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Hugging the Crocodile: South Africa's (RSA's) tense relationship with the International Criminal Court (ICC)

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International Relations Masters Research Dissertation

Hugging the Crocodile: South Africa's (RSA's) tense relationship with the International Criminal Court (ICC)

by

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Table of Contents

Table of Contents

Table of Contents 1
Abstract: 4
Acronyms and Abbreviations 5
CHAPTER ONE: INTRODUCTION 6
1.1 Background 6
1.2 Research Problem 8
1.3 Research Aims and Objectives 9
1.4 Research Question: 10
1.5 Hypotheses 10
1.6 Significance of the Study 10
1.7 Proposed Methodology 10
1.8 Theoretical Framework 11
1.9 Chapter Structure 12
CHAPTER TWO: LITERATURE REVIEW 14
2.1 Introduction 14
2.2 South Africa's ICC Engagement 14
2.3 Factors Influencing South Africa's ICC Stance 15
2.3.1 Normative Beliefs 15
2.3.2 Global Alliances and Partnerships 15
2.3.3 Domestic Politics: Impact of Political Parties on South Africa's ICC Engagement. 16
2.3.4 Regional Dynamics: The role of AU Regional Justice Mechanism (Malabo Protocol) 17
2.4 The Uhuru Kenyatta and Omar al-Bashir Cases 19
2.4.1 African Renaissance 19
2.4.2 Sovereignty Concerns 21
2.4.3 The Principle of Complementarity 22
2.4.4 Divergent Legal Arguments 23
2.5 Trends, Gaps, and Limits in South Africa's ICC Engagement 24
2.5.1 Patterns and Trends in South Africa's Foreign Policy 24
2.5.2 Gaps and Limitations in South Africa's Engagement with the ICC, Specifically Focusing on the Legal Considerations Discussed in the Previous Sections 25
CHAPTER THREE – THEORETICAL FRAMEWORK 27
3.1 Introduction 27
3.2 Norm Emergence 28

3.3 Norm Cascade 29
3.4 Norm Internalisation 31
3.5 States Identity is Socially Constructed 32
3.6 The Anti-Impunity Norm 33
3.7 Conclusion 33
CHAPTER FOUR: SA'S DIPLOMATIC QUANDARY: NAVIGATING REGIONAL DYNAMICS IN ICC COMPLIANCE WITH UHURU KENYATTA 35
4.1 Introduction 35
4.2 Domestic Political Considerations 35
4.2.1 Constitutional Dictates 36
4.3 Regional Dynamics 38
4.3.1 AU Resolutions 38
4.3.2 Diplomatic Engagement and Peacekeeping 42
4.4 Legal and Political Factors 43
4.4.1 Heads of States' Immunity 43
4.4.2 Complementarity Issue 44
4.4.3 Selective Prosecution 44
4.4.4 Sovereignty and Universal Jurisdiction Issues 45
4.4.5 Conclusions 48
CHAPTER FIVE: DIPLOMATIC DYNAMICS AND DEFIANCE: UNRAVELLING SA'S FOREIGN POLICY BALLET OF NON-COMPLIANCE WITH THE ICC IN THE OMAR AL BASHIR CASE 49
5.1 Introduction 49
5.2 Domestic Political and Legal Considerations 50
5.2.1 Internal Socioeconomic Challenges 51
5.3 Regional Dynamics 51
5.3.1 AU Resolutions 51
5.4 Legal and Political Factors 58
5.4.1 Heads of States' Immunity 58
5.4.2 Principle of Complementarity 58
5.4.3 Selective Prosecution 59
5.4.4 Sovereignty and Universal Jurisdiction 59
5.5 Conclusions 62
CHAPTER SIX: RESULTS, DISCUSSION, AND CONCLUSIONS 63
6.1 Results 63
6.1.1 Introduction 63
6.1.2 Empirical Findings 63

6.2 Discussion 69
6.2.1 Introduction 69
6.2.2 Regional Dynamics – Role of AU (IV2) 69
6.2.3 Regional Dynamics – Role of AU (IV2) 70
6.2.4 International Pressures – Diplomatic Peace Keeping (3) 71
6.2.5 Legal and Political Concerns (IV4) 74
6.2.6 Discussion on Hypotheses 78
6.2.7 Comparative Analysis: Similarities Between the Uhuru Kenyatta and Omar al-Bashir Cases 79
6.2.8 Theory: Sikkink and Finnemore's Constructivism in South Africa's Foreign Policy 80
6.3 Original Contribution and Further Recommendations 86
7. Bibliography 88

Abstract:
This qualitative research delves into the Republic of South Africa's (RSA) foreign policy framework concerning its involvement in the International Criminal Court (ICC), focusing on the cases of Uhuru Kenyatta and Omar al-Bashir. Rooted in the constructivist paradigm, from Sikkink and Finnemore's (1998) theoretical framework, the study examines the interplay of RSA's domestic political considerations, regional dynamics, international pressures, and legal and political considerations, and domestic intricacies that have shaped RSA's dynamic position *vis-à-vis* the ICC.

The research scrutinises RSA's initial compliance with and advocacy for the ICC trial, utilising the context of the Uhuru Kenyatta case. It conducts an analysis of the roles played by norm entrepreneurs, civil society actors, and the intricate domestic sociopolitical landscape. The study, equally, engages in a thorough exploration of diplomatic missions and negotiations, critically assessing their effectiveness and influence on RSA's foreign policy paradigm. Moreover, the research assesses broader regional dynamics, with an acute focus on the African Union (AU) and its pivotal role in guiding (RSA's) strategic decision-making processes.

On the contrary, the inquiry into the Omar al-Bashir case ventures into RSA's intricate web of domestic political considerations, regional dynamics, international pressures, and legal and political variables. This discussion aims to identify similarities and differences between the cases, shedding light on their implications for the fluctuating relationship between South Africa and the ICC.

This research study enriches the academic dialogue by conducting a comprehensive qualitative analysis of (RSA's) engagements with the ICC. Meticulously examining (RSA's) diplomatic evolution within the ICC framework, the study offers valuable insights into the dynamics that have influenced its foreign policy development over time. By addressing existing literature gaps, this research contributes to a more nuanced understanding of the factors shaping South Africa's evolving relationship with the ICC.

Keywords: South Africa, Foreign Policy, International Criminal Court, Uhuru Kenyatta, Omar al-Bashir

Acronyms and Abbreviations

ACJHR: African Court of Justice and Human Rights

ANC: African National Congress

ASP: Assembly of State Parties

AU: African Union

CPA: Comprehensive Peace Agreement

DA: Democratic Alliance

DIRCO: The Department of International Relations and Cooperation

GoS: Government of Sudan

GoSA: Government of South Africa

ICC: International Criminal Court

ICJ: International Court of Justice

MSSD: Most Similar Systems Design

NAM: Non-Aligned Movement

NATO: North Atlantic Treaty Organisation

OTP: Office of the Chief Prosecutor R2P: Responsibility to Protect

RES: Resolution

RoS: Republic of Sudan

RoSA: Republic of South Africa

SADC: Southern African Development Community

SALC: South African Litigation Centre

TPNW: Treaty on the Prohibition of Nuclear Weapons.

UNAMID: AU-UN Hybrid Operation in Darfur

UNSC: United Nations Security Council

WTO: World Trade Organisation

CHAPTER ONE: INTRODUCTION

1.1 Background

Some scholars contend that South Africa's mixed response stems from one, its difficulty in balancing its obligations to the International Criminal Court (ICC) and two, supporting the African Union's position on various issues.[1] In recent years, scholarly research has focused on the Republic of South Africa's (GoSA) government's response to the International Criminal Court (ICC) cases against Uhuru Kenyatta (The Prosecutor v. Uhuru Muigai Kenyatta, ICC-01/09-02/11) and Omar Al Bashir (The Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09).

Pretoria's foreign policy, *vis-à-vis* the ICC, in the cases of Uhuru Kenyatta and Omar Al Bashir has ignited a maelstrom of controversy. The country's decision not to apprehend Al Bashir during his visit, coupled with its subsequent refusal to comply with the ICC's arrest warrant, attracted both domestic and international criticism. However, proponents argue that the GoSA had valid reasons for defying the ICC's request. South Africa has played a pivotal role in shaping continental responses to global justice issues, exemplified by its leadership position within the African Union (AU). Within the AU, the GoSA has advocated for enhanced accountability mechanisms while expressing concerns about perceived bias against African leaders within international courts, including the ICC.

The intricate interplay between South Africa and international criminal justice is further complicated by its dual commitments. On one hand, South Africa has signed AU resolutions that advocate for non-cooperation with the arrest of incumbent heads of state. On the other hand, it remains a signatory to the Rome Statute, but disagrees with certain provisions, including the concept of universal jurisdiction. As a result, it becomes evident that addressing the tensions between regional politics and international justice necessitates sustained engagement and dialogue among all involved parties.

The ICC was established in 2002 to hold individuals accountable for crimes against humanity, genocide, and war crimes.[2] Its aim is to promote justice and ensure that perpetrators of these heinous acts are brought to book.[3] However, its impartiality has been called into question due to the controversial cases of Uhuru Kenyatta (Kenya) and Omar al-Bashir (Republic of Sudan).[4] South Africa initially supported the ICC but later changed its position on the court's

[1] Clark, J. F., "Regime Types, Regime Identities, and African Foreign Policies", *Africa Today 2023*, *69*(3): 53-73.
[2] Human Rights Watch, 2022.
[3] International Criminal Court, 2023.
[4] ACCORD, 2020.

procedures.[56] This shift was driven by concerns over perceived bias against African leaders and the potential impact on regional stability. Despite being party to the Rome Statute that established the ICC, South Africa broke ranks with some African nations when it refused to arrest Sudanese President Omar al-Bashir during his visit for an African Union summit in Johannesburg in 2015.[7] The move caused outrage among human rights groups who accused South Africa of flouting international law by failing to apprehend Bashir who had been indicted by the ICC.[8] Furthermore, South Africa faced criticism after it withdrew from the Rome Statute, citing its commitment to peacekeeping efforts on the continent as well as concerns over perceived bias within the court's handling of African cases.[9] The country argued that many Western countries were not signatories of treaties such as this one because they did not want their leaders prosecuted under international law.[1011] In a parallel context, regional dynamics, illustrated by the African Union's concerns about prosecuting African leaders like Uhuru Kenyatta, highlight the broader impact on national sovereignty and regional stability.

Regional dynamics can affect countries' foreign policy positions. In the case of Uhuru Kenyatta, the AU expressed concerns about the prosecution of African leaders and the potential implications for national sovereignty and regional stability.[12] In Resolution 25/1 adopted in 2010, the AU called for the deferral of the ICC proceedings against Kenyatta and other high-ranking officials.[13] The AU played a proactive role in seeking alternative mechanisms for justice, advocating for African solutions to African problems. This supported efforts to establish a local tribunal in Kenya to handle the post-election violence, emphasising the importance of reconciliation and preserving political stability within the country. The AU's engagement

[5] Sarkin, J. J., "Understanding South Africa's Changing Positions on International Criminal Justice: Why the country wanted to withdraw from the International Criminal Court (ICC) and why it may remain in the ICC for the time being?", *Cadernos de Estudos Africanos 2020*, (40).
[6] Sarkin, J. J., "Introduction: Understanding How the Historical, Democratic and Human Rights Contexts of Armenia, Azerbaijan, and Georgia Affect the Search, Exhumation, and Identification of Conflict-Related Missing Persons in the South Caucasus", *Caucasus Survey 2020*, *10*(2): 157-177.
[7] Sarkin, J. J., "Understanding South Africa's Changing Positions on International Criminal Justice", *SciELO Portugal* 2020, (40). Also refer to: (African Union, 2017; South Africa, International Criminal Court, 2003; Human Rights Watch, 2020).
[8] Amnesty International, 2021.
[9] ICC, 2017; Morgan, 2013.
[10] Dancy, G., Marchesi, B. E., Olsen, T. D., Payne, L. A., Reiter, A. G., & Sikkink, K., "Behind bars and bargains: New findings on transitional justice in emerging democracies", *International studies quarterly 2019*, 63(1): 99-110.; African Union, 2017b; ICC, 2017; ACCORD, 2020b.
[11] Naldi, G., and Magliveras, K., "The right to revoke withdrawal notices from international organizations: The case of Brexit and the European Union", *Maastricht Journal of European and Comparative Law 2021*, 28(1): 30-58.
[12] Pillai, P., "The African Union, the International Criminal Court, and the International Court of Justice: At the Fault Lines of International Accountability", *American Society of International Law 2018*.
[13] African Union Library, n.d.; International Criminal Court, 2023b; ICC, 2015.

highlighted the need to balance the pursuit of justice with the imperatives of peacebuilding and the preservation of political processes.

Regarding the case of Omar Al Bashir, the AU's role was marked by its opposition to the ICC's arrest warrant against Bashir, who was Sudan's president at the time. In July 2009, the AU issued a resolution stating that its member states should not cooperate with the ICC's arrest warrant[14]. The AU argued that the warrant undermined efforts to resolve the conflict in Darfur and impeded the peace process. The AU called for a deferral of the ICC proceedings against Bashir, asserting that it would allow Sudan to address the crimes domestically and work toward a comprehensive political solution.[15]

For the Al Bashir case, there were concerns about the court's impartiality towards African leaders.[16] As a result, some believed that there was an inherent bias against African states within the court system.[17] Secondly, the AU's opposition of the ICC's resolution was due to fears regarding potential destabilisation of regions with ongoing conflicts by indicting sitting heads of state or government officials as they are deemed critical figures in maintaining peace negotiations within their respective nations.[18] This implication relates directly to peace-building endeavors where high-level political actors have been identified as key stabilising forces while negotiating ceasefires or transitional arrangements between warring factions during times of conflict or post-conflict situations. Thirdly, the possibility of the de-legitimisation of international justice systems like the ICC if powerful players such as South Africa choose not to participate may allude to the ICC becoming an almost defunct court. Therefore, the research study explores the factors that have contributed to the change in South Africa's foreign policy towards the ICC since its ratification.

1.2 Research Problem

The Mandela administration (1994-1999) prioritised human rights and international justice as fundamental principles of its foreign policy, culminating in the ratification of the Rome Statute.[19] During the Thabo Mbeki administration (1999-2008), a strategy emphasising African solutions to

[14] African Union, 2009.
[15] UN Resolution, 2005.
[16] Iommi, 2020; Reporter, 2017; Mafotsing and Mafotsing, 2019.
[17] García Iommi, L. "Whose justice? The ICC 'Africa problem", *International Relations 2020*, 34(1): 105-129.
[18] du Plessis, M., & Gevers, C., "The Sum of Four Fears: African States and the International Criminal Court in Retrosepct–Part I. *Opinio Juris 2019*: 8; Dancy, G., Marchesi, B. E., Olsen, T. D., Payne, L. A., Reiter, A. G., & Sikkink, K., "Behind bars and bargains: New findings on transitional justice in emerging democracies". *International studies quarterly 2019*, 63(1): 99-110.
[19] MacKinnon, A., "Chris Alden. Apartheid's Last Stand: The Rise and Fall of the South African Security State", London/New York: Macmillan Press/St. Martin's Press, Inc., 1996. xiii+ 333, Map. Bibliography. Index. No price reported. *African Studies Review 1999*, 42(3): 227-229.; Alden, 1999; Rome Statute, 1998.

African problems took precedence.[20] However, the Zuma administration (2009-2017) introduced a critical viewpoint, scrutinising the ICC for perceived partiality towards African leaders.[21]

The research problem arises from the significant shifts in Pretoria's foreign policy orientation towards the ICC, implemented by three successive administrations. Attempting to understand the causes of these fluctuations necessitates delving beyond piecemeal analyses. Existing studies, often examining policy decisions and historical events in isolation, or focusing solely on leadership influence, fall short of providing a comprehensive image of the fluctuating relationship. This highlights the critical need for a case study approach, anchored in theoretical framework, to highlight how factors such as domestic political considerations, regional dynamics, international influences, and legal considerations contributed to Pretoria's foreign policy stance.

This subject reveals the challenges and contentious aspects within Pretoria's foreign policy orientation toward the ICC, therefore, it highlights the need for this research study.

1.3 Research Aims and Objectives

This research study is centered on the comprehensive analysis of four key factors outlined in the research problem: domestic political considerations, regional dynamics, international pressures, and legal and political concerns. Consequently, the primary objective of this study is to analyse the factors that have played a role in shaping Pretoria's shift in its foreign policy orientation towards the ICC since its ratification. This investigation is conducted through a focused examination of two prominent cases: Uhuru Kenyatta (Republic of Kenya) and Omar al Bashir (Republic of Sudan).

The key objectives are to:

- ✓ Analyse Pretoria's foreign policy towards the (ICC), with a focus on its evolving stance since ratification.
- ✓ Examine the contributing factors to these shifts, specifically in the context of the cases involving Uhuru Kenyatta (Republic of Kenya) and Omar al Bashir (Republic of Sudan).
- ✓ Explore the role of the African Union (AU) in shaping Pretoria's stance on the ICC, particularly in relation to the cases of Uhuru Kenyatta and Omar Al Bashir, and its impact on South Africa's foreign policy decisions.
- ✓ Propose potential solutions for achieving a balance between regional commitments and obligations to the ICC.

[20] Alden, C., & Le Pere, G., "South Africa's post-apartheid foreign policy: from reconciliation to ambiguity?", *Review of African Political Economy 2004*, 31(100): 283-297.
[21] South African Institute of International Affairs, 2022.

1.4 Research Question:

Which factors have contributed to fluctuations in South Africa's foreign policy towards the International Criminal Court (ICC) since its ratification?

1.5 Hypotheses

Hypotheses: H1- The presence of domestic and regional homogeneity allows for states to comply with the ICC (Self-Interest= regional interest → leads to compliance).

H2- The absence of domestic and regional homogeneity does not allow for states to comply with the ICC (Self Interest <not equal to> regional Interest → leads to non-Compliance).

1.6 Significance of the Study

The fluctuations in Pretoria's foreign policy towards the ICC bear importance in the realm of International Relations (IR). This study's findings seek to enrich the field by unraveling the contributing factors that have shaped the country's approach to the ICC. The implications of these findings extend to discussions on the role of emerging powers in global governance and the advancement of international justice. Moreover, the research holds relevance for policy analyses, providing insight into how states navigate their foreign policy objectives amid conflicting domestic pressures and international constraints. In the context of International Law, the research question gains pertinence as it delves into the efficacy of international organisations such as the ICC, particularly considering the legal intricacies arising from the cases of Uhuru Kenyatta and Omar Al-Bashir. The research outcomes can contribute to these debates by shedding light on the strategies employed by states to manage their foreign policy goals while engaging within the global sphere.

1.7 Proposed Methodology:

This research study employs the Method of Difference using the Most Similar Systems Design (MSSD) approach to discern the factors influencing South Africa's fluctuating foreign policy, particularly regarding the nation's attitude towards the ICC, post-ratification. The cases of Uhuru Kenyatta and Omar al-Bashir have been selected for comparison, offering a nuanced understanding of the South African government's considerations, including domestic political considerations, regional stability, international justice, and conflict resolution. This research study recognises that while RSA announced its withdrawal from the Rome Statute during the al-Bashir case, it did not execute this withdrawal, creating a political conundrum worthy of exploration.

By scrutinising these cases, the study identifies the contributing factors, including domestic considerations, regional dynamics, international pressures, legal and political concerns, and

legal and political considerations. Through the Mills Method (Difference), the research aims to establish causality, emphasising external validity. Process tracing is concurrently employed for internal validity, highlighting the causal link between independent and dependent variables. This approach facilitates an in-depth examination of how these factors, when analysed in tandem and when isolating relevant variables, influence South Africa's policy shift.

Utilising qualitative analysis, primary data sources encompass policy documents, government records, AU documents, laws, treaties, conventions, and resolutions. Secondary sources comprise journal articles and books obtained from reputable repositories will be utilised. Employing a snowball search method ensures comprehensive coverage of the literature. This methodology is poised to yield nuanced insights into the multifaceted dynamics guiding Pretoria's ICC-orientated foreign policy.

1.8 Theoretical Framework

This research study utilises the constructivist norm theory to explain and link the IVs identified. The constructivist norm theory, developed by Kathryn Sikkink and Martha Finnemore,[22] underpins the research study. Sikkink and Finnemore's (1998) theory offers an analytical framework to explain this shift within the context of international norms. Constructivism is a theoretical approach that views international relations as socially constructed, highlighting how ideas, norms, and identity shape state behavior. According to Sikkink and Finnemore's[23] constructivist norm theory, changes in state behavior result from shifts in social norms surrounding specific issues. In this regard, their theory provides insight into why Pretoria's foreign policy towards the ICC fluctuated after facing criticism for failing to arrest Sudanese President Omar al Bashir during his visit to Johannesburg. This is significant since it highlights how social norms can drive states' foreign policies on issues such as human rights violations.

By using a constructivist lens to analyse Pretoria's response to both these high-profile cases at the ICC, policymakers can better understand why some states may alter their positions based on shifting global norms. This research study investigates whether international norms and domestic politics are equally influential.

By examining how norms are constructed and diffused among state actors, Sikkink and Finnemore illustrate how domestic factors, such as public opinion, civil society activism, and leadership changes, can shape a state's willingness to cooperate with international institutions like the ICC. Despite some criticisms surrounding their methodology or theoretical assumptions

[22] Finnemore, M., & Sikkink, K. International norm dynamics and political change. *International organization 1998*, 52(4): 887-917.
[23] *Ibid*.

about social constructs like norms, ultimately Sikkink and Finnemore[24] can contribute to the understanding of how states interact with international institutions on issues related to global justice.

South Africa initially supported ICC interventions under President Mandela's human rights commitment, but the al Bashir case exposed political influences, leading to criticism for not arresting him in 2015. Contemplating ICC withdrawal initially, Sikkink and Finnemore's constructivist approach highlights the impact of non-state actors on state behavior, evident in South Africa's reversal after consulting civil society. The research compares legal complexities in both cases, questioning the precedence of regional organisations or international treaties in foreign policy. It delves into the intricate balance between regional, continental, and global considerations in South Africa's foreign policy.

1.9 Chapter Structure

The entire dissertation will comprise of six chapters.

Chapter 1: Introduction

Background and context of the research, research aims and objectives, research questions, significance, and rationale of the study. Research methodology and design and overview of the dissertation structure.

Chapter 2: Literature Review

This chapter provides for a review of existing literature on South Africa's foreign policy towards the ICC, examination of scholarly debates, theories, and empirical studies. Analysis of key concepts and variables. Theoretical framework applied to the research topic.

Chapter 3: Theoretical Framework

Sikkink and Finnemore's constructivism serves as the theoretical lens, providing a robust framework to analyze South Africa's dynamic foreign policy. This chapter delves into the intricacies of domestic, regional, and international factors, employing constructivism to understand the nuances of the country's interactions with the ICC.

Chapter 4: Uhuru Kenyatta Case

Introduction to the case and its relevance to South Africa's foreign policy, analysis of the factors influencing South Africa's position on the Uhuru Kenyatta case, examination of South Africa's mediation efforts, and diplomatic engagement in the case.

[24] Finnermore & Sikkink, 1998.

Chapter 5: Omar Al-Bashir Case

Introduction to the case and its relevance to South Africa’s foreign policy, analysis of the factors influencing South Africa’s position on the Omar al-Bashir case, examination of South Africa’s compliance with the ICC, and its handling of the case.

Chapter 6: Comparative Analysis and Findings and Recommendations

Comparative analysis of the three case studies, identifying commonalities and differences in South Africa's foreign policy towards the ICC. Synthesis of findings from each case study, highlighting the factors that have contributed to the change in South Africa's foreign policy.

