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## Challenging the International Criminal Court over al-Bashir

Emma Gilligan

*Gladstein Committee for Human Rights*

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## Challenging the International Criminal Court over al-Bashir

### Abstract

As of late November 2008, we are still awaiting the decision of the U.N. Security Council with regard to the request for the arrest of Sudanese President, Omar al-Bashir for war crimes, crimes against humanity and genocide put forward by the International Criminal Court (ICC) in July. With former Presidents Charles Taylor of Liberia and Slobodan Milosevic of Serbia as the only two heads of state formally indicted by the ICC since its inception in 2002, the question remains whether the U.N. Security Council will allow this controversial indictment of al-Bashir by Chief Prosecutor, Luis Moreno-Ocampo or invoke Article 16 of the Rome Statute to defer it?

### Keywords

Human rights, Sudan, Darfur

## Challenging the International Criminal Court over al-Bashir

by Emma Gilligan

As of late November 2008, we are still awaiting the decision of the U.N. Security Council with regard to the request for the arrest of Sudanese President, Omar al-Bashir for war crimes, crimes against humanity and genocide put forward by the International Criminal Court (ICC) in July. With former Presidents [Charles Taylor of Liberia](#) and [Slobodan Milosevic of Serbia](#) as the only two heads of state formally indicted by the ICC since its inception in 2002, the question remains whether the U.N. Security Council will allow this controversial indictment of al-Bashir by Chief Prosecutor, Luis Moreno-Ocampo or invoke Article 16 of the Rome Statute to defer it?

The prospects for an indictment of the Sudanese President look discouraging. Britain, China, France and Russia have indicated that they may well support a plan to defer the investigation and prosecution of al-Bashir for the purported task of preserving the delicate 2005 [Comprehensive Peace Agreement](#) to stabilize the 22-year-old Sudanese civil war and to encourage the fulfillment of the [2006 Darfur Peace Agreement](#). Similarly, the Arab League and the African Union have employed the same legitimate, but problematic arguments, calling for the suspension, but not the cancellation of the indictment.

One of the chief supporters of this approach is the scholar, activist and consultant, Alex de Waal of Harvard University's Department of Government. In all his permutations, de Waal has made a remarkable contribution to disentangling the conflict in Darfur, historicizing the problems in social, economic and political terms through his publications, as well as acting as a consultant to various bodies, including the African Union's mediation team.

De Waal's preferred approach to the crisis in the Sudan is diplomatic. He unequivocally rejects the ICC's indictment of al-Bashir as a provocative gesture capable of destroying a negotiation process that demands a collaborative and inclusive approach. To pursue that end, he joined the politically neutral [Darfur-Darfur Dialogue and Consultation](#) organization formed in 2006 to popularize the terms of the Darfur Peace Agreement. Nick McDonell's article in *Harper's Magazine* follows de Waal into his meetings in Khartoum and Addis Ababa, as the British scholar seeks to shore up alliances. These meetings not only illustrate the extent of de Waal's political contacts in the region, but the entrenched positions of the political factions in Sudan. These disturbing vignettes include de Waal's meeting with Musa Hilal, the former government leader of the [janjaweed](#) forces, General Oyai Deng Ajak of the Southern People's Liberation Army as he seeks munitions support in Ethiopia, Sudan's Ambassador to Ethiopia, Ambassador Mohieldin Salim and most unnerving—a meeting with Abdullah Safi-al-Nur—the figure responsible for arming Hilal's *janjaweed*.

De Waal's arguments against the indictment of al-Bashir are legitimate and they resonate the same concerns others have had with regard to Truth and Reconciliation Commissions and Criminal Tribunals in transitional democracies. Would the President's arrest only incite further civil war? Is this an appropriate time to deal with issues of accountability over Darfur? Will issues of accountability, as de Waal [has claimed elsewhere](#), be marginalized in the negotiation process precisely because of the indictment?

These concerns are no doubt speculative and whether the negotiation process succeeds or fails in the Sudan depends on any number of historical contingencies that are by no means always predictable. And de Waal is not without his critics. The Save Darfur Coalition, a group of 180 faith-based, advocacy and human rights organizations rejects his position and leaders of the Darfuri diaspora have called it a “[bartering of accountability](#).” Moreover, de Waal’s argument that issues of accountability may be sidelined in the negotiation process precisely *because* of the indictment is difficult to sustain. One wonders whether al-Bashir would ever allow for accountability clauses in any peace agreement, with or without the threat of an arrest.

The most problematic issue, however, that is not addressed adequately by either McDonnell’s article or by de Waal himself rests in the question, if not through the ICC, how will the problem of justice be handled for those thousands of victims in Darfur? If not through the indictment of a leader responsible for perpetrating and sustaining such a gruesome and cruel conflict, through what channels will the ever-marginalized civilian victims be answered in moral terms? This too is a vision worth pondering.

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*After completing her doctoral studies in Russian history at the University of Melbourne, Australia, Emma Gilligan was a postdoctoral fellow in the Department of History at the University of Chicago from 2003-2006. During this time, she completed her book Defending Human Rights in Russia; Sergei Kovalyov Dissident and Human Rights Commissioner, 1969-96 (Routledge, 2004). This book traces the evolution of the Soviet human rights movement from the 1960s in Moscow to the collapse of the Soviet Union in 1991. It analyzes, in particular, the rise of Sergei Kovalyov, Russia's first human rights commissioner under the presidency of Boris Yeltsin and the impact of former Soviet dissidents on the discourse of human rights in the post-Soviet era. Her second book, War Crimes in Chechnya (Princeton University Press, forthcoming 2008) examines the war crimes committed by Russian soldiers against the civilian population of Chechnya. The study places the conflict in Chechnya within the international discourse on humanitarian intervention in the 1990s and the rise of nationalism in Russia. Emma Gilligan is the author of articles for the Chicago Tribune, 'Why there is no Peace in Chechnya,' 2005 and 'US Loses High Ground on Human Rights,' 2006 and the International Herald Tribune. She is a member of the Gladstein Committee for Human Rights and a joint hire with the Human Rights Institute. She teaches courses on the history of human rights and genocide after the Second World War.*