Withdrawal from the Rome Statute by the Republic of South Africa: *filling the gaps*

An analysis of the international and domestic mechanisms for withdrawal from international agreements and a legal assessment of the Gauteng High Court's judgment on South Africa's revoked notice of withdrawal from the Rome Statute of the International Criminal Court by comparing this with the Brexit rulings

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We could start fires with the amount of times we laugh

ABSTRACT

On the 19th of October 2016, the Republic of South Africa issued a notice of withdrawal from the Rome Statute, the treaty that established the International Criminal Court. Because the filing took place without prior parliamentary approval, a political party called Democratic Alliance challenged the executive's decision to withdraw before the Gauteng High Court. This court determined that the executive cannot unilaterally trigger a withdrawal process from an international agreement because this would constitute the use of legislative powers and thus a breach of the separation of powers. Only parliament can bind the state and its citizens to a treaty, ratified by the executive, through the enactment of it in the domestic legal order. By the same token, it therefore lays in the power of parliament to undo this process. That there exists no provision in any South African law saying this is no barrier; it is a confirmation of the fact that the executive cannot bypass parliament. However, given the troubled backdrop of the African Union's political influence, incorrect actions as regards the obligation to arrest Sudanese President Omar al-Bashir, and, in extension of that, the South African government's unchanged intention of withdrawing from the Rome Statute, this research contends that we need to look further than the Gauteng High Court's categorical exclusion of unilateral withdrawal by the executive. While international treaty law creates no substantive withdrawal procedure as it merely demands a written notification from a government's authoritative forum, to be lodged at the United Nations Secretary-General, ongoing cooperation obligations under the Rome Statute will remain applicable after withdrawal becomes effective (which it will after one year), even when these duties came into existence after an instrument of withdrawal is already lodged. Alternatively, by drawing explicit parallels with the Brexit judgments of the British courts, this thesis demonstrates that parliament's exclusive role and power to create and change citizens' rights and obligations through the implementation of treaties in the national legal order is a substantial and crucial limitation to the executive's power to withdraw from international agreements. This very point was not taken into consideration by the Gauteng High Court presumably because it incorrectly sees the Rome Statute's domesticating legislation, the Implementation Act, as functioning independently from the Rome Statute itself, which raises a further controversial point of considerable importance seeing as how to date there is no viable alternative mechanism to the Implementation Act in place, neither regional, nor domestic, while the government still wishes to withdraw from the Rome Statute and has already taken steps in that direction.

INDEX

ABBREVIATIONS

ANC	African National Congress
ASP	Assembly of States Parties
AU	African Union
DA	Democratic Alliance
DRC	Democratic Republic of the Congo
ECA	European Communities Act 1972
EFF	Economic Freedom Fighters
EU	European Union
EWHC	High Court of England and Wales
ICC	International Criminal Court
ICJ	International Court of Justice
NA	National Assembly
NCOP	National Council of Provinces
NGO	non-governmental organization
NPA	National Prosecuting Authority of South Africa
OTP	Office of the Prosecutor
PTC	Pre-Trial Chamber
SCA	Supreme Court of Appeal of South Africa
TEU	Treaty on the European Union
UK	United Kingdom
UN	United Nations
UNSC	United Nations Security Council
UNSG	United Nations Secretary-General
VCLT	Vienna Convention on the Law of Treaties

I. Introduction

On 19 October 2016, the South African government sent a notice of withdrawal from the Rome Statute, the treaty that established the International Criminal Court (''ICC''), to the United Nations Secretary-General (''UNSG''). In this notice of withdrawal, the Minister of International Relations and Cooperation argued that South Africa's obligations with respect to the peaceful resolution of conflicts are at times incompatible with the ICC's interpretation of state obligations under the Rome Statute.[1] The government is of the opinion that continue being a state party to the Rome Statute hinders its ability to achieve its foreign policy objectives because it compromises the country's effort to promote peace and security in Africa.[2] Moreover, the government questions the credibility of the Court as long as three of the five permanent members of the Security Council of the United Nations (''UN'') are not members to the Rome Statute. It has also some doubts about equality and fairness in the practice of the ICC regarding the perceived focus of the Court on African states.[3]

The deposit of the notice of withdrawal was a rather controversial event given South Africa's history of apartheid, which has been a catalyst for South Africa's support for the ICC, and because of the close relationship it had with the court in its very first years. Under the stewardship of Nelson Mandela, Desmond Tutu, and others, South Africa had a firm policy of promoting human rights and placed primacy on considerations of justice and respect for international law.[4] The country was one of the staunch supporters of the establishment of the ICC and took the lead in doing so; it was the first African state to sign, ratify and implement the Rome Statute in its domestic legal order.[5] It acted that progressively because of the official

[1] Declaratory Statement by the Republic of South Africa on the Decision to Withdraw from the Rome Statute of the International Criminal Court, at 2. Available at < https://www.parliament.gov.za/storage/app/media/CommitteeNotices/2017/february/16-02-2017/docs/Withdrawal_from_the_Rome_Statute_of_the_International_Criminal_Court_tabled_Friday_4th_November_2016.pdf > accessed 12 October 2017.

[2] Explanatory Memorandum on South Africa's Withdrawal From the Rome Statute of the International Criminal Court (''Rome Statute''), *supra* note 1.

[3] Declaratory Statement by the Republic of South Africa on the Decision to Withdraw from the Rome Statute of the International Criminal Court, *supra* note 1, at 1, 2.

[4] Stated by Judge Richard Goldstone, who served as a prosecutor at the ICTY and has been leading the campaign to prevent South Africa's withdrawal from the ICC. See Goodman, T., 'Justice Richard Goldstone: South Africa's Attempt to Withdraw from Int'l Criminal Court is Unconstitutional' (*Just Security*, 21 October 2016) < https://www.justsecurity.org/33731/justice-richard-goldstone-south-africas-attempt-withdraw-intl-criminal-court-unconstitutional/ > accessed 12 October 2017.

[5] South Africa signed the Statute on 17 July 1998 (the date it was first opened for signature) and ratified it on 27 November 2000 after first obtaining parliamentary approval. See International Criminal Court, 'States Parties to the Rome Statute' (*International Criminal Court*) < https://asp.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/south%20africa.aspx > accessed 10 March 2017.

system of racial segregation it had not even a decade before South Africa committed itself to the establishment of the ICC and the prosecution of international crimes. In 1948, the laws of apartheid institutionalized racial discrimination and those laws influenced every aspect of social life in a horrific manner. International condemnation of the system led to the codification of it as an international crime in the Rome Statute.[6]

This course of history, however, is according to some at odds with the current direction of the government in which the purported withdrawal from the Rome Statute is seen as a 'retrogressive step which raises great concern about the government's priorities with regard to matters of justice, accountability and the prevention of egregious crimes.'[7] The current direction entails the government's wish to revoke its (international) obligations concerning the investigation and prosecution of individuals who breached the Rome Statute, to be effectuated by the denunciation of the Statute. According to the government, South Africa is hindered by the Rome Statute and implementing legislation in exercising its international relations with other states.[8] Parliament was therefore asked to draft a Bill that would repeal the Implementation of the Rome Statute of the International Criminal Court Act No. 27 of 2002 (''Implementation Act'') and thus the international criminal law obligations flowing from the Rome Statute which were domesticated through that Act. On 3 November 2016, the government introduced the Implementation of the Rome Statute of the International Criminal Court Repeal Bill (''Repeal Bill'') in parliament. After parliament would pass the Bill, the process of withdrawal would start nationally.

Another, more pertinent reason for considering the notice of withdrawal as a rather contentious issue is that it is a fairly new phenomenon in the history of international criminal justice, but appears to gain traction nevertheless. This is illustrated by the fact that there are more states that not just have the intention to withdraw from a treaty, but already have taken significant legal steps in this direction (Kenya, United Kingdom) or even effectively have exited

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On 18 July 2002, the President assented to the Implementation of the Rome Statute of the International Criminal Court Act. See South Africa (2002) Implementation of the Rome Statute of the International Criminal Court Act (Proclamation No. R. 984, 2002) *Government Gazette* 23642:445, July 18 (hereinafter: ''Implementation Act'').

[6] Article 7(1)(j), Rome Statute of the International Criminal Court, (UN Doc. A/CONF.183/9, 2178 UNTS 3) 17 July 1993 [in force on 1 July 2002], last amended in 2010 (hereinafter: ''Rome Statute'').

[7] 'Mandela legacy on the line as South Africa moves to leave ICC', (*Global Justice,* 21 October 2016) < https://ciccglobaljustice.wordpress.com/2016/10/21/mandela-legacy-on-the-line-as-south-africa-moves-to-leave-icc/ > accessed 12 February 2017.

[8] Implementation of the Rome Statute of the International Criminal Court Act Repeal Act, 2016, B23-2016, at 2 (hereinafter: ''Repeal Bill''). Available at < https://www.parliament.gov.za/storage/app/media/Docs/bill/c85a476b-8c4f-4917-8ed1-fb667be65060.pdf >.

membership of a treaty (Burundi). Against this backdrop, the relevance of this research becomes evident when is considered that the South African government's notice was sent to the Secretary-General without prior public announcement by the government, without any public consultation and - most vitally - without approval from the organ designated for this purpose: South Africa's parliament. Also, the government asked parliament to revoke the Implementation Act *after* the executive notified the UNSG of its intention to withdraw. This begs the question whether the executive branch of government is authorized to trigger these legal processes without prior involvement from the legislator.

A political party called Democratic Alliance challenged the legal enforceability and validity of the notice of withdrawal. On 22 February 2017, the North Gauteng High Court of South Africa in Pretoria (''Gauteng High Court'') ordered the government to revoke the notice of withdrawal as it held, in short, that it is not constitutionally permissible for the national executive to give a notice of withdrawal from international agreements without prior parliamentary approval.[9] In order to adhere to said judgment, South Africa revoked the notice of withdrawal with immediate effect on 7 March 2017.[10] The Repeal Bill was canceled on the 13th of March.

Yet, this judgment and the subsequent actions taken by the government should not be treated as a *fait accompli* or guarantee that South Africa will remain a member of the ICC. The question about how the South African government should deal with the actual cessation of the Rome Statute domestically is still relevant. The possibility of South Africa feeling the urge to quit its membership of the ICC remains: the spokesperson of the Minister of Justice and Correctional Services said that the Repeal Bill is withdrawn purely to comply with the court ruling and that the Bill will be reintroduced at a later stage.[11] In fact, on 8 December 2017, the Minister of Justice has reaffirmed South Africa's intention to withdraw from the Rome Statute by requesting parliament's approval for a new notice of withdrawal and introducing the

[9] *Democratic Alliance v Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening)* (83145/2016) [2017] ZAGPPHC 53; 2017 (3) SA 212 (GP).

[10] C.N.121.2017.TREATIES-XVIII.10, Rome Statute of the International Criminal Court, Depositary Notification, South Africa, United Nations, New York, as available on < https://treaties.un.org/doc/publication/CN/2017/CN.121.2017-Eng.pdf > accessed 22 April 2017.

[11] Du Plessis, C., 'Justice Minister Withdraws Bill That Would Take South Africa Out Of International Criminal Court', (*Huffington Post*, 14 March 2017) < http://www.huffingtonpost.co.za/2017/03/14/justice-minister-withdraws-bill-that-would-take-south-africa-out_a_21886524/ > accessed 8 April 2018; Quintal, G., 'ANC is sticking to its guns on ICC withdrawal', (Business Day, 4 July 2017) < https://www.businesslive.co.za/bd/politics/2017-07-04-anc-is-sticking-to-its-guns-on-icc-withdrawal/ > accessed 12 October 2017.

controversial 'International Crimes Bill'.[12] Furthermore, the government expressed frustrated political rhetoric directed against the litigants ánd the judiciary before the Gauteng High Court's judgment was handed down and the government found it afterwards '[w]orth noting that the Court did not find the decision on withdrawal from the ICC to be unconstitutional, but rather the implementation of it without prior Parliamentary approval'. These processes and incidents stress the importance of a critical examination of the arguments the Gauteng High Court has put forward for rendering the notice of withdrawal illegal.[13]

As mentioned above, South Africa is not the only state to have commenced a withdrawal process from an international agreement in the past two years. In January 2017, Britain's Supreme Court ruled that the government of the United Kingdom (''UK'') must hold a vote in parliament before beginning the process of leaving the European Union (''EU'') by virtue of Article 50 of the Treaty on the European Union (upholding a November High Court decision). Prime Minister Theresa May intended to begin this process without a decision in parliament. This case appears to adjudicate a similar situation in which the South African withdrawal was faced a challenge on grounds of constitutionality as 'Brexit' was executed without prior parliamentary assent. This dissertation will therefore also constitute a comparative analysis with the judgments on the British executive's attempt to bypass parliament by filing a notice of withdrawal from the EU. The aim of this legal comparison is to strengthen - or weaken - the conclusions drawn from the analysis of the outcome before the South African court.

[12] 'The Government's resolve in this regard remains unchanged because of the active role that South Africa continues to play in promoting dialogue and peaceful resolution of conflicts in Africa and elsewhere. South Africa's continued membership of the Rome Statute, as it is currently interpreted and applied, carried with it the potential risk of undermining its ability to carry out its peace-making mission efforts in Africa, and elsewhere'. See South African Government Press Release, 'Minister Michael Masutha: General Debate at Sixteenth Session of the Assembly of States Parties of the International Criminal Court' 8 December 2017, available at < https://www.gov.za/speeches/minister-michael-masutha-general-debate-sixteenth-session-assembly-states-parties > accessed 3 January 2017; Assembly of States Parties to the Rome Statute of the International Criminal Court: sixteenth session, New York, 4-14 December 2017: official records. New York, NY: United Nations, available at < https://asp.icc-cpi.int/iccdocs/asp_docs/ASP16/ASP-16-ZA.pdf > accessed 3 January 2018.

[13] Said by Siphosezwe Masango, the Chairperson of the Portfolio Committee on International Relations and Cooperation. See South African Government Press Release, 'Parliament welcomes court ruling on South Africa withdrawal from International Criminal Court' 9 March 2017, available at < https://www.gov.za/speeches/sa-icc-withdrawal-9-mar-2017-0000 > accessed 17 October 2017; 'I cannot see how a court can dictate - either to the executive or this Parliament - choices imposed by those who have the privilege to approach court because they can' - stated by Minister of Justice and Correctional Services Michael Masutha. See 'African Leaders Have A Strategy For Leaving The ICC' (*Huffington Post*, 1 February 2017) < http://www.huffingtonpost.co.za/2017/02/01/african-leaders-ok-strategy-for-mass-withdrawal-from-icc_a_21704603/ > accessed 24 October 2017; Fowkes, J., 'South Africa's Withdrawal from the ICC: The High Court Judgment and its Limits' *Verfassungsblog* 8 March 2017.

The starting point of this research is the premise that there was an incorrect order of legal actions regarding the notice of withdrawal from the Rome Statute. Additionally, considering the Gauteng High Court decided that the national executive's notice of withdrawal was invalid, the crux of this thesis is to scrutinize the reasons the court provided and to assess the validity of those arguments by comparing them with the Brexit judgments that serve like a benchmark. The aim is to ultimately establish a holistic exploration of the limitations to the South African government's power to withdraw from the Rome Statute. Therefore, this thesis will constitute first a descriptive part: what does withdrawal mean both internationally and nationally and what occurred on these levels concerning South Africa's withdrawal? Second, this research lays out a normative test: what kind of response on the issue is required? Are there more limitations to withdrawal than the ones presented and if so, on what grounds?

In view of the above considerations, this research will seek to address the following research question:

What are the limitations under international law and South African law to the South African executive's power to withdraw from the Rome Statute of the International Criminal Court?

Methodology and structure

Chapter two will deal with a succinct background history of South Africa's motives for withdrawal from the Rome Statute. This part of the research is not essential for answering the research question but is of meaning nevertheless because understanding *why* South Africa actually wants to cancel its membership of the ICC is important for putting the further research in context. This chapter, therefore, illustrates some of the political and legal events that preceded - and possibly explain the felt need for - the notification of withdrawal.

Chapter three will discuss established international law on treaty withdrawal. This framework requires attention because it is part of the research question: what are the limitations to withdrawal under international law?

Chapter four will demonstrate how the enactment of treaties works pursuant to the Constitution of South Africa 1996. This chapter is the start of answering the question what limitations domestic law poses to withdrawal and therefore addresses the reasons the Gauteng High Court has put forward for rendering the unilateral notice of withdrawal constitutionally invalid. In respect of the question what the correct legal procedure is by which South Africa can withdraw from the ICC, will be analyzed whether there is any executive power to withdraw from

international agreements without preceding legislative support. Since the Constitution (or any other South African law) does not contain a provision on the denunciation of international agreements, the Gauteng High Court's reasoning is the primary source for discussing how the termination of treaties should be effectuated in the domestic legal order, and what the role of parliament is in this more specifically.

It is noted above that this thesis will provide a holistic legal review of the arguments of the Gauteng High Court. To achieve this, chapter five will be a comparative analysis of the judgments of the UK courts regarding the British executive's attempt to unilaterally withdraw from the EU. In this chapter, it shall be possible to argue if - and why - and which elements of - the underlying reasoning in the verdicts on Brexit could also be applicable in the distinct legal order of South Africa. This will be done by showing the similarities and differences between the reasoning of the Gauteng High Court on the one hand and the High Court and Supreme Court of the United Kingdom on the other. Ultimately, chapter six will confirm - or impair - the reasoning why the Gauteng High Court found the instrument of withdrawal legally incompatible with the domestic legal order and thus the limitations to the executive's ability to withdrawal as laid out by the South African court.

Overall, this research will be based on a qualitative analysis of important legislation such as the Rome Statute of the International Criminal Court and the Constitution of the Republic of South Africa 1996, as well as relevant academic literature and judgments applicable for the research question, both from domestic and international courts. The study of the British judgments regarding the intention to terminate EU-membership will serve as a contemporary comparison in order to further develop the answer to the research question.

II. Reasons for Withdrawal

This chapter assesses the reasons advanced by South Africa for unilateral withdrawal from the Rome Statute. It is by no means a full-fledged critical analysis, as the function of this chapter is only to provide a brief background sketch on several motives for withdrawal, which is helpful for understanding the broader legal and political environment in which South Africa took this step. Hence, an explanation of the practical reasons why South Africa turned against the ICC is of importance for putting the subsequent legal analysis of this research in context.[14]

Based on official documents and literature, three main reasons for withdrawal can be discerned: the influence of the African Union (''AU''), the desire to preserve diplomatic immunity for sitting heads of state, and the ICC's alleged bias against African states.[15] In the following paragraphs will also become clear that all three arguments are interconnected and thus have (had) influence on each other; the first and second paragraph set out the general context of animosity between Africa and ICC in relation to the whole African bias, the third paragraph zooms in on the particular events of President Omar al-Bashir's visit to South Africa, which was the concrete trigger for the country to decide to pull-out of the ICC.

§ 2.1 The African Union and the International Criminal Court: a Vexed Relationship

South Africa is a member of the AU since 6 June 1994.[16] The African Union is a league consisting of all 55 countries on the continent that *inter alia* means to promote peace, security and stability on the continent and defend the sovereignty, territorial integrity and independence of its member states.[17]

A somewhat implicit reason for South Africa's withdrawal is the influence of the AU on the relationship between African states and the ICC. During the first few years after the ICC began functioning, it enjoyed a cooperative relationship with the Union; several African states referred situations to the court.[18] This changed, however, when the Sudanese President Omar

[14] See chapter 3, paragraph 3.3 that connects this chapter's elaboration on the case of President Omar al-Bashir with the consequences of withdrawal for the obligations for South Africa under the Rome Statute.

