



International Justice and the Prevention of Atrocities

Case Study: Darfur

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1. Three preliminary comments

Before we dive into the complexities of Sudan, three preliminary comments must be made on the frame within which this paper fits: the ECFR project on ‘international justice and the prevention of atrocities’. First, while the project’s title refers to ‘international justice’, the focus seems to be on ‘international *criminal* justice’. This paper will thus also focus on international criminal justice, and in the context of Darfur, in particular the International Criminal Court (ICC or the Court). But the difference between international criminal justice and international justice is crucial: initiatives towards the realisation of alternative conceptions of justice (justice as restoration, justice as rule of law, justice as redistribution) could have fundamentally different impacts on peace, prevention of atrocities, and indeed, the realisation of ‘justice’.

Secondly, while the title looks at the impact of international criminal justice on ‘the prevention of atrocities’, the study is in fact interested in more: it also asks questions about the impact on peace settlements and accountability. These various impacts need not coincide: the conclusion of a peace agreement is often accompanied by violence and *rising* crime rates; and a decline in

¹ Many of the arguments presented here have been more fully developed in S.M.H. Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan*, Cambridge University Press, 2013.

² This paper was prepared as part of a project of the European Council on Foreign Relations to compare the experience of different situations where international responses to crises involving mass atrocities have faced the dilemma of seeking accountability while trying to bring the crisis to an end. Please cite fully in the event of reference or quotation.

'atrocities' need not usher in a peace agreement. Accountability, in turn, is an aim entirely separate from peace: accountability may be achieved at the expense of peace. In sum, we need to look at all these impacts, but as conceptually separate.

Thirdly, the evaluation of the impacts depends on one's philosophical theory of international criminal justice: if one's theory is deontological (criminal justice must be done for the sake of it), then its consequences are of little relevance. If one is interested in the consequences, the evaluation depends on which impact one values most: the impact on the conflict concerned, the impact on (potential) other conflicts in the world, the impact on the project of international criminal justice. Ultimately, with respect to all these questions, it is important to assess who decides and who bears the consequences.³

2. The International Criminal Court in Sudan

On 31 March 2005, the UN Security Council adopted Resolution 1593 under Chapter VII of the UN Charter, referring 'the situation in Darfur since 1 July 2002' to the ICC.⁴ It did so at the recommendation of the International Commission of Inquiry on Darfur (ICID), which the Security Council had established in 2004 to investigate the reports of gross violations of international humanitarian and human rights law.⁵

For the purposes of this paper, five features of the referral stand out. First, the referral was as much, if not more, about the impact on the ICC as/than it was about the impact on Darfur. The Rome Statute had entered into force three years before and given the hostile attitude of the US to the Court, it was considered unlikely that the Court would receive any situation through a Security Council referral. The ICID, perhaps unsurprisingly since its chairman was one of the founding fathers of the ICC, advised that the ICC was the only and best avenue for justice in Darfur, concluding that it would 'be consistent for the Security Council, the highest body of the international community responsible for maintaining peace and security, to refer the situation of Darfur and the crimes perpetrated there, to the highest criminal judicial institution of the world community'.⁶ It advised against alternative avenues for justice, such as the establishment of new ad hoc international tribunals or mixed courts, or expanding the jurisdiction of existing ad hoc tribunals. The US tried to convince other Security Council members to refer the situation in Darfur to any jurisdiction other than that of the ICC, for instance a joint AU/UN Special Court for Darfur. However, confronted with the refusal of ICC States Parties on the Council to let Darfur escape the ICC, the US eventually abstained from the vote referring the situation in

³ See more elaborately, S.M.H. Nouwen, 'Justifying Justice', in J. Crawford and M. Koskeniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press, Cambridge, 2012) 327.

⁴ UN Doc. S/RES/1593 (2005):[1].

⁵ UN Doc. S/RES/1564 (2004):[12].

⁶ UN Doc. S/2005/60 (2005):[589].

