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POLICY BRIEF



CAPE TOWN, SOUTH AFRICA



SOUTH AFRICA IN AFRICA: THE DILEMMAS OF FOREIGN POLICY AND HUMAN RIGHTS

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, one on 11 April 2016 on “South Africa in Africa: National Interest Versus Human Rights?”, and another on 30 June 2016 on “South Africa in Southern Africa: ‘Good Governance’ Versus Regional Solidarity?” Both events were held at the Centre for the Book in Cape Town.

The main focus of the public dialogue “South Africa in Africa: National Interest Versus Human Rights?” was to discuss South Africa’s obligations to the Hague-based International Criminal Court (ICC) generally, and its specific obligations towards arresting Sudanese president Omar al-Bashir, who is wanted for war crimes by the ICC. Following the adoption by the United Nations (UN) Security Council of resolution 1593 in March 2005, several investigations resulted in two warrants being issued by the ICC for the arrest of al-Bashir in March 2009 for war crimes, and, in July 2010, relating to charges of genocide, both committed in Sudan’s Darfur region.

South Africa and the ICC: National Interest Versus Human Rights?

South Africa became a signatory to the Rome Statute – the treaty that established the ICC – in July 1998, and ratified the statute in November 2000. This was then incorporated into its domestic law. Through a mechanism established in its Implementation Act of 2002, South Africa committed to cooperate with the ICC to arrest and/or surrender persons accused of international crimes. Africa as a continent, however, does not have the necessary instruments to deal with crimes of genocide and violent crimes effectively. Furthermore, only seven African states – Burkina Faso, Côte d’Ivoire, Ghana, Malawi, Mali, Rwanda, and Tanzania – had ratified Article 34(6) of the African Court on African and Peoples’ Rights (AfCHR) by September 2016, and accepted the jurisdiction of the Court that allows individuals and non-governmental organisations (NGOs) to bring cases directly to the Court.

In April 2014, the ICC issued a decision to arrest al-Bashir. South Africa hosted the African Union (AU) summit in Johannesburg in June 2015, with Tshwane (Pretoria) being asked by the AU Commission to organise the technical aspects of the summit. Omar al-Bashir had been invited by the AU to attend the summit rather than by the South African government. Therefore, in anticipation of al-Bashir’s entry into the country and his participation at the AU summit, Tshwane argued that the AU hosting agreement of June 2015 granted the Sudanese leader the immunities and privileges provided for in Article VIII of this agreement. However, in May 2009, when Jacob Zuma was inaugurated as South Africa’s president, al-Bashir had not been invited to this ceremony.

“Africa as a continent does not have the necessary instruments to deal with crimes of genocide and violent crimes effectively.”



(FROM LEFT TO RIGHT), AMBASSADOR WELILE NHLAPO, FORMER SPECIAL REPRESENTATIVE OF SOUTH AFRICA TO THE GREAT LAKES REGION AND FORMER NATIONAL SECURITY ADVISOR TO THE SOUTH AFRICAN PRESIDENT; DR DAVID MONYAE, CO-DIRECTOR, UNIVERSITY OF JOHANNESBURG CONFUCIUS INSTITUTE (UJC); AND MS NICOLE FRITZ, INDEPENDENT CONSULTANT, JOHANNESBURG; AT THE PUBLIC DIALOGUE “SOUTH AFRICA IN AFRICA: NATIONAL INTEREST VS. HUMAN RIGHTS?”, HELD AT THE CENTRE FOR THE BOOK, CAPE TOWN, 11 APRIL 2016.