[15] Such as that South Africa argues that there is an urgent need to assess whether the ICC is still reflective of the principles and values which guided its creation and its envisaged role as set out in the Rome Statute. South Africa also questions the credibility of the ICC as long as three of the five permanent members of the Security Council of the UN are not state parties to the Rome Statute. Given this observation, the legitimacy of referrals by the Security Council is seen as controversial. See Explanatory Memorandum on South Africa's Withdrawal From the Rome Statute of the International Criminal Court (''Rome Statute''), *supra* note 1.

[16] African Union, 'Member State Profiles' *(African Union*) < https://au.int/web/en/memberstates > accessed 15 May 2017. See also Declaratory Statement by the Republic of South Africa on the Decision to Withdraw from the Rome Statute of the International Criminal Court, *supra* note 1, at 1.

[17] African Union, 'AU in a Nutshell' (*African Union*) < https://au.int/web/en/history/oau-and-au > accessed 15 May 2017.

[18] For example, the Central African Republic (I in December 2004), Uganda (in January 2004) and the Democratic Republic of the Congo (in April 2004) did this.

al-Bashir was indicted in 2009 after the situation in Darfur was referred to the Prosecutor of the ICC by the UN Security Council (''UNSC'').[19] This prompted the Union to adopt a hostile attitude towards the ICC and led to a gradual African disinterest in the ICC.[20] The AU unsuccessfully asked the UNSC to defer the case against al-Bashir as it was of the opinion that it might derail peace and reconciliation efforts in the fragile nation of Sudan. After the UNSC rejected this proposal, the AU called upon African states to not cooperate with the ICC on the enforcement of the arrest warrants against al-Bashir. More specifically, the Assembly of the AU decided in an extraordinary session on 12 October 2013, convened to discuss Africa's relationship with the ICC, that no charges should be commenced or continued before any international court or tribunal against any serving Union head of state or government and that any AU member state that wishes to refer a case to the ICC 'may inform and seek the advice of the African Union'.[21] It was adhered to by African states such as Chad, Malawi, the Democratic Republic of Congo, Kenya, and South Africa.[22]

The African Union has thus been a growing critic of the ICC's 'intervention' in Africa and has passed a number of resolutions on heads of state immunity since al-Bashir was indicted by the ICC - many of them to specifically protect him.[23] In 2010, for example, the Union expressly stated in its decision on the ICC that AU member states should not cooperate in arresting President al-Bashir.[24] These dynamics continued in 2011 when decisions were made that resulted in another call for non-cooperation with the ICC.[25] But also more recently, the AU has expressed its views on the ICC. In January 2016, African heads of state passed a motion

[19] See the United Nations Security Council, Resolution 1593 (31 March 2005) UN Doc. S/RES/1593. At the time of issuance of the arrest warrants, the ICC already had a number of suspects in custody, among them Jean-Pierre Bemba, Germain Katanga and Mathieu Ngudjolo Chui, and had issued arrest warrants against others - all Africans. Yet, the AU (or any African state) did not protest. See M. Ventura and A. Bleeker, 'Universal Jurisdiction, African Perceptions of the International Criminal Court and the New AU Protocol on Amendment to the Protocol on the Statute of the African Court of Justice and Human Rights', in E. Ankumah (ed) *The International Criminal Court and Africa: One Decade On* (Cambridge: Intersentia, 2016) 441-460, at 444.

[20] Chapter 2, paragraph 2.2 mentions that the issuance of arrest warrants against al-Bashir was not the starting point for the growing skepticism against the ICC, but it is seen as a key moment for the deterioration of the relationship. See also fn. 62.

[21] AU Assembly, ''Decision on Africa's relationship with the International Criminal Court (ICC)'', Ext/Assembly/AU/Dec.1(Oct.2013), 12 October 2013, at 10(i).

[22] Which led to decisions by the Pre-Trial Chambers of the ICC. See chapter two, paragraph 2.3.1.

[23] Moffett, L., 'Al-Bashir's escape: why the African Union defies the ICC', (*The Conversation*, 15 June 2015) < http://theconversation.com/al-bashirs-escape-why-the-african-union-defies-the-icc-43226 > accessed 9 July 2017.

[24] AU Assembly "Decision on the progress report of the Commission on the implementation of decision Assembly/AU/Dec.270 (XIV) on the second ministerial meeting on the Rome Statute of the International Criminal Court (ICC): Doc.Assembly/AU/10 (XV), (Kampala, July 2010), at 5, 8 and 9.

[25] AU Assembly "Decision on the implementation of the decisions on the International Criminal Court (ICC)": Assembly/AU/Dec.334 (XVI) (Addis Ababa, 31 January 2011); AU Assembly "Decision on the implementation of the Assembly decisions on the International Criminal Court - Doc. EX.CL/670(XIX) (Malabo, July 2011), at 9.

endorsing an 'ICC Withdrawal Strategy'.[26] The AU requested the open-ended committee of Ministers of Foreign Affairs to develop 'a comprehensive strategy' for 'collective withdrawal' which would serve as a guidance to African states wishing to re-assess their relationship with the ICC.[27] The non-binding resolution comprehends a list of concerns regarding the functioning of the court. It came with reservations from several states, however, and it was actually anything but a 'withdrawal strategy' because it is a roadmap for continued engagement between the AU and the ICC.[28] The document merely states that 'further research on the idea of collective withdrawal, a concept that has not yet been recognized by international law, is required in order to seek out additional guidance regarding the potential emergence of a new norm of customary international law.'[29] Instead of a collective action plan, the document repeatedly affirms that withdrawal is a 'sovereign exercise' that 'has to be executed' in accordance with the 'constitutional provisions of individual African states'.[30] A rather interesting statement because the original instrument of withdrawal by the South African executive is rendered unconstitutional by a domestic court.[31] The document further states that the proposed collective withdrawal from the Statute 'can be implemented on a state by state basis by using Article 127 of the Rome Statute' - which is useful for chapter three of this research.[32]

While this paragraph is only a cursory outline of previous and current issues, what is clear is that the influence of the AU is growing and changing in character. The above mentioned events are meaningful examples of how African states party to the ICC are in a difficult position of having obligations as member states of the African Union on the one hand, and obligations as member states to the Rome Statute on the other. It is possible that as regards South Africa, these contradictory obligations create an even more pressing situation. South Africa had a key role in the negotiations for the Rome Statute and was one of the first to adopt domestic

[26] African Union, Withdrawal Strategy Document, available at < https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan._2017.pdf > accessed 27 July 2017.
[27] Labuda, P., 'The African Union's Collective Withdrawal from the ICC: Does Bad Law make for Good Politics?', (*Blog of the European Journal of International Law,* 15 February 2017) < https://www.ejiltalk.org/the-african-unions-collective-withdrawal-from-the-icc-does-bad-law-make-for-good-politics/ > accessed 27 July 2017.
[28] African Union, Withdrawal Strategy Document, *supra* note 26, paras 27-38.
[29] *Ibid*, para 21.
[30] *Ibid*, paras 8-10.
[31] *Democratic Alliance v Minister of International Relations and Cooperation,* High Court Judgment, *supra* note 9, para 57.
[32] African Union, Withdrawal Strategy Document, *supra* note 26, paras 10-18. See also chapter 3, paragraph 3.2.

legislation to implement it. The country was (and still is) considered an example of progressive thinking to other African states and it has a powerful position in the region.[33]

§ 2.2 The Court's Alleged Bias on African States

In contemporary discussion it is argued what underlies or strengthens the African Union's anti-ICC rhetoric is the trenchant critique and growing perception that the ICC is an institutional vessel to let 'the global north' control and rule over 'the global south'.[34] Particularly, South Africa mentioned in its instrument of withdrawal that it questions the equality and fairness of the ICC's practice - *i.e.* whether the court focuses on African states.[35]

The skepticism against the ICC by African states more or less begun when Africa became concerned about the 'erosion' of sovereign immunity after the *Arrest Warrant* Case (see next paragraph). Subsequently, Germany arrested a retired Lieutenant Colonel in the Rwandan Army, Rose Kabuye, in 2008 for shooting down former Rwandan President Juvenal Habyarimana's jet.[36] As a result, the AU adopted a resolution declaring that Western states were abusing and misusing the doctrine of universal jurisdiction to hunt Africans.[37]

The ICC's arrest warrants for Omar al-Bashir in 2009 and 2010 led to more critique regarding the 'deterioration' of diplomatic immunity. The issuance of the warrants has been called the 'watershed moment for the AU's relationship with the ICC' as it worsened the already shaky relations between Africa and the court.[38] Antagonism regarding cases being pursued against 'high-profile' Africans and thus the belief that the ICC targets African states and heads of state gained even more ground in 2013 when Kenya's President Uhuru Kenyatta and Vice President William Ruto were indicted for alleged war crimes in connection with Kenya's post-election

[33] 'South Africa is the political standard-bearer of sub-Saharan Africa - and arguably the entire continent [...].' See 'Africa and the International Criminal Court', *Strategic Comments,* Volume 22 Comment 39, December 2016.

[34] Cruvellier, T., 'The ICC, Out of Africa', (*The New York Times,* 6 November 2016) < https://www.nytimes.com/2016/11/07/opinion/the-icc-out-of-africa.html > accessed 18 October 2017.

[35] Declaratory Statement by the Republic of South Africa on the Decision to Withdraw from the Rome Statute of the International Criminal Court, *supra* note 1, at 1, 2.

[36] T. Mude, 'Demystifying the International Criminal Court (ICC) Target Africa Political Rhetoric', 7 *Open Journal of Political Science* (2017) 178-188, at 181; 'Top Rwandan aide chooses French terror trial', (*The Guardian,* 10 November 2008) < https://www.theguardian.com/world/2008/nov/10/rwanda-congo-kabuye > accessed 24 June 2017.

[37] African Union Executive Council Thirteenth Ordinary Session, 'Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction EX CL 411/XIIII', (*African Union).* See also African Union Peace and Security Council Communiqué PSC/Min/Comm. (CXLII) 21 July 2008, paras 3, 11, in which the AU Peace and Security Council had made known its displeasure at the ICC investigations against al-Bashir and called for a process 'that does not impede or jeopardize efforts aimed at promoting lasting peace.'

[38] M. du Plessis, T. Maluwa and A. O'Reilly, 'Africa and the International Criminal Court' *Chatham House* July 2013.

violence in 2007 and 2008. Both cases collapsed,[39] but Kenya took the matter to the AU to discuss a mass withdrawal from the ICC nevertheless.[40] In response to the indictment of al-Bashir and the cases against Kenyatta and Ruto, the AU argued that the ICC jeopardizes the promotion of peace and stability in Africa by prosecuting African leaders.[41] On these and related grounds, the Union has even asked for an amendment to the Rome Statute so that sitting heads of state and their deputies can be exempted from prosecution by the ICC.[42]

All individuals indicted by the ICC up until today are African. Currently, the court investigates eleven situations (*i.e.* in which evidence is gathered and examined, from which cases against individuals can arise), ten of which are located in Africa: Mali, Libya, Kenya, Sudan, Uganda, the Democratic Republic of the Congo, the Central African Republic (twice) and Côte d'Ivoire.[43] The only investigated state outside of Africa is Georgia. Of the eight preliminary examinations the Office of the Prosecutor (''OTP'') has opened, Gabon, Guinea and Nigeria are under preliminary examinations.[44]

This data could give perceptions of inequality and unfairness in the sense that it too can create the impression that Africa is being targeted by the court in its investigations and prosecutions. It further provided a basis for a number of African leaders and the African Union to criticize or perceive the ICC as a biased instrument driven by Western neo-colonialism which is 'intended for developing and weak countries and was a tool to exercise cultural superiority.'[45] For instance, the Ethiopian Prime Minister accused the ICC of 'hunting' Africans because of their race and Burundi officially held the court as a 'Western tool to target African governments'.[46]

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[39] International Criminal Court, 'Ruto and Sang Case ICC-01/09-01/11' (*International Criminal Court*) < https://www.icc-cpi.int/kenya/rutosang > accessed 8 August 2017; International Criminal Court, 'Kenyatta Case ICC-01/09-02/11' (*International Criminal Court*) < https://www.icc-cpi.int/kenya/kenyatta > accessed 8 August 2017.

[40] 'African Union members back Kenyan plan to leave ICC', (*The Guardian,* 1 February 2016) < https://www.theguardian.com/world/2016/feb/01/african-union-kenyan-plan-leave-international-criminal-court > accessed 8 August 2017.

[41] A. Knottnerus, 'The Au, the ICC, and the Prosecution of African Presidents', in K. Clarke, A. Knottnerus and E. de Volder (eds), *Africa and the ICC: Perceptions of Justice* (New York: Cambridge University Press, 2016) 152-184, at 152.

[42] C.N.1026.2013.TREATIES-CVIII.10, Rome Statute of the International Criminal Court, Proposal of Amendments, Depositary Notification, Kenya, United Nations, New York, as available on < https://treaties.un.org/doc/Publication/CN/2013/CN.1026.2013-Eng.pdf > accessed 8 August 2017.

[43] International Criminal Court, 'Situations under investigation' (*International Criminal Court*) < https://www.icc-cpi.int/pages/situations.aspx > accessed 2 January 2018.

[44] International Criminal Court, 'Preliminary examinations' (*International Criminal Court*) < https://www.icc-cpi.int/pages/preliminary-examinations.aspx?ln=en > accessed 2 January 2018.

[45] See Security Council, 'Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court', 5158th Meeting, SC/8351 (31 March 2005), statement by the representative of the Sudan, Elfatih Mohamed Ahmed Erwa, < http://www.un.org/press/en/2005/sc8351.doc.htm > accessed 16 August 2017.

[46] Negeri, T., 'Ethiopian leader accuses international court of racial bias', (*Reuters,* 27 May 2013)

Moreover, the OTP has declined to investigate crimes allegedly committed in states outside of Africa, for instance in Venezuela and Korea.[47] Some African states are disappointed with the Court (and the UNSC) for not taking their requests for deferral or referral seriously. Hence, critics accuse the OTP of discrimination against Africa in deciding which situations to investigate and to prosecute.

Not only South Africa deposited an official notification of withdrawal at the UNSG or intended to withdraw from the Rome Statute. Just a few days before South Africa notified the Secretary-General of its intention to opt out from the Rome Statute, the Burundian parliament voted in favor of withdrawal from the ICC. President Pierre Nkurunziza backed this decision when he signed a decree allowing the state to withdraw.[48] On 27 October 2017, Burundi notified the UNSG of its withdrawal. A year later it became the first state ever to effectively exit the ICC.[49] The Gambia[50] and Namibia[51] have also announced their intention to withdraw, however, they are yet to formally notify the UNSG (and The Gambia restated its commitment to remain a state party after a new president was elected).[52] It is possible that more states will (want to)

< http://www.reuters.com/article/us-africa-icc-idUSBRE94Q0F620130527 > accessed 22 April 2017;
Ngendakumana, E., 'Burundi notifies U.N. of International Criminal Court withdrawal', (*Reuters*, 26 October 2016)
< http://www.reuters.com/article/us-burundi-icc-idUSKCN12Q287?il=0 > accessed 22 April 2017;
'African Union accuses ICC of 'hunting' Africans', (*BBC News*, 27 May 2013)
< http://www.bbc.com/news/world-africa-22681894 > accessed 22 April 2017.

[47] International Criminal Court, 'Office of the Prosecutor's Response to Communications received concerning Venezuela', 9 February 2009 < https://www.icc-cpi.int/venezuela > accessed 4 April 2017; ICC Press Release, 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the conclusion of the preliminary examination of the situation in the Republic of Korea', (ICC-OTP-20140623-PR1019), 23 June 2014 < https://www.icc-cpi.int//Pages/item.aspx?name=pr1019 > accessed 13 October 2017.

[48] Gettlemen, J., 'Raising Fears of a Flight from International Criminal Court, Burundi Heads for Exit', (*New York Times*, 12 October 2016) < https://www.nytimes.com/2016/10/13/world/africa/burundi-moves-to-quit-international-criminal-court-raising-fears-of-an-exodus.html > accessed 24 April 2017. Burundi wanted to escape the preliminary examination by the Office of the Prosecutor started on 25 April 2015. President Nkurunziza announced his intention to run for a third term in April 2015, which sparked a wave of violence in which hundreds of people have been killed. See International Criminal Court, 'Situation in Burundi' (*International Criminal Court*) < https://www.icc-cpi.int/burundi > accessed 24 April 2017. South Africa, however, has never been the subject of the Office of the Prosecutor's attention but nevertheless has put forward likewise the alleged targeting by the ICC as a reason for withdrawal.

[49] < https://treaties.un.org/doc/Publication/CN/2016/CN.805.2016-Eng.pdf > See also chapter 3, paragraph 3.3.

[50] Kooren, M., 'Gambia announces withdrawal from International Criminal Court', (*Reuters*, 26 October 2016) < http://www.reuters.com/article/us-gambia-icc-idUSKCN12P335 > accessed 20 August 2017.

[51] 'Namibia pulls out of ICC', (*The Herald*, 25 November 2015) < http://www.herald.co.zw/namibia-pulls-out-of-icc/> accessed 4 January 2018.

[52] Human Rights Watch, 'Gambia Rejoins ICC', (*Human Rights Watch*, 17 February 2017) < https://www.hrw.org/news/2017/02/17/gambia-rejoins-icc > accessed 1 May 2017. The Gambia notified the UNSG of its decision to rescind the notification of withdrawal 'with immediate effect' and 'will continue to honor its obligations under the Rome Statute.' See C.N.62.2017.TREATIES-XVIII.10, Rome Statute of the International Criminal Court, Depositary Notification, Gambia, United Nations, New York, as available on < https://treaties.un.org/doc/Publication/CN/2017/CN.62.2017-Eng.pdf > accessed 30 March 2017.

withdraw. In Kenya, for example, two motions were approved in parliament backing the withdrawal from the ICC, but the cabinet is yet to deliberate on the matter.[53]

South Africa's official notification, talks of withdrawal in other African states, the deeply rooted criticism and skepticism towards the court infused by the AU's decisions and its 'ICC Withdrawal Strategy' could inspire the possibility of a mass exodus from the ICC.[54] There are possibly no sustained financial (albeit perhaps diplomatic) costs to withdrawal from the Rome Statute which could too be an appealing factor. The talk of a continent-wide pull out from the ICC has been a recurring theme since June 2009 - when the AU resolved that it would not cooperate with the court to surrender al-Bashir.[55] However, this potential 'domino effect' and the incentive for other states to withdraw from the Rome Statute on their own are perhaps farfetched. Several African countries, including Botswana, Nigeria, Tunisia, Senegal and Zambia, have spoken up in support of the court.[56]

It is important to note that while the tension between African states represented by the African Union and the ICC is considered to be much policy-driven and thus to have political undertones, it can nevertheless be grounded in legal doctrinal complexities. This is especially illustrated by the issue of South Africa's failure to detain and surrender President al-Bashir to the ICC.

§ 2.3 President Omar al-Bashir and Heads of State Immunity[57]

In the last decennium, there has been a discussion within the AU about diplomatic immunity

[53] Hansen, T., 'Will Kenya withdraw from the ICC?', (*Justice Info,* 13 December 2016) < http://www.justiceinfo.net/en/analysis/kenya.html > accessed 2 January 2018.

[54] Maasho, A., 'African Union leaders back mass exodus from International Criminal Court', (*Independent,* 1 February 2017) < http://www.independent.co.uk/news/world/africa/african-union-international-criminal-court-a7557891.html > accessed 4 May 2017.

