The ICC indictment against Al-Bashir and its repercussions for peacekeeping and humanitarian operations in Darfur

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ABSTRACT

The impact of the International Criminal Court (ICC) on peace processes has received much scholarly attention. We argue, based on the ICC arrest warrant against Sudanese President Omar al-Bashir, that ICC indictments against government officials not only can be detrimental to the prospects for peace, but can also negatively affect everyday practices of peacekeepers and humanitarian workers. We draw on a combination of quantitative and qualitative data in order to develop our argument. We interrogate some measurable consequences of the indictment in relation to the work of the United Nations – African Union Mission in Darfur (UNAMID) as well as humanitarian actors in Darfur. We do so using a data set compiled to support the work of UNAMID. We also draw on interviews with UN and UNAMID staff, aid workers, and representatives of the conflict parties. Our analysis shows that the indictment of President al-Bashir was perceived by the Sudanese government as the continuation of a confrontational approach pursued by the international community. We further show that the indictment accelerated patterns of obstruction and intimidation of peacekeeping actors, other third-party actors, and local staff associated with these. This complicated the everyday activities of peacekeepers and humanitarian efforts.

Introduction

The impact of the actions of the International Criminal Court (ICC) on peace processes has received much scholarly attention in recent years. Yet ICC indictments have a much broader effect than just on prospects for successful conflict resolution. In this article we argue, based on the request for an arrest warrant in mid-July 2008 and the subsequent ICC arrest warrant against Sudanese President Omar al-Bashir issued in early March 2009, that ICC indictments against government officials are not only detrimental to the prospects for peace, but also negatively affect everyday practices of peacekeepers and humanitarian workers, and through this, directly or indirectly, local population groups. Peacekeeping and humanitarian operations require the consent of the host state in order to be effectively deployed, and thus operate within the parameters of juridical statehood. In reality, this consent translates into a spectrum of different degrees of acceptance, ranging from an invitation by the host...
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...government to grudging acceptance and stonewalling or outright hostility.3 Even before
the arrest warrant against President al-Bashir by the ICC, the relationship between the
Government of Sudan (GoS) and United Nations (UN) peacekeeping missions on its soil was
fraught with difficulties.4 In this article, we show how the ICC indictment served as an import-
ant additional trigger for the GoS to transform and accelerate its efforts to undermine the
work of peacekeepers and humanitarian actors in Darfur.

Methodologically, we draw on interviews with UN and United Nations – African Union
Mission in Darfur (UNAMID) staff, aid workers, and representatives of the conflict parties
conducted in Khartoum, Addis Ababa, The Hague and the United Kingdom between
September 2014 and March 2017. The interviews are used to provide context to the rationale
behind Sudanese government actions to undermine the work of peacekeepers and staff
members of humanitarian agencies in Darfur. We thus use a similar methodology to others
who have studied the effect of the ICC, but we focus specifically on the impact on peace-
keeping and humanitarian operations rather than on peace processes per se.5

In addition, we present some figures on obstruction and intimidation of UNAMID peace-
keepers and aid workers in March 2009, based on situation reports collected by the Joint
Mission Analysis Centre (JMAC) between 3 January 2008 and 6 April 2009.6 Ideally, we would
also have taken levels of obstruction over a longer time period after the issuing of the arrest
warrant in March 2009 into account, but the data set made available to us via the African
Union High-Level Panel on Darfur does not extend beyond early April 2009. The figures we
present on the basis of this data set therefore only focus on the immediate response of GoS-
related actors in Darfur to the arrest warrant. Our findings suggest that the level of obstruc-
tion and intimidation of UNAMID and humanitarian actors sharply increased immediately
after the ICC’s arrest warrant for President al-Bashir was issued. We define obstruction as the
refusal of passage to peacekeepers and staff of humanitarian agencies, while intimidation
refers to efforts to influence the behaviour of these actors through threats and instilling fear.7

Several interviewees further suggest that while the relationship between the GoS and
the international community was already highly problematic, the ICC arrest warrant inten-
sified Sudanese efforts to sabotage the work of peacekeepers and humanitarian workers in
Darfur. A closer look at the consequences of the ICC warrant suggests that it resulted in
government forces and militias stepping up their effort to undermine, often indirectly, the
work of third parties, specifically UNAMID. This article thus contributes to the peace versus
justice debate, but we do not subscribe to its often binary nature. Instead, we follow Kersten,
who argues that rather than having solely positive or solely negative effects, the ICC has
positive, negative, and some inconsequential effects on peace.8 Our work builds on Kersten’s
and provides a specific focus through studying the impact of the ICC on peacekeeping and
humanitarian efforts. We thus contribute to the wider debate on unintended consequences
in the potential trade-offs between peace and justice in a setting like Darfur, where govern-
ment and rebel actions violate civilian human rights, while the capability of UN peacekeepers
to uphold those rights is severely curtailed.9

In doing so we do not argue in favour of impunity for those responsible for war crimes
and crimes against humanity, or question the potential the establishment of the ICC may
hold for international justice. Yet it is important to critically reflect on the broader impact of
ICC indictments. This is particularly the case when the United Nations Security Council (UNSC)
was the referral body and where at the same time a UN peacekeeping mission is in place,
mandated by the same body, as this means the ICC is bound to be seen as a political
instrument by those investigated. This raises important questions whether, in situations where peacekeepers are deployed and civilian populations dependent on support by humanitarian agencies, the issuing of ICC indictments is the best course of action. At a minimum, referrals for an ICC investigation should arguably not come from the UNSC in these types of situations.

