

Bashir and the ICC: The Aura or Audition of International Justice in Africa?

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The recent move by the prosecutor of the International Criminal Court (ICC), Luis Moreno Ocampo, seeking the indictment of Sudanese President Omar al-Bashir on grounds of his aiding and abetting the commission of war crimes, crimes against humanity and genocide in Darfur has taken the world by storm. Ocampo has stated that over 35,000 Darfuris have been killed and another 2.5 million subjected to a campaign of rape, hunger and fear by Sudanese armed forces and the Janjaweed militia in what he calls “genocide by attrition.”

This move was not unprecedented since Bashir is poised to become the third sitting head of state to be indicted by an international court after Yugoslavia’s Slobodan Milosevic and Liberia’s Charles Taylor. Nonetheless, this is a controversial move, as Bashir has allowed the United Nations to send a joint UN-AU peacekeeping force to stabilise Darfur amid several peace initiatives that some commentators believe the ICC charges could jeopardise. This move also followed the indictment of two Sudanese ministers in Bashir’s government, Ahmed Haroun (Humanitarian Affairs minister) and Ali Kushayb (Janjaweed militia leader) and the secret indictment and surprise arrest in Belgium of former Congolese rebel-leader-turned-opposition-politician, Jean Pierre Bemba. The recent ICC charges have fuelled an already heated debate (and growing scepticism among African observers) about the ICC’s involvement in Africa.

The ICC’s uncompromising search for justice in Africa – in places such as northern Uganda, ravaged by the Lord’s Resistance Army (LRA), Central African Republic (CAR), the Democratic Republic of Congo (DRC) and Sudan’s Darfur region – has startled many observers. Are we witnessing in Africa an end to impunity or simply a test-run of an international justice system?

There is no doubt that, in only six years of operation, the ICC has drawn attention to concerns about justice and impunity in Africa and beyond. It has highlighted the malevolence humanity endures every day, and has awakened the international community to the need to fight injustice. The ICC has also signalled that impunity shall not be tolerated and no individual is above the law.

Nonetheless, the ICC has thus far controversially involved itself in only a few situations in Africa but left Iraq, Afghanistan, Burma and other areas untouched. Of the over 139 complaints made to the ICC, it has managed to investigate and find evidence warranting indictments only in Africa, although war crimes are being committed all over the world. This suggests that the ICC is more concerned with impunity in Africa than addressing war crimes and crimes against humanity committed in other parts of the world.

By disproportionately focusing on Africa, the ICC prosecutor seems to have reduced the problem of impunity to an exclusive African phenomenon. Even African states

such as Sudan which did not ratify the Rome Statute are being subjected by the United Nations Security Council to a system they do not recognise. However, some permanent members of the Security Council do not themselves recognise the Rome Statute. And, moreover, in the case of Sudan, not only has the Security Council referred a dissenting sovereign state to the ICC, but it did so against a backdrop of international outrage over its acquiescence to the international crimes being committed by some of its own permanent members, such as the US, Russia and China (with China even answerable for its support of the Sudanese government).

Over the last four years, Ocampo's ICC has increasingly resembled a misguided missile. To advocate for punitive justice only for Africa is to miss the target of comprehensive justice in the fight against impunity. Africa comprises societies accustomed to restorative justice approaches. Having suffered atrocities and abuses over decades, the fabric of African societies is torn and demands something more than convictions and imprisonment. The restoration of peace might be the first measure of justice in all of the African situations currently under investigation by the ICC.

Furthermore, the ICC's very involvement might be part of the suffering as it often constitutes an obstacle to an immediate cessation of hostilities and long-term end to conflict. The ICC prosecutor might well bear no responsibility for renewed and heightened violence and atrocities in conflict situations under his investigation, for example in Darfur and northern Uganda, even when his continued involvement may frustrate a realistic chance of ending the commission of international crimes. The fear of ICC prosecution might scare indicted parties from engaging in a meaningful peace negotiation. Some people affected by the LRA insurgency in northern Uganda, for example, blame the ICC for their continued plight. Many northern Ugandans initially believed that the ICC would arrest Kony and bring the war to an end. They now know that there can be no permanent peace in the region as long as Kony and the LRA remain at large. The recently concluded Juba peace process may have had a different outcome had it not been for the ICC's indictment of Kony and his top commanders.

Norbert Mao, chairman of Gulu district in LRA-affected northern Uganda, once wrote that Ocampo would not hesitate to drop or suspend the charges against the LRA commanders for the sake of peace, had Ocampo's own mother been decaying in a squalid IDP camps. A caller to the "Beyond Juba Project" talk show on Mega FM, a local radio station in Gulu, complained, "We would not be dying of this Hepatitis E disease had the ICC not frustrated the Juba peace talks. We would all be back in our villages and not in these congested camps. But how can we go back when Kony is not coming back home fearing the ICC? How sure are we that he is not going to decide to fight forever to die rather than be taken to the ICC?"

