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THE MERITS OF JUSTICE

Would more people, or less people, rob banks if there was no penalty for robbing banks?

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This week the International Criminal Court, or ICC, took important steps toward promoting peace and accountability in Sudan by urging an arrest warrant for crimes against humanity against the Sudanese President Omar al-Bashir. Sadly, but somewhat unsurprisingly, the step has set off a chorus of hand-wringing among certain diplomats, academics, and pundits, who are now arguing that holding perpetrators of crimes against humanity accountable for their actions is unhelpful. In the *Financial Times* a columnist positively quelled at the notion of bad people being held responsible for their actions, bemoaning that “the threat of international justice may in fact be working against peace.” A veteran academic expressed his worry that almost all African senior officials could be made vulnerable to similar charges by this precedent.

Let’s be clear: Holding people accountable for war crimes is not only the right thing to do from a moral perspective—it directly promotes peace and makes future such abuses less likely. Part of the reason Darfur has remained locked in crisis for years is that the international community has been slow to acknowledge what has always been painfully obvious: The *janjaweed* militias that have terrorized and decimated Darfur have been directed by the Sudanese government. The militias were financed by the government, and received direct battlefield support from the Sudanese military. The International Criminal Court is doing no more than acknowledging the plain, painful truth of Sudan’s tragedy. The prosecutor should be congratulated for recognizing that turning a blind eye to war crimes is not helpful.

CASE ONE: SLOBODAN MILOSEVIC

If the hand-wringing all feels a bit familiar, it is because we have been through this more than once before. In 1999, during the Kosovo conflict, Slobodan Milosevic was indicted in the middle of

not only a NATO bombing campaign to reverse the ethnic cleaning in Kosovo, but of high-level peace talks between the United States, Russia, and Finland to end the war.

Very few commentators took exception with the notion that Milosevic had been intimately involved in directing ethnic cleansing, genocide, and sundry other war crimes in Bosnia and Kosovo. But Russian envoy Viktor Chernomyrdin said the indictment “pulled out the rug from under the negotiating process,” as both Russia and China decried what they called a “political” indictment that was designed to scuttle peace talks.¹ Others suggested the indictment would push Milosevic to stay in power permanently or lead his forces to adopt an even more brutal approach on the ground in Kosovo.² Some insisted that Milosevic would never face justice because the question of how he would be handed over to authorities was not immediately apparent. Instead of appreciating that Milosevic employed ethnic cleansing in Kosovo in large part because he had used such tactics with impunity in the earlier Bosnia conflict, commentators appeared deathly afraid that the international community might somehow offend Mr. Milosevic’s delicate sensibilities.

Yet, in retrospect, the work of the Yugoslav tribunal and the indictment of Milosevic led to none of the doomsday scenarios envisioned by the skeptics. Yes, the Russians postponed a single diplomatic trip to Belgrade for *one week* to express their dissatisfaction with the indictment, but the peace talks resumed quickly and Milosevic accepted the demands that were placed upon him: Kosovar refugees were allowed to return home; Serb forces withdrew from the province and a NATO-led force entered to provide security.

Milosevic’s hold on power did not last long after the 1999 war and his indictment. When he tried to steal a September 2000 presidential election,

1 “Crisis in the Balkans: The Indictment; Tribunal is Said to Cite Milosevic for War Crimes,” *New York Times*, May 27, 1999

2 Tom Gallagher, “Demonisation of the President is Unlikely to Lead to Peace,” *The Herald (Glasgow)*, May 28, 1999.

Milosevic was ousted by massive street protests, and turned over to the international tribunal a number of months later. He died of a heart attack during his war crimes trial proceedings.

So, what did we learn from the Milosevic example?

