A Sign of the Times: South Africa's Politico-legal Retrogression as Illustrated through the Intention to Withdraw from the Rome Statute

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Abstract

Sending the unequivocal message that perpetrators of crimes against humanity, genocide and war crimes would be prosecuted, South Africa was an active participant in the negotiations towards adopting the Rome Statute Establishing the International Criminal Court (ICC). Indeed, South Africa was the twenty-third state to ratify the treaty and domesticated it in the form of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002. Pursuant to the obligations undertaken by South Africa, it was incumbent on the state to arrest and surrender to the ICC the President of Sudan, Omar Al Bashir in June 2015, on the strength of two international arrest warrants issued against him by the ICC, when he attended the African Union Summit in South Africa. Instead, not only was Al Bashir's sudden departure from South Africa facilitated by South African officials in contempt of a court order prohibiting same, but South Africa also deposited its instrument of withdrawal from the Rome Statute with the United Nations Secretary General soon afterwards. It is against this contextual background that South Africa's failure to comply with the rule of law is assessed, with the evidence indicating that political considerations often outweigh legal obligations.

Keywords: Separation of powers; rule of law; political will; state sovereignty; International Criminal Court; international criminal law; enforcement

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Introduction

Shklar's critique that 'law does not by itself generate institutions, cause wars to end, or states to behave as they should'[1] epitomises the conundrum that is South Africa's relationship with the International Criminal Court (ICC). Locating the arguments pertaining to South Africa's intention to withdraw from the Rome Statute Establishing the ICC (Rome Statute) within their proper context, it is necessary to highlight that South Africa was one of the first states to take an active part in the negotiations towards the adoption of the Rome Statute.[2] So serious was South Africa's commitment that it was the 23rd state party to sign the Rome Statute on 17 July 1998, then to ratify it on 27 September 2000.[3] Shortly after that, in July 2002, national legislation, appropriately named the 'Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002' (Implementation Act), was promulgated, removing any ambiguity about South Africa's intention to comply fully with the Rome Statute. South Africa's decision to ratify and implement the Rome Statute was underpinned by the history of crimes against humanity that had been perpetrated against the majority of South Africans during the apartheid period. Consequently, the message conveyed was that South Africa would not condone crimes against humanity elsewhere in the world.

The factual scenario in the February 2017 judgment in the matter of the *Democratic Alliance against the Minister of International Relations & Others*[4] (hereafter referred to as the '2017 judgment') dates back to the year 2003. Omar Hassan Al Bashir rose to power in the Republic of Sudan through a bloodless coup d'état in June 1989. In his capacity as president he was implicated in the perpetration of international crimes, including genocide and crimes against humanity[5] from 2003 until 2008. The crimes resulted in the deaths of at least 300 000 men, women and children and also the displacement of more than three million Darfuris. Collin Powell, the former Secretary of State of the United States, alleged that international crimes had been committed. Powell invoked the provisions of Article VIII of the 1948 Genocide Convention, which authorised state parties to call upon the United Nations (UN) to take action in terms of the provisions of Chapter VII of the UN Charter, as read with Article 13 of the Rome Statute, in order to prevent and suppress acts of genocide or any other relevant acts. Consequently, the UN Security Council adopted Resolution 1564 on 18 September 2004[6] to set up an International Commission of Inquiry to investigate the reports of the

1 Judith Shklar, *Legalism: Law, Morals, and Political Trials* (Harvard University Press 1986) 131.

2 Lee Stone, 'Implementation of the Rome Statute in South Africa' in Chacha Murungu and Japhet Biegon (eds), *Prosecuting International Crimes in Africa* (Pretoria University Law Press 2011) 305.

3 Stone (n 2) 306.

4 *Democratic Alliance v Minister of International Relations and Cooperation & Others* (Council for the Advancement of the South African Constitution Intervening) 2017 (3) SA 212 (GP); [2017] 2 All SA 123 (GP); 2017 (1) SACR 623 (GP).

5 Stone (n 2) 325–326.

6 'UNSC Resolution 1564, Sudan' <http://www.cfr.org>Conflict>.

massive and widespread violation of international humanitarian law and human rights law in Darfur.[7]

The findings of the Commission of Inquiry prompted the members of the Security Council to vote on whether the situation in Darfur should be referred to the ICC for investigation; the vote in favour of a referral prevailed. Why the Security Council's vote is significant is that although Sudan signed the Rome Statute on 8 September 2000, the calculated and deliberate decision made was not to deposit its instrument of ratification of the Rome Statute.[8] Accordingly, the ICC undertook the investigation into the conduct of a non-party state, which was permissible in terms of Article 13(*b*) of the Rome Statute. The ICC issued the first warrant of arrest bearing Al Bashir's name on 4 March 2009.[9]

In May 2009 Al Bashir was invited to President Jacob Zuma's inauguration in Pretoria, South Africa. Pursuant to the express provisions of section 8(2) of the Implementation Act, had Al Bashir entered South African territory to attend the inauguration, the relevant authorities would have been duty bound to arrest him and, on the basis of complementarity,[10] a central feature of the Rome Statue, South Africa would have been obliged to prosecute him in South Africa. If, however, South Africa was 'unable or unwilling'[11] to prosecute Al Bashir, he would have had to have been surrendered to the ICC for prosecution. Al Bashir declined the invitation to attend the inauguration.

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7 UNSC (n 6).

8 William Schabas, *An Introduction to the International Criminal Court* (4 edn, Cambridge University Press 2011) 49–54.

9 *The Prosecutor v Omar Hassan Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Al Bashir, Case No ICC-02/05-01/09, Public Redacted Version, Pre-Trial Chamber I, 4 March 2009 <http://www.icc.cpi.int/darfur>. See also Editorial Staff, 'Profile: Sudan Omar al-Bashir' *BBC News* (London) <http//www. bbc.com/news/world-africa-1610445>. As an indirect co-perpetrator, the ICC charged Al Bashir with five counts of crimes against humanity, to wit, murder, extermination, forcible transfer, torture and rape; two counts of war crimes, on the grounds of intentionally directing attacks against the civilian population or against individual civilians not taking part in the hostilities; pillage; and three counts of genocide by killing, causing serious bodily or mental harm and deliberately inflicting on each target group conditions calculated to bring about the group's physical destruction.

10 Articles 1 and 17 of the Rome Statute clearly provide for complementarity. Complementarity means that the state is required to exercise its criminal jurisdiction over those responsible for international crimes. See Benson Olugbuo, 'Positive Complementarity and the Fight against Impunity in Africa' in Murungu and Biegon (n 2) 251, quoting Markus Benzing, 'The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity' (2003) 7 Max Planck Yearbook of United Nations Law 592. See also Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press 2007) 127; and Michael Newton, 'Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court' (2001) 167 Military LR 20, 26.

11 Stone (n 2) 308.

On 12 July 2010, the ICC issued a second warrant of arrest against Al Bashir. Despite these warrants, in June 2015 Al Bashir did come to South Africa. He accepted the invitation to attend the 30th Ordinary Session of the Permanent Representatives Committee, the 27th Ordinary Session of the Executive Council and the 25th Ordinary Session of the African Union Assembly held in South Africa from 7 to 15 June. Al Bashir had apparently been promised immunity on account of his being an African Head of State.[12] He duly arrived on South African soil on 13 June 2015. Immediately upon being informed of his arrival, the Southern Africa Litigation Centre (SALC) sought an urgent court order declaring the government's failure to arrest Al Bashir to be in breach of the Constitution.[13] A related order sought was 'to compel the government to cause President Al Bashir to be arrested and surrendered to the ICC.'[14] Before a final order was granted, Al Bashir's swift departure from South Africa was facilitated from the Waterkloof Airbase, a highly secured national key point.[15]

Intriguingly, on 19 October 2016, South Africa deposited a notice of withdrawal from the Rome Statute with the Secretary General of the UN.[16] The Democratic Alliance and other interested parties challenged the propriety of the government's conduct. In finding the government's conduct to in fact be invalid and unconstitutional,[17] the court did precisely what it was supposed to do. The judiciary is not supposed to subvert the powers and functions of either the Executive or the Legislature: all that it is required to do is to declare any conduct or any law invalid on account of its inconsistency with the Constitution, unless the circumstances justify intervention.[18] The dictum in the case of *De Lange v Smuts NO & Others*[19] illustrates the 'unique' form of separation of powers

12 Article 46A of the Protocol on Amendments to the 2008 Treaty on the Merged Court of Human Rights and Court of Justice exempts serving AU Heads of State or government, or anybody acting in such capacity, or any senior officials accused of committing crimes against humanity [genocide and war crimes] from prosecution by the Court. 'Shielding these individuals defeats the spirit of the 2008 Protocol and carves out a sphere of impunity for principal perpetrators.' See International Justice Resource Centre, 'African Union Approves Immunity for Governmental Officials in Amendment to African Court of Justice and Human Rights' Statute' (2 July 2014) <www.ijrcenter.org/2014/07/02/african-union-approves-immunity-for-heads-of-state-in-amendment-to-african-court-of-justice-and-human-rights-statute/>.

