

# The African Union and the International Criminal Court: The battle for the soul of international law

*Dire Tladi\**

## **Introduction**

On 3 July 2009, the African Union (AU) Assembly of Heads of State and Government (Summit) adopted a decision on the International Criminal Court's (ICC) indictment of the President of Sudan (decision), Omar Hassan Al Bashir.<sup>1</sup> The essence of the decision was that African states would not cooperate with the ICC in the execution of the arrest warrant issued against Al Bashir. The decision placed African states party to the Rome Statute establishing the ICC,<sup>2</sup> in the unenviable position of having to choose between their obligations as member states of the AU on the one hand, and their obligations as states party to the Rome Statute, on the other.

The AU decision also raises a number of critical questions about the direction of international law and international law-making from both a normative and an institutional perspective. From a purely institutional perspective, the decision raises

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\*BLC LLB (University of Pretoria) LLM (University of Connecticut) PhD (Erasmus University Rotterdam). Legal Counsellor to the South African Permanent Mission to the United Nations. Extraordinary Professor, Department of Public Law, University of Stellenbosch. The views expressed in this paper are those of the author and do not necessarily reflect the views of the SA Permanent Mission to the United Nations or the Government of the Republic of South Africa.

<sup>1</sup>AU Summit Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Assembly/AU/Dec 245(XIII), July 2009. Subsequent to this decision, the Ministers of Justice of the African Union adopted a further decision in relation to the Review Conference of the ICC Statute to be held in Uganda in June 2010. Under this decision, African states party to the Rome Statute were called upon to propose an amendment to art 16 of the Rome Statute relating to the powers of the UN Security Council to defer investigations and prosecutions. Under the proposed amendment, the General Assembly would have comparable powers to defer prosecutions. Because of the complex legal questions raised by the relationship between the Security Council and the General Assembly, this latest decision is not considered as part of this article.

<sup>2</sup>1998 Rome Statute of the International Criminal Court.

questions about the relationship between the AU and the UN, the relationship between the AU and its member states *vis-à-vis* broader international issues, and the relationship between international organisations and their African member states *vis-à-vis* AU decisions. From a more normative perspective, the decision raises questions about the reality of a new value-based international law, centred on the protection of humanity and human rights and whether such a new international law can escape accusations of neo-imperialism.<sup>3</sup> The pursuit of a new vision of international law predicated on the respect for human rights and concern for the plight of humanity is one which should be a common goal. Yet the vision continues to be questioned as imperialistic, colonialist and even racist. Thus it may be argued that the AU decision is simply a response to this new form of imperialism – one in which the ICC is seen as a Western imperial master exercising imperial power over African subjects. Put another way, the question can well be asked whether the ICC represents a tool through which Western powers can further demean the already demeaned victims of past colonialism? The question forces us to confront the question, whose international law is this new international law that has generated so much excitement.<sup>4</sup> But the decision also raises questions about the respective roles of peace and justice in this new vision of international law. It forces us to confront the question of whether the ICC's pursuit of Al Bashir threatens the peace process in Sudan.

In this article I consider the AU decision in the light of some of these normative questions. While the institutional questions fall outside the scope of the article, some references to these will be made to the extent that they shed light on the normative questions posed. Similarly, the sociological question of whether there can be peace without justice, while relevant to the question of the indictment's impact on peace, falls beyond the scope of the article. I avoid the question whether there can be peace without justice mainly because, in the context of the AU decision, it is possible to comment on the indictment's impact on peace efforts without making any general propositions about the general relationship between peace and justice.

I begin by briefly tracing the chronology of events that led to the July decision. It is through the chronological recounting of events that the context of (and arguments for) the AU decision is provided. I then set out the international law context in which the AU/ICC battle takes place before providing an evaluation of the decision of the AU in the light of the framework set out earlier.

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<sup>3</sup>Koskeniemi 'International law in Europe: Between tradition and renewal' (2005) 16 *European Journal of International Law* 113 at 123. For the author's views on the implications of this new international law see Tladi 'South African lawyers, values and new vision of international law: The road to perdition is paved with the pursuit of laudable goals' (2008) 33 *SAYIL* 167.

<sup>4</sup>See, eg, Jouannete 'Universalism and imperialism: The true-false paradox of international law' (2007) 18 *European Journal of International Law* 379; Koskeniemi n 3 above.