Darfur to the Court.⁷ Even China, Sudan's largest trading partner, did not veto the Council's first referral to the ICC. Remarkably, Brazil, a strong ICC supporter, also abstained—not because it had reservations about the ICC, but because in its view the resolution's concessions to the US had unacceptably weakened the position of the Court.⁸ The Security Council's debates about the referral were thus primarily a battle about this legal and political milestone for the ICC and much less so about Darfur.

Secondly, while the resolution referring the situation was adopted under Chapter VII of the UN Charter and thus technically as an instrument to promote peace and security, the Security Council did not elaborate its theory of change, in other words how international criminal justice would promote peace in Darfur.⁹ For both the Council and the Statute (requiring referrals by the Security Council to be made under Chapter VII of the UN Charter),¹⁰ the idea that international criminal justice can contribute to peace and security seems more a principled idea (an idea about right and wrong independent of empirical evidence) than a causal idea (an idea about cause and effect that is adjusted in the light of evidence).¹¹ Indeed, the referral fits in a series of Security Council actions in which international justice is chosen officially as an avenue towards peace and security, but in fact seems more and more an end in itself.¹²

Thirdly, the resolution isolates the conflict in Darfur from other developments in Sudan. In the very same week, the Security Council had adopted two other Sudan-related resolutions, one establishing a peacekeeping force to monitor the implementation of the Comprehensive Peace Agreement that had three months earlier been concluded between the Government of Sudan and the Sudan People's Liberation Movement (SPLM),¹³ the other establishing a sanctions

⁷ For the US considerations, see Z. D. Kaufman, 'Justice in Jeopardy: Accountability for the Darfur Atrocities', 16(4) *Criminal Law Forum* (2006) 343.

⁸ Particularly controversial were the provisions on funding, the limitations on the Court's personal jurisdiction and the creation of exclusive jurisdiction, and the references to the Security-Council's power to defer proceedings for a year and to the so-called 'bilateral immunity agreements'. See UN Doc. S/PV.5158, Reports of the Secretary-General on the Sudan (Thursday, 31 March 2005), <http://daccessdds.un.org/doc/UNDOC/PRO/N05/292/47/PDF/N0529247.pdf?OpenElement>.

⁹ See also, the International Commission of Inquiry (*supra* note 4): 'The prosecution by the ICC of persons allegedly responsible for the most serious crimes in Darfur would contribute to the restoration of peace in the region' (p. 5). In para. 648 it revealed some of its assumptions: 'The investigation and prosecution of crimes perpetrated in Darfur would have an impact on peace and security. More particularly, it would be conducive, or contribute to, peace and stability in Darfur, by removing serious obstacles to national reconciliation and the restoration of peaceful relations.' However, a precise theory of change is not presented.

¹⁰ Rome Statute of the International Criminal Court, art. 13(b).

¹¹ On the difference, see S. Khagram, J.V. Riker and K. Sikkink (eds), *Restructuring World Politics: Transnational Social Movements, Networks and Norms* (University of Minnesota Press Minneapolis, London 2002) 14.

¹² See also F. Mégret, 'A Special Tribunal for Lebanon: The UN Security Council and the Emancipation of International Criminal Justice', 21 *Leiden Journal of International Law* (2008) 485.

¹³ UN Doc. S/RES/1590 (2005).

regime with respect to Darfur.¹⁴ While consistent with the Council's approach to Darfur as a relatively isolated problem in Sudan, the specific Darfur-related instruments such as sanctions and the ICC would later also affect attempts to promote peace in Sudan more broadly.

Fourthly, the Security Council resolution referring the situation in Darfur to the ICC implemented only one of two recommendations of the ICID to the Council: the ICID had recommended that the Council not only refer the situation to the ICC, but also establish a Compensation Commission to 'grant reparation to the victims of the crimes, whether or not the perpetrators of such crimes have been identified'.¹⁵ The Council did not do the latter. This prioritisation of criminal justice over restorative justice is at odds with Sudanese conceptions of justice in which reparations are key.¹⁶ (This preference is not necessarily cultural. It is at least as much related to the position in which people find themselves at a particular time and which form of justice would help them most to improve their situation.) But the prioritisation does correspond with the international institutionalisation of 'justice': there is an international *criminal* court; there are no permanent international institutions focusing on restorative justice.

