

THE ICC AND THE CRIME OF GENOCIDE:

MANEUVERING THE STATUS OF MINORITY IN DARFUR



Poster at Khartoum International Airport following Al-Bashir's indictment by the ICC: [Ocampo's farce. Having neither evidence nor any proof. Al-Bashir's achievements unmask the accusation charged against him]. Written in ungrammatical French, the poster lashes out at Prosecutor Moreno-Ocampo. 2009 © Alice Franck

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The International Criminal Court (hereafter the ICC) first indicted the Sudanese head of State, Omar Hassan Ahmad Al-Bashir, in March 2009 for the crimes committed by the Sudanese Armed Forces, the National Intelligence and Security Service, and affiliated Arab militias in the course of the Darfur civil war that broke out in early 2003. Western media, NGOs or governments have occasionally embraced the depiction of the Darfur conflict made by the Sudanese government. That is: a conflict opposing autochthonous African rebels – mainly factions belonging to the Sudan Liberation Army (SLA) and the Justice and Equality Movement (JEM) – to the Arab government of Sudan over issues such as power-sharing, resource-sharing, or traditional land rights. This common representation of the conflict obscures the fact that Arab tribes instrumentalized by the government of Sudan suffer the same structural and systemic discrimination as African tribes do in Darfur. It also begs the question of former transnational affiliations of JEM and SLA factions to Chad or Libya.

Since March 2005, former ICC chief prosecutor Moreno-Ocampo opened six cases indicting mainly members of the Government. Yet, ICC chief prosecutor Fatou Bensouda announced in December 2014, that war crimes investigations in Darfur were coming to a halt due to the lack of support from the United Nations Security Council (UNSC) and from the United Nations-African Union Mission in Darfur (UNAMID). President Al-Bashir welcomed the news as a victory and most gladly mocked the Court in the local media. The situation worsened lately when the High Court of Justice in Pretoria failed to arrest Al-Bashir and to eventually surrender him to the ICC while he was participating to the African Union Summit in

South Africa in June 2015.¹

The difficulties the ICC is facing in the Darfur situation originate in its structural defects – the lack of coercive means and the necessity to rely on State cooperation. These defects came to light in the process of issuing the second arrest warrant for Al-Bashir, which damaged the Court's legitimacy and resulted in the current halt of war crimes investigations in Darfur. In this article, I investigate how the judicial fabrication of criminal facts in the *Al-Bashir* case served the purpose of securing the political aim of arresting the Sudanese head of State. In this process, the improper recourse to the crime of genocide had dramatic effects on the categorization of minorities in Darfur, and stressed the polarization of ethnic identification in the conflict. I will first suggest that the reference to the crime of genocide was a strategic and clumsy resolution to secure the arrest of Al-Bashir (1). This unfortunate strategic move relied on a simplistic reading of ethnic groups' involvement in the conflicts taking place in Darfur. This reading reinforced a conflict-based approach to the definition of minorities that misread the ethnic dynamics in Darfur by relying both on a too simplistic African-Arab polarization and on an imprecise correlation between ethnic minorities and rebel groups (2). I will therefore show that this approach does not adequately represent ethnic dynamics at work within conflicts and proves unable to secure minority protection in Darfur (3).

¹ On June 15th, after the Attorney of the South African Government stated he had reliable information that Al-Bashir left the country, the High Court of Justice in Pretoria decided too late the Government was under an obligation to arrest him.

1. THE INSTRUMENTAL REFERENCE TO THE CRIME OF GENOCIDE AND THE DAMAGED LEGITIMACY OF THE ICC

The ICC is an autonomous international organization, unaffiliated to any main UN organ. Although the ICC signed a cooperation agreement with the UN, its judicial body does not enjoy the same support from UNSC as the two UN *ad hoc* tribunals, namely the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. The ICC has to rely on State cooperation and has no coercive means of its own to apprehend indicted persons. Sudan is not party to the Rome Statute – the international treaty establishing the ICC –, neither did it sign any specific cooperation agreement with the Court. It is therefore bound by no obligation to cooperate with it. The *Al-Bashir* case is challenging considering the head of State does not run the risk of a waiver of international immunity under the Rome Statute (art. 27). Moreover States parties shall not act inconsistently with their other obligations in international law regarding immunity of a person of a third State (art. 98§1). Henceforth, with regard to the *Al-Bashir* case, any State party to the Rome Statute will necessarily breach either the obligation to cooperate with the ICC in the arrest of the indicted person – regardless his position as the head of a third-State – or the obligation to respect the immunity of that head of State according to the 1961 Vienna Convention or international customary law.

