July 26, 2011

The Latent Danger in Sequencing Justice: Africa, the ICC and the Sudanese Quagmire

Iseghohime Daniel Ehighalua, Esq

Available at: https://works.bepress.com/iseghohime_ehighalua/1/
The Latent Danger in Sequencing Justice: Africa, the ICC and the Sudanese Quagmire

Daniel Ehichialua*

Abstract

Although Africa played a pivotal role in the establishment of the ICC, it has borne the brunt of the full weight of implementation of the prosecutorial powers of the Office of the Prosecutor (OTP). With 3 self-referrals and the UNSC referral of the Sudanese situation, the court has since been struggling to shrug off the claim that its actions are self-serving and directed at poor African countries. The sequencing of peace vis-a-vis justice remains a thorny issue. At the recently concluded 2010 Rome Statute Review Conference in Kampala, this issue, in addition to the definition of the crime of aggression continued to bug down the universal acceptability of the court and the carrot being dangled at non member states like the United States of America, Russia, India and Brazil to ratify the Rome statute.

For the most part, peace and justice the African style appear to be colliding with unadulterated western style concept of justice. With specific reference to the Sudan situation, there is an increasingly vocal view by African states and non state parties to the ICC that, an alternative form of conflict resolution be charted with respect to the Darfur conflict. The AU is the arrowhead championing the exercise of the deferral powers of the UNSC with a view to an African led settlement mechanism of the conflict. There are however vociferous opponents of this line of strategy, led mainly by non African state parties, but with strong African civil society support, that justice should not be traded for peace at all cost.

The ICC is at a crossroads. Although it has commenced preliminary investigations and initiated prosecution of those identified as most responsible for the 2007/2008 mayhem in Kenya, it is unclear as to its commitment to see through those investigations in light of the staunch opposition to the present 4 African situations before it. Does this mean the end of the road for ICC and international justice in Africa? What signals will that be sending to African leaders about impunity? Is the ICC ever going to be able to take the moral high ground and re-engage with the argument at the level that will restore confidence amongst African states in the work of the court? These issues remain at the core of the future success of the court in Africa.

* Daniel is a solicitor and barrister with both legal practice experience in Nigeria and the United Kingdom. He concluded postgraduates studies in Human rights law; International Law and Armed Conflict at University of Bristol, United Kingdom; Diploma (Advanced Course on the International Protection of Human Rights, Abo Akademi University, Turku, Finland); International Practice Diploma, International Human Rights.
Arguably, the posthumous World War II Nuremberg and Tokyo trials, reopened the universal quest to seek justice for international criminal offences. The doctrine of universal jurisdiction in consequence, was actively canvassed; however, what emerged was isolated establishment of so called ‘hybrid’ courts to deal with specific egregious breaches of international human rights and humanitarian law. The eventual adoption, ratification and coming into force of the Rome Statute on 1st of July 2002, was the culmination of a combination of advocacy and the push by leading states for the establishment of the International Criminal Court. Senegal an African country was the first to ratify the statute on 2nd of February, 1999. This was not surprising given the role played by African states in the years leading to the adoption of the Rome statute on the 17th of July, 1998. As at 18th August, 2010, 31 African state parties have ratified the statute, others like Cote d'Ivoire have accepted to submit themselves voluntarily to the jurisdiction of the ICC. This is by virtue of an article 12(3) declaration submitted by the Ivorian government on 1st October, 2003. The declaration accepts the jurisdiction of the court as of 19th of September, 2002.

Apart from the lead role played by Africa states, Africa has provided the court with 4 of its caseloads. 3 ‘self referrals’ and the Sudanese referral by the United Nations Security Council (hereafter UNSC) pursuant to article 13(b) of the Rome statute; following the 2005 International Commission of Enquiry report that looked into the possible commission of war crimes, genocide and crimes against humanity in the Darfur region of Sudan. The UNSC legal authority to refer the Sudanese situation to the court was derived from the provisions of article 13(b) of the Rome statute. This UNSC referral was pursuant to the adoption of resolution 1593 on the 31 March 2005. This decision has raised a number of legal questions given the circumstances leading to the referral; the inherently political role the UNSC plays in world politics; the undemocratic nature of the composition of that body, as well as the much larger question of the role of the UNSC - an essentially political organ - making a decision with legal consequences. This has raised the question of how to balance the UNSC political role - which is essentially securing international peace and security vis-à-vis the additional legal responsibility invested in it by the Rome statute. It is no wonder then that, of the 4 situations before the court, this referral has remained problematic. This is without prejudice to some studies carried out, that continue to posit that the 3 self-referrals were made under considerable pressure, blackmail, financial arm-twisting and duress of powerful states. Whilst the Central Africa Republic (CAR), Democratic Republic of Congo (DRC) and Uganda self-referred, the UNSC decision was
tinged with politics, consequently, blurring and tainting an essentially legal decision with politics. The consequence has been the trajectory of the court battling to delineate its work from the political machinations of powerful states and the desire to uphold justice.

