

# PURSUING JUSTICE IN DARFUR

By GUNNAR M. SØRBØ\*

**Abstract:** *Pursuing justice during ongoing conflict raises issues that differ from those that arise when justice is pursued after peace agreements have been made or wars have been won. Using the arrest warrant issued by the International Criminal Court (ICC) against Sudan's President Bashir for crimes committed in Darfur, this paper explores these issues, particularly the implications for tensions between peace and justice. The warrant has exposed increasing divisions within the international community regarding Darfur as well as the ICC. It is too early to conclude whether criminal proceedings and peace negotiations can successfully proceed on parallel tracks. So far, the arrest warrant diverts political attention away from other pressing political issues and has made it more rather than less likely that Bashir will remain Sudan's president after elections scheduled for 2010.*

**Keywords:** *Criminal justice, Darfur, ICC, Peace, Genocide.*

## A. INTRODUCTION

On March 4, 2009, the Pre-Trial Chamber of the International Criminal Court (ICC) issued a warrant of arrest against Sudanese President Omar Ahmad Hassan Al Bashir, having found reasonable grounds to believe him responsible for crimes against humanity and war crimes committed in Darfur.<sup>1</sup> The Chamber rejected charges of genocide that had been included in the application presented to the Court by its Chief Prosecutor Luis Moreno-Ocampo in July 2008.

While a number of international human rights and advocacy organizations and several Western countries welcomed the decision, describing it as a crucial step towards challenging the impunity that has worsened conflict in Darfur, the arrest warrant was met with criticism by the African Union (AU) and the Arab League. It was also opposed by many non-Western countries, including Russia and China, and questioned by many scholars. A common argument was that the arrest warrant would make it more difficult to achieve peace in Darfur and that it might also jeopardize the already fragile Comprehensive Peace Agreement (CPA) concluded by the Sudan Government and the Sudan People's Liberation Movement (SPLM) in 2005 that ended 22 years of war in southern Sudan. A number of African leaders also accused the Court of unfairly targeting their continent while not looking at human rights abuses elsewhere.

---

\* Gunnar M. Sørbo (b.1948), Dr.Philos (Bergen), Director, Chr. Michelsen Institute. Email: gunnar.sorbo@cmi.no.

<sup>1</sup> Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-01 (The Hague: ICC 2009).

In Sudan, Bashir and his government took a defiant stance. The President said the judges of the ICC could “eat” their arrest warrant and he traveled to Darfur as well as abroad to mobilize support. The Court’s decision was followed by the immediate expulsion of 13 aid agencies from Sudan. The government claimed they had violated the laws of humanitarian work in cooperating with the “so-called International Criminal Court”<sup>2</sup> and it was announced that Sudan would “nationalize” all humanitarian work within one year. In addition, several Sudanese human rights organizations were closed down by the government. This caused grave concern not only for the plight of the population in Darfur but also for people in other parts of Sudan where humanitarian assistance is sorely needed.<sup>3</sup> There was also fear that communities would turn against each other as resources provided by NGOs disappeared.

Not many years ago, it would have been unthinkable to pursue justice claims during an ongoing conflict, particularly against a serving head of state. When proceedings occurred, it was usually in a post-conflict or post-war context or part of a political transition, as e.g. in Argentina. Since the Balkan wars, however, we have seen dramatic developments in this regard.<sup>4</sup> The first tribunal to be established in the context of an ongoing armed conflict was the International Criminal Tribunal for the former Yugoslavia (1993). Later, we saw the establishment of a Special Court for Sierra Leone and the ICC, the latter being established in The Hague in 2002 based on the Rome Statute. The ICC has 108 member states and has issued arrest warrants in four ongoing conflicts – in Uganda, the Democratic Republic of the Congo (DRC), the Central African Republic (CAR) and Sudan. Except for Sudan, which did not ratify the Rome Statute, the other African countries have referred themselves to the ICC.

Pursuing justice during a conflict raises a number of issues that differ from those that arise when justice is pursued after peace agreements have been made or wars have been won and there is a victor. The implications for tensions between peace and justice are particularly obvious. Could indictments issued during conflict have positive effects (including deterrence) or rather prolong conflict and suffering? How do we interpret the interests of justice? This paper explores these issues based on an analysis of the Darfur crisis and the intense debate that was unleashed by the Prosecutor’s application for an arrest warrant and still continues.<sup>5</sup>

## B. DARFUR: AN UNFOLDING CRISIS

Darfur was a Fur-dominated yet multi-ethnic sultanate until 1916 when it came under the Anglo-Egyptian Condominium which lasted until Sudan achieved independence in 1956.

---

<sup>2</sup> <http://www.sudantribune.com/spip.php?article30392>. Accessed October 14, 2009.

<sup>3</sup> <http://www.odi.org.uk/events/report.asp?id=460&title=indicting-bashir-sudan-international-criminal-court>. Accessed October 14, 2009.

<sup>4</sup> International Center for Transitional Justice: *Pursuing Justice in Ongoing Conflict: A Discussion of Current Practice* (New York: ICTJ May 2007).

<sup>5</sup> The author is grateful to Astri Suhrke and Abdel Ghaffar Mohamed Ahmed for very constructive comments on earlier drafts of this paper.

