

# Do law & politics intersect or collide

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On Friday, several newspapers reported that Luis Moreno-Ocampo, the Argentine chief prosecutor of the International Criminal Court (ICC), would formally seek an arrest warrant on July 14 for Sudan's President Omar Hassan al-Bashir. The charge is genocide and crimes against humanity in Darfur where 300,000 people have been killed and two million made homeless since February 2003. Mr. Ocampo has charged almost a dozen people in the last four years and has not yet been denied a public request for an arrest warrant by the pretrial chamber.

ICC advocates applaud the precedent-setting charge against a sitting head of state; critics warn of over-reach and serious collateral damage. The ICC has the authority to investigate heinous international crimes wherever, whenever and by whoever they are committed. It represents the much-needed advance in global governance and offers hope for a permanent reduction in the phenomenon of impunity. Nevertheless, there are four possible downsides.

## Possible downsides

First, the logics of peace and justice can be contradictory. Peace is forward-looking, problem-solving and integrative, requiring reconciliation between past enemies within an all-inclusive community. Justice is backward-looking, finger-pointing and retributive, requiring trial and punishment of the perpetrators of crimes. On July 12, the African Union "expressed its strong conviction that the search for justice should be pursued in a way that does not impede or jeopardise efforts aimed at promoting lasting peace" (BBC News, July 13).

Mr. Bashir has been courted both by United States President George W. Bush and United Nations Secretary-General Ban Ki-moon in the search for peace and as an ally in the war on terror. Sudan's U.N. ambassador warns that laying charges against Mr. Bashir would destroy international efforts to reach a settlement in Darfur. Senior U.N. officials fret about the impact on the 9,000 strong hybrid U.N.-AU peacekeeping force. In an attack on July 9, probably orchestrated by

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the government, nine peacekeepers were killed and 22 injured. The security alert has been raised to level four, just short of evacuating all staff; foreign workers not directly involved in security and relief operations are being relocated to safer locations. But what will happen to the two-thirds of Darfuris reliant on international humanitarian assistance?

Secondly, it is critically important to ensure that the rule-of-law standard is scrupulously observed with regard to the collection and presentation of evidence, the right to cross-examination of witnesses, and all the other procedures that we associate with a fair trial. A necessary condition of a fair trial is the possibility of a verdict of innocence. It cannot be the case that "the person will be hanged, but only after a fair trial," for that is the standard of show trials. For the trial to be authentic, the possibility of acquittal must be as much an inbuilt requirement as the possibility of conviction.

In the U.S. legal culture in particular, human rights law gives primacy to protecting the rights of the arrested and the accused over the requirements of the prosecution for securing conviction. International criminal law, by contrast, has shifted the focus from the defence to the prosecution, for example with respect to the right of the accused to confront the accuser versus the anonymity of witnesses in order to protect them from harm and to reduce their sense of humiliation when confronting perpetrators of sexual violence crimes.

International criminal trials have not always respected the rights of criminal defendants with the same rigour as scrupulous national courts. Impelled by the momentum of international accountability, the balance has shifted in favour of the victim and con-

viction. So much so that a verdict of 'not guilty' is seen as proof of the failure of the system rather than of innocence of the defendant. Because the peak U.N. body is the P5-dominated Security Council, it simply cannot ensure that the process of trial and prosecution is always credible, meets international standards of independence and impartiality of prosecutors and judges, treats the rich and poor, powerful and weak as equals in and before the law, and respects the rights of defendants as well as victims.

Thirdly, the ICC is not embedded in a broader system of democratic policymaking. There is no political check on it. In a national system, the office of the prosecutor functions within a well-established structure of state governance, while the ICC, in the words of Judge Hisashi Owada of the World Court, "is not established as part of a centralised system of international governance that can govern the entire international community." In claiming jurisdiction over nationals of countries that are not members of the court, it displaces the state as the conduit of democratic representation without providing an alternative. Its authority to overturn policy established by national democracies is questionable. Why should it have authority over constitutionally legitimated democracies such as Australia, Britain, Canada, India and the U.S.? And if not over them, can it fairly claim jurisdiction over non-democracies like Sudan?

Perceptions are firming that the ICC is Afro-centric. On July 12, the African Union formally "reiterated the AU's concern with the misuse of indictments against African leaders" (BBC News, July 13). Until such time as Presidents, Prime Ministers and generals from some major western countries are also indicted, convicted and punished for

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war crimes, the ICC will remain suspect as the vehicle for dispensing biased justice of the strong against the weak.

Fourthly, international criminal justice takes away from domestic authorities the options of alternative modes of healing and restitution with a view to reconciliation that puts the traumas of the past firmly in the past. In South Africa, building on the Chilean model, this was done by means of the Truth and Reconciliation Commission. In both cases, the final reports summarised the findings, put them in their proper political and historical contexts and disseminated the facts of past atrocities to their own public and the world. The South African case is especially interesting and instructive because the criminal apartheid state was such an international cause célèbre for such a long time, and also because the TRC became such a celebrated case of the genre.

Criminal law, however effective, cannot replace public or foreign policy. Determining the fate of defeated leaders is primarily a political question, not a judicial one. The legal clarity of judicial verdicts sits uncomfortably with the nuanced morality of confronting and overcoming, through a principled mix of justice and high politics, a troubled past. Truth commissions take a victim-centred approach, help to establish a historical record and contribute to memorialising defining epochs in a nation's history. A criminal trial is not always the best instrument for collective memory and communal healing. It can cause more damage and solidify the very social cleavages that led to genocide and ethnic cleansing. The international criminal justice route takes away from the affected societies the right to decide whether, how and who to prosecute for alleged mass crimes, and what punishment to inflict on those found guilty. It also takes away from them the options of alternative modes of reconciliation. The purely juridical approach to transitional justice traps and suspends communities in the prism of past hatreds.

