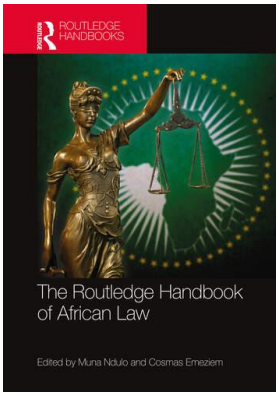

The Routledge Handbook of African Law

Muna Ndulo, Cosmas Emeziem

South Africa's contribution to international criminal justice

Publication details
https://www.routledgehandbooks.com/doi/10.4324/9781351142366-33
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Published online on: 24 Nov 2021

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SOUTH AFRICA'S CONTRIBUTION TO INTERNATIONAL CRIMINAL JUSTICE

Ntombizozuko Dyani-Mhango

Introduction

"We the people of South Africa,
Recognise the injustices of our past;
Honour those who suffered for justice and freedom in our land;
Respect those who have worked to build and develop our country; and
…
We, therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to—

- Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; …; and
- Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations."[1]

The preamble to the Constitution of the Republic of South Africa, 1996 ("the Constitution") gives context to what South Africa had been through before its adoption.[2] South Africa (also referred to as "the Republic" throughout the chapter) comes from a violent past, where the minority government perpetrated international crimes in the form of apartheid against the majority of its citizens. The Constitutional Court ("the Court") has confirmed that "it is … clear that the practice of apartheid constituted crimes against humanity and some of the practices of the apartheid government constituted war crimes."[3] Interestingly, no person has ever been prosecuted for the crime of apartheid as an international crime in South Africa. This chapter, however, examines South Africa's contribution to international criminal justice. I argue that South Africa is positively contributing to international criminal justice. However, the chapter also recognizes the fact that there are matters of concern that still need to be resolved in relation to the independent institutions that are responsible for the effective investigations and prosecution of international crimes.

DOI: 10.4324/9781351142366-33

This chapter has three objectives: first, it tracks South Africa's contribution to international criminal justice by examining its international and domestic obligations in relation to international crimes. Second, it examines the role of the independent institutions responsible for South Africa's effective contribution to international criminal justice. Third, the chapter highlights recent legal and political developments in relation to South Africa's contribution in this area. Relevant judgments are used to illustrate South Africa's contribution to international criminal justice.

South Africa and the obligation to prosecute perpetrators of international crimes

The chapter begins with the assumption that South Africa has an obligation to investigate and prosecute perpetrators of international crimes. This assumption is supported by treaty, constitutional and legislative provisions, and rules of customary international law. The Constitution situates the place of international law in domestic law (Constitution, §§39(1), 231, 232, and 233). The Constitutional Court in *S v. Makwanyane*, para. 35, confirmed that "customary international law and the ratification and accession to international agreements is dealt with in … the Constitution which sets the requirements for such law to be binding within South Africa."[4] Indeed, it is a well-established principle that customary international law becomes the law of the Republic as long as it does not conflict with the provisions of the Constitution or an Act of Parliament.[5] The Constitution further specifies the procedure to be followed before treaties can bind South Africa both internationally and domestically and when they can become the law of the Republic (Constitution, §231). This is confirmed in *Glenister II* at para. 95, in which Ngcobo CJ remarked:

> In our constitutional system, the making of international agreements falls within the province of the executive, whereas the ratification and the incorporation of the international agreement into our domestic law fall within the province of Parliament. The approval of an international agreement by the resolution of Parliament does not amount to its incorporation into our domestic law. Under our Constitution, therefore, the actions of the executive in negotiating and signing an international agreement do not result in a binding agreement. Legislative action is required before an international agreement can bind the Republic.[6]

It is against this background that I argue that the Constitution requires investigation and prosecution of perpetrators of international crimes irrespective of whether South Africa is party to a treaty that prohibits these crimes. First, the prohibition of international crimes is argued to have acquired the status of customary international law and *jus cogens*.[7] A norm that has acquired the status of *jus cogens* is accepted by the international community as a whole,[8] and it is non-derogable (Shaw 2008, 126). It is, therefore, generally accepted that the rules prohibiting war crimes, genocide, crimes against humanity, slavery, and torture may be of a *jus cogens* character.[9] The Court also confirmed that international crimes, which include torture, war crimes, crimes against humanity, and genocide "require states, even in the absence of binding international treaty law, to suppress such conduct because 'all states have an interest as they violate values that constitute the foundation of the world public order.'"[10] The basis for the Court's holding is that the prohibition of these international crimes forms part of the law of the Republic, "due to its status as a peremptory norm of customary international law" to "which no derogation is permitted."[11]

Second, South Africa has ratified several treaties that require the investigation, prosecution, and subsequent punishment of perpetrators of international crimes.[12] Some of these treaties are generally accepted to have acquired the status of customary international law.[13] Importantly, the Rome Statute of the International Criminal Court, to which South Africa is a party, has been incorporated into domestic law.[14] As a result, the preamble to the Implementation of the International Criminal Court of the Rome Statute, Act 27 of 2002 (ICC Act) recognizes:

> … the Republic of South Africa, with its own history of atrocities, has, since 1994, become an integral and accepted member of the community of nations; … South Africa is committed to—
>
> bringing persons who commit such atrocities to justice, either in a court of law of the Republic in terms of its domestic laws where possible, pursuant to its international obligations to do so when the Republic became party to the Rome Statute of the International Criminal Court, or in the event of the national prosecuting authority of the Republic declining or being unable to do so, in line with the principle of complementarity as contemplated in the Statute, in the International Criminal Court, created by and functioning in terms of the said Statute …[15]

The ICC Act lists its objectives in relation to the prosecution of persons before South African domestic courts as follows: first, it provides for the creation of a framework for an effective domestic implementation of the Rome Statute (§3(a)) and ensures that South Africa adheres to its obligations under the Rome Statute (§3(b)); second, it incorporates genocide, crimes against humanity, and war crimes into domestic law (§3(c)); and third, and in line with the principle of complementarity, it grants to the National Prosecuting Authority of South Africa (NPA) the power to prosecute and jurisdiction to the South African High Courts "to adjudicate in cases brought against any person accused of having committed a crime in the Republic and beyond the borders of the Republic in certain circumstances" (ICC Act, §3(d) (see Republic of South Africa 2002, 8). It is clear from these objectives that the ICC Act defines international crimes in accordance with the Rome Statute; it gives power to prosecute, which includes the power to investigate, to the relevant authorities, and it provides jurisdiction to courts to deal with international crimes, including complementarity and universal jurisdictions (Republic of South Africa 2002).

