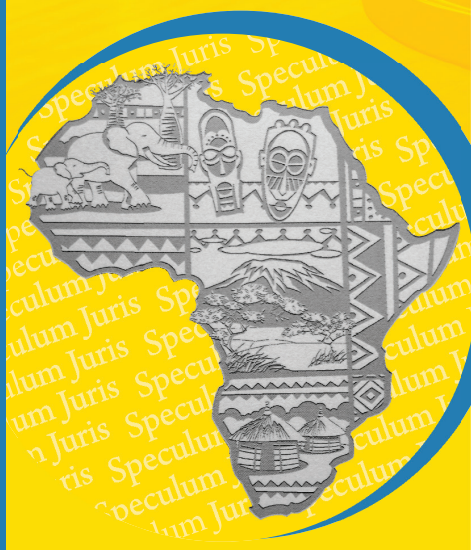
Speculum Juris

Special Issue on African Courts and Contemporary Constitutional Developments

Enyinna S Nwauche
Guest Editor

Vol 35 No 1 (2021)
Published 31 March 2021

ISSN 2523-2177



University of Fort Hare
Together in Excellence

Cite as: Dube and Nkosi "The impact of bill of rights litigation on state practice in international criminal law: An analysis of the jurisprudence of the South African Constitutional Court " 2021 (35) Spec Juris 70

The impact of bill of rights litigation on state practice in international criminal law: An analysis of the jurisprudence of the South African Constitutional Court

Angelo Dube*
Professor of Law, Department of Public, Constitutional and International Law, College of Law, University of South Africa

Mfundo Nkosi**
Centre Manager
(Child and Youth Care Centre) Eastern Cape Department of Social Development

Abstract

The proliferation of international law principles into the domestic sphere has taken foothold in many jurisdictions today. To a large extent, this can be attributed to the fact that most constitutions and bills of rights are derived from or closely mirror the provisions of key international instruments aimed at protecting human rights and at fighting impunity for international crimes. Needless to say, this overlap between international law norms and domestic law norms has also created conflict in the sphere of governance, sovereignty and the pursuit of criminal justice at the international level. Recent developments in South African bill of rights litigation cases involving foreign dignitaries bear testimony to this conflict. Not only is there a conflict of norms, there also seems to be conflict between the different arms of government, leading to the executive expressing its desire to withdraw from major international criminal law mechanisms. Despite these unintended negative consequences, there exists a need to analyse how these various litigation processes have fashioned South Africa's state practice at the international level.

Keywords: norm conflict, dualism, state practice, bill of rights litigation

* LLD (UWC); LLM (UP); MBL (UNISA); LLB; BA (Swaziland).
** PhD; MPhil; BSW (UWC).

1 INTRODUCTION

The classical model of the South African legal framework viewed international law as distinct from municipal law. This was largely influenced by South Africa's dualist tradition, in which the executive perceived itself as being the sole custodian of decision-making in the context of international law; while the legislature was relegated to determining the domestic legal framework. With the coming into force of the Constitution of the Republic of South Africa, 1996, and the changes in global politics and international law, South Africa found itself having to grapple with the tension between an executive poised to handle matters of international law and a legislature that was bent on exerting its power in a sphere which was previously the exclusive preserve of the executive. This was seen in the tensions that arose from South Africa's attempted withdrawal from the International Criminal Court (ICC) in 2016. Considering the above, the question that begs an answer is: What impact have the series of Bill of Rights litigation had on South Africa's state practice in international law? This paper therefore explores the historical development of the conduct of international relations in the Republic of South Africa, traces how the Constitution shifted the prevailing status quo, as well as analyses a few judgments from the Constitutional Court, which shaped the way in which the executive in South Africa conducts its business. The paper limits itself to the sphere of international criminal law and how the Bill of Rights, as interpreted through the courts, has influenced South Africa's state practice in that sphere of law.

