



Canadian Social Science
Vol. 14, No. 3, 2018, pp. 1-10
DOI:10.3968/10184

ISSN 1712-8056[Print]
ISSN 1923-6697[Online]
www.cscanada.net
www.cscanada.org

President Al Bashir's Dance-Tease With the ICC: Did the ICC Unfairly Get Its Comeuppance for Singling out African Leaders?

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Received 4 December 2017; accepted 7 February 2018
Published online 26 March 2018

Abstract

This paper examines why the ICC indicting President Al Bashir has culminated in a rapid deterioration in relations between African countries and that transnational organization. The paper uses the atrocities the Sudanese government committed in Darfur to examine the disputatious issue of official immunity and whether President Al Bashir, as an incumbent head of state, should enjoy it. Irrespective of the merits and demerits of official immunity being extended to top public officials accused of crime, African leaders have shown a near unanimous disdain for the ICC since the organization began to push for President Bashir's indictment. This paper examines to extent to which the ICC through its actions is blamable for precipitating the deteriorating relationship between itself and the AU. Alternatively, governments of the AU may not escape blame for capitalizing on the ICC's awkward move on Bashir to rid themselves of an organization the international community set up to clamp down on human rights abusers throughout the world. There is no disguising that many African leaders feel gleeful for masterfully setting up a firewall that ostensibly blunts the ICC's ability to use the long reach of the law to bring violators to justice. The ultimate losers of this break down of trust have been Africans who since the dawn of independence have been at the receiving end of governmental brutality and injustice. These are the poor, the working class, the politically unconnected, and people who dare raise their voice against corruption and egregious human rights abuses.

Key words: Omar Bashir; ICC; Janjaweed; Zuma; Official immunity; African Union

Bamfo, N. (2018). President Al Bashir's Dance-Tease With the ICC: Did the ICC Unfairly Get Its Comeuppance for Singling out African Leaders?. *Canadian Social Science*, 14(3), 1-10. Available from: <http://www.cscanada.net/index.php/css/article/view/10184>
DOI: <http://dx.doi.org/10.3968/10184>

INTRODUCTION

After the International Criminal Court (ICC) charged President Omar Al Bashir with war crimes in 2009, he made several overseas trips including to Ethiopia and Egypt. Nevertheless, it was his visit to South Africa from June 7 to June 15, 2015 as head of Sudan's delegation to the African Union's 25th African Union Summit that gained notoriety. The ICC petitioned the South African former president Jacob Zuma to arrest President Bashir. The ICC's request unexpectedly came to dominate the summit. When President Al Bashir arrived for the summit a South African judge, Hans Fabricius, ordered the Sudanese president to remain in South Africa until a judge decided whether he would be arrested to face war crime charges at the International Criminal Court (Makhubu, 2015). Amid all the confusion, a Sudanese embassy official, Saif Ahmed, said Khartoum seemed not bothered by the ICC's move "The court has no authority on Sudan," he said (Dube, 2015). When the summit ended, the South African government allowed the Sudanese president to leave the country. Tisdall reports that as Al Bashir's plane took off from a military airfield outside Pretoria, the local high court was still hearing arguments over an application that would have forced the South African government to arrest him (Tisdall, 2015). A South African judge criticized the government for allowing Bashir to leave, while the ICC on its part gave the South African government up to early October to explain why it refused to arrest President Bashir.

The South African government went on the offensive, sternly rebuking the ICC and what it stands for. According

to Powell, the foreign minister, Maite Nkoana-Mashabane, accused the organization of bias because “all nine of the situations the court is investigating are in Africa.” Moreover, the minister claimed that South Africa was not afforded the opportunity to present legal arguments on the application of why Al Bashir was not detained; hence, the principles of justice were not adhered to (Powell, 2015). In the view of South Africa’s government the ICC had committed a serious infringement of South Africa’s rights as a state and that the court had acted against the letter and spirit of the Rome Statute.

1. ICC’S CRITICS AND SUPPORTERS

There were supporters and critics of the South African government’s inaction to arrest Al Bashir. Writing in the *New York Times*, Sengupta and Simons stated the ICC lacking support since 2002 was because the law protects only those who have powerful friends, singling out former American president George Bush for escaping the atrocities invading Iraq created (Sengupta & Simons, 2015). Ankomah described the controversy surrounding the South African government agreeing first to detain Al Bashir as a case of “mistaken memory.” The statement sarcastically implored Africans to open their eyes to the danger that outsiders pose to the stability of the continent and its institutions. Ankomah was incredulous there were people in South Africa who wanted their government to ignore the collective voice of Africans (who he claimed did not want Al Bashir arrested) so some Westerners could rejoice (Ankomah, 2015).