[55] J. Grant and S. Hamilton, 'Norm Dynamics and International Organisations: South Africa in the African Union and International Criminal Court' 52 *Commonwealth and Comparative Politics* (2016), at 172-173.

[56] Human Rights Watch, 'African Members Reaffirm Support at International Criminal Court Meeting', (*Human Rights Watch,* 17 November 2016) < https://www.hrw.org/news/2016/11/17/african-members-reaffirm-support-international-criminal-court-meeting > accessed 8 August 2017; Cropley, E., 'Stay and fix the ICC, African Union hopeful urges peers', (*Reuters,* 26 October 2016) < http://in.reuters.com/article/africa-icc-botswana/stay-and-fix-the-icc-african-union-hopeful-urges-peers-idINKCN12Q179 > accessed 8 August 2017.

[57] For more information on this very subject, see P. Gaeta, 'Does President Al Bashir Enjoy Immunity From Arrest?' 7 *Journal of International Criminal Justice* (2009) 315-332; C. Kreß, 'The International Criminal Court and Immunities under International Law for States Not Party to the Court's Statute', in Bergsmo and Ling (eds), *State Sovereignty and International Criminal Law* (Torkel Opsahl Academic EPublisher, 2012) 223-265; D. Akande, 'The Legal Nature of the Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities', 7 *Journal of International Criminal Justice* (2009) 333-352; Knottnerus, A., 'The Immunity of al-Bashir: The Latest Turn in the Jurisprudence of the ICC', (*Blog of the European Journal*

for incumbent heads of state. The stance of the AU, changed after the issuance of arrest warrants against al-Bashir, created a rift between South Africa and the ICC in June 2015 as South Africa was faced with 'conflicting international law obligations which had to be interpreted within the realm of hard diplomatic realities' when South Africa hosted meetings of the African Union.[58],[59] Omar al-Bashir visited South Africa to attend these sessions while the OTP accuses him of genocide, war crimes and crimes against humanity in Sudan's Darfur region.[60] The ICC circulated cooperation requests on 6 March 2009 and 21 July 2010 (for the ICC is dependent on member states for the exercise of criminal jurisdiction).[61]

Al-Bashir's attendance of the AU summit in South Africa triggered a legal confrontation with domestic human rights and law organizations, as well as with the South African judiciary and the ICC.[62] As soon as the president arrived in Johannesburg, Southern Africa Litigation Centre (a non-governmental organization (''NGO'')) submitted an urgent request for his arrest. The Gauteng High Court issued an interim order[63] that al-Bashir could not leave South Africa before it reached its decision on enforcing the ICC arrest warrants, but the government did not arrest the president and he left the country on 15 June 2015.[64] The incident prompted South Africa to

of International Law, 15 November 2017) < https://www.ejiltalk.org/the-immunity-of-al-bashir-the-latest-turn-in-the-jurisprudence-of-the-icc/ > accessed 4 January 2018.

[58] Declaratory Statement by the Republic of South Africa on the Decision to Withdraw from the Rome Statute of the International Criminal Court, *supra* note 1, at 2.

[59] South Africa needed to enter into a host agreement with the AU Commission because it was the host country for the summit. This required that South Africa agreed to accord privileges and immunities to delegates and other representatives of intergovernmental organizations attending the meetings. These privileges and immunities are contained in the Vienna Convention on Diplomatic Relations 1961, which in South Africa is enacted in the Diplomatic Immunities and Privileges Act. The government gave effect to the host agreement by the publication of the agreement in the Government Gazette (No. 38860), which included the privileges and immunities accorded to delegates and attendees. The role of the host agreement, in combination with the Diplomatic Immunities and Privileges Act, in the matter before the relevant courts, are elements of reasoning well beyond the scope of this research, however.

[60] *The Prosecutor v Al Bashir* (ICC-02/05-01/09-3), Decision on the Prosecutor's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 4 March 2009; *The Prosecutor v Al Bashir* (ICC-02/05-01/09-94), Second Decision on the Prosecutor's Application for a Warrant of Arrest, Pre-Trial Chamber I, 12 July 2010.

[61] Article 89(1), Rome Statute. See Request to All States Parties to the Rome Statute for the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, *Situation in Darfur* (ICC-02/05-01/09-7 1/6 EO PT), Registry, 6 March 2009; Supplementary Request to All States Parties to the Rome Statute for the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, *Situation in Darfur* (ICC-02/05-01/09-96 1/6 RH PT), Registry, 12 July 2010.

[62] Notably, the Gauteng High Court regards the laborious relationship between South Africa and the ICC as having its genesis in South Africa's refusal to arrest and surrender President al-Bashir. See *Democratic Alliance v Minister of International Relations and Cooperation*, High Court Judgment, *supra* note 9, para 2. See also M. Du Plessis and G. Mettraux, 'South Africa's Failed Withdrawal from the Rome Statute', 15 *Journal of International Criminal Justice* (2017) 361-307, at 362.

[63] *Southern Africa Litigation Centre v The Minister of Justice and Constitutional Development*, Interim Order, North Gauteng High Court, Case No. 27740/15.

[64] Noteworthy here is that al-Bashir was invited to attend the inauguration of President Jacob Zuma of South Africa in 2009. But, as a result of the 2009 arrest warrant, South African officials confirmed that they would arrest al-Bashir, should he set foot on the territory. Therefore, the President declined the invitation. See *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* (867/15) [2016] ZASCA 17; 2016 (4) SA 317 (SCA), para 104;

formally adopt the stance that by adhering to the Rome Statute's duty[65] to arrest a head of state wanted by the ICC, it breaches Article 98(1) that says that states cannot be forced to cooperate with the court when that cooperation violates another obligation the state has. According to South Africa, that another obligation it has is to respect the customary international rule that sitting heads of state enjoy immunity from prosecution by other states. Put differently, national authorities cannot be obliged to arrest and extradite a sitting head of state, indicted by the ICC, when he or she visits a foreign state's territory. Consequently, al-Bashir was immune from arrest when he visited South Africa in June 2015. Should South Africa be correct in that claim, then this could legitimize its effort to withdraw from the Rome Statute. However, whether South Africa *is* correct in its claim, is a question outside the scope of this research.[66] The mere function of the following paragraph is to illustrate the fact that, based on relevant jurisprudence, there are nuances to what South Africa has put forward as a motive for withdrawal.

§ 2.3.1 A More Nuanced Image

Regarding the refusal to arrest al-Bashir, South Africa was summoned to appear before Pre-Trial Chamber (''PTC'') II on 7 April 2017. In its submissions,[67] South Africa cited the so-called '*Arrest Warrant* Case' in claiming that it was not obliged to arrest al-Bashir because the International Court of Justice (''ICJ'') supports the view under customary international law[68] that heads of state are ordinarily entitled to immunity from civil and criminal jurisdictions of other states.[69] This immunity does not cease even where the foreign head of state is accused of international crimes.[70] However, the ICJ stipulated in the same judgment that the immunities enjoyed under international law do not represent a bar to prosecution of heads of state before international criminal courts and tribunals - which is at stake with the al-Bashir case.[71] He is to

South African Government Information "Notes following the briefing of Department of International Relations and Co-operation's Director-General, Ayanda Ntsaluba" (31 July 2009), available at < http://www.info.gov.za/speeches/2009/09073110451001.htm > accessed 18 November 2016.

[65] '[o]fficial capacity as a head of state shall in no case exempt a person from criminal responsibility under the Statute', Article 27, Rome Statute.

[66] The same can be said of whether the SC has the authority to waive immunities of heads of state.

[67] *The Prosecutor v Omar Hassan Ahmad Al Bashir* (ICC-02/05-01/09-290), Submission from the Government of the Republic of South Africa for the purposes of proceedings under Article 87(7) of the Rome Statute, Pre-Trial Chamber II, 17 March 2017, para 57.

[68] International customary law is defined in Article 38(1)(b), Statute of the International Court of Justice, (33 UNTS 993), 26 June 1945 (hereinafter: ''ICJ Statute'') as 'a general practice accepted as law'. See also *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark, Federal Republic of Germany v The Netherlands),* Judgment, 20 February 1969, ICJ Reports (1969) 3, para 77; *Institut de Droit International*, Resolution on Immunities from Jurisdiction and Execution of Heads of State and Government in International Law, 26 August 2001.

[69] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgment, 14 February 2002, ICJ Reports (2002) 3, para 51.

[70] *Arrest Warrant* Case, ICJ Judgment, *supra* note 69, para 58.

[71] *Ibid*, para 61, *cf.* Article 27(2), Rome Statute.

be prosecuted by the ICC and not by a domestic court, and therefore he possibly does not enjoy immunity from prosecution.[72] Exactly this is why South Africa considers itself not to be bound by the ICC's arrest warrants. It argues that even if it accepts that there are under customary law no immunities for incumbent heads of state that are being sought by an international court for the commission of international crimes, the ICC still asks states and their domestic authorities to arrest these heads of state and precisely that request is illegal because according to the *Arrest Warrant* Case, a domestic authority cannot arrest that person. But once he is transferred to the ICC, the court does not violate the immunities of the head of state because the ICC is an international jurisdiction. Hence, the outcome of the *Arrest Warrant* Case does not resolve the contestation between the adherents of state sovereignty promoting the respect for immunity on the one hand, and the proponents of the fight against impunity on the other. Therefore, South Africa argued before PTC II that there is an inaudibility in the nature and scope of Article 98 of the Rome Statute, which carves out an exemption for states from cooperation based on immunity, and its relationship with Article 27, which stipulates that immunity is not a bar to the ICC's jurisdiction.[73] It further contended it wishes to adhere to the customary international rule that grants heads of state immunity when visiting other countries.[74] The state also cited[75] the PTC I and II decisions on the failure of the Democratic Republic of the Congo (''DRC''), Malawi and Chad to comply with the cooperation requests of the court.[76] In these decisions, the PTC recognized the inherent tension between Articles 27 and 98(1) but the Chambers nonetheless repeatedly considered that the states were not entitled to rely on Article 98(1) to

[72] Would Omar al-Bashir be tried before a Sudanese court, however, then he would enjoy immunity under international law. See *Arrest Warrant* Case, ICJ Judgment, *supra* note 69, para 61.

[73] D. Tladi, 'The ICC Decisions on Chad and Malawi: On Cooperation, Immunities and Article 98' 11 *Journal of International Criminal Justice* (2013) 199-221, at 201.

[74] *The Prosecutor v Omar Hassan Ahmad Al Bashir* (ICC-02/05-01/09-290), Submission from the Government of the Republic of South Africa for the purposes of proceedings under Article 87(7) of the Rome Statute, Pre-Trial Chamber II, 17 March 2017, paras 21-24.

[75] *Ibid*, paras 21-22.

[76] *The Prosecutor v Omar Hassan Ahmad Al Bashir* (ICC-02/05-01/09-139), Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 12 December 2011 (hereinafter: ''Decision on non-cooperation of Malawi''); *The Prosecutor v Omar Hassan Ahmad Al Bashir* (ICC-02/05-01/09-140-tENG), Decision Pursuant to Article 87(7) of the Rome Statute on the refusal of the Republic of Chad to Comply with the Cooperation Requests issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 13 December 2011 (hereinafter: ''Decision on non-cooperation of Chad 2011''); *The Prosecutor v Omar Hassan Ahmad Al Bashir* (ICC-02/05-01/09-151), Decision Pursuant to Article 87(7) of the Rome Statute on the refusal of the Republic of Chad to Comply with the Cooperation Requests issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber II, 26 March 2013 (hereinafter: ''Decision on non-cooperation of Chad 2013''); *The Prosecutor v Omar Hassan Ahmad Al Bashir* (ICC-02/05-01/09-195), Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, Pre-Trial Chamber II, 9 April 2014 (hereinafter: ''Decision on cooperation of DRC''). The PTC have also issued decisions on Uganda, Sudan and Djibouti, but these more or less reiterate what has been decided in the Malawi, Chad and DRC decisions.

justify their non-cooperation: no sitting head of state can claim immunity before the ICC under customary international law.[77]

More or less the same was decided by the Gauteng High Court that, after its interim order, handed down judgment on South Africa's refusal to arrest al-Bashir. The High Court contended that customary international law confers immunity to heads of state, but argued that Article 27 of the Rome Statute trumps this immunity when individuals are sought by the ICC for the commission of international crimes.[78] The South African Supreme Court of Appeal (''SCA'') reaffirmed this, but with a different line of reasoning. It was of the opinion that the South African government should have arrested al-Bashir under domestic law.[79] The government had violated national law given that the Rome Statute had been domesticated through the Implementation Act. According to the SCA, the Implementation Act excludes head of state immunity in relation to international crimes and the obligations of South Africa towards the ICC.[80] This is a departure from customary international law, but the SCA stipulated that South Africa is entitled to do so by Section 232 of the South African Constitution. This Section states that customary international will not be law in South Africa when it is inconsistent with the South African Constitution or an Act of Parliament (which the Implementation Act is).[81]

Interestingly, in the decision on DRC's and South Africa's failure to arrest al-Bashir, the PTC added a new motivation in that regardless of Sudan's non-state party status to the Rome Statute,

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[77] Decision on non-cooperation of Malawi, para 37; Decision on non-cooperation of Chad 2011, para 13; *The Prosecutor v Omar Hassan Ahmad Al Bashir* (ICC-02/05-01/09-302), Decision Pursuant to Article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al Bashir, Pre-Trial Chamber II, 6 July 2017 (hereinafter: ''Decision on non-compliance of South Africa''), paras 80, 81.

[78] *Southern African Litigation Centre v Minister of Justice and Constitutional Development and Others* (27740/2015) [2015] ZAGPPHC 402; 2016 (1) SA 1 (GP), para 28.8.

[79] *Minister of Justice and Constitutional Development v Southern African Litigation Centre*, Appeal Judgment, *supra* note 64, para 103.

[80] *Ibid*, para 102.

[81] The national executive reacted by announcing the withdrawal from the Rome Statute. The government wanted to appeal the SCA's decision at the Constitutional Court but withdrew its application because it views the Implementation Act as being 'in conflict with and inconsonant with' the provisions of the Diplomatic Immunities and Privileges Act 2001 (which for the South African domestic order recognizes in Section 4 that heads of state are immune from civil and criminal jurisdiction to the extent afforded to them under customary international law). Instead of appealing the SCA's decision, the government argued that 'the effect of the withdrawal from the Rome Statute as well as the repeal of the Implementation Act thus completes the removal of all legal impediments inhibiting South Africa's ability to honor its obligations relating to the granting of diplomatic immunity under the international law as provided for under our domestic legislation.' See 'Al-Bashir: Government will no longer go to Court', (*Independent Online*, 21 October 2016) < https://www.iol.co.za/news/crime-courts/al-bashir-government-will-no-longer-go-to-concourt-2082424 > accessed 27 October 2016; South African Government Press Release, 'Minister Michael Masutha: Media briefing on International Criminal Court and Sudanese President Omar Al Bashir', 21 October 2016, available at < https://www.gov.za/speeches/minister-michael-masutha-media-briefing-international-criminal-court-and-sudanese-president > accessed 17 October 2017. See also Du Plessis, *supra* note 62, at 363.

the UNSC referral to the ICC waived the immunity of al-Bashir and therefore, states are obliged to arrest al-Bashir when he enters the territory of a state party to the Rome Statute.[82] The Chamber held that by virtue of the language used in paragraph 2 of Resolution 1593[83] 'the SC implicitly waived the immunities granted to Omar Al Bashir under international law and attached to his position as a Head of State' and also found that the referral placed Sudan in a similar position as a state party.[84] This approach is supposed to nuance the friction between Articles 27 and 98 of the Rome Statute and thus to address South Africa's particular concern that the non-existence of heads of state immunity before international courts seems to trump the existing heads of state immunity before domestic judiciary: the UNSC referral actually stripped al-Bashir from *any* immunity, whether it be before international or domestic courts.

The tension between the judicial interpretation of the doctrine of heads of state immunity and South Africa's need to fulfil its self-appointed role as a mediator for peace in conflicts in Africa is the most pertinent motivation behind South Africa's (cancelled) withdrawal. Nevertheless, the growing impression that the ICC focuses prejudicially on African states and, more generally, the influence the African Union has in these issues create pressure and polemic. What remains subject of discussion is what perception and reality is when it comes to the relationship between African states, the African Union and the International Criminal Court.[85]

[82] Decision on cooperation of DRC, para 29; Decision on non-compliance of South Africa, paras 83, 93.

[83] United Nations Security Council, Resolution 1593 (31 March 2005) UN Doc. S/RES/1593.

[84] Decision on cooperation of DRC, para 29; Decision on non-compliance of South Africa, paras 87-88, 91 and para 93 in particular.

[85] For further information that opposes the above said, see A. Smeulders, M. Weerdesteijn and B. Hola, 'The Selection of Situations by the ICC: An Empirically Based Evaluation of the OTP's Performance and Africa and the ICC, Perceptions of Justice', 15 *International Criminal Law Review* (2015) and J. Vilmer, 'The African Union and the International Criminal Court: counteracting the crisis' 92 *International Affairs,* 1 November 2016, 1319-1342.

III. International Law on Treaty Withdrawal

South Africa's withdrawal from the Rome Statute is contested, but it is not impossible to renounce the multilateral treaty. The aim of this chapter is to examine if established international law on treaty withdrawal suggests that a unilateral withdrawal from the Rome Statute is invalid - *i.e.* what the limitations under international law for unilateral withdrawal are. Therefore, this chapter assesses the mechanisms that are put in place in order to bring about the withdrawal of treaties in general, and the Rome Statute more specifically. What is more relevant with regard to this research is how the Rome Statute itself deals with denunciation of it, rather than what the general convention on the law of treaties regulates. Notably, the legal principle *lex specialis derogat legi generali* determines that if two laws govern the same factual situation, the special law governing a specific subject matter overrides the general law. For reasons of completeness, however, it is important to highlight the general rules regarding treaty withdrawal. What is important too is a definition of key terms. 'Withdrawal' and 'denunciation' are used interchangeably to refer to a unilateral act by which a state that is currently a party to a treaty ends its membership of that treaty.[86] But, denunciation is more usually referred to in connection with withdrawal from a bilateral treaty.[87] Because the Rome Statute is a multilateral treaty, further chapters will refer to 'withdrawal'.

