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Bashir and the ICC

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Bashir and the ICC

Abstract

Nesrine Malik argues that the International Criminal Court (ICC) made a mistake when it declared that it might charge Omar al Bashir with genocide, in addition to the existing charges of war crimes and crimes against humanity. She argues that the court's ruling will contribute to Bashir's propaganda efforts and that the current charges have had no appreciable effect. Given the extreme duplicity of Bashir and the other crimes he has quite clearly committed, it is unclear how the genocide charge would make a big difference.

Keywords

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

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Bashir and the ICC

by Kurt Mills

Nesrine Malik argues that the International Criminal Court (ICC) made a mistake when it declared that it might charge Omar al Bashir with genocide, in addition to the existing charges of war crimes and crimes against humanity. She argues that the court's ruling will contribute to Bashir's propaganda efforts and that the current charges have had no appreciable effect. Given the extreme duplicity of Bashir and the other crimes he has quite clearly committed, it is unclear how the genocide charge would make a big difference.

It is evident that Bashir and the Sudanese government have committed mass atrocities in Darfur. What we call these acts, in one sense, makes little difference. In 2005, there was a big debate over whether to call the situation genocide— as the United States did—or to identify war crimes and crimes against humanity—as the United Nations did. This fraught debate allowed the international community to avoid taking action and missed the point. Whether we call it crimes against humanity or genocide, the fact is that the Sudanese government (as well as other actors) has been responsible for killing many people. Genocide is seen as the “gold standard” mass atrocity—the one that trumps all others. But the main differentiator is intent; whether the intent was to wipe out an entire population on ethnic grounds or to kill a lot of people in the pursuit of some other particular agenda makes little difference to the dead.

There is a reasonable debate on whether to call what has happened in Darfur genocide or not, but making such a determination is what legal processes are for. The court will ultimately decide—if given the opportunity—whether or not to convict Bashir of genocide or the “lesser” crimes against humanity. The ICC just said there may be a reasonable case for trying him. Adding this charge will not, in the end, probably change all that much. He can already claim persecution by the international community to the few who will still listen to him. And the problems in Southern Sudan go far beyond this particular debate. We have seen the negative consequences of the original arrest warrant when Bashir kicked out most of the foreign NGOs providing food and medical care—an action which might itself constitute a war crime and which, regardless, underlines his complete lack of consideration for human life.

Malik claims that Bashir “travels freely and enjoys the support of his Arab and African brethren.” Here she is at least partly wrong. She mentions that he was in Qatar, “making a mockery of the arrest warrant.” Qatar is not a member of the ICC and so would be under no obligation to arrest him. It is true that most Arab countries and many African countries would not arrest him, given that they are not parties to the Rome Statute, and many have been unhappy with the arrest warrants. Yet, it is a much more complex picture. Many leaders see Bashir as a burden and would probably prefer that he just leave power, but will not say so because of the possible precedents this might set for their own rule. The African Union has made statements calling for the UN Security Council to defer the arrest warrants because of the possible impact on the peace processes in Sudan, and have declared that African countries will not cooperate with the ICC. However, the latter flows as much from anger that the Security Council ignored the African Union's (AU) request to defer the investigation, as well as Libyan President Muammar Qaddafi's bullying of many African countries into supporting the AU statements. There is, in fact, a feeling within the African parties to the ICC that they should carry out their responsibilities, and some,

such as Botswana and South Africa, have stated that they will cooperate with the ICC and arrest Bashir if he should come to their countries. He does not have nearly as many friends as Malik indicates, and has, in fact, been restricted in the countries to which he can travel. He has been invited to some countries for international meetings while being informed privately what would happen to him if he actually accepted the invitation and visited an ICC member state.

Bashir will try to make himself out as being persecuted by the international community. There are fewer and fewer leaders who will accept this, even if they do not say so publicly. The fact that he was willing to let people die when he kicked out the humanitarian organizations demonstrates his heinous nature, as will any attempts to use this most recent development to sidetrack the multiple peace processes going on in his country. Adding one more count to his arrest warrant will, in the end, make little difference, even if publicly some leaders decry it. The arrest warrant is situated in a much broader geopolitical debate about changing human rights norms and sovereignty, and the place of Africa and other developing regions in the emerging global order. Should the ICC Prosecutor take all of these things into account? What would happen if we expected domestic prosecutors to take political issues into account when they decided whether or not to charge somebody with a particular crime? No judicial mechanism is—or can be—perfect, but asking a prosecutor to take such considerations into account would immeasurably harm such processes, including those of the ICC.

*Kurt Mills is a Senior Lecturer in International Human Rights at the University of Glasgow. He previously taught at The American University in Cairo, Mt. Holyoke College, James Madison University, and Gettysburg College, and served as the Assistant Director of the Five College Program in Peace and World Security Studies at Hampshire College. Publications include Human Rights in the Emerging Global Order: A New Sovereignty?, and numerous articles on human rights and humanitarian issues in, among other journals, *Civil Wars*, *Global Governance*, *Global Responsibility to Protect*, *Global Society*, *Journal of Human Rights*, *International Politics*, *Netherlands Quarterly of Human Rights*, and *Peace Review*. He is currently working on a book examining international responses to mass atrocities in Africa. He is the founder of the Human Rights Section of the International Studies Association, and founder and co-editor of the H-Human-Rights listserv. His web page is: <http://web.mac.com/vicfalls/>*