The article proceeds as follows. The next section briefly reviews the literature on the potential role of the ICC in relation to prolonged civil wars or intrastate conflicts. Next, we provide a background to the Darfur conflict and the ICC warrant against al-Bashir. The subsequent section discusses the changed context in which peacekeepers and humanitarian workers had to operate following the ICC proceedings against al-Bashir. The final section concludes that the challenging environment in which peacekeepers and humanitarian actors operate in Darfur deteriorated as a result of the indictment against President al-Bashir in March 2009.

The potential role of the ICC in intrastate conflicts

The potential impact of the ICC on peacemaking efforts in ongoing civil wars has attracted much scholarly attention. On one side of the argument are those who see the Rome Statute, the treaty that established the ICC in 2002, as an important mechanism to hold those responsible for war crimes, crimes against humanity and genocide to account. In addition, it is argued that the ICC has a deterrent effect. Mass atrocities, as the argument goes, are less likely to occur in a state that has ratified the Rome Statute. Several studies support this argument. At the same time, recent research suggests that rulers with little respect for human rights who face armed rebellion are unlikely to give up power if a strong international criminal court regime is in place. Nalepa and Powell show that the same is true for armed opposition movements that have conducted substantial human rights violations themselves, who have equally been shown to become more reluctant to make peace if a strong international criminal court regime is in place.

ICC indictments may thus inhibit amnesty or other peace agreements, if those indicted face the prospect of standing trial for any human rights abuses they may have committed in the past. In short, ICC indictments can provide strong incentives or disincentives to conflict parties to lay down their weapons and resolve conflict. More generally, the optimistic view of the potential of the ICC ignores the fact that, since it only provides ex-post justice mechanisms, the ICC cannot serve as a substitute for peacekeeping interventions and civilian protection.

The picture becomes even more complicated when ICC action occurs in settings already home to international peacekeeping efforts in the form of a (UN) peacekeeping mission, and where humanitarian aid plays an important role in sustaining local civilian populations. In such settings, political relationships between the conflict parties and the mandating agency of the peacekeeping force are an important determinant of the level of cooperation with or obstruction of peacekeepers. Recent research has begun to uncover the ways in which perceptions of different conflict parties towards peacekeeping missions translate into different patterns of cooperation, and how such cooperation and local compliance determine a peacekeeping mission’s effectiveness to an important degree.

These insights suggest that ICC involvement may in fact undermine the effectiveness of peacekeeping missions, as ICC indictments are bound to make conflict parties targeted by the ICC less likely to cooperate with peacekeepers and more likely to obstruct their mandates.
This is particularly the case for settings in which the UNSC – rather than a nation state itself – refers a case to the ICC, as permitted under the Rome Statute, and does so in relation to crimes allegedly committed on the territory of a state that has not ratified the Rome Statute and thus is not party to it.\(^\text{18}\) The ICC’s engagement in Sudan was indeed the first time a case was referred to the ICC by the UNSC. Even if one follows the argument that this referral does not contravene the complementarity principle – which states the ICC only has the right to intervene if a state’s judiciary is unable or unwilling to conduct a fair trial – this UNSC referral brings the ultimately political character of the ICC clearly to the fore.\(^\text{19}\)

With the arrest warrant the ICC has becomes a potentially important ‘other’ actor in an intrastate war scenario. While in principle the ICC might present itself as a purely legalistic entity that operates independently, any party whose members are indicted by the ICC is likely to perceive the ICC as representing a particular hegemonic agenda of the international community, the same international community in whose name peacekeeping forces and humanitarian workers are on the ground. This implies that once the ICC becomes actively involved in any ongoing civil war, those parties opposing the ICC or any of its indictments have clear political reasons for obstructing peacekeeping operations and their humanitarian counterparts. At the same time, other actors may side with the ICC and feel vindicated in prolonging the fight against a government whose head they can now regard as an international criminal and thus illegitimate – as happened in Darfur.\(^\text{20}\) These dynamics in turn have important repercussions for the wider quest for justice and the protection of civilians.

The ICC indictment against President al-Bashir is thus an important case that can be studied to explore how the ICC affects peacekeeping and humanitarian operations.

The dynamics behind the ICC indictment against al-Bashir and the deployment of UNAMID

The indictment of Sudanese President al-Bashir is based on his alleged responsibility for atrocities in Darfur that constitute crimes against humanity. In order to grasp how the indictment altered the prospects for third-party involvement in Darfur, a brief discussion of the conflict dynamics in Darfur leading up to this indictment is necessary.

Darfur has been a marginalised part of Sudan starved of vital resources and prospects since its incorporation into the British Empire, a state of affairs not altered in any substantial way post-independence.\(^\text{21}\) This state of affairs provided the incentive for two Darfurian rebel movements – the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM) – to take up arms against the GoS in 2002 with the objective of radical reform of the national government.\(^\text{22}\)

Faced with a revolt that outran its military capacity, the GoS started to provide local militias with arms. These militias – which subsequently became known as Janjaweed – not only fought the rebels, but also targeted civilians.\(^\text{23}\) The delegation of counterinsurgency to local militias turned Darfur into what Alex de Waal has described as an ‘ethics free zone’ in which the GoS ‘told the soldiers and militiamen to do what they could get away with and not report back’.\(^\text{24}\)

In spite of the large-scale human rights abuses that took place in Darfur, the international community was slow to respond to the conflict. The US and the UK allegedly actively tried to keep the Darfur conflict from being discussed during negotiations aimed at ending the north–south Sudan war, out of a fear that this might undermine the north–south peace
process. Eventually, the large-scale violations of humanitarian law committed in Darfur and referred to by various international UN staff as ethnic cleansing prompted the UNSC to establish a Commission of Inquiry (CoI) through UNSC Resolution 1564, adopted on 18 September 2004.