§ 3.1 The Vienna Convention on the Law of Treaties 1969

The VCLT itself is not retroactive according to Article 4 and therefore does not apply to treaties concluded before its own entry into force.[88] The Rome Statute entered into force on 1 July 2002 and the Vienna Convention became effective on 27 January 1980, so the provisions of the VCLT are applicable to the Rome Statute, moreover because the Vienna Convention applies to treaties between states 'in written form and governed by international law.'[89] However, the VCLT applies only for states that have become bound by the Convention itself. Up to now, South Africa is not a state party to the VCLT, but this does not prevent any customary rules similar to those found in the Convention from applying.[90] The Vienna Convention itself

[86] L. Helfer, 'Terminating Treaties', in D. Hollis (ed), *The Oxford Guide to Treaties* (Oxford: Oxford University Press, 2012) 634-649, at 635; T. Giegerich, 'Termination and Suspension of the Operation of Treaties', in O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (New York: Springer Heidelberg, 2012) 963-967, at 951.
[87] R. Jennings and A. Watts, *Oppenheim's International Law* (Essex: Longman, 1992), at 1296, fn. 1.
[88] M. Dixon, *Textbook on International Law* (Oxford: Oxford University Press, 2013), at 62.
[89] Article 2(1)(a), Vienna Convention on the Law of Treaties 1969 (1155 UNTS 331), 23 May 1969 (hereinafter: ''Vienna Convention'').
[90] United Nations Treaty Collection, Depositary, 'Status of Treaties', Vienna Convention on the Law of Treaties < https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en > accessed 21 August 2017.

preserves the operation of customary international law: Articles 3 and 4 state that nothing shall preclude the operation of rules set forth in the Convention to treaties outside its scope if such rules exist 'independently of the Convention'- that is, in customary law.[91] This suggests that the VCLT is in part a codification of customary international law as some of the rules expressly stated in the VCLT also exist independently, meaning that some of its provisions are binding on non-party states, such as South Africa. If this is the case with the provisions on treaty withdrawal is a matter of debate simply because it is difficult to identify precisely all of the provisions which also form part of customary law. What is indicative for considering the rules of withdrawal as customary international law - and binding upon South Africa - is that the ICJ decided in one of the *Fisheries Jurisdiction* Cases that the rules allowing treaties to become inapplicable due to a fundamental change of circumstances pursuant to Article 62 VCLT (*clausula rebus sic stantibus)* 'may in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances.'[92] The same has been decided regarding the rules on treaty termination on account of breach.[93] This suggests that, by analogy, the provisions on withdrawal can be seen as customary international law. The effect of withdrawal and termination of treaties is the same: to discontinue the membership of a multilateral agreement and the obligations that come with it. That Articles 60 and 62 VCLT are viewed as customary law by particularly the ICJ is important also because that court is the principal judicial organ of the UN and considered an authoritative expounder and developer of international law, particularly in the settlement of international disputes.[94] Even though the principal function of the ICJ is the application of law in dispute settlement,[95] it plays a major role in the development and clarification of the rules and principles of international law.[96]

[91] Dixon, *supra* note 88, at 63.

[92] *Fisheries Jurisdiction Case (United Kingdom v Iceland),* Judgment, 25 July 1974, ICJ Reports (1974) 3, para 18; I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 1984), at 20; *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia),* Judgment, 25 September 1997, ICJ Reports (1997) 7, para 55.

[93] Article 60, Vienna Convention. See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion, 21 June 1971, ICJ Reports (1971), para 94.

[94] M. Amr, *The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations* (The Hague: Kluwer Law International, 2003).

[95] According to Article 59, ICJ Statute, '[t]he decision of the Court has no binding force except between the parties and in respect of that particular case.' This proviso was primarily intended to underline the opinion that the Court should not be considered a lawmaking or law creating institution. See A. Zimmerman, C. Tomuschat and K. Oellers-Frahm, *The Statute of the International Court of Justice: A Commentary* (Oxford: Oxford University Press, 2012), at 1233.

[96] H. Lauterpacht, *The Development of International Law by the International Court* (London: Stevens & Sons Ltd, 1958), at 5.

Part V of the Convention deals with the invalidity, termination and suspension of the operation of treaties and sets out exceptions to the general international law principle *pacta sunt servanda*, which means as much as that existing treaty obligations need to be respected.[97] Article 42(2) refers to the contractual obligations of individual state parties and defines that withdrawal may take place first and foremost as a result of the application of the provisions of the treaty in question. The VCLT's exit provisions are, together with those set forth in the treaty itself, intended to be exhaustive. Consequently, the VCLT recognizes in Articles 54(a) and 57(a) that a member state may withdraw from the multilateral agreement according to the terms of the treaty itself. Under the legal maxim *lex specialis derogat legi generali,* Article 127 of the Rome Statute regulates the manner in which a state's right to withdraw from the Statute must be effectuated on the international plane. South Africa is bound by the Rome Statute as it has ratified the treaty on 27 November 2000 and parliament has domesticated it in terms of the Implementation Act.

§ 3.2 Article 127 of the Rome Statute: No Substantive Procedure

The Rome Statute's possibility to withdraw gives the treaty a flexibility factor. The option to withdraw is regarded as 'sufficiently flexible not to seem like a definitive block on the will of member states' because it is only restricted by the Statute's goal and object.[98] From a different point of view, however, the possibility of withdrawal can be seen as threatening to the court's universality and future functioning because, as the next paragraph will also will confirm, Article 127 is entirely open-ended in the sense that it does not require a state to justify its decision to withdraw.[99] On the contrary, notices of withdrawal are generally short letters that inform the treaty depository that the state is quitting a particular agreement on a specified future date.[100] The South African instrument of withdrawal confirms this seeing as how it is a stylized letter that explains in a few short paragraphs the arguments for withdrawal, the legal basis and the date on which the withdrawal must take effect. Indeed, South Africa gave reasons for withdrawal, but this is not necessary. It is probably more custom to explain why it undertakes a legal course of action.[101]

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[97] Article 26, Vienna Convention.

[98] Alain Pellet, 'Entry into Force and Amendment', in A. Cassese, P. Gaeta, J. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (United States: Oxford University Press, 2002) 145-184, at 167.

[99] R. Clark, 'Article 127', in O. Triffterer and K. Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Munich: C.H. Beck, 2016), at 2322; Cassese, *supra* note 98, at 171.

[100] H. Blix and J. Emerson, *The Treaty Maker's Handbook* (New York: Oceana Publications, New York, 1973), at 114-16.

[101] Triffterer and Ambos, *supra* note 99, at 2322.

What further confirms the objectivity of the withdrawal process is the revoking document of the notification of withdrawal of 7 March 2017.[102] As explained in the introduction, South Africa repealed its instrument of withdrawal in response to the Gauteng High Court's decision, in which the government's enunciated withdrawal was held to be invalid and unconstitutional.[103] There are no provisions governing the step of rescinding the notification of withdrawal - while it does have legal consequences[104] - so South Africa only informed the UNSG of this step in a very short letter that referred to the judgment of the Gauteng High Court and explained that the government wished to adhere to it. Notwithstanding the fact that Article 127 is silent on the matter of withdrawal of the instrument of withdrawal, it is possible for a state to revoke a notification of withdrawal.[105]

In sum, the United Nations Secretary-General only wants an official notice of withdrawal from a state and does not demand a justification for doing so.[106] Therefore, internationally, unilateral withdrawal from the Rome Statute is possible. Compliance with domestic constitutional requirements for withdrawal is not a matter of concern for the UNSG or international law as a whole. Generally, the principle of state sovereignty determines that no other person, state, intergovernmental organization, *etc*. can interfere in the national affairs as the state itself has the ultimate authority and jurisdiction over its people and territory (within the limitations of international law). This corresponds to the possibility of unilateral withdrawal from the Rome Statute. States may determine if and when they want to withdraw without an overarching body demanding them to justify the withdrawal or dictating them as to how and by whom the decision to withdraw must be taken.[107]

§ 3.3 Limitations to Withdrawal under Article 127 of the Rome Statute

Article 127 of the Rome Statute stipulates:

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[102] C.N.121.2017.TREATIES-XVIII.10, Rome Statute of the International Criminal Court, Depositary Notification, South Africa < https://treaties.un.org/doc/publication/CN/2017/CN.121.2017-Eng.pdf > accessed 30 October 2017.

[103] *Democratic Alliance v Minister of International Relations and Cooperation,* High Court Judgment, *supra* note 9, para 84.

[104] Since the withdrawal of withdrawal means that South Africa remains a member to the ICC.

[105] Legal scholars 'believe it to be the case' and argue that 'it must surely be the case' that a state could withdraw its notification at any time before the withdrawal becomes effective. See Triffterer and Ambos, *supra* note 99, at 2323; T. Slade and R. Clark, 'Preamble and Final Clauses' in Roy S. Lee (ed), *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results* (The Hague: Kluwer Law International, 1999) 421-450, at 446.

[106] Which is reaffirmed by the Gauteng High Court in *Democratic Alliance v Minister of International Relations and Cooperation,* High Court Judgment, *supra* note 9, para 50.

[107] *Ibid*, para 48.

1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.
2. A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.

Hence, the Rome Statute gives the possibility to unilateral cessation by a state, but it also specifies the conditions under which it must take place. *Unilateral*, because, as explained above, no international institution will check whether the instrument of withdrawal is processed in a constitutionally sound way. Regarding the substance of the instrument, there is no limitation on what grounds a state may withdraw under Article 127. Only regarding the technicalities of withdrawal exist a few formal requirements.

§ 3.3.1 A Legitimate Domestic Authority and the Depositary Function of the UNSG

Article 127(1) stipulates that 'a State Party' is allowed to withdraw from the Rome Statute, but it does not define the particular domestic forum that has to provide the instrument. This criterion can be inferred from Article 67(2) VCLT which stipulates that the notice of withdrawal must be signed by the head of state, head of government, Minister of Foreign Affairs, or, if not signed by one of those, the representative of the state communicating the instrument.[108] Therefore, in most political systems, it lays in the power of the national executive to lodge a notification. South Africa has complied with this limitation to withdrawal because the notice was signed by the Minister of International Relations and Cooperation, the foreign minister of the South African government.

[108] 'If the instrument is not signed by the Head of State, Head of Government or Minister of Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers'. According to Article 7(2)(a) of the Vienna Convention, heads of state, heads of government and Ministers of Foreign Affairs are considered as representing their state for the purpose of performing all acts relating to the conclusion of a treaty.

Moreover, a state's executive can withdraw by sending a written notice[109] to the UNSG, who exercises the depositary function.[110] When the Secretary-General receives a notice of withdrawal, he verifies that the withdrawal of the treaty is allowed and that the conditions therefor have been met. He informs the other state parties[111] and specifies the date of effect of the withdrawal.[112] This has been done with regard to the South African instrument of withdrawal on 25 October 2016.[113]

§ 3.3.2 One Year Notification Period

The most common unilateral exit clauses require advance notice of a decision to withdraw.[114] This corresponds to the Rome Statute: a limitation to withdrawal is that it takes effect one year after the receipt of the notification, unless the state in question specifies a later date. A state that uses the instrument of withdrawal to threaten the ICC with the aim of shaping the direction taken by the court may perhaps offer a longer period than a year. This is possible as it is the power and discretion of the withdrawing state - although one might argue that the state behaves unreasonably.[115] South Africa, however, has mentioned in its instrument of withdrawal of 19 October 2016 that the withdrawal had to take effect one year after the date of its receipt by the Secretary-General.[116]

Hence, the limitations the Vienna Convention and Article 127(1) of the Rome Statute pose to the possibility of withdrawal from the Statute are that the instrument must be deposited i) by a legitimate authority ii) at the UNSG and iii) withdrawal takes effect after one year. Additionally, Article 127(2) stipulates a fourth - not so much limitation but more a clarification of the process: obligations incurred while being a member to the Rome Statute will continue to exist after withdrawal.

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[109] *Ibid*, Article 67(1).

[110] According to the Treaty Handbook of the UN, when a treaty contains provisions on withdrawal, the UNSG is guided by those provisions. See *Treaty Handbook, Prepared by the Treaty Section of the Office of Legal Affairs of the United Nations*, Sales No. E.12.V.1, Revised edn of 2012, at 28. See also *Final Clauses of Multilateral Treaties Handbook*, United Nations, Sales No. E.04.V.3, at 109.

[111] An act of withdrawal 'shall be carried out through an instrument communicated to the other parties.' Article 67(2), Vienna Convention.

[112] *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, Prepared by the Treaty Section of the Office of Legal Affairs*, ST/LEG/7/Rev.1, Sales No. E.94.V.15, 1994, at 47.

[113] C.N.786.2016.TREATIES-CVIII.10, Rome Statute of the International Criminal Court, Depositary Notification, South Africa, United Nations, New York, as available on < https://treaties.un.org/doc/Publication/CN/2016/CN.786.2016-Eng.pdf > accessed 6 January 2018.

[114] Helfer, *supra* note 86, at 643.

[115] Lee, *supra* note 105, at 447.

[116] C.N.786.2016.TREATIES-CVIII.10, Rome Statute of the International Criminal Court, Depositary Notification, South Africa, United Nations, New York, as available on < https://treaties.un.org/doc/Publication/CN/2016/CN.786.2016-Eng.pdf > accessed 6 January 2018.

§ 3.4 Consequences of Withdrawal from the Rome Statute on the International Level

Withdrawal from an international agreement is not suspensive and article 43 of the Vienna Convention states that withdrawal does not affect the state's other obligations under international agreements or customary international law.[117] Moreover, the multilateral treaty in question continues to produce its effects with respect to other member states to the agreement.[118] More importantly, a state that successfully opts out from the Rome Statute will still have to fulfill any obligations which it accrued while being a state party.[119] This prevents, for example, the use of withdrawal as a means of avoiding the ICC's jurisdiction when a state finds its nationals or leaders targeted by investigations or prosecutions commenced before withdrawal becomes effective (notwithstanding the possibility that it would get very difficult for the Prosecutor to obtain the cooperation of a withdrawing state in these situations).[120] If member states could refuse cooperation by withdrawing from the Statute, the ICC's jurisdiction - which fully depends on their cooperation in the conduct of investigations - would be reduced to a merely theoretical concept.

The first part of the second sentence of Article 127(2) covers obligations that arise after the state has sent its notification, but before withdrawal becomes effective.[121] The continuing obligations referred to in this sentence are set out in Part 9 of the Statute, and include cooperation pertaining to investigations and arrest and surrender of individuals.

The second part of the second sentence of Article 127(2) stipulates an example of the principle that past duties survive treaty withdrawal, namely cooperation in investigations and prosecutions. Withdrawal shall not 'prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.' It follows from this part that a state whose nationals have been subject to a referral to the Prosecutor by another state party or by the Prosecutor acting *proprio motu* is not able to terminate such proceedings by withdrawing.[122] The date on which withdrawal becomes effective is the relevant date by which a pending investigation or trial

[117] W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2016), at 1535. This means that the obligations for South Africa as state party to the Genocide Convention (one of the international crimes against peace as codified in Article 5 of the Rome Statute) are not affected by withdrawal.

[118] Dörr and Schmalenbach, *supra* note 86, at 952.

[119] Article 70(1)(b), Vienna Convention and Article 127(2), Rome Statute.

[120] Schabas, *supra* note 117, at 1535.

[121] *Ibid*, at 1536. Article 127(2) indicates that withdrawal does not affect the obligation to cooperate with the Court 'in connection with criminal investigations and proceedings in relation to which the withdrawing state had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective [...].'

[122] Triffterer and Ambos, *supra* note 99, at 2324; Lee, *supra* note 105, at 446.

must be commenced to render something 'under consideration by the Court'. Say there are ongoing crimes against humanity at the time the notification of withdrawal is given. So long as the state referral or a *proprio motu* action results in an investigation or prosecution commenced during the one year notification period, the state in question will still have to cooperate with the ICC in this because the state's obligations under the Rome Statute continue when the state is no longer a member of the ICC.[123]

Thus, despite the fact that the UNSG only demands an official notification of withdrawal, attempts to withdraw from the Statute that do not comply with ongoing cooperation requirements will be viewed as a treaty breach for which individual states will be accountable, even after they elapse the one year period.[124]

§ 3.5 Consequences of Withdrawal from the Rome Statute for South Africa

From the analysis above, it is possible to note that it is difficult to become discharged of the obligations a state had under the Rome Statute for Article 127(2) rules out the possibility of withdrawal ending proceedings in hand.[125] The case of South Africa's refusal to arrest and extradite President Omar al-Bashir to the ICC further illustrates this. As explained in paragraph 2.3, the international doctrine of immunity of heads of state cannot be invoked to oppose a prosecution by the ICC.[126] South Africa was obliged to arrest al-Bashir when he visited the country in June 2015. In accordance with the second sentence of Article 127(2), South Africa will still be obliged to arrest and hand al-Bashir over to the ICC should he visit the country again. It revoked its instrument of withdrawal and thus the Rome Statute's obligations continue to be in force, but even when South Africa would file a new notification of withdrawal the state will remain obliged to arrest the Sudanese president. This fact seems to be overlooked by the South African government since a (primary) reason for the government to withdraw from the ICC is the conflicting obligations to arrest sitting heads of state under the Rome Statute on the one hand and the rule under customary international law that recognizes heads of state

[123] *Ibid.*

[124] The same counts for attempts to withdraw that do not comply with the notice procedure (*i.e.* obligation to deposit a written notification at the Secretary-General).

[125] See also section 2(2) of the Repeal Bill: 'Any cooperation with the Court in connection with criminal investigation and proceedings in relation to which the Republic had a duty to cooperate and which commenced prior to the effective date and the continued consideration of any matter which was already under consideration by the Court prior to the effective date contemplated in Article 127 of the Rome Statute, must be dealt with and concluded in terms of the provisions of the Implementation of the Rome Statute of the International Criminal Court Act, 2002 (Act No. 27 of 2002), as if that Act had not been repealed in terms of section 1 of this Act'.

[126] *Arrest Warrant* Case, ICJ Judgment, *supra* note 69, para 61; Decision on non-cooperation of Malawi, para 47; Decision on non-cooperation of Chad 2011, para 14; Decision on non-compliance of South Africa, para 102.

immunity before domestic courts on the other hand.[127] By implication, the government suggested that by withdrawing from the Statute, the treaty obligations would no longer apply for South Africa.[128] But the analysis in this chapter renders an alternative conclusion with regard to obligations incurred while being a member to the Rome Statute - exactly the obligations in respect of the disputed doctrine of heads of state immunity.

The explanation above begs the question whether withdrawal from the Rome Statute is a desirable direction seeing as how Article 127(2)'s wording is framed on the consequences of withdrawal for *state obligations*, but does not include possible consequences for the *rights of individuals* pursuant to the Rome Statute. This focal point is a matter of domestic affairs which will be discussed in chapters five and six.

Finally, a consequence of withdrawal on the international level will not be that the ICC ceases to exist. Paragraph 2.2 mentions that the current (political) situation in the African Union could inspire a mass exodus from the International Criminal Court. It is highly unlikely to happen, but if the number of parties to the Statute falls to a figure less than sixty (the required amount for its entry into force[129]), this situation will have no effect on the court's functioning.[130] The Rome Statute - and therefore the ICC's activities - will continue to exist.

[127] Declaratory Statement by the Republic of South Africa on the Decision to Withdraw from the Rome Statute of the International Criminal Court, *supra* note 1, at 2.
[128] *Democratic Alliance v Minister of International Relations and Cooperation,* High Court Judgment, *supra* note 9, para 65.
[129] Article 126(1), Rome Statute, *c.f.* Article 55, Vienna Convention.
[130] Cassese, *supra* note 98, at 173; Schabas, *supra* note 117, at 1535.

IV. South Africa's Notice of Withdrawal and the Domestic Legal Order

The previous chapter described how public international law regulates treaty withdrawal, and, more specifically, how withdrawal from the Rome Statute can be effectuated by Article 127 of the Statute. As this is explained from the international legal point of view, withdrawal does not demand parliamentary involvement. However, how membership must be revoked domestically is a fundamentally different legal situation than the one described in chapter three.[131] Hence, this chapter analyzes the domestic situation concerning South Africa's withdrawal from the Rome Statute. The first paragraph introduces South Africa's state structure for brief background information on the constitutionally divided tasks. This then allows for a description of the rules on joining international agreements which will be illustrated by the implementation of the Rome Statute. The subsequent paragraph scrutinizes the reasoning of why the Gauteng High Court concluded that the government's attempted withdrawal was both illegal and invalid. Ultimately, this chapter will illustrate what limitations to withdrawal domestic law poses, and whether unilateral withdrawal is actually possible.

§ 4.1 The Government of the Republic of South Africa

South Africa is a parliamentary democracy composed of three interconnected branches: Parliament, the executive and the judiciary. They are all subject to the South African Constitution 1996, which is the supreme law in the state. The Constitution sets up the separation of powers between the tree branches.[132]

The legislative authority is held by the Parliament of South Africa.[133] It consists of the National Assembly (lower house) (''NA'') and the National Council of Provinces (upper house) (''NCOP'').[134] The function of the NA is to represent the South African people, while the NCOP represents the provinces.[135] Both ensure that citizens and the provinces can participate in the legislative process provided for under the Constitution. Parliament passes legislation,

[131] *Democratic Alliance v Minister of International Relations and Cooperation*, High Court Judgment, *supra* note 9, para 50.

