

The ICC and Culture of Impunity in Africa

ICC Warrant of Arrest against President Bashir of the Sudan

Biong Kuol Deng

The Organisation of African Unity (OAU) member states' adoption of the African Charter on Human and Peoples' Rights (ACHPR) in 1981 in Nairobi, Kenya, marked a milestone development in terms of the human rights normative framework on the African continent. Indeed, the ACHPR had by then introduced a conceptual point of departure from the prevailing international concept of human rights, which classified human rights into generations of rights (first generation, second generation and third generation). Notwithstanding this progressive human rights normative framework, the continent has continued to witness colossal and grave human rights violations, especially war crimes, crimes against humanity and genocide. The 1994 Rwanda genocide was a tragic reminder of the Second World War holocaust in Europe in the 1940s, and against which humanity had resolved 'never again.' The current reported war crimes, crimes against humanity and genocide in the Darfur region of the Sudan have once again challenged humanity's resolve: never again. In this respect, the International Criminal Court (ICC), under the United Nations Security Council (UNSC) resolution 1593 mandate, has taken an unprecedented decision by issuing a warrant of arrest against a sitting president, whose country (the Sudan) had signed the Rome Statute of the ICC but withdrew its signature to signal its total rejection of its jurisdiction in the future. This policy brief attempts to provide answers to the following questions: how did Africa reach this human tragedy point? Does the ICC have a mandate to issue a warrant of arrest against a sitting president? What implication, if any, will it have on the human rights situation on the ground and concluded peace agreements (Darfur Peace Agreement (DPA), Comprehensive Peace Agreement (CPA), and Eastern Sudan Peace Agreement (ESPA)) in the Sudan?

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Introduction

In order to address the questions at hand, it is imperative to pose a critical question: how did Africa arrive at this low point in terms of the violation of human rights to have one of its sitting presidents issued a warrant of arrest by the ICC? The simple and straightforward answer to this question is that the existence of a weak and inept human rights infrastructure in Africa might have been responsible for Africa's current human rights challenges, especially the involvement of the ICC.

It is critical to give a brief recounting of Africa's human rights trajectory. In terms of the normative human rights framework, Africa has produced the most comprehensive and holistic human rights instrument: the 1981 ACHPR had, since then, defined all human rights to be equal, indivisible, interdependent and interrelated. Since then, the international human rights law was underpinned by the notion of generations of human rights: first generation of rights (civil and political rights); second generation of rights (economic, social and cultural rights); and third generation of rights (development and environmental rights). The Declaration of the 1993 Vienna Conference on Human Rights ended this classification of human rights and adopted that all human rights were equal, indivisible, interdependent and interrelated.¹

The main continental mechanism, among others, that purports to address human rights violations is the African Commission on Human and Peoples' Rights, an off-shoot of the ACHPR. However, its mandate is somewhat restricted to receiving and deliberating on human rights cases, making recommendations and filing reports (which the violators ignore, more often than not); conducting studies on human rights; and organising seminars and workshops on human rights. It is, in effect, a dialogue forum on human rights and not an enforcer thereof. Thus, the ACHPR has been unable to stamp out these violations.²

To address this challenge, the International Commission of Jurists (ICJ) developed and submitted a Draft Protocol on the ACHPR, which the OUA Assembly in Ouagadougou, Burkina Faso, adopted on 10 June 1998 and opened for ratification. Indeed, the Protocol to the ACHPR on the Establishment of an ACHPR came into effect after 15 African states deposited their ratification instruments on 25 January 2004. The main mandate was to complement the protective mandate of the ACHPR.³ However, when the Constitutive Act and the Abuja Treaty came into existence with respect to the establishment of the AU, the Assembly of the Heads of State and Government decided to

have one court, and that is the African Court of Justice and Human Rights, arguing that it would not be cost-effective to have a plethora of bodies.⁴ Thus, a proposal was made to develop a protocol on the extension of the African Court's jurisdiction to include human rights issues. This draft Protocol is yet to be adopted. While the African Court has been established and its justices have been appointed, it has yet to receive cases.⁵

