

# **The Indictment of Omar al-Bashir and the Political Anxiety across Africa**

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In the prospect of an international criminal court lies the promise of universal justice. That is the simple and soaring hope of this vision. We are close to its realization. We will do our part to see it through till the end. We ask you...to do yours in our struggle to ensure that no ruler, no State, no junta and no army anywhere can abuse human rights with impunity. Only then will the innocents of distant wars and conflicts know that they, too, may sleep under the cover of justice; that they too, have rights and that those who violate those rights will be punished.<sup>1</sup>

Kofi Annan, Former UN Secretary-General

## **1. Introduction**

This past week the International Criminal Court (ICC) has finally decided that Sudan's president general Omar al-Bashir may be charged with genocide. President al-Bashir is already indicted on seven counts of war crimes and crimes against humanity, including masterminding murder, rape and torture in the Darfur region of the Sudan. As it did before, the African Union (AU) opposed this decision. African dictators are, individually and collectively rallying behind the suspect genocider, Omar al-Bashir. They are unashamed of standing by the side of the butcher rather than his victims. They claim that charging the guy is ruinous to peace efforts (as if there was one). But are these dictators concerned about peace or even about al-Bashir, or about the precedence this sets and who might be next? Without doubt al-Bashir's indictment has sent a powerful signal that even those at the helm of power cannot escape accountability. While the anxiety of dictators across the continent may not be surprising, their claims need scrutiny. In what follows I

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<sup>1</sup> Press Release, United Nations, International Criminal Court Promises Universal Justice, Secretary-General Tells International Bar Association (June 12, 1997), U.N. Doc. SG/SM/6257 (1997)

will discuss the unique significance of international justice to Africa and why African dictators are fiercely opposing the indictment of al-Bashir.

## **2. International Criminal Justice: Development**

The Nuremberg and Tokyo trials at end of World War II are widely considered as the beginning of modern international criminal law. Limitations inherent in the circumstances notwithstanding, those trials marked a significant advance in terms of crystallizing the idea of personal criminal liability under international law. Under such background and in light of its objectives, the United Nations (UN) tasked the International Law Commission to draft a statute for a permanent international tribunal as early as 1948. However, Cold War competitions meant that the idea of creating a permanent criminal court would remain stalled in the subsequent decades. A post Cold War renewed interest in the issue culminated by the adoption of the Rome Statute creating the ICC in 1998. The establishment of the first permanent international criminal Court, dubbed as the last great international institution of the twentieth century, is regarded as a historic breakthrough. The jurisdiction of the ICC is limited to the gravest and most heinous crimes, such as genocide, war crimes, and crimes against humanity.

### **3 Are Peace and Sovereignty incompatible with Justice?**

The significance of an international legal infrastructure for holding those who commit crimes of genocide, war crimes, and crimes against humanity to account, which the ICC represents, is indisputable. The establishment of the ICC heralds a rare promise of justice to the victims of the most heinous crimes in Africa and beyond. However, embracing a noble objective alone does not make its path smooth. Apart from the enigmatic role of the Security Council, the lack of enforcement mechanisms and other practical issues, the very legitimacy of the ICC's is challenged on various fronts. In particular, the contention that the universal jurisdiction of the ICC conflicts with the principle of national sovereignty represents tough hurdle for the young Court. It is also argued that international justice must at times give way to other schemes which serve the 'interest of peace.' While realism suggests that states (at least some of them) harbor deep political skepticism against the ICC, the principle of *sovereignty* and the '*interest of peace*' are invoked as the

chief grounds of resistance to the ICC's universal jurisdiction. African 'leaders' are making the most of these excuses. But is justice really irreconcilable with peace and sovereignty?

**a. Does Justice Encroach upon Sovereignty?**

Traditionally, in sovereignty lies the political sensibility of states. States jealously guard their sovereignty against any encroachment. As a result, they resist handing over a part of their sovereignty to an international organization. Such resistance is more profound when it comes to matters that have deep political implications. Criminal jurisdiction is a glaring example. However, the universal jurisdiction of the ICC is moderated by the doctrine of complementarity. According to articles 1, 18-19 of the Rome Statute every state has the right to try crimes committed in its territory (irrespective of the nature of the crime). The ICC can step in only if the state is *unable* or *unwilling* to do so. Thus, this doctrine clearly shields member states from any encroachment upon their sovereignty. The sovereignty argument is, thus clearly indefensible. Moreover, governments that do not respect popular sovereignty, like many in Africa, cannot invoke the obsolete notion of unfettered sovereignty to shield their abusive rules.

