

February 10, 2005

New York Times

OP-ED CONTRIBUTOR

Court of First Resort

By SAMANTHA POWER

Cambridge, Mass.

TEN years ago, I asked Bosnian civilians under siege in Sarajevo where they would go if they could escape. Most chose one of the sand or pebble beaches along the Adriatic. Last summer, when I traveled through the Sudanese province of Darfur, I asked the same question of Sudanese who'd seen their homes torched, their cattle stolen and their children butchered. The surprisingly common answer, whether from refugees wandering the Sahara, or from farmers who had never had electricity or running water, was this: "The Hague." They had heard there was an international court there, and they wanted to go testify.

I didn't have the heart to tell them that their attackers couldn't be tried at the International Criminal Court because Sudan was not a party to it and because the United States, even though it was Khartoum's fiercest critic, was likely to block an investigation by the court.

In late January, a United Nations commission issued its findings on Darfur, where more than 200,000 people have been killed. Much has been made about the commission's refusal to describe the atrocities by government-backed militias as genocide. But more striking was the commission's authoritative documentation of some of the worst horrors of the last half-century: violations "without any military justification" that "no doubt constitute large-scale war crimes." In addition, the team delivered a sealed list with the names of 51 Sudanese suspected of war crimes and recommended just what the Darfurians had been urging all along: investigation and prosecution in The Hague.

The Bush administration has been more forthright than any of the United Nations' 191 member states in denouncing the atrocities in Sudan - a fact that should shame European nations that pride themselves on their human rights pedigrees. The United States was the first to characterize the violence as genocide and the first, way back in June, to name potential perpetrators and call for punishment. It has also dismissed offers by the Sudanese government to conduct the trials at home, rightly recognizing that Khartoum is unlikely to prosecute crimes that it has ordered and committed.

But the Bush administration can't decide what it dislikes more: genocide or the International Criminal Court, which aims to punish it. Administration officials have missed no opportunity to undermine the court. During President Bush's first term, the United States suspended military aid to more than 20 countries that refused to shield

Americans from potential prosecution, including Mali (a fledging democracy), Ecuador (a partner in drug interdiction efforts), and Croatia (a fragile government trying to stem a nationalist tide).

In one of its most astounding moves, the administration teamed up with Republican lawmakers in August 2002 to pass a law that includes a measure known colloquially as the "Hague invasion clause," which authorizes American troops to use "all means necessary and appropriate" to liberate American servicemen should they ever be imprisoned. That's not exactly the kind of diplomacy that will, as Secretary of State Condoleezza Rice promised on the eve of her trip to Europe, join the United States and its allies "around a common agenda for the next several years, one that is firmly rooted in our values, our shared values."

Since coming into force in July 2002, has the court done anything to justify the administration's fears that Americans will be hauled before an "unaccountable" tribunal? For example, has its chief prosecutor, Luis Moreno Ocampo, begun investigating the torture and murder carried out by American soldiers and contractors in Iraq or Guantánamo Bay? No. Mr. Moreno Ocampo has explained that these crimes don't fall within his jurisdiction.

Instead, working with Christine Chung, formerly a top federal prosecutor in New York, Mr. Moreno Ocampo has been busy building complex cases against militia leaders in Congo and against the Lord's Resistance Army in Uganda, which the State Department has branded a terrorist group. Mr. Moreno Ocampo took up these cases not on his own initiative, but because Congo and Uganda asked him to. And now, although Mr. Moreno Ocampo has the funds and the personnel to investigate the horrors in Darfur, he cannot act unless the United Nations Security Council tells him to.

But the United States so mistrusts the International Criminal Court that President Bush has instead proposed that the African Union and the United Nations create a Sudan tribunal based at the war-crimes court run by the United Nations in Tanzania. "We don't want to be party to legitimizing the I.C.C.," Pierre-Richard Prosper, the United States ambassador for war crimes issues, said in late January. That's an about-face from the American stance in 2002, when Mr. Prosper criticized the very same United Nations ad hoc tribunals for Rwanda and the former Yugoslavia that he now hails. Citing "problems that challenge the integrity of the process," like a lack of professionalism among staff, Mr. Prosper demanded that the interminable proceedings at those courts be wrapped up by 2008, regardless of who was left at large. Justice at these courts, he said, "has been costly, has lacked efficiency, has been too slow, and has been too removed from the everyday experience of the people and the victims."

Temporary courts suffer other disadvantages next to the permanent International Criminal Court. Because their mandates are finite, they tend to rush indictments and arrests, disregarding their potentially destabilizing effects on societies still reeling from conflict. The permanent court, by contrast, can time its arrests to advance both justice and peace.

Moreover, creating a court from scratch takes months, or even years. A new statute would need to be devised, staff members and judges would need to be recruited, and the African Union, which has never before overseen criminal trials, would need a crash course.

The ad hoc court could cost as much as \$150 million annually. By contrast, the supposedly bloated international court, which is already investigating multiple crises simultaneously, will cost roughly \$87 million in 2005. Couldn't that same \$150 million be better spent on arming and transporting African Union peacekeepers into Darfur to prevent the massacres from being committed in the first place?

Skeptics say that international courts will never deter determined warlords. Musa Hilal, the coordinator of the deadly Janjaweed militia in Darfur, gave me a very different impression when I met with him soon after the Bush administration had named him as a potential suspect. He had left Darfur and was living in Khartoum, courting journalists in the hopes of improving his reputation. Almost as soon as I sat down with him, he began his defense. Like his victims, he had only one place on his mind. "I do not belong at the Hague," he said. Surely President Bush doesn't want to find himself on the side of someone his administration considers a killer.

Samantha Power, a lecturer at the Kennedy School of Government at Harvard, is the author of "A Problem From Hell: America and the Age of Genocide," which won the 2003 Pulitzer Prize for general nonfiction.