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The Courts: Lights That Guide Our Foreign Affairs?

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ABSTRACT

South Africa's constitutional democracy reserves a specific role for the judiciary in upholding human rights. This responsibility inevitably has an impact on the formulation and conduct of South Africa's foreign policy. The constitution is clear in mandating that all public power be exercised in accordance with the rule of law; that it be rational; and that relevant considerations be taken into account and given appropriate weight to ensure informed and accountable decision-making. This is as true for foreign policy as it is for any other type of governmental policy, making it susceptible to judicial scrutiny. It is the constitution that is to be the 'light that guides our foreign affairs'.¹

Civil society has increasingly sought to use the courts to shape a more accountable, human rights-oriented foreign policy. This was evident when civil society approached South Africa's courts to secure a measure of accountability for crimes of torture committed in Zimbabwe.

In the case of a suspected war criminal whom Sri Lanka proposed posting to South Africa as its deputy ambassador, the threat of litigation to challenge the President's power to receive and recognise diplomats, if it were exercised in favour of Sri Lanka's nominee, was enough to ensure the appointment did not materialise.

Again, the threat of litigation to secure an arrest warrant for Sudanese President Omar al-Bashir in compliance with the International Criminal Court's indictment, in the event that he attended President Jacob Zuma's inauguration, was enough to secure his non-attendance.

A similar strategy in Kenya, requiring actual litigation, secured an order that an arrest warrant be issued for al-Bashir. This demonstrates that South Africa is not alone on the continent in recently having witnessed civil society either resorting to litigation or threatening to do so in an attempt to condition foreign policy choices.

ABOUT THE AUTHOR

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ABBREVIATIONS AND ACRONYMS

ANC	African National Congress
AU	African Union
DIRCO	Department of International Relations and Co-operation
ICC	International Criminal Court
ICJ-Kenya	International Commission of Jurists – Kenya
IGAD	Inter-Governmental Authority on Development
NDPP	National Director of Public Prosecutions
PCLU	Priority Crimes Litigation Unit
SADC	Southern African Development Community
SALC	Southern Africa Litigation Centre
ZEF	Zimbabwe Exiles Forum

INTRODUCTION

Twenty years ago, South Africa's transition to democracy allowed the country to assume a larger role within the international community. Statements made by the incoming African National Congress (ANC) government that South Africa would pursue a foreign policy of principle² – an article by Nelson Mandela published in the influential *Foreign Affairs* journal in 1993 promised that human rights would be the 'light that guides our foreign affairs'³ – and South Africa's inspiring domestic record of securing a peaceful end to apartheid, meant that expectations of it on the international stage were high.

South Africa certainly attempted to capitalise on this goodwill and actively sought elevated positions at the international level: it has secured participation in new global formations such as the G-20 and the BRICS (Brazil, Russia, India, China, South Africa) bloc, as well as two near-consecutive turns as a non-permanent member of the UN Security Council in 2007–2008 and 2011–2012 respectively. However, it has often disappointed expectations that it might inject greater human rights considerations into foreign policy design and implementation. In fact, an *Economist* article in 2008 famously labelled South Africa's approach to international affairs 'the see-no-evil foreign policy'.⁴

However, while there have been international critics of South Africa's foreign policy, domestic civil society has often been most dismayed at the positions adopted by the South African government in multilateral and bilateral forums. In these instances, civil society has sought to pressure the government, through lobbying and advocacy, to amend its positions. An earlier paper written by the author for the South African Institute of International Affairs, *People Power: How Civil Society Stopped an Arms Shipment for Zimbabwe*,⁵ presents a case study of how litigation, together with other pressure tactics, prevented the transfer of arms, destined for the Zimbabwean Defence Force in the aftermath of the bloody 2008 elections, across South African territory.

This paper specifically seeks to examine the role that South Africa's courts might play, and how civil society might use the courts, in ensuring that the country's foreign policy complies with human rights standards. It does so by reflecting on several different examples. It should be noted that the objective of this paper is to describe and analyse those different examples and not to construct a definitive legal theory for judicial review of South Africa's foreign policy (however much such an account is needed).

