



**Parliamentarians for Global Action**  
**Parlamentarios para la Acción Global**  
**Action Mondiale des Parlementaires**  
برلمانيون من أجل التحرك العالمي

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## **Submission of PGA on the RSA Bill to Repeal the Implementation of the Rome Statute of the International Criminal Court Act 2002**

The membership of Parliamentarians for Global Action (PGA)<sup>1</sup> engaged in a significant manner in the process that brought about South Africa's prompt ratification and effective implementation of the Rome Statute of the International Criminal Court (ICC).

Between 1997 and 1999, PGA worked with one of the most prominent actors of the anti-apartheid movement, the late Hon. Mr. Dullah Omar, who had assumed the pivotal role of Minister of Justice and Constitutional Affairs in the Mandela Administration.

In 2000-2003, PGA received the leadership contribution of the late Hon. Ms. Cheryl Gillwald, MP, Deputy Minister of Correctional Services, Justice and Constitutional Development and Member of PGA, who addressed the II *Consultative Assembly of Parliamentarians for the ICC & the Rule of Law*, organised by PGA at the UN in New York in parallel to the first session of the ICC Assembly of States Parties (September 2003): Ms. Gillwald presented the Rome Statute of the International Criminal Court Act 27 of 2002 (the Rome Statute Implementation Act) and her firm commitment to the fight against impunity was a source of inspiration for hundreds of Parliamentarians who decided to take action in their own Legislatures.

PGA had the privilege to contribute to the proceedings of a working meeting held in Pretoria in July 1999 on the drafting of the *Southern African Development Community (SADC) Kit on the Ratification and Implementation of the ICC Statute*. Thanks to the leadership of South Africa, steered by its Minister of Justice, the entire SADC group of States received guidelines and discussed the political need to join the Rome Statute system against impunity.

Against this background, the Parliament of South Africa adopted a law, the Rome Statute Implementation Act of 2002, which became a reference and a model for all law-abiding and peace-loving nations of the world.

With the present submission to the Parliament of South Africa, PGA renews its recognition and appreciation to the Parliament and Government of South Africa for the extraordinary contribution

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<sup>1</sup> Parliamentarians for Global Action (PGA) is the largest NGO network of individual Members of Parliament with 1,400 members in 143 parliaments. Over 500 of its Members are from Sub-Saharan Africa. PGA is a no-profit legal entity under the law of The Netherlands and the law of the United States of America, with offices in New York and in The Hague. Its membership is open to sitting Parliamentarians from countries with democratic, quasi-democratic and/or transition-to-democracy status. The organization is based on principles of multi-partisanship (political pluralism) and gender equality. The vision of PGA is "to contribute to the creation of a Rules Based International Order for a more equitable, safe and democratic world". For more information, see [www.pgaction.org](http://www.pgaction.org).

that your country has made to the development and the consolidation of the Rule of Law and the fight against impunity for the most serious crimes of international concerns stemming from South Africa's membership in the ICC system and its prompt and effective domestic implementation of the Rome Statute.

On the merits of the Preamble and content of the Bill to repeal the Implementation of the Rome Statute of the International Criminal Court, **PGA respectfully submits the following points**, which are primarily based on the consideration of matters of **International Law** and their inter-relation with the domestic legal order of the Republic of South Africa:

**1) As Member of the United Nations (UN) and as founder and member of the African Union (AU), the Republic of South Africa is bound to respect the letter and spirit of the UN Charter and the AU Constitutive Act, which are rendering all AU Decisions relating to non-cooperation with the ICC on situations referred to the ICC by the Security Council under Chapter VII, UN Charter, null and void.**

Under the AU Constitutive Act, the AU has a mandate to maintain international peace and security<sup>2</sup> that is derived from the system of collective security enshrined in the UN Charter.<sup>3</sup> The AU may act autonomously from the UN Security Council (SC) action only if the SC decides not to include an African crisis in its agenda or if the SC fails to take action under Chapter VII, hence violating its own mandate (as in the situation of Syria, where the SC failed to take any measure under Chapter VII, Articles 41 and 42 of the UN Charter, due to the vetoes of the Russian Federation and, at times, the People's Republic of China). In the Darfur/Sudan situation, the Council took action under Chapter VII of the UN Charter.<sup>4</sup>

Under Article 103 of the UN Charter<sup>5</sup>, which establishes the prevalence of the obligations contained in the UN Charter over obligations under any other international agreement, the decisions adopted by a regional organization – such as African Union – can never prevail over resolutions adopted under Chapter VII of the UN Charter. In fact, under Chapter VIII of the UN Charter, regional organisations can only take measures that are consistent with Chapter VII resolutions on the same subject matter. Thus, the content of any AU decision or resolution that contravene the obligations stemming from the resolutions adopted by the UN Security Council under Chapter VII are null and void, as they are *ultra vires* (beyond the powers derived from the UN Charter and the AU Constitutive Act under its peace and security mandate) and *contra legem* (against the law stipulated in the UN Charter and the law of treaties). Such legal status exists even if a country is not a party to the Rome Statute.

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<sup>2</sup> Art. 4 of the African Union Constitutive Act, 1 July 2000, done at Lomé, Togo, available at: <http://www.achpr.org/instruments/au-constitutive-act/> .

