the Vienna Convention on the Law of Treaties would be followed. This describes an international agreement as a written agreement between states governed by international law.¹⁷⁰

As briefly discussed above, Section 231 of the 1996 Constitution of South Africa states:

1. “-The negotiating and signing of all international agreements is the responsibility of the national executive.
2. An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
3. An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.
4. Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
5. The Republic is bound by international agreements which were binding on the Republic when the Constitution took effect.-”

South African courts first entered the debate on clarifying the meaning of the term, “international agreement” within the bounds of section 231 in the *Harksen* cases.¹⁷¹

The judgement of the Cape High Court¹⁷² followed by a Constitutional Court decision¹⁷³ provide practical relevance and constitutional guidance in the interpretation of section 231.

The requirement lying at the heart of a binding international agreement is the intention of the parties to create reciprocal rights and obligations. The Cape High Court stated

¹⁷⁰ Olivier ME, “The status of international law in South African municipal law: section 231 of the 1993 Constitution.” (1993/4) 19 *SAYIL* 5.

¹⁷¹ See Botha N, “Lessons from Harksen: Constitutionality of extradition” (2000) XXXIII *CILSA* 274 and Botha N, “International law in South African courts.” (1999) 24 *SAYIL* 330.

¹⁷² *Harksen v President of the Republic of South Africa and Others* 2000 1 SA 1185 (CPD).

¹⁷³ *Harksen v President of the Republic of South Africa and Others* 2000 2 SA 825 (CC).

that “it is this very intention and consent that distinguishes treaties from informal or *ad hoc* arrangements or agreements.”¹⁷⁴ By excluding extradition in this case from the scope of section 231, the court indirectly supported the understanding that the term “international agreement” as used in section 231, applies only to legally binding agreements creating enforceable rights and duties.¹⁷⁵

The Constitutional Court supported the Cape High Court decision regarding the interpretation of international agreements. In addition the Constitutional Court indicated that the meaning of the term “international agreement” as used by section 231 of the Constitution, should be given a narrow interpretation to coincide with the term “treaty” as it is used in the *Vienna Convention*.¹⁷⁶ The 1996 Constitution is premised on the *Vienna Convention*,¹⁷⁷ which allows final consent to be bound by a treaty to be given by ratification, accession or signature.¹⁷⁸

1.10 The relationship between the African Union (AU) and the ICC

The relationship between the African Union (AU) and the ICC is often termed “the battle for the soul of international law.”¹⁷⁹ Following the indictment of President Omar al-Bashir, the AU, at the AU Assembly of Heads of State and Government summit meeting, adopted a decision that African states would not cooperate with the ICC in the execution of the arrest warrant issued against al-Bashir.¹⁸⁰ This decision placed African states party to the *Rome Statute* in a difficult position regarding their obligations to the AU and their obligations as states party to the *Rome Statute*. The decision also raises questions about the reality of a new value-based international law, centred on the protection of humanity and human rights and whether such a new international law can escape accusations of neo-imperialism.¹⁸¹ This new value-based concept of international law predicated on the respect for human rights should be the common goal of all nations. Yet, this vision continues to be questioned in Africa as

¹⁷⁴ *Harksen v President of the Republic of South Africa and Others* 1 SA 1185 (CPD) [52].

¹⁷⁵ See Olivier ME, “Informal international agreements under the 1996 Constitution” (1997) 22 *SAYIL* [65].

¹⁷⁶ *Harksen v President of the Republic of South Africa and Others* 2000 2 SA 825 (CC) [23].

¹⁷⁷ The Vienna Convention on the law of treaties. Vienna 23 May 1969.

¹⁷⁸ Dugard J, *International Law: A South African Perspective*, 416.

¹⁷⁹ Tladi D, “The African Union and the International Criminal Court: The battle for the soul of international law.” (2009) 34 *SAYIL* [57].

¹⁸⁰ AU Summit Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Assembly/AU/Dec245(XIII), July 2009.

¹⁸¹ Koskeniemi M, “International law in Europe: Between tradition and renewal” (2005) 16 *European Journal of International Law* 113 at 123.

imperialistic, colonialist and even racist. It would appear that the ICC is seen as a Western imperial master, exercising imperial power over Africans, and using the court to further demean the past victims of colonialism. It would appear that an underlying reason for the African rejection of the ICC, is the belief that African leaders ought not to be tried under non-African legal systems.¹⁸² This raises the question of why the African states were so keen on the formation of the ICC and significantly contributed to the formation of the *Rome Statute*. It is also important to remember that the ICC will only exercise jurisdiction where states having jurisdiction over the crimes are “unable or unwilling genuinely to carry out” the prosecution.¹⁸³

The decision by the AU not to cooperate with the ICC regarding the al-Bashir affair, neglects the concern for the well-being of vulnerable members of society in Africa. The ICC was formed with values and consideration of human rights central to humanity, regardless of geography. Any argument developed by the AU to resist cooperation with the ICC, negates the tireless effort directed at the formation of the ICC by Africans themselves and detracts from constitutions dedicated to the protection of human rights.

1.11 The significance of this study

South Africa’s initial commitment to the ICC and contribution to its founding document, the *Rome Statute*, has been significant. The country’s role as a leading nation in Africa and its relationship with the AU, make it an important link between African countries, the ICC and other western nations. The al-Bashir affair and the subsequent notice to withdraw from the ICC has generated considerable debate within South Africa, including several High Court decisions. This study is extremely important to carefully investigate the history and formation of the ICC, South Africa’s role and the possible impact a withdrawal from the ICC would have on African affairs. South Africa’s role as the bastion of human rights in Africa is under threat with the possible withdrawal from the ICC, including its commitment to section 7 of the Bill of Rights contained in the Constitution.¹⁸⁴

¹⁸² Dec 245(XIII) see note 167 above. Paragraph 7 of the decision also encourages capacity building programmes to enable Africans to undertake the work of dealing with serious crimes of international concern.

¹⁸³ Article 17(1) of the Rome Statute of the International Criminal Court.

¹⁸⁴ Section 7, Bill of Rights, Constitution of the Republic of South Africa, 1996.

The study is important as it clarifies the separation of powers regarding the Republic's international obligations and illustrates the independence of the country's courts which promotes respect for the rule of law.

The ICC functions within an imperfect framework. Leading nations, such as South Africa and its parliament should identify shortfalls in the court, and using its influence with the African Union, strive for improvements from within the system. This study is vital to promote a greater understanding of the ICC, its members and the promotion of human rights.

The possible withdrawal by South Africa from the ICC has been cancelled, but it is vitally important to discuss the implications of such a withdrawal in terms of the consideration of international human rights and future legal implications. A future application to withdraw from the ICC may be made by successive South African governments, so this dissertation seeks to provide the groundwork and rationale to its ICC membership. The historical connection between South Africa and the authors of the *Rome Statute* cannot be relegated to the realms of the past. Cicero¹⁸⁵ once stated, "to be ignorant of what occurred before you were born is to remain perpetually a child. For what is the worth of a human life unless it is woven into the life of our ancestors by the records of history?" South Africa needs to weave the history of our past into the tapestry of our future, and strengthen our respect for international human rights and the welfare of our nation.

Following this analysis of international human rights law and its influence on human rights law within South Africa, this study will now progress towards investigating the incorporation of international human rights law into the South African Constitution. This will be completed against the background of the legal-historic analysis leading to the formation of the *Rome Statute* and South Africa's progressive involvement in the formation of the International Criminal Court, including the ICC Act¹⁸⁶ supported by domestic case law.

¹⁸⁵ Marcus Tullius Cicero, 106-43 BC. (M.TVLLI Ciceronis Orator Ad M Brutum).

¹⁸⁶ *The Implementation Rome Statute of the International Criminal Court Act 27 of 2002.*

CHAPTER 2. The place of international human rights law within South African domestic law

2.1 Introduction

International human rights law has been incorporated into the Constitution of South Africa,¹⁸⁷ which has been supported by the South African courts in various judgements.¹⁸⁸ These judgements will now be discussed including reference to international human rights instruments. The background of international human rights, their application into South African domestic law, is a vital component of this study, which investigates the implications of a possible withdrawal from the ICC and is debated in our courts.

2.2 International human rights law

One of the principal aims of international law is the protection of the human rights of the individual against infringement by his or her government.¹⁸⁹

The League of Nations period witnessed three important developments in the protection of international human rights. The mandates system that was established in 1919 promoted the welfare of “peoples not yet capable to stand alone against the strenuous conditions of the modern world.”¹⁹⁰ Specific mention is made in article 22 of the Covenant of the League of Nations¹⁹¹ to Central Africa, where the maintenance of public order and promotion of equal opportunities, should be the responsibility of the Mandatory. The International Labour Organisation, (ILO) was also created in 1919 to improve the working conditions of employees, ensuring an enhanced social environment.¹⁹² The minority treaties were also introduced, designed to safeguard the rights of ethnic and religious minorities in the Balkans and Eastern Europe.¹⁹³

¹⁸⁷ Section 39(1) (a)(b)(c) of the Constitution of South Africa 1996.

¹⁸⁸ For example, *S v Makwanyane* 1995(3) SA391 (CC).

¹⁸⁹ Buergenthal T, “The evolving international human rights system,” (2006) 100 *AJIL*. 783.

¹⁹⁰ Article 22 of the Covenant of the League of Nations, 28 June 1919.

¹⁹¹ The League of Nations was an intergovernmental organisation founded on 10 January 1920 as a result of the Paris Peace Conference that ended the First World War.

¹⁹² Shaw M, *International Law* 6 ed (2008) 271.

¹⁹³ The League and the Minority Treaties. *Bulletin of International News* Vol 5, No 18 (March 16, 1929), p 3-10.

In spite of these features of international law aimed at promoting the welfare of individuals, minorities and undeveloped peoples, international law was largely directed at states.¹⁹⁴ This failure resulted in states failing to intervene in Germany before 1939, despite awareness of the atrocities committed by the Nazis against their own nationals.

The Preamble of the Charter of the United Nations¹⁹⁵ (the Charter) reaffirmed “faith in fundamental rights, in the dignity and worth of the human person and in the equal rights of men and women.” The South African Prime Minister at the time, General Smuts, contributed significantly in the drafting of the Preamble.¹⁹⁶ Chapter XIV of the Charter is focussed on the proposed International Courts of Justice. Article 94(1) of the Charter provides that each member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is party. This is an interesting provision to consider regarding the position of modern day Sudan, in terms of its current membership of the UN and not the ICC.

Article 1(3) of the Charter states:

“-To achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex or religion.-”

These provisions are clearly evident in the current South African Constitution, contained within the Preamble and Bill of Rights¹⁹⁷ and discussed below in paragraph 2.3

These weaknesses in the legal status of human rights articles contained within the Charter were exploited by South Africa. It actively sought to exclude debate and subsequent legal action by the UN¹⁹⁸ on its racial policies during the apartheid era. South Africa’s racial policies featured regularly on the agenda of the UN General Assembly from 1946 until 1994.¹⁹⁹ The UN General Assembly was of the opinion that

¹⁹⁴ Dugard J, *International Law: A South African Perspective* 321.

¹⁹⁵ The Charter of the United Nations, 26 June 1945, San Francisco, coming into force on 24 October 1945.

¹⁹⁶ Barber J and Barratt J, *South Africa’s Foreign Policy: The Search for Status and Security 1945-1988* (1990) 16-20.

¹⁹⁷ Sections 7-10 of The Bill of Rights, the Constitution of South Africa 1996.

¹⁹⁸ Dugard J, “The legal effect of the United Nations resolutions on apartheid” (1996) 83 *SALJ* 44.

¹⁹⁹ See UN Resolution 44(1) of 8 December 1946 for the first General Assembly Resolution on this subject.

South Africa's racial policies constituted a real threat to international peace and a blatant violation of the recognised principles of human rights.²⁰⁰ South Africa countered these resolutions on the ground that article 2(7) took precedence over the human rights clauses in the Charter.²⁰¹ The policy of apartheid forced UN member states to choose between the supremacy of domestic jurisdiction and human rights. They chose human rights, and as a result, moved international law into a new era.

In 1946, the Economic and Social Council of the UN, (ECOSOC) established a Commission on Human Rights. Its task was to draft an International Bill of Rights, comprising a declaration and a multilateral treaty. The first step in this process was the drafting of the Universal Declaration of Human Rights, which was approved by the UN General Assembly in Paris on 10 December 1948.²⁰² It was interesting to note that 48 states voted in favour of the Declaration, but South Africa, now under a new National Party government, abstained from voting. The other states that abstained from voting included Poland, Czechoslovakia, Saudi Arabia, the USSR and Yugoslavia. In future years, history would show that many of these countries were involved in serious human rights violations that resulted in either international or internal conflict.

Prior to 1994 South Africa was party to only one instrument containing human rights clauses, the Charter of the United Nations.²⁰³ South African constitutional history traced the British legal system requiring the legislative transformation of treaty obligations. Customary law at the time could be directly assimilated into the common law. Because this Charter had not been incorporated into municipal law, no effect could be given to articles 55 and 56 of the Charter. Article 55(c) of the Charter states "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."

Article 56 of the Charter states that all UN members would pledge to take joint and separate action in cooperation with the UN for the achievement of the purposes as set forth in Article 55. Attempts to persuade the courts to take these clauses into account

²⁰⁰ 7 UN GAOR, Annexes, Agenda Item 66, at 1-3, UN Doc A/2183 (1952).

²⁰¹ Prevost D, "South Africa as an illustration of the development of international human rights law" (1999) 24 *SAYIL*. 211-231 at 219.

²⁰² Resolution 217A (111); Morsink J, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (1999).

²⁰³ Dugard J, "The South African judiciary and international law in the apartheid era" (1998) 14 *SAJHR* 110.

as a guide to statutory interpretation fell on deaf ears.²⁰⁴ In *S v Werner*,²⁰⁵ the Appellate Division failed to take account of international human rights norms. Similarly, in *S v Khanyile*,²⁰⁶ Didcott J, invoked the European Convention on Human Rights, to which South Africa was not a party in the course of formulating a right to counsel rule.²⁰⁷ This progressive step was rejected by fellow judges and subsequently ignored by the Appellate Division.²⁰⁸

This situation has radically changed since 1994. South Africa is now party to several major human rights instruments.²⁰⁹ This includes the African Charter on Human and People's Rights.²¹⁰ The Bill of Rights, contained in chapter 2 of the South African Constitution, had been inspired by these international human rights conventions, and relies heavily on their structure and content. Had there been no reference to international law in the Bill of Rights, South African courts would have been obliged to refer to international and foreign courts for guidance. The courts of Canada,²¹¹ Zimbabwe²¹² and Namibia²¹³ whose Bills of Rights contain no express direction to apply international law, have not hesitated to draw on international human rights treaties to assist them in interpreting their Bills of Rights.²¹⁴

It could be suggested that the South African Constitution reflects the global human rights struggle in that it contains many references to international human rights instruments.²¹⁵ This recognition of global human rights suggests a hierarchical

²⁰⁴ Dugard J, *International law: A South African Perspective* 347.

²⁰⁵ *S v Werner* 1980 (2) SA 313 (W) [328C] *S v Werner* 1981 (1) SA 187(A) [225].

²⁰⁶ *S v Khanyile* 1988 (3) SA 795 (N).

²⁰⁷ The European Convention on Human Rights is an international treaty to protect human rights and fundamental freedoms in Europe. Drafted in 1950 by the council of Europe, the convention entered into force on 3 September 1953.

²⁰⁸ *S v Rudman* 1989(3) SA 368(E) at 376A-B; *S v Rudman* 1992(1) SA 343 (A).

²⁰⁹ The International Covenant on Civil and Political Rights, The United Nations General Assembly Resolution 2200A(XXI) 16 December 1966. The International Convention on the Elimination of All Forms of Racial Discrimination, United Nations General Assembly Resolution (XVIII) 20 November 1963. Convention of the Rights of the Child, UNCRC 20 November 1989. The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and the Genocide Convention, adopted by United Nations General Assembly Resolution 39/46 of 10 December 1984.

²¹⁰ Also known as "The Banjul Charter" CAB/LEG/67/33 rev.5, 21 ILM.58 (1982)

²¹¹ Schabas W, "International Human Rights Law and the Canadian Charter (1991) 32.

²¹² *S v Ncube* 1988(2) SA 702 (ZS) [714-715].

²¹³ *Ex parte Attorney-General, Namibia: in re Corporal Punishment by Organs of State* 1991 (3) SA 76 (NmS) [87-88].

²¹⁴ *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General* 1993 4 SA237 (ZSC).

²¹⁵ See note 207 above.

approach to rights, where one considers all rights as integral to the pursuance of dignity and equity.²¹⁶

2.3 The incorporation of international human rights in the South African Constitution.

The interim Constitution²¹⁷ adopted a new approach to international human rights law. Section 35(1) stated that:

“-In interpreting the provisions of [the Bill of Rights] a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.”

This section of the interim Constitution contains values stated in the 1948 Universal Declaration of Human Rights, (UDHR). This includes the recognition of the dignity of the human family which forms the basis of freedom, justice and peace throughout the world.²¹⁸ Similarly article 3 of the UDHR refers to the rights to life, liberty and security of persons, article 6 providing for equality before the law and article 7 against discrimination in any form.

The content, intent and language contained in the final Constitution²¹⁹ builds on the provisions of the UDHR and interim Constitution. Section 39(1) now reads:

“-When interpreting the Bill of Rights, a court, tribunal or forum-

- (a) must promote the values that underlie an open democratic society based on human dignity, equality and freedom;
- (b) must consider international law; and
- (c) may consider foreign law.”

It is clear that the Bill of Rights, in this particular case section 39(1), relies heavily on the language and structure of universal human rights instruments listed above.²²⁰ This provision, together with section 233 of the Constitution, ensures that the courts will be

²¹⁶ De Vos P, “Pious Wishes or Directly Enforceable Human Rights: Social and Economic Rights in South Africa’s 1996 Constitution,” 13 *SAJHR* 67 (1997).

²¹⁷ Section 35(1) of the interim Constitution of South Africa 1993.

²¹⁸ Preamble to the Universal Declaration of Human Rights 1948.

²¹⁹ Section 39(1) of the Constitution of South Africa 1996.

²²⁰ See note 207 above.

guided by international norms and the interpretation of international courts.²²¹ Section 233 provides:

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

It is important to note the word “must” contained in both sections 39(1) and 233 of the Constitution, which ensures that international law, including international human rights law, will be considered by our courts.

In addition to the first generation rights discussed above, the Bill of Rights incorporates a variety of socio-economic rights. This includes the right to a healthy environment,²²² the right to have access to adequate housing,²²³ health care, food, water and social security.²²⁴ These second generation rights are supported by rights of access to information,²²⁵ just administrative action²²⁶ and an interpretation of the Bill of Rights that supports an open democratic society based on human dignity, equality and freedom.²²⁷

Under South African law, several bodies are mandated to pursue human rights that are embodied in the Constitution. These include the Public Protector,²²⁸ the Human Rights Commission,²²⁹ the Commission for Gender Equality,²³⁰ and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.²³¹ In addition to constitutionally mandated bodies, several human rights bodies, including the rights of Children and Rights of People with Disabilities, have been established in the office of the President.

Both the provincial divisions and the Constitutional Court have considered international treaties and decisions in their interpretation of the Constitution and Bill of

²²¹ Dugard J, *International Law: A South African Perspective* 348.

²²² Section 24 of the Bill of Rights, Constitution of South Africa 1996.

²²³ Section 26 of the Bill of Rights, Constitution of South Africa 1996.

²²⁴ Section 27 of the Bill of Rights, Constitution of South Africa 1996.

²²⁵ Section 32 of the Bill of Rights, Constitution of South Africa 1996.

²²⁶ Section 33 of the Bill of Rights, Constitution of South Africa 1996.

²²⁷ Section 39 of the Bill of Rights, Constitution of South Africa 1996.

²²⁸ Section 182-3 of the Constitution of South Africa 1996.

²²⁹ Section 184 of the Constitution of South Africa 1996.

²³⁰ Section 187 of the Constitution of South Africa 1996.

²³¹ Section 185 of the Constitution of South Africa 1996.

Rights. The interpretation given by these courts is discussed within the framework of international human rights.

2.4 The application of international human rights law in domestic case law

Both the provincial divisions and the Constitutional Court have relied heavily on human rights treaties and decisions whilst interpreting of the Bill of Rights.

Initially, there was concern that international human rights law may be narrowly interpreted,²³² to cover only clear rules of customary law and human rights conventions to which South Africa was a party. This concern was dispelled by the Constitutional Court in *S v Makwanyane and Another*.²³³ In this case concerning the constitutionality of the death sentence, the Constitutional Court indicated that international agreements, including customary international law, could provide a framework within which the Bill of Rights could be evaluated and understood. The case referred to several international human rights commissions,²³⁴ including foreign law in the United States Supreme Court decision in *Furman v Georgia*,²³⁵ demonstrating a jurisprudentially expansive approach. Brennan J, in the *Furman* case, indicated that the significance of corporal punishment was that members of the human race were treated as non-humans, and that even the vilest criminal remains a human being possessed of common human dignity. In *S v Williams*,²³⁶ the Constitutional Court investigated whether the sentence of juvenile whipping, pursuant to the provisions of the Criminal Procedure Act²³⁷ was consistent with the provisions of the Constitution. The Court²³⁸ referred to foreign law in a similar case regarding corporal punishment to provide guidance.²³⁹ The Court²⁴⁰ referred to the European Commission of Human Rights which found corporal punishment as an aggravated form of inhuman treatment, as well as the European Court of Human Rights, which categorised degrading conduct as that which aroused in its victims fear, anguish and humiliation. The Court²⁴¹ also

²³² Dugard J, "The Role of International Law in interpreting the Bill of Rights" (1994) 10 *SAJHR* 208-215 at 210.

²³³ *S v Makwanyane and Another* 1995 (3) SA 391 (CC) [151].

²³⁴ United Nations Committee on Human Rights. The Inter-American Commission on Human Rights, the European Commission on Human Rights and The European Court of Human Rights.

²³⁵ *Furman v Georgia* 408 U.S. 238 (1972).

²³⁶ *S v Williams* 1995 (3) SA 632 (CC).

²³⁷ Section 294 of the Criminal Procedure Act 51 of 1977.

²³⁸ *S v Williams* 1995 (3) SA632 (CC) at [6]

²³⁹ *Ex Parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State* 1991(3) SA 76 (NMSC).

²⁴⁰ *S v Williams* 1995 (3) SA632 (CC) at [27].

²⁴¹ *S v Williams* 1995 (3) SA632 (CC) at [28].

referred to the Eighth Amendment to the Constitution of the United States of America as well as Article 12 of the Canadian Charter of Rights and Freedoms, which prohibit cruel and unusual punishment. The Court in *Tyrer v United Kingdom*²⁴² regarded the whipping of a juvenile as institutionalised violence which constituted an assault on the person's dignity and physical integrity and was considered by the Constitutional Court. In *Ferreira v Levin*,²⁴³ the Constitutional Court referred to international jurisprudence for guidance in terms privacy and dignity of the individual. The Canadian position in *Thompson Newspapers*,²⁴⁴ indicated that the privacy, autonomy and dignity of a person must be respected by the state. In *Ferreira v Levin*,²⁴⁵ the Court referred to article 2 of the German Constitution for guidance on the term liberty. Article 2(2) of the German Constitution provides that:

“-Everyone shall have the right to life and to the inviolability of his person. The liberty of the individual shall be inviolable. These rights may be encroached upon pursuant to law.”²⁴⁶

Ackerman J, compared the German Constitutional position to the South African Interim Constitution, section 11(1). He found that “we are enjoined to protect the freedom guaranteed by section 11(1), against all government action that cannot be justified as necessary. Section 11 of the Interim Constitution of South Africa, later became section 12 in the final Constitution, which was expanded to include the right to bodily and psychological integrity, specifically guaranteed in the European Convention on Human Rights.²⁴⁷ In *Bernstein v Baxter*,²⁴⁸ decisions of the European Court of Human Rights were considered in an examination of the right to privacy.²⁴⁹ In *re Gauteng School Education Bill 1995*,²⁵⁰ Mahomed DP referred to section 23 of the Canadian Charter, regarding linguistic minority rights of children to receive instruction in the language used in their particular province, and compared this right to the content of section 32(b) of the South African Interim Constitution. This section provided that “every person shall have the right to instruction in the language of his or her choice, where this is

²⁴² *Tyrer v United Kingdom* ECHR, Series A, vol 26, 1978.

