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Commentary

BRIDGING GAPS BETWEEN ICC AND ROL DISCOURSE WITH BRICS

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ABSTRACT

The rule of law has increasingly become a germane concept in current legal and political debates on international and national platforms alike. Critics opine that the BRICS member states are afflicted by rampant corruption, in the main catalysed by the lack of transparent and democratically accountable elected governments. The resultant weak rule of law undermines the efforts of the BRICS member states to achieve sustainable global economic growth or attract foreign investment. The International Criminal Court contributes to the fight against impunity and the establishment of the rule of law by ensuring that the most severe crimes do not go unpunished and by promoting respect for international law. Thus, this article interrogates the correlation between the rule of law and criminal justice mechanisms; the adherence to the principles of the rule of law by BRICS member states; the role of the International Criminal Court vis-à-vis the rule of law as well as the relationship between the BRICS member states and the ICC. Of course, most desirable is a balanced outcome of political reciprocity without compromising the cardinal rule of law doctrine.

I. Introduction

On the 24th of September 2012, the United Nations General Assembly held a High-Level Meeting on the Rule of Law at the national and international levels. During this Meeting, the participating states adopted a resolution which recognised the role of the International Criminal Court (ICC) in a multilateral system that aims to end impunity and re-establish the rule of law.[1]

Now, bringing the Meeting into the BRICS nations' framework, it would be completely remiss to ignore the manifestations of the critical composition of the rule of law doctrine. Therefore, in analysing the correlation between the rule of law and criminal justice mechanisms, the adherence to the principles of the rule of law in the BRICS member states, the role of the International

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[1] High Level Meeting on the Rule of Law, 67th Session of the UN General Assembly 2012. Of the five BRICS member states, only South Africa delivered a statement in which former President Jacob Zuma emphasised that the rule of law at the domestic level should be pursued with the same vigour at the international level.

Criminal Court vis-à-vis the rule of law, and the relationship between the BRICS member states and the ICC, regard must be had to the origins of the rule of law doctrine. Dicey espoused three cardinal principles, namely: no act may be punishable without a law prohibiting that crime, equality of treatment of all under the same law and equal protection of all under the same law.[2] Also, Haggard and Tiede postulate that the rule of law is a multi-dimensional concept which affects various spheres of governments and societies.[3]

On the rule of law, the International Development Law Organisation stated that "*...the rule of law is a culture and daily practice. It is inseparable from equality, from access to justice and education, from access to health and the protection of the most vulnerable. It is crucial for the viability of communities and nations, and for the environment that sustains them".*[4]

Thus, this article starts with the premise that there can be no discussion of economic and social development without respect for the substantive rule of law. The rest of the article comprises of four parts, these being: an overview of the BRICS; the notion of the rule of law, the ICC and, lastly, conclusions on bridging the gaps between ICC and rule of law discourse amongst the BRICS Member states. Each of them is discussed in turn.

II. The BRICS member states at a glance

The term BRICS is used as an acronym to refer to a grouping of five economies said to be the world's major emerging national economies in their respective regions. These comprise of Brazil, Russia, India, China and South Africa. Prior to 2011, the association, then known as BRIC (or the BRICs) had four members namely Brazil, Russia, India and China. The acronym BRIC, sans South Africa's affiliation, was first used in a report published in 2001 by the multinational investment bank and financial services company Goldman Sachs as part of an exercise to predict the global economic trends of the next fifty years. The report concluded that the economies of Brazil, Russia, India and China would grow significantly in terms of economic muscle and eventually would globally take the lead as major economic powers.[5]

Then, in a following report, Goldman Sachs reiterated earlier published findings and further postulated economic projections for the year 2050. This report is hailed as the first to make long term economic projections encapsulating the Gross Domestic Product (GDP) of several countries, which included South Africa.[6] The first recorded meeting of the BRIC nations as a group took place in 2009.[7] Discussions focused on improving the economic situation and reforming financial institutions at a time when global markets were emerging from global recession.[8] A further area of interest to the BRIC members was strengthening the members' reputation in international affairs.

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[2] Dicey, A. V., Introduction to the Study of the Law of the Constitution (1" ed., 1885; 10' ed. 1959), Ch IV

[3] Haggard, S., and Tiede, L., "The Rule of Law and Economic Growth: Where are We?" *World Development* 39, no. 5 (2011).

[4] *See* https://www.idlo.int/what-we-do/rule-law [accessed: 30 March 2019].

[5] Goldman Sachs, Building Better Global Economic BRICs, Global Economics, 66, 2001, http://www.goldmansachs.com/ourthinking/topics/brics/brics-reports-pdfs/build-better-brics.pdf.