The ICC Act defines international crimes that are found in the Rome Statute, except for the crime of aggression.[16] The Act defines the term "crime" as "the crime of genocide, crimes against humanity and war crimes" (ICC Act, §1; Republic of South Africa 2002, 6). These are linked to the definitions found in the Rome Statute (§1), read with Sch. 1, Parts 1–3 of the ICC Act; see also arts. 5, 6, 7, and 8 of the Rome Statute). According to the preamble to the Rome Statute, these crimes are "the unimaginable atrocities that deeply shock the conscience of humanity" and "the most serious crimes of concern to the international community as a whole" (ICC 2002, art. 1). The Rome Statute also emphasizes that these crimes include: "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group" (ICC 2002, art. 6); "acts when committed as part of a widespread or systematic attack directed against any civilian population" (ICC 2002, art. 7); and those "committed as part of a plan or policy or as part of a large-scale" (ICC 2002, art. 8). The ICC Act also emphasizes that when Parliament enacted the ICC Act, it was "[mindful] that—throughout history of humankind, millions of children, women and men have suffered as a result of atrocities which constitute the crime of genocide, crimes against humanity, war crimes and the crime of aggression in

terms of international law" (ICC Act, Preamble). Consequently, §4(1) of the ICC Act creates these international crimes by stipulating that anyone found to have committed a crime may be found guilty and may face a sentence of imprisonment, including imprisonment for life, or a fine, or both a fine and imprisonment. Thus, it is clear that the ICC Act provides for the prosecution and the punishment of perpetrators of international crimes in accordance with international law.

Although the crime of aggression is included in the Rome Statute, its activation only became effective from July 17, 2018, following negotiations relating to its definition and enforcement by the Assembly of States Parties of the Rome Statute.[17] States parties to the Rome Statute are required to consent to the activation of the crime of aggression before the ICC can exercise its jurisdiction over its nationals (see ICC ASP 2017, para. 2). South Africa is yet to ratify the activation, as required, even though it made commitments to ratify the activation several times.[18] Therefore, it is unnecessary at this stage to discuss the crime of aggression any further for the purposes of this chapter.

In addition to the Rome Statute, South Africa is party to the Geneva Conventions, 1949, and their Additional Protocols, 1977, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("the Torture Convention"). These treaties have been incorporated into South African law.[19] The incorporation of these treaties into South African law means that there should be no legal impediment for South African authorities to exercise investigative, prosecutorial, and judicial powers over persons accused of committing these crimes. The question that needs to be answered in this regard is: are the South African institutions ready to prosecute perpetrators of international crimes?

The institutions responsible for prosecution and investigations of international crimes

Section 5(1) of the ICC Act requires the National Director to give consent before a prosecution is instigated against the accused for perpetrating international crimes. The National Director is defined as "the National Director of Public Prosecutions [NDPP] appointed in terms of §179(1)(a) of the Constitution," which stipulates that, "[t]here is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of—a [NDPP], who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive."

The enabling legislation mentioned in the Constitution is the National Prosecuting Authority Act 32 of 1998. (NPA Act). The NDPP is expected to be independent and to act without undue influence.[20] In this regard, the High Court in *Corruption Watch NPC*, at para. 18, has recently remarked that:

> The importance of the office of NDPP in the administration of justice is underscored and amplified by no less an instrument than the Constitution itself. Section 179(4) of the Constitution requires that there be national legislation which guarantees the independence of the prosecuting authority. In terms of section 179(1) the prosecuting authority consists of the NDPP who is its head, Directors of Public Prosecutions and prosecutors. Section 179(4) provides that national legislation must ensure that the NPA exercises its functions without fear, favour or prejudice. That legislation is the NPA Act. Predictably, section 32(1)(a) of the NPA Act requires members of the prosecuting authority to carry out their duties without fear, favour or prejudice, and subject only to the Constitution and the law.[21]

This remark by the Court is significant because the occupant of the office of the NDPP has never completed his or her term of office of 10 years since the inception in 1998 of the office, as outlined in the NPA Act, §12(1). The office has had five permanent NDPPs, all of whom have left office for different reasons prior to the end of their terms.[22] There are two judgments of the Court that effectively removed the incumbent NDPPs from office.[23] The constant uncertainty in the office of the NDPP calls for concern in its ability to properly implement its mandate and also casts the NPA, as an institution, in a bad light. In this context, I subscribe to the following remarks by the Court in *Corruption Watch NPC*, at para. 87:

> The narrative at the beginning of this judgment shows that for a few years there has been instability in the office of NDPP and, therefore, in the leadership of the NPA … Surely, this unending instability is deleterious not only to the office of NDPP, but also to the NPA as an institution. The sooner it is brought to an end the better.

It is worth mentioning that the Court in this case gave the President 90 days after the handing down of this judgment to find a suitable candidate to fill the NDPP position. In an unprecedented move, President Ramaphosa appointed a special panel to assist him in identifying and interviewing suitable candidates for the position (African News Agency 2018a, b). The panel identified and interviewed persons suitable for the position, and three successful names were communicated to the President to make a final decision (Dlulane 2018). Toward the end of 2018, the President appointed Shamila Batohi as the new NDPP (Bateman and Manyathela 2018).

Let me pause here to give a brief background to the President's unprecedented move to appoint this special panel. As stated previously, the appointment of the NDPP is governed by §179 of the Constitution. In this regard, §179 enjoins the president, as head of the national executive, to appoint the NDPP (Constitution, §85(2); see, also, Dyani-Mhango [2018a]). This means that the president, despite being vested with full executive authority, does not act alone, but together with the cabinet. This is distinct from constitutional provisions that require the president to act as head of state, because in those instances the president acts alone and is solely responsible for decisions he makes as head of state in terms of §84(2) of the Constitution (Currie and De Waal 2001). In discussing the distinction between the president as head of state and head of the national executive, the authors note that as head of state, the president does not need to consult with anyone but is required to act together with the cabinet if making decisions where an element of political discretion is involved (Currie and De Waal 2001, 237–8). Section 179 is further accentuated by §9 of the National Prosecuting Authority Act 32 of 1998, which provides for certain legal constraints on the president. Section 9 stipulates that:

> 9. (1) Any person to be appointed as *National Director, Deputy National Director or Director* must—
> (a) possess legal qualifications that would entitle him or her to practise in all 5 courts in the *Republic*; and
> (b) be a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned.
> (2) Any person to be appointed as the *National Director* must be a South African citizen
>
> *Republic of South Africa 1998, 7–8*

It is clear from the provisions in §9 that there is no provision in the Constitution or in the NPA Act that requires the president to appoint the NDPP on the advice of a special panel. Similarly, there

are no provisions that prohibit the advisory panel, as long as the ultimate decision belongs to the president, according to terms of §179 of the Constitution read together with §9 of the NPA Act.

