

THE INTERNATIONAL CRIMINAL COURT'S CASE AGAINST THE PRESIDENT OF SUDAN: A CRITICAL LOOK

Mahmood Mamdani

On 14 July 2008, after much advanced publicity and fanfare, the prosecutor of the International Criminal Court (ICC), Luis Moreno-Ocampo, applied for a warrant of arrest against the president of Sudan, Omar Hassan Ahmad al-Bashir, on charges that included conspiracy to commit genocide along with other war crimes.¹

The application charges President al-Bashir with the polarization of ethnic groups into two broadly racialized groups (Arab and *Zurga* or black), followed by a violent conflict from 2003 to 2005, leading to the ethnic cleansing of *Zurga* ethnic groups (in particular, the Fur, the Masalit and the Zaghawa) from their traditional tribal lands or *dars*, and a deceptively non-violent process whereby those forcibly expelled were left to die, either in the desert or from malnutrition, rape or torture, leading to “slow deaths” in the internally displaced persons (IDP) camps. The prosecutor argues that this process has gone on for five years, from 2003 to the time of the publication of the application in 2008.

I will seek to place the prosecutor’s account of these atrocities within a historical and regional context. Such an account raises important questions of fact and interpretation with reference to each of the three charges contained in the prosecutor’s application: racialized polarization, dispossession of land and atrocities in the camps.

This is how the prosecutor describes President al-Bashir’s responsibility for the racialized polarization of the conflict in Darfur:

In Darfur, AL BASHIR promoted the idea of a polarization between tribes aligned with him, whom he called ‘Arabs,’ and the Fur, Masalit and Zaghawa, whom he called ‘Zurgas’ or ‘Africans.’ The image is only one of many used by AL BASHIR to disguise crimes. Both, victims and perpetrators are in fact ‘Africans,’ and speak ‘Arabic.’²

The racialization of identities in Darfur has its roots in the British colonial period. As early as the late 1920s, the British tried to organize two confederations in Darfur: one “Arab” the other “Zurga” or black. Racialized identities were incorporated in the census and provided the frame for government policy and administration. Despite official British policy, Arab was never a singular identity: Whereas the sedentary Arab tribes of riverain Sudan were identified with power, the nomadic tribes of western Sudan, in particular Darfur, were the most marginalized groups in a marginal province. If anything, the evidence shows that whereas successive Sudanese governments—al-Bashir’s included—looked down on all Darfuris, non-Arab Zurga and Arab nomads, it is the Save Darfur Coalition, with the media in tow, that drove the portrayal of the conflict in Darfur as one between “Arabs” and “black Africans.”

The conflict over land is also more complex than the prosecutor’s application describes. The spiral of land conflict and dispossession has been a consequence of four different if related causes: the land system, environmental degradation, the spillover of the four decade long civil war in Chad and the brutal counterinsurgency waged by the al-Bashir government from 2003 to 2004.

The application submitted by the prosecutor is silent about the discriminatory nature of the colonial system that reorganized Darfur as a patchwork of tribal homelands, with several consequences. First, whereas peasant tribes were guaranteed a dar in the lands where they had historically settled, the camel pastoralists of northern Darfur with no settled villages were left without any dar. Second, a system of so-called native administration systematically distinguished between the supposedly native tribe and non-native tribes in each dar, privileging the former and discriminating against the latter when it came to access to land, participation in local administration and the resolution of local disputes. The prosecutor’s application sanitizes this colonial legacy as traditional:

The traditional division of the land into homelands called dar—which essentially are areas to which individual tribes can be said to have a historical claim—is crucial in the local self-perception of the population. The division of land between individual tribes in existence in 2003 dates back to the beginning of the 20th century when the last sultan of Darfur, Sultan Ali Dinar, decreed this division, which was accepted by all tribes. Each group established a ‘native administration’ of paramount importance for Darfurian society and recognized by the Government.³

