

## **Braced for the aftershock**

*The International Criminal Court issues its first indictment against a serving head of government, Sudan's Omar al-Bashir.*



THE quality of international justice is no longer quite so strained, but its reach is still uncertain. If Sudan's president, Omar al-Bashir, eventually graces the dock of the International Criminal Court (ICC) at The Hague to answer charges that he has been responsible for much of the appalling violence in his country's western region of Darfur, it will not be without a struggle.

Mr Bashir firmly denies all the accusations. He told his critics this week to dissolve their accusations in water and drink them. No matter: the warrant issued on March 4th for his arrest on charges of war crimes and crimes against humanity (charges of genocide were dropped, on a majority verdict, but can be reinstated with more evidence, said the judges) means that all 108 governments that have ratified the Rome treaty, creating the court, are obliged to help bring him to justice.

Yet many members of the African Union (AU) and of the Organisation of the Islamic Conference, about a third of the supposed posse (though Jordan is the only Arab member of the ICC), have long been up in arms over the court's desire to pursue Mr Bashir. Even the UN Security Council, which four years ago voted to refer the conflict in Darfur to ICC prosecutors, is split over what should happen now.

Other warrants were already out for Mr Bashir's "humanitarian affairs" minister and a leader of the government-backed Arab janjaweed militias, and more are likely. Yet the upheavals that will follow Mr Bashir's indictment could yet damage the court. Some African members had previously threatened to give up on the ICC if the Bashir case went ahead.

Undaunted, the court's chief prosecutor, Luis Moreno-Ocampo, last year pronounced all of Darfur a "crime scene", in light of evidence of killings and mass rape carried out by the janjaweed against the mostly black population of western and southern Darfur. He had added genocide to the charge-sheet, based in part on the appalling conditions and violence in and around the refugee camps in Darfur. The ICC's statute (like the UN genocide convention) defines genocide as acts committed with the intent to "destroy, in whole or in part", a national, racial or religious group. Intent is crucial and would have to be traced right up to the top. The UN-backed tribunal for Yugoslavia recently acquitted Serbia's ex-president, Milan Milutinovic, on war-crimes charges; though head of state when the deeds were committed, he was not deemed to have been in the loop.

The aftershocks of the effort to bring Mr Bashir to trial will also be felt far beyond The Hague. The joint UN-AU peacekeeping operation in Darfur, called UNAMID and now (counting police and civilians) some 15,000 strong, had already come under attack from local rebels; related

arrest warrants have been requested against three rebel commanders. Reprisals against UNAMID could now follow from government-backed forces. Susana Malcorra, who heads all UN peacekeeping logistics efforts in New York, says she has had assurances "from all levels of government" in Sudan that UN personnel will be safe. Just in case, a separate peacekeeping operation in southern Sudan has withdrawn all non-essential staff.

Mr Bashir had accepted the hybrid Darfur force only under protest and after having had his arm twisted by China and others who, though happy to carry on doing oil business-as-usual, were embarrassed at being associated with a regime accused of such appalling atrocities. Despite assurances, will he now attempt to force out the blue helmets?

The omens are not good. Hours after the arrest warrant, several of the main Western aid agencies were told to leave the country, some within 24 hours. This was at the extreme end of the reaction people expected: a worrying sign that Darfur's civilians may again bear the brunt of the regime's wrath.

The UN Security Council has to decide whether to support or defer the warrant for Mr Bashir. Unlike the special tribunals set up to hear cases of war crimes and other egregious offences after the wars in Yugoslavia, the mass genocide in Rwanda and the violence of Sierra Leone's civil war (and another that belatedly opened prosecutions last month against surviving perpetrators of the Khmer Rouge genocide in Cambodia), the ICC is independent of the UN. Yet court statutes allow the council not only to refer cases to the ICC that would otherwise fall outside its jurisdiction (Sudan, for example, is not a member), but also to insist on deferring cases before the court for renewable periods of a year—and so possibly indefinitely.

#### The case for, and against

Those arguing for deferral, including a committee of African and Arab ministers lobbying the UN, say this would help find a solution to a conflict that may have already taken 300,000 lives and has forced 2.75m to flee their homes. Others, including several African governments, disagree; they fear the return to a "climate of impunity" that deferral could imply.

At first the request for the arrest warrants against Mr Bashir had provoked debate among the five permanent, veto-wielding members of the Security Council (three of which—America, China and Russia—are not members of the ICC) about possible deferral. But some terms had to be met: helping the peacekeepers' work, and making real progress on a peace deal.