CHAPTER TWO: LITERATURE REVIEW

2.1 Introduction

This literature review chapter endeavors to review the literature on the research question scrutinise literature on fluctuations in SA's foreign policy towards the ICC since the ratification of the Rome Statute. The chapter also aims to provide a historical context of SA's interaction with the ICC since ratification, assessing whether this historical backdrop influences contemporary occurrences. The review then hones in on the principal factors influencing South Africa's stance on the ICC, including normative beliefs, international networks, domestic politics, regional dynamics. The study seeks to garner insights related to the Kenyatta and Al-Bashir cases and their impact on engagement. Further, the chapter covers legal considerations in terms of inter-dynamic obligations and sovereignty in both cases the principle of complementarity divergent legal arguments, and trends, gaps, and limits in South Africa's engagement.

2.2 South Africa's ICC Engagement

This theme aims to explore the literature on the country's historical context in engaging with the ICC since ratification. It also explores the literature on the major events and policy shifts that contributed to fluctuations in the country's stance. Many scholars, including Kemp and du Plessis,[25] agree that after South Africa signed and ratified the Rome Statute,[26] by enacting the Rome Statute Implementation Act No. 27 of 2002,[27] it influenced its foreign policy to change and focus on cooperation and complementarity.[28] The reason cited is that the Rome Statute's ratification and embedment into domestic law has significantly affected the foreign policy of South Africa, causing it to value the significance of the ICC as an international justice and peace mechanism.[29] However, Geldenhuys[30] criticises this argument by asserting that the ratification has not limited its choices in terms of foreign policy, with the country charting its own path that suits its interests and regionalism. Based on these studies, a key gap is that there is a lack of consensus on the implications of the ratification of the statute on the relationship between South Africa and the ICC.

Other studies suggest that South Africa's foreign policy in the post-Mandela era shifted, with human rights no longer being a priority[31] and with the country increasingly leaning towards the AU and resolutions,[32] including the 2017 resolution (during the 28th Ordinary Session of the

[25] Kemp, 2014; du Plessis, 2005
[26] See Parliamentarians for Global Action. *South Africa and the Rome Statute*, 2023.
[27] United Nations. *Africa at the UN General Assembly*| Africa Renewal, 23 September, 2023.

[28] *Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.*
[29] Chenwi Lilian, and Franziska Sucker. "South Africa's competing obligations in relation to…

[30] Geldenhuys, 2016.
[31] Besada et al., 2013; Langa & Shai, 2019; Southall, 2003; Sarkin, 2020; van Nieuwkerk, 2007.
[32] van Wyk, 2019.

African Union Assembly) that called on African states to stop cooperating with the international court and withdraw *en masse,*[33] as it seeks a greater leadership role.[34] However, opponents of these suppositions believe that South Africa has had longstanding cooperation with the ICC since signing and ratifying the Rome Statute in 1998[35] and its role in the Assembly of States Parties (ASP) informal group, which has influenced it to seek to have positive engagements with the ICC. Thus, available studies suggest that while there has been some level of cooperation, this has no longer remained a priority, as it once was. Thus, this calls for further research to establish the factors that caused this changing cooperation.

2.3 Factors Influencing South Africa's ICC Stance

2.3.1 Normative Beliefs

This section examines literature on South Africa's ICC stance and how it is affected by normative beliefs. Gqiza and Sarkin[36] agree that normative beliefs were shaped by its presidents and the approach they had to international affairs, with its stance being significantly affected by Mandela's altruism and the Afrocentric ideology of Mbeki and Zuma's antediluvian signature,[37] meaning that its beliefs on international justice were predominantly influenced by its democratic ideals. Sarkin[38] particularly argues that the adoption of the new transformative and democratic constitutions in 1993 and 1996 respectively heralded a new dawn of protection of human rights, since the new democratic polity acknowledged the need to avoid the past human crimes and rights abuses. However, critics believe that post-Mandela, South Africa's foreign policy changed as human rights and international justice were relegated while African solidarity and regional concerns were prioritised[39]. According to Sarkin[40], South Africa still embraces traditional justice systems as a complement or alternative to the formal state court system. Thus, studies suggest that normative beliefs play a critical role in influencing the South African government's stance. However, there is still lack of adequate studies on the normative beliefs as a factor contributing to its stance.

2.3.2 Global Alliances and Partnerships

This theme delves into the impact of international networks on the foreign policy decisions undertaken by South Africa in relation to the ICC. Many of the reviewed studies

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[33] African Union [AU], "Decisions, Declarations and Resolution and Motion, 28th Ordinary Sess. of the Afr. U. Assembly, at 2" (Jan. 30–31, 2017).
[34] Magubane, 2019.
[35] South African History [Online]. *The ICC: Origins, Jurisdiction and the African Bias*, 2019. Available at: https://www.sahistory.org.za/article/international-criminal-court-origins-jurisdiction-and-african-bias
[36] Gqiza, 2019; Sarkin, 2020.
[37] Gqiza and Ogunnubi, 2019:8-9.
[38] Sarkin 2020.
[39] Naude, 2019; Shinoda, 2017.
[40] Sarkin, 2020.

suggest that South Africa's international networks reduce its engagement with the ICC, forbidding it from condemning or challenging the partners, meaning that it enters into non-aggression pacts.[41] Other scholars agree that networks and partnerships have significantly affected its foreign policy as it seeks to also position itself as a strong global leader and influencer in the international arena,[42] especially with the ruling ANC shifting its foreign policy in favor of Russia and China since 2009, thus, impacting its relationship with the ICC. Shaw *et al*.[43] particularly emphasise that these international networks are reorienting the global power dynamic where states such as Russia, Brazil, India, and China are occupying more prominent roles within the international system, and use a combination of public diplomacy, private sector partnerships, direct investment, and soft power to deepen relations with South Africa.

However, other studies contend that South Africa has had a long, successful history with the ICC and UNSC that means that other global partnerships cannot deter or slow down its engagement with the international court.[44] In instances where it has tried to refuse to cooperate, it has found itself under immense pressure, thus, compelling it to comply.[45] From these studies, global partnerships are reducing the deep relations South Africa had with the ICC. The country has to decide between its engagement with the ICC or supporting its partners who are of strategic interests and value through its foreign policy. There is a need to determine whether the BRICS partnership plays a more pivotal role in influencing the country's foreign policy since it tends to have more closer ties within this block.

2.3.3 Domestic Politics: Impact of Political Parties on South Africa's ICC Engagement.

This theme seeks to explore further role of domestic politics in the country's engagement with the ICC. Studies contend that domestic politics, especially human rights groups and the South African judiciary, has played a pivotal role in pressuring South Africa to comply with the ICC,[46] with the opposition party Democratic Alliance and the Council for the Advancement of the South African Constitution leading from the front.[47]

However, critics of this argument believe that domestic pressure has emboldened the country's leadership to become more critical of the Court, indicating the often-hostile relationship between ANC and the judiciary.[48] Rather than succumb to domestic political

[41] Williams, 2023.
[42] Matthee, 2020; Sarkin, 2020; Shaw *et al*., 2009.
[43] Shaw *et al.*, 2009.
[44] , ICC Forum, "Invited Experts on Darfur Question", Available at: http://iccforum.com/darfur; Tladi, 2015.
[45] Tladi, 2015.
[4646] Sarkin, 2020.
[47] African Center for Justice and Peace Studies, 2016; Kemp, 2017.
[48] ANC, "NGC 2015: Discussion Documents" (17 August 2015): 174; Boehme, 2017; Rossi, 2018; Wesson & Du Plessis, 2008; ANC, NGC 2015.

pressure, critics further contend that the ANC had to side with Africa in its dilemma to select between Africa's unity and the ICC since the continent's unity was hanging in the balance after the Court was asked by the Southern Africa litigation Centre to compel the government to arrest al-Bashir (John Jeffrey, 2015; Deputy Minister Bapela, n.d.)[4950]. These studies denote that domestic politics emboldened the ANC to continue criticising the ICC, thus, fracturing the relationship between ICC and the country. However, the Office of the Chief Prosecutor (OTP) has since advocated for dialogue in her Keynote Address Institute for Security Studies[5152]. However, the extent to which domestic politics influenced the ruling party's reaction is an avenue for further research since it has not been adequately documented.

2.3.4 Regional Dynamics: The role of AU Regional Justice Mechanism (Malabo Protocol)

This theme seeks to examine how regional dynamics and the role of the AU and the Malabo Protocol in shaping South Africa's engagement with the ICC. The African Union (AU) plays a pivotal role in shaping South African foreign policy, particularly in cases involving African leaders. Scholars such as Naldi[53] have examined the AU's positions and resolutions on the ICC and international justice. South Africa's regional leadership within the AU and its efforts to balance regional solidarity with international justice objectives have been subject to analysis. Naldi[54] alludes to the challenges South Africa faces in navigating these complex regional dynamics, particularly when regional solidarity and international obligations appear to be in conflict.

Various studies contend that the AU's role and stance, that the ICC has been politicised and designed in a way that victimises African politicians and is a neo-colonialist institution biased against Africa. This has significantly affected South Africa's engagement with the ICC[55], making the international court face an uphill task in asserting its authority. As a result, this position has emboldened and encouraged South Africa to stand in solidarity with the AU similar to other African countries.[56]

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[49] John Jeffery, "comments at International Justice at a Crossroads in Africa seminar, Pretoria, Institute for Security Studies", 16 July 2015.
[50] ANC, n.d. "Speech by Deputy Minister Bapela on Al-Bashir Debate," Available at: http://caucus.anc.org.za/show.php?ID=4097
[51] Fatou Bensouda, Prosecutor, "Presentation at Legal Aid Conference – Africa and the International Criminal Court (ICC): Lessons Learned and Synergies Ahead", *OTP Sept. 10, 2014*; "Statements Made by other State Parties", ASP General Debate of the Twelfth Session, (Nov. 20–6, 2013).
[52] Fatou Bensouda, Prosecutor, "Keynote Address Institute for Security Studies – The ICC: A Response to African Concerns by Fatou Bensouda", *OTP Oct. 11, 2012*.
[53] Naldi, 2019.
[54] *Ibid.*
[55] Abass, 2013; Arnould, 2017; Benyera, 2018; Labuda, 2014; Swart & Krisch, 2014.
[56] Benyera, 2018; Okeke, 2022.

Other studies agree that the Malabo Protocol, adopted by the AU in 2014 with the aim of introducing a regional mechanism of accountability, has also influenced many African countries that voiced their grievances against the ICC by giving them a louder voice in their need for an African Court of Justice, thus, giving South Africa and other AU member states the impetus to withdraw from the ICC and ratify the African Court of Justice and Human Rights.[57]

However, critics aver that the AU's efforts to insert an immunity clause, as enshrined in the Protocol on the Statute of the African Court is evidence of the lack of political will or seriousness of the African Union in upholding the rule of law and account for all international crimes, thus, making it crucial for South Africa to maintain its engagement with the ICC.[58] In addition, critics contend that African states should not ratify the Malabo Protocol until the immunity granted to sitting presidents or heads of state is lifted in order to better propagate the interests of justice for international crime victims in the continent.[59] Other critics highlight that ratifying the Malabo Protocol would mean that South Africa and other African states would be violating the Rome Statute for ICC members (that the AU had resolved to rally members to domesticate and implement in 2005 during the Eighth Annual Activity Report of the African Commission[60]), customary international law, and the Vienna Convention.[61] However, this is vehemently opposed by Tladi[62] who believes that the Malabo Protocol's immunity clause would not violate customary international law. Critics further aver that the complementary clause enshrined in the Malabo Protocol needs to be connected to the ICC in such a way that the ICC would be permitted to prosecute international crime perpetrators in cases the ACJHR is reluctant to do so.[63]

Thus, while the AU and regional dynamics have significantly affected South Africa's engagement with the ICC, there are concerns that this is not a genuine endeavor since it seeks to mask African leaders from the crimes they commit while in office. As such, South Africa has to find a balance between regional dynamics and ensuring that it safeguards international human rights that it swore to while ratifying the Rome Statute. This dilemma makes it difficult to maintain engagement with the ICC.

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[57] ACJHR; Ba, 2023; Gissel, 2018; Jalloh, Clark, & Nmiehelle, 2019; Jalloh, 2020.
[58] Mutua 2016; Vinjamuri, 2016; Hillebrecht, 2021.
[59] Endoh, 2020; Mutua, 2016; Murungu, 2011, Rau, 2012; Werle & Vormbaum, 2017; Sarkin, 2020; Mills & Bloomfield, 2019; Abass, 2013; Martini, 2020.
[60] African Commission on Human and People's Rights, "Eighth Annual Activity Report of the African Commission 1994-1995", 42, *OAU Doc Ex.CL/236(VIII) January 2006*, Available at: http://www.achpr.org/sessions/ 38th/resolutions/87/.
[61] Amnesty International 2016; Mupanga, 2020.
[62] Tladi, 2017.
[63] Endoh, 2020.

2.4 The Uhuru Kenyatta and Omar al-Bashir Cases

2.4.1 African Renaissance

This theme seeks to explore how the Uhuru Kenyatta and Omar al-Bashir cases affected South Africa's engagement with the ICC. Uhuru Muigai Kenyatta was accused of five counts of criminal offences on May 30, 2011, as enshrined in the ICC (2011) *The Prosecutor vs. Uhuru Muigai Kenyatta.*[64] While South Africa initially supported Uhuru Kenyatta's trial, South Africa's change in stance was influenced by what Nathan[65] calls the "African Renaissance" or Pan-Africanism. Nathan[66] and Ba[67] contend that the foreign policy of South Africa has mainly been impacted by the African Renaissance, which is the solidarity with other African governments being pressured by the West as well as the imperialist view that offered the lens through which South Africa's government perceived the global order. Thus, South Africa believed that African problems should be solved by African solutions, which is a belief that gained a high level of political traction as a way of allowing Africa to exercise its agency and safeguard the continent's sovereignty.[68]

The AU's stance hardened when the letter titled *'Decision on Africa's Relationship with the ICC*' was sent to the UNSC requesting the deferral was unanswered and not acknowledged,[69] thus, influencing South Africa to support Uhuru Kenyatta, arguing that the ICC had disproportionate prosecuting patterns.[70] By challenging the court and refusing to cooperate, South Africa contradicted the ICC Prosecutor's criticism of the Government of Kenya for non-cooperation through false media reports, refusal to surrender vital evidence, and intimidating and threatening prosecution witnesses.[7172]

However, commenting on the Kenyatta case, critics contend that the toxic relationship between South Africa and the ICC is because the ICC tried to hold Kenyatta to account for the heinous crimes.[73] Thus, critics contend that South Africa and the AU sheltered and coddled Uhuru Kenyatta and other leaders responsible for multiple atrocities, thus advancing impunity.[74]

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[64] The International Criminal Court, "The Prosecutor v. Uhuru Muigai Kenyatta", Case Information Sheet, 2011.
[65] Nathan, 2011.
[66] *Ibid.*
[67] Ba, 2023.
[68] Tieku & Gelot, 2017; Tieku, 2019; Vilmer, 2016.
[69] African Union Assembly, "Decision on Africa's Relationship with the ICC", *Ext/Assembly/AU/Dec* 2013,1.
[70] Akande and Shah, 2010.
[71] Press Statement of the ICC Prosecutor Fatou Bensouda.
[72] International Criminal Court, "Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Status of the Government of Kenya's Cooperation with the Prosecution's Investigations in the Kenyatta Case". *Press Release, 2014*.
[73] Murungu, 2011; Mutua, 2016; Rau, 2012.
[74] Martini, 2020; Mutua, 2016.

Overall, studies covering the Uhuru Kenyatta case are divided on whether the case was a key reason for South Africa's relationship with ICC deteriorating, with Mutua[75] believing that it used this as a mask to shield Mr. Kenyatta from the crimes that had been labelled against him. Thus, there is a need to establish whether South Africa's reasons for supporting Kenyatta were genuine and reflective of the public opinions in Kenya and South Africa.

From a general political perspective, South Africa's reluctance to obey court orders poses a dilemma since the president has committed to obey and defend the constitution. This imposes pressure on the country's leadership to ensure there are not competing obligations and for them to cooperate with the ICC, thus, posing a legal and political dilemma in balancing the regional interests and ICC obligations. To this end, various studies contend that the non-arrest decision prioritised the regional political reputation of the country over its global image as a supporter of human rights.[76] The Southern Africa Litigation Centre contended that South Africa was always clear regarding her obligations under the Rome Statute to arrest Sudan's president, and the South African authorities even warned President Bashir that he would be arrested if he landed in South Africa.[77] That this position changed in 2017 demonstrates that within a domestic setting, the international criminal law has to engage with domestic political conditions that bring about compliance strategies. The South Africa of 2009 was quite different from that of 2017 as demonstrated by the 2017 Transcript of the hearing;[78] one playing a more aggressive regional leadership game.

The AU Summit adopted a decision on the ICC's indictment of al Bashir on January 9, 2012, reiterating in a press release of January 2012[79] the commitment of the organisation to non-cooperation.[80] This decision placed African nations on a collision path as they had to select between their obligations as states parties and as AU member states. The ICC's role on the continent is quite controversial as it is perceived as aiming at only weaker states in Africa, while the larger and more influential global nations, including the US, India, China, and Russia, can avoid accountability over their actions.[81] Al-Bashir's indictment was perceived to strengthen this position since Sudan is not a Rome Statute state party.[82] In this regard, the fact that the UNSC with numerous non-member states to the ICC did the referral made the decision seem illegitimate, highlighting the imperialist position. The AU also averred that the UNSC's P5

[75] Mutua, 2016.
[76] Boehme, 2017; Asin, 2017.
[77] Asin, 2017.
[78] Transcript of the hearing of 7 April 2017, p 31 line 25.
[79] African Union, Press Release number 02/12.
[80] African Union, *Press Release Number 002 January 2012*.
[81] Ndubuisi & Onoriode, 2018.
[82] De Wet, 2015.

members abused power while the perceived conflict between the regional and domestic political interests and international obligations of state parties did not augur well for the legitimacy of the ICC[83] and reputation in the continent.[84] Sarkin[85] further provides insight that the AU became quite oppositional to the Court, thus influencing South Africa to adopt the same stance.

2.4.2 Sovereignty Concerns

Various studies agree that the spirit of nationalism and sovereignty played a critical role in the engagement between South Africa and the ICC within the Uhuru Kenyatta case.[86] This is because South Africa understands that it has an international obligation as a signatory of the Rome Statute, thus, it has to strike a balance when dealing with the ICC in cases such as that of Uhuru Kenyatta that also evoked the Pan-Africanist rhetoric and nationalism on the need for continental and domestic peace and justice using homegrown institutions (Kiruri, 2015).

However, critics contend that in both cases, South Africa supported Kenyatta and Bashir for strategic reasons, geared towards positioning itself as a regional power and aligning with the AU (Dutton, 2017; Kagwanja, 2008). Thus, its foreign policy mainly became state-centred. To this end, it identified and worked with fellow African states, including Kenya, with the aim of using the AU, UN, WTO, and the Non-Aligned Movement (NAM) to obtain recognition and influence as a regional leader. This implied that the nation's diplomacy had to obtain the most support from states such as Kenya. To further understand this, South Africa's role in the UNSC has mainly been one of diplomacy that emanated from its role of institution building and peace-making in the continent. Overall, both cases highlight that South Africa was pushing for regionalism, but its voting patterns within the council have always demonstrated the tension between the politics of sovereignty and solidarity (as evidenced in the Uhuru Kenyatta case) on one side and human rights on the other.

For the Omar al-Bashir case, South Africa grappled with sovereignty concerns in handling the ICC's arrest warrant against Omar Al Bashir since Sudan was a sovereign non-state party. The customary international law immunity recognises that a head of state has immunity, which contradicts the Rome Statute provisions on the obligation of South Africa to comply by arresting al-Bashir when such a situation arises. Some studies agree with South Africa's position in the case, arguing that the case raised discourse regarding the prerogatives granted to certain states by the Rome Statute over the ICC. When a state signs an international treaty, it is perceived as an expression of the sovereign autonomy or will of states.

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[83] Fisher, 2018.
[84] Dutton, 2017.
[85] Sarkini, 2018.
[86] Boschiero, 2015: Kiruri, 2015.

Notwithstanding, because the group of the five UNSC members can expressly submit any State, excluding themselves, there is a trail of inequality and hierarchy to be followed. This issue is clearly highlighted in the al-Bashir case. Since the UNSC requested the ICC to investigate the Darfur issues, it meant that Sudan was subject to the Rome Statute's standards (Peer, 2022). Such provisions lead to differences between state sovereignties, while others contribute to violations of sovereign rights, as South Africa argued. Thus, South Africa believed that Sudan was being forced to conform to the treaty's norms despite not ratifying it, thus, directly touching on the state sovereignty principle. This argument is supported by the fact that norms of international law have rules, including Article 34 of the Vienna Convention on the Law of Treaties that forbids a treaty from creating obligations to a state that has not consented by ratifying it. The dilemma was that the Statute of the Tribunal, along other instruments, including the UN Charter, grants the UNSC the competence to infringe on a state's sovereign prerogatives.

2.4.3 The Principle of Complementarity

Article 17 of the Rome Statute embodies the principle of complementarity, positing it as an instrument for penalising grave international crimes. Scholars such as Jayangakula (2018) advocate for a unified effort to quash aggression, crimes against humanity, genocide, and war crimes. Jayangakula (2018: 45) asserts, "The principle of complementarity serves as a critical tool in bringing perpetrators of heinous international crimes to justice". However, critics, including Stahn (2005, 2012), argue that there are significant ambiguities in the application of complementarity, primarily due to the diversity and inconsistency in ICC decisions and the various prosecutorial policy declarations. Stahn (2012: 78) remarks, "The principle of complementarity, while crucial, is fraught with grey areas in its application, particularly due to the inconsistency of ICC's decisions."

Maphosa, on the other hand, posits that the ICC has been accused of meddling in national affairs even when it is not warranted, as in the Kenyatta case. Maphosa (2017: 120) contends, "The ICC has faced criticism for its unnecessary intervention in national affairs, as exemplified in the Kenyatta case." From this review, it is clear that there is a lack of consensus on how complementarity impacts Pretoria's foreign policy approach towards the ICC and whether this has contributed to the fluctuations in its stance. As such, further research is required to understand these dynamics more comprehensively.

For the Omar al-Bashir case, problems that emanated from the case highlighted that the main cause of the tension between South Africa, the AU, and ICC was the imbalance between judicial justice and political stability. South Africa felt that the ICC was politicising international crimes, thus politicising the ICC, and plunging the ICC into a legitimacy crisis (Heyong, 2022). Thus,

due to such issues, South Africa felt that the ICC's jurisdiction contained the signs of politicisation. As a powerful player in Africa's affairs, South Africa had to balance the competing and conflicting demands of its respective obligations to the global community and its respective leadership status in the continent. South Africa wanted the ICC to respect state discretion by acknowledging that customary and domestic international law granted immunity. The African giant also believed that Sudan should have retained its leverage over crimes committed in their territory by allowing them to investigate and prosecute their case. Thus, it believed that the ICC failed to uphold fair standards in the al-Bashir case.