<sup>3</sup> Art. 3(e) of the African Union Constitutive Act, which includes as one of its objective: taking due account of the Charter of the United Nations.

<sup>4</sup> The situation in Darfur (Sudan) was referred to the ICC on 31 March 2005 by the UN Security Council (UNSC) through its Resolution 1593 adopted under Chapter VII, UN Charter, with 12 votes in favour and 3 abstentions.

<sup>5</sup> The United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, available at: [www.un.org/en/charter-united-nations/index.html](http://www.un.org/en/charter-united-nations/index.html). Article 103 stipulates: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”

The situation in Darfur (Sudan) was referred to the ICC on 31 March 2005 by the UN Security Council (UNSC) through its Resolution 1593, which sought to eliminate any impediment to the proceedings before the Court and called for all UN Member States to fully cooperate with the ICC. Therefore, the AU Decisions on non-cooperation with the ICC in arresting President Al-Bashir<sup>6</sup> are in violation of the UN Charter and of the AU Constitutive Act, which the Republic of South Africa is bound to respect, whether or not it would withdraw from the Rome Statute and/or repeal the Implementation of the Rome Statute of the ICC Act 2002. These AU decisions are also contravening the general principles of international law underpinning the fight against impunity for the most serious crimes of concern to the International Community as a whole and the right to justice of victims of these crimes.

This reasoning also extends to the matter of applicability of immunities, which will be further developed below. Since immunities attached to the President of Sudan, Mr. Omar Al-Bashir, are not a procedural or substantive bar for prosecution before the Court, the applicability of the Rome Statute and the cooperation-regime envisaged in the said resolution is meant to eliminate any impediment to the proceedings before the Court, including the lifting of immunities.<sup>7</sup> In line with Article 103 of the UN Charter, any pre-existing international obligation relating to immunities is trumped by the decision of the UN Security Council referring the situation to the ICC jurisdiction as competent International Court and the consequent applicability to the Darfur/Sudan situation of the Rome Statute in its entirety.

## 2) The necessity of mechanisms of accountability to ensure durable peace and security

ICC prosecutions are conducive to prevention of conflicts and may help deter their further escalation, depending on a number of subjective and objective factors. Deferrals of situations under the investigation or preliminary examination before the ICC do not necessarily help in the peaceful resolution of conflicts, as the Government of the Republic of South Africa appears to suggest in the Repeal Bill, but are, on the contrary, detrimental to that end. A peace settlement must inevitably include solid mechanisms of accountability to provide guarantees of non-reoccurrence of conflict and guarantees non-repetition of atrocities that are normally associated with a conflict.

The impunity of individuals responsible for gross violations of human rights and grave breaches of international humanitarian law constitutes one of the root causes of the conflict itself and, therefore, mechanism of accountability for such violations are the cornerstone of establishing durable peace and security in any given country affected by armed conflict.

Mr. Al- Bashir has been playing a role in all national and sub-regional armed conflicts in the past 27 years.<sup>8</sup> His impunity is one of the factors of repetition of mass atrocities and reoccurrence of conflicts.

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<sup>6</sup> Assembly of the African Union, Thirteenth Ordinary Session 1 – 3 July 2009 Assembly/AU/Decl.1- 5(XIII) in Sirte, Great Socialist People's Libyan Arab Jamahiriya, Assembly/AU/Decl.1- 5(XIII), [www.au.int/en/sites/default/files/decisions/9560-assembly\\_en\\_1\\_3\\_july\\_2009\\_auc\\_thirteenth\\_ordinary\\_session\\_decisions\\_declarations\\_message\\_congratulations\\_motion\\_0.pdf](http://www.au.int/en/sites/default/files/decisions/9560-assembly_en_1_3_july_2009_auc_thirteenth_ordinary_session_decisions_declarations_message_congratulations_motion_0.pdf).

<sup>7</sup> As reaffirmed by the ICC in its *Decision on Cooperation of the Democratic Republic of the Congo concerning the arrest and surrender of Omar Al-Bashir to the Court*, ICC-02/05-01/09, 9 April 2014, para. 2.

<sup>8</sup> The coup d'état that led Mr. Bashir to power took place in 1989. In a biographic article of 2014, the BBC World Service wrote: "if there is one over-riding constant of President Bashir's time in power, it is conflict. There has not been

According to the Prosecutor and the Pre-Trial Judges of the ICC, Mr. Al-Bashir is allegedly responsible for several counts of genocide, crimes against humanity and war crimes, including crimes of murder, extermination, forcible transfer of population, torture, rape, attacks against civilians and pillaging. According to UN reports, 300 000 people are estimated to have been killed and 2.7 million others displaced as a result of the Darfur conflict(s).

The ICC's indictment of President Omar Al-Bashir for atrocity crimes in Darfur provides an opportunity for Sudan and the International Community to both fight impunity and bring peace to the country for the purposes of achieving justice and reconciliation in Darfur, as well as for providing access to justice for victims. On the basis of the UN SC Resolution 1593, Sudan is under an obligation to arrest and surrender all persons charged with war crimes, crimes against humanity or genocide by the ICC as a measure to restore international peace and security. The refusal of the UN SC to defer the Darfur situation of six months<sup>9</sup>, as requested by the AU Peace and Security Council on 21 July 2010<sup>10</sup> demonstrates that the Council has determined that arresting and surrendering indictees under Chapter VII would contribute to peace and security in Sudan and neighbouring countries.