Finally, the referral came *after* the worst violence in Darfur had already taken place. Attributing the decline in the intensity of the conflict to the Court's intervention would suffer from the logical fallacy *post hoc ergo propter hoc*. Instead, other factors are more directly relevant for the reduction in violence: the Government of Sudan had managed to push back the rebellion; a humanitarian ceasefire had been agreed upon; AU peacekeepers were on the ground to monitor compliance and the Government of Sudan had reason to refrain from a fourth offensive because Western powers had promised normalisation of relations in exchange for its signature of the Comprehensive Peace Agreement. That said, whilst changed in character and intensity, neither conflict nor crimes had ended by the time the ICC intervened, and indeed, they still have not at the time of writing.

3. Consequences of the ICC's involvement

The referral itself spurred relatively few effects in Sudan. Most effects occurred in response to concrete actions of the Court, for instance, the Prosecutor's opening of an investigation, the request for warrants of arrest and the issuance of such warrants, in particular for President Omar al-Bashir. All in all, several effects can be identified and distinguished.

Impact on discussions about transitional justice and democratisation

The ICC's intervention, and particularly the request for an arrest warrant for the President, triggered attention for the topic of transitional justice in the Sudanese media, albeit rather one-

¹⁴ UN Doc. S/RES/1591 (2005).

¹⁵ See the Report of the Commission of Inquiry, *supra* note 4, p. 6. See also para. 649.

¹⁶ See Nouwen, *Justifying Justice*, *supra* note 2.

sidedly: the ICC's involvement in Sudan also led the Government of Sudan (GoS) to limit the space for views diverging from its own. The 'debate' on transitional justice in the media was therefore for most of the time a monologue against 'international injustice'. While newspapers could not provide the counterarguments to the Government's anti-ICC campaign, the campaign itself kept the issues of international criminal justice and Darfur on the agenda. During the second part of 2008 and much of 2009, the arrest warrant against the President made the ICC the talk of the town.

Posters of a defiant Omar al-Bashir stayed in the streets and on the windows of taxi minivans, but the context gradually changed from the battle against the 'international court of injustice' into that of the 2010 presidential elections. According to insiders, Bashir, tired after 21 years of being in charge, had considered handing over to a protégé in the National Congress Party. However, facing an arrest warrant from the ICC, Bashir reckoned that he could not risk losing the protection provided by the Republican Palace. By the time he emerged victorious in the elections, public attention for the ICC had subsided: the ICC had proved to be another international actor too weak to defeat the NCP.

For organisations and people with a specific interest in transitional justice, organising events in Sudan became increasingly difficult after the ICC's intervention. In 2005, a few months after the referral, international and local NGOs could still organise a public seminar on the ICC in which even government officials participated.¹⁷ After the arrest warrants for Harun and Kushayb, and particularly since the request for the President's, the environment became more hostile. For the first time since the initial years after the 1989 coup, the National Intelligence and Security Service (NISS) resumed the practice of torturing human rights defenders, now on allegations of cooperating with the ICC.¹⁸ In court, people were convicted for such cooperation.¹⁹ International humanitarian NGOs were expelled and national human rights NGOs were closed on the same allegations fifteen minutes after the ICC's decision on an arrest warrant against Bashir came out.²⁰ Fearing for the same fate, international actors such as UNAMID adjusted their human rights work, avoiding at all costs being associated with the politically sensitive topic

¹⁷ Participant observation, Khartoum, October 2005.

¹⁸ Unlike in the old days, it sent home its victims without insisting on their prior recovery in detention. Their wounds had to serve as a warning against supporting the ICC. See A.M. Fernandez, Freed Human Rights Activist Describes 'Ghost House' Detention, 2 December 2008, Khartoum 1280 <http://wikileaks.org/cable/2008/12/08KHARTOUM1738.html>.