This unmanageable situation led the ICC chief prosecutor and the Pre-Trial Chambers to adopt a two-fold strategy to secure – unsuccessfully – the arrest of Al-Bashir. The first component of this strategy was a political argument that carries poor legal consistency but aims at winning the support of substantial members of the international community. More precisely, it advocated for an extended binding effect of UNSC Resolution 1593, by which the *situation* in Darfur was referred to the ICC chief prosecutor in the first place. This interpretation is based on the absolute binding legal effect over all UN members States – including Sudan – of UNSC’s resolutions adopted upon Chapter VII of the UN Charter. Therefore, insofar as the Darfur *situation* is concerned, resolution 1593 would turn the ICC into some kind of *de facto* subsidiary organ of the UNSC and extend the opposability of the Rome Statute to

the Sudan. ICC members States would consequently have to monitor the arrest of Al-Bashir.

Yet, this interpretation on the effect of the UNSC referral voluntarily fails to acknowledge the distinction between a criminal case, which rests on the discretion of the prosecution, and the broader criminal *situation* in which a specific case can be opened, investigated and eventually prosecuted. The UNSC can only refer *situations* in which crimes listed in the Statute might have been committed (art. 13§b). This implies that the chief prosecutor remains free to investigate and eventually to open and prosecute a specific case (Yee 2009). By relying on the aforementioned strategy Prosecutor Moreno-Ocampo himself inaccurately suggested the UNSC resolution implied mandatory investigation for the ICC and cooperation from member states as regards the *Al-Bashir* case. African member States objected this lacunar reasoning and accordingly resisted the ICC. A legitimate argument forcing member States to arrest Al-Bashir should therefore be based on the specific *Al-Bashir* case rather than on the broader Darfur situation. In an attempt to bypass this obstacle the Pre-Trial Chamber I (hereafter the PTC-I) completed the prosecution strategy with a second and more technical component. The PTC-I’s second arrest warrant of 12 July 2010 this time indicted Al-Bashir for the crime of genocide.² The PTC-I was in fact referring to a former jurisprudence of the International Court of Justice stating an obligation for States parties to the Genocide Convention to arrest and transfer indicted persons to international criminal tribunals (art. VI of the Convention). Sudan being a State party to the Genocide Convention, this obligation would be watching over its relations with States parties to both the Genocide Convention and the Rome Statute. The second arrest warrant therefore intended to constrain State parties to the Rome Statute to cooperate in the arrest and transfer of Al-Bashir to the ICC. This inventive strategy has nevertheless proven deficient considering African States have been resisting the ICC and its chief prosecutor. Between 15 July 2013 and 23 January 2015 only, another Pre-Trial Chamber of the ICC issued nineteen decisions related to Al-Bashir’s travels and restating States’ obligation to arrest him, with no success so far.³ An

2 ICC, Pre-trial Chamber I, Situation in Darfur (Sudan), The Prosecutor v. Omar Hassan Ahmad Al Bashir (« Omar Al Bashir »), Public, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, 12 July 2010.

3 ICC-02/05-01/09, The prosecutor v. Omar Hassan Ahmad Al Bashir, Situation in Darfur (Sudan), Public Court Records–Pre-Trial Chamber II http://www.iccpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050109/court%20records/chambers/ptcII/Pages/index.aspx

extra-legal explanation of this failure is that the PTC-I and the chief prosecutor never expressed frankly their strategic move based on the Genocide Convention but instead relied on the highly questionable above-mentioned binding effect of the UNSC referral to the ICC. Indeed, expressly relying on the ‘Genocide Convention’ strategy would limit its effectiveness to the *Al-Bashir* case only, which is the sole Darfur case containing counts of genocide.

