

The public must hold governments to account for international actions



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On Thursday, September 10, I was honoured to present the 25th University of Pretoria Expert Lecture, which explored whether international law can address the most pressing concerns of society. The concerns to which I referred during the lecture included a range of security issues and the fight against poverty and inequality, environmental degradation and climate change, in particular.

I concluded that international law as it stands is ill-equipped to deal with the most pressing concerns of the international society, mainly because the content and development of international law was determined by narrow national interests that often override common interests, social values and solidarity.

The lecture, however, ended with words of modest hope: "While states are abstract entities, they are ultimately accountable to real people. You want international law to change the world and hold your government accountable for the positions it adopts in international forums."

The question asked by some attendees at the lecture,

Courts can help citizens overturn some of state's decisions

and subsequently on social media, was how the public can hold the government accountable for its actions on the international stage.

One way the public can hold their governments accountable for their conduct internationally is through court decisions. In Ireland and the Netherlands, for example, courts have demanded stronger international action from the government to curb the problem of climate change.

Under the Paris Agreement, each state is obliged to specify nationally

determined targets to address climate change. The courts of the Netherlands and Ireland determined that the targets specified by the executives of their countries were inadequate.

SA is no stranger to courts questioning the international conduct of the executive. Judgments passed down by the Constitutional Court have, for example, declared decisions of the executive to "render" persons to foreign countries where they were liable to face the death penalties, such as the US and Botswana, invalid.

SA courts also overturned the decision of the executive not to arrest former Sudanese president Omar Al-Bashir during his visit to SA in 2015; the decision of the executive to withdraw from the Rome Statute; the decisions to participate in the SADC Summit to terminate the SADC Tribunal and the failure to prosecute Grace Mugabe during the SADC Summit.

While it might be tempting to place the responsibility for promoting better, more progressive international law on courts, this solution is

fraught with problems. The role of courts is not to make international law, but to apply it. The assessment of international law by courts should be constrained by the methodology of international law. Permitting the courts to simply substitute their vision of morality and public policy raises legitimacy questions.

In most cases, judgments about foreign conduct involve policy choices, which courts are ill-equipped to make.

Thus, while courts can and should play some role in holding the state to account for its conduct in international forums, this role should be constrained by the methodology of international law and constitutional prescriptions.

Another possible way to hold governments accountable is through civil society organisations, which are often at the forefront of criticising government actions in many areas of human endeavour. But the source of national civil society organisations' legitimacy is not always clear. Who funds these organisations? Where do they get their mandate? To whom do they represent? To whom are they accountable?

These are important questions if civil society organisations are to be bestowed with the responsibility of holding governments accountable for their conduct on the international stage.

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South African courts overturned the decision of the executive not to arrest former Sudanese president Omar Al-Bashir during his visit to the country in 2015.



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