The CoI visited Sudan in late 2004 and subsequently published a report that found the Janjaweed militias, the GoS, and – albeit to a lesser extent – the rebels responsible for war crimes and crimes against humanity. The report argued that the ICC was the only credible way to bring perpetrators of atrocities in Darfur to justice – and the CoI submitted 51 names to the ICC of people that they recommended should be investigated. In due course, Sudan was referred to the ICC by UNSC Resolution 1593 on 31 March 2005.

Following ICC jurisdiction over the situation in Darfur, Prosecutor Moreno Ocampo obtained arrest warrants against two individuals on 27 April 2007: Ahmad Harun, who had served as Minister of the Interior and head of the Darfur Security Desk in 2003, when the majority of crimes under investigation occurred, and Ali Kushayb, leader of the Janjaweed militia in West Darfur, who had thousands of personnel under his command. The ICC investigators issued the arrest warrant based on criminal acts committed by Harun and Kushayb in Darfur during the 2003–2004 period.

For many observers the indictment of these two individuals was to some extent pragmatic. Harun had command responsibility, but he was not sufficiently senior nor well enough connected to not be politically sacrificed; and Kushayb was already detained, which made the ICC prosecutors believe that al-Bashir was more likely to surrender him. Yet the GoS proved unwilling to cooperate with the ICC, partly because the arrest warrant against Harun and Kushayb was seen as a way to collect more information to make a case against officials higher up in the political hierarchy. Kushayb remained detained in Sudan and Harun continued to serve as the Minister of State for Humanitarian Affairs and later Governor of South Kordofan.

In response to the ICC arrest warrant against Harun and Kushayb, President al-Bashir stated that Sudan would never hand any citizen over for trial outside the country.

The ICC indictment of Harun and Kushayb further complicated the UN effort to deploy a UN-led peacekeeping mission to the region, in place of the under-equipped AU-led African Mission in Sudan (AMIS). The GoS was already reluctant to allow UN peacekeepers into Darfur as this would give them less flexibility to conduct operations in Darfur, but when Harun and Kushayb were indicted it was also widely believed by the GoS that a UN peacekeeping force could be used to arrest the ICC indictees. Calls to deploy a robust UN peacekeeping mission had grown stronger when the AU-mediated Darfur peace process – which had been ongoing in Abuja, Nigeria, since early 2005 – started to make some progress from early 2006 onwards. The hope within the UN was that the United Nations Mission in Sudan (UNMIS), which was already deployed in other parts of Sudan, could be extended to Darfur once an agreement was concluded. However, at no time during the negotiations in Abuja had the issue of how AMIS could be transformed into an UN mission been discussed. In fact, both the US and the UN had been hesitant to address the transition from an African peacekeeping force to a UN peacekeeping force in the Abuja negotiations, because the mediation effort was led by the AU. The AU saw Darfur as a test case for its peacemaking and peacekeeping capacity, which made it reluctant to agree to a UN peacekeeping mission in Darfur as this could be interpreted as a failure of the AU to deal with the Darfur conflict. Instead, US Deputy Secretary of State Zoellick convened a secret meeting with Sudanese Vice President Ali Osman Taha in Paris on 8 March 2006, in which Taha promised Zoellick that a UN mission
could be deployed following the conclusion of the a peace agreement on Darfur. But when it became clear that the US would not normalise relations with Sudan after the conclusion of the Darfur Peace Agreement (DPA), Khartoum backtracked on its private promise to Washington to allow a UN peacekeeping force in Darfur.

Third-party efforts to get the GoS to agree to the deployment of UN peacekeepers continued following the conclusion of the DPA. What ensued was a long, drawn-out process of quiet diplomatic activity to get UN boots on the ground in Darfur, which cumulated in a high-level meeting attended by UN Secretary General Kofi Annan, the permanent members of the UNSC, the AU, the EU, several African states, and Sudan in Addis Ababa on 16 November 2006. By the end of this meeting, the parties had agreed that a hybrid AU–UN mission would be deployed under UN command, but with a principally African character. Yet it was not until 1 January 2008 that AMIS was transformed into UNAMID. The background to the deployment of UNAMID illustrates what de Waal has described as ‘the politics of non-cooperation’ – a defiantly rejectionist stance of the GoS regarding any cooperation with the international community.

Khartoum’s commitment to non-cooperation grew even stronger when in July 2008, only half a year after the deployment of UNAMID, ICC chief prosecutor Ocampo applied for an arrest warrant against President Omar al-Bashir, which was issued, on charges of war crimes and crimes against humanity, in Darfur on 4 March 2009. The crime of genocide was added more than a year later, on 12 July 2010. The ICC ultimately needs detailed information from the ground level on atrocities and crimes committed, and among the groups most likely to possess such information are staff members of peacekeeping missions and humanitarian agencies – even if the ICC referral in this case explicitly excluded the use of UN funds to conduct investigations. But given the fact that it was the UNSC that triggered the referral, this was always bound to undermine UNAMID’s claim to political neutrality. Indeed, that the GoS would obstruct peacekeepers and staff from humanitarian agencies was predictable. Several external observers, chief among them Alex de Waal and Julie Flint, warned that the indictment of al-Bashir would negatively affect the peace process, peacekeeping and humanitarian operations. The next section thus discusses the immediate consequences of the March 2009 arrest warrant against al-Bashir for the everyday practices of UNAMID peacekeepers and humanitarian workers in Darfur, essentially supporting the predictions levied right before the indictment of al-Bashir in March 2009 with concrete data.

