

## **Understanding Africa's Position on the International Criminal Court**

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10 March 2010

### **Introduction**

Much of the debate around the International Criminal Court's (ICC) relationship with Africa has tended to focus on the case of Sudan's Darfur region and the Court's decision to issue an arrest warrant for the country's President, Omar al-Bashir. At the July 2009 African Union (AU) Assembly of Heads of States and Government summit in Libya, Libyan President Muammar al-Gaddafi rallied his counterparts to sign onto what became known as the "Sirte decision", in which AU states resolved not to cooperate with the ICC.

As a matter of international law, the Sirte decision was hollow. But as a political decision, it was clear: international justice on the continent is now at a major crossroads. This should not be misconstrued, however, as the continent being against the ICC. In fact, it is important to note at the outset that the tensions between the ICC and African governments often disguise an important underlying fact: Africa's states are divided about the role that international justice should play in contributing to the continent's fight against impunity for mass crimes.

The continent is composed of fifty-three states whose views on the ICC's role are more varied and complex than is often imagined. This was evident in Sirte where some states (e.g. Botswana) had a different view from others (e.g. Rwanda and Libya) on the ICC's role in Sudan. African states, like others, approach international relations, including international justice, based on their individual interests. Their postures towards the ICC are not homogenous. Each African case before the ICC is premised on varying circumstances and reasons, and so the ICC's relationships with individual African countries also vary. Yet, the Sirte decision also demonstrated that Africa's leaders are becoming bolder and more vocal in their criticism and rejection of the ICC's actions. What does this mean for the ICC's role in Africa?

### **Awkward But Varied Relationships**

If judging only by the Sudan case, one would be forgiven for believing that the AU backlash against the Court renders its fate in Africa precarious. One could also argue that the initial backlash at Sirte is blowing over in the absence of a unified position on how to respond to the Court. A fairer assessment of the continent's relationship with the ICC is that it is awkward.

On one hand, the relationship is based on the aspiration that Africa should never again witness the horrors of genocide or apartheid, and should therefore support the design of mechanisms to prevent such heinous crimes. On the other hand, states remain undecided about the types of interventions necessary to prevent such crimes, especially if such interventions originate externally. This ambivalence is shown by the fact that of Africa's fifty-three states, thirty have signed the Rome Statute—but only three (Senegal, South Africa and Kenya) have enacted legislation to incorporate the Statute's provisions into domestic law.

Further evidence of African governments' uneven posture is that three African states—Uganda, Democratic Republic of Congo (DRC), and the Central African Republic (CAR)—voluntarily

referred their country situations to the ICC for investigation and prosecution. This point is often used by those who argue that the Court is not out to target Africa's leaders. The important fact here is not that three African countries referred cases to the Court, but rather leaders in two countries, Uganda and DRC, used it as an additional tool against their adversaries. Another important issue is that leaders are far less willing to cooperate with the Court if the spotlight is turned on them or their acts.

### **Worsening Difficulties: the AU's Sudan Concerns**

Some African state parties to the ICC have become sceptical of the ICC because of the arrest warrant against al-Bashir. While they have not openly supported some of the vociferous attacks against the ICC, states considered ICC proponents such as South Africa and Senegal have expressed reservations about the arrest warrant, arguing that it shows the Court's lack of political insensitivity and poor judgement. President Abdoulaye Wade of Senegal, head of the first African state to ratify the Rome Statute, voiced his frustration by saying that the Court "only tries Africans".<sup>1</sup>

The AU says it remains committed to the fight against impunity and cites its Constitutive Act—which gives the AU the right to intervene to protect citizens against genocide, war crimes, and crimes against humanity—as evidence. It also states that its frustration are limited only to the Sudanese case and not to ICC interventions in Uganda, the DRC and CAR (situations of State referral), and Kenya, where the Prosecutor has applied on his own initiative to open an investigation against the alleged perpetrators of post election violence.<sup>2</sup> So what are the AU's objections to the ICC in Sudan?

First, it is concerned about the timing of the ICC's arrest warrant against a sitting head of state in a conflict country.<sup>3</sup> It argues that securing peace should be the first priority and that with time justice will always reach those who have committed crimes. One cannot dismiss the AU's concern that the execution of an arrest warrant without a carefully managed transition could lead to further instability in Sudan and its nine neighbouring countries. But, this argument is a variation of the numerous excuses for inaction that inevitably accompany justice measures against a head of state.

