

**UNDERSTANDING SOUTH AFRICA'S CHANGING POSITIONS  
ON INTERNATIONAL CRIMINAL JUSTICE:  
WHY THE COUNTRY WANTED TO WITHDRAW  
FROM THE INTERNATIONAL CRIMINAL COURT (ICC)  
AND WHY IT MAY REMAIN IN THE ICC FOR THE TIME BEING?**

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## **Understanding South Africa's changing positions on International Criminal Justice: Why the country wanted to withdraw from the International Criminal Court (ICC) and why it may remain in the ICC for the time being?<sup>1</sup>**

*This article examines why the South African Government decided to withdraw from the Rome Statute for the ICC in 2016. South Africa's history with international law and international justice are examined to indicate how these matters over time reflect South Africa's political history and political developments. The next section of the article examines the role the United Nations Security Council plays in relation to the ICC and why that, along with other issues, has led to a greater reluctance by African countries to accept who is judged and who is not. Finally reviewed, is how South Africa's position on international justice has changed over time, what has caused such change, and whether the country's withdrawal from the ICC will occur in the future.*

**Keywords:** International Criminal Court, South Africa, African Union, United Nations Security Council, international criminal justice, international law

## **Compreendendo as mudanças de posição da África do Sul sobre a justiça penal internacional: Por que o país quis retirar-se do Tribunal Penal Internacional (TPI) e por que pode permanecer no TPI por enquanto?**

*Este artigo examina o porquê da decisão do governo sul-africano de abandonar o Tribunal Penal Internacional (TPI) em 2016. A história da África do Sul no que toca ao direito internacional e à justiça internacional é examinada de modo a pôr em evidência como essas questões ao longo do tempo refletem a história e os desenvolvimentos políticos que nela ocorreram. A secção seguinte do artigo analisa o papel que o Conselho de Segurança das Nações Unidas desempenha em relação ao TPI e por que isso, juntamente com outras questões, tem levado a uma maior relutância por parte dos países africanos em aceitar quem é julgado e quem não o é. Finalmente, é examinado como a posição da África do Sul sobre a justiça internacional se tem vindo a alterar ao longo do tempo, o que desencadeou esta mudança, e é ponderado se a retirada do país do TPI virá a ter lugar no futuro.*

**Palavras-chave:** Tribunal Penal Internacional, África do Sul, União Africana, Conselho de Segurança das Nações Unidas, justiça penal internacional, direito internacional

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South Africa has been in the news relating to the International Criminal Court (ICC or Court) for some time now. It has been involved in various ways in the disputes between the African Union (AU) and the Court since 2009. In fact, however, the schism between Africa and the Court can be seen from 2005, although South Africa did not clearly state that it sided with the AU against the ICC until 2015 (Arnould, 2017). While it was open about the dualist position it was taking supporting both sides, it was clear by all the signs that in private South Africa was siding with the AU. South Africa's position however only became crystal clear in 2015 when then President al-Bashir entered South Africa (Bamfo, 2018) to attend the 25<sup>th</sup> African Union Summit. That event (Sarkin, 2015) generated a chain of events that then saw the South African Government on 21 October 2016 deciding to withdraw from the Rome statute of the ICC (Sarkin, 2017).

No one was consulted on that decision, but the South African Minister of Justice and Constitutional Development finally confirmed during a media briefing that South Africa had submitted to the United Nations (UN) its notice of intention to withdraw from the ICC. The decision by South Africa to withdraw from the ICC in 2016 was taken around the same time that Burundi and Gambia were also deciding on that matter (Ssenyonjo, 2018). The Philippines did withdraw from the ICC in 2018, but that was because of the decision by the Court to open a case into Philippines President Duterte's "war on drugs" and the extra-judicial killings that were alleged to be state sanctioned. Malaysia had on 4 March 2019 ratified the Rome Statute and a month later in April 2019 backtracked on its decision and withdrew from the Rome Statute. The Malaysian Prime Minister stated that:

There seems to be a lot of confusion about the Rome Statute, so we will not accede. This is not because we are against it, but because of the political confusion about what it entails, caused by people with vested interests. (Hamid, 2019)

The timing of the South African Government's withdrawal decision may have been prompted by wanting to be the first country to withdraw from the Court. At the time, several states were considering doing so (Rossi, 2018). Withdrawing could therefore have been done then as a means to show some leadership to other African countries that were also considering this option.

