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15th

Annual Human Rights Lecture

SOUTH AFRICA'S ENGAGEMENT WITH
INTERNATIONAL HUMAN RIGHTS LAW

Judge Navi Pillay



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15th

Annual Human Rights Lecture



Introduction

This commemorative booklet celebrates the 15th Annual Human Rights Lecture of the H.F. Oppenheimer Chair in Human Rights Law and centenary of the Stellenbosch Law Faculty. The lecture was delivered by Judge Navi Pillay, former United Nations High Commissioner for Human Rights, at a well-attended virtual event hosted by the Law Faculty on 20 May 2021.

The Annual Human Rights lecture series is a flagship event of the Law Faculty. Since 2004, the lecture has been delivered by three former Chief Justices, a Deputy Chief Justice, five other Justices of the Constitutional Court, a Judge of the Supreme Court of Appeal, representatives of Chapter Nine Institutions, a senior advocate, and a leading human rights scholar. Details of the lectures presented in this series to date are set out below.

These lectures have engaged with key human rights themes in the evolution of South Africa's constitutional democracy. The lectures have been well-attended and received extensive media attention. Most of these lectures have been published in the Stellenbosch Law Review, and have been widely cited in academic literature, various court judgments as well as publications by civil society organisations.

Delivered by leading figures involved in human rights adjudication, litigation, monitoring and scholarship, this lecture series provides unique insights and perspectives into the complex challenges entailed in realising human rights. It is hoped that the lectures will deepen awareness and foster public debate on how to improve human rights accountability in South Africa.

This lecture series would not be possible without the generous sponsorship of Webber Wentzel. The Chair and Faculty are immensely grateful for the support, and look forward to a continued partnership with Webber Wentzel in hosting the Annual Human Rights lecture series.

Prof Sandra Liebenberg

H. F. Oppenheimer Chair
in Human Rights Law



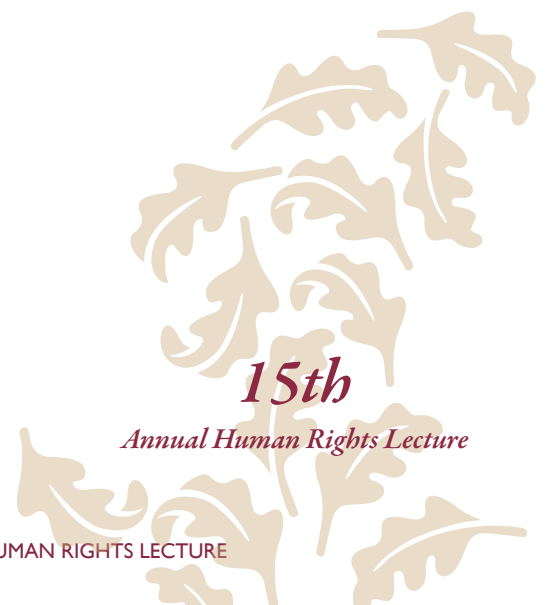
Prof Nicola Smit

Dean



15th

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Overview of Annual Human Rights Lecture Series

ANNUAL HUMAN RIGHTS LECTURE SERIES

H. F. OPPENHEIMER CHAIR IN HUMAN RIGHTS LAW & STELLENBOSCH UNIVERSITY

LAW FACULTY

2004 – 2021

Year	Guest speaker	Title of address	Publication reference in Stellenbosch Law Review
2004	Justice Kate O'Regan, Constitutional Court	"Equality under our New Constitutional Order"	Unpublished
2005	Justice Edwin Cameron, Constitutional Court	"Legal and Human Rights Responses to the HIV/AIDS Epidemic"	E Cameron "Legal and Human Rights Responses to the HIV/AIDS Epidemic" (2006) 17 <i>Stell LR</i> 37-46
2006	Chief Justice Pius Langa, Constitutional Court	"Transformative Constitutionalism"	P Langa "Transformative Constitutionalism" (2006) 17 <i>Stell LR</i> 351-360
2008	Deputy Chief Justice Dikgang Moseneke, Constitutional Court	"Transformative Constitutionalism: Its Implications for the Law of Contract"	D Moseneke "Transformative Constitutionalism: Its Implications for the Law of Contract" (2009) 20 <i>Stell LR</i> 3-13
2009	Justice Yvonne Mokgoro, Constitutional Court	"Ubuntu, the Constitution and the Rights of Non-citizens"	Y Mokgoro "Ubuntu, the Constitution and the Rights of Non-citizens" (2010) 21 <i>Stell LR</i> 221-229
2010	Chief Justice Sandile Ngcobo, Constitutional Court	"South Africa's Transformative Constitution: Towards an Appropriate Doctrine of Separation of Powers"	S Ngcobo "South Africa's Transformative Constitution: Towards an Appropriate Doctrine of Separation of Powers" (2011) 22 <i>Stell LR</i> 37-49
2011	Advocate Thulisile Nomkhosi ("Thuli") Madonsela, Public Protector of South Africa	"The role of the Public Protector in Protecting Human Rights and Deepening Democracy"	T N Madonsela "The Role of the Public Protector in Protecting Human Rights and Deepening Democracy" (2012) 23 <i>Stell LR</i> 4-15
2013	Chief Justice Mogoeng Mogoeng, Constitutional Court	"The Implications of the Office of the Chief Justice for Constitutional Democracy in South Africa"	M Mogoeng "The Implications of the Office of the Chief Justice for Constitutional Democracy in South Africa" (2013) 24 <i>Stell LR</i> 393-405

2014	Advocate Geoff Budlender SC, Cape Bar	"20 years of Democracy: The State of Human Rights in South Africa"	G Budlender "20 Years of Democracy: The State of Human Rights in South Africa" (2014) 25 <i>Stell LR</i> 439 - 450
2015	Professor Karl Klare, Matthews Distinguished Professor, Northeastern University School of Law, Boston, USA	"Self-Realisation, Human Rights, and Separation of Powers: A Democracy-Seeking Approach"	K E Klare "Self-Realisation, Human Rights, and Separation of Powers: A Democracy-Seeking Approach" (2015) 26 <i>Stell LR</i> 445 - 470
2016	Justice Sisi Khampepe, Constitutional Court	"Meaningful Participation as Transformative Process: The Challenges of Institutional Change in South Africa's Constitutional Democracy"	S V Khampepe "Meaningful Participation as Transformative Process: The Challenges of Institutional Change in South Africa's Constitutional Democracy" (2016) 27 <i>Stell LR</i> 441 - 453
2017	Judge Mahomed Solomon Navsa, Supreme Court of Appeal	"Human Rights and the Rule of Law – A Bulwark against Corruption and Maladministration?"	M S Navsa "Human Rights and the Rule of Law – A Bulwark against Corruption and Maladministration?" (2017) 28 <i>Stell LR</i> 529 - 539
2018	Justice Mbuyiseli Madlanga, Constitutional Court	"The Human Rights Duties of Corporations and Other Private Actors in South Africa"	M Madlanga "The Human Rights Duties of Corporations and Other Private Actors in South Africa" (2018) <i>Stell LR</i> 359 - 378
2019	Mr Thembikile Kimi Makwetu, Auditor-General of South Africa	"Constitutional Accountability for Public Resources: The Role of the Auditor-General"	T K Makwetu "Constitutional Accountability for Public Resources: The Role of the Auditor-General" (2019) 30 <i>Stell LR</i> 318 - 332
2021	Judge Navi Pillay, Former UN High Commissioner for Human Rights	"South Africa's Engagement with International Human Rights Law"	N Pillay "South Africa's Engagement with International Human Rights Law" forthcoming (2021) <i>Stell LR</i>



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Profile of Navi Pillay



Judge Navi Pillay

Photo credit: <https://www.aba-icc.org>

Judge Navi Pillay grew up in KwaZulu-Natal (then Natal Province) during the apartheid period. In the 1960s she was a student at the University of Natal, graduating with a BA LLB. During this period, she was active in various student organisations resisting the racial oppression and injustices of the apartheid regime.