Nonetheless, it is important to appreciate that South Africa's constitutional democracy reserves a specific role for the judiciary in upholding human rights. This responsibility inevitably has an impact on the formulation and conduct of its foreign policy. South African courts have become increasingly cognisant of their responsibility to protect and promote human rights and have passed judgements with explicit foreign policy implications, as explored later in this paper.

In doing so, they distinguish themselves from courts in some other jurisdictions. Foreign policy has typically been thought of as the exclusive preserve of the executive. In many traditionally Westphalian jurisdictions, courts tend to extend generous deference to the executive when legal issues involving foreign policy considerations are put before them. In the US, for example, the 'political question doctrine' seeks to distinguish fundamentally political issues from those that are essentially legal. If a US court finds that a question brought before it is fundamentally political it will typically refuse to hear the case on the grounds that the court does not have jurisdiction, leaving the issue to

the political process to settle. Issues involving foreign policy have often been held to be archetypal political questions.⁶

South Africa's constitution is clear in mandating a different approach, which requires that all public power be exercised in accordance with the rule of law; that it be rational; and that relevant considerations be taken into account and given appropriate weight to ensure informed and accountable decision-making. Therefore, it is the constitution that is to be the 'light that guides our foreign affairs'.

However, as this paper will demonstrate, while South African courts have issued judgements that have discernible foreign policy implications, it would be erroneous – even damaging – to imply that they are unappreciative of the limits of judicial intervention. As former Chief Justice Arthur Chaskalson observed in the case of *Kaunda and Others v the President of the Republic of South Africa*, South African courts are mindful in cases touching on foreign policy that this area is essentially the preserve of the executive:⁷

A decision as to whether, and if so, what protection should be given [to South African nationals abroad], is an aspect of foreign policy which is essentially the function of the executive. The timing of representations if they are to be made, the language in which they should be couched, and the sanctions (if any) which should follow if such representations are rejected are matters with which courts are ill equipped to deal. The best way to secure relief for the national in whose interest the action is taken may be to engage in delicate and sensitive negotiations in which diplomats are better placed to make decisions than judges, and which could be harmed by court proceedings and the attendant publicity.

However, the fact that foreign policy considerations are at play in a decision will not in itself place the decision beyond the reach of judicial scrutiny. Instead, South African courts recognise the constitutional import of human rights-rooted limitations constraining even the most coveted of executive powers:⁸

This does not mean that South African courts have no jurisdiction to deal with issues concerned with diplomatic protection. The exercise of all public power is subject to constitutional control. If government refuses to consider a legitimate request, or deals with it in bad faith or irrationally, a court could require government to deal with the matter properly. Rationality and bad faith are illustrations of grounds on which a court may be persuaded to review a decision. There may possibly be other grounds as well and these illustrations should not be understood as a closed list.

In the sections that follow, several case studies are examined. The first looks at the use of litigation in an attempt to compel accountability in South Africa for state-sanctioned torture in Zimbabwe. The second study describes how the threat of litigation was used to prevent a suspected war criminal being posted to South Africa as a high-level diplomat. That is followed by an examination of the threat of litigation to prevent the visit to South Africa of Sudanese President Omar al-Bashir, indicted on counts of genocide, crimes against humanity and war crimes by the International Criminal Court (ICC). As a final example, and demonstrating that South Africa is not alone on the continent in recently having witnessed civil society's resorting to litigation or threatening to do so in an attempt

to condition foreign policy choices, the actual use of litigation in Kenya to prevent a visit there by al-Bashir is examined.

TORTURE IN ZIMBABWE

As the 2008 elections in Zimbabwe approached, a discernible increase in political violence occurred. In particular, it appeared that the ruling ZANU-PF (Zimbabwe African National Union – Patriotic Front), fearful of the increasing political opposition to its rule and of possible electoral defeat, embarked on a campaign of systematic intimidation and harassment of those deemed political opponents. These included not only members of the main political opposition, the Movement for Democratic Change, but also trade union activists, journalists, lawyers and community leaders. Torture while in police custody became routine.⁹

