



RESPONSE TO WORLD AFFAIRS ARTICLE CRITICAL OF ICC PROSECUTOR OVER THE BASHIR ARREST WARRANT

In the Spring 2009 issue of World Affairs, Julie Flint and Alex de Waal published the article “Case Closed: A Prosecutor Without Borders”¹ claiming that the personality and management style of ICC Chief Prosecutor Luis Moreno Ocampo make him inadequate for this work. The authors declare that his particular prosecutorial style, specifically in handling the arrest warrant against President of Sudan Omar Al Bashir, is unprofessional and incompetent and, thus, “the Court’s reputation, and perhaps even its life, is at risk.” It is clear that de Waal and Flint feel a deep sense of anguish and anxiety about Sudan. Their intense personal experience on the ground in Southern Sudan and Darfur make understandable and justifiable their unease about the consequences of Bashir’s reaction to the arrest warrant.

In this particular article, the authors shift back and forth several times between different aspects of their line of reasoning. Consequently, this paper first presents their case in a single description in order to make our response to it coherent and understandable. In summary, they suggest that the Prosecutor’s ego affects the skills and abilities that his position requires and, in consequence, he has made serious mistakes in the exercise of his charge. The title of the article suggests their argument that the Prosecutor’s arrogance is heightened by his independence within the Court, an independence the Rome Statute rightly gives him to protect the integrity of his investigations and prosecutions.

The authors go back to his years as a prosecutor in Argentina to emphasize that he has always been difficult to work and that he has a “love for the media spotlight.” They also gather several statements from some of the Prosecutor’s colleagues at the Office of The Prosecution (OTP) to reaffirm that the way he administers his office is arbitrary, arrogant and inept in managing his staff. On the latter point, they cite his mishandling of the dismissal of OTP staff member Christian Palme. They say that many experienced investigators have left the ICC because they were “burnt out” and they felt dissatisfied since their job was not sufficiently valued. The authors claim that as a consequence of this turnover, investigations and prosecutions run the risk of going “calamitously wrong”. They cite as an example of how the Prosecutor’s poor management of his office is affecting the investigations his alleged mishandling of the evidence in the case against Thomas Lubanga Dyilo. In that case, the judges told the Prosecutor that he must find a way to release to the defense exculpatory evidence he had obtained under confidentiality agreements, and he did. For more information, refer to http://www.amicc.org/docs/Lubanga_Delay.pdf.

In particular, the authors express their concern about how Ocampo has handled the arrest warrant of Omar Al Bashir, president of Sudan. They argue that his arrogance has pushed him to bring this sensational case before the Court for his own vainglory, as it would be the first time that the charge of genocide is made in a case before the Court and the first time an arrest warrant has been issued for a sitting head of state. The authors add that the Prosecutor’s unprofessional and incompetent management of the situation was proven by the fact that the judges “threw out” the genocide charges. In addition, de Waal and Flint say that Ocampo’s penchant for publicity meant that he neglected the consequences of suffering and death from an arrest warrant for Bashir.

¹ <http://www.worldaffairsjournal.org/2009%20-%20Spring/full-DeWaalFlint.html>





In the case against Bashir, both the Court and the Prosecutor have acted according to their mandates. The Rome Statute established a permanent Court so the most serious crimes of concern to the international community would not go unpunished and to put an end to impunity for the perpetrators of these crimes. Article 27 of the Statute establishes that neither the official capacity of a person nor immunities or special procedural rules attached to such capacity – whether under national or international law – will bar the Court’s jurisdiction over such a person. As a result, the creators of the Court, as the Statute reflects, recognized the possibility of the Court investigating and prosecuting leaders whose official capacity as heads of state would enable them to retaliate. This painful dilemma is therefore built into the nature of the Court. However, if the Court does not hold accountable a sitting head of state, like Bashir, because it is fearful of the consequences, then the purpose for which the Court was established is not fulfilled and the Court would be useless. It was the intention of the founders of the Court to warn everyone, even heads of state, that they would be held accountable by the Court if they committed the crimes which fall under its jurisdiction. By establishing a permanent court that can try and will try those most responsible for the worst crimes against humanity, they ensured that no leader, regardless of their capacity, position or ability to respond with more atrocious violence, would be safe in committing such crimes.

