The Sudanese Conflict: War Crimes and International Criminal Court

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Abstract *: The International Criminal Court (ICC) was created to facilitate the prosecution of perpetrators of international humanitarian law something not within the jurisdiction of the International Court of Justice. As an international court, it was not restricted by head of state or diplomatic immunity. In March 2005, the United Nations Security Council under Chapter VII of the UN Charter adopted resolution 1593 which referred the situation in Darfur, Sudan to the International Criminal Court Prosecutor, effectively giving the ICC jurisdiction over Sudan even though Sudan is not part to the Rome Statute. The Resolution is binding on all UN member states, including Sudan. On March 4 2009, ICC judges issued a warrant for the arrest of Sudanese President Omar Hassan al- Bashir. The warrant holds that there are reasonable grounds to believe that Bashir is criminally responsible for five counts of crimes against humanity and two counts of war crimes, referring to alleged attacks by Sudanese security forces and pro- government militia in the Darfur region of Sudan during the government's seven year counter insurgency campaign. This ability to indict a head of state in office raised debates and animosity between the court and African leaders as well as Arab leaders after it indicted Hassan Omar Al-Bashir, the Sudanese head of state. The paper seeks to analyse the extent to which the Sudanese conflict gave rise to situation that constitute war crimes and examine the extent to which the laws have been applied worldwide. In essence, the paper makes an exposition about the law's applicability in the contemporary world. The paper espouse that the Sudanese sets as a test case were a sitting head of state could be brought before the ICC.*

Keywords : Conflict, War Crimes, International Criminal Court, Sudan, Omar Hassan al-Bashir

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Introduction

It is an accepted norm of customary international law that sitting Heads of State have immunity from criminal prosecutions before the domestic courts of foreign states. However, in recent years, we have witnessed a dramatic shift from this customary international law principle, where some jurisdictions have been arresting or threatening to arrest former and sitting heads of state in order to institute criminal prosecutions against them. The Statute of the ICC, also known as the Rome Statute entered into force on July 1 2002 and established a permanent, independent court to investigate and bring to justice individuals alleged to have committed war crimes, crimes against humanity and genocide. Article 28 of the Rome Statute establishing the ICC holds that neither the immunity of a head of state nor the official position of a suspected international criminal will bar the Court from exercising its jurisdiction. This position differs significantly from the traditional international legal position on immunity. Customary international law on the immunity of heads of state and government stipulates that a head of state has immunity, which includes personal inviolability, special protection for his or her dignity, immunity from criminal and civil jurisdiction and from arrest/ or prosecution in a foreign state on charges concerning all crimes, including international crimes. The Rome Statute therefore seeks to institute a new rule, in which, as an international court, it is not constrained by customary law and international comity. While Heads of State have been tried before, arresting a Head of State in office without that head of state having been removed from office by war is a new practice. However, existing jurisprudence on this subject is not firm in its application. Therefore the Sudanese case sets as precedence where a sitting head of state can be arrested and be brought before the international criminal court.

Emergence of Legal Documents on the War Crimes

One can argue that the development of the jus in bello in international customary law marked the development of war crimes. Different civilizations in the world, most notably the Greek City States, had a well developed law governing the conduct of war.[1] These rules ranged from the treatment of prisoners of war and the respect of sacred monuments like temples. However, in the absence of an international court, war crimes were generally committed by the soldiers and their commanders and tried by their sovereigns who would not do the same if they felt that their soldiers did it for the best of the sovereign.[2]

War crimes are acts and omissions that violate international humanitarian law and are criminalized in international criminal law.[3] The most notable codification of war crimes was at the end of WW II by the Charter of the Nuremberg International

Military Tribunal and the 1949 Geneva Convention on civil conflicts. Marko Divac Oberg notes that;

> *Article 6 of the Charter of the Nuremberg International Military Tribunal of 8 August 1945 gave the Tribunal jurisdiction to try people who, acting in the interests of the European Axis countries, committed: ... War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.*[4]

The development of war crimes took place in an environment in which war was a lawful means of settling disputes between different sovereigns. In such a case, jus in bello was meant to regulate and bring humanity to international conflicts. Its development was largely customary and not by treaty law. The 20th century saw the documentation of jus in bello and the criminalization of breaches of the agreements.[5] Francois Bugnion argues that, "The autonomy with regard to jus ad bellum was confirmed after the Second World War by the Charter of the Nuremberg Tribunal, which made a distinction between war crimes, that is, acts committed in violation of the laws and customs of war, and crimes against peace."[6]

