IDSA ISSUE BRIEF

The ICC's Role in Sudan: Peace versus Justice

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Summary

The ICC's approach to the Sudan crisis has been flawed because it failed to acknowledge the political implications of its rulings. It has only targeted the ruling elites of the Sudanese government, which poses a problem because these same elite perceive such indictments not as legal edicts but as tools of coercive diplomacy in the international arena. It is very difficult to enforce law in an ongoing conflict, and trade-offs are necessary between short-term deterrence and long-term prevention strategies. In order for ICC jurisdiction to truly have a sway it needs to be credible as a deterrence mechanism, and it should keep track of the political strategies used by various actors to resist a tribunal.

On 14 July 2008, the International Criminal Court's Chief Prosecutor, Luis Moreno-Ocampo, handed over evidence towards an arrest warrant application for Sudanese President, Omar Hassan al Bashir. On 4 March 2009, the warrant was approved by the pre-Trial Chamber at the ICC. The charges included responsibility for five counts of crimes against humanity and two counts of war crimes under Article 25(3) (a) of the Rome Statute.[1] This indictment is not the first time that a sitting head of state has been condemned for war crimes – Charles Taylor of Liberia and Slobodan Milosevic of Serbia were both charged on similar accounts while in office. Yet the subsequent expulsion of aid workers from Sudan's Darfur region has brought back into limelight the debate over the effectiveness of international criminal justice. On the one hand, the additional pressure on the Sudanese regime by the international community has been welcomed by many. On the other hand, there is the fear that such an indictment will mark the end of diplomatic efforts to bring peace within the country. Either way, it highlights the dual role that the ICC is compelled to adopt for itself – a legal obligation alongside a political act.

Prosecutions during an ongoing conflict such as the one in Sudan present an ethical dilemma in international law for an international court – there is the need to balance the need for justice as a deterrent towards future atrocities alongside the possibility of an exacerbation of conflict because wanted criminals ignore such rulings. This is in recognition of the fact that shaming certain individuals or passing certain kinds of verdicts has widespread repercussions in so far as they can incite wanton violence. More than simply administering punitive reparations the court needs to also account for the possibility of future atrocities due to its legal rulings.

In other words, ICC decisions have to be carefully calibrated because of the on-the-ground and political ramifications they can have. Legal deterrence, while necessary, is limited in its scope to prevent atrocities if not backed by political muscle power, intimidation and force. This brief examines the existing debates around the dual objectives of peace and justice for the ICC, and its application to the Sudan case. It shall also demonstrate how the two cannot be reconciled simultaneously without a credible enforcement mechanism from the international community.

ICC Verdict in the Sudan Crisis

When the ICC issued its arrest warrant for Sudan's president, it did so in compliance with Article 5 of the Rome Statute, which allows it to address crimes related to genocide, crimes against humanity, war crimes and crimes of aggression.[2] In a UN-issued mandate

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1 Prosecutor vs. Omar Hassan al Bashir, "http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050109/icc02050109?lan=en-GB

2 Rome Statute, ICC website, http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf

(Resolution 1564), an International Commission for Inquiry in Darfur was created to "investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, determine whether or not acts of genocide have occurred, identify the perpetrators of violations of international humanitarian law and human rights law in Darfur, and suggest means of ensuring that those responsible for such violations are held accountable."[3] The report found guilty the Government of Sudan and the Janjaweed for "serious violations of international human rights and humanitarian law." It also determined the government forces and certain militia groups were responsible for indiscriminate killings, albeit not amounting to genocide.[4] The matter was only subsequently handed over to the ICC's jurisdiction under Resolution 1593, whereby the Sudanese government was required to cooperate with the Court despite the fact that Sudan is not a party to the Rome Statute.[5]

The ICC, under the leadership of Prosecutor Moreno-Ocampo, conducted an investigation and issued warrants against two government officials in 2007 – Ahmed Mohamed Haroun and Mohamed Abdel Rahman Kushayb. Later in 2009, President al Bashir himself faced an arrest warrant.