The reaction to the information about the South African Government's intention was, from at least some, tremendous criticism. The South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC), the South African Research Chair in International Law (SARCIL) and the International Commission of Jurists made submissions to the South African

Parliament's Portfolio Committee on Justice and Correctional Services, drawing the committee's attention to what they considered an injudicious decision to withdraw from the ICC. Thereafter, several organisations lodged an application in the North Gauteng High Court to set aside the Government's decision to withdraw from the ICC. In that case, the applicants contended that the Government's decision was taken precipitously without having first consulted and obtained parliamentary imprimatur, reminiscent of the position under apartheid law, where entering into, ratification of and withdrawing from international treaties was solely the executive's prerogative and could be executed without the approval of Parliament.

On 22 February 2017, the High Court delivered its judgment, in which it criticised the Government's conduct, declaring unconstitutional and invalid the executive's decision to deliver to the UN South Africa's notice of withdrawal from the ICC, and ordered the Government to rescind with immediate effect the said notice. On 13 March 2017, the Justice Minister, in compliance with the court order, gave notice to Parliament that he was revoking the bill that, if signed into law, would have officially decreed the divorce, and severed the almost 20-year-old tie between South Africa and the ICC.

This article examines why the South African Government took the decision to withdraw from the ICC in 2016, why it has still not withdrawn, and whether it is likely to do so in the future. South Africa's history with international law and international justice are examined to indicate how these matters over time reflect South Africa's political history and political developments. The article notes that there was little regard for international law during the apartheid era. That position changed, as the country became a democracy, but changed again as South Africa sought greater status and new political partners in such a quest. The relationship between the AU and the ICC is then examined to understand how and why South Africa's position changed over time. The next section of the article examines the role the United Nations Security Council (UNSC) plays in relation to the ICC and why that, together with other issues, has led to a greater unhappiness on the part of African countries who are states parties to the ICC about who is prosecuted and who is not. Finally, reviewed in the context of that background is how South Africa's position on international justice has changed over time, what has caused such change, and whether the country's withdrawal from the ICC will occur in the future.

## The historical context of South Africa and international law

In 1994, following the end of apartheid, South Africa became a constitutional democracy. When the two new democratic and transformative constitutions were adopted in 1993 and 1996 respectively, they represented the end of the struggle for liberation against a despotic regime whose egregious violations of basic human rights shocked the collective conscience of nations around the world. The new democratic polity knew that it had to take steps to avoid the past perpetration of crimes against humanity and other human rights abuses. Thus, the new Government began the process of building a “united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations” (South Africa, 1996).

With that in mind, and the need to ensure the significance of international legal norms in domestic law, section 39(1)(b) of the Constitution of the Republic of South Africa 108 of 1996 enjoins the domestic courts to consider international law when interpreting the Bill of Rights, and section 233 further provides that “[w]hen 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.” Thus, the Constitution became the iconic symbol of South Africa’s commitment to upholding the rule of law, and protecting and advancing international human rights.

In this context, it was therefore no surprise when, on 17 July 1998, South Africa signed, and, on 27 November 2000, deposited its instrument of ratification in terms of article 125 of the Rome Statute of the International Criminal Court. South Africa elected to be in the company of the sovereign states that, by implementing the Rome Statute nationally on 16 August 2002, undertook and committed to cooperate with the ICC to bring international criminals to trial for offences that fell within the remit of the Court. South Africa, as a democracy based on constitutional supremacy and as an active member of the international community that observes international customary norms, recognises and upholds the doctrine of head-of-state immunity as a settled practice amongst nations of the world (Gaeta, 2009).

South Africa was a keen supporter of the ICC, as were many other African countries (Rukooko & Silverman, 2019) way before the Court came into existence. It supported the process to establish the Court and played a critical role during the drafting of the Rome Statute at the conference to set up the Court in 1998 (Assembly of States Parties to the Rome Statute, 2002). Former President Nelson Mandela played a key role in that regard, as did many other South Africans (Mandela, 2004).

## The African Union versus the ICC

The role of the ICC on the African continent is very controversial (García Iommi, 2020). The ICC's role is seen to aim at only the weaker countries, mainly in Africa (Du Plessis, 2013), and that the larger and more powerful states are able to avoid accountability for their actions, including Russia, China, India, and the United States (Ndubuisi & Onoriode, 2018).

While the forerunner of the AU, the Organization of African Union, was a major supporter of the creation of the ICC, more and more African countries and the AU itself are now opposed to the Court (Abass, 2013). The AU has become ardently in favour (Swart & Krisch, 2014) of African states leaving the Court. The feelings against the ICC have grown over the last decade or so. Those sentiments were originally about the attempts by the Court to prosecute the presidents of Sudan and Kenya.