The impact of the ICC indictment against al-Bashir: nonviolent and violent resistance against peacekeepers and humanitarian actors

The ICC indictment of President al-Bashir in March 2009 served to provide the GoS with ultimate evidence that the international community used the ICC for political ends in a wider geopolitical environment. From 2001 onwards, the US Bush administration had held out the promise of normalisation of relations between Washington and Khartoum in order to move the GoS towards making peace with the Sudan People’s Liberation Movement/Army (SPLM/A). The Sudanese leaders felt that they had kept their promise by signing and implementing the Comprehensive Peace Agreement signed with the SPLM/A. Yet, due to the ongoing conflicts in Darfur and spurred on by the vocal lobbying of the Save Darfur campaign among others, Washington backtracked on its promise and continued to regard Sudan as in many ways a ‘rogue’ state. The Sudanese Presidential adviser on the north–south
peace process, Ghazi Salah al-Din al-Atabani, reflects in this regard that ‘every single US statesman that participated in Sudan’s peace process promised to normalise relations if the government would sign the Comprehensive Peace Agreement. These US statesmen used Darfur as an excuse to break their promise’.47

Indeed, the ICC indictment was perceived as adding insult to injury, causing enormous bitterness among the ruling elites in northern Sudan, even among those who had previously shown a willingness to cooperate with international third-party efforts in Darfur. Many in the GoS were convinced that the ICC indictment was a tool to ultimately secure regime change in Sudan. Vladimir Zhagora, who acted as the Mediation Coordinator in the UN Department of Political Affairs at the time of the indictment against al-Bashir, notes in this regard: The GoS had signed the Comprehensive Peace Agreement, the Eastern Sudan Peace Agreement, the Cairo Agreement, [and] the Darfur Peace Agreement, and it was negotiating with Darfur rebel movements that had not signed the Darfur Peace Agreement. Yet it had not received any peace dividend it had been promised in return for signing the Comprehensive Peace Agreement; Sudan had not been taken off the list of state sponsors of international terrorism, and now the country had even an arrest warrant against its President – the person who has the sole authority to sign a peace agreement in the first place.48

The fact that the UNSC is the ultimate body behind the mandate of UNAMID, as well as the entity that originally referred Sudan to the ICC over Darfur, made the deployment environment for UNAMID even more difficult than it already was. Instead of putting pressure on the al-Bashir government to change its strategy on Darfur, as some advocates in favour of the indictment believed, the regime was more likely to ensure it stayed in power and prevent the arrest of al-Bashir – not least as the indictment was based on the premise that al-Bashir used the state apparatus to commit the crimes for which he was now said to bear individual criminal responsibility, thus rendering the entire Sudanese state a criminal entity.49 As US Special Envoy to Sudan Andrew Natsios put it, ‘the chances of a peaceful political transformation in Sudan, admittedly slim to begin with, have become even slimmer with the order for Bashir’s arrest’.50 The perception of the GoS that the ICC indictment was ultimately aimed at regime change was enforced by the fact that leaders of Darfuri rebel movements – some of whom were themselves under suspicion of having committed atrocities – not only welcomed the ICC indictment, but also presented themselves as partners in the fight against ‘war criminals’.51

The ICC indictment against al-Bashir immediately altered the relationship between the GoS and the international community. One of the areas in which this is visible is in relation to UNAMID peacekeeping operations in Darfur, as a look at the descriptive statistics drawn from the JMAC data set demonstrate. The impact of the ICC indictment against al-Bashir in March 2009 can clearly be observed by comparing the level of resistance against UNAMID staff and humanitarian workers in March 2009 with the levels of resistance in the previous months. The Arab league and the AU had criticised the ICC for endangering the security of peacekeepers, but large-scale violent attacks on UNAMID forces in response to the ICC indictment did not take place.52 Neither did, according to the JMAC data set, Sudanese forces or Arab militias engage in large-scale direct attacks of third parties. As shown in Figure 1, four armed attacks on UNAMID personnel took place in March 2009. In none of these four attacks could the identity of the perpetrators be established. The average number of attacks on UNAMID between March 2008 and February 2009 was two. The only time when a comparable number of direct attacks took place was in the aftermath of the request for an arrest warrant
of Al-Bashir, after July 2008, with four attacks reported in July 2008 and five attacks reported in September 2008.

The first direct attack on UNAMID following the indictment took place on 9 March 2009, according to the JMAC data set: ‘On 09 March at about 2010, a UNAMID vehicle returning from the Military Deputy Sector Commander’s residence was attacked by armed men injuring four soldiers, one of them seriously. The aim of the attack and the identity of the attackers are unknown. UNAMID is investigating’ (Observation 2654 in the JMAC data set).