[6] Goldman Sachs, Dreaming with BRICS: The Path to 2050, Global Economics, 99, 2003, http://www.goldmansachs.com/ourthinking/topics/brics/brics-reports-pdfs/brics-dream.pdf.

[7] Stuenkel, O., "The BRICS and the future of R2P- Was Syria or Libya the exception?", global responsibility to protect 6 (2014) 3-28, Brill Nijhoff, doi 10.1163/1875984X-00601002 at 6.

[8] Thakur, R., "Institutionalizing BRICS: The New Development Bank and its Implications." (2014) Delhi Policy Group.

In 2011, South Africa became a member of the BRICs, following high-level visits of the South African government to each of the initial member states and an official invitation to join the BRIC association was extended by China at the end of 2010. It is at this time that the use of the acronym BRICS with a capitalised letter's' was adopted by the group. The Institute for Security Studies attributes South Africa's efforts to gain membership to the BRICS in part to the need to find new sources of economic growth due to the economy of the country being largely dependent on export.[9] In a statement issued on its membership, the South African Department of International Relations and Cooperation said that for South Africa, entry into the BRICS added a new geopolitical clout to the African continent. Furthermore, the minister for International Relations at the time added that BRICS' push for reform of the global institutions of governance and the United Nations would ensure that African issues are on the agenda in deliberations within the UN Security Council, the IMF and World Bank. Such an averment was not the first time South Africa had pushed for a reformation agenda concerning the same institutions.[10] Notably, two of the BRICS members, Russia and China sit on the United Nations Security Council as permanent members. The importance of this fact will be examined later on.

BRICS has no Charter or Treaty and describes itself as an informal group initiated by Russia.[11] The association continues to hold annual meetings in its constituent states, producing yearly declarations on commitments to promote the reform of the United Nations Security Council (UNSC) and Bretton Woods Institutions.[12]

Meanwhile, Thomashausen finds that the status of "international organisation" is conferred on entities which meet certain criteria, i.e. having members and a documented agreement from which international legal status emerges.[13] The ramifications of the BRICS' lack of legal personality imply that the association's prospects of formal collaboration with other international institutions are questionable. As an example more central to this paper, the R*ome Statute,* which is the document establishing the International Criminal Court, states in Article 87(6) that:

> "The Court may ask any intergovernmental organisation to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organisation and which are in accordance with its competence or mandate".

It would thus appear that BRICS as an association is excluded from the above form of cooperation with the Court, owing to a lack of legal personality or status as an international organisation. But, as individual states, the BRICS still hold significant dominance in their respective regions and as international economies, which is the reason why research into their compliance with and leadership over the rule of law is particularly necessary.

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[9] Cilliers, J., "Life beyond the BRICS? South Africa's future foreign policy interests", Institute for Security Studies, Southern Africa Report 9, June 2017 at 4.

[10] "Decisions are taken outside the UN and other global structures by developed and rich countries when these decisions have a great impact on the poorer countries and directly affect the lives of billions of poor people." - Dlamini-Zuma, N., Speech delivered to the 55th Session of the United Nations' General Assembly during the 13th plenary meeting, New York: United Nations/Verbatim Reporting Service, A/55/PV.13, 2000.

[11] *See* https://infobrics.org/page/history-of-brics/.

[12] *Ibid.*

[13] Thomashausen, A., "Is BRICS becoming an international organisation?" https://www.iol.co.za/news/opinion/is-brics-becoming-an-international-organisation-16291598 accessed: 10 November 2019.

Having said this, the paper now moves on to define the concept of the rule of law, after which a discussion will follow on measuring the rule of law through criminal justice systems using sub-factors identified by the World Justice Project's Rule of Law Index.

III. Defining the notion of the "rule of law"

The notion of the "rule of law" may be defined as the "restriction of the arbitrary exercise of power by both governments and citizens by subordinating such power to well-defined and established laws."[14] Theorist Raz adds that the following elements guarantee the independence of the judiciary, namely: the principles of natural justice, judicial review, and access to justice.[15] Arising from the rule of law premise is the principle that there can be no crime without a law.[16] Consequent to this principle is the invocation of the rules of the English law concept 'natural justice'. This concept is intended to ensure fairness in judicial processes. Natural justice is predicated on two integral aspects. The first directly speaks to the *audi alteram partem* rule, which demands that all parties concerned should have the opportunity to express their arguments. The second hails the right to be heard by an impartial body, which essentially means that it is free from third party influence and that it refrains from being directly invested in the outcome of the judicial process.[17]

Today, history with the two World Wars has brought to the fore a victor's justice that saw the Allied Powers establish their own permanent status as global leaders on issues of peace and security through the UNSC.[18] To posit the same in contemporary society will fly against all that human rights has painstakingly sought to achieve in the last few decades. Through its notion of complementarity though, the ICC has aspired toward "levelling the playing fields", so to speak. The *Rome Statute* emphasises the equality of all signatories and acknowledges the sovereignty of all states by supporting their primary obligation to prosecute violations under the Statute. Ensuring that the same fundamental rules applicable at the international level will be mirrored at the domestic level is important to guarantee the equal application of the rule of law doctrine.