It is equally important to highlight that there are calls for the NDPP to be appointed by the president on the list approved by the National Assembly. This follows a private member's bill called the Constitution Eighteenth Amendment Bill in 2013, which was introduced by a member of the Democratic Alliance, the main opposition political party in Parliament. The Eighteenth Amendment sought to amend the Constitution in matters pertaining to the NPA. In the pertinent part, the Eighteenth Amendment sought to provide: "(a) that the President should appoint the National Director on the recommendation and approval of the National Assembly; (b) that civil society should participate in the nomination of persons for the position of National Director."[24] This Bill has not yet been passed as law by Parliament. It is, therefore, unclear whether the current President, by appointing this advisory panel, is paving way to support the Democratic Alliance's call to amend the Constitution, in order to leave the appointment of the NDPP to the National Assembly.

For the investigation of complex and serious crimes, the NPA Act makes provision for an establishment of a directorate to deal with those crimes. In this context, the NPA Act instructs the president to create a directorate to be attached to the office of the NDPP via a proclamation, to be published in the Government Gazette (§7(1)). Pursuant to this provision, former President Thabo Mbeki published a proclamation in 2003, wherein he announced an appointment of a Special Director of Public Prosecutions in order "to manage and direct the investigation and prosecution of crimes contemplated in the [ICC Act]."[25] This directorate became known as the Priority Crimes Litigation Unit (PCLU).[26]. The PCLU does not have an investigative capacity, and therefore, it relies on the South African Police Service (SAPS) and the Directorate of Special Operations (DSO), situated within the NPA, for such capacity (PCLU n.d.). It is important to note that the DSO was later disbanded in 2008,[27] paving way for the Directorate of Priority Crime Investigation ("the Hawks"). Through the reforms of 2008, the investigation function for international crimes shifted to the Hawks and the Hawks was located within the SAPS.[28]

The SAPS is established by §205 of the Constitution, which also requires an enactment of national legislation in order to enable an effective discharge of the police service responsibilities. The SAPS Act 68 of 1995 (as amended) is the enabling piece of legislation contemplated in §205 of the Constitution, which establishes the powers and functions of the SAPS. The Constitution also sets out the objectives of the SAPS, which require prevention, combating, and investigation of crime and the maintenance of public order.[29] In this regard, §17C(1) of the SAPS Act establishes the Hawks to investigate the crimes contemplated in the ICC Act (to the SAPS Act, §§17D(1)(a), 6(2)(iA); and Schedule, Item 4, read together with ICC Act, Sch. 1). The role of the SAPS in relation to the investigation of international crimes was confirmed in *National Commissioner of the South African Police Service* at para. 55, where the Court held that:

> The Supreme Court of Appeal held that the SAPS has the requisite power to investigate the allegations of torture. I would go further. There is not just a power, but also a duty. While the finding that the SAPS does have the power to investigate is unassailable, the point of departure is that the SAPS has a duty to investigate the alleged crimes against humanity of torture. That duty arises from the Constitution read with the ICC Act, which we must interpret in relation to international law.[30]

The Constitutional Court also held that the SAPS is not only permitted but has a duty, pursuant to domestic law, to investigate crime, including torture as a crime against humanity. As

discussed earlier, the Hawks is a unit within SAPS that carries out this obligation. It is important to mention that the Hawks also had its fair share of leadership problems in the recent past, which had to be resolved by courts, and for some time the Hawks did not have a permanent head (Phukubje 2017).[31] President Ramaphosa has since appointed a suitable person to head the Hawks (Gerber 2018).

The previous discussion demonstrates that there are institutions put in place for the investigation and prosecution of perpetrators of international crimes in South Africa. This is important for the administration of international criminal justice, as there can be no effective administration of international criminal justice without credible institutions with clear powers.[32] However, it is concerning that there have been issues with the leadership of the institutions mandated to deal with international crimes, especially since the determination of whether South Africa is willing and able to prosecute perpetrators of international crimes relies on the question of whether its institutions are fully functional. The next section, therefore, considers the question of complementarity.

The complementarity principle and South Africa's ability and willingness to prosecute perpetrators of international crimes

The preamble to the Rome Statute reiterates, "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes" and that the ICC "shall be complementary to national criminal jurisdiction."[33] Article 1 of the Rome Statute further reinforces that the national courts will be given primacy over the ICC to deal with perpetrators of international crimes (ICC 2002, art. 1, 2). Consequently, the principle of complementarity gives states primary jurisdiction, dependent on their willingness and ability to investigate and to prosecute (Rome Statute, art. 17(1)(a), read with art. 17(2)(a)–(c) and 17(3)). In other words, it is permissible for a state party to prevent the ICC from exercising jurisdiction by showing willingness and ability to prosecute an international crime domestically (May and Fyfe 2017, 42). However, it is left to the ICC to make the final determination on the willingness and ability of the state, as art. 19(1) of the Rome Statute stipulates that the ICC "shall satisfy itself that it has jurisdiction in any case brought before it" and "may, on its own motion, determine the admissibility of a case in accordance with article 17 [of the Rome Statute]" (ICC 2002, 12). What is established here is that the principle of complementarity relies on the willingness and ability of states to investigate and prosecute perpetrators of international crimes (ICC 2002, art. 17, 10–11). The two issues—the willingness and ability to investigate or prosecute—arise when the ICC determines whether a state is willing or able to prosecute perpetrators in its own courts. If the state is willing and able, the ICC will not assume its jurisdiction. Further, if the state is unwilling and unable to prosecute, the ICC will take over the investigation and prosecution (El Zeidy 2002, 898).

The ICC Act provides for the exercise of the complementarity principle in line with art. 1 of the Rome Statute. Indeed, art. 5(3) of the ICC Act directs the NDPP to give primacy to the domestic courts to exercise jurisdiction over persons accused of committing international crimes. Neither the Rome Statute nor the ICC Act defines the principle of complementarity. Nevertheless, Professor Xavier Philippe, legal advisor for the International Committee of the Red Cross, has eloquently explained this principle:

> First and foremost, the principle of complementarity is a means of attributing primacy of jurisdiction to national courts, but includes a "safety net" allowing the ICC to review the exercise of jurisdiction if the conditions specified by the Statute are met.