The Sudan situation has posed critical political and legal questions which needs to be interrogated and properly contextualized. This involves the key actors’ understanding of their roles and responsibilities, that is to say, the UNSC, the African Union and Sudan. Given the present messy situation, finding common ground with a view to resolving the imbroglio will obviously require a deeper understanding of the law and politics; one that will produce a win win situation for the court and the Sudanese people, nay the African Union – without undermining the global quest for international law and justice at the same time, indeed, dousing the growing call for regionalisation of international criminal law in Africa. The task of this paper is therefore a limited one. One that will set out the factual background, apply those facts to the law and come up with recommendations that will help the discourse, and the beginning of the process of resolving this legal and political impasse. This is particularly important given the expected 14th February, 2011 outcome of the recent plebiscite that took place between the 9th to 16th of January, 2011, granting independence to Southern Sudan. Full independence is not expected until sometime in July, 2011.

It is submitted that whilst the AU must remain at the heart of the solution, the imperative and supremacy of international law must remain the driving force. Any form of dispute resolution must proceed on the basis that justice should not be seen to be undermined at the expense of peace. Peace at all cost does not necessarily produce the desired outcome, nor does it effectively deter future would be violators of international criminal law.

**Historical and Political Background to the Sudan Situation**

‘Sudan is located in northeastern Africa. It borders the Red Sea between Egypt on the North and Eritrea and Ethiopia on the South East; it borders Chad and the Central African Republic on the West. The total area of the country is 2,505,813 square kilometer. The length of Sudan’s border is 7,687 kilometers’

Sudan was previously under British and Egyptian colonial subjugation for much of the 20th and latter part of the early 21st centuries. The Arabs and Muslim north bound together after World War 1 to raise the tempo of Sudanese nationalism. The early Sudanese nationalists were sharply divided as to which direction they should be headed. Whilst some favoured reunification with Egypt, there were some who opted for an independent Sudan. The latter
pro-independence inclined Sudanese nationalist group won the argument; and on January 1, 1956 Sudan gained independence from Britain.

The north of Sudan is predominantly Arabs/Muslims whilst, the south is populated by black African ethnic groups. The south continued to live under the shadow of the fear of northern domination. Signs of sharp disagreements emerged as early as 1955. This continued intermittently particularly through the 1990s. The twofold issue of the southern part of Sudan’s claim are; their agitation for self-rule and secondly, the refusal to accept the imposition of sharia law. These have remained at the core of the secession agitation by the south. By the early 1980s, Colonel John Garang spearheaded the movement for self-determination under the aegis of the Sudan Peoples Liberation Army (SPLA). This conflict raged for much of the 1990s until the international community intervened. By June 2002, both parties agreed that a referendum should be conducted within 6 years of the Comprehensive Peace Agreement, whilst sharia should be limited to the north.

By 2003, the Darfurian agitation against political and economic marginalization renewed conflict in the south. In response, the El-Bashir government initially acquiesced, but evidence later demonstrated the active encouragement of the militia Janjaweed by the Sudanese government, leading to massive ‘pogrom’ - killings, maiming and raping of black Africans. This drew the ire of the international community owing to the massive and wanton nature of the violent conflict. With threats of sanction by the United Nations and the African Union setting up of a ceasefire monitoring troops, fighting thawed considerably. However, given the scale and brazenness of the killings, the United Nations commissioned an International Enquiry to look into the possibility of establishing culpability, with a view to taking actions at the international level, failing the Sudanese government refusal, failure and/or neglect to bring the perpetrators to justice.

National level response is what ideally the Rome statute envisages, particularly against so-called low profile accused persons, whilst those ‘most responsible’ for perpetrating violence remain the concern of the ICC. The Sudanese government have had ample time to initiate prosecution of their own, but they have failed and outrightly neglected to do this. This was despite the overwhelming weight of evidence about the ‘genocide’. The Commission submitted its report in 2005 to the UNSC. And in exercise of its powers under Article 39 of the UN Charter, the UNSC forwarded the report of the Commission to the ICC with a view to bringing to account those who have been identified as most responsible for the crimes of genocide, war crimes and crimes against humanity.

The Sudanese government has at best responded with indifference and disdain to the intervention, and indeed, the steps so far taken by the ICC, including the 2 warrants for the arrest of El-Bashir. It has raised at various times the tenuous argument about Sudan’s sovereignty; her territorial integrity and interferences in the internal affairs of the country.
This is in addition to the charge of imperialism, attempts to appeal to irredentist Islamic fundamentalism. It has also, given the United States involvement in the prosecution of the ‘war on terror’ in Afghanistan and Iraq, appealed to the sensibilities of the far-right Islamic fundamentalist groups; and in light of very credible legal opinion that the intervention and eventual war in Iraq appeared to have been premised on questionable legal grounds. There is however now, a growing body of evidence which strongly points in the direction of ‘regime change’ as the sole controlling reason for the Iraq war. El-Bashir himself has played the brinkmanship and courted organizations like the Arab League (AL), Organisation of Islamic Countries (OIC) in support of his cause. This has neither tilted the political nor the legal arguments in his favour.

**Juggling Politics and Justice: Sudan Caught in the Middle**

The antecedent of the Rome statute in a sense provided the veritable background to the present Sudanese messy situation. Records of the deliberations at the Assembly of States Party’s Preparatory Meeting in Rome 1998 - leading to the adoption and eventual ratification of the Rome statute - indicated clearly and early in the life of the court, the dichotomy between politics and law, particularly, with regards to the wording of, and splitting of legal responsibilities for commencing proceedings under the provisions of article 13 of the statute. It was vehemently argued by some of the state parties at the outset, that the decision to commence investigation and then institution of proceedings before the court should lie ‘solely and primarily’ with the Office of the Prosecutor (OTP). The argument was that the decision whether or not to prosecute should be purely a legal decision only open to the OTP to make, after investigation of the facts and evidence; however, the ‘puritans’ eventually caved in to the horse trading and demands of international politics at the relevant time, thereby carving out a legal role for the UNSC. This became inevitable if the meeting was to proceed and produce a workable and agreeable document that would find acceptance and common grounds amongst majority of the state parties present.