2. A POLICY-ORIENTED AND DISTORTED CONFLICT-BASED DEFINITION OF MINORITIES IN DARFUR

The Appeal Chamber of the ICC formerly quashed all counts of genocide in the 2009 Decision of the PTC-I. However, the latter issued a ‘Second Decision’ on 12 July 2010 and published straightaway the aforementioned second arrest warrant with three counts of genocide against Al-Bashir. In their reference to the crime of genocide, the PTC-I and the chief prosecutor relied on a biased reading of the conflict in Darfur so as to put specific ethnic groups at the leading edge. To that end the PTC-I claimed Al-Bashir acted with the specific genocidal intent to destroy pointedly in whole or part the Fur, Masalit, and Zaghawa ethnic groups. It notably referred to a Human Rights Watch report (HRW) as convincing data. In so doing the PTC-I defined each of the targeted groups as a comprehensive single ethnic group additionally integrated within the general racial category of ‘African tribes’. This essentialist analysis gives the impression that there is a complete overlap between targeted ethnic groups and rebel movements: at the time JEM and SLA factions. In actuality, despite polarization of ethnic identities along a racial line the HRW report underlined that group identities in Darfur have been ‘flexible, with intermarriage between ethnic groups’ (HRW Report 2005, at 3). The PTC-I moreover did not take into account HRW’s statement that the government-militia forces have targeted many other ‘African’ ethnic groups (*ibid.*). Thus, it selectively avoided taking into account events and references that would overturn the genocide argument in favour of more inclusive international crimes.

This reading corroborates the misrepresentation of some NGOs – including Minority Rights Group International (MRGI) – in defining minorities in Darfur. Various MRGI reports performed expeditious minority qualification both before and after the issuance of the arrest warrants in the

Al-Bashir Case. These reports supposedly relied on a syllogism that consisted in checking a given set of criteria defining minorities. However, the criteria are implicitly postulated using analogy with rebel groups’ identity. This is notably true of a 2006 MRGI micro-study referring to Darfur ethnic minorities without even checking its own set of criteria. Instead, in its report, MRGI merely defines minority in terms of ‘non-dominance’ and experience of ‘right violation’. It then induces ‘experience of rights violation’ from participation to hostilities against the Government and its supportive militia; thus qualifying Fur, Zaghawa and Masalit as minorities.⁴ This is just one example among many of MRGI reports defining the three aforementioned ‘African’ groups as minorities insofar as they collude with rebel groups.⁵ This approach results in a hierarchical reading of the dynamic of conflicts in Darfur – rebels groups against the government and its supportive militias – so as to ensure the chain of command involves Al-Bashir in the commission of genocide.

Yet, such ascertainment of genocide immediately affects the designation of minorities. The Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General written by the late Professor Cassese (hereafter the Cassese Report) leaves no doubt on this point. In international law, the identification of groups protected from genocide generates an analogy with the production of minorities, insofar as ethnic groups are concerned.⁶ The *ex post facto* observation of genocide thus plays a part in the process of awarding the status of minority to a group. This is what actually occurred in Darfur when MRGI labelled three ethnic groups as minorities in the aftermath

4 The MRGI micro-study underlines minorities ‘sought to defend themselves’ and refers to the statement made by the Government of North Darfur in 2005 according to which ‘the problem began as protection and it comes to be rebels’. There is thus an analogical correlation between ‘the lack of power to decide one’s own affairs’ – the last criterion established by MRGI to define minorities – and participation to hostilities (S. Srinivasan 2006, at 4-5).

5 This NGO notably took on the qualification of genocide and often refers to both the work of the ICC and the UNSC referral. The annual MRGI worldwide reports usually refer to Fur, Zaghawa, Masalit as minorities in Sudan, that is to say groups MRGI considers under threat, which took up arms, and stand along rebel groups. See: MRGI’s State of the World’s Minorities reports 2007 to 2014.

6 The Cassese Report specifically surmises from the international rules on genocide and the attached international jurisprudence that groups protected from genocide are to ‘constitute a distinct racial, national, ethnical or religious group’. Moreover, Article 1 of the 1992 UN Declaration – which refers to the obligation of States to ‘protect the existence’ of minorities – has been extensively interpreted as a fundamental right of minorities to protection against genocide (Baldwin, Chapman & Gray 2007, at 5).

of the work of both HRW and the ICC (S. Srinivasan 2006, at 4-5). In the *Al Bashir* case this overlap between victims of genocide and minority status was based on the provisional and unverified criminal intent of Al-Bashir. The Cassese Report is however more cautious, underlining the difficulty of proving the government's genocidal intent in targeting tribal units. Indeed, international norms do not consider tribal units as 'protected groups' unless they are seen as belonging to wider 'racial, national, ethnical or religious' community (Cassese Report 2005, at 30). This complication led the ICC to cast tribal groups as parts of larger ethnic units themselves gathered along a racial line in order to assert the special criminal intent of Al-Bashir. To the contrary, the Cassese report delved deeper into the motives of the criminal conduct of the Sudanese army and affiliated militias and concluded that they did not commit genocide concerning the three groups concerned (*ibid.* at 130).