The Nuremburg Trial and the Geneva Conventions of 1949 became the first instruments to explicitly draw a line between war crimes and other general crimes. It is quite clear that all the agreements that came into effect after WW I did not criminalize war but tried to separate between approved rules to govern its conducts and those acts that would be regarded as excesses in war. The agreements were also meant to criminalize those who start wars of aggression. However, the question that remained was how to apply the doctrine of war crimes to internal conflicts. This arose from the fact that the sovereign would declare the rebels criminals deserving to be punished in the strongest way, while the rebels would denounce the legitimacy of the sovereign hence announcing their own independence. While both parties would be calling for the other to observe the law of armed conflicts, they will all be likely to commit the crimes in a move to win ground against the other. This has been the case in the Sudanese Darfur crisis in which both sides have accused the other of committing war crimes while denying their part in the war crimes.

After the Geneva Protocol on civil wars which can be viewed as part the codification of customary international law, the major step in recognizing that jus in bello can be applied in civil wars, and hence the criminalization of those who breach the law of armed conflicts was in the International Criminal Tribunal for the former Yugoslavia (ICTY). Francois Bugnion notes that;

> *There is ... a set of treaty and customary rules that govern the mutual relations of the warring parties in cases of non-international armed conflict. In its judgment of 2 October 1995 in the Tadić case, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia expressly recognised that the concept of serious violations of the laws and customs of war applied to internal as well as international conflicts.*[7]

The Rome Statute of the ICC added to the international body of law that had been developed including the Statute of the ICTR and the Special Court for Sierra Leone (SCSL), which criminalized those acts that had already been criminalised in international conflicts in internal conflicts as well. It is from the acceptance of the fact that jus in bello can be applied in internal conflicts that the Darfur crisis will be analysed.

Historical Background of the Darfur Crisis

Since attaining independence from Britain, Sudan has been ravaged by a number of conflicts, the most famous one being the civil war between the North and the South which was concluded by a peace deal on 9 January 2005 called the Nairobi Comprehensive Peace Agreement, with partial autonomy given to the Southern part of the country.[8] However, in 2003 a conflict had already been brewing against the local 'African' tribe and the invading Afro-Arab tribes in Darfur in the western part of the country.

The Darfur crisis has been viewed as different from the North-South conflict that preceded it. The Darfur crisis has been explained as a genocidal conflict by a number of scholars and organizations that include Usman A. Tar, Julie Flint, Human Rights Watch (HRW) and Women Waging Peace (WWP), between the indigenous African tribes and the Afro-Arab tribes in the region. The official Sudanese statement notes that the conflict is a resource based conflict pitting the sedentary indigenous tribes against the pastoral Afro-Arab tribes. The indigenous tribes organized around two main rebel groups namely Sudanese Liberation Movement/Army (SLM/A) and the Justice and Justice and Equality Movement (JEM) changed the course of the crisis when the two rebel groups alleged that the three States (Sultanates) of Darfur were marginalized than the rest of the Sudan especially the North. This became the major grievance of the new crisis that erupted in 2003.

While the rebel groups have called on the government to address its development grievances, the government has argued that such claims were fallacious. The government noted that a lot of improvements have been developed in Darfur since the independence which includes construction of schools, universities,

provision of piped water, hospitals and health centers as well as an increase in the electricity supply in the region.[9] The government alleges that the rebellion in Darfur was influenced by the peace deal that was signed between the government and the SPLM/A in 2003. The Sudanese Embassy in the United States of America noted that JEM and SLM/A took up arms and raided police and military installation without any talks with the government and only wanted to gain concessions that were extended to the rebel movement in the South of Sudan.[10]

The Sudanese government also argues that the conflict is part of a grand Western project meant to destabilize the country and create a situation in which sustainable peace will not be realized[11] until the country is broken up. However, this argument is myopic in the sense that it neglects the long history of the conflict in Darfur between the nomadic herders and the sedentary farmers.

