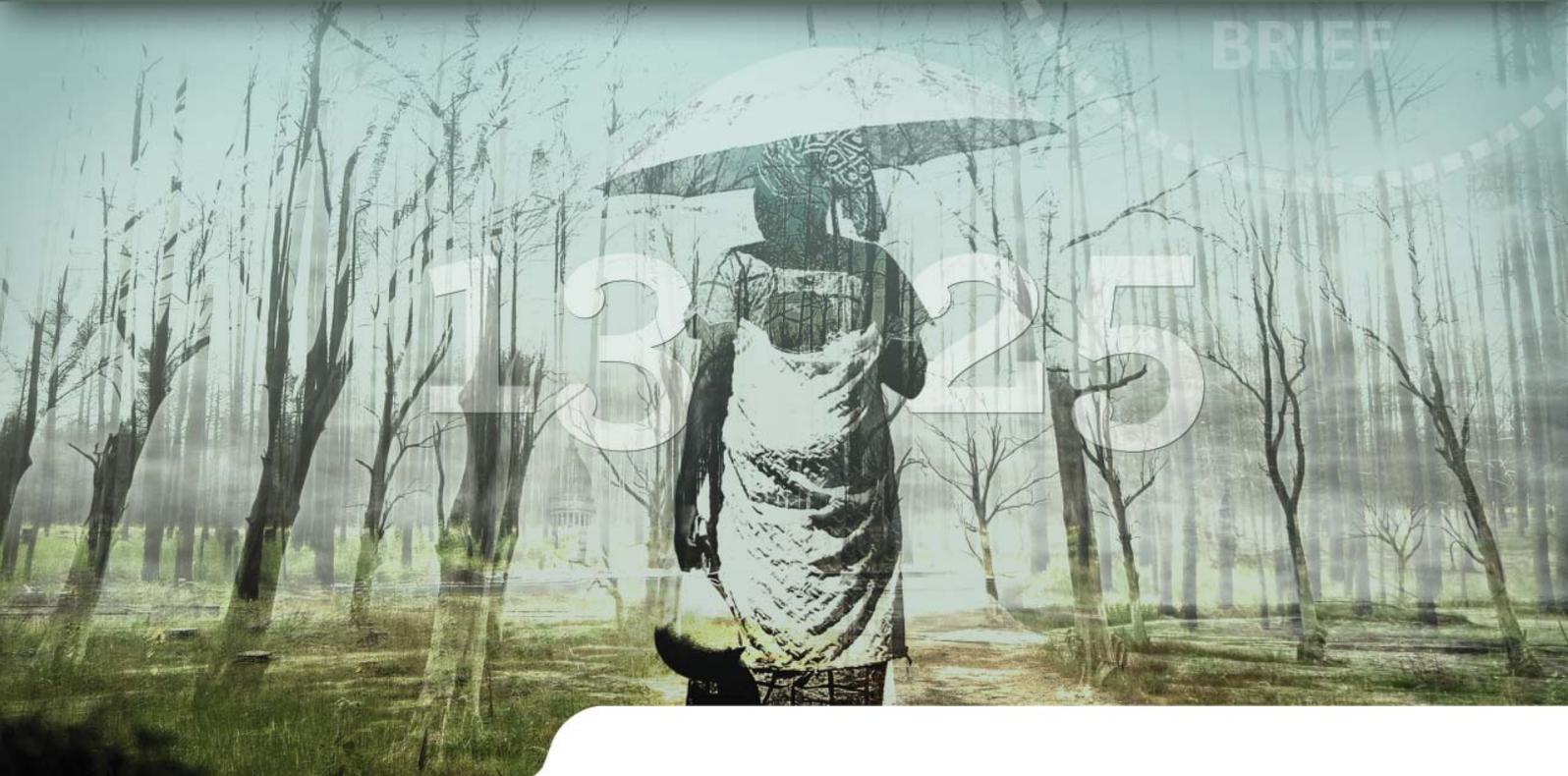


1325



CAPE TOWN, SOUTH AFRICA



AFRICA AND SOUTH AFRICA ON THE RIGHT TO PROTECTION, THE ICC, AND UNSC RESOLUTION 1325

Cape Town, South Africa

Date of publication: July 2017

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Funding for this policy brief is facilitated by the Foundation for Human Rights (FHR) through South Africa's Department of Justice and Constitutional Development and the European Union's (EU) Sector Budget Support Programme – Socio-Economic Justice for All (SEJA) Programme.