### The AU/ICC collision course: A chronology

Central to the story of the AU and ICC collision course is the United Nations Security Council. In 2005 the Security Council, acting under Chapter VII of the UN Charter and pursuant to article 13(b) of the Rome Statute, referred the situation in the Darfur region of Sudan to the ICC.<sup>5</sup> On 14 July 2008 the prosecutor presented evidence against Al Bashir to the ICC Pre-Trial Chamber and requested that an arrest warrant be issued against the Sudanese President for ten charges of genocide, crimes against humanity, and war crimes. On 4 March 2009, the Pre-Trial Chamber handed down its judgment in which it agreed to issue an arrest warrant against Al Bashir for crimes against humanity and war crimes, but not for genocide.<sup>6</sup>

The Security Council is central to the story of the AU and ICC collision course not only because it was the Council that initiated the process that led to the issuing of an arrest warrant against Bashir, but also because the Council holds the power to defer the proceedings against Bashir under article 16 of the Statute.<sup>7</sup> Mindful of this power, and in response to the prosecutor's application for an arrest warrant against Bashir, the AU Peace and Security Council (PSC) issued a communiqué on 21 July 2008 on the prosecutor's application.<sup>8</sup> While, in terms of status, this communiqué was the least potent representation of the (evolving) AU position, it is significant as it provides the contours of the AU's rejection of Bashir's arrest warrant. The communiqué begins by reiterating the PSC's 'commitment to combating impunity and promoting democracy, the rule of law and good governance ...' and condemning 'the gross violations of human rights in Darfur'.<sup>9</sup> The communiqué further expresses the view that 'in order to achieve long-lasting peace' it is important to 'uphold principles of accountability and bring to justice the perpetrators of gross human rights violations' in Darfur.<sup>10</sup> Woven throughout these calls for an end to impunity and the promotion of justice and accountability, however, are strong objections to the prosecutor's application for an arrest warrant. To this end, the communiqué declares that 'the search for justice should be pursued in a way that does not impede or jeopardize efforts aimed at promoting lasting peace'.<sup>11</sup> Furthermore, the communiqué expresses concern at the fact that

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<sup>5</sup>SC res 1593 (2005).

<sup>6</sup>*The Prosecutor v Omar Hassan Al Bashir* ICC-02/05-01/09. A detailed account of the activities of the Council, the prosecutor and the ICC in the period leading up to and immediately after the issuing of the arrest warrant is contained in the 'Tenth Report of the Prosecutor of the International Criminal Court to the Security Council' of 4 December 2009 (on file with the author).

<sup>7</sup>Article 16 of the Rome Statute grants the Security Council the power to defer investigations and prosecutions for a renewable period of 12 months under whatever conditions may be laid down by the Council.

<sup>8</sup>AU Peace and Security Council Communiqué PSC/Min/Comm(CXLII) 21 July 2008.

<sup>9</sup>*Id* par 2.

<sup>10</sup>*Id* par 10.

<sup>11</sup>*Ibid*. Similar references suggesting the need to ensure that justice should not negatively affect the pursuit of peace are found in pars 4 and 11.

the ICC arrest warrant may reflect ‘double standards’ and may amount to a ‘misuse of indictments against African leaders’.<sup>12</sup> In the light of the need to ‘address in a mutually reinforcing manner’ the issues of non-impunity and peace, the PSC called on the Security Council

in accordance with Article 16 of the Rome Statute of the ICC, to defer the process initiated by the ICC [*sic*], taking into account the need to ensure that the ongoing peace efforts are not jeopardized, as well as the fact that, in the current circumstances, a prosecution may not be in the interest of victims and justice.<sup>13</sup>

By the time the AU Heads of State and Government met in Addis Ababa in February 2009, the ICC had not delivered its decision on the prosecutor’s request, but neither had the Security Council acted on the PSC’s request. The Summit decision of February 2009, mainly endorsed the PSC communiqué and reiterated the call for an article 16 deferral by the Security Council.<sup>14</sup> As with the PSC communiqué, the February 2009 decision cautioned that the indictment would undermine the ‘delicate peace process underway in The Sudan’, while also expressing the AU’s ‘unflinching commitment to combating impunity’.<sup>15</sup> In addition to reiterating various parts of the PSC communiqué, the Summit also took an unprecedented step by requesting the AU Commission to

convene as early as possible, a meeting of African countries that are parties to the Rome Statute on the establishment of the International Criminal Court (ICC) to exchange views on the work of the ICC in relation to Africa, in particular in the light of the processes initiated against African personalities, and to submit recommendations thereon taking into account all relevant elements.<sup>16</sup>

The step was unprecedented because, while the AU Assembly has broad competence under article 9 of the AU Constitutive Act, including the competence to ‘determine the common policies of the Union’, intuitively it seemed irregular for the AU to convene a meeting of states party to a treaty that the AU is not itself party to and which was not adopted under its auspices. This issue certainly raises the institutional question about the relationship between the AU and its member states with respect to other treaty bodies. Nonetheless, the AU Commission did call the meeting of Ministers of Justice of African States Parties to the ICC Statute, and the meeting took place in June 2009, just over a month before the July Summit.