**b. Does Justice Spoil Peace?**

Justice may be an elusive concept. Yet, it is arguably the most cherished ideal of all societies. The quest for a just social organization is the fundamental baseline of legal/political theories since Aristotelian times. Although most legal theories explain justice in context of a nation-state, modern thinkers such as John Rawls argued in favor of international justice. In John Rawls's incisive statement, 'justice is the first virtue of social institutions, as truth is of the system of thought.'<sup>2</sup> Dictators and their cronies contend that the imperatives of 'sustainable peace,' require flexibility in the pursuit for justice. Their contention is that peace and justice are sometimes incompatible goals. However, whether and how justice frustrates sustainable peace is never clear. African governments vehemently argue that in order to give peace a chance, national and regional initiatives should be preferred to the ICC. Those who advocate trading justice in the 'interest of restoring peace' argue that realism requires that parties to a conflict must cooperate to put an end to atrocities. Since it is unrealistic to expect dictators to

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<sup>2</sup> See John Rawls, *A Theory of Justice*, The Belknap Press of Harvard University Press, Cambridge, Massachusetts (1971) at 3

relinquish power or rebels to submit voluntarily, they argue, reconciliatory arrangements are necessary. The experience of countries such as South Africa is often invoked as empirical evidence for the desirability of amnesty. Whether the experience of South Africa is a success to imitate is deeply controversial. South Africa might have made a peaceful transition. Gruesome human rights violations remain unidentified; decisions were grossly arbitrary, biased and inefficient; justice denied; impunity rewarded, etc. That is nothing short of a travesty of justice. Many believe such travesty is reinforcing the growing culture of violence the country has come to be known for. Also, to what extent such unique experiences can apply to situations such as in Darfur, where regime change is unlikely, is another matter. Most importantly, the arguments seem to rest on the assumption that the power of law and of the international community to deter atrocities is limited that there is a need to somehow yield to the demands of mass-killers.

#### **4. Darfur as a Test Case and Africa's Resistance**

Unsurprisingly, the early years of the ICC have proved particularly significant to Africa. All the cases currently under investigation before the Court are associated with conflicts in Africa. On March 4, 2008, the ICC-the first permanent international tribunal in history-made history when it issued an arrest warrant for the Sudanese president General Omar al-Bashir. Human rights advocates hailed the indictment of a sitting Head of State as an important milestone that heralds: '[n]ot even presidents are guaranteed a free pass for horrific crimes. The Sudan dismisses the ICC ruling as a neocolonialist conspiracy.

Beyond the target government, the issue has caused deep political anxiety across the region. Controversies sparked since the ICC prosecutor asked for arrest warrant in July 2008. Unsurprisingly, the African Union and the Arab League are both opposed to the ICC warrant. For the time being, the Sudanese dictator is mocking of the ICC, and freely traveling and attending meetings across friendly Africa countries and elsewhere, including Eritrea, Ethiopia, Egypt and Saudi Arabia-none of which are known for human rights sensitivity. Many governments, including those who were involved in the referral of the case to the ICC are now wary of it. Evidently the ICC ruling *per se* has sent a powerful signal that many at the helm of abusive regimes might be next. Totally

unconvinced by the African leaders' outcry, former UN Secretary General Kofi Annan writes:

One must begin by asking why African leaders shouldn't celebrate this focus on African victims. Do these leaders really want to side with the alleged perpetrators of mass atrocities rather than their victims? Is the court's failure to date to answer the calls of victims outside of Africa really a reason to leave the calls of African victims unheeded?<sup>3</sup>

Interestingly, for many Africa countries that are members to the ICC, opposing the ICC warrant is problematic. At any rate, the case of Darfur presents a unique challenge to the Court. It is the first real challenge not only to the untested court, but also to the international community's commitment to international criminal justice. To be sure, the indictment of a sitting head of state is historic in its own right, and how it is handled will have symbolic significance.

