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The International Criminal Court

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The International Criminal Court

Abstract

I believe I speak for many when I say that the International Criminal Court (ICC) has not been anywhere near the institution that it was anticipated as being, and the latest manifestation of the ICC's shortcomings is the humanitarian disaster that has ensued after the Court issued an arrest warrant against Sudanese President Bashir. Since no other UN action is anticipated, all that remains is to count the ever-growing number of Sudanese deaths that will result from what now appears to be a purely symbolic act that was all-too predictable.

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The International Criminal Court

by Mark Gibney

I believe I speak for many when I say that the [International Criminal Court](#) (ICC) has not been anywhere near the institution that it was anticipated as being, and the latest manifestation of the ICC's shortcomings is the [humanitarian disaster](#) that has ensued after the Court issued an [arrest warrant](#) against Sudanese President Bashir. Since no other UN action is anticipated, all that remains is to count the ever-growing number of Sudanese deaths that will result from what now appears to be a purely symbolic act that was all-too predictable.

Yet, the problems with the ICC go much further and much deeper than this. Certainly, a large part of the blame rests with the Prosecutor Luis Moreno Ocampo. There is every reason to believe that the careful and analytical lawyer that had been advertised was in so many ways anything but the truth. However, even with the perfect prosecutor in office, it is by no means clear that the ICC could be doing much better than it has. But perhaps this was the intended result all along.

The biggest problem is the canyon-like gap between a world rife with human rights violations and a Court that really has not achieved much of anything—but more importantly, it has given every indication to the world that it does not have the slightest interest in doing so. As poorly thought out as it was, the Bashir incident at least served as a reminder to the generation that had such high hopes for this institution that the ICC actually still exists. However, the real fear is that after serving this notice that it intends to be a “player,” the ICC will retreat back into its deep slumber mode—meanwhile, violence continues unabated, and those responsible are never held accountable for their actions.

The ICC certainly can play an important role in the protection of human rights, but it is essential to recognize the limitations that the Court has been placed under. The problem in a nutshell is that the Court was promoted as providing Salvation (of sorts)—but then given no police force, slight [Security Council](#) support, and an ineffective and seemingly megalomaniacal Prosecutor. This seems to be a recipe either for pure disaster or total inertia. Take your pick.

But rather than simply piling on Moreno Ocampo or the ICC itself, perhaps some broader lessons can be learned. One of these is that the creation of the ICC truly has served to whet the world's appetite for accountability. Before this, it was rather readily assumed that this was simply not in the realm of the possible. To its credit, the ICC has changed our thinking on this matter, even if it has not come anywhere close to delivering on these expectations.

But the ICC's greatest contribution might come in understanding and accepting the reality that it will be hard pressed to ever make a great contribution. Rather than shoving aside (whether intentionally or not) other possible actors and avenues, the ICC should actively promote, assist and nurture state and regional efforts at establishing accountability in the form of money, expertise, evidence, and so on. In addition, the Court should view the proposal by the Special Rapporteur on Torture ([Manfred Nowak](#)) for the creation of a [World Court of Human Rights](#) as a complement and not a competitor.

This humbling but important work will never occur so long as the ICC presents itself as it does. For sure, prosecuting a relatively small number of high-level political operatives could help make an enormous difference. No institution is as well placed to do this as the ICC, and let us hope that the body is able to achieve some success at some point toward this end.

But there is more that the Court could and should be doing. The comparison that is always made is with the [Nuremberg proceedings](#). But what is easy to forget are the other proceedings in Germany, later in time and certainly less visible and less known, but which had a more profound effect on the German state and its people. To my mind, then, one of the legacies of Nuremberg concerns the limits of Nuremberg-like proceedings and the need to adopt a battery of strategies intended to establish accountability that are much closer to the victims themselves. The ICC would do well to acknowledge and to learn from this lesson.

Mark Gibney is the Belk Distinguished Professor at the University of North Carolina-Asheville. His most recent book publications include [International Human Rights Law: Returning to Universal Principles](#) (Rowman & Littlefield, 2008) and the edited volume [The Age of Apology: Facing Up to the Past](#) (University of Pennsylvania Press, 2007). He also has two forthcoming books. The first (with Sabine Carey and Steve Poe) is [The Politics of Human Rights](#) (Cambridge) and the second is an edited volume (with Sigrun Skogly) [Human Rights and Extraterritorial Obligations](#) (University of Pennsylvania Press).