During the Ministers of Justice meeting in Addis Ababa, a number of African state parties called for the withdrawal of ICC support, while others defended the

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<sup>12</sup>Note 8 above pars 3 and 7.

<sup>13</sup>*Id* par 11(i).

<sup>14</sup>‘AU Summit Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of Sudan’ Assembly/AU/Dec 221(XII) February 2009.

<sup>15</sup>*Id* pars 2 and 6.

<sup>16</sup>*Id* par 5.

court against attacks. The outcome of the meeting is embodied in a report which contains, strangely, two sets of recommendations to the Assembly.<sup>17</sup> The first set of recommendations were recommendations on which there was consensus and these included, for example, the reiteration of the AU's 'unflinching commitment to combating impunity' as well as the call for an article 16 deferral by the Security Council.<sup>18</sup> The second set of recommendations, entitled 'proposals made on which there was no consensus', included proposals that the AU decide that all member states withdraw from the ICC statute or refuse to cooperate on the Bashir indictment.<sup>19</sup> Surprisingly, it was a proposal 'made on which there was no consensus' that formed the main element of the AU/ICC decision under consideration, namely that

in view of the fact that the [Article 16] request by the African Union has never been acted upon, the AU Member States shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar Al Bashir of The Sudan.

In light of the above, one can conclude that the AU's objection to the execution of the arrest warrant against Al Bashir is based on the fear that such action would threaten the peace process underway in The Sudan. But an underlying reason is the notion that the ICC, as a western institution, should not exercise jurisdiction over African leaders – the idea that the arrest warrant smacks of imperialist arrogance.<sup>20</sup> In the AU decision, there are hints of the attitude that African leaders ought not to be tried under non-African systems. The decision, for example, calls on the AU Commission to investigate the possibility of empowering the African Court on Human and Peoples' Rights to 'try serious crimes of international concern', presumably as an alternative to non-African courts and tribunals.<sup>21</sup> The decision, furthermore, warns that the AU 'reserves the right to take any further decision' in order to protect the 'dignity, sovereignty and integrity of the continent' – a thinly veiled threat that African states could withdraw from the ICC altogether.<sup>22</sup> The Organisation of Islamic Conference (OIC) has been slightly more overt about claims of imperialism in its attacks against the ICC. In its communiqué of 27 March 2009, the OIC labels the ICC

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<sup>17</sup>Report of the Meeting African States Parties to the Rome Statute on the ICC' 8-9 June 2009 AU/MinICC/Report (on file with the author).

<sup>18</sup>*Ibid.*

<sup>19</sup>*Ibid.*

<sup>20</sup>Kofi Annan has noted that in the months leading up to the July 2009 Summit, 'some African leaders have expressed the view that international justice as represented by the ICC is an imposition, if not a plot, by the industrialised West.' Annan 'Africa and the International Court' *New York Times* 30 June 2009.

<sup>21</sup>Dec 245(XIII) n 1 above at par 5. Paragraph 7 of the decision also encourages capacity building programmes to enable Africans to undertake the work of 'dealing with serious crimes of international concern'.

<sup>22</sup>*Id* par 12.

pursuit of Bashir as ‘void and lacking sound reasoning’, suggests that ICC activities are a threat to the ‘sovereignty, independence, territorial integrity’ of Sudan, and describes Sudan as ‘a victim of this machination’.<sup>23</sup> The communiqué then refers to the ‘selectivity and double standards’ evident in the decisions of the ICC, and notes that these will ‘adversely affect the credibility of the international legal system.’<sup>24</sup>

The attitude of the AU can be interpreted as questioning the validity of the new value-based system of international law which is reflected in the ICC Statute. It is appropriate, therefore, briefly to reflect on this modern system of international law before evaluating the AU’s objection to the ICC’s indictment of Bashir.