3) The principle of irrelevance of official capacity (no-immunities) before competent international jurisdictions is a principle of customary International Law reaffirmed in Article 27 of the Rome Statute: As such, this principle will continue to be binding for South Africa regardless of its decision to withdraw from the Statute and/or repeal the ICC Implementation Act (2002).

Under the Preamble of the Bill to repeal the Implementation of the Rome Statute of the ICC, the Executive of the Republic of South Africa submits that it wishes to give effect to the rule of customary international law that recognizes the diplomatic immunity of Heads of States in order to effectively promote dialogue and the peaceful resolution of conflicts wherever they may occur, but particularly on the African continent.

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a day of peace in Sudan since Mr. Bashir's coup." Cf. BBC, *Sudan's great survivor: Bashir's 25 years in power* (James Copnall, 14 July 2014), at [www.bbc.com/news/world-africa-28196075](http://www.bbc.com/news/world-africa-28196075). See also: [www.insightonconflict.org/conflicts/sudan/conflict-profile/](http://www.insightonconflict.org/conflicts/sudan/conflict-profile/) and [www.theguardian.com/world/2011/apr/20/omar-al-bashir-darfur-responsibility](http://www.theguardian.com/world/2011/apr/20/omar-al-bashir-darfur-responsibility).

<sup>9</sup> Contrary to what stipulated in a number of AU reports, UNSC Member States have met on matter pertaining to Article 16 of the Rome Statute (AU requests to defer the situations in Sudan and Kenya) and no majority vote of 9 Council Members has taken place in support of such requests. In fact, not even one of the UNSC Member States have been able to produce a draft resolution on deferral, simply because no State found that such a deferral was a measure not implying the use of force that could have helped resolve an armed conflict falling under Article 41 of the UN Charter. To the contrary, the referral of the Darfur/Sudan situation to the ICC jurisdiction was clearly framed as an Article 41 measure under UNSC Res. 1593. Regretfully, the relevant AU Ministerial Committee on the ICC complained that the rank of UNSC Member States' representatives available to meet with the Committee was not adequate. It must be pointed out that the subjects of International Law are the States as such, through their organs, including Representatives to the UN acting on behalf of the State in question. **Rank does not count if a duly accredited representative to an International Organization is presenting the position of a State. In fact, when a position is negative, a State will send forward a low rank official, in order for high rank officials to be spared from confrontations with trade and political partners.** There is no doubt that, regardless of the Bashir/ICC controversy, South Africa remains an excellent trade partner and political ally of basically all States Parties to the Rome Statute that have a seat in the UN Security Council, including permanent members France and the UK.

<sup>10</sup> The Security Council Report, September 2010 Monthly Forecast, 25 August 2010: [www.securitycouncilreport.org/monthly-forecast/2010-09/lookup\\_c\\_gIKWLcMTTsG\\_b\\_6196127.php](http://www.securitycouncilreport.org/monthly-forecast/2010-09/lookup_c_gIKWLcMTTsG_b_6196127.php).

As evidenced by provisions of the various treaties<sup>11</sup>, international instruments<sup>12</sup>, statutes of international tribunals<sup>13</sup>, as well as international<sup>14</sup> and national case law<sup>15</sup>, customary international law has evolved to the effect that all State officials, including those at the highest level, are not entitled to immunities from arrest and criminal proceedings — either of a national or international nature — if charged with such offences as war crimes, crimes against humanity, genocide or the crime of aggression by a competent international jurisdiction.

This development in case of prosecutions for international crimes, supported by the opinion of renowned legal scholars<sup>16</sup>, results from the non-relevance of the reasons for which immunity *ratione*

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<sup>11</sup> Convention on the Prevention and Punishment of the Crime of Genocide (1948); International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted by the UN General Assembly on 30 November 1973.

<sup>12</sup> *Affirmation of the Principles of International Law recognized by the Charter of Nuremberg Tribunal*, adopted by the UN General Assembly Resolution 95 (I) of 11 December 1946; *Draft Code of Crimes against the Peace and Security of Mankind*, adopted by the International Law Commission at its forty-eight session, from 6 May to 26 July 1996, General Assembly, Official Records, 51<sup>st</sup> Session, Supp. N° 10; U.N. Doc. A/51/10.

<sup>13</sup> Cf. Art. 7, *The London Agreement of 8 August 1945 establishing the International Military Tribunal (IMT)*, to be read in conjunction with the judgment related thereto; Art. 7, *Statute of the International Criminal Tribunal for the Former Yugoslavia* and Art. 6 of the *Statute of the International Criminal Tribunal for Rwanda*, annexed to UN Security Council resolutions 827 (1993) and 955 (1994) respectively; Art. 27, *Rome Statute of the International Criminal Court (1998)*; Art. 6, *Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315 (2000) of 14 August 2000 establishing the Special Court for Sierra Leone*. All the above mentioned instruments are legally binding international treaties. Instead, the 1945 *Control Council Law No. 10: Punishment of persons guilty of War crimes, Crimes against peace and against humanity* represents the exercise of the joint legislative powers of the Allied States occupying Germany after World War II and the *Charter of the International Tribunal for the Far East establishing International Military Tribunal for Far East*, dated 19 January 1946, is a unilateral act of the United States of America as victorious power exercising jurisdiction over Japan. As such, these two Statutes of relevant jurisdictions on international crimes represent States' practise that confirm the customary international law nature of general principles of international law, including the no-immunity (irrelevance of official capacity) principle, but they are not sources of International Law.

