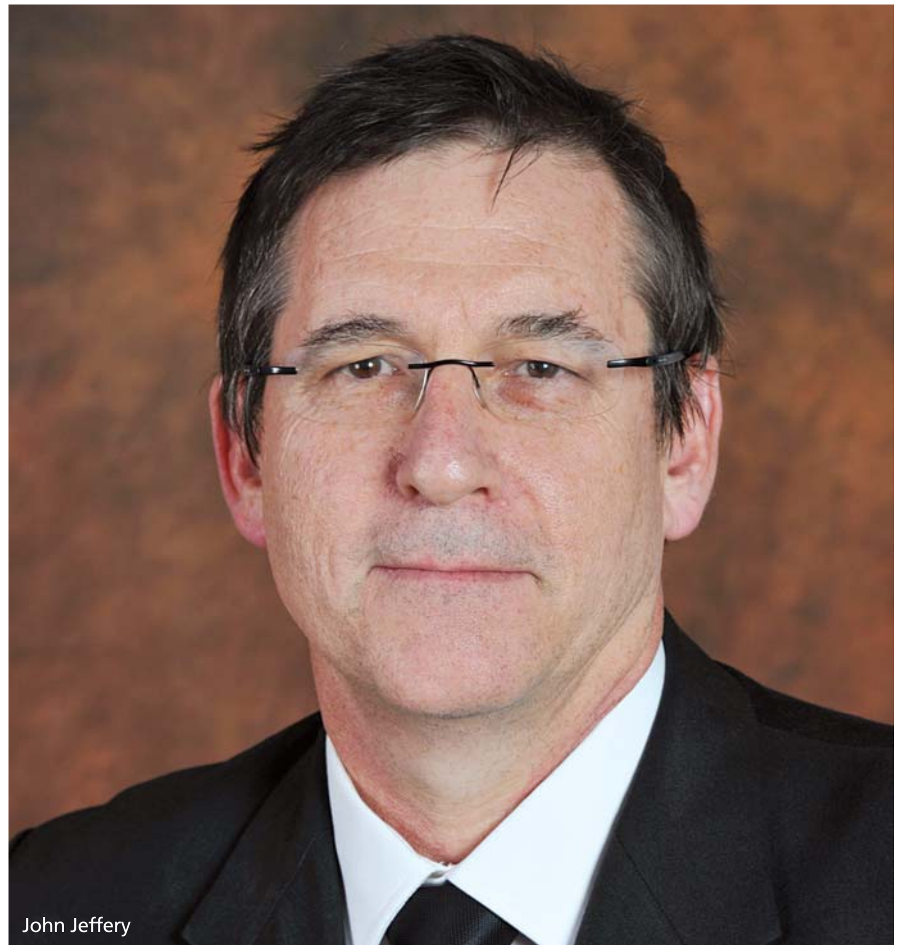
ICC RELATIONS: A TIGHTWIRE, NOT A CRISIS A RESPONSE TO BENNUN

By *John Jeffery, MP*

The author is the deputy minister of justice and constitutional development in South Africa

Deputy Minister Jeffery presents the government's view of the Al-Bashir affair


John Jeffery

The recent visit of Sudan's President Omar Al-Bashir raised many issues. Mervyn Bennun seems to think that the legal argument as to whether or not to arrest President Bashir in South Africa was simple and clearcut. It was neither.

Our argument, in broad terms, relates to the interpretation of two pieces of South African legislation: the Implementation of the Rome Statute of the International Criminal Court Act, Act 27 of 2002, and the Diplomatic Immunities and Privileges Act, Act 37 of 2001.

We argued that the Court should have held that immunity precludes the endorsement of a warrant. Alternatively, the Court should have held that section 8 of the Implementation Act only imposes a duty to endorse a warrant of arrest for execution but, for as long as the person to whom the warrant relates enjoys immunity, it does not impose a duty to execute the warrant.

Mervyn Bennun's article speaks of a "crisis of courts and state". There is no crisis. He refers to statements made by Ministers Zulu, Radebe and myself and says that "little effort has been made to criticise the [Gauteng] High Court's decisions". The simple reason for this is because the matter is still very much before the courts.