Image source - CCR
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“ Moving from the continental to sub-regional level, following its independence in 1994, post-apartheid South Africa developed a reputation for being a strong promoter of human rights in Southern Africa and beyond. ”



(FROM LEFT TO RIGHT), PROFESSOR LLOYD SACHIKONYE, ASSOCIATE PROFESSOR, INSTITUTE OF DEVELOPMENT STUDIES CENTRE FOR APPLIED SOCIAL SCIENCES (CASS), DEPARTMENT OF POLITICAL SCIENCE, UNIVERSITY OF ZIMBABWE, HARARE; DR KUDRAT VIRK, SENIOR RESEARCHER, CENTRE FOR CONFLICT RESOLUTION (CCR), CAPE TOWN; AND DR DAVID MONYAE, CO-DIRECTOR, UNIVERSITY OF JOHANNESBURG CONFUCIUS INSTITUTE (UJCI); AT THE PUBLIC DIALOGUE “SOUTH AFRICA IN SOUTHERN AFRICA: ‘GOOD GOVERNANCE’ VS. REGIONAL SOLIDARITY?”, HELD AT THE CENTRE FOR THE BOOK, CAPE TOWN, 30 JUNE 2016.

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In June 2015, the Southern Africa Litigation Centre (SALC), an NGO, took the South African government to the Gauteng Division of the High Court in Tshwane. The SALC’s argument before the Court was that South Africa had failed in its obligations under the Rome Statute as well as in its own Implementation Act of the country’s 1996 Constitution. SALC further contended that Tshwane was obliged to give effect to the ICC’s warrants issued for the arrest of al-Bashir and to surrender him to the ICC for prosecution on charges of war crimes and genocide. The South African government sought to postpone the court hearing to allow itself time to prepare affidavits in response to SALC’s court filing and for the High Court hearing. Recognising that al-Bashir might leave the country, the High Court granted the South African government a postponement on condition that government officials took all necessary steps to prevent al-Bashir from leaving the country.

At the second High Court hearing, two days later, the Court sought assurances from the South African government that al-Bashir was still in the country. The Sudanese leader, had, however, already left South Africa with the assistance of the government, despite the court order prohibiting his departure. The High Court thereafter requested that a full argument be set down by the parties on the merits of the case. The independence of South Africa’s judiciary was demonstrated in the final ruling by the High Court in March 2016, which found the South African government guilty of having failed to take steps to arrest and detain al-Bashir. The South African government was also found guilty of having acted unlawfully against its obligations as a signatory to the Rome Statute, as well as its obligations under its own constitution.

South Africa in Southern Africa: “Good Governance” Versus Regional Solidarity?

Moving from the continental to sub-regional level, following its independence in 1994, post-apartheid South Africa developed a reputation for being a strong promoter of human rights in Southern Africa and beyond. The country’s first democratic president and Nobel peace prize laureate, Nelson Mandela, pledged his commitment to the pursuit of democracy, human rights, and “good governance” across the continent. The South African president was the only African leader who spoke out publicly and vociferously against Nigeria’s autocratic leader, General Sani Abacha, following the hanging of environmental campaigner, Ken Saro-Wiwa and eight fellow Ogoni human rights activists in November 1995, though Tshwane found itself diplomatically isolated on the continent.

Relations among Southern African states have historically been defined by strong norms of solidarity enshrined in regional economic communities (RECs) like the 15-member Southern African Development Community (SADC) which obliges its member states to act in accordance with principles of solidarity, peace, and security. Such regional norms were pursued when the Front Line States (FLS) was created in 1975 to wage

liberation struggles against white minority regimes in South Africa and Rhodesia (Zimbabwe). South Africa was invited to join SADC in 1994, and accounts for about 60 percent of the sub-region's economy, with a Gross Domestic Product (GDP) of \$358 billion in 2015. Tshwane thus has the capacity to play a leadership role and to drive the promotion of human rights and democratisation efforts in Southern Africa.