Second, the AU questions whether the Rome Statute should be binding on non-State parties (the contentious Article 98 on cooperation with respect to waiver of immunity and consent to surrender).<sup>4</sup> The question is a complex one and as yet, there remain some doubts among States as to whether the arrest warrant against President al-Bashir can be enforced in either State Parties or non-State Parties.

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<sup>1</sup> Cited in Reed Brody, "Playing it firm, fair and smart: the EU and the ICC's indictment of Bashir", European Union Institute for Security Studies Opinion Piece, March 2009, p. 1.

<sup>2</sup> The Prosecutor is waiting for the Court's Pre-Trial Chamber to authorise his request before he can commence investigations.

<sup>3</sup> See the *Communiqué of the 142nd meeting of the African Union Peace and Security Council, 21 July 2008*, psc/min/comm(cxlii). The AU has continued to maintain this line.

<sup>4</sup> At the AU ministerial meeting in November 2009, Africa State parties agreed that "there is need for clarity as to whether immunities enjoyed by officials of non state parties under international law have been removed by the Rome Statute or not". *Recommendations of the Ministerial Meeting on the Rome Statute of the International Criminal Court*, 6 November 2009, Min/ICC/Legal/Rpt. (II), p. 1.

Third, the AU is disappointed with the UN Security Council's "refusal" to acknowledge its request for a deferral under Article 16 of the Statute which grants power to the Council to defer cases for one year.<sup>5</sup> Related to this is the fact that only two of the permanent five members of the Security Council—Britain and France—are signatories to the Statute, while the United States, Russia and Africa's newest friend China have yet to ratify the Statute.

Finally, the AU criticises the major imbalance in the international arena in responding to justice. One cannot dismiss the AU's criticism about Western hypocrisy and double standards especially in the aftermath of the Iraq and Afghanistan wars, as well as the serious violations of international law by the United States—particularly of the universal prohibition against torture—in the context of the post 9/11 war on terror. The fact that international justice is powerless to bring action against powerful nations like the United States strengthens perceptions that international justice is selectively pursued against weak states—such as Africans—and feeds accusations that the Court represents a new form of neo-colonialism or judicial imperialism.

### **Avoiding African exceptionalism**

The AU's concerns should not be dismissed, but the decision of member states in the July not to cooperate with the ICC sent the wrong message to perpetrator governments and their allies. The South African government's decision to distance itself from this position, after the urging of South African civil society organisations and prominent dignitaries, was a welcome move. The impact of the Sirte decision on the future of international justice remains to be seen, but it is part of a trend by African leaders to seek ways to avoid accountability. Instead, they assert that Africa has its own brand of justice that espouses reconciliation over sanctions or punishment. It is unmeritorious and discriminatory to claim that African victims do not deserve to seek criminal accountability for serious international crimes with standing equal to that of other victims of grave abuse.

### **Welcome Relief: The work of the African Union Panel on Darfur**

The report of the African Union High-Level Panel on Darfur, however, is a welcome relief because a group of African leaders have not shied away from recommending accountability measures. Headed by former South African President Thabo Mbeki, the Panel was mandated by the AU Peace and Security Council (PSC) in July 2008 to examine the situation in Sudan and submit recommendations on an effective and comprehensive means to address accountability, reconciliation and healing. It began its work in March 2009 and submitted its report to the PSC in October 2009.

It recommends balancing the need for justice, peace, and reconciliation in by establishing a hybrid court composed of Sudanese and non-Sudanese judges and legal experts; the introduction of legislation to remove all immunities of state actors suspected of committing crimes in Darfur; and a 'Trust, Justice and Reconciliation Commission'. On the ICC, the Panel diplomatically avoids taking a position. Rather, it provides carefully crafted language by drawing attention to the fact that the ICC can deal with only a limited caseload. It appears to offer an avenue to seek an Article 16 referral from the Security Council if a credible hybrid court is established. At the

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<sup>5</sup> See *Decision of the Second Meeting of State Parties to the Rome Statute of the International Criminal Court*, Assembly/AU/Draft/3 Dec (XIV). para. 8, p. 2.

same time, it asserts the Court's independence on the question of complementarity by making it clear that it is for the Court's judges to decide whether the Sudanese government has made genuine efforts to deal with crimes in Darfur (Articles 17 and 19 on admissibility).<sup>6</sup> President Mbeki's recommendations may reach farther than the ICC if they are allowed to work, but there is a real possibility that they will be blocked by the Sudanese government.

