

The enforcement gap: How the International Criminal Court failed in Darfur

Sudan's lack of cooperation is one among many compliance challenges facing the ICC's work in Darfur.

By Maryam Jamshidi – Aljazeera, 25 March 2013

On March 4, 2009, the International Criminal Court (ICC) issued an arrest warrant against Omar al-Bashir, the President of Sudan, for crimes against humanity and war crimes allegedly committed in Darfur. Four years later, Bashir remains at large amid concerns that the ICC's lack of enforcement mechanisms coupled with a largely uncooperative international community have hamstrung the case.

Issues of enforcement have plagued the ICC since it first opened its doors in July 2002. Until now, attempts at rectifying the problem have either been woefully inadequate or politically troubling. Unless it develops a set of robust mechanisms to address this enforcement gap, the ICC stands little hope of achieving its mission to end impunity for the worst international crimes.

In the Bashir case, problems began at the very start, with the Security Council's decision to refer the Darfur situation to the ICC. In September 2004, the UN Security Council ordered a commission to investigate and report on the situation in Sudan's Darfur region. After receiving the commission's report, the Security Council passed Resolution 1593 on March 31, 2005, giving the ICC jurisdiction to investigate and prosecute alleged crimes committed in the region. Concluding that the statutory criteria for referral were satisfied, the Office of the Prosecutor opened a formal investigation into the case on June 6, 2005.

On April 27, 2007, the ICC issued two indictments for crimes against humanity and war crimes against then-Minister Ahmed Muhammad Harun and former Janjaweed militia leader Ali Muhammad Al Abd-Al-Rahman. In addition to the March 2009 indictment, on July 12, 2010, the ICC issued another indictment against Bashir for genocide.

On March 1, 2012, the ICC issued an arrest warrant for crimes against humanity and war crimes against Sudan's Minister of National Defense, Abdel Raheem Muhammad Hussein. The prosecutor also brought petitions to indict three high-profile members of the Darfur opposition, Bahr Idriss Abu Garda, Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus.

Lack of cooperation

In the years since the indictments issued, there has been limited progress in the case, with all defendants, except the three opposition members, still at large. Despite its ostensible obligation to comply with the referral, Sudan's rejection of Resolution 1593 and general unwillingness to cooperate with the ICC case are unsurprising.

On the one hand, domestic politics inside Sudan have made a hand over highly unlikely - in the years since the referral was made, Bashir, Harun and Hussein have consistently maintained

important positions within the Sudanese government. On the other hand, international politics has made it virtually inevitable that Sudan would both see and present itself to the world as a victim of Western hypocrisy and hegemony.

The ICC referral came at a time when the global "war on terror" was at its apex, with very evident and devastating consequences on civilian populations. Against this backdrop, Sudan had ample reasons to cry foul. While Western governments, like the United States, had the political weight to sidestep criminal accountability, Sudan saw itself as selectively and unfairly targeted for international opprobrium by virtue of its weakness and lack of influence.

Sudan's lack of cooperation represented one among many compliance challenges facing the ICC's work in Darfur. Other states and inter-governmental organisations (including the UN) have also been unwilling to enforce the ICC's actions.

Enforcement is critical to the ICC's work; without it, the ICC's decisions are worth little more than the paper on which they are written. Lacking an associated police force or other enforcement arm, the ICC primarily depends on two elements to ensure its decisions are implemented.

First, under the Rome Statute, all State Parties are obligated to take necessary measures to enforce the ICC's indictments and otherwise support its work. Through these mechanisms, the ICC is able, in principle, to leverage the resources of member states to ensure its decisions are respected. Where a State Party fails to follow through on its obligations to the ICC, the ICC may make a finding to that effect and refer the matter to the Assembly of States Parties, its governing body.

Second, support for the ICC depends in large part on its image as a trusted and reputable international institution. For the ICC, creating and maintaining this image largely depends on the legal soundness and objectivity of its work. Whether to encourage adoption of the Rome Statute or ensure State Parties adhere to its provisions, building normative support around the globe increases the reputational risks facing countries that eschew compliance with the ICC's directives.

In the Darfur case, the ICC's inability to realise either of these objectives has resulted in toothless prosecutions. Much of this failure stems from continuing problems created by perceptions about Resolution 1593's "political" nature.

While support for the ICC's work may have been strong in its early days, as the prospects increased for a negotiated settlement to the conflict, some Western states appeared to prioritise political and diplomatic processes over judicial prosecutions. As a result, these governments have been unwilling to push for enforcement of outstanding ICC arrest warrants.

The Security Council has similarly made little effort to pressure UN member states to enforce the ICC's indictments. In fact, in June 2012, the UN provided a helicopter ride to Ahmed Haroun, who had since become governor of the Sudanese state of South Kordofan, to facilitate his attendance at a meeting to resolve a local conflict within his governorate.

Obviously, this lack of support for the ICC's work is more a result of political expediency than concern with Resolution 1593's politicisation. Nevertheless, because of widespread

perceptions about the referral's political-nature, the normative soundness of the ICC's work has been weak. This, in turn, has allowed Western actors to suit their own interests and turn a blind eye to the ICC's outstanding arrest warrants.

Enforcement regime

A similar dynamic has been at play among a number of Arab governments as well as the African Union (AU), all of which have opposed the Darfur case. This hostility has largely focused on the ICC's indictment of Bashir, and likely reflects a generalised fear that similar action may be taken against leaders in other regional countries. Again, normative controversies surrounding the Darfur case and suspicions about the political objectives behind the Security Council referral have given this hostility a stronger footing.

In March 2009, the Arab League issued a statement expressing its "solidarity with Sudan and reject[ion] of the ICC decision [against Bashir]". Since his indictment, Bashir has made a number of official visits to Arab countries, receiving guarantees against arrest during his stays. Although support for Bashir may currently be waning among some of these states, public consensus in favour of his handover has yet to materialise within the Middle East and North Africa region.