While Article 4 (h) of the AU Constitutive Act has precipitated a paradigm shift in Africa from the non-interference doctrine in a state's affairs to the non-indifference doctrine in cases of genocide, crimes against humanity and war crimes, that paradigm shift has not been translated into concrete actions.⁶ In this respect, the AU Peace and Security mission in Darfur was hampered by its mandate, which was to protect humanitarian workers and not the civilian populations in Darfur. The DPA was problematic at its inception since most of the fighting groups did not sign it except the Menawi faction of the Sudan Liberation Movement. The AU's and the international community's efforts to salvage the DPA have yet to produce positive results.⁷

Notwithstanding this progressive approach to human rights, African peoples have continued to be victims of colossal and gross human rights violations as a result of intra- and inter-conflicts.⁸ This phenomenon can only be explained by the fact that, since independence, African rulers have, in effect, entrenched and indulged in what one may call 'the ideology of rhetoric,' which is anchored in inexplicable contradictions. This lip-service approach to addressing human rights violations on the continent has indeed compounded the human rights situation in many African countries.

ICC and Africa

Africa as a continent continues to be retarded in terms of socio-economic development because of the intra-state conflicts and governance challenges. Human rights violations continue to be rampant and African rulers, notwithstanding the two waves of democracy, remain trapped in the old mindset. Hence, the need to have a mechanism that can address the culture of impunity cannot be overemphasised. Acknowledging this stark reality, Mochochoko avers that:

No other continent has paid more dearly than Africa for the absence of legitimate institutions of law and accountability, resulting in a culture of impunity. Events in Rwanda were a grim reminder

that such atrocities could be repeated anytime. This served to strengthen Africa's determination and commitment to the creation of a permanent, impartial, effective and judicial mechanism to try and punish the perpetrators of these types of crimes, whenever they occur.⁹

African countries have been among those who have been supportive of the notion of establishing the ICC since the 1990s. Indeed, among 108 countries that have signed and ratified the Rome Statute of the ICC, 30 countries are from Africa, 25 from Eastern Europe, 23 from Latin America, 16 from Western Europe, and 14 countries from Asia.¹⁰ This enthusiasm on the part of African states should not be within the realm of what one may call the ideology of rhetoric. In this respect, Judge Navanethem Pillay, the former judge of the ICC and the current UN High Commissioner for Human Rights, warns African states against rhetorical commitment to the ICC:

From the standpoint of the rule of law, the ICC is one of the greatest achievements of the twentieth century. It is a court that deserved to be taken seriously by African states. On paper this appears to be the case. Currently, 30 African states have ratified the Rome Statute...but the real challenge is converting this expression of high-level political commitment into awareness and practical implementation on the ground. It is only through increased awareness, enhanced capacity and broad-based political support from practitioners and policymakers that Africa will be able to gain a reputation for being a continent seriously committed to ending impunity and non-adherence to the rule of law.¹¹

The Sirte AU Assembly summit sadly realised Judge Pillay's prophecy by passing a resolution that called on all member states to withhold their cooperation with the ICC.

More than 139 countries have signed and are yet to ratify the Rome Criminal Statute. However, the signature per se signifies the respect of the spirit of the Rome Statute of the ICC. It follows that while these countries are not legally bound by the Statute, they are expected to cooperate with the mandate of the ICC.

While African states are in the majority in terms of those countries that have ratified the Rome Statute, the ICC and the AU have yet to sign a cooperation agreement which will help in forging mutual understanding and advancing the mission, vision, mandate and objectives of the ICC.¹²