[132] The Constitution does not expressly mention the separation of powers, but the Constitutional Principles that formed part of the interim Constitution required that the final Constitution contained a separation of powers between the three branches of government as well as the appropriate checks and balances on the exercise of power of each branch to 'ensure accountability, responsiveness and openness.' See P. de Vos and W. Freedman, *South African Constitutional Law in Context* (Cape Town: Oxford University Press South Africa, 2014), at 60; Constitutional Principle VI of Schedule 4 of the interim Constitution of the Republic of South Africa, 1993 [No. 200 of 1993] < http://www.gov.za/documents/constitution/constitution-republic-south-africa-act-200-1993 > accessed 11 June 2017.

[133] Section 43(a) in conjunction with Section 44(1) Constitution of the Republic of South Africa, 1996 [No. 108 of 1996] - G17678 (hereinafter: ''South African Constitution''). See *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) SA 416 (CC), para 38.

[134] Section 42(1), South African Constitution.

[135] *Ibid*, Section 42(3)(4).

scrutinizes and oversees executive action, and provides a national forum for public consideration. The major political parties in parliament are Democratic Alliance (''DA''), African National Congress (''ANC''), and the Economic Freedom Fighters (''EFF''). ANC became the leading political party after the end of apartheid in 1994. Currently, the ANC's party leader Jacob Zuma is the President of South Africa. DA is the main opposition party and the EFF is a more radical version of the ANC.

The executive authority is vested in the President and his/her Cabinet.[136] The executive branch consists of the President, the Deputy President and the Ministers. The executive is *inter alia* responsible for implementing national legislation, assenting to and signing Bills, and referring a Bill (back) to the NA or the Constitutional Court for a review of the Bill's constitutionality.[137] The President is also responsible for the negotiation and signing of all international agreements.[138]

The third branch of the government is the judiciary, which consists of the Constitutional Court, the Supreme Court of Appeal, seven High Courts and the Magistrates' Courts.[139] A judiciary's function and power is to declare invalid any legislation inconsistent with the Constitution.[140] The High Courts are provincially divided and have general jurisdiction over their defined areas.[141] These courts act as a court of first instance for cases outside the jurisdiction of the Magistrates' Courts. That jurisdiction is applicable for the case about the notice of withdrawal.

§ 4.2 Implementation of the Rome Statute in South Africa

South Africa has a dualist system, which means that constitutional requirements must be satisfied before international law becomes binding domestically and is applicable to the state and its nationals. Under this circumstance, it is the executive's authority to negotiate and sign international agreements, a task vested in him/her in terms of Section 231(1) of the South African Constitution.[142] This legal step does not automatically bind the state unless it is an agreement of a technical, administrative or executive nature, or one which does not require either ratification or accession.[143] Those agreements do not have to go through a parliamentary process. The Rome Statute, however, is not a treaty of this nature because ratification and

[136] *Ibid*, Section 85.
[137] *Ibid*, Section 84(2)(a)(b)(c).
[138] *Ibid*, Section 231(1).
[139] *Ibid*, Section 166.
[140] P. de Vos and W. Freedman, *supra* note 132, at 26.
[141] Section 169, South African Constitution.
[142] *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* (CCT31/99) [2000] ZACC 1; 2000 (2) SA 674 (CC), para 20.
[143] Section 231(3), South African Constitution.

implementation of this treaty creates rights and obligations for citizens. The implementing legislation protects individuals against particular international crimes committed by state party's' nationals on or a state party's' territory. It does so by establishing a comprehensive cooperative scheme for South Africa *vis-à-vis* the ICC and providing a statutory basis for domestic prosecution of international crimes against peace (in line with the principle of complementarity).[144]

Hence, the Rome Statute can only become national law in South Africa when there are taken domestic acts of transformation to incorporate the Statute nationally.[145] Put differently, a signed international agreement that has not been enacted in South African law cannot be a source of rights and obligations.[146] More specifically, the constitutional requirements for the ratification (or accession to) and implementation of a treaty are in Section 231 of the South African Constitution. This Section serves to secure parliament's participation in the decision-making process when the executive enters into rights and obligations at the international level.[147] The power of legislative incorporation is constitutionally conferred upon parliament by virtue of Section 231(4) of the South African Constitution. As explained by former judge Ngcobo in *Glenister,* '[t]he constitutional scheme of Section 231 is deeply rooted in the separation of powers, in particular the checks and balances between the executive and the legislature.'[148] Subsection 2 and 4 restrain the executive's power to conclude treaties as follows: first, the national executive needs to obtain consent in the form of an approval by resolution in parliament. Once parliament approves the agreement, internationally the state becomes bound

[144] Pursuant to Articles 88 and 17, Rome Statute.

[145] 'International conventions do not become part of the municipal law of our country, enforceable at the instance at the instance of private individuals in our courts, until and unless they are incorporated into the municipal law by legislative enactment'. See *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others* (CCT17/96) [1996] ZACC 16; 1996 (8) SA 672 (CC), para 26.

[146] *Glenister v President of the Republic of South Africa and Others* (CCT48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC), para 92.

[147] F. Sucker, 'Approval of an International Treaty in Parliament: How Does Section 231(2) 'Bind the Republic'' *Constitutional Court Review* 2013 417-434, at 422.

[148] *Glenister v President of the Republic of South Africa and Others*, Constitutional Court Judgment, *supra* note 146, para 89. Yet, this does not mean that South Africa has a strict separation of powers between parliament and the executive branch. For example, Section 73(2) allows involvement of the executive in the performance of the legislative functions by allowing the Cabinet or Deputy Ministers to introduce Bills in the NA. See P. de Vos and W. Freedman, *supra* note 132, at 66. For case law on this very subject, see *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* (CCT27/95) [1995] ZACC 8; 1995 SA 877 (CC). This case involved a challenge to provisions in an Act of Parliament which delegated powers to the President, allowing him to amend an Act by proclamation.

by it.[149] Yet, domestically, the process is not completed.[150] After the executive has gained consent, a treaty becomes binding upon the state when parliament enacts it through national legislation.[151] In other words, 'the legislative act which incorporates the treaty into domestic law has the effect of transforming an international obligation that binds the executive on the international level into national legislation that binds the state and its citizens as a matter of domestic law.'[152] Regarding the Rome Statute, this process took place by drafting the Implementation of the Rome Statute of the International Criminal Court Act No. 27 of 2002 in accordance with the South African Constitution. Section 3(a) of this Act provides for the creation of a framework to ensure the effective domestication of the Rome Statute. The Implementation Act incorporates the substantive criminal law of the Rome Statute with direct reference, via a Schedule appended to the Act, of the definitions of the crimes provided for in the Rome Statute.[153] The Implementation Act was enacted on 18 July 2002 and came into operation on 16 August 2002. South Africa became the first African state to give effect to the provisions the Rome Statute, which was quite momentous because prior to the Act, South Africa had no national legislation on the subject of international war crimes, genocide and crimes against humanity.[154]

With the South African government and its Constitution outlined, it is possible to assess how the Gauteng High Court has dealt with the practical and legal concerns over the national executive's notice of withdrawal of 19 October 2016.

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[149] Article 2(1)(b), Vienna Convention provides that the act of approving a treaty is an 'international act [...] whereby a State established on the international plane its consent to be bound by a treaty.' This constitutes an undertaking at the international level to take steps to comply with the substance of the agreement (which has not yet been given effect by either incorporating the agreement into South African law or taking other steps to bring South African law in line with the agreement to the extent they do not already comply). An international consequence of treaty approval is that a failure to observe the provisions of the agreement may result in South Africa incurring responsibility towards other signatory states. See *Glenister v President of the Republic of South Africa and Others*, Constitutional Court Judgment, *supra* note 146, paras 91, 92.

[150] Unless it is a self-executing international agreement which becomes South African law upon such approval unless it is inconsistent with the Constitution or an Act of Parliament. *Ibid*, para 90.

[151] Section 231(4), South African Constitution. There are four principal methods employed to transform treaties into municipal law. The simplest technique of incorporation is considering the pre-existing legislation sufficient to give effect to subsequent treaty obligations. Second, the treaty may be included as a schedule to a statute. Third, an enabling Act of Parliament may grant the executive the power to bring a treaty into effect in municipal law by means of proclamation or notice in the Government Gazette (this proclamation effectively amounts to a simplified incorporation procedure for a large number of similar agreements). In case of the Rome Statute, however, the fourth method was used: the provisions of a treaty are embodied in the text of an Act of Parliament. See E. de Wet, H. Hestermeyer and R. Wolfrum, *The Implementation of International Law in Germany and South Africa* (Pretoria: University Law Press, 2015), at 31.

[152] *Glenister v President of the Republic of South Africa and Others*, Constitutional Court Judgment, *supra* note 146, para 94.

[153] G. Werle, L. Fernandez and M. Vormbaum, *Africa and the International Criminal Court* (The Hague: T.M.C. ASSER PRESS 2014), at 66.

[154] M. Du Plessis, 'South Africa's Implementation of the ICC Statute: An African Example' 5 *Journal of International Criminal Justice* 2007 460-479, at 461.

§ 4.3 The Constitutional Challenge at the Gauteng High Court

Before the court, DA questioned the constitutional validity of the executive's notice initiating South Africa's withdrawal from the Rome Statute. DA's challenge was predicated on whether parliamentary approval and repeal of the Implementation Act were required before a notice of withdrawal can be given and if so, whether the executive was allowed to seek approval after the notice had been delivered.

The point of departure here is Section 231 of the Constitution. As explained in the previous paragraph, Section 231(1) confers upon the executive the power to conduct international relations and conclude treaties. But, the constitutional scheme is rooted in the separation of powers as reflected by Subsection 2 and 4: any international agreement that creates rights and obligations for citizens must be approved by parliament to take effect in the country. That process is completed by parliament enacting such international agreement as national law.

The debate before the Gauteng High Court, however, was not about treaty-making and the domestication of international agreements. It was about the *reverse process,* where the government wants to withdraw from an international agreement. DA argued since it is parliament that must approve a treaty and pass legislation before it can bind the country, it should be the same *vice versa*: it must be parliament who decides if and when a treaty ceases to bind the country before the executive may deliver a notice of withdrawal.[155] Obviously, the national executive took the opposite view.[156] The gist of its legal argument was that prior parliamentary approval is not required since Section 231 contains no express provision that says so and it should not be read into the Constitution. To substantiate this, the executive argued that the conclusion of treaties is the executive's primary role and parliamentary approval is only required in order for a concluded treaty to become binding.[157] Hence, ratification of a treaty is a function of the executive and, by the same token, undoing the conclusion of a treaty - 'unsigning' it - is also for the executive to do, without preceding parliamentary involvement necessitated. Moreover, the executive drew an analogy to international law in that a notice of withdrawal from a treaty does not require approval in international law. Consequently, DA contended for a construction of the Constitution which departs from international law.[158]

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[155] *Democratic Alliance v Minister of International Relations and Cooperation,* High Court Judgment, *supra* note 9, para 36.

[156] The national executive was represented by three respondents: the Minister of International Relations and Cooperation (responsible for signing and delivering the impugned notice), the Minister of Justice and Correctional Services (responsible for the administration of the national legislation that domesticated the Rome Statute) and the President of the Republic of South Africa (responsible for negotiating and signing all international agreements).

[157] *Democratic Alliance v Minister of International Relations and Cooperation,* High Court Judgment, *supra* note 9, paras 37-42.

[158] *Ibid,* para 40.

The High Court did not agree with the government and unequivocally determined that the executive breached the separation of powers by bypassing parliament. First, it highlighted that '[w]hile the notice of withdrawal was signed and delivered in the conduct of international relations and treaty-making as an executive act, it still remained an exercise in public power, which must comply with the principle of legality and is subject to constitutional control.'[159] Second, it emphasized that it is parliament's role to make laws. Based on these constitutional guidelines, the court found that it could not accept the government's statement that the notice of withdrawal is not subject to prior parliamentary assent.

The crux of the judgment lay in the decision that the power to bind the state to the Rome Statute is expressly conferred on parliament and it must therefore, perforce, be parliament that has the power to decide whether and when the Statute ceases to bind the state.[160],[161] Conversely, the executive argued that 'in terms of s 231(1) and (2) of the Constitution the national executive first negotiates and signs an international agreement. Parliament thereafter approves the agreement to bind the country'.[162] Hence, to demonstrate that withdrawal is the equivalent of the executive signing a treaty, it put considerable emphasis on the *conclusion* of treaties rather than the *binding effect* of a treaty. To substantiate that this is a wrong presumption, the court used the government's analogy with the deposit of instruments of ratification with the UN. It held that '[a] notice of withdrawal, on a proper construction of s 231, is the equivalent of ratification, which requires *prior* parliamentary approval in terms of s 231(2).'[163] Therefore, the act of signing a treaty and the act of delivering a notice of withdrawal are different in their effect.[164] Signing a treaty has no direct legal consequences (it only requires the state not to act in a manner that would defeat the purpose of the treaty), while the act of delivering a notice of withdrawal is considered by the High Court to constitute a binding, unconditional and final decision of terminating treaty obligations.[165]

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[159] *Ibid*, para 44. See also *Kaunda and Others v President of the Republic of South Africa* (CCT23/04) [2004] ZACC 5; 2005 (4) SA 235 (CC) paras 78-80, 178, 191, 228.

[160] Which seems a logical inference seeing as how constitutions are living documents that judges have to interpret and apply in an ever-changing political, economic and social environment. See P. de Vos and W. Freedman, *supra* note 132, at 2.

[161] *Masetlha v President of the Republic of South Africa and Another* (CCT01/07) [2007] ZACC 20; 2008 (1) SA 566 (CC), para 68. In this judgment, the Constitutional Court emphasized that it is obvious that where the constitutional provision confers a power to do something, that provision necessarily confers the power to undo it as well. See *Democratic Alliance v Minister of International Relations and Cooperation*, High Court Judgment, *supra* note 9, para 53.

[162] *Ibid*, para 46.

[163] *Ibid*, para 47. (*emphasis added)*

[164] Du Plessis, *supra* note 62, at 364. See also *Glenister v President of the Republic of South Africa and Others*, Constitutional Court Judgment, *supra* note 146, para 95.

[165] *Democratic Alliance v Minister of International Relations and Cooperation*, High Court Judgment, *supra* note 9, para 47.

In consideration of that argument, the court pinpointed the importance of the key principle of the separation of powers. This seeks to limit the power of the three branches of government. Withdrawal from the Rome Statute, effectuated by the national executive, would pertain to the use of legislative powers for it would terminate existing rights and obligations for citizens. This, however, would be a clear breach of the separation of powers and the rule of law.[166] Parliament has the legislative power to bind the country to the Rome Statute, not the executive, and there is no cogent reason why withdrawal from that treaty should confer the power to bind the country onto the national executive. In other words, until parliament empowers the executive to withdraw from the Rome Statute and repeals the Implementation Act, the executive may not take the legal step of formally notifying the UNSG.[167] The fact that Section 231 is silent on this matter, is no bar to the court's interpretation.[168] This interpretation of Section 231(2) is 'the most constitutionally compliant' and gives effect to the separation of powers.[169]

The government also argued that should the court decide that parliamentary consent was required indeed, the executive complied with this by virtue of the fact that the request to approve the notice of withdrawal and repeal the Implementation Act were pending before parliament.[170] Again, the High Court did not agree. Retrospective approval by parliament does not cure the defect in the process followed for the instrument of withdrawal. The president exercised a power he constitutionally does not have and thus breached the separation of powers and the principle of legality.[171] A subsequent ratification by parliament (*i.e.* repeal of the Implementation Act) would not cure the invalid conduct of the national executive.[172] Hence, only an *ex ante* consultation of and approval from parliament and repeal of the Implementation Act result in a constitutionally valid notice of withdrawal. Therefore, the Gauteng High Court

[166] *Ibid*, para 56.
[167] The executive presumably may express the intent to withdraw, as this has no legal consequences. Also, the formulation of policy to withdraw from the Rome Statute falls exclusively within the national executive's province. The executive may decide to withdraw, but it cannot implement that decision without prior parliamentary approval. *Ibid*, paras 45, 81. See also *Kaunda and Others v President of the Republic of South Africa*, Constitutional Court Judgment, *supra* note 159, para 172.
[168] *Democratic Alliance v Minister of International Relations and Cooperation*, High Court Judgment, *supra* note 9, para 53.
[169] *Ibid.*
[170] *Ibid*, para 58.
[171] In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council and Others* (CCT7/98) [1998] ZACC 17; 1999 (1) SA 374 (CC), para 56, the Constitutional Court defined the rule of law and the principle of legality as that all government action must comply with the law in the sense that 'the exercise of public power is only legitimate where lawful.'
[172] *Kruger v President of the Republic of South Africa and Others* (CCT57/07) [2008] ZACC 17; 2009 (1) SA 417 (CC), para 52.

declared the notice of withdrawal constitutionally unlawful as enjoined by Section 172 of the Constitution and ordered the executive to revoke it.

Finally, the court dealt with the fact that the Constitution (or any other South African law) contains no provision regulating the withdrawal from international agreements. This was also posed as an issue in the introductory chapter of this research. The court, however, explained that the plausible reason for this silence in the Constitution is the rule of law. The executive needs authority to act, which comes from the Constitution or an Act of Parliament and '[t]he absence of a provision in the Constitution or any other legislation of a power for the executive to terminate international agreements is therefore confirmation of the fact that such power does not exist unless and until Parliament legislates for it. It is not a *lacuna* or omission.'[173]

Ultimately, this ruling on the prematurity of the lodging of the notice of withdrawal is clear about the question whether the national executive can withdraw unilaterally from an international agreement that creates rights and obligations for citizens (such as the Rome Statute): the executive cannot.[174] The court rendered the instrument of withdrawal invalid based on a corollary in that since parliament has the constitutional power to bind South Africa to the Rome Statute, it must be parliament that has the legislative power to 'disconnect' the state from it and therefore the national executive has breached the separation of powers by triggering the process of withdrawal in the manner it has. Hence, a first answer to the research question can be given: while the instrument of withdrawal complied with the limitations posed to it under international law, the limitation under domestic law, as discerned and interpreted by the Gauteng High Court, was not adhered to by the South African executive.

Yet, one critical remark that must be made already is that it is a *procedural* ruling. The court set aside opinions on membership of the ICC itself for it put considerable emphasis on the state's parliamentary democracy and the separation of powers embodied in the South African Constitution. It held that the executive cannot bypass the country's democratically elected parliament when taking decisions of the magnitude of withdrawing from an international organization concerned with international criminal justice. What this shows, however, is that

[173] *Democratic Alliance v Minister of International Relations and Cooperation*, High Court Judgment, *supra* note 9, para 54. See also chapter five, paragraph 5.2 and fn. 207 for this issue in the Brexit litigation.

[174] By stating that the notice of withdrawal is unconstitutional and invalid, is throughout this thesis meant both the notice of withdrawal, signed by the Minister of International Relations and Cooperation, and the underlying cabinet decision to deliver the notice of withdrawal to the UNSG without prior parliamentary approval.

the High Court's decision is an important rebuke of the *means used to withdraw*.[175] As noted in the introduction of this thesis, the ruling did not affect the government's position on withdrawal from ICC. Therefore, assessing the arguments of the British courts for rendering the instrument of withdrawal from the EU invalid is relevant. The judgments might shed light on more substantive constitutional arguments against the decision to withdraw itself - *i.e.* more pertinent limitations to the power to withdraw from the Rome Statute.