2 BACKGROUND

South Africa largely embraces the dualist tradition of international law.[1] Dualism regards international law and domestic law as distinct legal systems while monism perceives the two as a single legal system.[2] In terms of the dualist worldview, international law regulates the relations between states and as such is applicable in the international plane, while domestic law regulates human conduct (including the conduct of juristic persons and the behaviour of that particular state) within the national sphere.[3] It is trite that states at the international plane create international law, primarily as a regulatory mechanism for inter-state relations. Although designed to operate mainly on the international plane, international law has over the years found itself being applied increasingly within the domestic sphere. This has to a large extent been facilitated by the adoption of bills of rights and constitutions fashioned in like manner to the large body of international human rights instruments. Indeed most constitutions mirror, to varying extents, the texts of the Universal Declaration of Human Rights (UDHR),[4] the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.[5] The South African Constitution is no exception, as its Bill of Rights mirrors most provisions found in the United Nations (UN) human rights protection treaties. In this regard, Tladi asserts that this Constitution has come to be regarded as one of the most international law-friendly constitutions in the world,[6] and this can partly be attributed to its appeal to international law and universally accepted norms and values.

2 THE PLACE OF INTERNATIONAL LAW IN SOUTH AFRICAN LAW

South Africa's previous constitutions (1910, 1961 and 1983) did not address themselves to the role played by international law in the domestic legal framework. Their main focus was the regulation of domestic law. This was during the era of parliamentary supremacy, where parliament could pass any law, and no court of law could enquire into or declare that law invalid.[7] This, coupled with South Africa's dualist approach, meant that parliament could pass legislation contrary to established norms of international law without much domestic trouble. The idea of international law being used to interpret, and possibly restrain and alter domestic law was a somewhat foreign concept, until the shift from parliamentary sovereignty to constitutional supremacy.

The role of international law in the Republic was first expressly pronounced upon by the Interim Constitution Act 200 of 1993 (Interim Constitution) in sections 35(1) and 231(2) and (3). Section 231(2) provided for the power of parliament to agree to the ratification of or accession to an international agreement already negotiated and signed by the executive. Subsection (3)

7 Section 59(2) of the Republic of South Africa Constitution Act 32 of 1961 provided that "[n]o court of law shall be competent to enquire into or pronounce upon the validity of any Act passed by Parliament".

thereof provided that once duly agreed to by parliament, such international law became part of the law of the Republic unless it was inconsistent with the Constitution. Thus, for the first time there was guidance on the place of treaty law and customary law in South African law, as well as the use of international law to interpret domestic law, in particular the Bill of Rights. When the Constitution was promulgated, it further entrenched this dualist approach to treaty law, save in the context of self-executing treaties and customary international law.[8]

4 CONSTITUTIONAL PROVISIONS RELATING TO INTERNATIONAL LAW IN THE BILL OF RIGHTS

Section 39(1)(b) of the Constitution stipulates that in interpreting the rights in the Bill of Rights, South African courts must consider international law. International law in this context refers to both customary international law and treaty-based law. It is imperative to note that the Constitution makes it mandatory for courts to consider international law, hence they have no discretion regarding the determination of whether or not to have resort to international law. Mention must be made here of Chaskalson P's opinion in the *S v Makwanyane* judgment, heard under the Interim Constitution, in which section 35 of the Constitution was interpreted.[9] In paragraph 39, Chaskalson J opined that, '[w]e can derive assistance from public international law and foreign case law, but we are in no way bound to follow it'.[10]

Chaskalson J's stance seems to have flowed from the inclusion of the words "where applicable" in section 35, which indicated that the court was not necessarily bound by international law in interpreting the rights in the Bill of Rights. The Constitution introduced an improved version of that clause in section 39, and provided that, "[w]hen interpreting the Bill of Rights, a court, tribunal or forum … must consider international law". It no longer refers to the imperative to consider international law only "where applicable". It simply enjoins courts to consider international law whenever they are engaged in constitutional interpretation. It must be noted, however, that Chaskalson J's stance is not necessarily at odds with the current understanding of the place of international law as introduced by the Constitution. In both instances, the court is not necessarily enjoined to apply international law, but to consider it, and thereafter decide whether it is applicable or not.

This means that even where a litigant does not specifically advance an argument based on international law, the courts have a duty to consider international law in their determination of the matter. The use of international law as an interpretive aid means that the court can rely on both binding (ratified treaties) and non-binding (UN) and African Union (AU) Resolutions and so forth) international law.[11] Of course the weight to be attached to each of the selected forms of international law will vary.[12]

The Constitution stipulates that international agreements are binding on the Republic after approval by the National Assembly and the National Council of Provinces. This requirement for parliamentary approval is, however, dispensed with in relation to treaties that can be classified as technical, administrative, or executive in nature.[13] This class of agreements flows from the day-to-day activities of government departments.[14]

The Constitution also addresses itself to customary international law in section 232. This section provides that "[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament". Although South Africa largely follows the dualist tradition, where customary international law is concerned, it adopts the monist approach. Hence both international and national law are regarded as one legal system.