### **Universality as a core element of the new vision of international law**

There has, in recent times, been a certain degree of excitement about the infusion of values into international law and the emergence of a ‘new *jus gentium* of our times’.<sup>25</sup> The characteristics of this new (and emerging) international law include a move away from a state-centric model of traditional international law based on the preservation of sovereignty, to one more concerned with humanity.<sup>26</sup> This idea of a limited view of sovereignty ‘which brings moral value to order’ is also reflected in what Jones, Pascual and Stedman have referred to as ‘responsible sovereignty’ – a notion that sovereignty entails obligations and duties to one’s own citizens and to other sovereign states.<sup>27</sup>

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<sup>23</sup>Final Communiqué of the Expanded Meeting of the Executive Committee of the OIC at the level of Permanent Representatives on the ICC’s Moves Targeting HE The President of Sudan’ New York 27 March 2009 par 1.

<sup>24</sup>*Id* par 3. The idea that Arab countries in the AU have played the most prominent role in steering the AU towards an anti-ICC view is reflected in the statements of African Arab states on the ICC, most notably Libya. On 29 March 2009, eg, the Libyan leader, Muammar Gaddafi described the arrest warrant as ‘First World terrorism’, while Libyan African Affairs Minister, Ali Triki, prophesied that the ‘33 African member states of the ICC will meet in the immediate future to consider withdrawing from the ICC’ reported in ‘Darfur, Ghadafi: ICC are terrorists’ *AfricaTimes* 29 March 2009 available at <http://www.africa-times-news.com> (accessed 10 July 2009).

<sup>25</sup>Trindade ‘The human person and international justice’ (2008) 47 *Columbia Journal of Transnational Law* 16 at 18. See further, Sands *Lawless world: America and the making and breaking of global rules: From FDR’s Atlantic Charter to George W Bush’s illegal war* (2005); Dugard ‘The future of international law: A human rights perspective – With some comments on the Leiden School of International Law’ (2007) 20 *Leiden Journal of International Law* 729. See also Tladi n 3 above.

<sup>26</sup>For more a more detailed discussion of the characteristics see Tladi n 3 above. See also, Dugard n 25 above and, Jouannet n 4 above. See also Sands ‘Lawless world: The cultures of international law’ (2006) 41 *Texas International Law Journal* 387.

<sup>27</sup>Jones, Pascual and Stedman *Building international order in an era of transnational threat: Power and responsibility* (2009).

But perhaps the central – and most controversial – feature of this new value-laden approach to international law is its claim to universality. By universality, here, I refer to Simma’s ‘third level universality’ – an approach which establishes a ‘public order on a global scale, a common legal order for mankind as a whole.’<sup>28</sup> This concept of universality is characterised by a number of features including the establishment of a hierarchy of norms, a value-oriented approach, de-emphasising consent in the international law-making process, and the creation of a body of international criminal law.<sup>29</sup> This appeal to universality obviously has strong roots in the natural law school of thought.<sup>30</sup> It is encapsulated in legal norms such as *ius cogens* and obligations *erga omnes*.<sup>31</sup> Not surprisingly, the birth of international criminal tribunals, including the ICC, to try serious international crimes is a direct consequence of this appeal to universality.<sup>32</sup> The Rome Statute gives the ICC the competence to try individuals, irrespective of the office held, for crimes having the character of *ius cogens* and creating obligations *erga omnes*, namely crimes against humanity, genocide and war crimes.<sup>33</sup> While there has indeed been an evolution of a more humane international law concerned with the plight of people and not only the rights and obligations of states, there have also been concurrent mass atrocities and violations of rights – Rwanda, Darfur, Uganda, Kosovo are examples. Many of these atrocities, however, can be explained as failings in the system, and not necessarily as a lack of traction for this new vision of international law.

The rosy picture of a world united in its desire for a more humane international law, concerned with the plight of its community and intolerant of impunity – leaving aside that the normative development has not been accompanied by a

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<sup>28</sup>Simma ‘Universality of international law from the perspective of a practitioner’ (2009) 20 *European Journal of International Law* 265 at 267. Simma identifies two other levels of universality, namely, that international law exists and is valid at a global level (first level), and the question of international law’s coherence or unity (second level).

<sup>29</sup>*Id* at 268. Assessing this phase of international law, Simma notes that it is true that international law has moved beyond the phase where it is only concerned with correlative rights and obligations of states to a phase which ‘also incorporates common interests of the international community as a whole, including not only states but all human beings’.

<sup>30</sup>Tladi and Dlagnekova ‘The will of state, consent and international law: Piercing the veil of positivism’ (2006) 21 *SAPR/PL* 111.