The Court also acted according to its design under the Statute when the Security Council referred to it the situation in Darfur and it decided to accept the referral and open an investigation into crimes within its jurisdiction. Under the UN Charter, the Security Council is in charge of determining the existence of threats to international peace and security. Therefore, when the Security Council decided to refer the situation of Darfur to the Court, it considered that such a threat existed. Moreover, the fact that it has not used the mechanism set out in Article 16 of the Rome Statute to defer the case against Bashir shows that in the question of which shall prevail – peace or justice – the Security Council has for now decided that justice must be pursued. Through Article 16 the Rome Statute establishes that the political choice of peace or justice should be made by the Security Council. This reflects the creators’ intention to relieve the Court from being politicized and ensuring its independence as a judicial institution. Both the Prosecutor and the Court have emphasized that political decisions, as the peace and justice question, must be dealt with by the Security Council, the highest political body in the international system, and not by the ICC.

In the Darfur case, the Prosecutor only announced that he was going to ask the Court to issue an arrest warrant for Bashir after long investigations and immediately following one of his semi-annual reports to the Security Council. On March 4, 2009, the three judges of Pre-Trial Chamber I issued a public arrest warrant for Bashir for war crimes and crimes against humanity. For more information, please consult the AMICC paper http://www.amicc.org/docs/Bashir_Analysis.pdf.

Moreover, de Waal and Flint do not dispute that mass killings took place in Darfur; indeed they confirm it on other articles, such as “In Darfur, from Genocide to Anarchy”.² In fact, they do not claim that the other charges in the application for the arrest warrant, specifically murder and extermination as crimes against humanity, were incorrectly or unprofessionally made. They simply do not address this aspect of the Prosecutor’s application. For most observers, the long 112 page application is a very professional and convincing document. Indeed, the Court, in its own accurate and highly professional decision, accepted both the war crimes charges

² <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/27/AR2007082701339.html>





and the charges of crimes against humanity. As to the genocide charges, their response was not hostile or severe. Two of the judges decided that the Prosecutor had not convinced them on the genocide charge. He retains the option to gather more evidence on genocide and bring it back to them so they can consider including the charge. This is normal both in international and domestic proceedings. Moreover, one of the judges, in a dissenting opinion, concluded that the Prosecutor had provided sufficient evidence and analysis to include genocide in the arrest warrant.

It should be noted that at this point it is highly unlikely that the Prosecutor would drop the case or that the Security Council would decide to suspend it. The only way out is by arresting Bashir. In that case, the government of Sudan would still exist and there would be someone to deal with. Therefore, a way to restart and succeed in the peace negotiations is only possible if the international community, supported by the US, decides not to get into Bashir's game but instead, arrest him, as suggested by John Prendergast and Jim Wallis in "Obama Can Make a Difference".³

In the Palme case, the Prosecutor's Public Information Adviser, Christian Palme, filed an internal complaint alleging that Ocampo sexually harassed a South African journalist who was interviewing him. Palme considered that this could cause serious harm to the reputation of the Court. He reported the incident and Ocampo dismissed him. A panel of ICC judges concluded that the harassment complaint was "manifestly unfounded," noting that both parties denied the incident took place. A personnel panel in the ICC ruled that this firing violated ICC procedures. Palme appealed to an appeals panel in the International Labor Organization (ILO) which provides this service to the ICC. It awarded substantial damages to Palme. Although both the ILO and the ICC judges concluded that what happened in South Africa between the Prosecutor and the journalist was unclear, the Prosecutor acted wrongly and in violation of Court rules by dismissing Palme without due process. This resulted in the Court having to pay damages out of its own budget. This episode, although it is not relevant to the Prosecutor's management of cases, does as the authors claim display his willfulness. It also shows the need for the ASP to exercise its oversight of the OTP through an appropriate standing body without infringing on his prosecutorial discretion.

In conclusion, nothing in the article shows that the Prosecutor, despite his defects, has seriously mismanaged any of his cases. The disagreements with the judges are all well within the normal interaction of the different actors in any legal system. It is understandable that the Prosecutor, as the most public face of the Court, is usually the target of the media's attention and criticism. However, it should be noted that he only heads one of the four organs that compose it; he is not the Court.

For more information about the authors, visit:

- Julie Flint: http://commentisfree.guardian.co.uk/julie_flint/profile.html
- Alex de Waal: <http://www.gov.harvard.edu/faculty/dewaal/>

³ The Wall Street Journal, April 12, 2009, <http://online.wsj.com/article/SB123958504474112427.html>





Here are examples of previous collaboration by these authors:

- Social Science Research Council blog “Making sense of Darfur” (<http://www.ssrc.org/blogs/darfur/>)
- Co-authored book, *Darfur: A Short History of a Long War*
- Co-authored article, “To put justice before peace spells disaster for Sudan” (<http://www.guardian.co.uk/commentisfree/2009/mar/06/sudan-war-crimes>)
- Co-authored article, “Justice Off Course in Darfur” (<http://www.washingtonpost.com/wp-dyn/content/article/2008/06/27/AR2008062702632.html>)

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