State control of the courts meant there was no realistic prospect of securing the accountability of the perpetrators and redress for their victims. The political crisis in Zimbabwe drew international condemnation and South Africa, as a regional power, was looked to for leadership. South Africa, however, was pursuing a policy of ‘quiet diplomacy’ in respect of Zimbabwe¹⁰ and seemed intent on using its leverage in the international sphere to thwart efforts to censure the country. For instance, in 2008 Russia and China cast vetoes defeating a UN Security Council resolution that would have imposed sanctions on Zimbabwe – largely at the instigation of South Africa, then also on the UN Security Council and also voting against the sanctions.¹¹

In a bid to deter the escalation of political violence that was likely to (and in fact did) occur over the election period in Zimbabwe, the Southern Africa Litigation Centre (SALC) compiled and delivered a docket containing evidence of acts of torture committed in Zimbabwe to South Africa’s Priority Crimes Litigation Unit (PCLU) – the unit within the National Prosecuting Authority responsible for the management of investigations in terms of South Africa’s International Criminal Court Act of 2002 (or the ICC Act).¹² SALC maintained that the torture was systematic and took place as part of an attack on the civilian population pursuant to a state policy: the hallmarks of a crime against humanity.

The docket identified a range of state agents, from mid-level police officials to senior security and government ministers,¹³ who frequented South Africa on official and personal business. On this basis, SALC asked the National Director of Public Prosecutions (NDPP) to investigate and, if necessary, prosecute these crimes under the ICC Act. In order to understand how that request could be made, it is important to have some understanding of the ICC Act and the institution to which it is obviously related, the ICC.

Established in 2002, the ICC is tasked with prosecuting genocide, crimes against humanity and war crimes.¹⁴ States parties are required to co-operate with the ICC and must implement national laws if needed in order to ensure co-operation – for example, to make arrests and surrender suspects to the ICC. As the statute of the ICC makes it clear that the preference is for domestic courts to prosecute ICC crimes, with the ICC only doing so if the relevant domestic state is unwilling or unable, there is also an onus on states parties to ensure they have the capacity to prosecute.

South Africa’s ICC Act has served as a model for domesticating ICC commitments into national legislation for several other states (such as Mauritius and Kenya). It is notable

because it provides that South African courts can exercise jurisdiction over international crimes not only in circumstances where the perpetrator is a South African or ordinarily resident in the country, or where the crime was committed against a South African or person ordinarily resident in the country, but also where the perpetrator is present in South Africa after the commission of the crime.

It was this latter ground – presence after the perpetration of the crime – that allowed SALC to make the request of the PCLU, as the Zimbabwean officials travelled into the country on a regular basis. Although the initial response from the PCLU seemed positive, it became evident that no action would be taken and in June 2009 the NDPP informed SALC that there would not be an investigation.

SALC, together with the Zimbabwe Exiles Forum (ZEF), an organisation representing Zimbabweans displaced by political violence, launched a legal challenge to the decision on the grounds that it was irregular and unlawful under South Africa's administrative justice principles and contrary to the rule of law. In their court application, SALC and ZEF asked that the decision be set aside and that the matter be remitted to the authorities for reconsideration.

In a lengthy judgement, the North Gauteng High Court ruled in favour of the applicants, holding that the evidence placed before the PCLU raised reasonable suspicion that the alleged crimes had been committed; that this was sufficient to start an investigation; and that the investigation could proceed even without the presence of the accused, although their presence would be required for trial – in essence, that the investigation could proceed in anticipation of the accused's presence in the country.¹⁵ The decision was accordingly set aside and the authorities were ordered to initiate an investigation. The court order had ramifications for South Africa's foreign policy: it was hardly consistent with a policy of quiet diplomacy towards Zimbabwe that one arm of the government (the judiciary) was ordering another (the executive) to conduct an investigation into crimes allegedly committed by top officials in Zimbabwe.