While prone to local conflict over resources, the region remained quite stable until the late 1980s. Its stability was based on what has been termed the “Darfur consensus.”<sup>6</sup> Land was the lynchpin of this consensus. The ethnic groups that make up a central majority bloc in Darfur (Fur, Baggara [cattle holding] Arabs, Masalit, Zaghawa and many smaller non-Arab tribes) came together in enjoying access to land under particular arrangements (the *dar* and *hakura* systems) based on the native administration system of local government. The largest group that was deprived of land rights was the Abbala (camel holding) Arabs.<sup>7</sup>

According to Fadul and Tanner, most Darfurians contend that the current conflict constitutes an assault on the Darfur consensus.<sup>8</sup> To a large extent, the factors that pushed the region over the edge were external and include the blow-back from the Chadian wars, Libyan meddling and interventions by the central government in Khartoum, and severe droughts leading to migrations. One of the primary traits of the Darfur crisis can be described as a split between those members of the population with territories or land grants (*hawakir*) and those without.<sup>9</sup>

One of the early signs of conflict was a dramatic increase in violent incidents between farmers and herders. Cyclical droughts during the 1970s, 1980s and 1990s forced herders to encroach on the lands of farmers. While banditry based on the use of small arms began in the late 1970s, a wide-ranging conflict started in 1987–89 between the sedentary Fur and a broad coalition of both cattle and camel-herding Arab tribes. For the first time, the majority of Arabs in Darfur came together, united by a pro-Arab ideology and supported by Libya and the government in Khartoum. It was during these conflicts that the term “Janjaweed” first appeared, to describe armed horsemen organized as (mostly Arab) militia groups seeking access to land.<sup>10</sup>

When the first rebel groups, the SLA and JEM, appeared in early 2003, widespread inter-community violence had already spread across Darfur, much of it exacerbated by the government’s divisive policies, including manipulation of land issues and reorganization of administrative subdivisions. The two groups made claims that aimed to transcend ethnic cleavages with demands for a more equitable distribution of power and wealth for Darfur as well as for all of Sudan. Their base was mostly non-Arab, mainly Zaghawa and Fur. In response to their early military success, Khartoum mobilized militias from local Arab populations. The ensuing violence destroyed numerous non-Arab villages. It also drove non-Arab civilians to join the armed opposition.

In 2004, the violence finally attracted the attention of the international community. The extent of forced displacements, killings and criminal acts has made Darfur one of the worst

---

<sup>6</sup> A.-J. Fadul and V. Tanner: “Darfur After Abuja: “A View from the Ground” in A. de Waal and J. Flint: *War in Darfur and the Search for Peace* (Global Equity Initiative: Harvard University and Justice Africa 2007) 297.

<sup>7</sup> Fadul and Tanner (2007) 298.

<sup>8</sup> Fadul and Tanner (2007) 298.

<sup>9</sup> J. Tubiana: “Darfur: A War for Land?” in A. de Waal and J. Flint: *War in Darfur and the Search for Peace* (Global Equity Initiative: Harvard University and Justice Africa 2007).

<sup>10</sup> J. Tubiana (2007) 70.

human rights disasters in the world. More than 200,000 people may have been killed, although both numbers and causes of death remain disputed.<sup>11</sup> Nearly two million people have been displaced, i.e. one in three Darfurians. Many observers have spoken of genocide, others of ethnic cleansing, meaning that civilians were forced off their land because of their ethnicity – their villages destroyed, their livestock and other belongings looted. As the crisis developed, the war exposed and aggravated a feeling of difference between Arabs and non-Arabs, not based on skin color, culture, livelihood or religion but on claims to identity prompted by, and as a reaction to the Arab racist ideology that had emerged since the early 1980s.<sup>12</sup>

The great majority of massacres were committed between July 2003 and April 2004. Mortality from disease and hunger peaked at the end of 2004 and fell rapidly after that. The period of intense conflict lasted until January 2005. The main reason displacement still continues has been generalized insecurity, much of it banditry and rampant criminality, some of it fighting between militias as government-armed tribal militias or rebel movements turn on one another, but also among Arab nomads fighting for access to resources. To most people on the ground it appears as a vicious combination of counterinsurgency by the government and intertribal fighting. Deployment of AU peacekeepers, replaced in 2008 by a hybrid UN/AU force (UNAMID), may have improved security in the vicinity of their encampments but overall, there has been no peace to keep.

The current situation is often referred to as a low-intensity conflict. The number of fatalities reported by UNAMID indicates about 100 deaths from violence monthly in 2009, down from about 150 in 2008, and only a minority of these deaths are due to combat between government and rebels.<sup>13</sup> For the same period, the United Nations Mission in Sudan (UNMIS) declared that violent deaths due to conflict in South Sudan were considerably higher than casualties in Darfur. However, a conflict which, for longer or shorter periods, involves relatively few killings may nonetheless cause profound and lasting social disruption. This is clearly the case in Darfur where the crisis has caused forced displacement of large populations, disruption of livelihoods and social changes that generally have increased insecurity and undermined dignity.

The Darfur crisis has also become increasingly complex and difficult to solve. Thus current conflicts extend into Chad. In 2003–04, some 200,000 Sudanese refugees fled across the border and rear bases in eastern Chad were established by Darfurian rebel groups. The rebels were strengthened by their membership of cross-border ethnic groups, including the Zaghawa to which the Chadian president Idris Deby belongs. As a result, several crises are now increasingly interlinked, including the long-standing conflict in Chad between the Cha-

---

<sup>11</sup> M. Mamdani: *Saviors and Survivors – Darfur, Politics and the War on Terror* (London and New York: Verso 2009) 5–6.

<sup>12</sup> J. Tubiana (2007) 70. J. Flint and A. de Waal: *Darfur: A Short History of a Long War* (London and New York: Zed Books 2005) 51.