Deon (2015), on the other hand, argued that South Africa was becoming a rogue state because the ANC’s claim the ICC was biased was false and pure political posturing. “In the eyes of the African leaders, the ICC is biased...only Africans they are interested in. This is what has made Africa feel we need to reconsider our participation. It looks like it is just meant for us.” According to Deon, a closer look at the ICC’s caseload suggests nothing biased in the court’s approach to Africa even though President Zuma tried to use the “biased” argument to announce a plan to withdraw South Africa from the ICC. The *Economist* (2015) also asserted in an article that the late South African leader, Nelson Mandela’s, legacy had been tarnished by the South African government’s failing to arrest President Omar Bashir who had been indicted by the ICC for genocide. According to the article, the South African government allowing Omar Al Bashir to return home safely after the African Union summit harmed international justice.

President Al Bashir’s nonchalant behavior about the ICC’s indictment was a vivid reflection of the ill-boding contempt the AU has had for the ICC for targeting African leaders—a targeting which many leaders believe has been unfairly applied. In a resolution passed at the Extraordinary Session of the Assembly in October 2013,

the Assembly reiterated its unflinching commitment to fight impunity, promote human rights and democracy, and the rule of law and good governance in the continent. The AU, however, reiterated that it stood by its earlier resolution that no sitting African head of state should be tried before the ICC (Extraordinary Session, 2013).

The basis for the AU’s seemingly duplicitous stance toward the ICC stemmed from the organization much publicized effort to indict Uhuru Kenyatta, the incumbent President of Kenya. Uhuru Kenyatta, who was the former Minister of Finance and William Ruto, the Secretary-General of KANU, were charged as indirect co-perpetrators in the violence which erupted during Kenya’s 2007 presidential elections. The charges were five counts of crimes against humanity consisting of murder, deportation or forcible transfer, rape, persecution and other inhumane acts allegedly committed during the post-election violence between 2007 and 2008. Other high-ranking Kenyan government officials were also indicted. In March 2011, the ICC decided to call up Uhuru Kenyatta and two other co-conspirators to appear at The Hague, which the suspects voluntarily did in April, 2011.

2. THE GENESIS OF DISTRUST

Africans have a deep distrust of their political institutions. Studies in the *Afrobarometer* on the subject in sub-Saharan Africa show citizens’ wariness for governments seen to be corrupt (Razafindrakoto & Roubaud, 2008). It may seem reasonable to extrapolate citizens’ distrust of political institutions to governments’ distrust of international institutions but there are no empirical studies ascertaining this link. Based on the resentment some African leaders have shown for international organizations especially those championing causes for human rights, however, it would be naïve to suggest a deep-seated distrust for these organizations did not exist. Analyses of a cross-section of individuals using micro-data from the World Values Survey on trust in international organizations, specifically trust in the United Nations, suggest that socio-demographic, socio-economic factors and politics have an impact on citizens’ beliefs. Political trust at the state level leads to a higher trust at the international level (Torgler, 2008). Rational-choice and structural functional theories in the context of international politics suggest a reasonable expectation among Third World leaders harboring a fundamental suspicion for international organizations.

The relationship that had existed between Omar Bashir and the ICC had been predicated on distrust as Bashir perspectively saw nothing but doom if he lent his support for an organization dedicated to putting human rights abusers on trial. The Sudanese government intuitively never signed the Rome Statute. Omar Bashir’s resentment toward the ICC, indeed, the general distrust other African leaders have shown human rights organizations, therefore, must be understood in the context of governments seeing

themselves as potential victims of a conspiracy to bring their character and that of top associates into disrepute.

Dependency theorists like Amin (1976) and Cardoso (1972) have laid a strong theoretical foundation to contextualize the instinctive skepticism which leaders of developing countries have about the plots developed countries conceive to keep developing economic, social, and political systems in a state of permanent suspension. According to Wallerstein (2006), Gunder Frank, an early *dependistas*, suggested the situation in which Third World countries found themselves today was not the result of some “traditional” characteristics they had inherited but the result of their incorporation as “dominated”, and “exploited” sectors in the modern world system. Leaders, both dead and living including Gaddafi, Eyadema, Mugabe, Bashir and Neto who international organizations had long targeted for human rights abuses had fundamental suspicions about human rights organizations.

3. THE HORROR IN DARFUR

The International Commission of Inquiry on Darfur (ICID) examined reports from different sources including government, intergovernmental organizations, non-governmental organizations, and interviews with victims and private individuals to prepare the charges against President Omar Al Bashir. To be sure, the ICID charged other groups including the Janjaweed, individuals, senior government officials, military commanders, members of rebel groups, and certain foreign army officers that aided in planning and committing crimes against the people of Darfur. Based on the ICID’s report, the ICC issued two warrants for Bashir’s arrest.

The first issued on March 4, 2009 lists crimes that include five counts of crimes against humanity, murder, extermination, forcible transfer, torture and rape. Two counts of war crimes: Intentionally directing attacks against a civilian population or against individual civilians not taking part in hostilities, and pillaging. Three counts of genocide: genocide by killing, genocide by causing serious bodily or mental harm and genocide by deliberately inflicting on each target group conditions of life calculated to bring about the group’s physical destruction (ICC, 2009).

