

## The Politics of Justice: The International Criminal Court Prosecutor seeks a Warrant

Written by Benjamin Schiff

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BENJAMIN SCHIFF, JUL 16 2008

There is some irony in the criticism of ICC Chief Prosecutor Luis Moreno Ocampo for issuing his request for a warrant of arrest for Sudanese President Omar Hassan Ahmad Al Bashir.

Approximately two years ago, responding to the request of the Pre-Trial Chamber (PTC I), *amicus* filings from two distinguished commentators – Judge Antonio Cassese (who had chaired the International Commission of Inquiry into the Sudan<sup>1</sup> that reported to the Secretary-General and UN Security Council (UNSC) in early 2005, leading to the UNSC's March 31 referral of the situation to the ICC), and Judge Louise Arbour (former Chief Prosecutor of the International Criminal Tribunal for the Former Yugoslavia and by 2005 the UN High Commissioner for Human Rights) – indicated that the Office of the Prosecutor (OTP) should move more quickly and against high levels of the Sudanese government in order to pressurize it to protect the citizens of Darfur and to be more visibly pursuing justice in the situation.<sup>2</sup>

Within the wider non-governmental organization (NGO) human rights community, the OTP was criticized for moving too slowly and cautiously. Moreno Ocampo's explanation was that he was carrying out his investigations in as responsible a way as possible, seeking evidence that would stand up in court.

Now that he's determined that he has the requisite evidence, while human rights NGOs have generally applauded the action,<sup>3</sup> he is being criticized by others on the grounds that, given the likely Sudanese reaction, his move might be politically counterproductive.<sup>4</sup> Peace and humanitarian-oriented activists argue that his actions, at best, can be used for constructive pressure on the Sudanese government, but at worst that they will impair peace efforts and increase Sudanese attacks against peacekeepers.

Much of the debate can be explained by the extremely broad, and somewhat indeterminate mandate that the Court serves. It is to pursue both retributive and restorative justice goals, promote deterrence, and serve the interests of victims. From the standpoint of the Court's operations, however, has the Prosecutor behaved as he should, given his job definition?

Article 42 of the Statute says, "The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the court, for examining them and for conducting investigations and prosecutions before the Court. A member of the office shall not seek or act on instructions from any external source."<sup>5</sup>

Once the prosecutorial machinery was put into gear – as it was by the UNSC referral – how sensitive to a politics of consequence should the Prosecutor be?

As a first step, the OTP as currently structured (through its Jurisdiction, Complementarity, and Cooperation Division, JCCD) carries out analyses of referrals to determine what actions the OTP should take. The JCCD is supposed to, first, determine whether crimes appear to be taking place that would fall under the Court's jurisdiction; second, establish whether appropriate national authorities are genuinely investigating and prosecuting those crimes (in which

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case the Court would not have to get involved); and, third, evaluate the potential for the country in question and other countries to assist the OTP to acquire evidence and apprehend suspects.<sup>6</sup>

In the Sudan case, the UNSC referral triggered the OTP to carry out an initial investigation from which it concluded that crimes under the jurisdiction of the Court appeared to be taking place in Darfur, warranting further, formal investigation. The OTP then collected evidence both of crimes (largely through interviews of victims outside of the Sudan, given the authorities' refusal to cooperate) and of Sudanese efforts to prosecute alleged perpetrators (which it found wanting). In essence, although the mechanism may have worked too slowly, cautiously, or otherwise less than optimally, the OTP concluded this stage of its investigation with both the initial summons and then the warrant requests of spring, 2007 (for Ahmad Haroun<sup>7</sup> and Ali Kushayb<sup>8</sup>) and now with the request regarding President Bashir.

The Prosecutor has apparently operated according to book. From the standpoint of the ICC as an international judicial organization, the current warrant request is the appropriate move (assuming that the evidence supports the charges). To postpone or avoid the request out of deference to the implied government threats against humanitarian and peacekeeping organizations operating in Sudan would have been to pursue exactly the kind of political activities that Court officials have argued from the start would undermine its legitimacy and destroy its unique role. To fulfill its mandate as the judicial component of a larger international institutional network that includes other organizations that pursue humanitarian and political objectives, the Court must appear to proceed on evidentiary and judicial grounds, not political ones. For the OTP as an operational unit of a judicial organization, the political consequences on the ground should not be a guiding constraint. The evidence is what counts.

The move against President Bashir can be seen as political from another direction. Genocide is an extremely challenging charge to substantiate (as compared with crimes against humanity and war crimes). Some commentators fear that Moreno Ocampo has aimed so high with his target and charges in order to distract observers from difficulties the OTP is having in another case, the trial of Thomas Lubanga Dyilo of the Democratic Republic of the Congo.<sup>9</sup>

Should the OTP's evidence justifying a warrant for President Bashir fall short in the eyes of the PTC, the Chamber can alter the charges; however, the credibility of the Prosecution as a judicial, not political, organ now depends on the expertise and thoroughness demonstrated in the charges against President Bashir. If the PTC finds the Prosecutor's arguments convincing, the Court should issue the warrant and leave to the politicians – of the UN and its member states – the political question of how to balance the pursuit of justice with objectives of peace and humanitarian values.

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<sup>1</sup> UN Secretary-General, "Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004" Geneva (January 2005) <[http://www.un.org/News/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/News/dh/sudan/com_inq_darfur.pdf)>.

<sup>2</sup> ICC, Pre-Trial Chamber I, "Observations on Issues Concerning the Protection of Victims and the Preservation of Evidence in the Proceedings on Darfur Pending Before the ICC," by Antonio Cassese (August 25, 2006) <[http://www.icc-cpi.int/library/cases/ICC-01-02-05-14\\_English.pdf](http://www.icc-cpi.int/library/cases/ICC-01-02-05-14_English.pdf)>; ICC, Pre-Trial Chamber I, "Observations of the United Nations High Commissioner for Human Rights Invited in Application of Rule 103 of the Rules of Procedure and Evidence" (October 10, 2006), <[http://www.icc-cpi.int/library/cases/ICC-02-05-19\\_English.pdf](http://www.icc-cpi.int/library/cases/ICC-02-05-19_English.pdf)>.

<sup>3</sup> For example, Human Rights Watch, "Darfur: ICC Moves Against Sudan's Leader Charges Against al-Bashir a

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Major Step to Ending Impunity,” (July 14, 2008).

<sup>4</sup> A very useful blog “Making Sense of Darfur,” assembling a range of views is available from the Social Sciences Research Council in New York.

<sup>5</sup> Rome Statute of the International Criminal Court, available at the ICC website, ICC Legal Tools, and at the UN Treaty site.

<sup>6</sup> A discussion of the genesis of the OTP’s procedures is contained in Benjamin N. Schiff, *Building the International Criminal Court*, chapter 4.

<sup>7</sup> ICC, Pre-Trial Chamber I, “Warrant for the Arrest of Ahmad Harun”.

<sup>8</sup> ICC, Pre-Trial Chamber I, “Warrant for the Arrest of Ali Kushayb”.

<sup>9</sup> See William Schabas’ skeptical blog entry, “Genocide Charges at the International Criminal Court (July 13, 2008), and Antonio Cassese, “Flawed International Justice for Sudan” (July 16, 2008).