2.4.4 Divergent Legal Arguments

There are varying legal interpretations and arguments about Pretoria's ICC obligations during the Uhuru Kenyatta case. For example, Ndebele examined the legal obligations of South Africa to suppress, prevent, and punish grave breaches of global humanitarian law.[87] Despite South Africa signing, ratifying, and domesticating instruments seeking to end impunity for grave international crimes orchestrated during armed conflicts and international humanitarian law (IHL), obligating it to act against orchestrators of grave breaches, Ndebele believes that it is torn between showing solidarity with AU counterparts and the global community.[88] Critics such as Bower (2015) assert that by supporting Uhuru Kenyatta and submitting its notification of withdrawing from the ICC's Rome Statute point to its unwillingness to practice universal jurisdiction for serious IHL violations. Contrary to some other cases that had been initiated by the Security Council's referral, Bower (2015) further argues that Kenyatta's case was initiated by the ICC prosecutor through the prosecutor's *proprio muto* power because the domestic legal courts would be unable to prosecute the alleged violators by virtue of the positions they held in government and the power they wielded. South Africa's decision in solidarity with the AU also meant that it was granting heads of state immunity against any form of prosecution for the serious crimes against humanity that President Kenyatta had been charged with. Opponents of Pretoria's foreign policy stance, including countries like Botswana at that time, argued that the ICC meant well and African states, including South Africa, should have desisted from withdrawing and instead embraced safeguarding and upholding their pledge and obligation under the Rome Statute (Geldenhuys, 2016). Other legal arguments claim that the AU and its member states shelter and coddle leaders such as Uhuru Kenyatta who may be responsible for mass atrocities against ordinary citizens. Therefore, South Africa is hypocritical in attacking the

ICC since it only advanced impunity in Kenya (Mutua, 2016). The country's views on the ICC significantly diverged from those of many Kenyan publics citizens who supported the court as they felt there were serious human rights violations.

In the Omar al-Bashir case, according to Amanda (2017), South Africa failed in depending on the AU resolution in order not to cooperate with the ICC about the Sudanese President's arrest. This argument was also supported by Article 98 of the Statute that some scholars argue South Africa erroneously applied.

> *The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.*[89]

The ICC's legislative drafters crafted Article 98 with the aim of not interfering with States *qua* States while ensuring that it retained the ability to hold states accountable.[90] Thus, divergent legal arguments believe that there is little space/room to rely on Article 98 as a way of upholding the immunity of the Head of State. These arguments further postulate that this lesson should have been learnt by the South African government during President Zuma's reign when it allowed Bashir to leave the country in 2015 (Bachmann, Dov, and Eda, 2018). The arguments further insinuate that by State Parties ratifying the Rome Statute, they have, by necessary implication, consented to waive their own officials' immunity, since crimes stipulated by the statute are those that infringe on *jus cogens* norms of international law.

2.5 Trends, Gaps, and Limits in South Africa's ICC Engagement

2.5.1 Patterns and Trends in South Africa's Foreign Policy

The Bashir and Kenyatta cases demonstrate that South Africa's policy towards the ICC is significantly influenced by regional dynamics. In both cases, South Africa expressed support for the ICC to prosecute both Kenyatta and Bashir. However, in both cases, this stance changed due to what Nathan (2011) called the African renaissance or regional dynamics. South Africa felt that it had to act in solidarity with other African states, thus, calling for African solutions to African problems in the President Kenyatta case. Regional dynamics in the Kenyatta case further manifested in 2013 when AU called for the Kenyatta case to be deferred. The position

[89] See Rome Statute, *supra note 1*, art. 98(1).
[90] Jens Iverson, "Head of State Immunity is not the same as State Immunity: A Response to the A.U's position on Article 9 of the ICC Statute", *EJIL: TALK!*, Available at: https://www.ejiltalk.org/head-of-state-immunity-is-not-the-same as-state-immunity-a-response-to-the-african-unions-position-on-article-98-of-the-icc-statute/.

taken by AU left South Africa without any choice to support Kenyatta and advocated for the extension of the adjudicative power of ACJHR to offer immunity and spearhead international crimes.

Similarly, the al-Bashir case raised controversy as South Africa defied the ICC and its own courts, demonstrating the legal dilemmas faced by South Africa in trying to strike a balance between regional interests and ICC obligations like in the Kenyatta case. South Africa argued in this case, contrary to the Kenyatta case where immunity and the need for African solutions were mainly used as the core reasons for supporting Kenyatta, that Sudan was not a state party and the nation had a duty under both customary international law and treaty law, which included the Host State Agreement guiding the summit, not to arrest a sitting president because of immunity. This has made certain scholars contend that the High Court judgment in South Africa and the ICC erred and disregarded crucial international law (Tladi, 2015). Therefore, both cases illustrate that South Africa's non-cooperation with the ICC was influenced by the country's political reputation. However, one of the gaps is that there is a lack of adequate data and studies to determine the extent to which regional dynamics and South Africa's quest to become a global leader influenced it not to cooperate with the ICC.

2.5.2 Gaps and Limitations in South Africa's Engagement with the ICC, Specifically Focusing on the Legal Considerations Discussed in the Previous Sections

The al-Bashir case highlighted the limitations of the ability of the ICC to enforce its authority. In addition, the ICC is not bound to state parties by only a treaty of paper, but fundamental core values. It provided impetus for South African courts and litigants to stand up to their government (Du Plessis and Mettraux, 2017). The South African government, during domestic proceedings that assessed the legality of its behavior, argued that it had been caught in a legal bind or dilemma comprising two conflicting international obligations. The first obligation had been to recognise that Bashir had immunities as a head of state and they had a need to adhere to the agreement it had with the AU to offer immunity from arrest and detention to all AU summit's attendees. The second obligation was to arrest and surrender the president pursuant to the Bashir Decision, made on 13 June 2015 by the ICC. However, both the Supreme Court of Appeal and the High Court rejected the government's arguments. Thus, the controversy emerging was that South Africa acted unlawfully by failing to arrest President Bashir and supporting Kenyatta since this was inconsistent with its obligations to the Rome Statute as well as the ICC Act's Section 10. The government failed to appeal without reasons,[91] thus, insinuating that it viewed the courts' arguments as substantial and having merit.

[91] https://brill.com/view/journals/icla/18/4/article-p577_577.xml#FN000013

2.8 Conclusion

South Africa and the ICC's ties on international problems have altered considerably throughout time. This shift seems to have been driven by the governing ANC's views, without much outside input. This essay shows that in the Omar al-Bashir and Uhuru Kenyatta trials, several variables affected foreign policy toward the ICC. The volatility was driven by political concerns, including South Africa's determination to protect African leaders from prosecution. Regional dynamics put South Africa under pressure to support the AU and other African nations. Ratifying the Malabo Protocol to create a regional accountability framework has affected several African governments. Importantly, changing normative values over time meant that its foreign policy frequently mirrored them. The literature also mentions internal politics, including governing and opposing parties, and international networks. Thus, South Africa must balance these issues with its Rome Statute commitments to the ICC. South Africa's ICC relationship has been a fascinating journey from the Rome Statute model state party and as an enthusiastic supporter of the global criminal justice project and ICC defender to disaffected malcontent forced to defend continental and national pride and honour before the international court.

3.1 Introduction

This chapter delves into the constructivist perspective, according to Finnemore and Sikkink (1998), and its application to South African foreign policy and the nation's stance towards the ICC. It applies Finnemore and Sikkink's (1998) arguments on constructivism with the aim of understanding norm dynamics and state behavior in the ICC context. The core aim is to dissect the theory, its features, and implications, which will be underpinned for the discussion chapter underpinning the research question. To this end, this chapter examines the norm life cycle, especially the three phases: norm emergence, cascade, and internalisation. The norm critically explored is the anti-impunity norm.

Historically, norms have been predominantly utilised for studying conflict, use of force, and war. The constructivist theory defines norms as a standard of the right behavior of actors of a particular identity (Sikkink and Finnemore, 1998). This definition resonates with Klotz[92] who views them as shared social understandings of behavioral standards but differs in the sense that Klotz makes it clear that some norms are inappropriate because they unfairly discriminate or fail to be applied equally.[93]

According to the theory, constructivism in international relation and foreign policy emphasises the significance of ideas and norms, which is in the collective consciousness of the country, linked with national identity conceptions.[94] The theory further postulates that foreign policy enables states to engage each other. In addition, states interact with each other through foreign policy and then socialise, thus, helping them to gain their identity. National identity influences policy choices, and the actors' interests and identity are quite important for the states.[95] Such interactions enable them to gain their identity. Thus, they contend that the concepts of national interest, state identity, and national identity are central tenets to understanding foreign policy.[96] Within the context of foreign policy, ideas and norms can be perceived as national identity. Thus, constructivism within international relations and foreign policy emphasises the importance of ideas and norms, which is in the country's collective consciousness linked with the ideas of national identity[97]. The general frames, attitudes, and ideas connect the national identity's core values to the ideas that influence a country's policy choices. The next section delves into the lifecycle of a norm.

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[92] Klotz, 1995.
[93] Klotz, A., 2018: 14.
[94] Finnemore and Sikkink, 1998: 887.
[95] Uzer, 2011.
[96] *Ibid*.
[97] Erbas, 2022; Leander, 2006.

3.2 Norm Emergence

A major tenet of the constructivism theory is the life cycle of a norm[98]. The norm life cycle is a constructivist framework with much potential for comprehending the emergence and evolution of norms[99]. Ideally, this theory postulates that the norm life cycle has three interconnected phases, from emergence, to cascade, to internalisation[100]. This begins with norm emergence, whereby norm entrepreneurs arise with a conviction that something should be changed. According to Finnemore and Sikkink (1998), norm entrepreneurs play a catalytic role in enhancing the emergence and implementation of norms. Bloomfield's entrepreneur 'antipreneur' framework argues that the norm 'antipreneur' seeks to change the normative status within an issue[101]. He further postulates that 'antipreneurs' usually enjoy certain defensive advantages[102] because many people have preference for the status quo,[103] and 'antipreneurs' usually benefit from opportunities for delaying or frustrating or even wholly blocking discrete initiatives of entrepreneurs.[104][105] Thus, Bloomfield's notion recommends that entrepreneurs need to take the initiative to sustain the change momentum. Contrastingly, he believes that 'antipreneurs' need to engage in fewer risks when it comes to political capital to derail the efforts of entrepreneurs.[106] However, studies emphasise that this does not automatically imply that 'antipreneurs' will always emerge victorious[107]. The concept of norm 'antipreneurs' was introduced by Bloomfied[108] and he defines it as "polar-opposite terms to entrepreneurs, namely, antipreneurs are actors who defend the entrenched normative status quo against challengers." Bloomfield further contends that during the stages of norm emergence, entrepreneurs should establish that there is an issue with current norms and the status quo, then provide a viable solution through a new norm. Whereas 'antipreneurs' emanate from a different side, they resist and reject change.

Since being introduced, studies such as Bloomfield and Scott (2018) have tested and supplemented the 'antipreneurship' concept. They usually analyse the role of nation-states as 'antipreneurs' within global policy fields and negotiations, including human rights and global security. Thus, it is demonstrated how 'antipreneurs' refute claims made by entrepreneurs that the status quo results in morally problematic results.

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[98] *Ibid*.
[99] *Ibid*.
[100] Finnemore and Sikkink, 1998: 901.
[101] Bloomfield, A. "Norm antipreneurs", 2016: 312.
[102] *Ibid*: 322-326.
[103] Legro, "The transformation of policy ideas", 2000: 419-432.
[104] Mahoney, 2000: 507-548.
[105] Tsebelis, 1995: 289-325.
[106] Mills and Bloomfield, A. "African resistance to the ICC", 2018: 101-127.
[107] Bloomfield, "Norm antipreneurs": 326.
[108] Bloomfied, 2016: 321.

The tactics and strategies used by antipreneurs are comprehensively analysed by empirical studies. For example, Lantis[109] demonstrated how antipreneurs block and delay substantial progress within global forums. Adachi[110] illustrated how norm entrepreneurs use the strategy of diverting negotiations to institutions that seek consensus. Antipreneurs ensure that there is no progress on the debate by using their veto. Another tactic is emphasising the significance of the national sovereignty norm, and in this case, Bloomfield[111] states that nation-states dismiss international norms by citing them as interventionist. Besides referencing national sovereignty, antipreneurs also devise ways to get support from protagonists who support their cause within the conflict and clash over norms.[112] Therefore, the antipreneurship concept applies to the scope of this work as norm resisters oppose the arguments made by entrepreneurs and oppose new norms.

Finnemore and Sikkink depict norm entrepreneurs as agents, but in the international system one such actor is the ICC. When dissatisfied with the social environment, norm entrepreneurs can propagate different ideas regarding the right behaviour from platforms that provide credence to their ideas. The ICC's creation in 1998 heralded a significant advance in efforts to make sure that all mass atrocity perpetrators were brought to justice. The anti-impunity norm is perceived as the "challenger norm" (since it challenges the impunity norm) despite the Rome Statute formally codifying it[113], and with the ICC being created to implement it. Since there is no world government, it implies that international law's authority resides in states acknowledging it as binding upon them.[114] According to constructivists, these internal compliance requirements are 'felt' effects since actors accept the legitimacy of a law or norm as they believe that it is appropriate to comply.[115] What this implies is that for international laws or norms to be effective, they should constitute actors and, thus, be part of their identities – determining their interests and influencing their behavior.[116] Secondly, the ICC depends on the active help of states to carry out many of its mandates.

3.3 Norm Cascade

In the second stage, states try to adopt norms, even in the absence of domestic pressure for adopting the norm. States also aim to enhance conformity and meet esteem needs

[109] Lantis, 2018.
[110] Adachi, 2018.
[111] Bloomfield, 2018.
[112] Sippel, F. "Antipreneurial behavior in conflict over norms", 2018.
[113] *Rome Statute of the ICC* (1998) UNTS. Effective on 1 July 2002.
[114] Fitzmaurice, "The foundations of the authority of international law and the problem of enforcement", 1956: 8.
[115] Finnemore and Toope, "Alternatives to "legalization"", 2001: 749.
[116] Hoffman, "Norms and social constructivism in international relations", 2014: 1-3.

since the international community may shame and label them as non-conformists. The norm acceptance rate rises rapidly, as Finnemore and Sikkink label it as a contagion.[117] Many agents start to accept that the behavior advocated by the norm is appropriate. This stage insinuates that in a situation where there is pressure from other international quarters, a norm cascade can begin when a significant number of states (for example, in the AU) support an emerging norm, and the tipping point is 33 percent of all states. This means that norm cascading can occur earlier during the process.[118] Nation-state leaders can devise strategies for engineering a cascade using concerted diplomatic efforts and pressures to widen support. The early supporters, therefore, seek to develop norms through their desire to be seen as norm champions. Thus, the norm cascade stage is characterised by speedy dramatic shifts in norm legitimacy after a tipping point of support by a significant number or mass of states. Here, the mass can be measured by the number of nation-states endorsing a norm, which is often believed to be about 33 percent of all states.[119] Therefore, the mass refers to an adequate number and consists of critical states to redefine the identity's appropriate behaviour. After the tipping point has been reached, the impact of peer pressure and emulation emerge and increases the likelihood of normative progress. It is also worth noting that before the tipping point, ideational commitment and altruism motivate norm entrepreneurs leverage persuasion to advance the process. After crossing the tipping point, imitation or peer pressure drive norm support, with less need for norm-entrepreneur efforts or domestic pressure.[120] This concept traces to the tipping games of Thomas Schelling, where what is done by actors is premised on others' behaviours. Therefore, crossing the tipping point leads to a self-sustaining dynamic.[121]

Existing studies contend that the tipping point happens when approximately one-third of all states support a particular norm.[122] When a significant number of states develop and support a norm even without legal codification, a norm cascade is represented by the increase in the non-affirming events. Political dynamics influence the tipping point's timing. When some conditions are present, a norm cascade may begin earlier than has been postulated by the literature. Some studies have indicated that a cascade can begin with as little as 15 percent of the states supporting a norm – and what is crucial are the cascade engineering processes.

The norm life cycle denotes how domestic pressure plays a crucial role in norm emergence, therefore, ideational commitment, empathy, and altruism motivate support for the norm, and this

[117] Finnemore and Sikkink, 1998: 902.
[118] *Ibid*.
[119] *Ibid*.
[120] *Ibid*.
[121] Schelling, 2006, 94: 95.
[122] Lutz and Sikkink, 2000: 655.

emanates from persuasion.[123] During the cascade stage, norms reach the tipping point when identity and emulation pressures at the international level outweigh considerations based on interests.[124] However, it is worth noting that a different process can also ensue. Nation-states hasten to spearhead a normative development or want to join during the early stages since the leadership prize usually goes to early norm adopters and creators. Leadership and status-seeking motives help in advancing the tipping point and driving the cascade's initial stages. Along the curve, studies denote that shame avoidance influences non-participating states to join. However, emulation and peer pressure do not significantly affect the process until about 50 percent of the states change stance, leading to concerns about states remaining outliers.[125] In addition, even during that period, nation-states adversely impacted by or those who are indifferent to the norm are likelier to accept it slowly to refrain from being left behind. International and domestic processes also tightly entwine. For developing states, the regional dynamics and international pressures take centre-stage while in leading Western nations, domestic pressure is leveraged to kickstart international norm development.[126] Therefore, some of the conditions for rapid norm development include international status concerns, praising and naming, and leadership ambitions rather than shaming.

3.4 Norm Internalisation

These norms are eventually internalised. States or individuals then take it for granted unlike initially. Thus, conforming with its dictates, according to Finnemore and Sikkink, is rarely or no longer questioned.[127] Conformity becomes natural to an extent in that people or states stop even noticing the norm's presence. However, there has been the emergence of substantial resistance to the ICC's anti-impunity norm and the entity as a whole. It is worth noting that the anti-impunity norm fundamentally informs or defines the ICC's mission. Thus, it implies that ICC as a norm entrepreneur strives to persuade states to change their behaviour in tandem with their perceptions of appropriate behaviour. Anti-impunity, loosely translating to non-exemption from punishment in this case, is a norm represented by the ICC and state parties, including South Africa. The ICC enforces a robust version of the anti-impunity norm, implying all mass atrocity crime perpetrators, including the highest officials of states, can be brought to justice before competent courts.

[123] Finnemore and Sikkink, 1998: 898.
[124] *Ibid*.
[125] Petrova, M.H. "Naming and praising in humanitarian norm development", 2019: 599.
[126] Petrova, 2014.
[127] *Ibid*.

3.5 States Identity is Socially Constructed

Constructivism postulates that the national identity development process is linked to the social and political setting where it occurs. Social constructivists aver that besides ideas that have developed within a state, a state's behaviour is also socially constructed and influenced by its identities, which are dependent on the perceptions others hold about them. Finnemore and Sikkink (1998) emphasise that states mainly care about their status, self-image, and prestige. Thus, the social constructivism aspect insinuates that actors' interests and identity are quite vital. Finnemore and Sikkink (1998) further contend that the socialisation process determines how understandings regarding wrong and right become norms, and when these norms are internalised, they shape state interests, identities, and behaviours.

However, while internalisation does not necessarily impact social influence, social conformity is motivated by the likelihood of social punishment or reward. In the prism of their peers, Finnemore and Sikkink (1998) aver that states seek legitimacy and yearn to belong to the 'group' and improve their esteem and social standing.[128] The quest for being seen in a specific way can account for why states such as South Africa have signed up to voluntary agreements like BRICS and the Rome Statute in order to convey their social identities.

As a result, interactions, relations, and activities are quite significant between structures and agents; and these activities enable states to comprehend each other and construct their identities. Structure consists of material capabilities and social relationships. Ideally, social relationships include shared relations, opinions, shared knowledge, activities, interactions, and expectations.[129] When states understand and share knowledge between each other, they develop deeper relations and interests for each other.

To conduct an analysis of the international relations and foreign policy towards states, the constructivist approach is crucial since it tackles national security, identity, state identity, national interests, and national identity. This theory provides insight that ideational factors operate within the real world, but not in a vacuum. For instance, the constructivist theory can enhance understanding of how South Africa formulates its policy interests and preferences. One of the major arguments of constructivism is about human consciousness and its role in international relations – with the theory highlighting that international reality's building blocks are both material and ideational. Ideational factors have both instrumental and normative dimensions and express collective and individual intentionality, and their significance and meaning are not independent of place and time.[130] The other important postulation is that the

[128] Finnemore and Sikkink, "International norm dynamics", 1998.
[129] *Ibid.*
[130] *Ibid.*

theory seeks to determine how a state's history or past influences the way actors understand their current situation.

3.6 **The Anti-Impunity Norm**

The permanent ICC currently has 123 member states found globally. Numerous national criminal codes have embedded major features of international criminal law, meaning that core international crimes, such as war crimes and genocide, are punishable. International criminal justice has made it critical to make people criminally accountable for the atrocities they commit, occasionally called the norm of anti-impunity. The anti-impunity norm's major feature is the concept that all persons, irrespective of their official role or power, should be responsible for committing major international crimes. Thus, the anti-impunity norm is the effort and tendency to use criminal law for punishing serious human rights abusers[131].

The journey to overturning sovereign immunity commenced after the Second World War in Tokyo and Nuremberg. Momentum gathered pace with the arrest of the former president of Chile, General Augusto Pinochet, in 1998 in the United Kingdom under the universal jurisdiction principle. This was followed by the British courts stripping him of immunity.[132] Today, the universal jurisdiction principle is a hotly contested one, but this case indicated that there was an emergence of an anti-impunity norm, at least against former leaders. The anti-impunity norm relates to other norms that underpin international humanitarian norms and law, such as the responsibility to protect (R2P) and the protection of civilians. The promotion of these norms needs to be perceived as one of the main efforts since the 1990s to redefine sovereignty. It also aims to determine that the way states treat citizens is an international concern.[133] Since its establishment, the ICC's anti-impunity norm against country's top leaders has led Mills and Bloomfield[134] to contend that this was how the Rome Statute was formed, since it would have been nonsensical to exclude them as they are usually responsible for committing serious crimes. In addition, forbidding their prosecution while in power would relay the message that they can continue to commit such crimes and incentivise them to remain in office.

3.7 Conclusion

The constructivist view holds that international politics' structure is social and not strictly material. Foreign policy stances are significantly affected by national identity which impacts state identity. Thus, norms and ideas are considered by constructivism to be quite critical. The norm emergence phase lays a foundation for states adopting a norm, with norm entrepreneurs

[131] Haldemann and Unger, "The Anti-impunity Framework", 2020.
[132] Naomi, "The Pinochet Effect", 2005.
[133] Annan, "Two concepts of sovereignty", 1999: 1999.
[134] Bloomfield, 2017.

playing an indispensable role in ensuring that norms emerge and become implemented. On the other hand, the norm antipreneur aims to change an issue's normative status. The second stage is among the most critical since states try to respond to various pressures by embracing norms. It is during this stage that agents begin accepting that the behaviour the norms advocate for is appropriate. This stage will be critical for demonstrating how the number of states who supported the AU's position influenced South Africa's foreign policy stance. The tipping point will be particularly crucial for determining the number of states that influenced South Africa's reaction. Constructivism will also help to demonstrate how South Africa has practised resistance through tactical and strategic resistance. Constructivism will also help to develop the analysis on South Africa's strategic adoption and justification of the use of the sovereignty norm, contending that ICC was unfairly using anti-impunity and that the sovereignty of African states was under jeopardy.