As is common knowledge, the High Court refused to grant leave to appeal, largely on the basis that the issue is now moot. Government has since approached

the Supreme Court of Appeal (SCA). Our argument is that the dispute is still relevant – as President Bashir may need to return to South Africa at some stage in future, particularly given the bilateral relations between South Africa and Sudan and with both being members of the African Union.

We are of the view that the court's declaration that the government had acted unconstitutionally in failing to take steps to arrest President Bashir is a serious adjuration of the government's conduct. Government is therefore taking the matter to the SCA – precisely *because* we believe in the rule of law and in our courts and because we need to seek clarity on the correct legal position.

DIPLOMATIC IMMUNITY

On the issue of diplomatic immunity, South Africa hosted the African Union (AU) Summit of Heads of State and Government in Johannesburg from 14 to 15 June 2015. The AU invited heads of state and government of all AU member states, including President Bashir, to attend the Summit.

We accepted that he had diplomatic immunity – on the same basis that the USA does not arrest foreign heads of state when they attend the UN General Assembly. Bennun argues that a previous example I gave in a parliamentary debate, namely the case of Augusto Pinochet, does not apply.

Could Bennun then please explain on what basis the UK – in the same week as the Bashir controversy – chose not to arrest Tzipi Livni, a former Israeli foreign minister accused of war crimes? The UK chose to give full diplomatic immunity to Livni to attend an event in her private capacity. Livni is not even a sitting head of state, but merely a former minister. And barely a word was said about it, both in the UK and internationally. I am not justifying the granting of diplomatic immunity outside of the Immunities Act, but I am raising this example to show that double standards are at play in the world.

There is, under Article 86 of the Rome Statute, a duty to cooperate with the International Criminal Court (ICC). There is, however, an exception to the duty to arrest and surrender. This exception can be found in Article 98 of the Statute.We are of the view that South Africa's obligations under international law, with respect to diplomatic immunity of President Bashir, bring the circumstances surrounding his attendance of the AU Summit squarely within the ambit of Article 98. As such, we were of the view that the exception of Article 98 applies.

South Africa is of the view that a serious infringement of South Africa's rights as a state party has taken place and that the Court has acted against the letter and spirit of the Rome Statute.

Prior to the Summit, acting on the possibility that President Bashir might attend, the ICC wrote to the South African government, stating that it was under an obligation to arrest President Bashir and surrender him to the Court, should he attend the Summit, and also inviting it to consult with the Court in terms of Article 97 of the Rome Statute.

Article 97 provides that, where a state party to the Rome Statute receives a request for cooperation with which it identifies problems that may impede or prevent the execution of the request, the requested state shall consult with the Court in order to resolve the matter.

Recognising that South Africa was faced with possible conflicting obligations with respect to the Court's request for arrest and surrender and the immunities that international law accords to serving heads of state and government, as acknowledged by Article 98 of the Rome Statute, South Africa then approached the Court with a view to consult with it in terms of Article 97.

However, what South Africa interpreted to be a diplomatic and political process morphed into a judicial process when the Prosecutor of the Court made an urgent application for an order on the South African obligations to the Court.

South Africa was unfortunately not afforded the opportunity to present legal arguments on this application, and hence it is of the view that the principles of justice were not adhered to. In light of the above, South Africa is of the view that a serious infringement of South Africa's rights as a state party has taken place and that the Court has acted against the letter and spirit of the Rome Statute.

South Africa will therefore approach the Secretariat of the Assembly of States Parties to the Rome Statute (ASP), the political body of the ICC, to ensure that the ASP meeting in The Hague from 18 to 26 November 2015 will discuss the rules and procedures that must be developed to ensure clarity on the Article 97 consultation process and on the interpretation of Article 98, dealing with the complex issues around the immunities of serving heads of states which are not parties to the Rome Statute, like Sudan. It is of the view that these discussions will serve to enhance the proper execution of international criminal justice.

JUDICIAL INDEPENDENCE

The second issue Bennun raises relates to the independence of the judiciary.

There was never an attack on the independence of the judiciary. It must be remembered that judges are invested with great constitutional powers: they are permitted to override measures enacted by the legislature

and the executive, measures that that the legislature and executive regard as being within their constitutional domain. It is therefore natural that tensions will occur.