13 *The Southern Africa Litigation Centre v Minister of Justice and Constitutional Development & Others* 2016 (1) SACR 161 (GP); 2015 (5) SA 1 (GP); [2015] 3 All SA 505 (GP); 2015 (9) BCLR 1108 (GP). (hereafter, *SALC v Minister of Justice and Constitutional Development*).

14 Paragraph 3, 2017 judgment.

15 *SALC v Minister of Justice and Constitutional Development* para 36.1 and 36.2.

16 Paragraph 4, 2017 judgment. The South African government was represented by the Minister of International Relations and Co-operation, who signed a notice of withdrawal from the Rome Statute and deposited it with the Secretary General of the United Nations.

17 Paragraph 59, 2017 judgment.

18 Section 172(1)(*a*) of the Constitution.

19 1998 (3) SA 785 (CC).

in South Africa, where the Judiciary may intervene to safeguard Constitutional principles, if necessary:

> over time our courts will develop a distinctively South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed both by South Africa's history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances and, on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest.[20]

The fact that a notice of withdrawal from the Rome Statute was deposited with the Secretary General of the UN and that this case even got to the Pretoria High Court is where the real problem lies. What this case actually illustrates is something more sinister. It highlights two things: first, that there is growing tension within the already complex and politically charged relationship between South Africa's foreign[21] and domestic policy. This is true particularly as it relates to the sovereign prerogative of the state to ratify international treaties, the wide discretion granted to a state to implement the treaties as it sees fit, and the corollary, being the right of a state to withdraw from international treaties if this would further the objective of securing the national interest. Second, that a pattern has formed, for which the most accurate diagnosis is that South Africa is experiencing a compliance deficit with respect to adherence to the procedural and substantive rule of law.

This article therefore advances the argument that South Africa is at a crossroads: the country's repeated undermining of the international[22] and domestic laws applicable to South Africa can only end in a constitutional crisis and the retrogression of the integrity of the state. A pertinent example is the finding in the *Glenister* case that the state's failure to establish an independent anti-corruption unit violated numerous binding international obligations as well as relevant domestic legislation.[23] Accordingly, it is argued that the state and the government should be held to account (both internationally and domestically) if there is incongruence between the international and domestic commitments that have been voluntarily entered into by way of ratifying and

20 Paragraph 60.

21 'Foreign' is used in this context to denote not only South Africa's relationship with other sovereign, independent states but equally, South Africa's compliance with international treaties and respect for international institutions.

22 One of the foundational elements of international treaty law, as contained in Article 26 of the 1969 Vienna Convention on the Law of Treaties, to which South Africa is a party, is the concept of *pacta sunt servanda*, which literally means 'a state is bound to carry out in good faith the obligations which it has assumed by a treaty.'

23 *Glenister v President of the Republic of South Africa & Others* (*Glenister II*) 2011 (3) SA 347 (CC) para 171.

implementing treaties, specifically if it is the conduct of a recalcitrant government seemingly giving preference to political over legal considerations.[24]

South Africa's history and its constitutional emphasis on adherence to the rule of law provide the impetus for the argument that South Africa's internal and external expressions of the fundamental legal and normative principles upon which the state is premised should cohere. The substantive part of this article therefore takes the form of an analysis of three criteria for ensuring compliance with the law by a state, as developed by Viljoen[25] and their application to the findings in the February 2017 judgment relating to South Africa's ill-conceived and poorly executed intended withdrawal from the Rome Statute. This analysis is undertaken against the backdrop of South Africa's transformation subsequent to apartheid as well as on the basis of a theoretical examination of compliance with the law juxtaposed against the concept of sovereignty. This gives the state a large amount of discretion to decide which international treaties it wishes to become a party to—and how best to comply with that law.

South Africa's failure and/or refusal to arrest Al Bashir, in defiance of the prescripts of the Rome Statue and the Implementation Act, constituted a 'true test'[26] of the Implementation Act, one which South Africa failed dismally. Al Bashir had 'dodged a bullet' so to speak. But did South Africa dodge a bullet?

Delimiting the Boundaries and Parameters: South Africa's System of Separation of Powers and *prima facie* Attitude to Compliance with the Law

The 2017 judgment emphasised that the government is bound to comply with the doctrine of the separation of powers and, therefore, to afford the appropriate forum an opportunity to make the important decision whether South Africa should withdraw from the Rome Statute.[27] The judgment concerns itself principally with the way in which the state is to function, in constitutional-law terms and with specific reference to the doctrine of the separation of powers.

South Africa's constitutional system of the separation of powers dictates that the Executive is responsible for formulating policy and implementing the law[28] and that the

24 Max du Plessis and Guénaël Mettraux, 'South Africa's Failed Withdrawal from the Rome Statute: Politics, Law and Judicial Accountability' (2017) J of Intl Criminal Justice 10.

25 Frans Viljoen, *International Human Rights Law in Africa* (2 edn, Oxford University Press 2012) 464. In short, these criteria are: is there adequate public participation; is there the requisite political will; and is the issue sufficiently depoliticised to ensure compliance?

26 Max du Plessis, 'South Africa's Implementation of the ICC Statute: An African Example' (2007) 5 J of Intl Criminal Justice 15.

27 Paragraphs 13–16.

28 Section 85(2)(*a*) and (*b*) of the Constitution.

Legislature (Parliament) is responsible for enacting laws[29] pursuant to such policy decisions. The electoral system operating in South Africa—closed list proportional representation—requires that at regular intervals of five years the electorate vote for the political party of their choice. The persons listed on each party's 'electoral list' are then elected to the Legislature based on the proportion of votes the party received. Democratically, the electorate therefore entrust those duly elected representatives to pass laws on their behalf and in their best interests.[30] It is also Parliament's duty to elect the president at its first sitting.[31] Therefore, the people indirectly vote for the president based on a combination of the list-based proportional representation system and the fact that the elected Members of Parliament vote on the people's behalf. The president then appoints the Cabinet (the Ministers and Deputy Ministers, constituting the responsible authorities within the executive branch), whose duty it is to implement and enforce the law.

The functioning of the Legislature and the Executive is largely unfettered, save for the right of the Judiciary to review the conduct of the Legislature and the Executive if litigation is instituted alleging a violation of their constitutional obligations.[32] Indeed, the people certainly cannot condone patently retrogressive action by the Executive, hence the necessity for the Judiciary to intervene if necessary in order to sustain respect for the rule of law.[33] At all times, the Judiciary must remain deferent to the Legislature and the Executive's expertise and knowledge[34] so as to prevent polycentric decision-making and therefore ultimately the impairment of the effective administration of the state.[35] This deference is mitigated, however, by the constitutional provisions regulating the remedy of unconstitutional conduct: these provisions oblige the Judiciary to grant an effective remedy, including a declaration that conduct is invalid and unconstitutional.[36]

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29 Section 44(1)(*a*)(ii) of the Constitution.

30 Paragraph 55 of 2017 judgment.

31 Section 86(1) of the Constitution.

32 The case of *South African Association of Personal Injury Lawyers v Heath & Others* 2001 (1) BCLR 77 (CC) provides support for the fact that the separation of powers is 'implicit' in the Constitution, with the judiciary having the power to review executive and legislative conduct if necessary.

33 Section 1(*c*), as read with section 2 the Constitution of the Republic of South Africa 1996, affirms the status and role of the rule of law.

34 Paragraph 63 of the 2017 judgment.

35 'Polycentricity' refers to the institutional inappropriateness for the judiciary to make policy decisions or to make decision which have an impact on the allocation of public funds because the judiciary is not in a position to know of the amount of available funds, nor to be able to re-allocate funds from one area of priority (such as health care), to another (education, for example), as this would have a 'ramifying effect' and would distort the executive's ability to realise and give effect to its responsibilities. See, for example, Christopher Mbazira, 'Confronting the Problem of Polycentricity in Enforcing Socio-economic Rights in the South African Constitution' (2008) 23 SAPL 30. See para 77 of the 2017 judgment.

