

## If Ocampo Indicts Bashir, Nothing May Happen

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Regarding the ICC's likely indictment of Sudanese President Omar al Bashir, one of the main concerns expressed is that it would cause Khartoum to lash out and inflict further atrocities on civilians, worsening the security and humanitarian situations in Darfur. While it is near-impossible to predict the impact that pursuing international justice will have on domestic politics and peacemaking, I propose that quite a different problem may emanate from the Bashir case: Because of the ICC's failures in Sudan and elsewhere to date – especially its inability to arrest key indictees – its move against Bashir may represent a hollow threat which Khartoum could easily ignore and which may ultimately have little impact on the political and conflict situation in Sudan. The concern is not that the indictment of Bashir may have a negative effect but that it may have no effect at all, raising questions about the fundamental purpose of the ICC in responding to mass atrocity.

My argument here leads on from debates in the recent Royal African Society collection, [\*Courting Conflict? Justice, Peace and the ICC in Africa\*](#), in which Alex de Waal and I disagree on the role of the ICC in pursuing major suspects, especially sitting heads of state such as Bashir, Congolese President Joseph Kabila and Ugandan President Yoweri Museveni. In his chapter in the collection, de Waal praises the ICC for its initially 'cautious step-by-step strategy' in Sudan. He argues that the ICC's 'politically astute' approach of issuing arrest warrants for two middle-ranking figures, Amhed Mohamed Haroun and Ali Mohamed Abdel Rahman 'Kushayb', while not indicting individuals at the highest level of government such as Bashir and thus avoiding explosive confrontation with Khartoum, judiciously balanced concerns for justice and peace. In contrast, in my chapter I criticise the ICC for its generally timid approach in the Democratic Republic of Congo (DRC) and Uganda, where the Court has eschewed the most difficult cases – principally those concerning suspects in the Congolese and Ugandan governments – in favour of those that could have been ably handled by the domestic courts. In the process, the ICC has contravened its own principle of complementarity, as outlined in Article 17 of the Rome Statute, which holds that the Court should not investigate or prosecute cases when domestic institutions are genuinely willing and able to do so. By avoiding cases that a global Court is mandated to pursue, particularly those involving high-ranking national officials who have insulated themselves from domestic justice, the ICC has also forfeited much of its legitimacy among populations affected by conflict.

To fulfil its mandate and maintain its legitimacy in the Darfur situation, the ICC should indict Bashir. This represents precisely the sort of case for which the ICC was created, holding accountable a head of state for committing grave crimes against his own citizens, while the domestic courts display no genuine willingness or ability to investigate or prosecute the case. Unlike the DRC or Uganda situations, where the ICC has intervened following state referrals that were gained after sustained diplomacy between the Court and local political officials (my research indicates that the ICC spent almost a year trying to persuade the Ugandan government that a referral was in its interests), the Darfur situation was referred to the Court by the UN Security Council. The Court has never had to maintain positive working relations with the Sudanese government, either at the referral stage or during its investigations. Although Sudan's non-cooperation with the ICC greatly hampers the Court's gathering of evidence, the flipside is that it faces little domestic political impediment to indicting Bashir or other senior Sudanese figures.

Meanwhile concerns about the ICC's impact on the pursuit of peace in Sudan may be overstated. Commentators opposed to the indictment of Bashir on the grounds that it would lead to further violence are right to emphasise that the ICC is a political as well as legal institution and that the impact of the Court must be assessed in political and peacemaking terms before the Court decides to intervene domestically. However, the impact of the ICC so far in Sudan and elsewhere suggests Khartoum has little reason to take the Court's indictment of Bashir seriously. If the Sudanese government interprets this as an empty threat, it will have little reason to react to it by unleashing further mayhem on civilians.

In the Sudan and Uganda situations, the ICC has proven to be a toothless tiger, issuing warrants for major perpetrators – Haroun, Kushayb and the leadership of the Lord's Resistance Army (LRA) – who remain at large and are unlikely to be transferred to The Hague any time soon. The ICC relies on national and international police and military actors to capture and arrest suspects. However, the Court has generally failed to foster meaningful relations with UN peacekeeping missions and other ground-level institutions that are vital to its cause. Officials from MONUC, the UN peacekeeping mission in the DRC, told me in 2006 that they were deeply frustrated by the ICC's unilateralism. One MONUC official in Bunia, the main town in Ituri province, said ICC investigators had "arrived out of the blue" in 2004 and demanded evidence regarding serious crimes in Ituri which MONUC had systematically gathered with the intention of aiding the local judiciary's prosecution of major atrocity perpetrators. Another official stated that the ICC had failed to adequately recognise the role that MONUC and the Congolese army played in arresting key suspects, including Thomas Lubanga and Germain Katanga, who were subsequently transferred to the ICC for prosecution. The official said that the ICC's failure to build strong relations with MONUC made the peacekeeping force reluctant to assist with other ICC cases, for example capturing and arresting the leaders of the LRA who have been based in north-eastern DRC since 2005. A breakdown in cooperation between MONUC and the ICC is a key reason why the UN is currently refusing to allow the Court's chief prosecutor, Luis Moreno Ocampo, to make public UN-gathered evidence regarding the Lubanga case. Without the UN's permission for Ocampo to hand over key documents to Lubanga's defence team, this case – which was supposed to lead to the ICC's first-ever trial – is on the brink of collapse and Lubanga may soon walk free.

At a meeting in May 2008 hosted by Oxford Transitional Justice Research, Ocampo stated that the fundamental role of the ICC is to coordinate its activities with government and non-government actors in order to help end conflict. The Court, Ocampo said, is simply one piece of the peacemaking puzzle. Evidence from the ground, however, suggests that the ICC has not always sought this collaboration and often perceived itself as the lead organisation to which all others are answerable. Without reliable police and military allies, the ICC cannot deliver justice for individuals such as Haroun and Kushayb. Bashir may therefore interpret an ICC indictment as mere bluster; an attempt by Ocampo – who is facing increasing pressure over the Lubanga and LRA cases and his overall failure to get 'judicial results' – to show that the Court is willing to prosecute the highest-ranking officials but without the practical capacity to do so. Given these calculations, it is the likelihood that the ICC's indictment of Bashir would have little impact at all on the behaviour of the Sudanese government – neither producing a violent backlash in Darfur nor deterring future crimes – that should cause alarm.

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