It was also thought expedient that the concession of splitting the prosecutorial decision between the OTP and a political organ like the UNSC would expedite, and not delay the adoption of the statute longer than was necessary. In the event, the language of article 13(a) and (b) was couched in such a manner where prosecutorial powers was effectively shared between the OTP and the interest of the larger question of securing international peace and security. With this latter interest taken into account, a role was carved out for the UNSC empowering that body to refer matters to the OTP to commence prosecution. Support for such role was premised on Article 39 of the UN Charter which vest the UNSC with the ‘primary responsibility’ to secure international peace and security. Further references and support were drawn from Articles 39 to 42 and 103 of the said UN Charter.
Given the very political nature and composition of the UNSC; the skewed and tilted balance of power within the Council; the overbearing veto powers of the 5 permanent members of the 15 member body, this was surely bound to throw spanner in the works. The politics of the UNSC is such that the exercise of a veto power by any of the 5 permanent members of the council effectively scuttles any form of agreement reached even by the other 14 non-permanent and permanent members combined. Thus, the UNSC was now uniquely and unusually placed to make a legal decision to refer situations for prosecution, even if that state was not signatory to the Rome statute, as in the case of Sudan. It was also curious given that the United States of America, China and Russia together permanent members of the council were not signatories to, nor have they ratified the Rome statute. It was the weight of this power to make a legal decision to refer prosecution, that has come to haunt both the court and African state parties, vide the AU support for Sudan.

The AU hard stance on the Sudan situation dates back to the AU 13th Summit of Assembly of Heads of States in Sirte, Libya, in July 2009 where it encouraged member states to withhold cooperation with the court in the bid to seek the prosecution of those most responsible for the Darfur genocides and crimes against humanity committed there. The AU reiterated this position at the 15th Summit in Kampala, Uganda in July 2010. Since then, the argument about the politics and legal question continued to swirl amongst African state parties and non state parties to the Rome statute. These have ranged from the perceived undue concentration of the OTP on poor, underdeveloped and disadvantaged African states, and generally underdeveloped countries of the South.

The argument is that, the court is deliberately seeking out African states for prosecution at the behest of powerful western countries who largely fund the court; that this is another form of neo-colonialism and imperialist design to continue to subjugate African countries. That given the vulnerability of these states - weak, fragile, undemocratic and failed states - most of them recovering from the throes of conflicts and wars, it serves the interest of the west to design post conflict transformation processes along the lines of western style adversarial/inquisitional concept of justice, which does not ideally reconcile or fit into the concept of African traditional understanding of justice and reconciliation. That justice western style is largely retributive, punitive, and not restorative and reformatory enough, one where the victims are genuinely reconciled. The victor and vanquished truly repentant. The Truth and Reconciliation Commission of South Africa is hoisted as a classic example,
where parties – victors and victims were allowed to vent their anger, frustration and pain right in front of the perpetrators – and genuine reconciliation was achieved\(^2\).

The political card has played out largely owing to the arrest warrant issued against President El- Bashir of Sudan – a sitting President. Two extant warrants have been issued for his arrest. He has continued to defy the court generally, and specifically denounce the warrants. Until recently, he was unable to visit a signatory country to the Rome statute. He has however successfully been invited by the Kenyan government as well as the government of Chad. Different reasons have been adduced for these visits. It appears overall that the extant arrest warrant has severely constrained and limited his decision to visit other state parties to the Rome statute for fear of being arrested. His scheduled visit to Nigeria to attend the Mbeki led AU Peace and Security Council (PSC) meeting in October 2010 did not happen. Neither has he been able to revisit Kenya given the strident calls by the opposition to avoid a repeat visit, as well as the backlash and condemnation of his earlier visit by civil society organizations there. His other itinerary in Africa is usually called off at the last minute.

**The AU Intervention and Proposal for Resolving the Conflict**

Since the Sirte AU meeting of Heads of States and Government, the AU has continued until recently to harden its position specifically on the Sudanese situation, and generally on the court's emphasis on Africa. Yet, it has been a coalition of the willing and unwilling. States like Botswana, South Africa and Uganda have been resolute in their reaffirmation of the imperative of the court working to end impunity in Africa. Some others like Chad, Kenya, Ethiopia – for varying reasons – have continued to dither. Still, the large majority of Africa states under the aegis of the AU have been prepared to go along with the AU’s resolution on non cooperation with the court. The Sudanese government continue to feed on this disparate levels of commitment to advance the core of their case for not cooperating with the court. In the result, the AU is still refusing to accede to the request of the court for the surrender of El-Bashir to answer to charges of war crimes and genocide – ‘the crime of all crimes’. The AU position in recent times have somewhat shifted towards formulating an alternative strategy for resolving the issue. One such legal strategy, in addition to the political one of engaging with Sudan directly, is the proposed amendment to Article 16 of the Rome statute.