South Africa has, however, experienced significant tensions in its efforts to promote democratic governance in its own sub-region. Tshwane has struggled to balance its foreign policy with regional solidarity. Though South Africa's 1996 Bill of Rights is regarded as one of the world's most progressive, and the country's transparent and participatory governance structures are a positive example for the sub-region, the Thabo Mbeki (1999-2008) and Jacob Zuma (after 2009) administrations, were accused by critics of having failed to prioritise the promotion of democratisation across Southern Africa. The South African government has, however, been a key player in responding to regional political crises. Thabo Mbeki helped to craft Zimbabwe's September 2008 Global Political Agreement which ushered in a government of national unity in Harare. Mbeki's successor, Jacob Zuma, continued South Africa's mediation efforts in Zimbabwe, culminating in a new constitution and elections in July 2013 that saw the 23-year rule of President Robert Mugabe extended. Tshwane was, however, criticised for helping to legitimise Zimbabwe's flawed elections in March 2002, March 2005, and March 2008. South Africa has been reluctant to use its political and economic clout in the sub-region to promote human rights and democratic values in order to avoid being perceived as an overbearing hegemon. The South African government was part of SADC's August 2012 summit that effectively dissolved the SADC tribunal, following a series of judgements against the Zimbabwean government brought by white farmers in June 2008.

While SADC has made some progress towards creating the conditions for transparent elections, governance challenges in the sub-region also include insufficient citizen participation, weak state capacity, and poorly delivering states.



THE SADC SECRETARIAT BUILDING, GABORONE, BOTSWANA.

Image source - Sunday Standard
<http://www.sundaystandard.info/mugabe-due-gaborone-crack-whip-sadc-headquarters>

While SADC has made some progress towards creating the conditions for transparent elections, governance challenges in the sub-region also include insufficient citizen participation, weak state capacity, and poorly delivering states. In the past two decades, Southern Africa has experienced a wave of political change, moving from protracted civil war and colonial or authoritarian rule towards peace and more democratic modes of governance characterised by political pluralism, openness, and the holding of regular elections. Several countries have progressed from *de facto* one-party rule to multi-party regimes in the sub-region, with Botswana and Mauritius having the longest records as constitutional democracies: regular elections have taken place in both countries since independence in 1966 and 1968 respectively. After 23 years of one-party rule (1970-86) and military dictatorship (1986-93), Lesotho made the transition to multi-party democracy with elections in 1993. Following its emergence from a protracted 27-year civil war in 2002, Angola introduced parliamentary rule, while Namibia and South Africa have made much progress towards consolidating constitutional democracy since 1990 and 1994 respectively. Several Southern African countries, however, continue to violate human rights and have not made the transition to more democratic regimes. They also have not overseen development efforts

that could have led to substantive improvements in the lives of SADC's 281 million citizens. This highlights a disconnect between the values of socio-economic development within the democratic context, and the capacity and will of states in the sub-region to engender such development. Several SADC governments are plagued by corruption, and remain incapable of delivering basic social services and infrastructure to their citizens. This failure to address pressing socio-economic issues manifests in various ways, including voter apathy, mass protests, public cynicism, and withdrawal of citizens from policy implementation. The strengthening of public institutions for the effective delivery of services to Southern African citizens is therefore a key component of building and consolidating democracy in the sub-region. Poor governance not only harms national societies, but also undermines sub-regional security and development.

With regard to regional peacemaking, South Africa's role has been informed by its own experiences of a democratic transition between 1990 and 1994 mediated through a facilitated dialogue process. Tshwane has used these experiences in mediating regional conflicts. South Africa has, however, been cautious in its efforts to foster greater respect for human rights in the sub-region by regimes such as Swaziland's absolutist monarchy. Under South Africa's deputy president, Cyril Ramaphosa, who acted as the SADC facilitator, an agreement was brokered that led to Lesotho's elections in February 2015. South Africa was also instrumental in peacemaking efforts in SADC member, the Democratic Republic of the Congo (DRC), and contributed 1,400 troops to the UN mission in that country. In March 2013, the UN authorised the deployment of a SADC-led intervention brigade. The 3,000-strong brigade consisted of South Africa, Tanzania, and Malawi, and was deployed by October 2013. The brigade was able, with the Congolese army, to rout the March 23 (M23) rebel group in November 2013. South Africa has, however, been constrained on human rights issues by poor migration policies inherited from the apartheid regime which have discriminated against migrants from other African countries. This is underscored by the recurrent xenophobic attacks against mostly African migrants (largely from Zimbabwe, Mozambique, and Malawi) in South Africa that have resulted in more than 350 foreigners being killed since 2008. South Africa, therefore, needs to pay more attention to its own domestic human rights record.