36 Section 38 of the Constitution, which refers to 'appropriate relief' in order to enforce rights.

A broader picture of democratic South Africa demonstrates that it was not only the Rome Statute to which South Africa voluntarily bound itself. The behaviour of states, and the method by which a state's political will is determined, is usually characterised as state practice. Cristiano D'Orsi elaborates on the ways in which the behaviour of states can be established:

> The obvious way to find out how countries are behaving is to read the newspapers, consult historical records, listen to what governmental authorities are saying and peruse the many official publications. There are also memoirs of various past leaders, official manuals on legal questions, diplomatic interchanges and the opinion of national legal advisors.[37]

The first decade-and-a-half of democracy saw South Africa elevated to the status of an exemplary role model among states. Very few would dare argue that South Africa's Constitution is not one of the most progressive in the world. Directly related to the letter and spirit of this solemn declaration, and the need to give meaningful effect to the Constitutional imperatives of freedom, equality and dignity, the early to mid-1990s saw South Africa deliberately accede to more than 100 international treaties and a variety of international institutions so as to insert itself into the community of nations as a full and equal member. Specifically, South Africa joined the Organisation of African Unity (OAU) (now the African Union (AU)) on 23 May 1994 and the UN General Assembly on 23 June 1994. South Africa continues to ratify international treaties. The list below[38] is by no means exhaustive, but serves to illustrate a concerted effort made towards South Africa's becoming a rehabilitated member of the international community and participating meaningfully in international affairs while simultaneously domesticating international treaties and implementing them in good faith.

Title of treaty	**Date of ratification**
UN Convention on the Rights of the Child	16 June 1995
UN Convention Relating to the Status of Refugees	December 1995
Protocol to the UN Convention Relating to the Status of Refugees	January 1996
OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa	January 1996

37 Cristiano D'Orsi, *Asylum Seeker and Refugee Protection in Sub-Saharan Africa: The Peregrination of a Persecuted Human Being in Search of a Safe Haven* (Routledge 2015) 9.

38 'International Organizations, Treaties, Conventions and Declarations', Department of International Relations and Co-operation <www.dirco.gov.za>.

African Charter on Human and Peoples' Rights	9 July 1996
UN Convention on the Elimination of Discrimination Against Women	10 December 1998
UN Convention on the Elimination of Racial Discrimination	10 December 1998
UN Convention on the Elimination of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	10 December 1998
International Covenant on Civil and Political Rights	10 December 1998
African Charter on the Rights and Welfare of the Child	7 January 2000
Protocol to the African Charter on the Establishment of an African Court of Human and Peoples' Rights	3 July 2002
Protocol to the Treaty Establishing the African Economic Community, relating to the Pan African Parliament	3 July 2002
Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the Abolition of the Death Penalty	28 August 2002
Convention on the Privileges and Immunities of the United Nations	30 August 2002
Convention on the Privileges and Immunities of the Specialised Agencies	30 August 2002
Protocol to the African Charter on the Rights of Women in Africa	17 December 2004
International Covenant on Economic, Social and Cultural Rights	18 January 2015

Undoubtedly, respect for the rule of law and the protection of fundamental rights was foremost in South Africa's diplomatic discourse and action,[39] and this stance was

39 The Chayeses provocatively state: '"status" in the international community is a state's "new sovereignty": 'Sovereignty, in the end is status—the vindication of the state's existence as a member

validated by South Africa's election to the UN Human Rights Council (UNHRC) in 2006[40] and subsequent re-election on 17 May 2007 as one of only fourteen countries to serve a three-year term on the UNHRC. There can be no doubt that the overwhelming majority of the international community endorsed this election, given that South Africa received 175 out of a possible 192 votes. South Africa was also re-elected for the period 2013–2016. Consequently, South Africa has developed a fairly good record as far as the ratification of important treaties is concerned, apparently confirming its commitment to upholding international law. To be sure, although South Africa was exceedingly slow to ratify the 1966 UN International Covenant on Economic, Social and Cultural Rights, the reason for this was that the Department of Foreign Affairs (the precursor to the Department of International Relations and Cooperation) always recommended that South Africa should not blindly ratify treaties it could not immediately enforce. However, there is no clear explanation why South Africa has failed to make the Article 34(6) Declaration, which permits individuals to lodge cases alleging violations of human rights directly with the African Court on Human and Peoples' Rights. Henkin's synopsis highlights the true state of affairs: 'almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.'[41]

South Africa was described as 'the toast of the world' up until May 2008 (when the fatal xenophobic attacks tarnished South Africa's image as hospitable to all within the territory).[42] Much of the enthusiasm about South Africa's revolutionary shift is attributable to the late former president and statesman Nelson Mandela's reconciliatory demeanour and progressive attitude to the importance of the rule of law and to ensuring coherence between the internal and the foreign policies of the state.[43] The Mbeki administration continued to emphasise a foreign policy consistent with the domestic legal framework. Recognising the need for consistency between the stated objectives of the state at both the international and the domestic levels, during 2005 the Minister of Foreign Affairs, as she was at the time, Dr Nkosazana Dlamini-Zuma, remarked:

> Our foreign policy is linked to our domestic policy and the two are mutually reinforcing. The principles and values are defined through the Freedom Charter and our Constitution.

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of the international system.' See Abram Chayes and Antonia Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press 1998).

40 Margaret Beukes, 'Southern African Events of International Significance—2007' (2008) South African Yearbook of Intl L 289.

41 Louis Henkin, *How Nations Behave* (2 edn, Columbia University Press 1979) 47.

42 See Yolanda Spies, 'South Africa's Foreign Policy' (2009) South African Yearbook of Intl L 288, quoting Nkoana-Mashabane, 'Lecture by the Minister of International Relations and Cooperation' (Rhodes University, Grahamstown, 22 October 2009).

43 The word 'principled' is one of the best descriptions. See Nelson Mandela, 'South Africa's Future Foreign Policy' (1993) 72(5) Foreign Affairs 87. The foreign policy was decisively dedicated to advancing all human rights; encouraging democracy globally; a belief in justice (and that international law is necessary to guide international relations).

> South Africa stands for a democratic, peaceful, stable, prosperous, non-racist, non-sexist society with respect for human life, and which contributes to a world that is just and equitable. We also want a better life for Africa and the world as a whole—we cannot have a better Africa without a better world. This is based on solidarity …[44]

South Africa's foreign policy post-1994 was informed by the African Renaissance, an avowedly 'idealistic notion of collective continental interest'[45] formulated by former President Thabo Mbeki.[46] Evidence of African solidarity is contained in South Africa's hegemonic role on the continent in pursuit of resolving national and regional crises. A peculiar example of this preoccupation is the granting of asylum to Jean-Bertrand Aristide, the ousted leader of the oldest black republic, Haiti (despite vehement opposition by South African human rights lobby groups),[47] a non-African state that has sought membership of the AU.

More controversial is South Africa's voting behaviour in the UN Security Council and its condonation of flagrant human rights abuses elsewhere in Africa. Four specific examples highlight South Africa's increasingly contentious, controversial and contradictory foreign policy position, which 'outraged the human rights community', which accused the country of 'betraying its own rich legacy of human rights struggle and of opposing the very traditions and strategies that enabled it to achieve political freedom'.[48] As a non-permanent member of the UN Security Council, South Africa voted alongside China and Russia in preventing:

i. The adoption of a Security Council resolution condemning and imposing sanctions on the military leadership in Myanmar;

ii. A resolution condemning the Mugabe regime in Zimbabwe;

iii. The condemnation of states using rape as a political and military weapon;

iv. The imposition of sanctions on Iran for violations of the Treaty on the Non-Proliferation of Nuclear Weapons.[49]

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44 Roland Henwood, 'South Africa's Foreign Policy' (2005) South African Yearbook of Intl L 302–303, referring to the inaugural Department of Foreign Affairs *imbizo*.