> Second, the principle of complementarity in the ICC Statute is not only a general principle as stated in the preamble and in Article 1, but also includes concrete means of implementation, for the Statute lays down conditions relating to the exercise of jurisdiction. They allow the Court some scope for possible interpretations and could lead it to be regarded as an arbitrator. The principle of complementarity will—beyond any doubt—leave member states free to initiate proceedings, but will also leave the ICC to decide whether the process has been satisfactory or not: "There must be an impartial, reliable and depoliticised process for identifying the most important cases of international concern, evaluating the action of national justice systems with regard to those cases and triggering the jurisdiction of the ICC when it is truly necessary." The responsibility therefore rests on the shoulders both of states and of the ICC. The challenge will be to strike the right balance!
>
> *Philippe 2006, 381*

The principle of complementarity was also explicated in *National Commissioner of the South African Police Service*, where the Court stated that:

> International criminal law and the ICC system in particular are premised on the principle of complementarity. States parties may take the lead in investigating and prosecuting international crimes. The ICC will only undertake investigations and prosecutions as a court of last resort where states parties are unwilling or unable to do so. The primary responsibility to investigate and prosecute international crimes remains with states parties.[34]

The question of whether or not South Africa is willing and able to prosecute perpetrators of international crimes has not yet arisen. However, another pertinent question is whether South Africa would pass the test if the ICC had to make this determination. It has been argued earlier in this chapter that it is concerning that the institutions responsible for investigating and to prosecuting international crimes have had some leadership crises. However, I argue that, despite the leadership issues of the NDPP and the Hawks highlighted previously, it is unlikely that South Africa would lose jurisdiction to the ICC for unwillingness and inability to prosecute on two grounds. First, South Africa has an independent judiciary. Jurisprudence shows that the courts have been able to fully exercise their powers independently, "and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice" (Constitution, §165(2); see Republic of South Africa [2012a]). There are numerous cases that were highly controversial and politically charged that the courts have dealt with (for example, *Economic Freedom Fighters and Others v. Speaker of the National Assembly*, 2018 (2) SA 571 (CC), about the removal of the president from office; *Economic Freedom Fighters v. Speaker of the National Assembly; Democratic Alliance v. Speaker of the National Assembly*, 2016 (3) SA 580 (CC), about whether the president violated his oath of office; *President of the Republic of South Africa and Others v. South African Rugby Football Union and Others*, 2000 (1) SA 1, about the review of presidential powers). It is no surprise, therefore, that the courts have been able to steer the other branches of government toward a correct path with regard to issues concerning international and domestic obligations arising from the Rome Statute and the ICC Act. The other branches of government have, so far, generally adhered to the courts' judgments. For example, in *Democratic Alliance v. Minister of International Relations and Cooperation*, the executive branch of government revoked the notice of withdrawal that had been deposited already with the United Nations Secretary-General (Manaleng 2017).

However, it is also equally important to highlight the *Southern Africa Litigation Centre v. Minister of Justice and Constitutional Development* case, in which President Al Bashir mysteriously left the country while the High Court had issued a provisional order that he should not leave before the finalization of the court case.[35] What happened here is concerning, and I agree with the High Court's remarks on the issue:

> A democratic State based on the rule of law cannot exist or function, if the government ignored its constitutional obligations and fails to abide by court orders. A court is the guardian of justice, the corner-stone of a democratic system based on the rule of law. If the State, an organ of State or State official does not abide by court orders, the democratic edifice will crumble stone-by-stone until it collapses and chaos ensues.[36]

It is also important to highlight that when the issue of South Africa's failure to arrest and surrender President Al Bashir to the ICC was before the ICC Pre-Trial Chamber (PTC), the ICC Pre-Trial Chamber held, "South Africa's domestic courts have found that the government of South Africa acted in breach of its obligations under its domestic legal framework by not arresting [President] Al Bashir and surrendering him to the [ICC]." The PTC also noted that the Supreme Court of Appeal (SCA) had concluded that the conduct of the government of South Africa was unwarranted, and this was a final ruling. The PTC construed this to mean that "the government of South Africa has accepted its obligation to cooperate with the ICC under its domestic legal framework." Furthermore, the PTC reasoned that its decision "comprehensively and conclusively disposes of the matter as concerns South Africa's obligations under the Rome Statute. Any possible ambiguity as to the law concerning South Africa's obligations has been removed." These remarks by the PTC demonstrate that the ICC has confidence in South Africa's judiciary.[37]

Second, South Africa has an active civil society, which plays a significant role in ensuring that South Africa abides by its international and domestic obligations, with respect to international criminal justice (see Woolaver [2016], detailing the importance of civil society in the exercise of the complementary jurisdiction in South Africa). Civil society is able to play a significant role, because the drafters of the Constitution adopted a liberal approach with regard to *locus standi*, which enables civil society to take cases to courts on the basis of public interest, as evidenced by various court judgments (see §38 of the Constitution, which deals with the issue of standing). As a result, all the important cases that deal with issues concerning international criminal justice were brought before the South African courts by civil society: *National Commissioner of the South African Police Service* (about Zimbabwe torture investigations); *Southern Africa Litigation Centre v. Minister of Justice and Constitutional Development* (about the arrest and surrender of President Al Bashir to the ICC); and *Democratic Alliance v. Minister of International Relations and Cooperation (Council for the Advancement of the South African Constitution Intervening)* (about South Africa's premature withdrawal from the Rome Statute). If it were not for the active civil society, the courts would probably have not dealt with these cases. Therefore, the role of civil society in South Africa in ensuring that the government abides by its international and domestic obligations, with respect to international criminal justice, cannot be disputed.

This section has demonstrated that, despite a few missteps, South Africa is a good candidate to exercise the complementarity principle because it has an independent judiciary and an active civil society. The next section deals with a different, but related principle of universal jurisdiction and its place in South Africa.

The exercise of universal jurisdiction for international crimes in South Africa

Universal jurisdiction is a controversial topic in international law with both supporters and critics (Cryer et al. 2014, 56). The source of this controversy arises because universal jurisdiction allows states to exercise jurisdiction over any person accused of perpetrating an international crime as defined under customary international law, such as piracy, war crimes, genocide, and crimes against humanity, without any link to the crime, the accused, or the victim (Randall 1988, 785; Abi-Saab 2003, 600; Cryer et al. 2014, 57). As Robinson (2001, 16) put it, "The principle of universal jurisdiction is based on the notion that certain crimes are so harmful to international interests that states are entitled—and even obliged—to bring proceedings against the perpetrator, regardless of the location of the crime or the nationality of the perpetrator or the victim." Universal jurisdiction is a customary international law principle according to Cassese (2003, 591; UN 2017), who argued that "customary international law makes, however, an exception for some special classes of criminal offences that constitute attacks on the whole international community, that is, international crimes." Consequently, the exercise of universal jurisdiction by states implies the exercise of state sovereignty (Shaw 2014, 469). State sovereignty comes with the duty not to interfere in other states' internal affairs, as contemplated in art. 2(7) of the Charter of the United Nations (Shaw 2014, 470). However, generally, states exercise jurisdiction,[38] based on one of four principles: the territoriality principle; nationality principle; passive personality principle; and protective principle (Shaw 2014, 484).