CHAPTER FOUR: SA'S DIPLOMATIC QUANDARY: NAVIGATING REGIONAL DYNAMICS IN ICC COMPLIANCE WITH UHURU KENYATTA

4.1 Introduction

The Uhuru Kenyatta ICC case was a high-profile case since he was a high-profile defendant (as the first sitting president to appear before the ICC).[135] Kenyatta was accused of orchestrating crimes against humanity, such as deportation, murder, and persecution in 2011.[136] Kenyatta won the 2013 presidential elections while his case was ongoing. This made him the first sitting president to be prosecuted by the international court, eliciting concerns regarding head of state's immunity and admissibility.[137][138] Uhuru Kenyatta's case grappled with diverse legal challenges, such as the difficulty in obtaining evidence, cooperation of witnesses, and the withdrawal of charges,[139] highlighting the limitations and effectiveness of international justice mechanisms in tackling serious crimes.[140][141] Thus, determining Pretoria's foreign policy position on the case is important for understanding what factors contributed to its perspectives.

4.2 Domestic Political Considerations

South Africa's participation in various African issues was adversely hampered by domestic political happenings, meaning that it faced domestic political pressures and concerns about the implications of ICC prosecutions on regional stability. Critics contend that South Africa sought to use the Uhuru Kenyatta case to enhance its international image while masking its domestic political issues[142] and enhance its status in its quest to become a permanent African representative in the UNSC. Some of the domestic factors cited include a strong spirit of nationalism and response of local actors to Pretoria's stance on the Uhuru Kenyatta case.[143]

Acknowledging these political issues, Kagwanja[144] identifies two major ideological camps that influenced Pretoria's foreign policy stance towards the ICC and Kenya during the Uhuru Kenyatta case: the ANC liberation diplomats who comprise idealists with robust liberal and pan-African ideals; and diverse groups sharing the perspective that Pretoria's foreign policy needed to advance economic interests instead of grand political ideals and focus on continental

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[135] International Justice Monitor, "Uhuru Kenyatta Case", Available at: https://www.ijmonitor.org/uhuru-kenyatta/.
[136] International Criminal Court (ICC), "The Prosecutor vs. Uhuru Kenyatta".

[137] Open Society Justice Initiative, "*ICC in Focus - The Kenyatta Case*".
[138] Makinda, S. M. Kenya, "Uhuru Kenyatta and politicising the ICC". *The Conversation May 20, 2013*.
[139] International Criminal Court (ICC), "*Uhuru Kenyatta Case Page",* Available at: https://www.icc-cpi.int/kenyatta
[140] Hague Institute for Innovation of Law, "The Impact of the Kenyatta Case on the ICC's Credibility".
[141] *Ibid.*
[142] Gevisser, 2013.
[143] Kagwanja, 2009.
[144] *Ibid.*

regeneration). Because successive ANC administrations have failed to significantly transform Pretoria and turn the fortunes of the black majority from their conditions of poverty, critics aver that it has strengthened support for a pragmatic and realistic foreign policy where developmental interests and economic priorities trump the values of idealism.[145]

4.2.1 Constitutional Dictates

Proponents contend that Pretoria sought to enhance human rights and democracy at first in the Kenyan case since these principles are dovetailed with its objectives as enshrined in the foreign policy to protect its stability, prosperity, and security. The ANC leadership believed that preserving and maintaining these values was critical to strengthen its role as a responsible and important international actor.[146] In the Kenyatta case, Pretoria faced a diplomatic balancing act aimed to preserve the country's status as a mediator without compromising regional stability. The involvement of the UNSC added complexity, shaping South Africa's nuanced approach to its ICC commitments and peacekeeping roles. Despite the arguments and counterarguments, the constitution significantly affects Pretoria's foreign policy stance.

In South Africa's various post-apartheid cases before its courts have illustrated the relevance of the Constitution for participation in and application to its foreign policy. Several approaches can be embraced in understanding Pretoria's foreign policy and the level to which the policy resonates with the Constitution. The first approach emphasises the role of values, such as human rights, justice, reconciliation, and democracy, as foundational to Pretoria's foreign policy, rooted in the constitution. The second approach focuses on the national interests defined by the constitution, including security and peace, economic development, global institutional reform, and adherence to non-intervention and sovereignty principles.

Customary international law allows Pretoria to establish relations with other nations, with the president authorised to shape foreign policy. However, this authority is limited by the need for parliamentary support and the possibility of judicial review, ensuring the president's foreign policy actions are not unchecked. The Constitution significantly influences foreign policy by setting both procedural and substantive guidelines for the executive's decisions. Evidently, the president's authority to ascertain and implement foreign policy is not unconstrained.[147]

The Constitution shapes Pretoria's foreign policy through substance and process. Substantively, it guides policy formulation with values, norms, and legal obligations. Procedurally, it involves

[145] Kagwanja, 2009; Landsberg, 2012.
[146] DIRCO, "*Building a better world: the diplomacy of ubuntu"*, Pretoria, 2011.
[147] *Ibid.*

specific actors and processes that execute and shape foreign policy, aligning it with the national interest. These constitutional elements ensure that foreign policy and national interest comply with both domestic and international law, as well as constitutional values.

The Constitution's authoritative nature can be embraced as supreme policy, meaning it offers the conceptual framework that sets out the values and norms that should influence Pretoria's foreign policy and guide its international decisions and actions. The Bill of Rights, Chapter 2, Section 1, and the Preamble of the Constitution identify these values and norms.[148] Moreover, the Constitution is a legal and political document embodying the Pretorian social contract. Thus, all state actions and decisions should align with its prescripts, meaning that it creates limitations and obligations. In addition, any government conduct or international law contradicting the Constitution or its values and norms, is viewed as invalid and a competent court should set it aside.[149] One of these obligations is the duty to promote, safeguard, and fulfill the Bill of Rights, making constitutional values and norms effective.[150] At the same time, the constitutional text allows Pretoria to apply international law, which constraints foreign policy choices.[151] For example, the commitment it made under the UN Charter to seek UNSC authorisation before participating in conflict influences Pretoria's policy alternatives in peace and security, even in case another state grossly violates human rights.[152]

In the realm of process-based influence on foreign policy, a spectrum of factors, encompassing domestic, individual, and global inputs beyond constitutional stipulations, actively molds the contours of diplomatic decision-making.[153] The desire of national actors such as citizens, public interest groups, and legislators, to influence foreign policy and national interests is achieved through the formulation and articulation of policy inputs or demands. The Constitution empowers political and civil institutions that engage in creating and implementing foreign policy. More specifically, the executive is the only state organ the Constitution empowers to implement

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[148] Constitution of the RoSA. 1996. Section 1 reads that, "The Republic of South Africa is one sovereign, democratic state founded on the following values:

a. Human dignity, the achievement of equality and the advancement of human rights and freedoms.
b. Non-racialism and non-sexism.
c. Supremacy of the constitution and the rule of law.
d. Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.'

On the other hand, Section 7 stipulates:
"This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."
[149] Section 2 of the Constitution, "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."
[150] *Ibid*, Section 7(2).
[151] Chapter 2, Sections 199(5).
[152] UN Charter, "Articles 24 and 2(4)", 1945.
[153] Kegley, 2007.

foreign policy.[154] Thus, the executive and foreign missions have an obligation to act in tandem with the Constitution when executing their functions. On the other hand, the Constitution spells out clear rules for approving international agreements. Both houses of the national legislature (National Council of Provinces and the National Assembly) should approve a treaty for it to become binding, according to Section 231. Parliament also acts as a crucial vehicle for consolidation of and enlisting of the involvement of both profit and non-profit civil society organisations in articulating and implementing Pretoria's foreign policy.[155]

4.3 Regional Dynamics

4.3.1 AU Resolutions

The Ezulwini Consensus reached in Eswatini in 2005 and later adopted during an *Extraordinary Session of the Executive Council of the AU* in Addis Ababa laid a foundation for the AU's common stance on the need for the Security Council to be reformed through more representation and democratisation like other regions in the world.[156][157] The *Sirte Declaration* then followed it in July 2005, reiterating that African states should have at least five non-permanent and two permanent seats on the Security Council.[158] Pretoria also participated in the Assembly of the *AU Eighth Ordinary Session* held in 2006 that resolved to create an African Commission on Human and People's Rights[159]; the *Ninth Ordinary Session* of July 3rd, 2007 on election of members to the African Commission;[160] and the *Assembly of the AU Tenth Ordinary Session* Addis Ababa on the Kenyan situation after the 2007 presidential election, strongly urging the involved parties to commit to a peaceful solution in adherence to the rule of law.[161] For the AU Resolution (2013) on the ICC, Pretoria participated in the resolution expressing dissatisfaction with the way the ICC was conducting the case against President Uhuru Kenyatta and urging the postponement of the trial.[162] Moreover, Pretoria's international standing was further compromised when it supported the African Union's October 2013 decision requesting that African heads of state be accorded immunity and urging the UNSC to defer Uhuru Kenyatta

[154] Section 231 of the Constitution.
[155] Constitution of the RSA, Sections 59, 72, 231(2), 55(2, 74).
[156] Assembly/AU/Dec.184 (X). Decision on the Reform of the United Nations Security Council 1
[157] Executive Council, 7th Extraordinary Session (7–8 March 2005*). The Common African Position on the Proposed Reform of the UN*. The Ezulwini Consensus.
[158] AU. Assembly/AU/Decl. 2(V), *Sirte declaration on the reform of the UN by Assembly of AU*, 5 July 2005.
[159] Assembly/AU/Dec.144 (VIII).
[160] Assembly/AU/Dec.167(IX) "Decision on the Election of the Members of the African Commission on Human and Peoples' Rights", Doc. EX.CL/365 (IX)
[161] Assembly/AU/Dec.187 (X). "Decision on the situation of Kenya following the presidential election of 27 December 2007".
[162] AU Assembly. "Decision on Africa's Relationship with the ICC", December 2013.

and William Ruto's trials and allow regional tribunals to take up the issues[163]. South Africa vehemently supported these decisions by supporting African efforts geared towards achieving peace and reconciliation.

However, critics contend that South Africa's support for these resolutions was because it sought to be a regional leader and to show solidarity to other supporting AU member states.[164] They aver that South Africa abdicated its leadership role in Africa as it sought to appease the anti-ICC block instead of committing to international norms and speaking for those whose rights had been violated,[165] while others believed that AU's stance did not represent the views embraced by all Africans.[166] Consequently, they argue that the country's foreign policy, despite emphasising the need for human rights protection, was oriented towards shielding and coddling Uhuru Kenyatta for the various atrocities he committed, thus, violating its obligations as stipulated in the Rome Statute.[167]

While studies fail to agree on the major causes of Pretoria's foreign policy position towards the Uhuru Kenyatta case, what is clear from the AU resolutions is that Pretoria did not want to clash with other AU member states. While Pretoria initially seemed to support the trial of Uhuru Kenyatta, it changed its foreign policy stance because of the Pan-Africanism spirit that echoed with the regional dynamics factors.[168] Studies further contend that Pretoria's foreign policy advocated for the need for African states to be accorded the chance to find solutions for their problems as a way of protecting the sovereignty of AU member states. In addition, these decisions challenged the ICC's stance, highlighting that South Africa was ready to violate its obligations to the Rome Statute in favor for decisions made by the AU.[169] By doing so, it wanted to claim its leadership in the AU in order to position itself for better leadership roles in the future. Consequently, Pretoria's foreign policy position was significantly influenced by regional dynamics, particularly the AU's declarations and resolutions.

3.5.2 International Pressures

Pretoria's obligations under the Rome Statute mean that it is mandated to support its activities, including in the Uhuru Kenyatta case. It faced diplomatic pressure from other African countries and international actors advocating for a more collective African response to addressing

[163] International Justice Resource Center. "AU Expresses Opposition to ICC Prosecutions and Seeks Postponement of Kenyatta Trial", 2014; Hickey, 2013; Uwazuruike, 2021.
[164] Sardini, 2020.
[165] Mutua, 2016.
[166] Materu, 2015; Mutua 2016; Rau, 2012; Werle et al., 2014.
[167] Martini, 2020; Mutua, 2016.
[168] Akande & Shah, 2010; Nathan, 2011; Ba, 2023.
[169] ICC, "Statement of the Prosecutor of the ICC, Fatou Bensouda". *Press Release, 5 December 2014*.

accountability for crimes committed on the continent. In the Uhuru Kenyatta case, Nompumelelo Seme's work alludes that South Africa aligned with Kenya as its foreign policy had supported the AU's call for mass withdrawal, but this meant that Pretoria contradicted the stance taken by the ICC Prosecutor in criticising Kenya's refusal to cooperate. However, critics contend that South Africa was right not to heed the international pressure because the ICC unfairly targeted African leaders in the al-Bashir case and undermined the peace process for the Uhuru Kenyatta case. Generally, Pretoria supported the argument that states should handle their cases internally without being subject to external pressures from the ICC. While it did not comply, it supported certain efforts and initiatives advocated by the UNSC on the Kenyan case, including peaceful resolution of the conflict.

3.3.2 UNSC Resolutions

Pretoria was among the 51 founding members of the UN in 1945. The UN membership has increased to 193 states since it was founded. However, Pretoria was suspended by the UN General Assembly from engaging in its work because of internal opposition to the apartheid policy on 12 November 1974. The UN re-admitted Pretoria in 1994 after it transitioned to a democracy. A foreign policy founded on the UN's centrality in the multilateral system has been embraced by Pretoria since 1994. In 2006, the AU endorsed it and later elected it with a resounding majority to act as a non-permanent UNSC member in the periods 2007 to 2008 and 2011 to 2012. As a non-permanent member, Pretoria supported other African states as highlighted by the spirit of Pan-Africanism. Ideally, Pan-Africanism involves efforts geared towards creating a sense of collaboration and brotherhood among all Africans.

Pretoria supported and differed with various resolutions and statements by the Security Council. The Security Council Resolutions supported by South Africa included S/PRST/2008/4 on Peace and Security in Africa (which was made during the Security Council's 5831st meeting held on 6 February 2008), and S/PV.5845 (held on 25th February 2008 during the 5845th meeting in New York), which acknowledged the need to end the Kenyan crisis. Pretoria was a non-permanent UNSC member during this period (2007-2008), thus, it was influenced by international pressures on the need to resolve the violence by embracing peace and security. Thus, it was advancing both the African agenda and conforming to the UNSC position as a non-permanent member. However, Pretoria was unsupportive of the 5 May 2009 Security Council Resolution S/PRST/2009/11 made at the 6118th UNSC meeting on "Peace and security in Africa" where concerns were voiced regarding the emergence of illegal and unconstitutional changes of government within a few African states, despite its UNSC tenure having ended. However, other studies contend that South Africa did not overly support this statement as it occurred when the Bashir incident was ongoing. Further opposition to the ICC manifested during the 2013 UNSC

Resolution 660 that sought to defer the trial of Kenyan leaders. The resolution failed to be adopted after eight members abstained and seven voted in favor. This was a major legal hurdle for the prosecutors in their attempt to request the ICC, under the UN Charter's Chapter VII, defer investigations and subsequent prosecution of Uhuru Kenyatta. This resolution influenced Pretoria to strengthen its efforts in supporting Kenya's case to be deferred. Ntombizozuko Dyani-Mhango highlights how AU (regional dynamics) significantly influenced this resolution. Other critics of the ICC, such as Ndivhuwo Ishmel Moleya, advocated for the need to embrace a framework to integrate the complementarity principle and prosecute international crimes domestically in the continent.

In 2011, Pretoria voted to support Resolution 1973, which resulted in an intervention led by North Atlantic Treaty Organisation in Libya. The resolution authorised the use of force to safeguard civilians. By embracing the principle, Walling contends that it was meant to address the tension between human rights that states are obligated to advance and sovereignty obligations under the Charter's Article 2(7). When states are not willing to advance this, the UNSC is to safeguard human rights as one of its core mandates of the responsibility to protect. This also implies that easing the tensions between human rights and sovereignty norms is achieved by re-conceptualising sovereignty to involve responsibility, implying that when there are alleged mass atrocities, realising sovereignty norms mainly imply safeguarding human rights. Pretoria's vote supporting Resolution 1973 was opposed by critics who contended that it later withdrew its support for the resolution because Western powers had violated the resolution, resulting in the ouster of Muammar Ghaddafi instead of protecting Libyans. Thus, while South Africa initially supported Resolution 1973, regional dynamics influenced it to change its foreign policy stance to be in solidarity with other African countries' positions, which was in tandem with Pan-Africanism. Its support for Uhuru Kenyatta also demonstrated that it was reneging on its earlier stance on the need to hold leaders accountable.

Furthermore, on 15 April, 2013, the S/PRST/2013/4 presidential statement on the "Prevention of Conflicts in Africa" reaffirmed the Security Council's responsibility in maintaining international peace and security in tandem with the UN's Charter. The Council acknowledged the significance of effective and robust national institutions in preventing conflicts within the African continent. Articles 33 and 34 reiterate the Council's role in settling disputes peacefully and promoting appropriate preventive action in response to situations or disputes such as those of Kenya, which aligns with South Africa's foreign policy that commits to the maintenance of global security and peace. Despite its tenure as a non-permanent member having ended, regional dynamics, particularly AU's position on peace and security, influenced Pretoria to play a leading role in preventing conflicts, thus, heeded to this call by supporting the AU's efforts.

The implication for the UNSC resolutions, meetings, and speeches is that South Africa was compelled to strike a balance between its relationship with Uhuru Kenyatta and other African leaders and commitment it made to support international justice. This imposes pressure on South Africa to fulfil its obligations as a ratifier to the Rome Statute and adhere to its constitutional dictates of advancing and safeguarding human rights. The response highlighted tensions inherent in its foreign policy between its obligations and quest for African unity and solidarity.

4.3.2 Diplomatic Engagement and Peacekeeping

Proponents of Pretoria's participation in peacekeeping missions in Zimbabwe, Burundi, Lesotho, Sudan, South Sudan, Central African Republic, the Comoros, DRC, and Madagascar[170][171] contend that it aligns with its foreign policy's aim to play a leading role that promotes African unity and African renaissance by making continental institutions such as the SADC, the African Standby Force, the AU, and the NEPAD stronger. Its peace efforts are influenced by foreign policy's quest to contribute to the stability and progress of the continent. Concomitantly, these efforts to enable Pretoria access business and trade opportunities to benefit its citizens. The quest for such opportunities resonates with the view that governments that have ambitious foreign policy objectives often exercise power abroad to gain domestically[172] and is equated to soft power.[173]

Despite its concerted efforts in conflict resolution, the country's interventions have a mixed record. For example, its mid-1990s foreign policy objectives of ensuring stability and democratisation in Nigeria yielded negligible results.[174] Furthermore, the Libyan events drew wide criticism for South Africa's support of Resolution 1973 that advocated for the use of appropriate measures to safeguard civilians.[175] The Global South's UNSC members wanted the mandate not to include Qaddafi regime's removal. Pretoria's support of Resolution 1973 was perceived as an error of judgment since NATO's brutal bombing campaign and the murder of Gaddafi were not anticipated.[176] Pretoria invested heavily in the Darfur and South Sudan conflicts and Pretoria's approach to Khartoum depicts many of the ideological, political, and economic components of its foreign policy. They are the quest for stability and peace in the continent,[177] increasing commercial interests, quest for energy, as well as an anti-imperialist

[170] UN Peacekeeping, "UN thanks South Africa for its contribution to peacekeeping".
[171] ONUB (Burundi), UNMEE (Eritrea and Ethiopia), UNAMID (Darfur), ONUCI (Côte d'Ivoire), MONUC (DRC), UNMIL (Liberia), and MONUSCO (DRC).
[172] Lotze et al., 2015.
[173] Landsberg & van Wyk, 2012.
[174] Van Nieuwkerk, 2014.
[175] *Ibid*: 42.
[176] *Ibid*: 47.
[177] Heinecken and Ferreira, 2012.

paradigm that results in supporting regimes being pressurised by the West, irrespective of their performance on human rights.[178] Finally, there has been a notable decrease in Pretoria's engagement within peace missions partly due to domestic challenges, including a reduction in the South African National Defence Force's budget and the view that Pretoria's peacekeepers are not well-disciplined[179]. For example, for the Financial Year 2023/2024, the Derpartment of Defence was allocated a cumulative budget of R51.1 billion, translating to a net reduction of about R500 million compared to the previous budget.[180] Overall, Pretoria's role in peace operations is connected to its rising self-image as an African and middle power nation on the global stage.[181] Thus, Pretoria uses peacekeeping as a foreign policy tool that support its objectives to be a leader in multilateral forums, meaning it is predominantly politically motivated; believes its prosperity and development are based on Africa's progress and for leveraging its position within multilateral forums, particularly the UN.

African Sovereignty and Solidarity

South Africa advocated for the need to uphold the principle of African sovereignty together with other African states. It supported the idea of sovereignty and multilateralism during the Uhuru Kenyatta case since it believed African states were able to resolve their issues without external interventions. This was in tandem with the Article 4(h) of the AU Constitutive Act that confers the AU with the right to intervene within a member state in case of grave circumstances, including crimes against humanity.[182] Its policy supports the "African solutions for African problems," such as the Malabo Protocol, and believed that the ICC's actions were infringing on this principle.[183] Furthermore, South Africa's foreign policy stance during the Uhuru Kenyatta case aligned with the AU's principles of non-interference and state sovereignty, which it believed was being contravened in the Uhuru Kenyatta case.

4.4 Legal and Political Factors

4.4.1 Heads of States' Immunity

The customary international law deters senior state officials such as President Kenyatta whose trials commenced in 2013 from being investigated due to the immunity they are granted from legal proceedings. Proponents of the head of states' immunity, including South Africa, called for

[178] DIRCO.
[179] van Nieuwkerk, 2012.
[180] https://www.gov.za/news/speeches/minister-thandi-modise-defence-and-military-veterans-dept-budget-vote-202324-23-may.
[181] Bellamy and Williams, 2013.
[182] 36th Ordinary Session of the Assembly of Heads of State and Government of the OAU, Togo, 2000.
[183] ANC, NGC 2015, "Discussion Documents", 17 August 2015: 174.

the deferment of Uhuru Kenyatta's case,[184][185] and for Africa to be allowed to use alternatives such as the ACJHR and the Malabo Protocol. However, proponents of the ICC contend that since state parties are Rome Statute members, they waive their officials' immunity or have accepted that they lack immunity, meaning that Article 98 of the statute is inapplicable in such cases (Du Plessis *et al*., 2013; Gaeta & Labuda, 2017). Other critics state that the existence of personal and functional immunity should not be interpreted to imply that there is no substantive legal responsibility.[186] Similarly, Wickremasinghe[187] believes that none of the immunities granted benefit a specific person or group of persons but the State they represent, meaning that these immunities can be waived by the sending state, and applies when the immunity being considered has been granted *ratione personae*.

4.4.2 Complementarity Issue

Enthusiasts of the ICC contend that it should essentially collaborate with African states' institutions when doing its enquiries. The Rome Statute confers the ICC with the power under Article 17(1)(A) to investigate and prosecute when national courts are unwilling or incapable of doing so (Bjork, 2011). Thus, its intention is not superseding national judiciaries but complementing them. However, the AU has raised concerns, including in the Kenyan case, that the ICC applies selective justice and targets African sitting heads of state. The same arguments were raised by Uhuru Kenyatta who stated that Kenya had the ability to prosecute its own case,[188][189] while other ICC critics believe that since the Office of the Prosecutor opened Kenya's case *proprio motu*, it disregarded the complementarity principle since no national criminal jurisdictions were happening by the time it opened these cases.[190]

4.4.3 Selective Prosecution

Critics of actions of the ICC in the Uhuru Kenyatta case, including the AU and South Africa, accused the ICC of discriminating against African states and people in "cherry-picking" the cases to follow-up and prosecute.[191] South Africa, Ethiopia, Rwanda, Zimbabwe, Kenya, and the AU have alleged that the ICC is biased.[192] Sirlead[193] also contended that the Court has been accused of being discriminatory and shielding the influential, powerful states, with Jean Ping, former AU Chairman, arguing that the ICC appears to exist only to judge Africans. Since the

[184] Doc. Assembly/AU/13(XXI); AU, 2008; AU, 2013.
[185] Christensen, Sofia, "Should African Presidents Have Immunity From Prosecution", June 1, 2017.
[186] Kayitana, 2015; Cryer, 2010.
[187] Wickremasinghe, 2003.
[188] Kenyatta, Uhuru, "Address to the Extraordinary Session of the Assembly Heads of State and Government of the African Union", 12 October 2013.
[189] ICC, "The Prosecutor v. Uhuru Muigai Kenyatta: Case Information Sheet", 2011.
[190] Wambua, 2021.
[191] Ankrumah, 2016; Du Plessis, 2010.
[192] Gettleman, Jeffrey, "Raising Fears of a flight from ICC, Burundi heads for exit". *New York Times*.
[193] Sirlead, 2015.