¹⁹ 'Three human rights activists arrested in Sudan', *Sudan Tribune* (25 November 2008) and 'Sudanese gets 17 years for "spying" for war crimes court', *AFP* (28 January 2009).

²⁰ See, *inter alia*, UN Doc. S/2009/201 (2009):[26] and African Centre for Justice and Peace Studies, *An Opening for Expression or Shifting Tactics? Freedom of the Press and Freedom of Expression in Sudan* (Report on the Situation of the Freedom of Expression and the Freedom of Press in Sudan, 1 January 2009 – 30 September 2009), 5.

of international justice.²¹ Human rights activists left the country and many stayed away even after the threat subsided. The ICC's intervention thus drew attention to accountability and transitional justice, but at the same time led the GoS to restrict the space for dissenting voices. The GoS interpreted any interest in the ICC, or ICC-related issues such as criminal accountability, as support for yet another Western instrument aiming to achieve regime change in Sudan.

It was the African Union's engagement with transitional justice in Sudan that somewhat opened up the space for discussion and triggered even the GoS's interest in the topic. 'Concern[ed] with the misuse of indictments against African leaders',²² the AU established an African Union High-Level Panel on Darfur (AUPD) and mandated it to submit recommendations on 'how best the issues of accountability and combating impunity, on the one hand, and reconciliation and healing, on the other, could be effectively and comprehensively addressed, including through the establishment of truth and/or reconciliation Commissions'.²³ Since the Panel had been created in response to the ICC Prosecutor's request for an arrest warrant for the Sudanese president and the AU in the same resolution 'request[ed] the United Nations Security Council, in accordance with the provisions of Article 16 of the Rome Statute of the ICC, to defer the process initiated by the ICC',²⁴ the Panel was widely expected to focus on how to end the ICC's proceedings against an African head of state.²⁵ However, in its 2009 report the AUPD focused on resolving the conflict in Darfur, and treated the ICC as a side-issue.²⁶ It merely stressed that 'the ICC is a "court of last resort"' and that the Rome Statute recognises the duty of states to exercise jurisdiction over international crimes.²⁷ It identified complementarity as a way of addressing ICC involvement, but with the following caveat:

The Panel does not believe that the motivation, or the rationale, for taking national steps to address justice issues should derive solely, or predominantly, from the perceived need to deal with the ICC issue. Whilst the ICC action might be a catalyst for acts of accountability in Sudan, Darfurians deserve attention not because of the threat of

²¹ When they seemed not to do so, their activities were interrupted, as an official of an international programme conducting trainings on the rule of law accounted in an interview in El-Geneina in May 2010: 'After the ICC arrest warrant [for President Bashir] national security closed three of our trainings. We had fifteen minutes to get out.'

²² AU Doc. PSC/MIN/Comm CXLII Rev.1 (2008), clause 3.

²³ *Ibid.*, clause 11(ii).

²⁴ *Ibid.*, clause 11(i).

²⁵ See, e.g., 'Mbeki "outraged" over his panelist remark on Darfur mission' Sudan Tribune (9 November 2009) ('The timing [of the establishment of the AUPD] fueled speculation that the AU is seeking to circumvent the ICC indictment of Bashir particularly in light of the pan-African body position opposing the warrant').

²⁶ AU Doc. PSC/AHG/2(CCVII) 2009.

²⁷ *Ibid.*: [244]-[245].

international action, but principally because they have a right to justice, in their own country, on account of what they have suffered.²⁸

Without spending many more words on the ICC, the Panel proposed an ‘Integrated Justice and Reconciliation Response’, based on the broad understanding of ‘justice’ that Darfurians had conveyed to the Panel, encompassing ‘processes of achieving equality, obtaining compensation and restitution, establishing the rule of law, as well as criminal justice’.²⁹