In October 2013, the AU called an extraordinary session of the Assembly of the African Union that dealt with the continent's relationship with the ICC in the context of international justice (Vilmer, 2016). It decided to urgently request deferral of the Kenyan cases. The AU's position hardened when the letter to the Security Council requesting the deferral was unheeded and in fact not even acknowledged. The AU's case against the ICC was further strengthened by the events in South Africa in 2015 over attempts by the ICC to get South Africa to arrest then President al-Bashir of Sudan.

There is a wider context to the issues concerning the way the AU views the ICC (Sarkin, 2016a). There have long been allegations of bias on the part of the ICC (Austin & Thieme, 2016) against Africa (Benyera, 2018), but more recent has been the view that the ICC is a neo-colonialist institution (Labuda, 2014) doing the bidding of the Global North (Maklanron, 2016). It has also been asked why African states should be held accountable when many of the powerful states including the USA, Russia, China, India, etc. refuse to be (Ssekandi & Tesfay, 2017). The indictment of President al-Bashir was seen to cement that position, as Sudan is not a state party to the Rome Statute (de Wet, 2015). Thus, the fact that the Security Council with many non-member ICC states did the referral, rendered to many that decision illegitimate, and highlighted the position of imperialism (Condorelli & Ciampi, 2005). The alleged abuse of power in the hands of the so-called "P5 members" of the UNSC and the perceived conflict between states parties' international obligations and domestic and regional political interests did not bode well for the Court's legitimacy (Fisher, 2018) and reputation in Africa (Dutton, 2017). However, those who do not want the Court to take up such cases

have used the issues concerning the ICC in Africa for political purposes. As South African Archbishop Tutu has stated:

I regret that the charges against President Bashir are being used to stir up the sentiment that the justice system – and in particular, the international court – is biased against Africa. Justice is in the interest of victims, and the victims of these crimes are African. To imply that the prosecution is a plot by the West is demeaning to Africans and understates the commitment to justice we have seen across the continent. (Tutu, *Cape Times*, 2009)

The fact, however, is that the anti-ICC sentiment has taken hold across Africa. Much needs to be done to improve this situation by educating stakeholders on the role and function of the Court and why the Court is essential for deterrence (Sarkin, 2011-2012). This will be returned to.

Regardless, some have been highly critical of the development of international criminal justice in general, and that of the ICC specifically, because they see this as a degradation of sovereignty. The Court is contentious, at least in part, because a majority of its cases concern only Africa (Cannon et al., 2016). It has no cases from elsewhere, hence the criticism that it is biased against the developing world and favours developed countries (Niang, 2018). The Court is currently addressing various “situations” or cases, including Uganda, Mali, Ivory Coast, the Democratic Republic of the Congo (DRC), the Central African Republic (CAR), Kenya, Libya and Sudan. Five cases were referred to the ICC by the governments of those countries. The Security Council referred two cases to the ICC. Such referrals are very controversial, because of the powers and membership of the Council are not seen by many to be democratic and rather reflect the world as it was in 1945 (Sarkin, 2019).

For those reasons, the AU (Chigara & Nwankwo, 2015, p. 247) has raised the issue of bias by the Court against African states (Mills & Bloomfield, 2018). There has been widespread concern among the 33 African state parties to the Rome Statute, which include South Africa, that the ICC is “hunting” African leaders (Gaeta & Labuda, 2017) almost to the exclusion of any other head of state or government official elsewhere in the Global North.

Thus, there has been a growing call among many African states to sever ties with the ICC. This is particularly evinced by the refusal or failure of “Uganda, Chad, Kenya, Djibouti, Malawi, Congo, South Africa, and Egypt to be involved in detaining and surrendering President Al Bashir to the ICC” (Chigara & Nwankwo, 2015, p. 246).



The AU became increasingly oppositional and recalcitrant towards the Court (Sarkin, 2018). At the extraordinary session of the AU's summit of heads of state in Addis Ababa in 2013, the AU avowed its position against the prosecution of Kenyan President Uhuru Kenyatta, citing disproportionate prosecuting patterns. The AU asserted that it would not allow a sitting head of state to be prosecuted by an international body.

As a result, the AU has sought to extend the African Court of Justice and Human Rights (ACJHR)'s adjudicative power to try international crimes (Tilden, 2018) while at the same time providing for immunity (Akande & Shah, 2010) in such cases for heads of state and other state officials in terms of Article 46A *bis* of the 2014 Protocol Amendments of the AU. Thus, the AU endorsed the proposition to expand the mandate of the ACJHR (which merged the African Court on Human and Peoples' Rights (ACHPR) and Court of Justice of the African Union) so the Court can have the jurisdiction to try international crimes (Asaala, 2017).