²⁴³ *Ferreira v Levin* 1996(1) SA 984 (CC).

²⁴⁴ *Thompson Newspapers v Canada* [1990] 67 D.L.R. (4th) 161.

²⁴⁵ *Ferreira v Levin* 1996(1) SA 984 (CC) [180].

²⁴⁶ Translated by Professor Christian Tomuschat and Professor Donald P. Kommers in cooperation with the Language Service of the German Bundestag.

²⁴⁷ European Convention on Human rights (1950) protocol 1 Article 2.

²⁴⁸ *Bernstein v Baxter* 1996 (2) SA751 (CC).

²⁴⁹ *Bernstein v Baxter* 1996 (2) SA751 (CC) [790-2].

²⁵⁰ Gauteng Provincial Legislature in *re: Gauteng School Education Bill of 1995* (CCT39/95) [1996] ZACC4; 1996(4) BCLR 537; 1996 SA165 (4 April 1996) [14].

reasonably practicable.” This was amended in the 1996 Constitution of South Africa²⁵¹ to read, “...everyone has the right to receive education in the official language of their choice in public educational institutions where reasonably practicable.” This subject was visited again in *Hoerskool Ermelo and Another v Head, Department of Education, Mpumalanga*,²⁵² where The State of African languages and Global Language Politics²⁵³ were referred to, in order to provide clarity to the education of minority groups in line with international human rights law.

In *Minister of Home Affairs v Fourie and Another*²⁵⁴ Sachs J referred to article 16 of the 1948 Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). These references provided additional information on the common law definition of marriage that was inconsistent with the Constitution of South Africa, because it unfairly discriminated against same-sex relationships.

In *Minister of Safety and Security v Carmichele*,²⁵⁵ the Court invoked a decision of the European Court of Human Rights in support of its finding that there is a positive duty on the state to protect an individual whose life was at risk from the criminal acts of another individual. This supports section 12(1)(c) of the Bill of Rights where everyone has the right to freedom and security and be free from all forms of public and private violence.

In *Christian Lawyers Association of South Africa v Minister of Health*,²⁵⁶ the jurisprudence of the European Court was invoked in order to dismiss a challenge to the constitutionality of abortion legislation.

In *National Media Ltd v Bogoshi*,²⁵⁷ Hefer JA, referred to the European Court of Human Rights regarding freedom of expression and the right of the public at large to receive information on matters of public interest. The South African Bill of Rights, section

²⁵¹ Section 29(2) of the Constitution of South Africa.

²⁵² *Hoerskool Ermelo and Another v Head, Department of Education, Mpumalanga, and Others* 2009(3) SA 422 (SCA).

²⁵³ “The State of African Languages and Global Language Politics: Empowering African Languages in the Era of Globalisation” 36th Annual Conference on African Linguistics, 2006.

²⁵⁴ *Minister of Home Affairs v Fourie and Another* (CCT60/04) [2005] ZACC19; 2006(3) BCLR 355(CC); 2006(1) SA 524 (CC) [99].

²⁵⁵ *Minister of Safety and Security v Carmichele* 2004 (3) SA305 (SCA).

²⁵⁶ *Christian Lawyers Association of South Africa v Minister of Health* 1998 (4) SA 1102 (T).

²⁵⁷ *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA) [25].

16(1)(b) Freedom of Expression, provides that everyone has the right to receive or impart information or ideas, which does not extend to the incitement of violence, hatred or the causing of harm to others.

Recourse to international law as prescribed in section 39(1)(b) in the Bill of Rights may not always advance the rights of the individual. In *Prince v President of the Law Society, Cape of Good Hope*,²⁵⁸ the Constitutional Court found that international norms on religious freedom (in the case of a Rastafarian's use of cannabis for religious purposes) were outweighed by South Africa's international obligations, intended to suppress drug abuse. This demonstrates that a court is not confined to international human rights treaties when it acts under section 39(1)(b) of the Bill of Rights.²⁵⁹

It must be remembered that the Constitution is not the only legal instrument to promote the harmonisation of South African law and international human rights law. The Labour Relations Act²⁶⁰ maintains that one of the primary objects of the Act²⁶¹ is to give effect to the obligations incurred by the Republic as a member of the International Labour Organisation. Similarly, the Refugees Act,²⁶² provides that the Act must be interpreted with due regard to the principal refugee conventions²⁶³ and the Universal Declaration of Human Rights.²⁶⁴

2.5 Conclusion

This chapter has investigated international human rights law and its incorporation into the South African Constitution. In addition, the role of international law in the interpretation of South African law has been examined. The interpretation given by the courts has supported the development and protection of human rights, with generous reference to international human rights instruments.

²⁵⁸ *Prince v President of the Law Society of the Cape of Good Hope and Others* (CCT36/00) [2000] ZACC 28; 2001 (2) SA 338; 2001(2) BCLR 133 (12 December 2000) [9].

²⁵⁹ Dugard J, *International Law: A South African Perspective* 351.

²⁶⁰ The Labour Relations Act 66 of 1995.

²⁶¹ Section 1(b) of the Labour Relations Act 66 of 1995.

²⁶² The Refugees Act 130 of 1998.

²⁶³ Convention Relating to the Status of Refugees (UN, 1951); the Protocol Relating to the Status of Refugees (UN, 1967); the OAU Convention Governing Specific Aspects of Refugee Problems in Africa. (OAU, 1969).

²⁶⁴ Section 6(1)(d) of the Refugees Act 130 of 1998.

This investigation of international human rights law is now considered in the context of the history, formation, jurisdiction and composition of the International Criminal Court, (ICC).

CHAPTER 3 The history, formation, jurisdiction and composition of the International Criminal Court, (ICC)

3.1 Introduction

The greater implications of South Africa's possible withdrawal from the ICC are brought sharply into focus when considering the historical background of its formation. So many eminent jurists have contributed their work and experience over an extended period, resulting in the formation of the ICC. One should consider the many devastating events that have plagued the world, including the development of international crimes, which has accelerated the demand for this eminent court.

3.2 Historical context and formation

In July 1998, at a United Nations (UN) conference in Rome, Italy, several governments approved a statute to promote the establishment of a permanent International Criminal Court, the ICC. By 31 December 2000, 139 states had signed the treaty. Subsequently on 11 April 2002, the *Rome Statute* of the ICC received more than the 60 ratifications required, including South Africa. The treaty then came into force on 1 July 2002.²⁶⁵

The road to Rome has been a long and arduous route to travel. Hall believes that the idea of some form of international justice system can be traced back to the 19th century.²⁶⁶ It is only in the last half century that there have been coordinated attempts to achieve such a system. In 1872, Gustav Moynier, (featured on an historic stamp in Illustration 1 below) one of the founders of the International Committee of the Red Cross, proposed a permanent court to recognise the crimes committed during the Franco-Prussian war.²⁶⁷ This war raged on from 1870 until 1871, and was contested between the Second French Empire of Napoleon III, and the German states of the North German Confederation, led by the Kingdom of Prussia.

²⁶⁵ Schabas WA, *An Introduction to the International Criminal Court* (2004) 12.

²⁶⁶ Hall CK, "The first Proposal for a Permanent International Criminal Court" 5.

²⁶⁷ Hall CK, 1998 *International Review of the Red Cross* No 322.

The next serious development occurred after the First World War, with the signing of the 1919 Treaty of Versailles at the Paris Peace Conference.²⁶⁸ This began on 18 January 1919 and was regarded by Slavicek as a milestone in World history.²⁶⁹ Unsuccessful attempts were made to bring the German Emperor to trial before an international tribunal,²⁷⁰ and later to try the Turks responsible for the genocide of Armenians before a tribunal designated by the Allied Powers.²⁷¹

Illustration 1

Gustav Moynier, Founder Member of the International Red Cross



Stamp from Monaco depicting Gustave Moynier (l), Henri Dunant, and General Henri Dufour.

In 1937, following the assassination in 1934 of King Alexander of Yugoslavia by Croatian nationalists in the French city of Marseilles, treaties were formulated to outlaw international terrorism.²⁷² It was intended that these treaties would provide for the trial of international terrorists before an internationally constituted tribunal. As the Second

²⁶⁸ The Paris Peace Conference was convened in January 1919 in order to establish the terms of peace following World War II. Thirty nations participated, but the United Kingdom, France, the United States and Italy became known as the “big four” and dominated the proceedings that led to the formation of the Treaty of Versailles.

²⁶⁹ Slavicek LC, *The Treaty of Versailles. Milestone in World History* 37.

²⁷⁰ 6 Article 227 of the *Treaty of Versailles*.

²⁷¹ Helmreich PC, *From Paris to Sevres: the Partition of the Ottoman Empire at the Peace Conference of 1919-1920*.

²⁷² Dugard J, *International Law: A South African Perspective* 170.

World War approached, states lost interest in this venture, and no state ratified the treaty to establish an international court.²⁷³

Following the outbreak of the Second World War, an aggressive campaign was conducted by Germany. The subsequent atrocities committed by its officials and soldiers provided the impetus for the creation by the Allied powers of an *ad hoc* international military tribunal.²⁷⁴ Following World War II, the Allies established the Nuremberg International Military Tribunal of 1945 and 1946 to try war criminals. Ball suggests that these trials introduced a new radical approach to International Law, which imposed considerable influence on the post-war international community. This generated a desire for a similar permanent based international court.²⁷⁵

The reason for the establishment of a permanent based international court was mainly because the trials set a precedent in creating new standards of international law, and subsequently, a new concept of international law emerged focussing on war crimes and humanitarian issues.

A similar tribunal was established in Tokyo in 1946 in respect of three types of war crimes committed by Japanese leaders.²⁷⁶

The establishment of the Nuremberg and Tokyo international military tribunals that tried the principal German and Japanese leaders for war crimes and crimes against humanity, was a natural progression of the pre-war debate over an international criminal court.²⁷⁷

Ehrenfreund believed that the Nuremberg trials demonstrated the power and ability to try specific individuals for crimes. This also highlighted the accountability for all these individuals, regardless of military, political or social position.²⁷⁸

In October 1946, soon after the Nuremberg Judgements were handed down, an international congress met in Paris to probe the adoption of an international criminal code. This code prohibited crimes against humanity and promoted the establishment

²⁷³ Convention for the Creation of an International Criminal Court, in MO Hudson *International Legislation* vol 7, no 500 (1941)

²⁷⁴ Taylor T, 1992, *The Anatomy of the Nuremberg Trials* 172.

²⁷⁵ Ball H, *Prosecuting War Crimes and Genocide: The Twentieth Century Experience* 42.

²⁷⁶ Brackman AC, *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trial* 60.

²⁷⁷ Dugard J, *International Law: A South African Perspective* 171.

²⁷⁸ Ehrenfreund N, *The Nuremberg Legacy* 64.

of an International Criminal Court. Baros²⁷⁹ reported that on 9 December 1948, the United Nations General Assembly adopted *The Convention on the Prevention and Punishment of the Crime of Genocide*.²⁸⁰ The Convention came into force on 12 January 1951. The parties to the Genocide Convention are shown below in Illustration No 2, where it can clearly be seen that most countries in the world had either signed and ratified or acceded or succeeded to the Convention. Roach believes that it was the paradigm shift within the international community regarding their attitude to criminal justice that prompted the United Nations to energise the International Law Commission (ILC) activities.²⁸¹

Illustration 2.

World countries participating in the Genocide Convention



Source: The Genocide Convention. United Nations Treaty Series Adopted by the UN on 9 December 1948

It is interesting to note that one of the first accusations of genocide submitted to the United Nations after the Convention entered into force concerned the treatment of the Black people in the United States of America (USA). The Civil Rights Congress, represented by William Patterson, drafted a petition arguing that the USA had been responsible for hundreds of wrongful deaths and genocidal abuses.²⁸² The petition was

²⁷⁹ Baros M, *The Establishment of the International Criminal Court* 58.

²⁸⁰ Adopted by the United Nations General Assembly as *General Assembly Resolution 260*.

²⁸¹ Roach S, *Politicising the International Criminal Court* 62

²⁸² Docker J, Raphael Lemkin, Creator of the Concept of Genocide: A World History Perspective *HR 16(2)*.

presented to the United Nations in December 1951. It is interesting to observe that the USA was a vocal opponent of the South African system of “*apartheid*.”²⁸³ This racial abuse in the USA was manifested in the system of slavery, prevalent in the Southern States of North America, which has been regarded by Finkelman as one of the primary causes of their Civil War.²⁸⁴

From 1949 until 1954 the ILC drafted statutes for an International Criminal Court (ICC). Opposition from influential states of the Cold War, specifically the USA and Russia, hampered these efforts.²⁸⁵ The United Nations General Assembly effectively abandoned the effort, pending an acceptable definition of the crime of aggression and an International Code of Crimes.

Impeded by the Cold War, it was not until 1989 that interest once again resurfaced among the international community. Even the agreement between East and West over *apartheid* in South Africa, failed to produce a court that had been proposed during the late 1970s to try the *apartheid* criminals.²⁸⁶ In 1979, the United Nations Human Rights Commission instructed Professor Bassiouni to draft a statute for an international court to try offenders under the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid.²⁸⁷ A statute was drafted but no further action was taken on the project.

Kreiger believed that it was Arthur Robinson, the then President of Trinidad and Tobago, who resurrected the proposal for the establishment of an international court.²⁸⁸ His proposal was motivated by the will to create some form of structure to address the growing international problem of drug trafficking. This was supported by the increase of international crimes provided by treaties outlawing hijacking of aircraft, (The Hague Convention, effective 14 October 1971)²⁸⁹ and seizure of ships on the high seas, including attacks on diplomats. In response, the United Nations General

²⁸³ Apartheid was a political and social system in South Africa, operating from 1948 to 1994, which called for the separate development of the different racial groups in the country.

²⁸⁴ Finkelman P, “Slavery, the Constitution, and the origins of the Civil War,” *OAH Magazine of History*, p 14-18.

²⁸⁵ Dugard J, *International Law: A South African Perspective* 171.

²⁸⁶ Dugard J, *International Law: A South African Perspective* 171.

²⁸⁷ Bassiouni M, *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal* 10-11.

²⁸⁸ Kreiger D, *The Nuremberg Promise and the International Criminal Court* 141.

²⁸⁹ Convention for the Suppression of Unlawful Seizure of Aircraft [Hijacking Convention] 860 *UNTS* October 14 1971.

Assembly requested that the ILC continue working on the previously abandoned draft statute and code of crimes.

Weber points out that following the termination of the Cold War, there was a considerable change in the political environment.²⁹⁰ Some subsequent violators of human rights lost their Cold War aura of protection, and their actions gained prominence on the international stage.

The concept of a permanent international criminal court was subsequently placed on the agenda by Latin American States. They believed that such a court would assist the prosecution of international drug-traffickers, which had a devastating social effect on their region.²⁹¹

While the Statute of the ICC was once again being revised by the United Nations General Assembly ILC, the early 1990s witnessed two landmark events that strengthened the momentum for the development of an International Criminal Court. The atrocities that occurred in the former Yugoslavia under Slobodan Milosevic, described by Blumenthal and McCormack,²⁹² were put on trial in 1993 under an *ad hoc* International Criminal Tribunal.²⁹³ This Tribunal was then established by the UN Security Council. Similarly in 1994, the leaders of the Rwandan genocide were put on trial under another United Nations Security Council *ad hoc* Tribunal.²⁹⁴

Furamura describes situations that occurred in both the former Yugoslavia and Rwanda as “threats to international peace and security.”²⁹⁵ The tribunals were created as a direct response to these concerns and specifically were undertaken as a necessary measure in order to enforce Chapter VII of the United Nations Charter.

²⁹⁰ Weber M, *Coping with Anarchy: Ethnic Conflict and International Organisations in the former Soviet Union* 1.

²⁹¹ Kittichalsaree K, *International Criminal Law* 27.

²⁹² Blumenthal D and McCormack T, *The Legacy of Nuremberg; Civilising Influence or International Vengeance?* 82.

²⁹³ International Criminal Tribunal for the former Yugoslavia (ICTY) Milosevic, Slobodan (IT-02-54)

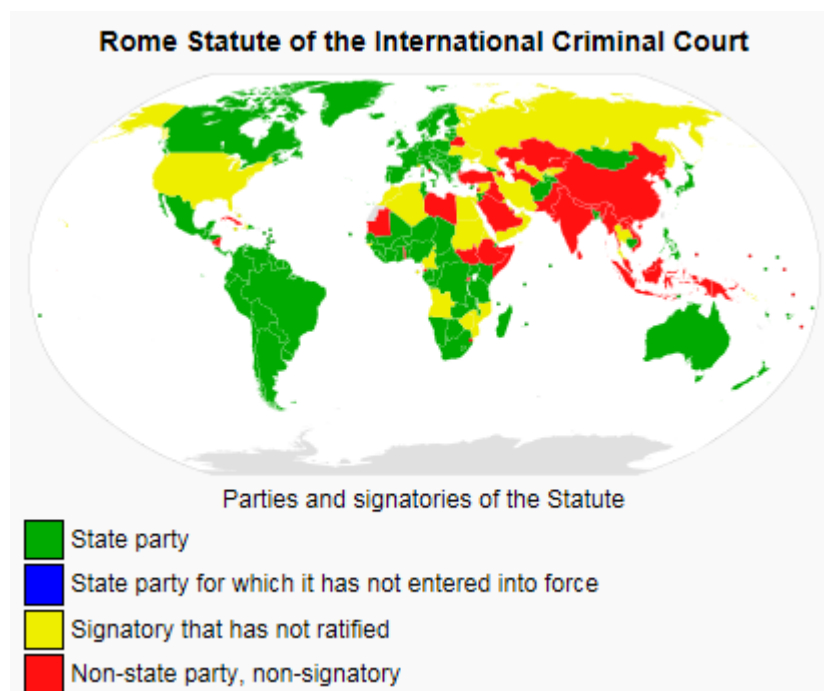
²⁹⁴ International Criminal Tribunal for Rwanda. Established in November 1994 by United Nations Security Council Resolution 955.

²⁹⁵ Furamura M, *War Crimes Tribunals and Transitional Justice* 37.

In July 1998 a United Nations (UN) *ad hoc* committee of the UN General Assembly, established a three-year Preparatory Committee to finalise a text to be presented at a conference of plenipotentiaries.²⁹⁶

From 15 June to 17 July 1998, 160 countries, including South Africa, participated in the UN Diplomatic Conference of Plenipotentiaries on the establishment of an international criminal Court in Rome. These debates subsequently were reflected in the *Rome Statute*.²⁹⁷ One hundred and twenty nations voted to adopt the International Criminal Court under the *Rome Statute*, with seven voting against.

Illustration 3



Source: International Criminal Court asp.icc-cpi.int/ referenced on 3 February 2018

The nations voting against were the USA,²⁹⁸ Israel, China, Iraq, Algeria, Libya and Yemen. Unfortunately, on 6 May 2002, the United States government under the Bush Administration, formally announced to the United Nations, the United States government intended not to ratify the *Rome Statute*.²⁹⁹ In its view, the USA was no

²⁹⁶ The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. (UN Doc. A/CONF.183/10).

²⁹⁷ Schabas W, *An Introduction to the International Criminal Court* 167.

²⁹⁸ Gurule J, "United States Opposition to the 1998 Rome Statute establishing an International Criminal Court: Is the Court's Jurisdiction truly complementary to National Criminal Jurisdictions?" *CILJ* 35.

²⁹⁹ Du Plessis M, Seeking an International, International Criminal Court-Some reflections on the United States opposition to the ICC (2002) 15 3 *SACJ* 301.

longer bound by the terms of the Treaty, which was previously implied by the signature of the Clinton Administration in December 2001. Ever since the International Criminal Court's subsequent establishment in 2002, the Court has experienced active opposition from the United States (US) government. This was due to the possibility that US military and political leaders would be held accountable to politically motivated international justice for their previous actions in warfare.³⁰⁰ These concerns were conveyed by the Bush Administration, which then threatened to veto all UN peacekeeping operations, unless granted a twelve-month blanket immunity. This was renewed for the second time a year later. The Bush Administration was concerned over the public outcry over the treatment of prisoners of war in Iraq and the notorious Guantanamo Bay detention centre. This centre is an offshore prison for criminals considered a threat to American national security.³⁰¹

To date, the *Rome Statute* has been signed by 139 states and ratified by 117 states. Of those 117 states, a significant proportion, 31, are from Africa.

The US opposition to the *Rome Statute* could be seen as an objection to the exercise of the ICC's jurisdiction, which directly implicates the principle of complementarity.³⁰² The drafters of the *Rome Statute* decided that national courts should have primary jurisdiction.³⁰³ Under the *Rome Statute*, the proper role of the ICC is to complement national court jurisdictions and assist when States do not comply with their obligations to prosecute the perpetrators of serious international crimes.³⁰⁴

On 1 July 2002, following the formula set out in the *Rome Statute*, the Treaty came into force, becoming binding for all countries that had positively ratified or acceded to the Statute. Ehrenfreund pointed out that the enforcement of the Treaty which marked the official opening of the ICC, occurred almost seventy years after its initial stages of development.³⁰⁵

³⁰⁰ Alshdaifat SA, *International Law and the use of Force against Terrorism* 235.

³⁰¹ Guantanamo Bay has held prisoners in its detention facility since January 11, 2002. Despite a promise by President Obama to close the facility by January 2010, 173 detainees remain. Human Rights Watch has called for the closure of Guantanamo Bay and the treatment of foreign terrorism suspects in accordance with US obligations under International Law.

³⁰² The Preamble of the Rome Statute para 10 art 1.

³⁰³ *The Rome Statute* art. 112(2)(a).

³⁰⁴ Holmes J, *The Principle of Complementarity* 73-74

³⁰⁵ Ehrenfreund N, *The Nuremberg Legacy* 16.

The author considers that the origin and critical development of the ICC are extremely dependent on human rights violations in the post Second World War era. Highly publicised areas of international conflict radically changed political and social dispensations. The advent of affordable television and the mass distribution of newsprint promoted a wider appreciation of world events and associated human rights.

On 11 March 2003, the first of eighteen judges were sworn-in during a ceremony in The Hague, Netherlands.³⁰⁶ Trinidadian Queen's Council (QC) Karl Hudson-Philips was the first judge to be sworn-in at a gala ceremony at the Knight's Hall of the Dutch Parliament. Hudson-Philips was the most senior of the first eighteen judges. It was fitting that this honour should be bestowed, as the former President of Trinidad and Tobago, President Robinson, had been instrumental in getting the UN to place the idea of the ICC on the UN General Assembly's agenda.

On June 16 2003, the first Prosecutor, Mr Louis Moreno-Ocampo of Argentina was sworn-in at The Hague, Netherlands.³⁰⁷

Subsequently on 24 June 2003, Mr Bruno Cathala from France was appointed Registrar of the ICC, marking the selection of the final ICC official.

By March 2003, there were 139 signatories and 89 parties to the Statute. There were 21 African States, 21 non-European states, 15 European Union States, 18 Latin-American and Caribbean States, 12 Asia and Pacific States, one Middle-East State and one North American State.³⁰⁸

3.3 The context of the jurisdiction of the ICC

Cryer³⁰⁹ has noted that according to Article 5 of the *Rome Statute*,³¹⁰ the ICC will have jurisdiction with respect to the crime of genocide, war crimes and crimes against humanity. The crime of aggression was ingeniously included when determining that the ICC will have jurisdiction to try this crime once an agreed definition of aggression has been developed.³¹¹

³⁰⁶ Dugard J, *International Law: A South African Perspective* 174.

