The relationship between the International Criminal Court and Africa

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I thank the Harold Wolpe Memorial Trust and the Institute for Justice and Reconciliation for asking me to speak at this Open Dialogue on such a timely subject coming soon after the meeting of African Ministers at the African Union earlier this month to discuss the role of the ICC in the context of the controversial arrest warrant issued in March this year against Sudanese President Omar al-Bashir.

Clarifying Africa's position on the ICC: an awkward acceptance

Much of the debate around the ICC's relationship with Africa has tended to focus on the case of Sudan's Darfur region and the Court's decision to issue an arrest warrant for President Bashir. Indeed, the ICC's indictment was received by several African heads of state as a knife in their hearts; it is not surprising that this indictment provoked mounting criticism towards the ICC. At the meeting of the AU Assembly of Heads of States and Government in Sirte, Libya in July of this year, President Qaddafi rallied his counterparts to sign onto the Sirte decision in which AU states would not cooperate with the ICC. As a matter of international law, the Sirte decision is hollow, particularly for AU States Party to the ICC who are legally bound through their ratification of the Rome Statute to cooperate with the ICC. But the political message of the Sirte decision is clear: international justice is now at a major crossroad on the continent.

It is important to note at the outset that the tensions that have emerged between the "ICC and Africa" disguise the fact that Africans are divided as to the role that international justice should play in contributing to the continent's fight against impunity for mass crimes. We often forget that the continent is composed of 51 states whose views on the ICC's role are varied, complex and nuanced than is often imagined. To be sure, there remain differences between African states, which approach international relations, including international justice, from their individual interests. But the Sirte decision also demonstrated that African heads of state are becoming bolder and more vocal in their criticism and rejection of the ICC's actions on the continent. But are these leaders speaking for themselves or the people they represent? Africa's citizens continue to struggle each day for the right to good governance, democratization, the rule of law, and effective mechanisms to close the impunity gap

that remains entrenched in many of our societies across the continent. African civil society leaders placed great faith in the ICC as the institution that would help narrow that impunity gap.

A fairer assessment of the continent's relationship with the ICC is that it is an awkward relationship based, on the one hand, on an aspiration that the continent must Never Again witness the horrors of genocide as in Rwanda or the apartheid era crimes of South Africa and should therefore design mechanisms to prevent such heinous crimes, while on the other hand, remaining somewhat ambivalent about the types of interventions necessary to fulfil this aspiration of Never Again. This ambivalence can be seen by the fact that of Africa's 51 states, well over half - 30 - have signed up to the Rome Statute of the ICC, but only three (Senegal, South Africa and more recently, Kenya) have created implementing legislature to domesticate the Court. The reticence, even among those states that have ratified the Statute, betrays the fact that the continent, largely as a result of Africa's experience with colonialisation, remains wary of external mechanisms especially if they are perceived as politicised, insensitive or selective.

This does not however prevent the continent from engaging with international mechanisms such as the ICC. In fact, some simple facts highlight the intensive collaboration that exists between the continent and the ICC: 25% of the judges at the ICC are African; 50% of the ICC's request for cooperation is from the continent and the continent is the largest regional bloc that is party to the ICC. While deep criticism is leveraged against the AU's indictment for Bashir, we must also recall that three African states – Uganda, Democratic Republic of Congo, and the Central African Republic – voluntarily referred their country situations to the ICC for investigation and prosecution (essentially to target political enemies).

These dynamics reveal the fact that Africa is not against the Court even if some AU member states that are not party to the Rome Statute give the impression that the ICC has no place on the continent. But it is equally true that African States Party to the ICC have become sceptical of the workings of the Court. While they have not openly supported some of the vociferous attacks against the ICC, they have equally been silent or lukewarm about their cooperation with the Court because of its perceived political insensitivity and poor judgement. Their scepticism is further assisted by the fact that victim groups and their supporters in civil society, having campaigned for the first permanent world court, now also have misgivings about the performance of the ICC's work on the continent.