The developments concerning the ICC and Africa came to a head in 2016, which was a critical year for the ICC. It was the year that African countries began to seek to withdraw from the Court (Magliveras, 2019). Three African countries (South Africa, The Gambia and Burundi) began the process to leave the Court, and a number of others, including Uganda, Namibia and Kenya (Helfer & Showalter, 2017) were seen to be moving in that direction.

The ICC has categorically denied any accusations of "partiality", arguing that the sum of African cases referred to the ICC has more to do with the Court's jurisdiction being limited to states parties to the Rome Statute, and for crimes committed after 2002. In addition, while other cases have been investigated, they have lacked the ability to graduate to a trial because of a lack of evidence or some other deficiency. ICC spokesperson, Fadi El Abdallah, has stated that:

[o]f the current cases on the prosecutor's desk, all but two were brought to the ICC by the states themselves, including when national justice systems have failed. In the cases of Libya and Sudan, the investigations were referred to the Prosecutor's Office after a vote by the UN Security Council, votes in which African countries participated. (Chutel, 2016)

The fact of the matter is that of the first ten situations that were investigated by the ICC, nine of those were African states: Democratic Republic of Congo (DRC) (referred to the ICC by the DRC Government in April 2004); Uganda (referred to the ICC by Uganda in January 2004); Central African Republic (CAR) (referred to the ICC by the CAR Government in December 2004); Darfur, Sudan (referred to the ICC by the UNSC in March 2005); Kenya (ICC Prosecutor opened *proprio motu*



investigation in March 2010); Libya (referred to the ICC by the UNSC in February 2011); Côte d'Ivoire (accepted the ICC's jurisdiction in April 2003); Mali (referred to the ICC by the Government of Mali in January 2004); and CAR II (referred to the ICC by the CAR Government in December 2014). Thus, many of the cases were in fact self-referrals by the countries themselves. In other words, it was not the ICC deciding to investigate but the country itself asking for the events there to be taken up by the Court.

## **The controversial role of the Security Council with respect to the ICC**

The Security Council has been given various powers in connection with the ICC (Schiff, 2008). The key issue has been stated as follows:

[I]n principle, it is questioned how those non-party states, especially from among the permanent members of the Council (P5 member states), can justify their exceptionalism, namely of subjecting to the Court another state not party while they do not accept the Court's jurisdiction over themselves. Thus, many question whether, through Security Council referrals, the ICC becomes a policy tool to advance the political interests of those states represented on the Security Council. (Mistry & Verduzco, 2012)

Problematically, the Permanent Council has a membership that still reflects the geopolitics of the so-called superpowers immediately after the Second World War (Cryer, 1996), at the exclusion of the rest of the world. It has been argued that:

[t]he configuration of the Security Council not only mirrors the political and economic reality of 1945, but it is also an increasingly delegitimized center of power. On the other hand, the ICC's lack of total independence from politicization as well as its statutory limitations threatens its primary objective of holding individuals accountable for abuses. Therefore, these two global institutions urgently need to reform their backward and obsolete interpretation of power that only perpetuates the status quo. (Jimenez, 2012, p. 86)

Among the P5 member states, only France and the UK are States Parties to the Rome Statute. Previous signatories the US (Groenleer, 2015, p. 924) and Russia (Seyapin, 2016) opted out and withdrew their intention to ratify. China has neither signed nor ratified the Statute.

In this context, there is strong criticism of what many perceive to be a very dangerous configuration of power politics inherent in the referral and deferral mechanisms between the Council and the ICC. The question may very well be asked: why is it that the subject of international peace and security is the concern of all member states, but when it comes to the subject of taking the decisions whether or not to refer or defer matters and the adoption of resolutions in respect thereof, the discretionary power essentially falls only within the province of permanent members of the Security Council (Babington-Ashaye, 2014)?

The significant issue is how can some member states be vested with the power to cause the commencement or the suspension of an investigation or prosecution of cases under the Rome Statute, but themselves reject, and not be bound by, the Rome Statute? It is indeed accepted practice in treaty law that a state is bound to follow what that state has voluntarily agreed to. Similarly, member states, of their own volition, consented to be bound by the UN Charter by joining the UN. However, the exclusive concentration of veto power in the hands of the permanent members (as determined in 1945 and no longer appropriate in the 21st century) has given to a select few a far greater and more superior say than other member states when it comes to decisions about international peace and security.