<sup>31</sup>Koskenniemi n 3 above.

<sup>32</sup>See, eg, Kourula ‘Questions and observations relating to the International Criminal Court’ in Petman and Klabbers (eds) *Nordic cosmopolitanism: Essays in international law for Martti Koskenniemi* (2003) at 328, who observes that the issues of ‘criminal responsibility for violations of norms of international law emerged fairly late when certain *moral values* were accepted as being of general interest to *all states*’ (emphasis added). See also the dissenting opinion of *ad hoc* Judge van den Wyngaert in *The Case Concerning the Arrest Warrant of 11 April 2000 (DRC v Belgium)*, 2002 ICJ Reports 3 especially at pars 27-33. See also the dissenting opinion of Judge Al-Khasawneh in the *Arrest Warrant case* where the states that the ‘effective combating of grave crimes has arguably assumed a *jus cogens* character reflecting the commitment by the international community of the vital community interests and values it seeks to protect and enhance’.

<sup>33</sup>Article 5 of the Rome Statute.

significant reduction in mass atrocities – is, however, blurred by the realisation that some view the development with great suspicion. The appeal to universality has spawned a debate about neo-imperialism and the imposition of cultural values – the idea that the values espoused by this new vision of international law are, in fact, not universal but are rather reflective of Western ideology and are now being pushed on non-Western cultures in the name of universality.<sup>34</sup> If these values are Western values, then surely Koskenniemi is right to ask the question ‘how can a particular tradition speak in the name of humanity?’<sup>35</sup> With regards to *ius cogens* and obligations *erga omnes*, Koskenniemi cites these as examples of a false universalism, or kitsch.<sup>36</sup> Even Jouannet, who defends the claim to universalism, acknowledges the reality of the imperialism objection.<sup>37</sup> The idea of universality, she asserts, being grounded in the natural law school of thought, is clearly founded upon ‘Western rationalism’.<sup>38</sup> Even the substantive norms aspiring to universality are, themselves, based on Western values.<sup>39</sup>

Although not expressed as clearly, the AU objection against the ICC indictment of Bashir is based, at least partially, on this objection to universality – I am leaving aside the possibility that African leaders are simply protecting one of their own, a basis that would not warrant an analytical discussion. As mentioned above, Arab leaders, and certainly the government of Sudan, have been more direct about the claim of imperialism. In a statement delivered at an AU Ministers of Justice Meeting in 2008, the Sudanese Minister of Justice noted that concepts such as universal jurisdiction<sup>40</sup> and the intended exercise of jurisdiction over African leaders by the ICC, are deemed by the proponents as ‘being firmly lodged in the Law of Nature’.<sup>41</sup> The statement went on to assert that the indictment against Bashir was a clear breach of Sudan’s sovereignty establishing ‘new tyrant legal supremacy under the guise of lofty objectives’.<sup>42</sup> The Minister then suggests that Sudan is not

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<sup>34</sup>See for discussion, Steiner, Alston and Goodman *International human rights in context: Law, politics and morality* (2008) at 517-521.

<sup>35</sup>Koskenniemi n 3 above at 115.

<sup>36</sup>*Id* at 122.

<sup>37</sup>Jouannet n 4 above at 386. At 396, she concedes that it is clear that ‘behind universalizing approaches’ lies ‘disguised imperialism, albeit a benevolent hegemony’.

<sup>38</sup>*Id* at 387.

<sup>39</sup>*Id* at 389.

<sup>40</sup>The application of this concept by some European countries against African leaders has also attracted the wrath of the AU on a similar basis. See the AU Summit decision on the ‘Abuse of the Principle of Universal Jurisdiction’ Assembly/AU/Dec 243 (XIII). While there is a clear distinction between universal jurisdiction and the exercise of jurisdiction by the ICC, Sudan continues to see the two as being the same and serving the same purpose.

<sup>41</sup>Statement of Mr Abdul Sabdrat, Minister of Justice of the Republic of Sudan, at the Meeting of Ministers of Justice and Attorneys-General of the African Union on Legal Matters 3-4 November 2008, Rwanda (on file with the author).

<sup>42</sup>*Ibid.*

the target of this neo-imperialism, but rather that ‘all African, Arab and other third-world countries are equally targeted.’<sup>43</sup> Speaking in the aftermath of the July 2009 decision, the Prime Minister of Rwanda, Bernard Makuza, said that though the African leaders were not promoting impunity, they were sending a message that ‘Westerners who don’t understand anything about Africa should stop trying to import their solutions’.<sup>44</sup> It is against this background that the decision of the AU of July 2009 is evaluated.