In assessing the relationship between the ICC and the continent, I believe that it is necessary to appreciate the very different constituencies that the ICC has to interact with on the continent, all of which yield very different results and multiple narratives.

ICC: positive role in conflict resolution and deterrence?

It is worth pointing out that the impact of the ICC has also propelled some innovative domestic judicial and non-judicial approaches to deal with impunity, such as in Uganda. An important and constructive effect of the ICC indictment was that it drove both parties to engage and explore an extensive array of national accountability and reconciliation options that could service as alternatives to the ICC under the complementarity clause. However, the Lord's Resistance Army remains in the bush, refusing to end its war campaign leaving many to question whether the ICC has exacerbated conflict in the country. In Kenya, the ICC is being used for pragmatic deterrent effect. The Court is now part of a three-pronged approach to bringing justice for the December 2007 post elections violence with many Kenyans believing that if properly managed, the ICC could help prevent the electoral violence they predict will happen if several political leaders are not removed from the scene before 2012. In Guinea-Conakry, news that the ICC may examine the 28th September stadium massacres is forcing the military junta to accept calls for an international commission of inquiry.

Sudan: the African Union's reservations towards the ICC

But it is in Sudan that the ICC appears to be causing difficulties for the continent. The AU claims it remains committed to the fight against impunity citing its 2000 Constitutive Act – which gives the AU the right to intervene to protect citizens against genocide, war crimes, and crimes against humanity - as evidence of this commitment. The AU also wants to makes it quite clear that its frustration with the ICC is limited only to the Sudanese case and not other ICC interventions in Uganda, the DRC and the Central Africa Republic situations of State referral. So what are the AU's objections to the ICC in Sudan?

First, the AU argues that its frustration with the ICC must be understood within the context of what some member states perceive as the misuse of the application of universal jurisdiction. Universal jurisdiction is a legal principle – separate from the ICC – under which national courts may prosecute those alleged of serious international crimes regardless of the nationality of the suspect or where the crimes occurred. Since the 1990s, several European states invoked universal jurisdiction and in doing so undertook cases against Africans (e.g. Senegal and Rwanda) in European courts. These procedures first

raised alarm bells on African perceptions of Europeans unjustly targeting Africans through international justice procedures.

Second, the AU is concerned about the timing of the ICC's arrest warrant against President Bashir - a sitting head of state in a conflict country. The AU argues that securing peace should be the first priority and that justice will always reach those who have committed crimes. One cannot dismiss the AU's concern that the execution of an arrest warrant without a carefully managed transition could lead to the implosion of Sudan and have further destabilising effect for its nine neighbouring countries.

A third related frustration is what the AU perceives as a violation of the international law of treaties especially in relation to questions of whether a treaty such as the Rome Statute should be binding on non state party parties (the contentious Article 98). In the case of Sudan, legal practitioners remain divided as to whether President al Bashir is immune from the ICC.

A fourth concern is the AU's anger with "the refusal" of the United Nations Security Council to acknowledge its request for a deferral of the Darfur case under Article 16 of the Rome Statute which grants power to the Council to defer ICC cases for one year. Related to this is the fact that only two of the permanent five members of the Security Council – Britain and France – are signatories to the Rome Statute while the United States, Russia and Africa's newest friend, China, have yet to ratify the Statute.

A fifth concern is the major imbalance in the international arena in responding to justice. One cannot dismiss the AU's criticism about Western hypocrisy and double standards especially in the aftermath of the Iraq and Afghanistan wars and the serious violations of international law by the United States – particularly violating the universal prohibition against torture – in the context of the post 9/11 war on terror. That international justice is powerless to bring action against powerful nations – like the United States – validates the perception that international justice is selectively pursued against weak states – such as Africans – and feeds accusations that the Court represents a new form of neo-colonialism or, as some have asserted, judicial imperialism, against some African leaders. In fact, the ICC stands to suffer from continued attacks, even from its staunchest allies if the US and its allies do not address accountability at home.

Finally, the AU – and indeed many African civil society leaders – is disappointed with the personal tactics and strategies that the ICC Prosecutor has adopted thus far in his tenure.