By focusing on the need for justice *and* peace *and* reconciliation, and adopting the broad understanding of justice that is prevalent in Darfurian society, the Panel broke the ICC’s monopoly on the definition of justice and made transitional justice discussable in Sudan. Transitional justice became attractive to the Sudanese authorities precisely because it encompassed more than, and could perhaps be distinguished from, criminal justice, recognising that sometimes a balance must be struck with other worthwhile aims such as peace and reconciliation.³⁰

While international attention focused on the GoS’s rejection of the idea of hybrid courts, the GoS did not dismiss the AUPD report as a whole.³¹ The report thus provided development agencies with openings to discuss transitional justice with the Sudanese authorities, to spread brochures with the ABC of transitional justice among Sudanese judicial and law enforcement agencies and to conduct training for state officials. Transitional justice, for a while taboo because of its association with the ICC, thus became discussable as an alternative to the ICC. This effect was not directly catalysed by the ICC’s involvement, but mediated by those who sought for alternatives to the ICC, in particular the African Union.

Impact on the inclusion of accountability in the peace process

Initially, the impact of the ICC’s involvement was that the topic of accountability was taken *off* the agenda of Sudanese peace negotiations: according to the mediators, this divisive item had been delegated by the Security Council to the ICC. Consequently, the Darfur Peace Agreement (DPA) omits any reference to accountability for crimes committed during the conflict.

²⁸ *Ibid.*: [245].

²⁹ *Ibid.*: [317].

³⁰ Discussion with a senior official in the Ministry of Justice, Khartoum, July 2011. See also ‘Sudan fires Darfur war crimes prosecutor amid talk of “transitional justice”’, *Sudan Tribune*, 17 October 2010, citing the Minister of Justice as saying: ‘[I]f we cannot present [any] cases to the courts, we can resort to the axis of the reconciliations and transitional justice’.

³¹ ‘Sudan reiterates rejection of Darfur hybrid courts’, *Sudan Tribune*, 1 November 2009 (‘[T]he Sudanese presidential adviser Mustafa Osman Ismail said that Khartoum accepts the AU report “in its generalities” and the “African solution for the Darfur crisis” ... Ismail said Sudan wants further dialogue with the AU on the judiciary mechanism for Darfur for the purpose of “securing the independence of the Sudanese judiciary and at the same time the necessary transparency to achieve justice on its most noble levels and punishing the perpetrators who committed crimes in Darfur”.’)

However, the ICC Prosecutor's application for an arrest warrant against the Sudanese President indirectly put the issue of justice back on the agenda of the Darfur peace talks. Convinced 'that the search for justice should be pursued in a way that does not impede or jeopardize efforts aimed at promoting lasting peace' and concerned 'with the misuse of indictments against African leaders', the Peace and Security Council (PSC) of the African Union adopted a communiqué in which it established the African Union High-Level Panel on Darfur; requested the UN Security Council to defer the ICC proceedings against the Sudanese President; and 'encourage[d] the Sudanese parties, with the support of the Joint Chief Mediator, to ensure that issues of impunity, accountability and reconciliation and healing are appropriately addressed during the negotiations aimed at reaching a comprehensive peace agreement'.³² Whereas the AU mediation team had taken justice off the agenda in Abuja, the AU PSC reinserted it into the Doha talks. The AUPD endorsed this reinsertion by observing in its report that dropping accountability from the Abuja talks had been 'an error'³³ and contending that 'external interventions will not, and cannot, of themselves, provide the answers to the range of difficult questions that Sudan faces'.³⁴ The Doha Document for Peace in Darfur now sets an ambitious transitional-justice agenda in terms of aims, principles and scope (but misses a political deal on transitional justice that will ensure that the mechanisms will be implemented). Again, it was thus the search for an alternative to the ICC that spurred negotiations on transitional justice. Having first taken accountability off the agenda on account of the ICC's involvement, the AU put it back in, in light of the controversy around the arrest warrant for the Sudanese President.

