

**Should President Omar al-Bashir of Sudan be charged and arrested by the International Criminal Court?**  
**An Exchange of Views by Alex de Waal and Gregory H. Stanton**

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*The recent activity at the International Criminal Court (ICC) at the Hague concerning the case of President Omar al-Bashir and the crisis in Darfur has set off a firestorm of commentary amongst international lawyers, human rights activists, genocide scholars, experts on Sudan, and journalists, among others. Some argue that the ICC prosecutor, Luis Moreno-Ocampo, was correct in charging al-Bashir with genocide, others believe that he had little to no grounds for doing so. Furthermore, while some see the prosecutor's charges of genocide as questionable, at best, and highly counterproductive, if not dangerous, at worst, others see it as extremely positive and a move towards ending impunity for such crimes. The same is largely true of the arrest warrant that the ICC has issued for al-Bashir's arrest.*

*Dr. Alex De Waal, an Oxford-trained social anthropologist, a Fellow of the Global Equity Initiative at Harvard University, and the Director of Justice Africa in London; and Dr. Gregory H. Stanton, a Yale-educated lawyer and Chicago-trained cultural anthropologist, professor of Genocide Studies and Prevention at George Mason University, President of Genocide Watch, and past president of the International Association of Genocide Scholars, kindly agreed to debate the merits and demerits of the prosecutor's charges and the ICC's issuance of the warrant.*

**The Case Against Prosecution of President Omar al-Bashir by the International Criminal Court**  
**Alex de Waal**

The Chief Prosecutor of the International Criminal Court, Luis Moreno Ocampo, is making a misjudgment in demanding an arrest warrant against Sudan's President Omar al Bashir. The arrest warrant is an immense gamble, which has the potential to set back the cause of peace and democracy in Sudan, and is unlikely to advance the cause of justice and human rights. As I write this, I hope that the outcome will not be adverse, but my judgment is the risks of contributing to a further disaster in a volatile country and unraveling its tentative steps towards democracy, are greater than the opportunities for striking a blow against impunity.

Heinous crimes have been committed, during the last two decades in Sudan as a whole and during the last five years in Darfur. In fact, I have devoted much of my adult life to documenting human rights violations in Sudan. I have no doubt that President Bashir carries much responsibility for counterinsurgency campaigns that have involved countless abuses against civilians, for the repression of Sudan's civil society and dismantling of its democratic institutions, and for the infliction of famine, displacement and other forms of misery on millions of Sudanese citizens. He carries responsibility, not only in his capacities as head of state and commander in chief of the armed forces, but also in a more personal capacity in the specific actions he has taken to incite, encourage and organize excessive violence in war and against the political opponents of his government. It is precisely because such grievous violations of human rights have been perpetrated, and because a ruthless government which is ready to disregard human rights remains in power, that it is important to be especially careful in framing any charges against senior members of that government, and ensuring that a strategy for pursuing justice is fully aligned with strategies for securing peace, defending human rights and promoting democracy.

I will not provide a critique of the substance of the 14 July Public Application and especially the genocide charges here. But it is important to stress that the Application is a substandard piece of work, riddled with ethnographic and other factual errors as well as copyediting mistakes (de Waal, 2009). The genocide charges are breathtakingly ambitious, based upon extremely contentious lines of argument which run contrary to the case put forward by the most sophisticated academic advocates of the point of view that genocide occurred in Darfur (Hagan and Rymond-Richmond, 2009). If Luis Moreno Ocampo were to try to prosecute President Omar al Bashir for genocide using the arguments outlined in the Public Application, he would face huge challenges in obtaining a conviction. An acquittal of Bashir following a trial on genocide charges would not be a triumph for the ICC and international justice.

The main thrust of my argument is that the arrest warrant is a gamble with the future of Sudan.

In 2001, the international community, led by the neighboring countries of north-east Africa plus the United States, Britain and Norway, resolved that the best way to deal with the war in Southern Sudan, its disastrous domestic humanitarian consequences and its destabilizing impact on the region, was to support negotiations towards a peace agreement. After three years of talks, the Sudan Government and the Sudan People's Liberation Movement/Army (SPLM/A)—the largest, though not the only, armed opposition group—signed the Comprehensive Peace Agreement (CPA). The CPA promises a referendum for southern Sudanese on the right of self-determination (scheduled for January 2011) and, prior to that, national elections and a host of processes designed to reform the laws, promote human rights and redistribute wealth and power in favor of historically marginalized groups.

The CPA was heralded as "Sudan's second independence." Implementing it was always going to be a challenge, demanding hard political work, common understanding and cooperation between two mutually-suspicious former belligerents, and international guidance and support. The two exercises of democratization and self-determination are inextricably linked, because unless the government that presides over a southern decision

for independence or unity is truly legitimate, the result will surely be contested. The price of CPA failure is as high as can be. Another north-south war, this time a contested partition of the country, would be a truly disastrous outcome.

While the talks were ongoing in a Kenyan resort, a new war exploded in Darfur. While major hostilities in Darfur ended in January 2005, the same month that the CPA was signed, the legacy of the killing and displacement in Darfur continues to fester. The hope and anticipation for the CPA was that it would provide the framework whereby Darfurians and other discontented northern Sudanese groups could participate in this process of democratic transformation. That did not happen—in part because of the untimely death of John Garang, the SPLM leader whose political vision of a “New Sudan” of racial and religious equality had inspired the leaders of the Darfuran rebellion. Today, Darfur is a lawless place, most of it beyond the control of either government or rebels, in which one third of the population is displaced and largely dependent on one of the world’s largest humanitarian operations. Perhaps 150 people are killed each month in violence, about two thirds of them by government forces and their proxies. There seems little prospect of this misery ending soon.

The CPA remains the keystone of Sudan’s hopes for democratization and peace (Thomas, 2009). In Sudanese national politics, the relationship between north and south is the fundamental question. The two north-south civil wars since independence have been longer, bloodier and costlier than the Darfur war of 2003-2004. Resolving the north-south war was a signal triumph. Achieving peace in Darfur is more tactically difficult because of the fragmentation and political immaturity of the Darfuran rebel groups and because the post-CPA Government of National Unity (which includes both the dominant northern National Congress Party and the SPLM) are unwilling to revisit the central tenets of the CPA. There can be no progress on peace in Darfur if the CPA does not remain intact.

Two-thirds of the way through the CPA’s six-year interim period, less than half of the political work of democratization and preparation for the southern vote on self-determination has been done (Thomas 2009). An immense political task lies ahead, involving complex legislation, the technical tasks of preparing for elections and demarcating borders, and building confidence among the parties in the broad-based government. Into this stressed and volatile situation, the Chief Prosecutor of the ICC has demanded that the head of state surrender himself for arrest and trial in The Hague.

The optimists see two possible positive outcomes. One is that Sudan decides to rid itself of Bashir and his henchmen, either by a democratic uprising or an internal coup in which NCP moderates decide that the President is such a liability that they are better off without him and his henchmen. There is a Sudanese tradition of peaceful popular protest—known as *intifada*—bringing down military dictatorships, and for this reason the security apparatus systematically dismantled the civil society organizations that had led previous *intifadas*. Security surveillance and repression of human rights groups and the media has intensified in recent months. The popular uprising scenario is most improbable. An internal coup cannot be ruled out—but the most likely putschists are the senior security chiefs who have good reason to fear that the ICC would be after them too, especially as the ICC Prosecutor insists that the entire Sudan Government is a criminal apparatus. The most probable outcome is that Bashir, and the other leading members of the NCP and security apparatus, conclude that their safest place is in power. Rather than

considering stepping down at the next election, Bashir will want the protection bestowed by an electoral mandate. Rather than sharing power, they will ensure they keep the levers of sovereignty in their own hands.

A second optimistic outcome is that the ICC arrest warrant becomes a bargaining chip to be used by western nations, which offer a 12-month deferral under Article 16 of the Rome Statute as an incentive for political concessions, either in Darfur or regarding the CPA. This may occur. But it faces three difficulties. First, there is no international consensus on what concessions to look for. Second, it is only a year-long suspension, and the Sudan Government expects that another set of concessions will be demanded as the precondition for a renewal, and so on, leading ultimately to regime change. Khartoum's incentives for compliance are low. And thirdly, the ICC is not designed to be used as a political lever in this way. It is a court whose creation has taken away any power of granting amnesty.

The darkest pessimists fear that the ICC arrest warrant will lead to pre-emptive military action in Darfur, a reversal of the recent gains for civil and political rights, further restrictions on the UN and humanitarian operations, and an end to the CPA (Natsios, 2008). They fear emboldened rebels, who took their war to the national capital in May 2008. There are certainly ominous signs on all these fronts, and the President of South Sudan, Salva Kiir, has warned that the CPA would be endangered if its northern signatory—President Bashir—becomes a wanted man.<sup>1</sup> Some of the damage could be self-inflicted by supporters of the ICC, for example if the UN were to debar its senior representatives from meeting with Bashir or his ministers and officials, or if States Parties to the ICC were unable to dispatch ambassadors to Sudan, or if international agencies were to evacuate all non-essential personnel fearing violence against them.