Moreover, as enunciated by the United Nations, the rule of law is:

> "a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of

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[14] Tamanaha, B. Z. "The Primacy of Society and the Failures of Law and Development," *Legal Studies Research Paper Series No 09-0172,* (St John's University, School of Law, 2009), 9.

[15] Joseph Raz, "The Rule of Law and Its Virtue," in *The Authority of Law: Essays on Law and Morality*, ed. Joseph Raz (New York: Clarendon Press, 1979), 214-18.

[16] Derived from the Latin maxim: *Nullum crimen sine lege* which is sometimes called the legality principle. See https://www.law.cornell.edu/wex/nullum_crimen_sine_lege. *See also*: Franz von Liszt, The Rationale for the *Nullum Crimen* Principle, *Journal of International Criminal Justice*, Volume 5, Issue 4, September 2007, Pages 1009–1013, https://doi.org/10.1093/jicj/mqm054.

[17] Sahu, M. K., Principle of Natural Justice in South Africa (September 1, 2015). Available at SSRN: https://ssrn.com/abstract=2765896 or http://dx.doi.org/10.2139/ssrn.2765896

[18] Baroud, R., End of Hegemony: UN must reflect changing World Order (2018). Available at: https://www.counterpunch.org/2018/10/05/end-of-hegemony-un-must-reflect-changing-world-order/ [accessed: 17th February 2019].

> the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency".[19]

Now, to consider that The World Justice Project (WJP), an independent organisation working to advance the rule of law internationally through a multidisciplinary approach which includes original research and data synthesis, defines the rule of law as a system in which the following four universal principles are upheld:[20]

- The government as well as its officials and agents are accountable under the law;
- The laws are clear, publicised, stable and fair, and protect fundamental rights, including the security of persons and property;
- The process by which the laws are enacted, administered and enforced is accessible, efficient and fair; and
- Justice is delivered by competent, ethical and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.

From all of the abovementioned definitions, we deduce that quality rule of law can be achieved through judicial systems that are independent, impartial, open, transparent and can provide fair and prompt trial. The rule of law may co-exist in both domestic and international spheres and its key elements are attested through the quality of law making, access to justice, and the independence and accountability of the judiciary.

Before delving into the Rule of Law Index rankings of the BRICS, contextually, it must be noted that The WJP Rule of Law Index for 2019 is based on research derived from more than 120,000 household surveys and 3,800 expert surveys in 126 countries.[21] The conceptual framework of the Rule of Law Index which is published annually by the WJP is comprised of eight factors namely: constraints on government powers; absence of corruption; open government; fundamental rights; order and security; regulatory enforcement; civil justice and criminal justice. A ninth factor which is excluded from the Index's aggregate scores and rankings is based on informal justice systems which are frequently imperative in states which lack adequate, accessible and effective formal justice institutions. This factor is excluded from the Index's aggregate scores and rankings because of the complexities related to the often primal nature of these systems and the challenges of systematically measuring how fair and effective their resolutions are.[22]

Accordingly, Brazil ranked 58th amongst 126 countries in the 2019 Rule of Law Index published by the WJP.[23] Russia,[24] with the lowest ranking of the BRICS nations on the Rule of Law Index is ranked as 88th whereas India[25] and China[26] rank as 68th and 82nd respectively. South Africa ranks higher than all its counterparts in the BRICS at 47th amongst 126 countries.[27]

This article centres on the criminal justice factor of the rule of law. After all, the focus is placed on bridging the gaps between the International Criminal Court and rule of law discourse by

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[19] *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary General*, UN SC, UN Doc. S/2004/616 at 4.
[20] 2019 WJP Rule of Law Index at 9.
[21] 2019 WJP Rule of Law Index Insights at 7.
[22] *Ibid* at 11.
[23] 2019 WJP Rule of Law Index at 16.
[24] 2019 WJP Rule of Law Index at 17.
[25] 2019 WJP Rule of Law Index at 16.
[26] 2019 WJP Rule of Law Index at 17.
[27] 2019 WJP Rule of Law Index at 16.