The court order sparked recriminations from Zimbabwe: at the official opening of a meeting of Southern African Development Community (SADC) liberation movements in Harare shortly after the delivery of the judgement, Zimbabwean President Robert Mugabe insisted that the 'judgement, like those outrageous ones of the SADC Tribunal which has now been dissolved, constitutes a direct assault on our sovereignty by shameless forces afflicted by racist nostalgia'.¹⁶ He also called on the ANC to 'see this for what it is and apply every means at [its] disposal to ensure that such machinations are not in the end, allowed to negatively affect our cordial relations'.¹⁷

More profound, perhaps, than the impact the ruling had for South Africa–Zimbabwe relations is the promise it holds out for the utilisation of the courts in shaping foreign policy. Here, it is worth looking in some detail at the court's pronouncements in respect of SALC and ZEF's standing to bring the challenge. The respondents argued that they had no direct interest in the question of whether an investigation was conducted and so could not challenge the decision not to do so. The court disagreed.¹⁸

It is my view that the Applicants are entitled to act in their own interest in the present context, and also in the public interest in particular. They do not have to be the 'holders' of any human rights themselves. They certainly have the right, given their attributes, to request

the state, in the present context, to comply with its international obligations on behalf of those who cannot do so, and who are the victims of crimes against humanity.

The court went on to find that the applicants were also entitled to act in the public interest, in that the ‘general South African public ... deserve to be served by a public administration that abides by its national and international obligations’.¹⁹ This makes it clear that foreign policy powers are bounded by the constitution in the same way that all state power is.

The decision of the High Court went on appeal to the Supreme Court of Appeal, which affirmed the findings of the High Court. The decision of the Supreme Court of Appeal was then appealed to the Constitutional Court. As of this writing, the judgement of the Constitutional Court is still awaited. While the outcome cannot be predicted, the Constitutional Court has not shirked from issuing judgements with overt foreign policy repercussions.

At first glance, the case of *Government of Zimbabwe v Fick and Others*²⁰ seemed to concern the rather technical and politically uncontroversial issue of the enforcement of costs orders issued by the SADC Tribunal – a regional court to which South Africa is party. However, the fact that the government of Zimbabwe was party to the proceedings gives a clue to the political sensitivities involved.

The case arose from a series of cases brought before the SADC Tribunal by Zimbabwean farmers who had been dispossessed of their farms as part of the Zimbabwean land reform process. The Tribunal had found in their favour, issuing a costs order for the legal expenses incurred. The applicants sought unsuccessfully to have this order enforced in Zimbabwean courts and then turned to South Africa, seeking execution of the orders against several commercial properties owned by Zimbabwe in South Africa. From the point of view of South African foreign policy, the interesting aspect is the reasoning of the Constitutional Court once the case reached it. In justifying its extension of the common law to recognise the enforceability of the SADC Tribunal’s rulings, the court placed great emphasis on the concept of comity, traditionally understood to be the deference extended by one state to another.

In this case, the court extended deference to a regional institution at the cost of a neighbouring state. Furthermore, the court also held that its decision to extend the common law in this manner was supported by the fact that the applicants could not avail themselves of the right to access justice within their own domestic jurisdiction, namely Zimbabwe.²¹ It in effect ruled on the conduct of a state – a matter that had not explicitly been put before it. In reaching the decision, the court did not suggest that it was doing anything extraordinary. However, the judges cannot have been unaware of the fierce resistance that the judgement would trigger from the Mugabe government, and the potentially negative implications this ruling would have for Zimbabwe–South Africa relations.

THREAT OF THE COURTS: SENDING A DIPLOMAT PACKING

Sometimes, just the threat of resorting to the courts is sufficient. This was the case when in 2012, Sri Lanka proposed sending Major General Shavendra Silva to South Africa as

its deputy ambassador. Silva has been implicated in the mass killings of civilians during the Sri Lankan civil war (1983–2009), with UN reports linking him to the commission of crimes against humanity and war crimes.²² Civil society groups (including the Tamil Federation of Gauteng and the South African Tamil Federation) in South Africa alerted the presidency to these allegations, and provided it with a legal opinion examining the president's powers to receive and recognise foreign representatives, and the necessary corollary power to refuse to recognise such persons.²³

The opinion pointed to the international conventions regulating diplomatic immunities and privileges to buttress the submission that certain persons are ineligible for diplomatic recognition; and also made reference to the policy documents of South Africa's Department of International Relations and Co-operation (DIRCO) with respect to the purpose of diplomatic immunities and privileges. The civil society groups argued that the deployment of Silva to South Africa as Sri Lanka's deputy ambassador was not exclusively an act of Sri Lanka's sovereign power. South Africa's constitution authorises the president to recognise and receive foreign diplomats. The exercise of this power requires the president to assess their suitability for the post and either grant or reject the applicable state's request for acceptance of their chosen diplomat.