Most of the current indictments of the ICC affect Africans. There are currently four cases pending,

one of which is from Uganda. Under Articles 13 (a) and 14, the Government of Uganda referred the case of the Lord's Resistance Army (LRA) to the ICC, calling on the ICC to investigate crimes against humanity committed by the LRA. The Government of the Democratic Republic of the Congo (DRC) referred the case of a rebel commander to the ICC, with a view to investigating crimes against humanity that this commander had committed. Another case is from the Central Africa Republic (CAR) in which the government applied to the ICC to investigate crimes against humanity that Mr. Pemba of the DRC, who was once the vice-president of the DRC, had committed during the civil war in the DRC. The case from the Sudan, although it is not a party to the Rome Statute, was referred to the ICC by the UNSC under its resolution 1953 under Chapter VII of the UN Charter.¹³

Thus, African member states have been cooperating with the ICC's mandate. The question that begs to be asked is: is this cooperation genuine and sincere, or is the ICC being used by African rulers to deal with their adversaries or perceived enemies? The jury is still out on the answer to this. However, their negative reaction to the ICC issuance of the warrant of arrest against President Bashir challenges their resolve to end the culture of impunity in Africa. Indeed, the Sirte Resolution, Sirte, Libya, July 2009, with respect to the issuance of the warrant of arrest against President Bashir of the Sudan, has certainly prejudiced the cooperation that characterised the development of the Rome Statute and its subsequent ratification. The resolution, in effect, calls on those African countries (30 of them) that have ratified them to violate the Rome Statute.¹⁴

Sudan and ICC Jurisdiction

The conflict that continues to rage in the Darfur region of the Sudan between the forces of the Darfur liberation movements and those of the armed forces of the Sudan and their allied militias has been devastating in terms of human lives, forced migration and internal displacement. According to many independent reports, the conflict has, so far, claimed more than 300 000 lives and displaced more than 2.6 million persons. The government of the Sudan claims that only 10 000 lives have been lost.

The atrocities committed in the Darfur region are considered to be the worst this century. Indeed, the US government has since declared such atrocities as genocide. The UN, on its part, had an expert commission investigate violations

of human rights in the Darfur region. In its report, the commission concluded that while there was no evidence of genocide to have been committed, crimes against humanity and war crimes were certainly committed. The commission recommended to the UNSC to refer the Sudan case to the ICC.

After extensive deliberations, the UNSC adopted its resolution 1593 under Chapter VII, mandating the ICC to investigate human rights violations in the Sudan. It was upon this mandate that the ICC, pursuant to Article 27, commenced its investigation in the Sudan. Article 27 provides:

This Statute 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 under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

After extensive and thorough investigations, the ICC Prosecutor submitted an application to the Pre-trial Chamber of the ICC to issue warrants of arrest against two Sudanese officials: Mr. Ahmed Haroun, former State Minister for the Interior and State Minister for Humanitarian Affairs, currently the governor of Southern Kordofan state; and militia commander Ali Mohamed Ali Abdel Rahman, known as Ali Kushayb.¹⁵

Since the issuance of arrest warrants, the ICC has engaged the government of the Sudan with respect to its investigations into the crimes committed by these individuals. Upon the issuance of warrants of arrest, Sudan judicial authorities arrested Ali Kushayb for a brief period of time and released him on the basis there was insufficient evidence to warrant his continued detention. Regarding Mr. Ahmed Haroun, government officials interviewed him and found him innocent of all the crimes the ICC had alleged to have been committed by him.¹⁶

Besides, the Sudan Penal Code does not include genocide, crimes against humanity and war crimes. Thus, national courts lack jurisdiction to try crimes that are not covered by the Penal Code. This means that the principal of complementarity or subsidiarity in terms of jurisdiction does not apply. In this respect, these indicted individuals can only be tried by the ICC.¹⁷

Through its extensive and thorough investigations, the ICC has come to the conclusion that the atrocities and human rights violations that have been committed in Darfur can be traced to the highest echelon of government hierarchy. The Prosecutor has specifically identified President Omar Al Bashir under Article 27 of the Rome Statute of the ICC. In this respect, the Prosecutor did not initiate this process, but rather pursuant to the 1593 UNSC resolution under Chapter VII. Thus, the critics of the ICC, on the basis of having issued a warrant of arrest against President Bashir of the Sudan, should instead direct their criticism to the UNSC.