After earning her law degree, she became the first black woman to open her own law practice in Natal Province. As an attorney, she was involved in defending anti-apartheid activists and exposing the use of torture and the deplorable treatment of prisoners.

In 1982 she graduated with an LLM, followed in 1988 by a Doctor of Juridical Science (SJD) from Harvard Law School. In 1995, she was appointed an acting judge on the High Court in KwaZulu-Natal – the first black woman to serve on the bench in KwaZulu-Natal.

Shortly thereafter, she was elected by the United Nations (UN) General Assembly to serve as a judge at the International Criminal Tribunal for Rwanda, set up to adjudicate international crimes in the aftermath of the Rwandan Genocide of 1994. She held this post for eight years, including four years as its president. In this role, she is best remembered for the ruling that rape and sexual assault constitute acts of genocide.

In 2003, she was elected by the UN as a judge on the International Criminal Court, a post she held until 2008, when she was confirmed by the UN General Assembly as its High Commissioner for Human Rights.

She served as the High Commissioner for Human Rights at the UN from 2008 to 2014. During her tenure, she distinguished herself for her principled and courageous defence of human rights, particularly in relation to groups experiencing systemic discrimination such as women, migrants, indigenous peoples, people living with disabilities, lesbian, gay, bisexual and transgender people. Moreover, she emphasised the need to focus not just on political and civil rights, but also economic, social, and cultural rights, and championed the right to development. As High Commissioner, she was also actively involved in promoting the agenda of UN institutional reforms with a view to strengthening the overall system of human rights protection.

Subsequent to completing her term as High Commissioner, she has been involved in a number of initiatives. She was appointed to the High Level Panel on the Assessment of Post-Apartheid Legislation chaired by Former South African President Kgalema Motlanthe, and is a member of the African Group for Justice and Accountability.

Currently she is serving as an ad hoc judge on the International Court of Justice (based in The Hague) in the application brought by The Gambia against Myanmar alleging violations of the Genocide Convention against its Rohingya people. In addition, she is President of the International Commission against the Death Penalty based in Madrid, and President of the Advisory Council of the Nuremberg Principles Academy, which supports the fight against impunity for international crimes such as genocide, war crimes and crimes against humanity.



*South Africa's Engagement with International Human Rights Law**

Judge Navi Pillay

Former United Nations High Commissioner for Human Rights



1. Introduction

I am honoured to deliver the 15th Annual Human Rights Lecture in celebration of the centenary of the Law Faculty, University of Stellenbosch. I thank Prof Sandra Liebenberg and Prof Nicola Smit for inviting me.

In January 1995, I assumed my post outside the country as a judge on the United Nations International Criminal Tribunal for Rwanda in Arusha, Tanzania. When I arrived, I was seen as the face of democratic South Africa. I am sure that that was the experience of many other South Africans who were posted outside of our borders. The children on the dusty streets of Arusha would call after me "Mandela" or "Bafana Bafana". I imagine they are dancing joyously to "Jerusalem" today.

The struggle for freedom and fundamental rights in South Africa was won with the collective world-wide support of the international community and civil society organisations, human rights defenders and ordinary people who, as children, stopped eating South African oranges in support of United Nations ("UN") sanctions against the apartheid regime.

Over the years, I received many gratuitous compliments on our country's achievements: our peaceful revolution, exemplary Constitution and Bill of Rights, and our trusted leaders. Judges and lawyers shared their enthusiastic approval for our progressive laws and the influential decisions of our Constitutional Court. These include groundbreaking judgments on socio-economic rights, the abolishment of capital punishment, giving prison inmates the right to vote, providing protection for victims of domestic violence, and opening up the production of generic antiretroviral drugs for HIV/AIDS relief despite opposition by patent monopolies.

AIDS activists told me, with tears of gratitude, that the UN World AIDS Conference hosted by South Africa in my hometown of Durban was "saved" by two heroes - Justice Edwin Cameron, the incumbent Chancellor of this University and Professor Dr Jerry Coovadia. Because of this rich recent past, as well as the reception and perception of post-apartheid South Africa by human rights advocates, people likewise regularly tell me of their hope and expectation that South Africa will exercise its moral authority and take the lead on our continent and in the rest of the world for the protection of human rights.

In this lecture, I will examine whether we have acted consistently and vigorously to deliver on the Mandela promise, namely, his insistence that: "Human rights will be the light that guides our foreign affairs."¹

This is, to be sure, a story that predates Mandela and one cannot begin to understand where South Africa is today only on the basis of where it started in 1994. We must recall that there was much that needed to be overcome and changed.

South Africa's foreign policy objectives have included a focus on human rights, peace and security, and economic development. South Africa was a founding member of the United Nations in 1945 with apartheid leader, Jan Smuts, helping to craft the UN Charter's preamble, including its reference to human rights.²

It is remarkable to think that leaders and states actively violating human rights were among those expressing their importance. Of course, as commitment to human rights grew internationally and the horrors of apartheid became more widely understood, South Africa was suspended by the General Assembly for its apartheid policies in 1974. It was only readmitted in 1994 after the country dismantled apartheid.

*The editorial assistance of Christiaan Van Schalkwyk is acknowledged with gratitude.

1 N Mandela "South Africa's Future Foreign Policy" (1993) 72(5) *Foreign Affairs* 86-88.

2 Charter of the United Nations (24 October 1951) I UNTS XVI.

South Africa's history of expulsion and readmission into the UN membership has built and reinforced expectations that South Africa would and should hold a principled view and position on human rights on the international scene, and in Africa in particular. The new South Africa was in this sense, born in a "human rights moment". Human rights and democratic principles became founding principles of our Constitution, a document that has since become the envy and blueprint of many states emerging from autocracy into the promise of a democratic and human rights abiding future.³

We likewise situated our country not as an island unto itself, but as a member of a community of states aspiring to make respect for human rights a global norm. The preamble to our Constitution is specific that our place is within "the family of nations". That means we never claim "South Africa first" like Donald Trump's "America first". Our country cannot go it alone. Divided, as they say, we fall. We must thus instead follow the path of multilateralism.

Our Constitution further enjoins respect for international law. Section 39(1)(b) states that courts "must consider international law" when interpreting the Bill of Rights. Moreover, section 233 states that:

"When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

Of course, these are mere words. Let me now turn to the action and to South Africa's record on turning its human rights rhetoric into reality.