Taken together, direct violent attacks against UNAMID staff did not increase considerably in March 2009 compared to previous months. However, the level of more indirect obstruction and intimidation of peacekeepers in Darfur did increase sharply, as Figure 1 illustrates. This suggests that Khartoum’s response was much more subtle than in the form of direct attacks on UNAMID. The GoS instead stepped up its resistance against UNAMID through indirect forms of obstruction and intimidation, including prevention of access along certain routes and car-jacking. While on average five incidents of obstruction and intimidation occurred per month between March 2008 and February 2009, 18 such incidents took place in March 2009 alone. In essence, the obstruction and intimidation of UNAMID by armed actors opposing the ICC was aimed at showing that the GoS was in control. For example, on 5 March 2009, the day following the indictment of President al-Bashir, GoS fighter jets made low-level passes over UNAMID Headquarters in el Fasher town (Observation 2487 in the JMAC data set). In addition, UNAMID patrols were obstructed relatively often by Sudanese armed forces after the handing down of the indictment. For instance, the JMAC data set reports that ‘On 04 March, at 1800 hours, UNAMID vehicles travelling from Zam Zam to the Supercamp were stopped at a GoS roadblock at the El Fasher bridge and not allowed to proceed. The vehicles returned to Zam Zam’ (Observation 2461 in the JMAC data set). Similarly, it is reported in the JMAC data set that ‘At 0930 hrs On 07 Mar 09 at Kass, the UNAMID military patrol team vehicle was stopped by a GOS military. The GoS military challenged the UNAMID military patrol team and informed them that they were not informed earlier about the UNAMID military patrol since 04 March 09 after the arrest warrant against President has been issued by ICC’ (Observation 2543 in the JMAC data set). The increase in the obstruction of UNAMID patrols reflects what the US Special Envoy on Darfur, Andrew Natsios, described as the stonewalling of UNAMID as a result of the ICC indictment. It should be noted that it is unlikely that the GoS engaged in a coordinated and widespread effort to disrupt UNAMID’s peacekeeping efforts from scratch. It probably anticipated that an arrest warrant for al-Bashir would be issued and devised a response accordingly.

Figure 2 shows that the level of obstruction and intimidation of aid workers, similar to UNAMID personnel, spiked in March 2009. Only three violent attacks against aid workers took place in March 2009, which is even lower than the average of 3.75 attacks on aid workers per month between March 2008 and February 2009.

By contrast, while on average 1.5 incidents that involved the obstruction or intimidation of aid workers took place per month in Darfur between March 2008 and February 2009, 17 such incidents took place in March 2009. What is more, immediately following the announcement by the ICC that it had issued an arrest warrant for al-Bashir, the GoS expelled 13 international non-governmental organisations (NGOs) and revoked the licences of three national NGOs. This expulsion was perfectly synchronised by the Sudanese authorities. The staff members of the expelled humanitarian agencies in Darfur had to fly from El Geneina, El Fasher, or Nyala to Khartoum, where they had to wait for a flight away from Sudan. Some of the staff members of the expelled humanitarian agencies were not given exit visas in
Khartoum and were blocked from leaving Sudan for a few weeks. UN agencies were not officially expelled, but whenever UN staff, from for instance the United Nations High Commissioner for Refugees (UNHCR) and International Organization for Migration (IOM) went on Rest and Recuperation (R&R) leave, they were not let back into Sudan.\textsuperscript{54} According to one estimate in early 2009, as a result of this expulsion ‘7,610 aid workers – 308 internationals and 7,302 nationals – were directly affected in Northern Sudan (including Darfur), where these agencies accounted for 40% of aid workers, delivering more than half the total amount of aid’.\textsuperscript{55} The number of staff working for humanitarian agencies in Darfur was brought down to 9750 by the end of March 2009, whereas there had been 14,700 staff members in Darfur in January 2008 and even 16,250 in early March 2009.\textsuperscript{56} More generally,
it has been widely acknowledged that these third-party actors – relying to a large extent on local Sudanese staff – had succeeded in reducing mortality levels in Darfur considerably.\textsuperscript{57}

Now, however, the GoS accused the NGOs of cooperating with the ICC and breaking Sudanese laws. On 6 March 2009, in a statement to the press, Hassabo Mohammed Abdel Rahman, the head of the Sudanese commission that coordinates humanitarian efforts – the Humanitarian Aid Commission (HAC) – indicated that there were ongoing investigations to determine whether other NGOs had also cooperated with the ICC. From the Sudanese side, this was in many ways a predictable response, as few NGOs were prepared to draw the logical conclusion that in order to impartially provide humanitarian assistance, they would need to have a transparent policy of non-cooperation with the ICC.\textsuperscript{58} Arguably, the ICC could have anticipated this response. As it did not send its own investigators into the region for security reasons, for the GoS it seemed obvious that the ICC would rely on humanitarian agencies for part of its collection of information.

According to the perceptions of affected international staff, that was exactly what happened. Interlocutors in the GoS felt betrayed by NGOs and humanitarian actors, and alleged these actors had collected the data on which the ICC indictment was built. While checking in for their flights to Khartoum at the airports in Darfur, many of the laptops, hard drives and photo cameras of NGO staff were confiscated in an effort by the security services to examine possible links between the NGOs and the ICC.\textsuperscript{59} It is impossible to determine the extent to which humanitarians passed on information to the UN and even the ICC, but it is clear that the GoS believed that a great deal of information had been passed on.