The ICC, upon investigation, came up with what it asserted were two irrefutable facts about the situation in Darfur. First, according to United Nations estimates, there were 1.65 million internally displaced people in Darfur and more than 200,000 refugees from Darfur in neighboring Chad. Second, there had been large-scale destruction of villages throughout the three states of Darfur. The ICC conducted independent investigations to establish additional facts and gathered extensive information on multiple incidents of violations affecting villages, towns and other locations across North, South and West Darfur.

Based on an analysis of the information gathered in the course of its investigations, the ICC concluded the Government of the Sudan and the Janjaweed were responsible for serious violations of international human rights and humanitarian law amounting to crimes under international law. In particular, the ICC found that Government forces and militias conducted indiscriminate attacks, including killing of civilians, torture, enforced disappearances, destroying villages, rape and other forms of sexual violence, pillaging and forced displacement throughout Darfur. The extensive destruction and displacement resulted in loss of livelihood and means of survival for countless women, men and children. Besides the large scale attacks, many people had been arrested and detained, and many held incommunicado for prolonged periods and tortured (Milanovic, 2008). Sudanese government officials have stated that any attacks carried out by Government armed forces in Darfur were for counter-insurgency purposes and conducted by military imperatives (Taylor, 2008).

A 2005 UNICEF reports identified the crisis in Darfur to be the world’s worst complex emergency, characterized by widespread insecurity, population displacement and dependence on humanitarian aid. According to the report, over 210,000 refugees remained in Chad while the total conflict affected population in Darfur rose to approximately 2.4 million persons. According to UNICEF, approximately 1.4 million of these groups were children under 18 years of age and 550,000 were under five years old. These children were vulnerable to the effects of violence, abuse, hunger, disease and exploitation during the increasing social and economic collapse. The report concluded that the Government of Sudan had not pursued a policy of genocide but that the grave crimes committed in Darfur “may be no less serious and heinous than genocide”. The commission recognized however that some individuals, including government officials, might have committed acts with genocidal intent (UNICEF, 2005). The ICC identified several top government officials and military commanders including Ahmad Harun Ali Kushayb, Abdel Raheem Mohammad Hussein, and Abdallah Banda for actively participating in the crime against the people of Darfur.

Apsel (2009) asserts Darfur was not an isolated case that suddenly erupted in violence. Rather, it followed a long history of repeated violations by the Sudanese state against its citizens including using proxy militias (the Janjaweed) to sign peace agreements that fragmented and weakened the opposition. The root of the conflict was multiethnic and multicausal as the Sudanese government with speed uprooted millions of its citizens in 2003-2005 from their homes. This restructuring of the population in Darfur was part of a strategy to control the populace and redistribute land and other resources. Reyna attributes the conditions in Darfur worsening to Omar-Al Bashir, an Arab, coming to power in a military coup in 1989 as he

quickly entered an alliance with the Islamist movement, the National Islamic Front (NIF), led by Hassan al-Turabi, a radical Islamic ideologue.

Al-Turabi was behind introducing Sharia law in South Sudan, a non-Islamic region. As chairman of the legislative committee and subsequently Attorney General, he was in a position to influence government policy. Turabi also was a supporter of Osama bin Laden and was behind his invite to live in Sudan (Reyna, 2010). Al Bashir's new regime immediately posed problems in Darfur, especially for non-Arab peoples as it divided Darfur in 1994 into three smaller states—North, West and South Darfur to make certain that boundaries were gerrymandered to make the Fur a minority in each of the states, decreasing Fur power. A year later the central government appointed eight Arab emirs in West Darfur that directly threatened Masalit authority in their West Darfurian heartland.

3.1 The Controversy About Official Immunity

Immunity is defined as the exception or exclusion of the entity, individual or property from prosecution. The 1961 Vienna Convention on Diplomatic Relations and the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons which came into force in February 1977, grants Heads of State including any member of a collegial body performing the roles of a Head of State under the constitution of the State concerned immunity *ratione materiae*, or functional immunity, for official acts committed as part of one's duties while in office (Convention, 1977). Incumbent leaders continually committing atrocities against their citizens, however, have raised questions about the propriety of head of states invoking total immunity for their actions.