While these scenarios are all credible and consistent with the habitual reactions of security chiefs in Khartoum, none have yet come to pass. The record of the last six months is one of limited political opening -- the "Sudan People's Initiative" whereby for the first time the NCP admitted errors in Darfur and involved other parties in discussing its Darfur policies -- along with clear threats of repression.

An intermediate scenario is equally plausible. This is that the ICC arrest warrant becomes the dominant and defining issue in Sudanese politics, until such time as the Sudan Government learns to adapt to the pariah status it thought it had escaped four years ago, or there is dramatic political change. Under this scenario, the SPLM struggles with the question of how to deal with being part of an internationally illegitimate government, while the Darfur rebels wait it out. The result is paralysis or slow-motion business as usual. But in the fifth year of the CPA's Interim Period, business as usual at stalling velocity is not a viable option. If the essential political business—formal and informal—is not transacted during this year, then the referendum in southern Sudan will be held with a host of unresolved political issues and no political bargain between the northern and southern elites on how their interests will be catered for in its aftermath. Given that most southerners are likely to vote for secession, this entails a southern attempt to separate without the preconditions for an orderly, consensual and legitimate partition of the country. That, I fear, spells war.

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<sup>1</sup> 'Sudan's First VP Pleads Case Against ICC Arrest Warrant for Bashir,' *Sudan Tribune*, 14 January 2009, <http://www.sudantribune.com/spip.php?article29859>

African leaders are terrified of this scenario because they know that a meltdown of Sudan or a new war will bring in neighboring countries and paralyze the African Union. This fear underpins their anger against the ICC. Africa's leaders have little respect or patience for President Bashir, but they are more alarmed at the prospect of an ungovernable Sudan. In the early days of the Court, African countries were among its most enthusiastic backers. During 2008, they became its critics. Coming on the heels of the arrest of the Congolese opposition leader Jean-Pierre Bemba while visiting Brussels, and arrest warrants by French and Spanish magistrates against Rwandan government officials,<sup>2</sup> the Bashir application unleashed the prospect of the political fate of the continent being decided by judicial activists in Europe. It is inconceivable that another African state will refer a case to the ICC in the foreseeable future, and most unlikely that any will cooperate with the ICC in executing arrest warrants. Africa may become a jurisdiction-free zone as a result, scarcely a victory for human rights.

With faint prospect of getting Sudan's leader in the dock, Luis Moreno Ocampo has chosen a strategy that seeks to have President Bashir tried in the court of world opinion. It is a gamble with serious perils, especially for the people of Sudan.

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<sup>2</sup> Rwandese Presidential Advisor Rose Kabuye was arrested in Germany in November 2008, and later released on bail.

## **The Case for Prosecution of Omar al-Bashir by the International Criminal Court**

**Gregory H. Stanton**

The Prosecutor of the International Criminal Court, Luis Moreno-Ocampo, has charged President Omar al-Bashir of Sudan with three counts of genocide, five counts of crimes against humanity, and two counts of murder as a war crime committed in Darfur since 2002. The ICC's Pre-Trial Chamber I has now issued a warrant for his arrest on the charges of crimes against humanity and war crimes, but not for genocide. It left open the possibility that the Prosecutor could produce additional evidence to justify amendment of the arrest warrant to include genocide.<sup>3</sup>

### **I. Is the ICC Prosecutor right to charge Omar al-Bashir and seek an arrest warrant against him?**

Mr. Moreno-Ocampo is justified in his charges and in seeking an arrest warrant for President al-Bashir. Mr. Moreno-Ocampo is fulfilling his mandate as the ICC's Prosecutor. The situation in Darfur was referred to the ICC by the United Nations Security Council in UN Security Council Resolution 1593 (2005).<sup>4</sup> The Security Council's referral was based on strong evidence gathered by a UN Commission of Inquiry of crimes against humanity and war crimes committed against specific ethnic and racial groups in Darfur, the Fur, Massalit, and Zaghawa. The Commission concluded that the government of Sudan armed and otherwise aided and abetted Janjaweed militias who have committed crimes against those groups.<sup>5</sup> The UN Commission of Inquiry's report on atrocities in Darfur, while not concluding that the Sudanese government had the intent to commit genocide, nevertheless noted that "single individuals, including government officials" might be determined to have such genocidal intent. The UN Commission recommended referral of the situation to the International Criminal Court, and furnished the ICC with names of specific individuals to investigate. After a thorough investigation, the ICC Prosecutor has amassed evidence of crimes against humanity and war crimes committed by Humanitarian Affairs Minister Ahmed Haroun, by Janjaweed leader Ali Muhammad Ali Abd al-Rahman, also called Ali Kushayb, and by President Omar al-Bashir. He has also found genocidal intent by al-Bashir. Arrest warrants were issued in 2007 for Haroun<sup>6</sup> and Kushayb.<sup>7</sup> The ICC Pre-Trial Chamber has now issued an arrest warrant for al-Bashir for crimes against humanity and war crimes, but found insufficient evidence to include genocide in the arrest warrant.<sup>8</sup>

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<sup>3</sup> ICC-CPI-20090304-PR394, 4 March 2009

<sup>4</sup> UN Security Council Resolution 1593, 31 March 2005, S/RES/1593 (2005)

<sup>5</sup> UN Commission of Inquiry Report, S/2005/60

<sup>6</sup> ICC-02/05-01/07-2-Corr

<sup>7</sup> ICC-02/05-01/07-3-Corr

<sup>8</sup> ICC-CPI-20090304-PR394

Evidence of Sudanese government planning, complicity, and aiding and abetting systematic crimes against humanity, including genocide, in Darfur is strong. Use of Sudanese government aircraft to bomb and strafe Fur, Massalit, and Zaghawa villages in Darfur has been documented by numerous investigators. Such bombing has been coordinated with Janjaweed militia attacks on the same villages, in which significant proportions of the male populations have been killed, women have been systematically raped, and villages have been pillaged and burnt to the ground.<sup>9</sup> When the U.S. State Department sent its Atrocities Documentation Team to Darfur in 2004, its own estimates of the death toll stood at over 50,000. By April 2008, the UN's Under-Secretary for Humanitarian Affairs said that 300,000 people have died above the normal mortality rate.<sup>10</sup> Over 2.5 million people are in camps for refugees and internally displaced persons.

Sudan expert Alex de Waal does not disagree with the US State Department's 2004 finding of genocide. He has written, "Powell is correct in law. According to the facts as known and the law as laid down in the 1948 Genocide Convention, the killings, displacement and rape in Darfur are rightly characterised as 'genocide'.<sup>11</sup> He has called Sudan's policies, "genocide by force of habit," and "famine that kills." The al-Bashir regime's twenty-year record of serial genocide against the Nuba, against the Dinka, Nuer, and other groups in southern Sudan, and now in Darfur, lends weight to the Prosecutor's charge.

As Sudanese head of state and commander in chief, President al-Bashir has command responsibility for the atrocities he knows are being committed in Darfur by the Sudanese armed forces and the Janjaweed militias, many of whom al-Bashir has incorporated into the Sudan government's reserve forces.<sup>12</sup> He has coordinated Sudan's policies that are intended to destroy a substantial part of the targeted ethnic groups, and also to drive them off their land.

Al-Bashir's responsibility is also direct for war crimes. The Prosecutor has evidence that al-Bashir has directly ordered Sudanese troops to adopt a "scorched earth" policy, and to "take no prisoners."<sup>13</sup> These are war crimes under the Geneva Conventions.

Under the Rome Statute, the Prosecutor's mandate is to analyze the seriousness of the information he has received on crimes within the jurisdiction of the Court, and if he concludes that there is a reasonable basis to proceed, he shall submit the case to the Pre-Trial Chamber.<sup>14</sup>

The Rome Statute of the International Criminal Court specifically excludes political office as providing immunity from prosecution. "This Statute shall apply

<sup>9</sup> See, e.g. Documenting Atrocities in Darfur, <http://www.state.gov/g/drl/rls/36028.htm> (accessed 19 January 2009)

<sup>10</sup> <http://articles.latimes.com/2008/apr/23/world/fg-darfur23>

<sup>11</sup> <http://www.preventgenocide.org/news-monitor/2005feb1.htm>

<sup>12</sup> Rome Statute of the International Criminal Court, Article 28 at [http://www.icc-cpi.int/library/about/officialjournal/Rome\\_Statute\\_120704-EN.pdf](http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf).

<sup>13</sup> Public Redacted Version of the Prosecutor's Application, para. 53, at [http://www.genocidewatch.org/images/Sudan\\_08\\_07\\_14\\_Public\\_Redacted\\_Version\\_of\\_the\\_Prosecutor\\_s\\_Application\\_under\\_Article\\_58.pdf](http://www.genocidewatch.org/images/Sudan_08_07_14_Public_Redacted_Version_of_the_Prosecutor_s_Application_under_Article_58.pdf)

<sup>14</sup> Rome Statute of the International Criminal Court, Article 15, op.cit.

equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute.”<sup>15</sup>

If the Prosecutor were not to charge President al-Bashir, he would be ignoring the evidence against al-Bashir and contributing to the impunity Sudan’s leaders now brazenly anticipate. He would fail to do his duty as Prosecutor of the International Criminal Court.