Crimes usually involve the territoriality principle, which derives from the *Lotus Case* (*SS Lotus S.S. Lotus (France v. Turkey)*, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), in which the Permanent Court of Justice expounded two basic principles in relation to the states' exercise of criminal jurisdiction. First, that states were prohibited from exercising jurisdiction outside their borders, unless international law rules permitted such; and second, states could exercise any form of jurisdiction within their borders with little limitation (*Lotus Case,* paras 45–47; Shaw [2014, 475–7]). Today, states no longer have such a wide discretion in exercising their jurisdiction within their borders (Shaw 2014). However, there are certain instances in which states are inclined to interfere with the internal affairs of another state when the other state's actions affect the international community as a whole. The exercise of universal jurisdiction over persons accused of committing international crimes falls into the latter category, because the crimes involved affect the international community as a whole.

With this background in mind, §4(3) of the ICC Act permits the South African courts to exercise jurisdiction over persons who have perpetrated international crimes outside the South African borders as if they perpetrated those crimes within the territory if

(a) that person is a South African citizen; or
(b) that person is not a South African citizen but is ordinarily resident in the Republic; or
(c) that person has committed the said crime against a South African citizen or against a person who is ordinarily resident in the Republic.

These provisions are similar to §6(1) of the Prevention and Combating of Torture of Persons Act 13 of 2013 (see Republic of South Africa 2013). On the other hand, §7(1) of the Geneva Conventions Act provides that, "Any court in the Republic may try a person for any offence under this Act in the same manner as if the offence had been committed in the area of jurisdiction of that court, notwithstanding that the act or omission to which the charge relates was

committed outside the Republic" (Republic of South Africa 2012b, 10). The common theme in these provisions is that they all recognize the principle of universal jurisdiction.

The Court has confirmed that the ICC Act provides for the exercise of universal jurisdiction by South African courts. In *National Commissioner of the South African Police Service*, the Court was called upon to determine South Africa's domestic and international obligations in relation to the investigation and prosecution of non-South Africans accused of perpetrating international crimes against non-South Africans outside the borders (para. 4). The case concerned the violence that occurred in Zimbabwe prior to the elections in 2007, where it was alleged that Zimbabwe's ruling party, the Zimbabwe African National Union–Patriotic Front (ZANU–PF) instructed the police to commit acts of torture against the opposition political party members (para. 9). The Southern African Litigation Centre, a nongovernmental organization based in South Africa, prepared a dossier in which signed testimonies and evidence were collected. The dossier was sent to the SAPS for investigation. The SAPS refused to investigate. The Southern African Litigation Centre took the National Commissioner of the SAPS to the High Court.

After a thorough discussion on the application of international law in South Africa, including the treaties to which South Africa is party, the Court, at para. 40, held that South Africa was under an obligation to investigate crimes of torture. The Court reached this conclusion by first discussing the jurisdictional principles in international law to find basis for its decision (para. 26). In so doing, the Court revisited the principles outlined in the *Lotus Case* in order to provide content to the concept of jurisdiction under international law (para. 26). The Court acknowledged that there existed no universality principle under the Rome Statute and that the ICC exercises its jurisdiction on the basis of the principles of territoriality and nationality (para 27). The key question, however, was whether the principle of universal jurisdiction can be exercised over non-South Africans who perpetrated international crimes against non-South Africans beyond South Africa's borders. The Court held that international law did not prohibit such exercise of jurisdiction, as the permissive jurisdiction in the *Lotus Case* dictated (para. 26). To justify its holding, the Court, in para. 39, reasoned that:

> Because of the international nature of the crime of torture, South Africa, in terms of sections 231(4), 232 and 233 of the Constitution and various international, regional and sub-regional instruments, is required, where appropriate, to exercise universal jurisdiction in relation to these crimes as they offend against the human conscience and our international and domestic law obligations.[39]

However, the Court found that there are conditions to the exercise of universal jurisdiction, as found in §4(3) of the ICC Act. These conditions include: first, that the accused person must be a South African citizen or ordinary resident; second, the accused must have committed the crime against a citizen or resident within South Africa; and finally, the accused person must be present in South Africa after the conclusion of the crime.[40] It is noteworthy that this finding is enough to support just one of the conditions outlined by the Court, as stipulated in §4(3) of the ICC Act.

Given these conditions, the Court was tasked to determine the requirement of the presence of the accused in the territory with respect to the investigation of the crimes, since the SAPS argued that there was no duty to investigate torture because the accused persons were in Zimbabwe. The Court disagreed with this argument and held that the presence requirement did not apply to investigations. The Court reasoned that "requiring presence for an investigation would render nugatory the object of combating crimes against humanity" (*National Commissioner of the South African Police Service*, para. 48). The Court went further to set two conditions for the

exercise of universal jurisdiction to investigate international crimes under the circumstances of this case: South Africa may only investigate international crimes extraterritorially only on the basis of a two-part test, which requires (1) that the affected state is unwilling and unable to do so on its own—in line with the sovereignty principle (the subsidiary principle); and (2) that it must be reasonable and practicable to conduct investigations extraterritorially. According to the Court, the determination of this test would be done on a case-by-case basis.[41]

Consequently, the legal position is that South African courts may exercise limited universal jurisdiction for international crimes, as contemplated in §4(3) of the ICC Act and in the Prevention of Combating and Torture of Persons Act (Republic of South Africa 2002, 2013). However, the Geneva Conventions Act does not require the presence of an accused for prosecution (§7(1)). This provision has not yet been tested by the courts. It is unclear how the courts would deal with the conundrum, since it has already decided that "it would appear that the predominant international position is that presence of a suspect is required at a more advanced stage of criminal proceedings, when a prosecution can be said to have started" (*National Commissioner of the South African Police Service*, para. 47).

Let me pause here to say that the judgment in *National Commissioner of the South African Police Service v. Southern African Human Rights Litigation Centre* is an important contribution to the international criminal justice jurisprudence, as it promotes the culture of accountability, and its impact could be wider if adopted by courts in other African states. Most importantly, given the porous nature of the African borders, it is easy for a perpetrator to move from one state to another in order to escape prosecution for international crimes. Interestingly, the African Union (AU) has also adopted a Model National Law on Universal Jurisdiction, 2012 (see, also, Dube [2015]; Ventura and Bleeker [2016]) to be adopted by its members states.[42] The AU agrees that there is a need for the exercise of the universality principle, so as to curb impunity for international crimes in line with its Constitutive Act, 2002 (see Constitutive Act of the African Union, adopted July 11, 2000, OAU Doc. CAB/LEG/23.15, entered into force May 26, 2001). This is on the basis that art. 4(h) of the Constitutive Act states that the AU Assembly of Heads of State and Government has a right to intervene in the territory of its member state, where international crimes are being committed (see AU Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, 2012).

