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South Africa's (Possible) Withdrawal from the ICC and the Future of the Criminalization and Prosecution of Crimes Against Humanity, War Crimes and Genocide Under Domestic Law: A Submission Informed by Historical, Normative and Policy Considerations

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SOUTH AFRICA'S (POSSIBLE) WITHDRAWAL FROM THE ICC AND THE FUTURE OF THE CRIMINALIZATION AND PROSECUTION OF CRIMES AGAINST HUMANITY, WAR CRIMES AND GENOCIDE UNDER DOMESTIC LAW: A SUBMISSION INFORMED BY HISTORICAL, NORMATIVE AND POLICY CONSIDERATIONS

GERHARD KEMP^{*}

ABSTRACT

The ANC-led Government's decision in October 2016 to withdraw South Africa from the International Criminal Court ("ICC") came as a shock to those who regard South Africa as a champion of international criminal justice on the African continent. The decision was vehemently opposed by opposition parties and civil society in South Africa. The high court in Pretoria ultimately annulled South Africa's notice of withdrawal from the ICC, and the ICC Repeal Bill was also withdrawn from the parliament.

This Article argues for South Africa's continued membership of the ICC. The argument is informed by the history and traditions of the ANC, an internationalist liberation movement-turned-government and one of the early supporters of the ICC. The Article explores the normative roots of the ANC's commitment to accountability for serious violations of human rights and humanitarian law, not only via the ICC, but also via incorporation of international criminal law in South African domestic

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criminal law.

While the Article does not pretend to know the political fate of the ANC-led Government's future attitude to the ICC, it is argued that there are solid normative foundations on which the ANC should build to advance the project to end impunity for the worst crimes under international law.

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1. SOUTH AFRICA'S WITHDRAWAL FROM THE ICC, INTERRUPTED:
WHERE WE STAND NOW

In October 2016, the South African government gave notice of its withdrawal from the Rome Statute of the International Criminal Court (ICC). According to Article 127 of the Rome Statute, the withdrawal takes effect one year after the date of receipt of the notification by the Secretary-General of the United Nations.¹ Apart from the notification of withdrawal, which falls within the executive domain, the judiciary and the parliament also have an impact on whether South Africa will eventually withdraw from the ICC. In a case before the High Court of South Africa ("*Democratic Alliance*"), the Democratic Alliance (DA), a political party, challenged the government's decision to withdraw from the Rome Statute.² The court entered final judgment annulling the notice delivered to the UN Secretary-General. Before the application by the Democratic Alliance was finalized in court, the Minister of Justice initiated a legislative process in the parliament to repeal the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 ("ICC Act").³ The ICC Act implements the Rome Statute in South Africa, including establishing domestic violations of crimes of genocide, crimes against humanity, and war crimes as defined in the Rome Statute. The repeal bill proposed to repeal the ICC Act in its entirety.⁴ However, after the judgment of the *Democratic Alliance* was delivered, the Minister of Justice

1. The written Instrument of Withdrawal, pursuant to Article 127(1) of the Rome Statute of the ICC, was signed by the Minister of International Relations and Cooperation of South Africa on October 19, 2016. See *Declaratory Statement by the Republic of South Africa on the Decision to Withdraw from the Rome Statute of the International Criminal Court*, C.N.786.2016.TREATIES-XVIII.10 (Depositary Notification) (19 October 2016), <https://treaties.un.org/doc/Publication/CN/2016/CN.786.2016-Eng.pdf>.

2. *Democratic Alliance v. Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening)* 2017 (3) SA 212 (GP) (S. Afr.), <http://www.saflii.org/za/cases/ZAGPPHC/2017/53.pdf>.

3. Shortly after the Instrument of Withdrawal was signed in October 2016, the Department of Justice published the Implementation of the Rome Statute of the International Criminal Court Act Repeal Bill. Implementation of the Rome Statute of the International Criminal Court Act Repeal Bill B23-2016; See also Explanatory Summary of the Implementation of the Rome Statute of the International Criminal Court Act Repeal Bill, 2016 GN R.747 of GG 40403 (3 November 2016).

4. Implementation of the Rome Statute of the International Criminal Court Act Repeal Bill B23-2016 (S. Afr.).

withdrew the repeal bill from the parliament.⁵ Nonetheless, a repeal bill can, of course, be reintroduced in the future.

The decision by the high court in the matter of *Democratic Alliance* has annulled the notice of withdrawal delivered to the UN Secretary-General.⁶ The court decided that the notice of withdrawal, which was signed by the Minister without prior parliamentary approval, is unconstitutional and invalid. The cabinet decision to deliver the notice to the UN Secretary-General without prior parliamentary approval, was also found unconstitutional and invalid. The court thus ordered the relevant members of government, including the President of the Republic of South Africa, to revoke the notice of withdrawal.⁷ It is important to note that the court did not wade into the merits of the debate on South Africa's withdrawal from the Rome Statute. The court was determined not to overstep the separation of powers. The court reasoned:

There is nothing patently unconstitutional, at least at this stage, about the national executive's policy decision to withdraw from the Rome Statute, because it is within its powers and competence to make such a decision. What is unconstitutional and invalid, is the implementation of that decision (the delivery of the notice of withdrawal) without prior parliamentary approval.⁸

The court referenced Section 231 of the Constitution of the Republic,⁹ which deals with treaty making powers and the

5. National Assembly, Parliament of the Republic of South Africa, *Announcements, Tablings and Committee Reports*, No. 33-2017 (Fourth Session, Fifth Parliament), <http://www.pgaction.org/pdf/2017-03-13-WithdrawalofRepealICCAct.pdf>.

6. *Democratic Alliance*, *supra* note 2.

7. On March 7, 2017, South Africa delivered a notice of "Withdrawal of Notification of Withdrawal" to the Secretary-General of the United Nations. The Notice of Withdrawal deposited on October 19, 2016, was thus revoked. See *South Africa: Withdrawal of Notification of Withdrawal*, 7 March 2017, C.N. 121.2017.TREATIES-XVIII.10 (Depository Notification), <https://treaties.un.org/doc/publication/CN/2017/CN.121.2017-Eng.pdf>.

8. *Democratic Alliance*, *supra* note 2, at para. 81.

