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The ICC Arrest Warrant Against Omar al-Bashir: Darfur and the Non-Intervention Discourse

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On March 4, 2009, the International Criminal Court (ICC) issued an arrest warrant against Sudanese President Omar al-Bashir for war crimes and crimes against humanity committed in the country's Darfur province. It was the first such action ever taken against an incumbent head of state, thus establishing a potential and extremely controversial precedent. Consequently, African Union (AU) leaders unanimously supported Bashir's rejection of the court ruling, notwithstanding the fact that the AU itself is an interested party in the Darfur conflict. Following a decision to dispatch a peacekeeping force to the region, the AU had established AMIS (African Mission in Sudan), whose first contingents arrived in Darfur in June 2004. For the first time in the post-colonial era, African leaders had agreed to intervene in the internal affairs of one of their fellow African states, in response to massive human rights abuses. This challenge to one of the sacred norms of the African unity discourse since the 1960s thus made Darfur a test-case whose potential implications were far-

reaching.

The second and third clauses of the convention of the Organization of African Unity (OAU), established in 1963, deal with the principles of non-intervention in the internal affairs of independent states and respect for the sovereignty and territorial integrity of each state. In many cases, the commitment of sovereign African states to these principles enabled leaders to disregard clear evidence of grave violations of human rights in various intra-national conflicts. Beginning in the 1980s, however, the fierce commitment of the OAU to the principle of non-intervention revealed some cracks. A more critical discourse emerged, emphasizing that blind adherence to the non-intervention principle promoted a "culture of impunity" toward heads of state who committed atrocities, and demanding the development of a "culture of accountability". Yet, changes in the actual policies of the OAU were negligible.

The consequences of the OAU's blind adherence to the norm of non-intervention were clearly revealed during the genocide in Rwanda (1994). This event was different from previous cases of intra-national conflicts in post-colonial Africa in its intensity and cruelty: over a period of 90-100 days, more than 800,000 Tutsis (and Hutus suspected as collaborators) were murdered by government-inspired Hutu death squads. An international debate ensued regarding the responsibility of the international community to protect civilians in cases of intra-national conflicts that involve grave violations of human rights. Worldwide criticism pointed to the fact that although international efforts to damp down violence were undertaken prior to the onset of the genocidal rampage, nothing was done during the slaughter itself. As such, the international community ignored its commitment to Article 1 of the United Nations 1948 Convention on the Prevention and Punishment of the Crime of

Genocide, the "Never Again" promise. In addition, widespread international criticism of the OAU's lack of response to the Rwandan genocide obliged leaders of African states to reexamine the nature of their commitment to the principle of non-intervention in the internal affairs of sovereign states.

The Constitutive Act of the African Union, which replaced the OAU in 2002, indicates that this criticism had an impact. The AU's establishment signified the desire of African leaders to establish a more effective model of regional cooperation along the lines of the European Union, one better able to address Africa's acute social, economic and political problems. Regarding non-intervention, Article Four of the Act declared "the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity".

The outbreak of the conflict in Darfur presented an early challenge to the newborn (or re-born) organization. Its decision to dispatch a military and police force to the region, combined with the declaration of Prof. Alpha Oumar Konare, AU Commission Chairman, regarding the organization's commitment to a policy of "non-indifference", indicated that AU norms and principles had evolved.

Following an escalation of the conflict in 2003-04, the AU sponsored a cease-fire accord, signed in N'djamena, Chad in April 2004 between the Sudanese government and the two main rebel groups (the Sudan Liberation Army/Movement (SLA/M) and the Justice and Equality Movement (JEM)). The first AMIS contingents arrived in Darfur in June 2004 and were composed of 456 personnel from ten African countries. During 2005, the AMIS force was

further expanded to a total of 6171 and again at the end of July 2007, following Security Council Resolution 1769, authorizing the deployment of a hybrid UN-AU force UNAMID. With a planned deployment of 26,000 personnel (until March 2009, 60% were deployed) and an annual budget of over two billion dollars, UNAMID is the largest peacekeeping mission in Africa today. Yet, more than five years after the arrival of the first AMIS contingents in Darfur, with an estimated death toll of 300,000-400,000 and about 2,000,000 refugees and internally displaced people, the AU's intervention clearly had not produced the desired results, and called into question the significance of the new African discourse concerning the legitimacy of intervention in the internal affairs of sovereign states.

To be sure, it may be claimed that in spite of its failures and shortcomings, the AU intervention in Darfur was of historical importance. Notwithstanding its inability to prevent genocide, many international observers claimed that the AMIS presence in Darfur had helped reduce the intensity and cruelty of the conflict. A test case for Africa's peacekeeping capabilities, AMIS was able to handle various tasks, including those dealing with previously untouched subjects such as gender-based violence.

On the other hand, it is clear that AMIS forces were not able to prevent the continuation of the armed conflict and the associated murders, rapes and deportations which created what is currently the world's gravest humanitarian crisis. Part of its failure can be ascribed to the fact that the AMIS presence on the ground serves the interests of the Sudanese government, which employed the rhetoric of "African solutions to African problems", in order to delay effective international intervention. The continuing dependence of the AU on the Sudanese authorities' consent to its mandate as a peacekeeping mission in

Darfur was already revealed in the initial AU acceptance of a very restricted mandate, and was made clear repeatedly. As such, it indicates that the AU had not, in fact, abandoned its commitment to the sanctity of long-held principles prioritizing non-intervention in internal affairs and respect for the sovereignty and territorial integrity of member states.

Since the issuing of the arrest warrant, the Sudanese President has visited Egypt, Eritrea, Libya, Qatar, Saudi Arabia and recently Ethiopia. "The ICC decision has become positive for us," he claimed. "We have noticed a firm position by regional organizations, namely the Arab League and African Union." Indeed, it seems that at the moment, from the standpoint of the AU, the official representative of the African unity discourse, the principle of non-intervention in the internal affairs of sovereign states still reigns supreme. Yet, the actual discourse regarding the sovereignty of the State, the legitimacy of violent and oppressive regimes and the right to protect African citizens in cases of grave violations of human rights remains lively, on both the official and unofficial levels, and will surely be a factor in future African conflicts.

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