

Annex

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Reflexions in International Criminal Law

Saturday, March 20, 2010

Healing the Rift: the Impasse between the African Union and the International Criminal Court

Introduction

There are often in human affairs turbulent occurrences that grate the nerves. And just as often, they are left well alone for want of easy resolution—in hopes that passage of time will dull memory, mollify nerves, and all becomes substantially well again ... eventually. But then, up pops a fresh pebble that lands smack on the still raw nerves.

Such is the story of the rift between the African Union and the International Criminal Court. An impasse was touched off in their relations when the ICC Prosecutor indicted President Omar el Bashir of Sudan in 2008. The AU protested. The trajectory of risen tension continued when an ICC Pre-Trial Chamber in 2009 confirmed the indictment in all other respects, save for the count of genocide. The AU squirmed and grumbled some more. But things came to a head when the AU requested the Security Council later in 2009 to defer the prosecution for 12 months, pursuant to article 16 of the ICC Statute. The Security Council did not act on the request. Feeling slighted and brushed aside, the AU passed a resolution, calling on African States to not cooperate with the ICC on the Bashir prosecution. This was in July

2009. [See Dapo Akande, 'Is the Rift between Africa and the ICC Deepening?': www.ejiltalk.org/is-the-rift-between-africa-and-the-icc-deepening-heads-of-states-decide-not-to-cooperate-with-icc-on-the-bashir-case/]

The two sides had been carrying on with the tension still between them; perhaps hoping that things would work themselves out. But in early February 2010, the Appeals Chamber of the ICC, ruling on the Prosecutor's appeal, reversed the Pre-Trial Chamber's decision that quashed the genocide count and remanded the matter back to the Pre-Trial Chamber for reconsideration.

This last event is that fresh pebble that popped up and landed on the still sore nerves of the AU. But this latest development affords occasion to reflect upon what has been gained by either side from this stalemate. The occasion is propitious, with the Kampala review conference looming large in the immediate horizon—affording, perhaps, a fresh opportunity of healing the

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rift.

It must, however, be said from the outset that, as a practical matter, the burden of this reflection appears to weigh heavier on the side that resists the AU request for the article 16 deferral.

A presumption of good faith

While some of the opposition to the AU request for deferral has been premised on a reasonable difference of opinions by responsible people, there remain traces of a cynical assumption in some quarters—often unspoken, but not always so—that anyone sympathetic to the AU call for the deferral must be seen as supporting, promoting or condoning impunity for violations of international humanitarian norms. The assumption is idle at best, and particularly foul when it is permitted to rise to the level of implicit or explicit suggestion that the AU leaders are just ‘a club of [African] cronies out to protect one of their own’. In fact, one CNN reporter once said as much.

It needs to be clearly said in defence of AU leaders that they must be accorded the presumption of good faith that they deserve, when they insist that justice must be done, but that they are more immediately concerned with securing peace and stability in Darfur and Sudan. Speaking on the Bashir indictment before the UN General Assembly in September 2008, President Jakaya Kikwete of Tanzania, the AU Chairman at the time, stressed the essential matter of justice, but insisted on the best sequencing of justice with the imperatives of security. As he put it: ‘Justice is a matter of essence—it must be done, it must be seen to be done. We are simply concerned with the best possible sequencing of measures so that the most immediate matters of saving lives and easing the suffering of the people of Darfur are taken care of first.’ [\[www.unmultimedia.org/radio/english/detail/35916.html\]](http://www.unmultimedia.org/radio/english/detail/35916.html)

What President Kikwete, the statesman, was saying late in 2008 finds eminent juristic support in the words of Benjamin Cardozo many years before: ‘Justice is not to be taken by storm. She is to be wooed by slow advances.’ Cardozo’s observation could, of course, be adjusted a little with the qualifier ‘some times’ or ‘when appropriate’. But the point is easy enough to grasp.

In the circumstances, the position of the AU, thus explained, deserves serious regard. It is wrong to drown out this consideration with presumptions of corrupt motive. For the reasons that follow, the opposite presumption is more appropriate. First, AU leaders, more than most of the people who oppose their position, bear the heaviest burden of legitimate worry. Many of those who want nothing more than immediate arrest and prosecution of Bashir will not share with AU leaders the trauma of concrete and immediate chaos that will result from the spiralling out of control of Darfur and Sudan, were Bashir to be immediately and forcibly removed from office and arraigned at The Hague for trial. Leaders of wealthy and able nations will be constrained to consider whether their domestic public

opinion will permit them to 'send [their] young men and women in harm's way' in any international military effort to stabilise a nation in chaos in distant Africa. African leaders will not have that luxury.

