

**The African Union and the Darfur Crisis: Regional Peacemaking in an era of
International Justice**

Presentation to New York City Bar Association's Committee on African Affairs

Dr. A. Sarjoh Bah
Senior Fellow, New York University's Center on International Cooperation
5 October, 2006
New York

I would like to start by extending my gratitude to Elizabeth Barad and Megan Moloney for inviting me to speak with you today and to the entire Committee for your warm hospitality. Thank you all!

It gives me a great pleasure to speak with you this evening on one of the most difficult questions of our time, the international failure to provide adequate response to the Darfur crisis. The conflict as you are aware has left an estimated 250,000 people dead and displaced over 3 million more as refugees or internally displaced persons, living in squalid conditions.

My presentation this evening will focus on how the African Union's peacemaking efforts intersected with other initiatives most notably, the International Criminal Court's arrest warrant of President Omar Bashir of Sudan. Needless to say, the warrant has added a complex layer to an already complicated situation. I will highlight how various actors including the AU, the United Nations Security Council, the League of Arab States, the United States, and civil society organizations have responded to the indictment and how disagreements among these actors is impacting the peace process. In my view, lack of consensus over the indictment points to deeper divisions in the international community over issues of transitional justice, especially as they relate to the delicate balance of dealing with impunity on the one hand and restoring peace and security on the other. I will start my presentation with a brief overview of the conflict.

Darfur, an arid region in western Sudan, has proved to be a major test case of the AU's capacity to undertake complex peacemaking in an era of international justice. The brutal conflict has become synonymous with genocide; although most, including the AU have not described it in those terms. As the conflict between the Islamist government in Khartoum and the predominantly Christian, Sudan People's Liberation Army raged for over two decades, the long-standing tensions in Darfur were neglected. However, negotiations led by the Inter Governmental Authority on Development culminated in the Comprehensive Peace Agreement between the National Congress Party and the Sudan Peoples Liberation Movement, the parties to the North-South conflict. Signed in January 2005, the CPA marked the end of Africa's longest running civil war; a conflict that had claimed approximately two million lives and displaced millions more.

However, the marginalization of Darfur by the central government rendered celebrations marking the end of the North-South conflict short-lived, as news of mass murder involving government soldiers and their infamous militia ally, the *Janjaweed*, eclipsed

the much celebrated deal. In Darfur, the Government and the *Janjaweed* were pitted against the Sudan Liberation Army and the Justice and Equality Movement, the two groups that had taken up arms against the Islamist government in early 2003. Since then the rebels have splintered into over a dozen groups, hindering efforts to reach a political settlement.

As the international media focused its radar on Darfur in late 2003, the gravity of the situation was exposed with scenes of death and destruction. Images of violence evoked memories of earlier atrocities, most notably, the genocide in Rwanda in 1994, leading to calls for intervention to avert a repeat of that tragedy. These calls were led by civil society and human rights organisations concerned that the administration of President George W. Bush's preoccupation with the war on terror would overshadow the violence in Darfur. To the surprise of many observers including myself, senior U.S. government officials most notably, former President George W. Bush, Secretary of State Colin Powell, and the U.S. Congress described the conflict as genocide. The pronouncements by the Bush administration and Congress generated optimism but that optimism was short-lived since the pronouncements were not followed by a robust response, politically or militarily.

For their part, human right activists and other observers saw Darfur as a perfect case to implement the much vaunted concept, the *Responsibility to Protect*, which calls for intervention in situations involving war crimes, crimes against humanity, ethnic cleansing and genocide. Additionally, some observers viewed Darfur as an 'opportunity' for the international community to salvage its image after its indifference to the Rwandan genocide. But the much anticipated response failed to transcend the rhetoric; instead it degenerated into arguments about the right labels for what was unfolding in Darfur. This was reminiscent of similar debates during the genocide in Rwanda. It was soon evident to some of us that there would be no immediate robust intervention and that the people of Darfur, like the hundreds of thousands of Rwandans in 1994, were at the mercy of their killers.

However, this time the sub-Saharan African leadership - led by Nigeria, South Africa, Senegal and others - which was also strongly criticized for its inaction during the Rwandan genocide was determined to act. In my view, the AU responded to the Darfur crisis due to four inter-related reasons. First, having adopted the most 'interventionist' security regime anywhere in the world for egregious violations of human rights, the AU had to live up to its principles. The AU's founding Charter, the Constitutive Act, gave the Union the right to intervene in a Member State in respect of grave circumstances, namely war crimes, crimes against humanity and genocide. Under the new framework the principle of *non-indifference* would supersede that of *non-intervention* in situations involving the three aforementioned crimes. Second, lingering memories of international failure during the Rwandan genocide served as a strong imperative for the AU's proactive engagement in Darfur and elsewhere. Third, the AU was keen to make sure that the Naivasha Peace process between the GoS and the SPLM was insulated from the conflict in Darfur. And finally, the AU had to respond to pressure from civil society organizations on the continent and internationally that had adopted the Darfur crisis as a major part of their advocacy.