³⁰⁷ As per *The Rome Statute* art. 42.

³⁰⁸ Dugard J, *International Law: A South African Perspective* 173.

³⁰⁹ Cryer R, *Commentary on the Rome Statute for an International Criminal Court* 271.

³¹⁰ Art. 5(2) of the *Rome Statute*.

³¹¹ The Assembly of States Parties to the Statute of the International Criminal Court has on 15 December, 2017, adopted a resolution which activates the jurisdiction of the Court over the crime of aggression.

The jurisdiction of the ICC has to be understood in various contexts. Jurisdiction *ratione materiae* is concerned with crimes that can be tried before the ICC.³¹² Jurisdiction *ratione personae* is concerned with who can be tried before the ICC,³¹³ whilst jurisdiction *ratione temporis* concerns itself with the period within which crimes are tried before the court.³¹⁴ A positive feature of Article 7 of the Statute is a recognition that crimes against humanity may be committed not only in time of war, but in peacetime as well. This is a reflection of the law that was developed by the International Criminal Tribunal for the Former Yugoslavia (ICTY).³¹⁵

According to Article 13 of the Statute, the exercise of jurisdiction is triggered by the referral of a particular situation to the Prosecutor of the ICC.³¹⁶ This can be achieved either by a State Party or the UN Security Council acting under Chapter VII of the Charter of the UN, or when the Prosecutor has initiated an investigation in respect of crimes for which the Court may exercise jurisdiction. The Court will determine if a case is inadmissible if it is being investigated by a State having jurisdiction, unless the State is unwilling or genuinely unable to carry out the investigation.³¹⁷

The ICC is intended to act complementarily with a state's national courts, and is enabled by individuals only when national courts are unwilling or unable to do so. The notion of complementarity is central to the understanding that national courts take priority over the ICC unless they are unable to act accordingly.

There are several pre-conditions to the ICC's exercise of jurisdiction. A state that ratifies the *Rome Statute* accepts jurisdiction of the ICC with crimes listed under article 5 of the *Rome Statute*.³¹⁸ This implies that there must be some form of nationality or territorial connection between the accused person and the state party to the *Rome Statute*. Similarly, the ICC has jurisdiction over nationals of all states that have ratified the *Rome Statute*, regardless of the place where they commit a crime.³¹⁹ The *Rome Statute* has also made provision for the exercise of its jurisdiction on an *ad hoc* basis. This occurs when a non-state party to the *Rome Statute* accepts to submit to the

³¹² Art. 5 of the *Rome Statute*.

³¹³ Arts. 12 and 26 of the *Rome Statute*.

³¹⁴ Art. 11 of the *Rome Statute*.

³¹⁵ *Prosecutor v Dusko Tadic* IT-94-AR72, 1995, Opinion and Judgement (1997) 4 *IJHR*, p 645 para 141.

³¹⁶ Art. 19(1) of the *Rome Statute*.

³¹⁷ Art 17(1)(a) of the *Rome Statute*.

³¹⁸ Art 12(1) of the *Rome Statute*.

³¹⁹ Art 13 of the *Rome Statute* and Dugard J, *International Law: A South African Perspective* 190.

jurisdiction of the ICC on a temporary basis.³²⁰ An example of this situation was the referral to the ICC by Cote D'Ivoire in 2005. This provision allows a state that has a territorial or nationality *nexus* to a crime within the jurisdiction of the court, to accept the jurisdiction of the ICC without ratifying the *Rome Statute*.³²¹ The principle of universal jurisdiction was rejected in the *Rome Statute*.³²² It was argued by some states that since states have universal jurisdiction over core crimes within the jurisdiction of the court, that the same jurisdiction should be conferred on the ICC.³²³ It is interesting to note that three states that vehemently opposed the universal jurisdiction of the ICC, namely the USA, Russian Federation and China have not ratified the *Rome Statute*, but are permanent members of the United Nations Security Council (UNSC). These three states also have veto powers in the UNSC, and can also refer non states-parties to the ICC.

Other limitations to the ICC's jurisdiction include the *ne bis in idem* principle of double jeopardy. This legal principle means that legal action cannot be instituted twice for the same cause of action. The ICC cannot have jurisdiction over a person who was previously tried for the same conduct.³²⁴ The ICC also cannot have jurisdiction over a case where the case is not of a serious nature. In making this decision the court is called upon to consider paragraph 10 of the preamble.³²⁵ The ICC also has no jurisdiction over persons below the age of eighteen.³²⁶ Since the ICC is based on the principle of complementarity, national legal systems would assume jurisdiction over those under the age of eighteen years.³²⁷

The jurisdiction over nationals of non-state parties is provided for in Article 13(b) of the *Rome Statute*, which states:

“-The court may exercise its jurisdiction with respect to a crime referred to in Article 5 in accordance with the provisions of the Statute, if a situation in which one or more such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.-”

³²⁰ Art 12(3) of the *Rome Statute*.

³²¹ Art. 12(2) of the *Rome Statute*.

³²² Art 12 of the *Rome Statute*.

³²³ Schabas (2008:61).

³²⁴ Art. 20 of the *Rome Statute*.

³²⁵ Art 17(d) of the *Rome Statute*.

³²⁶ Art. 26 of the *Rome Statute*.

³²⁷ Preamble to the *Rome Statute* of the International Criminal Court.

This jurisdiction over nationals of non-state parties who commit offences within the jurisdiction of the court on the territories of non-state parties has been exemplified in the Sudanese³²⁸ and Libyan³²⁹ situations. Referrals in both these situations were in the form of a UN Security Council resolution.

3.4 Composition, structure and financing of the ICC

The ICC is composed of the following organs: the Presidency; An Appeals Division, a Trial Division and a Pre-Trial Division; the Office of the Prosecutor and the Registry.³³⁰

There are 18 judges in the ICC.³³¹ These judges are chosen according to a high standard of moral character, impartiality and integrity. They must also possess the qualifications required in their respective States for appointment to the highest judicial offices.³³² The judges serve three-year terms.

The Presidency is comprised of three judges, who are elected from the 18 judges in the ICC. The Presidency is comprised of The President of the Court, a First Vice-President and a Second Vice-President. Once elected, these judges oversee the management of the ICC, including all judicial, administrative and external relations.³³³

The Judicial Divisions of the ICC are the Appeals Division, the Trial Division and Pre-Trial Division. The President sits on the Appeals Division, along with four other judges. The Trial and Pre-Trial Divisions consist of at least six judges each, but their proceedings consist of three judges.³³⁴

The Office of Prosecutor receives referrals for cases and information on crimes within the Court's jurisdiction from States, the UN Security Council or on their own initiative. The Prosecutor then conducts investigations and potentially prosecutes cases before the Court.³³⁵

The Registry, headed by the Registrar, is responsible for the non-judicial aspects of the administration and servicing the Court, without prejudice to the functions and

³²⁸ Resolution No 1593 of 31 March 2005.

³²⁹ Resolution No 1970 of 26 February 2011.

³³⁰ Art 34 of the *Rome Statute*.

³³¹ Art 36 of the *Rome Statute*.

³³² Art 36(3)(a) of the *Rome Statute*.

³³³ The International Criminal Court. *The Presidency*. Web. 28 February 2017. <http://www.icc-cpi.int>

³³⁴ The International Criminal Court. *Chambers*. Web. 28 February 2017. <http://www.icc-cpi.int>

³³⁵ The International Criminal Court. *Office of the Prosecutor*. Web. 28 February 2017. <http://www.icc-cpi.int>

powers of the Prosecutor. The Registry will typically secure victims and witnesses for future appearance before the ICC.³³⁶

The work of the Court is presided over by an Assembly of States Parties, which provides management oversight, assesses budget requirements and conducts elections.³³⁷ The Assembly of States Parties meets at least once a year.³³⁸

The ICC is currently funded by assessed contributions made by States Parties and funds that have been allocated by the United Nations.³³⁹ In addition, the Statute provides that the ICC may receive and utilise voluntary contributions from international organisations, corporations and Governments. These funds are allocated and used in accordance with laid down criteria, which are then adopted by the Assembly of States Parties.

3.5 Conclusion

The formation of the ICC has evolved over centuries of conflict and hostility between the nations of the world resulting in untold hardship to both participants and civilians. International military tribunals that developed following major conflicts introduced a new radical approach to International Law, which generated the desire and impetus to form a permanent based international court. The emergence of social crimes, such as drug-trafficking and international terrorism, stimulated the desire for accountability, irrespective of one's social, political or military standing. A wide cross-section of countries contributed to the development of the *Rome Statute*, which gave the body international standing and credibility.

Following this current investigation of the history, formation, jurisdiction and composition of the ICC, it is now appropriate to consider how South Africa ratified the *Rome Statute*, and introduced *the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002*.

³³⁶ The International Criminal Court. *Structure of the Court*. Web. 28 February 2017. <http://www.icc-cpi.int>

³³⁷ Dugard J, *International Law: A South African Perspective* 174.

³³⁸ Art. 112 of the *Rome Statute*.

³³⁹ Art. 115 and 116 of the *Rome Statute*.

CHAPTER 4. South Africa's ratification and domestication of the *Rome Statute*

4.1 Introduction

On 17 July 1998, South Africa signed and ratified the *Rome Statute*, becoming the 23rd State Party.³⁴⁰ This ratification was authorised by President Nelson Mandela, who regarded both the ICC and South Africa as a positive force for regional peace and prosperity. By being one of the first states to ratify the *Rome Statute*, South Africa signalled its dedication to the rule of law on both the national and international arena.

Where South Africa's signature is subject to ratification, the initial signature does not establish the consent to be bound. South Africa's initial signature qualified the signatory state to proceed to ratification.³⁴¹ Ratification defined the international act whereby South Africa indicated its consent to be bound by the *Rome Statute*. The process of ratification granted the necessary time for the National Assembly (NA) and the National Council of Provinces (NCOP), to approve the statute and enact the necessary legislation to give domestic effect to that treaty.³⁴² In order to domesticate the obligations prescribed in the *Rome Statute*, the South African parliament drafted *The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002*, (the ICC Act) which became law on 16 August 2002.³⁴³

The 1996 Constitution of South Africa is inspired by and aligned to provisions of the Vienna Convention, which allows final consent to be bound by a treaty to be given by ratification, accession or signature.³⁴⁴ Section 231 of the 1996 Constitution indicates a return to the pre-1994 position relating to the incorporation of treaties which included the need for parliamentary ratification of treaties. For example, Section 231(3) provides:

- (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly within a reasonable time.

³⁴⁰ Du Plessis M, "South Africa's International Criminal Court Act" The Institute for Security Studies Paper 172 November 2008.

³⁴¹ Articles 10 and 18, Vienna Convention on the Law of Treaties, 1969.

³⁴² Article 2(1), 14(1) and 16, Vienna Convention on the Law of Treaties, 1969.

³⁴³ This is fully discussed in Chapter 5 below.

³⁴⁴ Dugard J, *International Law: A South African Perspective* 416.

A more precise meaning of the terms “technical, administrative or executive” in Section 231(3) in the context of treaty law,³⁴⁵ depends on the intention of the parties concerned. The Vienna Convention on the Law of Treaties³⁴⁶ emphasises the intention of the parties to decide whether or not a treaty requires ratification. This principle was approved by the South African Appellate Division in *S v Eliasov*.³⁴⁷

It is interesting to note that in *The President of the Republic of South Africa v Quagliani and Others*³⁴⁸ the Constitutional Court indicated that the President, as head of state and head of the national executive, has the power to enter into treaties in terms of a specific Act. He is also obliged to act “in a collaborative manner” to exercise this authority. This “collaborative manner” of conduct suggests an interaction with Parliament including discussions as to the merits of entering into international agreements. It would be natural to suggest therefore, that withdrawal from an international agreement would warrant a “collaborative manner” of interaction with Parliament.³⁴⁹

The relationship that developed between South Africa and the ICC, following the ratification and domestication of the *Rome Statute* is a result of the particular principle of complementarity. This principle proceeds from the belief that a national court should be the first to act in terms of prosecuting an international criminal act. Only when a State Party is unwilling or unable to investigate and prosecute an international crime committed by its nationals or on its own territory, is the ICC then seized with jurisdiction.³⁵⁰ The ICC Act facilitates the complementarity obligation on South African courts to domestically investigate and prosecute ICC offences. This principle of complementarity is now more fully investigated.

4.2 The principle of complementarity

Complementarity is a fundamental principle on which the functioning of the International Criminal Court (ICC) is based, and refers to the complementarity of its

³⁴⁵ Scholtz W, “A few thoughts on Section 231 of the South African Constitution” (2004) 29 *SAYL* 2002.

³⁴⁶ Article 14 of the Vienna Convention on the Law of Treaties. 1969.

³⁴⁷ *S v Eliasov* 1967 (4) SA 583 (A).

³⁴⁸ *President of the Republic of South Africa v Quagliani and Others* 2009 (4) BCLR 345 (CC) at 355C.

³⁴⁹ *President of the Republic of South Africa and Others v Quagliani, and Two Similar Cases*, 2009 (2) SA466 (CC)

³⁵⁰ Article 13 of The *Rome Statute* of the International Criminal Court, 17 July 1988.

jurisdiction to national criminal jurisdictions.³⁵¹ The *Rome Statute* which established the ICC is an international, multilateral treaty. According to the Vienna Convention on the Law of Treaties,³⁵² provisions of a treaty shall be interpreted with due regard to its object and purpose. Under the *Rome Statute*, which established the Court, the ICC can only positively exercise its jurisdiction, where the State Party of which the accused is a national, is unable or unwilling to prosecute.³⁵³ This means that the term “complementarity” indicates that the ICC is a Court of last resort.

The principle of complementarity is implemented by the Court through Articles 17 and 53 of the *Rome Statute*, which deals with the conditions for a specific case to be admissible at the ICC. Article 17(2) defines the term “unwillingness” of a State Party to prosecute as:

“-proceedings for the purposes of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court, or proceedings that are “not conducted independently or impartially, and were conducted in a manner which, in the circumstances, is inconsistent with the intent to bring the person concerned to justice.-”

The most evident underlying interest that the complementarity regime of the Court is designed to protect and serve, is the sovereignty of both State Parties and third states. The exercise of criminal jurisdiction can be considered a central and determining aspect of sovereignty itself.³⁵⁴ As distinct from the right of states to exercise their own criminal jurisdiction over crimes contained in the *Rome Statute*, the Preamble of the Statute also refers to the duty of every state (not limited to State Parties) to exercise its criminal jurisdiction over those responsible for international crimes.³⁵⁵ The purpose of the complementarity principle would be to ensure that states abide by that duty, either by prosecuting the alleged perpetrators themselves, or by providing for an international prosecution in case of their failure to do so. It would appear that the principle of complementarity was designed to allow for the prosecution of crimes at international level, where national systems were failing to deter any future commission of crimes. In addition, the duty to prosecute, including the complementarity principle,

³⁵¹ Benvenuti P, “Complementarity of the International Criminal Court to National Criminal Jurisdiction” (1999) 21.

³⁵² Article 31 of the Vienna Convention on the Law of Treaties, 1969.

³⁵³ Article 17 of the *Rome Statute*.

³⁵⁴ Brownlie I, (1999) *Principles of Public International Law* 289 and 303.

³⁵⁵ Preamble, para 6, the *Rome Statute*.

encourages states to exercise their jurisdiction and make the system of international criminal law enforcement more effective.³⁵⁶

Another possible reason behind the principle of complementarity, may be the right of the accused to be prosecuted by domestic authorities and tried before a domestic court. This would of course depend on whether or not those authorities and courts were unable or unwilling to do so. It should be remembered that the accused or suspect may, in terms of the *Rome Statute*,³⁵⁷ still challenge the admissibility of the case.

A practical aspect driving the principle of complementarity may be the realisation that the Court's scope for action could be limited by resource constraints.³⁵⁸ In addition, the complementarity principle appreciates that national authorities are closer to evidence and that the crimes falling under the jurisdiction of these Courts, are normally best prosecuted in the state where they have been committed.³⁵⁹ The complementarity principle is not just a political concession, but a substantive operating rule that recognises that trials closer to the scene of events at issue have inherent practical as well as expressive value.³⁶⁰

It could, in conclusion, be stated that the principle of complementarity has been primarily designed to strike an even balance between state sovereignty to exercise jurisdiction, and the understanding that for the effective prevention of these crimes, the international community must promote its objectives of maintaining sound international law. In addition, the principle of complementarity removes the possibility for the States Parties to remain inactive, even under the breach of international law in cases where the duty to prosecute exists under other instruments. The principle finally gives effect to and completes the idea of an effective decentralised prosecution of international crimes³⁶¹ including the promotion of an enhanced international criminal justice system.

³⁵⁶ Sarooshi D, "The Statute of the International Criminal Court." *ICLQ* 48 (1999) at 387.

³⁵⁷ Article 19 (2)(a) of the *Rome Statute*.

³⁵⁸ ICJ, *Case Concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of Congo v Belgium), 14 February 2002, Diss Op. Van den Wyngaert, reprinted in: *ILM* 41 (2002), 536 et seq. (639, para 65).

³⁵⁹ Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, GAOR 50th Sess. suppl. No 22 (Doc A/50/22) para 29.

³⁶⁰ Alvarez JE, "The New Dispute Settlers: (Half) Truths and Consequences" *Tex. Int'l L.J.* at 39.

³⁶¹ Dinstein Y and Tabory M, *War Crimes in International Law* 233 et seq.

4.3 International criminal law

International criminal law may be described as a body of international rules prescribing international crimes and regulating principles and procedures regulating the investigation, prosecution and punishment of such crimes.³⁶² The history and development of the International Criminal Court (ICC), described above in Chapter 3, included the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes.³⁶³ Individuals accused of international crimes are ordinarily tried before domestic courts,³⁶⁴ but more recently, the ICC and other tribunals have been established to prosecute international crimes.³⁶⁵ Although there is no single, unified international criminal procedure, consistent procedural rules have developed from the practice and jurisprudence of international criminal tribunals. Each court, however, would exercise its own rules of procedure and evidence.

International criminal law can be divided into substantive and procedural criminal law. Substantive international criminal law defines international crimes, the subjective elements of such crimes and the conditions under which a state must, under international rules, prosecute a person accused of such international crimes.³⁶⁶ Procedural international law regulates the various stages of international trials, including admission of evidence and the protection of victims and witnesses.

International criminal law may be classified as a hybrid of international law and national criminal law. The sources of international criminal law are the same as the sources of international law. International criminal law is also based on the principles derived from national criminal law, which emerged from two major world legal systems.³⁶⁷ These include common law or adversarial system, and civil law or inquisitorial system. At present, there is no uniform, worldwide criminal code, which lists all the international crimes. Each international court, such as the ICC, provides in its statutes a list of international crimes in order to clearly determine its jurisdiction. There is currently no

³⁶² The Elements of Crimes contained by the Preparatory Commission for the International Criminal Court, June 2000, (PCNICC/2000/INF/3/Add.2)

³⁶³ Preamble of the *Rome Statute* of the International Criminal Court (17 July 1998) UN Doc A/CONF.183/9, para (6).

³⁶⁴ See para 4.1 above re: Principle of Complementarity.

³⁶⁵ Taylor T, "The Anatomy of the Nuremberg Trials" (1992) 41 *AJIL* 172.

³⁶⁶ Cassese A, *International Criminal Law* 15.

³⁶⁷ Snyman CR, *Criminal Law*, 3

truly universal court; the existing international courts and tribunals all have their own limited jurisdiction, but strive to promote international cooperation.³⁶⁸

In the Preamble to the *Rome Statute*, the most serious crimes that are of concern to the international community which threaten peace, security and the well-being of the world, included:

- Genocide
- War crimes
- Crimes against humanity
- Crimes of aggression (also referred to as crimes against peace)

The ICC, including the ICTY and ICTR tribunals, have been given jurisdiction over these crimes, which are also referred to as “core crimes.” In the broader sense, the list of international crimes include piracy, terrorism, slavery, unlawful offences committed on board aircraft, and serious apartheid offences.³⁶⁹ During the negotiations on establishing the ICC, there were discussions concerning the inclusion of terrorist offences and drug trafficking. Although these were considered extremely serious crimes, they were not included within the Court’s jurisdiction. It has subsequently become impossible to reach agreement on the definitions of these two crimes.³⁷⁰

Since International criminal law is a branch of international public law, its legal sources are derived from Article 38 of the Statute of the International Court of Justice (ICJ).³⁷¹ According to paragraph 1 of Article 38 of the ICJ statute, the sources of international law, in order, are:

- International conventions
- International custom, as evidence of a general practice accepted as law
- General principles of law as recognised by the community of nations³⁷²
- Judicial decisions and the teachings of highly qualified publicists

³⁶⁸ Statute of the International Criminal Court (17 July 1998) UN Doc A/CONF.183/9 para (6).

³⁶⁹ Bassiouni M C, “The Sources and Content of International Criminal Law: A Theoretical Framework,” *International Criminal Law* (n4) 32, 33, 62-69.

³⁷⁰ Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the establishment of the International Criminal Court (17 July 1998), UN Doc A/CONF.183/10, Res E.

³⁷¹ Statute of the International Court of Justice (26 June 1945), 3 Bevans 1179, 59 Stat 1055 (hereinafter ICJ Statute).

³⁷² Article 38(1)(c) of ICJ Statute refers to “civilised” nations, which should be replaced by “community of nations.”

This classification is considered by the author as inadequate, since the provision fails to acknowledge the importance of other instruments which serve as credible sources of international law. This would include binding resolutions of the UN Security Council adopted under Chapter VII of the UN Charter. Another important source of international criminal law is the Statutes of the international courts and tribunals.³⁷³ Some of these statutes are in fact treaties, which would fall under the general category of international conventions listed under article 38. For example, the *Rome Statute* of the ICC, which lists the international crimes falling within the Court's jurisdiction,³⁷⁴ general principle of international criminal law, and the procedure brought before the Court.

4.4 Pre-conditions for the exercise of jurisdiction of the ICC

The *Rome Statute* of the International Criminal Court, (the Statute), was adopted on 17 July 1998. To date the Statute has been signed by 139 states and ratified by 117 states.³⁷⁵ The Statute now strictly defines the jurisdiction of the court.³⁷⁶ By 11 April, 2002, 66 countries had ratified the Statute. (Six more than the required threshold) This meant that the ICC's temporal jurisdiction commenced on 1 July 2002.³⁷⁷ For those states that became a party to the Statute after 1 July 2001, the ICC has jurisdiction only over crimes committed after confirmed entry into force of the Statute, with respect to that state.³⁷⁸ The ICC is not a convenient remedy of crimes of the past, which must in future be addressed by national, international or hybrid initiatives.³⁷⁹

The pre-conditions to the exercise of jurisdiction for the ICC to exercise its competence are set out in article 12 of the Statute. This article provides that the court may exercise jurisdiction if the state where the alleged crime was committed is a party to the Statute, either in terms of territoriality,³⁸⁰ or in terms of nationality, where the state of which the accused is a national is a party to the Statute.³⁸¹ In terms of article 14 of the Statute, a State Party may then refer to the Prosecutor, a situation in which one or more crimes

³⁷³ Dugard J, *International Law: A South African Perspective* 24.

³⁷⁴ *The Rome Statute* of the International Criminal Court, Part 2 Article 5 (1).

³⁷⁵ www.iccnw.org referenced on 27 March 2017.

³⁷⁶ Part 2. Jurisdiction, "Admissibility and Applicable Law." *The Rome Statute of the International Criminal Court*.

³⁷⁷ Article 11 *The Rome Statute of the International Criminal Court*.