**Article 16 Amendment as Proposed by the AU**

Article 16 of the Rome Statute states that;

‘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’

The gravamen of the AU amendment is anchored on the powers of the UNSC to cause its deferral powers to kick in and allow the Sudanese situation to be resolved politically, failing this, and after 6months of inaction, the proposal envisages that the UN General Assembly should be able to intervene. A formal request for consideration was lodged by the AU with the UNSC, but there has been no formal response to that request, only an acknowledgement of receipt. This non-plussed i.e. lack of a formal written response has itself drawn the ire of the AU. The terms of the proposed amendment requires the UNSC to exercise its powers of deferral of a referred situation, so that, this now relives the court of the right to proceed with further hearing of the matter for at least 6months in the first instance, whilst a political solution is explored for resolving the conflict. In effect, the deferral will be akin to a ‘stay of execution’ pending the exploration of alternative peaceful resolution of the conflict. This is the fulcrum of the peace versus justice conundrum. This halfway house strategy has come under intense legal scrutiny.

Quaere: What is the utility of deferring a legal process when there are no concrete strategy laid out and submitted before an international body that would see through the terms, failing those peaceful strategies? What guarantees are there that the alternative peaceful resolution process will not be truncated, undermined or simply used as a decoy to buy time? Given particularly the imperviousness and intransigence of the Sudanese government, would they ever submit themselves to an alternative resolution process without their own preconceived condition precedent? How do we reconcile the role of the AU with a process that has involved the UNSC, where the UNSC has come to a decision on the matter to refer Sudan to the ICC? Herein lies possibly the value and utility of the proposed AU intervention as enunciated in the proposed article 16 amendment.

With reference to the Sudanese situation, there was an International Commission of Enquiry preceding the institution of legal processes. One strand of the argument is that the UNSC remains the primary global body for the maintenance of international peace and security and by virtue of Article 103 of the UN Charter every regional and continental body or organization must necessarily subsume their peace and conflict role within the overall framework of the powers of the UNSC when it exercises its article 39 powers. Quite apart from this, the additional involvement of the UN General Assembly after a 6month period, will necessarily create a dilemma - political and legal, as well as the long standing practice of the United Nations - vis-a-vis the relationship that has developed between the two most powerful institutions of the United Nations. Reference has been made to the
Uniting For Peace Resolution of 1950 as an example of where the UN General Assembly was able to successfully exercise such oversight powers.\(^{15}\)

The history of the AU proposed amendment dates back to the meeting of African states parties to the Rome statute in June and November 2009. The proposed AU amendment states;

‘No investigation or prosecution may be commenced or proceeded with under this statute for a period of 12 months after the security council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the court to that effect; that request may be renewed by the Council under the same conditions.

A state with jurisdiction over a situation before the Court may request the UN security council to defer a matter before the Court as provided for in 1 above.

Where the UN Security Council fails to decide on the request by the state concerned within six (6) months of receipt of the request, the requesting party may request the UN General Assembly to assume the Security Council’s responsibility under para 1 consistent with resolution 377(v) of the UN General Assembly’

The 3 leading authors of the African expert position paper earlier referred to, whilst conceding and finding relevance, as well as legal basis for the amendment, they also expressed reservations about the pragmatism of pursuing, or of the amendment ever becoming reality. Firstly, the legal hurdle to be surmounted in pushing the amendment through the very difficult process of amending the Rome Statute.\(^{16}\) Secondly, the task of garnering the right amount of number of states to accept the proposal as couched. Finally, the timing for putting up the request for amendment of the provisions before the Assembly of State Parties (ASP). In the result, they expressed considerable doubt about the amendments ever becoming law, but importantly, they did read between the lines that this was one realistic way of pushing forward with the legal and political hurdle in resolving the Sudanese situation.

That the Assembly of States Parties is not minded as yet to consider amending the article, does not render it inauspicious, indeed, the authors are of the view that, without prejudice to the Sudanese situation that engendered the proposal, the intentions of the AU is worth giving considerable thoughts to, if not specifically in relation to Sudan, but in developing the jurisprudence of the Rome statute generally.

The position of this paper is not too dissimilar to the views of the learned authors above, except to say that the relevance of the amendment to the Sudan situation will be too futuristic, to find relevance with resolving the Sudanese situation. Consequently, the
Sudanese situation requires a combination of short, medium and long term strategies. It is realistically both political and legal. This paper however stresses the legal imperative.

**The Current Position: Courses of Action Open to Resolving the Conflict**

Whilst acknowledging that the Sudanese situation cannot stricto sensu be resolved legally, it is imperative that any other alternative form of dispute resolution must be charted and anchored within the framework of international law and justice; specifically, within the ambit of the present processes under consideration before the ICC. Any attempt to undermine that process will have long term implications, not only for the court, but the pursuit of international justice particularly for African countries. African states must realise the fact that, undermining the fundamental framework and structures of the ICC, will pose serious threats to continued impunity in Africa. It might sound all well and good to play the imperialist and neo-colonialist card, but that will only be playing to the narrower ends of justice for Africa. The bigger picture certainly will augur well and serve Africa better. The right message must be sent to all potential African leaders that impunity will no longer be condoned.

It is ironic that the AU has allowed itself to drift too far towards the other extreme of the spectrum. The 2000 AU Constitutive Act was considered a major paradigm shift, primarily because of the provisions of Article 4 of the Act. The sorry state of African countries should have dictated a different course that embraces the necessity of forging an alliance, albeit an understanding that carves a prominent role for the AU - because two thirds of the world’s conflicts are raging in Africa. Poverty is endemic. Strife and extreme centrifugal forces are more active in Africa than anywhere else. These are the harbingers of conflict and wars. Conflicts in turn stunt democratic and developmental growth. Development is what is seriously in short supply in Africa. Two thirds of African countries continue to, year in, year out, top the rung of the UN Human Development Index. The Mo Ibrahim Foundation was unable to deliver its 2009 and 2010 yearly annual award to an African leader that have made significant contributions to the advancement of democracy and development in any African country. That was because they found none.

