



PRESS STATEMENT

IMPLICATIONS OF THE SUPREME COURT OF APPEAL JUDGMENT ON OMAR AL-BASHIR CASE FOR THE ICC DEBATE

17 March 2016

The Centre for Human Rights (CHR), Faculty of Law, University of Pretoria, welcomes the clarity provided in the Supreme Court of Appeals (SCA) judgment in the case of *The Minister of Justice and Constitutional Development and Others v The Southern Africa Litigation Centre and Others*, on the matter of the visit of the Sudanese head of state, President Omar al-Bashir, to South Africa, and the failure of the South African government to arrest him in accordance with South Africa's obligations under the International Criminal Court (ICC) and the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (ICC Act).

However, the CHR notes with apprehension the potential political murkiness surrounding the case, and is concerned about the possible reactions from the South African government. In particular, the CHR is alarmed about the possibility of the government using the SCA judgment as coals to stoke the fire on the debate surrounding South Africa's potential withdrawal from the ICC. The CHR reiterates its [position taken earlier](#), that it is not advisable for South Africa to withdraw from the ICC, and want to raise the following arguments, some of which are based on the recent SCA judgment:

First, withdrawal from the ICC is not in the best interest of South Africa from either an international human rights or an international relations perspective. South Africa has a long tradition of respecting its international human rights commitments, and cooperating with others to uphold those commitments. Notwithstanding South Africa's support for AU Resolutions calling for the removal of arrest warrants against President Bashir, the South African government made it clear in 2013, during

speculation around President Bashir's presence at the memorial of former President Nelson Mandela, that it would have no option but to arrest President Bashir if he enters the country.

The position taken by the South African government in 2013 is in line with its apparent general acceptance that there is indeed an obligation to arrest President Bashir, and that the attempt to grant him immunity at the AU Summit in 2015 was aimed at providing a temporary exception. The South African government even issued a Government Gazette to that effect, and stated that it 'collectively appreciated and acknowledged that the [decision to grant immunity] can only apply for the duration of the AU Summit' (Paragraph 12 of the SCA judgment). The CHR would like to point out that the state's argument for a temporary exemption does not constitute a principled legal argument that there is no, and never has been, a legal obligation for South Africa to arrest President Bashir in 2015. To the contrary, this argument underscores South Africa's acceptance of its responsibility to arrest and transfer President Bashir to the ICC as a general rule.

Second, the CHR points to the fact that the SCA based its judgment on domestic law, in particular the ICC Act, and the subsequent implications for the South African legal system. It is prudent to highlight that all domestic legislation, including the ICC Act, must be interpreted and construed in a way that gives effect to South Africa's international law obligations and the spirit, purport and objects of the Bill of Rights. There is an undeniable link between South African domestic legislation and international human rights commitments, especially in a case such as this where these international commitments have been domesticated and enacted into law.

In the event that South Africa withdraws from the ICC, it would necessitate a serious revision of, if not the entire repeal, of the ICC Act – the domestic legal endorsement of South Africa's obligations under the Rome Statute. This would require the South African government to take the matter to Parliament, and go through the necessary Parliamentary procedures, to facilitate South Africa's withdrawal from the ICC. It is very difficult to imagine a cogent argument for the repeal of the ICC Act that would be consistent with the South African Constitution, and the obligations of all branches of government under the Constitution.

Third, the South African government will be playing into the hands of those encouraging impunity of leaders committing human rights abuses. The argument that the ICC is biased towards prosecuting African leaders, valid as it may be, appears to be a red herring in this particular debate, as was confirmed by the actions of Rwanda recently. Together with Sudan and Kenya, Rwanda has been at the forefront of fighting the ICC on the basis of its selective prosecution, arguing that an African institution should replace the ICC. However, Rwanda recently also withdrew its acceptance of direct access by victims (Article 36(4) declaration under the Protocol on the African Human Rights Court) to

the African Court on Human and Peoples' Rights (African Court), in the wake of having 6 complaints against them submitted to the African Court.

Similarly, where Kenya started out as a fervent supporter of the ICC, it retraced its steps and changed its position after the ICC started investigating Kenyan leaders for their involvement in electoral violence that led to several deaths in Kenya. It should be noted that the ICC acted in its complementary role, and only investigated these deaths after the Kenyan government failed to do so. It is clear that those arguing most strongly for Africa's withdrawal from the ICC, including Sudan, Rwanda and Kenya, do so from behind thinly veiled excuses such as the bias of the ICC towards African leaders, when the facts clearly show that they actually attempt to reinforce a system in which African leaders can violate human rights with impunity. It would be an irremovable blemish on the human rights record of South Africa, should it decide to support the perpetuation of such a system.

South Africa's withdrawal from the ICC, especially in light of the events in Sudan, would be a great disservice to itself and its human rights record. Distancing itself from the ICC would not exclude or absolve it from other global treaties that South Africa has ratified, including the Convention on the Prevention and Punishment of the Crime of Genocide. Under Article 6, South Africa is under an obligation to ensure prosecution of the crime of genocide in its domestic court or an "international tribunal" that has jurisdiction, such as the ICC. In this 30th year of celebrating the South African Constitution, and also the African Charter on Human and Peoples' Rights, the CHR calls on the South African government to take the lead in championing the best interests and human rights of the African people by setting a new precedent that would effect justice and accountability in matters where human rights are violated on a large scale.

For more information, please contact:

Prof Frans Viljoen
Centre for Human Rights
University of Pretoria
Tel: (012) 420 3228
Email: frans.viljoen@up.ac.za

Josua Loots
Centre for Human Rights
University of Pretoria
Tel: (012) 420 4531
Email: josua.loots@up.ac.za