<sup>13</sup> A. de Waal: *Fixing the political marketplace: How can we make peace without functioning state institutions?* (Bergen Chr. Michelsen Institute: The Chr. Michelsen Lecture 2009) 3.

dian government and a divided political opposition, and the proxy war in which Chad and Sudan are engaged through rebel groups and militias.<sup>14</sup>

The events and developments in Darfur, then, must be understood in the context of a number of factors operating at different levels, some with primarily local, others with regional and even international dimensions, the latter having become particularly prominent as the crisis has unfolded.

### C. THE ICC AND DARFUR

In September 2004, US Secretary of State Colin Powell appeared before the Senate Foreign Relations Committee and announced that “genocide has occurred in Darfur and may still be occurring.”<sup>15</sup> With that announcement, the United States officially accused the Sudan Government of perpetrating genocide. For his statement Powell relied on the work done a few months earlier by the Darfur Atrocities Documentation Team (ADT) which conducted interviews with more than 1,200 Darfurian refugees along the Chad/Sudan border. The survey team was sponsored by the State Department and its findings have been widely disseminated and discussed.<sup>16</sup>

In brief, the material collected by the ADT showed that (a) the Janjaweed and Sudanese military forces had committed large-scale acts of violence, including murders, rape, and physical assaults on non-Arab individuals; that (b) they destroyed villages, foodstuffs and other means of survival; that (c) the Sudan government and its military forces obstructed food, water, medicine, and other humanitarian aid from reaching affected populations, thereby leading to further deaths and suffering; and that (d) Khartoum failed to stop the violence despite multiple warnings.

Aside from continuing to provide humanitarian aid, the only practical action the United States undertook following Powell’s statement was to refer the matter to the UN Security Council. In doing so, it called for a more comprehensive study and an International Commission of Inquiry into Darfur (ICID) was established led by Antonio Cassese from Italy, former president of the International Criminal Tribunal for the Former Yugoslavia. The five-member commission included three Africans – from Ghana, South Africa and Egypt.

The ICID report concluded that the government did not pursue a policy of genocide in Darfur but that Khartoum and government-sponsored Arab militias (Janjaweed) engaged in “widespread and systematic” abuse that may constitute crimes against humanity. The panel

---

<sup>14</sup> J. Tubiana: *The Chad-Sudan Proxy War and the ‘Darfurization’ of Chad: Myths and Reality* (Geneva: Graduate Institute of International Studies, Small Arms Survey, Sudan Working Paper No.12, 2008) 57.

<sup>15</sup> R.O. Collins: “Disaster in Darfur: Historical Overview” in S. Totten and E. Marcussen (eds.): *Genocide in Darfur – Investigating the Atrocities in the Sudan* (New York and London: Routledge 2006) 21.

<sup>16</sup> S. Totten and E. Marcussen (2006); J. Hagan and W. Rymond-Richmond: *Darfur and the Crime of Genocide* (Cambridge: Cambridge University Press 2009).

further maintained that the Sudanese judiciary “is unable or unwilling” to prosecute those crimes and recommended referring the case to the ICC.<sup>17</sup> This was done by the Security Council on March 31, 2005 (Resolution 1593). As Sudan is not a member of the ICC, it meant that its jurisdiction was imposed on it by the Security Council. According to a press statement by the Secretary-General, the decision was made in order to “provide an appropriate mechanism to lift the veil of impunity that has allowed human rights crimes in Darfur to continue unchecked.”

More than two years later (May 2007), the first warrant of arrest was issued against Ahmad Haroun, Minister of State for Humanitarian Affairs, and Ali Kushayb, alleged leader of Militia/Janjaweed, for crimes against humanity and war crimes committed in Darfur. The Prosecutor’s application detailed several specific crimes committed during the height of hostilities in 2003 and 2004. The mode of liability is “common purpose” in committing the crimes, i.e. the crimes are regarded as the product of collective action by an institution or group.<sup>18</sup> The Sudan government, however, refused to hand the pair over to the Court or to start criminal proceedings against them in Khartoum.

It should be noted that the Prosecutor has also investigated possible criminal acts committed by Darfur’s rebel movements. On May 18, 2009, Bahr Idriss Abu Garda appeared as the first Sudanese in front of the Court. He was in charge of military operations of the United Resistance Front in Darfur and his confirmation hearing is scheduled for October 19–29, 2009.<sup>19</sup>

The charges against Bashir are broad-ranging, covering the period since early 2003 when the insurgency started in Darfur until the present. The charges of crimes against humanity and war crimes are mostly specific to the period between July 2003 and April 2004 and include murder, extermination, forcible transfer, torture and rape, as well as “intentionally directing attacks against a civilian population as such or against individual civilians not taking part in hostilities.”<sup>20</sup>

More specifically, the Prosecutor’s application charged President Bashir with (a) intending to destroy those ethnic groups whose members challenged his power, mostly Fur, Masalit and Zaghawa, thereby polarizing tribes in Darfur into Arab and Zurga (or Black); (b) waging a violent conflict (2003–05) leading to the ethnic cleansing of those targeted ethnic groups from their traditional lands; and (c) planning with others the malnutrition, rape and torture of internally displaced persons (IDPs) so as to bring about a “slow death” in the camps, a process that the Prosecutor claimed went on from 2003 until the application was submitted in 2008.

---

<sup>17</sup> Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General (Geneva 2005) 4.