Consequently, the ICC indictment against al-Bashir motivated the GoS to firmly crack down on the international presence in Darfur. A UNAMID Civil Affairs officer notes in this regard: Although it had been a very tense and complicated relationship, the al-Bashir regime has almost constantly been firmly in control of its relation with the international community since it took power in 1989. However, the situation in Darfur during 2003 and 2004 – and especially the international pressure and condemnation that came with this conflict – made the Government of Sudan lose control. Many within the government felt that the numerous NGOs in Darfur engaging in advocacy were a symptom of this lack of control and that the ICC indictment against al-Bashir was the ultimate outcome of this lack of control. Consequently, following the indictment against al-Bashir, the government tried reclaim control by stonewalling the international community.\textsuperscript{60}

A UNICEF staff member notes, around eight years after the first expulsions, that ‘the expulsion in March 2009 was the first hit, but since then there have been many organisations and individuals expelled to the point that currently you can speak of a strangu- lation of the humanitarian operation.\textsuperscript{61} The expulsion of organisations and individuals has clearly been used as an instrument of control by the Sudanese authorities. This logic works both for organisations and on a personal level. A staff member of the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) explains that the Sudanese authorities are masters at very subtle intimidation. Every year there is this person who really speaks his or her mind about the situation in Darfur, after which his or her residence permits is not extended. This has a very effective impact on people. I think in many cases this has led to a permanent state of self-censorship where people are very careful of what they are saying. Crucially, I think that this strategy is effective on both a junior and a senior level.\textsuperscript{62}
In line with this general response by the GoS, government officials stepped up harassment of local employees of expelled international NGOs. A telling example of these tactics is the following entry from the JMAC data set:

The Human Rights Section (HRS) was informed of the harassment and intimidation of an Oxfam national staff member in El Fasher, North Darfur. Immediately following the ICC decision, the staff member was summoned by NISS officials for questioning regarding his activities with Oxfam. According to information received, the staff member has also been receiving repeated phone calls from a group calling itself ‘Al Jihad’ accusing him of collaborating with the ICC. On 16 March at approximately 0700hrs, the staff member received a phone call informing him that they will take revenge ‘today or tomorrow’. The HRS has advised the victim to report the incident to the police. The HRS is monitoring the situation. (Observation 2611 in the JMAC data set)

Such patterns of intimidation and obstruction – rather than direct violence – against UNAMID forces and other third-party actors in Sudan became engrained over time, negatively affecting UNAMID’s monitoring role and its ability to protect civilians. Vladimir Zhagora, who acted as the Mediation Coordinator in the UN Department of Political Affairs when al-Bashir was indicted, notes how following the indictment, the GoS increasingly engaged in a ‘deliberate low-intensity stemming off of UN activities’ including trying to limit the moving around of UNAMID soldiers in Darfur.

Obstruction through limiting access of peacekeepers in particular hampered the work of UNAMID’s Human Rights Section that relies on local staff in its effort to report human rights violations in Darfur. As a former local staff member of this section, who had to leave Sudan because of fears for his personal security due to this work, recalls: ‘Before the indictment we were strong, we would go on field missions and report, we did at least four missions per week in the past, but nowadays [after the indictment] we are afraid for our lives, after indictment we do much fewer missions […] I was from the start with the human rights section, I am one of the founders, and I reported thousands of incidents, it helped the Darfur issue reach the highest point, the ICC’. On the one hand, this interviewee believes that the indictment was the right thing to do – ‘the judges should do their job’ – but he is also clear that the ICC indictment had repercussions for dynamics on the ground (and, in his case, for him personally).

Similarly, a local NGO staff member states that The ICC indictment against al-Bashir has a strong impact on peacekeeping operations in Sudan, as the regime changed its policy in dealing with UNAMID in term of investigating any claims of human rights violations. What happened in Tabit is one example: they refused to allow UNAMID to investigate the incident and there are many others examples.

The Tabit example this interviewee refers to relates to the restriction of access to investigate human rights abuses in the form of rape allegations in Tabit. In late October 2014, Sudanese soldiers were accused of having raped more than 200 women and girls during an attack on Tabit in north Darfur. According to Human Rights Watch, the GoS subsequently blocked UNAMID investigators from entering Tabit. On 9 November 2014, the Sudanese authorities gave UNAMID in term of investigating any claims of human rights violations. What happened in Tabit is one example: they refused to allow UNAMID to investigate the incident and there are many others examples.

We flew to the village in a helicopter to report on these human rights abuses, but the Sudanese security services refused the helicopter to land, delaying it for 24 hours. When our
patrol finally arrived, people were afraid to speak and it was clear that the crime scene had been cleaned up.58

The GoS not only curtailed human rights investigations, it also effectively prevented NGOs from engaging in advocacy activities following the issuing of the ICC indictment against al-Bashir. In parallel to reorganising the humanitarian operation with those organisations that could stay in Darfur, the UN started negotiations on permits for new NGOs in Darfur. These negotiations were moderately successful – with NGOs like Mercy Corps Scotland and Save the Children Sweden – stepping into the void that the expelled NGOs had left behind. In a number of instances, other national chapters of the same NGOs that were expelled stepped into the void. However, as pointed out by a former OCHA staff member, it was implicitly agreed during these negotiation that these new NGOs would only deliver humanitarian aid, while refraining from conducting any advocacy.69

A local NGO staff member confirms how the GoS has tried to limit advocacy since 2009: The work of NGOs became even more difficult following the indictment of al-Bashir in March 2009. Besides the expulsion of the international NGOs and the closing down of the local NGOs, the government changed the way they deal with NGOs, specifically the ones working on human rights advocacy. Since 2009, the Sudanese authorities either close or refuse to renew the registration of any independent organisation that addresses human rights issue or engages in any advocacy issues.70

More generally, humanitarian access to contested areas in Darfur has been restricted since the ICC indictment was issued against al-Bashir. Limited humanitarian access to Darfur has become so entrenched that many humanitarian agencies have come to accept this as the status quo. As an OCHA staff member explains,

Many within the UN now just accept the lack of humanitarian access. For example, the UN is not really trying to get access to the Jebel Marah Mountains anymore. The only progress that has been made in getting access to the Jebel Marah Mountains is access to those areas that have been re-taken by government forces. This makes the lack of humanitarian access in Darfur also partly the international community’s fault.71