9. Section 231 of the Constitution of South Africa provides as follows:

“(1) The negotiating and signing of all international agreements is the responsibility of the national executive.

incorporation of treaties into South African law. The court concluded that according to Section 231 of the Constitution, prior parliamentary approval of the executive decision to withdraw from the Rome Statute and the repeal of the ICC Act are required before the executive branch could deliver a notice of withdrawal.¹⁰ Given the supremacy of the Constitution, the enactment of a repeal bill (should the executive branch decide to reintroduce a repeal bill) may still be challenged in the Constitutional Court on the basis that the repeal bill itself is in violation of the norms and values of the Constitution. Nonetheless the first step is for the parliament to debate the withdrawal from the Rome Statute and to repeal the ICC Act. While the parliament cannot cure the invalidity of the notice of withdrawal, the High Court emphasized that the Minister of Justice is acting well within his powers to present a repeal bill before the parliament.¹¹

This is where we are now. South Africa's withdrawal from the ICC has effectively been halted by the High Court, and South Africa's government has dutifully withdrawn its notification of withdrawal from the Rome Statute. As of the time of writing, it was not clear whether the South African government still intends to withdraw from the Rome Statute. However, there is a political risk that the executive may initiate a withdrawal from the ICC in the future. Below is an exposition of the current treatment of international criminal law under South African law. The ICC Act

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

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

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect."

S. Afr. Const., 1996, <http://www.justice.gov.za/legislation/constitution/SACConstitution-web-eng.pdf>.

10. *Democratic Alliance*, supra note 2, at para. 71.

11. *Id.* at para. 60.

constitutes a crucial part of this body of law. The paper concludes with some thoughts on the future development of incorporating international criminal law into the South African domestic legal system.

2. THE CORE CRIMES UNDER SOUTH AFRICAN LAW AND THE PROSECUTION OF INTERNATIONAL CRIMES IN DOMESTIC COURTS: THE PRESENT POSITION

South Africa's post-apartheid re-entrance into the international political system in the early 1990's coincided with the renewed interest in international criminal law as a normative ideal and concretization of international human rights and international humanitarian law.

During this period, South Africa dealt with its history of gross human rights violations by establishing the Truth and Reconciliation Commission (TRC) which was premised not on amnesia and blanket amnesty, but rather on truth and responsibility.¹² This is not to say that the TRC, which is quite different from other criminal prosecutorial modalities such as the various *ad hoc* international criminal tribunals and the permanent International Criminal Court, is not controversial. Indeed, it is not universally regarded as an acceptable alternative to criminal prosecutions for past atrocities, and it is today criticized as an inadequate vehicle to achieve its stated goals of truth and, even more so, reconciliation.¹³ Nevertheless, during the time of transition, the South African TRC was hailed as a beacon of hope for dealing with the past in a peaceful and restorative way.

The internationally renewed emphasis on responsibility for gross human rights violations became the hallmark of the 1990's. This trend has inspired many countries, including South Africa, to adopt laws that incorporate aspects of international criminal law into

12. For a critical overview and reflection, see John Dugard, *Symposium: Reconciliation and Justice: The South African Experience*, 8 *TRANSNAT'L L. & CONTEMP. PROBS.* 277, 287, 293-94 (1998).

13. For more on this debate, see Antjie Krog, *Research into Reconciliation and Forgiveness at the South African Truth and Reconciliation Commission and Homi Bhabha's "Architecture of the New,"* 30 *CAN. J.L. & SOC.* 202, 204-05 (2015).

domestic law.

*A. The Implementation of the Rome Statute of the
International Criminal Court Act*

The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 was signed into law in the same year that the Rome Statute of the ICC entered into force.¹⁴ The Preamble to the ICC Act signals South Africa's commitment to bring those who commit genocide, crimes against humanity, and war crimes to justice, either in a court of law of the Republic by prosecuting under its domestic laws, or in the event of the national prosecuting authority declining or being unable to do so, in the ICC.¹⁵

The ICC Act criminalizes the crimes of genocide, crimes against humanity, and war crimes under South African law.¹⁶ The ICC Act directly adopted the definitions of these crimes as they are provided for in the Rome Statute.¹⁷ In order to achieve the stated goal of individual criminal liability for these crimes, the ICC Act provides that any person who commits an international crime is guilty of an offence under the ICC Act.¹⁸ The Act further provides for four grounds of jurisdiction with respect to the prosecution of these crimes, namely: territoriality, nationality, active personality, and universality.¹⁹

With respect to universality as a basis for the investigation and possible prosecution of the above crimes, the Constitutional Court, in *National Commissioner of the South African Police Service v. Southern African Human Rights Litigation Centre*²⁰

14. The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 ("ICC Act") entered into force on 16 August 2002. The text, with reference to the entry into force, is available at: <http://www.justice.gov.za/legislation/acts/2002-027.pdf>. The Rome Statute of the International Criminal Court entered into force on 1 July 2002. The text and an explanatory note is available at: <https://www.icc-cpi.int/resource-library/Documents/RS-Eng.pdf>.

15. *Supra* note 14, at 1, *Preamble* to the ICC Act.

16. *Supra* note 15, at 5, § 4(1).

17. *Supra* note 15, at 22-23, Schedule 1, pts. 1-3.

18. *Supra* note 16.

19. See Max du Plessis, *South Africa's Implementation of the ICC Statute: An African Example*, 5 J. INT'L CRIM. JUST. 460, 462-63 (2007).

20. *National Commissioner of the South African Police Service v. Southern African Human Rights Litigation Centre & Another* 2015 (1) SA (CC) (S. Afr.) [hereinafter "Torture Docket Case"]. The author was one of four academic *amici curiae* who submitted a brief in support of the investigation of the torture allegations to the Constitutional Court. The *amici* were: Professors John Dugard

(“*Torture Docket Case*”) declared the following: “the exercise of universal jurisdiction, for purposes of the investigation of an international crime committed outside our territory, may occur in the absence of a suspect without offending our Constitution or international law.”²¹ The Constitutional Court held that the South African police has not only the power to investigate alleged international crimes, but a legal and constitutional *duty* to do so.²² This duty extends to international crimes committed beyond South Africa’s borders and to crimes committed within the territories of countries that are not parties to the Rome Statute “because to do otherwise would be to permit impunity.”²³ The duty to investigate extraterritorial genocide, crimes against humanity and war crimes are subject to certain limitations, according to the Constitutional Court. These limitations include the principle of subsidiarity, the principle of non-intervention, and the principle of practicability.²⁴

The Constitutional Court decision in the *Torture Docket Case* is a milestone in the domestic implementation development of international criminal law in South Africa.²⁵ Unfortunately, as will be discussed later in this paper, the progressive application of international criminal law via the ICC Act has become a victim of its own success, leading to the dramatic announcement of withdrawal from the Rome Statute by the South African government, as mentioned in the Introduction, which has been temporarily stalled by the High Court.

(Leiden/Cambridge), Kevin Jon Heller (SOAS, University of London), Gerhard Kemp (Stellenbosch) and Hannah Woolaver (Cape Town). Max du Plessis & Christopher Gevers, *Civil Society, “Positive Complementarity” and the “Torture Docket” Case*, 1 ACTA JURIDICA 158, 164 n. 28 (2016).