<sup>14</sup> ICJ, *Arrest Warrant* of 11 April 2000 (Democratic Republic of the Congo v. Belgium), p. 26; ICTY, the *Prosecutor v. Anton Furundžija*, case n° IT-95-17/1-T, Judgement, 10 December 1998, para. 140; see also ICTY, the *Prosecutor v. Slobodan Milošević*, Case n° IT-99-37-PT, Decision on Preliminary Motions, 8 November 2001, para. 28; *Prosecutor v. Tibomir Blaskic*, case (IT-95-14) ICTY, Judgement on the request of the Republic of Croatia for review of the decision of Trial Chamber II of 118 July 1997, Judgment of 29 October 1997; *Prosecutor v Charles Ghankay Taylor*, Case Number SCSL-2003-01-I, Decision on Immunity from Jurisdiction, 31 May 2004; *Decision on Cooperation of the Democratic Republic of the Congo concerning the arrest and surrender of Omar Al-Bashir to the Court*; ICC-02/05-01/09, 9 April 2014; as well as *Corrigendum to the Decision Pursuant to Article 87 (7) of the Rome Statute in relation to the failure by the Republic of Malawi to comply with the requirement of cooperation addressed by the Court for the arrest and surrender of Omar Hassan Ahmad Al-Bashir*; ICC-02/05-01/09, 13 December 2011.

<sup>15</sup> *Attorney-General of the Government of Israel v. Adolf Eichmann*, Supreme Court (sitting as a Court of Criminal Appeal), Judgement of 29 May 1962; House of Lords, *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet Ugarte*, 25 November 1998; The Committee of African Jurists established by the African Union to examine the question of the prosecution of Hissène Habré took the position that “Hissène Habré cannot shield behind the immunity of a former Head of State to defeat the principle of total rejection of impunity that was adopted by the Assembly”, See para. 13 of the Report of the Committee of Eminent African Jurists on the case of Hissène Habré, submitted to the Summit of the African Union in July 2006, available at: [www.hrw.org/justice/habre/CEJA\\_Repor0506.pdf](http://www.hrw.org/justice/habre/CEJA_Repor0506.pdf). The Chadian authorities had waived Habré's immunity in the criminal proceedings instituted against him in Belgium.

<sup>16</sup> See, for all, O. Triffterer, “Article 27 – Irrelevance of Official Capacity”, in O. Triffterer (ed.), *Commentary on the Rome Statute of the ICC – II edition* (Baden Baden/Munich/Oxford, Nomos/Beck/Hart, 2008): “Professor Otto Triffterer's contribution to the progressive development of International Criminal Law dates back to the mid- 1960s when his pivotal

*materiae* has been conferred. The first reason for this type of immunity is that official acts done by individuals are deemed to be acts of the state for which it is the state and not the individual which is responsible. However, this general principle does not apply to acts that amount to crimes under International Law, as the immunities have come to conflict with more recently developed rules of International Law, according to which the official position of an individual does not exempt him/her from individual responsibility for international crimes.<sup>17</sup>

This principle has been established in 1943 and 1945 when, respectively, the Moscow Declaration of the Allied Powers and the Nuremberg Charter eliminated any immunity applicable to Heads of States for mass atrocity crimes. Article 7 of the Charter of the International Military Tribunals, which was applicable to the international tribunal established by London Agreement<sup>18</sup> in Nuremberg and, as well as the Tokyo Tribunal, states as follows: “*The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.*”

As the *Nuremberg Tribunal* stated:

The principle of international law which under certain circumstances protects the representatives of a State, cannot be applied to acts which are condemned as criminal by

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Ph.D. thesis entitled, “*Dogmatische Untersuchungen zur Entwicklung des materiellen Völkerstrafrechts seit Nürnberg*” (“Theoretical Basis for the Development of Substantive International Criminal Law since Nuremberg”), marked a new beginning for the understanding of the principles established at Nuremberg. According to Triffterer, war crimes, crimes against humanity including genocide, and crimes against the peace (i.e. the crime of aggression) are crimes *under* international law, each State or international Courts and Tribunals exercise jurisdiction over them on behalf of the community of nations, and it is irrelevant whether domestic laws codify them for their application in a specific case concerning individual perpetrators and their victims. Hence, the legality of the Nuremberg Trials is explained as an exercise of the *jus puniendi* by the *International Community as a whole* to put an end to impunity for the crimes of concern to the International Community as whole, and not as a prolongation of national criminal jurisdictions through common Courts or Tribunals.” Cf. D. Donat Cattin, *In Memoriam of Prof. Otto Triffterer: A giant of International Criminal Law* (15 June 2015), at [www.pgaction.org/news/in-memoriam-prof-otto-triffterer.html](http://www.pgaction.org/news/in-memoriam-prof-otto-triffterer.html).

