South Africa and International Criminal Justice

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Building of the International Criminal Court in The Hague, Netherlands

In its short existence since it opened its doors in 2002, the International Criminal Court (ICC or the Court)) has generated controversy from Washington to Beijing, and most recently Tshwane to Addis Abeba.

It is particularly loathed in the corridors of power in Sudan. The opposition to the Court peaked on 4 March this year, when the Court issued a warrant of arrest for President Omar al-Bashir of Sudan for massive crimes in Darfur. Al-Bashir in turn expelled humanitarian aid workers and threatened rights defenders. A number of states – including South Africa – have asked the UN Security Council to halt the proceedings. President Gaddafi, otherwise known for his level-headed comments, has branded the indictment 'First World terrorism.' A well-respected African scholar – Mahmood Mamdani – has lamented that 'its name notwithstanding, the ICC is rapidly turning into a Western court to try African crimes against humanity.' The African Union (AU) has loudly criticised the Court and shored up support for al-Bashir. And there is a threat by some states that they are considering withdrawing from the Court's Statute – the Rome Statute of the International Criminal Court of 1998.

How did it come to this, a mere 11 years after the adoption of the Rome Statute and six years after the Court began its work? The answers to this question are varied and deep. And fortunately for me my brief is far narrower: to speak about South Africa's obligations to the Court with specific reference to the AU's decision on 3 July 2009 to withhold cooperation in respect of the arrest warrant issued for al-Bashir.

But in part the answer to that narrower question is tied up with the broader political troubles facing the Court. The Court's biggest obstacle is not unexpected; that is, it faces a backlash from individuals in power who fear an independent court that is empowered to hold accountable persons accused of the world's worst crimes of genocide, crimes against humanity and war crimes.

The indictment of President al-Bashir is a case acutely in point. Although the Rome Statute allows for it, indicting a head of state is unsettling (particularly for the head of state). The world's powerful are thus not a little perturbed by the Court's apparent reach, and they predictably dislike the al-Bashir precedent. As *The Economist* puts it in a recent issue: the unseemly clubbing together by various heads of state to condemn the warrant is probably driven by a fear that one or more of them may be next.

One measure of attack against the ICC has been directed at its prosecutor, Mr Luis Moreno Ocampo. As Jim Goldston, the executive director of the Open Society Justice Initiative, has remarked,[2] the prosecutor has been accused of being publicity-hungry and also of doing too little to publicise the work of the Court; of pandering to politicians on the one hand, and on the other of being politically tone-deaf; of bringing cases too slowly – and moving too quickly to charge a head of state. Homer's adage of being caught between Scylla and Charybdis will not have been lost on the office of the prosecutor. On the flight down to Cape Town from Durban I read in *Advocate* that Andrew Breitenbach (now SC) described a regrettable moment when under pressure in motion court, instead of 'my Lord', he exclaimed 'oh Lord'. Given the stresses and strains Mr Ocampo is under, he may well feel 'oh Lord' remains thoroughly appropriate, at least before the ICC.

But as Goldston points out, the real issue is not the character of the prosecutor or the judges, but the crimes of a president. Of course, indicting a head of state is then often discomfiting for other reasons. These include the uncertainty of injecting a new and independent element into the already-complex dynamics of peace negotiations and conflict resolution. And this in part appears to be one of the reasons South Africa and other African states are pushing for the Security Council to defer the prosecution of al-Bashir. If they could wave a banner reading 'Give Peace a Chance', they would. While the peace versus justice debate is not my focus, history demonstrates that insisting on justice does not necessarily mean an end to peace talks or renewed conflict as some predict. The indictment of President Slobodan Milosevic in 1999 when Richard Goldstone was prosecutor in the International Criminal Tribunal for the former Yugoslavia was condemned by many as destabilising and politically dangerous. But two years later the Kosovo war had ended and Milosevic was in the dock in The Hague, until he left for another jurisdic-

tion by passing away on trial. When, in 2003, the UN-backed Special Court for Sierra Leone brought charges against former Liberian president Charles Taylor, many predicted mayhem in west Africa. After a period of enforced exile in Nigeria, Taylor suddenly vanished two days after the Nigerian government said it would end his asylum and allow him to face the indictment. Taylor was later arrested on the Nigerian border after reportedly making a run for it in a disguised diplomatic car with a stash of US dollars. He is now in custody before the Special Court and today Liberia is making its way towards being a peaceful democracy. In short, in practice the anticipated negative consequences of pressing for accountability often do not come to pass.[3]

So let me return then to the question I've been asked to discuss: South Africa's obligations to the Court with specific reference to the AU's decision on 3 July 2009 to withhold cooperation in respect of the arrest warrant issued for al-Bashir.