Section 233 regulates the use of international law in interpreting any legislation. It thus

8 Scholtz and Ferreira "The interpretation of section 231 of the South African Constitution: a lost ball in the high weeds!" 2008 *The Comparative and International Law Journal of Southern Africa* 332.

9 Section 35 of the Interim Constitution provided that:
"In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law."

10 *S v Makwanyane* 1995 3 SA 391 (CC).

11 *S v Makwanyane* para 35. Note that this also includes pronouncements and reports of specialised UN agencies, such as the International Labour Organisation.

12 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 26.

13 Section 231(3) of the Constitution.

14 Botha "Treaty-making in South Africa: A Restatement" 2000 *South African Yearbook on International Law* 77.

provides guidance on how South African courts should treat international law in interpreting the law in cases before them. The provision enjoins courts to prefer a reasonable interpretation of any law that is consistent with international law over any other law that is not.

The foregoing clearly demonstrates the significance of international law within the South African legal system, in particular, the Bill of Rights. The broad range of sources from which the courts draw inspiration include instruments from the sub-regional system such as the Southern African Development Community (SADC) and regional instruments such as the AU's African Charter on Human and Peoples' Rights. For example, in the case of *Government of Zimbabwe v Fick*,[15] the Constitutional Court had to interpret the application of the SADC Tribunal Protocol. Over the years, our courts have relied on several instruments of the AU,[16] the UN,[17] and other regional blocs.[18]

5 SOUTH AFRICA'S INTERNATIONAL OBLIGATIONS IN THE FIELD OF INTERNATIONAL CRIMINAL LAW

South Africa is a member of both the AU and the UN.[19] In fact, South Africa was one of the founding members of the UN in 1945. Former statesman, Jan Smuts represented South Africa and played a critical role in the formation of the UN Charter. Ironically, Smuts and his cohort were advancing noble ideals such as human rights, while denying same to the indigenous South African population through apartheid policies.[20]

At the sub-regional level, South Africa is a member of the SADC. As a result, it is bound by the international law instruments that it has signed and ratified under the auspices of these bodies. Key amongst these are the UN Charter and the Constitutive Act of the AU. The Rome Statute of the International Criminal Court (Rome Statute) also binds South Africa. To give effect to its international obligations, South Africa has also enacted enabling legislation such as the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (ICC Act), and the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004. In addition to the above instruments and laws, South Africa is also bound by rules of customary international law.[21]

15 *Government of the Republic of Zimbabwe v Fick* 2013 5 SA 325 (CC).

16 For example, the AU Convention on Preventing and Combating Corruption (adopted on 1 July 2003, entered into force on 5 August 2006) was relied upon by the court in the case of *Corruption Watch NPC v President of the Republic of South Africa; Nxasana v Corruption Watch NPC* 2018 10 BCLR 1179 (CC) para 43.

17 In *Corruption Watch v President of the Republic of South Africa*, the court relied on the UN Convention Against Corruption adopted by UN General Assembly resolution 58/4 of 31 October 2003, as well as UN General Assembly Resolution A/RES/60/207 of 22 December 2005.

18 For example, our courts have had resort to the Opinion of the Council of Europe Commissioner for Human Rights, on the Independent and Effective Determination of Complaints Against the Police. See *Robert McBride v Minister of Police* 2016 11 BCLR 1398 (CC) para 34. See also *S v Makwanyane* para 35 where the court listed the various international legal frameworks that could be used to draw inspiration from in interpreting the Bill of Rights.

19 South Africa joined the AU's predecessor, the Organisation of African Unity on 23 May 1994.

20 Dubow Smuts "The United Nations and the rhetoric of race and rights" 2008 *Journal of Contemporary History* 44.

21 Article 38 of the Statute of the International Criminal Court of Justice lists custom as one of the sources of international law, subject to two prerequisites being met, namely, a general practice (*usus*) accepted as law (*opinio juris*).