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Introduction

The Centre for Conflict Resolution (CCR), Cape Town, South Africa, and the Johannesburg-based Foundation for Human Rights (FHR), hosted three public dialogues on “The International Criminal Court (ICC) and Africa: Friend or Foe?” on 22 February 2017; on “South Africa and the Responsibility to Protect (R2P): Principles vs. Interests” on 30 March 2017; and on “Promoting Women’s Rights: Implementing United Nations Security Council (UNSC) Resolution 1325 in South Africa” on 25 May 2017.

Following its independence in 1994, post-apartheid South Africa through the Nelson Mandela and Thabo Mbeki administrations adopted foreign policy strategies that included, among other things, self-promotion as the leader of the “African Renaissance”, human rights, democracy, and good governance. Generally, South Africa has sought to promote multilateralism in the international system as the best means of maintaining global order, addressing global problems, mitigating the domination and unilateralism of powerful states, and empowering weaker countries. It has thus been argued that South Africa’s participation at the United Nations is driven by its intention to reform the organisation as well as showcase itself as a representative of the developing world and especially Africa, in an attempt to increase its global stature as a moral and African power. The three public dialogues convened by CCR and the FHR speak to a large extent to the successes, challenges, and solutions pertaining to the core principles that guide South Africa’s foreign policy. This policy brief connects and covers a number of conceptual, policy, and practical issues that relate to South Africa’s position on the responsibility to protect, taking into account the debates on the country’s compliance with ICC obligations and implementation of UNSC Resolution 1325.

“The United Nations Security Council has been imbued by the international community with the responsibility to act in three distinct ways: to prevent, to react, and to rebuild.”

1. The Responsibility to Protect

Sovereignty lies at the heart of the debate around the responsibility to protect, as such the R2P principles and a country’s interests are mutually inclusive and intertwined. The responsibility to protect comprises the following three pillars, in sequence: it is the state’s responsibility to protect its citizens; the international community has the responsibility to aid the state to realise this responsibility; and the international community has the responsibility to act when the state manifestly fails to uphold this primary responsibility. Of the three pillars, it is the latter that is controversial as it includes military intervention or the use of force. Giving the international community the right to intervene without consent because the state has failed to protect its citizens, or has become a perpetrator of human rights violations, is tricky, as this right can be abused to effect regime change by big powers. The United Nations Security Council has been imbued by the international community with the responsibility to act in three distinct ways: to prevent, to react, and to rebuild.

The African Union gives legal meaning to the responsibility to protect in its Constitutive Act, Article 4(h), emphasising the protection of civilians. In 2015, the African Union (AU) undertook about 60 interventions that included mediation, observer missions, and peacekeeping operations. Malte Brosig, of the Department of International Relations at the University of Witwatersrand, Johannesburg, noted that the responsibility to protect in Africa becomes controversial when it relates to military intervention, which as mentioned



(FROM LEFT TO RIGHT), ASSOCIATE PROFESSOR MALTE BROSIG, DEPARTMENT OF INTERNATIONAL RELATIONS, UNIVERSITY OF THE WITWATERSRAND (WITS), JOHANNESBURG; AMBASSADOR WELILE NHLAPO, FORMER SPECIAL REPRESENTATIVE OF SOUTH AFRICA TO THE GREAT LAKES REGION; AND FORMER NATIONAL SECURITY ADVISOR TO THE SOUTH AFRICAN PRESIDENT; PROFESSOR DIRE TLADI, DEPARTMENT OF PUBLIC LAW AND FELLOW AT THE INSTITUTE FOR INTERNATIONAL AND COMPARATIVE LAW IN AFRICA (ICLA) UNIVERSITY OF PRETORIA; AT THE PUBLIC DIALOGUE “SOUTH AFRICA AND THE RESPONSIBILITY TO PROTECT (R2P): PRINCIPLES VS. INTERESTS”, HELD AT 6 SPIN STREET, CAPE TOWN, MARCH 2017.