ensuring that the gravest crimes are punishable through justice mechanisms and by promoting respect for international law.[28] In measuring the rule of law through criminal justice, the WJP assesses various sub-factors. The first sub-factor focuses on the process of investigation. In order to determine whether a criminal investigation system is effective, measurement is directed at assessing whether perpetrators of crimes are effectively apprehended and charged. This is a process, which includes, but is not limited to, an assessment of whether police, investigators, and prosecutors have adequate resources, are free of corruption, and perform their duties competently.[29]

The second sub-factor is that of the criminal adjudication system. The criminal adjudication system should be timely and effective, encompassing effective prosecution and punishment of perpetrators, whilst also examining the competency of judges and other judicial officers to reach timely decisions.[30] The third sub-factor examines the efficacy of the correctional system in reducing criminal behaviour.[31] In this regard, correctional institutions must be secure, respect prisoners' rights, and be successful in rehabilitating offenders.[32] Fourthly, criminal justice systems must be impartial and neither police nor criminal judges should exhibit discrimination in terms of socio-economic status, gender, ethnicity, religion, national origin, sexual orientation or gender identity.[33]

Furthermore, a well-functioning criminal justice system which abides by the rule of law is one which is free from influence of criminal organisations, which is the fifth sub-factor.[34] The sixth sub-factor measures the independence of the criminal justice system from government or political interference.[35] Lastly, the WJP measures the respect for due process of the law and rights of the criminally accused. This includes freedom from arbitrary arrest, unreasonable detention without trial, the right of the accused to access and challenge evidence against them, the right to legal representation and the basic rights of convicted prisoners.[36]

Subsequently, the table below reflects the WJP 2019 rule of law scores specifically for criminal justice systems in BRICS member states based on the above discussed sub-factors. The scores are determined from zero to one, with one indicating the strongest adherence to the rule of law in the specific factor and sub-factors. Based on this result, the WJP Index also provides a global ranking for each of the 126 states examined. The table shows that with a ranking of 45, South Africa's criminal justice system in the year of assessment is slightly better in comparison to its BRICS counterparts.[37] However, a scoring of 0.52 across sub-factors is still considered to be towards to the lower end of the spectrum as far as adherence to the rule of law is concerned.

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[28] 2019 WJP Rule of Law Index at 13.
[29] *Ibid.*
[30] *Ibid.*
[31] *Ibid.*
[32] *Ibid.*
[33] *Ibid.*
[34] *Ibid.*
[35] *Ibid.*
[36] *Ibid.*
[37] Brazil is ranked 94th in terms of its criminal justice system whereas Russia, India and China are ranked 101st; 77th and 57th respectively.

Table 1: 2019 WJP Rule of Law Index rankings of BRICS Member states according to the criminal justice system factor

Country	Criminal Justice System Ranking by country *(out of 126)*	Effective investigations	Timely & effective adjudication	Effective correctional system	No discrimination	No corruption	No improper government influence	Due process of law	Total
Brazil	94	0.30	0.28	0.18	0.18	0.55	0.59	0.36	**0.35**
Russia	101	0.24	0.36	0.38	0.38	0.48	0.15	0.38	**0.34**
India	77	0.27	0.37	0.39	0.34	0.47	0.57	0.41	**0.40**
China	57	0.57	0.57	0.50	0.34	0.58	0.20	0.51	**0.47**
South Africa	45	0.39	0.52	0.31	0.55	0.59	0.73	0.55	**0.52**

The findings of the WJP reflect that amongst the BRICS, there certainly are gaps between the rule of law and criminal justice. Following the table, this paper moves on to discuss the ICC and its relations with the BRICS.

IV. The ICC

The International Criminal Court established by the Rome Statute in 2002 is hailed as the first permanent court with international jurisdiction that possesses the mandate to investigate and prosecute individuals suspected of committing acts of genocide, war crimes, crimes against humanity and crimes of aggression where states are reluctant or incapable of doing so (unwilling or unable).[38] However, it is still the primary responsibility of states to investigate and prosecute, which is contained in the admissibility clause of the statute.[39] Intervention by a body such as the ICC implies the failure of a state to execute its primary duty to prosecute core crimes.[40] This occurs on the basis of "the principle of complementarity", for which there is no specific article in the *Rome Statute* that provides a definition thereto.[41] However, Article 1 and the Preamble of the Statute state that the ICC *"...shall be complementary to national criminal jurisdictions"*.[42] The Statute further provides that a case shall be deemed inadmissible before the Court if it is already being adequately investigated or tried by a national court, except where the national courts are *"unwilling or unable genuinely to carry out the investigation or prosecution"*.[43] Kleffner concludes that according to the definitions usually attached to the word 'complement', *"the ICC is thus*