Referral of the Darfur Case to the ICC – A Political Move

In carrying out the tasks given to it by the UNSC, the ICC fulfilled a legal obligation. But it also carried out what can be deemed as the political will of the international community. Security Council Resolution 1593 was adopted in 2005 with eleven favourable votes and four abstentions in the Security Council.[6] Most voting countries recognized the urgent need to address the "culture of impunity" prevalent in Sudan. In many ways, violations of humanitarian law had been recognized much earlier, and the international community had reached a general consensus that the war in Darfur had crossed humanitarian boundaries; a verdict from the ICC only served to legalize the international community's joint opinion on the Darfur activities.

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3 Report of the International Commission of Inquiry in Darfur to the UN Secretary General, January 2005, p. 2, http://www.un.org/News/dh/sudan/com_inq_darfur.pdf

4 Ibid, p. 4.

5 http://www.un.org/News/Press/docs/2005/sc8351.doc.htm. As per the Rome Statute, the Security Council is permitted to refer a situation to the Prosecutor by referral of a situation by a state party or under Chapter VII of the UN Charter. The request to take up the Darfur case was unprecedented because: 1) Sudan was not a signatory of the Rome Statute and hence under no obligation to abide by its rulings; and, 2) The UNSC had never before tried to pursue the law in a conflict situation without a functioning peace process at hand.

6 Algeria, Brazil, China and United States abstained. Denmark, Philippines, Japan, United Kingdom, Argentina, France, Greece, United Republic of Tanzania, Romania, Russian Federation and Benin voted in favour.

The pursuit of justice in an ongoing conflict through the ICC is a conscious decision by the international community to direct the conflict in a certain way and achieve some set objectives. An examination of the legal and political debates reveals that they all rely chiefly on a deterrence rationale, i.e. to end a "culture of impunity". Indeed many international lawyers and academics of law have claimed that deterrence was one of the most important reasons for the creation of international criminal tribunals and the ICC in the first place.[7] However, legal deterrence of the sorts administered by an international court has no place for realist politics. It only advances justice for those who have been wrongfully affected by humanitarian or war crimes. It also assumes that by punishing wrongdoers, it will prevent future abominations from occurring.[8]

Yet, in referring the Darfur problem to the ICC, UN Security Council (UNSC) members demonstrated that this was as much a political move as it was a way to address the issue of human rights violations. Although the ICC is technically independent of the Security Council, it shares a very complex relationship with the UNSC. In the Darfur case, the Prosecution began work only after referral from the Security Council, despite the fact that Sudan is not a party to the Rome Statute. The referral itself was made a full two years after the Darfur crisis had begun. Initially, the UNSC paid scant attention to the region – they were more concerned about the Naivasha peace process, a conflict resolution plan that would bring to an end the longer running civil war between the northern Khartuom government and the Southern command led by John Garang.

Yet the Darfur issue got increasing attention after human rights groups in the United States began to publicize the human rights violations occurring in the region. Although the US government at the time was involved in delicate counter-terrorism activities with the aid of the Sudanese government, it began to also get increasingly vocal about the Darfur atrocities. Resolution 1547, the UNSC's first resolution on the region, supported an intergovernmental African mission to Sudan along with a Chapter VI style political mandate.[9] In the subsequent Resolution 1556 in 2004, the UNSC took a stronger stance by acting under Chapter VII of the UN Charter thus employing peace enforcement mechanisms as well as welcoming the involvement of African Union troops to stop the

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7 The Overview of the Rome Statute of the ICC states that "Effective deterrence is a primary objective of those working to establish the international criminal court, " http://untreaty.un.org/cod/icc/general/overview.htm. In an essay M. Cherif Bassiouni, a Law Professor, writes that "the pursuit of justice and accountability, it is believed, fulfils fundamental human values, helps achieve peace and reconciliation, and contributes to the prevention and deterrence of future conflicts. "See, his "Combating Impunity for International Crimes," *University of Colorado Law Review*, 409, Spring 2000, p. 71.

8 The idea that justice will prevent future misdoings can be found in the preamble of the Rome Statute, which states that the ICC is "determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes, " http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf

9 http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/386/26/PDF/N0438626.pdf?OpenElement

humanitarian catastrophe playing out in Sudan. Yet, there was no mention of the kind of sanctions that would be in place should parties to the conflict fail to comply with the resolution.