According to Foakes (2011), the question about what to do with heads of states who commit crimes has led to developing a universal jurisdiction for international crimes. This principle allows the national authorities of any state to investigate and prosecute people for serious international crimes such as genocide, crimes against humanity, war crimes, and torture even if they were committed in another country. Acting on that principle, human rights groups have made several unsuccessful tries to prosecute leaders including the former president of Chile, Augusto Pinochet and US officials for crimes committed in Iraq and Afghanistan. The Rome Statute of 1998 which set up the ICC was the defining achievement human rights groups had sought after many years to enshrine universal jurisdiction as a commonly accepted principle in international law. Article 27 of the ICC statute was clear:

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. (Rome Statute, para.3, 1999-2000)

Applying the principle of universal jurisdiction, however, has not been without controversy—a controversy that has undermined the ICC's effort to arrest Al Bashir. One is whether Bashir, as incumbent head of state, could be subject to prosecution irrespective of the crimes he purportedly has committed. Akande and Shah (2010) disagree, asserting that international law according head of states and some top level officials immunity *ratione personae* in foreign courts for international crime may not be changed. Bohien (2010) also admits that practical problems may prevent justice from being served through the ICC such as the Sudanese government not being a signatory to the Rome Statute. Besides, as an independent body, the ICC relies on state cooperation for enforcement of its rulings and the Sudanese government has no wish to extradite Al Bashir who is the head of that government.

Article 98(2) of the Rome Statute forbids the Court from proceeding with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender. Kiyani (2013) concurs that past precedents and customary international law undermine the ICC's position to indict Al Bashir because sitting heads of states have traditionally had "personal" immunity, whether this immunity is *ius cogens*. This immunity applies whether the head of State is traveling or not, and whether he or she is abroad for government business or private purposes. Therefore, head of State immunity is more comprehensive than diplomatic immunity or ordinary functional immunities.

President Al Bashir's other claim to immunity stems from Sudan not being a signatory to the Rome Statute and therefore exempt from ICC prosecution. Laughland (2009) asserts that President Bashir must not be subjected to ICC jurisdiction because Sudan is not a signatory to the Rome Statute. Nowhere in the ICC Charter, he argues, does it say that the Court has jurisdiction over states which have not accepted that jurisdiction. Therefore the judges should not have concluded that it does. Besides, he asserts, an important and widely accepted principle of international law is that treaties should be interpreted with the utmost good faith in the sense they were meant. On one hand, states agreed to pool some of their powers on a voluntary basis to allow a body to which they had delegated powers to exercise those powers. On the other, it is a different matter if the body thus created claims powers over states which are not parties to it, and which have not given their consent.

3.2 Bashir's Other Alibis

In September 2015, Al Bashir visited the People's Republic of China during that country's anniversary

of the end of World War II. The Chinese President Xi Jinping welcomed him as an “old friend” and invited him to a military parade. He went to India one month later to attend the India-Africa Summit. The Indian government rebuffed the ICC’s entreaty to arrest Al Bashir, stating the country was under no duty to arrest him as India was not a party to the Rome Statute. China and India inviting Omar Al Bashir in his capacity as Sudan’s head of state, dealt an embarrassing blow to the ICC’s credibility as an organization whose prosecutorial powers governments must respect.

Legal precedents appear to lend credence to President al Bashir’s immunity from prosecution even if he did not directly reference them. One is the bilateral immunity agreement, also known as Article 98 Agreements, which the United States negotiated with individual countries soon after the Rome Statute entered into force.¹ The Agreement was intended to shield American citizens from the jurisdiction of the ICC. Besides, a UK court rejecting a request in 2004 to issue a warrant for the arrest of President Robert Mugabe of Zimbabwe, set a precedent that has become significant in the ICC’s warrant to have Al Bashir’s arrested. Peter Tatchell, a human rights campaigner, had twice tried to perform a citizen’s arrest on President Mugabe for human rights abuses but in 2004, Magistrate Timothy Workman, ruled that Mugabe was entitled to immunity as a head of state (Andrews, 2004). Buzzard (2009) agreed with the court’s position arguing that the absolute immunity a Head of State, as embodying the sovereign power of the state enjoyed has evolved over time.

Torgler (2008) argues that although UNSC Resolutions 1593 and 1970 sought to remove head of state immunity, the customary immunity Al Bashir and Mouamar Gaddafi (now deceased) enjoyed would not be removed. Above all, the legal obligations Resolutions 1593 and 1970 placed on States to arrest relevant state officials were unlikely to be enforced. Wardle (2011) reiterates in his essay that Al Bashir remains protected by head of State immunity, and that ICC jurisdiction over him could only be maintained through either the Security Council overriding customary international law rules of treaties and immunities, or the law of immunities already provides an exception that invalidates Al Bashir’s protection. The latter simply does not exist and underscores why both propositions are unsustainable and require considerable revision of public international law.