45 Spies (n 42) 287.

46 Thabo Mbeki, 'Statement on behalf of the African National Congress, on the occasion of the adoption by the Constitutional Assembly of The Republic of South Africa Constitutional Bill 1996' 8 May 1996, in Thabo Mbeki, *Africa: The Time has come, Selected Speeches by Thabo Mbeki* (Tafelberg 1998), <http://www.info.gov.za/speeches/1996/960819_23196.htm>

47 Adam Habib, *South Africa's Suspended Revolution: Hopes and Prospects* (Wits University Press, 2013) 182.

48 ibid 187–188.

49 Id 187.

While this gap between what is said and what is done is endemic to foreign relations, it was in 2009—for the very first time since 1994—that the issue of 'national interest'[50] superseded that of continental interest. As a consequence, South African foreign policy was criticised for being riddled with incoherencies and inconsistencies. From that point onwards, South Africa's primary objective was national interest, with morality being relegated to the role of a secondary objective.[51] This served to accentuate the paradox that South Africa still regarded itself as one of the leaders on the African continent and sought to forge closer ties between all the African states while at the same time seemingly being preoccupied with its own independent advancement.

In this regard, the 2011 White Paper on South Africa's foreign policy proclaims that South Africa 'faces the challenge of balancing its national interests against global realities in a rapidly changing world.'[52] A specific example of more self-interested action is that in 2010 South Africa began lobbying to join BRICS (an alliance between Brazil, India, China and Russia) and was invited to join on 24 December 2011. As an emerging country, South Africa sought to collaborate with the BRICS states to work collectively towards the reform of the global system and the fundamental reform of international financial institutions.[53] Importantly, this collaboration has not only resulted in the establishment of the BRICS bank, but it also presents an opportunity for South Africa to benefit from the partners' fiscal reserves for the purposes of infrastructural development in Africa.[54]

Furthermore, as a member of various alliances such as the African Union and BRICS, South Africa has been unflinching in its criticisms of the UN Security Council, arguing for the expansion of the Security Council to include developing countries from Africa, Asia and Latin America.[55]

Sovereignty and South Africa's Position as a Liberal State, Operating within a 'Community of Nations'

On the basis of the evidence provided above, post-apartheid South Africa could be described as a liberal state because of its clear success in defeating the oppressive apartheid state and transforming the country into a state that prides itself on a conscious

50 As Kotzé states: 'The national interest is an elusive concept and very difficult to concretise'. See Dirk Kotzé, 'South Africa's International Relations during a Second Term: Domestic Interests within Global Dynamics' (2014) South African Yearbook of Intl L. See also Spies (n 42) 332.

51 Roland Henwood, 'South Africa's Foreign Policy' (1995) South African Yearbook of Intl L 284.

52 DIRCO, 'Building a Better World: The Diplomacy of Ubuntu' White Paper on South Africa's Foreign Policy: Final Draft 13 May 2011.

53 Habib (n 47) 184–185.

54 It is anticipated that the development should take place by 2020 and that the amount of this investment is in the region of US$480 billion. See Habib (n 47) 185.

55 Habib (n 47) 186–187.

aim to 'realign itself with accepted practice in international politics'.[56] The democratic Constitution was the catalyst for political and social change premised on non-racialism, non-sexism, human dignity and the advancement of human rights and freedoms, as reflected in international law. South Africa therefore professed to exist within a community of values. Moreover, every decision by the state was calculated to have a 'positive impact on the country's position in the international political environment.'[57]

Liberal states are generally believed to behave better than South Africa has.[58] This is consistent with the notion that states are rational actors,[59] compelled to comply with international law because of the numerous advantages that accrue from operating as a member of the international community. These advantages include the 'reward' of establishing a reputation among its peers for respecting international rules[60] and the desire of states to protect their material and political interests.[61] Complex social orders, such as South Africa's—a country that is party to numerous multilateral treaties regulating all aspects of its international relations—have seemingly adopted a 'culture' of compliance, because states are 'bounded, rational, and purposive actors systematically organised to formal rules.'[62] But Hathaway cautions that mere ratification of treaties does not mean that states are more likely to comply with the treaty requirements incumbent upon them purely on account of such ratification.[63]

What cannot be ignored when evaluating a state's behaviour is that the implementation of treaties is subject to the nebulous concept of state sovereignty, the principle of subsidiarity and the margin of appreciation—all of which confer on states the right and the discretion to decide how best to implement the law, based on the state's knowledge of its people, their socio-economic, historical and political circumstances and the

56 Roland Henwood, 'South Africa's Foreign Policy' (1993) South African Yearbook of Intl L 256.

57 Id 258.

58 Anne-Marie Slaughter, 'International Law, International Relations and Compliance' in Walter Carlsnaes, Thomas Risse and Beth Simmons (eds), *Handbook of International Relations* (SAGE 2002) at 538 and 539; Anne-Marie Slaughter, 'International Law in a World of Liberal States' (1995) 3 European J of Intl L 503. However, this assertion is not without its critics, such as Asher Alkoby, 'Theories of Compliance with International Law and the Challenge of Cultural Difference' (2008) 4(1) J of Intl L and International Relations 165, quoting José Alvarez, 'Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory' (2001) 12 European J of Intl L 183.

59 Stacy-Ann Elvy, 'Theories of State Compliance with International Law: Assessing the African Union's Ability to Ensure Compliance with the African Charter and Constitutive Act' (2012) 41 Georgia J of Intl and Comp L 78, quoting Catherine Powell, 'United States Human Rights Policy in the 21st Century in an Age of Multilateralism' (2002) 46 St Louis ULJ 425.

60 Elvy (n 59) 101, 138 and 158, quoting Powell (n 59) 426–427.

61 The quest for compliance with obligations is often attributed to materialism. See Alkoby (n 58) 155; Elvy (n 59) 153, quoting Powell (n 59) 426–427.

62 Ryan Goodman and Derek Jinks, 'Towards an Institutional Theory of Sovereignty' (2003) 55 Stanford LR 1762.

63 Goodman and Jinks (n 62) 2002–2020.

resources at the state's disposal.[64] This discretion to implement treaties based on characteristics particular to a state is complicated further by the notion of cultural relativism. Cultural relativism is premised on the philosophical notion that whereas human rights are in theory universal in their application, all cultural beliefs are equally valid and truth itself is relative, depending on the cultural environment in which it exists.[65] The cultural relativism and subsidiarity arguments in particular highlight the nuances that must be considered when determining the extent and protection of international law in the African philosophical, anthropological and social context—an issue of specific importance to South Africa. One of the better-known cultural concepts that applies to South Africa (having similar application in other African states) is the notion of ubuntu, referred to in the Department of International Relations' White Paper on foreign policy of 2012, titled 'Building a Better World: The Diplomacy of Ubuntu'.[66] In the context of crimes against humanity, war crimes and genocide, ubuntu holds the promise of preventing the perpetration of atrocities against innocent civilians due to its emphasis on respect for every individual in society, given its general definition:

> Group solidarity, compassion, respect, human dignity, humanistic orientation and collective unity have, among others been defined as key social values of Ubuntu … its value has also been viewed as a basis for a morality of cooperation, compassion, communalism and concern for the interests of the collective respect for the dignity of personhood.[67]

Perhaps this accounts for South Africa's involvement in mediation on developmental issues in Africa, such as its appointment to the AU's Ministerial Committee on Post-Conflict Reconstruction and Development in Sudan.[68] At the same time, though, this involvement is antithetical to South Africa's strong support[69] for the AU Assembly's Resolution vehemently condemning the ICC.[70] These contradictory stances have led to a disturbing sense that all is not as it appears with respect to South Africa's domestic and foreign policies and its international relations taking hold in South Africa. The central criticism levelled by the AU has been about the 'discriminatory double standard in ICC prosecutions' because of its specific targeting of African states without

64 *Prince v South Africa* (2004) AHRLR 105 (ACHPR 2004) para 51.

65 See Paul Magnarella, 'Assessing the Concept of Human Rights in Africa' (2001) 1 J of Human Rights and Human Welfare 25; Idit Kostiner, 'Evaluating Legality: Toward a Cultural Approach to the Study of Law and Social Change' (2003) 37 Law and Society Review 323; Adamantia Pollis, 'Cultural Relativism Revisited: Through a State Prism' (1996) 18 Human Rights Quarterly 324.

66 DIRCO (n 52).

67 Yvonne Mokgoro, 'Ubuntu and the Law in South Africa' (1988) 4 Buffalo Human Rights LR 15–23.

68 Habib (n 47) 181.

69 Press Statement of the African Union Peace and Security Council on its 141st Meeting, PSC/PR/BR(CXLI) (11 July 2008). This statement implied that the ICC's attempts to pursue justice were disrupting the process of attaining lasting peace in Africa.

