DEFENDING THE JUDGES

A CRISIS OF COURTS AND GOVERNMENT

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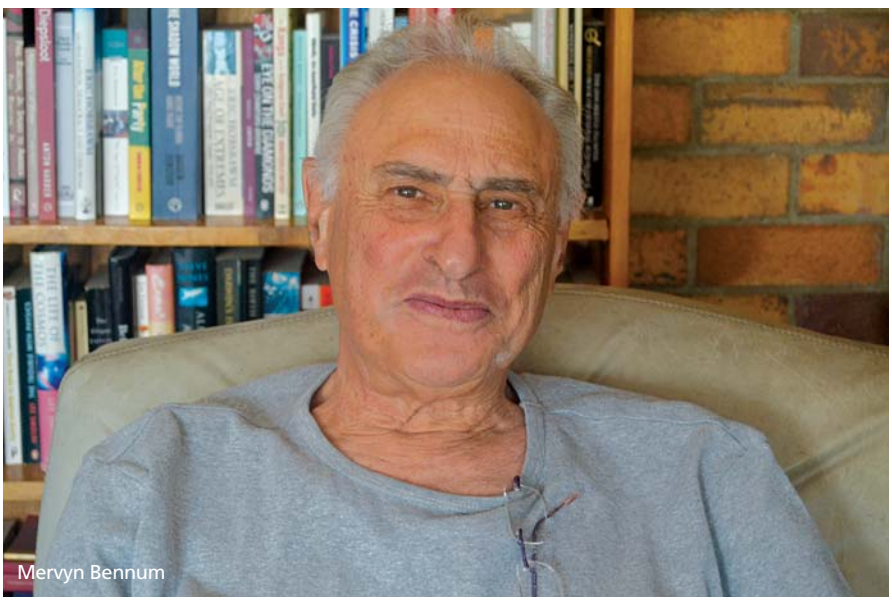
Mervyn Bennum argues that the conflict between the government and the Gauteng High Court over the International Criminal Court and the Al-Bashir ruling is not legal but political.


Mervyn Bennum

President Jacob Zuma, cabinet ministers and others who spoke out following the departure of President Omar al-Bashir from South Africa – despite a High Court order that he be held "pending a formal request for his surrender from the International Criminal Court" – are neither naïve nor illiterate. They understand the Constitution and the legislation, the implications of their decision to defy the order, and the implications of their responses to the criticism which has followed.

It is wrong to characterise the situation as a clash between the judiciary and the legislature. In fact, the tension is between the state, as established under the Constitution and as represented by the judges, and a political party which happens for the moment to constitute the government. The Constitution, its conventions and the law endure and must be respected across any change in government. The manner in which judges are appointed and their long tenure (at maximum, to the age of 70) are designed to remove them from the sphere of political activism and to protect their independence. By design, they outlive any government under which they were appointed.

This is underlined by the statement on the judiciary's commitment to the rule of law that was issued by the Chief Justice and Heads of Court and Senior Judges of all Divisions on 8 July 2015, following the defiance of the court order that Bashir should be held:

> Our constitution, like others of its kind, sets out the powers of each arm of state. No arm of the state is entitled to intrude upon the domain of the other. However, the constitution requires the Judiciary ultimately to determine the limits and regulate the exercise of public power. (Mogoeng, 2015)

MINISTERIAL POSITIONS

Several statements by Lindiwe Zulu, the minister for small business development, provide evidence that the clash is between the state and the Zuma administration. She told parliament that the decision to let Bashir leave the country was "a collective cabinet

decision" (Joubert, 2015). She claimed that putting justice ahead of all other elements was "counter-productive" (RDM, 2015). And during a subsequent debate on the President Zuma's fitness for office because of this decision, she told parliament that a motion to investigate and to consider the matter was aimed at discrediting the ANC (Reuters, 2015).

Defending the decision to defy the order of court, John Jeffery, the deputy minister of justice and constitutional development, and Jeff Radebe, the minister in the office of the Presidency and former minister of justice, claimed that South Africa's Diplomatic Immunities and Privileges Act (the "Immunities Act") protected Bashir from being detained (Jeffery, 2015).

The same speech claimed that Article 98 of the ICC's founding treaty, the Rome Statute, contradicts its own Article 27. Article 27 denies heads of state immunity from the jurisdiction of the ICC, while Article 98 sets conditions on the ICC's ability to request third-party surrender of a person with immunity.

Jeffery also drew attention to a judgement in the British House of Lords involving the extradition of the Chilean dictator Augusto Pinochet to stand trial in the UK, claiming that these showed that international law protects sitting heads of state by granting absolute immunity when they visit other countries on official business.