- Indictments don't necessarily derail peace talks and, indeed, they seem to be most helpful in clarifying the minds of dictators that their very existence is at stake.
- Indictments send a powerful message to the cronies, business partners, and sycophants that orbit around such dictators that they may well be lashed to a sinking ship and should get out while they can. This allows more responsible political voices space to challenge the authority and destructive policies of the ruling government. The Kosovo conflict marked an important point when Milosevic's corrupt business partners began to see him as much as a liability as an asset.
- War crimes indictments have a chilling effect on commanders on the ground. Few military commanders want to be vulnerable to such prosecutions, and they are more likely to alter their behavior if they know the international community is serious about justice.
- The fact that members of different ethnic communities were indicted for their particular crimes furthered the sense that the tribunal approached its work with an even hand.
- More broadly, the war crimes prosecutions in the Balkans have been a remarkable cornerstone in allowing remarkably rapid progress in reconstruction, stability, and democratization across the region because they removed the most noxious nationalists who had inflicted such terrible suffering on the civilian population.

CASE TWO: CHARLES TAYLOR AND HIS CONDITIONAL EXILE

In June 2003, Liberia was on the brink. Rebel forces had advanced within 10 miles of the capital in the first of a series of offensives that Liberians would dub "World Wars" for their ferocity. President Charles Taylor, who had directed a brutal proxy war in Sierra Leone using legions of child soldiers, was now facing a taste of his own medicine.

On June 4, Taylor was in Accra, Ghana for the opening of peace talks that aimed to negotiate an end to the Liberian conflict. Shortly after Taylor promised to step down by the end of the year, the special court for Sierra Leone unveiled an indictment against Taylor for war crimes and crimes against humanity perpetrated during that country's brutal war. The court hoped that Ghanaian authorities would arrest Taylor, but instead he was allowed to return to Liberia, albeit as an international fugitive. Some diplomats engaged in the negotiations denounced the indictment as an impediment to peace, and the presidents of South Africa, Nigeria, and Ghana complained that they had been "sandbagged" by the timing of the indictments as they tried to persuade Taylor to resign.³ Pessimists were quick to critique the court's prosecutor for interjecting the concept of justice into the rarefied realpolitik of peace negotiations.

In fact, Taylor's indictment, combined with unprecedented levels of international pressure (including a U.S. warship on the horizon) helped to build the leverage necessary to actually move him out of Monrovia into a negotiated exile in Nigeria. The terms of this deal were clear: As long as he stayed out of Liberian politics, Nigeria would keep him out of the hands of the court, despite an Interpol warrant for his arrest.⁴

3 Felicity Barringer with Somini Sengupta, "War Crimes Indictment of Liberian President is Disclosed," New York Times, June 5, 2003

4 ICG, Liberia: Security Challenges, p. 20

5 Anna Borzello, "Nigeria Warns Exiled Taylor," BBC News, September 17, 2003, available at <http://news.bbc.co.uk/2/hi/africa/3115992.stm>; and Open Society Justice Initiative, "Nigeria Says Taylor Cannot Stay If Asylum Terms Violated," May 19, 2005, available at http://www.justiceinitiative.org/db/resource2?res_id=102721

Despite stern public warnings from his host, Taylor did not hold up his end of the bargain.⁵ From exile in Calabar, Nigeria, Taylor used his connections to international criminal networks to fund a range of presidential candidates in Liberia's transitional presidential elections, delivered support to armed groups in the region, and even supported an assassination attempt against the President of Guinea.⁶

Taylor's post-exile behavior violated the terms of his asylum, but it was also a significant change from the utterly brutal behavior exhibited during his career as a warlord. Despite his regional reach, Taylor never again attempted to reignite the regional contagion of violence against civilians that he had previously exported to Sierra Leone, Guinea, and Ivory Coast. International pressure in the form of his indictment dramatically changed the context of conflict in Liberia and helped to bring about genuine civilian protection on the ground.

Nigeria continued to host the intransigent Taylor through Liberia's tense elections. Following the inauguration of President Ellen Johnson-Sirleaf, political pressure to deliver Taylor to justice mounted. A dramatic and nearly successful escape attempt was foiled at the last minute when Taylor tried to cross from Nigeria into Cameroon. Taylor was turned over to the special court and is currently facing trial on 11 counts of war crimes and crimes against humanity. Meanwhile, Liberia benefited from the deployment of a sizeable Chapter VII peacekeeping operation and substantial international support during its transition. Under President Johnson-Sirleaf, Liberia is on the long road to recovery.