¹ Several versions of these bilateral agreements have been implemented: those that are reciprocal, providing that neither of the two parties to the accord would surrender the other’s “persons” without first gaining consent from the other; those that are non-reciprocal, providing only for the non-surrender to the ICC of U.S. “persons”; and those that are intended for states that have neither signed nor ratified the Rome Statute. US Bilateral Immunity or So-called Article 98 Agreements. The Global Policy Forum. 18 April 2003. <https://www.globalpolicy.org/component/content/article/164/28427.html>

3.3 Flipped Loyalty

African countries have enthusiastically joined international organizations since the dawn of nations’ independence. Countries still look up to international organizations as the vehicle to restore justice and promote development. African governments that signed the Rome Statute saw setting up the ICC a hopeful antidote to years of human rights abuses that leaders had perpetrated against their own people. The governments that signed the Rome Statute showed genuine optimism from their action because for the first time in modern history countries had come to terms to establish an organization endowed with power to hold governments and their leaders accountable for behaving badly. Thirty-four out of fifty-three sovereign African countries signing was evidence of this optimism.

Several African countries drafted legislation that incorporated the crimes the Rome Statute had listed that represented a prima facie evidence for indictment against those who committed those crimes. National laws incorporated the ICC’s high judicial standards to ensure that signatory nations and the ICC were on the same accord (“Africa and the ICC,” 2002). At the same time, twenty African countries including Sudan, Egypt, Ethiopia, Angola, Somalia, the Republic of Congo, and Central African Republic abstained from signing the Rome Statute. The abstentions were disconcerting for their symbolism as they showed that some governments were disinclined to embrace the new era of committing to respect human rights.

Governments that signed the Rome Statute in the early 2000s, undoubtedly, were flaunting their democratic credentials by reassuring the world they were committed to turning a new page. The timing of the Organization of African Unity (OAU) changing to become the African Union (AU) in 1999 was also significant, because it was the same year the Rome Statute took effect. The newly-created AU was eager to showcase to the world the recently created African Commission on Human and Peoples’ Rights as its watchdog for human rights. The AU initially raised no objections to African countries assenting to the Rome Statute as a prelude to joining the ICC. The era when the OAU paraded narcissistic human rights abusers like Idi Amin and Jean-Bedel Bokassa reigned seemed a distant memory.

When the UN raised alarm about the rapidly worsening situation in Darfur in 2003, the AU warmly welcomed the idea of stopping the atrocities which the Sudanese government and armed militias were perpetrating on people. In 2004, the UN Security Council Resolution 1564 set up the African Union Mission in Sudan (AMIS), which approved setting up a modest peacekeeping operation in Darfur of 150 troops that increased to 7,000 in a few years. Since 2005, NATO has provided support at the request of the AU. The AU and the United Nations embarked on a

joint effort to prevent millions of Darfurians from starving by flying nine out of ten planes into the besieged territory (Fint, 2007). In 2007, UNSC Resolution 1769 set up the African Union/UN hybrid operation in Darfur, UNAMID, which took over from AMIS in late 2007. The budget of UNAMID was US\$1.04 billion for the fiscal year 2016-2017, and the strength of all uniformed personnel in Darfur stood at 17,754 (UNAMID, 2017).

4. INDICTMENTS AND CONVICTIONS

The AU accepted and even encouraged the ICC to indict and send to trial lower military and administrative officials. From 2005 to 2009 when the ICC indicted twelve Africans including Joseph Kony, Raska Likwiya, and Okot Odhiambo on assorted charges of human rights abuses, the AU did not object. No government however has been as compliant as the Democratic Republic of Congo (DRC) for handing over war criminals to the ICC. More than six militia leaders from that country accused of various crimes of war have been indicted or tried at The Hague, according to Human Rights Watch. Thomas Lubanga Dyilo, Germain Katanga and Bosco Ntaganda were in the custody of the ICC but Sylvestre Mudacumura remained at large. The prosecution applied for a warrant for the arrest of Lubanga and Katanga in June 2007, both of whom were transferred into detention in February 2008. Thomas Lubanga Dyilo was found guilty in March 2012 of the crimes of enlisting and conscripting children under the age of 15 years and using them to take part actively in hostilities. He was sentenced in July 2012 to 14 years of imprisonment. Katanga whose trial began in November 2009 was sentenced in November 2012 to 12 years for crimes that include being an accessory to murder in 2003, even though the sentence was reduced to three years because of good behavior and has since been released ("ICC/DRC: Second Trial," 2009).

In late 2015, the ICC transferred Germain Katanga and Thomas Lubanga from The Hague to finish serving their sentences in the DRC. This was the first time the ICC appointed a state to carry out a sentence imposed by the ICC because both men had expressed a preference for serving time in their home country. Another DRC warlord on trial at The Hague was Bosco Ntaganda, who surrendered himself voluntarily to the US Embassy in Rwanda in March 2013 and has been in ICC's care since. His charges consist of 13 counts of war crimes that include murder and attempted murder; attacking civilians; rape; and sexual slavery of civilians. Ntaganda's trial at The Hague began in September 2015 and is still continuing.