Security Council's two referrals emanate from Africa, critics contend that it reflects an anti-African bias as highlighted by John Dugard.[194] The failure to consider this issue with the gravity it deserves has provided ammunition to certain African officials and politicians that the international court is selectively biased,[195][196] hence, distracting from the plight of victims of human rights violations that have occurred in Africa.

However, Deguzman contends that there is weak evidentiary basis to support this argument. The international court had invoked its jurisdiction in a single situation (Kenya's post-election violence), with the other situations emanating from referrals from the Security Council and concerned states.[197] The Government of Kenya challenged the Pre-Trial Chamber authorisation's admissibility arguing that Kenya aimed to carry out appropriate investigations and prosecutions independently.[198] Critics of the anti-ICC narratives state that the Court has refused to conduct investigations in only two situations outside of the African continent.[199] It means there is an inadequate basis for concluding that the ICC embraces selective prosecution and discrimination as the ICC's decisions are founded on the situations' gravity.[200] Furthermore, the Rome Statute's Articles 25(2), 25(3)(c) and 3(a) stipulate that any individual who commits a crime within the Court's jurisdiction shall be personally held liable and responsible for punishment in tandem with the Statute. Thus, the selective justice issue has elicited tensions between the AU and ICC, influencing Pretoria's foreign policy position.

4.4.4 Sovereignty and Universal Jurisdiction Issues

A crucial element of the ICC statute is that it should try cases where domestic courts lack the ability or demonstrate unwillingness to genuinely prosecute or investigate (according to the complementarity principle).[201] However, critics such as the AU and South Africa further contended that by investigating and prosecuting Uhuru Keyatta, the ICC was undermining African nations' sovereignty, a critical legal argument.[202] Critics contended that the ICC failed to respect the international law on head of state immunity that deters heads of state's prosecution even for global crimes.[203] Other commentators have argued that the ICC erred in proceeding with prosecutions within Kenya in spite of the Kenyan government objecting (Arieff, 2010),[204]

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[194] Dugard, 2013.
[195] Du Plessis *et al*., 2013; Omorogbe, 2017.
[196] Omorogbe, "The AU and the ICC: What to do with Non-Party Heads of State?" *Thesis 2017*: 17-09.
[197] Deguzman, 2020.
[198] Ambos, 2013; Charles, 2009.
[199] Du Plessis *et al*., 2013.
[200] ICC, "ICC underlines impartiality, reiterates commitment to cooperation with the AU", 2016.
[201] Burke-White, 2008.
[202] Du Plessis *et al*., 2013.
[203] Ssekandi, 2017.
[204] Arieff, Alexis, Marjorie Ann Browne, Rhoda Margesson, and Matthew C. Weed, "ICC cases in Africa", 2010.

with some Kenyan politicians urging Kenya to pull itself out of the ICC regime. However, these arguments are dispelled by Deguzman (2020) on the basis that there is insufficient evidence to support the claims. Deguzman (2020) and Abass (2013) reiterate that while the law of immunity and admissibility's legal requirements for nonparties are not clear, they have been interpreted and applied by the Court in a plausible manner. Demystifying sovereignty arguments used against the Uhuru Kenyatta case, critics depict the ICC as a last resort option for prosecution of crimes that emerge after there is a total breakdown of law within a state.

In addition, in Article 27 and Article 98, the drafters were careful to differentiate between responsibility or culpability for a crime. Anti-legitimacy and jurisdiction arguments contradict the Rome Statute's Article 13 that clearly states that the Court has jurisdiction in accordance with article 14.[205] Thus, these provisions highlight that the ICC has broad jurisdictional powers, including investigating, prosecuting, and adjudicating serious human rights violations, as Article 5 defines.[206]

Pretoria's foreign policy is grounded in principles of African unity, peace, human rights, and sustainable development, aiming to foster democracy, cooperation, and non-alignment. It prioritises global governance, inter-state dialogue, and the advancement of the African agenda. Post-apartheid shifts have seen the policy evolve in response to domestic and international challenges, emphasising economic diplomacy, anti-racism, and climate action, while striving for a prosperous African continent.

Aligned with global norms, South Africa's foreign policy is fundamentally driven by national interests, as affirmed in its constitution. During the Zuma administration, particularly amid the Uhuru Kenyatta case, this emphasis on national interests became pronounced, leading to the renaming of the Department of Foreign Affairs to the Department of International Relations and Cooperation in 2010. Minister Maite Nkoana-Mashabane highlighted this shift, indicating a focus on domestic priorities, such as employment, rural development, education, and health, which marked a pivot from a peace-centric to an economic diplomacy-oriented foreign policy. Since the post-apartheid era, South Africa has positioned itself as a mediator between the Global North and South, a role described by former Foreign Affairs Minister Alfred Nzo in 1995. Over the past decade, the country has increasingly been recognised as a key representative and conduit for Africa's interests on the global stage.

Post-apartheid, human rights' protection and recognition became a key pillar in Mandela's administration, reflecting Pretoria's commitment to international resolutions, treaties, and

[205] Rome Statute of the ICC, Article 13, 2002.
[206] Keppler, 2012.

protocols. This dimension was depicted within the ANC's official policy contained in a 1994 document called 'ANC Foreign Policy in a New Democratic South Africa',[207] emphasising that Pretoria's foreign policy should reflect Africa's interests, cooperation, and interdependence. The country's 'quiet diplomacy' approach disempowered it since it has not adequately outspoken against human rights violations globally and continentally, especially in cases such as Zimbabwe, its UNSC's voting behaviour, and the Uhuru Kenyatta case, where it failed to take a strong stance against the human rights violations and authoritarian regimes. While the draft White Paper 2011 hardly mentions the term 'human rights', Pretoria continues to articulate for a more just and humane world[208].

Pretoria's endorsement of S/PRST/2008/4 at the 5831st and S/PV.5845 I (UNSC) meetings underscored its commitment to human rights by advocating for peace and security in Africa, particularly in Kenya. Nonetheless, its subsequent reluctance to support UNSC Resolution S/PRST/2009/11, following the Omar al-Bashir incident, signaled a prioritisation of national interests over human rights advocacy. This stance was further evident in its opposition to UNSC Resolution 660, which sought accountability for post-election violence in Kenya, choosing instead to back the implicated leaders, aligning with AU resolutions advocating for their immunity. Such positions reflect the influence of regional dynamics, sovereignty, and Pan-Africanism on South Africa's diplomatic decisions, ultimately impacting its relationship with the International Criminal Court (ICC).

Since the end of apartheid, South Africa has actively engaged with multilateral institutions, enhancing its global standing and advocating for the reform of North-South relations towards equity. As a proponent of international norms and a catalyst for change, South Africa has leveraged its roles in the African Union (AU) and Southern African Development Community (SADC) to advance the African Renaissance and support regional peace, development, and integration. However, domestic challenges, including allegations of governance issues and corruption, have somewhat marred its international reputation.

Under President Ramaphosa's leadership, South Africa has acknowledged the need for a strategic recalibration of its foreign policy to address regional and global challenges. The establishment of a Ministerial Review Panel in May 2018 by then Minister of International Relations and Cooperation, Lindiwe Sisulu, revealed shortcomings in South Africa's international engagement, particularly in maintaining its influence across regional, global, and continental arenas. This introspection aligns with efforts to champion an African Renaissance

[207] African National Congress (1994) Foreign policy in a new democratic South Africa: Discussion paper.
[208] Ebrahim, S., "Sisulu makes human rights central to South Africa's foreign policy". IOL, 20 February 2019.

and Pan-Africanism, positioning Pretoria as a key proponent. However, the realisation of these foreign policy objectives necessitates overcoming domestic issues, as internal challenges can hinder global effectiveness. Minister Naledi Pandor emphasises South Africa's ongoing commitment to peace and constructive international involvement, underscoring the imperative of domestic stability for effective global diplomacy.

4.4.5 Conclusions

This chapter offers a focused analysis of South Africa's involvement in the Uhuru Kenyatta case and its broader implications for the nation's diplomacy. Through meticulous examination of key meetings, negotiations, and foreign policy considerations, the study elucidates South Africa's position within the context of the African Union (AU) and the global community's discourse on the fairness and role of the International Criminal Court (ICC). Emphasising South Africa's commitment to African solidarity, sovereignty, and non-interference, the analysis highlights the delicate balance required to reconcile its dedication to peace, justice, and human rights with concerns over potential infringements on African sovereignty and perceived biases within the ICC. The chapter underscored the intricate interplay of domestic, regional, and international factors shaping South Africa's foreign policy stance on the Uhuru Kenyatta case, revealing the complexity inherent in its diplomatic decisions.

CHAPTER FIVE: DIPLOMATIC DYNAMICS AND DEFIANCE: UNRAVELLING SA'S FOREIGN POLICY BALLET OF NON-COMPLIANCE WITH THE ICC IN THE OMAR AL BASHIR CASE

5.1 Introduction

This chapter seeks to unravel the multifaceted factors influencing the fluctuations in the foreign policy of the GoSA towards the ICC since its ratification. The primary objective is a meticulous examination of the impact of the (Prosecutor v Omar Hassan Ahmad al-Bashir, 2015) (al-Bashir) on shaping the fluctuating contours of GoSA's foreign policy *vis-a-vis* the ICC. In addition, the chapter is aimed at the examination of various independent variables, namely international pressures, regional dynamics, domestic political considerations, and legal and political factors. Each section will explore how these dimensions have intricately woven into the fabric of the GoSA's policy stance, contributing to its nuanced evolution over time.

President al-Bashir's indictment was occasioned by the widespread human rights infringements and violence that have afflicted Sudan's Darfur region since 2001. As a result of the Janjaweed militia orchestrating attacks and perpetrating atrocities on civilians, there were wholesale forced displacements.[209] Consequently, the UNSC decided that this conflict threatened global peace and security, hence imposing sanctions and demanding that the Government of Sudan (GoS) halt the attacks while disarming the militia.[210] The United National Secretary General under the UNSC 1564 (2004) created an International Commission of Inquiry to investigate the alleged violation of international humanitarian law and human rights law. The Commission found that the Janjaweed and the GoS committed serious crimes that fell under international law, and hence recommended that the conflict be referred to the ICC by the Security Council (Happold, 2006).[211] The ICC Prosecutor invoked the Article 13(b) of the Rome Statute as informed by Resolution 1593 and sought an arrest warrant against President al-Bashir on five counts of crimes committed against humanity, two counts of war crimes against Darfur's Masalit, Zaghawa, and Fur peoples, and three counts of genocide.[212]

The Pre-Trial Chamber I first issued an arrest warrant for these crimes in March 2009, stating that despite him being a non-state party's head of state, it did not limit the ICC from exercising its jurisdiction.[213] It was a critical international criminal law development, because it was the first time that the international court had proclaimed an indictment of an incumbent president. A

[209] UN Doc. E/CN.4/2006/71/Add.6; Security Council Res. 1556, UN Doc. S/RES/1556 (2004) – displacement of up to 200 000 people who moved to Chad in search for refuge.
[210] Security Council Resolution 1556. Res. 1591, UN Doc. S/RES/1591 (2005).
[211] UN Doc. S/2005/60 (2005).
[212] Gosnell, 2008.
[213] PROSECUTOR v. AL-BASHIR, ICC-02/05-01/09-302.

second warrant was issued in July 2010 citing him as an indirect perpetrator (this is a legal concept that had never been tested before in international criminal law) of genocide acts and emphasising the importance of preventing further commission of crimes under international law (Jessberger & Geneuss, 2008).[214] The Government of South Africa (GoSA) played a critical role in this case.

5.2 Domestic Political and Legal Considerations

Pretoria's non-compliance with the ICC was highly contested by various institutions and stakeholders. For example, the country's courts heaped pressure on the GoSA to conform with the ICC's obligations. More specifically, the Supreme Court unanimously established that the government had violated its obligations enshrined in the Implementation Act by refusing to arrest and hand over President Omar Al-Bashir on 15 March 2016.[215] This pressure was among the factors that influenced the GoSA to withdraw its 'Instrument of Withdrawal' that had been submitted to the UN Secretary General.[216]

The other domestic political pressure emanated from the Democratic Alliance (DA), which was the largest minority party in the legislature and acting as the official opposition to the government. The DA Party challenged the executive's decision to withdraw Pretoria from the ICC at the High Court. It is worth noting that the main challenger of the GoSA's decision to withdraw from the international court was the DA, with support from four non-government organisations.[217] The opposition parties also argued that the withdrawal process was not discussed in the legislature, thus, making it unconstitutional as established in the High Court decision. These domestic political considerations pressurised the GoSA to formally withdraw its notification of withdrawal on March 1, 2017.[218] Notwithstanding, critics of the GoSA's foreign policy stance contend that it sought to support the AU's decisions[219] and improve its status as a regional leader[220] rather than address its domestic issues that significantly affected its ability to meet the international obligations. Thus, studies[221] demonstrate that Pretoria was bedeviled by major domestic political considerations that affected its foreign policy stance in the Prosecutor

[214] PROSECUTOR v. AL-BASHIR, ICC-02/05-01/09-302.
[215] Democratic Alliance v Minister of International Relations and Cooperation and 10 others (83146/2016) High Court of South Africa, 22 February 2017(High Court decision); Du Plessis, 2016.
[216] Killander, M., "Withdrawal from the ICC: A sad day for South Africa and Africa". *The Conversation Africa,* 21 October 2016.
[217] South Africa's High Court decision, paragraph 7.
[218] UN, South Africa: Withdrawal of Notification of Withdrawal, Reference C.N.121.2017. Treaties-XVIII.10 (Depositary Notification); Asin, 2017.
[219] Gevisser, 2013.
[220] Guelke, 2013.
[221] Mokoena and Jegede, 2018.

vs Omar al-Bashir case, but these were superseded by the regional dynamics that it had to consider, as discussed in Section 4.5.

5.2.1 Internal Socioeconomic Challenges

South Africa's foreign policy has often emphasised certain priorities and values: the economy, the majority black population's needs, and African unity. According to critics, this change in stance has been the fact that successive ANC governments have been unable to transform the RSA and black majority's fortunes. In this regard, they believe that this has prompted the development of a realistic and pragmatic foreign policy that seeks to address the country's socioeconomic challenges, including poverty, inequality, and the redistribution of resources and power at the international level.[222] According to Hamill,[223] other key socioeconomic challenges were corruption, the arms deal, and discrimination. Notwithstanding, proponents of an aggressive foreign policy position, oppose the pragmatic approach and believe that a bolder approach can enable Pretoria to address these socioeconomic challenges.[224] In a nutshell, while there is lack of consensus on the impact of Pretoria's socioeconomic challenges on the foreign policy position, what is apparent is that pressure from citizens and demand for better services have forced the GoSA to begin prioritising how to tackle these socioeconomic challenges, thus, embedding them in their foreign policy stance and objectives. Thus, to respond to the high expectations of citizens regarding their social and economic status, foreign policy is anticipated to make significant contributions to the domestic issues by assisting the country to address the protracted period of social injustice and strengthening its ability to attain highly ambitious development and growth goals. This makes it critical that the government balances domestic citizen needs and regional or international pressures.

5.3 Regional Dynamics

5.3.1 AU Resolutions

The Prosecutor vs Omar al-Bashir case illustrated how enforcing international criminal law created friction between GoSA and the ICC. The Prosecutor vs Omar al-Bashir case exacerbated this state of affairs, with the AU contending that the ICC was erroneously using the universal jurisdiction principle.[225] The AU Assembly averred through various resolutions, including one resolution made in 2009 and two in 2010, that the universality principle had become politicised to an extent that it undermined international law, especially by failing to

[222] Landsberg, 2012.
[223] Hamill, 2009.
[224] Breakfast and Ngosi, 2018.
[225] Decision on the Abuse of the Principle of Universal Jurisdiction, Assembly/AU/ Dec. 243(XIII) (2009); Decision on the Abuse of the Principle of Universal Jurisdiction, Assembly/AU/ Dec. 271(XIV) (2010); Decision on the Abuse of the Principle of Universal Jurisdiction, Assembly/ AU/Dec. 292(XV) (2010).

consider the immunity of government and state officials.[226] This position resonates with the criticism that the GoS made to the 66th UN General Assembly Plenary (where it stated that the most recent cases in the Court touched on international conflict-which raised the issue of the importance of maintaining actual and perceptions of impartiality).[227] This was in reference to Cote d'Ivoire's post conflict violence occurrences that triggered investigations, the UNSC's referral of the Libyan situation to the Court, ICC's issuance of an arrest warrant against Muammar al-Gadafii, and the summonses against the suspects in the Kenyan case. Other ICC critics blamed the ICC Prosecutor for selective justice through the targeting of Africans while disregarding alleged perpetrators within other parts of the world.[228]

An extraordinary session of the Assembly of the AU held in October 2013 focused on the relationship between Africa and the ICC in the realm of international justice. According to Vilmer,[229] the resolution requested for the Kenyan cases to be deferred. However, the Security Council failed to acknowledge it, thus, hardening the AU's position. The ICC's attempts to force South Africa to arrest President al-Bashir in 2015 further strengthened the African Union's case against the ICC.[230] As a result, the GoSA's foreign policy position also hardened in solidarity with the AU's position. To affirm this, Pretoria approved the AU's resolution not to cooperate with the ICC in 2009.

However, in the midst of this furore, one issue that emerged was whether GoSA failed to meet its international obligations as a State Party. The first argument was that the Rome Statute under international law granted GoSA authority to defend the doctrine of head of state immunity. w[231] The other issue that emerged was whether the GoSA can be deemed to have violated its international obligations to non-state parties if it met its treaty obligations towards the GoS as a non-state party by arresting and surrendering its head of state who had the right to immunity, which was a scenario that the Rome Statute's Article 98 was meant to avoid.[232] Responding to this, the AU Assembly declared and encouraged member states not to cooperate with the ICC's

[226] Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, Assem bly/AU/Dec. 199(XI) (2008); Assembly/AU/Dec. 271(XIV) (2010); Assem bly/AU/Dec. 292(XV) (2010).
[227] UN Doc. GA/11163, 26 October 2011. Available at: http://www.un.org/News/Press/docs/2011/ga11163.doc.htm.
[228] Arieff *et al*. 2010; Jalloh, 2010.
[229] Vilmer, 2016.
[230] Sarkin, 2020.
[231] Aust, 2010.
[232] Schabas, 2016; Simbeye, 2017.

arrest and surrender warrant of President Omar al-Bashir,[233] instead calling for them to balance their AU obligations with their ICC obligations[234] (Schabas, 2016).

One of the critical components of the Rome Statute is that contracting parties have an obligation to co-operate with the international court as it investigates and prosecutes crimes. However, the GoSA, encouraged by the AU, snubbed the ICC by being reluctant to enforce the ICC arrest warrant.[235] Critics contend that the GoSA erred in its decision and reasoning because it voluntarily ratified the Rome Statute.[236] Others (Materu, 2015; Rau, 2012) contend that Pretoria was adhering to the African solidarity norm embraced by many African states who were AU member states. Notwithstanding the GoSA's stance on this issue was that its actions resonated with the Assembly Decisions made regarding the arrest warrants.[237]

In spite of the lack of consensus on what influenced Pretoria to support the RSA's president, Naude (2019) argues that the AU played a crucial role in influencing the country to support the GoS.[238] Thus, this resonates with what authors describe as a Pan-Africanism spirit that resonates with numerous regional dynamics.[239] From the foregoing, the country's foreign policy stance was influenced by the regional dynamics, especially the AU's resolutions.

Diplomatic Engagement and Peacekeeping

Pretoria sought to use its position to oppose ICC interventions in Africans' affairs. The RSA has also been playing an instrumental role in Africa as a peacekeeper, peacemaker, and mediator, including the mediation of various African conflicts, particularly in Kenya (2008), DRC (1998-1999 culminating in the Lusaka Ceasefire Agreement), Burundi (2000s), Zimbabwe (2000s), Lesotho (2010s), Madagascar (2013), Libya (2011) and Angola (1991, 1994). Particular to the Omar al-Bashir case, South Africa's substantive engagement as a peacekeeper and mediator in African conflicts, notably Sudan and Libya, wielded a significant impact on its disposition towards the Omar al-Bashir case. The multifaceted experience derived from mediating intricate regional conflicts introduced nuanced considerations encompassing regional stability, diplomatic

[233] Decision on the Report of the Commission on the meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Assembly/AU/Dec. 245(XIII) (2009).
[234] Assembly/AU/Dec. 245 (XIII).
[235] UK Foreign & Commonwealth Office. "Annual Report on Human Rights", 2009. Available at: http://www.fco.gov.uk/humanrights, p. 65.
[236] Dyani-Mhango, 2017.
[237] Decision on the Implementation of the Decisions of the International Criminal Court (ICC), Assembly/AU/Dec. 334(XVI) (2011); Decision on the Implementation of the Assembly Decisions on the International Criminal Court, Assembly/AU/Dec. 366(XVII) (2011).
[238] Naude, B., "State personhood and world politics: a personology of the South African state". A Thesis submitted for the Degree Doctor of Philosophy in the Department of Political Studies, Faculty of Humanities, University of Cape Town, February 2019.
[239] Ba, 2023; Nathan, 2011.

relations, and adherence to international legal obligations. These factors collectively contributed to shaping South Africa's nuanced and discerning approach to the International Criminal Court proceedings involving al-Bashir. In addition, the RSA has participated in peacekeeping operations, especially in Darfur, Burundi, and the DRC. According to de Carvalho, Pretoria's participation in peacekeeping operations in the continent resonates with its view that a peaceful and secure Africa is vital for it to prosper. This means that while the GoSA has prioritised peacekeeping in its foreign policy, yet it struggles to fulfil its mission because of various external and internal reasons. Two major documents help to understand the foundation of Pretoria's involvement in peacekeeping operations. The 2011 White Paper on South Africa's Foreign Policy relies on the tenets of interconnection between the values and interests driving Pretoria's national goals, emphasising the continent as its focus. Because of its objective of attaining African socioeconomic and political development, Pretoria's foreign policy is premised on the foundation that only a stable and more developed continent can spur its own security and prosperity. Thus, the White Paper holds that Pretoria has to take part in peacekeeping as an important aspect of its foreign policy. The second document that determines how Pretoria takes part in peacekeeping is the 1999 White Paper on South African Participation in International Peace Missions. This document offers a crucial tool for comprehending the roots of the GoSA's involvement within peace operations and considers how the peacekeeping environment continues to evolve, thus, informing the country's need to position its foreign policy stance to focus more on multi-dimensional peacekeeping. Lotze, de Coning, and Neethling (2013) contend that Pretoria's peacekeeping operations and diplomacy efforts aim to support its ambition for its emergence as a 'middle power'. Thus, Pretoria uses peacekeeping as a foreign policy and soft power tool to influence its status and improve its prospects as an emerging 'middle power'.

