

## PLAYING IT FIRM, FAIR AND SMART: THE EU AND THE ICC'S INDICTMENT OF BASHIR

The indictment by the International Criminal Court (ICC) of Sudan's President Omar al-Bashir has set off a political firestorm which threatens to engulf global north-south relations and set back the ambitious project of international justice. Sudan threatens to unleash yet more misery in Darfur. Yet the indictment was the right thing to do, and these threats can be avoided if the EU and its allies play it firm, fair and smart.

Since the indictment was issued, the African Union (AU), the Arab League, China and Russia, among others, have rejected the warrant, the government of Sudan announced the expulsion from Darfur of aid agencies who provide a vital lifeline to millions of displaced persons, and some voices have even called for African 'de-ratification' of the ICC. President Abdoulaye Wade of Senegal, the first state to ratify the ICC statute, complained that, contrary to his country's expectations, the court 'only tries Africans'.

The EU must act decisively to uphold the warrant, to place responsibility for any further suffering on the Sudanese authorities, and to rescue the ideal of international justice.

**Playing it firm** means defending the indictment tooth-and-nail. The EU, as much as anyone, was behind the establishment of the ICC as a means to develop an international order based on the rule of law. If the ICC was created to do anything, it was to judge those most responsible for the very worst crimes in the world. Whoever else should be in that category, it is hard to argue that the leader allegedly directing the extermination of Darfuri populations has been wrongly targeted. History has taught us that silence in the face of atrocities does not prevent further crimes.

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Sudanese President Omar al-Bashir at a meeting with Sudanese NGOs in a national initiative to raise donations for Darfur in Khartoum, 16 March 2009. The Sudanese government ordered the expulsion of 13 international aid organisations and three domestic groups after the ICC issued an arrest warrant his arrest.

Playing it firm thus means unmasking the opposition to the warrant by many repressive regimes, whose stated concerns over the 'peace process' in Darfur mask an all-too-familiar solidarity with the oppressors rather than their victims. The truth is that no real peace process is currently under way because of a lack of adequate political will from both the government and rebel forces to end the conflict. Although one rebel group, JEM, and the government signed a 'declaration of intent' in February, this did not even include a commitment to a ceasefire. It means blocking any attempt to use the United Nations Security Council to suspend the ICC case in Darfur, even in return for unenforceable promises by al-Bashir.

The effect of the warrant in Sudan will depend on the backing it receives. The historical record from other conflicts shows that when supported by the in-

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ternational community warrants for arrest of leaders can actually strengthen peace efforts by stigmatising and marginalising these leaders. The arrest warrants against Charles Taylor of Liberia and Radovan Karadzic in Bosnia and Herzegovina removed them from peace processes and ultimately facilitated reaching agreement. In addition, many credit the ICC warrants against the leaders of the Lord's Resistance Army (LRA) in Uganda for their willingness to participate in peace talks for the first time in years. Playing it firm thus also means blocking any attempt to use the United Nations Security Council to suspend the ICC case in Darfur, even in return for unenforceable promises by al-Bashir.

Will the EU's vigour in defence of the warrant match that of its assailants? The sad fact is that when it comes to the international protection of rights, in recent years the governments with the clearest vision and strategy are often those that seek to undermine enforcement. Hiding behind the principles of sovereignty, non-interference, and southern solidarity, their real aim is to curb criticism of their own abuses or those of their allies and friends. These 'spoilers', whose diplomacy has run rings around the EU and its allies, have ended United Nations scrutiny of severe repression in Uzbekistan and Iran, mounted intense challenges to criticism of the Burmese military and deeply compromised the new UN Human Rights Council. Now their sights are set on the al-Bashir warrant.

But all is not lost, and the ICC's history in Darfur is a case in point. In 2005, when a UN Commission of Inquiry found that crimes against humanity had been committed in Darfur and recommended that the Security Council refer the case to the ICC as the 'single best mechanism' and 'only credible way' to ensure that justice was done, it seemed like a political non-starter given the looming vetoes not only by Russia and China but by the anti-ICC Bush administration. But European countries, in particular France, Germany and the UK, toughed it out to obtain the Security Council referral with abstentions by the big three.

Playing it firm also means placing the blame for any negative consequences of the warrant – such as the expulsion of aid groups – squarely on those responsible for their actions. It is the Sudanese government, not the ICC, that is creating catastrophic consequences for the people of Darfur by ousting humanitarian assistance. Expelling aid groups will further victimise those already made victim by atrocities al-Bashir is accused of committing in Darfur. This step compounds

the responsibility of the top Sudanese leadership for the gravest crimes committed in Darfur. The EU should lean heavily on Sudan's allies, such as China, to convince them to use their leverage in Khartoum to make clear that Bashir's retaliations against civilians and humanitarian groups maintaining a lifeline to millions of people in Darfur are unacceptable. The EU should request the African Union to stand more clearly with the victims in Darfur by expressing its concern over the expulsion of aid agencies. And the EU must be ready, as it has promised, to impose targeted punitive measures against those Sudanese officials responsible for a failure to co-operate with the ICC.