### Evaluating the AU’s objections

It is pertinent to begin this section by pointing out that thirty-three of the fifty-three member states of the African Union are party to the Rome Statute. This statistic certainly puts a lot of strain on the argument that the values represented by the ICC of intolerance against impunity, and the consequent indictment of Bashir – are being imposed on African states by Western states. I am quite aware that the transcription of norms into treaties and the subsequent ratification of such treaties are insufficient to cure the imperialism objection to universalism – though I would argue that the fact is not irrelevant in determining the genuine universality of norms.<sup>45</sup> But, it is also clear that many Africans were left feeling decidedly uncomfortable by the AU decision, suggesting that perhaps Africans (as opposed to the AU) felt a sense of commitment to those values underlying the ICC and the arrest warrant issued against Al Bashir.<sup>46</sup>

This suggests that the values underlying the ICC, even though based on Western rationalism and values, *could* reflect true universalism. I am reminded that even Koskenniemi, who cautions against the universalist project’s potential for racism and arrogance, never suggests that there are no universal norms, only that the universal norms do not have a voice of their own.<sup>47</sup> As I read it, the challenge posed by Koskenniemi – and I must admit to being ill-at-ease venturing into this deeply philosophical terrain – is not whether international law is capable of conveying the

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<sup>43</sup>*Ibid.*

<sup>44</sup>Montesquiou ‘African leaders denounce International Court’ available at [http://www.montereyherald.com/world/ci\\_12748764](http://www.montereyherald.com/world/ci_12748764) (accessed 15 July 2009).

<sup>45</sup>Jouannet n 4 above at 391.

<sup>46</sup>Kofi Annan’s op-ed n 22 above is an example of such commitment. For other sentiments suggesting discomfort at the AU decision from ordinary Africans see Tutu ‘Will Africa let Sudan off the “hook”?’ *New York Times* 2 March 2009; ‘Al Bashir must face justice: Allowing him to escape will send wrong message’ *Business Day* (SA) 10 March 2009; Maqungo ‘Al-Bashir’s welcome is test for AU’ 8 July 2009; ‘South Africa’s NGO’s may challenge AU ICC decision before court’ *Sudan Tribune* 12 July 2009 available at <http://www.sudantribune.com/spip.php?article31787> (accessed 15 July 2009). Koskenniemi n 3 above. See also Tladi ‘South Africa, the International Criminal Court and the African Union: Reflections on the burden of leadership (2009) June *The Diplomat* [*The Diplomat* is an internal publication of the Department of International Relations and Cooperation of South Africa] (on file with the author).

<sup>47</sup>Koskenniemi n 3 above.

universal norms in question, but rather whether the norms being conveyed are truly universal which is a fact that is not to be lightly assumed.<sup>48</sup> It is here that I think there is much to be said for Jouannet's observations that there are subtle practices, which move beyond both 'the primitive hegemony' of the dominant culture and the 'radical deconstruction of all notions of the universal'.<sup>49</sup> One way that this can happen, she observes, is through the re-appropriation of values from the dominant culture by the dominated.<sup>50</sup> She reminds us that values are not only defined in terms of specific cultures, but rather, some values 'correspond to general characteristics of human beings' and express an anthropological human identity as opposed to a purely cultural one.<sup>51</sup> It appears difficult to argue against the notion that the values reflected in the fight against impunity for serious international crimes, meet the criteria of 'corresponding to general characteristics of human beings' and are an expression of an 'anthropological human identity'.

I would further suggest that, whatever their origins, the values under consideration have been (re)appropriated by African culture so that the imperialist potential that Koskenniemi warns against, whatever its validity, is not applicable to ICC action consistent with its mandate, ie these values reflect genuine universality. To view ICC norms as an 'attempt to realize the [West's] special interest without having to fight',<sup>52</sup> would be to ignore not only that Africa has overwhelmingly indicated its support of the norms by having thirty-three of its fifty-three members ratify the ICC instrument, but also that Africa has effectively (re)appropriated these values by including them in the AU Constitutive Act. The principles governing the functioning of the AU include the right of the AU to intervene in cases of war crimes, crimes against humanity and genocide – the same crimes under which the ICC may exercise jurisdiction – and a rejection of impunity.<sup>53</sup> Indeed the various AU documents rejecting the ICC indictment of Al Bashir, including the July decision, all reiterate the AU's 'commitment to combating impunity'.<sup>54</sup> Like Pierre-Marie Dupuy, I think the time has come to accept that the values under consideration are not only part of European heritage but the common heritage of mankind, including Africa.<sup>55</sup>

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<sup>48</sup>*Ibid.* At 115, eg, Koskenniemi states that the 'fact that international law is a European language does not even slightly stand in the way of it being capable of expressing something universal'. At 123, speaking of *ius cogens*, obligations *erga omnes* and other international law constructs, he notes that they 'do not automatically express anything universal' (emphasis added). He concludes, at 123, that international law can have a 'universal ambition without the involvement of the civilizing mission'.