In parallel, the Sudanese authorities have ensured that NGOs face serious disincentives for strongly pushing for humanitarian access. Following a new HAC directive on humanitarian action, OCHA set up a coordination system to create information on humanitarian access. In this system, UN sections and NGOs could report on whether a request for a travel permit was granted, delayed or denied, as well as the reasons for denial. While this system could help the humanitarian community obtain insights into how the Sudanese authorities handle humanitarian access, almost no NGOs submitted information to this system. An OCHA staff member reflects that

of course, none of these NGOs would tell us that they are scared of retaliation, but this was clearly the case. The HAC could make the lives of NGO staff very miserable by obstructing their operations. After being beaten for almost 10 years, the humanitarian agencies operating in Darfur have become afraid of their own shadow.72

**Conclusion: The ICC indictment and its repercussions**

The pursuit of justice via the ICC is a worthy goal, but it can have negative consequences. Several previous studies have shown that ICC involvement in civil wars makes the resolution
This article has shown that ICC indictments can also complicate ongoing peacekeeping and humanitarian relief efforts. The consequences of the ICC indictment of al-Bashir suggests that this is in particular the case when ICC referrals come from the UNSC, the same body ultimately overseeing peacekeeping operation mandates. Looking at the example of Darfur, and in particular the repercussions of the ICC indictment of Sudanese president al-Bashir, we have shown that the indictment has accelerated patterns of obstruction and intimidation of peacekeeping actors, other third-party actors, and local staff associated with these. This has undermined activities such as those of the HRS of UNAMID geared towards the protection of civilians.

More broadly, one objective of the ICC indictment, to act as a deterrent for future violent action, has not been achieved – a state of affairs that was in fact highly predictable when looking at the longer term engagement of the GoS with the international community.

The GoS was cooperative in engaging in solutions to other conflict lines in Sudan based on the understanding that this would incur diplomatic benefits. For instance, hoping that this would lead to a normalisation of relations with the US and other western countries, the GoS concluded the Comprehensive Peace Agreement with the SPLM/A and provided intelligence on Islamist terrorists. The indictment of President al-Bashir was thus bound to be perceived by the GoS as the continuation of a confrontational approach aimed at regime change pursued by the international community. Consequently, following the indictment against al-Bashir, UNAMID peacekeepers and aid workers on the ground in Darfur faced an intensification of efforts aimed at undermining their operations.

This suggests that in situations of ongoing armed conflict in which the civilian population relies on peacekeepers and humanitarian actors for protection, it would be wise for the ICC to not issue indictments against high-ranking officials of the host state, particularly if the referrals for an ICC investigation have come from the UNSC. In these contexts, ICC indictments are bound to trigger a retaliatory response aimed at undermining the activities of peacekeepers and humanitarian organisations. This in turn negatively affects not only the everyday practices of peacekeepers and humanitarian workers but also the lives of the civilian population in sites of armed conflict.