The reason for this purposeful gap in the resolution was the varying interests of the UNSC member states. For the United States, Darfur was not at the top of the agenda. Russia and China did not want sanctions in place because they had vital economic interests in Sudan (oil wealth being the driving factor for China, and arms trade being the key for Russia). Others such as the United Kingdom did not want the Naivasha peace process to fall apart as a result of sanctions.[10] The task of managing Darfur was handed over to the African Union forces.

Security Council Resolution 1564 followed along the same vein, reiterating some of the same comments and commitments made in the earlier resolutions. It did call for an expansion of the role of the African Union as well as the establishment of an International Commission of Inquiry into the human rights violations. The commission's report, released in 2005, did not substantially assert that perpetrators had acted with genocidal intent. For, genocidal intent, according to the Commission, was a "determination that only a competent court can make on a case by case basis."[11]

When such a verdict was made, then the only logical choice left was for an international court like the ICC to take on the Darfur case. However, since Sudan was not a party to the Rome Statute treaty, the case could only be referred to the ICC via a UNSC resolution, which meant having to overcome the veto authority of Russia, China and the United States. Juan Mendez, the UN Special Advisor to the Secretary General on genocide, asserted that "the ICC offers the quickest, most effective way to initiate judicial proceedings against those responsible for war crimes and crimes against humanity in Darfur."[12] Facing increasing political isolation as well as increasing public activism on its stance, the UNSC finally decided to send the Darfur case to the ICC on 31 March, 2005.[13]

Impact of the ICC Decision on the Darfur Crisis

The prosecution of the sitting Head of State of Sudan, among other people, by the ICC provoked a series of reactions within the country. The most immediate impact was on the National Congress Party (NCP), the leading party to which al Bashir belongs. Members of the NCP perceived the indictment as a method for foreign governments to undertake regime change in Sudan, and viewed it as "the gravest threat to its survival it has ever

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10 Kenneth Rodman, "Darfur and the Limits of Legal Deterrence, "*Human Rights Quarterly*, vol. 30, 2008, p. 543.

11 http://www.un.org/News/dh/sudan/com_inq_darfur.pdf

12 Juan Mendez, "Action is needed to resolve the Darfur Crisis, "8 March 2005, republished in the Sudan Tribune, http://www.sudantribune.com/spip.php?page=imprimable&id_article=8402

13 Kenneth Rodman (2008) "Darfur and the Limits of Legal Deterrence, "*Human Rights Quarterly*, vol. 30, p. 546.

faced and a matter of life and death."[14] Hassan al Turabi, an opposition leader, was placed under arrest for stating that he was in agreement with the ICC decision. Even within the party, Bashir and his supporters are facing opposition from another group under the leadership of Second Vice President Ali Osman Taha, intelligence chief Salah Abdullah Gosh and energy minister Awad al-Jaz, who fear that Sudan is increasingly turning into a pariah state under al Bashir's leadership.[15]

The NCP also came under fire from its traditional Arab allies such as Egypt. President Hosni Mubarak expressed his disappointment in 2008 regarding al Bashir's failure to press forward with the Comprehensive Peace Agreement (CPA), and for encouraging Southern Sudan towards independence, thus setting hurdles in Egypt's unhindered access to the Nile River's waters.[16] Darfur's rebel groups such as the Justice and Equality Movement (JEM) welcomed the indictment, and have used it "to gain some legitimacy at the expense of the regime"[17] claiming that "it [was] a great moment for the people of Darfur."[18] The Sudan People's Liberation Movement (SPLM), the largest army after the Sudanese national army, had mixed reactions towards the indictment. Some like Salva Kiir, the President of the Government of Southern Sudan, believed that al Bashir's prosecution would be the beginning of the end of the CPA. Other elements within the SPLM were hopeful about regime change within Sudan.