See also P. Gaeta, “Official Capacity and Immunities” in A. Cassese/P. Gaeta/R.W.J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. I (Oxford/New York, Oxford University Press, 2002), p. 990: “Article 27 (1) [of the Rome Statute] does not depart from customary international law as far as functional immunities laid down in international rules are concerned. It restates the customary rule whereby for the purpose of establishing criminal responsibility the plea of acting in an official capacity is of no avail.”; A. Cassese, “*When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case*”, *European Journal of International Law*, 2012, Vol. 13, issue 4, pp. 864-865, available at: <http://www.ejil.org/article.php?article=1564&issue=32>.

<sup>17</sup> D. Akande & S. Shah: *Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, in *European Journal of International Law* Vol. 21 no. 4, 2011, p. 840.

<sup>18</sup> Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, Signed at London on 8 August 1945, United Nations - Treaty Series, 1951, n° 251, at 279. All UN Member States attending its first General Assembly session in 1945-1946 ratified this multilateral treaty, hence recognizing its normative value (legally binding and standard-setting) notwithstanding the political criticism that labelled Nuremberg and Tokyo as an exercise of “victors’ justice”. While these criticisms were legitimate and had political significance, they did not hamper the development and codification of customary international law brought about by the Nuremberg Charter and Judgement.

international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.<sup>19</sup>

This stems from the very purpose of International Criminal Law, namely to attribute responsibility to individuals, including State officials, and to defeat the defence of official capacity and the doctrine of act of state. Since acts amounting to crimes under International Law are to be attributed to the individual, there is no place for a principle that would shield those officials from responsibility for acts which had been –until World War II– attributed solely to the State. The newer rule of attribution supersedes the earlier principle of immunity, which seeks to protect non-responsibility.<sup>20</sup>

This principle was further confirmed by the all Member States of the United Nations General Assembly,<sup>21</sup> when it adopted the “Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal” in 1950. The Principle III states: “*The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.*”<sup>22</sup> The International Law Commission embraced the same principle in its “Draft Code of Crimes against the Peace and Security of Mankind”.<sup>23</sup> Even if General Assembly resolutions and ILC principles are not legally binding as such, they are an authoritative source of States’ practice and *opinio juris*, which are the quintessential elements of customary international law, in so far as the language contained in these non-binding instrument have precise legal content and direct significance for the formation of rules of customary international law: This is the case of the two above-mentioned instruments, which have been confirmed by the subsequent practice of the General Assembly.

While during the four decades of the Cold War the latter effectively froze the application of many principles and norms of International Law, the “Nuremberg law” revived in the 1990s and occupied a central stage in the debates and negotiations that led to drafting and adoption of the Rome Statute of the ICC. In particular, in 1993, at a time in which the UN Security Council was confronted with the legal basis and content to be given to an *Ad Hoc* Tribunal for the former Yugoslavia, the Secretary General presented a pivotal report to the Council in which he underlined the customary international law nature of the entire body of International Law principles that were incorporated in the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY). The Secretary General wrote: “[34.] In the view of the Secretary-General, the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are

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<sup>19</sup> *Goering and others*, International Military Tribunal, Nuremberg, Case No. 92, 1 October 1946, *Annual Digest and Reports of Public International Law Cases*, vol. 13, p. 203 at p. 221.

<sup>20</sup> D. Akande & S. Shah: *Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, in *European Journal of International Law* Vol. 21 no. 4, 2011, p. 840.

<sup>21</sup> It must be noted that all UN founding Member States had ratified the London Charter establishing the Nuremberg Tribunal during the first UN General Assembly session, hence making this treaty negotiated and adopted by the Allied Powers of World War II a universally accepted treaty codifying customary international law.

<sup>22</sup> UN General Assembly, Official Records, 5\* session, Supp. N°12, U.N. Doc. A/1316 (1950).

<sup>23</sup> International Law Commission, *Draft Code of Crimes against the Peace and Security of Mankind*, adopted by the Commission at its forty-eight session, from 6 May to 26 July 1996, General Assembly, Official Records, 51<sup>st</sup> Session, Supp. N° 10; U.N. Doc. A/51/10.

beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise.”<sup>24</sup> The report enlisted the crimes and the general principles of law applicable by the ICTY, including the irrelevance of official capacity, as forming part of customary international law. No Member State objected or otherwise dissented.

In a more recent development, the **International Court of Justice (ICJ)** in the *Arrest Warrant case* (2002), as well as the **South Africa Supreme Court** (2016)<sup>25</sup> and the **ICC** (2011 & 2014) referring to that ICJ case<sup>26</sup>, acknowledged that the customary international law only recognized immunities of certain State officials before foreign national courts. While recognizing that there are four exceptions to this immunity, the ICJ held that immunities of States officials do not apply before their own domestic criminal jurisdictions in three scenarios plus one applicable before international jurisdictions, namely when an arrest warrant has been issued by a competent international jurisdiction, enlisting the ICC as an example and citing in full the conflict-of-norms’ clause of Article 27, paragraph 2, of the Rome Statute.<sup>27</sup> The recognition that customary international law creates an exception to the immunity of Heads of States when an international court seeks an arrest of an Head of State for the commission of international crimes had been already confirmed by International Tribunal for the Former Yugoslavia in the *Furundžija case*.<sup>28</sup>

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<sup>24</sup> Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704 (3 May 1993), available at [www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/ICTY%20S%2025704%20statute\\_re808\\_1993\\_en.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/ICTY%20S%2025704%20statute_re808_1993_en.pdf).