The second cause of intense land conflict is more contemporary: extreme environmental degradation leading to desertification. Studies from the United

Nations Environment Program show that the Sahara expanded by 100 kilometers in four decades, and this process reached its high point in the mid-1980s, pushing all tribes of North Darfur, Arab and non-Arab, further south, onto more fertile Fur and Masalit lands.⁴ The resulting land conflict was not between the supposed Arab and Zurga tribes but between tribes with dars and those without. Contemporary observers like Sharif Harir explained the unprecedented brutality of the violence in every successive war since 1987 as a consequence of higher stakes in the conflict—as high as sheer survival.

The research conducted by the African Union's Darfur-Darfur Dialogue and Consultation (DDDC) pointed out that the land conflict had developed along two axes, north-south and east-west; whereas conflict along the north-south axis pits Arab tribes without dars against Zurga tribes with dars, the conflict along the east-west axis pits Arab against Arab, the former being tribes with dars and the latter without. The prosecutor's narrative echoes that of the Save Darfur Coalition: By obscuring the land conflict along the east-west axis, it racializes the land conflict through a set of silences.

The third factor that aggravated the land conflict was the growing civil conflict following Chad's independence. The politics of the Cold War exacerbated Chad's conflict as the two sides—the tripartite alliance of Reaganite America, France and Israel versus the Soviet Union, also backing Libya—armed different factions in the war. As successive armed groups took turns ruling Chad, opposition groups took shelter in Darfur, where they mobilized and armed. As the Chadian civil war spilled over into Darfur, the easy availability of arms rapidly militarized the inter-tribal conflict in Darfur. Regional and international powers got involved in the Darfur conflict long before the Khartoum government did, but the prosecutor's application neglects to include this fact.

The final cause that aggravated the land conflict in Darfur came last: the brutal counterinsurgency unleashed by the al-Bashir regime from 2003 to 2004 in response to an insurgency led by three major tribes in the region, the Fur, the Masalit and the Zaghawa.

When it comes to estimating how many have died in Darfur since 2003, the prosecutor admits the lack of reliable figures, writing: "There exists no definitive account of the total number of civilians killed in Darfur since 2003."⁵ He then proceeds to cite a report, but does not include the report's author: "According to this report, the number of people dead as a consequence of the conflict during the period September 2003—January 2005 is 118,142 of whom approximately 35,000 were killed and 83,000 died as a consequence of injury, starvation, lack of water, or conditions in the camps."⁶ He follows this citation with a source from the United Nations (UN), "In April 2008, the United Nations estimated the total number of

deaths since 2003 at 300,000.”⁷

How reliable are these estimates? When it comes to estimates of mortality in Darfur after 2003, a wide range of studies are available in the public domain. The U.S. Government Accountability Office (GAO) has carried out the only U.S.-expert comparative evaluation of these estimates; its report found the smaller estimates to be more reliable.⁸ The prosecutor’s figure of 118,142 excess deaths comes from a World Health Organization (WHO) affiliate, the Centre for Research on the Epidemiology of Disasters. Unlike the assertion in the prosecutor’s application, this is not a tally of “the number of people dead as a consequence of the conflict during the period September 2003 – January 2005.” It is, rather, a tally of the number who died in that period from *all* causes, including the direct and indirect effects of *not only* the violence *but also* drought and desertification.⁹ Additionally, the victims come from both so-called Arab and non-Arab tribes.

The April 2008 UN estimate of 300,000 dead since 2003 is even more widely off the mark. This estimate came from John Holmes, UN Under-Secretary-General for Humanitarian Affairs. Holmes stated, “A study in 2006 suggested that 200,000 had lost their lives from the combined effect of the conflict. That figure must be much higher now, perhaps half as much again.” According to Reuters, “United Nations cautioned reporters that the number was not a scientific estimate but a ‘reasonable extrapolation.’”¹⁰ The assumption underlying the extrapolation—that the level of mortality has not changed in Darfur since 2003—was contradicted by the UN’s own technical staff in Sudan.