Impact on peace processes

The ICC has claimed that its arrest warrant for President Bashir did not disturb any peace process and that, indeed, it has encouraged the Doha peace process.³⁵ The reality is more nuanced. First, ever since 2004 there had been peace negotiations, under various auspices. In 2006, the Government of Sudan was ready to sign the AU-mediated DPA; the rebel movements were divided among themselves. The US Deputy Secretary of State, who tried to resolve the movements' concerns about the draft DPA and to pressure the Government to accept amendments in light of these concerns, referred to the ICC 'to convey a sense of the stakes [and] to give a sense of the possible consequences': "If you don't agree, I'll see you in The

³² AU Doc. PSC/MIN/Comm CXLII Rev.1 (2008), clause 11(iii).

³³ AU Doc. PSC/AHG/2(CCVII) 2009:[173]. See also [238].

³⁴ *Ibid.*: [245].

³⁵ See Fatou Bensouda, Deputy Prosecutor of the International Criminal Court, 74th Conference of the International Law Association, *De Jure Humanitatis*; Peace, Justice and International Law, Keynote Address, Peace and Justice, Friends or Foes?, The Hague, 17 August 2010.

Hague".³⁶ Ultimately, the GoS and one movement signed; the other two key movements stayed out, and splintered further. The US may have tried to use the ICC as a stick, but ultimately even the US could not control the stick (entirely).

Several efforts have been made to bring the non-signatories back into a peace process. However, after the Prosecutor's request for an arrest warrant for the President, the armed movements became more and more intransigent, arguing that they would not negotiate with a 'génocidaire'.³⁷ The fact that the Prosecutor had meanwhile also brought a case against members of the armed movements did not make them any more compromising: the Prosecutor had brought a case against members of splinter movements, thus emboldening the main armed movements even more. It was only when their military positions became weaker, *inter alia* because of the war in Libya, that some members of the armed movements separated from the core movements and decided to sign a new peace agreement, the Doha Document for Peace in Darfur. But key movements continue to stay out of any peace process.

The ICC's impact on peace processes in Sudan has gone beyond Darfur. The ICC's involvement in Sudan generally, and the arrest warrants against senior government officials including the President in particular, has led to a battle of frames: a battle over which perspective should determine the analysis, and this resolution, of the Sudanese crises.³⁸ According to the *political* frame, the crises in Sudan have political causes and must be resolved politically, even if crimes have taken place and must be addressed. In this perspective, Sudan's leaders are primarily political leaders, and possibly secondarily, also criminals. According to the *criminal* frame, however, the crises in Sudan are characterised by criminality, caused by the criminal intent of a few individuals, and must be resolved through the application of criminal law. According to this frame, the senior government officials sought by the ICC must be arrested, not negotiated or spoken with.³⁹

Whereas almost all international actors had applied the political frame to conflict between the GoS and the SPLM, some western states and international organisations (for instance, the EU and UN) adopted, with the referral of the situation in Darfur to the ICC, the criminal frame for the Darfur conflict. This division in frames led to international division, primarily between western states and western-dominated organisations on the one hand, and China, Russia and

³⁶ Interview with Robert Zoellick, Washington, 20 February 2009, and email correspondence with his office, 7 August 2009.

³⁷ See more elaborately, S.M.H. Nouwen and W.G. Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan', 21(4) *European Journal of International Law* (2010) 941.

³⁸ See more elaborately, S.M.H. Nouwen, 'The Diverging Conflict Analyses of the United Nations and the African Union', *ASIL Proceedings* (2013) forthcoming, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2332359.

³⁹ See, for instance, Prosecutor of the International Criminal Court, Statement to the United Nations Security Council on the Situation in Darfur, the Sudan, Pursuant to UNSCR 1593 (2005), 5 June 2013, para. 12.

particularly the African Union on the other, with respect to how the conflict in Darfur should be analysed and resolved. The AUPD's report is a clear attempt to overcome the purely criminal frame and to analyse and resolve the conflicts in Sudan comprehensively.