<sup>25</sup> *Judgment of the Supreme Court of South Africa*, 15 March 2016, Para. 76, available at: <http://constitutionallyspeaking.co.za/complete-high-court-al-bashir-judgment/>.

<sup>26</sup> See: *Decision on Cooperation of the Democratic Republic of the Congo concerning the arrest and surrender of Omar Al-Bashir to the Court*, ICC-02/05-01/09, 9 April 2014; as well as *Corrigendum to the Decision Pursuant to Article 87 (7) of the Rome Statute in relation to the failure by the Republic of Malawi to comply with the requirement of cooperation addressed by the Court for the arrest and surrender of Omar Hassan Ahmad Al-Bashir*, ICC-02/05-01/09, 13 December 2011.

<sup>27</sup> The ICJ recognized that

“an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 27, paragraph 2, that ‘[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person’.”

ICJ, *Arrest Warrant of 1 April 2000 (Dem. Rep. of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, p. 26, para. 61. Hence, an incumbent of an office entitled to immunity *ratione personae* can be brought to justice before the ICC without breaching any norm of customary international law on immunities. The other three exceptions recognized by the ICJ at this pivotal para. 61 of the Judgment in the Congo v. Belgium case are: “(i) such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law; (ii) persons cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity; (iii) after a person ceases to hold the office [...], he or she will no longer enjoy all of the immunities accorded by international law in other States [...].”

<sup>28</sup> ICTY, the *Prosecutor v. Anton Furundžija*, case n° IT-95-17/1-T, Judgment, 10 December 1998, para. 140; see also ICTY, the *Prosecutor v. Slobodan Milošević*, Case n° IT-99-37-PT, Decision on Preliminary Motions, 8 November 2001, para. 28.



Furthermore, the rules of the Geneva Conventions permitting the exercise of universal jurisdiction with respect to war crimes committed either in international armed conflicts or through the State apparatus clearly contemplate the prosecution of state officials, regardless their official capacity, status or rank. Also in this case, in an International Law perspective, the later jurisdictional rule overcomes the prior rule of immunity.<sup>29</sup> Whereby the application of the prior immunity would deprive the subsequent jurisdictional rule of practically all meaning, then the only logical conclusion is that the subsequent jurisdictional rule is to be regarded as a removal of the immunity *ratione materiae*.<sup>30</sup> Therefore, when the Geneva Conventions<sup>31</sup> and customary international law<sup>32</sup> conferred jurisdiction in respect of those crimes, it cannot be supposed that immunity *ratione materiae* was left intact as that would have rendered the conferment of such jurisdiction practically meaningless.

On the basis of the above-listed set of arguments, it follows that the recognized principle of non-applicability of immunities of Heads of States for international crimes, if charged and tried by competent international jurisdictions, is a norm of customary international law, which will not be affected by the repeal of the implementing legislation of the Rome Statute by the Republic of South Africa. By repealing the provisions that sets aside immunity in domestic criminal proceedings concerning crimes under the Rome Statute<sup>33</sup>, the Republic of South Africa will not withdraw or repeal customary law that binds all nations and, consequently, will continue to be bound by the principle of non-applicability of immunities for international crimes.

**4) Diplomatic immunities exist to safeguard diplomatic relations, for the purpose of permitting unfettered inter-State relations, not to protect and grant impunity to perpetrators of genocide and other mass atrocities.**

While diplomatic immunities are important in preventing interference with States' representatives, and thereby maintaining the conduct of international relations among sovereign States, they cannot serve

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<sup>29</sup> D. Akande & S. Shah: *Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, in *European Journal of International Law* Vol. 21 no. 4, 2011, p. 84.

<sup>30</sup> Memorandum prepared by the Secretariat for the 60th session of the International Law Commission (2008) on Immunity of State officials from foreign criminal jurisdiction ("Memorandum on Immunity of State officials from foreign criminal jurisdiction"), A/CN.4/596 and Corr.1, available at: <http://legal.un.org/docs/?symbol=A/CN.4/596>.

<sup>31</sup> See Arts 49, 50, 129, and 146 of the Geneva Conventions 1949 First Geneva Convention (1949), 75 UNTS 31; Art. 50, Second Geneva Convention (1949), 75 UNTS 85; Art. 129, Third Geneva Convention (1949), 75 UNTS 135; Art. 146, Fourth Geneva Convention, (1949), 75 UNTS 287; and Art. 85(1), Protocol Additional to the Geneva Conventions of 12 August 1949 (1977), 1125 UNTS 3. Under the relevant articles, States are required to search for alleged offenders "regardless of their nationality," and either bring them before their own courts or hand them over for trial by another State Party which has made out a prima facie case. While the Conventions do not expressly state that jurisdiction is to be asserted regardless of the place of the offence, they have generally been interpreted as providing for mandatory universal jurisdiction. Additional Protocol I of 1977 to the Geneva Conventions of 1949 extends the principle of universal jurisdiction to grave breaches relating to the conduct of hostilities.

