Implications of the Absence of Genocide Charges for Bashir

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The ICC prosecutor’s request for an indictment of Omar al-Bashir charged the Sudanese president with three distinct categories of crimes: war crimes, crimes against humanity, and genocide. The Pre-Trial Chamber of the Court, however, granted an indictment only on the grounds of crimes against humanity and war crimes, stating that “the material provided by the Prosecution in support of its application for a warrant of arrest failed to provide reasonable grounds to believe that the Government of Sudan acted with specific intent to destroy, in whole or in part, the Fur, Masalit and Zaghawa groups.”

The allegation of genocide has prompted great controversy in the Darfur case, and the Pre-Trial Chamber’s ruling will undoubtedly contribute further to this. While an international legal consensus appears to be emerging that the violence in Darfur does not constitute genocide, the political use of the term by certain advocacy groups is unlikely to diminish as a result of the Pre-Trial Chamber’s ruling. The schism between legal and popular use of “genocide” may ultimately pose a serious problem for the advocacy movement and lead to tensions between international jurists committed to upholding strict standards of law and human rights activists demanding accountability for mass atrocities.

While activist groups and government officials in the US have labelled the Darfur conflict “genocide” for years, the 2005 UN investigation into the conflict, while confirming possible war crimes and crimes against humanity, found that “the Government of Sudan has not pursued a policy of Genocide [in Darfur].” Prominent critics of international intervention in Darfur such as Mahmood Mamdani have also decried the use of the term in describing the conflict.

The crime of genocide, as defined in international law by the 1948 Genocide Convention, requires a standard of specific intent (dolus specialis): the perpetrators of the genocide must act with “intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.” Despite its restricted definition in international law, in political discourse the genocide label is applied more liberally to a vast array of conflicts. For example, activist groups once labelled both the Australian government’s policy towards

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aboriginal peoples and the 1990s international economic sanctions regime against Iraq as genocides.5

Political mobilisation around the Darfur conflict in particular has relied heavily on the fact that genocide generates near unparalleled moral outrage and concern. In the US, the Genocide-Intervention Network (GI-Net) and STAND (GI-Net’s student division) both describe their organisations as “anti-genocide coalitions”. While some major international NGOs like Human Rights Watch and Amnesty International have not described the violence in Darfur as genocide, an entire community of niche groups specifically devoted to Darfur advocacy makes ubiquitous use of the word “genocide” in discussing the conflict. Even the Enough Project, which describes itself as “a project to end genocide,” has taken to characterising the violence in Darfur as a genocidal campaign. The popular “never again” slogan of activist groups also seeks to link Darfur to historical cases of genocide in Rwanda and Nazi Germany. In political discussion about Darfur, the word “genocide” is ever-present, appearing in most of the literature of activist organisations and in many speeches by Western political leaders.

Increasingly, however, it appears that the political perspective of groups seeking international action concerning mass atrocities diverges from the legal perspective of international jurists about the specificity of the crime of genocide. While the Pre-Trial Chamber did note that future evidence could be introduced to charge Bashir with genocide, the refusal to grant Ocampo’s initial request will complicate the agenda of activist organisations. While human rights groups appear to have universally trumpeted the ICC announcement as a success for the rule of law, the absence of the genocide charge may cast a spectre over their celebration.

It may become more difficult for activist groups to continue to rely on support from international legal institution in their campaigns if there is increasing dissent about whether the conflict can be accurately viewed as genocide. Activist groups appear to have initially viewed the ICC’s warrant as a victory, but over time international legal precedent may impair the ability of these groups to continue to describe the violence in Darfur as a genocide. Political leaders and even constituent groups could make use of the Pre-Trial Chamber’s ruling as a way to downplay the gravity of the violence in Darfur and dispute activist groups’ claims for the necessity of immediate intervention.

There is little dispute that serious crimes have been committed in Darfur, but crimes against humanity and war crimes do not possess the same power as genocide in terms of political mobilisation. Other instances of mass atrocities in the Democratic Republic of Congo (DRC), Sierra Leone, Colombia, Uganda and Afghanistan have not garnered anything close to the attention political activists and popular media, especially in the United States, have devoted to Darfur, despite the fact that in the case of the DRC, civil war death tolls from direct violence far exceed those in Sudan. While it is not immediately clear that the label of genocide alone constitutes the reason for the greater attention paid to Darfur vis-à-vis other serious international conflicts, the findings of the

Pre-Trial Chamber might potentially decrease the potency and momentum of some campaigns for humanitarian intervention in Darfur. Should the Darfur conflict, as a result of international legal consensus, begin to lose its popularly perceived pre-eminent status as the world’s only ongoing genocide, activists may be forced to develop new tools and strategies to encourage political and humanitarian action in Darfur.

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