Avoiding African exceptionalism

While some of the AU's concerns do have merit, the decision of AU leaders in the July Sirte decision to not cooperate with the ICC is an unfortunate one which Africa's States Parties should work to reverse. Many of us commend the South African Government for finally distancing itself from this decision and stating that it would uphold its commitment to the ICC's Rome Statute. As it stands, however, the AU's decision allows perpetrator governments and their allies to hijack and manipulate the peace and justice discourse in a vain attempt to secure their survival.

It is a worrying trend for our leaders to champion calls for "African justice" based on African continental and cultural exceptionalism. Reconciliation is different from justice, but has become a metaphor among perpetrators governments to avoid redress. Similarly African leaders invoke "traditional justice" as a means of discrediting the concept of retributive justice which they claim is specific to the Western world. I do not want to denigrate traditional mechanisms – indeed some have proven relevant and appropriate such as Rwanda's Gacaca process. But it is unmeritorious and discriminatory to claim that African victims do not deserve to seek criminal accountability for serious international crimes at equal standing as other victims of such grave abuse around the world.

While we recognise the limits of a prosecutorial approach such as the ICC - it can only ever deal with a handful of the worst acts of international crime - we must be cautious of attempts by our leaders to promote solutions that serve to prolong their survival and undermine international human rights standards.

The work of the African Union Panel on Darfur

It is against this background that we must welcome the recommendations of the African Union High-Level Panel on Darfur which was mandated by the AU Peace and Security Council to examine the situation in Sudan and submit recommendations to the Council on an effective and comprehensive means to address issues of accountability, reconciliation and healing. Headed by former South African President Thabo Mbeki, it recommends balancing the need for justice, peace, and reconciliation in Darfur through the establishment of a Hybrid Court constituted by Sudanese and non-Sudanese judges and legal experts to deal with the most serious crimes. Furhher, it recommends the introduction of legislation to remove all immunities of state actors suspected to committing crimes in Darfur, calls for the establishment of a Trust, Justice and Reconciliation Commission to promote truth telling and appropriate acts of reconciliation and to grant pardons as considered suitable. There are concerns with some of these recommendations and the potential for its implementation, including the real possibility that the Sudanese Government will block the recommendations. But on the contentious issue of the ICC,

the Mbeki panel diplomatically avoids taking a position for or against the Court's role, limiting itself to only stating the views of the two sides. Ultimately, as President Mbeki observed: "Whatever the ICC might have done does not absolve Sudan from acting on crimes that might have been committed. So it is still the responsibility of the Sudanese state to act on those matters."

President Mbeki's recommendations may have farther reach than the ICC. President Bashir is reportedly disturbed and deeply shaken by the extensive reach of a report commissioned by the African Union which has judiciously argued that peace, justice and reconciliation are not distinct processes, but are "interconnected, mutually interdependent and equally desirable."

Dealing with the AU's concerns

So what is the way forward to healing the divide between the ICC and Africa, and are they really poles apart in their efforts to address impunity? My answer is no. Both the ICC and Africa do not hold competing views on dealing with impunity. Yes, there are imperfections and flaws contained in the Rome Statute, and both the ICC and Africa can work together to address these.

Several recommendations are emerging from African countries including a call to extend the UN Security Council's power to defer cases under Article 16, to the General Assembly if it does not respond to a deferral request within a specified timeframe; considerations of the ICC's prosecutor's powers, the issues of immunities of officials whose state are not part to the Rome statute (Article 98 of the Rome Statute). What is clear from the recent meeting of AU member states in November is that there is no clear consensus on the way forward. In dealing with the AU concerns, I suggest the following four areas:

1. ***African State Parties should work within Assembly of State Parties to seek improvement in the work of the Court.*** As the largest regional bloc in the Assembly, they should take leadership of the debate on how to enhance the effectiveness of the Court. Africa's large presence gives it considerable leverage. Rather than retreat from the Court, African State Parties should work within the Court's structure to promote and agitate for reform, but those reforms should not aim to dilute the independence of the Court. The stock-taking meeting of Assembly of State parties at The Hague beginning this week will be a moment for Africa to air its frustrations on the workings of the Court.
2. ***The AU and ICC should accelerate plans to draft a cooperation agreement and establishment of a Liaison Office.*** This is essential to building better coordination between the AU and the ICC and also capacity building of legal personnel in Rome Statute African state parties, including

training members of the police and the judiciary, and strengthening cooperation amongst judicial and investigative agencies.