The government also denies in total the claim that there was genocide as alleged by International Non-Governmental Organizations (NGOs), and the ICC prosecutor, Luis Moreno Ocampo. From the government's stand point, after the attack on all security installations in Darfur, the government was forced to pull back its personnel. This created a security vacuum in which the rebels tried to capitalize by raiding the animals of the nomadic Arab tribes.[12] This compounded the conflict as the Arab tribes, who were equally armed retaliated. Civilians who were caught in-between took refuge at government complexes in urban centers.[13] From this position, one can argue that the government did not perpetrate genocide but defended and gave sanctuary to the innocent civilians.

Concerns of Third Parties on the Conflict

That the government had no intent to perpetrate genocide was established by the International Commission of Inquiry on Darfur which noted that;

> *The Government of the Sudan has not pursued a policy of genocide. Arguably, two elements of genocide might be deduced from the gross violations of human rights perpetrated by Government forces and the militias under their control. These two elements are, first, the actus reus consisting of killing, or causing serious bodily or mental harm, or deliberately inflicting conditions of life likely to bring about physical destruction; and, second, on the basis of a subjective standard, the existence of a protected group being targeted by the authors of criminal conduct. However, the crucial element of genocide intent appears to be missing, at least as far as the central Government authorities are concerned.*[14]

The argument was also forwarded by the UN/AU Hybrid Operation in Sudan (UNAMID). The UN team however concluded that, "international offences such as the crimes against humanity and war crimes that have been committed in Darfur may be no less serious and heinous than genocide."[15]

The Sudanese government has rejected the claim that it is in control of and arming the Janjaweed, an alleged militia that is supplementing weak government forces in Darfur. The word Janjaweed is a decades old term which is used to refer to an armed mounted high-way robber in the Maghreb,[16] originally the term means devil (jinn) on a horseback. The government has noted that;

> *The "Janjaweed" have no political organization or agenda, and included many who have exploited the conflict for their criminal end. ... Once they concluded their criminal attacks, they disappeared into their respective communities. Complicating this was the fact that decades of inter-marriage had made nonsense of any clear ethnic distinction between the so called Arab and African in Darfur. It must be noted never-the-less that many Janjaweed had been caught, convicted and jailed.*[17]

However, humanitarian organizations and UN reports have alleged that the Sudanese government has been working with the Janjaweed in order to contain the crisis in Darfur. Human Rights Watch argues that, "The Sudanese government and the Arab 'Janjaweed' militias it arms and supports have committed numerous attacks on the civilian populations of the African Fur, Masalit and Zaghawa ethnic groups."[18] Ted Dagne and Bathsheaba Everett also support the assertion when they quoted the UN High Commission for Human Rights that, "In mid-2003, the government of Sudan significantly increased its presence in Darfur by arming Arab militias, collectively known as the Janjaweed, and by deploying the Popular Defence Force (PDF)."[19]

Given that it is beyond reasonable doubt that the Janjaweed have committed grave crimes against humanity, the government and forces opposing it have been pointing fingers at each other. The Sudanese government has totally disowned the Janjaweed saying they are criminals who are capitalizing on the current crisis while the rebel groups and the NGO community allege that the Janjaweed are part of the government forces and are armed and get orders from the central government. If the allegations are true, individuals responsible for state defense including the president will be held liable of the crimes committed by the Janjaweed militia through the principle of command responsibility.

From a neutral stand point, one can argue that war crimes have been committed from both sides. Both the rebel factions and the government have committed horrendous crimes that warrant to be tried in either a local court or an international court in the absence of local jurisdiction to try the cases. Some of these crimes include "targeted killing, summary execution and rape of thousands of

civilians, the destruction of hundreds of villages, the theft of millions of livestock and the forced displacement of more than two million people in Darfur."[20]

Legal Evaluations about the Developments in Darfur

According to the United Nations, more than 200 000 civilians are estimated to have died and at least 2 million are estimated to have been either internally or externally displaced.[21] A number of villages have been burnt and herds of livestock have been lost. These entire actions amount to war crimes according to both customary law and the Geneva conventions because they have been committed under a situation of war. There is however need to establish the true perpetrators of the crimes.