AP

Russia and China would still like the case to be put on hold. But the votes needed are not there. They might have been, says one senior Security Council diplomat, if Mr Bashir had put as much effort into peace in Darfur as he is alleged to have put into directing atrocities. It

would certainly be hugely damaging for the ICC, and for global peace and justice, if the council were seen simply to crumble at threats from the latest thug-in-a-high-place.

In fact, Mr Bashir would not be the first head of government to be had up in court for his alleged crimes: Liberia's Charles Taylor is on trial before a Sierra Leone court, convened in special session at The Hague; and Yugoslavia's Slobodan Milosevic beat his own likely conviction by tribunal only by dying before the trial was over. In both cases there were worries that bringing leaders to book would up-end peace efforts, but these proved unfounded. Still, both cases show that arresting "big fish" like Mr Bashir is virtually impossible without the co-operation of many governments, argues a new report on enforcing international criminal law published by the British-based Aegis Trust.

The ICC, like these earlier tribunals, brings charges only against individuals, not states. The hope of some Sudan-watchers is that by putting up a wanted poster for Mr Bashir, the ICC warrants will deepen fissures in the regime and force him out.

There are alternative paths to justice. The ICC's rules allow it to take on cases only when other courts, national or regional, cannot or will not do so. But the justice has to be of an equivalent standard. Mr Bashir's courts wouldn't do. A hybrid one with both Sudanese judges and international ones, sitting in Sudan, was proposed last year by the country's most prominent opposition politician, Sadiq al-Mahdi. Mr Bashir, however, shows no inclination yet to face charges, whoever puts them.

Some fear the ICC has already bitten off more than it can chew. It is conducting investigations in four countries: Congo, Sudan, Uganda and the Central African Republic. Its first actual trial, against Thomas Lubanga, a former Congolese warlord, at last got under way in January but had almost collapsed before it started when it was found that some evidence had been kept from defence lawyers. And the ICC has yet to win its first conviction.

Yet in some ways the court's future looks brighter. Barack Obama has signalled a more benign approach to the ICC than his predecessor took. Far from ratifying the Rome treaty, signed originally by the Clinton administration, George Bush had America "unsign" it. He also sought to cajole governments into promising that no American would ever be delivered into the ICC's clutches. Should they be, Congress passed legislation, known unaffectionately as the "Hague invasion act", to authorise springing them by force.

Allowing Darfur's mayhem to be referred to the ICC for investigation had signalled a change of tune, even under Mr Bush. Richard Dicker of Human Rights Watch, a New York-based monitoring group, says that Mr Obama should now appoint a bipartisan commission to look into ways of working more closely with the court, and making sure America's own laws on crimes against humanity meet new international standards.

Mr Obama is unlikely to ratify the ICC treaty. America's constitution brooks no higher authority over its citizens, and an amendment to change that would probably fail. Even so, as one of the original signatories, America, like Russia and China, can help shape the court's future.

Some countries worry that "aggression", the fourth crime the court is allowed to prosecute (along with genocide, war crimes and crimes against humanity), has yet to be properly nailed down. The court and the Security Council are at loggerheads over who could trigger an investigation: the council, supposedly the body with prime responsibility for international peace and security and where America, Russia and China all have vetoes, or the prosecutor and judges of the ICC.

Despite its absence from the ICC, America has done more than most, financially and diplomatically, to establish and support the tribunals for Yugoslavia, Rwanda and Sierra Leone. It has also backed the tribunal for Lebanon that has just started work to bring to book those responsible for the murder of the country's prime minister, Rafik Hariri, and other crimes.

On many fronts, the thirst for internationally backed justice seems unquenchable. The Sierra Leone court has completed all trials, except that against Mr Taylor, though the prosecution wrapped up its case earlier this year. The Rwandan court has left cases against supporters of the current Tutsi-led government of Paul Kagame until last and these will prove hard. The Yugoslav tribunal grinds on, although it is down to its last few cases; it awaits the surrender of two prominent Serb suspects, including Ratko Mladic, ex-commander of the Bosnian Serbs. And unless Kenya makes progress soon in setting up a court to try those responsible for the horrific post-election violence in 2007, Kofi Annan, a former UN secretary-general who helped mediate an end to the violence, will hand a list of names to the ICC for prosecution. Meanwhile, the indictment of Mr Bashir has raised the ICC's profile—and the stakes for international justice as a whole.

**The Economist, New York, 5 mar. 2009, International, online. Disponível em <[www.economist.com](http://www.economist.com)>. Acesso em: 10 mar. 2009.**