The groups maintained that an informed assessment of Silva's suitability led to the conclusion that he was ineligible to take up the ambassadorial post on account of the credible allegations against him (that he participated in the commission of war crimes and crimes against humanity in Sri Lanka in 2009). Specifically, the president and DIRCO were required to evaluate his eligibility with reference to two key considerations: the purpose and integrity of diplomatic status and its attendant privileges; and South Africa's domestic and international obligations to ensure accountability for international crimes.

Were Silva to be received and recognised as deputy ambassador to South Africa, he would be conferred with diplomatic immunity. The practice of diplomatic immunity is intended to safeguard sovereign equality between states and enable the peaceful conduct of foreign relations. It is not intended to shield individuals from accountability for egregious human rights violations. The conferral of diplomatic immunity in this case would thus amount to an abuse of the internationally regulated system of diplomatic status. Moreover, by recognising and receiving Silva, and in consequence recognising his diplomatic immunity, South Africa would render itself complicit in his impunity, frustrating efforts at accountability and denying justice to the victims of Sri Lanka's conflict. In so doing, South Africa would violate its own constitutional, domestic and international obligations.

In submitting the legal opinion to the presidency and DIRCO, the civil society groups hoped that the presidency would exercise its discretion and refuse to recognise Silva, but they reserved the right to launch legal proceedings to review the president's powers to recognise the Sri Lankan nominee in case Zuma did not do so. In the event, Sri Lankan authorities were discreetly informed that Silva would not be welcome in the country and no legal action was necessary.

THREAT OF THE COURTS: SENDING A HEAD OF STATE PACKING

In April 2009, the media reported that al-Bashir, as the Sudanese head of state, had been invited to attend Zuma's inauguration. A group of civil society organisations – SALC, the

Institute for a Democratic Alternative for South Africa and the Open Society Foundation–South Africa – expressed concern at his impending visit, noting that South Africa’s status as a party to the Rome Statute of the ICC required it to assist the ICC in effecting the arrest warrant it had issued for al-Bashir in March 2009.

They reminded South African officials that South Africa’s own ICC Act was applicable and required that, were al-Bashir present on South African territory and the ICC were to request his arrest, ‘the Director-General of the Department of Justice must immediately on receipt of that request, forward the request and accompanying documents to a magistrate, who must endorse the warrant of arrest for execution in any part of the Republic’.²⁴

The organisations briefed counsel to represent them in the event that al-Bashir did attend the inauguration and South African officials failed to take the required action. The organisations noted that South Africa, as a state party to the Rome Statute, ‘cannot be seen to be shielding persons who are alleged to be guilty of crimes against humanity and war crimes and who are sought for arrest and prosecution by the ICC’.²⁵

As it turned out, al-Bashir did not attend the inauguration and the threatened court application was unnecessary. Had the court action proceeded, it would have sought the following relief:²⁶

- 1 Declaring the conduct of the Respondents, to the extent that they have failed to take steps to arrest and/or detain the President of the Republic of Sudan Omar Hassan Ahmad Al Bashir, to be inconsistent with the Constitution of the Republic of South Africa, 1996, and invalid;
- 2 Compelling the Respondents forthwith to take reasonable steps to arrest the President of the Republic of Sudan Omar Hassan Ahmad Al Bashir without a warrant in terms of section 40(1)(k) of the Criminal Procedure Act and detain him pending a formal request for his surrender from the International Criminal Court. Alternatively;
- 3 Compelling the Respondent’s forthwith to take all reasonable steps to provisionally arrest President Bashir in terms of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.

It can only be speculated as to whether the litigation threatened by civil society played a part in convincing the South African government to clarify its position regarding its legal obligations to arrest al-Bashir. Still, al-Bashir chose not to visit South Africa and has not visited the country since.