The work of the UN Mission in Sudan and the AU troops on the ground was also adversely affected. Al Bashir "made it clear that he considers the UN responsible for allowing the ICC Prosecutor to proceed with his application for an arrest warrant, and he will hold the Secretary General and the Security Council responsible should the warrant be issued. Should this happen, all relations with the UN will be up for reconsideration."[19] Although the UN enjoys relative safety within the country, what was affected was their credibility as a neutral mediator in the conflict. The NCP suspected the UN of being partial (perhaps rightfully so), which in turn could adversely affect the weak comprehensive peace agreement. Within days of the indictment, al Bashir's government also expelled major humanitarian aid groups from Sudan because the government suspected "aid organizations of collaborating with the court by providing evidence and helping

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14 Alex de Waal, "Dangerous Weeks Ahead, " http://blogs.ssrc.org/sudan/2009/01/25/dangerous-weeks-ahead/.

15 Enough Team, "What the Warrant means: Justice, Peace and the key actors in Sudan, "12 February 2009, http://www.enoughproject.org/publications/what-warrant-means-justice-peace-and-key-actors-sudan

16 Ibid.

17 Ibid.

18 Benedict Moran and Jason McLure, "Darfur Rebels plan new assault on Sudanese capital, "Bloomberg News, 15 July 2008, http://www.bloomberg.com/apps/news?pid=20601116&sid=aRfRRmbfxqWE&refer=africa

19 Alex de Waal, "Dangerous Weeks Ahead, " http://blogs.ssrc.org/sudan/2009/01/25/dangerous-weeks-ahead/.

prosecutors gather testimony from victims."[20] Although the government promised to take over the aid delivery project, this dismissal had a catastrophic effect on the humanitarian situation on the ground.

Problems with the ICC Decision

An assessment of the immediate impacts of the indictment suggests that it only served to prolong the conflict and suffering in Sudan, without necessarily affecting al Bashir's own agenda – a point that had been duly noted by many states even within the Security Council. There are several juridico-political problems associated with the ICC decision.

Firstly, although the ICC has attempted to build a strong legal case based on procedural matters of law, it has not managed to translate its judicial proceedings into changing the way the international community thinks about and acts upon the Darfur crimes. The ICC has been caught up in trying to formulate international norms and winning legal debates, without necessarily understanding the political repercussions. The fact that very few people have been indicted and the spotlight has been placed on al Bashir suggests that these are the sole perpetrators who masterminded the Darfur atrocities, whereas the truth is that past Sudanese governments and many more people have also been complicit in carrying out military or military-proxy campaigns against civilians.

Secondly, incoherence between the Charter of the ICC and practical requirements for legal proceedings makes for a weak legal case for the prosecution. The ICC mandate acknowledges the stress that exists between peace and justice. For instance, Article 53 allows the Prosecutor to inform the pre-trial chamber to pause an investigation "in the interests of justice." In addition, Chief Prosecutor Moreno Ocampo has also stated in an Al-Jazeera interview that "My job is to present evidence to the judges. I have a mandate and I am driven by my mandate…but the negotiators' job is to stop [the atrocities]."[21] Yet, the ICC is often perceived as the go-to organization not just to solve legal problems, but also deal with humanitarian catastrophes, state building, conflict resolution, prevention of future conflict, and a host of other activities that fall outside its purview.

Furthermore, the ICC has been unable to dispense its legal duties in the pursuit of deterrence because of inherent flaws within its mandate. For example, the Rome Statute requires the cooperation of state parties to end impunity. It also provides assistance to those countries that are either unable or unwilling to carry out prosecutions locally.[22] The

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20 Lynsey Addario and Lydia Polgreen, "Aid Groups' Expulsion, Fears of More Misery, "*The New York Times*, 22 March 2009, http://www.nytimes.com/2009/03/23/world/africa/23darfur.html

21 Moreno Ocampo Interview, Al Jazeera, 31 May 2009, http://www.youtube.com/watch?v=t09ktdpN5ec

22 Under a principle known as "Complementarity, " the ICC even goes to the extent of incentivizing states to resolve their own conflicts in-house. This was a method devised to induce state leaders or combatants to seek peaceful solutions to their conflicts before an international justice system kicked in. Rome Statute, ICC website, http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf

legal absurdity here is that the ICC depends on those very states, leaders and governments for cooperation against whom it is carrying out an investigation. This sort of reliance creates a situation where evidence is defective or insufficient, thus incapacitating legal arguments.