Today, self-professed realists argue that Taylor's handover to justice sent the wrong message to dictators like Bashir and Zimbabwe's Robert Mugabe, maintaining that it undermines the credibility of amnesty offers to dictators who are all the more likely to hold on to power at any cost. This facile misreading of history misses the real lessons from Taylor:

- Conditional asylum remains a viable option. Taylor opted for exile because the right combination of pressures was belatedly applied by regional and international actors. It is the responsibility of international mediators to make clear the terms of such a deal and for the countries involved to ensure its credibility. There was no one but Taylor to blame that he broke a deal to which he agreed.
- International justice shines harsh light on human rights violations in otherwise remote places, deterring would-be warlords from emulating thugs like Taylor. The special court for Sierra Leone has helped to end the cycle of impunity in the Mano River region.

CASE THREE: HOLDING A CRIMINAL REGIME TO ACCOUNT IN SUDAN

Skeptics warn that the ICC's action against Bashir may cause Sudan to implode.⁷ But hundreds of thousands in Darfur have been killed or displaced by violence and its fallout. The UN-led peacekeeping effort remains largely stillborn, with seven peacekeepers killed in an ambush on July 8. Peace talks have been a dead-end, and tensions between North-South in Sudan threaten to unravel an earlier peace deal and could hasten Sudan's disintegration. This is not a status quo that we should worry about upsetting with an arrest warrant.

On the contrary, the only way by which the fundamental dynamics of conflict in Sudan will change is by introducing accountability. President Bashir's behavior in Darfur was predictably consistent with the way he presided over a war strategy in southern Sudan that led to seven times as many deaths. In waging its conflicts, the Sudanese government has repeatedly employed a strategy of divide-and-destroy at multiple levels of society, arming neighboring militias against each other to create a flimsy sense of plausible deniability that they were

6 Coalition for International Justice, "Following Taylor's Money: A Path of War and Destruction."

7 "Former US Special Envoy to Sudan Warns Against ICC Darfur Indictments," Sudan Tribune, June 27, 2008, available at <http://www.sudantribune.com/spip.php?article27670>

not directing the violence. No one on the ground had any illusion about the Sudanese government's criminal behavior, and neither should the international community. Human rights violations committed by rebels in Darfur and the South should not distract attention from the culpability of the Sudanese government in deliberately directing the great majority of these atrocities.

Like Milosevic and Taylor, impunity has emboldened Bashir over the years. It would be illogical for him to alter a brutal but successful formula for retaining power. Janjaweed militias backed by the Sudanese armed forces destroyed the homes and livelihoods of Darfur's non-Arab peoples. Today in the camps this slow-moving genocide continues, by attrition, through disease and malnutrition. Remember, genocide is not only gas chambers or militias with machetes. Genocide is the deliberate creation of conditions aimed at bringing about the destruction of specific groups of people on the basis of their identity, such as we have seen in Darfur. ICC Prosecutor Luis Moreno-Ocampo's June 5 statement before the Security Council clearly articulates the organized use of organized insecurity, systematic rape, and deliberate destruction of communities in these camps.⁸

The case against Bashir introduces three new elements into the Darfur equation: leverage, deterrence, and protection. How they are utilized by the international community will help determine whether or not a solution for Darfur is at hand. Until now, the UN Security Council and powerful states have done little in the way of building direct leverage that can be utilized in support of either peace talks or protecting civilians on the ground. Although the ICC remains independent of the Security Council, there are means by which its investigations can be suspended or its targets given security assurances in exchange for a binding exile deal.⁹ Bashir now must understand that his fate is tied to a peaceful resolution of the Darfur crisis, a

sensible peace deal, and deployment of the UN-led protection force. After Moreno-Ocampo presents his case, the ICC judges will most likely take several months to make a decision on issuing a warrant for arrest. During this time the Security Council should vigorously build leverage in support of a peace deal and deployment of peacekeepers. Equally, the Security Council needs to understand that any effort to derail justice or interfere with the chief Prosecutor's work would be a disaster.

Deterrence is also a positive new potential factor. Proper follow up to Bashir's warrant could deter future perpetrators of crimes against humanity in Sudan.

