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POLICY

BRIEF



CAPE TOWN, SOUTH AFRICA



SOUTH AFRICA, THE ICC, AND THE UN HUMAN RIGHTS COUNCIL

Cape Town, South Africa

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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 two public dialogues in Cape Town on 24 February 2016 on “South Africa and the International Criminal Court (ICC)”, and on 31 March 2016 on “South Africa and the United Nations (UN) Human Rights Council”.

In 1993, less than a year before the end of apartheid, Nelson Mandela – South Africa’s first democratically elected president – identified the protection and promotion of human rights and democracy as core principles to guide the country’s foreign policy. However, two decades on, South Africa’s efforts to forge a human rights-based foreign policy have been confronted by the realities of regional and global politics, with critics decrying the perceived forfeiture of its role as a “human rights entrepreneur”. Tshwane (Pretoria) has, however, emphasised the need for a balance between normative ideals and pragmatic concerns, pointing to the decisive influence that national interests play in international politics and arguing that South Africa should not be judged by a higher standard than other countries.

1. South Africa and the ICC

South Africa has historically been a firm supporter of the International Criminal Court, and was one of the first countries to ratify the Rome Statute, the treaty establishing the Court, in July 1998. The Southern Africa Litigation Centre’s (SALC), Angela Mudukuti, noted that post-apartheid South Africa’s first justice minister, Dullah Omar, was a key figure in crafting much of the provisions of the statute, playing an integral role in the crystallisation of the concept of a court that has universal jurisdiction over war crimes, crimes against humanity, and genocide. South Africa’s Medard Rwelamira, Omar’s legal advisor, went on to become a member of the Court’s Preparatory Commission. The country’s commitment to human rights and its support of the body was further entrenched when Tshwane domesticated the statute through the enactment of the Implementation of the Rome Statute of the International Criminal Court Act 27 in 2002. This implementation act provides South Africa – one of only five countries to have amended its penal codes in line with the Rome Statute at the time – with the legislative framework to try cases of genocide, war crimes, and crimes against humanity. The act, for example, allowed the Southern Africa Litigation Centre successfully to argue a case on behalf of Zimbabwean victims of torture, compelling the South African Police Service (SAPS) to investigate alleged crimes against humanity perpetrated in that country in 2007.

‘ In June 2015, Tshwane was accused of violating a court ruling ordering the arrest of Sudanese president, Omar al-Bashir, who had been indicted for his role in the Darfur conflict in March 2009. ’



SUDANESE PRESIDENT, OMAR AL-BASHIR, POSES FOR A GROUP PHOTOGRAPH AT THE START OF THE 25TH AFRICAN UNION (AU) SUMMIT IN JOHANNESBURG IN JUNE 2015.

Image source - Aljazeera
Photo - AP

<http://www.aljazeera.com/news/2015/06/africa-court-rule-arrest-sudan-bashir-150615065923527.html>

In June 2015, when South Africa hosted the African Union (AU) summit, Tshwane was accused of violating a court ruling ordering the arrest of Sudanese president, Omar al-Bashir, who had been indicted for his role in the Darfur conflict in March 2009. Tshwane argued that al-Bashir had been granted diplomatic immunity, as had all officials attending the summit, and appealed the ruling. The government subsequently noted that it was not

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in South Africa's national interest to have the Sudanese president arrested, citing the threat of terrorism and the need to protect South African business interests across the continent. In October 2015, the ruling African National Congress (ANC) called for South Africa to withdraw from the ICC, and for the implementation act to be repealed. In March 2016, the state lost its appeal of the June 2015 court ruling, and a month later, the country's justice ministry announced its intention to take the matter to South Africa's Constitutional Court.

Obed Bapela, South Africa's deputy minister of co-operative governance and traditional affairs and a member of the ANC's international relations committee, noted that the ANC, and the South African government by extension, was not encouraging impunity by calling for the country to withdraw from the ICC. Both the party and the government still believed that perpetrators of gross human rights violations must be held to account through structures mandated to do so. When reviewing its membership of the ICC, though, the ANC strongly opposed the Africa-focused bias in the Court's case-load. Powerful countries – the United States (US), Russia, and China – sit in judgement on ICC-related cases on the UN Security Council, though themselves not members of the Court. According to Bapela, the ICC has also been arrogant, particularly in the timing of its indictments. The ANC thus believes that the ICC “has lost direction”.

“Former Ivorian president, Laurent Gbagbo, was charged by the ICC for crimes against humanity in November 2011.”