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has implications for regime change and is often decided by outsiders, who normally dominate the debates around such interventions. Military interventions are never free of power politics, although they include some humanitarian intentions on the part of the implementers. Military intervention neither ends domestic unrest nor improves personal security. The challenge with the responsibility to protect within the African Union is that in the implementation of military interventions there is less or no emphasis on the principles of sovereignty, inter-governmentalism, and pan-Africanism than the principles of good governance, transparency, and accountability.

2. South Africa and the Responsibility to Protect

South Africa's objective is to challenge the current geopolitical system in pursuit of a fairer global order. According to Dire Tladi of the Department of Public Law at the University of Pretoria, South Africa is ambivalent about the responsibility to protect, as it accepted the philosophy with some reservations that it can be misused by big powers to pursue their own interests. For example, South Africa voted in favour of UNSC Resolution 1973, which formed the basis for military intervention in the Libyan civil war to avert an unfolding humanitarian catastrophe, but it still cautioned against the abuse of the resolution. Thus, South Africa supports the underlying principle of the responsibility to protect, but is reluctant about the use of force to implement it. Brosig argued that the fear for misuse can be curbed by a strict adherence to the use of the International Commission on Intervention and State Sovereignty's (ICISS) six principles of right authority, just cause, right intention, proportional means, reasonable prospect for success, and consequences.



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PROFESSOR DIRE TLADI DEPARTMENT OF PUBLIC LAW AND FELLOW AT THE INSTITUTE FOR INTERNATIONAL AND COMPARATIVE LAW IN AFRICA (ICLA) UNIVERSITY OF PRETORIA AT THE PUBLIC DIALOGUE “SOUTH AFRICA AND THE RESPONSIBILITY TO PROTECT (R2P): PRINCIPLES VS. INTERESTS”, HELD AT 6 SPIN STREET, CAPE TOWN, MARCH 2017.

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3. The ICC and Africa

The International Criminal Court was created with the purpose of complementing national jurisdictions, but more especially to tackle issues of genocide, crimes against humanity, and war crimes. Since its establishment, the ICC has indicted 29 individuals including former Ivorian president Laurent Gbagbo; Sudanese president Omar al-Bashir; and Kenyan president Uhuru Kenyatta and his deputy, William Ruto. There has been a growing discontent with the ICC, centred primarily on the perception that it has been targeting African leaders and not indicting leaders from other parts of the world. African leaders are deeply concerned that three of the world's most populous nations – the United States (US), China, and Russia – are not members of the ICC, yet they continue to decide who should and should not be indicted by the ICC.

In order to circumvent the “Africanisation” of the ICC, the African Union Assembly of Heads of States and Government adopted the Malabo Protocol in June 2014, which extends the jurisdiction of the yet-to-be-established African Court of Justice and Human Rights (ACJHR) to try crimes under international law in a manner similar to

that of the ICC. The protocol prohibits the indicting of African heads of state and government officials, as well as shields them from criminal prosecution before the proposed African Court. In January 2017, the AU Assembly went on to adopt a strategy calling for a collective withdrawal from the ICC preceding the declarations by three African countries – Burundi, Kenya, and South Africa – signalling their withdrawal from the Rome Statute that established the ICC. South Africa's withdrawal was sparked by its failure to arrest Sudanese president Omar al-Bashir when he attended the African Union summit, which it hosted in Johannesburg in June 2015. This happened against a background of public protests and a court appeal led by human rights defenders.

4. South Africa and the ICC

South Africa is a signatory to the Rome Statute. On 19 October 2016, the South African Department of International Relations and Cooperation (DIRCO) signed an "instrument of withdrawal", which has since been declared irregular by the country's Constitutional Court. Efforts by Tshwane to sponsor an ICC Act Repeal Bill have suffered many setbacks, the latest being the 22 February 2017 Pretoria high court ruling that forced the South African government to revoke its withdrawal from the ICC. Nicole Fritz, an independent consultant in international human rights law, argued that South Africa loses more than it gains by withdrawing. South Africa's arguments for withdrawing included the following: remaining on the ICC contradicts South Africa's bid for peaceful resolution of conflict on the African continent, and supporting the ICC in its current form of being heavily influenced by the double standards of the superpowers will mean promotion of an unjust world order. Fritz further noted that South Africa's position on the ICC reveals some sense of confusion, given that South Africa was very influential in pushing for the establishment of the ICC yet now it is the vanguard of forces threatening the ICC. South Africa has missed opportunities to use its influence and position in global politics to garner support for ICC criminal processes, such as in Syria where South Africa could have teamed with the US to persuade Russia to refer the Syrian case to the ICC. Nevertheless, as Fritz noted, South Africa has taken the correct diplomatic position in some ICC-related cases. For instance, South Africa was right in arguing that the North Atlantic Treaty Organisation (NATO) could have referred Libya's Muammar Gaddafi to the ICC rather than have him killed by its forces.