Recent events have brought South Africa's relationship with the International Criminal Court into sharp focus. At the outset let me say that South Africa was a vocal endorser of the ICC. Its influence at Rome in 1998 where the Court's statute was drafted has been chronicled widely and admired deservedly. It became a party to the Rome Statute in 2000. It was the first state in Africa to implement the Rome Statute's provisions into its domestic law. Parliament passed the Implementation of the Rome Statute of the ICC Act in August 2002 – and to date it is one of only three African states to have done so. It has moreover created a dedicated unit – the Priority Crimes Litigation Unit, headed by Advocate Anton Ackermann – to tackle the crimes outlawed under the statute, being genocide, crimes against humanity and war crimes. The ICC Act is also a progressive piece of legislation, allowing for a form of universal jurisdiction over offenders.

And lawyers and civil society members have sought to utilise the Act. A number of cases have been filed in South Africa in terms of the Act, perhaps the most high profile being a request for the NPA to act against Zimbabweans accused of torturing MDC members during the last election period, and more recently a dossier submitted to the NPA calling for the investigation of South Africans and others who are suspected of involvement in war crimes during Operation Cast Lead in Gaza.

These 'developments' should be seen in a sobering light, however. Domestically, the police have to date declined to investigate the cases that were referred to the NPA, and consideration is being given to the possibility of a review application. The demise of the Scorpions and the rise of the Hawks has introduced puzzlement as to just who is meant to investigate these crimes. A new unit in the police – the Directorate for Priority Crimes Litigation Unit – has been established. The fact that its acronym – DPCI – is the name of a well-known Telytubby, is hopefully no more than an unhappy coincidence.

At an international level, South Africa's position on the ICC has been confused and confusing. You may recall reading reports during May that South Africa had invited al-Bashir – by then wanted by the ICC – to President Zuma's inauguration. If he had arrived the country would have faced an embarrassing situation that threatened to undermine the jubilation of inauguration day, not least of all because we had a duty under our domestic and treaty law to arrest him. Only after significant protestation by civil society did Foreign Affairs eventually recant, and they issued a mealy-mouthed statement to say that although the Sudanese government was invited, President al-Bashir was not. As you know, al-Bashir, weighing his freedom in the balance, chose not to attend the party at the Union Buildings. Then July 2009 was dominated by the news that South Africa joined ranks with others at an AU meeting in Sirte, Libya, to support a 3 July AU resolution (driven by President Gaddafi) calling on its members to defy the international arrest warrant issued by the ICC for al-Bashir. Perplexingly, just a month before that South Africa's Justice Minister at a different AU meeting in Addis Ababa had joined with other African states to affirm a deep commitment to the Court.

The Sirte resolution of the AU – stressing that member states would not cooperate in the arrest and surrender of African indicted personalities – was quickly condemned as a betrayal of Africa's commitment to end impunity for human rights atrocities, and an international treaty violation. I should stress here that 30 African states are party to the ICC – the largest regional bloc in the world. Only Botswana publicly distanced itself from the AU move, and in a letter written the very next day to the ICC assured the Court that 'as a State Party to the Rome Statute of the ICC, Botswana will fully abide with its treaty obligations and will support the International Criminal Court in its endeavours to implement the provisions of the Rome Statute.'

Because of its support for the resolution South Africa was quickly singled out for severe criticism both at home and abroad. You may have seen a letter signed by amongst others Desmond Tutu, Richard Goldstone, and John Dugard, as well as Dumisa Ntsebeza and other members of the Cape and other Bars deploring South Africa's position; and the GCB issued a similar statement.

Then on 31 July we were told at a press conference – by Dr Ntsaluba of Foreign Affairs – that 'after taking legal advice on the matter', the department happily yielded to the rule of law. The department portrayed the matter as a purely legal process for the courts, deferring to the principles of our Constitution and respect for the ICC Act (without explaining where such high-minded, principled tendencies were when the AU resolution was passed in Sirte). Remarkably, at that press conference it was disclosed that an international arrest warrant for al-Bashir had in fact been endorsed by a Pretoria magistrate, apparently at the request of our government. Were these examples of a further reversal, or just a clarification? I admit that I don't know the answer.