<sup>18</sup> A. de Waal: *A Critique of the Public Application by the Chief Prosecutor of the ICC for an Arrest Warrant against Sudanese President Omar al Bashir* (<http://blogs.ssrc.org/darfur/wp-content/uploads/2009/01/bashir-public-application-critique-d6-250109.pdf>) 13. Accessed August 30, 2009.

<sup>19</sup> For more information on the ICC and Darfur, see the ICC web site: <http://www.icc-cpi.int>. Accessed August 30, 2009.

<sup>20</sup> Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-1 (The Hague: ICC 2009).

As noted by Alex de Waal, a prominent Sudan expert, the Prosecutor did not argue for modes of liability such as superior responsibility, conspiracy or joint criminal enterprise. Rather, his application charges Bashir with “indirect perpetration,” i.e. committing crimes “through persons, including the state apparatus, the members of the Armed Forces, and Militia/Janjaweed” (paragraph 244).<sup>21</sup> However, the fact that Bashir is both Head of State and Commander in Chief of the Sudan Armed Forces was an important consideration in the application as well as in the Court’s decision to issue an arrest warrant.

#### D. GENOCIDE OR COUNTERINSURGENCY?

Whether or not President Bashir has a case to answer in Darfur has not been an issue in the debate, except in Sudan where Moreno-Ocampo and the ICC have been regularly blasted by media loyal to the regime. Instead, the debate has focused on whether or not the acts committed against the target groups were of a sufficient nature to warrant the categorization of “genocide” under the 1948 Genocide Convention; and whether or not Bashir possessed the required genocidal intent (*mens rea*) to destroy particular ethnic groups, as such, in whole or in part (as the Convention requires). The following is a brief version of a highly polarized debate.

One of the strongest critics of the arrest warrant against President Bashir as well as the genocide charges has been Alex de Waal who keeps a lively Darfur blog on the web page of the Social Science Research Council in New York.<sup>22</sup>

According to de Waal, the Prosecutor has constructed a socio-political theory of the Sudanese state as a genocidal regime. According to this theory, President Bashir held supreme authority in the hierarchically organized structure of the Government of Sudan and intended to destroy those ethnic groups whose members challenged his power.<sup>23</sup>

But, as de Waal notes, throughout the entire period as well as today, members of the Fur, Zaghawa and Masalit served in senior positions in the government and also have large communities in the national capital and other parts of Sudan where they have continued to live as Sudanese citizens without being specifically targeted by the government or anybody else.<sup>24</sup> Moreover, the President’s exercise of executive power on a day-to-day basis is largely formal. Key decisions are taken by others and there are in fact multiple power centers within the government, ruling party and security apparatus. This applies as well to decisions and actions regarding Darfur.<sup>25</sup>

An alternative theory, de Waal writes, would be that genocidal acts are the regular corollary of the counterinsurgency strategy adopted by the Sudan Government, practiced repeatedly over the last 25 years. This is close to the position adopted by the ICID which concluded

---

<sup>21</sup> A. de Waal (2009) 14.

<sup>22</sup> <http://blogs.ssrc.org/darfur/>. Accessed August 30, 2009.

<sup>23</sup> A.de Waal (2009) 5–7.

<sup>24</sup> A.de Waal (2009) 11.

<sup>25</sup> A.de Waal (2009) 15–16.

that there was no evidence for a genocidal *plan* but that individual *acts* of genocide might have been committed.<sup>26</sup>

In a recent book on Darfur, Mahmood Mamdani argues that the case against Bashir rests on several erroneous assumptions, all of them so the Prosecutor can pin the full blame of the violence on Bashir. The first error, he claims, is to identify the duration of the conflict with his presidency. The conflict in Darfur began as a civil war in 1987, before Bashir and his group came to power and long before the cycle of insurgency and counterinsurgency that began in 2003. Second, the racialization of identities in Darfur had its roots in the British colonial period and to claim that ongoing rape in the IDP camps is the result of official government policy “is to ignore the simple fact that rape occurred in all camps, those controlled by the government and by the rebels.”<sup>27</sup>

Mamdani’s main argument is that the Prosecutor’s charge of genocide rests on a narrative of history which is mono-causal, one-dimensional and simply wrong.<sup>28</sup> In this version of history, colonialism turns into a benign “tradition” and any part of the historical record that suggests that the violence in Darfur has multiple causes and thus multiple responsibilities, is expunged from the record. To ascribe responsibility to a single cause (Bashir) is “demonization masquerading as justice.”<sup>29</sup>

Mamdani is correct in arguing that the conflict in Darfur has multiple roots and has been driven by many actors. However, it is also true that existing divisions in Darfur have both been exploited and made worse by the willful interventions from Khartoum and that the use of racial epithets became an increasingly important factor. This is a major point in a study by criminologists John Hagan and Wenona Rymond-Richmond who made use of the ADT archive. They find strong evidence that the Sudanese government forces played a key role in heightening the use of racial epithets in combination with Janjaweed militia during attacks, and that the collective expression of these epithets during attacks increased the level of killing, raping and other forms of atrocities. In brief, Hagan and Rymond-Richmond argue that a collective genocidal intent developed along racial lines where “landless, nomadic Arab groups became pawns in this vicious game.”<sup>30</sup> While it is true, they argue, that a rebel insurgency developed over time in Darfur, the collective punishment was dramatically disproportionate to this threat and the genocide that followed constituted “a criminally organized collective enterprise with a common purpose.”<sup>31</sup>

---

<sup>26</sup> A. de Waal (2009) 8. It should be noted that a similar distinction was made by the US government with reference to the genocide in Rwanda and is highly controversial on legal as well as political grounds.