2. South Africa's external record in human rights protection

2.1 Peace and security

South Africa has played and continues to play an important role within the multilateral system, taking up leadership roles in UN bodies and the African Union, while supporting and contributing towards the peace and security structures in both of these institutions. I will cover each in turn.

2.1.1 The African Union

South Africa champions African priorities and contributes to the African Union ("AU") and Pan-African agenda on peace and development. President Cyril Ramaphosa served as the chair of the AU until February this year and pressed for the urgent and equal distribution of Covid-19 vaccines to COVAX countries. He condemned the ugly trends of nationalism, greed and hoarding by rich countries of Covid-19 treatment drugs to the detriment of poor countries in Africa in particular.⁴

As a member of the AU's Peace and Security Council, South Africa is deeply engaged in conflict prevention and resolution, and addressing accountability for serious human rights abuses in the context of the many violent conflicts in Africa.

South Africa is playing a role in peace building, mediation and reconstruction efforts in countries in the midst of, or only recently emerging from, conflicts in Africa. I recall that when I was UN High Commissioner for Human Rights, South Africa requested the help of human rights advisers from my office to work with them in advancing reconstruction efforts in Madagascar. South Africa likewise played a significant role in the UN peacekeeping mission in Darfur, Sudan, before withdrawing after 12 years, in 2016.

In December 2020, South Africa's ambassador to the UN, Jerry Matthews Matjila told a press briefing that an AU-led mediating team had met with President Abiy Ahmed Ali of Ethiopia in the context of the ongoing fighting in Tigray and the ensuing humanitarian crisis.⁵ The efforts showed South Africa's commitment to conflict resolution, but sadly, Matjila also noted that President Abiy Ahmed had rebuffed its offer to help negotiate the crisis.

³ Constitution of the Republic of South Africa, 1996 ("the Constitution").

⁴ eNCA "Ramaphosa pleads with world leaders to support Covax" (24-02-2021) <<https://www.enca.com/news/cyril-ramaphosa-pleads-world-leaders-support-covax>> (accessed 24-06-2021).

⁵ S Fillion "South Africa, Bringing the Continent Inside the Security Council" (3-12-2020) *PassBlue* <<https://www.passblue.com/2020/12/03/south-africa-bringing-its-continent-inside-the-security-council/>> (accessed 24-06-2021).

At the same briefing, Marthinus van Schalkwyk, the political co-ordinator of the particular mission to the UN, reported that the Force Intervention Brigade, (“FIB”), an initiative of the South African Defence Force, was agile, able to move quickly and robustly in conflict zones, and was making substantial contributions to peace and security in Eastern Democratic Republic of Congo (“DRC”). The DRC is a region that remains volatile and dangerous for civilians who are regularly subject to killings, attacks and rapes. In this way, South Africa’s FIB was helping the UN implement its obligations under Chapter 8 of the UN Charter, in cooperation with regional and sub-regional organisations.

The FIB is a military formation embedded within the UN Organisation Stabilization Mission in the DRC (“MONUSCO”). It was authorised by the UN Security Council on 28 March 2013 through Resolution 2098. The FIB is the first UN peacekeeping operation specifically tasked to carry out targeted offensive operations to “neutralise and disarm” groups considered a threat to state security and civilian security. This is the first time in the history of UN peacekeeping that peacekeeping was extended to include peace enforcement.

South Africa is a troop-contributing nation in UN peacekeeping missions, thus ensuring the safety and protection of civilian lives. Rich countries rarely contribute peacekeepers and so the burden falls on developing countries. On a visit to the conflict areas in eastern DRC, I personally met and spoke with our brave soldiers. At great personal risk, they face the hazards of confrontation with heavily armed rebels in jungle terrain. South Africa’s crucial contribution to saving civilian lives in conflicts in Africa cannot be underestimated.

But it must also be acknowledged that accusations have been made against our troops for acts of sexual abuse of children and girls in the countries where they are stationed.⁶ These remain uninvestigated, as do alleged crimes committed by peacekeepers more generally. Such complaints must be investigated and suspects prosecuted in an appropriate forum. They should not be ignored, or actively swept under the rug, by troop-contributing states who claim jurisdiction over the actions of their troops, but do little to investigate their alleged crimes. There is something particularly harrowing about soldiers being sent to protect vulnerable peoples only to become their predators.

South Africa could provide leadership in addressing this pressing issue, perhaps by encouraging the creation of an international body with jurisdiction to investigate the atrocities committed by UN peacekeepers. Likewise, human rights education must be included in the training programmes of soldiers deployed in peacekeeping missions, and more women should also be included in the ranks for peacekeeping duties.

2.1.2 UN Security Council

South Africa served as a non-permanent member of the Security Council (“SC”) in the years 2007-8; 2011-12; and 2019-2020. It has focused on peace and security in Africa and pushed for greater co-operation between the SC and the AU. It has also advocated for the appointment of African envoys and mediators, and the inclusion of women and youth throughout the peace and dialogue agenda.

South Africa is a staunch supporter of SC reform in the context of paralysing divisions and fixed geo-political positions adopted by the veto-wielding countries US, UK, France, Russia and China, colloquially referred to as the “P5”. In the face of deadlock in dire situations of wartime and atrocities like Syria, South Africa has joined calls made to the P5 not to use their vetoes when evidence of atrocities is reported. To meet the deadlocks caused by the fractured relationship between the “P2” (Russia and China) and the “P3” (US, UK and France), South Africa formed alliances with elected African and Caribbean members of the SC, termed the “A3+1”.

African countries tend to have limited influence in the SC on matters affecting their continent. This was evident in June 2019, after the fall of Sudanese President Omar al Bashir in April 2019. The A3 pushed for a SC statement stressing the need for a transition to civilian rule in Sudan. The A3 supported the principle of “the primacy of African-led initiatives in search of a lasting solution of the crisis in Sudan” which should proceed without external interference.⁷ However, the A3 were blocked by Russia and China who had close military ties to the government of Sudan. The Russian objection was that such a statement interfered in Sudan’s internal affairs. South Africa’s alliance with the A3 is reportedly guided by what is best for the

6 “South African troops accused of abuse in DR Congo: UN” (12-02-2018) *Daily Maverick* <<https://www.dailymaverick.co.za/article/2018-02-12-south-african-troops-accused-of-abuse-in-dr-congo-un/>> (accessed 24-06-2021); “No defence for sexual abuse” (22-11-2019) *Mail & Guardian* <<https://mg.co.za/article/2019-11-22-00-editorial-no-defence-for-sexual-abuse/>> (accessed 24-06-2021)

7 “Press Conference by the African Members (A3) of the United Nations Security Council (Côte d’Ivoire, Equatorial Guinea & South Africa) on the situation in Sudan at the UNSC Press Stakeout, UN Head Quarters, New York” (06-06-2019) *Department: International Relations and Cooperation* <<https://www.dirco.gov.za/docs/speeches/2019/matj0606a.htm>> (accessed 24-06-2021).

continent. Clearly, what is not in the best interests of our continent is the failure of South Africa to acknowledge the Covid-19 pandemic as a major threat to peace and security in and of itself. António Guterres, the UN Secretary General, has said:

“The fury of the virus illustrates the folly of war. This is why I am calling for an immediate ceasefire in all corners of the world. It is time to put armed conflict on lockdown and focus together on the true fight of our lives.”⁸

His urgent appeal was not heeded.