[38] Article 17(1)(a) and (b) of the *Rome Statute*.
[39] Du Plessis, M. "Bringing the International Criminal Court Home – the Implementation of the Rome Statute of the International Criminal Court of 2002" at 2.
[40] Burke-White, W., "Implementing a Policy of Positive Complementarity in the Rome System of Justice" (2008) 19 *Criminal Law Forum* 59.
[41] Schabas, W. A., "An Introduction to the International Criminal Court" (2011) 4th ed. at 190.
[42] See Article 1 of the *Rome Statute* and paragraph 10 of the Preamble of the *Rome Statute*.
[43] Article 17(1)(a) and (b) of the *Rome Statute*.

envisaged to supply the deficiencies of national criminal jurisdictions, and together they form a unit in the enforcement of the prohibitions of ICC crimes".[44] It is thus evident that the dynamic visualised between the ICC and national courts was that they should be mutually supportive, rather than that the ICC was to take the place of national judiciaries.

Despite the lack of a definition in the *Rome Statute,* the concept of complementarity is regarded as a 'legal principle'. Dworkin, in '*Taking Rights Seriously'* writes that legal principles do not have consequences for non-compliance attached to them, *"[r]ather they incorporate into the law general goals and values, regularly specifying neither subjects nor their content in detail nor their conditions of application".*[45]

Furthermore, Kleffner states that Article 1 and the Preamble are 'programmatory in nature' and introduce complementarity as a general functional principle on which the ICC is established.[46] Therefore, together, the tenth paragraph of the Preamble[47] and Article 1[48] of the *Rome Statute* express the ideal relationship between national courts and the ICC as envisaged by the member states of the statute.

Although the principle of complementarity has no legal force, its importance is supported by the fact that it is emphasised in both the Preamble and the first Article of the Statute.[49] The principle is given significant weight by Articles 17 and 20, which transform the complementarity principle into a reason a case can be deemed inadmissible before the ICC.[50] Article 17 begins by stating *"having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: ..."*[51] and then further prescribes circumstances which would render a case inadmissible. These circumstances support the idea that the Court is precluded from trying a matter that is already before national courts. This is set out in Article 20 of the *Rome Statute* as the *ne bis in idem*-rule, which prohibits the institution of legal proceedings twice over the same cause of action, otherwise known as "double jeopardy".[52]

But, as an exception to the *ne bis in idem*-rule the ICC may, in certain circumstances, put to trial an individual whose alleged crimes have already been prosecuted by a national court. The ICC may do so if *"the national proceedings were intended to shield that person from criminal responsibility"* or *"the national proceedings did not respect due process or other international standards".*[53]

Accordingly, the *Rome Statute* in Article 17 supports this exception to the *ne bis in idem* rule by providing that allegations being adequately investigated or prosecuted by national courts and cases where a state already decided against prosecuting, will be inadmissible before the ICC, apart from situations where that country is 'unwilling or unable' to genuinely carry out the investigation or prosecution.[54]To establish that a state is unwilling to investigate or prosecute, the *Rome* Statute provides that it must be shown that the investigation, subsequent trial or decision

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[44] Kleffner, J., "Complementarity in the Rome Statute and National Criminal Jurisdictions" at 100.
[45] Dworkin, R., "Taking Rights Seriously*" (1977), Harvard University Press* at 22-23.
[46] Kleffner, J., "Complementarity in the Rome Statute and National Criminal Jurisdictions" at 99 and 100.
[47] "*...Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions*" para. 10 of the *Rome Statute.*
[48] "...and shall be complementary to national criminal jurisdictions" Article 1 of the *Rome Statute.*
[49] Preamble and Article 1 of the *Rome Statute*.
[50] Articles 17 and 20 of the *Rome Statute*.
[51] Article 17 of the *Rome Statute*.
[52] Article 20 of the *Rome Statute*.
[53] Walker, A., "The ICC Versus Libya: How to End the Cycle of Impunity for Atrocity Crimes by Protecting Due Process", 18 *UCLA J'nal of Int'l L. and For. Aff.* (2014) 303 at 331.
[54] *Ibid.*

not to conduct a trial, was orchestrated in order to protect the accused from facing punishment for his/her international law crimes. [55]

Additionally, or alternatively, if proceedings have been initiated by a state, it must be shown that the investigation or the trial have been unreasonably delayed, in a manner which contradicts a genuine intention for justice to prevail[56]. In addition, or alternatively, it must be shown that the proceedings were prejudiced.[57]

In this regard, Schabas is of the view that a state shows unwillingness to prosecute where lackadaisical proceedings are conducted by domestic courts with the intention to invoke the rule against double jeopardy and to prevent any future investigation or trial by the ICC.[58] In deciding whether a state has been unwilling to conduct a trial, the Court will have regard for the international standards held for due process of law.[59] Due process of law entails observance of substantive and procedural law.[60] Substantive law refers to legal action being valid based on an adequate intention. Substantive law defines the rights and responsibilities which exist between individuals and or between individuals and the state. Substantive law may be drawn from both Statutes and common law precedents. On the other hand, procedural law concerns itself with the set of procedures for making, administering and enforcing substantive law. Procedural law is rooted in due process and legal norms and aims to ensure that civil, criminal and administrative proceedings take place through a fair and just process.

