

RESPONSE TO CRITICISM THAT THE INTERNATIONAL CRIMINAL COURT IS “ANTI-AFRICAN”

All four active International Criminal Court investigations are looking into crimes that have occurred in African countries. The individuals that have been indicted by the ICC are all Africans. This has raised a number of questions and allegations that the court is purposely targeting Africans and the developing world. The Court has denied this charge. This paper addresses arguments that the ICC is anti-African.

African Union Concerns about the ICC

The ICC is an independent, permanent tribunal created to prosecute individuals for genocide, war crimes, and crimes against humanity. It is the first permanent, treaty-based Court established to end impunity for the perpetrators of the most serious crimes of concern to the international community. African support for the court was strong at its establishment; 30 African States have now ratified the Rome Statute. In fact, on February 2, 1999, Senegal was the first country in the world to ratify the Rome Statute of the ICC.

The African Union (AU), established on July 9, 2002, is an intergovernmental organization that consists of 53 African states. The primary objectives of the AU are to accelerate the political and socio-economic integration of the continent; to promote and defend African common positions on issues of interest to the continent and its peoples; to achieve peace and security in Africa; and to promote democratic institutions, good governance and human rights.

Recently, the AU and other members of the international community have voiced concern that the ICC is anti-Africa for two central reasons. Firstly, all four active ICC investigations are looking into crimes that have taken place in African countries and secondly, they claim that the ICC has not investigated crimes in other countries that some claim warrant investigation.

The AU has expressed concern that the United Nations Security Council (UNSC) had not even entertained the request made by the AU for a deferral of the case against President Omar Al-Bashir of Sudan, under Article 16 of the Rome Statute of the ICC.

Under Article 16 of the Rome Statute, the UNSC can ask the ICC via a resolution to suspend investigations or prosecutions for renewable periods of one year. The refusal to address the AU demand for a deferral led to the adoption of a non-binding resolution by the AU calling on all its members to halt cooperation with the ICC in apprehending President Bashir. According to the resolution, the AU member states shall not, pursuant to the provisions of Article 98 of the Rome Statute which relates to immunities, cooperate with requests for the arrest and surrender of President Bashir.

In spite of the fact that the AU commission had made serious efforts to mobilize international support for the deferral and the Commissioner for Peace and Security, Ramadan al-Amamra, made a number of visits to New York to consult with members of the UNSC, the request was turned down.

However, in response to the AU concerns that the UNSC had ignored its request for a deferral, it should be noted that three out of the four active investigations – those in the Democratic Republic of Congo, Central





African Republic, Uganda – are taking place at the request of the countries themselves. The ICC is therefore responding to specific African interests in justice and accountability. The fourth investigation, in Darfur, Sudan, was started on the request of the UN Security Council.

Under Article 13 of the Rome Statute, the ICC has jurisdiction if the alleged crime was committed by a national of a State Party or on the territory of a State Party. Further, the ICC can only investigate into alleged crimes on the territory of a non-State Party involving non-State Party nationals through Security Council referral, or if the State makes a declaration accepting the Court's jurisdiction.

Moreover, political questions of peace and justice are to be decided by political bodies, not by the ICC. Article 16 of the Rome Statute, the founding treaty of the ICC, prevents the Court from proceeding with a case if the UNSC has passed a resolution under Chapter VII of the UN Charter. It states, "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions."

Furthermore, the Court would not proceed with a case that is under investigation by the national judiciary itself. Under the principle of complementarity, the ICC must defer to national courts when the country which has jurisdiction is willing and able to investigate the situation domestically.

The Arrest Warrant for President Omar Al-Bashir

Background

In 2004, the UNSC established the UN Commission of Inquiry to look into alleged Darfur abuses. It was headed by the former President of the International Criminal Tribunal for the former Yugoslavia (ICTY) Judge Antonio Cassese of Italy. The commission concluded that the government did not pursue a policy of genocide in the Darfur region but that Khartoum and government-sponsored Arab militias known as the Janjaweed engaged in "widespread and systematic" abuse that constituted crimes against humanity.

Furthermore, Cassese concluded that the Sudanese judiciary "is unable or unwilling" to prosecute those crimes and thus recommended referring the situation to the ICC.

In March 2005, the Security Council formally referred the situation in Darfur to the Prosecutor of the International Criminal Court, taking into account the report of the UN Commission of Inquiry on Darfur, authorized by UNSC Resolution 1564 of 2004, but without mentioning any specific crimes.

In April 2007, the ICC judges issued arrest warrants against the former Minister of State for the Interior, Ahmed Harun, and a Janjaweed Militia leader, Ali Kushayb, for crimes against humanity and war crimes. The Sudan Government said that the ICC did not have jurisdiction to try Sudanese citizens and that it would not hand the two men over to it. These two men remain at large.