3. ***The AU and ICC should put in place plans to enable the principle of complementarity:*** The complementarity provision of the ICC offers significant possibilities. Properly understood and enforced, the ICC is essentially a court of last resort as criminal justice should begin at the national level. The complementarity provision is actually something that African states should find more attractive and ought to provide broader inspiration for buy-in into the Rome Statute. For that reason, we should welcome the decision by the African Union to encourage its member states to enhance domestic capacity to respond to crimes against humanity, war crimes and genocide. But capacity issues aside, is there the necessary political will to design credible institutions that hold perpetrators to account. After all is said and done about international justice mechanisms, are our leaders prepared to provide the necessary resources to support initiatives that in the end could be used against them? The lack of commitment both in political and financial terms surely undermines the AU's argument for extending criminal jurisdiction for the African Court on Human and People's Rights.
4. ***The AU should ensure a victim centred ICC*:** while much of the debate has centred on the decision of the Court to seek the arrest of President al Bashir, there are other concerns about the workings of the ICC that have caused consternation among victim groupings and human rights activists. Africa's States Parties to the ICC should work closely to guarantee better protection for victims and address issues of confidentiality and protection of informants. Other concerns voiced by victims and civil society groupings relate to excessive procedural delays, insufficient evidence for charges, and inadequate outreach by the Court, as well as the usage of the trust Fund for victims.

Concluding remarks

In conclusion, the involvement of the ICC in Africa is consistent with AU member states commitment to fight mass atrocities. The intense standoff by the ICC and the continent's pivotal political body, the AU, often overshadows one fundamental fact: that this continent is home to landmark efforts to address impunity. Several African states have been at the forefront in dealing with impunity starting with South Africa's experience to end apartheid crimes. We should not forget the decision by the Nigerian Government to fulfil a commitment to hand over former Liberian President Charles Taylor when requested to do so by the democratically elected government of Liberia.

But while we have many good examples, we cannot continue to defend states who fail to protect citizens of this continent and thereby fall guilty of a similar charge of double standards. The AU must work more effectively to enforce accountability. The AU must therefore work more effectively to translate its declarations on the fight against impunity into concrete actions that result in the protection of Africa's citizens and not regime survival.

Yes, international justice takes place within a political, socio-economic and ideological context that cannot be overlooked. Yes, the challenge today, which goes to the very heart of the ICC's survival, is to address the imbalance in the reach of international justice to over the perception that it is one-sided. While the ICC did not go out to target Africa, the perceptions is real that is it an African court. It is therefore helpful that a number of situations outside of Africa are under preliminary consideration, including Colombia, Georgia, Afghanistan and Palestine. South Africa's Judge Goldstone UN report on Gaza also urges referral of the situation in Gaza to the ICC in the absence of credible national prosecution. Many supporters of the ICC have expressed hope that one of these will result in an investigation to contribute to the global nature of the Court. But this must be done for the sake of justice and not just to placate the Court's critics. We must also welcome the announcement by the Obama Administration that the US will participate as an observer in the meeting this week of Assembly of State Parties at The Hague.

And while we as human rights activists and defenders of good governance and democracy should not blindly support the Court and ignore its imperfections, we must never forget why the Court was created. The Court's strongest supporters are on this continent and for good reason – they lack confidence in domestic institutions to deliver justice. Across this continent, victims groups and many African women's groups are being quite vocal in backing the ICC in countries like Uganda, Sudan and the DRC because there is not space at the domestic level to seek redress. Their voices and plight for survival must never be lost in the heat of the debate about the ICC's role in Africa.

Thank you