6 SOUTH AFRICA'S CONDUCT OF FOREIGN RELATIONS: A CONSTITUTIONAL IMPERATIVE IMPLEMENTED VIA POLITICAL MEANS

In the South African context, the President of the Republic is responsible for foreign policy and international relations.[22] In carrying out this function, the President is assisted by the Department of International Relations and Cooperation (DIRCO) and the Minister of International Relations. This department is responsible for consolidating South Africa's political, social, and economic relations at the global level. DIRCO is thus tasked with the daily conduct, formulation, promotion, and execution of foreign policy. Amongst its key strategic objectives, DIRCO seeks to position South Africa so that it meaningfully contributes to the formulation of international law and engender respect for the rule of law.[23] At the core of this objective is the rejection of impunity, respect for human rights and the promotion of peaceful coexistence amongst states. Equally important amongst DIRCO's listed objectives is the imperative to protect and promote South Africa's national interests and values through bilateral and multilateral interactions. The list of recent cases litigated before courts largely flow from a conflict between these two strategic objectives; which pits South Africa's commitment to the rule of law against its aspirations to promote its national interests in its interactions with other sovereign states. In most cases, South Africa's interventions are influenced by its belief that peace and stability on the African continent is a prerequisite for development and prosperity.

South Africa's foreign policy, and the manner in which it conducts its foreign relations is also influenced by DIRCO's vision of championing an African continent that is prosperous, peaceful, democratic, non-racial, non-sexist and united and which aspires to a world that is just and equitable.[24]

7 KEY SOUTH AFRICAN DECISIONS THAT SHAPED INTERNATIONAL RELATIONS

One of the ways in which international law permeates into the domestic sphere is through its application in the interpretation of laws, especially in interpreting the provisions in the Bill of Rights. As stated above, the Constitution enjoins courts to *consider* international law whenever they are engaged in the interpretive process. It raises the question what exactly does the phrase "consider international law" mean? In the case of *Glenister v President of the Republic of South Africa*,[25] although not concerned with international criminal law, the court dealt with the question of "consideration" of international law. In determining which international law is applicable, the bench had regard to both binding and non-binding (soft law) international law.[26] Tuovinen takes exception to this form of interpretation, and regards doing so as one of three key flaws in the court's approach to the interaction between international law and the Bill of Rights. It is trite that at the international plane, soft law is not binding, but may over time eventually crystallise into customary law. In the *Glenister* case, the court was presented with an anti-corruption report prepared by the Organisation for Economic Co-operation and Development. While noting that this report was not binding in international law, it went on to use it as an interpretive aid. In the court's opinion, the report could be used to interpret the obligations contained in related and binding treaties.

7 1 The *Zimbabwean Torture Docket* case: A continuation of quiet diplomacy or a simple case of protectionism?

It would seem that South Africa's reluctance to invoke international criminal law in attempting to remedy breaches of both international law and the Bill of Rights was not only limited to immunities of heads of state. The case of *National Commission of the South African Police Service v Southern Africa Human Rights Litigation Centre*, better known as the *Zimbabwean Torture Docket*, is instructive in this regard.[27] The court had to deal with the question whether the South African Police Service (SAPS) had a duty to initiate an investigation into the matter under the principle of universal jurisdiction. This was in relation to a group of Zimbabwean nationals who were tortured on Zimbabwean soil by Zimbabwean security agents. The complainants wanted the SAPS to investigate and possibly arrest the perpetrators, who were known to be

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

frequent visitors to South Africa, under the auspices of universal jurisdiction.[28]

The case essentially turned on South Africa's obligations to investigate allegations of torture committed by foreigners against foreign nationals on foreign soil, when those foreign victims were subsequently on South African soil.[29] At the centre of it all was South Africa's obligation to prevent impunity for the international crime of torture. Such an investigation would have been done under the auspices of the ICC Act, but the SAPS declined to act as they felt an investigation *in absentia* would be impractical. The second reason advanced flowed from a fear on the part of South Africa that relations between the two states could be soured by such an investigation. It was argued in court that investigating these extra-territorial acts of torture could potentially harm the South Africa-Zimbabwe relations on the political front.[30]

The Constitutional Court dismissed the arguments raised by the SAPS, stressing the fact that the investigation would have been conducted under the auspices of the universality principle, which is the cornerstone of the fight against impunity. The principle of universal jurisdiction aims to ensure that enemies of humankind (the so-called *hostis humani generis*) are held accountable, wherever their wrongful acts are committed. The court was of the view that the reasoning of the SAPS undermined that very cornerstone. The court went on to emphasise that holding torturers accountable under universal jurisdiction will necessarily strain relations, and that political inter-state tensions are virtually unavoidable.[31] The court opined further that the investigation would not have contravened the principle of non-intervention in the affairs of other states.[32]