<sup>27</sup> M. Mamdani (2009) 271–272.

<sup>28</sup> M. Mamdani (2009) 273.

<sup>29</sup> M. Mamdani (2009) 273.

<sup>30</sup> J. Hagan and W. Rymond-Richmond (2009) 221.

<sup>31</sup> J. Hagan and W. Rymond-Richmond (2009) 222; J. Hagan and W. Rymond-Richmond: *Genocide: Criminal Behavior and Law* (<http://blogs.ssrc.org/darfur/2009/03/23/genocide-criminal-behavior-and-law/>). Accessed August 30, 2009.



Gregory H. Stanton, who is President of Genocide Watch, argues in a similar vein that the atrocities in Darfur were intentional and included all the acts of genocide enumerated in the Geneva Convention.<sup>32</sup> He also points out that the “all or none” concept of genocide is a misconception, implying that de Waal’s argument about Darfurians being safe elsewhere in Sudan ignores the “in part” in the definition of the Genocide Convention.<sup>33</sup>

The Prosecutor, however, chose not to base his case on the period of intense hostilities covered by Hagan and Rymond-Richmond (2003-04) when stronger arguments in support of a genocide charge might have been made, and the Court found insufficient evidence to indict President Bashir on the counts of genocide. The fact that particularly grave crimes were confined to the localities and the time period of that intense conflict may also be an argument against specific genocidal intent and in favor of de Waal’s argument that crimes against humanity were committed in the course of counterinsurgency.

## E. PEACE AND JUSTICE IN SUDAN

While Moreno-Ocampo has submitted an appeal to include genocide charges in the arrest warrant (July 5, 2009), much of the debate has focused on its wider consequences. The main dividing lines here relate to the peace-versus-justice dilemma.

Those who have applauded the arrest warrant argue that there can be no peace without justice, that justice is not negotiable and may also act as deterrence. Others suggest that the more important question concerns the larger political consequences of pursuing justice regardless of its political context or consequence. What if the price is continued suffering in Darfur, the unraveling of the CPA and renewed civil war?

An important point raised by Alex de Waal is that the ICC decision stands in contradiction to the strategy adopted so far by the international community, including the United States government. Washington’s policy during the second Bush administration was that a “soft landing” for the National Congress Party (NCP) was necessary and that negotiated peace and political reform were possible. This strategy resulted in the CPA as well as the deployment of two international missions in Sudan, one in support of the CPA (UNMIS) and one to provide civilian protection and other peace support activities in Darfur (UNAMID).

The arrest warrant sends a totally different signal and it is difficult to see how negotiations can be pursued while the ICC calls for the arrest of the President. While de Waal concedes that it is possible this contradictory approach will still yield sufficient pressure to generate positive outcomes, more likely it will destabilize the transitions to peace and democracy. According to de Waal, the indictment is “an immense gamble with the future of Sudan.”<sup>34</sup>

The mantra that “there is no peace without justice” is clearly incorrect, de Waal notes, as many countries have peace (at least in the short run and on the whole) without justice: “In some cases, exercises in accountability will accelerate or consolidate peace and/or democra-

---

<sup>32</sup> G.H. Stanton: “Proving Genocide in Darfur” in S. Totten and E. Markusen (2006) 183.

<sup>33</sup> G.H. Stanton (2006) 185.

<sup>34</sup> A. de Waal (2009) 17–18.

cy, in others they may have no impact, and in yet other cases they may contradict one another.”<sup>35</sup>

Despite many setbacks in the implementation of the CPA and the continuing crisis in Darfur, de Waal argues that the challenge is to establish a robust common understanding of the objectives of international policy towards Sudan and the rewards for success. As the country faces the toughest test of its post-independence period, in the form of national elections (scheduled for 2010) and a referendum on self-determination in southern Sudan (scheduled for 2011), it is essential that political negotiations are sustained and the pace of implementing agreements is accelerated.<sup>36</sup> Consequently, he asks the UN Security Council and its member states to use Article 16 in the Rome Statute to defer the case against Bashir for twelve months.

According to Mamdani, the lesson is not that there need to be a trade-off between peace and justice. The real trade-off is between different forms of justice. Thus South Africa prioritized political or restorative justice over criminal or retributive justice by establishing a Truth and Reconciliation Commission. The rationale was simple: where there is no victor, one needs the cooperation of the very leaders who would otherwise be charged with war crimes to end the fighting and initiate political reform. South Africa’s post-apartheid transition is the paradigm of “survivors’ justice” as opposed to “victors’ justice.” While the latter insists on distinguishing right from wrong, the former seeks to reconcile different rights.<sup>37</sup>

Mamdani also claims that the ICC is turning into a Western court to try African crimes against humanity, and what we are seeing is a form of “politicized justice” which signals a new humanitarian order. When and how the different perpetrators in Darfur, including President Bashir, should be held accountable is a political decision and cannot belong to the ICC Prosecutor. Of greater concern to Africa than the innocence or guilt of the president of Sudan, according to Mamdani, is the relationship between law and politics, including the politicization of the ICC.<sup>38</sup>

## F. PURSUING JUSTICE IN ONGOING CONFLICT

The arrest warrant issued against the Sudanese president has raised a number of issues that have a bearing not only on developments in Darfur and Sudan but also on the future of the ICC itself.

### 1. THE TENSIONS BETWEEN PEACE AND CRIMINAL JUSTICE

The ICC Statute recognizes the tensions between peace and justice and gives the Prosecutor some discretion to apply to the Pre-Trial Chamber to halt an investigation or prosecution “in

---

<sup>35</sup> A. de Waal (2009) 18.