A French initiative for a SC resolution addressing the Covid-19 pandemic was stymied by the insistence of the Trump administration on inclusion of language that referred to the pandemic as the “Wuhan virus”, a wanton and racially tinged attempt to apportion blame for the pandemic on China. An initiative by Estonia for a statement from the SC that the novel coronavirus constituted a threat to international peace and security and calling for greater international cooperation in confronting the pandemic was opposed and overruled by China, along with South Africa.⁹

They argued that the pandemic did not constitute a threat to international peace and security and was therefore not the business of the SC, despite its effects on virtually every political issue facing the globe. They maintained their narrow-minded position in spite of support for an earlier 2014 SC resolution that declared Ebola a threat to international peace and security. The latter resolution urged the world to send more health care workers and supplies to the hardest hit countries, namely, Liberia, Sierra Leone and Guinea.¹⁰

In siding with China in this instance, South Africa lost the opportunity to serve the interests of Africa and poor countries by obtaining the SC's stamp for international cooperation and action while furthering the democratisation of the international response and recovery from the pandemic.

2.2 Covid-19 vaccines

It is commendable that South Africa, together with India has sponsored a proposal at the World Trade Organisation (“WTO”) to waive intellectual property rules related to Covid-19 vaccines and treatments temporarily to allow for generic manufacturing around the world.¹¹ South Africa has also warned that at the current pace of vaccinations, most poor nations will be left waiting until at least 2024 to achieve mass Covid-19 immunisation.

A waiver of the rules would help boost global supplies of vaccines for the poorest countries. The proposal is for the waiver to be accompanied by the open sharing of vaccine knowledge and technology and by coordinated global investment in research, development and manufacturing capacity. This initiative underscores that threats to public health are global and global co-operation is vital.

The United States of America under the Trump administration used their Defence Production Act to boost their own vaccine production as a consequence of which exports of critical raw materials were stopped. This is hindering and delaying vaccine production in other parts of the world.

The Serum Institute of India working with Novavax, the world's largest maker of vaccines and a critical supplier of the UN-backed COVAX facility, urged President Biden to lift the US embargo on exporting raw materials needed to make the vaccine doses.¹²

8 A Guterres “The fury of the virus illustrates the folly of war” (23-03-2020) *United Nations* <<https://www.un.org/en/un-coronavirus-communications-team/fury-virus-illustrates-folly-war>> (accessed 24-06-2021).

9 “UNSC President Estonia calls Security Council's handling of COVID-19 ‘a shame’” (02-05-2020) *The Economic Times* <<https://economictimes.indiatimes.com/news/international/world-news/unsc-president-estonia-calls-security-councils-handling-of-covid-19-a-shame/articleshow/75502430.cms?from=mdr>> (accessed 28-06-2021); “Estonia's presidency in UN Security Council” (04-05-2021) *Website: Republic of Estonia, Ministry of Foreign Affairs* <<https://vm.ee/en/activities-objectives/estonia-united-nations/estonias-presidency-un-security-council>> (accessed 28-06-2021).

10 UNSC, UN Doc S/RES/2177 (18 September 2014).

11 A Usher “South Africa and India push for COVID-19 patents ban” (05-12-2020) *The Lancet* <[https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)32581-2/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)32581-2/fulltext)> (accessed 29-06-2021).

12 “India COVID vaccine maker urges Biden to lift exports embargo” (16-04-2021) *Aljazeera* <<https://www.aljazeera.com/news/2021/4/16/indias-covid-vaccine-maker-urges-biden-to-lift-exports-embargo>> (accessed 28-06-2021).

A victory was achieved when, in May 2021, President Biden decided to issue Intellectual Property waivers for Covid-19 vaccines.¹³ However other developed countries, like Canada and Germany, have thus far not thrown their support behind the initiative.

2.3 UN Bodies

South Africa's record of interventions for the protection of human rights within UN bodies is inconsistent and often at odds with our constitutional principles of human rights and justice for victims. South Africa has resorted to avoidance tactics such as "non-interference in the internal matters of states" or claiming that to promote human rights would risk "creating dangerous precedents". They have relied on this approach to refrain from supporting human rights protection measures in the context of conflicts, even when credible evidence of massive violations of international human rights law ("IHRL") and international humanitarian law ("IHL") are produced by UN Agencies and civil society organisations.

It was painful for me, as High Commissioner, to watch South Africa's failure to react to the extensive investigations and reports from my office of mass civilian killings, sexual violence and forced displacement during armed conflict in countries like Syria, Iraq, Sudan and Sri Lanka.

Many people in the international community who had collaborated in the anti-apartheid struggle have expressed their bewilderment: how would South Africans have felt if we had sat back and said apartheid is an internal matter and we should not interfere? As we know, and as I have mentioned already, the struggle against apartheid was bolstered and its end precipitated in part because states made the "internal problems" of South Africa their human rights concern. They stood in solidarity with those seeking justice and dignity here. Hence, it bewilders and hurts many that less than three decades later, South Africa does not do the same for those facing chemical weapons attacks in Syria, genocide in Sudan, or ethnic cleansing elsewhere.

During South Africa's first tenure as a non-permanent member of the SC (2007-8), it did not support resolutions condemning human rights abuses in Zimbabwe and Myanmar, and the inclusion of climate change in the agenda of the SC. The rationale given for such positions at the time was the need to respect the division of roles among the various organs of the UN. In the case of Zimbabwe, South Africa reportedly attempted to block a SC resolution, which ultimately resulted in a fact-finding mission being sent to investigate violence following the 2008 elections.

In 2007, South Africa opposed a draft resolution condemning the killing of peaceful demonstrators by the military junta in Myanmar, arguing that condemning the junta's violence "does not fit with the UN Charter mandate," because of its focus on internal affairs.¹⁴ South Africa claimed that this was a "fundamental" reason for voting the resolution down and that its stance at the SC proved it had been "true to itself".

Ironically, their reaction is reminiscent of the opposition from the apartheid government in 1960 when Myanmar (then Burma) moved for a SC condemnation of the Sharpeville massacre. The ambassador for the apartheid government had said that discussion of the massacre would be "a most dangerous precedent."¹⁵ In my view, the real dangerous - and troubling - precedent is a post-Mandela government offering the same excuse as did the apartheid regime to avoid condemning human rights abuses.

In July 2012, South Africa also opposed a SC resolution for action to protect victims of massive atrocities in Syria, siding with Russia, China and Pakistan, and giving as their reason that the draft was "unbalanced." Few, if any, places have experienced worse violence and displacement than Syria has over the past decade and it is difficult to see how any condemnation of the blatant atrocities committed there could be "unbalanced".

All of this seems to be symptomatic of a deeper suspicion among South African governments about the place of human rights at the UN.