The situations referred to the ICC by means of the referral mechanism are in respect of signatory states of the UN Charter that did not consent to be bound by the Rome Statute, but are subjected to its authority and the jurisdiction of the ICC nonetheless (Keitner, 2018, p. 629). However, many of the permanent members of the Security Council do not themselves submit to the authority of the Rome Statute and the jurisdiction of the ICC. Nevertheless, they have the power to choose when to and when not to abide (Du Plessis & Gevers, 2018).

The fact is that these states are willing to impose the ICC on some states, like Sudan, but reject attempts to do so for themselves (Yigzaw, 2018, p. 204). In fact they have taken steps in the Security Council to block possible cases against their own citizens. In 2003, the Security Council adopted United Nations Security Council Resolution (UNSCR) 1487. This was a renewal of UNSCR 1422 pursuant to Article 16<sup>2</sup> of the Statute, which granted US soldiers and other UN peacekeeping personnel a 12-month immunity from the ICC. This can be renewed annually. This immunity further attenuated and undercut the Court's efforts to bring war criminals to justice.

<sup>2</sup> Article 16 of the Rome Statute makes provision for the "Deferral of investigation and prosecution". It states that "[n]o investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions."

This resolution drew the following response from the Parliamentary Assembly of the Council of Europe (PACE). It held that the Resolution

constitutes a legally questionable and politically damaging interference with the functioning of the International Criminal Court. Its independence from the UN Security Council, with regard to the opening of procedures against persons suspected of international crimes [...] is legally questionable for two reasons: firstly, it is *ultra vires* in that the legal basis for a Security Council Resolution under Chapter VII of the UN Charter – a present threat to international peace and security – was not present. Secondly, Resolution 1422 violates the Rome Statute (Articles 16 and 27). The Assembly considers that Article 16 does not cover blanket immunity in relation to unknown, future situations. It further recalls that Article 27 of the Rome Statute expressly prohibits making distinctions on the basis of official capacity in order to ensure that no person is above the law. The Assembly considers that this should also apply to UN peacekeepers, independently from their nationality.

The Assembly also resolved that it

regrets the ongoing campaign by the United States to convince State Parties to the Rome Statute, including member states of the Council of Europe, to enter into bilateral agreements aimed at subjecting these states' cooperation with the ICC, as regards United States citizens accused of crimes giving rise to the jurisdiction of the ICC, to prior agreement by the United States Government.

The USA's tactics in handling international criminal prosecution and justice matters illustrates the extent to which some states have gone to protect their domestic political interests and bilateral relations. This observation seems to give traction and lend credence to the view expressed by many African states that the ICC is a ploy by the West to achieve political ends (Nel & Sibiya, 2017).

This situation is exacerbated by what is perceived and promoted by African states as the Council's attitude of deep disrespect towards African issues. It has also been argued that a culture permeates the ICC's operations that: "comes with a prejudice and a hubris and an arrogance that has left a very bitter taste in the mouth of African states" (Chutel, 2016). These perceptions have grown over time but also as some African states have tried to push back against the role of the ICC.

## **South Africa's relationship with the ICC: past, present and future**

South Africa's relationship with the ICC must be seen in different time periods (Alden & Le Pere, 2004). South Africa had a very problematic role with the inter-

national community prior to 1994 (Black, 2001). It had an abnormal position with international law during apartheid (Botha, 1992).

The country was seen to be a pariah state, even though it tried to work within the confines of international law. This affected the way it viewed the international community in general and international justice in particular. While it was a founder of the League of Nations and the United Nations and was given a mandate over South West Africa (SWA) during World War I, it lost the support of the international community over its apartheid policies and its actions concerning the SWA mandate.

Significantly, in 1974, South Africa became the first country to have its credentials rejected at the UN. As a result, its voting rights were suspended in the General Assembly until 1994. Sanctions were levelled against it under Chapter VII of the UN Charter. A result of this was that South Africa came to view the international community as hostile towards it, and it reacted to international processes accordingly.

South Africa accepted few treaties. It was however a party to The Hague Regulations of 1907 and the four Geneva Conventions, which it ratified in 1952. Despite this, it refused to adopt the 1977 Additional Protocols (South Africa finally did so in 1995), fearing its applicability to the South African conflict. South Africa however only domesticated the Geneva Conventions in 2012 when it enacted the Implementation of the Geneva Conventions Act. Interestingly, in 1980 the ANC signed a declaration affirming its adherence to the Geneva Conventions and Additional Protocol I.

South Africa refused to engage with the international community on human rights matters. It did not have any concerns about international criminal justice because there were no institutions to hold South Africans criminally responsible for what were deemed international crimes.