The purpose of separating the powers of these three branches of state is to prevent an excessive concentration of power in one branch to the detriment of the others. Our Constitutional Court has held that that in South Africa, as in other well-known constitutional designs, a *complete* separation of functions between the three branches of government was never intended.The Constitutional Court has confirmed that boundaries of the doctrine of separation of powers are flexible and undetermined, and shaped by each country's realities, struggles out of which the Constitution, the supreme law, was carved.

Although the broad pattern of instituting some separation is apparent in all democracies, the degree of it differs. In the landmark *Van Rooyen* judgment (S v Van Rooyen 2002 (8) BCLR 810) on the subject, former Chief Justice Chaskalson confirmed this when he contended that different democracies have drawn the boundaries at different places, depending on their constitutional framework and socio-political context, while maintaining the universally acknowledged core principles of judicial independence as articulated in the United Nations Basic Principles on the Independence of the Judiciary.

Having said that, judicial power should, of necessity, be vested in a mechanism independent of the legislative and executive powers of the government with adequate guarantees to insulate it from political and other influences.

Discussions on the doctrine of the separation of powers and the so-called counter-majoritarian dilemma (where unelected judges use the power of judicial review to nullify the actions of elected public representatives in the executive or the legislature) are part and parcel of the constitutional law discourse and many legal arguments have been raised in respect thereof.

There is nothing wrong, in a constitutional democracy and within the separation of powers, with critical debate on perceived judicial overreach. Such debates should not be viewed as attacks on the judiciary. At the same time, such debates must take place in a spirit of respect for the separation of powers and the integrity of the institutions of state.

The significant meeting of the judiciary and the executive in August this year was the first of its kind. It is our conviction that such interactions can only advance and deepen our constitutional democracy.

PEACE AND JUSTICE

Finally, Bennun raises the "justice or peace and security" question, asking if can there ever be peace and security without justice.

Former President Thabo Mbeki, currently the head of the AU High Level Implementation Panel, recently said that President Bashir is a critical component of the peace-making process in Sudan, according to the wishes of the people there. He said:

> Among the Sudanese, both Sudan and South Sudan, over the years that we have worked with them, what they have been saying is that they need President Bashir there in order to get him to help them achieve peace. That is what the Sudanese have been saying to us. People who are required to achieve peace, to end wars, to end conflicts – you can't take that person away and say in the interest of justice we are going to take [him] away. (Sudan Tribune, 2015)

The impact of South Africa arresting President Bashir or even preventing him from leaving would have imperilled our bilateral relations with Sudan, the African Union and other states on the continent.

Sometimes the question of "peace or justice" is not as clearcut as Bennun would like to argue. In our own country, peace was achieved through a negotiated settlement. This is discussed in Bennun's own book *Negotiating Justice: A New Constitution for South Africa*. The South African Truth and Reconciliation Commission (TRC) was set up by the government of national unity to help deal with what happened under apartheid.The TRC was based on the final clause of the Interim Constitution of 1993 and passed in parliament as the Promotion of National Unity and Reconciliation Act, No 34 of 1995.

Apartheid was recognised as a crime against humanity in 1973. If the aim was "justice at all costs", former President FW de Klerk and other members of the apartheid government would have been arrested and charged them with crimes against humanity. Would we have had justice? Yes. Would we have had a peaceful settlement? No.

Government remains committed to achieving justice both locally and internationally. We also remain committed to achieving peace in Sudan. As international law experts Nahla Valji and Dire Tladi (2013) so aptly write, South Africa's foreign policy has to walk the tightwire between the expectations upon the country as a human rights leader (and the desire to play this role on the global stage) and the inevitable realpolitik of negotiating the shifting sands of a geopolitical landscape where power blocs are forming in new ways. NA

NOTE

Mervyn Bennun will be offered the opportunity to respond.

REFERENCES

Sudan Tribune. 2015. "Mbeki wants Bashir spared from arrest as AUHIP's performance is questioned", *Sudan Tribune* 20 August. Available at http://www.sudantribune.com/spip.php?article56128

Valji, N and D Tladi. 2013. "South Africa's foreign policy: Between idealism and the realpolitik of being an emerging power", *Open Democracy*, 19 June. Available at https://www.opendemocracy.net/openglobalrights/nahla-valji-dire-tladi/south-africa's-foreign-policy-between-idealism-and-realpolit