Westen Shilaho, a research fellow with South Africa's National Research Foundation (NRF), noted that the ICC has become a divisive issue in Africa, with some countries standing for and others against withdrawal from the ICC. However, South Africa's argument for withdrawal, to focus on peaceful resolution of conflict, is weak given the fact that peaceful resolution of conflict thrives better in an environment free of impunity, which the ICC was established to promote. Shilaho argued that although African countries are right to complain about ICC bias, it must be noted that the ICC cannot operate above the fray of politics. There will always be normative politics in legal proceedings given that powerful nations will always exert their influence and push for their interests. In Africa, as is the case on all continents, politicians normally operate above the local judiciary, defying domestic courts. For example, although the African Union called for the strengthening of domestic judiciaries in Africa, it was quick to introduce the Malabo Protocol, whereby politicians granted themselves immunity from domestic criminal trials. It should be pointed out that while Africans are right to complain about issues of unfairness at the ICC given the West's history of slavery, imperialism, and apartheid, they should refrain from fetishizing sovereignty when their interests are threatened.

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MS NICOLE FRITZ, INDEPENDENT CONSULTANT: INTERNATIONAL HUMAN RIGHTS LAW AT THE PUBLIC DIALOGUE "THE INTERNATIONAL CRIMINAL COURT (ICC) AND AFRICA: FRIEND OR FOE?", HELD AT THE CENTRE FOR THE BOOK, CAPE TOWN, FEBRUARY 2017.

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5. Promoting Women's Rights

United Nations Security Council Resolution 1325 was adopted on 31 October 2000 as the first tenable resolution on women, peace, and security. The resolution sought to address the lack of both participation and representation of women in the work for peace. It brought in the gender perspective to all UN programming, reporting, and Security Council missions, calling on all parties in conflict to take measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse. The resolution also acknowledged the need for gender mainstreaming given that implementation of the peace agenda has different effects for women compared to men, as women often lack access to resources and power. Martha Muller, chief operations officer for the South African Women in Dialogue (SAWID), noted that implementation of the UNSC Resolution 1325 in Africa has been weak, despite the African Union having declared 2010–2020 as the “African Women’s Decade”.

Cheryl Hendricks, head of the Department of Politics and International Relations at the University of Johannesburg, noted that UNSC Resolution 1325 was the result of a long political and historical process. The resolution re-defined and re-interpreted security from a narrow, national interest-based understanding to mean emancipation, centred on the individual’s right to choose and live in dignity. Hendricks also noted that the African Union has incorporated UNSC Resolution 1325 in various documents, including the 2003 Maputo Protocol and Agenda 2063. Similarly the SADC Protocol on Gender, Article 28, calls on all member states to adopt UNSC Resolution 1325. It should be noted that despite the AU’s commitment to UNSC Resolution 1325, only nine women have served as heads of state in Africa. No woman has headed the AU’s peace and security portfolio, nor are women serving as peacekeepers and mediators.

Seeham Samaai, director of the Women’s Legal Centre, argued that poverty in the context of the current unjust global macro-economic framework is the greatest enemy to the effective implementation of UNSC Resolution 1325. The collapse of the moral and social order in most conflict-ridden societies causes many women and girls to experience some form of sexual violence. For example, a 2004 assessment of internally displaced persons in Sierra Leone revealed that poor socio-economic circumstances facilitated sexual violence against women.