In July 2008, the Belgian government transferred Jean-Pierre Bemba Gombo to the ICC. Bemba was President and Commander in Chief of the Mouvement de libération du Congo (MLC), which allegedly was

criminally responsible for war crimes that include rape, torture and murder, and crimes against humanity including humiliating and degrading treatment in the Central African Republic. The trial of Bemba and his four associated began in September 2015 at the Hague.² In January 2004, the Ugandan government referred to the ICC a case involving Joseph Kony, the leader of the Lord's Resistance Army (LRA), a guerrilla group that had committed heinous crimes in that country. In September 2005, the ICC Pre-Trial Chamber issued a warrant for the arrest of Joseph Kony for crimes he had committed, as well as warrants for the arrest of four other persons named in the Prosecutor's application ("The Prosecutor v. Joseph Kony," 2005).

The AU never raised objection to the United Nations when the Sierra Leonean government asked the Security Council in August 2000 to "try and bring to justice the members of the Revolutionary United Front and their accomplices responsible for committing crimes against the people of Sierra Leone." The Security Council adopted Resolution 1315 (2000) that asked the Secretary-General to negotiate an agreement with the Government of Sierra Leone. In response the Special Court for Sierra Leone (SCSL) which was created in 2002 indicted Charles Taylor, the president of Liberia, who had just been removed from office by insurgents for his role in providing help for rebels in Sierra Leone. Holding Taylor's trial in Sierra Leone raised security concerns, so the SCSL conducted the trial at the ICC in t

he Hague. In April 2012, Taylor was found guilty of five counts of crimes against humanity, five counts of war crimes and one count of other serious violations of international humanitarian law perpetrated by Sierra Leone's Revolutionary United Front (RUF) rebels. He was sentenced to fifty years in prison ("Special Court for Sierra Leone," 2014).

Laurent Gbagbo is another former head of state on trial at The Hague for crimes committed during Cote d'Ivoire's civil war for refusing to stand down after losing the 2010 elections. Although Gbagbo was already in custody, the ICC prosecutor applied for a warrant for his arrest in October 2011 and was transferred to ICC's custody in November 2011. He has been charged as the former President of Côte d'Ivoire that bore individual criminal responsibility as an indirect co-perpetrator for four counts of crimes against humanity committed during the post-electoral violence from December 2010 to April 2011. His trial began in 2016 (The Prosecutor v Laurent Gbagbo, 2011).

² The cases involving DRC nationals are: The Prosecutor v. Thomas Lubanga Dyilo; the Prosecutor v. Bosco Ntaganda; the Prosecutor v. Germain Katanga; the Prosecutor v. Mathieu Ngujolo Chui; The Prosecutor v. Callixte Mbarushimana; and The Prosecutor v. Sylvestre Mudacumura. Case Information Sheet: Situation in the Democratic Republic of the Congo. The Prosecutor v. The Accused (Thomas Lubanga Dyilo et al.) ICC-01/04-01/06.

5. RATIONALIZING AFRICA'S ICC'S REBUKE

The AU becoming reticent about supporting the ICC's effort to arrest President Al Bashir and bringing him to trial is an unexplainable turnabout to the organization's early policy of cooperating with the UN to bring the perpetrators of the atrocities in Darfur to account. The seemingly dichotomous welcome the AU has begun giving the ICC underscores the complicity the organization has shown to human rights organizations since the 1960s. The AU's promise of holding member governments accountable to keep the highest standards in human dignity has not always materialized when it comes to renouncing leaders who had ignored basic standards in human dignity. When an external human rights agency such as the ICC therefore tries to take aggressive steps to bring wayward leaders in line, it is bound to face resistance. If the AU were to allow the ICC to freely indict African leaders, it would be tantamount to willingly allowing a cloud of uncertainty permanently to hang over their heads.

It is not hard to figure out why African leaders have become intransigent in complying with ICC demands with regards to indicting and sending additional African leaders to stand trial at The Hague. The current crop of African leaders believe it is about time they drew the line beyond which they would never cross allowing the ICC to cherry-pick from their ranks ostensibly to face trial. If standing up to the ICC potentially ruins their reputation as upholders of human rights, so be it. Leaders believe that if they stand aloof the ICC would decimate their ranks under a false guise of upholding justice. Acquiescing to the ICC would be akin to signing a death wish to a faceless transnational organization. Standing in solidarity with the AU in its condemnatory stance against the ICC, many African leaders believed, was the best strategy to use to confront an organization that might not have the best interest of Africans at heart.

The dichotomy in the AU's approach to the ICC has become evident as governments of countries such as Ghana and Senegal that have respectable human rights record have not been as condemnatory of the ICC as the rest of Africa has. On the contrary, Zimbabwe and The Gambia when they were headed by Robert Mugabe and Yahya Jammeh, respectively, never lent support for work the ICC was doing. International human rights organizations consistently criticized the two leaders for their deplorable human rights record. President Mugabe defended his human rights record as pristine and referred to the frequent criticism of him by human rights organizations as nothing short of an institutional witch hunt against him. It was only a few days into his tenure as the newly-appointed AU Chairman in early 2015 when President Mugabe claimed the ICC was unfairly targeting Africans.

