

Indicting el-Bashir

The promise of justice versus the peril of politics: negotiating a balance

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On 14 July 2008, chief prosecutor Luis Moreno-Ocampo applied to the International Criminal Court (ICC) for an arrest warrant to be issued against Sudanese President Omar el-Bashir. The action has once again polarised the 'peace versus justice' debate in fragile societies. It has portrayed the ICC's move as a stark confrontation between the interests of justice and those of peace. El-Bashir is accused of war crimes and masterminding a campaign of violence and genocide that killed thousands, dehumanised many others, and displaced millions in Darfur. The charges cover five counts of genocide, two counts of crimes against humanity, and two counts of war crimes.

Human rights groups have hailed the ICC move as a blow to impunity. However, various Sudanese and regional players are concerned that the move will derail the peace process in Africa's largest country. The implication is that prosecuting el-Bashir may jeopardise a negotiated settlement to the Darfur conflict.

The broader issue is acknowledging the tensions that arise between peace and justice. This issue is of particular significance because the ICC's actions in other African countries like Uganda have led to criticisms that the Court is an obstacle to the peaceful resolution of some of the protracted conflicts on the continent.¹ While the Sudanese president has so far not been formally charged, a decision by the Court to accede to the charges and issue a warrant of arrest is expected by September 2008. In the light of the controversies surrounding the ICC's move, a central theme that emerges is the portrayal of the relationship between peace and justice as being in discordant. Indeed, while the charges against el-Bashir are seen as an important move to deter human rights abuse, they have paradoxically animated real concerns that they could diminish hopes for a peaceful settlement to the Darfur conflict and even stall the implementation of the Comprehensive Peace Accord (CPA). This article highlights some of the practical, legal and political challenges inherent in the ICC's actions and their implications on conflict dynamics in a fragile society like Sudan. The aim is to discuss and make suggestions on policy options for negotiating these tensions in Sudan and other relevant contexts.

The ICC's jurisdiction over Sudan

The ICC is the first permanent international institution established to investigate and prosecute genocide, crimes against humanity and war crimes and although it has a global mandate, its activities have largely concentrated in Africa,² which has sometimes raised eyebrows about the selectivity of international justice. In fact, the Sudanese government has accused the ICC of international conspiracy and lack of jurisdiction given that Sudan signed but never ratified Rome Statute.

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The ICC can exercise jurisdiction in cases where a) the accused is a national of a state party, b) the alleged crime took place on the territory of a state party, or c) a situation is referred to the Court by the United Nations Security Council.³ It can also exercise jurisdiction when national courts are unwilling or unable to investigate or prosecute grave violations, an omission Khartoum is accused of. Given that the ICC was designed to respond to the need by the international community to take a more active role in preventing grave violations of human rights and bringing to account those responsible, proponents argue that ICC and the international community cannot simply stand by and watch when Sudan's actions in Darfur are leading to deaths, dehumanisation and the displacement of thousands. The argument here is that the ICC embodies the progress of the international community in combating impunity and the terms of any peace process(es) in Sudan or elsewhere, need to be in accord with international law, as enshrined in the Rome Statute.

Dealing with the peace versus justice dilemma in Sudan has therefore to consider the legal obligation for states to investigate and prosecute the worst crimes and ICC's role in intervening where states have failed to do so. The principle of complementarity in the Rome Statute stipulates that the ICC should back up national judiciaries rather than supersede them. The Court, therefore, often faces thorny relationships with domestic governments and judiciaries, not least when, as in Sudan, state actors are themselves suspected of committing atrocities. Khartoum, for instance, established a special criminal court on events in Darfur by decree signed and published one day after the ICC opened its investigation, a move which has been seen as an attempt to undermine the work of the ICC, which cannot conduct trials capable of being undertaken by national courts.⁴

Charging a sitting president

The indictment of war crimes and crimes against humanity for a sitting head of state has not very common, but is not unprecedented. Slobodan Milosevic of Serbia and Charles Taylor of Liberia, were both charged while still in office. However the specific charge of genocide against el-Bashir is historical since it is the first for a sitting president. , The charges shook Khartoum which responded with an intense public relations campaign, rallying diplomatic support from the Arab League and the African Union, among others. Internally, it engaged political allies and co-opted opponents in a show of unity against the indictment. If the ICC accedes to the prosecu-

tor's charges and issues a warrant of arrest, President Bashir may find it difficult to travel outside the country for fear that he could be arrested. The issue is also critical, since charging a sitting head of state in a country where the president has wide-sweeping powers, raises serious concerns as it strikes at the core of the regime. It is for this reason that it led to mobilization of the state machinery with widely-televised staged marches showing popular support for the president. It is also very interesting in this case because the president has more power than real authority or legitimacy over various parts of the Sudanese territory. While his control of the security forces is strong, his authority is in question as shown by the march by a Darfur rebel group through hundreds of miles from the west to the outskirts of the capital, Khartoum in April 2008.