<sup>36</sup> A. de Waal (2009) 18.

<sup>37</sup> M. Mamdani: “The New Humanitarian Order” (*The Nation*, September 29, 2008) 5; (<http://www.thenation.com/doc/20080929/mamdani/print>). Accessed August 30, 2009.

<sup>38</sup> M. Mamdani (2008) 5.

the interests of justice” (Article 53 of the Rome Statute).<sup>39</sup> So far, however, prosecutors have taken a strict interpretation of their terms of reference. Thus for former Yugoslavia, both Richard Goldstone and Louise Arbour argued that their mandate was to investigate and prosecute serious violations of humanitarian law, that this was a legal, judicial process and, that it was of secondary importance whether or not the indictment came at an opportune political moment.<sup>40</sup>

While the work of any prosecutor must follow the principles that regulate judicial activities in order to maintain legitimacy and credibility, international prosecutors operate in a complex political environment. One important consideration concerns the timing of indictments. To what extent could the pursuit of punitive justice during ongoing conflict prolong conflict and suffering – by precluding political arrangements for peaceful transition to a more just society in exchange for non-prosecutorial alternatives? On the other hand, could indictments possibly have positive effects by acting as a conflict-specific or more general international deterrence?<sup>41</sup>

Trying to summarize the experiences to date (May 2007), a paper produced by the Prosecution Program of the New York-based International Center for Transitional Justice (ICTJ) finds that history offers little empirical evidence to answer these questions. Thus it is difficult to judge the extent to which the indictment of President Milosevic really had much impact on the conflict and the peace process in former Yugoslavia. In the case of Liberian President Charles Taylor who was indicted by the Special Court for Sierra Leone in 2003, “it is not possible to claim that the indictment alone forced him out of office, although it probably contributed greatly.”<sup>42</sup>

It is too early, according to the ICTJ, to state conclusively whether the idea of proceeding with criminal proceedings and peace negotiations on parallel tracks can succeed in practice. Writing in 2005, the British anthropologist Tim Allen argued that, despite legitimate concerns regarding effects on the peace process and on vulnerable groups, the ICC investigations against senior leaders of the Lords’ Resistance Army (LRA) in northern Uganda had shaken things up in potentially positive ways. It had directed wider international attention to the crisis and made new resources available for peace negotiations and longer-term development schemes. Moreover, he argued, the issue of ending impunity, with its inherent rejection of compromises made with the perpetrators of violence, may turn out to be what is needed for achieving peace in the longer run.<sup>43</sup>

However, despite an aborted peace process led by the Government of South Sudan, the top leaders of the LRA have not attended talks outside the areas they control, and maintain that the arrest warrants, issued on July 8, 2005, are a serious obstacle to peace. The argument of the ICC Prosecutor, that the pressure to execute arrest warrants have contributed to reduce the

---

<sup>39</sup> International Center for Transitional Justice (2007) 5.

<sup>40</sup> International Center for Transitional Justice (2007) 2.

<sup>41</sup> International Center for Transitional Justice (2007) 3.

<sup>42</sup> International Center for Transitional Justice (2007) 5.

<sup>43</sup> T. Allen: *War and Justice in Northern Uganda: An Assessment of the International Criminal Court’s Intervention* (London, LSE, Crisis States Research Centre, February 2005).

flow of supplies to the LRA, may have been valid soon after the indictment but is clearly no longer the case.<sup>44</sup>

Fabrice Weissman, who is Research Director at the Centre de Réflexion sur l' Action et les Savoir Humanitaires (CRASH/MSF), has argued that the expression "no peace without justice" is prescriptive, in the sense that it "means that only peace agreements signed by non-war criminals are worthy of being reached."<sup>45</sup> It implies that the ICC has the legitimacy to decide who is and who is not worthy of bringing hostilities to an end. As Richard Goldstein wrote in his memoirs, "peace masterminded by and in order to accommodate the concerns of vicious war criminals defiant of all fundamental international law prescriptions or norms is no such effective or enduring peace."<sup>46</sup> In a similar vein, the ICC Prosecutor stated in February 2009: "Mr. Bashir could not be an option for (negotiations on) Darfur, or, in fact, for the South. I believe negotiators have to learn how to adjust to the reality. The court is a reality."<sup>47</sup> The underlying assumption is that the international community must refuse to negotiate with indicted war criminals while continuing to deal with persons who may also be criminals but who have not faced the formality of indictment.

The ICC Prosecutor has not formulated a doctrine on deterrence, but it is unlikely that any deterrent threat arising from the prospect of being brought in front of the ICC will be much amplified by the formal existence of an arrest warrant. Once deterrence fails and the arrest warrant is issued, the alleged criminal has nothing left to lose. As it turned out in former Yugoslavia, it took both a domestic revolution and extraordinary international pressure to deliver Milosevic to The Hague.

## 2. THE INTERESTS OF VICTIMS

According to article 53 of the Rome Statute, the Prosecutor of the ICC is required to ensure that any prosecution is in the interests of justice as well as in the interest of victims.

Victims usually have diverse views on forms of justice. Among rebel movements and large parts of the population in Darfur it is likely that the arrest warrant is strongly supported. On the other hand, the interests of victims in Darfur are also served by maintaining humanitarian assistance and continuing peace negotiations. According to Abdul Mohammed, who is the acting head of Political Affairs for UNAMID, whenever people in Darfur have been asked the question about justice,

---

<sup>44</sup> International Center for Transitional Justice 2007, 5–6. On October 21, 2009, it was even reported that LRA soldiers had made an attack inside Darfur (<http://www.sudantribune.com/spip.php?article32906>). Accessed October 26, 2009.

