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Waltz With Bashir

Why the Arrest Warrant Against Sudan's President Will Serve Neither Peace nor Justice

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Two weeks ago, the judges of the International Criminal Court (ICC) announced what many had long clamored for: an order for the arrest of Sudanese President Omar Hassan al-Bashir, whom it indicted in July for the atrocities his government committed against the people of Darfur. As the administrator of the U.S. Agency for International Development and then the U.S. special envoy to Sudan, I have interviewed enough people in Darfur over the past six years to know that Khartoum committed terrible crimes, particularly in 2003-4, when it tried to crush an insurgency through ethnic cleansing, ordering the burning of villages, mass rape, and the summary execution of young men it feared might join the rebel movement. The question now is not whether such crimes were committed -- they were -- but what consequences the ICC's latest action will have for justice, peace, and stability in Sudan. They will not be good.

Within days of the court's announcement, Bashir ordered the expulsion of 13 U.S., British, and French nongovernmental organizations on the grounds that they had been providing information about war crimes to the ICC. Unlike most war crime indictments, which are served against former heads of state, this ICC warrant was issued against a sitting head of state who controls an army, a ruthless internal security force, and a growing group of internal and external allies. Bashir had means of reprisals at his disposal, and he was swift to use them.

This was a predictable response. After the Bush administration developed plans in March 2007 for a new sanctions regime against Khartoum -- of my design and at my urging -- Bashir responded by, among other things, suspending oil payments he was required to give to the government of southern Sudan under the terms of the 2005 peace deal that ended the civil war between the north and south (known as the Comprehensive Peace Agreement). He also cancelled the withdrawal of northern troops from the south, in violation of the CPA, and remobilized the Arab militias that committed some of the worst atrocities in the south during the 1980s and early 1990s.

The past is prologue, and with Khartoum already retaliating against the humanitarian relief effort in Darfur, one can only fear that its response to the arrest warrant will also include more stonewalling of the international peacekeeping troops there and perhaps retributions against the south.

Advocates of the recent ICC decision believed it would pressure Bashir and his government to behave better. It has already done the opposite, and now the regime will do everything necessary to remain in power and make sure that Bashir is never arrested. The chances of a peaceful political transformation in Sudan, admittedly slim to begin with, have become even slimmer with the order for Bashir's arrest. So long as the threat of the order loomed, it probably did help to restrain the Sudanese government. With the threat now realized, the regime has far less to lose.

Paradoxically, the ICC warrant also gives Darfuri rebels the wrong incentives. The more international advocacy groups, the media, and foreign politicians demand war crimes trials for the perpetrators of atrocities in Darfur, the longer the list of nonnegotiable demands the rebels there will make and thus the more remote the possibility of any political agreement, which is the only real hope that refugees have of safely returning home. The traditional form of reparation in Darfur has been blood money paid by the perpetrator to the victim's family -- a mechanism that, before the ICC's intervention, the Darfuri rebels accepted (albeit at a high asking price) and Khartoum obliged with in the form of reconstruction money (accompanied with some self-serving rhetoric).

But now the rebels are demanding Western-style justice -- the arrest and prosecution of all perpetrators as a condition for any peace deal -- and the Sudanese government will never agree to this, especially now that Bashir is under indictment. Many Sudan observers expect the people of South Sudan to vote for secession in the referendum scheduled for 2011. At that point, it will become even more difficult for the Darfuri rebels to strike a peace deal with Khartoum because their allies in the south will no longer be part of the central coalition government.

Worse, from the point of view of the court's advocates, the ICC arrest warrant may not advance justice either. It was unclear from my conversations with displaced political leaders in Darfur in late 2007, after the indictments against lower-level Sudanese officials were issued, just who would comply with these demands: Sudan's leaders are not going to arrest themselves, and the international community has neither the political will nor the troops to do the job. The refugees and their leaders with whom I spoke in the displaced persons camps in Darfur said they welcomed the ICC's decision against Sudan's leaders. But they insisted that for justice to be served, the tens of thousands of government-led Arab militias who committed the atrocities would also have to be arrested and prosecuted. This expectation, however, cannot be satisfied; it is too impractical. The frustration that will result will only delay progress on a peace deal, and the longer a peace agreement is postponed, the greater the likelihood that none will ever be signed. In the meantime, either the Darfur camps will become another Gaza or the Sudanese government will disperse residents by force, probably causing many deaths.

Another unintended side effect of the ICC indictment, and perhaps the most disturbing, is that it has united many Arab and African governments behind Bashir, including some that both despise his regime (and have told me so privately) and have signed the ICC's founding treaty. Two years ago, Bashir and his party were being increasingly isolated; now he has a legion of supporters who have come to dislike the ICC more than they dislike him. The Arab League and the African Union have condemned the warrant order against Bashir and announced they would not carry it out; half of the AU's members have even threatened to withdraw from the ICC over the issue. Pragmatic leaders who want a negotiated peace in Sudan see the ICC's moves as Western neocolonialist impositions.