Least discussed but potentially most important are the implications the arrest warrant will have for protecting civilians. The record shows over the last two decades that General Bashir's regime has backed off its most deadly war strategies when international pressure has been well coordinated and at its high points. When the spotlight was on the regime's use of food as a weapon, it relented. When the pressure focused on ending bombing of civilians in the South, it stopped. When the temperature went up over the regime's facilitation of a resumption of slavery, it abandoned its strategy and slave-raiding ended. Putting the spotlight on Bashir provides a significant point of pressure that if backed by key governments and the UN Security Council could lead to real protection for the civilian population.

DARFURIAN PERSPECTIVES ON JUSTICE

Absent from all too many discussions about peace and justice in Darfur is the voice of the Darfurians themselves. In our visits to the region, from reports coming from inside Darfur as well as the Darfurian diaspora, the people of Darfur stand united behind the demand to end impunity. Despite the many divisions among Darfuri groups that have slowed progress toward a viable peace in Sudan,

⁸ Statement by Mr. Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, June 5, 2008

⁹ ENOUGH has recommended similar measures to deal with Joseph Kony and the Lord's Resistance Army in northern Uganda. See "What to do about Joseph Kony," ENOUGH Strategy Paper #8, October 2007, available at <http://www.enoughproject.org/node/51>

our research has found that Darfuris speak with one voice on several issues. The demand for justice is one which has galvanized Darfurians even amid dire circumstances.

The people of Darfur demand that the government of Sudan adheres to the rule of international law by arresting and surrendering suspects to the ICC. They are very clear on who they think was the perpetrator in this case. In numerous videos and documentaries filmed inside Darfur or in the refugee camps, displaced Darfuris squarely place the blame on the government of Sudan. Some people mention the name of President Bashir as the culprit, others mention Director of National Intelligence Salah Gosh and other state officials, but the message is clear: It is the regime that is responsible for the genocide.

Many Darfurians realize that it is impossible for the ICC to prosecute every alleged genocidaire in Darfur. They posit a solution whereby the ICC prosecutes the worst offenders, while serious reform to the Sudanese justice system enables it to handle the cases of the lower ranks of implicated persons.

ICC charges against Bashir, or any high-level official from his government, will be welcomed by Darfurians of all walks of life, because to them it represents the first step in ending impunity, and a hope for closure to a life of misery that seemed endless. It would also be a recognition from the international community that justice for Darfur will be served, even if it was delayed for a while.

CONCLUSION

Several spurious arguments continually obstruct efforts to secure both peace and justice in war-torn corners of the globe. World weary “experts” are often far too quick to speak about Sudan the same way they used to speak about the Balkans and West Africa—as a hopeless wellspring of endless ethnic tensions doomed to perpetual violence. It is baffling why anyone would think that acceding to the demands of war criminals is a sensible path to securing peace.

Conflict in Sudan may be complicated, but at its root is the criminal behavior of a regime that has continually used murderous and genocidal tactics to maintain power. Unless concerted international action is taken to impose a cost on the perpetrators of these crimes, they will not change their behavior. And although international politics may preclude punishment for every regime that may be guilty of atrocities, just because we cannot yet go after every war criminal does not mean we should go after none.

Two and a half million Sudanese lives have been extinguished as a result of the war tactics of President Bashir and his regime, and the chief Prosecutor simply and elegantly makes clear that such crimes can not be committed without cost. Yes, there will be many perilous days ahead in Sudan full of high-stakes diplomacy, confrontation, and difficult choices before Bashir and his accomplices face justice. Yes, the voices of the naysayers at times will reach a crescendo. However, the International Criminal Court should be applauded for taking the first brave step down this important road. The world will ultimately be a better place for its action.



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ENOUGH is a project of the Center for American Progress to end genocide and crimes against humanity. With an initial focus on the crises in Sudan, Chad, eastern Congo, Somalia and northern Uganda, ENOUGH's strategy papers and briefings provide sharp field analysis and targeted policy recommendations based on a "3P" crisis response strategy: promoting durable peace, providing civilian protection, and punishing perpetrators of atrocities. ENOUGH works with concerned citizens, advocates, and policy makers to prevent, mitigate, and resolve these crises. To learn more about ENOUGH and what you can do to help, go to www.enoughproject.org.



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