7 2 Derivative immunity of spouses of heads of states – the *Grace Mugabe assault* case

On 13 August 2017, Dr Grace Mugabe, wife of a former President of Zimbabwe, the late Robert Mugabe, allegedly assaulted Gabriella Engels, a young South African woman. The assault took place in Sandton, South Africa. Dr Mugabe was in South Africa at the same time as her husband who was attending the 37th SADC Summit. The complainant laid criminal charges against Dr Mugabe, who could not be traced by the police until she left South Africa two days later, on 15 August 2017. Soon thereafter, the Embassy of Zimbabwe sent a note to DIRCO asking that diplomatic immunity be invoked in respect of the case. The embassy was effectively asking for protection from arrest and prosecution.[33] The claim from the Zimbabwean Government was that Dr Mugabe had travelled to South Africa on official duties, as she was part of the advance team of the official delegation to the SADC Summit.

Despite representations from the complainant's lawyers, pointing out that a grant of immunity would not be in keeping with the law, the minister went ahead to inform the South African Commissioner of Police that it had conferred diplomatic immunity on Dr Mugabe. This is despite the Commissioner having informed the minister in detail that a *prima facie* case against Dr Mugabe had been established.

28 Dube *Universal Jurisdiction in Respect of International Crimes: Theory and Practice in Africa* (2016) 126.
29 *National Commissioner of the South African Police Service* para 4.
30 *National Commissioner of the South African Police Service* para 74.
31 *National Commissioner of the South African Police Service* para 74.
32 *National Commissioner of the South African Police Service* para 78.
33 *Democratic Alliance v The Minister of International Relations and Cooperation; Engels v Minister of International Relations and Co-operation* 2018 6 SA 109 (GP) para 2 (*Democratic Alliance*).

The main thrust of the minister's decision to grant derivative immunity to Dr Mugabe was customary international law. The High Court found that the minister had managed to establish only one of the two prerequisites of customary international law, namely *usus*. The Statute of the International Court of Justice stipulates that *usus* relates to usage, that is, the general practice of a particular rule by several states.[34] However, this leg must be accompanied by a second, *opinio juris*, which indicates a sense of obligation on the part of the states practicing that particular rule.[35] In other words, there must be evidence that states act in accordance with that rule because of a sense of obligation on their part, a mental attitude in which states accept the rule as law and as binding upon them.[36] The court opined that *opinio juris* is difficult to prove, especially in the absence of judicial pronouncement.[37] It also found that the International Law Commission was of the view that the extension of immunity to family members of heads of states was not a settled question in international law. It concluded that no such immunity existed for the enjoyment of Dr Mugabe.[38] The court further found that in terms of South African law, a head of state does not enjoy immunity in respect of proceedings relating to the death or injury of a person.[39] It therefore reasoned that if the main office bearer (head of state) did not enjoy such immunity, a family member (such as a spouse) could not claim derivative immunity which ought to flow from the incumbent's main immunity.

The litigation of this case was preceded by a dramatic playout of international relations, as South Africa scrambled to ensure that Dr Mugabe left South Africa unmolested by the justice system. In a media statement issued on 20 August 2017,[40] DIRCO indicated that Zimbabwe had invoked the immunities of Dr Grace Mugabe in relation to the case of assault that had been reported in the media. The conferment of immunity is a discretion exercised by the minister in terms of section 7(2) of the Diplomatic Immunities and Privileges Act 37 of 2001.[41] The minister, having considered a set of key determinants, decided to confer the requested diplomatic immunity on Grace Mugabe. The following considerations buoyed the motivations behind the grant of immunity:

First, it was the need to uphold the rule of law and to ensure that justice is administered fairly. Coupled with this consideration was the need to uphold the rights of the complainant. It is hard to reconcile the latter consideration with the eventual granting of immunity, for it is inconceivable that obscuring Grace Mugabe from the reach of the law could in any way advance the rights of the complainant, or uphold the rule of law. It is at best the encouragement of impunity, which is antithetical to the rule of law. Perhaps that is why the minister indicated in her statement that '[she] agonized over the matter and the decision was not an easy one to make'. Nevertheless, such a deplorable decision could not be justified in the manner that DIRCO sought to justify it. To do so would go against the very values DIRCO stands for, amongst which is *ubuntu*, *batho pele* and the values contained in the South African Constitution.