The mechanical pursuit of punitive justice by the ICC in complex situations like northern Uganda and Darfur, where victims want an immediate end to their anguish, is iniquitous, especially in the presence of more pragmatic efforts like peace negotiations. Whereas the ICC's involvement may have forced the parties to the negotiating table, peace talks have happened before and succeeded without any threat from the ICC, and none has so far succeeded in its presence.

Meanwhile, Ocampo's move to indict Bashir represents an empty threat; simply part of the ICC's unrealistic desire to pursue punitive justice in all situations. In light of

many African leaders' sugar-coated approach to Robert Mugabe in Zimbabwe, the ICC did not expect pressure or cooperation against Bashir from any other African leaders. Most African heads of states are (potential) criminals in the eyes of the ICC and the leaders are well aware of this. What happened to Charles Taylor is fresh in every African leader's mind, and the irresponsible quest for justice by the ICC prosecutor reminds them of Taylor being whisked off in handcuffs to The Hague aboard a United Nations helicopter. Like Mugabe, Bashir and his cohorts will stop at nothing to retain power. They will stifle opposition groups and rig elections with impunity, while those engaged in a liberation struggle or military rebellion like that of Kony's LRA and Bemba's *Mouvement de Libération du Congo* (MLC) will be labelled terrorists and referred to the ICC. The regime in power might even create conditions conducive to the commission of atrocities, while feigning some willingness to cooperate with the ICC. For example, Presidents Yoweri Museveni of Uganda and Joseph Kabila of the DRC – who referred the conflict situations in their countries to the ICC – have themselves committed international war crimes.

Before the recent aggressive pursuit of punitive justice by Ocampo and the ICC, it was thought that an effective international justice mechanism would help maintain global stability, stop impunity and complement states' efforts to administer justice. For sixty years, since the adoption of the Universal Declaration of Human Rights (UDHR), several international and regional instruments for accountability, including the International Court of Justice (ICJ), existed without igniting a globally polarising debate as the ICC has done. However, the structure and impact of the ICC on states' sovereignty, compounded by the uncompromising stance of its principals such as Ocampo, is calamitous given the current global political situation, which includes China and the US squabbling for oil in Sudan.

Until the adoption of the Rome Statute, international law and conventions – and the institutions in charge of their enforcement – recognised the importance of state sovereignty, especially where there was a genuine willingness and attempt to redress a wrong and move forward. Many states struggled with injustices and atrocities meted out in conflict situations but ultimately made progress because there were no threats of international prosecutions. Domestic struggles and peace talks, not international justice, ended a century of apartheid in South Africa and led to an ongoing process of reconciliation. In Angola, Sierra Leone, Liberia and Rwanda, attempts are now being made to heal divisions and meet the need for justice without the involvement of the ICC, and only after direct hostilities have ceased. Negotiations halted the 23-year-old violent conflict between the northern Khartoum government and southern Sudan People's Liberation Army (SPLA), producing an agreed solution to the oldest Afro-Arab conflict. Protracted talks between the government of Uganda and the LRA ushered in three years of unprecedented peace and facilitated the cautious but gradual return of IDPs to their villages, leaving behind the inhumane conditions in the camps. The above cases emphasise the need for promotion of local solutions and flexibility on the part of the international community in order to nurture local solutions to the often complex conflicts in Africa. They underscore the need to carefully sequence peace and justice and pave the way for a situation where the search for justice does not perpetuate conflict nor ignore the ongoing suffering of victims.

By seeking the arrest and prosecution of Bashir at this particular time, the ICC now risks thwarting the on-going peace initiatives not only in Darfur but also the fragile

Comprehensive Peace Agreement in southern Sudan. It also undermines the ICC's own interests in arresting the LRA indictees because realistically only Sudan could have captured them. The statement by Ocampo that he does not have the luxury to look away since he has evidence of serious crimes with which to indict Bashir, highlights his insularity. He risks portraying the ICC as detached from present global political and conflict realities.

The world now waits to see how the Sudanese government will react. The immediate effect though is that many aid agencies are frightened and threatening to withdraw from Darfur, thus affecting the delivery of much-needed food aid and other relief services. The United Nations has raised its security alert in the region and started evacuating non-essential staff. The ruling National Congress Party remains defiant and has warned of further violence. An impending referendum on independence for Southern Sudan now appears fraught and may not take place at all if Bashir feels threatened. The impact of the ICC's approach is that Darfuri victims may be left without relief supplies and without hope for a peaceful solution to the conflict.

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