[175] Kersten, M., 'Re-Setting the Clock - South African Court Rules ICC Withdrawal Unconstitutional' (*Justice in Conflict*, 22 February 2017) < https://justiceinconflict.org/2017/02/22/re-setting-the-clock-south-african-court-rules-icc-withdrawal-unconstitutional/ > accessed 18 October 2017.

V. United Kingdom's Withdrawal from the European Union: a Comparison

This chapter involves an analysis of the litigation on Britain's purported withdrawal from the EU Treaties. As mentioned in the introduction, the purpose of this assessment is to find particular reasoning that also makes sense in the South African situation to confirm the conclusion that the executive cannot withdraw without preceding parliamentary involvement and to enhance the analysis of why it cannot do so.[176] The aim is to demonstrate that there are similar starting premises (two executives attempted to withdraw unilaterally from international agreements), but possibly different lines of reasoning that can be applied in the South African case.

First, a concise introduction to Brexit and Britain's constitution is helpful for putting the following assessment in context. Subsequently, the judgments by the High Court of Justice and the Supreme Court will be examined. In chapter six, the substantive results of this assessment will be applied and compared to the judgment of the Gauteng High Court.

§ 5.1 United Kingdom's Principles of Constitutional Law

Like in South Africa, the power to make and ratify treaties in the UK falls within the executive's power. In the UK this power does not stem from codified constitutional arrangements in a single text, but from the 'royal prerogative'. This non-statutory power for the executive government (*i.e.* the Queen, who always acts on advice of her Ministers, so 'the Crown' in that context means the executive government headed by Prime Minister Theresa May and the Cabinet[177]) includes *inter alia* the power to declare and conduct war, to stop a criminal prosecution and to make treaties. The exact limits of prerogative powers are not capable of precise definition, but a definition frequently cited with approval is '[t]he residue of discretionary or arbitrary authority, which at any given time is legally left in the hand of the Crown.'[178] This definition suggests that any decision or conduct of the executive, not taken under statutory powers, may be regarded as the exercise of a prerogative power.[179] The royal

[176] Considering this, it is not the intention to elaborate on the UK's state structure and the political and legal situation(s) that preceded the notice of withdrawal or to provide an in-depth examination of the judgments on the notice of withdrawal as this does not contribute to the research question.

[177] *Gina Miller and Deir Tozetti Dos Santos v The Secretary of State for Exiting the European Union* [2016] EWHC 2768, para 24. See also *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] 2 WLR 1231, para 101.

[178] A. Dicey, *The Law of the Constitution* (London: MacMillan, 1959), at 424.

[179] E. Barendt, 'Constitutional Fundamentals: Fundamental Principles', in D. Feldman (ed), *English Public Law* (New York: Oxford University Press Inc., 2004) 3-43, at 12. See also *Blackburn v. Attorney General* [1971] 1 WLR 1037; *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5, para 47. Prerogative powers are limited to those that have previously been recognized by British courts and they cannot be extended. See *The British Broadcasting Corporation (BBC) v F.D. Johns (H.M. Inspector of Taxes)* [1964] 2 WLR 1071.

prerogative is therefore particularly important in the context of foreign affairs as in this area the executive is traditionally unconstrained by legislation.[180] A relevant example of it is that the British executive is able to create legal effects on the international level unconditionally, but cannot change domestic law without the intervention of parliament.[181] Hence, like in South Africa, in the UK international agreements are not part of domestic law unless and until they have been incorporated into domestic law by legislation. The reason behind this is the principle of parliamentary sovereignty.[182] It is the bedrock of the British state structure and it means that parliament has 'the right to make or unmake any law whatever; and further, that no person or body is recognised by the law [...] as having a right to override or set aside the legislation of Parliament.'[183] There is no other superior form of law than primary legislation, save only where parliament has itself made provision to allow that to happen. The European Communities Act 1972 (''ECA'') is the sole example of this.[184] But even regarding that Act, parliament remains sovereign and has the continuing power to repeal it.

§ 5.2 The United Kingdom and the European Union

On 1 January 1973, the UK joined the EU (then the European Communities). Parliament gave effect to this process through the ECA, which transformed the UK's obligations under European law to national law.[185]

On 23 June 2016, a referendum took place under the European Union Referendum Act 2015.[186] The referendum was about whether Britain should opt out from the EU. The outcome was affirmative. Subsequently, the government sought to notify the relevant EU institutions of its intention to withdraw. Withdrawal from the EU is governed by Article 50 Treaty on the

[180] *R (on the application of Miller and another) v Secretary of State for Exiting the European Union*, Supreme Court Judgment, *supra* note 179, para 54.

[181] *J.H. Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, para 499E-500D.

[182] South Africa used to have constitutions focused on parliamentary sovereignty during the colonial and apartheid eras, but this concept has been replaced in the South African Constitution 1996 with constitutional sovereignty. This means that the Constitution is the supreme law of the state, law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled. See Section 2, South African Constitution; P. de Vos and W. Freedman, *supra* note 132, at 204.

[183] A. Dicey, *An Introduction to the Law of the Constitution* (London: Macmillan, 1915), at 38; C. Munro, *Studies in Constitutional Law* (Oxford: Oxford University Press, 1999), at 135; Blackburn, R., 'Britain's unwritten constitution' (*British Library*, 13 March 2015) < https://www.bl.uk/magna-carta/articles/britains-unwritten-constitution > accessed 11 August 2017. See also the speech of Lord Bingham of Cornhill in *R (Jackson) v Attorney General* [2005] 3 WLR 733, para 9.

[184] *Gina Miller and Deir Tozetti Dos Santos v The Secretary of State for Exiting the European Union*, High Court Judgment, *supra* note 177, para 20.

[185] European Communities Act 1972, available at < https://www.legislation.gov.uk/ukpga/1972/68/contents > accessed 13 October 2017.

[186] European Union Referendum Act 2015, available at < http://www.legislation.gov.uk/ukpga/2015/36/contents/enacted > accessed 13 October 2017. The referendum produced an overall majority in favor of leaving the EU, although the populations of semi-autonomous Scotland and Northern Ireland (but not Wales) voted to remain.

European Union (''TEU''),[187] which has given effect in UK law by the European Union (Amendment) Act 2008.[188] Once a notice is given, it will result in termination of EU-membership at the end of a two year period in which to negotiate a withdrawal agreement.[189]
A major difference with the Rome Statute is that the key part of Article 50 TEU provides that a state's decision to withdraw its membership of the EU has to be made 'in accordance with its own constitutional requirements'. Because the UK's constitution is not set out in a single codified authoritative text, there is scope for argument about what Britain's 'constitutional requirements' are - *i.e.* whether the executive is entitled to use its prerogative powers to give notice under Article 50 TEU and thus whether a notice of withdrawal can lawfully be given by the executive without prior authorization by an Act of Parliament. This question has been dealt with before the High Court of England and Wales (High Court of Justice) (''EWHC'') and the Supreme Court (''SC''). In this respect, it must be noted beforehand that a considerable point of contention before both courts was whether there is any provision allowing the executive to unilaterally send a notice of withdrawal. That there is no authoritative list of the executive's powers leaves room to argue that the ECA permits the Crown to have the prerogative to trigger the withdrawal process from the EU. Here too is parallelism with the South African judgment as the executive argued that it has the power to withdraw unilaterally because the South African Constitution does not contain a provision that confers this power upon parliament. Conversely, it was claimed before the UK courts that the Crown cannot withdraw from a treaty unless parliament has conferred upon the Crown the authority to do so either expressly or by necessary implication by an Act of Parliament. The difference with the South African case was that it was hugely debated before the British courts whether the ECA contained such authority. The Gauteng High Court saw no problem in that there is no domestic law that regulates treaty withdrawal - it is a confirmation of the fact that the executive needs to obtain preceding assent - and therefore, this part of the British verdicts will not be assessed. It is also not relevant because it elaborates extensively on the distinct constitutional principles explained in the previous paragraph and involves a detailed analysis of the technical issue if previous case law can determine whether prerogative powers may be impliedly abrogated by primary legislation.[190]

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[187] Article 50, Treaty of the European Union, Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (hereinafter: ''Treaty of the European Union'').
[188] The ECA has been amended by the European Communities (Amendment) Act 2008 to allow for ratification of the Lisbon Treaty, which amended the Treaty on the European Union and made Article 50 come into effect.
[189] Article 50(3), Treaty on the European Union.
[190] *Gina Miller and Deir Tozetti Dos Santos v The Secretary of State for Exiting the European Union,* High Court Judgment, *supra* note 177, paras 95-104; *R (on the application of Miller and another) v Secretary of State for Exiting the European Union,*

§ 5.3 The Brexit Judgments

The first principal question the High Court of Justice answered was whether the executive can file a notice of withdrawal in the exercise of its foreign affairs prerogative. The government (represented by the Secretary of State for Exiting the European Union) argued it could. It contended that the royal prerogative empowers Ministers to 'make and unmake treaties' and, by extension, that this enables the executive to send a notice of withdrawal under Article 50 without the need for prior parliamentary consent.[191]

In this perspective, there is a striking similarity between the arguments of the British and South African government respectively. Both argued that as the conduct of international relations and concluding treaties are normally matters for the executive, the decision to withdraw and act accordingly should likewise be a matter for the executive, without demanding prior parliamentary legislation approving this. The EWHC's response, however, differs fundamentally from what the Gauteng High Court regarded as the decisive argument. By emphasizing the importance of the separation of powers and the South African Constitution, the Gauteng High Court decided that the constitutional power to bind the state to a treaty confers the power to undo that as well.[192] The High Court of Justice also alluded to the power of parliament to transform an international agreement into domestic legislation, but this court put considerable emphasis on parliament's legislative power *to create rights and obligations for citizens*. It decided that the royal prerogative, the executive's power to conclude treaties, is subject to the rule that 'the Crown cannot, in ordinary circumstances, alter domestic law by using such power to make or unmake a treaty. [...] It cannot without the intervention of Parliament confer rights on individuals or deprive individuals of rights'.[193] In other words, for the executive to engage in the process through the prerogative - *i.e.* to withdraw unilaterally - would have the effect of removing 'rights of major importance created by Parliament'.[194] Adding that this rule is a manifestation of parliamentary sovereignty in the foreign affairs context,[195] as a superior constitutional norm it must take precedence.[196] Precisely for this reason,

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Supreme Court Judgment, *supra* note 179, paras 74-125; *Democratic Alliance v Minister of International Relations and Cooperation,* High Court Judgment, *supra* note 9, para 54. See also fn. 205.

[191] *Gina Miller and Deir Tozetti Dos Santos v The Secretary of State for Exiting the European Union,* High Court Judgment, *supra* note 177, paras 30, 31.

[192] *Democratic Alliance v Minister of International Relations and Cooperation,* High Court Judgment, *supra* note 9, para 53.

[193] *Gina Miller and Deir Tozetti Dos Santos v The Secretary of State for Exiting the European Union,* High Court Judgment, *supra* note 177, para 32.

[194] *Ibid,* para 66.

[195] *Ibid,* para 86.

[196] T. Poole, 'Devotion to Legalism: On the Brexit Case', 4 *Modern Law Review* (July 2017) 569-774, at 697; *Gina Miller and Deir Tozetti Dos Santos v The Secretary of State for Exiting the European Union,* High Court Judgment, *supra* note 177, para

the EWHC held that not the executive, but parliament has the exclusive right to trigger notification under Article 50 TEU: it would result in a series of rights being nullified that were created by an Act of Parliament. As will be explained below, before the court was decided that British citizens' rights under EU law, as incorporated into domestic law by the ECA, will inevitably be lost once the withdrawal process is completed. The principle of parliamentary sovereignty requires that only parliament can overturn an Act of Parliament and thus can deprive citizens of rights and obligations. In this light, the executive cannot by exercise of prerogative powers override primary legislation as this will effectively amount to the executive branch of government exercising legislative functions.[197] This very argument sets the context for the general rule on which the Crown sought to rely - that normally the conduct of international relations and the making and unmaking of treaties are taken to be matters falling within the scope of the executive's prerogative powers. The EWHC acknowledged the government's position with regard to the fact that in the absence of express statutory words, the executive's prerogative over Article 50 remains intact, but only with respect to rights and obligations created *as a matter of international law*.[198] The ECA, however, implemented the international rights and obligations for citizens coming from the EU Treaties. It is *domestic law* that protects individual rights and when these rights are involved in withdrawal - which they are as it is common ground that the ECA will cease to have its function after withdrawal[199] - the executive needs to obtain prior parliamentary consent.[200]

Here surfaces a fundamental disparity with the Gauteng High Court's judgment. Namely, the South African court determined that government never has the right to withdraw unilaterally whereas it would appear that if British citizens' rights are not affected by withdrawal from the EU, then the executive may send a notice of withdrawal without preceding authorization of parliament because this will not amount to the executive using legislative power it does not have.

The first key finding raised another principal question before the EWHC: to what extent individual rights protected in domestic law would be affected by withdrawal from the EU.

88: '[t]he powerful constitutional principle that the Crown has no power to alter the law of the land by use of its prerogative powers is the product of an especially strong constitutional tradition in the United Kingdom.'

[197] *Ibid*, para 86.

[198] *Ibid*, para 89.

[199] 'It is common ground that withdrawal from the European Union will have profound consequences in terms of changing domestic law […]' and 'It is common ground that if the United Kingdom withdraws from the Treaties pursuant to a notice given under Article 50 of the TEU, there will no longer be any enforceable EU rights in relation to which this provision will have any application. Section 2(1) [of the ECA] would be stripped of any practical effect'. *Ibid*, paras 4, 51. *(emphasis added)*

[200] *Ibid*, paras 87, 89.

The executive accepted that if a notice of withdrawal is given, it would inevitably change domestic law and affect rights and obligations of citizens.[201] However, it was questionable *which part* of domestic law would change. The litigants distinguished three different categories of rights arising under EU law that are protected in domestic law.[202] Category I embraces rights that are capable of replication in domestic law (*e.g.* rights of workers under the Working Time Directive). Category II is about rights enjoyed by British nationals in other EU member states (*e.g.* right of free movement). Category III refers to rights that cannot be replicated in British law following withdrawal (*e.g.* the right to stand for election to the European Parliament).
Miller as the claimant needed to establish a loss of individual rights in the UK and it was in relation to the third, most important category that the government conceded that those rights would inevitably be lost upon withdrawal.[203] Also regarding the two other categories the EWHC decided that Miller was correct in that withdrawal from the EU would affect rights in domestic law and would undo or modify the legal effects as enacted by parliament through the ECA. It was parliament that, through the ECA, brought into effect all three categories of rights for British nationals so none of these rights can be repealed through the exercise of the executive's prerogative power by executing a unilateral withdrawal.[204]

The Secretary of State for Exiting the European Union appealed the High Court of Justice's decision. The Supreme Court then framed the issue as a tension between two principal constitutional features: i) the executive generally enjoys the prerogative power freely to enter into and terminate international agreements without recourse to parliament, and ii) the executive is not normally entitled to exercise that power if it results in a change in UK domestic law, unless an Act of Parliament[205] provides that the executive is entitled to terminate a treaty with as a result, changes in national law.[206] Here too is parity between the South African and British ruling. Indeed, it appears the SC considers the argument of the South African executive

[201] *Ibid,* para 11.
[202] *Ibid,* para 57.
[203] *Ibid,* para 62.
[204] *Ibid,* paras 62-66, 92.
[205] Before the Supreme Court it was a decisive point of contention whether the prerogative power to withdraw from treaties was excluded by the terms of the ECA. If so, the Secretary of State argued parliament would have recognized that the power to withdraw exists and is exercisable without prior legislation. However, as explained, the Gauteng High Court decided by implication that parliament needs to legislate first and did not derive any authority from the Implementation Act to determine whether the executive can withdraw unilaterally. Therefore, this element of analysis before the Supreme Court will not be elaborated on. See for the Supreme Court's analysis on this very point *R (on the application of Miller and another) v Secretary of State for Exiting the European Union,* Supreme Court Judgment, *supra* note 179, paras 74-125. See also chapter five, paragraph 5.2.
[206] *Ibid,* para 5.

that there exists no provision in the South African Constitution or any other domestic law that gives parliament the primacy to withdraw from international agreements.

Miller claimed the constitutional features prevent the executive withdrawing from the EU Treaties, until effectively authorized to do so by a statute.[207] Conversely, the executive's prerogative power was said by the Secretary of State to include the right to withdraw from the EU. The SC rejected that argument. Instead, this court corroborated the EWHC's reasoning and alluded to the fact that lodging a notice of withdrawal will inevitably change domestic law and rights and obligations for citizens,[208] and stressed that 'it is a fundamental principle of the UK constitution that […] the royal prerogative does not enable ministers to change statute law or common law.'[209] Therefore, the SC agreed with the EWHC in that withdrawal will remove existing domestic rights of British nationals by cutting off the source of EU law. In particular, the SC recognized that the rights in the third category will cease to exist when the UK is no longer a member of the EU, 'as they are by their very nature dependent on continued membership.'[210] Such a fundamental change will be the inevitable effect of a notice being served and this renders it impermissible for the executive to file an instrument of withdrawal without prior parliamentary authority.[211]

In sum, the Supreme Court upheld the interim observation that the EHWC seemed to be rather deferential to the idea that the limitation to the use of the royal prerogative in unilateral withdrawal from the TEU is the question whether 'unsigning' would actually amount to legislating in the sense of affecting citizens' rights and obligations. By contrast, the Gauteng High Court categorically stated that the executive cannot withdraw unilaterally from international treaties.

Both the South African and British judges aimed to preserve the separation of powers, but the former explicitly, the latter implicitly. The Gauteng High Court took a procedural point of view and the British courts zoomed in on the substance of the issue. But underlying this obvious difference lies a small nuance with great consequences, namely that the litmus test for the UK

[207] *Ibid*.

[208] *Gina Miller and Deir Tozetti Dos Santos v The Secretary of State for Exiting the European Union,* High Court Judgment, *supra* note 177, paras 76-80.

[209] *R (on the application of Miller and another) v Secretary of State for Exiting the European Union,* Supreme Court Judgment, *supra* note 179, para 50. As Lord Hoffman observed in *Bancoult No 2*: 'since the 17th century the prerogative has not empowered the Crown to change English common or statute law.' See *R (On The Application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] 3 WLR 955, para 44.

[210] *R (on the application of Miller and another) v Secretary of State for Exiting the European Union,* Supreme Court Judgment, *supra* note 179, para 72.

[211] *Ibid,* para 83.

courts is whether the executive's power to sign and repeal treaties, embodied in the royal prerogative, affects the rights and obligations of citizens. If it does not, it appears the executive may withdraw unilaterally. This is thus in stark contrast to the Gauteng High Court's ruling: this court unconditionally excluded the possibility of the executive withdrawing unilaterally from an international agreement, irrespective of whether this would affect the rights and obligations of citizens. Arguably, this finding leads to precarious consequences when looked at the question what would happen when South Africa would initiate a new withdrawal process, something not improbable because the South African government's intentions regarding the Rome Statute have not changed. This focal point merits further examination in chapter six.

To conclude, what this chapter at first sight illustrates is that the judgments of the High Court of Justice and Supreme Court show a striking parable to the South African ruling. The arguments of the British and South African executive respectively are almost identical in stating that the executive has the exclusive authority to conduct international relations and sign treaties and that perforce, this governmental body also has the authority do 'unsign' treaties without prior involvement of the legislature. Both the South African and British judiciary did not agree with this statement, yet, the reason why could not differ more.