Perhaps, Iraq must be kept in mind here; for it has become an object lesson in what happens when well-intentioned people undertake by storm the evidently just cause of removing and prosecuting bad men who hold their peoples stably together even with barbarous strings of tyranny. The prompt removal, capture, trial and execution of Saddam Hussein did not as promptly reward the people of Iraq with the promised dividends of peace and security that they deserve and clamoured for all those years under Saddam. America has now served Iraq a pullout notice, requiring Iraqis to take care of their own security. After the pullout, there will be a distance of continents and oceans and thousands of miles separating America and Iraq. But if Sudan goes the way of Iraq upon a precipitous removal of Bashir, there will be no continent or ocean or a thousand miles to separate AU leaders from Sudan. Their fate in the face of chaos in Sudan is simply that stark.

Notably also, the AU High Level Panel on Darfur, under the Chairmanship of former President Mbeki of South Africa, went to great lengths to stress that the advancement towards peace, justice and reconciliation in Darfur will require an integrated package of solutions which must necessarily balance the requirements of the imperatives of peace, justice and reconciliation. The Panel was 'convinced that any attempt to emphasise the importance of any of these three objectives at the expense of the others, would not bring about the just and stable peace we all desire for the people of Darfur, and which the Darfurians themselves seek.' [See Mr Mbeki's speech to the UN

Security Council on 22 December 2009.]

The point of the foregoing is not that tyrants must be allowed to strangle their own peoples forever with vicious cords of relative stability. The point rather is that the available choices are not limited to either (a) perpetual tyranny that promises ostensible social stability or (b) instant removal and prosecution that yields instant chaos to society. There is a middle course. That course is the AU model of sequencing and balancing of the imperatives of justice and social stability. While not a perfect model, it has been known to bring eventual justice, or the immediately realizable promise of it, in certain cases where, as in the Bashir case, the need was seen for prosecution of a malignant dictator. And that brings us to the second reason why good faith must be presumed on the part of AU leaders.

We must not be quick to forget that it is the AU leaders that passed a resolution requiring Hissen Habre (the former President of Chad) to be tried in Senegal for violations of international humanitarian norms. Similarly, the African leaders have tacitly endorsed the prosecution of Charles Taylor. Notably, ECOWAS leaders were visibly embarrassed—and they duly protested—when David Crane (the first Chief Prosecutor of the Special Court for Sierra Leone) surprised them at an ECOWAS peace conference in Accra

in June 2003, by showing up unannounced and brandishing an indictment and warrant of arrest against Charles Taylor, who then was the President of Liberia and a fellow participant at the conference. Yet, neither the ECOWAS nor the AU leadership has been known to complain against the eventual arrest and trial of Charles Taylor by the Special Court for Sierra Leone, *sequenced* after his prior, safe tease-out from Liberia and grant of exile in Nigeria. Indeed, it was his asylum host, Nigeria's President Obasanjo, that eventually arrested him from his refuge in Nigeria and handed him over to the SCSL for trial.

These antecedents are sufficient to demonstrate the folly of the suggestion that it is the motive of protection of a fellow 'old boy'—rather than their seriousness about sequenced measures—that explains the position of the AU leaders in respect of Bashir.

It is for these reasons and more that the AU leaders must be accorded a presumption of good faith, rather than not, when they seek a deferral of the Bashir prosecution. [In his own blogs, Dapo Akande has reviewed other reasons why good faith should be presumed on the part of AU leaders: see for instance, Akande, *supra*. See also Dapo Akande, 'Africa and the International Criminal Court': www.ejiltalk.org/africa-and-the-international-criminal-court/]

So, what was the point of the stalemate?

It is also with the foregoing in mind that we return to the question: What has the impasse between the ICC and the AU achieved that inures to the benefit of the Bashir prosecution? After much reflection, the answer to this question is hardly edifying.

Notably, the current phase of the stalemate resulted from the non-action of the Security Council to the AU request for deferral—a request based on a procedure in the ICC Statute that the AU felt entitled to invoke. This is the procedure under article 16, for deferral of investigation or prosecution. Now, let us pause for a minute and consider that procedure and the reasons for it. In the words of the provision: '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.'