Let me also clarify that the application of the universal jurisdiction is not yet settled under international law, although states generally accept that it should exist, especially when it comes to international crimes. In fact, the AU has expressed concern over the abuse of the universality principle, by maintaining that Africans are targeted through the exercise of this principle. The issues raised in relation to the universality principle have been correctly escalated to the UN General Assembly, where they are being considered (see UN General Assembly [2017]). Nevertheless, and despite the uncertainty, South Africa has chosen to exercise universal jurisdiction over perpetrators of international crimes. The Court has also made it clear that an alleged perpetrator can be investigated and prosecuted in South Africa, even if there is no link between the commission of the crime and South Africa (*National Commissioner of the South African Police Service v. Southern African Human Rights Litigation Centre*). This remains to be seen in action, as we wait for the Zimbabwe torture investigations and possible prosecutions.

The International Crimes Bill, 2017: A cause for concern?

In December 2017, the Minister of Justice and Correctional Services, Michael Masutha introduced to Parliament the International Crimes Bill, 2017 [B37 – 2017]. The purpose of the Bill is:

> To criminalise conduct constituting international crimes; to regulate immunity from the prosecution of international crimes; to grant extra-territorial jurisdiction to the courts in respect of international crimes; to regulate the investigation and prosecution of allegations of international crimes; to provide for the extradition of persons accused or convicted of international crimes to foreign States; to provide for the surrender of persons accused or convicted of international crimes to entities; to provide for cooperation with entities in respect of international crimes; to repeal the Implementation of the Rome Statute of the … [ICC Act]; to amend the Prevention and Combating of Torture of Persons Act, 2013, so as to confirm immunity for certain persons from prosecution in respect of the crime of torture; and to provide for matters connected therewith.
>
> *Republic of South Africa, 2017, 2*

When one analyzes this bill, it is clear that it does not abolish the prosecution of international crimes, nor does it alter the manner in which these crimes will be prosecuted within the domestic arena. However, one can also see that the bill's purpose is to facilitate the withdrawal from the Rome Statute, as constitutionally compliant as possible. This is no surprise since the High Court reprimanded the executive branch of government for its failure to follow proper constitutional procedures, when South Africa attempted to withdraw from the Rome Statute in 2016.[43]

Important to this discussion is the fact that the International Crimes Bill reinstates the customary international law immunities to which sitting heads of state are entitled before national courts. In a nutshell, by customary international law immunity for incumbent senior state officials, such as heads of state, reference should be made to Crawford (2012, 488), that "foreign state officials should not be impeded in the performance of their functions by a host state's exercise of adjudicative or enforcement jurisdiction over them" (personal immunities). In this context, the International Crimes Bill stipulates that one of its objectives is to "regulate immunity in the Republic against prosecution for international crimes" (Republic of South Africa 2017, 6, cl. 2(1)(b)). Accordingly, the proposed legislation will bar South African courts from exercising jurisdiction over persons who are entitled to customary international law immunities. This is a deliberate choice by the executive branch of government, since it has lost cases in litigation before South African courts[44] and the ICC,[45] where these tribunals rejected the application of customary international law immunities in their respective jurisdictions. In addition, the ICC Act does not recognize immunities for any person irrespective of their status (art. 4(1). On this point, the SCA explained:

> The section is in a part of the [ICC Act] conferring jurisdiction on South African Courts to try international crimes in certain circumstances. It would have been absurd and non-compliant with its international obligations for South Africa in such a case to permit the accused to raise immunity either *ratione personae* or *ratione materiae*, or obedience to orders, to avoid conviction or reduce any sentence. In the circumstances the section paraphrased the provisions of Article 27(1) of the Rome Statute and made them applicable in trials for international crimes in South Africa.
>
> *Minister of Justice and Constitutional Development, para. 93*

Further, the Constitution stipulates that customary international law forms part of the Republic as long as it does not conflict with an Act of Parliament or the Constitution (§232). It is, therefore, a settled law in South Africa that customary international law immunities do not bar the

courts from exercising jurisdiction of any person accused of perpetrating international crimes.[46] Hence, there is a move to repeal the ICC Act and ultimately to withdraw from the Rome Statute.

There are few implications that stem from the intended withdrawal of South Africa's contribution to international criminal justice. First, the withdrawal will mean that South Africa ceases to be party to the Rome Statute after 12 months of depositing the instrument of withdrawal (art. 127(1)). The obvious criticism of this intended withdrawal is that South Africa will promote impunity. In my view, this is not the case. As it has been shown earlier in this chapter, South Africa has a duty to prosecute perpetrators of international crimes, irrespective of it being a party to a treaty, as the prohibition of most of these crimes is generally accepted as a customary international law norm. In addition to the ICC Act (which may be repealed), there are other pieces of legislation that also prohibit international crimes and demand the prosecution of perpetrators (for example, the Geneva Convention Act and Prevention and Combating of Torture of Persons Act). Second, the International Crimes Bill requires the prosecution of persons accused of international crimes within the territory (including the exercise of universal jurisdiction), and stipulates that the South African authorities may cooperate with the ICC requests and also honor extradition requests from other states (see Republic of South Africa [2017], cl. 11 (extradition) and cl. 12 (surrendering the suspects to the ICC)). Third, and most controversial, sitting heads of state will not be prosecuted before South African courts because customary international law immunities will be applicable. This is the bone of contention, but this issue is not unique to South Africa. Customary international law immunities, to which incumbent heads of states, not party to the Rome Statute, are entitled vis-à-vis states parties with obligations under the Rome Statute, is not yet settled in international law. After numerous judgments on this issue before the ICC Pre-Trial Chamber (see Dyani-Mhango [2017b], discussing the judgments in detail), the ICC Appeals Chamber has been tasked to finally make a decision (see the *Hashemite Kingdom of Jordan's Appeal against the "Decision under Article 87(7) of the Rome Statute on the Non-Compliance by Jordan with the Request by the Court for the Arrest and Surrender [of] Omar Al Bashir*," ICC-02/05-01/09-326, March 12, 2018). The Appeals Chamber has recently handed down its judgment on this issue in May 2019 (*Judgment in the Jordan Referral re Al-Bashir Appeal*, ICC-02/05-01/09-397-Corr, (Appeals Chamber) May 6, 2019). The Appeals Chamber held that "there is neither State practice nor *opinio juris* that would support the existence of Head of State immunity under customary international law *vis-à-vis* an international court" (Judgment in the Jordan Referral, para. 113). The Appeals Chamber has therefore settled this issue and, consequently, states that parties to the Rome Statute are expected to arrest and surrender a sitting head of state to the ICC when requested to do so. Further, it must be recalled that immunities for sitting heads of state are only temporary, until such time that they leave office. In this regard, there is no longer a bar to states parties in relation to arresting and surrendering Al Bashir, based on the Appeals Chamber decision, and also, on the fact that Al Bashir no longer holds that position (Walsh and Goldstein 2019).