In July 2009, at its 13th Summit of Heads of States, the AU passed a resolution prohibiting its member countries from cooperating with the ICC arrest warrant against Bashir. In July 2010, the AU reiterated this decision. In early June 2012, the organisation again called upon the Court to drop its case against the Sudanese leader.

In contrast to the Arab League, a significant number of AU member countries are also State Parties to the Rome Statute and, as such, are subject to the decisions of both organisations. As some scholars have suggested, there is no clear way of legally reconciling these competing obligations. With many of these countries either unwilling or uninterested in cooperating with the ICC, it is left with little recourse.

To address these and other persistent problems of enforcement, the ICC has a number of options, of varying feasibility. It could, for instance, establish a police force to execute upon its arrest warrants, among other responsibilities. Such a force is, however, unlikely to materialise, given the high financial cost and logistical complexities associated with such an endeavour.

Alternatively, the ICC could take steps to increase the normative force of its work by addressing claims about political bias. Among various possible solutions, the ICC could create a mechanism for early-stage judicial review of Security Council referrals to consider issues of jurisdictional propriety. This process would subject referrals to legal scrutiny, impose some oversight over the Security Council's actions and reassert the ICC's independence as a judicial institution.

While a mechanism like this may have important long-term effects, transforming normative perceptions about the ICC's work will take time. It may also do little to alter the behaviour of states determined to act in their own self-interest. Strengthening the ICC's enforcement regime is both a long-term and short-term problem requiring normative and punitive solutions.

This brings us back to the ICC's reliance on the coercive power of its member states and the Assembly of States Parties. Historically, efforts made by these groups to bring recalcitrant countries into line have been largely limited to diplomatic gestures. They have also generally been unsuccessful.

There may, however, be a way of reorienting these efforts to more effectively resolve issues of non-compliance and potentially prevent their occurrence in the first instance.

Legally enforcing the Rome Statute against State Parties is the place to start. As a treaty, the Statute can be enforced against signatory states, which have obligated themselves to adhere to its provisions regardless of inconvenience or immediate self-interest.

The International Court of Justice (ICJ) serves as a possible forum for such enforcement proceedings. The ICJ is the principal judicial organ of the United Nations with jurisdiction to hear all cases, which "[state] parties refer to it and all matters specifically provided for in the Charter of the United Nations or in treaties and conventions in force".

In order for a state to bring a case, it must have acceded to the ICJ Statute or be a member of the UN. Unless it has already accepted the ICJ's jurisdiction as compulsory ipso facto under Article 36, the offending or defendant state must also accept the ICJ's jurisdiction over the particular matter. Among the types of cases that may be heard are those involving questions of fact which, "if established, would constitute a breach of an international obligation".

Any judgments rendered by the ICJ are binding only upon the parties to the action. Nonetheless, failure to abide by its decisions comes at a high price. Under the UN Charter, "[i]f any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."

Criminal accountability

In its role as an advisory body, the ICJ may also consider matters brought before it by international organisations. It may issue "advisory opinion[s] on any legal questions at the request of whatever body may be authorised by or in accordance with the Charter of the United Nations to make such a request". Although advisory opinions generally have no binding effect, they "carry great legal weight and moral authority. They are often an instrument of preventive diplomacy and have peace-keeping virtues".

Under this framework, ICC member states could bring cases before the ICJ against recalcitrant member countries. Arguably, State Parties are under an obligation to bring such enforcement actions pursuant to their responsibilities under the Statute to provide any "assistance [to the ICC] which is not prohibited by the law of the requested States, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court".

"Maintaining ICC's reputable image largely depends on the legal soundness and objectivity of its work."

The Assembly of States Parties (or even the ICC's Office of the Prosecutor) could also bring requests for advisory opinions to the ICJ. For instance, in the case of Omar al-Bashir, an

advisory request could be brought to resolve the competing obligations on African states subject to directives from both the AU and ICC.

Admittedly, the ICJ cannot be a panacea for the ICC's enforcement problems. It is an institution of limited resources, with a less than spectacular track record for rendering decisions in a timely manner. There are also a number of other not insignificant issues raised by potential ICJ proceedings.

Whether brought by individual states or the Assembly of States Parties, litigating before the ICC would obviously entail financial expenditures. These costs could theoretically be defrayed by creating a fund at the ICC to support enforcement proceedings, although the Assembly of States Parties may be unwilling to set aside the money.

Of course, State Parties may be as unlikely to bring enforcement actions to the ICJ as some ICC member states are to comply with the ICC's decisions. Where required, defendant states may also refuse to agree to the ICJ's jurisdiction, although the Rome Statute could be amended to mandate such jurisdiction over enforcement actions.

In the case of advisory opinions, it remains unclear whether subdivisions of the ICC would be able to appear before the ICJ in all cases. To bring a request for an advisory opinion, an international organisation must be an organ or specialised agency of the UN, or otherwise authorised by the Security Council or General Assembly. The ICC is wholly independent of the UN and, since Security Council authorisation may be hard to secure, would likely be required to obtain General Assembly approval before a request could be brought to the ICJ.

These questions, however challenging, are worth exploring. The ICJ is an institution whose decisions are accorded a great deal of respect by the international community, a fact demonstrated by the relatively high-rates of compliance with its decisions. In addition to subjecting non-compliant states to punitive measure, ICJ actions may also strengthen conformity with the ICC's directives, and promote the ICC's substantive norms on criminal accountability.

Leveraging the ICJ's work to help remedy the woeful compliance issues faced by the ICC is, as such, an important strategy to be considered. Ending impunity for the worst international crimes demands at least this much.

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