### **The ICC Review Meeting: A Means to Address Concerns?**

I began this essay by stating that, while the relations between the AU and ICC were more polarised over the question of President al-Bashir, this should not be misconstrued as a continental backlash against the Court. Despite some real tensions and differences in approach between the AU and the ICC, they do not hold competing views on dealing with impunity. Indeed, as noted, the AU's Constitutive Act still remains a vital document that binds, if sometimes loosely, its member states to the need to deal with mass violations of human rights similar to the ICC.

I also noted at the outset that there is no overriding consensus among African states on how to relate to the ICC except in the case of al-Bashir. But even in the al-Bashir case, African states have not taken unified action. At the meeting of the Assembly of State Parties (ASP) to the Rome Statute in November 2009, there was no concerted African effort to address the recommendations emanating from the AU ministerial meeting held shortly beforehand in Addis Ababa.<sup>7</sup> (notably amendment to Article 16 to grant the UN General Assembly power to defer cases if the Security Council fails to take a decision within a specified time frame and clarity on whether immunities enjoyed by officials of non State Parties under international law have been removed by the Rome Statute or not). Indeed, the AU Assembly of Heads of State expressed frustration that, with the exception of South Africa, none of the other African state parties to the Rome Statute supported the AU position.<sup>8</sup>

These AU recommendations were not approved for consideration at the ICC's upcoming 2010 Review Conference. It was agreed by ASP members that the AU's concerns should be considered at the working group level.<sup>9</sup> An important decision, however, was the ASP's approval of an ICC Liaison office in Addis Ababa. The decision not to give way on Articles 16, 27 and 98 might be perceived as a loss for Africa's continental organisation. The ASP's decision, however, to dedicate two days to substantive discussions to a "stocktaking exercise" at the Kampala Review Conference does give African governments an opportunity to address a range of issues to enhance the Court. The two days will focus on a range of issues of concern to the continent. They include four themes: complementarity between the ICC and domestic judicial systems, cooperation, the impact on affected communities, and the interaction between peace and

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<sup>6</sup> The Report of the African Union High-Level Panel on Darfur, Peace and Security Council, 207th Meeting at the Level of the Heads of State and Government, 29 October 2009, p. xvi, para. 249, p. 64 and para. 255, p.69.

<sup>7</sup> Aside from recommendations on Article 16, 27 and 98, another relates to procedural issues, namely guidelines for the exercise of prosecutorial discretion by the ICC Prosecutor. See Recommendations of the Ministerial Meeting on the Rome Statute of the International Criminal Court.

<sup>8</sup> Second Meeting of State Parties to the Rome Statute of the International Criminal Court, para. 4, p. 1.

<sup>9</sup> The AU recommendation that the Prosecutor be asked to review its policies to consider promoting peace in deciding whether to open investigations and report to the ASP was agreed upon; however the wording was revised to gain ASP acceptance.

justice. South Africa is working jointly with the Danish Government on a paper on positive complementarity. It is important in the lead up to the Review Meeting that African state parties and the AU consider how to usefully ensure that their various concerns and views are also tabled at the stocktaking exercise.

## **Conclusion**

The standoff by the ICC and the AU often overshadows one fundamental fact: that the continent is home to landmark efforts to address impunity. Several African states have been at the forefront in dealing with impunity. But while we can cite many good examples, we cannot continue to defend states who fail to protect citizens. Instead, the AU must work more effectively to enforce accountability; it should translate its declarations on the fight against impunity into concrete actions that result in the protection of Africa's citizens. The Court's strongest supporters are in Africa for good reason – they lack confidence in domestic institutions to deliver justice. This fact must never be lost in the heat of the debate about the ICC's role in Africa.

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**This paper is adapted from a presentation made at the Wople Open Dialogue in Cape Town on 17 November 2009. I would like to thank my ICTJ colleagues for their comments: Mirna Adjami, Suliman Baldo, Olivier Kambala, Miranda Sissons and Marieke Wierda).**