As Julie Flint explained in the *Independent* (London) and the *New York Times*, UN sources spoke of a sharp drop in mortality rates in Darfur from early 2005, so much so that these sources report mortality estimates dipped as low as 200 per month, lower than the number that would constitute an emergency.¹¹ The application goes on to break down the global figure of 300,000 into two categories, those killed directly (“AL BASHIR’s forces and agents killed outright at least 35,000 civilians”) and those killed indirectly (“Further, the conditions imposed during displacement and in the camps by AL BASHIR’s forces and agents have already resulted in the ‘slow death’ of between 80,000 and 265,000 people.”)¹² Whereas the former figure is based on a reasonably reliable WHO estimate, the latter is based on a wholly unreliable assumption that the level of mortality in Darfur has been more or less constant since 2003.

Even then, we need to keep in mind that the charge of genocide does not rest on a claim about the numbers that have died in Darfur since 2003—not even on the figure of 300,000. Rather, it rests on establishing the *intention* to kill the rest. In the words of the prosecutor: “The crime of genocide is a crime of intention. *AL BASHIR has the intention to destroy the target groups. We don’t need to*

wait."¹³ That intention, in turn, is derived from a narrative of history created by the prosecutor.

The conflict in Darfur began as a civil war in 1987, before President al-Bashir and his group came to power. It was marked by indiscriminate killing and mass slaughter on both sides. During this war, the language of genocide was first employed. For example, the Fur representative at the May 1989 reconciliation conference in El Fasher pointed to their adversaries and claimed that "the aim is a total holocaust and no less than the complete annihilation of the Fur people and all things Fur." In response, the representative of Arab tribes traced the origin of the conflict to "the end of the seventies when ...[t]he Arabs were depicted as foreigners who should be evicted from this area of Dar Fur."¹⁴

At the same time as he has uncritically taken on the point of view of one side in this conflict, a side that was speaking of a "holocaust" before al-Bashir came to power, the ICC prosecutor has refused to acknowledge that the violent conflict in Darfur began as an internal tribal civil war in the 1980s, long before the cycle of insurgency and counterinsurgency that began in 2003. Even though the two developments have since become entangled, they stem from separate causes: Not only does the civil war continue alongside the insurgency and counterinsurgency, a reform of power in Khartoum is by itself unlikely to bring the civil war to an end. Triggered by the effects of drought and desertification, the civil war was intensified by the internal failure to reform the system of tribal homelands and the external effect of the ongoing civil war in Chad. Besides a reform of power in Khartoum, it would take a reform of the land system in Darfur and a demilitarization of the region to bring the civil war to an end.

In his eagerness to make the prosecution's case, Moreno-Ocampo has not only obscured the origins of the violence in Darfur but he has also gone on to portray life in the IDP camps in Darfur as a contemporary version of life in Nazi concentration camps in Europe, with President al-Bashir as the Führer. At the press conference announcing the case against the President of Sudan, the prosecutor said, "AL BASHIR organized the destitution, insecurity and harassment of the survivors. He did not need bullets. He used other weapons: rape, hunger and fear. As efficient, but silent."¹⁵ The application elaborated:

AL BASHIR thus forced the displacement of a substantial part of the target groups and then continued to target them in the camps for internally displaced persons, causing serious bodily and mental harm—through rapes, tortures and forced displacement in traumatising conditions—and deliberately inflicting on a substantial part of those groups conditions of life calculated to bring about their physical destruction, in particular by obstructing the delivery of humanitarian assistance.¹⁶

To be sure, there were ongoing incidents of rape in Darfur, as there are indeed in most conflict situations where armed young men confront unarmed young men. This much was recognized by the U.S. special envoy to Sudan, Andrew S. Natsios, in his testimony before the Senate Foreign Relations Committee on 11 April 2007:

The government has lost control of large parts of the province now. And some of the rapes, by the way, that are going on are by rebels raping women in their own tribes. We know in one of the refugee camps, it's now controlled by the rebels, formally. There have been terrible atrocities committed by the rebels against the people in the camps.... Some of the worst atrocities are now being committed in Chad now, not in Darfur.¹⁷


One may ask why this testimony, though in the public record, has not found its way into the prosecutor's application. The answer lies in the same reason that the history of the conflict—including the fact that it evolved over three phases, the opening phase occurring before President al-Bashir even came to power—has also been left out of the prosecutor's application. The reason is all-important: To convict President al-Bashir of the crime of genocide, the prosecutor needs to argue both that the killing began *after* al-Bashir came to power and that al-Bashir all along *intended* to commit that crime. If to make this single all-important argument, it becomes necessary to distort the entire history of Darfur, so be it. The result is a mono-causal, one-dimensional history in which colonialism turns into a benign tradition; there is no Cold War and legislative attempts to reform the colonial legacy—especially the land system that turned Darfur into a conglomeration of tribal homelands (*dars*) that comprehensively discriminated in favor of the native tribe against all those considered non-natives—were a dress rehearsal building up to genocide. Thus, the application seeks to establish intent by narrating a history that begins in 1991 and ends in 2003: “AL BASHIR's decision to destroy the target groups developed over time.”¹⁸ Over six pages, the prosecutor sketches developments beginning with the Daud Bolad-led rebellion in 1991, presenting such events as the announcement by the then-Social Planning Minister, Ali Osman Taha (who became vice president in 1998 and second vice president in 2005), that tribal rights would no longer be associated with land in Darfur as proof of intent to commit genocide.¹⁹ Similarly, the 1995 redrawing of tribal boundaries to create *dars* for those tribes without *dars* is taken as further proof of this intent. Finally, the parliamentary passage on 18 February 2006 of the “Organisation of Humanitarian Voluntary Work Act 2005,” an act that according to the ICC “significantly restricted the work of NGOs, requiring them to obtain approval from

the Minister of Humanitarian Affairs in order to receive money from abroad, and allowing the Minister to refuse them registration for no reason at all,” is taken as proof that “AL BASHIR used the Ministry for Humanitarian Affairs to deny domestic humanitarian assistance to IDPs in Darfur, to hinder delivery of aid by third parties...”²⁰ Yet legal provisions similar to this act can be found to exist in most countries that take their sovereignty seriously.

Having assumed violence was the cause of excess deaths in Darfur, the application goes on to ascribe responsibility to a single source—the President of Sudan, Omar Hassan Ahmad al-Bashir: “He sat at the apex of, and personally directed, the state’s hierarchical structure and the integration of the Militia/Janjaweed within such structure. He has absolute control.”²¹ To journalists at The Hague the prosecutor said, “What happened in Darfur is a consequence of Bashir’s will.”²²

Regardless of whether the prosecutor was in such a rush to obtain a high profile conviction that he had glossed over all evidence that may undermine his case, there is little doubt about the highly politicized nature of the ICC’s prosecution of President al-Bashir. As Alex de Waal noted:

When Moreno-Ocampo made his announcement on Monday, the extreme nature of the charges (genocide against Fur, Masalit and Zaghawa) and the allegation that President Bashir was personally in total command of the state apparatus, made it much easier for the NCP to convincingly present the charges as politically-motivated. Nobody in Sudan, even the regime’s harshest critic, believes that Bashir was in total command of the organs of state, which bent to his every instruction. The Chief Prosecutor’s statement on Monday had the effect of making him look like any other polemicist speaking about Sudan without understanding the nature of the Sudanese state and society.²³

That the ICC has politicized the issue of justice is no reason to sidestep the question of accountability. The kernel of truth in the prosecutor’s application concerns the period from 2003 to 2004, when Darfur was the site of mass deaths. The WHO sources, considered by the GAO as the most reliable available information on mortality levels at the time, trace these deaths to two major causes: roughly 70 to 80 percent to drought-related diarrhea and 20 to 30 percent to violence. There is no doubt that the perpetrators of violence should be held accountable, but when and how is a political decision that cannot belong to the ICC prosecutor. More than the innocence or guilt of the president of Sudan, it is the relationship between law and politics, including the politicization of the ICC, that poses a wider issue, one of greatest concern to African governments and peoples. 