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(FROM LEFT TO RIGHT), MS MARTHE MULLER, CHIEF OPERATIONS OFFICER, SOUTH AFRICAN WOMEN IN DIALOGUE (SAWID), CAPE TOWN; PROFESSOR CHERYL HENDRICKS, HEAD OF THE DEPARTMENT OF POLITICS AND INTERNATIONAL RELATIONS, UNIVERSITY OF JOHANNESBURG; AT THE PUBLIC DIALOGUE “PROMOTING WOMEN’S RIGHTS: IMPLEMENTING UN SECURITY COUNCIL RESOLUTION 1325 IN SOUTH AFRICA”, HELD AT 6 SPIN STREET, CAPE TOWN, MAY 2017.

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6. South Africa and UNSC Resolution 1325

South Africa’s Constitution, Chapter 2, expresses the country’s commitment to human rights, which includes women’s rights. South Africa is a signatory to most of the international and regional conventions for gender equality, and has committed to the women, peace, and security agenda. Samaai noted that South Africa has progressive



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PARTICIPANTS AT THE PUBLIC DIALOGUE “PROMOTING WOMEN’S RIGHTS: IMPLEMENTING UN SECURITY COUNCIL RESOLUTION 1325 IN SOUTH AFRICA”, HELD AT 6 SPIN STREET, CAPE TOWN, MAY 2017.

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legislation on UNSC Resolution 1325, including the Child’s Act and the Sexual Offences Act. However, the main challenge with South Africa’s peace and security agenda is a lack of effective implementation due to a gap between community perceptions and the duty bearers coupled with a lack of understanding of roles and responsibilities by duty bearers, who also lack coordination.

According to Hendricks, South Africa is a poster-child for gender equality, as greater than 30 percent of the personnel in its armed forces and police are women as of 2015, compared to only 12 percent in 1994. However, South Africa is losing its poster-child position on the promotion of women under UNSC Resolution 1325, as in 2015 only 9 out of 52 armed forces generals were women. South Africa has been described in several quarters as a violent country at war with itself, as evidenced by its rising rates of crime and rape.

Samaai maintains that South Africa’s rape problem is a core legacy of apartheid and its history of violence and dispossession. During apartheid, no white man was convicted for rape, and black men were only convicted for raping white women. The Medical Research Council claims that only 1 in 25 women report rape in South Africa. This underreporting of rape is due to several factors, including lack of faith in the justice system; close relations between victims and perpetrators; unresponsive health services; secondary trauma and stigmatisation suffered at the hands of the police; and low rates of conviction due to the impunity enjoyed by perpetrators. According to the World Health Organisation, South Africa, where 80 in 100,000 women are raped, has the highest rate of violence against women in Africa.

Policy recommendations

The following emerged as recommendations during the CCR dialogues:

1. The ICC should not be neither a friend nor a foe of Africans, but rather an institution that dispenses justice dispassionately. It is imperative for AU member states to cooperate fully with the ICC in order to sustain the fight against impunity in Africa.
2. African countries need to take advantage of their majority membership at the ICC to influence and shape it into a balanced and impartial organisation, rather than withdraw from the ICC.
3. There is need for a human rights-based approach to increase the knowledge and participation of those affected by the responsibility to protect.
4. Other members of the international community need to boost peacekeeping resources and humanitarian contributions to fill the gap created by cuts in US aid under the Donald Trump administration.

5. There is need for greater care in stabilisation missions authorised to use force, as they often do not consider the safety of individuals.
6. Women need to be economically independent so that they do not become trapped in abusive relationships. Further, municipalities in liaison with their residents need to develop initiatives to geomap violence and devise transformative solutions aimed at reducing violence against women and girls.
7. South Africa, damaged as it is by its legacy of apartheid, gender-based violence, and patriarchal culture, needs to restore personhood and family values through family clinics, peace tables, and community capacity enhancement.
8. In order to avoid secondary victimisation and trauma for rape victims, a coordinated approach and response is required in the criminal justice system.



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DR WESTEN K. SHILAHO, NATIONAL RESEARCH FOUNDATION (NRF) SCARCE SKILLS RESEARCH FELLOW, INSTITUTE FOR PAN-AFRICAN THOUGHT AND CONVERSATION, UNIVERSITY OF JOHANNESBURG, AT THE PUBLIC DIALOGUE “THE INTERNATIONAL CRIMINAL COURT (ICC) AND AFRICA: FRIEND OR FOE?” HELD AT THE CENTRE FOR THE BOOK, CAPE TOWN, FEBRUARY 2017.

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