He also commented:

> It is interesting to note that Nigeria, when President Bashir visited Nigeria in July 2013, also did not arrest him and the ICC subsequently absolved Nigeria of liability for the failure of its security forces to arrest, as the Pre-Trial Chamber of the ICC ruled that Nigeria has justifiable reasons for its failure to arrest President Bashir.

Examining these claims one at a time, a different picture emerges.

Firstly, the Immunities Act which came into effect in February 2002, makes no reference to the ICC whatever. The long title to the Act states that its purpose is

> [t]o make provision regarding the immunities and privileges of diplomatic missions and consular posts and their members, of heads of states, special envoys and certain representatives, of the United Nations, and its specialised agencies, and other international organisations and of certain other persons; to make provision regarding immunities and privileges pertaining to international conferences and meetings; to enact into law certain conventions; and to provide for matters connected therewith. (RSA 2001)

None of this is arcane rocket-science law. These matters were well known to the cabinet when it decided to allow Al-Bashir to leave South Africa in defiance of the ruling of the Gauteng High Court.

Section 2 enacts into South African law the Convention on the Privileges and Immunities of the United Nations, 1946, the Convention on the Privileges and Immunities of the Specialised Agencies, 1947, the Vienna Convention on Diplomatic Relations, 1961, and the Vienna Convention on Consular Relations, 1963, thus bringing South Africa into line with universally-observed rules that enable accredited diplomats to do their tasks in the foreign countries where they are sent.

The Gauteng High Court pointed out that the African Union Convention, which purported to grant immunity for the purposes of the AU Summit, has not been enacted as a part of South African law and is therefore not binding in South Africa. Since the Immunities Act does not do this, the "structures, staff and personnel of the AU" do not automatically enjoy privileges and immunity in South Africa.

Section 4 of the Immunities Act states: "A head of state is immune from the criminal and civil jurisdiction of the courts of the Republic." The Immunities Act is valueless to defend the failure to hold Bashir, because the only immunity conferred is in relation to South African courts. And neither the Conventions nor the Immunities Act has anything to do with cases before the International Criminal Court, and they were never intended to provide immunity from its jurisdiction.

Secondly, Article 27 of the ICC's Rome Statute states:

> This Statute shall apply equally to all persons without any distinction based on official capacity. *In particular, official capacity as a Head of State or Government*, a member of a Government or parliament, an elected representative or a government official *shall in no case exempt a person from criminal responsibility under this Statute*, nor shall it, in and of itself, constitute a ground for reduction of sentence. (ICC, 2002; emphasis added)

Thus the ministers' first ground failed because the Rome Statute (and Article 27 in particular) is a part of South African law – and the second also failed because the AU Convention is not.

Turning now to the 1998 House of Lords cases involving Pinochet, it is significant that they predate the Rome Statute. South Africa signed this in 2000, it came into force as international law in August 2002, and it became the law of South Africa in August 2002 by the Implementation of the Rome Statute of the International Criminal Court Act (the ››

Cheering supporters greeted Mr Bashir at Khartoum airport, Source: *BBC.com*

"Implementation Act").

A fundamental rule for the interpretation of statutes is that, when passing a law that has the effect of amending an existing law, it is assumed that parliament intended to make that change or amendment. The Rome Statute and South Africa's Implementation Act thus totally changed the pre-existing international law governing the immunity of heads of state, and it was intended that they should do so.

Is it now seriously contended that those who negotiated and drafted the Rome Statute were unaware of the changes to customary international law made by Article 27, and did not intend them? That the government of South Africa was unaware of Article 27 of the Rome Statute when signing it? That the legislature accidentally overlooked the Article, and did not intend to make the changes to our law? That our legislature was unaware that the Immunities Act and the Conventions behind it had nothing to do with the Rome Statute?

Ministers Jeffery and Radebe referred to Article 98 of the Rome Statute as though it created problems for holding Bashir. Article 98 deals with "Cooperation with respect to waiver of immunity and consent to surrender". Its first two clauses prevent the ICC from proceeding in a request for surrender or assistance if it would require the requested state "to act inconsistently with its obligations under international law" in two respects:

> with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity ... [or] ... pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender is concerned.

> **The ICC is clearly contested terrain to defend and to develop, not to abandon.**

"Sending State" refers to a state whose official personnel are deployed in the territory of another state pursuant to some sort of agreement between them, such as members of a diplomatic or military mission. If one replaces the words "the requested State" with "South Africa", and "a third State" with a generic "State A", then the text becomes clear. If, under international law, South Africa is obligated to respect State A's territorial integrity and its diplomatic immunity, and a person whose surrender is sought by the ICC seeks refuge in State A or in State A's embassy in South Africa, South Africa can do nothing to effect the ICC's request unless State A cooperates by – for example – allowing South African authorities to enter its territory or by waiving the diplomatic immunity of its embassy. The clause is thus irrelevant to the Bashir matter.

