Another Piece in the Puzzle: Accountability and Justice for International Crimes in Sudan

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An important aspect that has been neglected in the debate triggered by the recent decision of the Prosecutor of the International Criminal Court (ICC) to apply for an arrest warrant against Sudan’s President al-Bashir is its impact on the ongoing quest for accountability for international crimes in Sudan itself. It is true that the referral of the Darfur situation to the ICC and the bringing of charges against alleged perpetrators may be taken as an indication of the absence of effective domestic accountability mechanisms. However, the latest events also provide a timely opportunity to assess how Sudan has responded to the broader challenge of holding accountable those responsible for international crimes committed anywhere in Sudan.

In light of responses to the application by the ICC Prosecutor, it is pertinent to ask about the prospects of accountability and justice for such crimes generally in Sudan. Seeing such justice done is an essential prerequisite for a lasting peace, not least because impunity has arguably contributed to the perpetuation of conflicts and violations. Given the controversy surrounding the latest charges, it is also appropriate to consider how the ICC proceedings themselves may contribute to the development of the rule of law and accountability in Sudan.

Human rights lawyers, NGOs, the United Nations, the African Commission for Human and Peoples’ Rights and other bodies have documented a range of gross violations of international human rights and serious violations of international humanitarian law in Sudan that may constitute international crimes. This includes violations committed in the course of various conflicts, particularly in the South (1955-1972 and 1983-2005), in the Nuba Mountains (1985-2002), and in Darfur (2003-present). Violations have reportedly consisted of, inter alia, indiscriminate killings of civilians, summary executions, forced disappearances, torture, systematic rape, arbitrary arrests, destruction of livelihood and forced displacement. These crimes have resulted in hundreds of thousands of civilians killed and injured, and millions of displaced persons. In parallel, a series of violations such as arbitrary arrests, torture, extrajudicial killings and lack of fair trials against a large number of individuals, especially those considered political opponents, and whole communities have been reported over the past two decades. To date the perpetrators of these crimes have enjoyed almost complete impunity. There are only few cases where largely low-ranking officers have been held to account.

This impunity can be attributed to a series of factors, namely: deficiencies in the legal framework; the lack of transparency and effective monitoring; the absence of an independent judiciary; and the failure to establish adequate accountability mechanisms in response to violations committed in the course of conflict. The Comprehensive Peace
Agreement (CPA) that ended the North-South conflict in 2005 triggered the adoption of the National Interim Constitution (NIC) and envisaged reforms to bring key national laws in line with human rights standards. The Bill of Rights in the NIC guarantees fundamental rights, including human rights binding on Sudan as a matter of international treaty law. The NIC also provides for institutional changes to strengthen the rule of law, such as the establishment of a Constitutional Court and a National Human Rights Commission.

However, three years on, reforms undertaken or under consideration have failed to address the key legal obstacles that perpetuate impunity. This is due to a combination of factors, including a lack of a clear political commitment, a prevailing mindset of shielding members of law enforcement agencies from legal responsibility as well as delays and other shortcomings in the law-making process. The Armed Forces Act enacted in 2007 incorporates international crimes for the first time in Sudanese legislation but its definition of international crimes is not in conformity with international and comparative statutes and jurisprudence. The definition and evidentiary requirements of the criminal offences of rape and torture still contained in the 1991 Criminal Code are such that there have been very few successful prosecutions. Proposals to reform the relevant provisions, particularly on rape and sexual violence, have made limited progress to date.

The Armed Forces Act and the Police Act of 2008 retain immunity provisions, and there are justified concerns that the same will be the case in the National Security Forces Bill to be considered despite repeated calls by civil society organisations and UN human rights bodies to abolish these immunities. The rule that any official can be prosecuted only with the approval of his or her superior effectively creates a separate legal regime that is not subject to judicial review and has in practice resulted in impunity. Immunities are seen as necessary for law enforcement agencies to function and are deeply engrained in Sudanese legal culture. Taken together with the wide-ranging powers enjoyed by the law enforcement agencies, including in emergency legislation, immunities are one of the most visible manifestations of a system of opaque and unaccountable exceptionalism. This system has been allowed to operate without any effective restraints to date, as the National Human Rights Commission is yet to be appointed and the Constitutional Court is still finding its feet. Suits are pending that challenge immunity and emergency legislation as well as statutes of limitations for the crime of torture but it is at present unclear what role the Constitutional Court will play in upholding fundamental rights.

The CPA contains a strong commitment to human rights but is, as other peace agreements in Sudan before and after, silent on accountability. This is not least because omitting any reference to accountability for violations of international humanitarian law and international crimes seemingly served the mutual interest of both parties, i.e. the Government of Sudan and the Sudan People’s Liberation Movement/Sudan People’s Liberation Army (SPLM/SPLA). As a result, there has been no truth mechanism, investigations, prosecutions or trials of the thousands of perpetrators responsible for the most serious violations committed in one of the longest lasting conflicts in Africa.
The Darfur Peace Agreement concluded in 2006 between the Government of Sudan and the Minni Minawi faction of the Sudan Liberation Army (SLA) is equally silent on the question of accountability. A Special Criminal Court had been set up in June 2005 in Darfur following the opening of an investigation by the ICC prosecutor into international crimes committed during the conflict. This step was ostensibly designed to show that domestic courts were able and willing to try such crimes, which, if it were the case, would have rendered ICC prosecutions inadmissible by virtue of the principle of complementarity in the Rome Statute. However, the Special Criminal Court has had the jurisdiction and capacity to try only a small number of cases, which have mainly concerned charges for ordinary criminal offences rather than international crimes. To date, these cases have not addressed the bulk of instances in which international crimes are alleged to have been committed in Darfur and have not dealt with the perpetrators suspected of bearing the greatest responsibility for such crimes. By all accounts, the Court and other related measures have failed to constitute a credible accountability mechanism.

The ICC proceedings on Sudan take place against a historical backdrop of a lack of accountability and serious concerns about the rule of law and the protection of human rights in the criminal justice system. Defendants in criminal trials, particularly in conflict-related cases, have been subject to the jurisdiction of special courts and denied their right to a fair trial. Given the adverse publicity that the ICC faces in Sudan and other countries in the region, it is imperative that all its organs adhere strictly to fair trial standards and clearly explain the rationale for any measures taken. By so doing, it can set an example of taking a rule of law approach to justice that seeks to investigate and, where sufficient evidence is available, prosecute even-handedly those responsible for having committed international crimes in Darfur. Such an approach will assist, or at least not hinder, domestic civil society efforts aimed at fostering a culture of accountability that signifies respect for the rule of law and human rights in Sudan.

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