There is palpable regression and setback of democratic gains made in the 1990s. Nowhere is this more prominent than in West Africa. Cote d'Ivoire is presently embroiled in the throes of a festering conflict, failing the refusal of the incumbent President to accept the outcome of an electoral process that have produced a winner other than himself. The situation in Guinea has only just been resolved, but no one can definitely say that the conflict there has ended. Parliamentary elections are slated there for 2011. The army is yet to be reformed or retrained; no real security sector reform has, or is envisaged to take place in the near future”. The situation in Niger Republic has only thawed. No concrete roadmap for the restoration of democratic government has been laid by the military regime
that intervened thankfully to stop President Mamoudou Tandja from viciously violating the basic law of Niger. As I write, the military government in Niger have charged Tandja to court for graft. He has been moved from his initial house arrest to prison. Elections are slated in 2011 for Nigeria, The Gambia, Liberia and Cape Verde; but no one can really be sure what the fate or the shape of these countries will turn out to be after those elections.

With reference to Sudan, the prolonged civil war between the John Garang led SPLA; the internal schism based on ethnicity, religion and political marginalization will continue to pose serious threat to peace and stability even with the present peace deal and declaration of independence. The enormously oil endowed southern part of Sudan will have to deal with resource control and importantly, border delineation conflict between communities that have lived together for centuries. The horrendous carnage that took place in the south of Sudan perpetuated against the black African communities is a testimony to the very weak democratic structures and the lack of human rights, leading to the impunity that was witnessed. This must not go unpunished. El-Bashir has shown brazen disregard for the people of Sudan. He has defied the international community and assaulted the collective psyche of decent and law abiding Sudanese. Should we allow him to continue to do that? Worse still, to continue to carry on like nothing has happened, when millions of Sudanese perished right under his nose and leadership? His culpability or otherwise must be established and the right place to do that is before the ICC.

Sequencing justice vis-a-vis peace as has been variously canvassed, particularly during the early years of the Sudan conflict appears no longer tenable. The fear understandably expressed then was the concern about the potential impact on UNAMID, the AU/UN hybrid peacekeeping mission in Darfur. At the minimum, any ‘Scot and Avery clause strategy’ of allowing reconciliation and mediation to work first must be managed in such a manner to set it right and within timelines of what needs to be done, otherwise, El-Bashir should be pursued until the ends of justice is served and he is brought to book. The utility of conciliation and reconciliation is not in doubt, but it should not be used as a cloak to shield or undercut international justice. The AU particularly must understand this. Getting away with impunity emboldens other dictators and entrench bad leadership. It undermines even the AU and other regional bodies’ resolve to enthrone democracy, rule of law and good governance.
Political versus Legal Solution: Are they Mutually Exclusive?

‘ICC is rapidly turning into a western court to try African crimes against humanity— the realization that the ICC has tended to focus only on African crimes, and mainly on crimes committed by adversaries of the United States has introduced a note of sobriety into the African discussion’ fuelling the notion of a politised justice and questions about ‘the relationship between law and politics’

By the very nature of international law and justice, politics must necessarily be intertwined in seeking to level the uneven landscape of international justice. There is absolutely no denying the fact that the present world order is almost unipolar with the United States of America being the last super power remaining. The last man standing. Globalisation has changed the face of the world as we use to know it 25years ago. The dismantling of communism, the dismembering of the former Soviet Union; the fall of the Berlin Wall; the rise and rise of China and the gradual emergence of medium powers like India, Brazil and the Asian tigers. Regrettably, international balance of power has not shifted to accommodate these realities either at the regional level, or at the level of the United Nations. The UNSC still retains its 5 permanent members with veto powers since the UN was founded in 1945. Africa has been insisting that the UN should be restructured especially at the Security Council and General Assembly levels. The pressure continue to mount, but understandably, change along these lines will be slow, painful and laborious, requiring tact and diplomacy. However, given the realities on the world stage, it would appear that economic muscle more than anything else will futuristically determine the reconfiguration of politics at the UN level.

As things stand, only China, India, Brazil could possibly mount that challenge. Even if for fair and proportional continental representation, it is unlikely whether African countries will be able to agree amongst themselves who would lead at that level. Nigeria has the population, resources from oil and some clout within the region and the continent. South Africa has international goodwill and respectability, in addition to her emerging economy and recent stability brought about with the dismantling of Apartheid. The point of these is that, a level playing field in international politics is a forlorn hope for now particularly for Africa. But this did not deter the African countries that spearheaded the adoption of the Rome statute knowing the benefit that will accrue from membership, and as a basis for incrementally building on restoring a modicum of decency, rule of law, democracy and human rights; and fighting impunity, conflict and underdevelopment that has stymied African’s growth, particularly in the last 40years.