That position changed in 1994 when South Africa regained its positive international status and sought to play an international role (Carlsnaes & Nel, 2006). It rapidly ratified a number of human rights treaties (Alden & Le Pere, 2004). During the years of President Mandela's tenure, South Africa played a strong supportive role in international criminal justice. Its role was recognised when one of its judges, Richard Goldstone, was appointed the first prosecutor of the two ad hoc international criminal tribunals. South Africa played a key role in the establishment of the ICC. It was one of the first countries to sign the Rome Statute on 17 July 1998 (Stone, 2018), and the first African state to do so (Rakate, 1998, p. 217). It formally joined the Court on 27 November 2000 and subsequently en-

acted the Implementation Act (Katz, 2003), which came into force in August 2002 (Du Plessis, 2003).

After the Mandela years, there was a shift in South Africa's foreign policy, with human rights no longer being so firmly advanced and not standing so high on the agenda as had previously been the case. As Southall noted, "the human rights, moralistic orientation of South Africa's early post-1994 foreign policy has been subordinated to pragmatic, regional concerns and African solidarity" (Southall, 2003, p. 269). Even Mandela himself in 2004 noted the shift when he wrote:

Just over 10 years ago, apartheid South Africa was an outlaw, an outcast from the community of nations. As we rejoice at the achievement of democracy and freedom, we also celebrate our elevation to global partner and a champion for Africa and other developing nations, and a bridge between North and South. (Mandela, 2004)

South Africa's role since has not been one of active engagement with respect to international criminal justice generally. South Africa is now not seemingly supportive of the Court. It has sided with the African Union and supports AU resolutions on the ICC. South Africa has not been cooperating with the ICC: this can be seen specifically in 2009 when the country approved an AU decision not cooperate with the ICC to arrest President al-Bashir. This position was later changed after an outcry in the country, but the writing was on the wall about where South Africa's sympathies lay.

South Africa, under the presidencies of Thabo Mbeki and definitely under Jacob Zuma (Langa & Shai, 2019), was generally reluctant to take up human rights matters especially when other African countries or Russia or China did not do so (Mangu, 2015). When it was a member of the Security Council before, South Africa refused to support action against India, Iran, Zimbabwe and Myanmar (Burma) (Van Nieuwkerk, 2007). These refusals were very controversial and contrary to human rights protection. South Africa frequently voted together with Russia and China. This pattern was also apparent when South Africa again served on the Security Council in 2011 and 2012. This can also be seen in the Human Rights Council and the General Assembly: on these occasions, South Africa argued that it took these positions for procedural and intuitional reasons rather than because of its stance on international justice issues.

At times, however, the courts in the country forced the Government to adopt different stances, including on torture in Zimbabwe (Chenwi & Sucker, 2015). The South African Government had refused to investigate these matters be-

fore the courts were approached. In fact, the South African Government on a number of occasions refused to comply with various international obligations (Venter, 2019) that they were then forced to do so by the courts. Again, when the Government refused to uphold the decisions of the South African Development Community (SADC) Tribunal against Zimbabwe, court action was necessary to achieve that result. South Africa also refused to hand over a report that contradicted another favourable report on how Zimbabwe's 2002 elections were conducted. The writers of that report, South African judges Dikgang Moseneke and Sisi Khampepe, had been sent by then South African President Thabo Mbeki to monitor Zimbabwe's elections. The report indicated that there were many tribulations in those elections, and refuted the more optimistic report by the official South African election-monitoring delegation. The resulting litigation, to stop that report becoming public, lasted 15 years, and millions of dollars were expended in legal costs.

Another negative stance adopted by the South African Government was its support of the decimation of the SADC Tribunal (Sarkin, 2016b). It supported the removal of the Court's jurisdiction to hear individual complaints and the refusal to appoint new judges or extend the tenure of the sitting judges, thereby ensuring that the Court did not have the requisite judges to allow it to sit.

Many times, South Africa took positions in international institutions against accountability. It often did so pleading some procedural point or that the position being taken by the country was because specific processes had to be, or ought to be, followed. It often cited peace processes as a reason not to support steps being taken against states that were violating human rights of their citizens (Prorok, 2017). There were also attempts to prosecute leaders from other countries for human rights violations who were in the country. These included former President Aristide of Haiti, former Madagascan President Marc Ravalomanana, Foreign Minister Tzipi Livni of Israel, and Prime Minister Meles Zenawi of Ethiopia. None of these individuals were arrested in the country even though some of them resided there for a while. The upshot was that South Africa seldom sided with the victims in countries where abuses were being carried out. However, it was also seldom clear about its motivations and its stance supporting the AU position generally on such issues.