President Mugabe's pugnacity toward the ICC seemed preemptive because since the mid-1980s, he left a long trail of human rights abuses which only a handful of his contemporaries equaled. This ranged from sending the national army to go to Ndebeleland to commit atrocities against the supporters of his chief opponent (McGregor, 2002), expropriating land belonging to white farmers (Shaw, 2003), and using security forces to intimidate voters in elections (Ranger, 1992). Although for three decades global human rights organizations like Amnesty International and Human Rights Watch regularly criticized Mugabe's authoritarian rule. Those organizations lacking the power to make arrests made their criticism of leaders for abuses irrelevant.

Iconoclastic leaders of Tunisia, Egypt and Libya being dishonorably swept away through people's power in 2011 in the Arab Spring, has made African leader insecure about similar circumstances happening to them. In October 2014, reverberations from the Arab Spring were felt in Burkina Faso when the country's long-serving leader, Blaise Compaoré, was ousted through street demonstrations. Now living in exile in Cote d'Ivoire and his reputation in tatters, his credibility was further damaged following a botched coup attempt by presidential guards in September 2015, allegedly carried out to restore him to power. In December 2015, a military court in Burkina Faso issued an international arrest warrant for the ousted president over the assassination of Capt. Thomas Sankara, the country's former revolutionary leader, with twelve of his supporters in 1987 ("Burkina Faso Issues," 2015).

6. ESCAPISTS MOVES BY RIGHTS VIOLATORS

Undoubtedly, observers who were hopeful just one decade ago that African governments embracing the ICC marked the beginning of a new era of open government and respect for human rights might be disappointed countries that enthusiastically supported the organization would threaten to withdraw their membership. On the practical side, human rights violations on the continent have not ended as electoral violence and suppression of political dissent continue unabated. The rationale behind the governments of Gambia, Burundi, and Kenya announcing their withdrawal from the ICC may only be fully understood in the context of those governments trying to erect a barrier to stop the ICC investigating any rights violations in those countries. These governments see the ICC as the only organization that has the legal authority to entreat governments to hand over high ranking officials to stand trial for human rights violations.

Wanton arrests in Burundi in the aftermath of the 2015 election prompted calls to the UN High Commissioner for Human Rights to inquire about human rights abuses in

that country. The United Nations subsequently established the UN Independent Investigation on Burundi in a special resolution (S-24/1 of September 20, 2016). The Human Rights Watch putting President Nkurunziza on notice about human rights abuses during the July 2015 elections in Burundi, prompted lawmakers in the country by a very wide margin to vote in March 2017 to withdraw from the ICC ("Burundi Votes to Leave," 2016). The first country officially to do so. In one report among many by the HRW, Burundian authorities were accused of targeting perceived opponents with increased brutality. Government forces were killing, abducting, torturing, and arbitrarily arresting scores of people at an alarming rate. The report called on the UN Security Council to press for the deployment of international police presence in Burundi ("Exposing Burundi's Human Rights," 2016).

In October 2016, Yahya Jammeh, the former President of Gambia decided to withdraw his country from the ICC. Jammeh's Alliance for Patriotic Reorientation and Construction party that controlled parliament issued a statement to explain that dramatic decision. The party accused the ICC of 'persecution and humiliation of people of color, especially Africans.' Yahya Jammeh had an ignominious human rights record and was widely condemned in a 2010 report by the US Department of State. The report recalled Yahya Jammeh since taking over power in 1994 ruthlessly repressing all forms of dissent. State security forces and shadowy paramilitary groups carried out unlawful killings and arbitrary arrests, detained, and made people forcibly disappear (2010 Human Rights Report). Jammeh's populist action in removing his country from the ICC just before the elections was designed to win him votes—he lost. In January 2017, Gambia's new government led by President Adamah Barrow announced that it would not only halt proceedings to leave the ICC but also would rejoin the British Commonwealth.

In October 2016, Kenya's parliament reaffirmed its second vote in as many years to withdraw its membership from the ICC. Kenya's first vote to leave the ICC occurred in 2013. These votes were a demoralizing act by a country that gave an early endorsement to the ICC's ideal. Kenya signed the Rome Statute in August 1999 and acceded the ICC treaty in March 2005. Without a doubt, Kenya signaling to leave the ICC was precipitated by the string of indictments the ICC had handed to high-ranking Kenyan officials, including President Uhuru Kenyatta for the electoral violence in 2007. The AU's reacted disapprovingly to the ICC charging President Kenyatta and his deputy, William Ruto's, to appear before the court at The Hague. In its Extraordinary Session in October 2013, the AU issued a statement condemning the ICC's move:

Reiterat(ing) the AU's concern on the politicization and misuse of indictments against African leaders by ICC as well as at the unprecedented indictments of and proceedings against the sitting

President and Deputy President of Kenya in light of the recent developments in that country (Extraordinary Session, 2013).