That said, the African states that attended the Rome statute adoption were never under any illusion that signing on to the statute was going to be a one stop shop to cure all the ills of Africa, or that the struggles thereafter will be easy. As already articulated supra, there was
considerable divergence of views about allowing the UNSC play a role in the legal process. As the travaus preparatoires reveals, this sharply divided states until it was agreed to carve the present role reserved for the UNSC. In any event, with respect to the much maligned Sudanese referral, it is instructive that 2 of the African non permanent members of the UNSC voted in favour of the decision to refer the Sudan situation to the ICC. As events are now unfolding, there is a sense in arguing that the ICC should also be looking the other way, other than Africa; and as to why prosecutions have not been quick to be initiated against rogue states and regimes, or indeed, against the United States of America and Britain for prosecuting an ‘illegal war’ in Iraq and Afghanistan against the weight of evidence now available tending to show that, the decision to invade Iraq was on questionable legal grounds. Evidence that have so far emerged from the enquiries in the United Kingdom would appear to suggest that the decision to go to war was not clear cut. It was a mix of politics and law.

What about Israel’s continued belligerence and invasion of Palestine and the Richard Goldstone Report which stated clearly that international law was breached when Gaza was aerially bombed in 2009 for days on end. There are a litany of other examples to point at, to justify why Africa must be skeptical about the ICC and its work of fighting impunity. It will frankly be difficult to absolutely justify the ICC on all fours, but the key question to be asked is - Will Africa be better off without the ICC? Is it possible to effectively undermine the international community in fighting impunity in Africa? Has Africa the capacity to do so even within its own present framework? Considerable doubts were raised by the civil society groups that signed up to the issue of empowering and vesting the African Court on Human and Peoples’ Rights (ACHPR) with powers to try international crimes. Their doubts range from the interplay of politics, self-interest and preservation of African leaders, financial muscle – as attested to by the continued inability to commence full blown legal prosecution against Ex-President Hissene Habre of Chad. The EU and other international bodies had to be involved to raise funds for just one trial. Still, they are nowhere near putting Hissene Habre in the dock.

Conflicts continued to intensify, not the least, in Uganda by the decimated ranks and battle weary remnants of the Joseph Kony’s led Lord Resistance Army (LRA); in the Democratic Republic of Congo; Somalia - where war lords still hold sway - indeed, fresh conflicts continue to brew and fester in Kenya, Cote D’Ivoire, Guinea, Cape Verde and Nigeria over matters as simple as conduct of free, credible and fair elections; democracy and respect for the rule of law. With respect to the Kenya situation - the post election violence of 2007/2008 - the OTP has already initiated prosecution against six most responsible accused persons. Against this backdrop, is it still reasonable to undermine international efforts and initiatives at addressing these issues? Should we undermine the utility and value
of international tribunals and international concerns to these issues, simply because they appear to be presently showcasing African countries? Africa need to move forward exponentially if we must catch up with other continents. Admittedly, the phenomenal growth experienced by the Asian tigers, India, Brazil, China, arguably were achieved on the back of a highly centralized, controlled and almost authoritarian governments; and the cost to individual human rights, liberty, freedom and democracy was huge. Africa can steer off that egregiously abusive course and still achieve stability, growth, development and deepen democracy. The history of western liberal democracy points in the direction that, development engendered by an open society is more sustainable in the long term, this is because it strikes the right balance between both extremes.

**Recommendations**

**Immediate Actions**

1. The AU must now begin to tone down its ‘rhetorics’. Indications are that this is now beginning to happen, thence, the recent proposal for the amendment of article 16. As espoused above, this is highly unlikely to help the Sudanese situation in the short or long term. The amendment appear to be a much broader approach for future circumstances. As Southern Sudan is almost certain of becoming the 54th AU state, the political colouration of the conflict will begin to take a different shape.

2. With further reference to the above, the AU must immediately set in motion, if possible before the independence of Southern Sudan is complete in July, 2011 a permanent body of Eminent Persons, or Panel, or Specific Agenda for the AU Peace and Security Council (PSC) to set to mediate between Sudan and Southern Sudan. There will certainly be unwholesome backlash, conflict, post-conflict issues to emerge from Southern Sudan’s secession from Sudan.

3. The AU should renew the formal request to the UNSC for deferral of the prosecution of El-Bashir; this time with a caveat spelling out what firm legal steps must be taken should reconciliation and mediation fail to take shape within a defined timeline. This reconciliation must be within the purview of the steps taken in 2 above, to douse the Sudanese situation politically. This is desirable for two reasons. Firstly, by July, 2011 Sudan will no longer be the Sudan when the indictment, investigation and prosecution was initially set in motion. Secondly, a ‘new’ formal request for deferral will be suffused with legal consequences should reconciliation fail or collapse, thereby acknowledging the imperative of international justice.

4. The UNSC should out of courtesy acknowledge the AU request as tersely as it deems fit. This should be in light of actions and steps in 2 and 3 above, and in the overall interest of its primary role of maintaining international peace and security, as well as the supervisory role of the UNSC over regional/continental bodies.
Short term Actions

5. The ‘new’ Sudan following the above steps happening, should enter a Declaration accepting the jurisdiction of the court, and possibly entering a caveat to take account of the AU mediation steps as well as her wider international obligations under the UN Charter.

6. The OTP will then be obliged to review the report of the 2005 International Commission of Enquiry with a view to realigning its position with the changed political situation in Sudan; the AU mediation process - how effective they would be in light of the law and justice of the issues raised in the report. The review must be clear on what must happen within the prisms of international law and justice. To this end, the AU would only need to build on the 2009 report of the AU High-Level Panel report on Darfur. This report stressed the need for prosecution whilst also emphasising the need for broader understanding of the meaning of justice.

