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REFLECTIONS ON BASHIR, NUCLEAR DEALS, MUGABE AND PUTIN

THE ROLE OF PUBLIC INTERNATIONAL LAW – IS THIS WORLD NOT MY HOME?

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INTRODUCTION

It used to be that international law concerned South African practitioners and judges very little. John Dugard was regarded as a one-man international law band. And international lawyers were regarded as just that: lawyers that did rarefied work internationally, but which had little to no relevance domestically. No more. While slowly at first, international law has moved from being regarded as external and exotic, to become an integral, binding, and justiciable part of South Africa's domestic and constitutional law. With increasing frequency and importance, international law is steadily now a core part of litigation and judicial decision-making across a range of areas.

The exotic is increasingly being "brought home". That this has happened is probably inevitable as a matter of constitutional law, but the speed of the homecoming was turbo-boosted by a number of events, as our judges have had to deal with executive decisions that have been challenged in court. Griffits Madonsela chose to subtitle our talk: *Is this world not my home?* So in my talk I'm going to keep the theme of home: the homecoming of international law, homegrown international law cases; and how accountability, under international law through South Africa's domestic courts, has influenced alleged war criminals, like President Putin, to stay home. And in doing so, I'm going to discuss four decisions to try and highlight the good news aspects of South Africa's place within international law; of how our country, with its courts and its legal system often achieve surprising results in service of the rule of law.[1]

HOMECOMING OF INTERNATIONAL LAW

First the homecoming. The Constitutional Court has observed that there is "no escape from the manifest constitutional injunction to integrate, in a way the Constitution permits, international law obligations into our domestic law".[2] Still, it is only now in the third decade of our constitutional democracy, that we can stand back to survey how our courts have, by successive decisions, interpreted and applied the Constitution to develop a South African approach to international law's use and application. What one sees is a careful weaving together of international law and our domestic law through its interpretation by the Constitutional Court and other courts.[3]

HOMEGROWN INTERNATIONAL LAW CASES

That brings me to my second theme – which is the manner in which South African courts have been increasingly confronted with international law issues. In part, the number of international law cases coming before our courts has been accelerated by the Zuma effect, with the Zuma administration's executive decisions giving rise to court challenges implicating international law. But here, critically, I think it is important to see how these cases gave South Africa an opportunity – through its courts – to be at the forefront of important international law developments. They also highlight the robust nature of our constitutional democracy, with our courts' rulings strengthening the rule of law in ways that may be the envy of other countries. Three examples suffice:

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THE BASHIR CASE

As we all recall, President Omar al-Bashir arrived in Pretoria for an AU conference in June 2015, but was not arrested despite South Africa being a member of the Rome Statute of the International Criminal Court (ICC), and despite there being an ICC warrant for his arrest for genocide in Sudan. The international law argument run by the South African government was that Bashir had immunity as a head of state, and Zuma's administration took a regional line: it said it was respecting the AU's endorsement of that immunity when it hosted him in Pretoria at the AU Summit. The case made its way to the Supreme Court of Appeal. A colleague at Oxford, a leading international lawyer, tells me that his class took the morning off to watch the argument – an early-day example of what is now the frequent livestreaming of international law hearings. And we can be proud that the South African courts were leading in this field. Zuma's AU's regionalism move had inadvertently elevated our domestic courts to international law paragons. And the judgment of the SCA, by Wallis JA, has been cited and feted in scholarly articles as robustly highlighting that South Africa was at the forefront of international law developments: our country, through its ICC legislation, had done what few others had – confirming that the fact that you are a head of state did not entitle you to immunity for international crimes. So we were, and remain, a trailblazer on the issue of head of state immunity. That finding meant that when President Putin was invited to attend the BRICS conference here last year in August 2023, there was no debate that immunity was no protection for him, and that he could face arrest for war crimes despite being Russia's strongman president. But I'll come back to that.