The peace versus justice nexus

An indictment of el-Bashir raises deep-seated fears that, should he be prosecuted, the country could tumble into Somalia-like chaos. After the ICC's announcement, Khartoum reacted angrily with Presidential Advisor, Bona Malual, threatening to expel the hybrid peacekeeping force from Darfur.⁵ The possibility of government implosion forced the political elite to rally around el-Bashir. The competing factions within the ruling National Congress Party (NCP) united in condemning the charges and revived the jihad rhetoric.⁶ They knew that the indictment could subject the entire state apparatus to uncertainty. While the posturing was dismissed by some as propaganda, it raised real concerns that el-Bashir might actually respond to the charges through a new round of violence, a concern informed by recent attacks on the hybrid peacekeeping force in Darfur.

Dealing with past human rights abuses in an emotionally charged and politically sensitive environment can be very problematic. A key issue becomes whether to prosecute at the risk of upsetting a fragile peace situation or not. In criminal systems, justice is seen to exist only if there is full respect and protection for human rights as well as independent and impartial judicial processes that can investigate and bring to trial those who have broken the law and violated human rights. Human rights groups, in particular, believe that impunity remains a major factor to continuing patterns of human rights abuse and, hence to punish cruel crimes against humanity becomes a moral duty and an obligation owed to victims and their families.

In the same vein, it is expected that the international community has to make a point to affirm that neither high officials

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like Bashir nor anyone else is above the law. The ICC's charges are therefore seen as a necessity in asserting the supremacy of democratic values and norms and to encourage the public to believe in them.⁷ The problem, however, in pursuing criminal justice against those who are politically and economically powerful, is that it could impede or even imperil the pursuit of peace. In Sudan, any international involvement that is deemed adversarial, may give the Khartoum government the chance to dismiss the effort as foreign meddling. It may provide an impetus for el-Bashir's policy of no peace no war. He may use the indictment as an excuse to stall the Darfur peace talks and the implementation of the CPA. In fact observers fear that el-Bashir may actually lash out by expelling Western diplomats and relief workers who provide aid to millions of displaced people in Darfur. This would provoke a serious humanitarian crisis. Khartoum has warned of a fierce reaction in the event of the Court assenting to the indictment. If it were to carry out its threats, the consequence may be disastrous. It may affect not only the humanitarian initiatives but also efforts toward expanding the peacekeeping mission in Darfur.

Currently, the Hybrid Peace-keeping Force remains badly undermanned. It took a period of protracted negotiations with Khartoum before it was finally agreed that 26,000 peacekeepers would start work on January 1 2008. By the end of July 2008 the Hybrid Force comprised of approximately 7,828 military personnel and under 2,000 unarmed police, a third of the required level. There is fear that the under resourced and poorly equipped hybrid force may come under attack from Sudanese soldiers and militias loyal to the government. There are also concerns that charging el-Bashir could end up emboldening rebel groups who have rejected the peace process in Darfur and lead them into an offensive against the government, which in turn would invite a military backlash from Khartoum. Opponents of the indictment against el-Bashir argue that the ICC's pursuit of war-crimes against leaders such as former Liberian warlord Charles Taylor has prolonged suffering in places like Zimbabwe, where the ruling party fears a similar fate if it were to surrender power.

Under what circumstances, then, should a fragile society turn to criminal justice in dealing with cases of impunity? Such societies face an array of institutional weaknesses and are sometimes forced to ask questions about justice that are different from those asked by formal courts in established democracies.⁸ In this case where criminal justice poses serious rule of the law problems, fragile societies may be forced to consider policy options that sometimes promote dissonance with the conventional understandings of justice. There certainly will be those who will be frustrated by such measures

but it is important to recognise the inherent opportunities as well as risks.

One opportunity in the ICC indictment is the possibility that they charges may be used to put pressure on the Sudanese government to reconsider its support for military actions in Darfur. El-Bashir has already visited the region on a campaign projecting himself as caring for the people of Darfur and willing to seek lasting peace in the region. The overall aim in Sudan should be to ensure the stability of the country in order to encourage and make possible social-economic and political reconstruction.

While the charges against el-Bashir represent recognition of human rights and a commitment to the rule of law, they also present possible constraints to the vital diplomatic efforts to bring lasting peace to Sudan. Indeed, while the pursuit of ICC charges may possibly lead to 'justice' for victims of atrocities committed by el-Bashir's government, they may also have the undesired consequence of undermining peace-building and normalization of society in a country in transition.

Sudan's peace process(es)

Sudan's multiple conflicts have been raging for some time now. The North-South conflict has been one of the longest and deadliest wars in Africa. Going as far back as 1955, it was only ended by a comprehensive Peace Accord (CPA) in 2005 which enshrined democratic transformation and the first free elections in 23 years by 2009. In Darfur, the conflict has existed for over five and a half years and it is estimated to have claimed over 300,000 lives. Besides Darfur, there are currently several other hot spots often witnessing sporadic armed conflicts. These include Abyei on the North-South border and Beja in the East.