¹³ "Will increase raw materials supply of Covid vaccines globally: Adar Poonwalla thanks Joe Biden" (04-06-2021) *mint* <<https://www.livemint.com/news/india/will-increase-raw-materials-supply-of-covid-vaccines-globally-sii-ceo-adar-poonwalla-thanks-joe-biden-11622809552712.html>> (accessed 28-06-2021).

¹⁴ Notes following Briefing by Deputy Minister Aziz Pahad (17 January 2007) <<http://www.dirco.gov.za/docs/speeches/2007/paha0117.htm>> (accessed 28-06-2021).

¹⁵ S Shetty "Challenges and opportunities in a changing world" (17-06-2013) *Open Global Rights* <<https://www.openglobalrights.org/challenges-and-opportunities-in-changing-world/>> (accessed 28-06-2021).

My predecessor as UN High Commissioner for Human Rights, Louise Arbour, was blocked from addressing the SC on human rights abuses, mainly by South Africa, on the premise that human rights were not relevant to the peace and security mandate of the SC. Human rights, they insisted, should be raised at the UN Human Rights Council ("HRC") in Geneva. This stretches the imagination and is out of touch with reality. In delivering on its mandate of peace and security, how can the SC exclude consideration of human rights abuses in conflict situations that are often alerts to such conflicts brewing? It can't. Human rights cannot be isolated from matters of international peace and security. And indeed, the SC has repeatedly regarded issues of human rights as integral to its work and an important part of its reasoning and decision-making in response to political violence and war.

Upon my election as UN High Commissioner for Human Rights in August 2008, one of the first things I did was to try to gain access to the SC. I asked then Secretary General Ban Ki-moon for his support. The Secretary General responded that it was not up to him, but depended on the SC extending an invitation to me. He recounted that he had once entered the SC accompanied by then High Commissioner for Human Rights, Louise Arbour, but that she was asked to leave the SC. Who had objected to her presence? South Africa's Ambassador, Dumisani Khumalo.

Soon after I had assumed office, I received a telephone call from Ambassador Khumalo in which he informed me that Poland was hosting a retreat for incoming members of the SC and wished to invite me to address the retreat, and he encouraged me to accept. This was the entry point I had been hoping for.

In my remarks, I stressed the need for the SC to take human rights on board in their peace and security agenda. I argued that they should allow the High Commissioner for Human Rights to present fact-based information stemming from her investigations in conflict situations to the SC to enable it to make informed decisions. Ambassador Khumalo argued that human rights are not the business of the SC. Some participants observed quietly to me that I was courageous in taking a position that was opposed by my government. I later understood that South Africa and developing countries were wary of human rights being misused by powerful countries to target and humiliate developing countries while exempting themselves from similar scrutiny.

During my six-year term as High Commissioner for Human Rights, from 2008-2014, the SC paid increasing attention to human rights and invited me to address the Council more times than all the previous High Commissioners put together. I reported on human rights situations in Syria, Libya, Mali, Central African Republic, the Occupied Palestinian Territories, South Sudan and Ukraine. I addressed the SC on prevention of conflict and made clear to States that lack of responsiveness on the part of the Council had led to the loss of thousands of lives, massive displacement, and enormous suffering.

I have urged the SC on a number of occasions to refer situations where it is suspected that war crimes and crimes against humanity have been committed, to the International Criminal Court ("ICC"). Regrettably, the international community remains unable to react strongly and quickly to crises, including situations of grave human rights violations with high potential for regional overspill.

Nevertheless, the increasing requests from the SC for information and advice on human rights issues were most welcome. They demonstrated heightened recognition that human rights are fundamental to peace, security and development. Unfortunately, the space that was opened to brief the SC on human rights violations in countries on the SC agenda appears to have been closed. My successor, High Commissioner, Zeid Ra'ad Al Hussein complained bitterly about being blocked from addressing the SC.

South Africa must play a role in increasing the authority of the SC in the field of human rights, and curtailing the use of the veto in situations of mass human rights violations.

The P5 veto-wielding states have done as little in responding to the world's health pandemics as they have done in resolving the many conflicts raging in the world. When most needed, international action is often missing. There are informal consultations in closed meetings by the SC, but no meaningful outcomes. The SC must be willing and able to act promptly and collectively as the UN Charter directs, in order to address threats as they emerge, to resolve conflicts, and to prevent and punish violations of IHL and IHRL.

As the UN reaches its 75th anniversary, it is a chilling fact that the inspiring promise of the Universal Declaration of Human Rights that “[a]ll human beings are born free and equal in dignity and rights” remains but a dream for far too many people.¹⁶ The World Bank has estimated that between 88 million to 115 million people will be pushed into extreme poverty due to the impact of the Covid-19 pandemic in 2020; and that 150 million are at risk of extreme poverty in 2021.¹⁷ The worst affected are those living in rural areas and the informal sectors. The economic, social and health impacts of Covid-19 highlight the interrelated challenges of poverty, conflict, human rights abuses, displacement and a host of other manifestations of systemic disadvantage.

The pandemic makes clear that, more than ever, multilateralism rather than unilateralism, is the answer for combating the pandemic and building a better new normal. We need to act globally to stem the rising tide of illiberal trends, of nationalism, populism and authoritarianism that threaten our fundamental freedoms and that collectively frustrate progress on providing human rights protections to all. We need to act in solidarity to safeguard the planet against climate change, against threats to peace, and ensure protection and promotion of the human rights of all persons, leaving no one behind.

On the occasion of the UN's 75th anniversary, SG António Guterres is promoting an ambitious plan to ensure a UN that is “fit for purpose” in the 21st century. The SG told the SC on January 9 2020 that, “[w]e must return to fundamental principles, we must return to the framework that has kept us together. We must come home to the UN Charter.”¹⁸ So too must South Africa.

Over the last two decades, the world has made impressive strides in setting human rights standards and the tools to implement them. None of these advances would have been made without the collective drive and action pursued with energy and resilience by civil society. They have thrown their weight behind much-needed reforms of the SC because the great conflicts and human rights violations need to be addressed at a macro-level by the highest UN body. Governments, more especially ours, must work in consultation with civil society organisations and respect their expertise.

2.4 SA's Human Rights Engagement with the HRC and UN Mechanisms

Our record of engagement with the current constellation of international human rights institutions has been mixed, positive in some instances and questionable in others. For example:

- South Africa has ratified all major UN human rights treaties. It is a state party to the International Covenant on Civil and Political Rights (“ICCPR”), the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”), the International Convention on the Elimination of all Forms of Racial Discrimination (“ICERD”), the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child, and the Convention on the Rights of Persons with Disabilities (“CRPD”). It has also ratified most of the Optional Protocols providing for individual complaints procedures in respect of these treaties. Regrettably, however, it has not ratified the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (“OP-ICESCR”).
- In 2001, South Africa hosted the first UN World Conference against Racism, Racial Discrimination, Xenophobia and Related Violence, which led to the landmark Plan of Action that sets a principled international agenda for the global movement against racism and xenophobia. The implementation of the Action Plan remains of crucial importance in our country and in the world as racial violence and xenophobia are on the rise, leading to protests such as the “Black Lives Matter” movement. South Africa should take the lead in the implementation of the Plan of Action.
- In 2010, the UN General Assembly (“GA”) successfully voted to reinstate a reference to sexual orientation into its biannual resolution on extrajudicial killings after the Third Committee of the GA had deleted the reference. The African group voted for deletion of the reference. But South Africa broke ranks with them and voted for the resolution restoring the reference, thereby upholding our constitutionally-recognised right to be free from discrimination on grounds of sexual orientation.

¹⁶ Universal Declaration of Human Rights, UN General Assembly Resolution 217 A (III) of 10 December 1948, article 1.

¹⁷ C Lakner, N Yonzan, D Mahler, R Aguilar & H Wu “Updated estimates of the impact of COVID-19 on global poverty: Looking back at 2020 and the outlook for 2021” (11-01-2021) *World Bank Blogs* <<https://blogs.worldbank.org/opendata/updated-estimates-impact-covid-19-global-poverty-looking-back-2020-and-outlook-2021>> (accessed 28-06-2021). See also: D Mahler, N Yonzan, C Lakner, R Aguilar & H Wu “Updated estimates of the impact of COVID-19 on global poverty: Turning the corner on the pandemic in 2021?” (24-06-2021) <<https://blogs.worldbank.org/opendata/updated-estimates-impact-covid-19-global-poverty-turning-corner-pandemic-2021>> (accessed 28-06-2021).

¹⁸ “Secretary-General upholds value of UN Charter for a world in turmoil” (09-01-2020) *UN News* <<https://news.un.org/en/story/2020/01/1055061>> (accessed 28-06-2021).

- In June 2011, the Human Rights Council adopted Resolution 17/19, which was sponsored by South Africa. This resolution is the first UN Resolution on sexual orientation and gender identity that expressed “grave concern” at violence and discrimination against individuals based on their sexual orientation and gender identity. Its adoption paved the way for the first official UN report on the issue prepared by my office, the Office on the High Commissioner for Human Rights (“OHCHR”).¹⁹ The report’s findings formed the basis for a panel discussion that took place at the HRC in March 2012. This was the first time a UN intergovernmental body held a formal debate on the subject. The right to sexual orientation is a right under our Constitution and so South Africa’s support is in line with our constitutional values.

This is the good part. But there is a dark side to South Africa’s engagement.

In June 2016, constitutional principles appear to have fallen by the wayside when South Africa abstained from a Resolution adopted by the HRC regarding the appointment of an Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity.²⁰ South Africa gave as their reason for their vote:

“How the current sponsors have sought to build on the South African initiative of 2011, has added divisive dimensions and created unnecessary acrimony in this Council. [...] [M]aximum consensus [...] could have been achieved had it not been for the arrogant and confrontational approach adopted”.²¹

The resolution was adopted by a vote of 23 in favour; 18 against and 6 abstentions, including South Africa.

Other unfortunate developments followed. For example:

- At the June 2014 session of the HRC, a resolution on the protection of the family was adopted that did not recognise the various and diverse forms of families. South Africa voted in favour of the resolution and also backed Russia’s attempts to shut down discussion of more inclusive language on the “family”; that would have recognised single parent households, child-headed households, same-sex relationships, couples without children, and other familial constellations in line with the jurisprudence of our courts.
- At the September 2014 session of the HRC, South Africa voted in favour of three amendments to the resolution on the death penalty moved by Saudi Arabia and China that would have deleted language relating to the human rights of those facing the death penalty, and inserted language affirming the sovereign right of all countries to develop their own legal system and penalties. The amendments were all rejected and the original draft was adopted.
- At the March 2014 session of the HRC, South Africa supported proposals by Russia, Ethiopia, Saudi Arabia, Egypt and China aimed at weakening a resolution on the right to free protest.
- South Africa took negative stances on other rights issues too. It abstained from voting on all country situations, including those on North Korea, Syria, Sri Lanka and Iran. South Africa has justified its actions by arguing that it does not support work on country specific situations because they are highly politicised and divisive. This is despite the fact that country specific resolutions play a key role in shedding light on abuses and giving a stronger voice to victims. They also allow for the creation of independent UN mechanisms that help expose abuse and pressure rights-violators.
- In July 2016, the HRC adopted a resolution on the protection of human rights defenders working to promote economic, social and cultural rights by a vote of 33 member states of the HRC to just 6 against and 8 abstentions.²² Yet South Africa voted against the resolution, giving as one of its reasons that it objected to the generalisation that there is a clampdown on civil society in many countries. It also asserted that in South Africa there is no clampdown of civil society. South Africa also objected to imposing new obligations on states relating to the provision of long-term supportive funding of civil society organisations, new reporting obligations on states on civil society space, facilitating

19 UNHRC *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, UN Doc A/HRC/19/41 (17 November 2011).

20 UNHRC *Protection against violence and discrimination based on sexual orientation and gender identity*, UN Doc A/HRC/RES/32/2 (15 July 2016).

21 Statement by Ms. Nozipho Mxakato-Diseko at the 32nd session of the Human Rights Council, transcript available in *Compilation of the Adoption of the 2016 SOGI Resolution* compiled by Allied Rainbow Communities International and the International Lesbian, Gay, Bisexual, Trans and Intersex Association 88-89, available at <https://ilga.org/downloads/SOGI_Resolution_Vote_compilation.pdf>.

22 UNHRC *Protecting human rights defenders, whether individuals, groups or organs of society, addressing economic, social and cultural rights*, UN Doc A/HRC/RES/31/32 (20 April 2016).

favourable banking terms to allow for cross-border transfer of funds for organisations, and to provide tax incentives for donors.

Before I retired as High Commissioner, I had prioritised the need for greater democratic space for civil society organisations in the Office's next four-year plan of action. This was actioned by High Commissioner Zeid Ra'ad Al Hussein in his report to the HRC at its 32nd session. He noted that "clampdowns on public freedoms and crackdowns on civil society activists and human rights defenders are hacking away at the forces which uphold the healthy functioning of societies."²³ Thirty obstructionist amendments to the text of the resolution on human rights defenders were proposed by a small group of states comprising Russia, China, Egypt, Cuba, Pakistan and South Africa - all of which were defeated before the resolution was adopted by a majority of members of the HRC.

The resolution, while expressing concerns, emphasises the positive contribution of independent, diverse and pluralistic civil society to peace, security, sustainable development and human rights. It highlights the need to safeguard the ability of civil society actors to exercise the rights to freedom of expression, opinion, assembly and association fully. These rights are entrenched in our Bill of Rights. Accordingly, South Africa should have been championing them and committing to the protection of human rights defenders.

In March 2014, at a Universal Period Review ("UPR") on China by the HRC, China objected to a request from NGO representatives to be permitted to use their own two-minute speaking time to observe a minute of silence for Chinese activist, Cao Shunli. She had been travelling to the HRC to present her remarks when she was detained in China and died in custody a week before the HRC session was due to begin in Geneva. South Africa joined China in opposing the request from the NGOs stating that it was "irregular and incompatible with the rules of procedure", and that it would "create a dangerous precedent." Once again, democratic South Africa used the same language as the apartheid regime had done in years prior in order to block freedom of speech.

South Africa's votes on a raft of human rights resolutions are inconsistent and not necessarily in conformity with the ethos of our Constitution. In September 2019, South Africa voted in favour of resolutions condemning violations of human rights in Yemen and Myanmar, but abstained on condemning violations in Venezuela, Burundi and Syria. On the other hand, in a welcome move, it supported the right to development and right to social security and abolition of the death penalty.

At the 42nd session of the HRC in September 2019,²⁴ South Africa voted in favour of the following resolutions:

- A/HRC/RES/42/1 on redressing the current imbalance in the geographical composition of OHCHR;
- A/HRC/RES/42/2 condemning violations of human rights in Yemen;
- A/HRC/RES/42/3 condemning serious violations of the human rights of the Rohingya Muslims in Myanmar;
- A/HRC/RES/42/4 strengthening OHCHR cooperation and technical assistance to Venezuela;
- A/HRC/RES/42/9 condemning the use of mercenaries;
- A/HRC/RES/42/13 South Africa introduced a draft resolution on the right to social security - which was adopted without a vote;
- A/HRC/RES/42/23 in support of the right to development;
- A/HRC/RES/42/24 Abolition of the death penalty - South Africa joined the sponsors and voted in favour;
- A/HRC/RES/42/28 Cooperation with the UN;

²³ Zeid Ra'ad Al Hussein *Opening Statement: Human Rights Council 32nd session by Zeid Ra'ad Al Hussein*, United Nations High Commissioner for Human Rights, Geneva 13 June 2016.

²⁴ See <<https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session42/Pages/ResDecStat.aspx>> for the complete list of resolutions, decisions and President's statements of the session.

South Africa abstained on the following resolutions:

- A/HRC/RES/42/25 condemning violations of human rights in Venezuela;
- A/HRC/RES/42/26 condemning violations of human rights in Burundi;
- A/HRC/RES/42/27 condemning violations of human rights in Syria.

3. *Assessment of South Africa's human rights performance by UN committees*

The UN Committee on Economic, Social and Cultural Rights, in its concluding observations on South Africa's initial report, expressed its concern at reports of human rights defenders, particularly those working to promote and defend the rights under the Covenant in the mining and environmental sectors, being threatened and harassed.²⁵ It also expressed concern at the overly broad and vague definition of "public violence", "which may have a deterrent effect on participants in peaceful protests."²⁶ The Committee was also concerned at the high number of rejections of protest applications owing to deliberate restrictions or inadequate understanding of legislation by public officials. It recommended that the State party provide a safe and favourable environment for the work of human rights defenders to promote and protect economic, social and cultural rights, including by investigating cases of intimidation, harassment and violence against human rights defenders and to bring perpetrators to justice.

The Committee on the Elimination of All Forms of Discrimination against Women issued a report on May 12, 2021 on South Africa's failure to tackle domestic violence.²⁷ The Committee found that South Africa's low levels of prosecution and conviction in domestic violence cases and the frequent failures by the police to serve and enforce protection orders exposed survivors to repeated abuses and resulted in the violation of women's fundamental rights. Out of 143 824 requests for protection orders in 2018-2019, only 22 211 were granted and in many of these cases, the protection orders merely instructed the abuser to sleep in another room in the same house. The Committee concluded that SA had failed to comply with its obligation to effectively investigate, prosecute and punish cases of domestic violence. It has also failed to provide systematic and effective capacity-building for the judiciary and law enforcement bodies, thereby violating the rights of South African women to live free from domestic violence.

Findings such as these by international human rights committees should be taken seriously by the authorities as they chillingly echo the frantic calls for protection against violence and the violent deaths of women in our country.

4. *International criminal justice*

South Africa is one of the founding members of the ICC. It signed the Rome Statute establishing the Court on the day it was adopted, 17 July 1998, and ratified it on 27 November 2000.²⁸ Throughout the process of negotiation and adoption of the Rome Statute, South Africa played a leading role. At the international conference to adopt the Rome Statute, then Minister of Justice, Abdullah Omar, said the following on behalf of the States of the Southern African Development Community:

"The establishment of an International Criminal Court would not only strengthen the arsenal of measures to combat gross human rights violations but would ultimately contribute to the attainment of international peace. In view of the crimes committed under the apartheid system, the International Criminal Court should send a clear message that the international community was resolved that the perpetrators of such gross human rights violations would not go unpunished."²⁹

²⁵ UN CESCR *Concluding Observations on the Initial Report of South Africa*, UN Doc E/C.12/ZAF/CO/1 (29 November 2018), paras 12-13

²⁶ Para 12

²⁷ CEDAW *Inquiry concerning South Africa under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, UN Doc CEDAW/C/ZAF/IR/1 (12 May 2021)

²⁸ Rome Statute of the International Criminal Court A/CONF.183/9 (17 July 1998)

²⁹ United Nations Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court, Rome (5 June-17 July 1998), *Official Records* vol.11 UN, New York (2002).

This good intent was put to shame by South Africa's failure to arrest and surrender Omar al-Bashir, former President of Sudan, on a warrant issued by the ICC in June 2015. The decision was declared unlawful by the North Gauteng High Court of South Africa as well as by the Supreme Court of Appeal.³⁰ South Africa was acting in breach of its obligations under the Implementation of the International Criminal Court Act 27 of 2002 ("the Implementation Act"). South Africa's failure to act on the warrant of arrest was also found to be in violation of the Rome Statute by the Pre-Trial Chamber of the ICC.

In addition, hundreds of researchers, academics, civil society leaders and human rights advocates were dismayed that a country that had taken a leadership position on International Criminal Law now flouted its obligations to a court it had so eagerly helped to create.³¹

In response to widespread condemnation, South Africa attempted to withdraw from the ICC, giving as its reason, among others, that it considered that both the Implementation Act and the Rome Statute compelled the government to arrest persons who may enjoy diplomatic immunity under customary international law. It also claimed that its obligations to the ICC complicated conflict resolution efforts. It will be recalled that the High Court ruled that the government must revoke that decision as it was made without the authority of Parliament.³² If South Africa wanted to withdraw, it would have to do so in a procedurally coherent and legal manner.

The Statute of the ICC provides that immunities which may attach to the official capacity of a person, under national law or international law, shall not bar the court from exercising its jurisdiction over such a person.³³ Similar provisions appear in the Implementation Act.³⁴

At the African Union, declarations have been made indicating that sitting heads of state or government, and other senior state officials are immune from prosecutions during their tenure of office. The Malabo Protocol would give heads of state and senior government officials immunity from prosecution at the African Court of Justice and Human Rights, should the court eventually consolidate itself as a tribunal with jurisdiction over international crimes.³⁵ South Africa has not distanced itself from these declarations and, in protecting al-Bashir from prosecution by the ICC, has lent credence to the notion that senior political officials should be immune from prosecution - even in instances where they are alleged to have perpetrated genocide.

It is evident that this idea of immunity for political leaders arose because of the profile of the persons indicted, and not because of the nature of the alleged crimes or the profile of the victims. The notion that political power can be a safe haven for impunity would create an unacceptable double standard for accountability. It is also incompatible with international law and our Constitution.

Currently, South Africa has a Bill before Parliament seeking an amendment to the Implementation Act to permit immunity from prosecution for heads of state and government and senior officials.³⁶ The Bill has not yet been enacted, but it is concerning that there has been no move to withdraw the Bill. By enacting the Implementation Act, South Africa accepted responsibility for undertaking prosecution of heinous crimes.

30 *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development* 2015 5 SA 1 (GP); *Minister of Justice and Constitutional Development and others vs Southern African Litigation Centre* 2016 3 SA 317 (SCA).

31 For critiques, refer to M du Plessis G Mettraux, "South Africa's Failed Withdrawal from the Rome Statute" (2017) 15 *Journal of International Criminal Justice* 361-370; N Dyani-Mhango "South Africa's (unconstitutional) withdrawal from the Rome Statute: A note on *Democratic Alliance v Minister of International Relations and Cooperation*" (2018) 34 *South African Journal on Human Rights* 268-289.

32 *Democratic Alliance v Minister of International Relations and Cooperation (Council for the Advancement of the South African Constitution Intervening)* 2017 (3) SA 212 (GP).

33 Article 27(2) of the Rome Statute of the International Criminal Court (last amended 2010) (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90.

34 Section 4.

35 African Union, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, A.U.Doc. No. STC/Legal/Min. 7(1) Rev. I (adopted 30 June 2014).

36 International Crimes Bill (B37-2017), available at <<https://www.parliament.gov.za/bill/2291658>>.

Fortunately, South African courts have delivered judgments that have placed the judiciary at the forefront of ensuring effective accountability for international crimes, and have thereby ensured that our country does not become a safe haven for suspected perpetrators of atrocious crimes. Other cases also provide hope that justice will be carried out for victims of egregious crimes across the continent.³⁷

I view the recent decision from the government of Sudan to allow Omar al-Bashir to stand trial before the ICC as proof that the arc of history is long and bends towards justice. South Africa should learn from its past blunders, recognise the futility of protecting alleged war criminals, and actively play a role in bending the arc of history in the direction of accountability.

5. *Death penalty*

With respect to South Africa's performance on the death penalty, the country has voted in favour of all the eight UN General Assembly ("UNGA") resolutions on a moratorium on the use of the death penalty since the first resolution in 2007. In the last resolution vote, South Africa was one of a record 123 countries that voted in favour of a moratorium.

Unfortunately, South Africa has also voted in favour of the sovereignty amendment in the 17 November 2020 vote of the UNGA resolution at the Third Committee. It was one of 95 countries that voted in favour of inserting the sovereignty language. These 'sovereignty clauses' are misused by states to avoid implementing the relevant resolution.

On its international impact, the judgment of our Constitutional Court that led to the abolition of the death penalty has been very influential, and has been used by lawyers and judges in apex courts around the world.³⁸ The Constitutional Court decision is currently being cited in an ongoing case on abolition in the Supreme Court of South Korea in which the International Commission against the Death Penalty ("ICPD") has submitted an *amicus curiae* brief. The ICPD is a non-profit organisation based in Madrid. I chair the body and the 23 commissioners include former heads of state, governments, ministers, senior UN officials, international judges and academics. South Africa is a founding member state of the ICPD. I hope that, in the coming months and years, its position on the matter will be more consistently aligned with efforts to abolish the use of the death penalty across the globe.

6. *The UN Arms Trade Treaty adopted by the UNGA on 2 April 2013*

South Africa played a leading role in pushing for the Arms Trade Treaty ("ATT"), and ratified it in December 2014, on the date it came into force.³⁹ The ATT is a landmark multilateral treaty that regulates the international trade in conventional weapons. Prior to the ATT there was no international regulation of trade in conventional arms and a strong resistance to what was perceived, particularly by the US, as internal matters. The ATT prohibits state parties to the treaty from exporting weapons if they know at the time of authorisation that these weapons will be used to commit war crimes, be used against civilians, or violate the Geneva Conventions.

Following the 1994 Cameron Commission investigation into Armscor's sales of weapons and its recommendation that the sale of arms in democratic South Africa align with the values of the Constitution,⁴⁰ the country adopted the National Conventional Arms Control Act 41 of 2002 ("NCACA") as well as an oversight body, the National Conventional Arms Control Committee ("NCACC").⁴¹

³⁷ *National Commissioner, South African Police Service and Another v Southern African Human Rights Litigation Centre and Another* 2014 (2) SA 42 (SCA); *National Commissioner of the South African Police Services vs Southern African Litigation Centre* 2015 1 SA 315 (CC).

³⁸ *S v Makwanyane* 1995 3 SA 391 (CC).

³⁹ UNGA *The Arms Trade Treaty*, UN Doc A/67/234B (11 June 2013).

⁴⁰ South Africa Commission of Inquiry into Alleged Arms Transactions between Armscor and one Eli Wazan and Other Related Matters: First report (5 June 1995), 65.

⁴¹ As amended by Act 73 of 2008.

South Africa's foreign policy positions on the arms trade are thus inconsistent with their stated commitments. This incoherence has a significant negative impact on respect for human rights across the world. At the Security Council debates on the conflict in Yemen, South Africa's Minister of International Relations and Cooperation, Naledi Pandor, as well as our ambassadors condemned the attacks on civilians in Yemen. In April 2019 Ambassador Jerry Matjila, the permanent representative of South Africa to the United Nations told the Security Council:

"Regrettably we have noticed recent clashes around Hodeidah which have been the most intense since the signing of the Stockholm agreement. We call on all parties to refrain from further escalation."⁴⁷

In October 2020, Ambassador Xolisa Mabhongo, South Africa's Deputy Permanent Representative to the United Nations, likewise expressed concern at the humanitarian crisis caused by the war in Yemen and said that, "the surging violence risks worsening the widespread man-made hunger crisis in Yemen".⁴⁸

The Department of International Relations and Cooperation is thus aware of the devastation caused by the war in Yemen and purports to seek its resolution. If that is true, it must account for why it has yet to use its role within the NCACC to discourage the export of South African weapons that may fuel the conflict.⁴⁹

7. Conclusion

In conclusion, while South Africa has often played an important role in a number of pressing human rights issues, the record makes clear that its engagement with international human rights law is a cause for concern. Whatever group or regional loyalties South Africa supports, these must not be at the expense of adherence to its stated commitments to constitutional rights and values, and promises of their implementation.

When South Africa adopted its Constitution in 1996, it committed to making human rights an incontrovertible and unimpeachable part of its law and its politics. The world may have changed since then, but that commitment is needed now more than ever.

47 Statement by Ambassador Jerry Matjila, Permanent Representative of South Africa to the United Nations, during the Security Council Meeting on Yemen (15 April 2019) <<http://www.dirco.gov.za/docs/speeches/2019/matj0415.htm>> (accessed 28/06/2021).

48 Ambassador Xolisa Mabhongo: Security Council Meeting on Yemen (15 October 2020) <<https://www.gov.za/speeches/statement-ambassador-xolisa-mabhongo-deputy-permanent-representative-south-africa-united-1>> (accessed 28/06/2021).

49 Open Secrets Investigation Report, 77-81.