<sup>32</sup> J.-M. Henckaerts: *Study of Customary International Humanitarian Law: A contribution to the understanding and respect for the rule of law in armed conflict*. Rule 157 ICRC provides that '[s]tates have the right to vest universal jurisdiction in their national courts over war crimes, p. 212.

<sup>33</sup> Chapter 2, Section 4 of the South African Act No. 27 of 2002 on the Implementation of the Rome Statute of the International Criminal Court.

as *carte blanche* for committing atrocities with the full enjoyment of inviolability and shield from accountability and criminal prosecution before competent international jurisdictions.<sup>34</sup>

Despite the traditional rationale of granting immunities, such as respecting the dignity of the Heads of States and ensuring political expediency<sup>35</sup>, with the increasing emphasis on human rights and the Rule of Law in global affairs, none of these underlying reasons is a compelling justification under contemporary International Law to preclude accountability for serious international crimes.

As amply demonstrated under point 3 above, International Law is not anymore at its pre-World War II status, as the Moscow Declaration (1943), the London Charter of the IMT in Nuremberg (1945), the Universal Declaration of Human Rights (1948), the Genocide Convention (1948), the Geneva Conventions (1949), the International Covenant on Civil and Political Rights (1966) and several other binding legal instruments, including UNSC Resolution 827 (1993) and 955 (1995) establishing the ICTY and ICTR under the UN Charter (1945), unequivocally affirmed all the general principles of International Criminal Law as customary international law principles, starting with the irrelevance of official capacity and the consequent removal of immunities before competent international jurisdictions. The fact that such principles are codified in Part III of the Rome Statute of the ICC does not mean that States can withdraw from the Statute and/or repeal them from their domestic laws and stop to be bound by these principles, which are customary and, as such, as part and parcel of the *general* International Law norms that have legally binding nature and force. While States can withdraw from international treaties, they cannot withdraw from international customary norms.

**5) Repeal of ICC Act is against the letter and spirit of fundamental norms of International Law, customs and treaties, including the Genocide Convention and the Geneva Conventions, and of the Constitution of the Republic of South Africa.**

In the preamble of the Implementation of the Rome Statute of the International Criminal Court Act (2002), the Republic of South Africa expresses the concern for the suffering of many as a result of its own history of atrocities, and the mindfulness of South Africa's acceptance back into the community of nations since 1994. Furthermore, it expresses commitment to bringing persons who commit such atrocities to justice to a Court of law, either at domestic or international law. As stressed by the Gauteng High Court, Pretoria – which ruled that the notice of withdrawal from the Rome Statute of the ICC, without prior parliamentary approval, is unconstitutional and invalid<sup>36</sup> – the overall purpose

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<sup>34</sup> The general rule on equality of States and their right to exercise unfettered diplomatic relations that underpins the regulatory framework on diplomatic immunity, summarized by the Latin maxim *par in parem non habet imperium* (the public International Law principle that one sovereign power cannot exercise jurisdiction over another sovereign power), is not applicable before international jurisdictions.

<sup>35</sup> R. Cryer et al.: “*An introduction to international criminal law and procedures*”, Cambridge University Press, 2010, p. 537.

<sup>36</sup> Gauteng High Court, Pretoria, South Africa, Case no. 83145/2016, para. 84 (1).

As a consequence, on 7 March 2017 the Government of South Africa filed a notice with the Depository of the Rome Statute, the UN Secretary General, through which it gives effect to the Gauteng High Court's decision and withdraws from its withdrawal: UN Doc. C.N.121.2017.TREATIES-XVIII.10 (Depository Notification) available at <https://treaties.un.org/doc/Publication/CN/2017/CN.121.2017-Eng.pdf>). This means that, as of today, 8 March 2017, **the Republic of South Africa is not anymore among the group of States that started the withdrawal process from the Rome Statute**, which takes one year to enter into force. In light of The Gambia's decision to withdraw its withdrawal (see [www.pgaction.org/es/news/gambia-set-retract-its-withdrawal-from-icc.html](http://www.pgaction.org/es/news/gambia-set-retract-its-withdrawal-from-icc.html)), only one State is currently undergoing this process of exit from the ICC: Burundi.

of the Implementation Act is to bring the perpetrators of serious international crimes to justice, in domestic courts or before the ICC. Furthermore, the Implementation Act creates a structure for the national prosecution of the international crimes of genocide, war crimes and crimes against humanity, which includes the crime of apartheid.<sup>37</sup>

Repealing of the Implementation of the Rome Statute of the ICC Act would represent a step backwards in the protection of human rights, the fight against impunity and the establishment of the accountability for the most serious crimes. By repealing the Act, the Republic of South Africa would deprive its civilians of the protection afforded by the international legal norms enshrined in the Rome Statute, including applicable provisions of Geneva Conventions and Genocide Convention. All individuals under South Africa's jurisdiction, including its citizens, would no longer be able to benefit from the protection before domestic courts, as the ICC Implementation Act creates a structure for the national investigation, prosecution and adjudication of international crimes, or from the access to justice at the ICC should such a national structure fail to perform its legally mandated role.

