

The Standoff between ICC and African Leaders Debate Revisited

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On 3 July 2009, at the 13th African Union (AU) summit of Heads of State in Sirte, Libya, African leaders resolved to

“denounce the International Criminal Court (ICC) and refuse to take action on the Court’s order that should Sudan’s President Omar al-Bashir land in their territories, he should be arrested, and extradited for prosecution by the ICC, for crimes against humanity, allegedly committed in the Darfur region of southern Sudan.”

This essay argues that despite the fact that African leaders have subscribed to the ICC Treaty, emerging developments show that African leaders have resorted to protecting themselves, implicitly sanctioning human rights violations. As a result, they continue to spread a protective umbrella over their peers such as Bashir, even when there exists strong evidence of genocide in the Darfur region,¹ and mass displacements continue unabated.²

It is important to note that in 2000 the leaders in the Organization of African Unity³ (OAU) created the African Union⁴ (AU) with the coming into effect of its Constitutive Act.⁵ The new institution showed determination to embark on reform. The Mechanism for Conflict Prevention, Management and Resolution under the OAU was changed to the Peace and Security Council (PSC), as a “standing decision-marking organ for the prevention, management and resolution of conflicts.”⁶ The PSC enshrines “the rights...to intervene in a Member States pursuant to a decision of the Assembly”⁷ in respect of grave circumstances, namely war crimes, genocide and crimes against humanity, in accordance with Article 14 (h) of the Constitutive Act.”⁸ The AU also established a standby force.⁹ Among the functions of the Standby Force is to intervene in countries where there is a “grave circumstance”, at the request of a member state, to

¹ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, The executive summary surmise that two elements of genocide can be deduced from the gross violation of human rights pg.4

²Nsongurua J. Udombana, “When Neutrality is a Sin: The Darfur Crisis and the Crisis of Humanitarian Intervention in Sudan,” *Human Rights Quarterly* 27 (2005), ” 1154-55. Also see Nsongurua Udombana, “Pay Back Time in Sudan? Darfur in the International Criminal Court,” *Tulsa Journal of Comparative & International Law* 13 no. 1 (2006), 2.

³ The Organization of African Unity (OAU) came into effect in 1963 as a regional

⁴ Hereinafter referred to as the AU

⁵ Constitutive Act Supra

⁶ Nsongurua J. Udombana, When Neutrality is a Sin” The Darfur Crisis and the Crisis of Humanitarian Intervention in Sudan . 1151, (2005)

⁷The Assembly of Heads of States and Government of the African is called “The Assembly” and is the highest decision making body in the AU, which composed of heads of states or governments or representatives of governments.

⁸PSC Protocol, Supra 7, art. 13 (1)

⁹ Udombana, Supra 8, quoting PSC Protocol 13 (2)

restore peace and security.¹⁰ Additionally, the force can provide humanitarian assistance to civilians suffering in conflict situations and in natural disasters.¹¹ Upon the coming into force of the ICC, African leaders endorsed it, ascribing in their majority by having thirty signatories, and by signing the Dakar Declaration.¹²

These developments solidified the AU's move away from the doctrine of non-intervention in the territorial integrity of each other's countries. They were hailed by human rights activists all over Africa and seen as recognition of the real threat posed by inaction which creates regional insecurity in Africa. There was hope that African countries would take the lead in intervening to end brutal ethnic and political suppression and civil wars by African leaders. The AU resolved that it would "take rights seriously", in line with the emerging norm of "humanity first"; and replacing "the culture of impunity with the culture of accountability..."¹³ This transformation was supposed to send a strong signal that African leaders could no longer hide behind the principles of state sovereignty and non-intervention to oppress their own people.

So, why should the same leaders of Africa who only a few years earlier had shown such resolve to end mass murder, genocide, and heinous crimes within African countries now band together to defend one of their own kind? Is it because they see the ICC as a non-African institution designed to prosecute mainly Africans?

One reason may be that the prosecution of former Liberian President Charles Taylor and the indictment by the ICC of the Sudanese President illustrates the beginning of a trend against which they must unite. Consequently, African leaders have argued that the indictment was mis-timed because the plight of the people of Darfur would worsen with reprisals from Bashir-supported militia. This argument acknowledges that crimes against humanity were underway in Darfur, but those crimes against the hapless people are swept under the carpet, and rationalized according to the outdated doctrine of territorial integrity and sovereignty concerns. The argument does not hold water, of course. For if the Sudanese president were arrested and prosecuted, it would send a message to whoever would succeed him, and in turn that person would be unlikely to wreak vengeance on the Southern Sudanese people. For instance, lessons learned from the indictment of Charles Taylor have seen the West African sub region become relatively quiet in terms of heinous crimes committed by leaders against innocent civilians. Even as recent events in Guinea-Conakry raised concerns, reference to mechanisms that are geared to stamping out impunity such as the Special Court for Sierra Leone and the ICC quickly saw the quelling of what would have otherwise become a clampdown on civil society and a full blown crisis.