3. CHALLENGING THE INACCURATE UNDERSTANDING OF MINORITY IDENTITIES AND CONFLICT DYNAMICS IN DARFUR

The ICC and the Cassese report draw different consequences from the polarization of identities along the Arab-African line.

The Cassese Report insists this polarization goes along with arbitrary ethnic and tribal restructuring instead of preventing it. In that sense, the Deputy Director of UNAMID Human Rights Section admitted that some ethnic groups are made of flexible units switching from one racial category to the other depending on societal contexts. He specifically referred to the Zaghawa sub-section known as *Gimmer* that is now seen as an Arab group but was originally categorized as African although they speak an Arabic dialect. Starting mid-1980, as Darfur rebels sought support from Chad, the Sudanese government of Sadiq Al-Madhi embraced the rhetoric of Arab supremacy with the aim of gaining Libyan support. The latter supplied the Arab tribes of Darfur – in need for land rights and territorial jurisdiction – with weapons, while the Sudanese government granted these Arab militias the official status of *Popular*

Defence Force (PDF). This new narrative reshaped ethnic identifications along a racial line. In the course of this polarization process the *Gimmer*, who were supportive of the government, were gradually and passively objectified as Arabs. The Cassese report obviously shows great awareness of these subtle changes of identities.⁷

By contrast the ICC simply asserts the intent to commit genocide against protected communities whose existence as racial groups it uncritically presupposes. Such an approach assumes that conflicts are racially driven, whereas ethnic polarization is rather the result of identity reconfiguration in the course of conflicts. The 'racial model' of ethnic delineation taken on by the ICC impedes the understanding of ethnic dynamics in Darfur and obstructs the process of legal identification of minorities. The thesis positing a clear match between ethnic minorities and the identity of the rebels in Darfur is invalidated by closer examination. The Cassese Report points out that the process of ethnic polarization does not condition affiliation to rebel groups or pro-government militias (Cassese Report 2005, at 130). The former Vice-President of the rebel group called United Resistance Front, Sherif Adam Nassour, admitted in an interview that 'although the Fur, Masalit and Zaghawa largely participated in rebel movements in Darfur, the Zaghawa definitely held the majority of top-ranking positions in most of the rebel movements (sic)'. Moreover, according to various sources the Zaghawa themselves can hardly be seen as a comprehensive ethnic group.⁸ The Zaghawa usually present themselves as made of three main sections, namely the *Kobe*, the *Bideyat* and the *Tuba*. They deliberate over common issues in a joint council even though they compete amongst themselves to be seen as the oldest lineage from which the two other sections would stem. Yet, as underlined by Christian Mikala, another Zaghawa section known as *Adeyat* exists prior to

⁷ It is in this regional context that the Arab Congregation emerged in 1987 in Darfur. Made of 27 Arab tribes, the congregation directed armed offensive against Fur communities around Jebel Marra in order to gain territorial jurisdiction on former Fur lands. The government would then grant Native Administration positions to militia leaders – notably Omdayat – over seized lands. This was also a way for the Central Government to overthrow traditional local nobility perceived as a threat, and secure local political support. Interview with Christian Mikala, Deputy Director of UNAMID Human Rights Section, Khartoum, 25/01/2015. In its report, the late Professor Cassese however offers an opposite categorization of the *Gimmer* (Cassese Report 2005, at 130).

⁸ Interview with Sherif Adam Nassour, current spokesman of the Sudan Revolutionary Front. Khartoum 2, Khartoum, 18/03/2014; Interview with Christian Mikala, Deputy Director of UNAMID Human Rights Section, Khartoum, Rotana Hotel, 25/01/2015; Interview with an US Embassy analyst, Khartoum 2, Khartoum, 30/12/2014.

the others and struggles peacefully to recover its identity and part with the other sections.⁹ Needless to say, the Zaghawa do not all participate in rebel groups to the same extent. The *Kobe* Zaghawa hold the most prominent positions, while the *Adeyat* are hardly implicated.²

Defining ethnic minorities through participation in rebel movements also leads to another pitfall: that of arbitrarily excluding other ethnic groups from the category of “minorities”. One could wonder why no other ‘African’ ethnic groups benefits from this label, and hence from the protection against genocide or from the investigations of the ICC. By the same token, Arab tribes were underrepresented during the negotiation rounds leading to the 2011 peace treaty, for it was assumed that Arab tribes siding with the government in the conflict were necessarily represented by the government. By contrast the negotiation rounds eventually favoured the Zaghawa who were well represented through participation of rebel groups. As a result, numerous Arab tribes felt that they were being misled by the central government and more joined the rebellion. This is true of the Misseriya of East Darfur and West Kordofan or of Rizeigat from South Darfur.