The threatened litigation to secure his arrest has an interesting epilogue. The African Union (AU) has, at various summits, issued communiqués expressing its opposition to the indictment of al-Bashir (and latterly President Uhuru Kenyatta of Kenya and his deputy William Ruto) and its resolve not to co-operate with the ICC over the matter. South Africa has been party to these AU communiqués. This has demanded some slippery manoeuvring from South African government officials as they have attempted to reconcile their regional positions with domestic undertakings. For example, shortly after the controversy surrounding al-Bashir’s possible attendance at Zuma’s inauguration, Zuma returned from the AU Summit having agreed to the resolution that the AU would withhold co-operation from the ICC in the case of al-Bashir. This triggered further civil society protest, leading the Department of Justice – in an unprecedented move and under substantial civil society pressure – to announce that South Africa remained cognisant of its ICC obligations and

that it had, in fact, secured a domestic arrest warrant for al-Bashir in order to meet these obligations when it appeared that he might attend the inauguration.²⁷

This development – that South Africa’s Department of Justice had secured an arrest warrant for al-Bashir – is arguably indicative of how effective civil society lobbying in respect of foreign policy-related issues can be. Of course, the fact that, notwithstanding the existence of the arrest warrant, Zuma elected to support the AU’s position of non-co-operation with the ICC may support exactly the opposite conclusion.

Recently, at the 23rd AU Summit of Heads of State and Government in Malabo, Equatorial Guinea, the Summit adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. This document vests the new African Court with criminal jurisdiction to prosecute those responsible for crimes such as genocide, crimes against humanity and war crimes, among others. Shamefully, it also provides that serving heads of state and senior government officials may not be prosecuted.²⁸

The AU’s decision places it in direct conflict with the requirement of the Rome Statute, to which most AU members are party, that ICC rules ‘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.’²⁹ Of greater concern to South Africa should be the fact that its decision to support this Protocol places it in breach of its own domestic laws and constitution. Civil society organisations are already discussing the possibility that a court interdict might be sought preventing the president from signing and ratifying the Protocol.

Kenya: Sending a head of state packing

South Africa is not alone in Africa in having recently witnessed a resort to litigation and the threat thereof by civil society in an attempt to condition foreign policy choices. This last case study is from Kenya and al-Bashir is again the source of controversy. His attendance at Kenya’s constitutional celebration in August 2010 created considerable consternation among civil society in the country. When it was publicised that he would be returning that October to attend an Inter-Governmental Authority on Development (IGAD) Summit, civil society took action, calling on the government to honour its obligations to the ICC by arresting al-Bashir should he visit Kenya.³⁰

In addition to making the public call on government leaders for al-Bashir’s arrest, civil society organisations also launched court action seeking an order compelling the government to do so. The International Commission of Jurists – Kenya (ICJ-Kenya) approached the Nairobi High Court, asking it to issue a provisional order of arrest for al-Bashir and order the minister of state for provincial administration to effect the warrant of arrest if and when al-Bashir set foot in the country.

At the same time, the ICC was also putting pressure on Kenya to arrest al-Bashir if he attended the IGAD Summit. It formulated a public request of the Kenyan government, asking that it be informed of any problem that would impede or prevent the arrest and surrender of al-Bashir in the event that he attended the summit. These points of pressure ultimately led to the summit being relocated to Addis Ababa and prevented al-Bashir’s return visit to Kenya.

The bigger victory, however, was secured sometime after the scheduled date of the summit. Although slow in ruling, in November 2011 the Kenyan High Court ultimately ordered that the attorney general secure an arrest warrant for al-Bashir under Kenya's International Crimes Act. As with the South African High Court's approach in the Zimbabwe torture case, the Kenyan High Court's interpretation of the right of the civil society organisations to seek the arrest warrant was expansive. The court found that the ICJ-Kenya had a 'genuine interest in the development, strengthening and protection of the rule of law and human rights'.³¹ The fact that the rule of law and human rights with which the ICJ-Kenya was concerned were arguably those that operated at the international level and beyond Kenya's borders, greatly enhances the prospects of organisations with similar outlooks successfully petitioning Kenya's courts to challenge aspects of foreign policy decisions.

CONCLUSION

All the case studies described in this paper involve an intersection with international criminal law issues. As such they represent only a small section of the foreign affairs-related decisions and activities undertaken by states. This sliver of issues with foreign affairs dimensions may be more susceptible to judicial scrutiny than other areas equally implicating foreign affairs. South Africa, for instance, has domesticated its international criminal law obligations. Decisions taken at the international level that conflict with these obligations will place the executive squarely in breach of South Africa's domestic law and courts will have little hesitation in finding so.