Previously there had been delays in implementing the CPA but recent months have witnessed progress including the northern forces redeploying from the south, a road map for the disputed oil-rich Abyei region, an election law being passed and the sensitive question of census being completed. Some analysts believe the prospect of an ICC indictment might prod the Khartoum government into behaving better on the Darfur issue.⁹ Comparisons have been made with the Lord's Resistance Army (LRA), a Northern Uganda rebel group which agreed to enter into peace talks in 2006 after its top leaders were indicted by the ICC. But on the flipside, Joseph Kony the leader of the LRA, has refused to sign a peace agreement until the ICC's indictments are dropped. This illustrates the problem of new solutions posing new problems

Responses to ICC's charges

While human-rights advocates and many western nations have welcomed the indictment of el-Bashir, others like the Arab League have strongly opposed it. The African Union adopted a more cautious approach by urging the United Nations Security Council to use its powers to suspend the indictment for at least a year.

El-Bashir's southern former foes, now partners in government, the Sudan People's Liberation Movement (SPLM), also opposed the charges. Interestingly, they had supported the ICC when it issued arrest warrants for government minister Ahmed Haroun and a Darfur militia leader in 2007. This time the parliament of South Sudan asked the United Nations Security Council to suspend the warrants in the interest of peace in Sudan. SPLM Vice Chairperson Riek Machar argued that the charges would have a negative impact on the implementation of the Peace Agreement since el-Bashir was the leader of the party that signed the agreement with the SPLM. To Machar, the charges would affect governments operations including traveling abroad. In a strategic move, el-Bashir chose the president of South Sudan, Salva Kiir rather than a northerner to chair a committee appointed to lead the diplomatic and legal counter-offensive against the ICC.

Other opposition groups, too, have an interest in seeing the CPA implemented in full since it holds out the promise of them joining parliament in the elections scheduled for 2009.¹⁰ Mariam al-Mahdi, an opposition politician observes; "this is a classic case of confrontation between justice and stability – both of them are right, so we are very much trying to reconcile a way to avoid in our country this direct clash between two rights... justice and peace"¹¹. Supporters of indictment dismiss fears that it will derail peace process, saying there is little momentum for peace to be undermined. They cite examples of Slobodan Milosevic and Charles Taylor to argue that their indictment did not impede the peace settlement in their countries.

Conclusion

What should the international community do at this critical moment, as peacekeeping forces in Darfur increasingly come under attack and the peace agreement with the south wavers?

The overall aim must be to ensure the stability of the country so that there can be social, economic and political reconstruction. In this regard, a sensible option would be for the UN Security Council to suspend the ICC proceedings of the

ICC against el-Bashir or for the ICC Prosecutor himself to withdraw the indictments based on Article 53 of the Rome Statute.

However, at the same time, the international community can use the threat of these charges to put pressure on the Sudanese government to curb violence in Darfur and genuinely engage in peace making and peace-building efforts. El-Bashir must understand that if human rights abuses continue in Darfur because of his intransigence, the arrest warrants will be executed. It is about using the 'big stick' if the peace 'carrot' of withdrawing the ICC indictments does not work.

It is important to recognise that bringing charges against el-Bashir will not alone transform Sudan into a fair and inclusive society respectful of human rights. For this to happen will require a more comprehensive approach that helps Sudan to develop domestic institutional capacity and norms to deal with its systemic sources of conflict and human rights abuse.

Policy recommendations

The government of Sudan

- Ensure consolidation of the progress made so far, especially on the CPA.
- Discuss ways of ending the Darfur conflict and other hot spots with a broad section of local and international players.
- Put on trial the two officials accused of masterminding war crimes in Darfur or hand them over to the ICC. This sign of goodwill might persuade the United National Security Council to ask the ICC to suspend the case against el-Bashir.

The ICC

- Consider the current realities in seeking criminal justice in this fragile society. Although the ICC has made a powerful and laudable statement against impunity in Sudan, it may be safer to defer the charges, at least until the threat to peace and stability posed by a criminal trial is minimised.
- Play an active role in encouraging Sudan to fulfil its legal obligations and work with domestic judiciaries in helping them build capacity to prosecute cases

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The international community

Support • actively the search for a peaceful solution to Sudan's multiple conflicts. The international community, which includes the European Union, NATO member states, the Arab League, China and the African Union, also needs to provide logistical and financial support to the hybrid peace-keeping force and ensure effective delivery of humanitarian assistance. This is important in fostering a climate of certainty toward civilian protection in Darfur.

Civil society

- Avoid pursuing a legalistic vision of prosecuting el-Bashir while ignoring the high political risks involved.
- Increase efforts in agitating for a more inclusive and democratic society in Sudan and in promoting conditions for sustainable peace and reconstruction ■

Endnotes

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- 5 <http://www.france24.com/en/20080725-beshir-aide-threatens-expel-PEACEKEEPERS-darfur-sudan-security>, 25 July 2008 Accessed 29th July 2008
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ISSN 1607 2375

Produced by Acumen Publishing Solutions, Johannesburg.