21. *Torture Docket Case*, *supra* note 20, at para. 47.

22. *Id.* at para. 55.

23. *Id.* at para. 32.

24. *Id.* at para. 61-64.

25. Max du Plessis & Christopher Gevers, *supra* note 20, at 175.

*B. The Implementation of the Geneva Conventions Act
("Geneva Act")*

South Africa is a signatory to the four Geneva Conventions of 1949, and acceded to them in 1952.²⁶ South Africa also acceded to the Additional Protocols of 1977 in 1995.²⁷ However, it took the country a few decades to fully implement the Geneva Conventions. The Implementation of the Geneva Conventions Act was only adopted in 2012.²⁸ The main objects of the Geneva Act are: (a) the incorporation of the Geneva Conventions of 1949 and the additional Protocols into domestic law, and (b) the prevention and punishment of grave breaches and other breaches of the Conventions and Protocols.²⁹

With respect to enforcement, it is important to note that the Geneva Act provides for universal jurisdiction over war crimes in the form of grave breaches of the Geneva Conventions, and the more restrictive forms of jurisdiction based on territoriality and nationality (but excluding passive personality) for other offences (including war crimes committed in non-international armed conflicts).³⁰

C. Domestic criminalisation of other crimes of international concern

In recent years, South Africa criminalized, via legislation, a number of crimes of international concern, thus giving effect to treaty obligations. Notable examples are the Prevention and

26. South Africa acceded to the four Geneva Conventions of 1949 on 31 March 1952. *See Geneva Conventions of 1949 and Additional Protocols, and their Commentaries*, INTERNATIONAL COMMITTEE OF THE RED CROSS, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp>.

27. South Africa acceded to Additional Protocol I and Additional Protocol II to the Geneva Conventions of 1977 on 21 November 1995. *See supra* note 26.

28. No. 8 of 2012: Implementation of the Geneva Convention Act, GN R. 536 of GG 35513 (12 July 2012) [hereinafter "Geneva Act"]. For a discussion, *see* Christopher Gevers, Alan Wallis & Max du Plessis, *Sixty Years in the Making, Better Late than Never?: the Implementation of the Geneva Conventions Act*, AFRICAN YEARBOOK ON INTERNATIONAL HUMANITARIAN LAW 185-200 (2012).

29. *See Geneva Act, supra* note 28, article 2. *See also* HENNIE STRYDOM ET AL., INTERNATIONAL LAW 396 (1st ed. 2016).

30. For a more detailed discussion, *see* GERHARD KEMP, ROBIN PALMER, DUMILE BAQWA, CHRISTOPHER GEVERS, BRIAN LESLIE, ANTON STEYNBERG, AND SHELLEY WALKER, CRIMINAL LAW IN SOUTH AFRICA 588-91 (2nd ed. 2015).

Combating of Torture of Persons Act 13 of 2013 (giving effect to South Africa's obligations under the UN Torture Convention of 1984),³¹ the Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004 (providing for a domestic definition of terrorism, as well as giving effect to various obligations under international treaties and Security Council Resolutions), and the Prevention and Combating of Trafficking in Persons Act 7 of 2013 (giving effect to South Africa's obligations under the UN Convention against Transnational Organized Crime³² and the Protocol on Human Trafficking). All three of the above mentioned legislative regimes that incorporate the three crimes of international concern also provide for enforcement mechanisms that include extraterritorial jurisdiction.³³

D. Crimes under customary international law

Section 232 of the Constitution of South Africa states: "Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."³⁴ This section incorporates customary international law into the law of South Africa. This provides for the possibility of prosecuting crimes like genocide, piracy, slave-trading and other crimes that have a customary status through the direct application of customary international law without the statutory implementation such as the ICC Act or the Geneva Act.³⁵ There are, however, significant practical and legal obstacles, which makes prosecuting on the basis of customary international law in South African courts very difficult, if not entirely unlikely.³⁶

31. *See generally* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 art. 2, 4, 5 [hereinafter "Convention Against Torture"].

32. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, Nov. 15, 2000, 2237 U.N.T.S. 319 [hereinafter "Palermo Protocol"].

33. For a more detailed discussion, *see* KEMP ET AL., *supra* note 30, at 613-30.

34. Section 232 of the Constitution of the Republic of South Africa, *supra* note 9.

35. KEMP ET AL., *supra* note 30, at 591.

36. *Id.* at 593.

3. A HISTORY OF STRIVING FOR HUMANITARIAN AND HUMAN RIGHTS IMPLEMENTATION

Philippe Sands' historical and biographical narrative on the origins of the criminalization of genocide and crimes against humanity reminds us that developments in law and policy are not clinical processes devoid of personal and collective histories.³⁷ That is also true for South Africa's anti-apartheid struggle, spearheaded by the African National Congress (ANC) and informed by commitment to human rights and humanitarian norms.

The legal and constitutional implementation and domestication of humanitarian and human rights norms depend on political will. "Political will" does not appear out of thin air; it is the manifestation of a complex combination of personal will (leadership), collective conviction, and a belief in a common purpose. The leader of "political will" in the democratic South Africa today is the governing party, the ANC. Before the advent of democracy, the ANC was the main liberation movement and the dominant force in the anti-apartheid struggle.³⁸ The ANC's views on humanitarian law, human rights and international criminal justice are therefore highly relevant, in both current and historical terms.

The ANC is Africa's oldest liberation movement. It was established in 1912 as a movement for the political emancipation of black people in South Africa.³⁹ Through the Freedom Charter it envisioned a post-apartheid, post-colonial South Africa free of racialism and sexism.⁴⁰ For the first several decades of its existence, the ANC used peaceful means to further its goals and to resist the racist policies of the apartheid regime in South Africa. During the 1950s, the ANC formed a political alliance with several other organizations, including the Communist Party of South Africa (SACP), which was established in 1921.⁴¹ The alliance is called the

37. See generally PHILIPPE SANDS, *EAST WEST STREET: ON THE ORIGINS OF "GENOCIDE" AND "CRIMES AGAINST HUMANITY"* (1st ed. 2016).

38. For an overview of the history of the ANC, see *African National Congress*, SOUTH AFRICAN HISTORY ONLINE, <http://www.sahistory.org.za/organisations/african-national-congress-anc>.

39. *Id.*

40. For an historical account of the Congress movement, the Freedom Charter, and the liberation struggle, see generally ISMAIL VADI, *THE CONGRESS OF THE PEOPLE AND FREEDOM CHARTER: A PEOPLE'S HISTORY* (2015).