It needs to be emphasized that the ICC plays an irreplaceable role in the human rights system as a permanent international court with the mandate to intervene when the competent national institutions are not able or willing to fulfil their principal duty to bring alleged perpetrators of the serious international crimes to justice. At the domestic level, the provisions of the Implementation of the Rome Statute of the ICC Act have an important dissuasive effect, which would be removed if the law is repealed. By removing the law, the Republic of South Africa might encourage disregard for human rights and commission of international crimes as the potential perpetrators might act without fear of sanction and with impunity.

This is in violation of South Africa's obligations under Article 7(2) of the Constitution of South Africa, which imposes an obligation to respect, protect, promote and fulfil constitutional rights of the civilians. It is also contrary to the African Union Constitutive Act and the African Charter on Human and People's Rights<sup>38</sup>, which, as one of their fundamental objectives, commit to promoting peace and security.<sup>39</sup> The concrete implementation of all these principles is dependent on the domestic legal frameworks in which there should be "real" consequences for the perpetration of international crimes. The Repeal Bill, if adopted, would represent a significant regression in the fight against impunity for international crimes in South Africa and in the region.

## **6) Peace with Justice; Justice with Peace.**

A few matters of facts are proven by empirical, scientific evidence and they have been recognized by the legal doctrine. The resolution of international or internal armed conflicts is not jeopardized, but it is advanced by the principles of International Law aimed at preventing and deterring mass atrocity crimes and wars of aggression. The statement that South Africa must help solve conflicts in Africa by repealing key legislation aimed at ending impunity is at odds with this reality, namely that prevention and repression of atrocities and aggression is one of the tools that the International Community,

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<sup>37</sup> Gauteng High Court, Pretoria, South Africa, Case no. 83145/2016, para. 10.

<sup>38</sup> African (Banjul) Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

<sup>39</sup> Article 4, AU Constitutive Act, and Article 23, African Charter on Human and Peoples' Rights.

including South Africa, has been using since World War II to prevent a new World War and to mitigate and curb the spread of bloody armed conflicts.

The notion that immunities and, as a consequence, impunity for sitting Heads of States can help solve conflicts runs counter to the history of impunity of dictators and authoritarian rulers who have used these shields to commit atrocities and launch aggressive wars. Additionally, it appears that immunities for Heads of States and other senior officials, as purportedly affirmed in a number of AU decisions that run counter the AU Constitutive Act and the UN Charter, may represent an additional incentive for such dictators or authoritarian rulers to continue to hold power indefinitely. The call for peace may not serve to compromise justice and bar the investigation and prosecution of the most serious international crimes. A conviction that peace cannot be achieved without justice is a huge step back and in strong confrontation with the development of the Rule of Law since 1943.

As Antonio Cassese, one of the most distinguished scholars in international criminal justice, stated in his capacity as Judge and first President of the International Criminal Tribunal of the former Yugoslavia: *“Justice is an indispensable ingredient of the process of national reconciliation. It is essential to the restoration of peaceful and normal relations between people who have had to live under a reign of terror. It breaks the cycle of violence, hatred and extra-judicial retribution. Thus Peace and Justice go hand-in-hand.”*<sup>40</sup>

There is no doubt that, since the sitting President of Serbia was indicted in 1999 and, later on, brought to justice before a competent international jurisdiction, the armed conflicts in the former Yugoslavia (that had conflagrated between 1991 and 1999 in Slovenia, Croatia, Bosnia and Herzegovina and Kosovo/Serbia) ceased to exist, as one of their root causes was the impunity of the main planners and organizers of mass-atrocities that were used to advance the purpose of such conflicts. The removal of the impunity-shield from Mr. Milošević and other leaders helped in the process of peace-making and stabilization, alongside other necessary political, social, economic, cultural and legal measures that must accompany every successful peace-process. It must be noted, in this respect, that, a few months after the ICTY Prosecutor indictment, Mr. Milošević was removed from power through the democratic electoral process. Thereafter, he was arrested and detained in Serbia on the basis of corruption charges, and he was subsequently transferred to Bosnia and Herzegovina by Serbian authorities with the view of having him transferred to The Hague to face the ICTY for charges relating to genocide, crimes against humanity and war crimes allegedly committed in Bosnia, Croatia and Kosovo. Mr. Milošević died during the trial.

On the contrary, the permanence into power of certain Heads of States or other senior State officials accused of being perpetrators of the most serious crimes under International Law has not been generally conducive to peace, including in a number of African crises.

In recognition of this problem, the AU itself has been promoting a policy of accountability for mass-atrocities in the most recent theatres of bloody conflict in Africa, including South Sudan and the Central African Republic, the latter being a State that fully support ongoing investigations and complementary prosecutions before the ICC.

Peace and justice must go hand-in-hand to be mutually reinforcing in a sustainable manner. Only if peace is perceived as just by the victims of violent abuses can these individuals and their communities

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<sup>40</sup> Statement of Mr. A. Cassese on "General Framework Agreement for Peace in Bosnia and Herzegovina", The Hague, 24 November 1995, CC/PIO/027-E, available at: <http://www.icty.org/en/sid/7220>.

agree to the terms of a peace settlement and so guarantee lasting peace and durable conditions for stabilization and human development in any given society.

*Done in The Hague/ Rome on 8 March 2017.*



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