



## **RESPONSE**

*June 17<sup>th</sup>, 2015*

### **Disregarding the Rule of Law**

There may be some validity to the argument that the International Criminal Court (ICC) has shown a bias against prominent African figures by focusing its prosecutorial efforts on warlords, dictators and *génocidaires* from this continent alone, while ignoring serious human rights violations elsewhere; especially those perpetrated by Western nations or their proxies in the middle-east and Western Asia. There may also be a legitimate legal question about whether President Omar al-Bashir was actually on South African soil when attending the AU summit in Sandton, or whether – by way of a legal fiction – he was on territory temporarily under AU control.

But even if we accept both of these positions (as the government and the AU have done) the way to resolve the arguments is through due process of law, international and domestic. South Africa is free to withdraw from the Rome Statute that brought the ICC into being. Once it has done so it would be under no obligation to honour the ICC's arrest warrants. The government is also free to appeal the order granted on Monday afternoon by the North Gauteng High Court, and to argue that diplomatic immunity applied to Bashir, and thus exempted him from arrest.

What the government is not free to do is to ignore its obligations under international law; to act in violation of the Constitution; and to display contempt for the High Court – all of which, by allowing Bashir to leave, and perhaps actually assisting him to do so, it did.

In a democracy there are few things as important as the rule of law. Our Constitution recognises this, by naming “supremacy of the Constitution and the rule of law” as a founding provision, right at the beginning, in section 1. Everything else in the Constitution, and therefore in the rest of the law, flows from this and depends on it. In the absence of the rule of law we are left at the mercy of arbitrary, capricious and unaccountable rule, of exactly the kind we saw in operation on Monday.

It may be said that this was an extreme case, involving a head of state, and that the government had to balance the risk of massive diplomatic fall-out among African neighbours against its duty to respect the Court's judgment. Such reasoning can only place the country on a trajectory of increasing disregard for constitutional government. Court orders are not to be respected and honoured only when the price of doing so is acceptable.

There are, fortunately, two positive results to take from this otherwise shameful incident. Firstly, the judiciary – the third arm of government – has shown itself once again to be independent, responsive and unafraid to reach a decision which it must have known would be unpopular with the executive. Secondly, President Bashir left the summit early. Even if the South African government declined to take the court's order seriously, Bashir himself was taking no chances. His hasty dash back to

Khartoum may not have been the outcome that human rights movements all over the world would have preferred to see, but it was a victory of sorts.

Finally, the attempt to portray these developments as some form of ‘African solidarity’ must be rejected. President Bashir is not wanted by the ICC for harming Western interests or for violence aimed at Europe or America. He was indicted for genocide and mass-murder of African people in Darfur. To this day, his regime is targeting black (as opposed to Arab) African civilians in the southern provinces of his country as part of its ongoing programme of subjugation of Sudan’s non-Arab and non-Muslim population.

If there was any solidarity to be discerned in what happened on Monday, it was strictly limited to a solidarity of the elite.

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