The second determinant that swayed the minister towards granting immunity to Dr Mugabe was DIRCO's stated imperative of maintaining good inter-governmental relations within the SADC region. Underscoring this was the need to maintain good relations between South Africa and Zimbabwe. From the statement issued soon after the incident, South Africa seemingly believed that subjecting Dr Mugabe to the criminal justice system would endanger the cordial relations the two countries enjoyed. This is an onerous position to align with. The criminal violation of a South African national on South African soil, by a Zimbabwean national should be an affront to South Africa since international law presumes that states have an interest in the protection and wellbeing of their nationals. By reason of Dr Mugabe's assault on Ms Engels, the relationship between the two countries cannot be said to be cordial anymore. That is why the jurisdictional link of passive personality was formed, to grant states jurisdiction over non-nationals who violate their citizens outside that prosecuting state's territory. That on its own demonstrates the centrality of a state's interest in the welfare of its nationals, and in the prosecution and punishment of the authors of such harm. Prosecuting Dr Mugabe would most likely restore that balance in relations, and not necessarily disrupt it.

40 "International Relations and Cooperation Media Statement" http://www.dirco.gov.za/docs/2017/media0820.htm (accessed 04-11-2020).

41 Section 7(2) provides that:
"The Minister may in any particular case if it is not expedient to enter into an agreement as contemplated in subsection (1) and if the conferment of immunities and privileges is in the interest of the Republic, confer such immunities and privileges on a person or organisation as may be specified by notice in the Gazette.'

The minister also considered the fact that the assault coincided with South Africa's hosting of the 37th SADC Summit of Heads of State and Government. Coupled with the foregoing was a consideration that Dr Mugabe might enjoy derivative immunity as a spouse of a head of state. It was clear from the wording of the statement that the minister was clutching at straws and had no legal backing but had to take a very hard decision to shield the offending spouse of a foreign head of state. The justifications advanced do not hold any water. There is no rational connection between the reasons advanced and the final determination. International law is established on the limitations of immunities of heads of states as well as derivative immunity enjoyed by their spouses. Further, the Foreign States Immunities Act 87 of 1981 was deliberately enacted by the South African legislature to take away that immunity in certain specified cases (death or injury of another person caused by the supposedly immune head of state). It was enacted with full knowledge of existing customary law. The South African Constitution is clear that although customary law is automatically binding on the Republic, this shall not be the case where it is inconsistent with the Constitution or an Act of Parliament, such as the Foreign States Immunities Act. These are the same considerations that motivated the High Court to find that the minister's conferment of derivative immunity on Dr Mugabe was unlawful.

Following the High Court decision in 2018, DIRCO issued a statement indicating that it noted the judgment and would comment later if necessary.[42] No further statements were released by DIRCO after this.

7 3 Dealing with norm conflict in international law – the *Al-Bashir Arrest Warrant* case

Former Sudanese President Omar Al-Bashir's visit to South Africa in 2015 also presented an international relations nightmare, which saw the executive hauled before the courts under Bill of Rights litigation, as well as before the ICC itself. This resulted from a conflict of norms, which saw South Africa torn between complying with its ICC obligations and those that flowed from its membership of the AU. Milanovic asserts that a conflict of norms is inevitable today because of the multiplicity of law-making processes under international law.[43] The mutating and varied subject-matter of international law also compounds the problems presented by a norm conflict, as seen in the *Al-Bashir* case. Unlike the domestic legal system, international law does not have a centralised hierarchical system to aid in the event of a conflict of norms.[44] As a result, the international legal system defers to the domestic system to resolve these conflicts.

Al-Bashir was part of an AU gathering in South Africa, when the ICC requested his arrest and surrender following charges of war crimes, crimes against humanity and genocide preferred against him. Citing international customary law of immunities of sitting heads of states, South Africa refused to acquiesce in the ICC's request. This prompted civil society to bring an urgent application seeking to declare the refusal unconstitutional, and an order compelling the government to effect the arrest of Al-Bashir for the purposes of surrender.[45] The High Court dismissed the state's arguments based on international customary law of immunities and held that the state had a duty to arrest and surrender Al-Bashir as per the ICC arrest warrant. Its failure therefore was inconsistent with the Constitution. The state took the matter on appeal to the Supreme Court of Appeal (SCA).[46] Following a negative outcome from the SCA, the state approached the Constitutional Court for relief. The state later withdrew this appeal.[47] These successive defeats on the part of the South African Government, coupled with the 6 July 2017 decision of the ICC in which it held against South Africa,[48] seems to have emboldened the efforts to have South Africa exit the treaty establishing the ICC.