The more important observation of the legal comparison is that the analysis conducted in this chapter creates rather fundamental questions as regards the Gauteng High Court's reasoning and, consequentially, the prospective situation where South Africa files a new instrument of withdrawal. Notably, the sharp distinction between the British judges crucial emphasis on the effect withdrawal has on the rights and obligations for citizens and the South African judges procedural reasoning indeed, as predicted in the introductory chapter, weakens the Gauteng High Court's ruling and produces more limitations to the executive's power to withdraw from the Rome Statute than the determination that it cannot do so unilaterally. In what manner the British litigation does this will be explained in next chapter.

VI. Filling the Gaps

In this chapter, the outcome of the comparative legal analysis of the withdrawal cases before the Gauteng High Court and UK courts will be assessed. All following findings have their basis in the fact that the Gauteng High Court refused to be critical about the substance of the lodged notice of withdrawal from the Rome Statute, something which was the backbone of the analysis of the British executive's withdrawal by the UK courts. To provide a full-fledged comparison, an alternative point of view than the one used throughout will be presented as well.

§ 6.1 The Substantive Argument before the Gauteng High Court

Against the backdrop of the British judges' reasoning, what stands out immediately is that the Gauteng High Court did not appear to appreciate the rather significant fact that rights of citizens will be affected by withdrawal from the Rome Statute. Arguably, the reason why the South African court did not address this focal point is twofold: it is of the opinion that after withdrawal there will be domestic law protecting South African citizens against international crimes against peace, and it considered that it could not answer the substantive question whether the Bill of Rights prohibits withdrawal from the Rome Statute altogether.

Regarding the latter statement, DA brought forward the substantive argument that South Africa's obligations in terms of Section 7(2) of the Bill of Rights, the human rights charter in the South African Constitution which protects political, civil and socio-economic rights of all people in South Africa and stipulates that the state must respect, protect, promote and fulfil the rights in the Bill, precluded withdrawal altogether for it constitutes 'a retrogressive measure in international relations which deprives South Africans of the protection afforded by the ICC [...].' Put differently, besides disagreeing with the manner in which had been decided on withdrawal, DA criticized the decision to withdraw as well. A lot of civil society groups were likewise of the view that parliament should consider and approve withdrawal from the Rome Statute first, particularly in light of how withdrawal from the Rome Statute will affect citizens' rights and obligations.[212]

DA's argument, however, was not addressed by the court. The court would have had to delve into the question whether the cancelled withdrawal from the Rome Statute was inconsistent

[212] After the introduction of a Bill in parliament, the Bill is referred to the relevant Portfolio Committee for consideration which then publishes the Bill and invites interested parties to make submissions on the Bill. In this respect, circa 30 non-governmental organizations, research centers for the promotion and protection of constitutional and human rights in South Africa, juristic entities that serve as a platform for democratic politics, *etc.* made use of the opportunity to comment on the Repeal Bill that had to repeal the Implementation Act.

with the government's constitutional obligations to respect, protect, promote and fulfil human rights. The court decided that parliament should consider that question first: the decision to withdraw is 'policy-laden, and one residing in the heartland of the national executive in the exercise of foreign policy, international relations and treaty-making, subject, of course, to the Constitution.'[213] The High Court thus determined that the issue could not be appreciated by the court in its political context. Indeed, the decision to withdraw is pre-eminently a political question which answering judicially is reserved for only the Constitutional Court.[214] Only the Constitutional Court can decide whether the withdrawal and the legislation processes for this purpose are unconstitutional on any ground (*e.g.* when parliament failed to facilitate public participation), [215] but that is an unfortunate fact for this situation seeing as how the Gauteng High Court considered the status of the Implementation Act post-withdrawal.[216]

§ 6.1.1 A Flawed Reasoning

Chapter three has illustrated that by withdrawing from the Rome Statute, a state (in time) ceases to have the duties flowing from the (ratification and) implementation of that treaty. However, what is equally important, as heavily emphasized by the EWHC and SC, but perceived differently by the Gauteng High Court, is that treaty withdrawal creates a situation where citizens can no longer appeal to rights incorporated in the domestic legal order through implementation of the treaty in question. Those rights will inevitably cease to exist. Contrary to the Gauteng High Court's view, it was before the UK courts 'common ground that if the United Kingdom withdraws from the Treaties pursuant to a notice given under Article 50 of the TEU, there will no longer be any enforceable EU rights in relation to which this provision will have any application. Section 2(1) [of the ECA] would be stripped of any practical effect

[213] *Democratic Alliance v Minister of International Relations and Cooperation*, High Court Judgment, *supra* note 9, paras 76, 77.

[214] *Doctors for Life International v Speaker of the National Assembly and Other*, Constitutional Court Judgment, *supra* note 133, para 21; *King v Attorneys' Fidelity Fund Board of Control*, South African Law Reports 2006 1 SA 474, para 23; *Glenister v President of the Republic of South Africa and Others*, Constitutional Court Judgment, *supra* note 146, para 23.

[215] 'Any legislation which has potential impact on the bill of rights passed without such participation could be susceptible to a constitutional challenge against parliament. That challenge will not lie to this court, as the Constitutional Court has the exclusive jurisdiction to determine a constitutional challenge based on alleged failure by the legislature to facilitate public involvement in its legislative and other processes as envisaged in s 59(1)(a) of the Constitution.' *Democratic Alliance v Minister of International Relations and Cooperation*, High Court Judgment, *supra* note 9, para 76. Moreover, 'it would be institutionally inappropriate for a court to intervene in the process of law-making on the assumption that parliament would not observe its constitutional obligations' - as observed by late Chief Justice Langa in *Glenister v President of the Republic of South Africa and Others*, Constitutional Court Judgment, *supra* note 146, para 56.

[216] Noteworthy is that on 24 October 2016, DA launched an application for direct access to the Constitutional Court seeking to challenge the executive's withdrawal. The Constitutional Court, however, refused the application on 11 November 2016. Its argument was that it was not in the interest of justice to hear the matter at this stage. See *Democratic Alliance v Minister of International Relations and Cooperation*, High Court Judgment, *supra* note 9, para 6.

[…].'[217] And precisely because it is domestic law that protects individual rights and is involved in withdrawal, the executive needs to obtain prior parliamentary consent.

Surprisingly, the Gauteng High Court was of the opinion that withdrawal from the Rome Statute does *not* mean that the rights and obligations under that treaty will inevitably be lost upon withdrawal. On the contrary, the court contended that when the Rome Statute is transformed into domestic law by parliament, the domestic legislation creates peremptory obligations which bind the state on their own terms, independent of its international obligations under the Rome Statute. 'South Africa's international law obligations are thus not dependent on the Rome Statute and *vice versa*'.[218] By implication, this would mean that the implementing legislation, if not repealed by the legislature, remains in force: 'the treaty obligations will *de facto* still be in force in the Republic, despite the fact that South Africa would not be bound formally by them on the international level.'[219]

Pursuing this line of reasoning would mean that withdrawal from the Rome Statute would not deprive citizens of rights they obtained when parliament domesticated the Rome Statute and that South African courts would remain able to exercise universal jurisdiction over genocide, crimes against humanity, and war crimes. To apply here the view of the UK courts would mean that the executive would be able to unilaterally send a notice of withdrawal, however, as explained, the Gauteng High Court categorically excluded this possibility. Moreover, it is questionable whether it is correct that withdrawal has no effect on the status of the Implementation Act. Chapter four demonstrated that South Africa - like the UK - has a dualist system regarding the implementation of international law, so when the executive signs a treaty, parliament needs to adopt additional implementing legislation and only that step effectuates a treaty in the domestic legal order. Through the Implementation Act, the Rome Statute is applicable in South Africa.[220] A logical inference from this constitutionally entrenched process is that withdrawal from the Rome Statute leads to the Implementation Act becoming invalid legislation. A closer look at the operational meaning of many of its provisions substantiate this as these will become void when South Africa pulls out from the Rome Statute. For example, Article 3 of the Act states that its objectives are *inter alia* to enable prosecution of and

[217] *Gina Miller and Deir Tozetti Dos Santos v The Secretary of State for Exiting the European Union*, High Court Judgment, *supra* note 177, para 51. *(emphasis added)*.

[218] *Democratic Alliance v Minister of International Relations and Cooperation*, High Court Judgment, *supra* note 9, para 65.

[219] E. de Wet, H. Hestermeyer and R. Wolfrum, *supra* note 151, at 38.

[220] 'A signed international agreement that has not been incorporated in South African law cannot be a source of rights and obligations. See chapter four, paragraph 4.2 and *Glenister v President of the Republic of South Africa and Others*, Constitutional Court Judgment, *supra* note 146, para 92.

adjudication in cases brought against any person accused of having committed an international crime against peace, and 'to ensure that anything done in terms of this Act conforms with the obligations of the Republic in terms of the Statute.'[221] But when South Africa withdraws, the prosecuting authority and the courts are no longer able to prosecute and adjudicate cases because the foundation therefor is gone: they no longer have these rights and obligations in terms of the Rome Statute. Hence, the objective of the Implementation Act would be gone. Arguably, it does not seem logical to continue giving effect to an act of transformation which is meant to implement a treaty that a state actually withdrew from. Prior parliamentary approval is deemed necessary '[…] given the undesirable legal complexity that would result from withdrawal from a domestic treaty, where the domesticating legislation remains in place' and '[t]his legislation would therefore be senseless without membership in the ICC.'[222]

In sum, chapter four and five explained that both the British and South African systems are dualistic: they rely on treaty implementation acts to derive international rights and obligations from them. The UK courts agreed that the implementing legislation would not retain any operational effect after withdrawal. Contrariwise, the Gauteng High Court was of the opinion that the act that implemented the Rome Statute remains in force after withdrawal. By implication, this would mean that there would not be any change in domestic law and thus the rights and obligations of citizens would not be affected. Yet, the court still decided that the executive cannot withdraw unilaterally; to consider whether or not citizens will lose rights and obligations upon withdrawal is irrelevant, it is a matter of principle that the executive first needs to obtain parliamentary approval because otherwise it would violate the separation of powers. Even so, the South African judges were in a sense contradicting themselves because they perceived the executive's actions as having no legal effect because the Implementation Act will still be active after withdrawal. A practical example illustrates this odd finding: as noted from the onset, one of the motives for withdrawal is that South Africa wants to provide immunity to heads of state of foreign countries in which conflicts take place and to be able to do so, it is of the opinion that the Implementation Act has to be repealed. Its very motive for revoking the Act is thus not the fact that withdrawal from the Rome Statute actually leads to the Implementation Act becoming void. What is peculiar in this sense, is that the Gauteng High

[221] Article 3(b)(c), Implementation Act.

[222] Woolaver, H., 'International and Domestic Implications of South Africa's Withdrawal from the ICC' (*Blog of the European Journal of International Law*, 24 October 2016) < https://www.ejiltalk.org/international-and-domestic-implications-of-south-africas-withdrawal-from-the-icc/ > accessed 18 October 2017.

Court produced a for the government undesirable conception of how the government's obligations under the Rome Statute remain in place after withdrawal.[223] After all, the government's primary motive for withdrawal is that South Africa's membership of the ICC clashes with the obligation to ensure diplomatic immunity for heads of state. Yet, the High Court held that the obligation to arrest a sitting heads of state that is an ICC fugitive will remain in force due to the Implementation Act remaining in force, while the government intends to stop having that duty through withdrawal from the Rome Statute.

This paragraph also shows as a matter of point, irrespective of whether citizens' rights and obligations will be affected by withdrawal and even before the substantive question whether the Implementation Act stays effective comes to mind, the Gauteng High Court finds that the executive has no right to unilateral withdrawal. Hence, this confirms the observation that the High Court's ruling is utterly procedural.

§ 6.1.1.1 A Different Scenario

The distinction between the situation where the implementing legislation keeps in place and the situation where it will not (which as advanced seems more logical) will be the premise from which the next findings will be presented. It has been concluded that when South Africa withdraws from the Rome Statute, its citizens would lose their rights and obligations under the Statute and the state itself would lose them too. But in what manner would withdrawal affect these rights and obligations if the Gauteng High Court is correct in its assumption that the Implementation Act continues to exist fully?

Chapter three explains that the Implementation Act contains the entire Rome Statute in an annex, so all the crimes listed in the Statute are domesticated by virtue of the Act. If assumed that the Gauteng High Court is correct and withdrawal from the Rome Statute does not mean that the Implementation Act becomes null and void, what will *not* change is the protection of South African citizens against the international crimes against peace enlisted in Article 5 of the Rome Statute because South African courts will still exercise jurisdiction over these crimes.[224] But on the international level, one possible change is that the chance of the OTP opening an investigation about South Africa after a filed complaint with the ICC will reduce.[225] Individuals or groups cannot commence a procedure at the ICC but they can send information on alleged

[223] See fn. 81.

[224] Sections 1(vii) and 4(1) and Schedule 1, Implementation Act.

[225] Regulation 25(1)(a), Regulations of the Office of the Prosecutor ICC-BD/05-01-09, available at < https://www.icc-cpi.int/NR/rdonlyres/FFF97111-ECD6-40B5-9CDA-792BCBE1E695/280253/ICCBD050109ENG.pdf > accessed 29 December 2017.

crimes to the OTP ('communications') which the OTP can take into account when acting *proprio motu*.[226] Any individual, group, NGO, intergovernmental organization or state can do this, so the entity filing a communication does not have to be (a national of) a member state. However, difficulties arise for South African citizens who want the OTP to take action in a given situation when South Africa is no longer a member state to the Rome Statute. The ICC will only be able to exercise jurisdiction in that situation when the state of South Africa declares[227] to accept the ICC's jurisdiction with respect to the crime(s) in question, or South African nationals will have to rely on the little chance that a situation will be referred to the ICC by a state party[228] (and then too is a declaration of South Africa required[229]) or the UNSC.[230] Both do not happen that often for various reasons and since South Africa wants to stop cooperating with the ICC, the chance of a persecution by the ICC of an international crime allegedly committed in South Africa or by a South African citizen will become negligible.[231] Yet, this observation might not mean much in practice because under the principle of complementarity, the ICC functions as a court of last resort so individuals, NGO's, *etc.* will have to rely first and foremost on domestic courts in respect of the persecution of international crimes. But also the domestic prosecution of international crimes against peace will face problems when the Implementation Act remains effective after withdrawal.

Under the current system where South Africa is a member to the ICC, it is obliged to try and prosecute individuals who commit violations of the Rome Statute and only if South Africa is unable or unwilling to do so, the ICC will act.[232] Consequently, one of the objects of the Implementation Act is to enable the National Prosecuting Authority[233] (''NPA'') 'to prosecute and the High Courts of the Republic to adjudicate in cases' and when the NPA declines or is 'unable to prosecute a person, to enable the Republic to cooperate with the ICC in the investigation and prosecution of persons […]' who commit atrocities codified in the Rome Statute.[234] If however South Africa is no longer a member state, then these obligations under

[226] Articles 13(c) and 15(1)(2), Rome Statute.
[227] *Ibid*, Article 12(3).
[228] *Ibid*, Articles 13(a) and 14(1).
[229] *Ibid*, Articles 12(2)(3) and 13(a).
[230] Article 13(b), Rome Statute and Chapter VII of the Charter of the Charter of the United Nations, (1 UNTS XVI), 24 October 1945.
[231] Article 12(2)(b), Rome Statute.
[232] In general, a case before the ICC is inadmissible when the case is being investigated or prosecuted by a state which has jurisdiction over it and that state is willing and able genuinely to carry out the investigation or prosecution. See Article 17(1)(a), Rome Statute.
[233] Section 179, South African Constitution.
[234] Section 3(d)(e), Implementation Act.

the Rome Statute to investigate, prosecute, and if unable to do so, to cooperate with the ICC, will cease to exist. When the Implementation Act in that situation remains effective, the NPA will end up having discretion to decide as to how use exactly its prosecutorial power in case of international crimes, which becomes problematic if the NPA then decides not to prosecute these crimes anymore. The Rome Statute obliges domestic authorities to prosecute but this treaty will be withdrawn from while the Implementation Act remains operative so the NPA would have the *ability* but no longer the *obligation* to prosecute. Precarious again is that the ICC will no longer be a court of last resort for South African citizens; they will no longer have the Rome Statute to compel South Africa and the NPA to investigate and prosecute these atrocities.

Hence, in the highly unlikely situation where indeed the Implementation Act stays operative after withdrawal, it seems South African citizens can still have a relative amount of protection against genocide, crimes against humanity and war crimes, but it will depend on the willingness of the NPA, member states to the Rome Statute, and/or the UNSC.

Alternatively, when the UK court's approach is applied in the South African situation, the Implementation Act ceases to exist after withdrawal. This would affect the rights and obligations of citizens substantially. Domestic courts and the NPA would no longer have legislation that would allow the prosecution of specific international crimes. Therefore, South Africa ends up in a paradigm where it has no viable alternative domestic legislation on the prosecution of and protection against international crimes (other than the flawed International Crimes Bill and the implementation acts of the Geneva Conventions and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, see paragraph 6.1.2.1 and 6.1.3) which is a rather undesirable situation analyzed in the next paragraph.

§ 6.1.2 A Limited Reasoning

The focus above on the status of the Implementation Act after withdrawal serves to demonstrate that the human rights perspective of the British courts is a pivotal rationale for limiting the executive's right to withdraw from international agreements and therefore, the Gauteng High Court's view on the status of the Implementation Act post-ICC can be criticized. Both the Gauteng High Court and the British judges held that the executive does not have the constitutional power to unilaterally send a notice of withdrawal from a treaty that through

implementation of it creates rights and obligations for citizens because by doing so, it appropriates itself the legislative role of parliament. But, as demonstrated above, the South African decision is built upon a legally inadequate argument as it perceives the Implementation Act to stand on its own - *i.e.* to stay in force after withdrawal from the Rome Statute. Yet, when this flawed venue of thought is taken further in comparing the reasoning of the EHWC and the SC with the Gauteng High Court, it is even more unfortunate that the latter had to eschew answering the question whether the filing of the instrument of withdrawal at the UNSG was invalid in respect of the Bill of Rights. In particular, the argumentation of the British courts is rather essential to take into account because up until now, South Africa has no viable alternative mechanism(s) for the protection against and prosecution of genocide, crimes against humanity and war crimes. The introduction mentions that the executive has requested parliament to approve a new notice of withdrawal and introduced the 'International Crimes Bill', however, this Bill it not passed yet and is already a criticized document for it is not an exact substitute to the Implementation Act. The government is applauded for first obtaining parliamentary approval for withdrawal and asking repeal of the Implementation Act because it will adhere to the Gauteng High Court's judgment and confirm the assessment made in previous paragraph: withdrawal would 'create a *lacuna* in our domestic law concerning the prosecution of genocide, war crimes and crimes against humanity' - contrary to the Gauteng High Court's opinion.[235] Through this Bill 'Parliament will be requested to remove legal uncertainty regarding South Africa's international obligations under both domestic and international law', but it can be questioned whether this legislation will actually do so.[236] For example, the Bill is seen by the DA as an instrument of impunity because the Bill supports the granting of diplomatic immunity.[237],[238] There is thus still no alternative legislation to the Rome Statute and Implementation Act in place. Consequently, sending a notice of withdrawal without prior parliamentary consent effectively amounts to the executive exercising legislative functions

[235] Gous, N., 'Government introduces new bill to combat international crime', (*Times Live*, 15 December 2017) < https://www.timeslive.co.za/politics/2017-12-15-government-introduces-new-bill-to-combat-international-crime/ > accessed 3 January 2018.