7. The ICC in tandem, must design a comprehensive victim support programme - identifying victims for compensation - should the mediation process proceed successfully, along with other measures which must involve the Sudanese government public acknowledgement of the horrendous events; and a clear statement and action addressed to the victims that what happened was regrettable.

Long term Measures

8. The UNSC as well as the ICC, without prejudice, must jealously guide and guard their legal authority to claw back their right to sustain or re-institute legal action. This is absolutely important. The message must be sent forth, right from the beginning that any other remedial measures are without prejudice to the UNSC and ICC reinstating their powers to recommence prosecution should the process collapse at any stage.

9. As evidence of good faith, Sudan should at some reasonable stage in the mediation process, up the ante by, adopting and ratifying the Rome statute and agreeing to be bound by the terms of any agreement or mediation process. Sudan must also ensure she plays an active role in the process of identifying victims and compensating them adequately irrespective of nationality - Sudan or Southern Sudan

10. The outcome of the terms of any successful mediation process must be registered, or lodged with the ICC, indeed, the ICC buy-in must be sought from the outset to give legal muscle to the terms of the negotiated agreement. The terms must take account of Sudan’s international obligations to Southern Sudan, the victims, the UNSC and the ICC

11. The ICC will now be burdened with making the decision to either continue to prosecute those accused persons presently subject to the jurisdiction of the court, if the charges will still be sustainable based on the facts and evidence, or enter a nolle
prosequi	extsuperscript{25}. This decision can, and should only happen after the terms of the mediation agreement has been deposited and registered with the court.

In conclusion, it should be noted that the 11 steps and measures above are a mix of politics and law. Either of them can be truncated at any stage of the process. This mix is inevitable if a durable solution will be found to the Sudan situation. The antecedent and underbelly of the Sudan situation was heavily politicized, particularly, with the involvement of the UNSC. Untangling and resolving the issue will necessarily involve a reasonable dose of, and infusion of politics, but that must be done with the ultimate aim of ensuring that justice is not only seen to have been done, but manifestly done. This will produce the designed win win situation. Trading off justice at all cost at the expense of peace as initially thought desirable by the AU, will have a ripple effect on similar situations under investigation, particularly, the emerging Kenyan situation. It is appearing already that the Kenyan situation is gradually being embroiled in politics	extsuperscript{26}. This is what must be avoided at all cost.
Endnotes

1. On 23rd December, 2010 the United Nations Security Council set up a new body to finish the remaining tasks of the United Nations war crimes tribunals for the former Yugoslavia and Rwanda, while calling on the courts to conclude their work by the end of 2014.

2. A select group of leading scholars met at Princeton University, USA on November 10 to 11th, 2000 and later January 25th to 27th, 2001 to formulate what became known as the ‘Princeton Principles on Universal Jurisdiction’: The underlying Principle was characterized thus ‘A nation’s courts exercise jurisdiction over crimes committed in its territory and proceed against those crimes committed abroad by its nationals, or against its nationals, or against its national interest. When these and other connections are absent, national courts may nevertheless exercise jurisdictions under international law over crimes of such exceptional gravity that they affect the fundamental interest of the international community as a whole. This is universal jurisdiction: it is jurisdiction based solely on the nature of the crime’. Under Principle 2, the participants identified the following crimes as falling within the purview of serious crimes under international law, id est, Piracy, Slavery, War Crimes, Crimes Against Peace, Crimes Against humanity, Genocide and Torture.

3. Article 13(b) states that ‘The court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if —(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the UNSC, acting under Chapter VII of the Charter of the United Nations’

4. For an expose on this call, see the article by Prof. Charles Chernor Jalloh entitled: Regionalising international Criminal Law? International Criminal Law Review 9, (2009). For an overview of African civil society perspectives on empowering the African Court on Human and Peoples Rights (ACHPR) to be able to deal with and try international crimes, see the position paper cum opinion of leading African civil society organisations entitled: ‘Implications of the African Court of Human and Peoples’ Rights being empowered to try international crimes such as genocide, crimes against humanity, and war crimes’. The opinion was signed up to by Coalition for an effective African court on human and peoples’ right (CEAC); Darfur Consortium; East African Law Society (EALS); International Criminal Law Centre, Open University of Tanzania; Open Society Justice Initiative; Pan-African Lawyers Union, (PALU); Southern African Litigation Centre (SALC); West African Bar Association (WABA)

5. This referendum was one of the outcomes of the 5 years painstaking Khartoum led Sudanese government and SPLA organisation 2005 Naivasha agreement.

6. ‘Ethnic identity is highly fluid in Sudan and depends upon the criteria by which individual groups of Sudanese distinguish themselves from other groups. The largest commonly recognized ethnic groups are Arabs, Nubians, Beja, and Fur (all northerners and Muslims), and the Dinka, Nuer, Shilluk, and Nuba, all Nilotic peoples of the South. The Arabs and Dinkas are the largest groups within their respective regions. All of these ethnic groups are sub-divided into tribal and other units. In rough percentages, Sudan’s population is composed of 50 percent Black Africans, 40 percent Arabs, 6 percent Bejas, and 3-4percent other.’ Culled from the USA Library of Congress-Federal Research Division. Country Profile: Sudan December 2004
7. Article 17 of the Rome statute enunciates this principle of complimentarity. It vests primary responsibility on national judicial institutions to undertake prosecutions for crimes that fall within the remit of articles 5, 6, 7 and 8, whilst the ICC acts as a ‘court of fourth instance’ where national authorities are unable or unwilling to cause the domestic courts to assume jurisdiction.