Though often weak and poorly organised, civil society in Southern Africa has grown increasingly vocal, and a critical media has emerged in many parts of the sub-region.



A PARTICIPANT AT THE CCR PUBLIC DIALOGUE "SOUTH AFRICA IN AFRICA: NATIONAL INTEREST VS. HUMAN RIGHTS?", HELD AT THE CENTRE FOR THE BOOK, CAPE TOWN, 11 APRIL 2016.

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

The Role of Civil Society

Though often weak and poorly organised, civil society in Southern Africa has grown increasingly vocal, and a critical media has emerged in many parts of the sub-region. Democratic institutions such as parliaments, electoral bodies, and judiciaries, too, have become more assertive in challenging human rights and domestic abuses of power. Indeed, only Swaziland has openly bucked the sub-regional trend towards more participatory democracy. The Principles for Election Management, Monitoring and Observation – developed jointly by the Electoral Commissions Forum and the Electoral Institute for Sustainable Democracy in Africa (EISA) – are a prime example of the positive and instructive contributions that civil society can make to

“The South African government should not lose sight of its domestic human rights challenges, particularly in relation to violence, crime, and xenophobia; and Tshwane should give these problems as much priority as its outward-looking foreign policy.”



SOUTH AFRICA'S PRESIDENT, JACOB ZUMA, AT THE SADC SUMMIT IN HARARE, ZIMBABWE, IN APRIL 2015.

Image source - Council on Foreign Relations
 Photo - Philimon Bulawayo/Courtesy Reuters
<http://blogs.cfr.org/campbell/2015/05/22/the-conflicting-messages-of-jacob-zuma/>

SADC's work in this area. Civil society was also instrumental in the creation of panels with grassroots involvement for the mediation of election-related conflicts in South Africa, Zambia, and Lesotho. Similarly, the Electoral Platform of Civil Society for Elections - a forum of non-governmental organisations in Angola - has been active in election observation and civic education. The Oasis Forum, alongside other civil society organisations, was also a vocal participant in Zambia's constitution-making process. Other examples abound, and include the work being done by the Southern African Forum against Corruption (SAFAC). In terms of the role of civil society in the SADC region, the work of women's groups is of particular note. Gender parity in politics is a key goal in the sub-region, and the SADC Declaration on Gender and Development of 1997 called on member states to ensure that 30 percent of their parliamentarians were women. Persistent lobbying by women's groups led Southern African policymakers to increase the quota for women representatives in political office from 30 to 50 percent in August 2005. Only South Africa has, however, met this quota. Civil society should therefore organise itself more effectively, networking across borders, and building a culture of cooperation in order to engage more robustly with the Botswana-based SADC Secretariat. Only through such efforts can effective support be provided to democratisation efforts in the sub-region, with active South African leadership.

Policy recommendations

The following four key recommendations emerged from the two public dialogues:

1. African and other governments need to work closely with the UN and the ICC to sequence the administration of justice in cases such as Sudan in ways that do not undermine the pursuit and consolidation of peace.
2. The South African government should not lose sight of its domestic human rights challenges, particularly in relation to violence, crime, and xenophobia; and Tshwane should give these problems as much priority as its outward-looking foreign policy.
3. South Africa, through SADC, should put in place a five-year implementation plan for greater regional industrialisation projects that build strong partnerships to promote socio-economic development and reduce human rights abuses.
4. Southern African governments must honour their commitments enshrined in SADC, the AU, the UN, and other international legal documents to promote human rights more effectively across the sub-region.