In the defense of the inclusion of immunities, the South African authorities have argued that the reinstatement of customary international law immunities is important so that South Africa can play a significant role in the maintenance of peace in the African continent. This is particularly important, because "South Africa found itself in the unenviable position where it was faced with conflicting obligations: obligations contained in the Rome Statute which are in conflict with customary international law pertaining to immunity for sitting Heads of State." This, according to Minister Masutha, compromised South Africa in its plans to play a role in the promotion of peace and security in the African region (Masutha 2016). Parliament

has not yet debated the bill, even though it was introduced in December 2017. It is also unclear when the bill will be debated as there has not been movement on the bill since it was introduced in Parliament. It is worth mentioning that the Minister of International Relations and Cooperation has reportedly said that the government is revisiting the issue of withdrawing from the Rome Statute (Bryce-Pease 2018). We wait.

Conclusion

This chapter has attempted to demonstrate South Africa's contribution to the international criminal justice system. It showed that South Africa has put in place law and institutions that will tackle the issues once faced with the prosecution of international crimes. The courts have clarified the role of the independent investigating authorities with respect to international crimes and have even clarified the issue of universal jurisdiction. It is concerning, however, that there has never been an NDPP who has completed a term of office, and that the Hawks also have had leadership challenges. If these are not dealt with effectively, questions about South Africa's willingness and ability to investigate and prosecute international crimes may arise. The chapter, however, has also demonstrated that South Africa has an independent judiciary and an active civil society that ensure that the authorities abide by their international and domestic obligations.

Notes

1 Republic of South Africa (2012a, 1).

2 See also, Constitution of the Republic of South Africa, Act 200 of 1993 ("Interim Constitution," www.gov.za/documents/constitution/constitution-republic-south-africa-act-200-1993), under the title "National Unity and Reconciliation," emphasizing, "The adoption of this [Interim] Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge." See also, *Certification of the Constitution of the Republic of South Africa, 1996*, 1996 (4) SA 744 (CC), paras 5–13, where the Court eloquently summarizes the violent history of South Africa (www.saflii.org/za/cases/ZACC/1996/26.html).

3 *S v. Basson*, 2005 (1) SA 171 (CC), para 37.

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

5 Constitution, §232; *Kaunda v. President of the Republic of South Africa*, 2005 94) SA 235 (CC), para. 151.

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

7 Vienna Convention on the Law of Treaties 1155 UNTS 333, art. 53.

8 It must be noted that this does not mean that all states must accept the norm as having a *jus cogens* character:

> It would be enough if a very large majority did so; that would mean that, if one State in isolation refused to accept the peremptory character of a rule, or if that State was supported by a very small number of States, the acceptance and recognition of the peremptory character of the rule by the international community as a whole would not be affected.

See UN Conference on the Law of Treaties, Vienna, Austria First Session, March 26–May 20, 1968 (Doc A/CONF 39/C I/SR 80 472), Remarks by the Chairman of the Drafting Committee, Mr. K. Yassen.

9 See, for example, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion ICJ Reports 1951, p. 15, 23, holding that "the principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on states, even without conventional obligation"; *Prosecutor v. Furundzija* Case No IT-95-17/1, December 10, 1998, at para. 147, stipulating that "the importance States attach to the eradication of torture has led to the cluster of treaty and customary rules on torture acquiring a particularly high status similar to that of principles such as those prohibiting genocide, slavery, racial discrimination, aggression, the acquisition of territory

by force and the forcible suppression of the right of peoples to self-determination"; and *Prosecutor v. Kupreškić et al.* (Judgment) Case No IT-95-16, January 14, 2000, at para. 520, stating that most norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity, and genocide, are also peremptory norms of international law, or *jus cogens*.

10 *Southern Africa Litigation Centre v. Minister of Justice and Constitutional Development*, 2015 (5) SA 1 (GP).

11 *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre*, 2015 (1) SA 315 (CC), paras 35, 37 and 77.

12 For example, see art. 147 of the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, August 12, 1949,75 UNTS 287; art. IV of the Convention on the Prevention and Punishment of the Crime of Genocide, December 9, 1948, 78 UNTS 277; art. 4 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984 UNTS 1465; art. 6 of the Convention to Suppress the Slave Trade and Slavery, September 25, 1926, 60 LNTS 253.; and art. 4 (2)(b) and (e) of the African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, July 11, 2003.

13 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion* ICJ Reports 1951, 15, 23.

14 Rome Statute of the International Criminal Court (adopted July 17, 1998, entered into force July 1, 2002) 2187 UNTS 90; Implementation of the International Criminal Court of the Rome Statute, Act 27 of 2002 (ICC Act).

15 Republic of South Africa (2002, 2).

16 The ICC Act does mention the crime of aggression in its preamble; however, that crime is not included in the provision that creates the crime, nor in the definitions section. See §§1 and 4(1) of the Rome Statute of the International Criminal Court (adopted July 17, 1998, entered into force July 1, 2002) 2187 UNTS 90; see Republic of South Africa (2002).

17 ICC Assembly of States Parties (ASP), Review Conference of the Rome Statute of the International Criminal Court, Kampala, Mar 31–June 11, 2010, Official Records, RC/9/11 International Criminal Court publication ISBN No. 92-9227-198-9, at para. 32, where the ASP agreed that:

> … [t]he actual exercise of jurisdiction is subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute, and one year after the ratification or acceptance of the amendments by 30 States Parties, whichever is later.

See ICC ASP (2017, para. 1) on the decision to activate the Court's jurisdiction over the crime of aggression. For a thorough discussion of the crime of aggression and the road to the activation of the crime of aggression, see Kreß (2018). See, also, art. 123(1) of the Rome Statute, which stipulates that the Rome Statute can be reviewed seven years after its entry into force, when the UN Secretary-General may call for a review conference.

18 See Global Campaign for Ratification and Implementation of the Kampala Amendments on the Crime of Aggression (2019). South Africa made a commitment to ratify the amendment on different occasions between 2010 and 2014.

19 See Implementation of the Geneva Conventions Act 8 of 2012, "[t]o enact the Geneva Conventions and Protocols additional to those Conventions into law; to ensure prevention and punishment of grave breaches and other breaches of the Conventions and Protocols; and to provide for matters connected therewith," (Republic of South Africa 2012b, 2); and the Prevention and Combating of Torture of Persons Act 13 of 2013, which was enacted "[t]o give effect to the Republic's obligations in terms of the … [Torture Convention]; to provide for the offence of torture of persons and other offences associated with the torture of persons; and to prevent and combat the torture of persons within or across the borders of the Republic; and to provide for matters connected therewith" (Republic of South Africa 2013, 2). Additionally, see, Protocol [I] Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, (adopted June 8, 1977, entered into force December 7, 1978), 1125 UNTS 3; Protocol [II] Additional to the Geneva Convention of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, (adopted June 8, 1977, entered into force December 7, 1978), 1125 UNTS 609; Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted on 12 A ugust 1949 entered into force 21 October 1950) 75 UNTS 31; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted on 12 August 1949 entered into force 21 October 1950) 75 UNTS

85; Convention (III) Relative to the Treatment of Prisoners of War (adopted on 12 August 1949 entered into force 21 October 1950) 75 UNTS 135.