<sup>49</sup>Jouannet n 4 above at 397.

<sup>50</sup>*Ibid.*

<sup>51</sup>*Id* at 403 (footnotes omitted).

<sup>52</sup>Koskenniemi n 3 above at 116.

<sup>53</sup>See art 4(h) and 4(o) of the 2000 AU Constitutive Act.

<sup>54</sup>Dec 245(XIII) n 1 above at par 4.

<sup>55</sup>Dupuy 'Some reflections on contemporary international law and the appeal to universal values: A response to Martti Koskenniemi' (2005) 16 *European Journal of International Law* 131 at 135.

If the idea that the values underlying the ICC Statute are European does not adequately explain the AU decision, then another source for the AU's objection must be sought. As suggested above, two alternative sources for the discontent, both related, even if remotely to the imperialism objection, can be identified. The first of these is that while Africa is committed to these universalist principles, 'the dignity, sovereignty and integrity of the African continent'<sup>56</sup> dictates that Africa itself should mete out justice for crimes committed by Africans against Africans. The second source of the AU objection may be that while Africa endorses these values, the indictment is poorly timed as it threatens 'the delicate peace process underway away in the Sudan'.<sup>57</sup> The sentiment implied in both alternative arguments is that there is nothing inherently wrong with the universal values being promoted but that the ICC's indictment of Bashir is a flawed application of these values. This sentiment requires us to define the contours of the authentic universal norms and does not amount to a rejection of these norms. I now turn my attention briefly to these two arguments.

Leaving aside the fact that to speak of the 'sovereignty of the African continent' is conceptually problematic, the first argument raises two problems. First, it ignores the fact that as a matter of course, the ICC will only exercise jurisdiction where states having jurisdiction are 'unwilling or unable genuinely to carry out' the prosecution.<sup>58</sup> The fact that the President of Sudan has been indicted by the ICC is, therefore, an indication that, in the view of the prosecutor, African states having jurisdiction over the crimes are 'unable or unwilling genuinely' to try Al Bashir.<sup>59</sup> The effect of the argument that trials for the atrocities committed (and being committed in Sudan) should be tried by Africans, therefore, would be to defeat the object of the ICC Statute and the value of non-impunity for grave international crimes. Second, the Hissene Habre case is an illustration of the constraints facing the AU in its insistence that only African states (or institutions) should be permitted to try Africans, even where there appears to be a genuine willingness to prosecute. In decision 246, adopted by the same meeting that adopted the decision on the ICC, the AU decries the lack of resources to try Hissene Habre.<sup>60</sup>

The second argument, ie that the indictment poses a threat to the peace process, raises the sociological question about the relationship between peace and justice.<sup>61</sup> I do not propose to enter the murky waters of the general relationship

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<sup>56</sup>Dec 245(XIII) n 1 above at par 12.

<sup>57</sup>*Id* par 3.

<sup>58</sup>Article 17(1) of the Rome Statute.

<sup>59</sup>See pars 36-43 of the 'Report of the Prosecutor' n 6 above.

<sup>60</sup>Dec 246(XIII) on the Hissene Habre case, pars 3-7. Belgium has instituted proceedings against Senegal at the ICJ on the basis of Senegal's failure to prosecute Hissene Habre in *Case Concerning Questions Relating to the Obligations to Prosecute or Extradite (Belgium v Senegal)*.

