

Ocampo's Darfur Strategy Depends on Congo

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The 14 July application by the Prosecutor of the International Criminal Court (ICC), Luis Moreno Ocampo, for an arrest warrant against Sudanese President Omar al-Bashir represents a key moment for the nascent and increasingly embattled Court. Many commentators have questioned why the Prosecutor is pursuing Bashir, given the unlikelihood of ever arresting him. To understand what the Prosecutor hopes to gain from this move, we should interpret it in the wider context of ICC's prosecutorial strategy to date. In particular, we should focus on how the Prosecutor's intentions in the Bashir case hinge on his handling of cases from the Democratic Republic of Congo (DRC).

The application to indict Bashir represents a major gamble by the Prosecutor who believes that, even though Bashir may never face trial, indicting an incumbent head of state will inherently bolster the ICC where it is currently weak: on issues of international legitimacy and problematic relations with the UN Security Council and key states, principally the US. The gamble is separate from the most common criticisms of the Prosecutor's strategy in Sudan. The move against Bashir is unlikely to provoke instability or violence in Darfur and southern Sudan, as some commentators have argued. The Sudanese government's withdrawal two weeks ago of troops from Abyei, the most recent flashpoint in the north-south conflict, highlights the unpersuasive nature of those predictions. Similarly unconvincing have been the self-serving accusations by the Sudanese and other African governments – several of them with their own citizens' blood on their hands – that the ICC's moves constitute nothing more than neo-colonialist meddling in Sudan's domestic affairs. Even though the Prosecutor can easily side-step such criticisms, the success of his strategy in Sudan will rely heavily on his ability to convict the four Congolese suspects currently in ICC custody (Thomas Lubanga, Germain Katanga, Mathieu Ngudjolo and Jean-Pierre Bemba) and thus produce tangible judicial results in order to give full force to the symbolic value of the Bashir case. Meanwhile, as long as Bashir remains at large, the pressure will increase on the Prosecutor to secure those results in the DRC situation.

The Prosecutor believes that he has sufficient evidence to convince the three Pre-Trial judges to issue the warrant against Bashir, which they are likely to do within the next month – possibly as early as 1 September. The Office of the Prosecutor (OTP) has had to rely on investigating crimes in Darfur via testimony from Sudanese exiles and other distanced sources because of Khartoum's refusal to allow ICC investigators on the ground. Nevertheless, the Prosecutor would not risk approaching the judges without strong evidence of systematic crimes in Darfur – including of genocide – that are feasibly traceable to the highest levels of the Sudanese government.¹ The Prosecutor is still smarting from two embarrassing exchanges with the Pre-Trial judges involved in the DRC situation. First, on 29 January 2007 when handing down their decision on the confirmation of charges in the Lubanga case, the judges criticised the Prosecutor for

¹ Whether the evidence is sufficient to ultimately convict Bashir is an entirely separate question; the key for the moment is that the Prosecutor is convinced that it justifies a warrant for Bashir's arrest.

charging Lubanga only with domestic crimes committed in Ituri province and for failing to recognise the international dimension of the Ituri conflict, implying the role of Uganda and Rwanda in funding and training local rebel groups, including Lubanga's *Union des Patriotes Congolais*. Second, the judges criticised the Prosecutor on the eve of the Lubanga trial on 16 June 2008 for failing to make key evidence available to Lubanga's defence team; a move that threatened the collapse of the trial. Following these difficulties, the Prosecutor would not approach the judges in the Darfur situation unless he believed he had a watertight case for the issuance of the Bashir warrant.

The Prosecutor recognises that few national or international actors will be willing and able to arrest Bashir – the same problem he has faced since indicting leaders of the Lord's Resistance Army (LRA) in the Uganda situation. Khartoum will not hand over its leader, just as it has refused to surrender the two middle-ranking Sudanese officials currently indicted by the ICC, Ahmed Mohamed Haroun and Ali Mohamed Abdel Rahman 'Kushayb'. The two relevant peacekeeping missions – the joint UN-African Union mission in Darfur (UNAMID) and the UN mission in Sudan (UNMIS) – are also unlikely to actively pursue Bashir. Neither mission is mandated to enforce ICC warrants, and both suffer severe personnel and logistical shortages and constant obstruction by Khartoum.

