

Confronting the Atrocities in Darfur

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By Nick Grono

International Crisis Group (Brussels)—Darfur's ongoing misery is the world's continuing shame. The international community has conspicuously failed in its responsibility to protect the people of Darfur from large scale crimes against humanity: the result is over 200,000 dead and more than two million forced from their homes.

But one notable exception to this international abdication of responsibility has been on the legal front, with the UN Security Council's referral of Darfur to the International Criminal Court (ICC) in March 2005. In the face of clear evidence of ethnic cleansing and other atrocity crimes, the ICC investigation has taken on enormous importance. It is also a critical test of the fledgling organisation.

The Prosecutor of the International Criminal Court, Luis Moreno-Ocampo, faces three big challenges. The first is that Darfur is in the middle of a continuing conflict, making it extraordinarily difficult to conduct a successful investigation and prosecutions. The government and its proxy Janjaweed militias continue to launch attacks on the rebels and their civilian sympathisers in western Sudan and in neighbouring Chad, and the rebels are not only fighting them, but also each other. The Prosecutor does not even have a security force to protect his staff and witnesses on the ground let alone help him collect evidence. The second challenge is that the Sudanese Government is doing everything in its power to obstruct and undermine the ICC investigation. When the Security Council referred Darfur to the ICC, in fact, President al-Bashir declared, "I shall never hand any Sudanese national to a foreign court", and Khartoum has acted accordingly ever since.

Very soon, the Prosecutor will have to begin to publicly confront this obstruction - if only for his own credibility. So far, the ICC has been testing the limits of Sudanese cooperation, and working to understand government structures and relationships with the janjaweed and various factions. But the Prosecutor should be under no misapprehension that there exist moderate leaders within the regime willing to genuinely assist his investigation. It is only external pressure that can help him.

The third challenge, and perhaps the biggest of all, will be confronting claims that the ICC prosecutions are actually an impediment to resolving the conflict. Already Khartoum has made it clear that one of its many objections to the UN taking over from the ineffective and under-resourced Africa Union force currently in Darfur is its fear that the UN peacekeepers will act as a police force for the ICC. As it becomes clear the Prosecutor is serious about pursuing those most responsible—including high-level Sudanese government officials and some rebel commanders—he will face more and more claims that his investigation is blocking peace in Sudan. Khartoum, and some in the international community, will assert that perpetrators should be given amnesties.

This challenge—whether to trade away justice to make peace easier to achieve—is not a new one. As justice and peace are both fundamentally important objectives, there are compelling arguments for the primacy of each. From the ICC's perspective, its underlying rationale is to demonstrate to those who plan and implement atrocity crimes they will be held accountable. In this sense, a successful ICC investigation in Darfur is critical not just for Sudan but for ending such crimes around the world.

There is a recognition in the ICC statute itself that there are circumstances in which the Prosecutor may decide not to continue with an investigation because it is not in the interests of justice to do so or because new facts or information changes the equation—which presumably includes, in exceptional circumstances, a new peace process with robust accountability mechanisms. But this is a very tough call for the ICC itself to make. It's hard to task the Prosecutor with pursuing justice against those responsible for horrific crimes, while at the same time burdening him with the political role of deciding whether the interests of an uncertain peace should trump justice.

This role should be left to the Security Council, which, after all, has responsibility for maintaining and restoring international peace and security. The ICC statute explicitly provides that the Security Council can put ICC investigations or prosecutions on hold. Getting Security Council agreement on such an issue will never be easy, but such a difficult decision merits attention at this level, leaving the Prosecutor free to focus on his primary job of pursuing perpetrators.

Leaders in Khartoum and rebel commanders are aware their actions could have real consequences for them personally - perhaps not now or in the next few months, but maybe two or three years down the track. They are acutely conscious of the precedents of Milosevic, Taylor and Pinochet. And if they are not to be held so accountable, it should only be because the Security Council determines that the interests of peace demand otherwise.

Nick Grono is Vice-President of the International Crisis Group

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