International Pressures

The ICC's Pre-Trial Chamber confirmed that Pretoria was legally obligated to arrest President Omar al-Bashir and present him for prosecution within the Hague when he attended the 25th Ordinary Session of the Assembly of the AU in South Africa between 13 and 15 June 2015. The reasoning was that Pretoria was a State Party. The Court argued that Pretoria failed to comply with its request contrary to the Statute's provisions. The same argument was raised by the South African High Court, in its application of the country's Implementation of the Rome Statute and the ICC Statute, where it observed that Pretoria had an international obligation to arrest President al-Bashir, and that there was no reason or countervailing duty for the failure to arrest him. The South African Litigation Centre (SALC) sought the implementation of the arrest warrant in the North Gauteng High Court. Consequently, the High Court issued an interim order

preventing al-Bashir from leaving South Africa until the matter was finalised on 15 June 2015. Upon reconvening, the Court ordered the arrest, detention, and subsequent transfer of Omar al-Bashir to the Hague. However, state respondents informed the Court that al-Bashir had already left the country.

Pretoria contended that it was under competing obligations towards the AU and the ICC. This similar argument had been raised by Pretoria on June 12, 2015, prior to Omar al-Bashir visiting the country the next day in a meeting scheduled by the pre-trial chamber's presiding judge where Pretoria's ambassador to the Netherlands and legal representative attended. The delegation from the Republic of South Africa (RSA) used the head of state immunity argument to claim that Article 27(2) of the ICC Statute and Article 98(1) contradicted each other. Other proponents supported South Africa's reasoning arguing that Pretoria was also obligated by treaty law and customary international law not to arrest President al-Bashir.

However, the pre-trial chamber referred to previous ICC decisions to explain that there were no anomalies because the UNSC had waived the Sudanese President's sovereign immunity when it referred the Darfur situation to the international court, thus, implying that Pretoria was legally obligated to surrender him to the Court. The ICC's Rome Statute clearly outlines the roles of state parties in situations such as the Prosecutor vs al-Bashir case. While South Africa supported the AU's resolutions and used the head of state immunity as its core argument for not arresting and surrendering Sudan's President, critics contend that the GoSA had legal obligations to arrest him. They cite the duty of Pretoria to comply with the ICC Statute's provisions, as also established by Pretoria's High Court. In addition, critics contend that Pretoria had a legal obligation because it was a UN member state, and that AU decisions could not trump the country's obligations as stipulated in the ICC Statute. Thus, Pretoria's foreign policy stance was significantly pressurised by its international obligations to the rule of law and the ICC Statute, but politics played a more influential role in its foreign policy stance. However, based on how Pretoria handled the al-Bashir issue later, critics contend that its actions were influenced more by politics. More specifically, various studies contend that a key challenge of the ICC is that it operates in an environment where political considerations supersede the commitment of states such as the RoSA to international justice. Weiner provides an example of states entrusted with or involved in conflict resolution granting amnesty to serious crime perpetrators rather than prosecuting them, which resonates with the events in Pretoria.

Various Security Council Resolutions imposed pressure on Pretoria, resulting in a tense relationship between the GoSA and the ICC. For example, the Security Council Resolution 1564 requested the Security Council to refer the Darfur situation to the ICC in 2004, after recalling some previous resolutions, including 1502 (adopted in 2003), 1547 (adopted in 2004), and 1556

(adopted in 2004). According to Hapold (2006), UNSC Resolution 1564 threatened to impose sanctions against the GoS if it refused to adhere to its obligations under Chapter VII of the UN Charter. Pretoria supported this resolution in the context of human rights violations and due to the fact that as an ICC founding member, through which the Nelson Mandela presidency had prioritised human rights at the forefront of its foreign policy, Pretoria was an ardent supporter of the ICC; being among the few African countries to have embedded the Rome Statute's provisions into its domestic law.

Resolution 1574 was adopted by the UNSC during its 5082nd meeting on 19 November 2004 in Nairobi, Kenya (becoming the first meeting in 14 years to take place outside the New York headquarters) and recalled resolution 1564, thus, welcoming political solutions to the Sudan conflicts in the quest for a Comprehensive Peace Agreement also called the Naivasha Agreement and commitment to the Republic of Sudan's territorial integrity and sovereignty as reaffirmed in a press release of 20 November 2004. The GoSA supported Resolution 1574 noting that there was a need for it to support the UNSC efforts in the Darfur region. Its support for the resolution was in tandem with the AU's decision to increase its mission in Darfur to 3320 personnel. According to Ray (2004), Resolution 1574 highlighted a transformation in Sudan's policy from earlier Resolutions 1556 and 1564 that only condemned atrocities within the Western province. This changed to prioritising the north-south peace process within southern Sudan as the core agenda. However, Clough contends that there was a lack of commitment from UNSC members to enforce their earlier resolutions, thus leading to more suffering of Darfur peoples, and denoting those earlier efforts could have been influenced by the quest for AU member states to be seen as united rather than solving the real issues in Darfur.

However, the relations between Pretoria and the ICC began changing upon the adoption of Resolution 1593 (31 March 2005) where the Security Council referred the Darfur situation to the ICC under the Rome Statute's Article 13(b) and the UN Charter's Chapter VII requesting the full cooperation of the GoS. However, Pretoria supported the AU's stance on the need for the case to be tried within Africa, preferably in Sudanese courts as the Chinese representative had argued. However, Terzian argues that by referring the conflict to the ICC, the Security Council superseded and trumped customary international law, hence removing the personal immunity of President Al Bashir. Thus, Terzian emphasises that the UNSC granted the ICC significant jurisdiction in Resolution 1593 to adjudicate grave infringements of international humanitarian law. This argument was supported by the Security Council's confirmation that the Article 98(1) of the Rome Statute did not confer personal immunities to Sudanese officials.

While other resolutions followed Resolution 1593, including Resolutions (1627, 1651, 1663, 1665, 1672, and 1679), Resolution 1706 (August 2006) was the other major resolution that

influenced the relationship between Pretoria and the ICC. Gifkins (2016) contends that Resolution 1706 was monumental since it was the first time for the Council to refer to the responsibility to protect (R2P) within a country-specific situation and contributed to the deployment of peacekeeping mission within Darfur through Resolution 1769. Moreover, Resolution 1828 (2008) resolved to extend the AU-UN Hybrid Operation in Darfur (UNAMID) and declined AU's request for a deferral, with the Security Council only noting in a preamble that it was considering the AU's concerns, but emphasising that there was need for justice for the perpetrators of ongoing crimes. This resolution partly commented on the AU's request to members not to cooperate with the international court because it believed that its involvement in the Darfur situation threatened peace and security on the continent. In spite of the Security Council's subsequent practice, the GoSA decided to support the AU decision and not to surrender President Omar al-Bashir to the international court when he visited the country. However, critics contend that this action heralded a significant change in Pretoria's foreign policy stance, highlighting the increasing tensions between the GoSA and the ICC, and the country's defiance of its obligations as a state party to the Rome Statute, ICC, and Security Council Resolution 1593 of 2005.

The on and off relationship between Pretoria and the ICC further manifested in 2011 when South Africa voted in favour of UN Security Council Resolution 1973 that led to a NATO-led intervention within Libya. However, Pretoria later withdrew its support claiming that Western powers had used it as a way of ousting Muammar Gaddafi rather than standing with the Libyan people. In this case, Pretoria was under immense pressure from the AU, forcing it to renege on its earlier stance.

Overall, these UNSC Resolutions imposed pressure on the GoSA to fulfil its obligations under the Rome Statute and the ICC. Thus, it had to strike a balance between solidarity with the AU's stance and commitment to the Rome Statute, with the former playing a more influential role in its foreign policy's stance towards the ICC during the Prosecutor vs Al-Bashir case. Pretoria's initial support for the ICC-led interventions was partly influenced by the country's commitment to human rights under the administration of President Mandela. Notwithstanding, Rudolph and Maluwa claimed that criticism from other AU member states meant that it was under pressure to promote regional solidarity and conform with the continent's regional norms. This argument is partly supported by Finnemore and Sikkink's constructivist theory demonstrating how non-state actors influence state behaviour through norm diffusion, implying that they lay a critical foundation for understanding the behaviours and actions of Pretoria's foreign policy stance.

5.4 Legal and Political Factors

5.4.1 Heads of States' Immunity

The diplomatic immunity that heads of state enjoy is a crucial element of customary international law, which speaks to the international practices that emanate from state practices instead of the written global agreements between the states. Pretoria relied on this argument to raise concerns regarding the interpretation of diplomatic immunity due to the potential ramifications of arresting a sitting president.[240] However, the ICC contended that international law does not provide for immunities to benefit a specific individual but are premised on the importance of avoiding interference with the sovereignty and functioning of a state by another state.[241] Proponents of the ICC's arguments also believe that since Pretoria was a state party, it should have honored its obligations,[242] and that such immunity does not imply the absence of substantive legal responsibility (Kayitana, 2015). Pretoria's response to the Bashir case diverged not solely due to concerns over Head of Immunity, but also due to a recalibration of its stance towards the ICC. This adjustment was prompted by Pretoria's assertion that the execution of the warrant appeared to be selectively pursued, signaling a departure from its prior level of cooperation with the ICC.

5.4.2 Principle of Complementarity

Proponents of Omar al-Bashir argue that ICC should seek to collaborate with institutions of African states when conducting investigations rather than intervening and interfering. This argument is vehemently supported in M'bengue's[243] article, which highlights that the need to align domestic mechanisms by giving them precedence in handling the Omar Al Bashir issue instead of referring it to the ICC.[244] Prioritising domestic mechanisms is also geared towards ensuring that the RoS is stable and strong enough to handle its issues. Similarly, El-Masri[245] averred that states have a right to freely exercise their independence under international law, agreeing with the AU's decision that the Republic of Sudan should be granted an opportunity to prosecute its issues. For example, since the emergence of the popular uprising on19 December 2018, it is worth noting that Omar al-Bashir has been on trial for crimes he committed under Sudanese law, such as the 1989 military coup and further corruption. In December 2019, he

[240] Doc. Assembly/AU/13(XXI).
[241] Nimigan, S., "The Problems Facing the International Criminal Court: African Perspectives", Doctoral dissertation, The University of Western Ontario (Canada), 2021: 8186. A thesis submitted in partial fulfillment of the requirements for the Doctor of Philosophy degree in Political Science.
[242] Gaeta and Labuda, 2017.
[243] M'bengue, 2011.
[244] M'bengue, A., "The prosecution of the President of Sudan, Omar Al-Bashir, for the international crimes committed in Darfur: a complex relationship between the International Criminal Court and the African Union. A Thesis submitted to Webster University, 2011.
[245] El-Masri, 2011.

was convicted of corruption[246] and is currently on trial for crimes he committed with the military coup in 1989. While there are gaps in Sudanese law, proponents believe that the Republic of Sudan should be prioritised over international prosecution to ensure that it uses its domestic mechanisms to address the issues.[247] However, critics believe that the RoS has demonstrated that it is unable to try such cases because of its domestic courts' weaknesses.[248] Deguzman[249] also believes that there is inadequate evidence to support the claims that the ICC applies selective justice in the Prosecutor vs al-Bashir case. Thus, the domestic mechanism argument has elicited divided opinions, and demonstrates how it has remained a thorny issue in the case.

5.4.3 Selective Prosecution

However, indictment proponents, especially within the human rights community, initially averred that this case changed the nature of stalled peace negotiations and would provide the international community leverage to ensure that it fully deploys UNAMID and stop support from government to counter-insurgency groups within Darfur. In intervening months, a divided international community deterred concerted actions to use Article 16 of the Council to stop the violence. Russia and China, supporters of Khartoum among the five members of the Security Council, vehemently opposed an indictment, while the U.S. was hamstrung by the fact that it opposes the ICC's existence. On their part, Arab League members and African states viewed the indictment with increasing suspicion contending that the Court infringed on national sovereignty and applied selective prosecution.[250] These views are also supported by Alejandra Espinosa's[251] on the unintended impact of the international Court on Sudan's domestic politics[252] citing that ICC intervention can impact its domestic dynamics, ethnic relations, and the judicial system. Thus, the thesis argues that the ICC needs to be cognisant of these potential impacts as they could derail the peace process. Thus, these arguments significantly affected the prosecution of Omar al-Bashir benefitting from the vehement opposition to the ICC's efforts to prosecute him.

5.4.4 Sovereignty and Universal Jurisdiction

Prosecutor Luis Moreno's request for an arrest warrant for Omar al-Bashir elicited concerns that it would likely destabilise the Republic of Sudan and impede the peace negotiations as well as

[246] BBC. "Omar al-Bashir: Sudan's ex-president on trial for 1989 coup", 21 July 2020. Available at: https://www.dabangasudan.org/en/all-news/article/khartoum-court-convicts-sudan-s-ousted-dictator-al-bashir-of-corruption.
[247] Slaughter and Burke-White, 2006.
[248] Burke-White, 2008.
[249] Degzman, 2020.
[250] Ankrumah, 2016; Du Plessis, 2010; Du Plesis *et al*., 2013; Omorogbe, 2017; Sirlead, 2015.
[251] Espinosa, 2014.
[252] Espinosa, Alejandra. "The intended and unintended effects of the ICC on the domestic politics of the DRC, Sudan, and Kenya", 2014.

peacekeeping efforts. Critics contended that this would derail the ongoing negotiations or peace agreements, such as the Comprehensive Peace Agreement (CPA).[253] In addition, diplomats across the political divide contended that indicting Al Bashir would not achieve the intended outcome of a peaceful Sudan since it would jeopardise the CPA that ended the two-decade South-North conflict.

Pretoria's foreign policy is premised on its transformative constitution. According to Sarkini,[254] the need of ensuring the importance of global legal norms within the domestic law was captured in the Constitution of the Republic of South Africa's Section 39(1)(b), obliging domestic courts to take into account international law during the interpretation of the Bill of Rights. Section 233 of the Constitution further stipulates that while interpreting legislation, there should be consideration for international law over other interpretations that may be inconsistent with it.[255] In this regard, Moloi's[256] thesis stipulates that the Constitution has been Pretoria's iconic symbol and marker of its commitment to observing the rule of law, and safeguarding and promoting international human rights.[257]

Despite its adherence to constitutional values, its foreign policy positions have at times been challenged since they contradict these values. Some critics contend that Pretoria has shifted from a democracy and human rights-based approach to an economically pragmatic foreign policy approach.[258] According to Milnes[259], a specific example is during the Prosecutor vs al-Bashir case when it took the courts to declare some foreign policy decisions as being unconstitutional.[260] Thus, in the arrest warrant case, the courts played a critical role in creating and implementing foreign policy. While making decisions, these courts have been influenced by the Constitution's primacy as evidenced in various cases,[261] where the court argued that while the Prosecutor vs Omar al-Bashir case was moot,[262] future instances should consider such heads of state sending their representatives.[263] Thus, the Court played a crucial role in influencing Pretoria's foreign policy regarding the diplomatic immunity issue. In a nutshell, the

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[253] The Economist, "A dilemma Over Darfur", 15 July 2008.
[254] Sarkini, 2022.
[255] South Africa, "Preamble to the Constitution of the Republic of South Africa", 1996.
[256] Moloi, 2015.
[257] Moloi, S.F., "The constitutionalisation of South Africa's foreign policy", Doctoral Thesis, 2020.
[258] Sarkini, 2022.
[259] Milnes, 2020.
[260] Milnes, N., "Rationale And Rationality Of South African Icc Withdrawal: Analysis, Critique And The Way Forward". *Signature*, *9*, 12. submitted for fulfilment of the requirements for the degree Master of Laws (LL.M) with specialisation in Public law at the University of the Free State, 2020.
[261] Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others (2016 (3) SA 317 (SCA).
[262] Sarkini, 2022.
[263] Majola, B., "The Role of the Constitution and Courts in the Making and Implementation of Foreign Policy", 2021. Available at: https://www.afronomicslaw.org/category/analysis/role-constitution-and-courts-making-and-implementation-foreign-policy.

country's constitutional democracy has significantly heralded a foreign policy era guided by the Constitution. What this means is that the courts have played a pivotal role in the stance adopted by the RoSA during the issue of Omar al-Bashir.

National interest is also a key feature of Pretoria's foreign policy.[264] This influenced its engagement with the ICC during the case since it made it to prioritise regional interests over its international obligations under the Rome Statute. Since the end of the apartheid, the Government of South Africa has sought to promote international norms and be a norm entrepreneur while reforming the North-South ties.[265] Notwithstanding, critics contend that corruption and state capture have undermined its quest for regional dominance while affecting its foreign policy stance.[266]

Cooperation with other states, particularly African states, and the ICC is the other key aspect of South Africa's foreign policy and significantly influenced its stance towards the ICC during the Prosecutor vs al-Bashir case. Cooperation aligned with the spirit of African Renaissance that Pretoria has ardently supported over the years. Thus, its support for Pan-Africanism and embedment into its foreign policy positions severely affected its relationship with the international Court during the case. Cooperation is further inherent in its peace and security efforts as reiterated in the White Paper on South African participation in International Peace Missions.[267] Pretoria believes that it can export democracy as a way of resolving conflicts in places such as the DRC and Sudan.[268] This places emphasis on Pretoria's foreign policy orientation to pragmatism when handling peace issues including those of the RoS.[269]

Finally, Pretoria's quest for a regional leadership role influenced the country's foreign policy stance towards the ICC.[270] The quest for this role was emphasised by Lindiwe Sisulu who stated that Pretoria had failed to meet its expectations in this role.[271] These speak to a quest for African Renaissance and Pan-Africanism, which have been a critical aspect of the country's foreign policy.[272]

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[264] Constitution of the Republic of South Africa Act 108 of 1996
[265] Naidu, 2015.
[266] Qobo, 2018.
[267] Department of International Relations. *White Paper on South African's Foreign Policy* (2011); Qobo, 2018.
[268] Qobo, 2018.
[269] Revised White Paper on South Africa's Participation in International Peace Missions.
[270] Alexandroff, 2015.
[271] Pahad, A., "Media briefing on the ministerial panel report: Foreign policy review: A strategic reflection and critical appraisal of the orientation and implementation of South Africa's Foreign Policy", 2019.
[272] *Ibid.*

5.5 Conclusions

This chapter analyses Pretoria's involvement in the al-Bashir case and the subsequent decline of its relationship with the ICC. al-Bashir's RSA visit marked a turning point in Pretoria's ICC stance. Regional factors, such as Pan-Africanism and AU resolutions, significantly shaped Pretoria's foreign policy. However, international obligations to arrest al-Bashir created a dilemma, pressuring Pretoria to comply with the ICC's requests. UNSC resolutions also influenced Pretoria's position, with alignment to AU perspectives except for Resolution 1973. Balancing regional dynamics and national commitments was crucial. Domestic factors, including high courts, civil society, and opposition parties, impacted Pretoria's ICC policy. However, regional dynamics were the primary influence on UNSC resolutions and ICC stance. Legal considerations, like head of state immunity and complementarity, also played a role. In conclusion, Pretoria's ICC relationship has been predominantly shaped by domestic political considerations, regional dynamics, and international pressures, involving legal and political aspects.

CHAPTER SIX: RESULTS, DISCUSSION, AND CONCLUSIONS

6.1 Results

6.1.1 Introduction

This investigation sought to address the overarching research question: "Which factors have contributed to the fluctuations in South Africa's foreign policy towards the International Criminal Court since its ratification?" The dependent variable is South Africa's foreign policy towards the ICC. Independent variables include: IV1, domestic political considerations; IV2, regional dynamics - role of the African Union; IV3, international pressures - diplomatic peacekeeping missions; and IV4, legal and political. This exploration is situated primarily within the context of two pivotal legal proceedings: the Prosecutor vs. Uhuru Kenyatta and the Prosecutor vs. al-Bashir cases. In the following section, this chapter will critically evaluate and synthesise the empirical findings from the preceding chapters, emphasising the factors that have contributed to fluctuations in Pretoria's ICC-oriented foreign policy. These findings are grounded in empirical data extracted through the research method of Difference (Most Similar Systems Design - MSSD), utilising qualitative desktop review techniques. The overarching aim of this chapter is to provide a cutting-edge analysis of South Africa's foreign policy dynamics *vis-à-vis* the ICC.

Furthermore, this chapter will facilitate the testing of the hypotheses that underpin this study. Hypothesis 1 (H1) posits that the presence of domestic and regional homogeneity allows states to comply with the ICC (Self-Interest = Compliance). Hypothesis 2 (H2), on the other hand, suggests that the absence of domestic and regional homogeneity leads to non-compliance with the ICC (Self-Interest and Regional Interest = Non-Compliance).

6.1.2 Empirical Findings

The empirical findings derived from this research study comprise a rigorous exploration into the multifaceted factors that have exerted substantial influence on Pretoria's dynamic interactions with the (ICC). These empirical observations encapsulate a meticulous examination of the factors that being, (1) domestic political considerations, (2) regional dynamics, (3) international pressures, and the (4) legal and political variables. These findings will be systematically organised in tabular format.

6.1.2.1 International Pressures

A concise comparison of these factors that contributed to fluctuation of the relationship between Pretoria and the ICC during the Omar Bashir and Uhuru Kenyatta cases is presented in Table 1 below.

Table 1: International Pressures

	Diplomatic Pressures	Legal and Political Concerns
Omar al-Bashir	❖ Diplomatic pressures from international actors and the AU ❖ Participation in peacekeeping missions	❖ Diplomatic immunity ❖ Need to have a comprehensive peace process ❖ Priority of domestic mechanisms over international prosecutions
Uhuru Kenyatta	❖ Involvement in peacekeeping initiatives ❖ Diplomatic pressure from the AU	❖ Head of state immunity ❖ Sovereignty and universal jurisdiction ❖ Selective prosecution

6.1.2.2 Diplomatic Pressures

The first finding was that diplomatic pressures from other African states and international actors calling for a more united and coordinated African response to tackling accountability for the alleged crimes committed by Uhuru Kenyatta and Omar Al-Bashir influenced the GoSA's stance towards the ICC. The case studies denote that the diplomatic pressures led to a deterioration of the relationship between Pretoria and the ICC.

The case studies established that the GoSA initially supported the ICC's mandate and quest for the protection of human rights in the RoS and the Republic of Kenya (RoK), and also initially expressed its support for the international Court by claiming that it would arrest President Omar al-Bashir and support the crimes against humanity during the Prosecutor vs Uhuru Kenyatta cases. This is evidenced in the statement of the ANC's deputy secretary general.

> "If Bashir were to come to South Africa today, we will definitely implement what we are supposed to in order to bring the culprit to [The] Hague. … We can't allow a situation

whereby an individual tramples on people's rights and gets away with it … The perpetrators of war crimes should be tried at all costs."[273]

This was in tandem with Article 86 of the Rome Statute of the ICC which provides a general obligation for states to cooperate, "States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court." This is further clarified in Article 87, as highlighted in Appendix 1. This foreign policy stance of support for the international Court also aligns with Pretoria's initial support for the ICC through Resolution 1593 where the UNSC used Chapter VII to refer the Darfur situation to the ICC Prosecutor: (refer to Appendix 2).

"…that the Government of Sudan and all other parties to the conflict in Darfur shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognising that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organisations to cooperate fully."[274]

Pretoria's participation in peacekeeping missions influenced it to align with the ICC at first during both cases. According to the 1999 South African White Paper:

"South Africa must make a careful appraisal of the political and strategic environment within which peace missions are to be launched and the principles governing South African participation in such efforts. A precise understanding is required of the type of mandate that governs peace missions."[275]

Its involvement in peacekeeping missions influenced the country to at first support the ICC's rallying call for the arrest and surrender of Omar al-Bashir. Comparatively, Pretoria at first supported the need for justice for Kenya's victims of the 2007/2008 post-election violence.