8. UN Charter article 39 states ‘The Security Council shall determine the existence of any threat, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security’

9. It should be noted that Sudan initially signed on to the Rome statute on 8 of September, 2000, but by Communication sent to the Secretary General of the UN, pursuant to article 127 of the Rome statute, she decided to withdraw its signature on the 26 of August, 2008.

10. The legal basis of the AU decision not to cooperate with the court is derived from article 98 of the Rome Statute. The provision states that the ICC may not request the surrender of a person if that would require a state to act inconsistently with its obligations under general international law in respect of the person’s immunity

11. Justifying why he would not get Rwanda to sign up to the Rome statute, the Rwandan President His Excellency Paul Kagame is reported to have said ‘Rwanda cannot be party to ICC for one simple reason — with ICC all the injustices of the past including colonialism, imperialism, keep coming back in different forms. They control you. As long as you are poor, weak there is always some rope to hang you. ICC is made for Africans and poor countries’. His Excellency, Jean Ping, was also reported to have said whilst he was the Chairperson of the African Union Commission - that ‘We are not against international justice. It just seems that Africa has become a laboratory to test the new international law’

12. Nigeria attempted to recapture the same process in 1999 after democratic rule was introduced from prolonged years of military authoritarianism. The Oputa Panel as it became known, never really went to the heart of the matter in some cases. In any event, prosecutions for politically inspired murder and attempted murder proceeded pari passu in the regular courts.

13. Article 103 states ‘In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail’

14. Article 12(1) spells out the delicate balancing of responsibilities between the two bodies. It states ‘While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the pr Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests’

15. For a very lucid and analytical discourse on this tenuous relationship, the position paper of some leading African experts on international law and justice is a compelling read. See 2010 Institute of Security Studies Position paper entitled ‘An African expert study on the African Union concerns about article 16 of the Rome Statute of the ICC’ Authored by Dapo Akande, Max du Plessis and Charles Chernor Jalloh

16. See generally articles 121 of the Rome Statute on amendments and 122 specifically on amendments to provisions of an institutional nature.


19. This view was actively canvassed by Julie Flint, Alex de Waal, in their commentary in the Washington Post of June 28, 2008 entitled ‘Justice Off Course in Darfur’. They argued that justice should wait until after those culpable are no longer in positions of authority; as it will delay the attempt to pull Sudan from the precipice.


21. See the African Charter on Human and Peoples’ Rights of 1980; as well as the ECOWAS Ratification, Popularisation and Implementation of the African Charter on Democracy, Elections and Governance and the ECOWAS Supplementary Protocol on Democracy and Good Governance; and the recent AU Constitutive Act of 2000 which speak to the fact that democracy, human rights, good governance, rule of law, regular conduct of free, fair and credible elections remain the goal of the region and continent.

22. These in bits and pieces represent the views of the much respected Prof. M. Mamdani made available to Pambazuka News 396 www.pambazuka.org in his contribution to the debate about ICC and Africa entitled ‘Darfur, ICC and the New Humanitarian Order: How the ICC’s responsibility to protect is being turned into an assertion of neo-colonial domination’

23. The opening of Preliminary Examinations in Honduras, Georgia, Colombia, Afghanistan, Palestine points in the direction that, the court must expand its dragnet to other continents so as to demonstrate its commitment to fight impunity globally other than in Africa.

24. See International Criminal Court, OTP Weekly Briefing 16-22 November, 2010. Issue No 64. The said Weekly also confirmed the launching of Preliminary Examinations in Nigeria, Guinea and Cote D’Ivoire. Summonses have been issued to 6 persons to appear before it. This was done pursuant to article 58(7) of the Rome Statute. That articles states ‘ As an alternative to seeking a warrant of arrest, the prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear. If the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the person committed the crime alleged and that a summons is sufficient to ensure the person’s appearance, it shall issue the summons, with or without conditions restricting liberty (other than detention) if provided for by national law, for the person to appear. The summons shall contain: (a) The name of the person and any other relevant identifying information (b) The specified date on which the person is to appear (c) A specific reference to the crimes within the jurisdiction of the court which the person is alleged to have committed and (d) A concise statement of the facts which are alleged to constitute the crime. The summons shall be served on the person.’

25. Articles 53(1)(c) and 53 (2)(c) provides that the prosecutor may decline to initiate, indeed, proceed with prosecution – as it now seem appropriate in the Sudanese case – if that would ‘serve the interest of justice’.
This term interest of justice is not defined in the statute, however, this could encompass a range of interest to include those of the victims. For a more robust view of the OTP perspectives on this, see the OTP paper entitled - Policy paper on the interest of justice, ICC September 2007.

26. The recent December 16th, 2010 statement made by Rt. Hon. Raila A. Odinga (MP) Prime Minister of Kenya and addressed to the National Assembly of Kenya re-echoed the possibility of the recent indictment by the ICC being politised. In his concluding statement however, the Prime Minister stated that ‘The present circumstance calls for calm and unity. We must exercise restraint and be judicious in our comments about the ICC process. As we seek justice for the victims of post election violence we must not visit injustice on innocent people. We must respect the presumption of one’s innocence until proven guilty beyond reasonable doubt through a fair and open process. We must seek reconciliation by ensuring that there is justice for all’