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Notes

1. Grono and O’Brien, “Justice in Conflict?”; Nouwen, Complementarity in the Line of Fire; Wegner, The International Criminal Court; Duursma, “Partnering to Make Peace.”
2. Bellamy and Williams, “The New Politics of Protection?”; Fast, Aid in Danger.
3. High-Level Independent Panel on Peace Operations, Report of the High-Level Independent Panel.
4. Appiah-Mensah, “African Mission in Sudan.”
5. See Wegner, The International Criminal Court; Kersten, Justice in Conflict.
6. These data were provided by the African Union High-Level Panel on Darfur with the help of Alex de Waal. For a discussion of these data, see Duursma, “Counting Deaths While Keeping Peace.”
7. Duursma, “Obstruction and Intimidation of Peacekeepers.”
8. Kersten, Justice in Conflict.
9. Müller and Bashar, “UNAMID Is Just Like Clouds in Summer.”
10. Human Rights Watch, Selling Justice Short; Roth, The Case for Universal Jurisdiction; Mills, “R2P and the ICC”; Toft and Duursma, “Globalization and Security.”
11. Meernik, “The International Criminal Court”; Gilligan, “Is Enforcement Necessary for Effectiveness?”; Jo and Simmons, “Can the International Criminal Court Deter Atrocity?”; Appel, “In the Shadow of the International Criminal Court.”
12. Nalepa and Powell, “The Role of Domestic Opposition.”
13. Ibid.
14. Snyder and Vinjamuri, “Trials and Errors: Principle and Pragmatism”; Grono and O’Brien, “Justice in Conflict?”
15. Mills, “Vacillating on Darfur.”
16. Dorussen and Gizelis, “Into the Lion’s Den”; Duursma, “Obstruction and Intimidation of Peacekeepers.”
17. Whalan, How Peace Operations Work.
18. However, Sudan has been a signatory to the Rome Statute since 8 September 2000, and thus is required to refrain from acts that would defeat the purpose of the Statute.
19. Williamson, “Justice Empowered or Justice Hampered”; Totten and Tyler, “Arguing for an Integrated Approach.”
20. Mills, “R2P and the ICC.”
21. Daly, Imperial Sudan.
22. Flint and de Waal, Darfur: A New History; Brosché and Duursma, “Hurdles to Peace.”
23. Brosché and Duursma, “Hurdles to Peace.”
24. de Waal, The Real Politics of the Horn of Africa, 66.
25. Cockett, Sudan: Darfur and the Failure of an African State, 180.
26. Prunier, Darfur: The Ambiguous Genocide, 127; Flint and de Waal, Darfur: A New History, 179.
27. International Commission of Inquiry on Darfur, Report of the International Commission of Inquiry.
28. Oette, “Peace and Justice, or Neither?”
29. United Nations Security Council, Resolution 1593.
30. International Criminal Court, “Situations: Darfur, Sudan.”
31. De Waal, “Darfur, the Court and Khartoum,” 31.
32. Méndez and Kelly, “Peace Making, Justice and the ICC,” 482–3; De Waal, “Darfur, the Court and Khartoum,” 33.
33. Grono and O’Brien, “Justice in Conflict?”, 17; Nouwen, “The International Criminal Court,” 176.
34. De Waal, “Darfur and the Failure of the Responsibility to Protect”; Badescu and Bergholm, “The Responsibility To Protect.”
35. Interview with Jan Pronk, who was the UN Special Representative to Sudan between June 2004 and October 2006, in The Hague on 1 June 2015; interview with Abdul Mohamed, who was the UN mediator during the Abuja talks and Acting Director of UNAMID’s Political Department, in Addis Ababa on 17 February 2015.
36. Interview with Abdul Mohamed in Addis Ababa on 17 February 2015; interview with Nurudin Azeez, who was the military liaison officer of AMIS to the Abuja peace talks, in Addis Ababa on 17 February 2015.
37. De Waal, “Sudan: Darfur,” 291; Duursma, “When to Get Out of the Trench.”
38. Flint and de Waal, Darfur: A New History, 211.
39. Interview with Vladimir Zhagora, UN Senior Political Affairs Officer, in Hawassa on 16 January 2016. See also De Waal, “Sudan: Darfur,” 292.
40. De Waal, “Sudan: Darfur,” 293; Flint and de Waal, Darfur: A New History, 268–9; Duursma, “When to Get Out of the Trench.”
41. De Waal, “Darfur, the Court and Khartoum.”
42. Akuffo, “Cooperating for Peace and Security,” 82; International Crisis Group, Sudan: Justice, Peace and the ICC.
43. Trahan, “The Relationship Between the International Criminal Court and the UN Security Council: Parameters and Best Practices”; Duursma, “Information Processing Challenges in Peacekeeping Operations.”
44. Flint and De Waal, “Case Closed: A Prosecutor Without Borders.”
45. Duursma, “When to Get Out of the Trench.”
46. Jumbert, “Sudan’s ‘Rogue’ State Label.”
47. Interview with Ghazi Salah al-Din al-Atabani in Khartoum, 7 December 2014.
48. Interview with Vladimir Zhagora, UN Senior Political Affairs Officer, in Addis Ababa on 16 January 2016.
49. Rodman, “Darfur and the Limits of Legal Deterrence”; Nouwen and Werner, “Doing Justice to the Political.”
50. Natsios, “Waltz With Bashir.”
51. Nouwen and Werner, “Doing Justice to the Political,” 957; Abusharaf, “Debating Darfur in the World.”
52. International Crisis Group, Sudan: Justice, Peace and the ICC, 15.
53. Natsios, “Waltz With Bashir.”
54. Telephone interview with a former OCHA staff member on 14 June 2017.
55. Pantuliano, Jaspars, and Basu Ray, “Where to Now? Agency Expulsions in Sudan,” 1.
56. UN Mission in Sudan, Sudan: Darfur Humanitarian Profile No. 30 – Situation as of 1 January 2008, http://reliefweb.int/report/sudan/sudan-darfur-humanitarian-profile-no-30-situation-01-jan-2008. For the figure of March 2009, we draw on UN-OCHA (2009) Sudan: OCHA Situation Report No. 1, 08 Mar 2009 – Expulsion of key NGOs from Darfur, http://reliefweb.int/sites/relief-web.int/files/resources/ECA64643771CB0B885257574007C81C5-Full_Report.pdf.
57. Brauman, Darfur: The International Criminal Court Is Wrong.
58. Weissman, “Humanitarian aid and the International Criminal Court.”
59. Telephone interview with a former OCHA staff member on 14 June 2017.
60. Telephone interview with a UNAMID Civil Affairs Officer on 13 May 2017.
61. Telephone interview with a UNICEF staff member on 13 June 2017.
62. Telephone interview with a former OCHA staff member on 14 June 2017.
63. While the JMAC data set suggests that the level of obstruction and intimidation of aid workers was unusually high in Darfur in March 2009, the data also shows that aid workers were intimidated and obstructed in the months before the ICC indictment as well. This is in line with the observations that the GoS resisted humanitarian efforts prior to March 2009. For further discussion, see for example Reeves, “Humanitarian Obstruction as a Crime Against Humanity,” 69.
64. Interview with Vladimir Zhagora in Hawassa on 16 January 2016.
65. Interview with a former UNAMID Human Rights Officer in a European city on 6 February 2016.
66. Email correspondence with a Sudanese humanitarian working for a local NGO, which has offices in Khartoum and Darfur, on 9 March 2017.
67. Human Rights Watch, “Mass Rape in North Darfur.”
68. Interview with a former UNAMID Human Rights Officer in a European city on 6 December 2016.
69. Telephone interview with a former OCHA staff member on 14 June 2017.
70. Email correspondence with a Sudanese humanitarian working for a local NGO, which has offices in Khartoum and Darfur, on 9 March 2017.
71. Telephone interview with a former OCHA staff member on 14 June 2017.
72. Ibid.
73. Nouwen, Complementarity in the Line of Fire; Grono and O’Brien, “Justice in Conflict?”
74. Duursma, “When to Get Out of the Trench.”

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