## **II. Who has the authority to decide whether charging al-Bashir in the ICC would constitute a threat to international peace warranting a Chapter VII deferral of the case under Article 16 of the Rome Statute?**

The wisdom of bringing charges against al-Bashir is both a legal and a political question. Prosecutor Moreno-Ocampo rightly believes that the political decision must be made by a political body, the UN Security Council. There is good reason why the UN Security Council, not the ICC, is the proper body to make this political decision. The Security Council, under the UN Charter, has “primary responsibility for the maintenance of international peace and security.”<sup>16</sup> Such responsibility is not conferred on the International Criminal Court by the Rome Treaty. The ICC is a judicial body, and lacks the diplomatic and political means to make judgments about whether it is appropriate or not to proceed with a case that has been referred to it by the UN Security Council.

By referring the situation in Darfur to the ICC, the Security Council made that decision. It could decide to defer prosecution of the case against al-Bashir by a vote of nine members of the Security Council<sup>17</sup> under Article 16 of the Rome Statute of the International Criminal Court.<sup>18</sup> But the Security Council supports the case against al-Bashir.<sup>19</sup> Nine members of the UN Security Council have not voted to defer the case, and both France and the US have declared their intention to veto any Chapter VII resolution requiring such deferral.<sup>20</sup>

Is the UN Security Council right to allow the case against al-Bashir to proceed? To answer that question, we must try to answer a difficult question about probable consequences.

<sup>15</sup> Ibid., Article 27.

<sup>16</sup> Charter of the United Nations, Article 24, op. cit.

<sup>17</sup> Charter of the United Nations, Article 27 op.cit.

<sup>18</sup> Rome Statute of the International Criminal Court, Article 16, op.cit .

<sup>19</sup> “Council Backs Idea to Indict Sudan Leader, NY Times, 4 December 2008, at [http://www.genocidewatch.org/images/Sudan\\_08\\_12\\_04\\_Council\\_Backs\\_Idea\\_to\\_Indict\\_Sudan\\_Leader.doc](http://www.genocidewatch.org/images/Sudan_08_12_04_Council_Backs_Idea_to_Indict_Sudan_Leader.doc) .

<sup>20</sup> See: Sudan Tribune, 19 September 2008, (France) at [http://www.genocidewatch.org/images/Sudan\\_08\\_09\\_19\\_France\\_will\\_veto\\_any\\_resolution\\_on\\_deferring\\_Sudan\\_president\\_indictment\\_Official.doc](http://www.genocidewatch.org/images/Sudan_08_09_19_France_will_veto_any_resolution_on_deferring_Sudan_president_indictment_Official.doc); Sudan Tribune, 23 September 2008,(US) at <http://74.125.47.132/search?q=cache:pK4nPV-ixlQJ:www.sudantribune.com/spip.php%3Farticle28738+UN+Security+Council+Darfur+Article+16+US+veto&hl=en&ct=clnk&cd=2&gl=us> (accessed 21 January 2009)

**III. Would charging al-Bashir in the ICC and arresting him have political consequences that would make the situation in Darfur and in Sudan more unstable and potentially more deadly than if al-Bashir were granted immunity, at least on a temporary basis? Will issuing an arrest warrant for al-Bashir result in intensified attacks by the Government of Sudan and cause it to become more recalcitrant?**

Alex de Waal rests his argument against charging President al-Bashir largely on his judgment that such charges could undo the Comprehensive Peace Agreement that has brought the twenty year civil war in southern Sudan to an end. President al-Bashir has obliquely threatened to undo that agreement, and has even threatened the safety of UN and other relief workers who currently feed and provide shelter and health care to more than two million internally displaced persons in Darfur.

Since the ICC Prosecutor brought charges against al-Bashir in July 2008, the Sudanese government bombed Kutum in November 2008, immediately violating a ceasefire it had promised to maintain, and has carried out other attacks in Darfur. UN officials met in September 2008 to discuss the “worsening situation” in Darfur. At that time Prosecutor Moreno-Ocampo said, “The evidence shows that crimes against Darfurians continue today. Al-Bashir has complete control of his forces, and they are raping women today, they are promoting conditions in the camps to destroy complete communities and they are still bombing schools.”<sup>21</sup> But the Sudanese government attacks have been no more intense than they were before the charges were brought in July 2008. Khartoum’s veiled threats against aid workers have not been carried out, though several have been murdered by militias. Relief assistance has continued to flow.

On March 4, 2009, immediately after the ICC issued its arrest warrant for al-Bashir, the Sudanese government revoked the licenses of ten major relief organizations that feed and care for displaced persons in the Darfur IDP camps. The cynicism of this move only underlines the long-term genocidal intent of the al-Bashir regime toward the ethnic groups in the camps.

**IV. Will the Government of Sudan actually be more active in restraining its Army and Air Force and Janjaweed militias from committing further crimes against humanity in Darfur as a result of the charges?**

Although the ICC’s arrest warrant for al-Bashir is its first against a sitting head of state, other sitting heads of state have been indicted by other international tribunals. Although situations are never completely congruent, one indicator of what effect charges against a head of state might have on his behavior may be gauged from the effects of similar charges of genocide and crimes against humanity brought against Slobodan Milosevic by the International Criminal Tribunal for the former Yugoslavia (ICTY) and

<sup>21</sup> UN News Centre, “Senior UN, African Union officials outline worsening situation in Darfur,” 22 September 2008, at

[http://www.genocidewatch.org/images/Sudan\\_08\\_09\\_22\\_Senior\\_UN,\\_African\\_UnionOfficials\\_outline\\_worsening\\_situation\\_in\\_Darfur.doc](http://www.genocidewatch.org/images/Sudan_08_09_22_Senior_UN,_African_UnionOfficials_outline_worsening_situation_in_Darfur.doc) (accessed 21 January 2009).

against Charles Taylor by the Special Court for Sierra Leone while they were still in office and conflicts were still underway. In both cases, the charges increased pressure on those leaders to negotiate peace. In both cases, the charges helped opponents displace them from power. And in both cases, the accused wound up in the dock.

When they were indicted, many of the same countries that now oppose the charges against an arrest of al-Bashir opposed the indictment of Milosevic and Taylor. The Prosecutors in both courts were roundly criticized for “upsetting the peace process.” But the charges turned out to advance the peace process by putting each of the leaders on the defensive both from outside and within their countries. Peace agreements were reached after, not before, the indictments.

**V. Although many predicted Slobodan Milosevic and Charles Taylor would escape arrest, both were eventually handed over to international courts and put on trial. Does the same fate await al-Bashir? Or will he escape arrest and justice?**

The best predictor of the future is study of the past and understanding of the forces that drive the present. Forces in Sudan are only partially similar to the forces that resulted in the overthrow of Milosevic and Taylor.

In Yugoslavia, a youth movement trained in non-violent resistance organized a united opposition to Milosevic. The dictator’s own miscalculation that he would win an election against a united opposition, followed by his transparent attempt to steal the election after losing, led to his downfall. The new government handed Milosevic over for trial as a condition of cooperation with the European community.

In Liberia, an ECOWAS force led by Nigeria had intervened in the civil war in Sierra Leone, and had largely defeated forces backed by President Charles Taylor of neighboring Liberia. On the first day of negotiations for peace in Liberia, the Sierra Leone Special Court Prosecutor David Crane issued an indictment and arrest warrant for Taylor. The negotiations proceeded without Taylor, and one of the key provisions of the agreement was that Taylor would resign the Liberian presidency and be granted temporary asylum in Calabar, Nigeria. A condition of his exile was that Taylor stay out of Liberian politics, a condition he never honored.<sup>22</sup> Finally, fed up with Taylor and learning that he was planning to go back to Liberia to mount a coup d'état, the Nigerian government ordered police to arrest him for extradition to the Sierra Leone Special Court. They caught him as he was trying to escape across the border into Cameroon. The Special Court arranged for this habitual escape artist (years before, he had even escaped from the Charles Street jail in Boston) to the Hague, where he currently is on trial. Elections in 2005 put Ellen Johnson-Sirleaf into the Presidency and Liberia is making a strong return to democracy. Again, indictment and an arrest warrant for a murderous dictator preceded peace, rather than obstructing it.

In the cases of both Milosevic and Taylor, their apprehension and trial required that they relinquish power, submit to arrest by a new government, and be handed over for trial by an international court. Is such a scenario likely in Sudan?

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<sup>22</sup> IRIN “LIBERIA: Taylor still looms large as election countdown begins,” 30 June 2005, at

<http://www.irinnews.org/report.aspx?reportid=55204>.

Sudan has different circumstances, but such a scenario might occur. Sudan has practically no tradition of democracy like Liberia's (however imperfect) and has no united opposition like Liberia's and Yugoslavia's. But there are almost certainly people within the Sudanese military government who would like to overthrow al-Bashir. International criminal charges against him are an embarrassment to Sudan, despite al-Bashir's loud denials. They are likely to hasten his downfall. Members of his government will realize that they, too, could be charged. If the atrocities in Darfur continue after they take over, they will also face the ICC, unless the UN Security Council revokes its referral to the ICC. So it is entirely possible that al-Bashir will eventually be tried by the ICC.