<sup>61</sup>Like most, I subscribe to the simplistic view that peace and justice are inextricably linked. However, while I do not attempt to determine which should be prioritised, I admit a bias to the

between peace and justice, and will restrict myself rather to the specific relationship between peace and justice in the context of the ICC Statute – a question that can be answered within a legal framework. The architecture of the Rome Statute includes, as objectives to be pursued, both peace and justice and does this by adopting a two track approach. The first track, which is inherently judicial, promotes justice by granting the ICC jurisdiction over crimes of serious concern to the international community. The ICC's issuing of the arrest warrant against President Al Bashir and his eventual prosecution – if it ever occurs – falls within this judicial track. The second, and overtly political track, promotes peace by granting the Security Council the power to defer prosecutions in the exercise of the powers in Chapter VII of the Charter, ie in the interest of international peace and security. The AU's request for a deferral under article 16 of the Statute falls within the second track. These two tracks (should) work together to promote the attainment of both peace and justice. It has to be said, though, that there is some doubt about whether article 16 was ever intended to operate in a case where the Security Council *itself* has referred a matter to the ICC.<sup>62</sup> Nonetheless, given the wide margin of discretion afforded to the Council in Chapter VII of the Charter, an argument limiting the article 16 to *proprio motu* and state referrals would be difficult to sustain.

The decision of the AU indicating an intention not to cooperate with the AU 'in view of the fact that the [AU request for deferral] has never been acted upon' by the Security Council is, from the perspective of the two track approach outlined above, problematic for two reasons. First, the decision conflates the judicial and political tracks and, as a result, imputes on the Court the perceived failure of the Security Council to act on the AU request. The AU's request for a deferral was never directed at the court and the court, as judicial organ, has no mandate to consider the request. Under the two track framework described, the court is mandated only to perform judicial functions and not political functions such as the deferral of proceedings under article 16.

Second, the decision of the AU, being based as it is on the failure to act on the request for article 16, appears to misconceive the scope of the powers of the Council under article 16 of the Statute. When the Security Council acts pursuant to article 16 it exercises its exceptionally wide powers under Chapter VII of the UN Charter. Thus, acting upon the request does not mean granting

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view that peace can never be sustainable if not accompanied by justice. See, eg, Jallow 'Justice and the rule of law: Global perspective' (2009) 43 *The International Lawyer* 77.

<sup>62</sup>Scheffer, who led the US negotiations on the ICC Statute, argues that art 16 was meant specifically for situations not referred to by the Security Council. See 'The Security Council's struggle over Darfur and international justice' *Jurist* 20 August 2008 available at <http://jurist.law.pitt.edu/forumy/2008/08/security-council-struggle-over-darfur.php> (accessed 10 July 2009).

the request. An article 16 deferral can thus only be granted by the Security Council if the latter makes a determination that such a deferral will lead to the ‘maintenance or restoration of peace and security’.<sup>63</sup> I must emphasise that it is the Security Council that has the discretion to determine that the deferral will lead to the maintenance or restoration of peace and security and not the African Union. Certainly, given the deficit in legitimacy often associated with the Council, the wide discretion afforded to the Council to defer ICC proceedings may be undesirable.<sup>64</sup> While this deficit in legitimacy puts into sharp focus the urgent need to reform the Security Council, it does not detract from the fact that the ICC warrant against President Al Bashir, under this two track framework, is not inconsistent with the pursuit of peace.

### Concluding observations

For far too long the world has witnessed populations ravaged by brutality and mass atrocities – acts that are contrary to shared values of humanity. In the second half of the twentieth century, international law and international lawyers preached the message of a new, humane vision of international law while watching helplessly, as mass atrocities were committed in Rwanda, Yugoslavia, Uganda and elsewhere. The ICC Statute, coming at the twilight of that century, served to offer hope that the values of this new international law, including the intolerance of impunity for crimes under international law, were not pipe dreams.

The decision of the African Union constituted a threat to the realisation of the hope offered by the ICC. But more than that, by suggesting, even if implicitly, that the ICC is a western tool against Africa, the AU decision served to question whether these values of a new kind of legal humanism, concerned with the common good – as opposed to safeguarding the state only – and opposed to impunity, can really be said to be universal, or whether the claim to universality is, in fact, imperial wool being pulled over our collective African eyes. The fight against impunity and the concern for the well-being of the most vulnerable are values central to humanity irrespective of geography. It is arguments to the contrary that attempt to blind us from this truth.

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<sup>63</sup>Article 39 of the Charter of the United Nations.

<sup>64</sup>I have previously argued for a restricted interpretation of the Security Council’s mandate precisely because of this deficit in legitimacy. See Tladi ‘Reflections on the rule of law in international law: The Security Council, international law and the limits of power’ (2006) 31 *SAYIL* 231; Tladi ‘Strict positivism, moral arguments, human rights and the Security Council: South Africa and the Myanmar vote’ (2008) 8 *African Human Rights Law Journal* 23. See also Tladi n 3 above.