President Bashir's Indictment and Sovereignty Discourse

Over the years, the concept of sovereignty has evolved to a point that positivists are currently and seriously concerned about what has remained of it, in terms of the sanctity of this principle.¹⁸ Their argument is that this concept is enshrined by Article 2 (7) of the Charter of the UN, the main legal document on which international law and international relations' systems are anchored, which is currently being eroded and undermined.¹⁹

The old concept of sovereignty that was based on the conquest theory is outdated and not orthodox any more. However, this does not mean that assumptions on this concept do not continue to prevail in some parts of the world. In this connection, conquests through coups continue to legitimise governments and, their legitimate claims to sovereignty notwithstanding, the AU has outlawed the takeover of governments through coups in Africa. While sovereignty and legitimacy are not necessarily synonymous, they are conceptually and institutionally closely related.

In this respect it is important to note an historical anecdote with respect to how President Bashir initially assumed power in the Sudan: he staged a coup against an elected government of Mr. El Sadiq El Mahdi in 1989. If his coup were to take place post the adoption of the 2002 AU Constitutive Act, his government would have been declared illegitimate by the AU and it would not have recognised its sovereign authority.

Sovereignty as a concept and institution is central to the discourse of the legitimacy of a state's functions and its impact on the rights of its citizens. Indeed, in the 21st century, the state has to immerse itself in the sociology of rights in order for it to earn its legitimacy from its citizens and the international community. This human rights paradigm on sovereignty has transformed

and reconstructed the concept of sovereignty to an extent that positivists, who define law as the command of the sovereign, express concern that a state sovereignty may totally disappear.²⁰

Indeed, war atrocities, humanitarian tragedies, international crimes and violations of human rights, the end of the Cold War, globalisation and the information highway, and regional integration have necessitated the reconceptualisation of sovereignty as an international law principle. International relations scholars have come up with three models of sovereignty:

- Collectivity of Sovereignty (collective sovereignty),
- Divisibility of Sovereignty (divisible sovereignty), and
- Contingency of Sovereignty (contingent sovereignty).

These three models of sovereignty have been accepted as being parts of the international relations' system. Indeed, they are currently used as conflict resolution tools.²¹

For the purpose of this discussion, while other qualifiers may be pertinent, the contingency of sovereignty appears to be more relevant. Under this qualifier, the exercise of a full sovereignty depends and is contingent on the sovereign authority complying with, and respecting, all national and international norms and standards, especially human rights standards. In this respect, conditional and contingent sovereignty calls for a policy intervention on the basis of pre-set legal criteria with respect to the behaviour of state, sub-state or non-state actors.²²

Pursuant to this reconceptualisation of sovereignty, the International Commission on Intervention and State Sovereignty (ICISS), in its report titled 'The Responsibility to Protect' in late 2003, averred that:

... sovereign states have the primary responsibility for the protection of their people from avoidable catastrophe - from mass murder, rape, starvation - but when they are unable or unwilling to do so, that responsibility must be borne by the wider community of states.

The AU, through Article 4 (h) of the AU Constitutive Act, has shifted from the non-intervention of the OAU to the intervention doctrine, or the non-indifference doctrine in the case of genocide, crimes against humanity, war crimes and aggressive offences. In effect, the AU has reconceptualised the absolute sovereign authority of the AU member states.

The UNSC invoked the conditional or contingent concept of sovereignty when it adopted its resolution 1953 to sanction the ICC to investigate the commission of crimes against humanity: war crimes in the Darfur region of the Sudan. In effect, the UNSC concluded that the Sudan government had failed in its responsibility to protect, and that the Darfur human rights situation threatened peace and security of the world. Thus, even if the Sudan government did not ratify the Rome Statute of the ICC, it was bound by the responsibility to protect.