<sup>45</sup> F. Weissman: *Humanitarian Aid and the International Criminal Court: Grounds for Divorce* (<http://blogs.ssrc.org/darfur/2009/07/21/humanitarian-aid-and-the-international-criminal-court-grounds-for-divorce-2/>). Accessed August 30, 2009.

<sup>46</sup> R. J. Goldstone: "Bringing War Criminals to Justice during Ongoing War" in J. Moore (ed.), *Hard Choices, Moral Dilemmas in Humanitarian Interventions* (Lanham MD: Rowman and Littlefield 1998) 198.

<sup>47</sup> Quoted in F. Weissman (2009) 1.

the answer has not come back in terms of privileging trials and punitive accountability, but in terms of dealing with inequities in development and political representation, overcoming marginalization and restoring livelihoods, and establishing the rule of law and the presence of the state and its services. Only in that context and in that order do Darfurians speak about punitive accountability.<sup>48</sup>

One important question relates to the depth of victims' understanding and their ability to make informed choices even when consulted. The difficult question of who speaks on behalf of victims also remains.<sup>49</sup> Conducting meaningful consultation with victims about these issues remains a tremendous challenge. In Sudan, such consultation has been very limited as the Prosecutor's investigations were conducted outside Darfur.

## G. REGIONAL EFFORTS AND DIVISIONS

The arrest warrant has exposed increasing divisions within the international community regarding Darfur. These divisions run deep also among the permanent members of the Security Council, they hinder a unified response to the atrocities committed in Darfur and encourage as well growing disagreement with the purpose and priorities of the ICC.

The AU and other regional organizations and actors have played an increasing role in issues of peace and justice, particularly through the mediation of conflict. In the case of Darfur, African states and the AU were engaged in negotiating a ceasefire and sending a mission of ceasefire monitors. The AU observer mission relied on Africans with the financial support from outside. This proved to be an unsustainable formula, but the AU presence improved the situation on the ground during the worst days of the 2004 crisis. Yet the agenda of building an African peacekeeping force with a force structure and doctrine appropriate to the particularities of African conflicts, which was a vibrant issue just a few years ago, may have been set back by the frequent verbal attacks on its Darfur mission (particularly by the US based Save Darfur Coalition) as well as its own failings.

The AU has called for the suspension of the indictment of Bashir, but the Security Council has so far shown no inclination to use Article 16 to defer the case for twelve months. On July 5, 2009, African foreign ministers meeting in Sirte, Libya, agreed to shield the Sudanese president from any possibility of arrest within the African continent by members of the ICC. However, the Rome Statute, which forms the basis of the ICC, imposes legal obligations on the member states to apprehend individuals wanted by the Court if the individual arrives in their territories, and Chad, Botswana, Uganda and South Africa have since declared their resistance to the Sirte decision. Thus in July 2009, Bashir had to cancel a trip to Uganda after speculations that the Ugandan government was considering handing him over to the ICC.<sup>50</sup>

---

<sup>48</sup> A. Mohammed: *Bringing The Politics Back In*

(<http://blogs.ssrc.org/darfur/2009/07/04/bringing-the-politics-back-in/>). Accessed August 30, 2009.

<sup>49</sup> International Center for Transitional Justice (2007) 8.

<sup>50</sup> <http://news.bbc.co.uk/2/hi/africa/8154730.stm>. Accessed October 13, 2009.

The AU has formed a high level Panel on Darfur (AUPD) led by former South African President Thabo Mbeki. During July 2009, the panel conducted a number of public hearings across Darfur to examine the root causes of conflict, to determine how best to end the conflict and expedite the peace process so as to create conditions conducive to promote justice, healing and reconciliation. The Mbeki report was released on October 29, 2009. It emphasizes that “the roots of Darfur’s crisis lie in the neglect of the Sudanese peripheries by the centre of power and wealth in Khartoum,”<sup>51</sup> and that it is a political crisis that can only be solved by political means and not by war and violence.

Concerning justice, the Panel argues that the people of Darfur understand “justice” broadly to encompass processes of achieving equality, obtaining compensation and restitution, establishing the rule of law, as well as criminal justice. They will therefore expect a package of interventions which will deal with all these aspects of justice, and which does not privilege any one measure above the other.

Regarding the ICC, the Panel writes that it is a “court of last resort” with limited capacity: it can only target a few individuals for prosecution. Indeed, conscious of its limited resources, the Prosecutor of the ICC has adopted a policy of focusing only on those few whom he believes “bear the greatest responsibility for the most serious crimes that have been committed in each situation,” the report says.<sup>52</sup>

Importantly, the report noted that Sudan could challenge the admissibility of the case at the ICC if the cases were prosecuted internally.

The principle of complementarity under the Rome Statute in any event gives precedence to national systems, even when a situation has been referred by the Security Council. This means that the ICC is obliged to take into consideration the fact that a State has taken or is taking effective justice measures to deal with relevant crimes.<sup>53</sup>

For such and other reasons, the AU Panel proposed the formation of hybrid courts for Darfur. The Panel recommended that foreign judges be appointed to work alongside Sudanese peers to prosecute war crimes suspects accused of masterminding atrocities in the region. As a prerequisite for adjudicating these cases, the report also calls for significant changes to the Sudanese laws and the judiciary.<sup>54</sup>

The Arab League has also requested the incorporation of provisions from the Rome Statute in Sudanese laws to resolve the standoff that included conducting national judicial proceedings and changes to criminal law. However, Khartoum has expressed reservations to some parts of the proposal, particularly the establishment of hybrid courts with African and Arab justices.<sup>55</sup> The Sudan government will likely stand firm on this point and not allow any foreigners to be part of the judiciary.