42 "International Relations and Cooperation Media Statement" http://www.dirco.gov.za/docs/2018/zimb0730.htm (accessed 04-11-2020).

43 Milanovic "Norm conflict in international law: Whither human rights" 2009 *Duke Journal of Comparative and International Law* 69. Also, see generally, Vranes "The definition of "norm conflict" in international law and legal theory" 2006 *European Journal of International Law* 395–418.

44 Milanovic 2009 *Duke Journal of Comparative and International Law* 74.

45 *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development* [2015] 3 All SA 505 (GP)

46 *Minister of Justice and Constitutional Development v Southern Africa Litigation Centre* [2016] 2 All SA 365 (SCA).

47 *Minister of Justice and Constitutional Development v Southern Africa Litigation Centre* Unreported Case No CCT75/16.

48 *Situation in Darfur, Sudan: In the case of The Prosecutor v Omar Hassan Ahmad Al-Bashir* ICC-02/05-01/09, 6 July 2017. This was a decision under article 87(7) of the Rome Statute on South Africa's non-compliance with the ICC's request for the arrest and surrender of Al Bashir.

In October 2016, South Africa attempted to withdraw from the ICC by filing a notice of withdrawal in line with article 127(1) of the Rome Statute. The decision to withdraw from the ICC was successfully challenged in *Democratic Alliance v Minister of International Relations and Cooperation* (*Council for the Advancement of the South African Constitution Intervening*).[49] The court held that the action by the executive of signing the withdrawal notice without prior approval of the legislature was unconstitutional, and therefore invalid. The same fate befell the executive's decision to deliver the same notice to the UN Secretary General and ordered its revocation.

7 4 South Africa's dilemma: The search for a politico-legal solution

Having been defeated in the courts, the executive sought newer, non-judicial ways of liberating South Africa from its obligations under the Rome Statute. The ruling party, the African National Congress, at a policy conference in 2017 adopted a resolution to have South Africa withdraw from the Rome Statute. The main reason advanced was its perceived bias against African states. Indeed in December 2017, the then Minister of Justice, Michael Masutha, informed a meeting of the assembly of state parties that South Africa would proceed with the withdrawal as planned.[50] In his opening statement,[51] Minister Masutha noted that South Africa does not view the ICC in isolation but as part of a larger matrix of international law mechanisms set up for the advancement of good governance, international justice, and the rule of law. He also reiterated South Africa's fundamental belief in peace-making as a central pillar of the global governance system, thereby indicating that the pursuit of justice through the criminal legal system should not always be elevated above peace-making. The minister further laid the blame squarely on norm conflict, indicating that South Africa was bound by the AU Host State Agreement and the Convention on the Privileges and Immunities of the Organization of African Unity of 1965 in the same manner as it was bound by the Rome Statute.

South Africa felt that the Al-Bashir matter was a diplomatic one, and that it was unfortunately turned into a judicial matter. It was, in other words, a matter that cried out for resolution using diplomatic channels, and not through the courts. This line of thinking on the part of the executive leans more towards the pre-constitutional era conduct of international relations. It fails to take into account the centrality of the Bill of Rights and its interaction with international law as key ingredients in international relations today. It reveals that the executive still regards any foray into international relations by the judiciary and the legislature as interference. It also manifests a failure to appreciate the fact that the judiciary only became involved in the matter because of the executive's failure to follow the constitutional provisions requiring such actions to be sanctioned by the legislature first. The High Court put this succinctly in its recent judgment in *Law Society of South Africa v President of the Republic of South Africa*, when it stated that: [52]

> the Executive has no authority to participate in a decision in conflict with South Africa's binding obligations. If it was the intention to withdraw from South Africa's obligations under … the [SADC] Treaty …, consent of Parliament had to be obtained first. Failure to do so, in the present context, is unlawful and furthermore irrational.

Despite the Minister of Justice's crusade to facilitate South Africa's withdrawal from the ICC, the South African Government seems to be talking in two voices. In July 2018, the then International Relations Minister, Lindiwe Sisulu uttered a slightly confusing statement, when she said that the decision to withdraw was adopted "under the previous administration". She was referring to the Zuma administration.[53] Sisulu's words indicated that there was ambivalence within the executive, on whether South Africa should eventually exit the Rome Statute or not. As at October 2019, there had been a lull on the issue, and there were no ongoing discussions

49 2017 3 SA 212 (GP).