20 Constitution, §179(4) and NPA Act, §32(2)(1)(a).

21 *Corruption Watch NPC and Others v. President of the Republic of South Africa and Others; Nxasana v. Corruption Watch NPC and Others* [2018] ZACC 23, August 13, 2018.

22 The permanent NDPPs were Bulelani Ngcuka, who resigned; Vusi Pikoli, who was suspended and later reached a settlement with the president; Menzi Simelane, who was removed from office after the Court's judgment; Mxolisi Nxasana, who was suspended and later reached a settlement with the president, which was then invalidated by the court's judgment; and most recently, Shaun Abrahams, who was removed from office after the court's judgment. See Sole (2014); de Lange (2017); Mailovich (2018).

23 *Democratic Alliance v. President of South Africa and Others* [2013] (1) SA 248 (CC); *Corruption Watch NPC and Others v. President of the Republic of South Africa and Others; Nxasana v. Corruption Watch NPC and Others* [2018] ZACC 23, August 13, 2018.

24 Eighteenth Constitutional Amendment Bill, Government Gazette No 36566, June 14, 2013.

25 Presidential Proclamation Regarding Determination of Powers, Duties and Functions of a Special Director of Public Prosecutions, GN 46 GG 24876, March 25, 2003, at para (a). See, also, §13(1)(c) of the NPA on the appointment of the Special Directors "to exercise certain powers, carry out certain duties and perform certain functions conferred or imposed on or assigned to him or her by the President by proclamation in the Gazette" (Republic of South Africa 1998, 10).

26 See, also, *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre*, 2015 (1) SA 315 (CC), para 11.

27 See the National Prosecuting Authority Amendment Act 56 of 2008, and the South African Police Service Amendment Act 57 of 2008. These amendments were challenged in *Glenister v. President of the Republic of South Africa* (2011 (3) SA 347 (CC)). Ngcobo CJ, at para. 17, summarized the contention by the applicant as follows: "The gravamen of the applicant's constitutional complaint is the disbandment of the DSO, which, as indicated above, was located within the NPA, and its replacement by the [Directorate of Priority Crime Investigation], which is located within the SAPS. The applicant contended that the scheme of the impugned laws which brought about these changes is unconstitutional." The applicant was unsuccessful in this regard.

28 See, also, the South African Police Service Amendment Act 57 of 2008; *National Commissioner of the South African Police Service v. Southern African Human Rights Litigation Centre*, 2015 (1) SA 315 (CC), para. 61.

29 Section 205(3) of the Constitution. See, also, *Glenister v. President of the Republic of South Africa* (2011 (3) SA 347 (CC)), para. 176, holding that, "[i]t is equally clear that the national police service, amongst other security services, shoulders the duty to prevent, combat and investigate crime …".

30 *National Commissioner of the South African Police Service v. Southern African Human Rights Litigation Centre*, 2015 (1) SA 315 (CC).

31 See, also, *Ntlemeza v. Helen Suzman Foundation and Another*, 2017 (5) SA 402 (SCA).

32 As articulated in *National Commissioner of the South African Police Service v. Southern African Human Rights Litigation Centre*, 2015 (1) SA 315 (CC).

33 Rome Statute of the International Criminal Court (adopted July 17, 1998, entered into force July 1, 2002) 2187 UNTS 90. See ICC (2002, Preamble, 1).

34 *National Commissioner of the South African Police Service v. Southern African Human Rights Litigation Centre*, 2015 (1) SA 315 (CC), para. 30.

35 *Southern Africa Litigation Centre v. Minister of Justice and Constitutional Development 2015* (5) SA 1 (GP), para. 6.

36 *Southern Africa Litigation Centre v. Minister of Justice and Constitutional Development 2015* (5) SA 1 (GP), para. 37.2.

37 *Decision following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir*, ICC-02/05-01/09-242, June 13, 2015, para. 136. See, also, Dyani-Mhango (2017a).

38 There are three types of jurisdiction—legislative, executive, and judicial. See Shaw 2014, 472–3),

39 *National Commissioner of the South African Police Service v. Southern African Human Rights Litigation Centre and Another* [2014] ZACC 30, para. 40.

40 *National Commissioner of the South African Police Service v. Southern African Human Rights Litigation Centre and Another* [2014] ZACC 30, para. 42.

41 *National Commissioner of the South African Police Service v. Southern African Human Rights Litigation Centre and Another* [2014] ZACC 30, paras. 61–63.

42 African Union, Model National Law on Universal Jurisdiction over International Crimes. 2012. Adopted by the Meeting of Government Experts and Ministers of Justice/Attorneys General on Legal Matters, Addis Ababa, Ethiopia, May 7–15, 2012.

43 *Democratic Alliance v, Minister of International Relations and Cooperation*, 2017 (3) SA 212 (GP); see, also, Dyani-Mhango [2018b]).

44 *Minister of Justice and Constitutional Development v. Southern African Litigation Centre*, 2016 (3) SA 317 (SCA), holding that the immunities for sitting heads of state accused of committing international crimes do not apply in South Africa's domestic courts because of §4(1) of the ICC Act (Republic of South Africa, 2002). The SCA endorsed a judgment by the High Court in *Southern Africa Litigation Centre v. Minister of Justice and Constitutional Development*, 2015 (5) SA 1 (GP). Both the High Court and the SCA found that South Africa failed to abide by its obligations, both under its domestic laws and international law, when it failed to arrest and surrender President Al Bashir to the ICC. See for example, *Minister of Justice and Constitutional Development v. Southern African Litigation Centre*, 2015, paras. 107 and 113, where the SCA altered the High Court Order as follows:

> The Conduct of the Respondents in failing to take steps to arrest and surrender to the [ICC], the President of Sudan, Omar Hassan Ahmad Al Bashir, after his arrival in South Africa on 13 June 2015 to attend the 25th Assembly of the African Union, was inconsistent with South Africa's obligations in terms of the Rome Statute … and section 10 of the Implementation of the Rome Statute of the [ICC] Act 27 of 2002, and unlawful.

45 *Decision following the Prosecutor's Request for an Order Further Clarifying that the Republic of South Africa Is Under the Obligation to Immediately Arrest and Surrender Omar Al Bashir* 2015; and *South Africa Decision* 2017.

46 See also *South Africa Decision* 2017, para. 136, where the ICC Pre-Trial Chamber noted that the SCA, "concluded that the conduct of the government of South Africa was unwarranted. And this was a final ruling" and took this to mean that "the government of South Africa has accepted its obligation to cooperate with the ICC under its domestic legal framework."

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