It can be argued that two broad groups are responsible for the crimes committed in Darfur since the eruption of the conflict. The first is the two rebel groups and the second is the government forces including the Janjaweed militia. Usman A. Tar notes that the rebels groups attacked both the military and civilian installations in their bid to gain ground against the central government. He notes that, "The JEM eventually merged, even if temporarily, with the SLA/M in carrying out intensive, more disastrous attacks on key military and civil targets."[22]

On the other hand, the government's reaction was beyond the required military proportions. The military tactics which were employed by the Janjaweed, including the Scorched Earth Policy are archaic military tactics that were outlawed in customary international humanitarian law.[23] While the government argue that the Janjaweed mostly act at their own will without such actions having been sanctioned by the central government leaders in Khartoum that does not free them from the crimes committed by the militia as they were officially under their command. The International Commission of Inquiry on Darfur noted that;

> *The Janjaweed are not organized in one single coherent structure …. The first category includes militias which are only loosely affiliated with the Government and which have received weapons and other supplies from the State ... They are thought to undertake attacks at the request of State authorities, but are suspected by the Commission of sometimes also acting on their own initiative to undertake small scale actions to loot property for personal gain.*[24]

In such a case the principle of command responsibility will come into effect, hence the state becomes liable for the crimes committed by the militia.

Position of Al-Bashir: Principle of Command Principle

The case against the Sudanese head of state, Hassan Omar Al-Bashir stems from the fact that he is the head of state and commander-in-chief of the Sudanese defense forces; he should have been able to stop the actions of his military in perpetrating war crimes and crimes against humanity. One can therefore argue that the case against the Sudanese head of state is derived from a number of international crime sources which also include the principle of 'command responsibility' given the fact that the president failed to restrain his subordinates from committing war crimes and crimes against humanity while he was aware that such crimes were being perpetrated or that he failed to bring the perpetrators to account when he had acquired the knowledge of such crimes having been committed. In order to have an appreciation of the crimes labeled against Omar Al-Bashir, it is imperative to explore the sources from which a head of state can be liable for criminal offences committed by his/her subordinates. The discussion will stem from the principle of command responsibility.

Bakone Justice Moloto notes that international tribunals have the authority to hold responsible individual persons for crimes against humanity, war crimes and genocide.[25] However, given the fact that these crimes are committed in war situations, it is not easy to identify the hundreds of persons who would have committed the crimes or when they are identified, the task to try them and bring all the evidence against them will be a daunting task. Bakone Justice Moloto argues that, "In cases where unidentified perpetrators are members of organized groups, such as military, paramilitary, or police units, the doctrine of command responsibility allows international criminal tribunals to hold superiors responsible for the crimes of their subordinates, whether or not the latter are identified by name."[26]

While the principle of command responsibility is regarded as a recent innovation in international criminal law, it can be argued that it has long and established but dormant roots in international customary law. In 1474, Peter von Hagenbach, a Roman Knight, was put on trial and convicted of crimes committed by his soldiers on the occupation of Breisach.[27] Be that as it may, the current principle of command responsibility was first "established by the Hague Conventions IV (1907) and X (1907) and applied for the first time by the German Supreme Court in Leipzig after World War I, on the Trial of Emil Muller."[28] Two cases popularised the principle. The first was the case against the Japanese General, Tomoyuki Yamashita. He was prosecuted by the US Supreme Court in 1945 for atrocities that were committed by soldiers under his command in the Philippines. The US Supreme Court charged him with failing to control troops under his command by allowing them to commit war crimes.[29] The second case is the one pertaining to US Army Captain, Ernest Medina. He was prosecuted for crimes committed in 1971 by forces under his command during the My Lai Massacre in the Vietnam War.[30]

Iavor Rangelov and Jovan Nicic note that international law recognise the principle of command responsibility in both international and internal conflicts.[31] The principle is codified in the Additional Protocol I to the Geneva Conventions, and explicitly included in article 7(3) of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) and article 6(3) of the Statute of the International Criminal Tribunal for Rwanda (ICTR), as well as article 28 of the Rome Statute for an International Criminal Court (ICC).

