

Human Rights & Human Welfare

Volume 10

Issue 4 March Roundtable: An Annotation of
"The ICC's Blunder on Sudan" by Nesrine Malik

Article 3

3-1-2010

Confronting the Politics and Law Behind Battles over the ICC's Bashir Indictment

Anthony Chase
Occidental College

Follow this and additional works at: <https://digitalcommons.du.edu/hrhw>



Part of the [African Studies Commons](#), [Human Rights Law Commons](#), [International Humanitarian Law Commons](#), [International Law Commons](#), [International Relations Commons](#), and the [Peace and Conflict Studies Commons](#)

Recommended Citation

Chase, Anthony (2010) "Confronting the Politics and Law Behind Battles over the ICC's Bashir Indictment," *Human Rights & Human Welfare*: Vol. 10: Iss. 4, Article 3.

Available at: <https://digitalcommons.du.edu/hrhw/vol10/iss4/3>



All Rights Reserved.

This Roundtable is brought to you for free and open access by the Josef Korbel School of International Studies at Digital Commons @ DU. It has been accepted for inclusion in Human Rights & Human Welfare by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, digitalcommons@du.edu.

Confronting the Politics and Law Behind Battles over the ICC's Bashir Indictment

Abstract

Nesrine Malik points in the wrong direction in arguing that charges of genocide embarrass the ICC more than they do Omar al-Bashir. The embarrassment here should come from those, such as Malik, who snidely downplay the level of war crimes committed in Darfur, who discuss genocide as if it is a cultural rather than political matter (does Malik seriously think genocide ever has anything to do with a country's cultural traditions, as she says in defending Sudan?), or who naively give credence to predictable political push-back from Sudan and its allies. The ICC faces serious legal and political obstacles, some of its own making. These obstacles, however, must be faced and overcome, not used as an excuse to cripple the ICC.

Keywords

Human rights, Darfur, International Criminal Court (ICC), Sudan, War crimes

Copyright Statement / License for Reuse



All Rights Reserved.

Publication Statement

Copyright is held by the Josef Korbel School of International Studies, University of Denver. User is responsible for all copyright compliance.

Confronting the Politics and Law Behind Battles Over the ICC's Bashir Indictment

by Anthony Chase

Nesrine Malik points in the wrong direction in arguing that charges of genocide embarrass the ICC more than they do Omar al-Bashir. The embarrassment here should come from those, such as Malik, who snidely downplay the level of war crimes committed in Darfur, who discuss genocide as if it is a cultural rather than political matter (does Malik seriously think genocide *ever* has anything to do with a country's cultural traditions, as she says in defending Sudan?), or who naively give credence to predictable political push-back from Sudan and its allies. The ICC faces serious legal and political obstacles, some of its own making. These obstacles, however, must be faced and overcome, not used as an excuse to cripple the ICC.

The political context that shields Omar al-Bashir from coming to trial and keeps Moreno Ocampo's genocide charge from legal resolution is the crucial issue. A trial must take place during which the Prosecutor can press the validity of his charges and Bashir can defend himself from those charges. Until then, the hundreds of thousands killed in Darfur and the millions turned into refugees deserve better than Malik's nonsensical claim that the Sudanese government lacks the wherewithal to be guilty of genocide, even as she allows that Sudan "could" possibly be guilty of "gratuitous" crimes against humanity—it is unclear what could possibly be gratuitous about war crimes. This ironic distance from the brutality of Sudan's crimes in Darfur is of a piece with countries allied to Sudan that have used similarly pusillanimous language in shielding Bashir from international action.

Malik illogically pretends the distinguishing feature between genocide and mere "human rights abuse" is level of resources or organization, rather than the intent and actions of a government that has targeted entire populations in Darfur. Malik is not the only critic who has inferred that the issue here is if all actors have to be governmental for the government to be responsible. That is, however, a facile position. No violation of human rights or humanitarian law is dependent on governmental leaders doing every detail of planning or execution. Blackwater/Xe is in Iraq, for example, under the authority of the US government. There may be a level of separation between the United States and a private corporation, but the United States still holds ultimate responsibility if systemic rights violations take place. This is also the case with Sudan and the actions of government-armed and affiliated militias in Darfur. The legal test does not revolve around whether or not the Sudanese government directly committed each and every war crime, but rather if it knowingly facilitated these war crimes (and, potentially, genocide) for its own political purposes.

Moreno Ocampo has perhaps not been the ideal ICC Prosecutor. For example, his issuance of a public indictment against Bashir in 2008 rather than a sealed, secret indictment that had a better chance of being carried out may have been a blunder. And there is, indeed, legal contention over what precisely defines genocide and the precise time frame during which genocide took place in Darfur. Moreno Ocampo has won this particular legal battle in that respect, at least for this round. Nonetheless, this favorable ruling is part of an ongoing legal process. It could well be that, at the end of the day, "genocide" will be deemed an overreach and other specific charges under the rubric of war crimes will be deemed more legally appropriate. Time will tell on that front. That time will perhaps come more quickly, however, if commentators like Malik turn

toward focusing political pressure on the states that protect Bashir from international justice. It is the lack of a trial that keeps these issues from being resolved; that trial, therefore, needs to be the focus of political attention.

Politics are not separate from law. Indeed, they are and must be intimately connected—law bereft of political support is dead letter law. The ICC as it has come into being is the result of a political and normative push that came from many parts of the world. The idea of a permanent international criminal tribunal has broad legitimacy, even if some powerful governments (such as the United States) continue to resist. The normative push that impelled the ICC into global politics should not be abandoned the first time a government under investigation (and its allies) pushes back politically. To do so would be to undermine the ICC during its crucial formative stage. It is predictable that the ICC will be challenged. If there is to be continued commitment to law's role in containing political practices the world—via legal treaty, political pressure, and normative assumptions—has deemed illegitimate, such challenges must be resisted.

Close to three million Darfuris remain in displaced-persons camps. Even more dauntingly, there are fears that, even as the bloodiest of Darfur's violence subsides, the Sudanese government is preparing to turn its ethnic cleansing machine once again on Sudan's south. Now is precisely the wrong time to become glib about the war crimes charges facing Bashir. The ICC may not have pursued such charges efficiently, and some of these charges are indeed contentious, but the underlying war crimes are an embarrassment only to Sudan's government and its enablers. Keeping that government and its crimes the target is essential to a political-legal strategy to contain the sort of violence Sudan has unleashed in the past, and threatens to unleash in the future. If efforts to create the ICC are to mean anything, now is its time to play that role.

*Anthony Tirado Chase is Associate Professor of Diplomacy & World Affairs at Occidental College. Chase is currently completing *Human Rights Debates in the Transnational Muslim World: Politics, Economics, and Society*. Drawing on Professor Chase's training in international law, Islamic law, and international relations theory, this book explores when, how, and why the international human rights regime has mattered to some of the transnational Muslim world's most important debates - including those over free expression, economic development, and the treatment of sexual minorities. Other forthcoming works include "Mutual Renewal: On the Relationship of Human Rights to the Muslim World" and "On Justifications for Human Rights in Difficult Circumstances: Why 'Pushing the Envelope' is Essential to Human Rights Continued Global Resonance," each scheduled to be published as chapters in edited volumes. Previous works include [Human Rights in the Arab World: Independent Voices](#) (University of Pennsylvania Press), a range of peer reviewed articles, and guest editorship of a Muslim World Journal of Human Rights special volume on [The Transnational Muslim World, Human Rights, and the Rights of Women and Sexual Minorities](#).*