41. For an historical overview of the SACP, see *South African Communist Party (SACP)*, SOUTH

Congress Alliance. The Congress Alliance was formed as a united liberation front against the apartheid regime.⁴² Today, the SACP and the trade union federation COSATU, are in an alliance with the much larger ANC. This alliance came to power after South Africa's first democratic elections in 1994, and currently controls more than 60% of the seats of the parliament.⁴³

Although not the only player in the broad anti-apartheid movement, the ANC was undoubtedly the preeminent liberation movement, recognized as such by a large part of the international community.⁴⁴ Significance is attached to the ANC's unilateral submission to humanitarian norms for armed struggles. The ANC also subjected itself to the processes before the TRC.⁴⁵ It is submitted that the ANC's historical commitment to internationalism, humanitarianism, and the quest to end impunity for violations of humanitarian and human rights norms, is currently in question. The ANC's decision to withdraw from the ICC is the most important exhibit in this regard. The ANC's apparent *animus* against the ICC is also ironic. What if the ICC was available during the apartheid years? Would the ANC not also have utilized the avenue of an international criminal tribunal in the multifaceted struggle against apartheid?⁴⁶ Indeed, it is a legal fact that apartheid was (and still is) a crime against humanity. This fact informed the collective international political and moral struggle against apartheid. It also informed the legal response that apartheid state's actions and policies to be in violation of international law.⁴⁷

AFRICAN HISTORY ONLINE, <http://www.sahistory.org.za/topic/south-african-communist-party-sacp>.

42. Vadi, *supra* note 40, at 1-83.

43. *Supra* note 38 and accompanying text.

44. RICHARD SPITZ & MATTHEW CHASKALSON, *THE POLITICS OF TRANSITION: THE HIDDEN HISTORY OF SOUTH AFRICA'S NEGOTIATED SETTLEMENT* 1-18 (1st ed. 2000).

45. Indeed, the ANC was credited by the TRC for being more frank and co-operative with the commission than either the apartheid state or the Pan Africanist Congress (the smaller liberation movement). See *Findings and Recommendations: The Legal Framework Within Which the*

Commission Made Findings in the Context of International Law, TRUTH AND RECONCILIATION COMMISSION FINAL REPORT, vol. 6, § 5, at 642 (2003) [hereinafter "TRC Report"], http://www.justice.gov.za/trc/report/finalreport/vol6_s5.pdf.

46. For remarks on the success of the international anti-apartheid movement, see Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT'L L. 485, 546-47 (2005).

47. Lennox S. Hinds, *The Gross Violations of Human Rights of the Apartheid Regime Under International Law*, 1 Rutgers Race & L. Rev. 231, 248 (1999); Newell M. Stultz, *Evolution of the*

The TRC's mandate was to deal with various aspects of the conflict between the apartheid state and the liberation movements. The TRC's mandate covered the period March 1, 1960 to May 10, 1994.⁴⁸ This timeframe not only covered the worst atrocities in South Africa, but also the armed conflict that played out between the apartheid state and the liberation movements, notably the ANC and its alliance partners, throughout the southern African region. The final report by the TRC revealed the moral and legal complexities underlying the armed struggle. The TRC report further revealed the application of the legal regimes relevant to the armed conflict between the apartheid state and the ANC and the other liberation movements.⁴⁹

The ANC was, as a matter of principle, an adherent to, but not always a practitioner of, the norms of international humanitarian law. In 1980, the leadership of the ANC signed a declaration at the International Committee of the Red Cross (ICRC) headquarters in Geneva, committing the ANC to be bound by the Geneva Conventions and Protocol I.⁵⁰ For its part, the apartheid state acceded to the Geneva Conventions in 1952. The apartheid government did not ratify or accept the Additional Protocols. South Africa acceded to the Protocols in 1995, after the end of apartheid. As for implementation, it was only in 2012 that the Geneva Conventions, as well as the Additional Protocols, were implemented via domestic legislation.⁵¹

The first part of the TRC mandate period, March 1960 to 1977, preceded the adoption of the Additional Protocols. South Africa acceded to the Geneva Conventions in 1952 and has

United Nations Anti-Apartheid Regime, 13 HUMAN RIGHTS QUARTERLY 1, 16 (1991).

48. Section 3 of the Promotion of National Unity and Reconciliation Act 34 of 1995, read with the Interim Constitution of 1993, provides for the investigation and the establishment of the nature, causes and extent of gross violations of human rights committed during the period March 1, 1960 to 1993, see Promotion of National Unity and Reconciliation Act 34 of 1995 § 3 (S. Afr.), <http://www.justice.gov.za/legislation/acts/1995-034.pdf>. The period for amnesty applications was later extended by President Mandela to 10 May 1994, see *Amnesty Cut-Off Date Extended*, SOUTH AFRICAN PRESS ASSOCIATION, <http://www.justice.gov.za/trc/media%5C1996%5C9612/s961213d.htm>.

49. *Findings and Recommendations: The Legal Framework Within Which the Commission Made Findings in the Context of International Law*, TRUTH AND RECONCILIATION COMMISSION FINAL REPORT, vols. 1-7 (2003), <http://www.justice.gov.za/trc/report/index.htm>.

50. John Dugard, *Human Rights, Humanitarian Law and the South African Conflict*, 2 HARV. HUM. RTS. J. 101, 105 (1989).

51. Geneva Act, *supra* note 28. See also KEMP ET AL., *supra* note 30, at 588-91.

remained a party ever since. The apartheid state was thus bound by the four Geneva Conventions for the period under consideration. More difficult to determine is whether the liberation movements, notably the ANC, was also bound by international humanitarian law norms during this first part of the TRC mandate period. As noted in the TRC Report, the nature of the conflict in South Africa was, facially, an internal conflict.⁵² However, regarding Resolution 31029 of the UN General Assembly (1973), the TRC observed that the conflict in South Africa was “regarded not as an internal but as an international armed conflict.”⁵³

Indeed, the “armed conflict involving the struggle of people against colonial and alien domination and racist regimes are to be regarded as international armed conflicts in the sense of the 1949 Geneva Conventions and the legal status envisaged to apply to the combatants in the 1949 Geneva Conventions and other international instruments are to apply to persons engaged in armed struggle against colonial and alien domination and racist regimes.”⁵⁴ The TRC further noted that the ANC was, at the time, a non-state actor, thus lacking the legal capacity to accede to the Geneva Conventions.⁵⁵ Regardless, the Common Article 3 of the Geneva Conventions (“Common Article 3”) was still found to apply. Two sources informed the TRC’s view that the ANC was, at a minimum, bound by the Common Article 3. First, regarding the relevant ICRC Commentary, the TRC noted that non-state parties to non-international armed conflicts “become bound to apply the provisions of Common Article 3 upon ratification or accession by the state party to the conflict.”⁵⁶ Second, the ANC had, via its public pronouncements during the period under consideration, considered itself “bound by the core principles enshrined in international humanitarian law.”⁵⁷