The statement noted further that was the first time that a sitting Head of State and his deputy were being tried in an international court and that behavior could undermine the sovereignty, stability, and peace of Kenya and in other Member States. The AU's statement highlighted Kenya's frontline role among states in the fight against terrorism at regional, continental and international levels. In December 2014, however, the Prosecution withdrew the charges against the Kenyan leader, after which President Kenyatta expressed relief. It is not coincidental that some African leaders want the ICC to end its work on African soil. The specific actions those governments have taken reflect a tit-for-tat tactic aimed at making the ICC irrelevant.

7. AN OBSERVATION

It may be much easier to understand the testy relationship that has emerged between African countries and the ICC on the presumption that a relationship forged between a supranational organization and a motley collection of countries about enforcing international law on important persons was doomed to sour. The interests between the African countries and the ICC have progressively diverged and would require considerable amount of discovery from both sides to resuscitate it. One of the parties is a relentless prosecutor wanting to institute justice; the other, prospective defendants who are prone to commit infractions. African governments showed qualified goodwill for the ICC because they recognized the value in the work it was doing. Nevertheless, governments have been apprehensive about overselling their hospitableness to the point of making it easy for the ICC to access damnable information as grounds for indictment. African governments have been unable to keep high human rights standards. It has not been for lack of trying but due to the uncertainty in political circumstances between ruling governments and opposition groups.

Longsuffering Africans who have lived under oppressive regimes and likely to do so in the future may be the biggest losers from the deteriorating relationship developing between their governments and the ICC. The international community set up the ICC to end the sort of atrocities of which President Omar Bashir has been accused. Nevertheless, in spite of the well-documented charges the ICC has compiled including complicity in terminating half a million Darfurians, President Bashir walks free. Above all, he enjoys unprecedented support not only from the people of Sudan but the AU at large. The AU backing President Bashir in his confrontation with the ICC has exposed the organization as an undedicated enforcer of human rights. African Heads of States adopting the Malabo Protocol (2016) gave a veiled warning to the ICC any other international organization to

tread carefully when it seeks to convict African leaders. The Protocol partly states:

No charges shall be commenced or continued before the Court against any serving African Union Head of State or Government, or anybody acting or entitled to act in such capacity or other senior state officials based on their functions during their tenure of office.

The Malabo Protocol was a conscious snub to the ICC's authority, and aims specifically to protect African Heads of State and senior government officials from prosecution (Abraham, 2015). African Heads of States seem conflicted about the proper role they must play in exorcising the continent's image from human rights abuses that have happened in the past and continue till this day.

CONCLUSION

The Rome Statute of 1998 that led to the creation of the ICC had a noble purpose. The statute established four prosecutable core international crimes consisting of genocide, crimes against humanity, war crimes and crime of aggression. Crimes of genocide and egregious human rights abuses that had occurred in Bosnia and Rwanda and several places in Africa precipitated action in setting up the ICC. The extraordinary success the ICC had in prosecuting high-ranking officials in Africa such as Jean-Pierre Bemba of Central African Republic and Thomas Lubanga Dyilo of the DRC emboldened it to go after more highly-prized targets like Laurent Gbagbo who served as Cote d'Ivoire's president from 2000 to 2011. Other than Gbagbo's supporters who were incensed, the AU and African political incumbents did not raise much objection to the ICC having him extradited to The Hague and putting him on trial. Apparently, emboldened by the success in arresting Gbagbo, the ICC went ahead in 2012 to charge Uhuru Kenyatta, then Kenya's Deputy Prime Minister and Minister of Trade, for crimes associated with Kenya's 2007 elections. Even though President Al Bashir was first charged for genocide in 2008, it was not until 2015 when the ICC made the most concerted effort through the government of South Africa to arrest him.

African governments acting collectively through the AU believe that the revolt they have begun against the ICC is legitimate. In the eyes of these leaders, the ICC pursuing incumbent leaders such as the President of Kenya for prosecution was overambitious. Furthermore, the ICC putting the Zuma government in an untenable circumstance by importuning him to arrest his colleague, Al Bashir, became the straw that broke the back of many African leaders to reconsider their relationship with the ICC. They reasoned that if they did not express their disapproval vociferously through an unusual action such as threatening to withdraw their membership, the international community would not take them seriously. Besides, the ICC being oblivious to pursuing leaders

in other parts of the world who have committed human rights abuses did not escape notice. By badgering the ICC with threats of withdrawal and invectives for its actions, the AU has given notice to the ICC to reevaluate its policy of singularly pursuing African leaders for wrongdoing. The people of Africa may be worse off for it, but the AU and many African leaders believe they have been fighting to preserve their legacy and the continent's dignity.

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