On a larger time scale the dynamics of conflicts in Darfur cannot be limited to a mere Arab-African polarization. Between 1970 and 1989, 70% of interethnic conflicts in the whole region were inter-Arab whereas only 20% were of Arab-African nature. The last decade witnessed exacerbated Arab-African conflicts, which increased to 54% of all interethnic conflicts in Darfur during this period. This Arab-African opposition lasted until a 2006 peace treaty signed between the Sudanese government and the most powerful SLA faction at the time known as SLA-Minni Minnawi (hereafter the SLA-MM), clearly identified as Zaghawa (Seisi M. Ateem 2007, at 14). Recent interethnic conflicts in Darfur developed in three phases from 2003 onward. The 2003-2005 period was still indicating major Arab-African conflicts. After the 2006 treaty, disappointed Arab groups turned against the central government, which led to a resurgence of inter-Arab conflicts, notably between *Baggara* (cattle-herders) and *Abbala* (camel-herders) in South Darfur. In late 2010 SLA-MM returned to rebellion just before the 2011 peace treaty was signed. The Government found itself recruiting militia members amongst

African ethnic groups such as Bergid or Tunjur to fight Zaghawa identified with the SLA-MM (Gramizzi & Tubiana 2012, at 13). Conversely, inter-Arab conflicts also gradually escalated since the 2006 treaty, and such clashes are currently taking place in East Darfur between Rizeigat and Ma`aliya over land control and resources.³

FUTURE PROSPECTS:

This article demonstrated that the way the ICC used the crime of genocide and minority status in the Darfur was driven by highly politicised demand concerning the *Al-Bashir* case, specifically during Moreno-Ocampo’s time as chief prosecutor. The ICC’s depiction of war-torn Darfur ensured the conflict would be categorized as ‘civil war’ or ‘internal armed conflict’: a move that was necessary to indict Al-Bashir, in accordance with the principles of criminal chain of command. However, one should be wary of the hasty conflation between rebel group and ethnic minority. Minorities in Darfur can hardly be defined by a binary Arab-African racial opposition, or by their belonging to rebel factions. The prosecution strategy of the ICC paradoxically resulted in creating a strong incentive for a depoliticization of rebel actors depicted as mere minorities seeking for the protection of legal status and attached rights. The various reports of MRGI exemplify well enough such – probably – unexpected outcomes. Likewise, pro-governmental militias are equally affected by this prosecution strategy considering the social constraints and reasons driving them into conflict are not scrutinized by the ICC. By admitting publicly the failure of war crimes investigations in Darfur for the time being, the new chief prosecutor Fatou Bensouda made an audacious move to restore the ICC’s original legitimacy. That is: a legitimacy which rests on long-term negotiation and cooperation rather than on professed expeditious coercion wrongly based on the questionable binding effect of the UNSC’s referral. Whether this de-escalation will appease the polarization of ethnic identities and the inappropriate use of minority status in Darfur certainly remains to be seen. But this will henceforth be played out without the ICC.

FOR FURTHER READING:

- C. Baldwin, C. Chapman & Z. Gray, *Droits des Minorités: clé pour la Prévention des Conflits*, MRGI, Rapport, 2007,

- 11 Interview with an US Embassy analyst, Khartoum 2, Khartoum, 29/12/2014.

9 Interview with Christian Mikala, Deputy Director of UNAMID Human Rights Section, Khartoum, 25/01/2015.

10 Interview with Sherif Adam Nassour, current spokesman of the Sudan Revolutionary Front. Khartoum 2, Khartoum, 18/03/2014; Interview with Christian Mikala, Deputy Director of UNAMID Human Rights Section, Khartoum, 25/01/2015.

note 8, at 5.

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- S. Srinivasan, *Minority Rights, Early Warning and Conflict Prevention: Lessons from Darfur*, MRGI Micro-studies, September 2006
- J. Tubiana, V. Tanner & Musa A. Abdul-Jalil, *Traditional Authorities' Peacemaking Role in Darfur*, Washington, United States Institute of Peace, 2012, at 12, 14 and 25.
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