From the outset, the AU pushed for a negotiated settlement to the conflict leading mediation efforts that culminated in the first ceasefire agreement in September 2003. Needless to say, since then durable and credible peace has been elusive despite continuing efforts by the AU, UN and others. The lack of progress has been attributed to several factors including lack of commitment by the Government of Sudan and the rebels to a negotiated settlement, the increasing splintering of the rebels groups into small and unwieldy groups often with no clear political agenda coupled with conflicting signals from the international community. Moreover, recent actions by the International Criminal Court have further complicated efforts to reach a political settlement, the central focus of my presentation.

The warrant of arrest issued for President Bashir by the ICC, on 4 March 2009, has undoubtedly added a complex layer to the crisis, threatening to overshadow peacemaking efforts in Darfur and to erode the North-South peace process. But how has the indictment affected the peace process? Well, despite initial concerns that the government might expel international peacekeepers from Darfur, those concerns did not materialize, except for the expulsion of over a dozen agencies providing critical humanitarian services. However, disagreement between the UN Security Council and the AU's Peace Security Council over the indictment has emerged as a bigger threat that could undermine their joint peacemaking venture. The ICC's indictment of President Bashir split the two Councils with the AU's Peace and Security Council making repeated requests for the Security Council to invoke Article 16 of the Rome Statute to suspend investigation and prosecution of President Bashir for one year. The suspension the PSC argues would give peace a chance; an argument that I agree with. But much to the anger of the PSC, it requests were ignored by the Security Council, exposing the undercurrents in this fragile partnership.

For their part, three Permanent Members of the Security Council, most notably, the UK, U.S. and France continue to insist that the ICC process should be allowed to run its course. Closer to home, the U.S. - though not a State Party to the ICC - under both President George Bush and Barack Obama, supports the indictment. However, China and Russia, the other two Permanent Members of the Security Council, raised doubts about the efficacy of the move arguing that the Government of Sudan should be given time to deal with what both countries view as a domestic affair. China and Russia are known to have commercial interests in Sudan in oil and armaments, respectively and are therefore less inclined to pressure President Bashir. However, despite their objections to the indictment, neither has offered to champion the AU's call for a suspension of the indictment.

As stated earlier, although the AU did not object to the indictment *per se*, it expressed alarm at the poor *timing* of the indictment, which in its view could worsen the Darfur crisis and unravel the North-South peace process. The AU's response to the warrant was summed up by Jean Ping, the Chairperson of the AU Commission who tried to walk the tightrope between fighting impunity and promoting peace when he stated that, "...peace and justice should not collide," adding "that the need for justice should not override the need for peace." Supporters of the AU on the issue of timing, including myself, point to

the fact that, unlike the tribunals for the former Yugoslavia and Rwanda, and the Special Court for Sierra Leone, the ICC is a permanent institution and as such, its activities are not dictated by timelines, as is the case with the *ad hoc* tribunals.

You will agree with me that the indictment touches on a critical issue, the dilemma of whether peace should be pursued before justice or justice before peace, a sequencing challenge that confronts most post-conflict societies. There is currently no consensus on this issue but it remains a critical challenge for the AU given its continued engagement in efforts to resolve conflicts that are characterized by egregious crimes.

Meanwhile, the establishment of an independent High-Level Panel on Darfur is the most practical step adopted by the AU to deal with this lingering puzzle. The High-Level Panel, led by former South African President, Thabo Mbeki was precipitated by the challenges that emerged from the ICC's indictment of President Bashir. The Panel, consisting of eminent Africans including three former Heads of State, was mandated among others to: "examine...how best the issues of accountability and combating impunity, on the one hand, and reconciliation and healing on the other, could be effectively and comprehensively addressed..."

It might interest you to know that the Panel was established against the backdrop of a growing concern among African leaders of what they perceive as the abuse of the principle of universal jurisdiction. These concerns were described by a 2008 AU Summit as "...a development that could endanger International Law, order and security" pointing to what the Summit viewed as the political nature of legal proceedings initiated by non-African judges, most notably from France and Spain, against officials in the current government of Rwanda, including President Paul Kagame. The actions of these judges they argued were a violation of Rwanda's sovereignty and territorial integrity. Subsequently, the Summit called on its members to disregard such warrants and EU member states to impose a moratorium on any arrests until the AU, EU and UN have had time to discuss the complex diplomatic, political and legal issues involved.

I am hopeful that the recommendations of the High-Panel would contribute to shaping the AU's response to the twin dilemma of justice and peace. However, if the AU pushes for a sequenced approach that emphasizes peace before justice, such a recommendation would clash with the position of the ICC especially after it has issued an indictment. Although the complementarity principle in the Rome Statute gives precedence to national judicial systems, the ICC is bound to act on referrals by the Security Council. The AU on the other hand, has the challenge of walking the fine line between upholding its principles against impunity and promoting peace.