---

<sup>51</sup> <http://www.sudantribune.com/spip.php?article32880>. Accessed October 26, 2009. *Sudan Tribune* released a copy of the report before its publication in Abuja.

<sup>52</sup> <http://www.sudantribune.com/spip.php?article32880>. Accessed October 26, 2009.

<sup>53</sup> <http://www.sudantribune.com/spip.php?article32880>. Accessed October 26, 2009.

<sup>54</sup> <http://www.sudantribune.com/spip.php?article32913>. Accessed October 26, 2009.

<sup>55</sup> <http://www.sudantribune.com/spip.php?article30742>. Accessed October 26, 2009.

## H. DEVELOPMENTS IN SUDAN

The UN Special Rapporteur on the situation of human rights in Sudan, Sima Samar, reported in mid-2009 that the human rights situation had deteriorated considerably after the Prosecutor brought his application to the Court.<sup>56</sup> The immediate effect of the announcement of the arrest warrant was clearly a worsening conflict. Aid agencies were expelled, several Darfur movements announced their refusal to negotiate with a criminalized president, and the government mobilized both domestic and international support. When visiting Darfur, the President seemed to play on mainly Arab support, thereby contributing further to the ethnic character of the conflict.

At the time of writing, however, it appears that some of the organizations that were expelled from Sudan are being let in again under new names and, as of November 2009, three new aid groups will be allowed into Darfur. This seems to have come about through negotiations with the Obama administration which had been signaling the possibility of a less confrontational stance towards the regime. This policy course was largely confirmed on October 19, 2009 when the new U.S. Sudan strategy was presented.<sup>57</sup>

While it is too early to assess the full effects of the arrest warrant, it clearly has changed the political landscape in Sudan. The warrant was issued at a time when there were rumors of increasing divisions within the ruling party (NCP). Divisions remain, but the most powerful actors in the party appear to have rallied around Bashir and strengthened his position, thereby ruling out the scenario that would mean a new head of state other than Bashir after the elections. Whether or not the arrest warrant, and more recently, the Mbeki report, may be an incentive for others to remove Bashir from power is much discussed in Khartoum. Yet those who might succeed in such a risky undertaking are likely to be on the Prosecutor's list themselves.

In the meantime, the arrest warrant diverts political attention away from other pressing issues. The country finds itself in a critical situation, with slim prospects for political change in Khartoum, equally slim prospects for peace in Darfur and permanent turbulence and continuous setbacks in the relationship between the two partners (NCP and SPLM) in the government. Talks on Darfur in Qatar and Egypt have failed to make much progress. There are many problems: a defiant government; fragmented movements; increasing complexity of the interlocking conflicts; the sidelining of the civilian population in Darfur; including the Arabs; low-energy and non-creative mediation on Darfur; and a divided international community. And while the arrest warrant cannot simply be recalled by the President's good behavior, its existence contributes to a justification of the intransigence of the armed rebel movements in Darfur.<sup>58</sup>

---

<sup>56</sup> Report of the Special Rapporteur on the Situation of Human Rights in the Sudan, Sima Samar (Geneva: Human Rights Council, A/HRC/11/14, June 2009).

<sup>57</sup> U.S. Department of State: *Sudan: A Critical Moment, A Comprehensive Approach* (<http://www.state.gov/r/pa/prs/ps/2009/oct/130672.htm>). Accessed October 19, 2009.

<sup>58</sup> A. de Waal (2009); F. Weissman (2009).

## I. CONCLUDING REMARKS

International justice is a blend of idealism and self-interest. On the African continent, it is being increasingly asked why Western countries appear strikingly idealistic in the face of evil-doing by others, particularly in Africa, and at other times cynically abandon the pursuit of justice, as in the Middle East. The Goldstone report on the war in Gaza, which has been attacked by the Israeli government and so far largely ignored by the Obama administration, is likely to confirm such positions.<sup>59</sup>

For the moment, it appears that the ICC can only operate against weak states and subject to international power politics. In some situations, justice will have to wait, particularly in areas where the Security Council is unwilling to act, as in Iraq. On the other hand, as Weissman has argued, the ICC is a new international actor – a half-political, half-judicial hybrid. It possesses the not-insignificant symbolic power to declare high-ranking political leaders enemies of (democratic, liberal) humanity. The emergence of this new actor – shaped by international power relationships, yet endowed with real autonomy – is likely to have unanticipated and important political consequences.<sup>60</sup>

A general problem, however, is that the absolutist nature of demands for judicial proceedings will tend to reduce the space for developing nuanced responses to specific conflict situations, for discussion of competing political exigencies, and for a local conversation about the future of a society at risk. Judicial institutions are not designed to address these and similar issues that victims and afflicted societies need to address. The fact that the ICC has limited competence to judge the effects of its decisions on peace and security in Sudan – although implicitly it has an obligation to do so – raises ethical issues that have hardly received any attention.

---

<sup>59</sup> United Nations Fact Finding Mission on the Gaza Conflict (United Nations Human Rights Council) September 29, 2009.

<sup>60</sup> F. Weissman (2009) 3.