The Prosecutor later noted that the Sudanese government had not taken serious steps to prosecute those suspected of being behind the war crimes in Sudan's Western region of Darfur and therefore proceeded with an



investigation of President Omar Al-Bashir. After evaluating the evidence, the Prosecutor filed an application for an arrest warrant for the Sudanese president which was issued on March 4, 2009. The Pre-Trial Chamber found evidence to support a warrant for two counts of war crimes, (intentionally directing attacks against civilians and pillaging) and five counts of crimes against humanity (murder, extermination, forcible transfer, torture, and rape.) The Pre-Trial Chamber found that there was no reasonable ground to support the allegation that Bashir had a specific intent to commit genocide. That is an intention to destroy, in whole or in part, a protected group. However, on June 24, 2009, the judges of the ICC granted the Prosecutor's request to appeal their decision to exclude the genocide charges in the arrest warrant issued for Al-Bashir. His appeal accuses Al-Bashir of mobilizing the entire Sudanese state apparatus with the aim of destroying a substantial part of the Fur, Masalit and Zaghawa ethnic groups in Darfur over more than six years.

African support for the ICC

At the July AU summit in Sirte, Libya, African nations adopted a non-binding resolution instructing its members who are ICC members not to cooperate in apprehending the Sudanese President Omar Al-Bashir despite their legal obligations under the Rome Statute to do so.

Senior Botswanian officials said that the resolution was forced upon the AU members by Libyan leader Muammar Qaddafi who is the Pan-African body chairman. AU members Chad, Botswana and Uganda have strongly resisted this resolution. The Ugandan foreign ministry issued a statement on July 10, 2009: "As a signatory to the Rome Statute, the Ugandan Government re-iterates its commitment to the Statute and support to the ICC. This position is shared by the other African States Parties to the Statute who clearly expressed it during the Assembly meeting in Sirte, Libya."

Archbishop Desmond Tutu of South Africa rejects any claim that the ICC is anti-African. Rather, the Court should be seen as pro-Africa. He stated, "I regret that the charges against President Bashir are being used to stir up the sentiment that the justice system – and in particular, the international court – is biased against Africa. Justice is in the interest of victims, and the victims of these crimes are African. To imply that the prosecution is a plot by the West is demeaning to Africans and understates the commitment to justice we have seen across the continent."¹ Further, many prominent Africans are judges of the ICC. For example, Fatoumata Dembélé Diarra of Mali is the First-Vice President of the Court.

Indeed, it must be noted that three out of the four active investigations, in the Democratic Republic of Congo, Central African Republic, Uganda, are taking place at the request of the countries themselves. In light of this, the ICC cannot be deemed an attempt by the West to interfere in African affairs.

Three members of the African Union – Algeria, Benin and Tanzania – were on the Security Council it adopted Resolution 1593 which referred the situation in Darfur, Sudan to the ICC on March 31, 2005. Though Algeria abstained from voting, the representative present did voice his belief for the need for an international court to battle impunity and provide justice to victims of human rights violations. However, he believed this task would

¹ Desmond Tutu, Will Africa let Sudan off the hook?, N.Y. Times, March 2, 2009, available at <http://www.nytimes.com/2009/03/03/opinion/03tutu.html>.





be best handled on a regional level. In his view, the African Union was best placed to carry out so delicate an undertaking because it could provide peace, while also satisfying the need for justice.

Benin and Tanzania, the other two African countries in the Security Council in 2005, voted in favor of the referral. The Benin representative argued that

the ongoing deterioration of the situation in Darfur requires the Security Council to take urgent action to end violations against civilians there. One prerequisite of such action is to end the reign of impunity by providing impartial justice. Thirdly, referring the matter to the International Criminal Court ensures that credible and timely action will be taken against persons charged with atrocities and serious crimes. Fourthly, Benin voted in support of the resolution out of respect for human dignity and the right to life that has been denied to thousands of people in Darfur, to whom the international community owes protection in view of their vulnerability.²

Conclusion

The ICC is a judicial institution which operates to ensure justice; it is not a politicized body with an aim to punish African citizens and countries. The Court, on behalf of the international community, aims to hold to account individuals, regardless of their nationality, for widespread and severe atrocity crimes which shock the “conscience of humanity.” The crimes that have taken place in Africa are deemed grave enough to “threaten the peace, security and well-being of the people” and therefore warrant investigation by the ICC. The Court therefore does not purposefully target Africans and the developing world.

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Updated August 24, 2009*

² Record of the 5158th meeting of the UN Security Council, March 31, 2005, p. 10, available at <http://www.un.org/Depts/dhl/resguide/scact2005.htm>.