³⁷⁸ Article 11(2) *The Rome Statute of the International Criminal Court*.

³⁷⁹ Dugard J, *International Law: A South African Perspective* 190.

³⁸⁰ Article 12 (2)(a) *The Rome Statute of the International Criminal Court*.

³⁸¹ Article 12 (2)(b) *The Rome Statute of the International Criminal Court*.

appear to have been committed, within the jurisdiction of the court. This process can be applied as long as the pre-conditions to the Court's exercise of jurisdiction have been met. These are that the alleged perpetrators of the crimes are nationals of a State Party, or the crimes are committed on the territory of a State Party.³⁸² There has been uncertainty as to whether article 14 allowed a State Party to refer alleged crimes committed in its own territory or whether the mechanism was intended as an inter-state referral mechanism.³⁸³ The subsequent decision of the ICC Appeals Chamber in the *Katanga*³⁸⁴ case has since clarified that self-referrals are permissible under article 14 of the Statute. The Appeals Chamber indicated that such referrals are indeed consistent with the *Rome Statute's* "object and purpose of eradicating impunity for international crimes."

The Prosecutor, in terms of the Statute,³⁸⁵ could institute investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court. This issue was debated at length by the drafters of the Statute. It was finally determined that in order for the Prosecutor to exercise this power, the alleged crimes must have been committed by national of a State Party, or have taken place within the territory of a State Party. These pre-conditions were set out in terms of article 12 of the Statute.³⁸⁶

In terms of the Statute,³⁸⁷ the UN Security Council is empowered to refer to the Court "situations" in which crimes appear to have been committed within the jurisdiction of the Court. This referral power is a mechanism by which the Court is accorded jurisdiction over an offender, regardless of where the offence occurred, and by whom it was committed. This referral can occur regardless of whether a state concerned has ratified the Statute or accepted the Court's decision.³⁸⁸ The Statute provides that the UN Security Council may only make such a referral by acting under Chapter VII of the UN Charter. It must regard events in a particular country as a threat to peace, a breach of the peace or an act of aggression.³⁸⁹ Considering these factors, the UN Security

³⁸² See Kirsch P and Robinson D, "Trigger mechanisms" in A Cassese, *et al* (eds) *The Rome Statute of the International Criminal Court: A Commentary*. Vol 1 (2002) 623-5.

³⁸³ Schabas W, "First prosecutions at the International Criminal Court" (2006) 27 *HRLJ* 27.

³⁸⁴ ICC-01/04-01/07 OA8 (25 September 2009) at [79].

³⁸⁵ Article 15 (1) of the Rome Statute of the International Criminal Court.

³⁸⁶ See Kirsch and Robinson (n 198) 661-3.

³⁸⁷ Article 13 (b) of the Rome Statute of the International Criminal Court.

³⁸⁸ See Kirsch and Robinson (n198) 634.

³⁸⁹ Dugard J, *International Law: A South African Perspective* 191.

Council in March 2005, referred the atrocities committed in the Darfur region of Sudan to the International Criminal Court for investigation.³⁹⁰

The crimes over which the jurisdiction of the Court are limited, and constitute the most serious crimes of concern to the international community.³⁹¹ The Court has jurisdiction in accordance with this Statute with respect to the crimes of genocide, crimes against humanity, war crimes and the crime of aggression.³⁹²

The *Rome Statute* is silent on amnesty, and it is argued that this is because the Statute was never drafted with the intention of allowing amnesty to trump the Court's jurisdiction.³⁹³

The jurisdiction of the ICC has had a marked influence on the elevation of the visibility and commitment to human rights, desperately needed within the international community. This issue will now be further explored in relation to South Africa's ICC membership.

4.5 Membership of the ICC cements South Africa's national commitment to human rights

Before 1994,³⁹⁴ there was little that South African courts could, or would do, about international human rights.

South Africa was a party to only one instrument with human rights clauses, the Charter of the United Nations, which was not incorporated into municipal law.³⁹⁵ Consequently no direct effect could be provided to articles 55 and 56 of the Charter. In *S v Werner*,³⁹⁶ the Appellate Division failed to take into account international human rights norms. This followed the decision in *Minister of the Interior v Lockhat*³⁹⁷ where the Appellate Division failed to take into account international human rights norms when giving its approval to the zoning of different residential areas for different races by means of a proclamation.

³⁹⁰ UN Security Council Resolution 1593, 31 March 2005.

³⁹¹ Article 5 of the Rome Statute of the International Criminal Court.

³⁹² Articles 6 to 8 of the Rome Statute of the International Criminal Court.

³⁹³ Dugard J, "Conflicts of jurisdiction with truth commissions." In A Cassese, *et al* (eds) *The Rome Statute of the International Criminal Court: A Commentary*. (2002) 700-1.

³⁹⁴ Dugard J, "The South African judiciary and international law in the apartheid era" (1998) 14 SAJHR 110.

³⁹⁵ Dugard J, *International Law: A South African Perspective* 346.

³⁹⁶ *S v Werner* 1981 (1) SA 187 (A).

³⁹⁷ *Minister of the Interior v Lockhat* 1961 (2) SA 587 (A).

Since 1994, the situation has changed dramatically. South Africa is a party to major human rights instruments³⁹⁸ and the African Charter on Human and People's Rights. In addition, the 1996 Constitution requires courts to consider international human rights instruments in their application of the Bill of Rights in Chapter 2 of the Constitution.³⁹⁹

In 1998, South Africa signed and ratified the *Rome Statute* and thereby joined other state parties in affirming its commitment to the rule of law and to end impunity for the perpetrators of international crimes. Ratifying the *Rome Statute* was a tacit recognition that human rights extend beyond geopolitical boundaries and interests, indicating that a collective commitment is required to uphold these rights.⁴⁰⁰ The commitment to the *Rome Statute*, and active participation in its development, was a reaffirmation of South Africa's commitment and dedication to human rights and the rule of law.

In 1993, President Nelson Mandela stated that South Africa's constitutional commitment to human rights, improved international relations, hereby demonstrating a commitment to peace, prosperity and goodwill.⁴⁰¹

The South African Human Rights Commission,⁴⁰² (hereafter the Commission) is a state institution established in terms of the Constitution.⁴⁰³ The Commission's task is to support constitutional democracy and is clearly mandated by the Constitution⁴⁰⁴ to promote, respect, monitor, and assess the observance of human rights in South Africa.

In the Commission's view, the intended exit of South Africa from the ICC would not bode well for the rule of law. This would include the consideration of human rights, a principle to which South Africa was committed, in the Preamble of the Implementation of the *Rome Statute of the International Criminal Court Act*.⁴⁰⁵ In addition, the Preamble emphasised that South Africa had since 1994 become an integrated

³⁹⁸ For example The International Covenant on Civil and Political Rights (ICCPR), and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

³⁹⁹ Section 39(1) of the Constitution of South Africa.

⁴⁰⁰ South African Human Rights Commission. Concern at South Africa's withdrawal from the International Criminal Court. Media statement 22 October 2016.

⁴⁰¹ Mandela N, "New Pillars for a New World," *Foreign Affairs*, Vol 72, No 5.

⁴⁰² Inaugurated on 2 October 1995 under the Human Rights Commission Act 54 of 1994 and as provided for by the Constitution of the Republic of South Africa Act 200 of 1993.

⁴⁰³ Chapter 9 of the Constitution of the Republic of South Africa, 1996.

⁴⁰⁴ Section 184(1)(a-c) of the Constitution of South Africa.

⁴⁰⁵ The Implementation of the Rome Statute of the International Criminal Court Act No 27 of 2002. Government Gazette Vol 445, 18 July 2002 No 23642.

member of the community of nations and was mindful of the recognition of international human rights abuse.

The Constitutional Court explained the inter-relationship between South Africa's obligations contained in international law and its domestic law, in *National Commissioner of Police v Southern African Human Rights Litigation Centre*.⁴⁰⁶ The Court explained that torture is criminalised in South Africa through the enactment of the Torture Act⁴⁰⁷ and operation of sections 232 and 233 of the Constitution, providing for the application of international law in conjunction with the ICC Act.

The current South African government faces growing criticism from human rights organisations regarding issues such as the Marikana massacre,⁴⁰⁸ increasing police brutality and farm murders. Leaving the ICC would tarnish South Africa's reputation and intent to be known as a democratic beacon in Africa, leaving the distinct impression as one who shied away from its international obligation to human rights and justice. Could it be, that the notice of intent to withdraw from the ICC, subsequently declared unconstitutional, used the President Omar al-Bashir incident as a convenient excuse to leave the ICC, as senior government leaders and officials fear future prosecution for human rights abuse by the ICC?

The implementation of the ICC Act⁴⁰⁹ in August 2002 cemented South Africa's commitment to human rights. Prior to the passing of this Act, South Africa had not tabled any domestic legislation on the subject of war crimes or crimes against humanity. Furthermore, no domestic prosecutions of international crimes had occurred. The domestication of South Africa's obligations to the *Rome Statute* will now be investigated, including the creation of the Priority Crimes Litigation Unit (PCLU) appointed in terms of the National Prosecuting Authority Act.⁴¹⁰

⁴⁰⁶ *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* (CCT 02/14)[2014] ZACC 30; 2015 (1) SA 315 (CC) [39].

⁴⁰⁷ Prevention and Combatting of Torture of Persons Act 13 of 2013.

⁴⁰⁸ The Marikana massacre. From 10 August to 20 September 2012 where 34 miners were killed by security forces.

⁴⁰⁹ See note 98 above.

⁴¹⁰ Section 13(1)(c) of the National Prosecuting Authority Act 32 of 1998.

4.6 An introduction to the *Rome Statute of the International Criminal Court Act 27 of 2002*

In order to comply with its complementarity obligations under the *Rome Statute*, South Africa incorporated the *Rome Statute* into its domestic law by means of the *Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002*,⁴¹¹ (the ICC Act). The ICC Act was approved on 12 July 2002 and signed by the President on 16 August 2002. The ICC Act should be interpreted within the context of the Constitution⁴¹² and the *Rome Statute*.⁴¹³ An inter-departmental committee, under the direction of the Department of Justice and Constitutional Development, was tasked to study the *Rome Statute*, establishing that the *Rome Statute* was constitutional and no amendments were required. The ratification of the *Rome Statute* required that an explanatory memorandum should be attached prior to forwarding to Parliament.⁴¹⁴

In order to assist implementation, the South African Development Community (SADC), of which South Africa is a member, presented member states with a “Model Enabling Act” in 1999,⁴¹⁵ which incorporated all international Criminal Court-related matters in one statute, with the *Rome Statute* itself appended as a schedule. As a result, the *Rome Statute* is annexed to the ICC Act.

The passing of the ICC Act was a significant event. Prior to this Act, South Africa had no domestic legislation focussed on war crimes or crimes against humanity. No domestic prosecutions of international crimes had previously occurred in South Africa.

One of the advantages of the ICC Act is that it coordinates a codified statement of the elements which constitute the crimes of genocide, war crimes and crimes against humanity. The drafters of the ICC Act, incorporated the ICC’s Statute’s definitions of core crimes directly into South African law through a schedule appended to the Act.⁴¹⁶

⁴¹¹ The ICC Act as amended by the Judicial Matters Amendment Act 22 of 2005. Section 231(4) of the Constitution of the Republic of South Africa provides that “any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law unless it is inconsistent with the Constitution or an Act of Parliament.”

⁴¹² Section 39(1)(b) of the Constitution of South Africa 1996.

⁴¹³ Article 21 of the *Rome Statute*.

⁴¹⁴ The South African Minister for Justice and Constitutional Development introduced the International Criminal Court Bill [B42B-2001] in Parliament as a Section 75 Bill. Section 75 of the 1996 Constitution refers to the procedure in passing Bills that do not amend the Constitution (s. 74) or affect Provinces (S.76).

⁴¹⁵ SADC Conference on the Ratification of the Rome Statute of the International Criminal Court, MODEL Enabling Act, DC/REP/RAT/D.A. 1999, Pretoria, 1999.

⁴¹⁶ Dugard J, *International Law: A South African Perspective* 201.

The ICC Act also provides for the amendment of domestic laws⁴¹⁷ in order to align them with definitions provided under the *Rome Statute*, including areas of cooperation regarding the arrest and surrender of persons.⁴¹⁸

The approach adopted by the ICC Act, providing South African courts extended jurisdiction to accommodate crimes committed outside the territory of the Republic,⁴¹⁹ is similar to Canadian legislation dealing with the prosecution of crimes under the ICC.⁴²⁰

It should be stated at this stage of the study that section 231 of the Constitution effectively requires Parliament to approve any possible future repeal of the ICC Act, prior to the National Executive sending notice of withdrawal to the Secretary General of the United Nations. Repealing legislation is an exclusive function of Parliament, a function that cannot be appropriated by the National Executive.⁴²¹ Similarly a form of public participation would be required prior to a decision of this magnitude being made.

4.7 An analysis of the ICC Act

The ICC Act provides a framework to ensure the effective implementation of the *Rome Statute* of the International Criminal Court in South Africa. The Act further ensures that South Africa conforms to its obligations set out in the Statute, providing cooperation by South Africa with the Court and assisting with related matters.

The Preamble to the ICC Act provides an interesting background to the context and intention of the legislation. The Preamble of the Act is mindful that:

- “-Throughout the history of human-kind, millions of children, women and men have suffered as a result of atrocities which constitute the crimes of genocide, crimes against humanity, war crimes and the crime of aggression in terms of international law;
- The republic of South Africa, with its own history of atrocities, has, since 1994, become an integral and accepted member of the community of nations;
- The Republic of South Africa is committed to-
 - Bringing persons who commit such atrocities to justice, either in a court of law of the Republic in terms of its domestic laws where possible, pursuant to its

⁴¹⁷ See Section 39 of the ICC Act which effectively amended aspects of the Criminal Procedure Act No 51 of 1977 and the Military Discipline Supplementary Measures Act 16 of 1999.

⁴¹⁸ See Chapter 4 of the ICC Act, sections 8-32.

⁴¹⁹ Chapter 2, Section 4 (3)(a-d) of the ICC Act.

⁴²⁰ See Section 8 of the Canadian Crimes Against Humanity and War Crimes Act, 2000.

⁴²¹ Section 231(2) of the Constitution of South Africa. See also discussion in section 1.6.5 above.

- international obligations to do so when the Republic became a party to the Rome Statute of the International Criminal Court, or in the event of the national prosecuting authority of the Republic declining or being unable to do so, in line with the principle of complementarity as contemplated by the Statute, in the International Criminal Court, created by and functioning in terms of the said Statute; and
- Carrying out its other obligations in terms of the said Statute....”

The Preamble states that South Africa has inherited an international obligation under the *Rome Statute*, to bring the perpetrators of crimes against humanity to justice, if possible, in a South African court under its domestic law. The Preamble recalls South Africa’s own history of atrocities, and welcomes its return to the community of nations, once again becoming a member of repute and dignity. This road to international acceptance has been a hard and arduous task, driven forward over decades by men and women of South Africa, determined that we provide a leading role in promoting human rights in the international community.

The ICC Act seeks to promote, inter alia, the following goals which are recorded in section 3 of the Act. The objects stated in the Act are:

- (a) “-To create a framework to ensure that the *Rome Statute* is effectively implemented in the Republic;
- (b) To ensure that anything done in terms of the ICC Act conforms to the Republic’s obligations in terms of the *Rome Statute*;
- (c) To provide for the crime of genocide, crimes against humanity and war crimes;
- (d) To enable South Africa’s National Prosecuting Authority to prosecute and High Courts to adjudicate in cases against persons suspected of having committed crimes against humanity, both within and outside the borders of South Africa, considering the principle of complementarity as referred to in Article 1 of the *Rome Statute*.
- (e) To cooperate with the ICC with investigations when the National Prosecuting Authority declines or is unable to prosecute a person as contemplated in paragraph (d) above.-”

The ICC Act⁴²² provides that no prosecution may be instituted against a person standing accused of having committed a crime, if the specific crime in question is alleged to have been committed prior to the commencement of the Statute, which was 1 July 2002.

⁴²² Section 5(2) of, The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.

While the ICC Act provides South African courts with potential jurisdiction over persons who may have committed ICC defined crimes, the issue of immunity from jurisdiction for high-ranking officials remains contentious.⁴²³ The most debated area has been directed at the extent to which serving heads of state, and other senior government officials can justifiably claim immunity from proceedings that may be instituted against them for allegedly committing defined international crimes.

4.8 Immunity from proceedings for heads of state and government officials

The *Rome Statute*⁴²⁴ provides that:

“-the official capacity as a head of state or government, a member of a government or parliament, an elected representative or a government official, shall in no case exempt a person from criminal responsibility under this statute.-”

The position of international legal immunity before national courts is unclear. In the *Pinochet Cases*,⁴²⁵ the House of Lords accepted that serving international heads of state retain absolute immunity, irrespective of the nature of crimes alleged, unless waived by the sending state. Initially the House of Lords denied immunity to Pinochet in his capacity as a former head of state, but emphasised that if he had still been an acting head of state, this immunity in international law would have continued to subsist. The International Court of Justice has affirmed this immunity in its decision in the *Arrest Warrant Case*.⁴²⁶ Regarding the provisions precluding immunity contained in constitutive instruments of international criminal tribunals, including the *Rome Statute* of the ICC, the Court held that this exception to customary international law was not applicable to national courts.⁴²⁷ This lack of clarity is problematic due to the fact that national courts of states parties aligned with the *Rome Statute* are expected to act in a “complementary” manner with the ICC. This would include prosecuting individuals

⁴²³ Dugard J, *International Law: A South African Perspective* 210.

⁴²⁴ Article 27 of the *Rome Statute*.

⁴²⁵ Lord Nicholls in the first *Pinochet* case held that “there can be no doubt that if Senator Pinochet had still been the head of the Chilean state, he would have been entitled to immunity.” (see *R v Bow St Magistrate, Ex p Pinochet Ugarte* [1998] 4 All ER (Pinochet 1) at 938. Lord Millett in the third *Pinochet* case that “Senator Pinochet is not a serving head of state. If he were, he could not be extradited. It would be an intolerable affront to the Republic of Chile to arrest him or detain him.” (see *R v Bow St Magistrate, Ex p Pinochet (no 3)* [1999] 2 WLR 824, 905H).

⁴²⁶ *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* 2002 ICJ Reports 3.

⁴²⁷ *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* 2002 ICJ Reports 3 [58].

for ICC crimes and deferring to the ICC only where the national state is unwilling or unable to perform its prosecutorial role.

South Africa has attempted to avoid this controversy by providing suitable provisions in the ICC Act.⁴²⁸ Section 4(2) states that:

“-Despite any other law to the contrary, including customary and conventional international law, the fact that a person-

- (a) Is or was a head of State or government, a member of a government or parliament, an elected representative or a government official; or
- (b) Being a member of a security service or armed force, was under a legal obligation to obey a manifestly unlawful order of a government or superior:

Is neither-

- (i) A defence to a crime, nor
- (ii) A ground for any possible reduction of sentence once a person has been convicted of a crime.-”

In terms of the ICC Act, South African courts, acting under the complementarity principle, are accorded the same power to override the immunity afforded to officials of government, as is the ICC, by virtue of article 27 of the *Rome Statute*.

Support for the argument that section 4(2)(a) of the ICC Act scraps immunity, despite the contrary position under customary international law, originates from the Constitution itself.⁴²⁹ Section 232 of the Constitution provides that “customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.” Similarly section 233 of the Constitution provides that “when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law.”

Cassese⁴³⁰ believes that if under international law, personal immunity attaches to serving senior cabinet officials, then not only would the prosecution of such an official by South Africa be inconsistent with its obligations under customary international law,

⁴²⁸ Section 4 (2)(a) of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.

⁴²⁹ Dugard J, *International Law: A South African Perspective* 211.

⁴³⁰ Cassese A, *The Rome Statute of the International Criminal Court: A Commentary* (2002) 992.

but the ICC would also be prevented from instituting proceedings against such a person or requesting the surrender of that person.⁴³¹

In the *Arrest Warrant* case, the International Court of Justice (ICJ) held:

“-The rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction. Thus, although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under international law.”⁴³²

While it is regarded that jurisdictional immunity is procedural by nature, criminal responsibility is recognised as a question of substantive law.

4.9 South African jurisdiction and prosecution under the ICC Act

The ICC Act has established a variety of jurisdictional bases by which a South African court may prosecute a person alleged to be guilty by virtue of genocide, crimes against humanity or war crimes.⁴³³

The ICC Act⁴³⁴ creates jurisdiction for a South African court over ICC defined crimes by providing that “despite anything to the contrary in any other law of the Republic, any person who commits [an ICC] crime, is guilty of an offence and liable on conviction to a fine or imprisonment.”

Section 4(2) of the ICC Act is important because, despite any other law to the contrary, being a head of state or a member of government, is no defence to an ICC crime or providing grounds for any possible reduction of sentence once a person has been convicted of such a crime.

⁴³¹ See also 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. *DeRebus*. 2015.

⁴³² Arrest Warrant of 11 April 2000, Congo, The Democratic Republic of the v Belgium, Judgement, Merits, Preliminary Objections, ICJ GL No 121, [2002] ICJ Rep 3, [2002] ICJ Rep 75, ICJ (ICJ 2002) 14 February 2002, International Court of Justice [ICJ] 59. Also see Akande D, Shah S, “Immunities of State Officials, International Crimes, and Foreign Domestic Courts,” *European Journal of International Law*, Vol 21, Issue 4, 1 November 2010, 815-852. (See note 15 and 16 above)

⁴³³ Dugard J, *International Law: A South African Perspective* 202.

⁴³⁴ Section 4(1) of *The Implementation of the Rome Statute of the International Criminal Court Act* No 27 of 2002.

Section 4(3) of the ICC Act provides for a wider extra-territorial jurisdiction. The jurisdiction of a South African court will be confirmed when a person commits an ICC crime outside the territory of the Republic, and:

- (a) “-that person is a South African citizen; or
- (b) that person is not a South African citizen, but is ordinarily resident in the Republic; or
- (c) that person, after the commission of the crime, is present in the territory of the Republic; or
- (d) that person has committed the said crime against a South African citizen or against a person who is ordinarily resident in the Republic.-”

Section 4(3) dictates that the crime has been committed within the territory of the Republic⁴³⁵ when a person commits a core crime outside the territory of the Republic in one of these four circumstances.

The jurisdictional “triggers” contained within the ICC Act are largely uncontested. Section 4(1) of the Act emphasises the traditional principle of territoriality where a state has competency in respect of all acts which occur in its territory. Trigger (a) indicates that international law has accepted that states have the competency to exercise jurisdiction over their citizens for crimes committed anywhere in the world. Trigger (b) extends jurisdiction over South African residents by virtue that they have a close and substantial connection with South Africa at the time of the offence. Trigger (c) is grounded by the concept of universal jurisdiction⁴³⁶ over the perpetrators of crimes which are of serious concern to the international community. Trigger (d) is based on the passive personality principle of international law which dictates that a state has the competency to exercise jurisdiction over an individual who causes harm to one of its nationals abroad.

The ICC Act provides that a South African court, charged with the prosecution of a person allegedly responsible for a core crime, should apply the Constitution and the law.⁴³⁷ The South African Bill of Rights⁴³⁸ provides for the rights of arrested, detained and accused persons, which would have to be considered for any person being tried under the ICC Act. In addition, Part 3 of the *Rome Statute* sets out a comprehensive framework of general principles of liability and defences.

⁴³⁵ Dugard J, *International Law: A South African Perspective* 202.

⁴³⁶ Cassese A, et al (eds) *The Rome Statute of the International Criminal Court: A Commentary* (2002) vol II at 1862.

⁴³⁷ Section 2 of *The Implementation of the Rome Statute of the International Criminal Court Act* No 27 of 2002.