***Playing it fair*** means acting on developing countries' legitimate grievances, such as the double-standard in which the powerful, and those protected by the powerful, seem to be out of the reach of international justice.

African leaders, such as President Wade, object that all the active ICC investigations (Central African Republic, Uganda, DRC and Sudan) focus on alleged African criminals. Except for Sudan, it must be noted that the others were sent to the ICC by the governments concerned.

Of course, delivering justice to Africans is a positive goal, not a negative one. As Archbishop Desmond Tutu wrote in support of the warrant, 'Justice is in the interest of victims, and the victims of these crimes are African'. And the main reason why Africa dominates the ICC docket is that the continent continues to be ravaged by war and atrocity, which its justice systems are unable or unwilling to address. Indeed, the four ICC cases do not even begin to exhaust the list of African countries where crimes against humanity have been committed in the recent past.

When the will is there, developing countries can deal domestically with state-sponsored atrocities. In Latin America, for instance, former leaders are standing trial in Argentina, Peru and Uruguay for human rights crimes. True, those crimes were committed by rulers whose time has past, but Africa seems unwilling even to deal with those cases. Mengistu Haile Miriam, whose 'Red Terror' regime killed thousands of political opponents between 1974 and 1991 is living in Zimbabwe, which has refused Ethiopia's extradition requests. When Mengistu went to South Africa for medical treatment, the government failed to act on calls from human rights activists that he be arrested. I have spent the last 10 years helping the victims bring to jus-

tice Chad's exiled former dictator Hissène Habré, accused of thousands of killings and systematic torture. But after his initial indictment in 2000, Senegal refused to prosecute him, rebuffed his extradition to Belgium in 2005, and has stalled in applying a 2006 AU mandate to prosecute Habré before the Senegalese courts.

Yet as long as the powerful are out of its reach, the international justice enterprise, so much a product of EU effort, will remain the object of legitimate skepticism. What is the likelihood that US leaders will be brought to book for the crimes they authorised at Guantanamo and the archipelago of secret prisons around the world? Or that Russian officials will be called to account for war crimes in Chechnya?

This inequity, entrenched by military muscle and a Security Council veto, makes it easy for cynical rulers of less powerful countries to tar attempts to prosecute crimes against humanity as 'political' or 'neo-colonial'.

When I was at the AU summit last month, virtually every discussion about the unfairness of international justice began and ended with an evocation of Gaza, where the killing of Palestinian civilians was daily TV fare in much of the world.

Human Rights Watch has called for an impartial international investigation into violations of the laws of war by all sides in Gaza as a first step to ensuring accountability for crimes allegedly committed there. The EU must not only back that call, but make sure that justice is applied with equal vigour in the case of Gaza as in Darfur. So far, that vigour has been absent.

When it comes to crimes allegedly committed by US officials in the 'war on terror', EU countries' record has been disappointing. In the past two years, both France and Germany refused to act on well-documented criminal complaints filed in their countries against Donald Rumsfeld and other US policymakers for alleged war crimes at Guantánamo and Abu Ghraib. Germany, faced with the US's refusal, also dropped a request to the US to extradite 13 suspected CIA agents accused of abducting a German citizen and sending him to be tortured in a secret jail in Afghanistan. Similarly, the Italian government rebuffed the request of an Italian

judge to seek extradition of 26 CIA agents in connection with the Milan kidnapping of a Muslim cleric who was allegedly sent to Egypt and tortured.

As long as some governments remain above the law, the ideal of international justice is tarnished and its application jeopardised.

**Playing it smart** thus means listening to southern voices and their concerns about the ICC and the emerging architecture of international justice. African states such as Senegal and South Africa were, together with EU states, Canada and democratic leaders in Latin America and Asia, at the forefront of the 'like-minded' coalition which created a strong and independent ICC in Rome, where the Court's statute was approved by an overwhelming 120-7 vote. Of the 108 states parties to the ICC, 30 are in Africa. The Court's first three cases were all referred by African governments.

But trouble has been brewing for a while, and the north-south consensus which carried the day in Rome is being replaced by confrontation. Last year, European judges issued arrest warrants for top officials in Senegal (over a ferry tragedy in Senegal) and Rwanda (over alleged crimes by forces loyal to Paul Kagame) leading AU heads of state to decry the 'exercise of power by strong states over weak states'. Many in Africa now see international justice in general, and the ICC in particular, as a western 'experiment', with Africa as a guinea pig, to use AU Chairman Jean Ping's metaphor. And Africa is powerless, legally, to respond. The AU has called, if perhaps cynically, for the ICC action against President al-Bashir to be suspended, but has no way of seeing its call heeded. Although most Security Council business relates to Africa, Africa has no permanent African representatives or veto on the Council. The result is a feeling of victimisation which only contributes to African resentment.

A reversal of the al-Bashir warrant would be incredibly damaging for the ICC and the emerging architecture of international justice, but so would be the impending north-south collision. EU insistence on the al-Bashir warrant should thus be accompanied by an even-handedness in the application of justice and an outreach to Africa and other countries of the global south.

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