#### **VI. Will the charges against al-Bashir make the Government of Sudan more likely to work toward a peace agreement that is acceptable to the many sides in Sudan's conflicts and that will return Darfur's displaced persons to their homes?**

With over two million people displaced in Darfur and another half million refugees in neighboring countries, the Darfur genocide is again proof that every genocide is a threat to international peace and security. The conflict in Darfur has spilled over into Chad and the Central African Republic, and the Sudanese government provides support to the Lord's Resistance Army in Uganda and genocidal killers in the Eastern Congo. Yet Sudan claims that international intervention is a violation of Sudanese sovereignty, when Sudan has not only failed in its responsibility to protect its own citizens – the first duty of sovereignty – but has been the perpetrator of atrocities against them. Acting under Chapter VII of the UN Charter," the UN has authorized a 26,000 person peacekeeping force for Darfur,<sup>23</sup> exercising, however weakly, the emerging norm called "the responsibility to protect" adopted in the World Summit Outcome Resolution.<sup>24</sup> The UN declared its intention to send the peacekeeping mission its authorized 26,000 personnel by the summer of 2009, but has failed to do so because UN member states have not volunteered enough forces.

The problem is that there is no peace to keep. For a peacekeeping mission to succeed, three elements are necessary: a peace to keep; a robust mandate to protect civilians with rules of engagement to match; and financial, military, and logistical resources to carry out the mandate. The Darfur peacekeeping operation has none of the three.

The vital first step toward peace in Darfur is a peace agreement that can be implemented. Yet the Sudanese government has few incentives to reach such an agreement. It has successfully driven millions of Fur, Massalit, and Zaghawa out of their villages into camps controlled by Sudanese troops. It can bomb and strafe Darfur's villages at will.

The "Comprehensive Peace Agreement," which is comprehensive in name only because it completely leaves out Darfur, has returned millions of southerners to their

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<sup>23</sup> UN Security Council Resolution 1769, S/Res/1769 (2007), renewed by UN Security Council Resolution 1868, S/Res/1868 (2008).

<sup>24</sup> A/Res/60/1 (2005) at <http://daccessdds.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement>

homelands and suspended the civil war there. Having thus pacified the south and its oil fields, the Government of Sudan reaps billions of dollars from petroleum exports per year, creating an economic boom in the Arab controlled north. It has cemented its alliance with China, which is dependent on Sudanese oil.

To arrive at a peace agreement that will include Darfur, this strategic imbalance must be changed. Multilateral diplomacy should be strengthened that involves Sudan's Arab neighbors. But the military imbalance must be changed as well. The government of Sudan must be prevented from more bombing of Darfur's villages through imposition of an "after-bombing" No Fly Zone enforced by French and other NATO aircraft that will destroy Sudanese Air Force planes on the ground if they are used to bomb villages. If the Government continues to fund and permit murderous raids into Darfur's villages, the Port of Sudan should be subjected to a blockade of petroleum shipments both out (crude) and in (refined) imposed by the US, British, and French navies. No permission for these measures should be sought from the UN, because China will undoubtedly veto them. The UN has proven incapable of preventing genocide largely because the Security Council is so often paralyzed by the veto. Although most international lawyers might argue that UN Charter Article 2(4) may render such actions illegal, others can argue that such actions are "consistent with the purposes of the United Nations." Like the Kosovo bombing that ended Serbian aggression there and helped bring down Milosevic, the aim of an "after bombing" No Fly Zone and a petroleum blockade is not to use force against the territorial integrity or independence of Sudan or to kill any Sudanese people, but rather to drive the Sudanese government to the negotiating table.

Omar al-Bashir has proven himself to be a serial genocidist. He has inflicted genocides on the Nuba, on southern Sudan, and now on Darfur. He must be overthrown from within before any meaningful negotiations can result in a peace agreement.

## **VII. Will the charges of genocide against al-Bashir clarify international criminal law?**

The UN's International Commission of Inquiry on Darfur<sup>25</sup> left the law of genocide in a muddle. Citing my friend and colleague, Professor William Schabas, the UN Commission of Inquiry reasoned that Sudan's IDP camps are proof that the Sudan government lacks genocidal intent. They gave examples of massacres in which some of the men were allowed to live, although many were killed, concluding that such examples proved absence of genocidal "specific intent." They failed to perceive a systematic plan in the killings against certain groups, even though by the time of their report over 100,000 people from three ethnic groups had been murdered or died of starvation and disease during forced displacement from their villages. They even claimed that ethnic groups in Darfur are not "objectively" distinguishable because "they all speak Arabic," ignoring the fact that the Fur, Massalit, and Zaghawa ethnic groups speak their own languages in addition to Arabic. The Commission treated the ethnic groups as protected groups only because they were distinguished "subjectively" by their Janjaweed killers. But they found that the Government of Sudan had no genocidal "specific intent" because the government's intent seemed to be forced displacement, not destruction of the groups. They left it up to a later court to determine whether certain individuals had such

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<sup>25</sup> UN Commission of Inquiry Report, S/2005/60.

genocidal intent, ignoring the preventive purpose of The Convention for the Prevention and Punishment of the Crime of Genocide.

The problem with the Commission's reasoning is that forced displacement into IDP camps is not an alternative to genocide. It often accompanies genocide. Legal scholars such as William Schabas, who claims that "ethnic cleansing" (a euphemism for forced displacement that should be erased from the legal lexicon) and "genocide" are mutually exclusive crimes,<sup>26</sup> are wrong. As any prosecutor knows, the same act may have two intents, one providing the *mens rea* for the crime of forced displacement, and the other the specific intent for genocide, the intentional destruction of a substantial part of an ethnic group.

The Commission of Inquiry also ignored the Genocide Convention's specific language that defines genocide as the intentional destruction of a substantial part of a racial or ethnic group. Its observations that millions of people remain in camps for displaced persons misses the point that hundreds of thousands of other Fur, Massalit, and Zaghawa have died simply because of their racial and ethnic identity. That is called genocide.

The ICC Pre-Trial Chamber's refusal to issue an arrest warrant against al-Bashir for genocide may mean that the Prosecutor's charges against Omar al-Bashir for genocide will not be adjudicated by the ICC Trial Chamber unless it allows amendment of the charges. That would be a pity. It will not permit the Prosecutor to prove at trial that the Government of Sudan did indeed have the intent to commit genocide, and that it committed the crimes of both genocide and forced displacement. The international law of genocide will remain muddled, and the Genocide Convention will remain toothless as a deterrent while genocide is underway.

### **VIII. Will the ICC's charges against Omar al-Bashir for crimes against humanity and war crimes have a sobering effect on other heads of state and their minions who are planning such crimes in the future?**

The charges against Omar al-Bashir should remind heads of state that even if their States do not ratify the Rome Treaty and grant jurisdiction over such crimes to the ICC, the UN Security Council has the authority to subject them to ICC jurisdiction.

A new era of international law has dawned in which national leaders can no longer be sure that they can get away with mass murder. It is about time. The long dark ages when war lords and dictators could commit atrocities with impunity is coming to an end.

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<sup>26</sup> Schabas, William, Genocide in International Law, Cambridge, 2000, at 200.

## The Case Against Prosecution of President al-Bashir, Part 2

### Alex de Waal

Writing on February 15, on the eve of a week that is widely expected to see the Pre-Trial Chamber of the ICC issue an arrest warrant for President Omar al Bashir, I shall respond to the main points raised by Greg Stanton. My comments are organized in response to the questions that he raises.

#### **I. Is the ICC Prosecutor right to charge President Bashir?**

The ICC Prosecutor is undoubtedly within his rights to charge the most senior officials and commanders, including heads of state, with grave crimes and to demand their arrest. Should the Prosecutor obtain evidence such that he has reasonable grounds to believe that a person has committed a crime within the jurisdiction of the Court, he is obliged to submit an application for an arrest warrant. He operates under an assumption that it is in the interests of justice and the interests of the victim to mount a prosecution. There may be grounds such as the age or infirmity of the accused which might militate against prosecution (not relevant in this case) and issues of victim and witness protection which might counsel against pursuing a case (which are relevant in this case, but which I shall not discuss here).

I harbor considerable doubts as to whether the investigation into President Bashir counts as “thorough.” I am not privy to the redacted text in the Public Application presented on 14 July, but the empirics that were made public raise a number of serious doubts about the quality of the case that has been constructed. A strong case for superior responsibility for war crimes and crimes against humanity could be made, based on an elaboration of the indictments against Ahmed Harun and Ali Kushayb.

An argument can also be made for a genocide charge, but I would be very surprised if this could be made to stick. An argument that genocide was committed in Darfur is not the same as an argument that President Bashir possessed genocidal intent. In this regard, let me explain the import of my phrase “genocide by force of habit.” This phrase intended to contrast the atrocities in Darfur with prior campaigns mounted by the Sudan government, especially in the Nuba Mountains in the early 1990s (driven by ideology) and in the oilfields in the late 1990s (driven by economic motives). The phrase was coined in an article entitled “Counterinsurgency on the Cheap” (de Waal 2004), and the principal argument therein was that the means for counterinsurgency adopted by the Sudan government—principally the use of proxy militia—routinely (and hence foreseeably) led to mass killing, forced displacement, pillage and rape that amounted to acts of genocide. The Sudan government did nothing to stop these atrocities and indeed its own forces participated willingly in them too. But these acts were confined in space and time to the conduct of the counterinsurgency—members of the same ethnic groups residing elsewhere (e.g. in the national capital) were not harmed and the atrocities largely ceased when the military objectives had been achieved (in early 2005). In this respect I agree with Antonio Cassese and the Commission of Inquiry he led. Lawyers do not agree on the question of whether, in such circumstances, it is possible to impute specific

genocidal intent to the architects of the campaign (Cayley, 2008). My position would be that the *acti rei* of genocide (probably) occurred during that terrible period but the specific *mens rea* cannot be demonstrated for the president.