⁴³⁸ Section 35 of the Bill of Rights, Chapter 2 of the Constitution of the Republic of South Africa, 1996.

4.10 Important features of the ICC Act

One of the distinct advantages of the *Rome Statute* of the ICC is that it combines in one place, a codified statement of the elements which constitute the crimes of genocide, war crimes and crimes against humanity.⁴³⁹ The drafters of the ICC Act incorporated the ICC Statute's definitions of the core crimes directly into South African law through a schedule appended to the Act.⁴⁴⁰ In this regard it should be noted that Part 1 of Schedule 1 of the ICC Act, follows after the wording of article 6 of the ICC Statute in relation to genocide. Part 2 of Schedule 1, reflects article 7 of the Statute with regard to crimes against humanity. Part 3 of Schedule 1, incorporates war crimes as defined in article 8 of the ICC Statute, which in turn, contains reference to the definitions of the Geneva Convention of 1929.⁴⁴¹

It is clearly evident that these crimes now form part of South African law through the implementation of the ICC Act. These crimes would also form part of South African law via the customary international law provision contained in section 232 of the Constitution. One of the objectives of the Act is to provide for the crimes of genocide, crimes against humanity and war crimes.⁴⁴² It is important to note that section 4(1) of the ICC Act, provides that despite any other contrary law in the Republic, any person who commits an ICC defined crime, is guilty of an offence

4.11 Cooperation with the ICC

Further to empowering South African officials and courts to domestically participate in the prosecution of ICC crimes, the ICC Act promotes a comprehensive cooperative scheme for South Africa to practice the principle of complementarity.⁴⁴³

The expectation under the Act, following South Africa's obligations under the complementarity scheme, is that a prosecution will occur within the Republic.⁴⁴⁴ If the National Director declines to prosecute a person in terms of the ICC Act, he or she

⁴³⁹ Du Plessis M, "South Africa's International Criminal Court Act" *Institute for Security Studies* paper 172, Nov 2008, 2.

⁴⁴⁰ Schedule 1 Parts 1-3 of *The Implementation of the Rome statute of the International Criminal Court* (Act No 27 of 2002).

⁴⁴¹ Geneva Conventions of 1929 reprinted in Roberts and Guelff (n 1) and GNs R749-752 GCE 2064 of 3 May 1968 (*Reg Gaz* 953).

⁴⁴² Section 39(c) of the ICC Act No 27 of 2002.

⁴⁴³ Section 5(3) of the ICC Act No 27 of 2002.

⁴⁴⁴ Dugard J, *International Law: A South African Perspective* 204.

must provide the Central Authority with full reasons for the decision, and forward these to the Registrar of the Court.⁴⁴⁵

In terms of arrest and surrender, the ICC Act is based on the understanding that the ICC will normally rely on national jurisdiction to secure the custody of suspects.⁴⁴⁶ As a result, the ICC Act envisages two types of arrest; one in terms of an existing warrant issued by the ICC, and another in terms of a warrant issued by the South African National Department of Public Prosecutions, (NDPP).⁴⁴⁷ An arrest in terms of an existing warrant, issued by the ICC, must comply with the ICC Act.⁴⁴⁸ This request must be referred to the Director-General of Justice and Constitutional Development, with the required documentation to satisfy a local court that there are adequate grounds for the surrender of the person to The Hague.⁴⁴⁹ An arrest in terms of a warrant issued by the NDPP, follows a request from the ICC for the provisional arrest of a person who is suspected or accused of having committed a core ICC crime. The director-general must then immediately forward this request to the NDPP, who will then apply for an arrest warrant before a magistrate.⁴⁵⁰

Having subsequently arrested the individual, the South African authorities proceed to surrender and deliver the arrestee to The Hague. In order to make a committal order, considering the surrender of an arrestee to the ICC, the magistrate must be satisfied that:

- (a) “-he warrant applies to the person in question⁴⁵¹
- (b) the person has been arrested in accordance with the procedures laid down by domestic law⁴⁵²
- (c) the rights of the person have been respected in terms of Chapter 2 of the Constitution to the extent that they are applicable.-”⁴⁵³

The nature of these three requirements emphasises that surrender to the ICC differs from extradition, because no reference is made of the double criminality rule which is

⁴⁴⁵ Section 5(5) of the ICC Act No 27 of 2002.

⁴⁴⁶ Section 8(1) of the ICC Act No 27 of 2002.

⁴⁴⁷ Section 9(3) of the ICC Act No 27 of 2002.

⁴⁴⁸ Section 8(1)(2) of the ICC Act No 27 of 2002.

⁴⁴⁹ See note 449 above.

⁴⁵⁰ Section 9(1) of the ICC Act No 27 of 2002.

⁴⁵¹ Section 10(1)(a) of the ICC Act No 27 of 2002.

⁴⁵² Section 10(1)(b) of the ICC Act No 27 of 2002.

⁴⁵³ Section 10(1)(c) of the ICC Act No 27 of 2002.

pivotal to extradition proceedings.⁴⁵⁴ This rule states that a suspect can be extradited from one country to stand trial for breaking a second country's laws, only when a similar law exists in the extraditing country.⁴⁵⁵ In *Patel v NDPP*,⁴⁵⁶ the court indicated that the principle of double (or dual) criminality is internationally recognised as central to extradition law. Shearer⁴⁵⁷ states that the double criminality rule will ensure that a person's liberty is not restricted as a consequence of offences not recognised as criminal by the requested state.

The magistrate must also be satisfied that the ICC has a valid interest in the surrender of the arrestee and be content that the person concerned may be surrendered to the court:

- (a) “-for the prosecution of the alleged crime
- (b) for the imposition of a sentence by the court in respect of which the person has been convicted
- (c) to serve a sentence already imposed by the court.”⁴⁵⁸

By contrast, the United Kingdom's ICC Act dictates that a court, when making an order for surrender, “is not concerned to enquire whether the warrant was duly issued by the ICC or where the person surrendered is alleged to have committed an ICC crime.”⁴⁵⁹ Article 89 of the *Rome Statute* provides that a court may transmit a request for the arrest and surrender of a person, together with supporting material, to a State Party, in order that this material would be available to the magistrate.

Article 93 contained in the *Rome Statute*, requires states parties to assist the ICC by cooperating in relation to investigations and prosecutions. Part 2 of the ICC Act describes a variety of circumstances in which the relevant authorities in the Republic should provide assistance to the ICC in relation to investigations and prosecutions. The Priority Crimes Litigation Unit (PCLU) was established to promote these obligations.⁴⁶⁰

⁴⁵⁴ Cryer R *An Introduction to International Criminal Law and Procedure* 89.

⁴⁵⁵ M Cherif Bassiouni, *International Extradition United States Law and Practice* 5 ed (2007) Chapter VIII: *Harksen v President of the Republic of South Africa & Others* 2000(2) SA 825 (CC) para3.

⁴⁵⁶ *Patel v NDPP* (838/2015)[2016] ZASCA 191 [8].

⁴⁵⁷ Shearer IA, *Extradition in International Law* (1971) at 137-138.

⁴⁵⁸ Section 10(5)(a) to (c) of the ICC Act No 27 of 2002.

⁴⁵⁹ Cryer R, “Implementation of the International Criminal Court Statute in England and Wales.” (2002) 51 *ICLQ* 733 at 736.

⁴⁶⁰ Dugard J, *International Law: A South African Perspective* 206.

4.12 The creation of the Priority Crimes Litigation Unit (PCLU)

In order to promote South Africa's obligations under the ICC Act, a Priority Crimes Litigation Unit (PCLU) was established within the National Prosecuting Authority (NPA). This unit is headed by a special director of public prosecutions and appointed in terms of the National Prosecuting Authority Act.⁴⁶¹ Section 13(1)(c) of the NPA provides that the President, after consultation with the Minister and National Director:

“-may appoint one or more Directors of Public Prosecutions (hereinafter referred to as Special Directors) to exercise certain powers, carry out certain duties and perform certain functions conferred or imposed or assigned to him or her by the President by proclamation in the Gazette.-”

The Special Director's appointment was confirmed in terms of Government Gazette No 24876 of 23 May 2003.⁴⁶² The Special Director was given two powers: first, to lead the Priority Crimes Litigation Unit; and secondly, to manage and direct the prosecution of crimes contemplated in the *Implementation of the Rome Statute of the International Criminal Court Act*. The Unit is therefore specifically tasked with dealing with ICC crimes as defined in the ICC Act.⁴⁶³ Recently a Directorate for Priority Crimes Investigation (DCPI) has been established within the Police service, and the crimes under the ICC Act fall within its purview for investigation.⁴⁶⁴ As a result, any requests by individuals or civil society groups for investigation and prosecution under the ICC Act, should be directed jointly to the PCLU and DCPI.⁴⁶⁵

On the assumption that the PCLU, together with the assistance of the DCPI initiates the investigation and issues a warrant of arrest, and the suspects are subsequently arrested, the matter will then progress to the prosecution stage. The ICC Act⁴⁶⁶ states that no prosecution may be instituted against a person accused of having committed a core crime without the consent of the National Director of Public

⁴⁶¹ Section 13(1)(c) of the National Prosecuting Authority Act No 32 of 1998.

⁴⁶² Proclamation No 43 of 2003.

⁴⁶³ As defined in Part 2, Articles 5-8 of the Implementation of the Rome Statute of the International Criminal Court (Act No 27 of 2002).

⁴⁶⁴ Directorate for Priority Crimes Investigation established in terms of Section 17C of the South African Police Service Act, 1995, as amended by the South African Police Service Amendment Act 57 of 2008.

⁴⁶⁵ Dugard J, *International Law: A South African Perspective* 208.

⁴⁶⁶ Section 5(1) of the ICC Act No 27 of 2002.

Prosecutions. Assuming that such consent is provided, the matter will proceed to court and the PCLU will adopt responsibility for the prosecution of the matter.⁴⁶⁷

4.13 Factors to be considered in the exercise of prosecutorial discretion under the ICC Act

Under the ICC Act the PCLU and the NDPP exercise prosecutorial discretion in relation to ICC crimes. Apart from the evidence that is presented to the PCLU and NDPP, there are three important factors which are considered in the process by which the PCLU and NDPP subsequently decide on whether or not to institute an investigation or prosecution under the ICC Act.

First, the decision to investigate or prosecute must consider the aims of the ICC Act. The primary aim of the Act is to secure the prosecution of individuals alleged to be guilty of crimes against humanity, war crimes and genocide.⁴⁶⁸ The Preamble to the ICC Act emphasises the obligation imposed on South African authorities under the Act is to:

“-[bring] persons who commit such atrocities to justice, either in a court of law of the Republic in terms of its domestic laws where possible, pursuant to its international obligations to do so when the Republic became party to the Rome Statute of the International Criminal Court.-”

It is important to record that one of the objects of the ICC Act⁴⁶⁹ is to:

“-Enable, as far as possible and in accordance with the principle of complementarity..... the national prosecuting authority of the Republic to prosecute and the High Courts of the Republic to adjudicate in cases brought against any person accused of having committed a crime in the Republic and beyond the borders of the Republic in certain circumstances.-”

Second, a decision taken by the national director must consider⁴⁷⁰ that:

“-If the National Director, for any reason, declines to prosecute a person under this section, he or she must provide the Central Authority with the full reasons for his or her decision and the Central Authority must forward that decision, together with the reasons, to the Registrar of the Court.-”

⁴⁶⁷ Dugard J, *International Law: A South African Perspective* 208.

⁴⁶⁸ Section 3(c) of the ICC Act No 27 of 2002.

⁴⁶⁹ Section 3(d) of the ICC Act No 27 of 2002.

⁴⁷⁰ Section 5(5) of the ICC Act No 27 of 2002.

The Central Authority referred to above, would be the Director-General of the Department of Justice and Constitutional Development.⁴⁷¹

Third, the decision must comply with the NPA Prosecution Policy.⁴⁷² The primary function of the Prosecutor⁴⁷³ is to assist the court in arriving at a just verdict, and in the event of a conviction, a fair sentence is imposed based on the presented evidence. The NPA has the responsibility and power to institute and conduct criminal proceedings on behalf of the State, and to perform the associated functions. The NPA Act requires that the Prosecution Policy be tabled in Parliament and that the *United Nations Guidelines of the Role of Prosecutors* be observed.⁴⁷⁴ This document instructs Prosecutors to give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognised by international law.⁴⁷⁵ This consideration has been recognised by the South African government which then created a Priority Crimes Litigation Unit to ensure that crimes committed under the ICC Act are prioritised and prosecuted.

The Prosecution Policy⁴⁷⁶ indicates that once a Prosecutor is satisfied that there is adequate evidence to provide a reasonable prospect of conviction, a prosecution should generally follow, unless the public interest demands otherwise. When deciding what is in the public interest, an important consideration should be the gravity of crimes, such as genocide, crimes against humanity and war crimes, as defined by the ICC. The Constitutional Court in *S v Basson*,⁴⁷⁷ expressed the following opinion in this regard:

“- As was pointed out at Nuremberg, crimes against international law are committed by people, not by abstract entities, so that only by punishing individuals who commit such crimes

⁴⁷¹ Du Plessis M, “South Africa’s International Criminal Court Act countering genocide, war crimes and crimes against humanity.” (2008) *Institute for Security Studies* Paper 12.

⁴⁷² NPA Prosecution Policy, revised in 2006, reviewed in 2010 and amended in June 2013.

⁴⁷³ Chapter 3 of the NPA Prosecution Policy.

⁴⁷⁴ Guidelines on the Role of Prosecutors (1990) adopted by the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990 (UN Doc. A/CONF.144/28Rev.1).

⁴⁷⁵ *United Nations Guidelines on the Role of Prosecutors* (1990) para. 15.

⁴⁷⁶ NPA Prosecution Policy, para.3C (June 2013).

⁴⁷⁷ *S v Basson* (CCT30/03A) [2005] ZACC 10; 2005 (12) BCLR 1192 (CC); 2007 (3) SA 582 (CC) (9 September 2005) [183].

can the provisions of international law be enforced.⁴⁷⁸ Given the nature of the charges, the SCA should have given appropriate weight and attention to these considerations, even in the absence of any argument on these issues by the state. Given the extreme gravity of the charges and the powerful and international need to have these issues properly adjudicated, particularly in the light of the international consensus on the normative desirability of prosecuting war criminals, only the most compelling reasons would have justified the SCA in exercising its discretion to refuse to rule on the charges.-”

South Africa’s interest in not becoming a safe haven for the perpetrators of crimes against international law, should form part of the overall consideration of “public interest” in prosecuting such crimes.

4.14 Prosecution and the NDPP’s consent

The ICC Act promotes the concept of complementarity by creating the necessary structure for national prosecutions under the ICC Statute.

The ICC Act⁴⁷⁹ provides that no prosecution may be instituted against a person accused of having committed a crime without the consent of the National Director [of Public Prosecutions]. The national director must, when reaching a decision regarding a prosecution, recognise South Africa’s obligation to the principle of complementarity under the *Rome Statute*. This includes the exercise of jurisdiction to prosecute persons accused of having committed an ICC crime.⁴⁸⁰

Considering the importance of a prosecution involving allegations against an accused of having perpetrated ICC defined crimes, the ICC Act provides that a specialised court would need to be designated.⁴⁸¹

The ICC Act does not provide for any specific trial procedure or punishment regime for domestic courts. What the ICC Act does provide, is for the designation of an appropriate High Court in which to conduct a prosecution against any person accused of committing an ICC crime.⁴⁸²

⁴⁷⁸ *Trial of the major war criminals before the International Military Tribunal (Nuremberg)* Vol 22 (1948) (the official text in the English language at page 465-6). Quoted with approval by La Forest (dissenting) in *R v Finta* [1994] 1 SCR 701 at 729.

⁴⁷⁹ Section 5(1) of the ICC Act No 27 of 2002.

⁴⁸⁰ Section 5(3) of the ICC Act No 27 of 2002.

⁴⁸¹ Section 5(4) of the ICC Act No 27 of 2002.

⁴⁸² Section 5(4) of the ICC Act No 27 of 2002.

The expectation under the ICC Act, considering South Africa's obligations under the complementarity principle, is that a prosecution would take place within the Republic. This is consistent with the spirit of cooperation and intent evident in the Preamble of the ICC Act, which promotes compliance with its obligations to the *Rome Statute*.

In this context, the existing confrontational relationship that exists between the African Union (AU), the ICC and the United Nations Security Council, should now be considered in the interests of all the citizens of Africa and their inherent human rights, dignity and economic freedom.

4.15 Conclusion

South Africa's ratification of the *Rome Statute*, followed by the enactment of the ICC Act, illustrates that the Republic is responding to international demand for a stand against ICC defined crimes. South Africa's role as an African leader in its continued support for the ICC, is vital to the Court's work and legitimacy on the continent.

CHAPTER 5 The relationship between African Union and the ICC

5.1 Introduction

Of the 124 countries in the world that are States Parties to the *Rome Statute*, 34 are African States. The African Union (AU) Member States were instrumental in the development of the *Rome Statute* and the subsequent formation of the International Criminal Court (ICC). Senegal was the first state to ratify the *Rome Statute*.⁴⁸³ Uganda referred the first case to the ICC, which currently has 10 cases under investigation, nine of which are African countries.⁴⁸⁴

Central to the relationship between the AU and the ICC is the United Nations Security Council. The AU has called for a permanent seat on the United Nations Security Council in order to make the Security Council (SC) more representative and legitimate by including African states in the power balance within the SC.⁴⁸⁵ This proposal was

⁴⁸³ United Nations. 1999. *Senegal first State to ratify Rome Statute of the International Criminal Court*. Press release L/2905, 3 February 1999 Rome: The United Nations.

⁴⁸⁴ Apiko P, Aggad F, "The International Criminal Court, Africa and the African Union: What way forward?" ECDPM Discussion Paper No 201 November 2016.

⁴⁸⁵ Dugard J, *International Law: A South African Perspective* 566.

originally built on the Sirte Declaration,⁴⁸⁶ calling for the allocation of two permanent seats to Africa along with veto powers, including five non-permanent seats.⁴⁸⁷

5.2 An analysis of the existing relationship between the African Union and the ICC

The Security Council is central to the history of the confrontational relationship between the AU and the ICC. This relationship exists not only because the SC initiated the process leading to the issuing of an arrest warrant against President Bashir, but because the SC holds the power to defer proceedings against Bashir under article 16 of the Statute.⁴⁸⁸ The AU Peace and the Security Council (PSC) responded with the view that in order to promote long-lasting peace, it was important that the search for justice should be pursued in a way that does not impede or jeopardise efforts aimed at promoting lasting peace.⁴⁸⁹ In addition, the PSC was concerned that the ICC arrest warrant may be an indication of double standards and may amount to a misuse of indictments against African leaders.⁴⁹⁰ The PSC then called on the SC, in terms of Article 16 of the *Rome Statute* of the ICC, to defer the process against Bashir in order that ongoing peace initiatives in Sudan would not be jeopardised, as well as the fact that in the current situation, a prosecution may not be in the best interests of victims and justice.⁴⁹¹

By the time that the AU Heads of State and Government met in Addis Ababa in February 2009, the SC had not acted on the PSC's request.⁴⁹² The Summit subsequently endorsed the call made by the PSC for an Article 16 deferral by the SC. The PSC also cautioned that the indictment would undermine the fragile peace process that was underway in The Sudan, whilst expressing the AU's resolute

⁴⁸⁶ The Sirte Declaration, a resolution originally adopted by the AU on 9 September 1999 at the fourth Extraordinary Session of the AU Assembly held in Sirte, Libya. This Declaration was followed by a summit in Lome in 2000, when the Constitutive Act of the African Union was adopted, and at Lusaka in 2001 when the plan for the implementation of the African Union was adopted.

⁴⁸⁷ This position was reaffirmed at the AU Summit in Ethiopia in February 2008.

⁴⁸⁸ Article 16 of the *Rome Statute* grants the Security Council the power to defer investigations and prosecutions for a renewable period of 12 months under whatever conditions may be laid down by the Council.

⁴⁸⁹ The 2002 Protocol Relating to the Establishment of the Peace and Security Council of the AU, Article 7.

⁴⁹⁰ *The Prosecutor v Omar Hassan Al Bashir* ICC 02/0501/09.

⁴⁹¹ See, eg, Jouannete "Universalism and Imperialism: The true-false paradox of international law." (2007) 18 *European Journal of International Law* 379.

⁴⁹² Tladi D, "The African Union and the International Criminal Court: The battle for the soul of international law." (2009) 34 *SAYIL* 58.

commitment to combating impunity.⁴⁹³ The Summit also took the unprecedented step by requesting the AU Commission to:

“-convene as early as possible, a meeting of African countries that are parties to the *Rome Statute* on the establishment of the International Criminal Court (ICC) to exchange views on the work of the ICC in relation to Africa, in particular in the light of the processes initiated against African personalities, and to submit recommendations thereon taking into account all relevant elements.”⁴⁹⁴

The step was unprecedented because, while the AU Assembly has broad competence under article 9 of the AU Constitutive Act, including competence to determine common policies of the Union, it appeared irregular for the AU to convene a meeting of states parties to a treaty that the AU is not itself a party.⁴⁹⁵ Subsequently, the AU Commission called a meeting in June 2009 of the Ministers of Justice of African States Parties to the ICC Statute. During that meeting in Addis Ababa, several African state parties called for the withdrawal of ICC support, while others defended the ICC against attack. The outcome of the meeting contained two sets of recommendations. The first set reiterated the AU’s unflinching commitment to combating impunity, as well as the call for an article 16 deferral by the Security Council.⁴⁹⁶ The second set, included proposals that the AU should decide that all member states withdraw from the ICC statute, or refuse to cooperate with the Bashir indictment. The main element of this recommendation, on which there was no consensus, stated that:

“-In view of the fact that the Article 16 request by the AU has never been acted upon, the AU Member States shall not cooperate pursuant to the provisions of Article 98 of the *Rome Statute* of the ICC relating to immunities, for the arrest and surrender of President Omar al Bashir of The Sudan.”⁴⁹⁷

⁴⁹³ AU Summit Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of Sudan. Assembly/AU/Dec 221 (XII) February 2009.

⁴⁹⁴ Twelfth African Union Summit of Heads of State and Government, Addis Ababa. Twelfth Ordinary Session 1-3 February 2009.

⁴⁹⁵ Tladi D, “The African Union and the International Criminal Court: Battle for the soul of international law.” (2009) 34 *SAYIL* 60.

⁴⁹⁶ Report of the Meeting African States Parties to the *Rome Statute* of the ICC, 8-9 June 2009, AU/MinICC/Report.

⁴⁹⁷ AU Executive Council, 15th Ordinary Session, “Report of the Commission on the Meeting of States Parties to the *Rome Statute* on the International Criminal Court,” (ICC) [Assembly/AU/Dec. 221(XII)]. This report AU/Dec.245(XIII) Rev 1 is confirmed by the Declaration of the 13th Ordinary Session of the AU expressing concern at the indictment issued by the ICC against President Omar El Bashir of Sudan.

One could conclude, in the light of the above recommendation, that the AU's objection to the execution of the arrest warrant against Al Bashir, is based on the concern that such action would threaten the current peace process in The Sudan. The underlying reason could be the notion that the ICC, as a perceived western institution, should not exercise jurisdiction over African leaders. The arrest warrant for an African head of state was also considered an example of imperialist arrogance, and the concept emerged that African leaders should not to be tried under non-African systems.⁴⁹⁸ The decision by the AU, warns that it reserves the right to take any subsequent decision to protect the dignity and sovereignty of the continent, implying that all the African states could withdraw from the ICC.