Partly because of the international backlash against South Africa for failing to arrest a wanted genocidaire in the form of Bashir, the Zuma administration then decided to withdraw from the ICC statute. This was immediately challenged in the courts in South Africa. Successfully so. It's a decision which handily reminds one of how **not** to withdraw from treaties: the High Court accepted the argument that you could not withdraw from treaties by bypassing the Constitution's demands about parliamentary processes – and here again, we are fortunate as South Africans. My British friends say they wish that their courts might have had the same judicial powers to have challenged their government's own calamitous Brexit decision. Another reminder of how strong our democracy is, despite its difficulties. And, as we shall see when we come to Putin, because we stayed in the Rome Statute as a party, there was scope to threaten Putin with arrest if he set foot in South Africa.

THE NUCLEAR DEAL

Then, the second case: the Nuclear deal: President Zuma and Minister Tina Joemat-Pettersson clandestinely entered into an international agreement with President Putin in 2014 to allow for nuclear power stations to be built in South Africa by Russia. The decision was challenged in the Cape High Court. It is a masterful judgment, which carefully navigates the treacherous international law waters of "act of state" (a doctrine I'll discuss in a second), and sets out the law on how South Africa must enter treaties. The judgment set aside Zuma's Russian frolic – thereby not only saving us and future generations from decades of financial misery in stock to the Russians, but also denying Putin a chance to meddle in our democracy. Instead of cementing Moscow's relationship with Pretoria, the nuclear deal demonstrated Russia's limited reach. And the real reason for Russia's failure had to do with South Africa's strengths, which are highlighted in the cases I'm discussing with you: these strengths include a country proud of its hard-won rights, resilient in terms of democratic governance, and blessed with strong civil society organisations, press freedoms and courts that remain independent.[4]

A good example of how progressive our democracy is, is on full display by what happened in the Nuclear case. There we had to navigate a peculiar feature of international law cases involving international agreements like the Russian treaty. The argument run by government lawyers all over the world to cover – and sometimes to cover up – the decisions taken by their countries on the international plane, is that the decisions are special. So special, that no court has the competence or

experience to interfere. This defence – of non-justiciability, or "act of state"[5] – is one that exists in England as well as other common-law jurisdictions. You may have read recently that the US government used that argument successfully before its own courts to contend that a judge in the Federal Court did not have the power or jurisdiction to decide whether President Biden and other US officials were complicit in acts under the Genocide Convention for supplying weapons to Israel.[6] And this principle was readily pressed by the government lawyers in the Nuclear case. They argued that the Russian treaty involved issues of international law so deeply implicating foreign and international relations, that our courts were duty-bound to defer to the government on such difficult questions; effectively, to yield to what had been done on the international stage. So, the case was carefully pleaded. While the Nuclear case potentially entailed our South African judges considering international acts of state and treaties, the applicants focused their challenge as one brought against a *domestic* government respondent (the Minister of Energy) who had failed to comply with a *domestic* legal requirement. This meant that the Court's power of judicial review was not blunted by the international relations aspects that the government so keenly tried to press into service.

The foreign shenanigans in Moscow had to be implemented through domestic steps back home. And the domestic mistakes and shortcuts would be the undoing of the international "acts of state". As but one example, the Minister's decision to generate nuclear energy required her to make a determination under section 34 of the Energy Regulation Act, with Nersa's concurrence. But the minister tried to issue her section 34 declaration furtively, and Nersa concurred in it without any consultation with the public. That was a reviewable error. The court adopted our arguments, criticising the government for failing to explain "how it acted in the public interest without taking any steps to ascertain the views of the public or any interested or affected party" in relation to nuclear energy.

"…OUR COURTS HAVE HAD TO GRAPPLE WITH THESE QUESTIONS AND THEREBY BUILD A HEALTHY JURISPRUDENCE BY DRAWING THE EXOTIC INTERNATIONAL LAW FIRMLY HOME."