This brings me to a response to Stanton's point VI: will the charges help clarify international criminal law? I suspect that a genocide charge (as opposed to charges of crimes against humanity) will muddy international criminal law, by trying to develop the argument that genocide can be committed through common purpose of a group, without every individual in that group possessing specifically genocidal intent.

Moreover, I would strongly disagree with the ICC Prosecutor that there was either the *actus reus* of genocide or the *mens rea* after January 2005 up to the present day. Speaking about the contemporary period, it seems to me that the Prosecutor has simply got his facts wrong. He says, "Five thousand are dying each month, and we are presenting that as a humanitarian crisis. It's not; it's a crime. ...these are the facts" (Moreno Ocampo, 2009). I have searched every available source and I cannot find any data that back up these claims. If he is referring to general mortality due to hunger and disease, the best data indicate that these levels returned to near-normal during 2005-2006 and have not risen subsequently (GAO, 2006). If he is referring to violent deaths, then the ICC's own data point to 35,000 violent fatalities in 2003 and 2004, and a fraction of that number since. United Nations monitoring data, which probably underestimate the number of fatalities (but not by a large amount) include 2,070 incidents and 1,449 violent deaths in Darfur during 2008, including inter-tribal fighting among Arab groups (the largest quotient at more than 550), battles between the army and rebels and among pro-government forces (the second largest number), bandit attacks and car-jackings, attacks on displaced persons (58, including 38 in a single incident in Kalma camp on 25 August), and aerial bombardment (39) and attacks on villagers by soldiers and militia (37). In popular usage, if not in law, there is a gravity threshold for defining genocide and I think it is doubtful if this level of violence meets that (ill-defined) criterion. The pattern of violence gives little support to the Prosecutor's inference of genocidal intent. This is important because, among other things, it draws the sting from the charge that things could not get worse. They could get much worse.

## **II. Who Should Decide on Whether a Prosecution is in the Interests of Peace?**

Greg Stanton argues in this section that it is the job of the UN Security Council to assess such consequences, not the task of the Prosecutor. I agree. Despite the possibility of interpreting Article 53(2)(c) of the Rome Statute to imply that the Prosecutor should not pursue a case if it endangers the life of the nation and risks further crimes, I do not see how the office of the prosecutor could be competent to make such a political judgment, nor how it would navigate its conflict of interest were it to try to do so.

I would add that a deferral of prosecution under Article 16 of the Rome Statute is a poor instrument. It is made poorer by the reflex of the member states of the Security Council, especially the P3 of the U.S., France and Britain, to see a deferral as a lever to obtain political concessions. I think this would be the wrong road to take. The ICC is not an instrument of political leverage, and once it has become entangled in political conditionalities and the monitoring of such conditionalities, it is in danger of losing its independence as a Court. If the UN Security Council were to decide that a deferral is in the interests of peace and security, better to make that decision unconditionally. This not

only preserves the independence of the Court but also leaves open the option of lifting the deferral unconditionally, avoiding any obligation of negotiating over whether political conditions have been met.

### **III. Will the Sudan Government be Active in Restraining its Forces?**

The pattern of violence in Darfur bears out the hypothesis that the Commission of Inquiry report and ICC referral had a deterrent effect. The major violence subsided in January 2005, at the time when Cassese presented his report and recommended referral to the ICC. There are anecdotal reports that field commanders said that they had received instructions not to kill. Ironically, Moreno Ocampo could have held this up as an example of the success of the Court.

Since the Prosecutor made his Public Application in July 2008, the pattern of violence in Darfur has not changed substantially. The majority of fatalities are due to inter-ethnic conflict among Arab tribes and criminality (see above). Army and air force attacks are principally in response to rebel offensives. There has been no ceasefire.

However, there are also ominous signs that the government is preparing for the worst. It has intensified its security surveillance of opposition parties and human rights organizations. It has mobilized its army. It has refused to reform the security laws, as required by the 2005 Comprehensive Peace Agreement. It seems near-certain that the elections scheduled for this year, rather than being an exercise in democratic transformation, will be a tactical and cynical exercise in hanging on to power.

### **IV. The Taylor and Milosevic Precedents give reason for optimism**

Stanton cites the encouraging examples of Charles Taylor, who was President of Liberia at the time when the Prosecutor of the Special Court for Sierra Leone, David Crane, demanded his arrest, and Slobodan Milosevic, who was President of Yugoslavia when Carla Del Ponte of the ICTY demanded his arrest. In both those cases, fears that the arrest warrant would lead to escalated or intractable conflict did not materialize.

I think it is important to examine the political contexts of these cases. Taylor was already in the process of being eased out of power by the combined efforts of African and international governments. Some Liberia specialists argue that the indictment delayed rather than hastened his departure, as he sought to negotiate an amnesty, and that it contributed to a round of violence in Monrovia. They believe that it was only the implicit offer of safe exile in Nigeria that allowed Taylor to leave, and had he known that this would not translate into a permanent asylum but rather into his deportation to face trial, he would have done his utmost to remain in power in Liberia. As I am not sufficiently familiar with the details of this case, I would not want to comment on this interpretation of events. However, it is clear that the indictment was in line with international policy towards Liberia, which was to remove Taylor.

In the Milosevic case, Del Ponte announced the indictment during the middle of a war in which NATO was bombing Serb positions in Kosovo and targets in Belgrade. In the calculus of coercion, the military weight of NATO surely counted for more than the arrest warrant of the ICTY.

By contrast, the international strategy for Sudan has, since 2001, focused upon a negotiated transition. This includes two peace agreements signed under international auspices, the Comprehensive Peace Agreement, signed in January 2005, and the Darfur

Peace Agreement, signed in May 2006. The key provisions of the CPA, including the setting up of a Government of National Unity with senior positions provided for the former southern rebels of the Sudan People's Liberation Movement/Army, the withdrawal of the northern army from the south to be replaced by the SPLA, and the allocation of a substantial share of the nation's oil revenue to the autonomous Government of South Sudan, have been honored. Southern Sudan has enjoyed peace for the first time in more than twenty years. The government has agreed to elections scheduled for 2009 and to a referendum on self-determination in the south in 2011. It has agreed to two international peacekeeping missions, one for the CPA and one for Darfur. In short, the approach to Sudan has been one of negotiation, not coercion. Some believe that this approach is mistaken, and the ICC Prosecutor and Stanton appear to be among them.

It will be extraordinarily difficult to negotiate in good faith with an individual under an ICC arrest warrant. While the only negotiations that were needed with Taylor and Milosevic were the terms of their respective surrenders, this is not the case with Bashir.

More relevant is the precedent of the Joseph Kony arrest warrant in the case of the Lord's Resistance Army of Uganda. When the ICC first announced the warrant for Kony and his lieutenants, it galvanized the peace process. Kony believed that the indictment was a form of political pressure and that it was intended to compel him to make concessions in the negotiations, which he duly made. But as the talks neared their conclusion, the issue of the arrest warrant could not be resolved, and became the sticking point. Finally, Kony withdrew from the peace talks and instead launched a new military campaign in south Sudan and the Democratic Republic of Congo.

Sudan has moved more rapidly from the initial moment of political traction to the point of paralysis. As I outlined in my first contribution, I fear that paralysis spells disaster.

## **V. Will the Sudan Government be More Likely to Work Towards Peace?**

The ICC has put immense pressure on the Sudan government, and there is no doubt that this is one contributory factor that has led it to sign a "declaration of intent" with the Justice and Equality Movement in Doha, Qatar, on 17 February 2009. But whether this is the beginning of a real peace process remains to be seen. Even if the government negotiates in good faith, it faces a divided set of negotiating partners, which are unable to agree on a peace agreement for the foreseeable future.

In military terms, the Government is in reactive mode in Darfur. It has limited capacity to inflict gross harm on the population, because its army is demoralized and the Arab militia are selective in the orders they prefer to obey. The government will respond to rebel offensives, and did so when JEM attacked and occupied the town of Muhajiriya in January. Its aerial and ground attacks caused thirty deaths, including ten or so civilians. It is only if JEM is sufficiently emboldened by an arrest warrant to escalate the war, by taking control of a major city, by widening the war to next-door Kordofan, or by again attacking the national capital, that we will see major repercussions in Darfur.

The key implications of an arrest warrant will most probably play out in the Sudanese national political arena. The stakes here are much higher: the survival of the Government of National Unity and, with it, the CPA and the possibility of

democratization and a peaceful and legitimate exercise of the right of self-determination by the people of south Sudan. The CPA processes are all imperfect, but they are far preferable to the alternative of an attempted overthrow of the current government, either by external or internal forces. Stanton argues that Bashir “must be overthrown from within before any meaningful negotiations can result in a peace agreement.” I believe that this is a recipe for a new war between north and south, or of all against all, which will kill far more than the 1,500-2,000 Darfurians who are being killed on all sides each year. One of the reasons why the President of South Sudan, Salva Kiir Mayardit, criticizes the arrest warrant is that he trusts Bashir to implement the commitment to self-determination in southern Sudan more than he trusts any successor, who would surely want to revisit that provision in the CPA. Should that happen, many southerners would argue for a unilateral declaration of independence for the south. Contested partitions such as this do not have a good record in terms of human rights and welfare.