[236] Assembly of States Parties to the Rome Statute of the International Criminal Court: sixteenth session, New York, 4-14 December 2017: official records. New York, NY: United Nations, available at < https://asp.icc-cpi.int/iccdocs/asp_docs/ASP16/ASP-16-ZA.pdf > accessed 3 January 2018.

[237] 'This Act does not apply to persons who are immune from the criminal jurisdiction of the courts of the Republic in accordance with customary international law or as provided for in the Diplomatic Immunities and Privileges Act, 2001'. Article 3, International Crimes Act, 2017, B 37-2017. Available at < http://www.justice.gov.za/legislation/bills/2017-b37-ICBill.pdf > accessed 4 January 2018.

[238] Selfe, J., 'DA notes serious concerns with aspects of the ''Rome Statute Repeal'' Bill', (*Democratic Alliance*, 17 December 2017) < https://www.da.org.za/2017/12/da-notes-serious-concerns-aspects-rome-statute-repeal-bill/ > accessed 4 January 2017.

because it takes away rights and obligations for individuals, while there are no necessary legislative measures for the domestic judiciary to continue to have jurisdiction over international crimes and, equally important, for individuals to continue having the protection that they had under the treaty the state withdraws from.[239] The Implementation Act established domestic crimes of genocide, war crimes and crimes against humanity, and asserts universal jurisdiction over these crimes. Contradictory to what the Gauteng High Court determined in a rather cursory statement, repeal of this Act means that citizens are left without protection against the domesticated international crimes because neither the ICC, nor South African courts can assume jurisdiction over those after withdrawal anymore. The legislation that transformed the treaty in municipal law cannot stand on its own. Therefore, when due to withdrawal the obligation to give effect to the domestication of the Rome Statute into national law falls away without adopting new, feasible legislation for the domestic investigation and prosecution of international crimes, the crucial legal basis for the protection against these crimes will at least be seriously weakened. Arguably, this will not bode well for the rule of law, accountability, the protection of human rights and justice for victims.[240]

While the government views the Gauteng High Court's judgment as an emphasis on the fact that 'there is nothing patently unconstitutional about the national executive policy decision to withdraw from the Rome Statute, because it is within the powers of the national executive to make such a decision',[241] that the judgment has to be characterized as a procedural ruling and the court could not assess the notice of withdrawal in light of Section 7(2) of the Bill of Rights does not encourage the government to take into account the very fact that its power might - or even should - be limited based on a different approach, taken by the British judges: the exercise of that power will have significant repercussions for South African nationals because, as this paragraph's assessment makes clear, there is no viable alternative to the Rome Statute in South

[239] Article 4(3), Implementation Act. In respect of the possible exercise of universal jurisdiction, worth mentioning is that recent domestic jurisprudence has established South Africa as a key venue for the possible prosecution of international crimes. The Constitutional Court has held that the Implementation Act imposes an obligation on domestic authorities to investigate international crimes committed outside of South Africa. See *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* (CCT02/14) [2014] ZACC 30; 2015 (1) SA 315 (CC). In addition, the SCA ruling in the al-Bashir case is of particular importance as the SCA held that the Implementation Act negates all forms of heads of state immunity under customary international law from charges of international crimes. See *Minister of Justice and Constitutional Development v Southern African Litigation Centre,* Appeal Judgment, *supra* note 64, para 103. These two landmark rulings, however, would effectively be erased by the required repeal of the Implementation Act.

[240] M. Ssenyonjo, 'State Withdrawal Notifications from the Rome Statute of the International Criminal Court: South Africa, Burundi and The Gambia' *Criminal Law Forum* (2017).

[241] South African Parliamentary Questions and Answers, 'Deputy President Cyril Ramaphosa: Reply to questions in the National Council of Provinces', 15 March 2017, available at < https://www.gov.za/speeches/deputy-president-cyril-ramaphosa-oral-replies-questions-national-council-provinces-15-mar > accessed 17 October 2017.

Africa.[242] Notably, this is the aim of the elaboration on to what extent the three categories of citizens' rights will be impaired by withdrawal from the EU. The ECA will not remain applicable and for that very reason, the parties debated before the EHWC whether categories of EU-rights will be affected by withdrawal in order to determine if the executive could have the primacy to trigger the withdrawal process.

This paragraph demonstrates that even though the Gauteng High Court held that it could not decide on the permissibility and compatibility of the notice of withdrawal in light of and with Section 7(2) of the Bill of Rights, it is highly conceivable that withdrawal from the Rome Statute in circumstances where there is no workable alternative to the ICC and the protection under the Rome Statute is not a reasonable and effective measure to advance the fundamental rights of citizens - which is a duty for the state under Section 7(2) of the Bill of Rights. That the Implementation Act has created rights and obligations for both nationals and the state and that these will inevitably be affected by withdrawal is thus a crucial limitation to the executive's power to withdraw. What substantiates and confirms this is that the SCA has determined the international crimes against peace codified in Article 5 of the Rome Statute as serious violations of the rights contained in the Bill of Rights, particularly human dignity, freedom, life, security, and equality. In the case of South Africa's refusal to arrest Omar al-Bashir, the SCA had to interpret the Implementation Act in such a way that promotes the spirit, purport and object of the Bill of Rights pursuant to Section 39(3) of the South African Constitution. Accordingly, it held that all of the international crimes covered by the Rome Statute would constitute severe breaches of the Bill if they were committed in South Africa.[243] The SCA has thus already indicated in substance an interpretation of the Rome Statute that confirms this paragraph's explanation. The commission of international crimes against peace violates the rights contained in the Bill of Rights - while the Implementation Act has become inoperative post-ICC. Hence, withdrawal from the Rome Statute would have detrimental implications for the interpretation and application of the Bill of Rights and the protection against international crimes. The Gauteng High Court has confirmed this implicitly: it concluded its decision with the 'warning' that a constitutional challenge against withdrawal 'is not an unreasonable forecast, due to the

[242] *Ibid.* Deputy President Cyril Ramaphosa stated that 'Cabinet has established a technical task team to develop a compliance roadmap to address what the High Court considered to be defects in the procedure preceding the issue of the notice of withdrawal.' This course of action is very welcome, however, to date there is no information made available about this compliance roadmap, the technical task team, how this team is going to approach the defects in the withdrawal procedure, *etc*.
[243] See *Minister of Justice and Constitutional Development v Southern African Litigation Centre,* Appeal Judgment, *supra* note 63, para 87.

importance of the matter to the country, both nationally and internationally, given the issues it raises.'[244] By saying this, the court gave leeway to the argument that withdrawal is undesirable in the current domestic situation. Because the International Crimes Bill is not seen as a feasible substitute to the Implementation Act, enacting this Bill will possibly only enforce this argument.

§ 6.1.3 More (Practical) Concerns

In line with the considerable threat of having no feasible substitute of the Implementation Act and the Rome Statute, there is more concrete apprehension regarding other South African acts of transformation. As noted above, the effect of a successful withdrawal from the Rome Statute will be legal uncertainty concerning the prosecution in South Africa of international crimes because to date the government does not provide plausible alternative proposals to impose accountability for these crimes. The South African situation is not exactly similar to Brexit for as such, it is not characterized by categories of rights under the Rome Statute and European law creates a fundamentally different relationship with member states than the Rome Statute does, but the fact that many of the international crimes against peace form part of customary international law[245] does also not create a satisfactory post-withdrawal situation. The very purpose of the Implementation Act is to clarify South Africa's domestic obligations in relation to the prosecution of crimes pursuant to the Rome Statute. After withdrawal South Africa would also be required to prosecute customary international crimes,[246] though, the exact contours thereof are much less definite and subject to more dispute than the provisions of the Rome Statute and the Implementation Act.[247] Since it is not certain that the International Crimes Bill will be enacted and it is argued that the Bill is not a viable alternative to the Implementation Act (the International Crimes Bill provides for immunity relating to the crime of torture), what

[244] *Democratic Alliance v Minister of International Relations and Cooperation*, High Court Judgment, *supra* note 9, para 69.
[245] B. Lepard, *Customary International Law: A New Theory with Practical Implications* (Cambridge: Cambridge University Press, 2010), at 7. Withdrawing states still have an implicit obligation to cooperate with the ICC, which has jurisdiction over genocide, when it is acting by virtue of a Security Council referral. This includes an obligation to arrest and surrender persons charged with genocide. See UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, United Nations, Article VI; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment of 26 February 2007 (2007) ICJ Reports (2007) 43, paras 439-447.
[246] Which is deemed possible as the Constitutional Court explicitly endorsed the direct application of customary international law through Section 232 of the South African Constitution. See *National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre and Another*, Constitutional Court Judgment, *supra* note 239, paras 37, 39.
[247] South African Institute for Advanced Constitutional, Public, Human Rights and International Law and South African Research Chair in International Law, 'Submission on the Implementation of the Rome Statute of the International Criminal Court Act Repeal Bill', at 12.

is left is the codification in South African law of a much more limited set of international crimes: the Prevention and Combating of Torture of Persons Act 2013[248] and the Geneva Conventions Implementation Act 2012.[249] Regardless of whether or not the new withdrawal procedure will be successful and the International Crimes Bill will be assented to, both situations can create risks of generating gaps and inconsistencies in the law.

Also on a practical level concerning the limitations to withdrawal can be noted that what should create an imperative for South Africa to have viable legal mechanisms in place to prosecute serious international crimes after withdrawal is the fact that Africa cannot handle accountability on the regional level. There is no existing mechanism to try perpetrators of international crimes. This means that when South Africa successfully withdraws from the Rome Statute, whether or not the Implementation Act will be repealed, there is no regional back-up and thus most likely justice will not be carried out for the victims thereof. Currently, the African Union is trying to set up an African instrument of justice. Even so, the option that is being proposed under the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) which would afford this court (which will be transformed into the African Court of Justice and Human Rights) criminal jurisdiction, suffers from several shortcomings. For instance, the Protocol has imprecise definitions of offences, it sources of funds are unclear, and a detrimental effect of it is that the threshold for trying perpetrators will become higher because the Protocol provides for heads of state immunity in criminal prosecutions.[250] Besides, it is not likely that the Protocol will enter into force anytime soon for it has only received a few signatures, with no ratifications to date.[251]

[248] Prevention and Combating of Torture of Persons Act, 2013, No. 36716, *Government Gazette* 29 July 2013, available at < http://us-cdn.creamermedia.co.za/assets/articles/attachments/45739_act_13.pdf > accessed 24 December 2017.

[249] Implementation of the Geneva Conventions Act, 2012, No. 35513, *Government Gazette* 12 July 2012, available at < https://www.gov.za/sites/default/files/a8_2012.pdf > accessed 24 December 2017.

[250] It guarantees the immunity of serving heads of state but also of 'anybody acting or entitled to act in such capacity, or other senior state officials based on their functions', which is a very wide formulation that possibly excludes far too many people from prosecution. See Vilmer, *supra* note 85, at 1340; Article 46A *bis* Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, African Union, 1 July 2008.

[251] Ten out of the 55 member states to the African Union have signed the Protocol. See the List of countries which have signed and/or ratified/acceded to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, available at < 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 > accessed 24 December 2017.

To conclude, the critical remarks of this paragraph do not mean to advocate for precluding withdrawal altogether, but because withdrawal from the Rome Statute can be seen as detrimental and in light of the research question can be determined that there are far more consequential limitations to the executive's power to withdrawal than the procedural observation that it cannot do so unilaterally. Most importantly, in combination with the analysis of chapter five it is concluded that the idiosyncratic statement of the Gauteng High Court concerning the status of the Implementation Act after withdrawal serves to demonstrate that there is a 'bigger picture' to be taken into account. The contrasting rulings show an even starker fashion why the South African executive cannot trigger a unilateral withdrawal process from the Rome Statute: the involvement of rights and obligations of citizens and the withdrawing state itself is something not considered by the Gauteng High Court, but a significant limitation to the executive's power. Moreover, this chapter gives the comprehension that the litigation scrutinized in this research is useful principally because it prompts us to consider what South African policy will (have to) look like after withdrawal.[252]

[252] Fowkes, J., 'South Africa's Withdrawal from the ICC: The High Court's Judgment and its Limits' *Verfassungsblog* 8 March 2017.

VII. Conclusion

The central research question discussed in this dissertation is: *'What are the limitations under international law and South African law to the South African executive's power to withdraw from the Rome Statute of the International Criminal Court?'*

To be able to answer this research question, the following observations and conclusions have been made throughout:

Chapter two dealt with the question why South Africa applied to leave the ICC. It was demonstrated that the role and influence of the African Union, the case of President Omar al-Bashir, and the presumption that the ICC unfairly singles out crimes on the African continent for prosecution were the most significant motives for South Africa for withdrawal. What is discernible throughout the analysis is that all three reasons are interlinked in the sense that how the AU depicts the ICC is enhanced by African states and *vice versa,* with the risk of encouraging more African states to withdraw from the Rome Statute. What stands out, however, is the central role of the (controversies around) al-Bashir's attendance to an AU summit, hosted by South Africa, and the country's highly judicially criticized refusal to arrest the president. By going into further detail - which was deemed necessary because the sole description of South Africa's opinion about diplomatic immunity would depict the situation incorrectly - it became clear that a definitive outcome regarding many questions in respect of the past and current political and legal situation remain.

Chapter three partially answers the research question. In light of the limitations to withdrawal under established international law it was concluded that the Rome Statute provides clear parameters regarding withdrawal from it. First was emphasized through relevant ICJ-case law that the fact that South Africa is not a member to the foundational treaty that regulates the international legal framework of *inter alia* treaty-making and treaty termination - the Vienna Convention - is no barrier to concluding that it is possible for South Africa to withdraw from the Rome Statute internationally. The limitations to withdrawal under international treaty law are that a government's state needs to send an official and written instrument of withdrawal to the Secretary-General of the UN in which the date on which withdrawal has to become effective is determined. Therefore, unilateral withdrawal under international law is possible and South Africa's instrument of withdrawal was sufficient to take effect in international law from 19 October 2017 onwards (if it had not been repealed on 7 March 2017). Yet, the second part of

the examination of the notice of withdrawal in light of international law is perhaps more important for South Africa. Namely, the normative outcome of the examination raises the question what happens *after* withdrawal. Do state obligations pursuant to the Rome Statute cease to exist on this very date? The answer to this question is negative. South Africa's obligations incurred while it was a state party to the Rome Statute continue to be in force, which was illustrated by the case of Omar al-Bashir. Also regarding duties under the Rome Statute posed upon a state after the notification of withdrawal is sent to the UNSG was concluded that these remain in force. The observation was made that the UNSG does not demand a justification for withdrawal (and that therefore the withdrawing state has full discretion) which is in stark contrast to the assessment of ongoing cooperation duties once the withdrawing state elapses the one year notification period.

Chapter four marked the beginning of answering the more contested part of the research question. From the lens of domestic law was analyzed whether the notice of withdrawal was lawful, given that this was a purely executive act that was not preceded by any form of parliamentary consultation, let alone approval. While in the previous chapter could be concluded almost right away that the notice of withdrawal was legally compatible with the established international legal framework, in chapter four was through an in-depth analysis of the Gauteng High Court's ruling demonstrated that the notice of withdrawal is legally *in*compatible with South Africa's domestic legal order. Notably, unilateral withdrawal is possible under international law, but the Gauteng High Court determined that the national executive cannot act unilaterally. The decisive argument of the court was that the executive has not adhered to the domestic legal requirements, which are not codified in the South African Constitution or any other South African law, but read into the Constitution by the court. It saw no problem in that the Constitution does not contain a corollary provision for the assignation of power to withdraw from international treaties - an issue mentioned in the introduction of this thesis. Particularly, it ruled that as it is parliament's power to bind the state to the Rome Statute by virtue of Section 231(2), it must therefore, perforce, be parliament to have the power to decide whether and when a treaty ceases to bind the state. Given that parliament is constitutionally required to approve an international agreement twice - at the ratification and the transformation stages - by logical implication, it would be inconsistent and a breach of the rule of law not to require parliamentary approval before withdrawal. Accordingly, the executive was reproached for appropriating itself the power to unilaterally send a notice of

withdrawal from an international agreement that creates rights and obligations for citizens because by leapfrogging parliament, it breached the separation of powers.

Ultimately, this ruling describes the prematurity of the lodging of the notice of withdrawal, which relates to the procedure by which the instrument was prepared and handled. The Gauteng High Court thus only decided whether South Africa *can* withdraw from the Rome Statute. This implies that the court did not search clarification as to whether South Africa *should* withdraw from the Rome Statute. In this context, chapter five has offered insight in more pertinent limitations to the executive's power to withdraw from international treaties. This chapter juxtaposes the reasoning of the British judges on Brexit and the South African judges for rendering the particular notices of withdrawal invalid. In this perspective, while analyzing the case law on Britain's proclaimed withdrawal from the EU, some striking similarities with and differences from South Africa's situation came to the fore. What stands out is the parity between the submissions of the South African and British executive. Both emphasized their power to conclude treaties and conduct international relations and found this the legal basis for also having the power to 'unmake' international agreements. But, apart from this observation, chapter six shows why the judgments of the British and South African judges diverge fundamentally.

The fact that withdrawal leads to a situation where citizens would be left without law to protect them runs like a red thread through both judgments of the UK courts. It was without doubt that the ECA will cease to exist after withdrawal from the EU. Accordingly, the rights and obligations of citizens will be affected. For precisely this reason, the courts decided that the executive does not have the authority to trigger an exit process without the imprimatur of parliament. This is in stark contrast to the paradoxical assessment of the Implementation Act by the Gauteng High Court. It argued that the Implementation Act remains effective after withdrawal, but still categorically stated that the executive cannot withdraw unilaterally because this would violate the separation of powers (whereas it seems the British courts left this option on the table when citizens' rights are not at stake). In this perspective, the assessment of the improbable situation where indeed the Act stays in force was made: citizens could still be protected against international crimes, but that protection will be dependent on the will of the NPA, Rome Statute's member states or the UNSC. Alternatively, the more logical situation where the Act stops to have its function after withdrawal, the quite critical remark that South Africa does not have viable domestic legislation concerning international crimes that stands on

its own encourages us to think about the domestic situation post-withdrawal. It was noted that new repealing legislation - the contentious International Crimes Bill - has been introduced in parliament, but it is always possible that it will not pass or will be withdrawn (again).
State withdrawals from the Rome Statute undermine the global movement towards greater accountability to put an end to impunity for the perpetrators of the most serious crimes. Therefore, domestic (as it will not be in place on a regional level in the foreseen future) substitutes are crucial. The British courts made the same analysis but from a different perspective: because the act of transformation created rights and obligations for individuals, withdrawal from the treaty that has been implemented cannot be executed without prior parliamentary approval because withdrawal will inevitably affect these rights and obligations. The Gauteng High Court, however, did not address this for it is in the sphere of whether South Africa should withdraw - a question only the Constitutional Court can answer. Also, the Gauteng High Court presumably did not elaborate on this very point because it was of the opinion that withdrawal from the Statute will not amount to the deprivation of the rights of citizens that they had pursuant to the Rome Statute.

To conclude, the aim of this thesis was to trace the international and domestic limitations to the South African executive's power to withdraw from international agreements and in line with that, to ameliorate the motives put forward for determining those limitations. Unsurprisingly, the Vienna Convention and the Rome Statute do not create a substantive withdrawal procedure. The Gauteng High Court stressed the same since the only limitation posed to the national executive's power is that it cannot act without preceding parliamentary assent, however, this does not provide a satisfactory normative outcome when compared with the argumentation of the British High Court of Justice and Supreme Court. These courts have put forward a more relevant and substantive reason to limit the executive's power to withdrawal than the one considered by the Gauteng High Court: when rights and obligations of individuals will be affected or cease to exist, unilateral withdrawal is not possible.

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