70 See Press Release of the African Union on the Decisions of Pre-Trial Chamber I of the International Criminal Court, No 002/2012 (9 January 2012) (arguing against two decisions of the ICC, which referred to alleged failures of AU states to comply with ICC arrest warrants).

prosecuting other alleged perpetrators of international crimes, such as those in Pakistan, Afghanistan, Iraq, and, of course, the United Kingdom and the United States.[71] But this criticism is based on a profound misunderstanding of how the ICC actually functions. To be precise, the states parties themselves often take the decision whether the ICC should undertake an investigation. Significantly, the situations concerning Uganda, the Democratic Republic of the Congo (DRC) and the Central African Republic (CAR) were self-referrals in terms of Article 14 of the Rome Statute, therefore no one else is to blame but the states themselves for the ICC prosecutions. Moreover, the situation in Kenya was prompted through the *proprio motu* powers of the prosecutor under Article 15 of the Rome Statute.[72] The prosecutor was nonetheless compelled to investigate and initiate prosecutions because of the serious loss of life, culminating in crimes against humanity, that resulted from the post-election violence in Kenya in 2008.

Regarding sovereignty, Marti Koskenniemi has described it as a 'paradoxical' concept in his seminal work *From Apology to Utopia.*[73] Brown takes this point further with her assertion that:

> Sovereignty is both a sign of the rule of law and supervenes the law. Or sovereignty is both the source of the law and above the law, the origin of juridicism and what resides outside it. It is all law and no law. Its every utterance is law, and it is lawless.[74]

Akehurst similarly comments that 'it is doubtful whether any single word has caused so much intellectual confusion and international lawlessness.'[75] An interesting perspective that confronts the concept of sovereignty in international law is brought by Chayes and Chayes, who submit that compliance will be ensured through an interactive process of justification, discourse and persuasion, implying that 'sovereignty no longer means freedom from external interference, but freedom to engage in international relations as members of international regimes.'[76]

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71 See Assembly of the African Union, Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction Doc. Assembly/AU/14(XI), para 5, Doc. Assembly/AU/Dec.199(X) (June–July 2008) (relating to belief in the abuse of the principle of Universal Jurisdiction by non-African states against African leaders); Press Statement, PSC/PR/BR(CXLI) (reference to decision Assembly/AU/14(XI) and reiterating concern for abuse of ICC indictments against African leaders).

72 See, among others, Benson Olugbuo, 'Positive Complementarity and the Fight Against Impunity in Africa' in Murungu and Biegon (n 2) 250 at note 9.

73 Marti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Finnish Lawyers' Publishing 1989) 207.

74 Wendy Brown *Walled States, Waning Sovereignty* (Zone Books 2010) 53.

75 Michael Akehurst, *A Modern Introduction to International Law* (HarperCollins 1982) 15 at note 49 of Koskenniemi (n 73).

76 Chayes and Chayes (n 39) 123.

Withdrawal from the Rome Statute as Symptomatic of Systemic Failure to Comply with the Law (both International and Domestic)

To return to South Africa's withdrawal from the Rome Statute: the country has been fairly vocal about its intention to withdraw from the Rome Statute,[77] but that is probably because other African states are speaking with the same voice:[78] South Africa, therefore, is not alone. However, the South African government's October 2016 decision to withdraw from the Rome Statute is inconsistent with its stated objective of complying with the rule of law and of preventing impunity on the African continent,[79] especially when the constant refrain is 'Africa's governments have failed their people'.[80] This about-turn by South Africa contradicts the internal and external utterances of the state, particularly regarding the legal and moral obligations it is obliged to comply with.[81] It is submitted that South Africa is abusing its 'sovereignty' by making decisions that have a material effect on South Africa's integrity within the international community, and for no justifiable reason.

As soon as South Africa furnished the UN Secretary General with a notice of withdrawal from the Rome Statute, this was challenged by the main opposition political party in South Africa, the Democratic Alliance. At paragraph 30 of the February 2017 judgment, it is elaborated that the challenge to the withdrawal was predicated on four grounds directly implicating the Constitution: (*a*) that prior Parliamentary approval was required before the notice of withdrawal could be delivered to the Secretary General of the UN; (*b*) that prior repeal of the Implementation Act was required before the notice of withdrawal was delivered to the Secretary General of the UN; (*c*) that the delivery of the notice of withdrawal, in the absence of prior consultation with Parliament, was flawed because it was procedurally irrational; and (*d*) that the withdrawal from the

77 The first time South Africa's withdrawal from the Rome Statute was mentioned was immediately after the decision of 23 June 2015, where South Africa was heavily criticised for the Cabinet's 'decision to grant President Bashir immunity from arrest' at para 5 of the February 2017 judgment. This is confirmed in Michelle Nichols, 'SA begins process to withdraw from International Criminal Court' *Mail & Guardian* (Johannesburg, 21 October 2016) <www.mg.co.za/article/2016-10-21-south-africa-begins-process-to-withdraw-from-the-icc>. See also Mpho Raborife, 'ANC wants SA to withdraw from the ICC' *News24* (Johannesburg) <http://www.news24.com>.

78 The AU Assembly has itself taken a decision concerning ICC prosecutions in Africa. See Assembly of the African Union, *Decision on the Implementation of the Decisions on the International Criminal Court Doc. EX.CL/639(XVIII)* para 6, Doc. Assembly/AU/Dec.334 (XVI) (January 2011).

79 The South African government has consistently sought to prevent repression and the systematic violation of human rights and fundamental freedoms both within South Africa, as well as in neighbouring countries, such as Zimbabwe. See para 32, Founding Affidavit in the matter of *Bishop Rubin Phillip & Another v National Conventional Arms Control Committee & Others* Durban and Coast Local Division, High Court, Order granted 18 April 2008**,** as discussed in Max du Plessis, 'A Chinese Vessel in Durban with Weapons destined for Zimbabwe' (2008) 33 South African Yearbook of Intl L 267.

80 Robert Guest, *The Shackled Continent: Africa's Past, Present and Future* (Pan Books 2004) 12.

81 David Kennedy, 'The Disciplines of International Law and Policy' (1999) 9 Leiden J of Intl L 133.

Rome Statute constituted a serious breach of the state's obligations and was therefore precluded by section 7(2) of the Constitution. Each of these aspects will be analysed using the paradigm of compliance with the law by states as articulated by Viljoen.[82] Viljoen's study on respect for the law reveals that three essential conditions must be met to ensure effective compliance with the law, namely (1) the opportunity for the public to have an opinion; (2) where there is the requisite 'political will', and (3) where issues are depoliticised.[83] A systematic application of the facts to these conditions illustrates South Africa's precarious position.

Compliance is Possible where there is an Opportunity for the Public to have an Opinion and for this Opinion to be Widely Disseminated

Neumayer's empirical study to determine whether the ratification of international human rights treaties increases respect for or compliance with human rights supports Viljoen's argument that public participation is a prerequisite. As Neumayer states:

> in most cases, for [human rights] treaty ratification to work, there must be conditions for domestic groups, parties, and individuals and for civil society to persuade, convince, and perhaps pressure governments into translating the formal promise of better human rights protection into actual reality.[84]

Substantive and procedural adherence to the law should follow naturally when the state is under constant scrutiny because the public is empowered to monitor compliance with international and domestic obligations and is afforded a forum (Parliament) in which to engage in such participation. This fact is underlined even further where the judiciary is permitted to declare that the government, acting on behalf of the state, has failed to comply with binding obligations. It is worth remembering that the 2017 judgment arose out of a challenge instituted by the official opposition political party, supported by a number of South African civil society organisations. Therefore, it is evident that broad public participation in decision-making is a central feature of South Africa's politico-legal landscape.