Under that procedure then, the resulting deferral has a non-self perpetuating life of 12 months. A fresh resolution would have to be tabled after the 12 months, if a renewal of the deferral were needed. It is difficult to imagine that there would be much appetite (on the part of the Security Council) or conviction (on the part of the AU) for repeated renewals after the initial one.

In addition to inquiring into the practical effects of the resistance to the AU request for deferral of the Bashir prosecution, one cannot help wondering

what it was that motivated the resistance to the first AU request in the first place. That question necessarily provokes the underlying inquiry as to why it was considered necessary to have article 16 in the ICC Statute in the first place. Is the AU request wholly outside those reasons? A cursory view of the Rome Statute's *travaux préparatoires* does not support that conclusion.

Article 16 is the product of a proposal from Singapore and Canada aimed at balancing two critical interests, to wit: (a) ICC's judicial interest in exerting justice in the face of criminal responsibility; and (b) the Security Council's political interest in maintaining international peace and security—sometimes in precarious circumstances. That balance was adequately captured by Mr Perrin de Brichambault of France whose remarks were recorded as follows: 'The proposed article [16] provided an excellent working basis as far as the role of the Security Council was concerned. There must be consistency between the actions of the Court and the actions of the Security Council *where there were situations endangering peace*. The Statute should provide for the Security Council to be able to ask the Court to defer action in situations coming under Chapter VII of the Charter of the United Nations' [Emphasis added.] *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, Rome, 15 June - 17 July 1998, Official Records, Vol II, Doc No A/CONF.183/13 (Vol. II) p 189]. Similar comments were made by other delegations that spoke in favour of article 16. See, particularly, the comments of Mr Mwangi of Kenya *ip cit*, p 317] and Mr Rowe of Australia *ip cit*, p 209] who respectively spoke of the need to strike a 'balance' in the suggested manner.

Justification for the resistance to AU's deferral request must be founded upon the proposition that the request may rightly be seen as unduly tipping that scale. But that would be a hard proposition to sustain, keeping fully in view the case of good faith made above in favour of the AU.

At any rate, the following question still remains: what exactly was the practical value of resisting the AU their first request for deferral, when it should have been obvious to anyone that Bashir could not be arrested and arraigned before the ICC within those initial 12 months, even without the requested deferral? In the absence of a practical value to that resistance, it seems that the only result achieved has been a needless—possibly self-indulgent—aggravation of the nerves of AU's leadership, and a resulting widening of the gulf of damaged relations. It is possible to imagine how the current reality of the product of that treatment, in terms of soured relations with the ICC, so poorly compares with that of a positive consideration of the deferral request. A positive consideration of the request would have stirred in the AU leaders feelings of respect, dignity and high regard to which they are entitled. With the leverage of the deferral, they might have been empowered to *achieve* more in terms of peace and security in Sudan and Darfur, especially if the international community had made steps along those lines conditions of the grant of the deferral request. And the damage in relations with the Court might have been avoided or repaired.

Bridging the Gulf

How then do we move forward in order to bridge the gulf of tension between the AU and the ICC? One important consideration in the effort to heal the rift is that the views of the AU must be treated with respect and dignity and given due regard. Failure to do that runs a great risk of alienating one of the—if not the—most important constituencies of this young Court.

For obvious reasons, alienation of the AU will not augur well for the Court. I anticipate here a demurrer to the effect that this amounts to mixing justice with politics. It certainly is. For, it will be a painful show of naïveté to presume otherwise. But, the presence of restraining politics in the affairs of the Court ought not impede it in substantially achieving the central aim for which it was founded: being the aim of banishing impunity from the minds of persons who abuse humanity and threaten international peace and security in alarming ways. The task for the Court then is to negotiate around these political obstacles and pitfalls and fog-spots, and remain dogged in its pursuit of justice and accountability. Granted, the potential achievements of the Court in those circumstances will be attenuated, as compared to the achievements of a court operating in a political vacuum. Yet, those attenuated achievements will be far superior than would be the lot of modern civilisation in a vacuum of international criminal justice. That is to say, the glass of justice represented by the Court, operating in a political reality, is not an empty glass. It is a glass half full. That is precisely the sort of balance contemplated by article 16 of the Court's Statute.

Posted by Chile Eboe-Osuji at 6:45 AM

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