¹⁰ PSC Protocol Supra 7, Article 13 (3) (c).

¹¹ Ibid Art. 13 (3) (f)

¹² The African Commission on Human and Peoples' Rights ("the Commission") in collaboration with the African Society of International and Comparative Law and Interights organised a seminar on the right to fair trial from 9-11 September 1999 in Dakar, Senegal.

¹³ Supra 110, at 1259

Now, the African leaders are calling for a negotiated settlement to the almost endless conflict in Darfur. In doing so, they are displaying insensitivity to the enormous suffering of ordinary people who, even in the best of times, are periodically murdered, and frequently displaced into fetid refugee camps, with little or no access to health care, or food. Justice has been slaughtered on the altar of international diplomacy. In my view, African leaders refer to “negotiations” merely to buy themselves time, so that their fellow Head of State in Sudan will be strengthened. With time, they hope the ICC net will be broken, and they will thwart its wide sweep that might catch them when they suppress their own people and govern outside the dictates of the rule of law.

African leaders appear repulsed by what they perceive as the ICC treating them as if they were still colonies of Europe. They appear united against the ICC to protect their dignity as nations, and, with a not too subtle revulsion against what they consider to be a biased stance of the ICC. In taking up this position, African leaders have apparently forgotten that “individual state sovereignty can be overridden whenever the behavior or the state even within its own territory threatens the existence of the elementary human rights abroad and whenever the protection of the basic human rights of its citizens can be assured only from the outside.”¹⁴ The era of individual sovereign discretion on how to treat civilians in a given country is gone and what operates now in the international arena is an imperative to protect human rights.¹⁵ This imperative enshrines the responsibility of the international community to protect vulnerable groups in conflicts if the states in question fail to do so. Hence, African leaders have individual and collective responsibility to ensure that rules of *jus cogens*, especially the rule on the prevention of genocide, are upheld.¹⁶

If African leaders have legitimate concerns over an affront to the dignity of African nations, they have other options like the platform they created many years ago, namely the Ezulwini Consensus, which resolved that the United Nations Security Council should be reformed, including expanding its membership.¹⁷ But one of those options must never be to undermine the international global justice mechanisms which stand on universal principles of justice and which cannot be particularized to one group of people. There is no “African Justice” or “European Justice” or “Asian Justice” – there is “Universal Justice” which must abhor not only international economic injustice, but must be uncompromising against all forms of crimes against humanity. What the leaders of the continent should do is to table an alternative mechanism to the ICC that will uphold the prevention of war crimes, crimes against humanity and genocide. Or if the AU can build up a case of injustice, even, racism, against the ICC then they have the option of the platform of the Ezulwini Consensus. African representation in the Security Council could

¹⁴ Michael J. Smith, *Humanitarian Intervention, An overview of the Ethical Issues* (1998) pg 45

¹⁵ Mahmood Mamdani's book *Saviors and Survivors: Darfur, Politics and the War on Terror*, forthcoming from Pantheon

¹⁶ Convention on the Prevention and Punishment of the Crime of Genocide, Adopted by Resolution 260 (III) A of the U.N. General Assembly on 9 December 1948. Entry into force: 12 January 1951. Article 1

¹⁷ The Common African Position on the Proposed Reform of the United Nations: “The Ezulwini Consensus” Ext/EX.CL/2 (VII) pg 9

lay to rest some of the cries of injustice in the international justice system today, of which the ICC's indictment of the Sudanese president is seen as a manifestation of.

With the present stance, indisputably, Africa is reverting to a past where African leaders have colluded with each other to slaughter their kinsmen with impunity. The AU appeared to have escaped from its murky depths after former Tanzanian President Julius Nyerere derided it as "a trade union of the current Heads of States and Governments, with solidarity reflected in silence if not in open support for each other". Now, in its position on the ICC's decision to indict the Sudanese President, the AU has regressed to a position that allows gross violations of human rights within each other's countries.

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