In continuing with the discussion on the exceptions to the *ne bis in idem* rule, the *Rome* Statute provides that a state shows inability to prosecute where there is *"a total or substantial collapse or unavailability of* [a] *national judicial system"* which results in the inability to gather evidence, secure the accused, or to conduct a trial in compliance with due process requirements.[61] Therefore, the absence of an adequately functioning judicial system is considered to reflect an inability to prosecute.[62] This also includes cases where the domestic legislation of a country does not prescribe punishment for an act deemed criminally punishable by international standards.[63] This prevents the trivialisation of crimes that have elevated status in terms of international criminal law.

From the above discussion, we conclude that the inability or unwillingness of a state to prosecute invites the jurisdiction of the ICC. The fact that national courts have the primary responsibility to prosecute war crimes, genocide and crimes against humanity in terms of the *Rome Statute*, means that states must give effect to the Statute by incorporating it into their domestic legislation, "implementing legislation".[64] Hence, implementing legislation is of particular importance because it serves as an expression of ability to prosecute international law crimes and of willingness to cooperate with the ICC. This is especially so because the ICC has no direct enforcement

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[55] Article 17 (2)(a) of the *Rome Statute*
[56] Article 17 (2)(b) of the *Rome Statute*.
[57] Article 17 (2)(c) of the *Rome Statute*.
[58] Schabas, W.A., "An Introduction to the International Criminal Court" (2011) 4th ed. at 86.
[59] Article 17 (2) of the *Rome Statute*.
[60] Morgan, M. I., "Playing by the Rules: Due Process and Errors of state Procedural Law" (1985) *Wash. Univ. L. Rev.* vol. 63, Issue I, at 1-37.
[61] Article 17(3) of the *Rome Statute*.
[62] *Ibid.*
[63] Schabas, W.A., "An Introduction to the International Criminal Court" (2011) 4th ed. at 86.
[64] *See* former ICC Registrar Silvana Arbia's remarks in "No Peace without Justice Roundtable on Implementing Legislation" (2009), Rome: Italy available at https://www.icc-cpi.int/NR/rdonlyres/9EA855BC-A495-40AA-B5F8-92F44E08D695/280578/statement_Registar2.pdf. [accessed: 20 May 2019].

mechanisms and relies largely on the willingness of individual states to cooperate with its decisions.

Nonetheless, the International Criminal Court has been plagued by a number of challenges concerning state cooperation. The most poignant being the lack of support by three of the five permanent members of the UNSC, namely: the USA, Russia and China.[65] China, like the USA, has never been a member of the ICC. Russia on the other hand withdrew its signature from the Rome Statute citing that the ICC was not living up to its expectations – that it is not truly independent and is subject to influence from the West.[66] This reason was advanced a day after the ICC's report classifying the Russian annexation of Crimea as an occupation.[67]

To recap, both China and Russia are members of BRICS. Of the five BRICS nations, only Brazil and South Africa are member states of the International Criminal Court with the South African government once resolute on withdrawing from the Rome Statute which establishes the ICC. South Africa's own relationship with the ICC is significant as, first and foremost, a regional leader on the African continent from which the majority of the *Rome Statute*'s signatories emanate and secondly, as the member of the BRICS with the highest ranking *vis-à-vis* the 2019 WJP Rule of Law overall index at 47th out of 126 countries[68] and specifically on the criminal justice system rankings, on which it ranked 45th.[69] These factors might inspire the idea that out of the BRICS member states, South Africa would naturally support the work of the Court and acknowledge the Court's role in upholding the rule of law.