Threat of Bashir Indictment and the Discourse on Peace and Justice

The ICC's issuance of an arrest warrant against a sitting president has engendered a heated debate between the proponents and those opposed to it. While the lines of demarcation are clear cut among those who are ideologically opposed in terms of the concept of sovereignty, these lines are not so clear among those who agree that crimes against humanity and war crimes have been committed in the Darfur region. The question that vexes this group is whether peace and justice can be concurrently achieved? If not, which one should be prioritised?²³

The proponents of absolute state sovereignty argue that it is not only the ICC that has erred in terms of international law in issuing an arrest warrant against a sitting president, but also the UNSC for having sanctioned ICC's investigations into the situation in the Darfur region of the Sudan, since the Sudan was not party to the Rome Statute of the ICC. By so doing, the UNSC was applying double standards because the US and the UK should have been investigated too for crimes against humanity and war crimes in Iraq and Afghanistan. Besides, the UNSC has violated international law in that parties that have not ratified treaties are made to be binding on them.²⁴

A number of African rulers, for example, the President of the Republic of Benin, have argued that the ICC is targeting African rulers per se, and thus it is applying double standards.²⁵ The discourse on this issue has rekindled the familiar notion that the West applies double standards when it comes to Africa. Thus, they have invoked a solidarity doctrine with a view to protecting their peers, obviously not the victims of such crimes and people concerned.²⁶

These rulers argue such a move is unprecedented and has not happened before. While it is true that President Bashir is the first sitting president to be issued a warrant of arrest, the fact remains

former presidents from Africa (former president Charles Taylor of Liberia) and Europe (former president Slobodan Milosevic of the Federal Republic of Yugoslavia) were indicted. While the former is being tried by the Criminal Tribunal for Sierra Leone, the latter had been tried by the Criminal Tribunal for the former Yugoslavia before he mysteriously died.

However, what is interesting is that those that the ICC has indicted had their cases referred to the ICC by the governments of the DRC, Uganda and CAR under Art.13 (a). Indeed, pursuant to its mandate, the ICC has commenced persecution of those individuals that state members have referred to it. Thus, the issue of double standards does not apply in these instances. What this argument suggests is that African rulers want to cling to and enjoy the old immunity and sovereignty, notwithstanding Article 27 of the Rome Statute of the ICC, in which case they are also applying a double standards approach.

The dilemma of the second group who strongly believes that genocide, crimes against humanity and war crimes have been committed in the Darfur conflict situation and that the perpetrators should be punished, is understandable. The issue of prioritisation of either peace or justice is a difficult one. However, if it were in a world where such crimes were unreservedly punished through collective resolve it would have been easy to say that peace and justice should be achieved concurrently. Unfortunately, we are in a world where member states have to balance between moral fortitude and national interests from the narrow perspectives of their rulers.²⁷

The Darfur Human Rights Organisation, the Federal World Human Rights, Amnesty International, Human Rights Watch, and Darfur fighting groups are of the opinion that there is no contradiction in achieving peace and justice concurrently. Indeed, you cannot have peace without justice, especially when you deal with those who do not respect peace agreements. In this respect, they cite the 2005 CPA between the Sudan People's Liberation Movement and the government of the Sudan, which is not only faltering but likely to collapse as well. The lack of the implementation of the Abyei Protocol and the razing of the Abyei town to the ground by the Sudan Armed Forces (SAF) is cited as a glaring example of the violation of peace in the Sudan. For these groups, justice delayed is justice denied. It would be shameful and morally repugnant if the international community remains helpless in the face of crimes against humanity and war crimes being perpetrated on the Darfurians.

The other faction argues that the international community's resolve to address the human rights situation in Darfur has been wanting. The AU and UN Hybrid Force that should have been on the ground to protect civilian populations in Darfur continues to be scuttled by the government of the Sudan, which has continued to reject participation of some countries in this force. While the negotiations are on-going in terms of the functioning of this force - which has only 10 000 troops on the ground out of the expected 26 000 - the SAF and their militia allies continue to target internally displaced persons in displaced persons' camps.