The second part of the TRC’s mandate period, from 1977 to

52. TRC Report vol. 6, *supra* note 45, at 598.

53. *Id.* at 599.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

1980, is significant because it is during this period that the Additional Protocols were drafted.⁵⁸ The drafting history shows that the drafters intended Protocol I to supplement the Geneva Conventions and to bring national liberation movements within the protective ambit of humanitarian law.⁵⁹ From the perspective of then South African government, the ANC was nothing more than a terrorist organization, whose members captured were simply prosecuted as ordinary criminals.⁶⁰ With the adoption of Protocol I, the international community (or at least a significant part of it) intended to transform the legal status and classification of conflicts in places like Israel and South Africa.⁶¹ Members of the armed wings of the ANC and the Palestine Liberation Organization were no longer to be treated as ordinary criminals (or, indeed, as “terrorists”) but rather as freedom fighters.⁶² Their struggles were henceforth regarded as international armed conflicts and not as internal conflicts.⁶³

The apartheid government did not accede to the Additional Protocols, and held the view that Article 1(4) of the Protocol I served no purpose other than to provide political, diplomatic, and legal cover for the liberation movements.⁶⁴ For its part, the ANC during this period did not approach the ICRC to seek ratification of or accession to Protocol I. The TRC thus concluded that for the period of March 1977 to 1980, the Common Article 3, but not Protocol I, applied to the ANC and its armed activities.⁶⁵

The third part of the TRC mandate period (from 1980 to 1994) saw an intensification of the armed struggle and a significant

58. *Id.* at 600. For further background, see Amanda Alexander, *International Humanitarian Law, Postcolonialism and the 1977 Geneva Protocol I*, 17 MELB. J. INT'L L. 15 (2016).

59. *Convention Against Torture*, *supra* note 31, at 40; U.N. GAOR, 35th Sess., c.6 at 257, U.N. Doc. A/35/PV.81 (Dec. 4, 1980); U.N. GAOR, 23rd Sess., SPC. at 20, U.N. Doc. A/PV. 1731 (Dec. 2, 1968) (calling on South Africa to accord POW status under the Geneva Conventions to captured ANC fighters).

60. See generally *State v. Petane* 1988 (3) SA 51 (SCA) (S. Afr.). The court concluded that members of the ANC were not to be treated as prisoners-of-war. In terms of the preliminary point on jurisdiction, the court held that the accused (a member of the armed wing of the ANC) could be tried for terrorism and attempted murder.

61. TRC Report, *supra* note 45, at 600.

62. Caleb M. Pilgrim, *Terrorism in National and International Law*, 8 PENN ST. INT'L L. REV. 147, 172-73 (1990).

63. *Supra* note 62.

64. *Id.*

65. *Id.*

increase in the levels of violence inside South Africa as opposed to in the 1960s and 1970s when the theater of the armed struggle was largely in the neighboring countries in Southern Africa. An important event occurred on October 20, 1980. In a letter to the ICRC, the ANC, under the leadership of Oliver Tambo, asserted that it “intends to respect and be guided by the general principles of international humanitarian law applicable in armed conflicts” and that it would apply the Geneva Conventions and the Protocols “whenever practically possible”.⁶⁶ There was some debate as to whether the ANC declaration was formally binding.⁶⁷ The ANC declaration was not deposited with the Swiss Federal Council (a requirement in terms of Article 96 of Protocol I).⁶⁸ For purposes of the TRC proceedings, this technical point turned out to be moot: the TRC reasoned that “it is the intention of the party making the declaration that is important . . . [The] ANC intended to hold itself bound by the Geneva Conventions and Protocol I.”⁶⁹ Therefore, for purposes of the TRC process, it was clear that the ANC, in 1980, publicly and probably in good faith, accepted the normative and moral parameters provided by the most important instruments of international humanitarian law. The TRC concluded that it was irrelevant that the apartheid state had not acceded to Protocol I (as it had done with respect to the four Geneva Conventions in 1952). The armed conflict between the ANC and the South African state was thus covered by the norms set out in the four Geneva Conventions as well as Protocol I.⁷⁰

A key finding of the TRC relates to the moral and legal dissonance resulting from the ANC's internationalist and humanitarian inclinations of seeing the conduct of the armed struggle. The ANC's viewpoint was directly opposed to that of the

66. For analysis, see Andrew Borrowdale, *The Law of War in Southern Africa: The Growing Debate*, 15 COMP. & INT'L L.J. S. AFR. 41 (1982).

67. *Id.* at 42-3; F.R. Ribeiro, *International Humanitarian Law: 'Advancing Progressively Backwards'*, 97 S. AFRICAN L.J. 42, 58 (1980).

68. The Swiss Federal Council is the official depository of 79 international instruments, including the Geneva Conventions and Additional Protocols. See Depository, FOREIGN DEPARTMENT OF FOREIGN AFFAIRS FDFA, <https://www.fdfa.admin.ch/eda/en/home/foreign-policy/international-law/internationale-vertraege/depositary.html>.

69. TRC Report, *supra* note 45, at 601.

70. *Id.*

apartheid government of South Africa, which viewed the ANC as a terrorist organization, to be defeated militarily outside the borders of South Africa, and to be prosecuted under the domestic criminal justice system.⁷¹ Regarding the ANC's conduct during the armed struggle, the TRC found that of all the major parties to the conflict, only the ANC committed itself to observing the principles of international humanitarian law.⁷²

The ANC's historical internationalism and commitment to international humanitarian and human rights law is well-documented.⁷³ The preceding paragraphs illustrated this with reference to the ANC's unilateral commitment to humanitarian law during the armed struggle. The constitutional project of the early 1990s that resulted in a progressive Constitution with an enforceable Bill of Rights was not a matter of compromise for the ANC; it was the centerpiece of the ANC policy positions.⁷⁴ The ANC-in-government's commitment to international human rights law and other international regimes aimed at the advancement of human rights and accountability for human rights violations are also well-documented. One example is South Africa's early support for the ICC. Indeed, the ANC-led government was instrumental in the diplomacy and drafting processes that resulted in the adoption of the Rome Statute of the ICC in 1998.⁷⁵ South Africa was also the first country on the African continent to fully implement the Rome Statute of the ICC through domestic legislation.⁷⁶ However, the internationalist ANC – an ANC historically guided by international norms on human rights and humanitarian law – then decided to

71. *Id.*

72. *Id.* at 642.

73. For a discussion of the international and historical roots of the ANC's human rights tradition, see generally Par Ousmane Barry, *De L'ANC a la Constitution Sud-Africaine: Continuité ou Rupture dans la Protection des Droits Fondamentaux?*, 10 REV. QUEBECOISE DE DROIT INT'L 3 (1997).

74. See generally Johann Van Der Westhuizen & Palmerston Manny, *Some Preliminary Notes on the ANC's Draft Bill of Rights*, 24 DE JURE 156 (1991).