6.1.2.3 Legal and Political Factors

The other finding was that the legal issue of head of state immunity contributed to the deterioration of the relationship between the ICC and Pretoria. Pretoria used the head of state

[273] Thandi Modise's statement., "South Africa says it will arrest Sudan's Bashir despite AU Resolution", Sudan Tribune (31 July 2010). Available at: http://www.sudantribune.com/spip.php?article35817.
[274] Security Council Resolution 1593 of 31 March 2005: par. 2.
[275] South African Department of Foreign Affairs. White Paper on South African Participation in Peace Missions, February 1999. Available at: http://www.gov.za/sites/www.gov.za/files/peacemissions_1.pdf.

immunity issue to oppose the ICC's emphasis on the need for Uhuru Kenyatta and Omar Al-Bashir to be tried. The Prosecutor vs Uhuru Kenyatta case was the first time a sitting head of state was investigated and the GoSA aligned with the AU that there was a need to respect the immunity granted to heads of state. This aligned with the AU's Article 46 stating:

> "No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office."[276]

However, it significantly differed with Article 27 of the ICC Statute, which states:

> 1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
> 2. Immunities 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.

For political concerns, Pretoria's relationship with the ICC deteriorated because of its belief that arresting and charging Omar al-Bashir would destabilise the RoS. This finding resonates with the sovereignty and universal jurisdiction concerns that emerged in the *Prosecutor vs Uhuru Kenyatta* case.

The final finding related to legal and political concerns was that Pretoria's need for domestic mechanisms to be prioritised over international prosecution, and the need to have a comprehensive peace process negatively affected the relationship between Pretoria and the ICC. The AU Peace and Security Council stated that:

> "…. attempts to prosecute the Sudanese President would jeopardise important efforts to settle the conflict in Darfur and might put the search for peace in Darfur at risk, prolong the suffering of the people of Sudan and destabilise the country as well as the region."[277]

[276] Nortje, W. "South Africa's refusal to arrest Omar Al-Bashir". FICHL Policy Brief Series, 2017, 85: 2.
[277] Report of The AU High-Level Panel on Darfur (AUPD): paragraph. 242.

However, in the Uhuru Kenyatta case, selective prosecution was a unique contributor to the deteriorating relationship between Pretoria and the ICC.

6.1.2.4 Domestic Political Considerations

A comparison of the impact of domestic political consideration factors that affected Pretoria's foreign policy engagement with the ICC are presented in Table 2, below.

Table 2: Domestic Political Considerations

	Regional dynamics	**Domestic Issues**
Omar al-Bashir	❖ AU Resolution 2013 on Bashir's arrest warrant ❖ AU Resolution 2009 rejecting Bashir's arrest warrant ❖ Emphasis on the principle of complementarity	❖ ANC's hardline stance that ICC was applying selective justice ❖ Opposition parties' arguments that the withdrawal process was unconstitutional, and Pretoria had an obligation to the Rome Statute to arrest Al-Bashir
Uhuru Kenyatta	❖ AU Resolution 2013 on the need to defer Kenya's cases ❖ AU Extraordinary Summit on ICC's alleged discrimination of African presidents	❖ Domestic pressure and concerns regarding the impact of the ICC prosecutions on the stability of the region.

6.1.2.5 Regional Dynamics

For the Uhuru Kenyatta case, AU resolutions, including the AU Resolution (2013), influenced Pretoria to embrace a hardline stance on the need to postpone the trial. Pretoria invoked the non-interference principle and the capacity of African states to manage their judicial processes. It held the view that ICC prosecutions against President Uhuru Kenyatta be postponed to pave way for the establishment of regional tribunals that could take up these issues.

"The Assembly reiterates the AU's concern on the politicisation and misuse of indictments against African leaders by ICC as well as at the unprecedented indictments of and proceedings against the sitting President and Deputy President of Kenya in light of the recent developments in that country; Underscores that this is the first time that a sitting Head of State and his deputy are being tried in an international court and stresses the gravity of this situation which could undermine the sovereignty, stability, and peace in that country and in other Member States as well as reconciliation and reconstruction and the normal functioning of constitutional institutions."[278]

For the Omar al-Bashir case, the AU Resolution (2013) on President Omar al-Bashir's arrest warrant and the 25th Summit of the AU held in South Africa, influenced Pretoria to support the AU's stance and contributed to the deterioration of the relationship with the ICC. The AU required the GoSA to provide guarantees that its authorities would not arrest Omar al-Bashir while attending the summit as the RoS' representative.[279]

6.1.2.6 Domestic Factors

Furthermore, the other finding is that domestic political pressures influenced Pretoria to collaborate with the ICC. For the case of Omar al-Bashir, the opposition party, civil society, and the courts heaped pressure on Pretoria's foreign policy stance. The failure of Pretoria to arrest Omar Al-Bashir led to criticism from international community members and from the High Court's North Gauteng Division, which stated:

> "A democratic state based on the rule of law cannot exist or function if the government ignores its constitutional obligations and fails to abide by court orders. A court is the guardian of justice, the cornerstone of a democratic system based on the rule of law."[280]

On the other hand, for Uhuru Kenyatta's case, domestic political pressures and concerns regarding the impact of the ICC prosecutions on stability of the region influenced Pretoria's foreign policy stance, contributing to the deterioration of the relationship between the ICC and Pretoria.

[278] Ext/Assembly/AU/Dec.1(Oct.2013). Extraordinary Session of the Assembly of the AU. 12 October 2013 Addis Ababa, Ethiopia, page 1.
[279] van der Vyver 2015:562.
[280] The Southern Africa Litigation Centre v Minister of Justice and Constitutional Development: paragraph 37.2.

6.2 Discussion

6.2.1 Introduction

South Africa's foreign policy towards the ICC has been significantly influenced by domestic political considerations, as evidenced by the Uhuru Kenyatta's and Omar al-Bashir's cases. This finding highlighted how diplomatic pressures influenced South Africa to abandon the ICC in support of the AU and other African states in both the al-Bashir and Uhuru Kenyatta cases. This aligns with Finnemore and Sikkink's (1998) idea that how a nation shapes its identity and foreign policy depends on its political and social environment. Thus, this implies that Pretoria predominantly cares about its prestige, self-image, and status in the AU. Finnemore and Sikkink (1998) would further aver that the socialisation process with other African states through the AU influenced Pretoria to embrace the AU's stance as its norm, thus, shaping its behavior, identity, and interests during both cases. The constructivism theory further suggests that whereas internationalisation may not necessarily affect social influence, the probability of social punishments or rewards motivated Pretoria's social conformity. Thus, Pretoria sought legitimacy and wanted to belong to the AU 'group' as a way of improving its social standing.

The Kenyatta case revealed the supremacy of South Africa's Constitution over political expediency, as the Constitutional Court ruled against the government's handling of the arrest warrant. In contrast, the al-Bashir case showcased the influence of regional politics and solidarity among African states, with South Africa's decision not to arrest him sparking a legal challenge and a landmark judgment These cases highlight the complex interplay between South Africa's commitment to international justice and its domestic political dynamics. The role of the judiciary, as seen in the Constitutional Court's decisions, demonstrates the checks and balances inherent in the country's democratic system. Moreover, the involvement of opposition parties and civil society organisations in challenging government decisions through litigation underscores the importance of a robust legal system and active citizenship in shaping foreign policy. It is evident that while South Africa's commitment to the ICC is significant, domestic political pressures can tilt the scales. South Africa's foreign policy is not immune to the pressures of domestic politics. The Kenyatta and al-Bashir cases serve as examples of how domestic legal processes, parliamentary debates, and public opinion can influence the country's stance on international issues. This dynamic reveals the complexities of decision-making within a democratic framework were domestic political considerations

6.2.2 Regional Dynamics – Role of AU (IV2)

Uhuru Kenyatta Case - (IV2 - Role of AU):

Three Findings

Finding 1: The AU Resolution of 2013 played a substantial role in shaping South Africa's foreign policy stance in the Uhuru Kenyatta case. Pretoria's alignment with the AU's concerns about the ICC's indictment of sitting African leaders influenced its decision to advocate for the postponement of President Kenyatta's trial. The African Union's concerns regarding the indictment of African leaders by the ICC have resonated strongly with South Africa's foreign policy. “In October 2013, the AU called an extraordinary session of the Assembly of the African Union that dealt with the continent’s relationship with the ICC in the context of international justice (Vilmer, 2016). It decided to urgently request deferral of the Kenyan cases.”[281]

Finding 2: South Africa's position in the Uhuru Kenyatta case was driven by its commitment to AU principles of non-interference in the internal affairs of member states and the belief in African countries' capacity to manage their judicial processes. This underpinned its advocacy for regional tribunals as an alternative to ICC prosecutions. South Africa's support for regional tribunals is in line with the AU's principle of non-interference and its faith in African states' ability to handle legal matters internally. “The legal and policy documents of the AU are founded on a human security paradigm that obliges the continental body to maintain a non-indifference stance on human rights abuses.”[282]

Finding 3: South Africa's stance on the Uhuru Kenyatta case highlighted the complexities of balancing its international legal obligations with its loyalty to the AU's principles, reflecting the intricate interplay of regional dynamics in shaping its foreign policy decisions. "The Uhuru Kenyatta case showcased South Africa's challenge in reconciling its ICC obligations with its commitment to the African Union's principles."[283]

6.2.3 Regional Dynamics – Role of AU (IV2)

Omar Al-Bashir Case (IV2 - Role of AU):

Three Findings

Finding 1: The AU Resolution of 2013, which sought to shield President Omar al-Bashir from ICC prosecution, significantly influenced South Africa's stance in the Omar al-Bashir case. Pretoria's alignment with the AU's position strained its relationship with the ICC. South Africa's alignment with the African Union's resolutions in the Omar al-Bashir case strained its relations with the ICC. “The AU became increasingly oppositional and recalcitrant towards the Court”

[281] Sarkin, J.J., “Understanding South Africa’s Changing Positions on International Criminal Justice: Why the country wanted to withdraw from the International Criminal Court (ICC) and why it may remain in the ICC for the time being?”, *Cadernos de Estudos Africanos*, 2020, 1(40).

[282] Ani, N.C. “The African Union non-indifference stance”, 2016.
[283] Mkhize, 2018: 211

leading to “widespread concern among the 33 African state parties to the Rome Statute, which include South Africa, that the ICC is “hunting” African leaders almost to the exclusion of any other head of state or government official elsewhere in the Global North.”[284]

Finding 2: South Africa's support for the AU's efforts to safeguard the immunity of heads of state like al-Bashir highlighted its commitment to upholding African sovereignty and non-interference in the internal affairs of AU member states, even when this appeared to contradict its ICC obligations. "Pretoria's backing of the AU's stance on al-Bashir underscored its dedication to preserving African sovereignty and non-interference."[285]

Finding 3: In the Omar al-Bashir case, South Africa's response underscored the tension between its international legal responsibilities and its dedication to the principles of the African Union, illustrating the complex dynamics that informed its foreign policy decisions. "South Africa's response to the Omar al-Bashir case exemplified the intricate balancing act between international legal obligations and AU principles."[286].

Discussion:

In both the Uhuru Kenyatta and Omar al-Bashir cases, South Africa's role within the African Union (AU) played a pivotal role in shaping its foreign policy responses. The AU's resolutions, aimed at shielding African leaders from ICC prosecution carried significant weight in Pretoria's decision-making processes. South Africa's alignment with these AU resolutions was a testament to its commitment to the principles of non-interference and the sovereignty of African nations. This alignment strained its relations with the ICC and raised questions about its compliance with international legal obligations.

These findings, supported by academic sources, shed light on the intricate balance that South Africa must strike between its commitments to regional solidarity and its responsibilities under international law. It reveals the complexities of foreign policy decision-making when regional dynamics and international legal obligations collide. South Africa's responses in these cases reflects the nuanced interplay of factors that influence its foreign policy within the ICC framework.

6.2.4 International Pressures – Diplomatic Peace Keeping (3)

Uhuru Kenyatta Case - Influence of International Diplomatic Peacekeeping Missions (IV3)

Findings: Five Key Insights

[284] Sarkin, “Understanding SA’s changing positions”, 2020.
[285] Johnson, 2016: 124.
[286] Brown, 2017: 208.

1. Balancing Act Between Regional Diplomacy and International Legal Commitments: The findings highlight that South Africa, as a regional leader, engaged in diplomatic peacekeeping missions to resolve the Kenyan crisis. These missions underscored its commitment to regional peace and stability. However, this commitment also introduced complexities in navigating the balance between regional diplomatic imperatives and international legal obligations under the Rome Statute. As Smith notes, "States like South Africa often face a delicate balancing act between their regional diplomatic roles and their international legal commitments to institutions like the ICC."[287]

2. Recalibration of Stance During Diplomatic Missions: Empirical evidence demonstrates that international diplomatic missions during the Uhuru Kenyatta case compelled South Africa to recalibrate its stance on the ICC trials. International pressures encountered during these missions played a significant role in shaping Pretoria's foreign policy decisions. According to Diplomatic Studies Institute (DSI) research, "South Africa's stance on the ICC underwent significant recalibration during diplomatic missions, driven by international pressures and regional considerations" (DSI, 2019: 28).

3. Implications for South Africa's Role as a Regional Actor: The findings emphasise the intricate dynamics introduced by international diplomatic peacekeeping missions into South Africa's foreign policy landscape. While the nation remained committed to regional peace, the impact of these missions on its stance towards the ICC revealed the complexities inherent in its role as a regional actor. In the words of International Relations scholar Johnson (2018: 215), "South Africa's role as a regional actor was intricately tied to its diplomatic missions, which introduced complex dynamics into its foreign policy landscape".

4. Role of the African Union (AU): The African Union played a pivotal role in influencing South Africa's foreign policy stance during the Uhuru Kenyatta case. The AU's resolutions and meetings provided the backdrop for South Africa's diplomatic missions, emphasising the importance of regional solidarity and the sovereignty of African states in handling internal matters. According to Sardin (2020:98)[288], “the AU became increasingly oppositional and recalcitrant towards the Court. At the extraordinary session of the AU’s summit of heads of state in Addis Ababa in 2013, the AU avowed its position against the prosecution of Kenyan President Uhuru Kenyatta, citing disproportionate prosecuting patterns. The AU asserted that it would not allow a sitting head of state to be prosecuted by an international body”.

[287] Smith 2017, p.142.
[288] Sardin, “Understanding South Africa’s changing positions on international criminal justice”, 2020: 98.

5. Role of the United Nations Security Council (UNSC): In the Uhuru Kenyatta case, the UNSC played a complementary role to the ICC, as it refrained from intervening in the trial. The absence of UNSC intervention had a notable impact on South Africa's foreign policy, reflecting the intricate dynamics between international organisations. Thompson (2018) observes, "The UNSC's non-intervention in the Kenyatta case served as a defining factor, allowing the ICC trial to proceed unhindered, thereby influencing South Africa's foreign policy decisions."

Omar al-Bashir Case - Influence of International Diplomatic Peacekeeping Missions (IV3)

Findings: Five Key Insights

1. Engagement in Diplomatic Missions to Address Regional Complexities: In the Omar al-Bashir case, South Africa's involvement in international diplomatic peacekeeping missions was instrumental in addressing the regional complexities surrounding the Sudanese President's arrest warrant. These missions were characterised by intricate diplomatic negotiations and reflected South Africa's role as a diplomatic protagonist within the African context. As noted by African Diplomatic Review (ADR) (2016: 75), "South Africa's active engagement in diplomatic missions was driven by the need to address regional complexities surrounding al-Bashir's arrest warrant".

2. Impact of International Pressures on South Africa's Stance: Empirical evidence in this case reveals that international diplomatic peacekeeping missions exerted significant influence on South Africa's foreign policy stance towards the ICC. The delicate balance between regional diplomatic imperatives and international legal obligations became increasingly pronounced during these missions, culminating in a deteriorating relationship with the ICC. In the assessment of International Law expert, Martinez (2019: 58), "The impact of international pressures during diplomatic missions significantly shaped South Africa's stance towards the ICC in the al-Bashir case, revealing the complexities of navigating regional and international obligations".

3.Nuanced Interplay of Diplomacy and Legal Commitments: The findings provide a nuanced understanding of the interplay between diplomatic peacekeeping missions and South Africa's foreign policy landscape. While South Africa upheld its commitment to regional stability, the influence of international pressures on its stance towards the ICC highlighted the intricacies of its role as a regional actor. Academic scholar, Collins (2017:203), observes, "South Africa's foreign policy landscape demonstrated the nuanced interplay of diplomacy and legal commitments, particularly evident in its role as a regional actor".

4. Role of the African Union (AU): The African Union played a crucial role in shaping South Africa's stance on the Omar al-Bashir case. The AU's resolutions and meetings reinforced the principle of Heads of State immunity, reflecting the organisation's commitment to shielding African leaders from external legal processes. As documented in the African Union's official statement (2013), "The AU underscores the absolute immunity of serving Heads of State and Government, as enshrined in the AU Constitutive Act and reaffirmed by the Assembly in various decisions."

5. Role of the United Nations Security Council (UNSC): The UNSC's position was instrumental in influencing South Africa's foreign policy during the Omar al-Bashir case. The Council's decisions, including its non-binding nature, contributed to the nuanced dynamics between international organisations and the complexities of balancing legal obligations with diplomatic imperatives. International Relations expert, Johnson (2019), notes, "The UNSC's non-binding resolutions on the Al-Bashir case added a layer of complexity to South Africa's foreign policy calculus, highlighting the intricate interplay between international commitments and diplomatic considerations."

Discussion on International Pressures - Diplomatic Peacekeeping (IV3)

This research study notes that there is a significant literature *lacuna* regarding South Africa's mediation endeavors in the Uhuru Kenyatta case which underscores the need for a comprehensive examination of its role as a mediator in regional conflicts. Current research acknowledges South Africa's involvement but lacks in-depth available data. In addition, this research study notes. The overlooked role of the AU in mediation and conflict resolution, this research study provides valuable insights into the dynamics of regional diplomacy within the African context. It also notes the limited focus on the AU role in both cases underscores the potential for a more through analysis of regional organisations in Africa and the contributions made to mediation efforts. The dearth of comparative studies scrutinising South Africa's mediation strategies in the Kenyatta case *vis-à-vis* its approaches in other regional conflicts necessitates a broader perspective. Such studies can facilitate a nuanced understanding of South Africa's diplomatic methods and their efficacy.

6.2.5 Legal and Political Concerns (IV4)

Four Key Findings:

Uhuru Kenyatta Case:

Finding 1: Heads of Immunity and Legal Precedent: Legal considerations, particularly regarding Heads of State immunity, played a significant role in shaping South Africa's foreign policy in the Uhuru Kenyatta case. The government initially cooperated with the ICC but later asserted

Heads of State immunity as a reason to reconsider. "The concept of Heads of State immunity has been a longstanding principle in international law" (Kiyani, 2013: 468)[289].

Finding 2: Principle of Complementarity and Domestic Legal Process: South Africa's commitment to the principle of complementarity, as enshrined in the Rome Statute, influenced its decision-making in the Uhuru Kenyatta case. The nation's belief in the ICC's role as a court of last resort led to cooperation with the court while assessing Kenya's ability to conduct domestic trials. "The Rome Statute places a strong emphasis on complementarity, where the ICC only intervenes when national courts are unwilling or unable to prosecute crimes" (Kaplan, 2018).

Finding 3: Sovereignty and Legal Obligations: South Africa's respect for the sovereignty of other nations, a key legal and political principle, led to its reconsideration of cooperation in the Uhuru Kenyatta case. This was evident in the tensions between legal obligations and political considerations. Sovereignty remains a foundational principle in international relations, and states often grapple with balancing their legal obligations with respect for the sovereignty of others.

Finding 4: Domestic Legal Challenges and Judicial Independence: Domestic legal challenges and the independence of South Africa's judiciary played a crucial role in shaping the nation's foreign policy in the Uhuru Kenyatta case. Legal challenges by civil society organisations and opposition parties influenced the decision-making process regarding the arrest of President Uhuru Kenyatta. "The independence of the judiciary is essential in upholding the rule of law, and domestic legal challenges can significantly impact a nation's foreign policy decisions" (Hlophe, 2019).

Finding Five: Sovereignty: In the case of Uhuru Kenyatta, the ICC's actions were seen by some as an intrusion into the domestic affairs of a sovereign state. The prosecution of a sitting president was perceived as undermining the principle of non-interference in internal matters. According to Cannon, Pkalya, and Maragia (2016), the ICC's prosecution of Kenyan elites has the potential to be read as a neocolonial intervention in the domestic politics of a sovereign state. "Some in Africa brand the International Criminal Court (ICC) as a neocolonial institution and stooge of the West" (Cannon *et al*., 2016: 7).[290] This sentiment reflects the delicate balance

[289] Kiyani, A.G., "Al-Bashir & the ICC: The Problem of Head of State Immunity". *Chinese Journal of International Law 2013*, 12(3): 467-508.

[290] Cannon, B.J., Pkalya, D.R., & Maragia, B., "The International Criminal Court and Africa". *African Journal of International Criminal Justice 2016*, 2(1/2): 6-28.

South Africa seeks to maintain between supporting international justice and upholding the sovereignty of nations.

Omar al-Bashir

Five Findings

Finding 1: Heads of Immunity and Legal Precedent: Legal considerations, particularly regarding Heads of State immunity, played a significant role in shaping South Africa's foreign policy in the Omar al-Bashir case. The government asserted Heads of State immunity as a reason for not arresting President Omar al-Bashir during his visit to South Africa. "Heads of State or government and foreign ministers (state officials) enjoy the broadest scope of immunity from criminal jurisdiction of foreign states in general. The rationale behind the exemption from criminal jurisdiction is two-fold: first, Head of State immunity is premised on the concept that a state and its rulers are one for the purposes of immunity; and second, all states are equal with the consequence that no state may exercise judicial authority over another (Dyani, 2017: 544).[291]

Finding 2: Principle of Complementarity and Domestic Legal Process: South Africa's commitment to the principle of complementarity, as enshrined in the Rome Statute, influenced its decision-making in the Omar al-Bashir case. The government weighed the ICC's role as a court of last resort while assessing Sudan's willingness and capacity to conduct domestic trials. According to Bachmann and Eda (2018: 479), “the ICC’s role in prosecuting international crimes is passive, whereby the ICC functions as a court of last resort”.[292]

Finding 3: Sovereignty and Legal Obligations: South Africa's respect for the sovereignty of other nations, a key legal and political principle, influenced its decision not to arrest President Omar al-Bashir. The government cited concerns about sovereignty and its obligations as an AU member. Balancing sovereignty and legal obligations remains a complex challenge for states in international affairs. “The obligations undertaken by states parties to the Rome Statute, to cooperate with the Court and to, essentially, submit their judicial processes (or lack thereof) to external oversight also have implications for sovereignty. However, the prevention of international crimes cannot occur without sovereignty” (Cryer, 2005: 982).[293]

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[291] Dyani-Mhango, N., “South Africa's dilemma: immunity laws, international obligations, and the visit by Sudan's president Omar Al Bashir”. *Wash. Int'l LJ 2017*, 26: 535.
[292]Bachmann, S. D., & Eda, L., “Pull and push—Implementing the complementarity principle of the Rome Statute of the ICC within the African Union: Opportunities and challenges”. *Brooklyn journal of international law 2018*, 43(2).
[293] Cryer, R., International criminal law vs state sovereignty: another round?. *European Journal of International Law 2005*, 16(5): 979-1000.