Twice before, in 1964 and 1985, a peaceable popular uprising has overthrown a military ruler in Sudan. Along with others, I dream of this happening again, but I fear that any attempt at regime change by anything other than the electoral process will spell disaster. The dangers are sufficiently real that they need to be taken very seriously and it would be unwise to bank on a best-case scenario.

## **VII. Will the ICC’s Charges Have a Sobering Effect on Other Heads of State?**

On this issue, I have no doubt that the Prosecutor’s charge has had a very salutary effect on heads of state and senior officials who are contemplating heinous crimes. Even if they escape justice for a while, the fear of ending up in the dock sooner or later will certainly galvanize their thinking. The immediate fear among many Sudanese is that their President will be found guilty in the court of world public opinion and sentenced to life in the Republican Palace. But it seems most unlikely that Bashir would be able to sustain such a position indefinitely, and over the years the wider international norm of no impunity will surely become entrenched. These are real benefits, a genuine sign of secular moral progress, but I think that the medium-term risks to the Sudanese people of the arrest warrant are greater.

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## The Case for Prosecution of Omar al-Bashir, Part 2

### Gregory H. Stanton

Alex de Waal has responded to my opening argument for the prosecution of President Omar al-Bashir and I shall first answer his responses. Then I will consider the political risk that Dr. de Waal says al-Bashir's prosecution will create for the implementation of the Comprehensive Peace Agreement for Southern Sudan.

#### **Did al-Bashir possess the specific intent required to convict him of genocide?**

Although Alex de Waal concedes that al-Bashir might be convicted of command responsibility for crimes against humanity and war crimes in Darfur, he doubts that the ICC Prosecutor can prove the specific intent required to convict him of the crime of genocide. The specific intent required is the deliberate destruction of a substantial part of a national, ethnic, religious or racial group, as such.<sup>27</sup> Dr. de Waal argues that al-Bashir's purpose in Darfur is counter-insurgency, not genocide. The problem with that argument is that counter-insurgency may be one motive for mass killing, but that motive does not negate the intent of genocide. Motive and intent should not be confused. One of a regime's motives may be economic -- to drive southern Sudanese off their oilfields, for example. But the regime's intent remains genocidal if it also has the purpose of deliberately destroying a national, ethnic, racial, or religious group, in whole or in part. Counter-insurgency and genocide are not mutually exclusive. In Darfur, they are congruent.

Will the Prosecutor be able to prove that al-Bashir has such genocidal intent? The International Criminal Tribunal for Rwanda (ICTR) in *Akayesu*<sup>28</sup> stated the following: "...the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act."

The Cassese Commission and Dr. de Waal note that all members of the targeted ethnic groups were not targeted everywhere in Sudan. But that fact does not diminish the specific intent to destroy these groups, in substantial part, in Darfur.

Dr. de Waal argues that the genocide charge "will muddy international law, by trying to develop the argument that genocide can be committed through the common purpose of a group, without every individual in that group possessing genocidal intent." This argument confuses the specific intent required to prove genocide and how an individual can be convicted of intentionally participating in the crime.

Genocide is a group crime, which by its nature, involves what common law calls conspiracy and the civil law calls "joint criminal enterprise." To quote Professor William Schabas, who generally takes a narrow view of the definition of the crime of genocide, "Genocide is, by nature, a collective crime, committed with the co-operation of many

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<sup>27</sup> William Schabas, *Genocide in International Law*, Cambridge, 2000, 222.

<sup>28</sup> Prosecutor v. Akeyesu, (Case No. ICTR—96—4—T), Judgment, 2 September 1998, para. 477.

participants. It is, moreover, an offence generally directed by the State. The organizers and planners must necessarily have a racist or discriminatory motive, that is a genocidal motive....At the same time, individual participants may be motivated by a range of factors, including financial gain, jealousy, and political ambition.”<sup>29</sup> To prove specific intent for an individual, the prosecutor needs to demonstrate that the perpetrator was aware of a plan or policy to destroy at least part of a group. Such intent can be proven by evidence of direct orders, but may also be proven by conscious participation in a pattern of criminal activity that can only have arisen out of a plan or policy. The ICC Prosecutor contends that the President of Sudan was aware of his own government’s policy to destroy a substantial part of the Fur, Massalit, and Zaghawa ethnic groups in Darfur.

Dr. de Waal argues that most of the killing occurred in 2003 and 2004, and that there has been no genocide since. The Prosecutor, on the other hand, contends that the genocide continues, and remains part of an overall plan to destroy these groups. Dr. de Waal points out that the number of “incidents” in 2008 was 2,070, resulting in 1,551 violent deaths. What he leaves out are the continuing deaths from starvation, disease, and rape in Darfur, even around the camps for displaced persons that are supposedly under the protection of the Sudanese government. Sociologist John Hagen and demographer Alberto Palloni estimated a total of 200,000 deaths by 2006<sup>30</sup> and Eric Reeves has estimated the number of such deaths since April 2003 at over 450,000.<sup>31</sup> The U.N.’s Under-Secretary for Humanitarian Affairs places the overall death toll since April 2003 at 300,000 deaths.<sup>32</sup> This is evidence of a policy of what Helen Fein has called “genocide by attrition.”<sup>33</sup> The al-Bashir regime has applied this policy not only in Darfur, but among the Nuba and in southern Sudan.

### **What drives al-Bashir’s genocidal policies?**

Alex de Waal’s own work offers some answers about the origins of the al-Bashir regime’s motives and its genocidal intent. In two of Dr. de Waal’s works,<sup>34</sup> there are examinations of the “Arab Gathering,” a loose alliance of Arab supremacists and Islamic extremists, who have throughout al-Bashir’s rule advanced a policy of Arab domination of Sudan. In *War in Darfur*, Ali Haggar describes the development of this semi-secret group that is openly racist and intends to “change the demography of Darfur and empty it of its African tribes.”<sup>35</sup> In their place, the Sudanese government has promoted instant citizenship and grants of land to Arab immigrants from Mali, Niger, Nigeria, and Egypt. With such a policy, can there be any hope for resettlement of the 2.5 million Fur, Massalit, and Zaghawa driven out of their ancestral homes and off their land?

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<sup>29</sup> William Schabas, op.cit., 255.

<sup>30</sup> John Hagen and Alberto Palloni, “Death in Darfur,” *Science*, 15 September 2006, Vol. 313. no. 5793, pp. 1578 – 1579.

<sup>31</sup> Eric Reeves, [Darfur Mortality: Shoddy Journalism at the New York Times](http://www.sudanreeves.org/Article180.html), Tuesday, August 14, 2007, at <http://www.sudanreeves.org/Article180.html>.

<sup>32</sup> <http://articles.latimes.com/2008/apr/23/world/fg-darfur23>.

<sup>33</sup> Helen Fein (1993). “Accounting for Genocide after 1945: Theories and Some Findings,” *International Journal of Group Rights*, I, 79 – 106.

<sup>34</sup> Alex de Waal, *War in Darfur and the Search for Peace*, and Alex de Waal and Julie Flint, *Darfur: A New History of a Long War*.

<sup>35</sup> Alex de Waal, ibid.

## **Will ICC charges and an arrest warrant against al-Bashir scuttle the Comprehensive Peace Agreement for southern Sudan?**

Dr. de Waal states that the Prosecutor and I favor a policy of coercion rather than negotiation with the government of Sudan. On the contrary, I favor both. In fact, I believe that without coercion, negotiation will fail. The main reason that the Comprehensive Peace Agreement was reached between the SPLA and the government of Sudan is that the SPLA had fought the Sudanese Army to a draw. It was in the interests of both sides to negotiate peace so they could divide the wealth that would flow from the vast oil reserves of southern Sudan.

These fundamental interests have not changed. The government of Sudan will bluster and threaten renewed war in the south if an arrest warrant is issued for al-Bashir. It will ignore the arrest warrant, and al-Bashir will travel only to countries not party to the ICC Treaty or those that promise not to arrest him. If there are skirmishes in southern Sudan, the Sudanese Army will soon learn that the SPLA remains a potent military force. Far more likely, the government of Sudan will abide by the CPA, maintain a government of National Unity, and continue to divide the oil revenues. It will try to postpone elections as long as possible to remain in power, will try to steal elections if they are held, and it will never allow the referendum on self-determination for the south, scheduled for 2011. The Sudan central government's main interest is to continue oil revenues from the South.

So what is likely to happen to Omar al-Bashir? Gradually, those who support him now will see him as a liability in international relations, just as Yugoslav leaders concluded Milosevic was. They will find ways to ease him out of power. Milosevic's loss in the Yugoslav elections was the result of a unified nationalist opposition led by non-violent resistance, not NATO bombing.

Eventually al-Bashir will be handed over for trial by the ICC. The Sudanese leaders who replace al-Bashir will realize that if they do not stop the crimes against humanity and war crimes in Darfur, they could be next in the dock. The U.N. Security Council's referral of the situation in Darfur to the ICC remains in effect.