75. At the Rome Diplomatic Conference, South Africa was one of the so-called "Like Minded Group" [hereinafter "LMG"] of states. The LMG consisted of about sixty states, including the countries that played a leadership role, namely Germany, the Netherlands, Australia, Canada, Argentina, and South Africa. See John Washburn, *The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century*, 11 PACE INT'L L. REV. 361, 368 (1999).

76. Implementation of the Rome Statute of the International Criminal Court Regulations, GN R. 1089 of GG 23761 (16 August 2002). For a discussion, see Kemp ET AL., *supra* note 30 at 586-88.

move away from the international criminal justice project in the form of the ICC.

To understand why the internationalist ANC moved away from the ICC, a brief discussion on an important decision by South Africa's Constitutional Court on the country's legal obligations to investigate and prosecute crimes under international law, including the crime of torture as a crime against humanity, is necessary. The unanimous decision by the Constitutional Court in the *Torture Docket Case* started with a brief exposition of the putative human rights-centered foreign policy of South Africa. In the first paragraph of the decision, former President Nelson Mandela is quoted as follows:

South Africa's future foreign relations will be based on our belief that human rights should be the core concern of international relations, and we are ready to play a role in fostering peace and prosperity in the world we share with the community of nations . . . The time has come for South Africa to take up its rightful and responsible place in the community of nations. Though the delays in this process, forced upon us by apartheid, make it all the more difficult for us, we believe that we have the resources *and the commitment* that will allow us to begin to make our own positive contribution to peace, prosperity and goodwill in the world in the very near future.⁷⁷

From the aspirational statement on foreign policy offered by Nelson Mandela in 1993, the Constitutional Court next quoted from the Constitution, wherein the Court also found an echo of Mandela's statement. From the preamble of the Constitution: "We, the people of South Africa, . . . adopt this Constitution as the supreme law of the Republic so as to . . . build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of

77. *Torture Docket Case*, *supra* note 20, at para. 1. It should be noted that the included quote is from an article that Mandela wrote for *Foreign Affairs* magazine, in the year before South Africa's first democratic elections that resulted in Mandela becoming the country's first democratically elected leader.

nations.”⁷⁸

Keeping Mandela’s statement and the Constitution in mind, the Court reasoned that the extent of South Africa’s “responsibilities as a member of the family of nations to investigate crimes against humanity lies at the heart of this case.”⁷⁹ The matter before the Court was an application for leave to appeal a judgment of the Supreme Court of Appeal (SCA), which dismissed an appeal against a decision by the High Court in Pretoria.⁸⁰ The latter had issued a declaratory order that the South African police’s decision not to investigate the alleged torture (as a crime against humanity) in Zimbabwe of Zimbabwean nationals by the Zimbabwean police was unlawful and constitutionally invalid. Thus, the legal issue before the Constitutional Court was “to establish South Africa’s domestic and international powers and obligations to prevent impunity and to ensure that perpetrators of international crimes committed by foreign nationals beyond [South Africa’s] borders are held accountable.”⁸¹

The Constitutional Court’s usage of Mandela’s article indicated its position on the interpretation of South Africa’s official political view on the role of human rights in international relations. In an earlier decision, *Glenister v. President of the Republic of South Africa* (“*Glenister II*”), the Constitutional Court reiterated the importance of international law to the South African constitutional order and interpretation of law.⁸² The Court made it clear that constitutional and legal interpretation is informed by international law. The Constitution has made it clear the status of treaties and customary international law in the domestic legal order.⁸³ South Africa is a state party to the Rome Statute, and has incorporated this treaty into domestic law through the ICC Act. The Constitutional Court in the *Torture Docket Case* was dismissive of the argument

78. S. AFR. CONST., 1996.

79. *Torture Docket Case*, *supra* note 20, at para. 3.

80. For a comment on the high court judgment, see Gerhard Werle & Paul Christoph Bornkamm, *Torture in Zimbabwe Under Scrutiny in South Africa: The Judgment of the North Gauteng High Court in SALC v. National Director of Public Prosecutions*, 11 J. INT’L CRIM. JUST. 659 (2013).

81. *Torture Docket Case*, *supra* note 20, at para. 4.

82. *Glenister v. President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) (S. Afr.).

83. See S. AFR. CONST. §§ 231, 232.

that the investigation of alleged crimes against humanity in Zimbabwe could have dire foreign policy consequences, reasoning that: “[p]olitical inter-state tensions are, in most instances, virtually unavoidable as far as the application of universality, the Rome Statute and, in the present instance, the ICC Act is concerned.”⁸⁴ The Court noted that an investigation “within the South African territory does not offend against the principle of non-intervention and there is no evidence that Zimbabwe has launched any investigation or has indicated that it is willing to do so, given the period since the alleged commission of the crimes”.⁸⁵ The Court practically considered Zimbabwe’s proximity to South Africa to be a relevant factor; thus, the possible presence (in South Africa) of the suspects in the future cannot be discounted, according to the Court.⁸⁶ With reference to the effect of any decision not to investigate allegations of torture as a crime against humanity, the Court observed that South Africa cannot be seen to be tolerant of impunity for alleged torturers. “We must take up our rightful place in the community of nations with its concomitant obligations. We dare not be a safe haven for those who commit crimes against humanity.”⁸⁷

The reasoning by the Constitutional Court in the *Torture Docket Case* was mainly based on a reading of the Constitution and the ICC Act, as well as the application of relevant international law principles. The outcome of the case did not turn on South Africa’s supposed human rights-oriented foreign policy.⁸⁸ However, it is nevertheless of some importance that the Court (a) contextualized the judgment in the human rights-based foreign policy statements from the Mandela-era and (b) rejected the police’s submission that investigations of alleged torture against Zimbabwean officials might harm bilateral relations between South Africa and Zimbabwe.

The document that reflects South Africa’s government policy on foreign affairs is the White Paper entitled: *Building a*

84. *Torture Docket Case*, *supra* note 20, at para. 74.

85. *Id.* at para. 78.

86. *Id.* at para. 79.

87. *Id.* at para. 80.

88. *Torture Docket Case*, *supra* note 20.

*Better World: The Diplomacy of Ubuntu.*⁸⁹ In the South African legislative process, a whitepaper is normally a broad statement of government policy. Three paragraphs from this whitepaper reflect the gist of the Government's priorities and emphasis:

Foreign policy, being an extension of national policy and interests, is an important component in South Africa's strategy for development and social purposes. Creating a better South Africa and contributing to a better and safer Africa in a better world encapsulates and conceptualises a South African foreign policy that enables the country to be a good international citizen...As the country engages with its region, continent and the international community, it seeks to build an environment in which it can realise its national socio-economic agenda as well as its political and security interests.⁹⁰

....