Thirdly, the indictment does not do what it was meant to accomplish, i.e. reduce human rights violations and prevent violence against civilians. Historically too, ICC rulings have not had much deterrence value, although this has not been empirically proven. Among the various ways to reduce crime, rigorousness of punishment backed with credible force is one. In the Sudanese proceedings while the severity of the sentence can be harsh, it is hardly credible. For one, the ICC has no enforcement mechanism. It can only penalize al Bashir if he is brought to court. But if the Sudanese government refuses to turn al Bashir over (which it would do as long as he is in power), there is little the ICC can do. There has also been an absence of a credible punishment mechanism for non-compliance with the ICC ruling. There is no reassurance from the international community that it would use force in Darfur if it had to. Most members of the UN Security Council have their own varied interests in the region. Troop contributing nations from the African Union are not powerful enough to monitor the entire Darfur region or prevent all the atrocities. Peaceful settlement of the dispute through mediation or through the UN is the approach that the international community has decided to take. An ICC verdict without credible deterrence thus becomes redundant.

Finally, the ICC's ruling has created conditions in which it is not in the interest of rebel leaders to return to the negotiating table or reduce civilian casualties. In an effort to remove al Bashir from power, they would allow the atrocities to continue, perhaps even highlighting them in order to expose the ineptitude and dirty internal politics of the present government. This has not only significantly hampered the peace process, but also converted a legal ruling of the ICC into a political tool to leverage the interests of certain actors in the Darfur arena. Solutions for the conflict therefore, lie not in law but in politics. The ICC has been forced to adapt itself to the ground realties and acknowledge its role not only as a court of international criminal law, but also as a space where the politics of peace mix with justice.

Peace or Justice?

Of the three likely follow-up scenarios – first, removal of al Bashir from the office of head of state; second, renewal of civil war; third, a confrontation between the Sudanese government and the international community – the third one seems most likely under the current circumstances. In the months following the arrest warrant, as the world waited with baited breath for Sudanese politics to unravel, there has been little indication that al Bashir has faced challenges by others to his control. If anything, it has been the reverse – propped up by Sudan's oil wealth, al Bashir has managed to almost triple the nation's

GDP since he took power.[23] Even though several independent sources critiqued the president's unfair election campaigning in 2010, ground reports suggest that he did not actually need to rig the elections – people would have voted for him anyway. The fact that he is a wanted criminal by the ICC does not seem to affect most Sudanese, who have thrived in the economic boom.[24]

The ICC's approach to the Sudan crisis has been flawed because it failed to acknowledge the political implications of its rulings. It has only targeted the ruling elites of the Sudanese government, which poses a problem because these same elite perceive such indictments not as legal edicts but as tools of coercive diplomacy in the international arena. It is very difficult to enforce law in an ongoing conflict, and trade-offs are necessary between short-term deterrence and long-term prevention strategies. In order for ICC jurisdiction to truly have a sway, it needs to be credible as a deterrence mechanism (which requires the strong backing of the international community either in the form of military intervention or sanctions), and it should keep track of the political strategies used by various actors to resist a tribunal.

The ICC has evolved into a space where international legal instruments have to work alongside political ones. The Darfur case, for all the reasons mentioned above, cannot be treated as simply a law and order problem. If peace is to be reconciled with justice, then political solutions need to be sought too. Complex cases such as Darfur point to inherent inconsistencies and paradoxes even within the Rome Statute. While the statute claims that the ICC's goal is to end impunity, it also states that nations shall "refrain from the threat or use of force against the territorial integrity or political independence of any State" or "intervene in an armed conflict or in the internal affairs of any State."[25] Yet, without a credible force backing it, the ICC is reduced to playing only second fiddle to the UNSC. The ICC, like other international tribunals, does not operate in a legal bubble, rather in a more complex context where law without politics is essentially rendered meaningless.

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23 IMF Report, http://www.imf.org/external/pubs/ft/weo/2009/02/weodata/weorept.aspx? pr.x =36&pr.y=10&sy=1989&ey=2010&scsm=1&ssd=1&sort=country&ds=.&br=1&c=732&s=NGDP_R&grp=0&a=

24 Jeffrey Gettleman, "Sudan's growth buoys a leader reviled elsewhere, " April 14, 2010, http:// www.nytimes.com/2010/04/15/world/africa/15sudan.html

25 Rome Statute, http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf