

SA one step closer to ICC withdrawal

Four years after SA defied the International Criminal Court (ICC) by hosting former Sudanese President (and ICC fugitive) Omar al-Bashir, it has started the process of withdrawing from the court's Rome Statute. At the same time, notes [Legalbrief](#), it is unveiling an alternative system for the prosecution of international crimes which is intended to provide for the prosecution of genocide, crimes against humanity and war crimes. This is expected to come into effect once SA withdraws from the Rome Statute of the ICC. [Business Day](#) reports that the government and a number of other African countries believe **the Rome Statute is in conflict with international law and with some of the provisions of the Diplomatic Immunities and Privileges Act** as it does not allow for immunity of certain people from prosecution. The details of the new system are contained in the International Crimes Bill, which is before the National Assembly's Justice & Correctional Services Committee. Members of the committee will be briefed about the new system on Wednesday. The Bill provides for the investigation and prosecution of international crimes committed inside and outside SA.

It also criminalises international crimes under domestic law and gives extraterritorial jurisdiction to SA courts to adjudicate them. It also provides for the extradition or surrender of those accused of international crimes to foreign states or entities respectively and regulates the immunity of heads of state and diplomats from prosecution for such crimes as is provided for in customary international law. Crimes committed outside the country can only be prosecuted locally if the accused is an SA citizen, or is not a citizen but is ordinarily resident in SA, or the crime has been committed against an SA citizen or against a person who is ordinarily resident in SA, or if the suspect is in SA. The Bill acknowledges that international crimes must not go unpunished, but also notes that SA plays an important role in resolving conflicts in Africa, notes the [Business Day](#) report. It says the country is hindered in its relations with the heads of state of foreign countries – especially those where there are serious conflicts – by the implementation of the Rome Statute of the International Criminal Court Act. This compels SA to arrest heads of state wanted by the court for genocide, crimes against humanity and war crimes and to surrender such people to the court **'even under circumstances where SA is actively involved in promoting peace, stability and dialogue in those countries'**. The report notes SA's resolve to withdraw from the Rome Statute was confirmed by the saga surrounding its failure to arrest al-Bashir when he visited the country in 2015, despite a warrant for his arrest having been issued by the ICC.

Pretoria argues that it couldn't have arrested al-Bashir as required by signatories to the Rome Statute because he was in the country for an event that fell under the AU's jurisdiction. The ICC rejected this, saying the country had failed to comply with its international obligation to do so. Al-Bashir, who was indicted in 2009 and 2010 for his alleged role in atrocities in Sudan's western Darfur region, was deposed in a coup this year after a 30-year dictatorship. A report on the [Moneyweb](#) site notes that African nations have criticised the ICC, which tries individuals for war crimes, genocide and crimes against humanity, noting that **nine of the 10 investigations it has opened since its formation in 2002 are on the continent**. They also note that the ICC didn't act against the US for invading Iraq over claims it had weapons of mass destruction that were never found, or against Israel for crimes committed against Palestinians. DA justice spokesperson Glynnis Breytenbach said the Bill was 'a bad piece of legislation which typifies the legacy of the Zuma administration when the ANC acted on all its worst instincts'.

[Legalbrief](#) reports that *SA has frequently been caught in international tangles relating to high-profile foreign fugitives*. These include mafia kingpin Vito Palazzolo who lived in SA for many years before being arrested in Thailand in 2012; former Rwandan intelligence boss Colonel Patrick Karegeya, who was assassinated in Johannesburg in 2013, and former Zimbabwean first lady Grace Mugabe who sparked an outcry when she received diplomatic immunity following an assault case in Sandton. In the latest case, the Gauteng High Court (Johannesburg) on Friday ruled that Justice Minister Ronald Lamola must decide anew whether to extradite former Mozambique Finance Minister Manuel Chang to either the US or his home country. A [News24](#) report notes that Chang is wanted by the US in connection with allegations of conspiracy to commit fraud and taking millions of dollars in bribes in a \$2bn loan scandal. The ruling comes after the court heard arguments on 16 October in an application Chang lodged to compel Lamola to give effect to his predecessor's decision to extradite him to that country, instead of the US. In a counter-application, **Lamola asked that former Minister Michael Masutha's decision be reviewed and set aside on the basis that it was contrary to the provisions of the Extradition Act**. During Masutha's term, Chang faced extradition requests from both the US and Mozambique – where he enjoyed automatic immunity as a lawmaker until it was lifted in January. Masutha decided to have Chang extradited

to his home country, Mozambique.

Judge Denise Fisher sent both Masutha's decisions to extradite Chang to Mozambique as well as his dismissal of the US extradition request to Lamola for him to rule on the matter, according to a Reuters report on the **TimesLIVE** site. 'Both decisions are remitted to the current Minister for determination,' the written ruling said. The parties can appeal the decision. Subject to any appeal, Lamola will now make the final call in a 10-month battle for Chang's custody that has put the US and Mozambique at loggerheads, just as other powers such as Russia crank up efforts to gain influence in the African country. One factor in Lamola's move to have his predecessor's decision revoked was a concern that Chang still benefited from political immunity in Mozambique. In an affidavit in August, Mozambique's Attorney-General said before a lawmaker's immunity can be formally lifted in the country, that person must appear before a judge there, which Chang cannot do while he is in SA. **If sent to the US, analysts say he may reveal more details of the debt scandal, with potential implications for senior members of the ruling party in Mozambique,** where the political situation is fragile following a contested election. The US charges relate to loans obtained from Credit Suisse and Russia's VTB bank that were guaranteed by the Mozambican Government but some of which were not disclosed, that Chang signed off on during his 2005-2015 term as Finance Minister. Mozambique has not yet formally charged Chang with a crime, prompting civil society organisations to argue that he should be sent to the US.

The US has welcomed the ruling. **Business Day** quotes US embassy spokesperson Robert Mearkle as saying they appreciated the 'well-reasoned decision' of the High Court. 'The US would like to thank the SA Ministry of Justice for its diligent work in pursuing this case and stands prepared to offer more information to the Republic of SA as necessary to move forward,' said Mearkle. **The US hoped the outcome would be beneficial to all parties in the long term,** he said, adding: 'The US also thanks its partners in the fight against corruption and impunity.'

Since June 2014 when African leaders agreed to set up an African international crimes court, there's been no progress towards its establishment. A recent **Institute for Security Studies** (ISS) analysis notes that the Malabo Protocol, adopted at an AU summit in Equatorial Guinea, needs to be ratified to give the court jurisdiction over international crimes and transnational organised crimes. If created, it would be the world's first regional court to address international crime. It could, for example, try perpetrators of drug trafficking in Kenya, war crimes in the CAR or DRC, leaders of violent extremist groups such as Boko Haram or al-Shabaab, and other large-scale human rights abuses on the continent. ISS notes that such jurisdiction could go a long way in addressing impunity for serious crimes in Africa. 'The court is an ambitious project, which is no doubt partly why its existence is still far from becoming a reality. **Only 15 of 55 AU member states have signed the protocol.** Each of these 15 states would still need to ratify it before any steps could be taken for the court to start work. The ratification challenges are enormous and complicated. The protocol adopted in Malabo is an amendment to an earlier protocol that seeks to merge two courts. The first of these courts is the African Court of Justice and Human Rights, which is largely non-existent beyond its creation by the Constitutive Act of the AU.'