It set aside Nersa's decision for flunking the test for rationality based on procedural grounds. The Russian deal was thus set aside, with the help of critical legality and international law arguments.

GRACE MUGABE

Then there's the third case: Grace Mugabe. During August 2017 South Africa hosted the SADC Summit of the Heads of State. The then President of Zimbabwe, Robert Mugabe, attended and his wife First Lady of Zimbabwe, Grace Mugabe, also travelled to South Africa. While here, some women came to visit her sons, who were staying at a hotel in Sandton. The sons weren't there, but Grace Mugabe found Ms Engels and confronted her about the whereabouts of her sons. Allegedly, when Engels could not give her an answer, Grace Mugabe proceeded to whip Engels with an extension cord. The attack is said to have lasted approximately 20 minutes, during which Grace Mugabe's 10 bodyguards stood by and watched. Engels needed 14 stitches to close up the gashes on her face and her scalp caused by the assault. Grace Mugabe, untouchable in Zimbabwe, found herself about to be arrested in South Africa after Engels laid a criminal charge of assault with intent to cause grievous bodily harm against her. Coming to Mugabe's rescue, the Minister of International Relations and Co-operation, Maite Nkoana-Mashabane, signed a notice under the Diplomatic Immunities and Privileges Act, granting Mrs Mugabe "immunity" under international law, on the basis that she was a spouse of a head of state. A case was urgently brought to challenge this conferral of immunity. Freedom Under Law argued successfully that in her rush to grace Grace with immunity, the minister had overlooked that there was no international law norm according a spouse of a head of state immunity from prosecution in a foreign land. The international law arguments were of course delicate and fascinating, but again, FUL's case was ultimately won by grounding them in domestic law. Recall that the minister had used a power under the Diplomatic Immunity Act, to grant an immunity. But you cannot grant an immunity by domestic law, that does not exist at international law. And so the High Court held that by trying to confer that immunity, the Minister committed an error of law. There was a further public law twist. The Minister tried to argue that the case was moot. That was because by the time of the hearing, Robert Mugabe was no longer head of state and Grace had returned to Zimbabwe. And so, argued the minister, the question of Grace Mugabe's immunity had ceased to be something the court needed to pronounce on. The court would have none of it, because of that old chestnut for administrative lawyers: *Oudekraal*. FUL argued that the minister's notice, conferring immunity on Grace Mugabe, stood until set aside. And the minister's own decision had kept the case alive. That

was because even though Grace Mugabe had no immunity under international law, she would still be entitled to rely on it in South Africa as it had been conferred upon her by an administrative act, which remained in place until set aside.

So the case wasn't moot, and the court went on to review and set aside the minister's grant of immunity. And Grace Mugabe has not returned to South Africa for shopping since.

Let me end these provocations by saying this: these three examples confirm how international law has come to feature as an important buttress against executive overreach. And our courts have had to grapple with these questions and thereby build a healthy jurisprudence by drawing the exotic international law firmly home. Furthermore, our home-grown international law jurisprudence over the past few years has encouraged the development of accountability under international law. That brings me to my fourth case and final closing topic: using international law against international criminals – the Putin case.

KEEPING INTERNATIONAL CRIMINALS HOME

Since March last year, the travel plans of one particular accused war criminal became the subject of much speculation and legal debate. On 17 March 2023, the ICC announced that it had issued an arrest warrant for President Putin. This, unsurprisingly, occasioned world-wide interest and attention. One focus of this was President Putin's invitation, together with other heads of state, to attend the August 2023 BRICS Summit hosted in South Africa – with South Africa being an ICC Rome Statute state party. Politicians, political pundits, journalists, scholars and lawyers began to ask: Will Putin attend the summit, or won't he? If he does, will South Africa arrest him? If it doesn't, wouldn't South Africa violate its international and domestic legal obligations?