What I do know is that South Africa's legal position is relatively clear. Naturally the al-Bashir saga, (not to mention the issue of Zimbabwean torturers and the Gaza docket) is controversial and complex. The way in which our institutions respond will be a measure of how seriously South Africa takes its international obligation to combat impunity.

The law implicated by these developments should not be marginalised by the political considerations and ramifications that surround - and threaten to engulf - them. The developments turn on the implementation of South Africa's ICC Act, enacted by Parliament to incorporate and operationalise South Africa's commitment to international criminal justice. Further, the developments delineate the two main functions of the ICC Act: to allow for our local courts and police service to cooperate with the ICC in apprehending suspects indicted by the ICC (like al-Bashir); and to ensure we fulfil our treaty obligations domestically to investigate individuals (like those named in the Gaza or Zimbabwe docket) – who are South African or who come within our jurisdiction – suspected of committing war crimes, genocide, or crimes against humanity. This second function is at the heart of the ICC's regime of *complementarity*. The complementarity principle, built into the ICC Statute, obliges ICC member states to act domestically by investigating and prosecuting these crimes or, if unwilling or unable to do so, surrender them to The Hague for prosecution.

The legal issues involved in such high-profile prosecutions are of course riddled with political controversies. Although the obligations imposed by law on our institutions are clear and weighty, how those obligations are

carried out inevitably involves policy choices. The effects of these choices will provide opportunities for principled leadership and involve political costs. Looking back two broad observations can be drawn from these developments, and should inform the policy choices of our government going forward.

In a thoughtful article published in *Business Day* last week,[4] Chris Gevers has explained that what emerged clearly from the al-Bashir indictment in the first place is the need for a coherent and coordinated policy on international criminal justice within government. The nature of these matters being such that numerous state departments are involved, coordination across government is essential. Nothing is to be gained from the equivocation that characterised our handling of the AU resolution and al-Bashir's indictment by the ICC. After some firm nudging, by South African civil society in particular, the government ultimately did the right thing by honouring our treaty obligations and acknowledging the legal effect they have in the domestic sphere. However, by the time we corrected our position we had already missed an opportunity to show leadership (Botswana had long since been heralded – correctly – as Africa's principled voice on the issue); and we had needlessly suffered the political cost of being portrayed as siding with al-Bashir and against the ICC; and of placing old-style OAU solidarity politics above the rights of African victims.

Secondly, and related to this, is what Gevers describes as the danger of aiming for short-term diplomatic solutions in response to such developments. South Africa lies at the centre of too many political dichotomies, and is pulled in too many directions, to properly anticipate the long-term effect of decisions based on immediate political cost. The al-Bashir matter has seen South Africa originally siding not only with African states, but also with various Arab states that had condemned the ICC indictment. Its revised, or clarified position – affirming its legal duty to arrest al-Bashir if he visited here – will not have sat well with the League of Arab States. The Gaza docket submitted earlier this month will sit better within Arab capitals, but any action thereon by the SA government is likely to draw the ire of Israel. Given these conflicting political allegiances, and the already embarrassing correction government was forced to make in respect of the al-Bashir arrest warrant, South Africa could do worse than to err on the side of principle and open commitment to its stated legal obligations.

Let me conclude by saying that one thing is abundantly clear. Africa is where international criminal justice – a relatively new phenomenon – is taking stride. And South Africa, with its progressive ICC Act and leading role on the continent, is at the cutting edge of these developments. It is thus important for government to coordinate and streamline its policies around international criminal justice. And it is imperative that the rule of law guide its response to developments in the field: whether it be a call from the ICC to arrest the Arab leader of an African nation, or an application for the investigation of Israeli war crimes in Gaza, or a request for the arrest of Zimbabwean torturers who come to do their shopping at Sandton City.

Endnotes

[1] Advocate of the High Court of South Africa, associate member of the KwaZulu-Natal Bar; associate professor, University of KwaZulu-Natal, Durban; senior research associate, International Crime in Africa Programme, Institute for Security Studies.

[2] See 'Draft Remarks' by James A Goldston, Seminar on International Criminal Justice, 'The Role of the International Criminal Court,' United Nations, New York, May 19, 2009.

[3] See further Human Rights Watch Report July 2009: 'Selling Justice Short: Why Accountability Matters for Peace'.

[4] Christopher Gevers, 'SA must tighten policies on international criminal justice' *Business Day* 20 August 2009.