The ambivalence in the South African state's position became clear when then Sudanese President al-Bashir arrived at the AU Summit in Johannesburg on Saturday 13 June 2015 (Sarkin, 2016c). South Africa was supposedly duty bound, as a state party to the ICC, to cooperate with the ICC by arresting him and surrendering him to the ICC (Tladi, 2015). Thus, al-Bashir's entrance into the country

was a test of what South Africa's true position on the ICC was. While it often muttered platitudes in favour of the ICC, it joined the African Union's resolutions on non-cooperation with the ICC. It did show its hand by endeavouring to give al-Bashir immunity before his arrival, understanding that this was going to be an issue (van Wyk, 2019). More than that, the Government did all in its power to get the state to comply with its obligations, knowing that al-Bashir was going to visit the country.

These stances were taken, as South Africa has wanted to play a significant role in international affairs. It has taken on positions in the Non-Aligned Movement, in BRICS<sup>3</sup> (Besada et al., 2013), in the African Union, and with Russia and China, to seemingly improve its international standing in those quarters (Volchkova & Ryabtseva, 2013). South Africa has sought a greater role, and specifically a greater leadership role, in international affairs in general and in Africa in particular. It has played key roles in the establishment of the African Renaissance and the African Peer Review Mechanism. It wants a leadership role in the African Union, and with other African states. For those reasons, at times at least, it takes positions that are seemingly contrarian to its Constitution and its espoused positions on human rights matters that it ought to take because of its apartheid past where massive human rights violations occurred.

Despite its past, South Africa's position in the ICC is tied to its grander international aspirations. It has been developing its interests and relationships with those who it believes will assist its causes, be they economic, diplomatic, etc. Those actors have exerted, at times, enormous influence on South Africa's stance on certain matters (Isike & Ogunnubi, 2017), including human rights ones (Carmody, 2016). Thus, South Africa's relationships with Russia and China, individually and through BRICS, have had an enormous impact on the positions it has taken, to the detriment of its human rights values and international obligations. In this regard, Volchkova and Ryabtseva believe that:

The BRICS forum might play an important role in promoting South Africa's role on the continent. For example, Russia believes it is possible to increase South Africa's influence among its neighbours and in the overall global economic arena through the development of a national currency exchange within BRICS. If the BRICS countries manage to execute trade in national currencies, all remaining African countries might settle accounts with Russia, Brazil, India and China in South African Rands. (Volchkova & Ryabtseva, 2013, p. 135)

<sup>3</sup> Brazil, Russia, China and South Africa.



The alliance with BRICS, and specifically Russia and China, has had important effects on South Africa. The country has been much more willing to support the matters of concern to these countries. An example is South Africa's enduring and repeated rejection of the Dalai Lama's attempts to get a visa to visit the country. South Africa has continuously claimed that delays were to blame in not granting him a visa. However, in fact the Chinese stance on the Dalai Lama, and issues concerning Tibet, have been behind this.

South Africa has however seemingly recently been more willing at times to put distance between itself and China, possibly because of the change in the presidency. This can be seen during South Africa's 2019-2020 tenure on the Security Council. During the first year on the Council, while being somewhat supportive of the positions of Russia and China initially during the rest of the first year, it showed greater independence and willingness to separate from those countries' positions later on. This is the case, despite the close economic ties between especially China and South Africa (Thompson, 2019), and in fact between China and Africa more generally (Aiping & Zhan, 2018, p. 88). Thus, South Africa allowed into the country the exiled president of the Tibetan government, Lobsang Sangay, and refused to expel him when China demanded that it did (Shinn & Eisenman, 2020). In fact, the Chinese issued a very strongly worded statement, which, in part, read that Sangay's travel to South Africa had undermined the political trust between China and South Africa:

It has sent a wrong political signal to the world community, and has undermined the political mutual trust between China and South Africa. It runs against the common interest of SA-China relations, and will undoubtedly discourage Chinese investors' confidence in South Africa, undermine SA's efforts for poverty reduction, and cause grave harm for the interest of South Africa and the South African people. (Tibetan Review, 2018).

Relations between South Africa and China have also been somewhat strained over the last few years because of issues concerning delays in the granting of loans by China to the South African power utility Eskom (Magubane, 2019). China has complained publicly about security issues in the country, the difficulty in obtaining visas, the state of South Africa's laws, particularly for investors, and how the problematic state of South Africa's infrastructure is affecting Chinese economic interests (China Embassy, 2019). It was also unhappy that there have been delays in appointing a South African ambassador to China.