Why is the purported clash between Articles 27 and 98 only now apparent? The answer is simple: there is no clash, and nobody ever thought there was one.

Another assumption when interpreting a statute is that a legislature will not contradict itself with irreconcilable and contradictory provisions, and that one should seek meanings for the provisions that make sense and make the statute enforceable.

The long title and preamble to the Implementation of the Rome Statute of the International Criminal Court Act could not possibly be more explicit about what was intended, and what was said in the national legislature by Jeffery is simply wrong.

Bashir was not in South Africa as an accredited diplomat in the Sudanese mission but as a head of state for the purposes of the AU Convention which, unlike the Rome Statute, has not been enacted to be a part of South African law. He thus enjoyed no immunity as a diplomat, and even as a head of state any immunity he might otherwise have enjoyed had been nullified by Article 27 of the Rome Statute. The whole of Article 98 of the Rome Statute is thus irrelevant to any attempt to justify the failure to detain Bashir and is consistent with Article 27.

Finally, while it is true that the ICC condoned Nigeria's failure to detain Bashir, this was because Nigeria had been physically unable to do so. Nigeria explained that there was an AU Summit on health matters, to which Bashir had not been invited but had "appeared ostensibly" to attend it. The ICC accepted the explanation that:

> [t]he sudden departure of President Bashir prior to the official end of the AU Summit occurred at the time that officials of relevant bodies and agencies of … Nigeria were considering the necessary steps to be taken in respect of his visit in line with Nigeria's international obligations. (ICC, 2013: para. 12)

The circumstances of Bashir's presence in South Africa were so different that the authority of the ICC's decision tends to justify detaining Bashir in South Africa – rather than South Africa's failure to do so. None of the above is arcane rocket-science law. These matters were well known to the cabinet when it decided to allow Bashir to leave South Africa in defiance of the ruling of the Gauteng High Court.

SOUTH AFRICA, THE ICC, AND THE RULE OF LAW

Those who support the political reasons for permitting Bashir to leave draw attention to the refusal of the United States and other countries to cooperate with the ICC. This is true. However, the US's dislike of the ICC was never secret from the very outset. Invoking this now, and to review South Africa's own cooperation with the ICC now, is an embarrassment to the moment in history when we became a signatory to the Rome Statute and enacted it as our law.

South Africa, with its newly-won freedom, was one of the foremost states behind the Rome Statute and was proud to lead the way. One genocidal holocaust after another had at last brought humanity to create an international court to put an end to impunity, and to affirm the cry of "never again!"

The courts in our democracy are not constitutionally required to jump to the crack of the executive's whip, whatever party wields it.

South Africa also refused to sign a bilateral immunity agreement (BIA) that would exclude US nationals from the jurisdiction of the ICC. The enormous pressure from the United States for countries to sign BIAs was quite simply blackmail, as a failure to sign meant an end to US aid. South Africa's commitment to the ICC was a passionate reflection of our determination to identify with the highest standards in human rights.

Commentators have justifiably pointed to anomalies and problems in the work of the ICC. This is not the paper to explore in depth the attempt by former colonial powers to abuse the ICC for their own ends. Nonetheless, the simple question must be asked: how are the purposes for which the ICC was founded, and to which South Africa was fully committed, to be advanced by leaving the field in ignominious surrender? The ICC is clearly contested terrain to defend and to develop, not to abandon.

In her national assembly speech, Lindiwe Zulu claimed that "our efforts for the renewal of the continent will remain void if the fundamentals elements which include peace and stability are not realised". How does returning Bashir to Sudan bring peace and stability to those who live there? How could putting a wanted African genocidaire into the hands of the International Criminal Court possibly leave the AU worse off?

In terms of the South African Constitution (section 83), the president and ministers have sworn to obey, respect and uphold the Constitution and all other law of the republic, to hold their offices with honour and dignity, and be true and faithful counsellors. If Bashir was allowed to depart from South Africa by a cabinet decision, as Zulu said, why should those who have sworn thus not be charged with treason?

Section 165 of the Constitution states that an "order or decision issued by a court binds all persons to whom and organs of state to which it applies". At the very least, why should those responsible not be charged with contempt of court?

Casting justice aside to secure its own idea of "peace" and "stability" was exactly how the apartheid regime ››

maintained itself, and at the very heart of our struggle for freedom was our belief that there never could be peace and stability without justice. It appears that the cabinet has betrayed not only our country, but also the fundamental ethic and the very core and founding principle of our entire historic struggle. Why should those responsible not be charged with bringing the entire ANC into disrepute?