The attitude of the AU could be interpreted as questioning the validity of the new value-based system of international law, which is reflected in the ICC Statute.⁴⁹⁹

Notwithstanding the AU's concerns, the ICC pre-trial chamber (PTC) resolved to issue an arrest warrant for al-Bashir on 4 March 2009. This prompted the PSC to immediately issue a further communique expressing concern as to the timing of the arrest warrant, confirming its concern that the ICC process would undermine ongoing efforts to achieve peace and security in The Sudan.⁵⁰⁰

It is important to consider that the Sirte Resolution⁵⁰¹ was considered by Botswana a violation of the *Rome Statute* and a betrayal of Africa's dedication to terminate impunity for human rights violations.⁵⁰² Within the AU, the Sirte Resolution was not wholeheartedly welcomed. Botswana, once again, distanced itself from the Resolution and reaffirmed its position as a State Party to the *Rome Statute* of the ICC, and fully agreed to cooperate with the ICC in the arrest and transfer of the President of Sudan

⁴⁹⁸ Kofi Annan, the United Nations Secretary General, noted that in the months leading up to the July 2009 AU Summit, some African leaders have expressed the view that international justice as represented by the ICC is an imposition, if not a plot, by the industrialised West. Annan "Africa and the International Criminal Court." *New York Times* 30 June 2009.

⁴⁹⁹ Tladi D, "The African Union and the International Criminal Court: The battle for the soul of international law." (2009) 34 *SAYIL* 62.

⁵⁰⁰ Peace and Security Council (PSC) Communique arising out of its 175th Meeting, held on 5 March 2009 in Addis Ababa.

⁵⁰¹ The Sirte Resolution was originally adopted by the Organisation of African Unity on 9 September 1999, at the fourth Extraordinary Session of the OAU Assembly of African Heads of State and Government held at Sirte, Libya. Subsequently in Lome in 2000, the Constitutive Act of the African Union was adopted, and implementation of the AU adopted in 2001 at Lusaka.

⁵⁰² The Sudan Tribune, "Botswana will not abide by AU decision on Sudan's Bashir," Monday 6 July, 2009.

to the ICC.⁵⁰³ At this stage, South Africa clarified its position, confirming that it would cooperate with the ICC in the investigation and prosecution of crimes and the subsequent execution of ICC arrest warrants.⁵⁰⁴

The AU confirmed its position of non-cooperation regarding al-Bashir's arrest warrant at its summit on 22 July 2010, where the following remarks were made by the AU Chairperson and Malawian President, Bingu wa Mutharika:

"-To subject a sovereign head of state to a warrant of arrest is undermining African solidarity and African peace and security that we fought for so many years. There is general concern in Africa that the issuance of a warrant of arrest for al-Bashir, a duly elected president, is a violation of the principle of sovereignty guaranteed under the United Nations and African Union Charter.-"

During 2010, President al-Bashir travelled to Chad, Kenya, Nigeria, Uganda and the Democratic Republic of the Congo without being detained.⁵⁰⁵ It is important also to consider that thirty-three of the fifty-three member states of the AU are party to the *Rome Statute*. This statistic places considerable pressure on the argument that the values represented by the ICC of intolerance against impunity, and the subsequent indictment of al-Bashir, are being imposed on African states by Western states. It is clear that many African states such as Botswana, were uncomfortable with the AU decision, suggesting that possibly the Africans felt a sense of commitment to those values supporting the ICC, including the arrest warrant issued against al-Bashir.⁵⁰⁶ Pierre-Marie Dupuy⁵⁰⁷ stated that the time had come to accept that the values under consideration are not restricted to European heritage, but constitute the common heritage of mankind, including Africa. Tladi reminds us as well, "that to fight against impunity and the concern for the well-being of the most vulnerable, are values central to humanity irrespective of geography. Arguments to the contrary attempt to blind us from this truth."⁵⁰⁸

⁵⁰³ See note 508 below.

⁵⁰⁴ Du Plessis M "Bringing the International Court Home- The implementation of the *Rome Statute* of the International Criminal Court Act 2002." (2003) *SACJ* 7.

⁵⁰⁵ See Jolloh M, du Plessis M, and Akande D, "Assessing the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court." *African Journal of Legal Studies*, 2011, p 5-13.

⁵⁰⁶ "South Africa's NGO's may challenge AU ICC decision before court." *Sudan Tribune* 12 July 2009.

⁵⁰⁷ Dupuy P, "Some reflections on contemporary international law and the appeal to universal values: A response to Martii Koskeniemi," (2005) 16 *European Journal of International Law* 131 at 135.

⁵⁰⁸ Tladi D, "The African Union and the International Criminal Court: The battle for the soul of international law." (2009) 34 *SAYIL* 69.

5.3 The African situations before the International Criminal Court

It is important to remember that there are three ways in which the ICC can initiate action: at the request of a State Party to the founding *Rome Statute*; at the request of the UN Security Council, and when the Court's prosecutor comes to the conclusion that a "situation" exists in a State Party indicating that its leaders or citizens have committed genocide, crimes against humanity or war crimes.⁵⁰⁹

Three parties to the *Rome Statute* have referred situations occurring on their territories to the ICC: the Democratic Republic of Congo, the Central African Republic and Uganda. In addition, the Security Council has referred the situations in Sudan and Libya to the Court, both of which have not ratified the *Rome Statute*.⁵¹⁰ On 31 March 2010, the Prosecutor was granted authorisation by the Pre-Trial Chamber II to initiate an investigation *proprio motu* into the situation in Kenya.⁵¹¹ The Court also considered violations in Cote d'Ivoire, which has not ratified the *Rome Statute*, but has made a declaration in accordance with article 12(3), which permits a non-state party to submit a declaration with the Registrar of the Court accepting the Court's jurisdiction for these specific crimes.⁵¹²

5.3.1 Democratic Republic of Congo (DRC)

In March 2004, the government of the Democratic Republic of Congo (DRC) referred the situation of grave crimes allegedly committed on the territory of the DRC to the International Criminal Court. The DRC requested the Prosecutor to investigate whether crimes under the Court's jurisdiction had been committed within its territory since the entry into force of the *Rome Statute*.⁵¹³ After thoroughly investigating the referral by the DRC, the Prosecutor, Luis Moreno Ocampo decided to open the first ICC investigation. He decided to concentrate the investigations on the perpetrators most responsible for crimes committed under the jurisdiction of the ICC, within the Ituri region of Northeast DRC. The first arrest warrant of the ICC was announced on 17 March 2006, which called for the arrest of Thomas Lubanga Dyilo, the leader of the

⁵⁰⁹ Articles 5-9 of the *Rome Statute* of the International Criminal Court.

⁵¹⁰ Dugard J, *International Law: A South African Perspective* 194.

⁵¹¹ The Coalition for the International Criminal Court "Cases and Situations available at <http://www.iccnw.org> (accessed 15 July 2017).

⁵¹² Du Plessis M, "The International Criminal Court and its work in Africa: Confronting the myths." (2008) *The Institute for Security Studies* Paper 173 at 5.

⁵¹³ Dugard J, *International Law: A South African Perspective* 195.

Patriotic Forces of Resistance (PFR), a political and military movement in Ituri province. In 2006 Lubanga was arrested and transferred to The Hague, where his trial commenced on 26 January 2009. Arrest warrants were issued for another four Congolese military leaders, including Germain Katanga, a senior commander in the PFR, for various war crimes and crimes against humanity.⁵¹⁴

Critics of this process believe that the insignificant players in Ituri province have been indicted by the ICC and placed on trial in The Hague. They believe that the Prosecutor deliberately left the most important actors, the national political and military leaders in the DRC in the shadows, including neighbouring Uganda and Rwanda, who provided militias with critical support. The Court has thus been unable to place the crimes in their full historical and regional context, and is not effectively uncovering the truth.⁵¹⁵

Germain Katanga was convicted by the ICC in March 2014 of war crimes and crimes against humanity during an attack against the Bogoro village in Ituri, Northeast DRC, and was sentenced to twelve years in prison.⁵¹⁶

Thomas Lubanga Dyilo was convicted in March 2012 of war crimes. Sentenced to 15 years' imprisonment, which was confirmed upon appeal. Reparations pending.

5.3.2 Uganda

In December 2003, the Ugandan government referred the situation in its country to the Prosecutor of the ICC and an investigation was initiated in July 2004. The investigation has centred on northern Uganda, where a number of atrocities, including crimes against humanity and war crimes have been committed against the civilian population. In July 2005 the Court issued arrest warrants for five senior commanders of the Lord's Resistance Army (LRA).⁵¹⁷

Dominic Ongwen was charged with 70 counts of war crimes and crimes against humanity in Northern Uganda. The trial of this LRA commander opened on 6 December 2016. He is the first LRA commander to appear before the ICC.

⁵¹⁴ Dugard J, *International Law: A South African Perspective* 195.

⁵¹⁵ Coalition for the International Criminal Court. "Overview and Timeline of Situations and Cases before the ICC." <http://www.iccnw.org>

⁵¹⁶ ICC situations and cases. The Coalition for the International Criminal Court. Available at www.coalitionfortheicc.org/explore/ICC-situations-and-cases. Accessed 15 July 2017.

⁵¹⁷ These warrants were for the arrest of Vincint Otti, Okot Odhiambo, Dominic Ongwen, Raska Lukwiya (deceased) and LRA leader Joseph Kony.

A warrant of arrest for Joseph Kony on twelve counts of crimes against humanity and twenty-one counts of war crimes was issued on 8 July 2005.⁵¹⁸ Joseph Kony is currently not in ICC custody.

5.3.3 Central African Republic

In December 2004, the government of the Central African Republic (CAR) referred the situation within the CAR to the Prosecutor of the ICC. This was the third referral submitted by a State Party in terms of the *Rome Statute*.⁵¹⁹ The Prosecutor subsequently decided to investigate the situation in May 2007. The situation in the CAR had been distinctive for the high number of sexually related crimes, which in the case of the CAR, has exceeded the number of alleged killings.⁵²⁰

The first suspect arrested in relation to this investigation was Jean-Pierre Bemba Gombo, president and commander-in-chief of the Movement for the Liberation of Congo. He was allegedly responsible, as a military commander, for the commission of war crimes and crimes against humanity in the CAR. Bemba was arrested by Belgian authorities on 24 May 2008 and transferred to a detention centre in The Hague on 3 July 2008.⁵²¹ His trial commenced on 22 November 2010, and he was convicted by the ICC in 2016 for war crimes and crimes against humanity perpetrated in the CAR. He was sentenced to 18 years' imprisonment. Reparations are pending.⁵²²

5.3.4 Kenya

On 26 November 2009, the Prosecutor used his *proprio motu* powers contained in the *Rome Statute* for the first time.⁵²³ Authorisation was sought from Pre-Trial Chamber II to open an investigation in relation to crimes allegedly committed during the 2007-2008 post-election violence in Kenya.⁵²⁴ On 8 March 2011, following extensive

⁵¹⁸ Case Information Sheet: ICC-PIDS-CIS-UGA-001-006/18

⁵¹⁹ Article 12(1) of the *Rome Statute* of the International Criminal Court.

⁵²⁰ Dugard J, *International Law: A South African Perspective* 196.

⁵²¹ Du Plessis M, "The International Criminal Court and its work in Africa: Confronting the myths." (2008) *The Institute for Security Studies* Paper 173 at 6.

⁵²² *The Prosecutor v Jean-Pierre Bemba Gombo* ICC-01/05-01/08.

⁵²³ Article 15(1) of the *Rome Statute* of the International Criminal Court.

⁵²⁴ This application was made partly on the basis that, despite indications that it would do so, Kenya had failed to seriously investigate the violence.

investigations, ICC Pre-Trial Chamber II issued a summons for six suspects, including senior politicians and government officials associated with both sides of the election violence.⁵²⁵ The suspects appeared before the ICC Pre-Trial Chamber II on 7 April 2011, where the Confirmation of Charges hearing was scheduled for 1 September 2011. However, on 31 March 2011, the Chamber received an application on behalf of the Government of Kenya, where on the basis of article 19 of the *Rome Statute* of the ICC, that the Chamber found the case against three of the indicted persons inadmissible.⁵²⁶ This request was based on the contention that Kenya was able to conduct its own prosecutions for the post-election violence, because it had adopted a new Constitution and other legal reforms.⁵²⁷ Kenya's political elite responded aggressively to the ICC's indictments, and on 22 December 2010, Kenya's Parliament passed a resolution calling for Kenya to withdraw from the *Rome Statute*.⁵²⁸

The incumbent president of Kenya, Uhuru Muigai Kenyatta initially appeared before the ICC on 8 April 2011 charged of being criminally responsible as an indirect co-perpetrator pursuant to article 25(3)(a) of the Rome Statute for crimes against humanity.⁵²⁹ The charges were dismissed on a technicality on 5 December 2014.

The ICC trial of Kenyan politician William Ruto and broadcaster Joshua Sang in 2016, was terminated due to insufficient evidence and alleged witness-tampering. They had initially been charged with crimes against humanity during the post-election violence that had occurred in Kenya during 2007-8.

5.3.5 Libya

On 26 February 2011 the United Nations Security Council passed Resolution 1970 (2011) referring the situation in Libya to the ICC. Libya was not a state party to the *Rome Statute*. The Resolution resolved to refer the situation in the Libyan Arab Jamahiriya to the Prosecutor of the ICC and compelled Libya to cooperate fully with the ICC, despite it's not being a party to the *Rome Statute*. Following an analysis of the situation, the Prosecutor, on 16 May 2011, applied to the ICC Pre-Trial Chamber I

⁵²⁵ Warrants issued for the arrest of William Samoei Ruto, Henry Kiprono Kosgey, Joshua Arap Sang, Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali.

⁵²⁶ Article 19(4) of the *Rome Statute* of the International Criminal Court.

⁵²⁷ Dugard J, *International Law: A South African Perspective* 197.

⁵²⁸ Du Plessis M, and Gevers C, "*International Justice: Kenyan case a good test of an ICC founding principle*" *Business Day* 28 January 2011.

⁵²⁹ *The Prosecutor v Uhuru Muigai Kenyatta*, ICC-PIDS-CIS-KEN-02-014/15.

for arrest warrants against Libyan leader Moammar al-Gaddafi, his son Saif al-Islam al-Gaddafi, the Libyan government spokesman, and Abdulla al-Sanusi, head of Libyan intelligence, for crimes against humanity. In the aftermath of a rebel victory, opposition forces captured and executed Moammar Gaddafi on 20 October 2011, thus terminating investigations against him.⁵³⁰ The cases of Saif al-Islam Gaddafi and Abdulla Senussi have remained in contention. The National Transitional Council (NTC), the temporary body of Libya, has appealed the admissibility of ICC jurisdiction in the cases against Gaddafi and Senussi in the ICC's Pre-Trial Chamber. On 11 October 2013, the Pre-Trial Chamber judges at the ICC issued their determination that the case of Abdulla al-Senussi was inadmissible before the court.⁵³¹ The Libyan government has, in other words, proved that they are willing and able to pursue an investigation against Senussi and the ICC terminated its investigation. In the case of Saif al-Islam Gaddafi, the Pre-Trial Chamber judges ruled that the Libyan government had not satisfied the requirements necessary to rule the case inadmissible before a court. Saif al-Islam Gaddafi has been held, without trial, by a militia group, known as the Abu Baker al-Siddiq Brigade, in the town of Zintan since his capture which occurred in November 2011. The ICC has since argued that the Libyan government is either incapable or unwilling to submit Saif al-Islam Gaddafi for trial, or is not willing to incur the political and monetary costs of forcing the Zintan militia to hand him over to the central authority.⁵³²

On 9 November 2016, Fatou Bensouda, the ICC Prosecutor, indicated in an address to the UNSC, that Saif al-Islam Gaddafi had been released from detention in Zintan and was beyond the custody and control of the Presidency Council of the Government of National Accord. Bensouda appealed to the Libyan authorities to have Gaddafi transferred to the ICC without further delay.⁵³³

In April 2017, the ICC unsealed a separate arrest warrant⁵³⁴ issued in 2013 for the former head of Moammar Gaddafi's Internal Security Agency, Mohamed Khaled Al-

⁵³⁰ Dicker R, "It's Time for Saif al-Islam Gaddafi to go to The Hague." (29 August 2013) *Think Africa Press* 12.

⁵³¹ Bensouda F, Prosecutor of the International Criminal Court. Statement to the United Nations Security Council on the situation in Libya. UN Security Council Resolution 1970 (2011) (UNSC Report 6) International Criminal Court.

⁵³² *The Prosecutor v Saif Al-Islam Gaddafi*, ICC-01/11-01/11

⁵³³ UN News Centre. "International Criminal Court aims to make Libya a priority for next year." (Accessed from www.un.org/apps/news/story on 16 July 2017).

⁵³⁴ International Criminal Court Arrest Warrant No: ICC-01/11-01/13 (13 April 2013).

Tuhamy, for crimes against humanity and war crimes committed in Libya between February-August 2011. His current whereabouts remain unknown.

5.3.6 Sudan

On 31 March 2005, the UN Security Council passed Resolution 1593,⁵³⁵ referring the prosecution of those allegedly responsible for several atrocities committed in the Darfur region in Sudan to the ICC.⁵³⁶ Subsequently, on 4 March 2009, Pre-Trial Chamber I, issued the warrant of arrest against Sudanese President Omar al-Bashir for alleged crimes against humanity and war crimes.⁵³⁷ The Sudan referral has highlighted several contentious issues in international law. Firstly, it is the first time that a presiding president has been investigated for international crimes before the ICC.⁵³⁸ This investigation was facilitated by the *Rome Statute*,⁵³⁹ providing that functional immunity does not apply to any specific individual before the ICC, making particular reference to heads of state and government.⁵⁴⁰

Since Sudan is not party to the *Rome Statute*, questions have arisen concerning head of state immunity under customary international law, and the extent to which the *Rome Statute*'s provisions eliminate that immunity, as applied to President al-Bashir.⁵⁴¹ These provisions have also generated further debate over the appropriate relationship between articles 27 and 98 of the *Rome Statute*. Article 98 provides that a state is not obliged to hand over an individual to the ICC, if doing so would be inconsistent with its obligations under international law with respect to State or diplomatic immunity.⁵⁴² This is largely the argument forwarded by the South African government for its failure to arrest President al-Bashir, which has completely ignored the spirit and intent of article 27 of the *Implementation of the Rome Statute of the International Criminal Court Act*

⁵³⁵ UN Security Council Resolution 1593, 31 March 2005.

⁵³⁶ Dugard J, *International Law: A South African Perspective* 197.

⁵³⁷ Warrant of Arrest for Omar al-Bashir, No ICC-02/05-01/09 (4 March 2009).

⁵³⁸ Williams S, and Sherif L, "The arrest warrant for President al-Bashir: Immunities of incumbent heads of state and International Criminal Court." (2009) 14 *Journal of Conflict and Security Law* at 71.

⁵³⁹ Article 27(1) of the *Rome Statute* of the International Criminal Court.

⁵⁴⁰ Du Plessis M, and Gevers C, "Making amendments: South Africa and the International Criminal court from 2009-2010 (2009) 34 *SAYIL* at 22.

⁵⁴¹ Akande D, and Shah S, "Immunities of state officials, international crimes and foreign domestic courts." (2010) 21 (4) *European Journal of International Law* at 815.

⁵⁴² Dugard J, "Regarding the relationship between article 98 and 27 of the *Rome Statute*; South Africa appears to have taken the robust position that, notwithstanding the fact that Sudan is not a state party to the *Rome Statute*, al-Bashir does not have an entitlement to immunity under article 27 of the *Rome Statute*" at 198.

27 of 2002. These events precipitated South Africa's misguided notice of withdrawal from the ICC which will be discussed in detail in the following chapter.⁵⁴³

On 6 July 2017 Judge Tarfusser of the ICC handed down judgement on South Africa's failure to arrest President al-Bashir when he visited the Republic in June 2015.⁵⁴⁴ He stated that, "the Chamber concludes that by not arresting Omar al-Bashir while in South Africa between 13-15 June 2015, South Africa failed to comply with the court's request for the arrest and surrender of al-Bashir, contrary to the provisions of the [Rome] Statute."⁵⁴⁵ South Africa was given five days to appeal the ruling.

It would appear that the inherent flaw of the ICC is that it does not enjoy universal jurisdiction, particularly in Africa, without which there can be no individual enforcement.

5.3.7 Other African ICC trials

Former Cote d'Ivoire president Laurent Gbagbo and youth leader Charles Ble Goude have been charged with crimes against humanity following the 2010 presidential elections. Their joint ICC trial opened in January 2016. It was noted that local public opinion indicated that the ICC needed to carry out their mandate "in a manner designed to ensure that the ICC's delivery of justice will be accessible, meaningful, and perceived as legitimate, having an impact in countries where it conducts investigations."⁵⁴⁶

On 27 September 2016, an ICC Court sentenced Islamic militant, Ahmed al-Faqi al-Mahdi to nine years imprisonment for intentionally directing attacks against historical monuments in Timbuktu, Mali.⁵⁴⁷

⁵⁴³ South African Justice and Correctional Services Minister, Michael Masutha announced the government's intention to withdraw from the ICC, and notice was given to the United Nations Secretary General on 17 October, 2016.

⁵⁴⁴ Failure to arrest President al-Bashir was inconsistent with South Africa's obligations in terms of the *Rome Statute* and section 10 of *The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002*.

⁵⁴⁵ Eyewitness News "ICC: SA violated ICC Agreement when it failed to arrest al-Bashir." 6 July 2017 (Accessed by ewn.co.za on 16 July 2017).

⁵⁴⁶ Human Rights Watch 2014 "Lessons from the ICC's Work in Cote d'Ivoire" www.hrw.org/report/2015/08/04 (Accessed 16 July 2017). ICC-02/11-01/15.

⁵⁴⁷ The Guardian "ICC Ruling for Timbuktu destruction should be a deterrent for others." (2016) www.the-guardian.com/world/2016 (Accessed on 16 July 2017)

5.4 South Africa's role in promoting an ongoing relationship with the ICC in Africa

The Chief Justice of the Republic of South Africa, Mogoeng Mogoeng, in his address to African Legal Aid (AFLA)⁵⁴⁸ quoted a former Secretary General of the United Nations, Mr Kofi Atta Annan:

“-On a continent that has experienced deadly conflict, gross violation of human rights, even genocide, I am surprised to hear critics ask whether the pursuit of justice might obstruct the search for peace. We must be ambitious enough to pursue both.-”

The Chief Justice continued to stress that Africa and the world needed the ICC yesterday, today and forever. He indicated that dialogue with Africa is crucial to address the strained relationship that exists between Africa and the ICC, and referred to the sentiments of the former President of the Republic of South Africa, Nelson Mandela, who stated:

“Our own continent has suffered enough horrors emanating from the inhumanity of human beings towards human beings. Who knows, many of these might not have occurred, or at least been minimised, had there been an effectively functioning ICC.”⁵⁴⁹

These three eminent jurists and statesmen all advocated the important role of the ICC in Africa. South Africa has in the past played a leading role in promoting the ICC in Africa which has previously seen the support of the AU.⁵⁵⁰ To confirm its power to recognise and implement the provisions of international instruments, section 231 was tabled which provides that any international agreement becomes law in the Republic of South Africa when it is enacted into law by national legislation.⁵⁵¹ In order to give effect to its obligations under the *Rome Statute* and to provide a leading example to the rest of Africa, South Africa enacted the *Implementation of the Rome Statute Criminal Court Act*.⁵⁵²

⁵⁴⁸ Chief Justice Mogoeng Mogoeng “Africa and the International Criminal Court (ICC)-Lessons Learned and Synergies ahead,” Address to African Legal Aid, Johannesburg, South Africa, 9 September 2014.

⁵⁴⁹ Address delivered by former President Nelson Mandela at the Conference of African National Institutions for the Promotion and Protection of Human Rights, Durban, 01 July 1998.

⁵⁵⁰ Article 4 of the African Union Constitutive Act affirms the continent’s commitment to the protection and promotion of human rights and the rejection of impunity.

⁵⁵¹ Section 231 of the Constitution of South Africa 1996.