Rather, in an official statement, the government of South Africa declared that *"the Republic of South Africa has found that its obligations with respect to the peaceful resolution of conflicts at times are incompatible with the interpretation given by the International Criminal Court".*[70] This statement alludes to the African Union's official position on the ICC's activities in Africa, which is that peace on the continent takes precedence over justice and that the indictment of sitting leaders threatens the political stability of Africa.[71]

Thereafter, in 2017 a ruling by the ICC found South Africa to have failed in its duties to comply with the decisions of the Court regarding the arrest and surrender of former Sudanese President Omar al-Bashir while he was attending an African Union Summit on South African territory.[72] The ICC accuses al-Bashir of indirect co-perpetration of crimes against humanity, war crimes and genocide in Darfur.[73]

South Africa's defence before the ICC was that it had no legal duty to arrest al-Bashir. This duty, South Africa argued, rested on Sudan solely. Such reasoning, as advanced by South Africa, is often used with reference to UNSC Resolution 1593, which does not oblige non-parties to a

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[65] Schiff, B. N., "Building the International Criminal Court" (2008) at 72.
[66] Segate, R. V., and Dovgalyuk, O., "From Russia and beyond: the ICC global standing, while countries' resignation is getting serious" (2017), available at www.researchgate.net [accessed: 1 July 2019].
[67] *Ibid.*
[68] 2019 WJP Rule of Law Index at 16.
[69] Brazil is ranked 94th in terms of its criminal justice system whereas Russia, India and China are ranked 101st; 77th and 57th respectively.
[70] *See* depositary notification C.N. 786.2016.TREATIES-XVIII.10 of 25 October 2016 (Withdrawal of South Africa).
[71] Jalloh, C. et al, "Assessing the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court" (2011) 4 *Afr. J'nal of Leg. St.* 5, at 8.
[72] Situation in Darfur, Sudan in the case of The Prosecutor v. Omar Hassan al-Bashir: Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar al-Bashir No. ICC-02/05-01/09 (6 July 2017).
[73] *Ibid.*

conflict to cooperate with the Court but rather, *encourages* all states to cooperate.[74] Sudan has not ratified the *Rome Statute* and it is for this reason that certain legal scholars opine that the national courts of Sudan are not obliged to give effect to the warrant arrest issued by the ICC against al-Bashir.[75] South Africa's Constitution is deemed the supreme law. Devotion thereto and to the rule of law is enshrined in Section 1(c) of the first chapter of the Constitution. Recalling the United Nations definition of the rule of law, as shared earlier in this article, the rule of law is predicated on equally enforced accountability in line with international human rights norms and standards.[76] However, what is apparent is that South Africa placed politics and its diplomatic ties first in the case of al-Bashir, thus snubbing the rule of law doctrine. Anthony, Tembe and Gull discuss South Africa's evolving approach to diplomatic relations – specifically that the country had in the past exhibited a stance in international relations which promoted human rights and western concepts of governance and is now shifting towards a policy which seeks to strengthen a geopolitical identity within the BRICS.[77]

Comparatively, in the case of the only other BRICS member state that is still a signatory to the *Rome Statute*, Brazil reiterated support for the Court in 2018 through a statement signed by 35 countries during the occasion of the 73rd session of the United Nations General Assembly.[78] The declaration affirms that:

> "The ICC is a central achievement of multilateral diplomacy and a true milestone in the development of international law. Due to its mandate of speaking law to power, it has been the target of political attacks for a number of years. It should thus come as no surprise that it is under increasing attack at a time of a broader assault on the rules-based order itself. We will always respect the independence of the ICC, an indispensable feature of any court of law.
> The ICC embodies our collective commitment to fight impunity for the worst crimes known to humankind. As we get used to living in a world that includes a permanent, independent and impartial criminal court, we must honour its significance, in particular for the victims of atrocious crimes.
> The ICC has shown a remarkable resilience in the face of adversity and is a firmly established part of the landscape of international institutions today. The necessity for it to act is apparent in many situations around the globe. From Syria to Myanmar, where even the most basic rules of international humanitarian law have been disrespected, policy-makers as well as victims look to the ICC to bring accountability where human rights have been systematically violated and serious international crimes have been committed. The ICC remains the most important instrument for prosecuting grave international

[74] "*The Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that states not party to the Rome Statute have no obligation under the Statute, urges all states and concerned regional and other international organizations to cooperate fully.*"
75 Jalloh, C. et al, 'Assessing the African Union Concerns about Article 16 of the Rome *Statute* of the International Criminal Court' (2011) 4 Afr. J'nal of Leg. St. 5, at 15.
[76] *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary General*, UN SC, UN Doc. S/2004/616 at 4.
[77] *Ibid* at 7.
[78] The signatories were Andorra, Argentina, Austria, Brazil, Belgium, Canada, Cyprus, Costa Rica, Denmark, Spain, Estonia, Finland, Gambia, Hungary, Ireland, Iceland, Italy, Liechtenstein, Luxembourg, Macedonia, Malta, Mexico, Montenegro, Norway, Netherlands, Peru, Portugal, Democratic Republic of Congo, San Marino, Senegal, Sweden, Switzerland and Uruguay.