After a history of bitter injustice, we have written a constitution that acts as the touchstone of justice, to which we have defined the highest standards anywhere. We have commanded our courts to act as our constitutional bodyguards, and our judges have given the most solemn undertakings to be vigilant and to strike down any law and to condemn any conduct which clashes with the Constitution. What we have done has been saluted across the world. If it now becomes established constitutional doctrine that justice is not necessary for "peace and stability", then we are back where we started from. With this new constitutional convention there is no protection for any section of the Constitution or any law. The executive could decide to ignore any section of the Constitution, any law and any order of the court, if to do so would be better for "peace and stability". Under the new jurisprudence, it seems that justice is an optional extra.

In our democracy, ruling parties can win and lose elections and governments can change, but the Constitution and its laws and conventions endure. Whichever party comes to power, it inherits what the previous government leaves. Now the current ANC government is establishing a new constitutional convention: in order to preserve what it considers to be "peace and stability", the ruling party may disregard any provision of the Constitution, any enacted law, and any order of a court. Section 37 of the Constitution, which regulates states of emergency, would be valueless because this itself would have been suspended.

In their July 8 statement, South Africa's judges said:

> The Rule of Law is the cornerstone of our constitutional democracy. In simple terms, it means everybody, whatever her or his status, is subject to and bound by the Constitution and the law. As a nation, we ignore it at our peril. Also, the rule of law dictates that court orders should be obeyed.

The comment by the Gauteng High Court was even grimmer:

> A democratic State based on the rule of law cannot exist or function if the government ignores its constitutional obligations and fails to abide by Court orders. A Court is the guardian of justice, the cornerstone of a democratic system based on the rule of law. If the State, an organ of State or State official does not abide by Court orders, the democratic edifice will crumble stone-by-stone until it collapses and chaos ensues. (Gauteng High Court, 2015: 37.2)

The courts in our democracy are not constitutionally required to jump to the crack of the executive's whip, whatever party wields it. The alternative is a different South Africa to the one we fought for and are now working to breathe life into. Our peace and stability both at home and in our international relations are only possible with justice and for our constitution to be respected meticulously. NA

NOTE

1. The ICC has asked South Africa to defend the decision not to arrest Bashir. The government requested extra time to study the High Court ruling and to prepare its response. A new deadline for the report to the ICC has been set for 31 December.

REFERENCES

Gauteng High Court. 2015. Southern Africa Litigation Centre v Minister of Justice And Constitutional Development and Others (27740/2015) [2015] ZAGPPHC 402. Available at http://www.saflii.org/za/cases/ZAGPPHC/2015/402.html

International Criminal Court (ICC). 2002. Rome Statute. Available at http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

International Criminal Court (ICC). 2013. The Prosecutor v. Omar Hassan Ahmad Al Bashir (ICC-02/05-01/09). Available at http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050109/court%20records/chambers/ptcII/Pages/159.aspx

Jeffery, J. 2015. "The implications of the attendance and departure of President Omar al-Bashir from the African Union Summit in South Africa: Debate in terms of Rule 103", National Assembly, 23 June . Available at http://www.justice.gov.za/m_speeches/2015/20150623_PresidentBashir.html

Joubert, J-J. 2015. "Al-Bashir: 'It was a cabinet decision'", Times Live, 24 Jun. Available at http://www.timeslive.co.za/thetimes/2015/06/24/Al-Bashir-It-was-a-cabinet-decision

Mogoeng, M. 2015. The Judiciary's Commitment to the Rule of Law: Statement Issued by the Chief Justice, the Heads of Court and Senior Judges of all Divisions on 8 July 2015. Available at http://www.judiciary.org.za/doc/Statement-Issued-By-The-Chief-Justice_8-July-2015.pdf.

RDM News Wire. 2015. "Peace and stability more important than justice: Zulu", Times Live, 24 June. Available at http://www.timeslive.co.za/politics/2015/06/24/Peace-and-stability-more-important-than-justice-Zulu

Republic of South Africa (RSA). 2001. Diplomatic Immunities and Privileges Act 37 of 2001. Available at http://www.dfa.gov.za/department/diplomatic%20immunities%20and%20privileges%20act.htm

Reuters. 2015. « South Africa lawmakers reject bid to impeach Zuma over Bashir saga", 2 September. Available at http://af.reuters.com/article/topNews/idAFKCN0R20LW20150902

Zulu, L. 2015. "The implications of the attendance of President Omar al-Bashir at the African Union Summit in South Africa: Draft speaking notes on the debate in terms of Rule 103", National Assembly, 23 June . Available at http://www.anc.org.za/caucus/show.php?ID=4096#sthash.eOUBithX.dpuf