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Politics and the Law: Enforcing Judicial Integrity

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Politics and the Law: Enforcing Judicial Integrity

Abstract

The ruling by the International Criminal Court (ICC) in early February concerning the arrest warrant for Omar al-Bashir provoked controversy. The role of the Court has been called into question, with Nesrine Malik's piece surmising that the ruling has shown that the Court is out of touch with political reality. She argues that the decision plays into the hands of authorities who are using it to their own political ends; that the charge of genocide is unjustified; and that the practicalities of enforcement undermine the Court.

Keywords

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

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Politics and the Law: Enforcing Judicial Integrity

by Anna Talbot

The ruling by the International Criminal Court (ICC) in early February concerning the arrest warrant for Omar al-Bashir provoked controversy. The role of the Court has been called into question, with Nesrine Malik's piece surmising that the ruling has shown that the Court is out of touch with political reality. She argues that the decision plays into the hands of authorities who are using it to their own political ends; that the charge of genocide is unjustified; and that the practicalities of enforcement undermine the Court.

This ruling, however, is merely a procedural one. It clarifies the standard of proof to be applied in deciding whether an arrest warrant can be issued against Bashir for genocide. It does not itself amend the arrest warrant, which remains the same as it has been since it was issued. In this sense, Malik's comment misconstrues the ruling and its impact. Further, while there is no doubt that much about law in general is political, the integrity of the law requires that its enforcement *must* be independent of political considerations. Rather than demonstrating the flaws of the ICC, this judgment affirms that the Court is operating with integrity.

History of the Judgment

The Prosecutor, in his initial application to the ICC in 2008 for an arrest warrant for Bashir, listed counts of genocide alongside those of crimes against humanity and war crimes. In its [decision](#), however, the Pre-Trial Chamber granted the warrant only on the basis of evidence of the latter two crimes. In relation to the counts of genocide, the Court found that the "existence of [the government of Sudan's] genocidal intent is only one of several reasonable conclusions available on the materials provided by the Prosecution." It considered that this meant that the standard of proof had not been met, with no warrant being issued on grounds of genocide.

The Prosecutor disagreed with this assessment, asking the Appeals Chamber to clarify the standard and to remit the matter to the Pre-Trial Chamber who should re-decide the matter on the basis of the newly clarified standard.

The Appeals Chamber [agreed](#) with the Prosecutor in finding that the standard applied by the Pre-Trial Chamber was too stringent. It found that the standard required by the Rome Statute to issue an arrest warrant (that there be "reasonable grounds to believe" that the accusation is true) should be the easiest standard to meet in the hierarchy of proofs required. As such, it decided that the Pre-Trial Chamber had erred in requiring that the existence of genocidal intent be the only reasonable conclusion available based on the evidence.

No decision was made by the Appeals Chamber as to whether that standard was met by the evidence before it in this case. In this sense, Malik misunderstands the ruling when she argues that the Court is giving Bashir and his regime more credit than is due. The ruling makes no reference to the conduct of the Bashir government. His regime is credited with nothing.

Law and Politics: Controversy Surrounding the ICC

Malik recognizes the controversy surrounding the International Criminal Court, particularly on the issuance of an arrest warrant against Bashir, a sitting head of state. The politics are complicated and emotive. It is probably true that there are those who see this ruling as demonstrating the irrelevance of a Court that is seeking to indict a man who may well win an upcoming election.

The law itself is, of course, inherently political. Legal analysis is also, and should be, aware of the political landscape in which laws operate. Where politics has no place, however, is in the enforcement of law. Malik argues that the timing of this judgment is unfortunate. With the first Sudanese Presidential and Parliamentary elections in twenty-four years due in April, authorities will construe this decision as seeking to disrupt a peaceful exchange of power. The Court, however, cannot defer to such political considerations in its own scheduling. It must make the decisions it is asked to make as quickly as possible, with reference to all available information, to minimize uncertainty. This is particularly so with controversial and high-profile cases such as that against Bashir. To do otherwise would be misguided, and would undermine the independence of this Court, which is at the heart of the international criminal law regime.

To import political considerations into the application of the law would undermine the very fabric of the Rule of Law. This legal principle, which forms the basis of modern law, requires laws to be applied to all equally. The head of state is as bound by the law as any other citizen, regardless of what stage of the electoral process he or she is in. The law must be, and must be seen to be, independent of power dynamics within a community. It is by maintaining independence that the law retains its strength.

**The views expressed in this article do not necessarily reflect the views of Amnesty International*

Anna Talbot has worked in the legal department of Amnesty International since January 2008. Before that she graduated with honors in Law and History from the Australian National University and qualified as a barrister and solicitor of the Supreme Court of Victoria (Australia) in 2007. She has also completed the Advance Course on the International Protection of Human Rights through the Institute for Human Rights at Åbo Akademi University in 2009.