Alex de Waal is right that this positive scenario is not a certainty. Things could get worse, much worse. War could resume in the south and aid could be cut off to the IDP camps in Darfur. If that scenario begins to unfold, the great powers in the UN will need to take strong military action, action they should have taken in 2004. With or without Security Council authorization, a No-Fly Zone should be imposed over Darfur and southern Sudan. A blockade of Port Sudan should keep crude oil from flowing out and refined petroleum products from flowing in. There is a much better chance in 2009 that with new administrations in the U.S., the U.K., and France, such action is possible.

If these measures, coupled with increased diplomatic pressure on Sudan from its neighbors, do not re-open assistance to displaced persons in the IDP camps in Darfur, the humanitarian crisis predicted by Dr. de Waal, may indeed unfold. At that point, the U.S., U.K., France and other powers in the international "community" – if only such a community actually existed -- must decide if they are going to back their brave words about "the responsibility to protect" with action to get humanitarian aid to the people of Darfur.

## The Case Against Prosecution of President al-Bashir, Part 3

### Alex De Waal

The judges of the ICC Pre-Trial Chamber (PTC) made public their decision on the Prosecutor's application for an arrest warrant against President Bashir on March 4. As expected, they issued an arrest warrant. They caused some controversy by refusing (by a majority of two-to-one) to charge President Bashir with the three counts of genocide, leading the Prosecutor to seek leave to appeal on March 10. Within an hour of the decision being announced, the Sudan Government began to expel international humanitarian agencies working in Darfur and gave clear signals that more steps against international presence in Sudan might be taken. In this final contribution I examine two issues: the genocide decision by the PTC, and the immediate aftermath of the arrest warrant, before returning to the fundamental question of weighing competing ethical demands.

#### **The Genocide Decision**

The majority decision not to charge President Bashir with genocide was, in my opinion, the correct one. A case for genocide could have been made with respect to the events of 2003-2004, although there are important controversies surrounding the nature of genocidal intent and the mode of liability. John Hagan and Wynona Rymond-Richmond have constructed a more credible case with respect to those years (though I would still argue that it falls short of establishing genocidal intent by the head of state).<sup>36</sup> Prosecutor Luis Moreno Ocampo chose not to make that case. The judges observed that the Prosecutor presented no direct evidence for Bashir's genocidal intent and sought to infer it from the facts of the case.

This decision reveals an important fact about the Public Application, namely that the redacted sections did not in fact contain any "smoking gun" evidence that pointed straight to President Bashir. In deciding not to proceed with the genocide charges, the judges did not of course rule out that additional evidence might later be adduced which might reinstate the charge at a later stage. Nor did they assert that no genocide had been committed by Bashir or anyone else. The judges made their decision solely on what was put before them by the Prosecutor. Unfortunately, because the Prosecutor's evidence and argument were less substantial than those presented in some of the public debates on Darfur, this does not provide us with an opportunity to advance the scholarly discussion on whether Darfur constitutes genocide and what should be done about it.

The judges' rejection of the genocide charge has an important implication for how we weigh the consequences. If it were the case that there is ongoing genocide in Darfur and President Bashir is personally responsible, then it would certainly alter the calculus of risks and outcomes in favor of dramatic action to remove him from power or isolate, stigmatize and humiliate him. However, if the violations in question occurred four or more years ago and the current situation is relatively stable, and there is no ongoing genocide, then the balance of risks and outcomes is more in favor of maintaining the status quo with its ongoing negotiations.

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<sup>36</sup> John Hagan and Wynona Rymond-Richmond, *Darfur and the Crime of Genocide*, Cambridge, Cambridge University Press, 2009.

## The Consequences

Immediately after the ICC decision was announced, the Sudan Government expelled a dozen international agencies. This should have come as no surprise as the chief of the National Intelligence and Security Service, General Salah Abdalla Gosh, had made his intentions clear just a few weeks previously. He said, “Our message to those who stand behind the ICC is that we were Islamic fundamentalists but have become moderate and civilized and this continues to be our conviction. If they press us to return to our past position, we will no doubt return. And if they want us to return into hard-liners anew, that is a simple thing to do. And we are capable of doing it.”

This should serve as a reminder that Sudan was isolated, stigmatized and humiliated before, during the 1990s, as a sponsor of *jihadist* terrorism. That was not only an atrocious situation for the Sudanese people but led to some extremely adverse outcomes internationally. The international experience with handling Sudan during the decade was that isolating its leaders was counterproductive and that humiliating them only enraged them. The basic rule of diplomacy is that an adversary should be given a ladder to climb down. It is possible that an international strategy of isolating and stigmatizing the Sudanese leadership will succeed in the coming years, but it is salutary to reflect on the earlier failure of this approach.

Gosh’s use of “we” also reminds us that the Sudan Government is a collective and that for almost all of its twenty years in power, President Bashir has been regarded as the front man for a cabal of security officers and civilian ideologues who wielded more real power than he did. Removing the Head of State, and most probably replacing him with another member of the same Islamist-security clique, would not represent an improvement.

In the same interview, Gosh continued, saying that Sudan would protect civilians and the staff of international organizations as long as they did not stray beyond roles defined in country agreements, “But whoever contradicts this or tries to trespass the marked boundaries, they have only themselves to blame.”<sup>37</sup> Looking back at the 1990s, when the Sudan Government (in its militant Islamist phase) prevented any humanitarian assistance from reaching millions of people affected by war and famine in southern Sudan, one need harbor no doubts about the reality of Gosh’s threat and the implications should he carry it out.

The stated reason for the expulsion was that the agencies in question had provided information to the ICC. Several other agencies were not expelled, without reason given. United Nations agencies remain. While some national human rights organizations were closed down and their staff harassed, no national service-providing agencies have yet been closed. A key part of the infrastructure for distributing food rations and providing medical and water and sanitation services to the in-need population of Darfurians was removed at a stroke. Fortunately, the nutritional and health situation in the region is well short of emergency thresholds (with the important exception of a meningitis outbreak). But the expulsions leaves the Darfuran population vulnerable to a deterioration in the

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<sup>37</sup> Quoted in AP, ‘Sudan official warns over indicting president,’ February 21, 2009.

humanitarian situation as well as removing important witnesses whose presence had undoubtedly help deter violence in some of the displaced camps.

In my previous post I argued that the Prosecutor's duty did not extend to making political judgments. However, having stated that there are about three million victims of violations in Darfur, it is concerning to note that the section in his December report to the UN Security Council on the Darfur case contained just four lines on the "interests of victims" and made no reference to any risks to the humanitarian provision to millions of Darfurians.

The law on "famine crimes" is under-developed. The Additional Protocols to the Geneva Conventions and the customary laws of war clearly prohibit the use of starvation as a method of warfare under certain circumstances.<sup>38</sup> Most recent attention to the subject has been focused on preserving the access of external humanitarian actors to populations in need rather than the right of victims of conflict to obtain essential assistance, or indeed the more basic question of whether actions that create humanitarian crises should be considered criminal. Regrettably, it is therefore not self-evident in law that an action that exposes a large civilian population to a significant risk of hunger, infectious disease and intolerable living conditions, constitutes a crime under international law. Given that such an action meets the basic requirement of a crime against humanity—it affronts the conscience of humankind—I hope that this shortcoming will be remedied.

I fear that the adverse consequences of the arrest warrant have yet to play themselves out. If the situation deteriorates, for example with more restrictions or expulsions of humanitarians, a crackdown on Sudanese civil society organizations, or stepped-up rebel offensives, then any criminal responsibility for these actions will lie with those in positions of power in Sudan who took the relevant actions. However, if it transpires that the situation in Sudan, including Darfur, was significantly better during the three or four years preceding the arrest warrant than it is over the coming years, and that the arrest warrant was at the minimum the pretext for the deterioration, then I believe the arrest warrant will be shown to have been an imprudent step.

### Weighing the Outcomes

Achieving justice in a court of law is both a right for victims of heinous crime, and also a good for national and international society. There are other rights and goods to be weighed as well. Among them are negotiated peace, the implementation of a national constitution that includes commitments to human rights, civil society, a free media, elections and the right of self-determination for the people of southern Sudan, negotiated humanitarian access to more than three million Darfuran people in need, the presence of international peacekeepers, ongoing dialogue and consultation among Darfuran communities leading to local outcomes in terms of reconciliation and restorative justice (though not yet compensation), and a level of international diplomatic engagement with the Sudan Government that, while frustrating, had nonetheless delivered substantial improvements in wellbeing and security for millions of Sudanese citizens.

I would like to believe that all these other outcomes are fully compatible with judicial accountability for the most heinous crimes. However, I fear that there are short-

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<sup>38</sup> Charles Allen, 'Civilian starvation and relief during armed conflict: The modern humanitarian law,' *Georgia Journal of International and Comparative Law*, 19 (1989), 1-85

term clashes between them, and that we will see some of these contradictions play out in the next year or two.