> crimes. We all play an important role in supporting the ICC so that it can reach its full potential and we must seize this crucial moment to make a political investment in the Court. By giving our support to the International Criminal Court today, we do a great service to the cause of justice and to defending the progress we have made together towards a rules-based global system."

Although Brazil is yet to come under the scrutiny of ICC investigations or its compliance hearings, there are rising calls for investigations into alleged crimes against indigenous people in Brazil.[79] This is concerning if one considers Brazil's ranking as 94th out of 126 countries on the criminal justice systems factor of the 2019 WJP Rule of Law index. A low ranking in this factor indicates that a national system has the propensity to flout the principles of the rule of law. This factor is particularly concerned with whether criminal justice is supported by effective investigations; timely and effective adjudication; an effective correctional system; equality; zero corruption; independence from the government and respect for the due process of law. Defective national criminal judicial systems hamper the delivery of the rule of law. In these cases, it is thus doubtful that domestic investigations would occur effectively or that the government led by the accused would cooperate with the ICC Prosecutor's investigations. Ultimately, a weak rule of law undermines the efforts of the relevant state to achieve sustainable global economic growth or attract foreign investment, because of the threat of governance instability resulting from poor accountability.

V. Conclusion

Former UN Secretary General Kofi Anan praised the ICC for its role in "serving as a catalyst for enacting national laws against the gravest international crimes".[80] Anan's statement speaks to the cruciality of implementing legislation, as briefly mentioned, which is of particular importance because the Court has no enforcement capacities to effect arrests and, as a result, relies on the good faith of member states. Therefore, in order for the ICC to be effective, the support and cooperation of states is vital.

Despite the Court's shortcomings, such as the lack of enforcement mechanisms and the growing number of disgruntled member states, there exist examples of how the ICC has supported domestic rule of law in other countries. Examples include the adoption of the Rome Statute's definitions of crimes and standards of process in the DRC.[81]

The Court's mandate to independently prosecute individuals for grave international crimes, irrespective of their position, is well aligned to the aims of the doctrine of the rule of law. It is therefore in the interest of criminal justice system improvement within BRICS member states to support the work of the Court through: ratification of the Rome Statute or returning to the Court's jurisdiction for non-member states like Russia, India and China, adopting implementing legislation that recognises all aspects of a well-functioning criminal justice system and cooperation

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[79] *See* "*Unpunished in Brazil, crimes against indigenous people are submitted to the ICC*" by Ogier, T., Justiceinfo.Net, 13 December 2019 available at: https://www.justiceinfo.net/en/tribunals/icc/43279-unpunished-brazil-crimes-against-indigenous-people-submitted-icc.html

[80] *Report of the Secretary General*, UN SC, UN Doc. S/2004/616 at 16.

[81] In 2009, one particular military court in Katanga Province used the definition of crimes against humanity as prescribed by the *Rome Statute* to convict twenty-one Mai-Mai combatants for various crimes. *See* HRW Press Release 'DR Congo: Militia leader guilty in landmark trial: Crimes against humanity conviction an important step for justice' 10 March 2009, http:// www.hrw.org/en/news/2009/03/10/dr-congo-militia-leader-guilty-landmark-trial [accessed: 15 July 2019].

with the ICC in effecting warrants of arrest. These are ways through which the gaps between the ICC and RoL discourse can be bridged within BRICS.

Moreover, implementing legislation domesticates the international standards of the *Rome Statute*. National systems are thereby encouraged to effectively prosecute international core crimes locally. This acknowledges the primacy of national systems, as well as the concept of complementarity. Domesticating the *Rome Statute* also establishes the criminalisation of core crimes and related offences. Analyses concerning cooperation with the ICC ought not to be reduced to political will or the absence thereof, although this is indeed often the leading cause for the lack of cooperation. However, it is paramount to also consider the resources and capacity of the state concerned in meeting obligations to the Court.

Finally, BRICS member states share the ideology to reform global institutions whose policies are deemed to be partial towards U.S governance ideals. Pushing the ICC agenda as part of the BRICS agenda is an opportunity to grow repute as an association of geopolitical leaders by showing commitment to the rule of law principles and promoting accountability for heinous crimes, which also fall under the jurisdiction of the Court. Thereby, the association rather takes on the perspective of reforming the ICC to strengthen its mandate. It must be borne in mind that at the heart of criminal justice are the victims who rely on national and international systems to bring perpetrators to book. It is, therefore, also in the best interests of the BRICS to cooperate with the ICC because it remains a pivotal mechanism in the fight against impunity globally and more narrowly within BRICS member states, of which the majority still do not satisfactorily adhere to the rule of law in criminal justice systems, as per the most recent WJP Rule of Law Index.