Nonetheless, the Prosecutor is using the Bashir case to pressure the UN Security Council into greater peacekeeping cooperation on the ground in Sudan and more generally in situations under ICC investigation. As the Darfur situation was referred to the ICC by the Security Council – the first such referral in the Court's history – the Prosecutor is lobbying the Council to help enforce the warrant against Bashir. If such support is not forthcoming, the Prosecutor will argue that the OTP has done its job as effectively as possible but suffered from a lack of political will in the Security Council. This is a likely outcome, given the improbability of China and Russia supporting cooperation between the ICC and UN peacekeeping missions in Sudan.

While Washington is still opposed to the existence of the ICC, it may cautiously support more active Security Council involvement, given the importance of the Darfur situation for US domestic constituencies, particularly conservative Christians, who were instrumental in George W. Bush's rise to the presidency and are central to John McCain's prospects in November. The US abstained from the 31 July renewal of UNAMID's mandate, in protest against the inclusion in the resolution of a paragraph noting some Security Council members' concerns over the OTP's investigations. This implicit US support for the ICC in the Darfur situation is vital in pressuring the peacekeeping missions to enforce the Court's arrest warrants. The Prosecutor may also hope that a Barack Obama victory in the presidential race ushers in an era of greater US – and consequently Security Council – support for the ICC. However, opposition to the ICC in Congress remains severe, and the fact that Obama has so far avoided all discussion of the Court during the presidential campaign highlights how politically fraught the subject remains in the US. Nevertheless, successful diplomacy by the Prosecutor on the Bashir issue could lead to stronger relations with the Security Council and establish precedents for future UN peacekeeping missions, which will be crucial for the ICC's ability to transfer indictees to The Hague.

The Prosecutor recognises that the ICC – and the OTP in particular – currently requires a major boost in international legitimacy. When the Prosecutor opened investigations into LRA crimes in northern Uganda in 2004, he stated that the rebel leaders would be brought

to trial within six months and, as a result, the twenty-year conflict would soon end. Four years later, the LRA indictees are still at large (or dead) and the OTP does not anticipate their arrest any time soon. The Prosecutor may be tempted to write those cases off unofficially – claiming that the threat of prosecution of the LRA leadership helped drive them to the (ultimately unsuccessful) Juba peace negotiations with the Ugandan government – and divert the OTP’s limited resources toward other cases, either in situations where investigations are already underway or in new situations, such as Colombia and Côte d’Ivoire, which the ICC has been monitoring for several years, or its latest country under analysis, Georgia.² Compounding the LRA problem, in both the Uganda and DRC situations, the OTP has been criticised for failing to pursue government actors complicit in serious crimes – preferring to go after relatively ‘small fish’ such as Lubanga, Katanga and Ngudjolo.

The move against Bashir is intended to show that the ICC is willing to pursue difficult cases of high-ranking officials and to regain some of the legitimacy that the Court has lost in Uganda and the DRC. The Prosecutor’s strategy is to secure results by convicting the four Congolese suspects currently in custody – cases he believes are relatively straightforward, given the extensive evidence gathered against them by the OTP and the DRC and Central African Republic (CAR) governments.³ Successes in these cases will secure the OTP’s legitimacy among the ICC states parties that have been demanding for several years that it produce tangible legal results. Convictions of the Congolese suspects, the Prosecutor expects, will allow him to use the Bashir case symbolically to gain international legitimacy by pursuing a sitting head of state and to build stronger relations with the Security Council and key states such as the US. As the difficulties with the Lubanga case so far highlight, however, the Congolese cases may not be as straightforward as the Prosecutor expects. Failure to secure convictions in any of these supposedly ‘easier’ cases will increase international pressure on the OTP to achieve the highly unlikely result of a trial – and conviction – of Bashir. Without success in the Congo cases, the Prosecutor’s calculated risk in pursuing Bashir could backfire badly.

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² Office of the Prosecutor, "ICC Prosecutor confirms situation in Georgia under analysis", ICC-OTP Press Release, ICC-OTP-20080820-PR346 ENG, 20 August 2008, <http://www.icc-cpi.int/press/pressreleases/413.html&l=en>.

³ While a Congolese national, Bemba is charged with crimes committed in CAR.