In their zeal to burnish the fledgling court's credentials with such a high-profile case, the ICC's prosecutors have indeed weakened the institution. During a lecture at Yale University on February 6, 2009, Luis Moreno-Ocampo, the court's chief prosecutor, claimed that 5,000 war-related deaths

continue to occur each month in Darfur. Presumably, he believed that the court's action could reduce that number. Not only does history suggest he will not get the results he expects but the data on which he based his assertion were questionable. He provided no source for it, but according to the human rights group Genocide Intervention Network, about 1,500 people were killed in Darfur in all of 2008, 500 of them Arabs killed by other Arabs. (The rest were Africans killed by Arabs.)

Even assuming that these accounts understate the number of casualties by half, it would be difficult to get to 5,000 deaths for the year 2008, let alone per month, as Moreno-Ocampo asserts. Statistics for 2007 were similar, which suggests that the fairly clearly delineated situation of 2003-4 has mutated into more general anarchy and that the line between victims and aggressors is no longer so clear. Reports from the United Nations and several nongovernmental organizations show that mortality rates from disease and malnutrition in the internally displaced camps are now well below those in the villages of Darfur. The high mortality rate during the 2003-4 civil war was largely accounted for by deaths among displaced people suffering from malnutrition, dehydration, and disease before the aid community could assist them with food, water, and medical care. By invoking a monthly death toll of 5,000, Moreno-Ocampo seems to suggest that Darfuris still die from these causes as a result of continued displacement, if not from violence per se. But this is simply not true -- at least it was not until the arrest warrant for Bashir, because the work of aid agencies had been keeping mortality rates down. These groups' recent expulsion now puts Darfuris at risk, but since that was retaliation for the ICC's move, that problem cannot justify the court's action.

Some ICC advocates insist that with Bashir under so much international pressure, the Sudanese military and security forces are now more likely to depose him. They seem to presume that this would be a good thing. But they misunderstand the problem. Bashir is just one in a long line of Arab leaders from the central Nile River Valley who have brutally suppressed any opposition from the country's periphery. Successive Nile River Arab governments (including one that had been democratically elected) prosecuted the 22-year civil war between North and South Sudan, which killed over two million southerners -- or ten times as many people as have died in Darfur since 2003.

One intelligence chief in a neighboring country told me in early 2007 that a coup against Bashir would yield an even more murderous and fanatical regime. According to him, more than half of Sudan's current senior military officers were handpicked by Hassan al-Turabi, the leader of the Sudanese Islamist party that invited Osama bin Laden to Sudan in the 1990s and tried to carry out an Islamic revolution in Africa. (Turabi was the mastermind behind the 1989 coup that brought Bashir to power, but Bashir and his allies later broke with his movement, finding it too radical.) A coup may indeed transform Sudan, but not into a constitutional democracy. At worst, an unintended effect of the ICC's arrest warrant would be to enable Turabi or another radical to return to power. A coup could also endanger the CPA's very existence: having not negotiated the treaty, a new government might well abrogate it.

Overlooking these risks, proponents of the indictment against Bashir say it can be used as a bargaining tool to secure a peace agreement in Darfur. They argue that the fact that the UN Security Council might postpone prosecutions for one year, as the ICC treaty allows, could entice Bashir to negotiate. This is specious. President Barack Obama cannot afford the political cost of calling for a delay and being viewed as softer on Sudan than the Bush administration, which opposed postponing Bashir's prosecution in 2008.

Another problem is that the ICC treaty does not allow for the dismissal of charges or for plea bargains, which means that the only incentive potentially on offer to Bashir is weak and conditional: his indictment would have to be delayed repeatedly, and the Sudanese have reason to worry that they might get arrested even after signing some sort of peace agreement. It is also unclear how a Western diplomat or politician who offered to suspend the arrest warrant as a means of negotiating a settlement could withstand the withering attacks he would most certainly suffer from advocacy groups and journalists calling for justice.

Instead of trying to bring Sudan to the gates of some just and democratic Eden, the West must encourage the Sudanese to work out a limited and practical settlement that tries to bring a measure of security and stability to this very fragile state by balancing the varying interests of ethnic groups, contending centers of political power, and regional authority structures. What Sudan needs right now is to focus on a political deal between the north and south based on a realistic appraisal of what is achievable under the current unfavorable circumstances. This would be best done by getting the CPA back on track, implementing the treaty's provisions on the 2011 referendum for South Sudan's independence, and preparing between now and then for an amicable divorce between North and South Sudan. The alternatives are not viable since the south would likely view any attempt to postpone or cancel the referendum as an act of war.

If the international community persists in imposing idealized standards of justice on Sudan, it will end up inciting violence in the future that would make past atrocities pale by comparison. By overlooking the political context on the ground, the ICC's order for Bashir's arrest makes such a potential catastrophe a bit more likely. Justice and peace are noble aspirations, but they cannot both be had in Sudan right now. In seeking a justice that cannot be obtained, rather than a realistic peace that might be, the international community risks bringing Sudan not to the doors of Eden but to the gates of Hell.

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