(FROM LEFT TO RIGHT), MR OBED BAPELA, DEPUTY MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS; MS YASMIN SOOKA, EXECUTIVE DIRECTOR OF THE FOUNDATION FOR HUMAN RIGHTS, JOHANNESBURG; AND MS ANGELA MUDUKUTI, INTERNATIONAL CRIMINAL JUSTICE LAWYER, SOUTHERN AFRICA LITIGATION CENTRE, JOHANNESBURG, AT THE PUBLIC DIALOGUE “SOUTH AFRICA AND THE INTERNATIONAL CRIMINAL COURT”, HELD AT THE CENTRE FOR THE BOOK, CAPE TOWN, FEBRUARY 2016.

Image source - CCR
<https://www.facebook.com/CCRCapeTown>

2. Africa and the ICC: A Biased Case-load?

Yasmin Sooka, Executive Director of the Foundation for Human Rights, noted that, even though 34 African countries are signatories to the Rome Statute – comprising the single largest regional bloc in the body – there has been a growing sense of discontent with the ICC over the past decade. This is primarily centred on the perception that the Court has only targeted African leaders, and has not indicted sitting presidents from other parts of the world. The perceived bias against African heads of state was heightened when Kenya's president Uhuru Kenyatta and his deputy, William Ruto, were indicted in January 2012 for crimes against humanity as a result of Kenya's post-election violence in 2007-2008, during which about 1,200 people died. Both were eventually cleared of the charges by April 2016, due largely to insufficient evidence. Former Ivorian president, Laurent Gbagbo, was also charged by the ICC for crimes against humanity in November 2011.

An extraordinary summit of the African Union called for an exemption from ICC prosecution for serving African leaders in October 2013. At the Court's January 2016 Assembly of States Parties (ASP) meeting, all but one of 22 African member states present – Botswana – indicated their intention to withdraw their membership from the Court.

Critics of this stance though, like the Southern Africa Litigation Centre's Angela Mudukuti, have noted that the Africa bloc failed to engage the ICC constructively by, for example, using its majority in meetings such as the Assembly of States Parties conferences to sway decisions in its favour. African



governments have also failed to establish viable regional courts as alternatives to the ICC. The Southern African Development Community's (SADC) Tribunal was suspended in August 2010, at the instigation of Zimbabwean president, Robert Mugabe, after white farmers from his country successfully brought a case against the government in Harare. The African Court of Justice and Human Rights (AfCHPR), established in 2008 following the merger of the African Court of Justice (ACJ) with the African Court on Human and Peoples' Rights (ACHPR), also lacks a mandate to prosecute criminal cases. Furthermore, the AU's Malabo Protocol of June 2014 includes immunity for African heads of state and senior government officials: a position distinctly at odds with South Africa's 2002 ICC Act.

3. Reform of the ICC

South Africa, like many other African countries, has called for the reform of the ICC regarding its policy of voluntary membership and its reliance on the authority of the UN Security Council. Of most concern to Tshwane is the double standard of the US, Russia, and China – which refuse to subscribe to the Rome Statute – being able to refer matters to the ICC and to use their vetoes to block proceedings. South Africa's deputy minister, Bapela, maintained that the Security Council could have referred certain non-African states that never joined the Court – such as Sri Lanka, North Korea, Uzbekistan, Israel/Palestine, Syria, and Iraq – to the ICC, but that the Council's permanent members have tended to protect countries they favour from the Court's jurisdiction.

According to Bapela, an additional concern affecting the integrity of the ICC is the influence that the Court's dominant European funders wield over the body's agenda. Bapela noted that European Union (EU) governments have used their influence in the ICC to block prosecutions of which they disapprove, citing the prosecution of Israeli officials for crimes committed in Gaza as an example.

Another major concern for South Africa is the timing of ICC prosecutions during peace processes in Africa, initiated and undertaken by African role-players. The UN Security Council made ICC referrals after the AU sent delegations to Sudan and Libya, in March 2005 and February 2011 respectively, which arguably jeopardised peace processes in both countries.

4. South Africa and the UN Human Rights Council

Since being readmitted to the UN and its subsidiary bodies in 1995 following the defeat of apartheid, South Africa has sought to lead on issues of human rights and fundamental freedoms. Pitso Montwedi, Chief Director for Human Rights and Humanitarian Affairs at South Africa's Department of International Relations and Cooperation (DIRCO), noted that the country chaired the predecessor to the UN Human Rights Council – the UN Commission on Human Rights (UNHCR) – in 1998; while its former

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STAFF AND JUDGES OF THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS IN ARUSHA, TANZANIA IN 2014.