NOTES

¹ Office of the Prosecutor, International Criminal Court (ICC), *Situation in Darfur, The Sudan*, Public Document, Public Redacted Version of the Prosecutor's Application under Article 58, no. ICC-02/05, 14 July 2008, 1-112.

² Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, *Prosecutor's Statement on the Prosecutor's Application for a Warrant of Arrest under Article 58 Against Omar Hassan Ahmad AL BASHIR*, The Hague, 14 July 2008, 2; see also *Situation in Darfur, The Sudan*, 7.

³ *Situation in Darfur, The Sudan*, 26-27.

⁴ United Nations Environment Programme, "The Sudan Post-Conflict Environmental Assessment," 23 June 2007, <http://www.unep.org/sudan/>.

⁵ *Situation in Darfur, The Sudan*, 34.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ U.S. Government Accountability Office, "Darfur Crisis: Death Estimates Demonstrate Severity of Crisis, but Their Accuracy and Credibility Could be Enhanced," GAO-07-24, November 2006.

⁹ Debarti Guha-Sapir, Olivier Degomme and Vicente Teràn, "Report on mortality and nutrition in Darfur, Sudan (Jul 2003-Jan 2005)," (Analysis paper, Center for Research on the Epidemiology of Disasters, 18 March 2005).

¹⁰ Louis Charbonneau, "UN says Darfur dead may be 300,000; Sudan denies," Reuters, 22 April 2008.

¹¹ Julie Flint, "In Sudan, Help Comes From Above," *New York Times*, 6 July 2007; Julie Flint, "All the moral posturing won't help Darfur," *Independent* (London), 31 July 2007.

¹² *Situation in Darfur, The Sudan*, 14.

¹³ Moreno-Ocampo, 5.

¹⁴ Sharif Harir, "'Arab Belt' versus 'African Belt': Ethno-Political Conflict in Dar Fur and the Regional Cultural Factors" in *Short Cut to Decay: The Case of the Sudan* ed. Sharif Harir and Terje Tvedt (Sweden: Nordiska Afrikainstitutet, 1994), 146-47.

¹⁵ International Criminal Court, "ICC Prosecutor presents case against Sudanese President, Hassan Ahmad AL BASHIR, for genocide, crimes against humanity and war crimes in Darfur," The Hague, 14 July 2008, ICC-OTP-20080714-PR341-ENG.

¹⁶ *Situation in Darfur, The Sudan*, 8.

¹⁷ Andrew Natsios, U.S. Senate Committee on Foreign Relations, *Hearing on the Situation in Darfur* 110th Cong., 1st sess., 11 April 2007.

¹⁸ *Situation in Darfur, The Sudan*, 96.

¹⁹ *Ibid.*, 96-98, 101-102.

²⁰ *Ibid.*, 88; see also 55.

²¹ *Ibid.*, 11.

²² International Criminal Court, "ICC Prosecutor presents case against Sudanese President, Hassan Ahmad AL BASHIR, for genocide, crimes against humanity and war crimes in Darfur," The Hague, 14 July 2008, ICC-OTP-20080714-PR341-ENG.

²³ Alex de Waal, "All Quiet in Sudan?" *Making Sense of Darfur*, Social Science Research Council Blog, 17 July 2008, <http://www.ssrc.org/blogs/darfur/2008/07/17/all-quiet-in-sudan/>.