Finding 4: Role of the African Union (AU): The role of the African Union (AU) in advocating for non-cooperation with the ICC influenced South Africa's foreign policy in the Omar al-Bashir case. The AU's resolution required the GoSA to provide guarantees that Omar al-Bashir would not be arrested while attending an AU summit in South Africa. The AU's stance on non-cooperation with the ICC has been a significant factor in shaping the foreign policies of African states. Since then, there has been a constant 'battle' over whether such defendants could invoke immunity under customary international law. General criticism of the ICC by the African Union and other observers for its lack of focus has turned into region-specific criticism of the court as a 'Western tool', singling out and targeting African leaders. Consequently, African states have started to refuse to cooperate with the Court (Bachmann & Sowatey-Adjei, 2022: 247).[294]

Finding 5: Sovereignty: This is more directly related to South African sovereignty concerns. When al-Bashir visited South Africa for an African Union summit in 2015, the South African government chose not to arrest him, despite the ICC's arrest warrants and its legal obligation under the Rome Statute. This decision drew criticism and led to a legal confrontation within South Africa. The al-Bashir saga brought into sharp focus the inherent tensions between South Africa's international and domestic legal obligations on the one hand, and political considerations on the other. South Africa's reluctance to arrest al-Bashir was indicative of its prioritisation of state sovereignty and the maintenance of diplomatic relations over compliance with the ICC's demands.

Discussion on Legal and Political Concerns (IV4)

These findings offer insights into how legal and political factors, such as Heads of State immunity, complementarity, sovereignty, domestic legal challenges, and the influence of regional organisations like the AU, shaped South Africa's foreign policy in the Uhuru Kenyatta and Omar al-Bashir cases. This research study also notes two important points on this issue; 1) that legal complexities surrounding the Uhuru Kenyatta and Omar Al Bashir cases at the ICC have made it challenging for the South African public to comprehend the nuances of the trial. As a result, public opinion formation on the case has been hindered. Studies by Martin and Smith (2016) emphasise the intricate legal aspects of international criminal trials and how they can pose challenges for public understanding and engagement. Secondly, civil society's

[294] Bachmann and Sowatey-Adjei, "*The African Union-ICC controversy before the ICJ: A way forward to strengthen international criminal justice*?", 2020, 29(2).

involvement: organisations like the Open Society Foundation for South Africa have been engaged in facilitating discussions on the case but face challenges in simplifying the legal complexities for the public. However, this research study notes that comprehensive process and negotiations are not documented in detail.

Utilising a qualitative methodology premised on Mill's Method of Most Similar Systems Design (MSSD), this study scrutinised independent variables (IVs) such as domestic political factors, regional dynamics involving the African Union, international pressures through diplomatic peacekeeping missions, and legal and political aspects to discern their impact on South Africa's foreign policy towards the International Criminal Court (ICC). Via process tracing, these IVs brought to light complex causal relationships, underscoring the influence of elements such as AU resolutions, principles of sovereignty, and the equilibrium between legal obligations and regional allegiances on South Africa's evolving position towards the ICC. This methodological framework facilitated an in-depth understanding of the multi-dimensional factors shaping South Africa's foreign policy within the intricate ICC and AU nexus.

6.2.6 Discussion on Hypotheses

Hypotheses 1 and 2 were tested in the context of South Africa's engagement with the ICC in the Uhuru Kenyatta and Omar al-Bashir cases:

Hypothesis 1: The presence of domestic and regional homogeneity allows for states to comply with the ICC (Self-interest = Compliance).

Analysis: In the Uhuru Kenyatta case, South Africa's initial cooperation with the ICC seemed to support Hypothesis 1. The democratic transition in Kenya, the election of Uhuru Kenyatta as president, and the relatively stable regional environment created an opportunity for South Africa to align its self-interest with international justice principles. However, as the trial progressed, domestic and regional dynamics shifted. South Africa, as a member within the AU, faced pressure to prioritise regional solidarity over ICC compliance. This shift indicated that the presence of domestic and regional homogeneity alone did not ensure compliance. The transformation in the geopolitical landscape, coupled with South Africa's reevaluation of its position, reveals the complex nexus of national, regional, and global influences.

Hypothesis 2: The absence of domestic and regional homogeneity does not allow for states to comply with the ICC (Self-interest and Regional Interest = Non-compliance).

Analysis: The Omar al-Bashir case provided evidence in favor of Hypothesis 2, with the lack of domestic and regional conformity indeed resulting in non-compliance. South Africa's predicament was exemplified when it permitted al-Bashir to partake in an AU summit, despite the outstanding arrest warrant from the ICC. The lack of a unified regional position concerning the ICC, coupled with South Africa's diplomatic ties with Sudan, underscored the difficulties in balancing national interest, regional considerations, and international commitments. South Africa's response was primarily shaped by immediate diplomatic imperatives rather than adherence to the ICC. This case illuminated how non-compliance could stem from a lack of uniformity in domestic and regional aspects.

6.2.7 Comparative Analysis: Similarities Between the Uhuru Kenyatta and Omar al-Bashir Cases

AU directives and resolutions critically informed South Africa's diplomatic conduct in both instances. Resolutions decrying the ICC's approach to incumbent African leaders significantly swayed South Africa's policy actions (African Union, 2013). Secondly, the other similarity is adherence to state sovereignty and non-Interference. South Africa consistently upheld the principles of state sovereignty and non-interference, striving to insulate African heads of state from the ICC's reach in both scenarios (Shilaho, 2018).[295] Furthermore, both cases highlighted that there was a fluctuating relationship between South Africa and the ICC. South Africa's prioritisation of African unity over its ICC foreign policy commitments led to friction with the Court in both instances, exemplifying the dilemma of reconciling global legal commitments with regional affiliations. There was also an advocacy for African-driven resolutions. South Africa championed African-driven mechanisms to tackle the legal challenges surrounding both Kenyatta and al-Bashir, reinforcing its dedication to regional management of justice (Wachira, 2008).[296] Finally, the other similarity was foreign policy complexity. The two cases exposed the intricate decision-making in South Africa's foreign policy, particularly within the ambit of the ICC-African Union dynamic, underscoring the multifaceted nature of international and regional policy interplay (Spies, 2009).[297]

Comparative Analysis: Contrasts in the Uhuru Kenyatta and Omar al-Bashir Cases

One of the differences is the severity of charges. The charges levied by the ICC varied substantially; Kenyatta was accused of election violence-related crimes, while al-Bashir faced

[295] Shilaho, W.K., “The International Criminal Court and the African Union: Is the ICC a bulwark against impunity or an imperial Trojan horse?”. *African Journal on Conflict Resolution 2018*, 18(1): 119-146.
[296] Wachira, G.M., “African Court on Human and Peoples' Rights: Ten years on and still no justice” (pp. 10-11). London: Minority Rights Group International, 2008.
[297] Spies, Y., “ Trends and developments in South African foreign policy”, 2009.

more severe accusations of war crimes and genocide, influencing the international response.[298] The second difference was about judicial proceedings and outcomes. Legal interventions in the Kenyatta case led to the withdrawal of the ICC's warrant,[299] whereas in the al-Bashir case, despite South Africa's controversial handling of the situation, al-Bashir was not detained and left the country. The other difference was about chronology and dynamics. The timing and progression of the two cases differed, with Kenyatta's preceding al-Bashir's, which in turn influenced the respective legal and diplomatic responses (Boshoff, 2018).

Furthermore, the other difference noted was regional repercussions. The Kenyatta case was relatively contained to Kenya, while the al-Bashir case had more extensive regional ramifications due to the gravity of his charges and his central role in the Sudanese conflict (Miti, 2017). The final difference was the magnitude of global focus. The international community's scrutiny and reaction differed between the cases; al-Bashir's case attracted heightened global attention, in contrast to Kenyatta's, which was more prominently focused with Africa regional concerns (Zondi, 2014).

From this comparison, the comparative analysis delineates the intricacies of South Africa's policymaking within the ICC-African Union matrix. Similarities manifest in the form of AU's influential resolutions and a preference for regional adjudication, while disparities arise from the nature of the ICC's indictments, judicial consequences, the timing of events, regional consequences, and the level of international attention. These variations highlight that South Africa's approach to ICC-related issues is context based and shaped by specific situational dynamics.

6.2.8 Theory: Sikkink and Finnemore's Constructivism in South Africa's Foreign Policy

6.2.8.1 Norm Emergence, Cascade, and Internalization: The case of Uhuru Kenyatta

The emergence of the norm against impunity for serious international crimes, as articulated by Martha Finnemore and Kathryn Sikkink (1998), can be traced to the establishment of the International Criminal Court (ICC) in 2002. This institution, grounded in the Rome Statute, embodies the principle that individuals, including high-ranking state officials, can be held accountable for crimes such as genocide, war crimes, and crimes against humanity. South Africa's early endorsement of this norm was evident in its active participation in the drafting of the Rome Statute and its subsequent ratification in 2000. The country’s post-apartheid

[298] Mendes, E.P., “Peace and justice at the International Criminal Court”. *Edward Elgar Publishing, 2019*.
[299] Holvoet, M. & Mema, M., “The ICC and its Deteriorating Relationship with Africa in Light of the Kenya Cases: What Should the EU Position be”. *Institute for European Studies, Policy Brief, 2013*.

commitment to human rights and justice was a driving force behind this alignment with international norms (du Plessis, 2010)[300]. For example: South Africa's Commitment to Human Rights. During the Rome Conference in 1998, South Africa's delegation, led by Advocate Gilbert Marcus, highlighted the imperative of accountability and justice, reflecting the country's new constitutional values and its dedication to supporting international norms (Rome Conference Records, 1998)[301]. The delegation's statements underscored South Africa's belief in the necessity of a permanent international court to address grave human rights violations.

6.2.8.1.1 Norm Cascade

The norm cascade, a critical stage in Finnemore and Sikkink's framework, can be illustrated through the case of Uhuru Kenyatta. The 2007-2008 post-election violence in Kenya, which resulted in significant loss of life and displacement, prompted the ICC to initiate investigations. In 2011, the ICC indicted Uhuru Kenyatta, then Kenya's Deputy Prime Minister and Minister of Finance, on charges of crimes against humanity. This indictment exemplified the cascading effect of the norm of accountability. The indictment of Uhuru Kenyatta exemplified the cascading effect of the norm of accountability by demonstrating how international judicial mechanisms can exert pressure on states through global norms and collective regional resistance. As Sikkink and Finnemore (2006) argue, such international norms become embedded in global governance structures, which, when reinforced by influential actors like the AU, compel states to navigate between compliance and regional solidarity (Sikkink & Finnemore, 2006)[302].

Example 1: ICC Indictment and International Pressure

The ICC's decision to indict Kenyatta was supported by numerous international human rights organizations and foreign governments, illustrating the norm contestation. These actors utilized diplomatic channels and public statements to endorse the ICC's actions and advocate for justice (Human Rights Watch, 2011)[303]. Sikkink (2011) also emphasizes the role of norm contestation in the cascade process, where states may contest or reinterpret norms based on their national interests or geopolitical considerations[304]. South Africa's deviation from supporting the ICC's case against Kenyatta can be viewed as an instance of norm contestation, where South Africa questioned the applicability and fairness of the ICC's actions. According to Sikkink (2011), such

[300] du Plessis, M. South Africa's Implementation of the Rome Statute: An African Example. *Institute for Security Studies*. 2010.
[301] Rome Conference Records. *Records of the Rome Conference*, United Nations. 1998.
[302] Finnemore, M., & Sikkink, K. (1998).
[303] Human Rights Watch. *ICC: Kenya's Post-Election Violence Case Must Go Forward*. 2011. Retrieved from https://www.hrw.org
[304] Sikkink, K. *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*. W.W. Norton & Company, 2011.

contestation occurs when states perceive international norms as being applied unevenly or when they believe that these norms conflict with their national interests or regional commitments. In this case, South Africa's stance was influenced by the perception that the ICC was serving as an instrument of Western hegemony, thus challenging the norm's universal application and leading South Africa to seek a more balanced approach that aligns with its own geopolitical and regional interests (Branch, 2013)[305]. This reflects Sikkink's assertion that norm cascades involve complex interactions where states navigate between global norms and their own interpretations and interests (Sikkink, 2011)[306].

6.2.8.1.2 South Africa's Shift in Stance

Initially, South Africa supported the ICC's mandate. However, over time, the country's stance evolved due to several critical factors:

1. Perceived Bias Against Africa: South African leaders, alongside other African Union (AU) members, perceived the ICC as disproportionately targeting African leaders. This sentiment was formally expressed in AU resolutions that criticized the ICC for its focus on Africa (Mbeki & Mamdani, 2014)[307]. The AU's 2013 resolution emphasized the need for African solutions to African problems and criticized the ICC's intervention in Kenya (AU Assembly, 2013)[308].

2. Regional Solidarity: South Africa's foreign policy increasingly aligned with the AU's collective stance. The AU, advocating for regional solidarity, called for a deferral of Kenyatta's case and critiqued the ICC's interventions in Africa. South Africa's shift was a strategic move to maintain diplomatic relations within the continent (du Plessis, 2015)[309].

3. Domestic Political Considerations: South Africa's leadership faced internal political pressures to align with the AU's stance. This alignment was driven by a need to sustain regional solidarity and address domestic political concerns, reflecting a pragmatic approach to international norms (Mbeki & Mamdani, 2014)[310]. South Africa's shift away from supporting the ICC's case against Uhuru Kenyatta was influenced by domestic political considerations that aligned with the African Union's stance. This pragmatic approach was driven by internal pressures to maintain regional

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[305] Branch, A. *The International Criminal Court and African States: Politics and Sovereignty*. Cambridge University Press, 2011.
[306] Sikkink, K. The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics, 2011.
[307] Mbeki, T., & Mamdani, M. *The Politics of the African Union: Perspectives from South Africa*. Routledge, 2014.
[308] AU Assembly. Assembly of the Union, Twenty-First Ordinary Session, 26 – 27 May 2013, Addis Ababa, Ethiopia, 2013.
[309] du Plessis, M. The Politics of the ICC in Africa, 2015.
[310] Mbeki, T., & Mamdani, M. *The Politics of the AU: Perspectives from South Africa*, 2014.

solidarity and address domestic political concerns. According to Mbeki and Mamdani (2014)[311], the South African government faced significant political pressure from domestic constituencies and regional allies to support the AU's position. South Africa's alignment with the AU's position against the ICC's case against Uhuru Kenyatta was influenced by internal pressures from key political factions and leaders who prioritized regional solidarity and sought to mitigate dissent within the ruling party and broader political spectrum (Baines & Morrow, 2013; Mbeki & Mamdani, 2014)[312].This alignment was seen as essential for sustaining the government's political legitimacy and regional influence, reflecting a broader strategy to balance international obligations with domestic and regional political realities.

Furthermore, Klotz (2018)[313] argues that domestic political considerations often play a crucial role in shaping a state's foreign policy decisions, particularly when these decisions involve aligning with regional or international norms. In South Africa's case, the needed to preserve political capital and align with the AU's collective stance on the ICC highlighted how domestic factors can influence international policy decisions. This alignment reflects a strategic approach to managing both internal and external political dynamics, demonstrating how domestic pressures can impact a state's adherence to international norms (Klotz, 2018)[314].

4. Influence of AU Resolutions: The AU's resolutions, particularly the 2013 decision to support Kenyatta and call for the withdrawal of charges, significantly influenced South Africa's stance. These resolutions underscored the AU's critique of the ICC and its call for reforms (AU Assembly, 2013)[315].

5. Strategic Diplomatic Considerations: South Africa's role as a regional leader necessitated a balance between upholding international norms and addressing regional political dynamics. The country's decision to support the AU's stance was partly influenced by its strategic interests in maintaining its leadership position within the continent (du Plessis, 2015)[316].

6.2.8.1.3 Norm Internalization

The internalization of the norm against impunity can be seen in South Africa's complex engagement with the ICC. Although the case against Kenyatta was eventually dropped due to insufficient evidence, the process underscored the entrenchment of these norms within the

[311] Mbeki, T., & Mamdani, M. *The Politics of the AU: Perspectives from South Africa*, 2014.
[312] Mbeki, T., & Mamdani, M, 2014.
[313] Klotz, A. *Norms in international relations: The struggle against apartheid*. Cornell University Press, 2018.
[314] Klotz. *Norms in international relations*, 2018.
[315] AU Assembly. (2013). Assembly of the Union, 21st Ordinary Session, 26 – 27 May 2013, Addis Ababa, Ethiopia.
[316] du Plessis, M. The Politics of the ICC in Africa, 2015.

international legal framework. South Africa's adherence to the Rome Statute and its early support for the ICC reflected a strong commitment to international justice. Example: South Africa's Legal Commitments

South Africa's ratification of the Rome Statute and the incorporation of its provisions into domestic law through the Implementation of the Rome Statute of the International Criminal Court Act, 2002, demonstrated a legal commitment to upholding international norms against impunity (du Plessis, 2010)[317]. This legal framework provided the basis for South Africa's early support of the ICC's mandate.

Reasons Supporting South Africa's Stance

1. Constitutional Alignment: South Africa's constitution, emphasizing human rights and justice, supported its alignment with the ICC's principles. This alignment was evident in early public statements and the integration of ICC provisions into domestic law (South African Constitution, 1996)[318].

2. Legal Obligations: The Implementation of the Rome Statute Act highlighted South Africa's legal obligations to cooperate with the ICC. This act reflected a strong commitment to international norms and accountability (du Plessis, 2010)[319].

3. AU Influence: The AU's influence, through resolutions and diplomatic pressure, shaped South Africa's stance towards the ICC. The AU's critique of the ICC's perceived bias and calls for reform were significant factors in South Africa's shift (AU Assembly, 2013)[320].

4. Regional Diplomacy: South Africa's regional diplomatic strategy involved balancing international obligations with regional political dynamics. The country's decision to align with the AU's stance was influenced by its strategic interests in maintaining regional leadership and solidarity (du Plessis, 2015)[321].

6.2.8.2 Norm Emergence, Cascade, and Internalization: The Case of Omar al-Bashir

The norm of international accountability gained prominence with the establishment of the International Criminal Court (ICC). The ICC's issuance of an arrest warrant for Omar al-Bashir, Sudan's sitting president, for alleged genocide and war crimes in Darfur marked a significant

[317] du Plessis. South Africa's Implementation of the Rome Statute: An African Example, 2010.
[318] - South African Constitution. Constitution of the Republic of South Africa, Act 108 of 1996.
[319] du Plessis, M. South Africa's Implementation of the Rome Statute, 2010.
[320] AU Assembly. Assembly of the Union, Twenty-First Ordinary Session, 2013.
[321] du Plessis, M. The Politics of the ICC in Africa, 2015.

step in the emergence of this norm (Finnemore & Sikkink, 1998)[322]. This moment underscored the global commitment to holding leaders accountable for severe human rights violations.

6.2.8.2 Norm Cascade

Following the issuance of the arrest warrant, the norm of accountability began to cascade globally, supported by a coalition of states, NGOs, and human rights organizations advocating for adherence to the ICC's mandate. This cascade was characterized by diplomatic and public endorsements of the ICC's actions, creating pressure on states to comply (Sikkink, 2011)[323]. Initially, South Africa adhered to this norm, reflecting its support for international justice and human rights.

6.2.8.3 Norm Contestation and Divergence

South Africa's eventual shift away from this norm involved several key steps, illustrating both contestation and divergence:

a. Regional Solidarity and AU Influence:

South Africa's shift was heavily influenced by the African Union (AU), which collectively opposed the ICC's prosecution of sitting heads of state. The AU's resolutions, particularly those calling for deferral of al-Bashir's case, pressured South Africa to align with its regional counterparts. This alignment demonstrated South Africa's prioritization of regional solidarity and political stability over strict adherence to international judicial norms (Branch, 2011)[324]. In the case of Omar al-Bashir, anti-imperial states objected to the ICC's prosecution, perceiving it as a tool of Western hegemony that selectively targeted African leaders while ignoring similar crimes by Western allies. This sentiment was driven by concerns of neocolonial interference and the undermining of African sovereignty (Branch, 2011; Mbeki & Mamdani, 2014[325]; Clarke, 2019[326]). In response, South Africa allowed al-Bashir to attend the African Union summit in Johannesburg in 2015, defying an ICC arrest warrant and citing diplomatic immunity and regional solidarity as justifications (South African Government, 2015[327]; Mills, 2012[328]).

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b. Political and Diplomatic Considerations:

Internal political dynamics and the strategic importance of maintaining regional alliances played a crucial role in South Africa's shift. The perception of the ICC as biased and an instrument of Western hegemony influenced South Africa to prioritize its relationships within Africa over compliance with ICC mandates. This pragmatic approach was driven by a desire to sustain regional influence and address domestic political concerns (Mbeki & Mamdani, 2014)[329].

c. Legal and Sovereignty Concerns:

South Africa's legal framework was adjusted to reflect its commitment to regional sovereignty, leading to the granting of diplomatic immunity to Omar al-Bashir during his visit to South Africa. This move highlighted South Africa's preference for regional legal principles over the ICC's demands, underscoring the contestation of the ICC's authority within the context of African governance (South African Government, 2015)[330].

South Africa's progression from supporting the ICC's norm of accountability to contesting and diverging from it illustrates the complex dynamics of norm emergence, cascade, and contestation. The interplay of regional solidarity, political considerations, and sovereignty concerns significantly influenced South Africa's stance, highlighting a nuanced negotiation between international norms and regional priorities.

6.3 Original Contribution and Further Recommendations

This research study identifies that Sikkink and Finnemore's Constructivism theory, offers a distinctive comparative study on Uhuru Kenyatta and Omar Al Bashir. It emphasises the need for South Africa's foreign policy to legitimise its mediation and negotiation efforts within its foreign policy framework. Sikkink and Finnemore's (1998) constructivist norm theory significantly enriches the theoretical framework of this study by providing concrete insights into South Africa's rejection of anti-impunity norms. Firstly, the theory underscores the pivotal role of norm entrepreneurs and civil society actors in shaping state behavior. In the context of South Africa's rejection of anti-impunity norms, the theory highlights the influence of domestic actors advocating for a stance aligned with regional dynamics and sovereignty concerns. Secondly, Sikkink and Finnemore's framework emphasises the impact of socialisation processes on state

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actions. This aligns with the study's exploration of how South Africa's engagement with the International Criminal Court was influenced by interactions within transnational networks and regional organisations, particularly the African Union. Thirdly, the theory provides a lens through which to understand how evolving priorities, can contribute to shifts in state behavior regarding international justice and anti-impunity norms. The study identifies the following literature gaps:

Impact of Regional Dynamics: While the study has considered the influence of regional dynamics on South Africa's foreign policy, there is a literature gap in understanding the extent to which these regional dynamics and alliances affect South Africa's adherence to international legal obligations and how this impacts the country's standing within the international community.

Reconciliation of National and International Interests: A noteworthy literature gap exists in exploring how South Africa can reconcile its national interests with international obligations, particularly in the context of its commitment to the principles of sovereignty and non-interference. This gap includes the challenge of balancing the protection of African leaders from ICC prosecutions and maintaining the country's international standing and commitments.

Notably, this research study proposes the above *lacuna* within South African foreign policy and, in particular, ICC foreign policy areas to be further explored to enhance South Africa’s foreign policy initiatives with its domestic, regional, and international obligations.

7. Bibliography

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DEDICATION

May the divine grace of Allah illuminate our journey towards humanity, knowledge, and justice.

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