### **5. The UNSC's Role: A Question of Legitimacy**

The situation in Darfur was referred to the ICC by the UNSC Resolution.<sup>4</sup> The Resolution was based on the UNSC's mandate under Chapter VII of the UN Charter, and was a determination that the situation in Sudan constitutes 'a threat to international peace and security.' The UNSC's referral of the situation in Darfur is widely hailed as crucial for the future of the controversial Court. However, the referral itself is also enigmatic, if not hypocritical, given the fact that three of its five permanent members; namely, China, Russia, and the United States, do not recognize the universal jurisdiction of the Court. It is a situation where outsiders decide both on the power of the ICC and the fate of other outsiders. By contrast, there appears no way that permanent members of the UNSC or their allies would be subjected to the ICC jurisdiction. This appears just political process devoid of rule of law and equal justice for all. How this can coherently be justified is unclear. Most important, it seems a fundamental credibility concern for the ICC.

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<sup>3</sup> Kofi Anna, Africa and the International Court, New York Times, June 29, 2009

<sup>4</sup> UNSC Resolution S/RES/1593 (2005) adopted on March 31, 2005.

This unjustifiable mechanism further fuels the African outcry against the ICC. African governments are questioning why only Africa is being targeted.<sup>5</sup> The obvious answer would be that the continent is most riddled by abhorrent human rights violations. Africa is probably the only continent where democracy is publicly despised in the twenty first century.<sup>6</sup> Further, the ICC intervenes when national courts are either *unwilling* or *unable* to investigate serious international violations. While devastating conflicts seem a constant in Africa, abusive regimes that rule most African countries are likely to be unable (like in Uganda) or unwilling (like in Sudan) to investigate atrocities.

### **6. A Supra-national Court: Dictator's Nightmare**

African leaders have historically not only invoked unfettered sovereignty over matters of human rights, which they regard as domestic affairs in order to shield misrule from international observers, but also are wary of supra-national judicial supervision. The history of the so-called African Human and Peoples' Rights Court is a paradigmatic example to demonstrate this assertion. The idea of a competent human right judicial body in Africa was considered almost half a century ago, at the 1961 Lagos Conference. But it was only in 1998 that the Protocol for the establishment of an African Court of Human and Peoples' Rights was adopted. It took yet another six years for the necessary fifteen African states to ratify the Protocol for its entry into force, and the court was finally constituted in 2004. This court rendered its first ever decision only in December 2009, when it declined jurisdiction on a complaint against Senegal.

### **7. The ICC is a Rare Promise of Justice for Africa**

The UN was established with a spirit of 'never again' after the atrocities of World War II. International human rights norms have blossomed since then. However, norms alone can do no miracles. Heinous crimes are still undeterred. People are still dying in large proportions by state sponsored atrocities. Worse, impunity for such serious international crimes still seems to be the norm than the exception. This is greatly because massive

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<sup>5</sup> Benin's President, Thoman Boni Yayi has been quoted by Reuters as saying the ICC is 'chasing Africa.' Available at <http://blogs.reuters.com/africanews/2009/01/25/putting-africa-on-trial/>

<sup>6</sup> Libyan President Muammar Guaddafi is the most vocal, if not the only one, to officially condemn democracy. According to him, democracy is incompatible with African values and traditions. See <http://news.bbc.co.uk/2/hi/africa/7870431.stm>

human rights violations are to a great extent linked with dictatorships and the absence of democratic institutions. Empirical evidences show that there is a strong correlation between undemocratic rule and threat to international peace and security, including war (and war crimes), genocide, refugee flows, religious persecutions, and so on. The hope that ‘an effective ICC could contribute to justice, deterrence...global norms, and ultimately, to a more humane world’ cannot thus be held more enthusiastically than in countries that suffer under abusive dictatorships. That is why African needs a strong ICC Than

### **Conclusion**

Impunity is cancerous to human rights. Hence, it should be combated. This requires ensuring that those who have committed such serious crimes will not get safe heaven in the state run by themselves or by their cronies. The culture of impunity, not justice is a threat to peace. While the world needs an effective ICC, this court represents a rare opportunity to hold Africa dictators accountable. Given the complementarity principle, those who are genuinely committed to international rule of law have nothing to fear about an effective ICC. Also, the doctrine of sovereignty, read in conjunctive harmony with fundamental human rights norms, is complementary, not contradictory to accountability. As a legal concept (as opposed to political rhetoric), sovereignty refers to the power of people in a given state. Governments that trump popular sovereignty cannot invoke the old notion of unfettered states sovereignty to shield their crimes.

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