⁵⁵² *The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002*.

But has South Africa continued to enact the wishes of its senior citizens such as Nelson Mandela and the Chief Justice? Does it still promote a favourable relationship between Africa and the ICC?

South Africa has over the years styled itself as a bridge between the western world and Africa, promoting the concept that the Republic served as the “gateway to Africa.” It perceives itself as a spokesperson for the continent, considering its membership of the BRICS alliance,⁵⁵³ and G20.⁵⁵⁴

But how do Africans beyond South Africa’s borders view the country? The widespread attacks on foreigners in South Africa in 2008 is perceived as an indication that South Africans do not view themselves as part of the continent and resented the immigrants from the rest of Africa. Over 75% of immigrants to South Africa come from Africa, with 1,5 million coming from Zimbabwe and over a third of Malawi’s population live and work in South Africa.⁵⁵⁵

There is also a growing lack of trust in South Africa’s *bona fides*. The country lays claim to represent the continent in BRICS and the G20, but there is a feeling that very little benefit filters through to the rest of the continent. South Africa’s own economic interests appear to enjoy priority, despite its rhetoric of *ubuntu*⁵⁵⁶ relating to human kindness and consideration.

These negative perceptions of South Africa’s leadership role in the continent have spilt over and damaged its relationship with the AU, the ICC and African citizens. Its credibility has diminished, especially with the influence of growing corruption in government and several setbacks in the High Court regarding its membership of the ICC.⁵⁵⁷

Several serious questions could be asked of the South African Government’s lack of commitment and resolve to the AU, and various agreements negotiated by South

⁵⁵³ An alliance of Brazil, Russia, India, China and South Africa.

⁵⁵⁴ The G20 is an international forum for governments and central bank governors from 20 major economies, formed in 2008, seeking to promote international financial stability.

⁵⁵⁵ <https://africacheck.org/factsheets/geo> (Accessed 17 July 2017)

⁵⁵⁶ *Ubuntu* is an African quality that includes the essential human virtues of compassion, understanding and humanity.

⁵⁵⁷ South Africa officially withdrew its notice of withdrawal from the ICC following a court order that found the notice to be unconstitutional. *The Democratic Alliance v Minister of International Relations and Cooperation and Others* (83145/2016)[2017]ZAGPPHC 53; 2017(3) SA 212 (GP); 2017.

Africa under the auspices of the AU.⁵⁵⁸ Why is it that these agreements are not made binding law in South Africa in terms of section 231(4) of the Constitution?⁵⁵⁹ Could it be that South Africa purposely decided to give domestic preference to the UN and to international agreements, such as the *Rome Statute*, perhaps in a bid to impress Western powers and gain their favour?

Some serious questions must be directed at the South African Government's legal advisors, and their failure to foresee the legal problems resulting from the Republic's government not domesticating AU agreements, but doing so with the *Rome Statute*.⁵⁶⁰ This has caused the South African government considerable reputational damage on the continent, and indeed across the rest of the world. Internationally, the failure to arrest President al-Bashir and the announcement of South Africa's intention to withdraw from the *Rome Statute* has done considerable damage to the country's reputation. Angela Mudukuti⁵⁶¹ believes that this former champion of international justice has fallen from grace.

Post-apartheid South Africa proclaims itself to be a constitutional democracy seeking to uphold the rule of law and provide an example to the rest of Africa. This failure to arrest al-Bashir and its initial intention to abandon the only available permanent mechanism for international accountability, could not be further at variance.

The al-Bashir case and the intended withdrawal from the ICC also highlight the intersection between politics and law. Whilst the law does not operate in isolation, it should not be influenced by political considerations that favour one leader or political party. Justice, accountability and the promotion of human rights within the ambit of the ICC, should be far higher on the government's list of priorities than political expedience.

⁵⁵⁸ For example, the development of the BRICS Alliance (Brazil, Russia, India, China and South Africa) and holding the first BRICS Summit in Durban in March 2013, and agreeing to establish the New Development Bank (NDB) African Regional Centre in South Africa, for the benefit of African states and the AU.

⁵⁵⁹ For example South Africa's position on the implementation of the AU Agenda 2063 currently under consideration. Department of Home Affairs November 2017.

⁵⁶⁰ For example The New Partnership for African Development (NEPAD) promoting socioeconomic development in Africa, containing principles designed to be incorporated in participating countries domestic law.

⁵⁶¹ Mudukuti A, "Prioritising Justice and Accountability in South Africa." *Perspectives and political analyses in Africa* Issue 1 January 2017.

On 14 March 2017, the South African Minister of Justice, formally withdrew the draft repeal legislation on the withdrawal of the *Implementation of the Rome Statute of the International Criminal Court Bill*.⁵⁶² This followed a High Court ruling that the government's decision to withdraw from the ICC was unconstitutional and invalid.⁵⁶³ The South African Law Commission (SALC) had also forwarded submissions to the Portfolio Committee on Justice and Correctional Services recommending the scrapping of the Repeal Bill in its entirety.⁵⁶⁴ Could this be the start of a rebuilding process for South Africa's support for the ICC? This provides a significant demonstration to Africa, that following a period of political uncertainty, it continues to provide unconditional support for international law.

Whilst considering these promising developments, it is important to understand the entire Omar al-Bashir affair in context, resulting in the circumstances leading up to South Africa's notice of withdrawal from the ICC.

5.5 Conclusion

The ICC's impact in affected communities in Africa is not immediately clear, but it is clear that the delivery of justice matters. Not only is the quality of justice important, but in Africa justice must be seen to be done. This is a fundamental aspect of indigenous law in this region, where a signal must be sent that no person is above the law. This provides a powerful affirmation of the rule of law, but only when that message is heard and understood by those victimised by criminality.

The message that South Africa gave to the AU following the withdrawal of its intention to leave the ICC, may strengthen the existing relationship between the ICC and the AU, as the AU begins to understand that the preservation of human rights is an issue gathering huge momentum on the continent.

⁵⁶² The Minister of Justice and Correctional Services withdrew the Repeal Bill in accordance with Rule 334 of the Rules of the National Assembly.

⁵⁶³ See note 544 above. (This will be further discussed in Chapter 7 below)

⁵⁶⁴ Southern African Litigation Centre. News Release, "Withdrawal of the ICC Repeal Bill" 16 March 2017.

CHAPTER 6 **The al Bashir affair and circumstances leading to South Africa's notice of withdrawal from the ICC**

6.1 Introduction

The circumstances leading up to South Africa's notification of withdrawal from the ICC revolve around African Union (AU) opinions, its decisions and the ICC's indictment of President Omar al-Bashir.

On 3 July 2009, the AU Assembly of Heads of State and Government adopted a decision on the ICC indictment of the President of Sudan, Omar al-Bashir. This decision indicated that African states would refuse to cooperate with the ICC in the execution of the arrest warrant issued for President al-Bashir.⁵⁶⁵ This decision placed the African states party to the *Rome Statute* establishing the ICC, in the unenviable position of having to choose between their responsibilities as member states of the AU, and their obligations as states party to the *Rome Statute*.⁵⁶⁶

It is important to recall that the history of the ICC's creation involved the active support of African states. Since the *Rome Statute* came into operation on 1 July 2002, it has been signed by 139 states and ratified by 113, of which 31 are African.⁵⁶⁷ Africa is also the largest grouping on the Assembly of States Parties (ASP), and the ICC in The Hague employs staff from across the world including five judges from Africa.

6.2 Factors surrounding the arrival of President Omar Al-Bashir in South Africa

African states contributed extensively to the preparations leading up to the conference in Rome, where the *Rome Statute* was finalised. Prior to this conference, various ICC related activities were organised throughout Africa, which was consistent with the concept of enhancing universal support for the ICC.⁵⁶⁸ Some 90 African organisations⁵⁶⁹ lobbied their respective countries for the early establishment of an independent and effective international criminal court.⁵⁷⁰

⁵⁶⁵ AU Summit Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Assembly/AU/Dec245(XIII), July 2009.

⁵⁶⁶ Tladi D, "The African Union and the International Criminal Court (2009) *SAYIL* 34.

⁵⁶⁷ Dugard J, *International Law: A South African Perspective* 173.

⁵⁶⁸ Phakiso Mochochoko, Africa and the International Criminal Court, in E Ankumah and E Kwakwa (eds), *African perspectives on international criminal justice*, Ghana: Africa Legal Aid, 2005,246.

⁵⁶⁹ Based in Kenya, South Africa, Nigeria, Uganda, Rwanda and Ethiopia.

⁵⁷⁰ Du Plessis M, "The International Criminal Court that Africa wants" *Institute for Security Studies* 6.

The Southern African Development Community (SADC) also played an important role in its support for the ICC. During ICC-related negotiations, after which the International Law Commission (ILC) presented a draft statute for an international criminal court to the UN General Assembly in 1993, experts originating from the group met in Pretoria during September 1997 to discuss their common position. Based on discussions and principles submitted to them, the SADC ministers of justice and attorneys-general issued a common statement that subsequently became the primary basis for SADC's negotiations in Rome.⁵⁷¹

At a meeting on 27 February 1998, council members of the Organisation of African Unity (OAU), (now the African Union, AU) acknowledged the Dakar declaration⁵⁷² and requested all OAU member states to support the development of the ICC. This resolution was subsequently adopted by the OAU summit of heads of state and government in Burkina Faso in June 1998.

During the Rome Conference itself South Africa was a member of the drafting committee and coordinated the formation of part 4 of the *Rome Statute*. Schabas⁵⁷³ noted at the Rome conference:

“-[a] relatively new force, the Southern African Development Community, under the dynamic influence of post-apartheid South Africa, took important positions on human rights, providing a valuable counter-weight to the Europeans in this field.-”

It is submitted that there is no doubt that African states had ample opportunity to ensure that the principles contained in the SADC and Dakar Declarations were implemented to the fullest extent possible.

In order to give effect to its complementarity obligations under the *Rome Statute*, South Africa passed the *Implementation of the Rome Statute of the International Criminal Court Act*,⁵⁷⁴ and was the first state in Africa to implement the Rome Statute's provisions into its domestic law.

The picture that emerges is that of an international criminal court created with extensive involvement of African nations. The measure of this African support for the

⁵⁷¹ Maqungo S, The establishment of the International Criminal Court: SADC's participation in the negotiations. *African Security Review* 9(1) (2000).

⁵⁷² Dakar Declaration for the Establishment of the International Criminal Court, Dakar, 6 February 1998.

⁵⁷³ Schabas W, *An introduction to the International Criminal Court*, 19.

⁵⁷⁴ The Implementation of the Rome Statute of the International Criminal Court Act 27, 2002.

ICC is clearly evident from the response by leading African nations to American efforts, post-1998 to undermine the development of the ICC. During President Bill Clinton's final days in office, the United States signed the ICC statute, but was unable to secure ratification of the treaty before President Bush came to power. Once established in office, the Bush administration advised the UN Secretary General on 6 May 2002, that the United States had no intention of becoming a party to the *Rome Statute*.⁵⁷⁵ The United States then resorted to diplomatic means to oppose the ICC. The United States method was to encourage states to enter into bilateral immunity agreements, whereby states agreed not to send US citizens for trial at the ICC. Over 60 countries signed these agreements under pressure from the United States, but several African states, including Kenya, Lesotho, Mali, Namibia, South Africa and Tanzania refused to sign. In the case of South Africa, the United States had imposed a deadline of 30 June 2003 to sign the agreement. Having refused to submit to US demands by the stated deadline, South Africa was blacklisted on 1 July 2003.⁵⁷⁶ According to the US embassy in Pretoria, South Africa's decision would cost it about 7,2 million dollars in military aid.⁵⁷⁷ The South African government's reason for taking this position was based on the country's commitment to the humanitarian objectives of the ICC and the country's international obligations.

The strong stand in supporting the ICC that characterised Africa's earlier stance on international criminal justice is far less evident today. It is important to investigate why this change of heart occurred? What was it that forced the voice of Africa alter its tone? It has been suggested that the ICC has developed into a tool of Western powers⁵⁷⁸ which is targeting or discriminating against Africa.⁵⁷⁹ It has been suggested that the ICC focus on Africa is restricting rather than assisting African efforts to resolve its problems.⁵⁸⁰ This complaint is often expressed in terms of the Sudan referral.⁵⁸¹ On October 19 2016, the South African Minister of International Relations and

⁵⁷⁵ Press Release, United States Department of State, International Criminal Court: Letter to the UN Secretary General, Kofi Annan, 6 May 2002, informing that the United States does not intend to become a party to the treaty. <http://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm>

⁵⁷⁶ US suspends all military aid to South Africa, *Cape Times*, 2 July 2003.

⁵⁷⁷ *Agence France Press*, 24 July 2003.

⁵⁷⁸ *Sunday Times* 27 July 2008.

⁵⁷⁹ Mamdani M, The new humanitarian order, *The Nation*, 29 September 2008.

⁵⁸⁰ Tladi D, "The African Union and the International Criminal Court: The Battle for the Soul of International Law," 61.

⁵⁸¹ The Sudan Referral. UN Security Council SC/8351 31 March 2005. Resolution 1593(2005) The Security Council refers the situation in Darfur Sudan, to the Prosecutor of the International Criminal Court.

Cooperation, Maite Nkoana-Mashabane gave notice to the UN that it planned to leave the ICC.⁵⁸² The Minister stated, “The Republic of South Africa has found that its obligations with respect to the peaceful resolution of conflicts at times are incompatible with the interpretation given by the International Court.”⁵⁸³ Other African states, through the AU, have called on the UN Security Council to defer the ICC’s investigation into President al-Bashir of Sudan by invoking article 16 of the *Rome Statute*. Another objection is that the ICC decided to proceed against a sitting head of state of a country that is not party to the *Rome Statute*. This complaint once again raises the question about head of state immunity under customary international law as read with articles 27 and 98 of the *Rome Statute*.

South Africa then progressed through a period of indecision regarding its commitment to the ICC. In May 2009, the government confirmed that should President al-Bashir attend President Zuma’s inauguration, he would be arrested in terms of the 4 March 2009 arrest warrant issued by the Pre-Trial Chamber of the ICC.⁵⁸⁴ In July 2009 South Africa attended an AU meeting in Sirte, Libya, to support a 3 July resolution calling on its members to support a resolution to defy the international arrest warrant issued by the ICC for the arrest of President al-Bashir. However, only a month previously, the South African Minister of Justice, at another AU meeting in Addis Ababa, had joined other African states to confirm its commitment to the ICC.⁵⁸⁵

Because of its support for the Sirte resolution, South Africa was soon the target of severe criticism both at home and abroad. Virtually all of South Africa’s leading human rights organisations, including the South African Human Rights Commission, called for the South African government to respect its own law and Constitution,⁵⁸⁶ and distance itself from the AU decision to refuse cooperation with the ICC. The General

⁵⁸² South African diplomats delivered a formal notice of withdrawal from the *Rome Statute* to the United Nations on 19 October 2016. This was the beginning of a year-long process to complete withdrawal.

⁵⁸³ Mail and Guardian. 21 October 2016. “South Africa begins the process to withdraw from the International Criminal Court.”

⁵⁸⁴ Sudan Tribune. 9 May 2009. “Sudanese President to skip Zuma’s inauguration.” President Omar al-Bashir had been invited to the inauguration of President Zuma in Pretoria, but the Sudanese envoy in Cape Town was warned that President al-Bashir would face arrest on arrival in South Africa.

⁵⁸⁵ AU meeting in Addis Ababa, 8-9 June 2009.

⁵⁸⁶ Sections 231-233 of the Constitution of South Africa 1996.

Council of the Bar of South Africa issued a strong statement in which it summed up its legal position as follows:⁵⁸⁷

“-The issue of whether or not President al-Bashir will be subject to arrest and surrender in South Africa should he enter the country, is determined by reference to our laws, including The Implementation of the Rome Statute of the ICC Act and our Constitution.

The political considerations that underlie the AU’s concern with the conduct of the ICC and the UN Security Council in relation to Africa, should not impede our authorities from performing their express legal obligations under our law should al-Bashir enter South Africa.-”

Following this criticism, on 31 July 2009, the South African government clarified its legal obligations in relation to the possible arrest of al-Bashir.⁵⁸⁸

In June 2015, President Zuma hosted Sudan’s President Omar al-Bashir to an AU summit in South Africa and he arrived on Friday 12 June. On the following Saturday, 20 June 2015, even before a South African court could rule that al-Bashir be arrested, an ICC judge, Cuno Tarfusser, issued a decision instructing that South Africa immediately arrest and surrender al-Bashir.⁵⁸⁹

On Monday, June 15, 2015, the North Gauteng High Court ruled that al-Bashir be arrested and handed over to the ICC.⁵⁹⁰ President al-Bashir was subsequently allowed to leave the Waterkloof Military Air Base, despite the court order.

The Notice of Motion forwarded by the Southern African Litigation Centre on 14 June 2105 and other High Court decisions will now be discussed in order to confirm various interpretations of the *Rome Statute* and the *Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002*.

6.3 The application compelling the executive to arrest President Omar al-Bashir

When President Omar al-Bashir arrived in South Africa on the evening of 13 June 2015, he was welcomed by South African officials and Sudanese diplomats.⁵⁹¹ The

⁵⁸⁷ General Council of the Bar of South Africa. Draft Press Statement. 3 July 2009. ICC Arrest Warrant against President Omar al-Bashir of the Sudan.

⁵⁸⁸ Mr. Ayanda Ntsaluba, Director General for International Relations and Cooperation in South Africa, stated that, “The South African Government has said it would be obliged to arrest Sudanese President Omar al-Bashir if he sets foot in the country.”

⁵⁸⁹ Mail and Guardian. 7 September 2015. “ICC demands South Africa explain al-Bashir exit.” Mg.co.za/article/2015-09-07.

⁵⁹⁰ *The Southern African Litigation Centre v Minister of Justice and Constitutional Development & Others* 2015(5) SA 1 (GP).

⁵⁹¹ Tladi D, “The Duty on South Africa to Arrest and Surrender President al-Bashir under South African and International Law: A Perspective from International Law. *J Int Criminal Justice* (2015) 13(5): 1027-1047.

government of South Africa took no steps to arrest him, adopting the stance that he enjoyed diplomatic immunity. Its failure to arrest President al-Bashir resulted in the South African Litigation Centre (SALC), bringing an urgent application on Sunday 14 June 2015, in the High Court in Pretoria.⁵⁹² The SALC sought an order declaring the failure to take steps to arrest President al-Bashir to be in breach of the Constitution, and compel the Government to arrest and surrender President al-Bashir to the ICC. The Government opposed the urgent application.⁵⁹³ In granting the postponement the High Court ordered that President Omar al-Bashir was prohibited from leaving the Republic of South Africa until a final order was made in the application, and the respondents were ordered to ensure all border posts were secure and provide proof of service of such an order.⁵⁹⁴ At 1300hrs on Monday 15 June 2015, the High Court sought assurance from counsel representing the executive that President al-Bashir was still in the country. This assurance was given and at 1500hrs the High Court ordered the arrest and surrender of al-Bashir to the ICC. The High Court made the following order:

1. “-That the conduct of the Respondents to the extent that they have failed to take steps to arrest and/or detain the President of the Republic of Sudan, Omar al-Bashir (President Bashir), is inconsistent with the Constitution⁵⁹⁵ of the Republic of South Africa, and invalid;
2. That the respondents are forthwith compelled to take all reasonable steps to prepare to arrest President Bashir without a warrant in terms of section 40(1)(k) of the Criminal Procedure Act 51 of 1977 and detain him, pending a formal request for his surrender from the International Criminal Court;
3. That the applicant is entitled to the cost of the application on a pro-bono basis.-”

Immediately after this order was made counsel for the Government informed the High Court that President al-Bashir had left South Africa from the Waterkloof Air Force Base at about 1130 hrs that morning. The High Court added that the representatives of Government set out to mislead the Court in giving instructions, or the representatives

⁵⁹² Judge Hans Fabricius of the North Gauteng High Court issued a temporary court order barring Sudanese president Omar al-Bashir from leaving South Africa.

⁵⁹³ The Government sought and obtained a postponement until 1130hrs on Monday, 15 June 2015, to enable affidavits to be prepared.

⁵⁹⁴ Judgement in the matter between *The Southern African Litigation Centre v Minister of Justice and Constitutional Development*. Case Number 27740/2015. [6].

⁵⁹⁵ See section 237 and section 172(1)(a) of the Constitution of South Africa.

and counsel misled the Court. Whatever was the true explanation, it was disgraceful conduct and would be investigated by the appropriate authorities.⁵⁹⁶

On appeal,⁵⁹⁷ the Supreme Court of Appeal (SCA) considered South Africa's obligations to arrest and surrender a person against whom the ICC had issued an arrest warrant.⁵⁹⁸ The SCA⁵⁹⁹ carefully reviewed article 27(1) of the *Rome Statute* which states:

“-This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no way exempt a person from criminal responsibility under this Statute, nor shall it, in and itself, constitute a ground for reduction of sentence.”

The SCA found that because Party States (including South Africa) bound themselves to the Statute, including this provision, all Party States had waived any immunity that their nationals would otherwise have enjoyed under customary international law.⁶⁰⁰ The SCA also considered the fact that Sudan was a non-Party State and not bound by section 27(1) of the *Rome Statute*. The Court's reasoning was that, as non-Party States, their nationals are ordinarily brought within the jurisdiction of the ICC by way of a UN Security Council reference under Article 13(b). Article 27 is thereby made applicable to the non-Party State that is not able to rely on Article 98 of the *Rome Statute*.⁶⁰¹ Regarding the relationship between article 98 and article 27 of the *Rome Statute*, South Africa would appear to have taken the position that despite the fact that Sudan is not a state party to the *Rome Statute*, Omar al Bashir does not have an entitlement to immunity under article 27 of the Statute.⁶⁰²

In its reasoning the SCA also referred to the constitutional background to the case. It noted that the Constitution makes international customary law part of the law of South Africa, but it may be amended by legislation.⁶⁰³ It provides a specific mechanism

⁵⁹⁶ See note 591 above at [7] and [38-39].

⁵⁹⁷ *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016).

⁵⁹⁸ Sections 4(2) and 10(9) of the *Implementation of the Rome Statute of the International Criminal Court Act* 27 of 2002.

⁵⁹⁹ See note 596 above at [59].

⁶⁰⁰ *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016) [16, 41, 42, 49-53].

⁶⁰¹ See note 597 above, at para [60].

⁶⁰² Dugard J, *International Law, a South African Perspective* 213.

⁶⁰³ Section 232 of the Constitution of South Africa.

whereby obligations assumed under international agreements became a part of the law of South Africa.⁶⁰⁴ The SCA referred to *Glenister*,⁶⁰⁵ which emphasised that the provisions of our Constitution demonstrate that international law has a special place in our law which is carefully defined in the Constitution. The Court pointed out that the aim of the ICC Act, noted in the Preamble, was for South Africa to once again become an integral and accepted member of the community of nations.

The SCA noted the ICC's view that South Africa was not barred by President al-Bashir's status as a head of state from arrest and surrender to the ICC.⁶⁰⁶ The ICC believed that immunities granted to President al-Bashir under international law had been implicitly waived by the UN Security Council.⁶⁰⁷

The SCA quoted an interesting opinion expressed by Dr Weatherall⁶⁰⁸ "that the State is not an abstract entity but a community of human beings. The protection of international criminals from international scrutiny under the guise of State dignity, is an affront to the citizens against whom grave violations of human rights are perpetrated."⁶⁰⁹ Similarly in *Tachiona v Mugabe*⁶¹⁰ it was held that resorting to head-of-state and diplomatic immunity is wearing thinner in the eyes of the world and waning in the cover of law.