The adoption of the criminal frame for Darfur also had implications for the resolution of the GoS-SPLM conflict. For instance, when the implementation of the Comprehensive Peace Agreement faced serious obstacles, those countries and organisations that had adopted a criminal frame for the conflict in Darfur were also prevented from meeting with President Bashir to exert influence on the Government for the purposes of the GoS-SPLM conflict. In other words, much to the frustration of diplomatic representatives of those states and organisations, they hugely decreased their relevance in the implementation of the CPA by refusing to talk with the key Sudanese actors. Over time, with the stakes of the CPA increasing, especially in the running up to the Southern Sudan referendum, one could observe a weakening of the criminal frame to the benefit of the political frame. With respect to Darfur, however, the criminal frame has remained dominant.

Impact on justice

In order to assess the ICC's impact on 'justice', we must distinguish several components of this rich concept, including:

- Distributive justice, which addresses fundamental injustices such as political and economic discrimination and inequalities of distribution (i.e. injustices that often foster conflict);
- Legal justice, which aims at (re-)establishing the rule of law;
- Rectificatory justice, which addresses the direct consequences of human rights abuses for specific individuals. Rectificatory justice can be distinguished in restorative justice, which focuses on the restoration of damage done to the individual and to relationships, and retributive justice, which focuses on accountability, or more narrowly punishment, of the perpetrator.⁴⁰

The ICC seems to have had little impact on distributive or restorative justice in Sudan. With respect to 'legal justice', in some other countries, for instance, Uganda, ICC intervention and particularly the attempt to substitute the ICC, led to a paradigm shift: following the ICC, domestic lawyers began to assert the relevance of law in situations of conflict. This has not happened in Sudan. For not only the GoS, but also many Sudanese lawyers, perceive of the ICC as another international *political* instrument that western powers in the Security Council use selectively to topple regimes of which they do not approve. Seen as a political instrument, the

⁴⁰ For these categories of justice, see R. Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Polity, Cambridge, 2002).

ICC did not usher in a stronger legal approach to the conflict in Darfur. Some human rights activists, who had since long advocated for more accountability, have been in favour of the ICC's intervention. However, as explained above, their rule-of-law promotional activities became much more difficult due to the ICC's involvement.

The strongest impact the ICC could be expected to have is on retributive justice, since this is the justice meted out by the Court. However, even that impact seems to have been rather limited, so far. As regards the ICC's directly contributing to retributive justice, of the seven Sudanese suspects with respect to whom the Court has brought cases, only three have appeared before the Court. All three are on the side of the armed movements. One of these appeared victorious in that Court refused to confirm the Prosecutor's charges.⁴¹ One is said to have died.⁴² So, only one Sudanese person is involved in ongoing proceedings before the Court. None of the four suspects on the government's side (including a member of an at the time pro-government militia) have appeared before the Court.

More indirectly, however, the Court's involvement has spurred some developments on the retributive-justice front in Sudan. First, in terms of proscription, in response to the ICC's intervention, Sudan has adopted legislation criminalising war crimes, crimes against humanity and genocide.⁴³ Secondly, in terms of enforcement and adjudication, the GoS has established several new courts, prosecution offices, investigative bodies and committees.⁴⁴ Both types of measures were taken with a view to influencing the Security Council, rather than the ICC. According to some Sudanese officials, some permanent members of the Security Council had told them that Sudan would have to demonstrate action towards more accountability for them to help address Sudan's 'ICC problem'.

However, neither the legislation nor the special mechanisms have thus far made a contribution towards more accountability in Sudan. The new legislation has not yet been applied and the special mechanisms have all faced difficulties in investigating, let alone prosecuting, in Darfur. The Special Criminal Courts for Events in Darfur tried only a dozen of cases, few of which were

⁴¹ *Prosecutor v. Bahar Idriss Abu Garda, Decision on the Confirmation of Charges*, ICC-02/05-02/09-243-Red, Pre-Trial Chamber I, 8 February 2010.

⁴² *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Public Redacted Decision Terminating the Proceedings against Mr Jerbo*, ICC-02/05-03/09-512-Red, Trial Chamber IV, 4 October 2013.