50 Pillay, Goldstone and Kersten "A plan for South Africa to stay in the ICC" *Mail & Guardian* https://mg.co.za/article/2018-09-10-a-plan-for-south-africa-to-stay-in-the-icc (accessed 04-11-2020).

51 Department of Justice and Constitutional Development "Opening Statement by Adv. Tshililo Michael Masutha, MP, Minister of Justice and Correctional Services, Republic of South Africa" presented under General Debate at the Sixteenth Session of the Assembly of States Parties of the International Criminal Court, New York 4 – 14 December 2017 www.justice.gov.za/m_statements/2017/20171208-ICC.html (accessed 04-11-2020).

52 *Law Society of South Africa v President of the Republic of South Africa* [2018] 2 All SA 806 (GP) para 71.

53 Du Plessis "SA might flip-flop on decision to withdraw from ICC – Lindiwe Sisulu" *News24* https://m.news24.com/SouthAfrica/News/sa-might-flip-flop-on-icc-decision-lindiwe-sisulu-20180704 (accessed 04-11-2020).

regarding the withdrawal since the new administration took over under the leadership of President Cyril Ramaphosa.

8 CONCLUSION

South Africa's foreign policy and its conduct of international relations embraces the values contained in the Constitution, as well as elements of *ubuntu*. DIRCO's own strategic objectives include the rejection of impunity, the promotion of the rule of law and meaningful engagement with the international legal framework with a view to positively influencing its development. Prior to the current Constitution, the challenges brought about by South Africa's participation in the global arena were not as complex as those experienced today. The absence of a supreme constitution and a bill of rights, and the restraints placed on the judiciary by the notion of parliamentary supremacy made it easier to deal with norm conflict.

The current socio-political and legal global environment that DIRCO now operates in keeps mutating daily. A combination of judicial oversight and parliamentary oversight has now made the executive approach the conduct of international relations differently and more responsibly. It is clear that owing to past experiences, the government (executive) now acts with due regard to the fact that other role players can turn to both judicial and parliamentary interventions if they are aggrieved by the actions of the executive. The existence of these two forms of oversight have forced DIRCO to change the way in which it conducts international affairs. The opposition party, the Democratic Alliance was vehemently opposed to the withdrawal from the Rome Statute. When its objections did not bear fruit, owing partly to the minister's decision to bypass parliament in making his decision, the party went outside the legislative framework and obtained a favourable order against the withdrawal in the *Democratic Alliance* case. It should be noted that subsequent legislative actions, such as the introduction of a bill aimed at repealing the ICC Act, also give credence to the observation that DIRCO and the executive are indeed approaching international relations not as an exclusive preserve of the executive anymore, but as a governmental function that requires the participation of and consultation with other arms of government where necessary.

Despite the above observations, it must be pointed out that there still exists a modicum of confusion on the direction South Africa wants to take in this matter. This can be attributed to a change of guard in the ruling party in South Africa. While the charge for withdrawal from the ICC was fervently pursued under the Zuma administration, there seems to be reluctance on the part of the new administration under President Cyril Ramaphosa. Hence the contradictory statement by International Relations Minister Lindiwe Sisulu as noted above.

In the final analysis, it is evident from the analysed cases that the South African executive branch, when faced with norm conflict tends to lean more towards diplomatic expediency at the expense of accountability. The *Zimbabwe Torture Docket* case demonstrates that quite clearly, as the SAPS were reluctant to investigate Zimbabwean officials for fear that political relations between the two states will be strained. The same sentiments informed the reluctance to arrest Dr Grace Mugabe for the assault of a South African national in South Africa. Al-Bashir's hasty exit from South Africa and the attempt to withdraw from the Rome Statute were all influenced by the idea that it was diplomatic flexibility that was better suited for South Africa's international relations, and not accountability under international criminal law. In all these situations, the pro-diplomatic flexibility stance that the executive (Minister for Justice, SAPS and DIRCO) ought to take in conducting international relations was shaped by the courts after litigation challenging the actions of the executive. The courts emphasised the point that for South Africa to be a member of the international community of states, it could not embrace cordial relations while stifling efforts to hold perpetrators of international crimes accountable. In essence, the courts were saying that embedded within international relations and state sovereignty is the equally binding obligation to end impunity, advance human rights and subject offenders to justice.