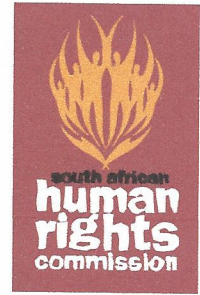


**SOUTH AFRICAN HUMAN RIGHTS COMMISSION**

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**Braamfontein**  
2017

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Tel.: 011 877 3600  
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15 July 2016

Ref: 19/5/2

Honourable Minister M E Nkoana-Mashabane  
Department of International Relations and Cooperation  
Per E-mail: [Minister@dirco.gov.za](mailto:Minister@dirco.gov.za)

Dear Honourable Minister

**RE: CONCERNS AS WE COMMEMORATE INTERNATIONAL JUSTICE DAY**

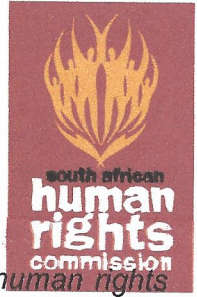
1. The 17<sup>th</sup> of July 2016 will mark the 6<sup>th</sup> anniversary of the International Justice Day (or otherwise known as the International Criminal Justice Day), a day that has been set aside to commemorate the coming into effect of the Rome Statute of the International Criminal Court (Rome Statute). Across the globe, the day is used to promote international criminal justice and to raise particular issues of concern pertaining to international justice.
2. In 1998, South Africa signed and ratified the Rome Statute and thereby joined with other state parties in affirming its commitment to the rule of law and to ending impunity for perpetrators of international crimes.
3. This commitment was a reaffirmation of South Africa's constitutional commitment to human rights and the rule of law. In this regard, section 1 of the South African Constitution (Constitution) provides that South Africa, as a sovereign democratic state, shall be founded on the values of human dignity, equality and the advancement of human rights and freedoms, as well as the supremacy of the constitution and the rule of law. This constitutional commitment echoes the commitment made by the ruling party before the dawn of our democracy. In this regard, in 1993, the late former president of South Africa, Nelson Mandela, when he was outlining the future international relations policy of the country, stated the following:

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*“South Africa’s future foreign relations will be based on our belief that human rights should be the core concern of international relations, and we are ready to play a role in fostering peace and prosperity in the world we share with the community of nations ... The time has come for South Africa to take up its rightful and responsible place in the community of nations. Though the delays in this process, forced upon us by apartheid, make it all the more difficult for us, we believe that we have the resources and the commitment that will allow us to begin to make our own positive contribution to peace, prosperity and goodwill in the world in the very near future.”<sup>1</sup>*

4. In light of the above therefore, it is apparent that the constitutional values were not only intended to inform the government’s interactions with its citizens but were also intended to inform the government’s interactions with other nations.
5. However, as we approach the 6<sup>th</sup> Anniversary of the International Justice Day, South Africa’s commitment to these values and principles in its international relations seems to be waning. In recent months, following the government’s failure to take steps to arrest and detain President Omar Al-Bashir during his visit to South Africa in June 2015, the South African government has indicated that it is seriously reviewing its participation in the Rome Statute. As you are aware, President Omar Al-Bashir has been charged by the ICC for international crimes (i.e. crimes against humanity, war crimes and genocide), allegedly perpetrated against his own people.
6. In the Commission’s view, in the absence of a viable alternative mechanism for holding African perpetrators of human rights violations and international crimes accountable for their actions, an exit from the ICC will not bode well for the rule of law, a principle South Africa has committed itself to.

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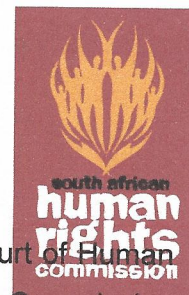
<sup>1</sup> Mandela “South Africa’s Future Policy: New Pillars for a New World” (1993) 72 Foreign Affairs.

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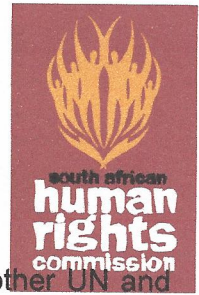
7. Whilst the Commission recognises that the establishment of the African Court of Justice and People's rights was an attempt to ensure greater accountability, in the Commission view, such attempt did not go far enough. In this regard, the Court's jurisdiction did not extend to criminal prosecutions and the Court's competence to receive complaints from non-state parties and non-African Intergovernmental Organisations was limited.
8. The attempt to ensure greater accountability by establishing the African Court of Justice and Human Rights also does not go far enough. This is because whilst the 2014 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Protocol) confers criminal jurisdiction to the Court, the Protocol also grants immunity to sitting heads of states and other senior state officials. The effect of this immunity is that those most guilty of the grossest violations of human rights and the perpetration of international crimes will not be held accountable for their actions, for as long as they remain in power. Combined with the tendency of some heads of states to want to remain in power for life, the extension of such immunity will undoubtedly result in some heads of states not being held accountable for their actions. Moreover, the granting of immunity to sitting heads of states is likely to encourage an increase in the number of heads of states in Africa who want to overstay in office (even for life), while unleashing a litany of human rights violations against their citizens. This is of course undesirable and goes against the values upon which South Africa is founded.
9. In addition to the above, a few weeks ago, the Commission was approached by various civil society organisations over concerns regarding South Africa's voting patterns at the 32<sup>nd</sup> Session of the Human Rights Council. Upon considering some of the concerns raised, the Commission addressed a letter to you on 30 June 2016, urging South Africa to vote in support of the resolution condemning discrimination and violence on the basis of sexual orientation and gender identity. Regrettably, to date, we have not had the courtesy of the Honourable Minister's response. The Commission has however learnt from media reports that South Africa abstained from voting, apparently on the basis that the draft resolution added unnecessary divisiveness.

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10. Moreover, during some of our interactions at some international fora with other UN and international human rights bodies, we are often confronted with questions relating to the matters referred to above. However, because we have not had an opportunity to share your views on these matters, we have not been able to respond in a manner that correctly reflects the thinking behind some of our voting patterns, such as referred to above or indeed our approach to some of the matters alluded to above.
11. Without pre-empting your views on the above matters, on this International Criminal Justice Day, the Commission reiterates the importance of South Africa maintaining its leadership role in the continent insofar as the promotion and the protection of human rights is concerned. The Commission avails itself to assist the South African government in any way possible, in order to ensure that its international relations policy reflects the highest ideals of our Constitution.
12. It is for this reason that the Commission requests to engage with your esteemed office at a round table dialogue, to discuss the issues raised in this letter and any other related matters that may be agreed upon.
13. Once we have received your response to our request, we will, in consultation with your office, initiate the necessary preparations to convene our requested dialogue.
14. We look forward to your response at your earliest convenience, which we hope to receive before the end of this month of International Justice.

Yours sincerely

A handwritten signature in black ink, appearing to read "Mushwana", written over a horizontal line.

**ADVOCATE M MUSHWANA**

**CHAIRPERSON OF THE SAHRC**

Transforming society. Securing rights. Restoring dignity.

**Chairperson:** M L Mushwana; **Commissioners (Full-Time):** B Malatji, L Mokate; M S Ameerma;  
**Commissioners (Part-Time):** D Titus; **Chief Executive Officer:** L Khumalo