In withdrawing from the Rome Statute, South Africa relied on Article 127(1) of the Rome Statute, which permits withdrawal, subject to the proviso that the withdrawal takes effect only 12 months after the depositing of a notice to that effect. Strictly (or literally) speaking, South Africa was still bound by the Rome Statute until the 12-month period expired, because the effect of withdrawal was suspended. However, a literal interpretation is not consistent with the idea that an action must have a result in order

82 Viljoen (n 25) 464.

83 Id 464–465.

84 Erik Neumayer, 'Do International Human Rights Treaties Improve Respect for Human Rights?' (2005) 49(6) The J of Conflict Resolution 952.

for it to be effective, to quote Lewis.[85] As such, the notice of withdrawal was the public statement, delivered to the South African public, that South Africa would no longer allow the Rome Statute to influence South Africa's future decisions, laws and conduct. Stated plainly, with effect from October 2016, a person accused of crimes against humanity who was in the territory of South Africa would not be arrested and/or surrendered to the ICC for prosecution. But, with the refusal to arrest Al Bashir, the precedent had already been set for this even while the Rome Statute was still in place. Therefore it is not far-fetched to have expected the South African government not to have complied with the Rome Statute from the moment that the notice of withdrawal was signed and deposited with the UN.

As far as the procedure relating to withdrawal is concerned, absolutely no public participation was involved in South Africa's decision to withdraw from the Rome Statute.[86] The case of *Doctors for Life International v Speaker of the National Assembly & Others*[87] is of specific relevance here: it was stated at paragraph 115 of this judgment that public participation promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice and which strengthen the legitimacy of legislation.[88] The travesty of this circumstance is particularly pronounced in the light of the fact that not only was the general public denied an opportunity to provide input on the decision to withdraw, but Parliament itself had not been consulted. While the Executive does have the right and the power to enter into international treaties and join international institutions and, similarly, it has the right to withdraw from same, the Executive must constantly have the interests of the people at heart. However, the Executive's decision is not final until such time as Parliament votes on the triggering of that decision.[89] Without such participation, therefore, the withdrawal has no legitimacy. This is so because, according to the relevant construct of the Constitution, express parliamentary approval was required[90] before the notice of withdrawal was delivered to the Secretary General of the UN. This had not occurred. The lack of prior parliamentary approval resulted in the unilateral termination of the social contract which had been established between the people of South Africa and their

85 Corinne Lewis, *UNHCR and International Refugee Law: From Treaties to Innovation* (Routledge 2012) 37.

86 Public participation in decision-making is prescribed in s 72(1) of the Constitution. The obligation to ensure public participation takes place has also been confirmed in the case of *Merafong Demarcation Forum & Others v President of the Republic South Africa & Others* 2008 (10) BCLR 968 (CC), where, from paras 133–140, the court stipulated that the participation must be genuine and must consider the views of those who make representations.

87 2006 (12) BCLR 1399 (CC).

88 Paragraph 61, 2017 judgment.

89 Paragraphs 35 and 49, 2017 judgment.

90 *Ex post facto* approval is not deemed to constitute participation.

elected representatives in the Legislature and the National Executive, which required compliance with the international treaty obligations that had been accepted.[91]

Alarmingly, the government's argument that prior parliamentary approval is not required for the notice of withdrawal to be given is patently disingenuous. The government argued that because section 231 of the Constitution contains no such provision and because Article 56 of the 1969 Vienna Convention on the Law of Treaties 'contemplates only a notice of withdrawal signed by the head of state, head of government or minister of foreign affairs or other representative of the state concerned', no parliamentary approval, ratification or confirmation was required.[92] Such an argument is contemptuous of the Constitutional construct as it pertains to law-making because the domestic law-making process involves the formulation of policy followed by the adoption of a Bill. The Bill is subject to further scrutiny, review and amendment, after which the state law advisors certify that the Bill is compatible with the Constitution (the supreme domestic law).[93] Inevitably, regard will have to be had to the (foreign) policy considerations as well as the text of the international treaty when domesticating the law. Only once the president signs the Act does it enter into force. The consistent enforcement of that domestic law is a *sine qua non* for adherence to the rule of law.[94] In this context, I rely on the substantive conception of the rule of law, which entails that officials will have acted outside of the scope of their legal authority if they do not implement the statutes strictly according to the Constitutional commitments contained in them.[95]

Concerning the Constitutional regulation of the domestication of international law, section 231 of the Constitution declares that

1 The negotiating and signing of all international agreements is the responsibility of the national executive [the President, in consultation with the Deputy President];
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 [and once an instrument of ratification has been deposited with the relevant international institution].

This parliamentary ratification of the international agreement translates the international policy undertaking into domestic legal processes and actions by virtue of the fact that section 231(4) provides that 'any international agreement becomes law in the Republic

91 Paragraph 52, 2017 judgment.
92 Paragraph 40, 2017 judgment.
93 Pierre de Vos and Warren Freedman (eds), *South African Constitutional Law in Context* (Oxford University Press 2014) 155–156.
94 Section 1(*c*) of the Constitution emphatically states that South Africa is founded on the rule of law.
95 De Vos (n 93) 85.

when it is enacted into law by national legislation ... unless it is inconsistent with the Constitution or an Act of Parliament.' The Implementation Act therefore constitutes the domestication of the Rome Statute. The 'effective'[96] implementation of those treaties is where South Africa's true intentions are revealed, however. Pound's assertion that 'the life of the law is in its implementation and enforcement'[97] is expressed aptly by Lazarev as 'enabling one to verify and embody in real legal relations behaviour which was programmed in a norm, imparting the spirit of life to a dead letter.'[98]

Logically, the best interpretation of section 231 of the Constitution is that, just as it is the Executive which is responsible for acceding to international treaties (except those of a technical, administrative or executive nature)[99] and their subsequent approval by Parliament is required to cause them to become binding on South Africa, it is likewise the Executive's prerogative to choose to withdraw from an international treaty, but it may do so only with the express approval of Parliament.[100] Moreover, the Constitution of South Africa is explicit in its regulation of accession to international treaties: a fundamental principle of the interpretation of legislation of an international or domestic character, one which now constitutes binding precedent, is that withdrawal from a treaty must take place in substantially the same manner as accession occurs.[101] Authority for this assertion is derived from the case concerning the removal by the president of Billy Masethla[102] as head of the National Intelligence Agency (NIA); this case is analogous in the light of the fact that it had been successfully argued that the power to dismiss the head of the NIA should be read into section 209(2) of the Constitution, where it states the 'the President as head of the national executive must appoint …', even though the Constitution is silent on the removal of the appointed person.

Confirmation of the fact that prior parliamentary approval was not sought lies in the fact that no attempt had been made to repeal the Implementation Act (since the repeal of legislation is strictly within the purview of Parliament and Parliament was not even

96 The term 'effective' is used deliberately here to indicate 'the capacity to produce an effect or result'. See Kal Raustiala and Anne-Marie Slaughter, 'International Law, International Relations and Compliance' in Carlsnaes and others (n 58) 538, 539.

97 Roscoe Pound, 'The Scope and Purpose of Socio-Logical Jurisprudence' (1912) 25(6) Harvard LR 514–516.

98 MI Lazarev, 'On a Theoretical Concept of Control Over the Fulfilment of International Obligations of States' in William Butler (ed), *Control Over Compliance with International Law* (Martinus Nijhoff 1991*)* 17.

99 International treaties of a technical, administrative or executive nature are distinguished in s 231(3) of the Constitution as treaties for which no approval of Parliament is required.

100 As the court held at para 35 of the judgment, '[the executive's] power is fettered by s 231(2) and (4), which enjoins the national executive to engage parliament. The section therefore clearly delineates the powers between the national executive and parliament.'

101 See para 51, 2017 judgment.

102 *Masethla v President of the Republic of South Africa & Another* 2008 (1) BCLR 1 (CC).

apprised of the decision to withdraw until the decision had been taken).[103] For this reason, the unilateral withdrawal was procedurally irrational and therefore invalid. Failure to grant an opportunity for public participation is fatal.[104]

Compliance is Possible where there is the Requisite 'Political Will'

States do not rely on coercion as a form of social control. In actual fact, social orders based on coercion tend to collapse from their own instability.[105] More sustainable and effective methods to ensure compliance have therefore evolved. States will generally comply if they view the international law to which they have subscribed as being legitimate and that it ought therefore to be obeyed; if they act purely in their own self-interest; or if they fear punishment for failure to conform.[106] Since 'legitimacy and justice together constitute fairness',[107] it is more than likely that international law will be complied with if it is viewed as legitimate and just to the state party that has ratified that law and is obliged to implement it.