Meanwhile, the response of AU member states to the indictment has varied. While Senegal and others voiced concerns over the indictment, Botswana for its part applauded the move as Libya forcefully rejected it, calling on African State Parties to withdraw their membership from the ICC. The ICC has been criticized by the AU and some of its member states for its unbalanced focus on African cases, given that all the four cases currently being pursued by the Court are in Africa: the Democratic Republic of Congo,

Uganda, the Central African Republic and Sudan. However, it is important to note that the first three cases were referred to the ICC by the government's of these countries, while the Sudan case was a referral by the UN Security Council; the first such referral by the Council.

Although a mass walk out from the ICC by the African State Parties is remote, the ICC needs to embark on a charm offensive to fend off criticisms of bias from certain African countries including signatories of the Rome Statutes. Part of this offensive should include a clear demonstration by the ICC that it can go where the evidence leads it and is not deterred by the whims of the powerful members of the international community; as it appears to be the case right now. The stakes are high for the AU, the Security Council and the ICC since it is not in the interest of any of them to be perceived as obstructing justice or peace. The challenge here is how to ensure that peace and justice are viewed as complementary and not mutually exclusive. Such a consensus is critical as it would minimize the chances of unilateral actions such as the AU's decision in July this year not to cooperate with the ICC in executing its warrant for President Bashir.

Unfortunately, the credibility of the High-Panel was undermined by the AU's decision. However, the decision came as a little surprise given Colonel Muammar Gadaffi's - the Libyan president and Chairperson of the AU - support for President Bashir and his staunch opposition to the ICC. But, despite efforts to present the decision as one that was based on consensus, several AU member states most notably, Botswana, Ghana, Chad and later South Africa distanced themselves from the decision, promising to abide by their treaty obligations. Nonetheless, it was evident that even some state parties that objected to the indictment did so out of frustration with the UN Security Council which had refused to consider repeated requests from the AU to suspend the indictment. This frustration was aptly captured by Ghana's Foreign Minister, when he stated that "we have been a little unhappy about the whole process...the AU actually addressed a resolution to the Security Council asking the SC to defer the warrant for one year, and it was virtually ignored. That we thought was a slap."

In my view, the AU's decision not to cooperate with the ICC on the Bashir case was a message to the Security Council for being unresponsive to its request for a deferral. The ICC is therefore collateral damage in the failed dialogue between the PSC and the Security Council. The rift between the two Councils is troubling given that the bulk of the Security Council's work is on Africa and the growing profile of the PSC on the continent and internationally.

So far, one of the unintended consequences of the ICC's indictment of the president Bashir and perceptions about abuse of the principle of universal jurisdiction is strengthening the AU's desire to establish an African criminal justice mechanism instead of referring cases to the ICC. A recent meeting of the AU's Executive Council in Kampala, Uganda adopted the idea for such a proposed mechanism. Although this is a laudable move that could ensure African ownership and accountability for egregious crimes at the same time, the AU needs to take concrete steps to bridge the gap between its decisions and the poor record of implementation. For instance, commitment of resources

remains a big challenge as most of its members are still too poor to make a meaningful contribution or have their priorities elsewhere.

At another level, the AU's decision not to cooperate with the ICC was criticized by African civil society groups. They condemned the move and called on individual state parties to adhere to their treaty obligations. Even before the AU summit in Libya, a group of African civil society organizations convened to discuss the implications of the AU's position on the principle of universal jurisdiction and the work of the ICC. In their final statement, the civil society groups called on the African state parties to reaffirm their commitment to ending impunity in accordance with AU's Constitutive Act and other regional and international legal instruments. The group also called on the non-signatories to accede to the Rome Statute to ensure its universality on the continent.

The seeming disconnect between the AU and civil society on this issue lends itself to two possible explanations. First, that AU member states are out of sync with the wishes of their populations; to the extent that civil society groups are representative of broad sections of their societies. Second, that AU member states are putting regime security ahead of human security. While the latter might be an unfair generalization given some of the bold decisions by the PSC including the intervention in Darfur and the rejection of the AU's decision not to cooperate with the ICC by several of its members, it nonetheless exposes unresolved tensions over the approach to and understanding of security. In my view, disagreements over this issue point to different conceptions of security with civil society preoccupied with human security while governments are still preoccupied with regime security.

To conclude, it is evident that the indictment of President Bashir constitutes a critical challenge for peacemaking efforts in Darfur and elsewhere in Sudan. Additionally, the indictment has refocused attention on the unresolved dilemmas of dealing with impunity and promoting peace and justice. In this vein, the African Union's establishment of the High-Level Panel on Darfur is a good first step that could serve as a foundation for the AU's broader response to the dilemmas posed by the issues of peace and justice. However, in an era of international justice, such efforts would be optimized if they are properly coordinated with developments at the international level. How the international community including the AU, responds to these challenges would lay the foundation for greater consensus around issues of transitional and international justice in post-conflict environments.

Thank you for listening!