However, the decisions to support Swaziland's King Mswati, or to entertain Equatorial Guinea's Theodore Obiang, who despite extensive oppression of their respective peoples face no international indictment, or to cosy up to Russia's President Vladimir Putin as he engages in aggression towards Ukraine, or to vote against the rights of lesbian, gay, bisexual, transgendered and intersex persons in the UN General Assembly or against condemnation of human rights abuses in Myanmar in the UN Security Council – these and a whole host of foreign policy-related decisions will be much more difficult to challenge before courts of law.

There is reason to use courts only as a last resort, even if these decisions might be challenged. That is generally true of any civil society-driven campaign to press government for change, but it may be especially true of change involving foreign policy. As foreign affairs are generally conducted by the executive with little or no consultation with the general public, the most powerful criticism of any foreign policy is likely to be that it is unrepresentative of the people the executive is intended to serve. The use of the courts, which require clear laws by which to judge the government's conduct in order to challenge foreign policy and are generally unconcerned over the public's opinion, will only exacerbate that criticism.

Still, using the courts to challenge aspects of foreign policy can sometimes be the only effective way to put the policy to the test, and the previous case studies point the way to how that might be done. Two recent efforts in the region to challenge foreign policy-related decisions show that litigation-centred initiatives go well beyond international criminal law. In Malawi and Tanzania, the respective law societies have indicated their

intentions to approach the courts for orders barring their countries from voting on or adopting a new Protocol on the SADC Tribunal that would limit the jurisdiction of the Tribunal to disputes between member states and prevent individuals from accessing the Tribunal, as the previous Protocol had permitted.³²

Finally, it bears noting that current world politics seems likely to eviscerate rather than shore up the post-Second World War global order that committed itself to the realisation of universal human rights. It is a diminishing prospect that the impetus for an ethically driven or human rights-oriented foreign policy will be found at the international level. To the extent that there remains pressure for such a foreign policy, it will be domestically driven. Innovative options will need to be explored: among them is the use of the courts.

ENDNOTES

- 1 Mandela N, 'South Africa's future foreign policy', *Foreign Affairs*, 72, 5, November/December 1993, pp. 86–97.
- 2 ANC (African National Congress), *Foreign Policy Perspectives in a Democratic South Africa*. Johannesburg: ANC, 1994. The document maintains that the first principle of South Africa's foreign policy will be '[a] belief in, and preoccupation with human rights which extends beyond the political, embracing the economic, social and environmental'.
- 3 Mandela N, *op. cit.*
- 4 *The Economist*, 'The see-no-evil foreign policy', 13 November 2008, <http://www.economist.com/node/12607346>, accessed 20 August 2014.
- 5 Fritz N, 'People Power: How Civil Society Blocked an Arms Shipment for Zimbabwe', Occasional Paper, 36. Johannesburg: SAIIA (South African Institute of International Affairs), 2009.
- 6 Glennon M, 'Foreign affairs and the political question doctrine', *The American Journal of International Law*, 83, 4, October 1989, pp. 814–821.
- 7 *Kaunda and Others v The President of the Republic of South Africa*, 2005 (4) SA 235 (CC), para 77.
- 8 *Ibid.*
- 9 For an overview of this period, see HRW (Human Rights Watch), *All Over Again: Human Rights Abuses and Flawed Electoral Conditions in Zimbabwe's Coming General Elections*. New York: HRW, 20 March 2008.
- 10 Adelman M, 'The reasons behind Mbeki's Zimbabwe policy', *Africa Spectrum*, 39, 2, 2004, pp. 249–276.
- 11 MacFarquhar N, '2 vetoes quash UN sanctions on Zimbabwe', *The New York Times*, 12 July 2008.
- 12 Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.
- 13 For background on the case, see SALC (Southern Africa Litigation Centre), 'South Africa/ Zimbabwe: Challenging the NPA's Refusal to Act in Terms of the ICC Act', <http://www.southernafricalitigationcentre.org/cases/ongoing-cases/challenging-the-npas-refusal-to-act-in-terms-of-the-rome-statute-act/>, accessed 2 September 2014.
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