These questions came to a head in May 2023, when the Democratic Alliance launched an urgent application in the Pretoria High Court. In that application, the DA sought declaratory and interdictory relief: asking the High Court to confirm South Africa's obligation to arrest President Putin, and to ensure that the necessary steps were taken to domesticate and execute the ICC arrest warrant. The seriousness of the issues was reflected in the number of international and domestic NGOs that joined the litigation as *amici curiae*, broadly supporting the DA's relief (including Amnesty International, Human Rights Watch, the International Commission of Jurists and the Southern African Litigation Centre). The matter was ultimately concluded by way of an agreed court order, on the day of the hearing.

The case is important: it highlights that South Africa does respect its obligations, even if those obligations had to be clarified and ultimately agreed after litigation. And the effect? As you will recall, President Ramaphosa announced that President Putin would no longer be attending the BRICS Summit in person (the only one of five BRICS heads of state not to do so). Putin was forced to stay home and Zoom into the conference virtually from his computer in the Kremlin – a big man, made small.

This was rather momentous. It is the first arrest warrant issued by an international criminal tribunal for a sitting head of state of a permanent security council member, and South Africa was caught up in the delicate foreign relations issues of having to arrest Putin. In response to the litigation, the South African government made the important announcement that it took the necessary steps to domesticate the ICC arrest warrant, so that should Putin ever enter South Africa, he would be arrested. In this regard, the court order in the Putin matter recorded the following:

> [The Director-General: Department of Justice and Constitutional Development] on 29 June 2023, signed a letter forwarding the ICC's request for cooperation to the National Director for Public Prosecutions (NDPP) to apply for an arrest warrant for President Putin in terms of section 9(1) of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, which was sent to the NDPP by his office on 17 July 2023.

Little wonder that soon thereafter it was announced that Putin would no longer be attending the BRICS Summit in August. This, coupled with the ICC's determination that all states parties, not just South Africa, are obligated to arrest Putin, are matters of no small moment for international justice and the fight against impunity. Even if we are still a long way from seeing President Putin standing trial for war crimes, the world has become a much smaller place for him.

CONCLUSION

I can thus conclude. We can now join the dots. We have a homecoming of international law principles, frequently invoked before our courts and applied in judgments that have generated home-grown and in some cases leading jurisprudence that is cited, studied, and in certain respects – marvelled at – abroad. This is good for South Africa, and for the international rule of law. And by those judgments, South Africa has not only remained a part of the ICC – with Zuma's efforts to withdraw from the ICC statute being undone by our courts. Our continued membership of the ICC's Rome Statute has meant that we could bring cases to court, and eventually agree an order, that domesticated the ICC arrest warrants and made them operational here in Pretoria, in advance of the BRICS conference. Putin will never admit it, but the truth is that by those ICC warrants being brought home to operate in South Africa, Putin stayed home in Moscow. To use the subtitle of the talk that Griffits Madonsela SC assigned me in his invitation: the world is not [Putin's] home anymore. International law has shrunk it for him.

Notes

1 The author was counsel in the matters referred to. Senior Counsel, Ubunye Chambers and Adjunct Professor at University of Cape Town and Nelson Mandela University, member of Lincoln's Inn and Doughty Street Chambers, London.
2 *Glenister v President of the Republic of South Africa* 2011 (3) 347 (CC) para 202.
3 See further Andreas Coutsoudis and Max du Plessis, "We are all international lawyers; now what? Taking seriously the constitutional injunction to integrate international law obligations into South African law", *Constitutional Court Review*, Vol 10, Issue 1, Jan 2020.
4 See further https://www.dailymaverick.co.za/article/2022-04-07-how-the-russian-nuclear-deal-would-have-taken-south-africa-to-the-brink/
5 James Crawford & Martti Koskenniemi (eds) The Cambridge Companion to International Law (2012), p 59.
6 See further and more recently: Jed Odermatt and Bilyana Petkova, "A Political Question Doctrine at the International Court of Justice?" EJILTalk 26 Feb, 2024.