South Africa subscribes to the principles of sovereignty and non-interference in the internal affairs of other states.⁹¹

....

[South Africa's] greatest asset lies in the power of its example. In an uncertain world, characterised by a competition of values, South Africa's diplomacy of Ubuntu, focusing on our common humanity, provides an inclusive and constructive world view to shape the evolving global order.⁹²

Reading through the document, one gets a sense that South Africa has indeed moved away from the explicitly human rights-centered approach towards a more developmental approach, which

89. White Paper on South African Foreign Policy, *Building a Better World: The Diplomacy of Ubuntu*, DEP'T OF INT'L RELATIONS AND COOPERATION (May 13, 2011) (S. Afr.).

90. *Id.* at 10.

91. *Id.* at 20.

92. *Id.* at 36.

emphasizes non-interference, socio-economic development, and national interest. An echo from the Mandela-era might be the statement that South Africa's "greatest asset lies in the power of its example."⁹³

The position that the South African government took in the *Torture Docket Case*, together with the more recent failure to arrest President Omar Al-Bashir during his visit to South Africa, which was found to be in violation of the Constitution, international obligations and South African law, points to a clear break with the past support by the ANC for the norms and enforcement mechanisms of international humanitarian and international criminal law.⁹⁴ In the *Torture Docket Case*, it is submitted that the Court should have made it clear that the executive (via the police and eventually the prosecuting authority) is not expected to just "endure" political tension for the sake of the greater good; the executive should positively set such examples as envisioned by Nelson Mandela in 1993 and referenced in the White Paper on Foreign Policy.⁹⁵

The fallout from President Al-Bashir's visit to South Africa in 2015, and the ANC-government's subsequent defeats in the High Court and subsequently the Supreme Court of Appeal, has led to the government's decision to withdraw South Africa from the Rome Statute of the ICC.⁹⁶

93. *Id.*

94. In 2009 and 2010 the ICC issued arrest warrants for President Al Bashir for war crimes, crimes against humanity and genocide (*The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-1, Warrant of Arrest (Mar. 4, 2009), https://www.icc-cpi.int/CourtRecords/CR2009_01514.PDF; *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-95, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, (July 12, 2010), https://www.icc-cpi.int/CourtRecords/CR2010_04825.PDF. See *The Minister of Justice and Constitutional Development v. The Southern Africa Litigation Centre and Others* 2016 (3) SA 317 (SCA) (S. Afr.).

95. This is not to suggest that states can simply ignore the implications of foreign relations and realpolitik. Legislative and enforcement schemes in the context of universal jurisdiction that do not provide for appropriate filters or checks can have not only dire diplomatic and political consequences, but indeed can lead to significant setbacks for the international criminal justice project. On the Belgian example, see CHRIS VAN DEN WYNGAERT, BART DE SMET, & STEVEN VANDROMME, STRAFRECHT EN STRAFPROCESRECHT IN HOOFDLIJNEN 823-24 (Maklu Uitgevers et al. eds., 9th ed. 2014).

96. For an overview and discussion of the legal and political saga surrounding President Al-Bashir's visit to South Africa, and the aftermath of that visit, see George Barrie, *Al-Bashir and the tale of two cities: The law of Rome and the law of Pretoria*, 2017 J. S. AFR. L. 149. For discussions of the decision by the high court in the matter of *Southern Africa Litigation Centre & others v. Minister of Justice and Constitutional Development*, see Erika de Wet, *The Implications of President Al-Bashir's*

The notice of withdrawal, which was declared to be invalid by the High Court in *DA v. Minister of International Relations*, stated that the interpretation that was given to South Africa's commitment to fight impunity, via the domestic implementation of the Rome Statute and the concomitant obligation to cooperate with the ICC, is at times difficult to reconcile with the demands of a complex world, and regional diplomatic efforts to bring about the peaceful resolution of conflicts on the African continent.⁹⁷ The document seemed to convey the Government's view that the Rome Statute unleashed contradictory forces that do more harm than good; that international criminal justice embodied by the ICC presents a binary choice between peace and justice. So, the subtext of the instrument of withdrawal was the anachronistic "peace versus justice" debate. Whether South Africa will ultimately withdraw from the ICC is an open-ended question. The observations below are premised on the political risk that the executive may still want to take South Africa out of the ICC.

4. SCENARIOS FOR THE WAY FORWARD

Some may point to the proposed expansion of the jurisdiction of the African Court of Human Rights to provide for criminal jurisdiction over individuals accused of serious crimes under international law as a more palatable alternative to the ICC. Indeed, the African Union (AU) already took steps in this direction with the adoption of the so-called Malabo Protocol of 2014,⁹⁸ which amends the protocol on the Statute of the African Court of Justice

Visit to South Africa for International and Domestic Law, 13 J. INT'L CRIM. JUST. 1049 (2015); Dire Tladi, *The Duty on South Africa to Arrest and Surrender President Al-Bashir under South African and International Law*, 13 J. INT'L CRIM. JUST. 1027 (2015).

97. *Declaratory Statement by the Republic of South Africa on the Decision to withdraw from the Rome Statute of the International Criminal Court* at para. 2, C.N.786.2016.TREATIES-XVIII.10 (Depositary Notification) (19 October 2016), <https://treaties.un.org/doc/Publication/CN/2016/CN.786.2016-Eng.pdf>.

98. *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, ASSEMBLY OF THE AFRICAN UNION, Assembly/AU/Dec.529(XXIII) [*hereinafter* "*Malabo Protocol*"], https://au.int/sites/default/files/treaties/7804-treaty-0045_-_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e-compressed.pdf; see also THE AFRICAN CRIMINAL COURT: A COMMENTARY ON THE MALABO PROTOCOL 219-256 (Gerhard Werle & Moritz Vormbaum eds., 2017).

and Human Rights.⁹⁹ The Protocol has yet to be embraced by AU members, with only a handful of states thus far signing the Protocol.¹⁰⁰ South Africa has not yet signed the Protocol.¹⁰¹ A provision is provided to set up an international criminal law section in the Human Rights Court.¹⁰² The international criminal law section will have jurisdiction over a long list of crimes, including the most serious crimes under international law, namely genocide, war crimes, and crimes against humanity.¹⁰³ It will have jurisdiction over individuals and corporations.¹⁰⁴ The international criminal law section will exercise complementary jurisdiction, meaning that it will only hear cases if States are either unwilling or unable to carry out investigations or prosecutions of the relevant crimes.¹⁰⁵

The Malabo Protocol, as an African answer to continental human rights concerns and obligations,¹⁰⁶ has its merits, but also significant problems that will not be discussed here. Suffice to say that a fully functioning international criminal law section of the African Human Rights Court will require meaningful commitments in terms of financial and human resources. It will require the political will to implement domestic laws to empower states to investigate and prosecute alleged criminals. However, there is one

99. For a comprehensive commentary on the Malabo Protocol, see Werle & Vormbaum, *supra* note 98.

100. For a status list, see *List of Countries Which Have Signed, Ratified/Acceded to the Protocol on Amendments to the Statute of the African Court of Justice and Human Rights*, AFRICAN UNION, https://au.int/sites/default/files/treaties/7804-sl-protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights.pdf (updated June 15, 2017).