Confirming the consensual nature of international law is the fact that states may become disillusioned—and may even wish to opt out of certain structures or institutions—as a result of the perception that the international law or system is no longer legitimate.[108] It is therefore not unheard of for a state to withdraw from a treaty or an international organisation as a result of discontent with an international regime. Morocco represents a good example in this regard: it withdrew from the OAU in 1984 to signal its disenchantment with the organisation having recognised the Arab Sahrawi Democratic Republic (Western Sahara) as an independent state, notwithstanding Morocco's assertion that Western Sahara formed part of its territory.[109] It is equally pertinent to state that withdrawal from an international organisation is not necessarily permanent: Morocco was welcomed back into the AU in January 2017 during the 28th AU Summit held in Ethiopia, notwithstanding that the situation with Western Sahara remains unchanged. The political will underpinning a state at any given time is therefore what dictates its actions.

103 Section 41(1)(*a*)(ii) of the Constitution. The amendment of legislation encompasses the repeal of legislation.

104 *Matatiele Municipality & Others v President of the Republic of South Africa & Others* 2006 (5) BCLR 622 (CC).

105 Friedrich Kratochwil, 'The Force of Prescriptions' (1984) 38 International Organizations 690–692.

106 Markus Burgstaller, *Theories of Compliance with International Law* (Brill Academic Publishers 2005) 85.

107 Id 132.

108 The legitimacy of the ICC itself is currently in question on account of the assertion that it is targeting Africans while not pursuing Western perpetrators of international crimes, such as former US President George W Bush and former British Prime Minister Tony Blair.

109 Western Sahara's independence is contested by Morocco on account of the Polisario Front's unilateral declaration of independence on 27 February 1976.

The argument concerning a state's view on the legitimacy of international law is particularly poignant if one considers Africa's relationship with the ICC, and the Al Bashir matter in particular. Al Bashir's arrival in South Africa in June 2015 to participate in the AU Summit, and the South African government's refusal to arrest him pursuant to the ICC's arrest warrants—in spite of a court order compelling the government not to allow Al Bashir to leave South Africa before the matter could be heard by a competent court[110]—is indicative of political decisions seemingly taking precedence over principled (and lawful) decisions.

Determining with any precision the political will in South Africa has become increasingly difficult because of the overlap between the state and the party (the African National Congress). Choudhry[111] argues that South Africa is effectively a dominant-party democracy. One of the 'pathologies' of this, according to him, is the 'colonization of independent institutions meant to check the exercise of political power by the dominant party, enmeshing them in webs of patronage.' He goes on to state that this puts immense pressure on an otherwise formally liberal democratic system because of the lack of alternation of power between political parties, which in turn generates constitutional challenges. In this respect, it is becoming increasingly obvious that the distinction between the Executive and the Legislature is becoming blurred in South Africa. An example of this blurring of the distinction is evident when one views the circumstances which arose during President Zuma's State of the Nation Address on 12 February 2015, as well as the State of the Nation Address of 9 February 2017. Responding to the Economic Freedom Fighters' chants that President Zuma must 'pay back the money' (in 2015) and that President Zuma is 'a constitutional delinquent' (in 2017), the Speaker of Parliament, Baleka Mbete, instructed the police (which fall within the Executive branch of the state) to remove those Members of Parliament, therefore infringing the clear separation of powers between the Legislature and the Executive. In such an act, political allegiance is prioritised over the sanctity of the Constitutional system. Choudhry reinforces this view by making reference to the incident that took place in April 2008 when the Judge President of the Western Cape High Court, Hlophe JP, approached Justices Bess Nkabinde and Chris Jafta of the Constitutional Court and uttered the words: 'You are our last hope; you must find in favour of our comrade.'[112] It is widely believed that these words related to the case that had just been heard by the Constitutional Court concerning allegations of corruption against Jacob Zuma in the *Thint* matter (before Zuma became president).[113] Whereas section 165(2) of the

110 Paragraph 5, *SALC v Minister of Justice and Constitutional Development*, 2015.

111 Sujit Choudhry, '"He had a Mandate": The South African Constitutional Court and the African National Congress in a Dominant Party Democracy' (2009) 2 Constitutional Court Review 1–86.

112 Id 1, 2.

113 Chief Justice Pius Langa, 'Statement in Support of the Complaint to the Judicial Service Commission by the Judges of the Constitutional Court made on 30 May 2008' para 9(*c*) <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71656?oid=92275&sn=Detail.>

Constitution declares that the courts are independent, section 165(3) emphatically states that 'no person or organ of state may interfere with the functioning of the courts.' Hlophe JP's position as President of the Western Cape High Court, compounded by the fact that he took an oath in terms of section 6 of Schedule 2 of the Constitution to be faithful to the Republic of South Africa and uphold and protect the Constitution and the law, is most concerning, especially because it reinforces the view that there is very little distinction between political party and the state. Indeed, at paragraph 67 of the 2017 judgment, proof of the Executive's unashamed dictation to the Legislature is provided where the national executive conceded that it had 'ordered the Legislature to finalise its process of considering the Bill repealing the Implementation Act before the effective date of 18 October 2017.' This is a circumstance which is 'impermissible, as it has the potential to undermine the process of Parliament'[114] and could easily equate to a constitutional crisis.

South Africa's notice of withdrawal from the Rome Statute on 19 October 2016 exacerbated the perception that the state's internal statements concerning respect for the rule of law, and its external utterances and conduct had become incompatible. In fact, the term 'schizophrenic' might be even more apposite.

Section 7(2) of the Constitution places an unequivocal injunction on the state to respect, protect, promote and fulfil the rights in the Bill of Rights. The cornerstones of our constitutional dispensation are freedom, equality, justice, human dignity, right to life, freedom and security of the person. All of these are rights for which numerous lives were lost during apartheid. It is therefore inconceivable that the government would sacrifice these rights merely to appease a recalcitrant leader of a foreign state. And not just one, but two foreign presidents. In the present case, it was both President Robert Mugabe and President Omar Al Bashir who were being appeased in the light of the fact that President Mugabe was the Chairperson of the AU in 2015; therefore it was he—acting in this official capacity—who had invited Al Bashir to South Africa, knowing that South Africa had obligations to arrest Al Bashir in terms of the Rome Statute. The political will to uphold the Rome Statute was sacrificed in this manner for no clear benefit.

As an aside, it is pertinent to highlight the fact that South Africa was not alone in seeking to withdraw from the Rome Statute: Burundi and The Gambia also deposited instruments of withdrawal.[115] However, South Africa can in no way be compared to

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Hlophe J had allegedly 'sought improperly to persuade them to decide the *Zuma/Thint* cases in a manner favourable to Mr Zuma.'

114 Paragraph 67, 2017 judgment.

115 Burundi's Parliament voted to withdraw from the Rome Statute on 12 October 2016, followed by the signing of a decree to this effect by President Pierre Nkurunziza. On 25 October 2016, when (former President) Yahyah Jammeh still held power, The Gambia also announced its withdrawal from the International Criminal Court (see Agencies, 'Gambia withdraws from International Criminal Court'

these two states. The political will to protect human rights and abide by international and domestic law is definitely not something which either Burundi or The Gambia are associated with. Indeed, Burundi's history has been fraught with genocide and conflict, with little to no political will evident to combat them. Furthermore, the escalation of political tensions in Burundi as a result of President Pierre Nkurunziza's announcement of his intention to run for a third term in April 2015 (and the subsequent attempted coup d'état) has caused more than 112 000 Burundians to seek asylum in neighbouring countries.[116] For its part, The Gambia is categorised as one of the worst countries as far as human rights records is concerned.[117] Among numerous other incidents, in 2014, former president Yahyah Jammeh, an ardent homophobe, assented to a Bill passed by Parliament, the Criminal Code (Amendment) Act, creating the offence of aggravated homosexuality—a vague definition open to wide-ranging abuse and carrying a life sentence.[118] The Gambia also withdrew from the Commonwealth in 2013;[119] therefore South Africa would be grossly remiss to compare itself to or keep company with The Gambia.

Political will has largely become subsumed within the dominant political party's own policy objectives and agendas. For example, Hlophe J's statement concerning the 'comrade' was part of the greater objective of ensuring that Jacob Zuma subsequently became president, which became a reality. This is indicative of the political will having changed dramatically from the early years of South Africa's democracy: it currently leans clearly away from adherence to the rule of law. While South Africa at first 'assumed the moral high ground in the global arena',[120] at present there is very little evidence of a principled stance on matters of importance to the international community.[121] Moreover, South Africa is certainly not speaking with a 'united, final and

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Aljazeera (Qatar, 26 October 2016) <www.aljazeera.com>). With the inauguration of President Adama Barrow in 2017 (first, at the Gambian embassy in Dakar, Senegal, in January 2017 and then once again on Gambian soil on 18 February 2017), The Gambia announced its reversal of the decision to withdraw from the Rome Statute (see Editorial Staff, 'Gambia to Reverse Withdrawal from International Criminal Court, EU Official says' *The Star* (Johannesburg) <www.thestar.com>).