My last point is about timing. There is no certainty that President Bashir will be arrested soon and he may remain at liberty, and indeed at the helm in Sudan, for some years. For the victims of the crimes for which he has been charged, the sense of vindication may begin to wear thin. A year ago, there was serious talk among very well-informed people that President Bashir would step aside at the 2009 elections, marking his twenty years in power with retirement to his newly-completed family house. Even had he not done so, the new Government of National Unity formed after the elections would have shared power more widely and cemented key elements of the democratic transition. Better, surely, to have allowed the elections to proceed, and with Bashir either out of office or reduced in power, with the risks of a backlash commensurately reduced, before proceeding with the demand for an arrest warrant.

## **The Case for Prosecution of Omar al-Bashir, Part 3**

**Gregory H. Stanton**

**The arrest warrant issued by the ICC has already had a positive effect on the safety of Darfuris in IDP camps in Sudan.**

One of the main goals of law is deterrence from criminal acts. There is evidence already that orders have gone out from Khartoum to minimize attacks on Darfuri villages and on people in IDP camps in Darfur.

Since the arrest warrant for Omar al-Bashir was approved by the ICC pre-trial chamber, the number of violent deaths in Darfur has decreased substantially. Despite veiled threats from Khartoum that it could not be responsible for the safety of IDP's if al-Bashir was indicted, and its expulsion of a dozen NGO relief groups from Sudan, ostensibly for providing information to the ICC, the death rate in Darfur has dropped, rather than increased. In 2008, UNAMID reported a total of 1,550 violent deaths. Less than 500 were civilians. More than 400 were combatants of various rebel groups and about 640 died in inter-tribal fighting.<sup>39</sup> On June 17, 2009 U.S. Special Envoy to Sudan, Maj. Gen. Jonathan S. Gration, declared that the situation in Darfur is now one of "remnants of genocide." His comments were quickly disowned by the State Department and U.S. Ambassador to the U.N., Susan Rice, but there is evidence that as Alex de Waal has argued in this useful exchange of views, the active genocide in Darfur may now be over. We should not celebrate yet, however, because the lives of the 2.7 million Darfuris still in IDP and refugee camps are still at grave risk.

Even if the active genocide is now over, Omar Al-Bashir can still be tried for crimes against humanity and war crimes committed under his command responsibility in 2003 and 2004. He should be. The ICC is, after all, a criminal court that sits in judgment on past crimes. If the Prosecutor wins his appeal to the pre-trial chamber, al-Bashir may yet also be tried for genocide. I have argued in earlier parts of this exchange that there is plenty of evidence that he should be.

Omar al-Bashir has been so embarrassed by the arrest warrant that he has undertaken a major diplomatic offensive to blunt its force. He has made numerous trips to neighboring countries to shore up his diplomatic support, the first to Ethiopia, which is now conducting brutal forced displacement of Somali populations in the Ogaden, where large gas reserves have been discovered, and others to Eritrea, Egypt, and Qatar. But Al-Bashir decided not to travel to Uganda when President Museveni said al-Bashir would be arrested and sent to the ICC in the Hague he came to Uganda. Al-Bashir's regime funds and arms the maniacal Lord's Resistance Army that has abducted thousands of Ugandan children.

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<sup>39</sup> Testimony of Ambassador David Shinn, before the U.S. Senate Committee on Foreign Relations Hearing on Sudan, 30 July 2009.

We may conclude that the Arrest Warrant for Omar al-Bashir has led to greater protection for Darfuris, not less, as Al-Bashir's henchmen once threatened and many critics of the arrest warrant feared.

### **The al-Bashir arrest warrant has not undermined the Comprehensive Peace Agreement (CPA) for Southern Sudan.**

Alex de Waal's strongest argument against the arrest warrant is that it would upset an already delicate peace process between South and North, and could derail elections scheduled for February 2010, and the Southern referendum on autonomy or independence scheduled for February 2011. There are two problems with this argument:

1. The CPA will stand or fall on the will of the government of Sudan and the SPLM, not on the situation in Darfur, which was intentionally excluded from the CPA. If the CPA breaks down, it will be because either the Government of Sudan or the SPLM want it to fail, not because of failure to resolve the conflict in Darfur, or because of an arrest warrant for al-Bashir.
2. The arrest warrant is unlikely to be enforced until after the elections and referendum. International diplomats can usually walk and chew gum at the same time, though they are also reluctant to impose forceful measures against genocide. They are well aware of the complexity of the situation in Sudan, and are unlikely to press for actual arrest of al-Bashir until the CPA is implemented. A parallel may be drawn with the arrest warrant of Slobodan Milosevic, which was not executed until after the Dayton Peace Accords ended the war in Bosnia, and Milosevic had been defeated in Yugoslav elections.

The U.S. Special Envoy to Sudan, Maj. Gen. Jonathan S. Gration, has clearly stated that resolution of the conflict in Darfur is now only one of the four major U.S. policy objectives for Sudan.<sup>40</sup> The others are implementation of the Comprehensive Peace Agreement between South and North, creation of a stable Sudanese government, and cooperation against terrorism. U.S. and E.U. foreign policy strongly supports implementation of the CPA. Chinese and French interests also favor its implementation because they want continued access to Sudanese oil reserves. Russia remains on good terms with the regime in Khartoum, and favors deferral of al-Bashir's arrest.

Eric Reeves has criticized General Gration's testimony as "phony optimism" that includes no plan for the resettlement of the 2.7 million Darfuris driven from their homes and now in IDP and refugee camps, with Janjaweed militias continuing to control Darfur.<sup>41</sup> Reeves also comments:

"Most disturbingly, Gration gives no evidence in any of his public comments of understanding the ruthless nature of the security cabal that rules Sudan and is determined to retain its stranglehold on national wealth and power; like many before him, he is convinced that the National Islamic Front is controlled by men who can be reasoned with, cajoled, rewarded, made to do 'the right thing.' He ignores the basic truth about

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<sup>40</sup> Testimony of Special Envoy Major General Jonathan S. Gration, before the U.S. Senate Committee on Foreign Relations Hearing on Sudan, 30 July 2009.

<sup>41</sup> Eric Reeves, "The Phony Optimism on Darfur" The Boston Globe, August 6, 2009, at [http://www.boston.com/bostonglobe/editorial\\_opinion/oped/articles/2009/08/06/the\\_phony\\_optimism\\_on\\_darfur/](http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2009/08/06/the_phony_optimism_on_darfur/).

these men: during their twenty years in power they have never abided by any agreement with any Sudanese party—not one, not ever.”<sup>42</sup>

Reeves has also detailed the lateness of preparations for national elections in February 2010 and the February 2011 referendum on independence for southern Sudan, and warns that foot-dragging by the Sudanese government is the greatest obstacle to implementation of the CPA.<sup>43</sup>

**The arrest warrant for Omar al-Bashir should remain as a deterrent to further crimes against humanity by him and his regime.**

Field research by the International Crisis Group, the Enough Project, Human Rights Watch, Amnesty International, Genocide Watch, the Aegis Trust and other anti-genocide groups provides plenty of evidence for Eric Reeves’ concern that there could be another outbreak of civil war in Southern Sudan. But the reason is not the arrest warrant for al-Bashir. It is because neither the government of Sudan nor the SPLM have withdrawn or disarmed troops in the South. Unemployed young men with Kalashnikov’s are waiting for war, and several recent tribal conflicts have been exacerbated by the plethora of deadly weapons. The government of Sudan’s brutal destruction of the town of Abyei in May 2008, witnessed by Roger Winter, rendered the recent judgment of the Permanent Court of Arbitration in the Hague over a year too late.<sup>44</sup> It was further evidence of a racist general policy of Khartoum to change the demography of Sudan and drive non-Arab Africans off of Sudan’s rich oilfields.

Darfur is but the latest instance of that racist policy, documented by Alex de Waal and Julie Flint in Darfur: A Short History of a Long War, who cite a “directive from Musa Hilal’s headquarters” calling for the “execution of all directives from the President of the Republic,” stating bluntly: “Change the demography of Darfur and make it void of African tribes,” through “killing, burning villages and farms, terrorizing people, confiscating property from members of African tribes and forcing them from Darfur.”<sup>45</sup>

I am perplexed that Alex de Waal, in Part 2 of his careful argument, states that “if the U.N. Security Council were to decide that a deferral [of the case against al-Bashir] is in the interests of peace and security, better to make that decision unconditionally. This not only preserves the independence of the Court but leaves open the option of lifting the deferral unconditionally, avoiding any obligation of negotiating over whether political conditions have been met.” Alex de Waal probably means that if the Security Council were to defer the case under Article 16 of the ICC Statute, it should do so for twelve months unconditionally. But Article 16 actually provides that renewal of a deferral may be made “under the same conditions.”

The important point, and I am sure that Alex de Waal would agree, is that there should be no impunity for the terrible crimes committed by Omar al-Bashir and his regime in Darfur. Eventually, as Luis Moreno-Ocampo has put it, al-Bashir and his henchmen must end up in the dock.

<sup>42</sup> Ibid.

<sup>43</sup> Eric Reeves, “Sudan Elections and Southern Self-Determination,” 28 June 2009 at <http://www.sudanreeves.org/Article246.html>.

<sup>44</sup> Roger Winter, “Abyei Aflame: An Update from the Field,” ENOUGH Strategy Paper 21, May 2008.

<sup>45</sup> Alex de Waal and Julie Flint, Darfur: A Short History of a Long War, p. 39.