Thus, the best approach is not to prioritise peace in the Darfur region because there is no peace on the ground. Instead, the international community should continue to put pressure on the parties concerned with a view to achieving peace as soon as possible. However, this should not stop the ICC from proceeding to investigate gross human rights violations that continue to be perpetrated. In this respect, it should tread carefully and judiciously when it invokes its universal jurisdiction. While this group also agrees that justice delayed is justice denied, it nonetheless views the situation in Darfur as somewhat different in that such an arrest warrant will trigger retributive attacks by the government forces and destroy all the efforts to achieve peace in Darfur. It argues that in this instance the international community is dealing with war criminals who will continue to perpetrate these crimes because they are protected by an entrenched culture of impunity.

Conclusion

There is obviously no contradiction between peace and justice. Indeed, unjust peace is usually not sustainable and can be a source of a renewed war. However, there may be a need to tactfully achieve both by pushing for peace and, at the same time, continue to investigate violations of human rights.

The ICC has already conducted extensive and thorough investigations into the Darfur situation and must continue to exercise its mandate under the UNSC resolution 1593. Peace and justice entail that perpetrators of gross human rights violations should be made accountable.

The Sudan government must put its house in order. It has to resolve the Sudan conflict in the Darfur region by using the CPA model. In this respect, the cost of declaring Darfur as one region, compensating those communities that have been uprooted by the war, disarming and disbanding the Janjaweed and other militias, agreeing on

security arrangements, and expelling individuals from Mali, Niger and Chad to their countries, is far cheaper than the cost of weapons from China, Russia and other Eurasia countries. It has also to implement, in good faith, the CPA and the ESPA. Simply put, Sudan, as a member of the UN, has to respect the UNSC Resolution 1593 by cooperating with the ICC. After all, the ICC had not initiated this process, but rather it was referred to it by the UNSC.

The UNSC and the AU have to continue to work collaboratively to bring about peace in Darfur and complete the establishment of the UN and AU Hybrid Force with a view to imposing an immediate ceasefire in the region. In this connection, the UNSC may have to: invoke Article 16 of the Rome Statute of the ICC if there are reasonable grounds that the Sudan government is resolved to reach an agreement with those who are fighting against it in Darfur; and implement the CPA and ESPA in order to avoid any relapse to a war situation. The UN and AU have to ensure that the Sudan cooperates with the ICC mandate. The Sirte Resolution adopted by the Summit of the Heads of State and Government in July 2009, Sirte, Libya, does not in anyway help in the fight against the culture of impunity that has unfortunately been entrenched as far as Africa is concerned.

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- 12 Considering the current myths that are being promoted and propagated by some African countries and scholars, it is imperative that the African Union and International Criminal Court develop a cooperative framework with a view to ascertaining the objectives of the International Criminal Court because of which African governments and states initially supported the establishment of the International Criminal Court. The resolution issued by the African Union Assembly summit in Sirte, Libya, July 2009, on the non-cooperation with the International Criminal Court was a worrying development which should be reversed as soon as possible.
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- 15 Mr. Ahmed Haroun is currently a governor of a state in which the Nuba people are in a majority and who accuse Mr. Haroun of having committed war crimes and crimes against humanity during the civil war between Sudanese People's Liberation Movement/Army and the Khartoum government (1983-2005). This war was ended by the signing of the Comprehensive Peace Agreement by the Sudanese People's Liberation Movement/Army and the Sudan government.
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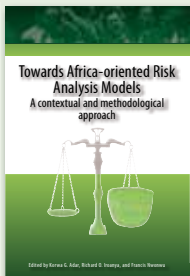
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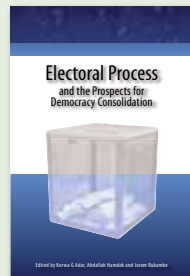
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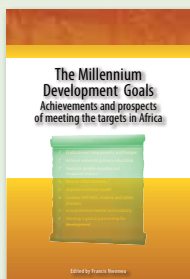
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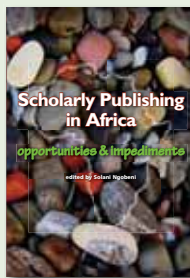
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