116 Katie Nguyen, 'Fleeing Burundi, Children as Young as Six arrive Alone in Camps: Charity' *Thomson Reuters Foundation* (London, 5 June 2015) <reuters.com/article/idUSKBN0OM02P20150606>. These statistics are reinforced by the UNHCR Regional Update 5: Burundi Situation – Highlights of 9 June 2015 <http://reporting.unhcr.org/sites/default/files/UNHCR%20Regional%20Update%20-%20Burundi%20 Situation%20%235%20-%209JUN15.pdf>.

117 Editorial Staff, 'Gambian Youth Flee Bleak Future at Home', *Deutsche Welle* (Bonn) <http://www.dw.de/gambian-youth-flee-bleak-future-at-home/a-18414345>.

118 See the report by the Human Dignity Trust <www.humandignitytrust.org>.

119 Editorial Staff, 'UK Regrets The Gambia's Withdrawal from Commonwealth' *BBC News* (London, 3 October 2013) <www.bbc.com>.

120 Y Spies, 'South Africa's Foreign Policy' (2011) South African Yearbook of International Law 327; Spies (n 42) 271.

121 On 7 March 2012, South Africa tabled Resolution 17/19 on LGBT Rights in the UN. However, this resolution was prevented from being passed because a large number of states were opposed to the resolution, including many of South Africa's African neighbours. Therefore, it appears that South

determinative voice'[122] on issues: instead, it vacillates, contradicts itself and is ambiguous.[123]

Where Disputes, Conflicts or Issues are 'Depoliticised'

Despite the sovereignty of states, they are still sensitive to their, and acutely considerate of others', political power within the international community. States will therefore be more inclined towards complying with the law if the situation is depoliticised.[124] By extension, the converse is also true: a state will not comply where it 'does not want to be seen to give in to a political settlement or to make a politically costly concession.'[125] Shielding Al Bashir from arrest was undeniably a distinctly political decision. In turn, it is submitted that the only way in which South Africa could 'save face' after not complying with its international and domestic obligations to arrest Al Bashir was to seek to withdraw from the entire institution, albeit that that was an irrational decision. The requirement for rationality is that government action must be rationally connected to a legitimate government purpose and it must comply with the principle of legality.[126] Therefore, the intended withdrawal was substantively irrational because it defeats South Africa's ambitions to fight impunity on the continent and to ensure respect for fundamental rights. This irrationality is evidenced in the reason advanced by the national executive for delivering the notice of withdrawal:

> the Rome Statute impedes its role in diplomatic and peace-keeping efforts on the continent, as it is required to arrest, on its soil, sitting heads of state against whom the ICC has issued warrants of arrest. By withdrawing from the Rome Statute, government would be free to pursue its peacemaker role on the continent.[127]

The argument was essentially that, in the circumstances, South Africa would be free to give immunity to such leaders, thus eradicating the obligation to arrest the indicted heads of state. Importantly, the principle of legality also requires that the process by which the decision is made must be rational. In the light of the fact that South Africa's deposit of the instrument of withdrawal from the Rome Statute on 20 October 2016 was the very first signal that South Africa no longer sought to be party to the Rome Statute (the international law), but that it had at that stage not yet repealed the domestic law (the

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Africa picks and chooses which issues it will dedicate its attention to, with other important issues falling by the wayside.

122 Paragraph 70, 2017 judgment.

123 Suzanne Graham, 'South Africa's Voting Behaviour in the United Nations, 1994–2008' (PhD thesis, University of Johannesburg 2013) 263.

124 See generally, Rosa Freedman, *Failing to Protect: The UN and the Politicisation of Human Rights* (C Hurst & Co 2014).

125 Viljoen (n 82) 464–465.

126 Paragraph 64, 2017 judgment, quoting the case of *Pharmaceutical Manufacturers Association of SA & Another: In re Ex Parte President of the Republic of South Africa & Others* [2000] ZACC 1; 2000 (2) SA 674 (CC) para 85.

127 Paragraph 65.

Implementation Act),[128] indicates not only that the required constitutional processes had not been followed but that that would also result in the paradoxical situation where the domestic legislation would still continue to apply. Leary locates such a situation within the paradigm of the consequences of non-adherence to international law. She asserts that:

> states are required under international law to bring their domestic laws into conformity with their validly contracted international commitments. Failure to do so, however, results in an international delinquency but does not change the situation within the national legal systems where judges and administrators may continue to apply national law rather than international law in such cases.[129]

Application of the national law would require the arrest and surrender of Al Bashir should he once again set foot in South Africa, irrespective of the notice of withdrawal from the Rome Statute. In order to remedy this untenable situation, the court made an order that the government was to revoke the (premature) notice of withdrawal with immediate effect.[130] The issue remains highly politicised despite the notice of withdrawal having been revoked; therefore it is doubtful whether the matter will be put to rest. It is also likely that the government may pursue further attempts to withdraw from the Rome Statute. In fact, it is anticipated that the Minister of International Relations may appeal the High Court's decision in the Constitutional Court, so convinced is the government that withdrawal from the Rome Statute is the only solution, and as a matter of extreme urgency.[131]

Conclusion

The 22 February 2017 judgment concerning South Africa's intended withdrawal from the Rome Statute by no means brings an end to the issue of South Africa's contradictory and paradoxical relationship with the ICC. Further litigation is envisaged because the Act repealing the Implementation Act may be challenged constitutionally,[132] however unwise that step may be.

Having taken cognisance of the content of the various documents recording state practice, it is clear that the behaviour of South Africa has changed quite substantially since 1994. At first, the change was 'heroic',[133] but that was not to last. The South

128 Paragraph 66, 2017 judgment.

129 Henry Steiner, Philip Alston and Ryan Goodman, 'Vertical Interpenetration: International Human Rights Law' in *International Human Rights in Context: Law, Politics, Morals* (Oxford University Press 2008) 1095, quoting Virginia Leary, *International Labour Conventions and National Law* (Martinus Nijhoff 1982).

130 Paragraph 79, 2017 judgment.

131 Paragraph 70, 2017 judgment.

132 Paragraph 69, 2017 judgment.

133 Jo-Ansie van Wyk, 'South Africa's Post-apartheid Foreign Policy: A Constructivist Analysis' (2004) 23(3) Politeia 109.

African government appears to have taken the stance that, in the name of sovereignty, it is permitted to withdraw from an institution that it is no longer 'compatible' with, irrespective of other binding obligations that it has undertaken in order to give effect to the international treaties it has voluntarily acceded to. Although this is consistent with the consent-based nature of international law, which allows for withdrawal, the unambiguous condition of withdrawal is that the correct process must be followed. It therefore seems apparent that sovereignty is being (mis)used to wilfully evade obligations and consequently to retrogress as far as international and domestic law and policy are concerned.

Based on the hypothesis that South Africa's withdrawal from the Rome Statute is indicative of a general decline in respect for the rule of law, this article has illustrated that South Africa has experienced a serious retrogression with respect to compliance with its legal and moral obligations. Viljoen's conditions for ensuring adherence to the law lend themselves well to South Africa's decision to withdraw from the Rome Statute, in that this single act represents the government's disregard for the separation of powers, since Parliament—and the people—were not afforded an opportunity to participate in the decision. The act also highlights a series of pernicious consequences, which include the lack of political will to hold perpetrators of international crimes accountable; unjustified reliance on international customary law granting diplomatic immunity to heads of state whereas the Rome Statute has invalidated such immunity, and the fact that the government has allowed decisions to become overtly politicised, thus imbuing the act with a tangible hint of the compromise of key values and the sacrifice of principle, pragmatism and commitment. This retrogression permeates all branches of the state. Without independent institutions to check the exercise of power, the retrogression will simply continue. Fortunately, however, the Judiciary has remained largely unscathed and it continues to hold the Executive and Legislature accountable when necessary.[134] But for how long it is able to do so, who knows?

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134 Paragraph 78 of the 2017 judgment.

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