Article 7(3) of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) provides that: "The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."[32]

Iavor Rangelov and Jovan Nicic sum up command responsibility as being the "the existence of a superior-subordinate relationship; that the superior knew or had reason to know that the criminal act was about to be or had been committed; and that the superior failed to take the reasonable measures to prevent the criminal act or to punish the perpetrator thereof. In this sense, command responsibility is a form of complicity under international law, with imputed knowledge of the criminal act on the part of the commander."[33]

In the Sudanese case, one can argue that the Sudanese Commander in Chief of the Defense Forces who is also the President was aware or had reason to know that his subordinates were committing war crimes and crimes against humanity. The Darfur Conflict had gone for years and a number of humanitarian organizations working in the region documented and published the atrocities that were being committed by the government forces and the Janjaweed militia which was also government sponsored.[34]

The charges against Al-Bashir can also be attributed to him having sanctioned them as a national coordinated counter-insurgency move. The ICC spokesperson, Laurence Blairon, pointed that Al-Bashir was suspected of being criminally responsible for "'murdering, exterminating, raping, torturing and forcibly transferring large numbers of civilians and pillaging their property'. She said the violence in Darfur was the result of a common plan organized at the highest level of the Sudanese government."[35] As the Sudanese head of state and commander-in-chief of the Sudanese defense forces, he is alleged to have sanctioned the atrocities against the rebel groups like the Justice and Equality Movement (JEM) and the Sudanese Liberation Movement/Army (SLM/A) as well as the indigenous people of the Zaghawa, the Masaalit and the Fur.

In the warrant of arrest issued against Al-Bashir, the ICC noted that;

> *There are reasonable grounds to believe: (i) that soon after the attack on El Fasher airport in April 2003, the [Government of Sudan] GoS issued a general call for the mobilisation of the Janjaweed Militia in response to the activities of the SLM/A, the JEM and other armed opposition groups in Darfur, and thereafter conducted, through GoS forces, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Force, the National Intelligence and Security Service ("the NISS") and the Humanitarian Aid Commission ("the HAC"), a counterinsurgency campaign throughout the Darfur region against the said armed opposition groups; and (ii) that the counter-insurgency campaign continued until the date of the filing of the Prosecution Application on 14 July 2008.*[36]

This therefore means that the case against the Sudanese head of state is derived from the alleged sanctioning of atrocities as well as acts of omission especially in relation state failure to restrain or try cases that were committed by the government forces and the Janjaweed militia. As head of state, the president became liable for crimes committed by his subordinates. Without a judiciary to try him in Sudan, the ICC took the initiative after the situation in the country had been referred to it by the UN Security Council under the Rome Statute of the ICC.

The problem for Sudan is that is a full member of the UN and is bound by the resolutions and treaties of the organization. This act was lawful given the fact that the Article 13 of the Rome Statute notes that;

> The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: … (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.[37]

While Sudan is not a party to the Rome Statute it is a member of the UN and it is bound by the body's resolutions including those from the Security Council, hence the ICC may exercise jurisdiction over Sudan.The ICC warrant states that there are reasonable grounds to believe attacks against civilians in Darfur were sanctioned by the Sudanese government, that such attacks were widespread and systematic and that Al Bashir acted as indirect perpetrator, and given that it is alleged that he was in control of the Janjaweed militia, he could stop their crimes. In his application for an arrest warrant filed in July 2008, the ICC Prosecutor affirmed that while Bashir did not physically/directly carry out abuse, he committed these crimes through members of the State apparatus, the army, and the Militia/Janjaweed as president and commander in chief of the Sudanese armed forces.[38] Human rights organizations

such as Amnesty International and Human Rights Watch hailed the arrest warrant, the first issued by the ICC against a sitting head of state as an important step against impunity. France, Canada, United Kingdom, Denmark, and the European Union (EU) as an entity have called on Sudan to cooperate with the warrant.

Conclusion

While it can be argued that the ICC is using Africa as a testing ground, it has to be understood, it is only the Sudanese case in which the court has opened a case without being invited by the state to open investigations. The arising issue that the Sudanese government at first allowed the mission from the ICC in the country and cooperated seem to raise legality questions as to whether cooperating in investigation automatically translate to agreeing to the jurisdiction of the court. The case of Sudan seems to reflect that any actor in the interest of the preservation of the state can be brought before the ICC. This would lead to a situation where those state that exercise veto power in the Security Council can manipulate the system to their advantage and their allies and those that do not have will face the wrath of the full law. In the final analysis, the paper questions the politics behind the operation of ICC in relation to Sudan, a situation that that might spread to other weaker countries who is to depend on the mercy of their allies in UN Security Council. Or the case makes the breaking point where sitting heads of state have to be made aware that application of state immunity when it comes to international criminal law is no longer applicable and now heads of state and government are liable to crimes committed whilst they are still in office.

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