The SCA noted that when South Africa decided to implement its obligations under the *Rome Statute* by passing the ICC Act, it did so on the basis that all forms of immunity, including head of state immunity, would not constitute a bar to the prosecution of international crimes in this country.⁶¹¹

The SCA dismissed the appeal from the Minister of Justice and Constitutional Development and stated that government actions in failing to take steps to arrest and detain, for surrender to the ICC, President Omar al-Bashir, was inconsistent with

⁶⁰⁴ Section 231 of the Constitution of South Africa.

⁶⁰⁵ *Glenister v President of the Republic of South Africa & others* [2011] ZACC 6; 2011 (3) SA 347.

⁶⁰⁶ *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016) at [83].

⁶⁰⁷ Special Resolution 1593(2005) of the United Nations Security Council.

⁶⁰⁸ Weatherall T, "Jus Cogens and Sovereign Immunity: Reconciling Divergence in Contemporary Jurisprudence" (2015) 46 *Georgetown Journal of International Law* [1175].

⁶⁰⁹ *Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/150) [2016] ZASCA 17 (15 March 2016) at [84].

⁶¹⁰ *Tachiona v Mugabe* 169 F Supp 2d 259, 316-7 (SDNY 2001).

⁶¹¹ *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016) at [103].

South Africa's obligations in terms of the *Rome Statute* and section 10 of the ICC Act, and unlawful.⁶¹²

6.4 The manner in which the notice of withdrawal from the ICC was effected

The matter of *Democratic Alliance v Minister of International Relations and Cooperation*⁶¹³ was heard before the Gauteng Division of the High Court of South Africa (the High Court) on 5 and 6 December 2016 and judgement delivered on 22 February 2017.

The matter dealt with an international treaty, *The Rome Statute*, the ICC Act 27 of 2002 and notice of withdrawal in terms of article 127(1). Section 231 of the Constitution was considered relating to the power of the national executive to negotiate and sign an international treaty, and if that power included the authority to withdraw from such a treaty without prior parliamentary approval. Another question was whether parliamentary approval could be sought after notice of withdrawal had been delivered to the UN?

The High Court noted that the litigation history over the ICC originated with the refusal by the South African government to arrest President Omar al-Bashir when he visited South Africa in June 2015 and surrender him to the ICC. Subsequently the national executive took the decision on 19 October 2016 to withdraw from the ICC. The withdrawal process in terms of the *Rome Statute*⁶¹⁴ takes effect 12 months following a notice of delivery to the UN.

On 20 and 21 October 2016, the Minister of Justice informed both the Speaker of the National Assembly and the Chairperson of the National Council of Provinces (NCOP) of cabinet's decision and reasons to withdraw from the ICC. The Minister also stated his intention to table in parliament a bill repealing the ICC Act.⁶¹⁵

It should be remembered that on 24 October 2016 the Applicant in this case launched an application for direct access to the Constitutional Court seeking to challenge the executive's decisions. On 11 November 2016, the Constitutional Court denied direct

⁶¹² *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016) at [113].

⁶¹³ *Democratic Alliance v Minister of International Relations and Cooperation & others* 212 (12) BCLR 1297; 2013(1) SA248 (CC).

⁶¹⁴ Article 127(1) of the Rome Statute of the International Criminal Court.

⁶¹⁵ The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.

access on the basis that at that stage it was not in the interests of justice to hear the matter.

The Democratic Alliance (DA) constitutional challenge was predicated on the following four grounds:

1. Prior parliamentary approval was required before notice of withdrawal was delivered to the UN. (s 231 of the Constitution)
2. Prior repeal of the ICC Act was required before the notice of withdrawal was delivered to the UN.
3. The delivery of the notice of withdrawal without prior consultation with parliament was procedurally irrational.
4. The withdrawal from the *Rome Statute* breaches the state's obligations in terms of the Constitution.⁶¹⁶

Once again the High Court referred to *Glenister*⁶¹⁷ where the Republic's legal obligations under international law were discussed, and the separation of powers between the executive and the legislature, particularly the checks and balances exercised by both parties. The High Court stated that there was no debate regarding the operation of s 231 of the Constitution regarding treaty-making, but noted the dispute regarding the withdrawal from an international agreement.⁶¹⁸

The High Court stressed that in terms of s 231 of the Constitution, South Africa had both ratified the *Rome Statute* and domesticated it through the ICC Act.⁶¹⁹ While the notice of withdrawal was signed and delivered in the conduct of international relations and treaty-making as an executive act, it still remained an exercise in public power, which must comply with the principle of legality and is subject to constitutional control.⁶²⁰ The High Court added that a notice of withdrawal, based on a proper construction of s 231(1), is the equivalent of ratification, which requires parliamentary approval in terms of s 231(2) of the Constitution.⁶²¹

⁶¹⁶ Section 7(2) of the Constitution of South Africa).

⁶¹⁷ *Glenister v President of the Republic of South Africa and others* 2011 (3) SA 347; 2011 (7) BCLR 651 (CC) (*Glenister II*).

⁶¹⁸ *Glenister v President of the Republic of South Africa and others* 2011 (3) SA 347; 2011 (7) BCLR 651 (CC) (*Glenister II*) at [36].

⁶¹⁹ See note 613 above.

⁶²⁰ *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC) [64].

⁶²¹ *Glenister v President of the Republic of South Africa and others* 2011 (3) SA 347; 2011 (7) BCLR 651 (CC) (*Glenister II*) at [44 and 47].

The High Court pointed out that it was indeed correct that in international law, a notice of withdrawal from an international agreement does not require parliamentary approval.⁶²² However the question of which between the national executive and parliament has to decide on, was how withdrawal could be settled according to domestic law.⁶²³ This is a domestic issue in which international law does not and cannot prescribe. Furthermore, parliamentary approval is required before instruments of ratification may be deposited with the UN. From this perspective, the court found it difficult to accept that the reverse process of withdrawal should not be subject to the same parliamentary process.⁶²⁴

The approval of an international agreement in terms of the Constitution⁶²⁵ creates a social contract between the people of South Africa, through their democratically elected representatives in the legislature and the national executive. The Court indicated that it is trite that where a constitutional provision confers specific powers, that provision necessarily confers the power to undo it as well.⁶²⁶ In terms of the *Rome Statute*, the power to bind the country is expressly conferred on parliament. It must therefore be parliament which has the power to decide whether an international agreement ceases to bind the country.⁶²⁷

The Court concluded that the absence of a provision in the Constitution of a power for the executive⁶²⁸ to terminate international agreements is not a *lacuna* or omission, but a confirmation of the fact that such power does not exist, unless, and until parliament legislates for it. The national executive's decision to deliver notice of withdrawal from the ICC to the UN, without prior parliamentary approval in terms of s 231(2) of the Constitution, breached the doctrine of separation of powers.⁶²⁹

⁶²² Section 16 of the Rome Statute of the International Criminal Court, article 56 of the Vienna Convention on the Law of Treaty.

⁶²³ Sections 73, 74 and 79 of the Constitution of South Africa.

⁶²⁴ *Glenister v President of the Republic of South Africa and others* 2011 (3) SA 347; 2011 (7) BCLR 651 (CC) (*Glenister II*) at [51].

⁶²⁵ Section 231(2) of the Constitution of South Africa.

⁶²⁶ *Masetlha v President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC) [68].

⁶²⁷ Section 231(2) of the Constitution of South Africa.

⁶²⁸ *Mansigh v General Council of the Bar and Others* 2014 (2) SA 26 (CC) [25].

⁶²⁹ De Vos P, *et al*, *South African Constitutional Law in Context* 62.

The Court emphasised the importance of public participation in law making by referring to *Doctors for Life International*.⁶³⁰ This case referred to the participation by the public on a continuous basis, which provided vitality to the functioning of representative democracy.⁶³¹ Similarly, it encouraged citizens to become actively involved in public affairs and enhance their representative democracy.⁶³²

The question of procedural rationality also received the attention of the Court.⁶³³ The requirement for rationality is that government action must be rationally connected to a legitimate government purpose.⁶³⁴ In *Democratic Alliance v President of the Republic of South Africa*⁶³⁵ the Constitutional Court explained that to determine procedural irrationality is to look at the process as a whole and determine whether steps in the process were rationally related to the end sought to be achieved.⁶³⁶

In conclusion the Court stated that the notice of withdrawal from the *Rome Statute* of the International Criminal Court, without parliamentary approval was unconstitutional and invalid. In addition the Minister of International Relations and Cooperation and the Minister of Justice and Correctional Services were ordered to revoke the notice of withdrawal. Subsequent to this court ruling, on 7 March 2017, the South African government issued notice of withdrawal of notification of withdrawal to the UN Secretary General Antonio Guterres.⁶³⁷

⁶³⁰ *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399(CC); 2006 (6) SA 416 (CC) [115].

⁶³¹ De Vos P, *et al*, *South African Constitutional Law in Context* 87.

⁶³² De Vos P, *et al*, *South African Constitutional Law in Context* 94.

⁶³³ *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399(CC); 2006 (6) SA 416 (CC) in De Vos P *et al*, *South African Constitutional Law* 136.

⁶³⁴ *Pharmaceutical Manufacturers of SA and another: In re Ex Parte President of the Republic of South Africa and others* 2000 (2) SA 674 (CC) [85].

⁶³⁵ *Democratic Alliance v President of the Republic of South Africa and others* 2012 (12) BCLR 1297; 2013(1) SA 248 (CC) [37].

⁶³⁶ *Democratic Alliance v President of the Republic of South Africa and others* 2012 (12) BCLR 1297; 2013(1) SA 248 (CC) [12(2)].

⁶³⁷ "Reference is made to the Instrument of Withdrawal from the Rome Statute of the International Criminal Court and its Declaratory Statement that was deposited by the Permanent Mission of the Republic of South Africa to the United Nations under cover of Note No. 568/2016 on 19 October 2016. (ref: C.N.121.2017 TREATIES-XVIII.10 Depository Notification) continued:-

"I wish to inform you that the Gauteng High Court of the Republic of South Africa has on 22 February 2017 issued a judgement in the matter between the *Democratic Alliance and the Minister of International Relations and Cooperation and others* and found that the approval of the Parliament of South Africa had to be obtained before the Instrument of Withdrawal from the Rome Statute of the International Criminal Court can be deposited with the United Nations as provided for in Article 127(1) of the Rome Statute of the International Criminal Court. Consequently, the above mentioned depositing of the Instrument of Withdrawal was found to be unconstitutional and invalid. In order to adhere to the said

Since the High Court ruling the government has not appealed its decision.

On 15 March 2017, Justice Minister Michael Masutha formally withdrew South Africa's decision to withdraw from the International Criminal Court. The Speaker in Parliament, Baleka Mbete, said in a note in Parliament that Masutha was withdrawing the Implementation of the Rome Statute of the International Criminal Court Repeal Bill.⁶³⁸

6.5 The legal implications and subsequent effects following South Africa's possible withdrawal from the ICC

It is important to analyse the legal position regarding South Africa's possible withdrawal from the ICC, even though at this stage no withdrawal is planned. The legal implications that would result are vital to understand the constitutional provisions contained in sections 232 and 233 of the Constitution, read with corresponding responsibilities contained in Article 127(2) of the *Rome Statute*.

Withdrawal from the *Rome Statute* takes effect one year after the date of receipt of a withdrawal notification.⁶³⁹ Until such time, a party remains bound by its obligation under this international agreement.

A legal implication of South African withdrawal from the ICC is that it will still have to comply with Article 127(2) of the *Rome Statute* which states:

“-Withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.-”

South Africa was a member of the ICC when the arrest warrants were issued against President Omar al-Bashir on 4 March 2009 and 12 July 2010.⁶⁴⁰ No thought had been directed at a withdrawal from the ICC at that time. South Africa was duty bound in terms of the ICC Act to arrest President al-Bashir when he visited South Africa in June

judgement, I hereby revoke the Instrument of Withdrawal from the Rome Statute of the International Criminal Court with immediate effect.”

⁶³⁸ www.iol.co.za/news/politics/sa-will-not-withdraw-from-icc accessed 17 November 2017.

⁶³⁹ Article 127(1) of The Rome Statute of the International Criminal Court.

⁶⁴⁰ ICC Warrant of Arrest ICC-02/05-01/09-1 Omar Hassan Ahmed Al Bashir 4 March 2009. Second Warrant of Arrest ICC-02/05-01/09-95 12 July 2010.

2015. South Africa failed to arrest him and thus may face an international charge under the Rome Statute.⁶⁴¹ Indeed, South African authorities have appeared at the International Criminal Court on 7 April 2017, to explain the country's failure to arrest President al-Bashir in June 2015.⁶⁴² South Africa will appear before the Pre-Trial Chamber of the ICC to argue why the Court should not make a finding of non-compliance against South Africa. In addition the ICC has decided to hold a public hearing, under the provisions of the *Rome Statute*⁶⁴³ to determine whether to find South Africa guilty of non-compliance. The *Rome Statute* in Article 87(7) invites the ICC to refer a non-cooperating state to the UN Security Council or the Assembly of State Parties. It is submitted the ICC, in the light of the existing convincing judicial processes and evidence, will find South Africa a non-cooperating State Party. This would be a highly embarrassing event for South Africa, given its extensive previous cooperation in the initial development of the ICC.⁶⁴⁴

Should South Africa withdraw from the ICC it would have a considerable impact on the domestic enforcement of international criminal law. The ICC Act⁶⁴⁵ establishes domestic procedures for cooperation with the ICC⁶⁴⁶ and would be meaningless without ICC membership. The ICC Act would have to be repealed or amended should South Africa's withdrawal proceed, supported now by an appropriate parliamentary process.

The ICC Act established domestic crimes of genocide, war crimes and crimes against humanity, asserting universal jurisdiction over these crimes.⁶⁴⁷ If the ICC Act is repealed, then no such jurisdiction will in future exist in South Africa. This would have a considerable effect on the international network of international criminal law.⁶⁴⁸ In the Constitutional Court in *National Commissioner of the South African Police Service v Southern African Litigation Centre*⁶⁴⁹ the Court held that the ICC Act imposed an

⁶⁴¹ Erasmus G, 2016 *Governance Implications of South Africa's Withdrawal from the International Criminal Court*. Tralac Working Paper No S16WP17/2016.

⁶⁴² www.icj.org accessed on 8 April 2017.

⁶⁴³ Article 87(7) of The *Rome Statute* of the International Criminal Court.

⁶⁴⁴ See Section 3.1 above.

⁶⁴⁵ *The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002*.

⁶⁴⁶ Chapter 3-4 of *The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002*.

⁶⁴⁷ Section 4(3)(c) of *The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002*.

⁶⁴⁸ Snyman C, *Criminal Law* 3.

⁶⁴⁹ *National Commissioner of South African Police Service v Southern African Human Rights Litigation Centre* (CCT 02/14 [2014] ZACC 30; 2015 (1) SA 315 (CC); 2015 (1) SACR 255 (CC); 2014 (12) BCLR 1428 (CC).

obligation on domestic authorities to investigate international crimes committed outside of South Africa.

Another legal implication of a possible South African withdrawal from the ICC, is that it may lead to accelerated ratification by AU Member States of the expansion of the African Court of Justice and Human Rights jurisdiction, to include international crimes.⁶⁵⁰ This could, in turn, accelerate further withdrawal from the ICC by AU Member States.

In February 2009 the AU Assembly decided to request the AU Commission to assess the implications of establishing an African Court to try international crimes, such as war crimes and crimes against humanity.⁶⁵¹

The establishment of an African Criminal Court (ACC) as a substitute for ICC membership, as suggested by the AU, including South Africa, has significant challenges.⁶⁵² It would not have jurisdiction over serving heads of state or “senior state officials.” This is contained in the Malabo Court Protocol⁶⁵³ which states:

“-No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.-”

Whatever the merits of an African-based court on criminal justice may be, it will be viewed with scepticism due to the conflict between this clause and the *Rome Statute* of the ICC. The corresponding section in the *Rome Statute* of the ICC⁶⁵⁴ provides that “official capacity” as head of state or senior state official shall in no case exempt a person from criminal responsibility. The jurisdiction of this Court will only commence in respect of actions committed after its establishment. Consequently President Omar al-Bashir would have nothing to fear from this court.

⁶⁵⁰ Tladi D, “The African Union and the International Criminal Court; The battle for the soul of international law,” 62.

⁶⁵¹ Assembly/AU/Dec. 213 (XII)

⁶⁵² Werle G, *The African Criminal Court: A Commentary of the Malabo Protocol*, 5.

⁶⁵³ Article 46(A) of the Malabo Protocol, June 2014.

⁶⁵⁴ Article 27 of the *Rome Statute of the International Criminal Court*.

6.6 Conclusion

While South African courts can still preside over cases involving international criminal justice, a subsequent Repeal Bill⁶⁵⁵ of the ICC Act would cast a dark shadow over South African commitment to ending global human rights concerns. The Repeal Bill Preamble is concerning in that it recognises diplomatic immunity of heads of state “in order to effectively promote dialogue and the peaceful resolution of conflicts wherever they may occur, but particularly on the African continent.”⁶⁵⁶ Bearing in mind that most conflicts in Africa have been initiated by heads of state, it is difficult to understand the content and logic of the Repeal Bill. In addition to the repeal of the ICC Act, certain sections of the South African Red Cross Society and Legal Protection of Emblems Act⁶⁵⁷ and Geneva Conventions Act⁶⁵⁸ have been repealed, because of their relationship and dependence on the ICC Act.

Finally, it is submitted that the withdrawal of South Africa from the ICC and possible repeal of the ICC Act, may jeopardise or undermine South Africa’s mandated ability to act against international crimes that may occur domestically, including racial discrimination and xenophobia which are becoming increasingly apparent.

Chapter 7 CONCLUSION

This dissertation has investigated the historical development of the *Rome Statute* of the International Criminal Court, South Africa’s involvement in its formation, and a critical appraisal of the legal implications of South Africa’s possible withdrawal from the ICC.

Since 1994, South Africa is now party to several human rights instruments, which have been incorporated in the Bill of Rights within the Constitution. As a result the application of international human rights law is evident in domestic case law, where international agreements and customary international human rights law has provided

⁶⁵⁵ Implementation of the Rome Statute of the International Criminal Court Act Repeal Bill B23-2016 (Government Gazette No 40403 of 3 November 2016).

⁶⁵⁶ Preamble to the Implementation of the Rome Statute of the International Criminal Court Act Repeal Bill B23-2016.

⁶⁵⁷ Section 13 of the South African Red Cross Society and Legal Protection of Certain Emblems Act, No 10 of 2007.

⁶⁵⁸ Section 20 of the Implementation of the Geneva Conventions Act No 8 of 2012.

a framework for the application of the Bill of Rights. It would appear that international law is mainly directed at states and not in the promotion of the welfare of individuals.

The Second World War and the resulting military tribunals, provided the impetus for the creation of a permanent international criminal court. These military tribunals created new standards of international law. The atrocities in Yugoslavia in the early 1990s strengthened the momentum for the development of an International Criminal Court (ICC). During the formation of the *Rome Statute*, South Africa took up important positions on human rights which were noted by international jurists. The ICC was created with the extensive involvement of African nations and subsequently provided leading African jurists the opportunity to function within its structures. President Mandela encouraged South Africa's involvement in the ICC, in order to once again become an integral and accepted member of the community of nations.

Membership of the ICC has cemented South Africa's national commitment to human rights, which has been facilitated by the involvement of prominent national leaders and jurists. Leaving the ICC would tarnish South Africa's reputation and intent to be known as a domestic beacon in Africa, focussed on its international obligation to human rights and justice. The intent to withdraw from the ICC used the President Omar al-Bashir incident as a convenient excuse, as senior government leaders and officials fear future prosecution for human rights abuses from the ICC.

Prior to the passing of the *Implementation of the Rome Statute of the International Criminal Court Act* in 2002, South Africa had no domestic legislation pertaining to war crimes or crimes against humanity. The ICC Act provides South African courts with extended jurisdiction to deal with crimes committed outside the territory of the Republic. The Preamble to the ICC Act records that South Africa has an international obligation under the *Rome Statute* to bring the perpetrators of crimes against humanity to justice. An important element of the ICC Act is that there is no defence to an ICC defined crime by virtue of being a head of state or member of government. Public opinion now dictates that Head of State and diplomatic immunity is wearing thin in the eyes of the world.

The UN Security Council is central to the story of the confrontational relationship that exists between the African Union and the UN. This was exacerbated by the two arrest warrants issued against President Omar al-Bashir and the Security Council's power to

defer proceedings against al-Bashir under article 16 of the UN Statute. The arrest warrant for al-Bashir has resulted that the ICC being perceived as a Western institution and should not exercise jurisdiction over African leaders.

The South African government's argument that it is not obliged to hand over an individual to the ICC, because in so doing it would be inconsistent with its obligation under international law. This is with respect to state or diplomatic immunity, which completely ignores the spirit and intent of article 27 of the ICC Act. The Chief Justice of South Africa, Mogoeng Mogoeng, remembering the words of Nelson Mandela, stressed that Africa and the world needed the ICC yesterday, today and forever.

The South African Supreme Court of Appeal (SCA), stated that failing to arrest President Omar al-Bashir was inconsistent with South Africa's obligations in terms of the *Rome Statute* and the ICC Act. In addition the SCA ruled that notice of withdrawal from the ICC required parliamentary approval which was not provided prior to notifying the UN of intent to withdraw from the ICC.

Should the ICC Act be repealed, no jurisdiction would be in place for crimes against humanity, war crimes and genocide. This would have a negative effect on the international network of criminal law, including the domestic application of the Act, where racial discrimination and acts of xenophobia are becoming increasingly apparent.

The ICC Act and South Africa's continued membership of the ICC underpin the new constitutional values that support South African society. The South African courts understand these values in the context of both international and domestic human rights obligations. It is indeed fortunate that the South African Chief Justice can provide clear direction and guidance for our membership of the ICC yesterday, today and forever.

The character and reputation of the South African government depends on the consistency of their actions. How the country is perceived abroad depends on congruence between the words and actions of government. The inconsistency of government's actions regarding our membership of the ICC has diminished the character and credibility of our nation which is manifest by internal violence, corruption and intolerance.

Only continued membership of the ICC, consistent government action and the respect of human rights, will drive South Africa back onto the rails of credibility and prosperity.

We shall see.

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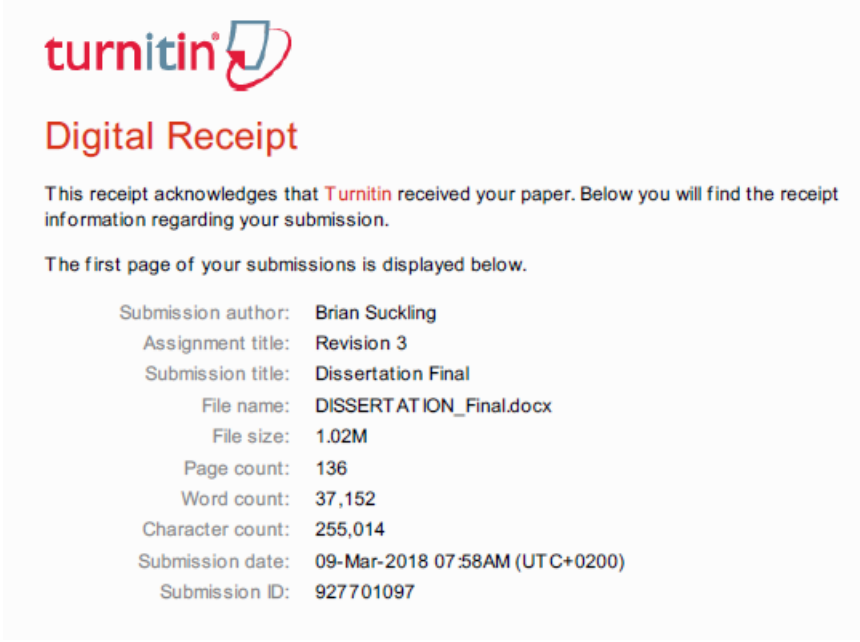
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