Image source - AfCHPR

<http://www.ijrcenter.org/2014/07/22/three-new-judges-elected-to-the-african-court-on-human-and-peoples-rights/>



permanent representative to the UN, Dumisani Kumalo, played a key role in the transition from the Commission to the Council in 2004/2005. South Africa served on the UN Human Rights Council between 2006 and 2010, and was re-elected in 2013 for a three-year term (2014–2016). Tshwane has recorded several achievements in the global human rights system including: pioneering the justiciability of economic, social, and human rights in 1998; hosting the 2001 World Conference against Racism, Racial Discrimination, Xenophobia, and Related Intolerance (WCAR), at which slavery was declared a crime against humanity, and colonialism recognised as a major source of historical injustices; and adopting a resolution on the right to development in 2009. Tshwane has, since 2001, drafted all substantive thematic resolutions on racism on the UN Human Rights Council. Together with Ecuador, South Africa initiated a resolution seeking to hold transnational corporations, private military and security companies, and extractive industries accountable for violations of human rights in June 2014. Furthermore, South African jurist, Navi Pillay, held the post of UN High Commissioner for Human Rights between 2008 and 2014. In December 2015, South African expert on justiciability of rights, Sandra Liebenberg, was nominated to serve on the UN Committee on Economic, Social, and Cultural Rights.

“Slavery was declared a crime against humanity, and colonialism recognised as a major source of historical injustices at the 2001 World Conference against Racism, Racial Discrimination, Xenophobia, and Related Intolerance (WCAR).”



A PARTICIPANT AT THE CCR PUBLIC DIALOGUE “SOUTH AFRICA AND THE UN HUMAN RIGHTS COUNCIL”, HELD AT THE CENTRE FOR THE BOOK, CAPE TOWN, IN MARCH 2016.

Image source - CCR
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Civil society activists have, however, criticised the South African government for its inconsistent support for the human rights of lesbian, gay, bisexual, trans-gender, and inter-sex (LGBTI) persons on the UN Human Rights Council. In June 2011, Tshwane co-sponsored the Council's first resolution on human rights, sexual orientation, and gender identity. In June 2014, however, South Africa supported a UN resolution on family protection containing non-inclusive language that was seen to undermine LGBTI rights. In July 2015, Tshwane voted against a resolution recognising only traditional family structures, after having unsuccessfully sought to insert language that took account of same-sex marriages and other non-traditional arrangements. Critics noted that some of these positions are not only inconsistent with the provisions of the country's constitution, but also with South African laws, in which both child-headed and single-parent family structures and same-sex unions are recognised. In June 2016, South Africa controversially abstained from a UN Human Rights Council resolution appointing an independent expert to monitor and report on violence against individuals on the basis of sexual orientation and gender identity (SOGI). Among the reasons that Tshwane cited for its abstention was that the country had to support African diplomatic solidarity. The vote though came three months after the South African Human Rights Commission (SAHRC), in collaboration with the country's justice and foreign ministries, had hosted a regional seminar in support of the African Commission on Human and Peoples' Rights (ACHPR) resolution in 2014 condemning violence and discrimination against the LGBTI community.

In November 2015, South Africa joined 13 other countries – Burundi, China, Iran, Kenya, Myanmar, Nigeria, North Korea, Pakistan, Russia, Saudi Arabia, Sudan, Syria, and Zimbabwe – on the Third Committee of the UN General Assembly in voting against a resolution protecting human rights



defenders during peaceful protests. This decision to vote against a resolution protecting the very rights for which liberation movements like the ANC had fought caused an outcry both domestically and abroad. This, together with Tshwane's alleged contravention of the country's Bill of Rights of 1996 – which guarantees the right to assembly – and South Africa's association with countries that have been traditionally criticised for their human rights record such as China, North Korea, Myanmar, and Saudi Arabia, was again controversial. A statement issued by the South African foreign ministry at the time referred to Norway – the resolution's sponsor – as having introduced last-minute oral amendments without first notifying South Africa. Tshwane later reversed its decision, and voted in favour of the resolution at the UN General Assembly in December 2015.