⁴³ See Armed Forces Act 2007 and Criminal Act Bill (Amendment) 2008.

⁴⁴ See, for instance, Chief Justice, Decree Establishing the Special Criminal Court on the Events in Darfur 2005; Chief Justice, Resolution No. 702 2005; Chief Justice, Resolution No. 981 2005; Chief Justice, Amendment of the Order of Establishment of Criminal Court for Darfur's Incidents 2005; Chief Justice, Order of the Establishment of Criminal Court for Darfur's Incident (Geneina) 2005; Chief Justice, Resolution No. 1128 2005; Chief Justice, Resolution No. 1129 2005; Minister of Justice, Decision No. 9/2005 Establishing a Committee of Prosecution for Special Criminal Cases in Darfur 2005; Minister of Justice, Decree on the Establishment of a Specialized Prosecution for Crimes against Humanity 2005 and Decision of the Minister of Justice, Appointment of Special Prosecutor for Crimes in Darfur 2008.

directly related to the conflict. These developments bear out that the real causes of impunity are not necessarily the absence of special laws and special mechanisms (the object of much donor and NGO activity): in fact, people could have been prosecuted for ordinary crimes and by ordinary courts. The causes of impunity are more deeply ingrained. Among them are the Government's lack of control over entire areas in Darfur, the reluctance on the part of witnesses to cooperate with the Court, and first and foremost, the rule of the patronage market in which the Government is dependent on the loyalty of militia.⁴⁵

Concluding observations

In evaluating whether a Security-Council referral to the ICC is a good idea, the first questions must be what the aim is and whose aim this is.

First, as the Darfur referral demonstrates, for some, the aim of a referral can be to support the ICC *per se*, irrespective of the absence of evidence that it will contribute to the resolution of the conflict in the situation referred. In this view, Security Council referrals are votes of confidence in the Court, and the existence of the Court strengthens the international rule of law. That said, some who generally hold this view have argued that the referral of the situation in Darfur was nonetheless a mistake, not because of the consequences in Sudan (which, from this perspective is hardly relevant), but because the lack of enforcement of arrest warrants has undermined the credibility of the ICC.⁴⁶

Secondly, in terms of justice, the ICC can, in the long term, make a contribution towards retributive justice by holding perpetrators to account (once they have been caught). Theoretically, the ICC could also spur domestic accountability proceedings, although domestic obstacles to such proceedings are often huge, and not removed by the Court. The ICC could also serve 'legal' justice at the international plane, by sending a message across the world that the perpetrators of these crimes must be held accountable.

However, these notions of justice are primarily inspired by international desires for a particular type of justice for the 'international community'. They need not correspond with the most pressing needs for 'justice' by people in the situation country, such as distributive justice, restorative justice and legal justice at the domestic level.

If the aim is peaceful conflict resolution, then a referral to the ICC is not necessarily helpful. A referral of a situation to the ICC leads to the applicability of the frame of criminal law to that situation, which will compete with the political frame. Any domination of the criminal frame

⁴⁵ See, inter alia, Alex de Waal, 'Dollarised', 38 *London Review of Books*, 24 June 2010.

⁴⁶ See, for instance, Louise Arbour, interviewed in Y. Boisvert, 'La fragile justice internationale fragilisée', *La Presse* (17 June 2013).

will allow less attention for the structural dimensions of the conflict. Moreover, the criminal frame changes the position of relevant actors in the conflict. Groups not targeted by the Court will feel emboldened and become more intransigent; whereas actors sought by the Court will be isolated by those adopting the criminal frame. Diplomats may be able to use the ICC as an instrument of pressure, but once the instrument has been activated, they no longer control it. While actors both inside and outside the ICC stress the importance of coordinating the ICC's judicial work with other efforts to address a conflict, such coordination is difficult: created as an independent Court, the ICC cannot be ordered to wait, submit to coordination efforts or anything else (with the exception of a formal request for a deferral made pursuant to article 16). The ICC's only frame is the criminal frame. And when the criminal frame applies, peace is possible only if achieved through total victory.

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