101. *Id.*

102. Malabo Protocol, *supra* note 98, art. 3.

103. Malabo Protocol, *supra* note 98. The crimes of genocide (Article 28B), crimes against humanity (Article 28C), war crimes (Article 28D), and the crime of aggression (Article 28M), are largely modeled on the crimes as provided for in the Rome Statute of the ICC. However, the Malabo definitions contain expansions of the crimes, for instance, a broadening of the *chapeau*, in the case of crimes against humanity, and new underlying acts, in the case of genocide. For further analysis, see Kai Ambos, *Genocide (Article 28B), Crimes Against Humanity (Article 28C), War Crimes (Article 28D) and the Crime of Aggression (Article 28M)*, in *THE AFRICAN CRIMINAL COURT: A COMMENTARY ON THE MALABO PROTOCOL* 31 (Gerhard Werle & Moritz Vormbaum eds., 2017).

104. Malabo Protocol, *supra* note 98, art. 46B (individual criminal responsibility); art. 46C (corporate criminal liability).

105. Malabo Protocol, *supra* note 98, art. 46H (complementary jurisdiction).

106. Ademola Abass, *Historical and Political Background to the Malabo Protocol*, in *THE AFRICAN CRIMINAL COURT: A COMMENTARY ON THE MALABO PROTOCOL* 11, 16 (Gerhard Werle & Moritz Vormbaum eds., 2017).

provision in the Malabo Protocol, the immunities clause,¹⁰⁷ that holds the potential to be the undoing of the project to find African solutions to international and transnational crimes in Africa. It provides: “No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.”¹⁰⁸ The immunities clause in the Malabo Protocol is a radical departure from the statutes of other international criminal tribunals which explicitly provide for the *irrelevance* of immunities. This clause will inevitably lead to *de facto* impunity.

Regional efforts aside, the more realistic options to fill the void in the event of a successful withdrawal of South Africa from the ICC, would, first, be a constitutional challenge to any repeal act by the parliament that does not provide for a replacement of the substantive parts of the potentially repealed ICC Act. This will be necessary, because a simple repeal, as per the first (withdrawn) version of the repeal bill, will have the effect of removing from South African domestic criminal law the ICC crimes of genocide, crimes against humanity, and war crimes. The Geneva Act provides for war crimes but it does so in a more limited way than the ICC Act. Removing the crimes of genocide and crimes against humanity from domestic criminal law should be challenged on the basis that it offends one of the foundational values of the Constitution, namely human dignity.

Another possibility would be to rely on customary international law to prosecute genocide and crimes against humanity in South Africa. It falls beyond the scope of this paper to fully explore this possibility, but the prospects of a common-law prosecution are not very good, at least in practical and policy terms. Having said that, it is worth to note that the Constitutional Court did

107. Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, FIRST MEETING OF THE SPECIALIZED TECHNICAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS, EX.CL/846(XXV), Annex 5, art. 46A *bis* (2014), http://www.iccnw.org/documents/African_Court_Protocol_-_July_2014.pdf. For a discussion, see Dire Tladi, *Immunities (Article 46A bis)*, in *THE AFRICAN CRIMINAL COURT: A COMMENTARY ON THE MALABO PROTOCOL* 203 (Gerhard Werle & Moritz Vormbaum eds., 2017).

108. Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, *supra* note 109, at Annex 5, art. 46A *bis*.

leave the door open for a formal recognition of certain crimes under customary international law as being part of domestic criminal law. The Court stated:

Along with torture, the international crimes of piracy, slave-trading, war crimes, crimes against humanity, genocide and apartheid 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'. Torture, whether on the scale of crimes against humanity or not, is a crime in South Africa in terms of section 232 of the Constitution because the customary international law prohibition against torture has the status of a peremptory norm.

Furthermore, along with genocide and war crimes there is an international treaty law obligation to prosecute torture. The Convention against Torture, an international convention drafted specifically to deal with the crime of torture, obliges states parties to 'ensure that all acts of torture are offences under its criminal law', together with an 'attempt to commit torture' and 'complicity and participation in torture'.

South Africa has fulfilled this international law obligation through the recent enactment of the Torture Act. In effect, torture is criminalized in South Africa under section 232 of the Constitution and the Torture Act whilst torture on the scale of crimes against humanity is criminalized under s 232 of the Constitution, the Torture Act and the ICC Act. Regional and sub-regional law also permits South Africa to take necessary measures against crimes against humanity, including torture.¹⁰⁹

109. *Torture Docket Case*, *supra* note 20, at paras. 37-39.

The above *dicta* of the Constitutional Court underscores the importance of the Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity.¹¹⁰ The merits of this project will not be discussed here. Suffice to note that a treaty like this, which is not linked to the ICC or supranational structures which might be politically controversial, provides strong normative and constitutional pressure on incorporating international criminal law into the framework of domestic legislation.¹¹¹

I would argue that the most important priority should be for the parliamentary ANC to take the history of their great movement to heart, to appeal to the better angels of the party of Mandela and Tambo, and to do the right thing: reject any future ICC repeal bill, or, alternatively, to make sure that the repeal bill contains the full domestication of crimes against humanity, genocide, and war crimes. That will be consistent with the historical attitude of the ANC towards human rights, humanitarian principles, and the international quest to end impunity for the worst crimes under international law.

110. For the English text, see *Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity*, WASHINGTON UNIVERSITY SCHOOL OF LAW WHITNEY R. HARRIS WORLD LAW INSTITUTE CRIMES AGAINST HUMANITY INITIATIVE (Aug. 2010), <http://law.wustl.edu/harris/cah/docs/EnglishTreatyFinal.pdf>. For the Corrigendum, see *Corrigendum to Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity*, WASHINGTON UNIVERSITY SCHOOL OF LAW WHITNEY R. HARRIS WORLD LAW INSTITUTE CRIMES AGAINST HUMANITY INITIATIVE (Feb. 2012), <http://law.wustl.edu/harris/CAH/docs/Corrigendum-ProposedConvention.pdf>.

111. See also Payam Akhavan, *The Universal Repression of Crimes Against Humanity Before National Jurisdictions: The Need for a Treaty-based Obligation to Prosecute*, in *FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY* 28 (Leila Nadya Sadat ed. 2011).