Thus, a key determinant in South Africa's position on international justice issues is what its ambitions are. After the courts declared the process to withdraw

from the ICC unlawful (Du Plessis & Mettraux, 2017), the Government stated that it was committed to doing the process properly (Kemp, 2017, p. 411). It realised that it had to repeal the Implementation Act. Thus, the International Crimes Bill was introduced to Parliament during the tenure of Jacob Zuma in 2017 (Wabwile, 2018). However, the Bill languished for more than two years. It was revived in 2019 but it has been stated that:

it seems the International Crimes Bill was ‘revived’ procedurally rather than with deliberate intent. All business before Parliament lapsed with the previous administration before the May elections. And so on 29 October all of that business was revived with a blanket resolution. It seems [President] Ramaphosa and [Justice Minister] Lamola are still kicking the ICC can down the road, and the bill is unlikely to make it onto the justice portfolio committee’s heavy workload this year. (Fabricius, 2019)

In December 2019, the Government of South Africa made a statement at the ICC Assembly of State Parties that included the position that: “we are still deliberating on the issue of withdrawal from the Rome Statute as the matter is still to be considered by our Parliament” (South Africa, 2019). Thus, it seems that there is no clarity even within the Government’s own ranks about what will occur and whether South Africa will withdraw from the ICC or not.

There are thus signs that there has been a softening on the issues of international criminal justice by the South African Government (Reinold, 2019). This has come about in part because of a change in the presidency. Nowadays, President Cyril Ramaphosa seems less in favour of South Africa’s withdrawal (Soler, 2019). There is therefore less clarity over whether South Africa will withdraw from the ICC. This is not to argue that the anger towards the Court has subsided or that the attitudes towards the Security Council’s role have changed. In fact, they may have hardened. But reality may have set in (Perez-Leon-Acevedo, 2018). There is a realisation that the merged African Court with criminal jurisdiction may be a long way off because the required ratifications will take many years to occur. While the Protocol only requires 15 signatures to ratify it for the African Court to come into force, as of 2020 the Protocol has only been signed by 15 of the 55 African states (Benin, Chad, Comoros, Congo, Ghana, Guinea-Bissau, Kenya, Mauritania, Sierra Leone, Sao Tome and Principe, and Uganda). None have ratified the Protocol. Crucially, the trend towards withdrawing seems to have been suspended for the time being. Other African states that were previously on the brink of withdrawing have seemingly stepped back. South Africa’s future role with the Court is thus unclear. South Africa may try to walk the tightrope again

in its quest for a high-profile international relations role. However, that possibility does seem to have been dented by internal and external factors that have curbed the country's ambitions and possibilities. The fact that South Africa is a member of the Security Council for 2019 and 2020 and that it chairs the AU in 2020 may also mean that it is more reluctant to take a position one way or the other on ICC withdrawal at the moment. South Africa is trying at present to reflect a more independent position internationally to try and regain its credibility and profile that it seemingly lost globally during the years of the Zuma presidency. Not withdrawing at present from the ICC, seems to be way that the South African Government believes may increase its international standing, while not causing it more difficulties with its Russian, Chinese and African friends.

## Conclusion

South Africa's position in the international community and with regard to international issues in general, and in particular on international criminal justice matters, has dramatically changed over the years. Much of this change has not been publicly debated and seems to have rather been positions taken by the ANC, with little external consultation. Even in Parliament, a stance tends to be adopted after an event, rather than putting a position on the table beforehand. Even on positions taken at the UN, there has been an absence of debate until after the fact. While South Africa was an outcast in the years before 1994, after the advent of democracy it became a key player in the community of nations in general, and on justice issues specifically. However, its commitment to human rights and justice as eminent concerns in the post-1994 era gave way to a greater focus on its political and economic interests. While South Africa played a key role on the ICC in the past, that role changed in the Mbeki and Zuma eras. Thus, the Mandela presidency was the high point of South Africa's prioritising of human rights and international criminal justice in its foreign policy agenda. There was a shift during the presidencies of Thabo Mbeki and Jacob Zuma, in support of the critical camp of African states that saw the Court as biased towards the continent. South Africa's stance mirrored those of the AU and BRICS (Bohler-Muller, 2013). The country's role became pragmatic rather than principled. While there have been attempts to withdraw from the ICC by South Africa, the political landscape has changed domestically and internationally. Domestically, there is less interest to do so and the political and economic situation in the country militates against it. South Africa's position internationally seems to also be against that happening, as efforts by other countries have not gone too far on this issue.

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