



ISS Public Seminar Report

Analysis of the 13th Ordinary Summit of the African Union (AU) Heads of States and Government, July 8, 2009

Conference Room 3, United Nations Conference Center (ECA), Addis Ababa

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Context

1 The 13th Ordinary African Union (AU) Summit in Sirte was never going to be business as usual, not because of its venue or the reputation of the host, but because of the pertinence of the issues it seeks to address. The theme of the summit was “Investing in Agriculture for Economic Growth and Food Security though timely and important considering the continent is facing serious food security problems, there was never any doubt the International Criminal Court (ICC) and the proposed Authority was going to generate heated and sometimes emotional debate. With regards to its’ decision on the ICC and AU Authority was the Summit a success? And where do these decisions leave or lead us?

Objective

2 While acknowledging the importance of other decisions that were taken especially with regards to agriculture; the principal objective of the seminar was to explore possible

implications of the Summit's decision on the ICC and the Proposed AU Authority. The strategic objective here was not to interrogate if the decisions taken were the rights ones or not. Rather in exploring possible implications, the seminar ventured to build consensus on how to manage, the consequences of the decisions.

Discussions

As customary to the ISS Public Seminars, the discussions were held under the Chatham House Rule and centred on the following themes.

A The Future of the ICC after Sirte

The Decision of the Summit on the ICC was centered on the following issues:

- The non-cooperation with ICC specifically on Al-Bashir not all ICC cases was quite an important and wise move. Important to note that Chad (for obvious reason that my enemy's enemy is my friend) and Botswana objected;
- The AU's disappointment on United Nations Security Council (UNSC) silence on its request for deferral;
- A question on why the UN Security Council should have referral role at all and a question of moral authority and legitimacy of the UNSC because of its membership was raised, considering the USA, China and Russia, all are against the ICC. Why should the UNSC have the power to refer cases to the ICC when three of the five permanent members are against the ICC?;
- The need to respect the primacy of jurisdiction;
- The need to capacitate the judicial and quasi-judicial bodies of the AU;
- Rectifying past mistakes of ICC State Parties conference which was held in Addis Ababa and excluded non-State parties of the ICC but members of the AU, this was raised as a concern. In terms of rules and regulations of the AU, any meeting conducted within its premises, headquarters or a mission, any Member States have the right to attend, unless the exception is justified by other decision.
- The revision of ICC's plea to the State parties to ICC of AU Member States to push for revision of the ICC prosecutorial power, especially to initiate on investigation.

- Specific assignment given to State parties of ICC from AU Member States that they should look at prosecutor's issue.
- The possibility that further decisions and measures with implementation of the already made decision by AU were also pointed as a decision.

3 It was argued that before one can begin to appreciate the implications of the Summit decision on the ICC, it is important to debunk some of the prejudices or assumptions that can impede helpful discussions. Some of these perception or prejudices are: any criticism against the ICC especially the Prosecutor is perceived as support for President Al-Bashir or supporting impunity in Africa or pro-impunity of officials; also some would want us to believe that the ICC is anti-African or a neo-colonial institution. Despite their existence, these are incorrect assumptions which blur any discussion that would have been helpful.. At least from an African perspective, the debate on the ICC in Sudan is not really about the fate of President of Sudan, the concerns are about Sudan's future, ICC's credibility and efficacy and the Darfurian victims.

4 Against this backdrop, one can begin to appreciate the implications of the AU's decision from two prisms: First what is the ICC's institutional interest when it took the Al-Bashir case knowing very well that is a sensitive and complicated one. The credibility of judicial institution rests on its ability to be perceived as being distant from political wrangling or not being seen as an activist. Is the ICC taking on more than it can chew? There are many cases at ICC's hand which are not yet finalized in terms of conviction or having the arrest of these people for example: the Lord's Resistant Army, Ali Mushabi and Mohammed Haroon. Why go after President Al-Bashir when these other cases are still far from being resolved? In exercising prosecutorial discretion why didn't the Prosecutor take note of public perception? It was argued that public opinion is an integral element in judicial proceedings. In some quarters, the ICC is seen as being impartial. How can one reconcile the fact that a common US soldier cannot be prosecuted by the ICC while a serving African President could easily be dragged before the ICC? Why LRA rebels and not Ugandan government soldiers?

5 The logical answer to the above questions could be that like any other institution, indicting President Al-Bashir was informed by an institutional urge for self-preservation. The ICC needed to prove its relevance but at what cost? It was pointed out in the discussions that one of the direct implications of the AU decision would be intense scrutiny of the thoughtfulness of the Prosecutor in exercising his discretion.

6 The second angle from which to appreciate the implications of the AU Decision is through the prism of mutual or commonality of interest. From an African perspective and in keeping of the African peace and security agenda, Africa wants ICC more than any other continent for the obvious reasons that there are a lot of human right violations of the gravest kind. The fact that African countries who are party to the ICC refused to withdraw enmass says a lot about how much some African states need the ICC. For now, the ICC wants Africa because it has 30 States parties to Rome statute and it is very important block for the ICC. The AU Commission was very interested and appreciated the ICC's role in Africa. AU was at the final stage of signing a very robust Memorandum of Understanding (MOU) with ICC which amongst others: encouraged AU member states to exercise first jurisdiction as part of the principles of complementarity; encourage remaining African states to ratify the Rome statute; AU to support witnesses of ICC and AU to submit information and documents necessary to ICC prosecutor and the opening of liaison office. For the time being, the fate of the MoU is in very precarious situation let alone the content.

7 Does the AU decision have some legal bases, is it entirely grounded in the logic of Article 98 or there is more than meet the eyes? Also one of the implications of the AU decision could be that the AU is not entirely happy with the level of cooperation and coordination between the AU and the UNSC. There is little doubt that by not listening to AU's request for referral, the AU feels humiliated and treated as a junior partner. Thus, the AU's reaction could be read as an expression of anger to being snubbed rather than a substantive objection to the ICC.

8 The most critical question is how some African countries can reconcile their obligation to the Rome Statute and their obligation to the AU decisions, taking cognisance of Article 27 and Article 98 of the Rome Statute. While Botswana and Chad objected to the decision, in the case of Chad it is highly unlikely that it would defect from the common position adopted by the AU. There is much at stake if it decides to incur the wrath of the AU. Thus Chad's objection was diplomatic posturing in lieu of its fight with Sudan rather a matter of principle considering the governance record of the country.

B Decision on AU Authority

9 It was pointed out that though the proposed AU Authority could be seen as a positive step towards African integration. The mandate of the Authority will not change that much from the Commission. Thus some of the problems especially political that have besieging the Commission will continue to constraint the Authority. Also the fact that the proposed Authority will operate within the same framework as the Commission, nothing substantially will change.

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