Despite having hosted the 2001 World Conference against Racism, Racial Discrimination, Xenophobia, and Related Intolerance, at which the Durban Declaration and Programme of Action (DPPA) was adopted, mandating governments to develop and implement a national plan of action to strengthen the elimination of racism and unfair discrimination, South Africa's draft national plan of action was only finalised in October 2015, with public consultations held by the country's justice ministry in June 2016. The report was submitted to the UN Human Rights Council in August 2016.

Written submissions by civil society to South Africa's foreign and justice ministries are also reportedly frequently ignored, while the government's reports to the UN Human Rights Council have been submitted late.

5. The Role of Civil Society

Corlett Letlojane, Executive Director of the Johannesburg-based Human Rights Institute of South Africa (HURISA), attributed Tshwane's actions partly to a marked decrease in government engagement with local civil society actors. Until 2013, South Africa's foreign ministry maintained a strong relationship with its human rights actors, consulting constructively on Tshwane's position on issues ahead of meetings of the UN Human Rights Council. Civil society, for example, provided substantive input into the International Convention on the Elimination of All Forms of Racial Discrimination in 1994, which Tshwane incorporated into its deliberations. Since 2014, Letlojane alleges, these preparatory meetings have been sporadic and, when held at all, have been rushed. South Africa's Department of International Relations and Cooperation, though, insists that its Civil Society Outreach Programmes are convened thrice annually, ahead of both UN Human Rights Council sessions and UN General Assembly meetings.

Written submissions by civil society to South Africa's foreign and justice ministries are also reportedly frequently ignored, while the government's reports to the UN Human Rights Council have been submitted late. South Africa, for example, ratified the UN International Covenant on Civil and Political Rights (ICCPR) in 1998, and was due to submit its initial country report in 2000. The document was, however, only submitted to the UN Human Rights Council in 2014.



PARTICIPANTS AT THE CCR PUBLIC DIALOGUE "SOUTH AFRICA AND THE INTERNATIONAL CRIMINAL COURT (ICC)", HELD AT THE CENTRE FOR THE BOOK, CAPE TOWN, IN FEBRUARY 2016.

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According to Corlett Letlojane, the lengthy delays in submitting reports to international bodies, and enacting human rights laws domestically, suggest a deprioritising of human rights issues by the South African government. Tshwane is said no longer to be robust in defending the country's position on human rights issues. Civil society will, however, continue to attempt to hold the government to account on these issues.

Policy recommendations

The following seven key policy recommendations emerged from the two public dialogues:

“Civil society must maintain sustained pressure on South Africa not to withdraw from the ICC.”



(FROM LEFT TO RIGHT), MS CORLETT LETLOJANE, EXECUTIVE DIRECTOR, HUMAN RIGHTS INSTITUTE OF SOUTH AFRICA (HURISA), JOHANNESBURG; PROFESSOR EVANCE KALULA, DIRECTOR, INTERNATIONAL ACADEMIC PROGRAMMES OFFICE (IAPO), UNIVERSITY OF CAPE TOWN (UCT); AND MR PITSO MONTWEDI, CHIEF DIRECTOR, HUMAN RIGHTS AND HUMANITARIAN AFFAIRS, SOUTH AFRICA'S DEPARTMENT OF INTERNATIONAL RELATIONS AND COOPERATION (DIRCO), TSHWANE, AT THE PUBLIC DIALOGUE "SOUTH AFRICA AND THE UN HUMAN RIGHTS COUNCIL", HELD AT THE CENTRE FOR THE BOOK, CAPE TOWN, MARCH 2016.

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1. Civil society must maintain sustained pressure on South Africa not to withdraw from the ICC.
2. African states should use their majority at the ICC constructively to place their concerns before the Assembly of Parties, and propose amendments to the 1998 Rome Statute.
3. South Africa and other African governments must continue pushing for the reform of the UN Security Council, particularly as it relates to referrals to the ICC.
4. All African countries should cede jurisdiction on war crimes, crimes against humanity, and genocide to the African Court of Justice and Human Rights in order to establish a viable regional court as an alternative to the ICC, which should be a court of last resort.
5. The granting of immunity to sitting African heads of state must be carefully weighed against a fair justice system that holds leaders to account and avoids impunity.
6. The South African government should not place its political and economic interests on the continent ahead of the rights of victims of war crimes, crimes against humanity, and genocide. Justice for victims must remain the priority.
7. South African government departments responsible for the implementation of the provisions of international human rights law instruments - including the departments of justice and constitutional development, social development, home affairs, and health - must be fully capacitated, both in terms of budget and human resources, to submit reports to the UN Human Rights Council timeously, and to implement the programmes emanating from this domestication.